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The Road to Booker

Slouching Toward Booker and Beyond—The Court Embraces and Rejects the Role of Juries at Sentencing

Diane E. Courselle*

A great irony of the United States Supreme Court's decision in United States v. Booker1 is that while the Court found on the merits that sentencing pursuant to the United States Sentencing Guidelines2 ("Guidelines") violated a defendant's right to a trial by jury,3 the Court crafted a remedy that did nothing to protect or vindicate the jury trial right.4 Booker was decided at a time when juries were increasingly scrutinized and criticized5 and was not the first time members of the Court demonstrated ambivalence toward juries. This article will explore the Court's reluctance to countenance a greater role for juries in the sentencing process.

One simple explanation for the conflicting position taken by the Court is that the judgment in Booker is based on two five to four opinions with very different compositions of the respective majorities. Four of the five Justices who crafted

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3. Booker, 435 U.S. at 244.
4. Id. at 247-48 (Breyer, J., delivering the majority opinion in Part II); id. at 288 (Stevens, J., dissenting in part). Whether the Court's remedy to selectively excise portions of the Sentencing Reform Act was justifiable or proper has been a source of considerable dispute both among the Justices themselves and among commentators. See also id. at 270-302 (Stevens, J., dissenting in part); id. at 303-13 (Scalia, J., dissenting in part); id. at 313-25 (Thomas, J., dissenting in part). This article examines the implications of the remedy on the continued respect for the jury trial right and therefore, the debate about the Court's severability analysis is beyond its scope.
the remedy dissented from the conclusion that there had been a legal error at all. But that does not tell the full story. Even before Booker, the application of the right to a jury trial for sentencing issues was a source of considerable controversy.

I. THE ROAD TO BOOKER

The road to Booker is paved with cases that demonstrate an ongoing controversy within the Court about the extent to which the jury trial right, and the abilities of jurors, should be valued. The line of cases that developed the rule applied on the merits in Booker begins with Jones v. United States.

6. Chief Justice Rehnquist and Justices Breyer, O'Connor, and Kennedy dissented on the merits. Booker, 435 U.S. at 325-34 (Breyer, J., dissenting). Those same Justices and Justice Ginsberg joined to form the majority on the issue of remedy. Id. at 244-68 (Breyer, J., delivering the majority opinion in Part II).


8. Id. at 229. The version of the statute at issue in Jones provided:

   Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle that has been transported, shipped, or received in interstate or foreign commerce from the person or presence of another by force and violence or by intimidation, or attempts to do so, shall—

   (1) be fined under this title or imprisoned not more than 15 years, or both,

   (2) if serious bodily injury (as defined in section 1365 of this title) results, be fined under this title or imprisoned not more than 25 years, or both, and

   (3) if death results, be fined under this title or imprisoned for any number of years up to life, or both.


10. Id. at 240-48. “The point is simply that diminishment of the jury’s significance by removing control over facts determining a statutory sentencing range would resonate with the claims of earlier controversies, to raise a genuine Sixth Amendment issue not yet settled.” Id. at 248.

11. “[T]o bolster its statutory interpretation, the Court raises the specter of ‘grave and doubtful constitutional questions’ . . . without an adequate explanation of the origins, contours, or consequences of its constitutional concerns.” Id. at 254 (Kennedy, J., dissenting); see also id. at 264-71.

however, the Court has remained seriously divided regarding the application of the jury trial right.\textsuperscript{13}

In \textit{Apprendi}, the defendant pled guilty to second degree possession of a firearm for an unlawful purpose based on an incident in which he fired bullets into the home of an African-American family in a previously all-white neighborhood; by statute, that second degree possession offense was punishable by imprisonment for "between five years and 10 years."\textsuperscript{16} New Jersey's "hate crime law" provided for enhanced punishment "if the trial judge finds, by a preponderance of the evidence, that "[t]he defendant in 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.""\textsuperscript{15} For second degree offenses, the hate crime statute authorized increased punishment of "imprisonment for between 10 and 20 years."\textsuperscript{16} At sentencing, the trial court found, by a preponderance of the evidence, that the offense was racially motivated, and thus the court imposed an enhanced sentence of twelve years imprisonment.\textsuperscript{17} At the Supreme Court, the majority concluded that the fact—racial motivation—that increased the maximum authorized punishment had to be proved to a jury beyond a reasonable doubt.\textsuperscript{18} The \textit{Apprendi} majority held that based on principles of due process and the right to trial by jury, any fact that could increase a defendant's sentence beyond the maximum sentence for the offense of conviction must be proved \emph{to a jury} beyond a reasonable doubt and with full due process protections.\textsuperscript{19}

\textit{Jones} and \textit{Apprendi} were decided in the wake of a movement among legislatures to exert more control over the sentencing process and to increase

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\textsuperscript{13} In \textit{Jones}, the majority opinion was joined by Justices Souter, Stevens, Scalia, Thomas, and Ginsburg. 
\textit{See Jones}, 526 U.S. at 229-52 (Souter, J., providing the majority opinion); \textit{see also id.} at 252-53 (Stevens, J., concurring); \textit{id.} at 253 (Scalia, J., concurring). Chief Justice Rehnquist and Justices Kennedy, O'Connor, and Breyer joined in the dissent. \textit{id.} at 254-72 (Kennedy, J., dissenting). The Court was split along those same lines in \textit{Apprendi, Blakely v. Washington}, 542 U.S. 296 (2004), and \textit{Booker}. \textit{See Apprendi}, 530 U.S. at 468-523 (Stevens, J., writing the opinion of the Court); \textit{id.} at 498-99 (Scalia, J., concurring); \textit{id.} at 499-523 (Thomas, J., concurring (joined in part by Scalia, J.)); \textit{id.} at 523-54 (O'Connor, J., dissenting (joined by Rehnquist, C.J. and Kennedy and Breyer, JJ.)); \textit{id.} at 554-66 (Breyer, J., dissenting (joined by Rehnquist, C.J.)); \textit{see also Blakely}, 542 U.S. at 287-313 (Scalia, J., delivering the opinion of the Court); \textit{id.} at 313-26 (O'Connor, J., dissenting (joined by Breyer, J., and joined in part by Rehnquist C.J. and Kennedy, J.)); \textit{id.} at 326-28 (Kennedy, J., dissenting (joined by Breyer, J.)); \textit{id.} at 328-47 (Breyer, J., dissenting (joined by O'Connor, J.)). The Court was similarly split in \textit{Ring v. Arizona}, 536 U.S. 584 (2002), although Justice Kennedy broke from the dissenters and Justice Breyer also concurred in the judgment of the Court. \textit{See Ring}, 536 U.S. at 588-609 (Ginsburg, J., providing the opinion of the Court (joined by Stevens, Scalia, Kennedy, Souter, and Thomas, J.J.)); \textit{id.} at 610-13 (Scalia, J., concurring (joined by Thomas, J.)); \textit{id.} at 613 (Kennedy, J., concurring); \textit{id.} at 613-19 (Breyer, J., concurring in judgment); \textit{id.} at 619-21 (O'Connor, J., dissenting (joined by Rehnquist, C.J.)).

\textsuperscript{14} \textit{Apprendi}, 530 U.S. at 468-70 (quoting N.J. STAT. ANN. § 2C:43-6(a)(2) (West 1995)).

\textsuperscript{15} \textit{Id.} at 468-69 (quoting N.J. STAT. ANN. § 2C:44-3(e) (West Supp. 1999-2000)).

\textsuperscript{16} \textit{Id.} at 469 (quoting N.J. STAT. ANN. § 2C:43-7(a)(3) (West 2005)).

\textsuperscript{17} \textit{Id.} at 471.

\textsuperscript{18} \textit{Id.} at 489.

\textsuperscript{19} \textit{Id.}
sentences by creating "sentencing enhancement" statutes. Under such "enhancement" schemes, proof of an additional fact (or facts) could lead to a sentence longer than that authorized for the offense itself. The Court, then, has had to confront whether these "enhancing" facts should be treated like elements of the offense or whether they should be treated like any other sentencing consideration. In other words, if a core function of the right to a jury trial is "the right to have the jury, rather than the judge, reach the requisite finding of 'guilty,'" what facts need to be proved to reach a finding of "guilty?"

The majority's resolution of this issue in Apprendi has been thoroughly dissected, analyzed, and criticized since the decision was handed down. The Court's reasoning came from the intersection of the right to a trial by jury with the due process requirement that a defendant's guilt must be proved beyond a reasonable doubt. "Taken together, these rights indisputably entitle a criminal defendant to 'a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" As the Court previously recognized in Jones, however, what constitutes an "element" of an offense is not always a straightforward determination.

In McMillan v. Pennsylvania, the Court "coined the term 'sentencing factor' to refer to a fact that was not found by a jury but that could affect the sentence

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20. See, e.g., Ring v. Arizona, 536 U.S. 584, 612-13 (Scalia, J., concurring) (observing that the past twelve years had seen an "accelerating propensity of both state and federal legislatures to adopt 'sentencing factors' determined by judges that increase punishment beyond what is authorized by the jury's verdict . . .").

21. One of the most common statutory grounds for enhanced sentences is recidivism. Despite repeated assertions of doubt, the Court consistently has held that the fact of a prior conviction need not be proved to a jury. See Almendarez-Torres v. United States, 523 U.S. 224 (1998). But see Apprendi, 530 U.S. at 489; id. at 519-21 (Thomas, J., concurring) (calling into question the validity of Almendarez-Torres).

22. The Court was first confronted with this issue in McMillan v. Pennsylvania, 477 U.S. 79 (1986). In McMillan, the Court upheld judicial factfinding of "sentencing factors" that would require the imposition of mandatory minimum sentences. Id. at 86-88. The Court had long permitted judicial determination of other facts in exercising its discretionary authority to determine what sentence to impose within the statutory range created by the legislature. See Williams v. New York, 337 U.S. 241, 246 (1949) ("[B]oth before and since the American colonies became a nation, courts in this country and in England practiced a policy under which the sentencing judge could exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.").


25. U.S. CONST. amend. VI; Duncan v. Louisiana, 391 U.S. 145, 156 (1968) (stating the Sixth Amendment right to a jury trial applies to the states).


28. See supra notes 7-11 and accompanying text.

imposed by the judge.” The “sentencing factor” at issue was a judicial determination that a person who “visibly possessed a firearm” in the commission of certain felonies would then be subject to a mandatory minimum sentence. The Court, though acknowledging that the Constitution places some limits on a state’s authority to define away facts necessary to constitute an offense and may limit a state’s authority to keep from the jury facts that increase the punishment to which a defendant is exposed, expressed “no doubt that Pennsylvania’s Mandatory Minimum Sentencing Act falls on the permissible side of the constitutional line.” Although in Apprendi the Court claimed to limit, rather than overrule McMillan, it found labels such as “elements” or “sentencing factors” were not helpful to the resolution of due process and jury trial claims. Instead, what was most important was the “effect” a particular “fact” had on the range within which the sentencing judge could properly exercise discretion.

To tie its analysis in Apprendi to the right to a jury trial, the Court looked to the long-recognized purposes and the historical practices of jury trials to support its determination regarding what facts must be found by a jury. The American jury trial right, which extended from centuries of common law practice, was maintained “to guard against a spirit of oppression and tyranny on the part of rulers.” In practice, the jury trial right was “understood to require that ‘the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of [the defendant’s] equals and neighbors . . . ’.” According to the majority’s historical analysis, at common law there was no reason to distinguish between “elements” and “sentencing factors;” criminal cases began with an indictment that had to contain detailed allegations of the facts constituting the criminal offense and substantive crimes generally carried determinate sentences so, once a particular crime was found to have been committed (a job for the jury), the

30. Apprendi, 530 U.S. at 485.
32. Id. at 85-88.
33. Id. at 88.
34. Id. at 91.
35. Apprendi, 530 U.S. at 487 n.13 (“We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury’s verdict—a limitation identified in the McMillan opinion itself.”).
36. Id. at 476.
37. Id. at 494. Apprendi did not alter the long-standing general principle that “within statutory limits” for the offense of conviction, a sentencing judge may exercise considerable discretion—“taking into consideration various factors relating both to offense and offender.” Id. at 481 (citing Williams v. New York, 337 U.S. 241, 246 (1949)).
39. Id. (quoting Gaudin, 515 U.S. at 510-11 (quoting WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769))).
sentence was a foregone conclusion.\textsuperscript{40} This "historic link between verdict and judgment,"\textsuperscript{41} highlights the critical role juries have played in the criminal process. Eliminating the jury from determining facts that permit punishment beyond that provided in the statute that the jury determined the defendant had violated, diminishes the jury's role at a time when it is critically important—when "both the loss of liberty and the stigma attaching to the offense are heightened."\textsuperscript{42}

The \textit{Apprendi} majority's description of the historical regard for the right to a trial by jury is not overstated. The Court previously recognized that "[t]he essential feature of a jury obviously lies in the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence."\textsuperscript{43} And, the decision to include the right to a trial by jury in the Bill of Rights was not at all controversial; it "reflect[ed] a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges."\textsuperscript{44} The more facts necessary to a determination of "guilt" that are entrusted to the discretion of a sentencing judge, and not a jury, the greater the diminution of the sense of community participation and shared responsibility that should come with the verdict.

The Court's ultimate conclusion in \textit{Apprendi} was 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."\textsuperscript{45} The holding in \textit{Apprendi} was then extended in \textit{Ring v. Arizona} to require that aggravating facts necessary to impose the death penalty also must be found by a jury and not a judge.\textsuperscript{46} The Court even acknowledged that while judges might be better or more reliable factfinders, that is beside the point:

Entrusting to a judge the finding of facts necessary to support a death sentence might be "an admirably fair and efficient scheme of criminal justice designed for a society that is prepared to leave criminal justice to the State. . . . The founders of the American Republic were not prepared to leave it to the State, which is why the jury-trial guarantee was one of

\begin{itemize}
\item \textsuperscript{40} \textit{Apprendi}, 530 U.S. at 478-81. The majority's historical analysis was roundly criticized by the principle dissenting opinion. \textit{See id.} at 525-27.
\item \textsuperscript{41} \textit{Id.} at 482.
\item \textsuperscript{42} \textit{Id.} at 484.
\item \textsuperscript{43} \textit{Williams v. Florida}, 399 U.S. 78, 100 (1970).
\item \textsuperscript{44} \textit{Duncan v. Louisiana}, 391 U.S. 145, 156 (1968).
\item \textsuperscript{45} \textit{Apprendi}, 530 U.S. at 490.
\item \textsuperscript{46} \textit{Ring v. Arizona}, 536 U.S. 584, 609 (2002). In Arizona, such aggravating factors already were required to be proved beyond a reasonable doubt. \textit{Id.} at 597.
\end{itemize}
the least controversial provisions of the Bill of Rights. It has never been
efficient; but it has always been free." 47

The Constitution already reflects not just a preference for, but a requirement of a
jury trial.

In support of jury sentencing in capital cases, Justice Breyer, concurring in
the judgment, emphasized the jury’s role as the voice of the community; that
community voice, however, was required not by the Sixth Amendment, but by
the Eighth Amendment. 48 Breyer notes, in particular, the jury’s advantage over
judges in expressing the experiences, sensibilities, and conscience of the
community. 49 Moreover, given the lack of consensus about the validity of the
death penalty as currently applied, the jury is better able to translate a particular
community’s assessment of whether such punishment is cruel and unusual. 50
While expressed in Eighth Amendment terms, Justice Breyer’s comments
support the notion that the Apprendi rule (which he rejected) 51 reflects and
protects important purposes of the Sixth Amendment jury trial right.

The final step in the march toward Booker occurred in Blakely v.
Washington. 52 At issue in Blakely were not specific sentencing enhancements, but
Washington’s sentencing guidelines, which were intended to make more uniform
the exercise of judicial discretion in sentencing within the sentencing limits for
the offense the legislature set. 53 Blakely was convicted of second degree
kidnapping involving domestic violence and use of a firearm; this offense carried
a legislatively authorized sentence of no more than ten years imprisonment. 54
Washington’s sentencing guidelines set the “standard range” sentence for that
offense at forty-nine to fifty-three months, 55 but the judge was permitted to
impose a longer sentence upon a finding of “substantial and compelling reasons
justifying an exceptional sentence.” 56 Those reasons included certain statutorily
enumerated aggravating factors. 57 The trial judge found that Blakely’s conduct
reflected at least one of those statutory aggravating factors: “deliberate cruelty”

47. Id. at 607 (quoting Apprendi, 530 U.S. at 498 (Scalia, J., dissenting)).
opinion of Stewart, Powell, and Stevens, JJ.); Witherspoon v. Illinois, 391 U.S. 510, 519 (1968).
49. Ring, 536 U.S. at 615-16 (Breyer, J., concurring).
50. Id. at 616, 618.
51. Apprendi, 530 U.S. at 555 (dissenting opinion); see also Ring, 536 U.S. at 613-14 (Breyer, J.,
concurring).
53. Id. at 300-05.
54. Id. at 297-300; see also WASH. REV. CODE ANN. §§ 9A.40.030(1),(3), 9.94A.125, 9A.20.021(1)(b),
55. Blakely, 542 U.S. at 299-300.
56. Id. (quoting WASH. REV. CODE ANN. § 9.94A.120(2)).
57. Id. (citing WASH. REV. CODE ANN. § 9.94A.390).
in a domestic violence case. Thus, Blakely received "an exceptional sentence of 90 months—37 months beyond the standard maximum." Somewhere between Apprendi and Blakely there was a subtle shift in the Court's analysis. In Apprendi, the right to a jury trial was deemed to apply to "any fact that increases the penalty or a crime beyond the prescribed statutory maximum." The Blakely majority, however, described the "statutory maximum" not in terms of the outside limit set by the legislature, but as "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Again in Blakely, the Court was divided as to whether the right to a jury trial truly should apply in such circumstances. The majority found the jury trial right implicated whenever a judge seeks to impose a sentence not based on facts necessary to the jury's verdict or admitted by the defendant. The dissent's primary concern in rejecting the application of the jury trial right in such circumstances was that requiring a jury determination of those facts that affect sentencing would be so costly and impractical that legislatures would be more likely to return to a regime of unfettered judicial sentencing discretion and all the inequities that discretion may invite. But, as the Court has consistently recognized, even if jury factfinding may be inefficient and burdensome, interests in convenience and expedition cannot trump the Sixth Amendment's constitutional command.

From Blakely, however, it was no big stretch for the same analysis to implicate the right to a jury trial when applied to the Guidelines. Booker applied the Blakely analysis and determined that the increase of the defendant's sentence, based upon additional quantities of drugs deemed "relevant conduct," and the determination that the defendant acted with deliberate cruelty, neither of which had been found by the jury, violated the right to a jury trial. Because the Justices agreed that if the Guidelines were not mandatory the Sixth Amendment implications could be avoided, a separate majority struck down only those portions of the Guidelines that made them mandatory. In the companion case,

58. Id. (citing WASH. REV. CODE ANN. § 9.94A.390(2)(h)(iii)).
59. Id.
60. Apprendi v. New Jersey, 530 U.S. 466, 490 (2000). The fact of a prior conviction, however, is excepted from this requirement. Id.
62. Compare id. at 307-08, with id. at 316 (O'Connor, J., dissenting).
63. Id. at 302-04.
64. Id. at 315-20 (O'Connor, J., dissenting). The development of guidelines sentencing had been a reaction to sentencing disparities that occurred under more discretionary sentencing regimes. See, e.g., Stephen Breyer, The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest, 17 HOFSTRA L. REV. 1, 4-5 (1988).
65. Id. at 311-14.
67. Id. at 231-34, 245-47, 258-60.
68. Id. at 243-45; see also infra notes 101-02 and accompanying text.
United States v. FanFan, the sentencing court followed only those provisions of the Guidelines that required no additional factfinding that would implicate the Sixth Amendment. The Court found that because FanFan nonetheless was sentenced by treating as mandatory those portions of the Guidelines that did not implicate Sixth Amendment concerns, he (and the Government) were entitled to resentencing. Thus, both majority opinions in Booker/FanFan are rooted, to some extent, in recognition of the right to a trial by jury.

II. THE COURT’S LOVE-HATE RELATIONSHIP WITH THE JURY TRIAL RIGHT

Despite the long-established common law roots of the right to a trial by jury and repeated exaltations of the jury as a critical protector against abusive government power, members of the Court have expressed considerable ambivalence about juries. For example, in finding that Ring was not retroactive, the Court recently noted that "for every argument why juries are more accurate factfinders [than judges], there is another why they are less accurate." The Sixth Amendment, however, reflects a choice to value the jury—regardless of the accuracy of verdicts—for the benefits that arise from jury independence, group decision-making, and community participation in the process.

The Court’s mistrust of juries has been most pronounced in cases focusing on jurors’ abilities to determine sentences or civil sanctions. For example, it has long been a centerpiece of capital sentencing jurisprudence that to satisfy due process and the Eighth Amendment, the jury must evaluate all the relevant circumstances and characteristics of the defendant, both mitigating and aggravating, when determining whether to impose a death sentence. The Court has held that the jury must be able to consider mitigating factors such as the defendant’s mental retardation and the defendant’s youth. In two recent cases, however, the Court

69. Id. at 228-29.
70. Id. at 267-68.
71. See, e.g., supra notes 39-42 and accompanying text; Courselle, supra note 5, at 210-13.
73. Indeed, in numerous other contexts, the Court has protected the jury’s role even when it appears particular juries may have reached unreliable results. See, e.g., Tanner v. United States, 483 U.S. 107 (1987) (protecting jurors from inquiry about deliberations, even though evidence suggested that jurors had been drinking and taking drugs during trial and deliberations); Dunn v. United States, 284 U.S. 390 (1932) (upholding an inconsistent verdict).
76. See Roper v. Simmons, 543 U.S. 551 (2005) ("A central feature of death penalty sentencing is a particular assessment of the circumstances of the crime and the characteristics of the offender. The system is designed to consider both aggravating and mitigating circumstances, including youth, in every case."); id. at 572 (O’Connor, J., dissenting). “There is no question that ‘the chronological age of a minor is itself a relevant
removed those factors from the sentencing juries' consideration by finding that the Eighth Amendment categorically prohibited application of the death penalty to defendants with mental retardation\(^7\) and juvenile defendants under eighteen years of age.\(^7\) Underlying the majority opinions in these cases, at least in part, was the concern that juries cannot be trusted to give such matters appropriate consideration.

For example, in *Atkins v. Virginia*, the Court noted several characteristics of persons with mental retardation that increased the risk "that the death penalty will be imposed in spite of factors which may call for a less severe penalty."\(^7\) According to the majority, the possibility of jurors misapplying evidence related to mental retardation "can be a two-edged sword that may enhance the likelihood that the aggravating factor . . . will be found by the jury."\(^8\) The dissent, however, criticized this distrust as both unsupported and contradictory to the important role the juries play in such matters.\(^8\)

In *Roper v. Simmons*, the majority expressed similar distrust of jurors' abilities to give accurate assessment to a capital defendant's youth. The Court explained:

> The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death.\(^8\)

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mitigating factor of great weight' . . . and sentencing juries must be given an opportunity carefully to consider a defendant's age and maturity in deciding whether to assess the death penalty." *id.* at 606 (quoting *Eddings*, 455 U.S. at 116).


81. *id.* at 349 (Scalia, J., dissenting). Justice Scalia opined:

> The second assumption [by the majority]—inability of judges or juries to take proper account of mental retardation—is not only unsubstantiated, but contradicts the immemorial belief, here and in England, that they play an *indispensable* role in such matters: "[I]t is very difficult to define the indivisible line that divides perfect and partial insanity; but it must rest upon circumstances duly to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes.”

*Id.* (quoting 1 Hale, Pleas of the Crown, at 30).

Again, the dissenters took the majority to task for the lack of support for its mistrust of jurors' abilities to handle such information. As Justice Scalia asserted:

The Court concludes... that juries cannot be trusted with the delicate task of weighing a defendant's youth along with the other mitigating and aggravating factors of his crime. This startling conclusion undermines the very foundations of our capital sentencing system, which entrusts juries with "mak[ing] the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system.'" McCleskey [v. Kemp], 481 U.S. 279, 311... (1987) (quoting H. Kalven & H. Zeisel, The American Jury 498 (1966)).

The Court... says that juries will be unable to appreciate the significance of a defendant's youth when faced with details of a brutal crime. This assertion is based on no evidence; to the contrary, the Court itself acknowledges that the execution of under-18 offenders is "infrequent" even in the States "without a formal prohibition on executing juveniles," suggesting that juries take seriously their responsibility to weigh youth as a mitigating factor.

These decisions reflect fundamental differences on the Court about the abilities of jurors to make sound, well-informed judgments.

The Court had an opportunity to fully express those differences when it was deciding in Schiro whether Ring applied retroactively to convictions that were final at the time Ring was decided. First, the Court concluded that the Ring rule was procedural, not substantive; rather than change what findings were necessary to the imposition of the death penalty, Ring only changed who needed to make them—the jury, not the judge. The Court then tackled the alternative argument that Ring was retroactive as a "'watershed rule[] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." The majority concluded that while there was much dispute about the relative merits of juries versus judges as factfinders, judicial factfinding did not "so 'seriously diminish[]' accuracy as to produce an 'impermissibly large risk' of injustice."

The dissent, on the other hand, suggested that one way in which juries were more reliable, and indeed necessary in capital sentencing, is not in making the

83. Id. at 587-89, 589-601, 603-08 (O'Connor, J., dissenting); id. at 619-22 (Scalia, J., dissenting).
84. Id. at 620-21 (Scalia, J., dissenting).
86. Id. at 355 (quoting Saffle v. Parks, 494 U.S. 484, 495 (1990)).
87. Id. at 355-56 (quoting Teague, 489 U.S. at 312-13) (emphasis added).
determination that an offense meets the statutory criteria for imposition of the death penalty, but in making the even more important judgment that the death penalty is the appropriate punishment in the particular case. The dissent's position was that because the Eighth Amendment requires greater accuracy in capital cases, and the jury is at the very least more accurate in delivering the community consensus that a person should receive the death penalty for an offense, the Ring rule should be deemed to fit Teague's retroactivity exception for "watershed rules." Thus, regardless of whether the dissenters believe that juries are more accurate in determining the facts of an offense, the value of the jury as the voice of the community elevated its role in the contexts of the Sixth and Eighth Amendments.

Distrust of, or at least ambivalence about, juror competence also is apparent in the Court's recent decisions regarding civil jury awards of punitive damages. In those cases, a significant source of dispute was whether jury determinations should be second-guessed by the Court. In both BMW of North America v. Gore and State Farm Mutual Automobile Insurance Co. v. Campbell, a majority of the Court found that the juries' determinations of punitive damages violated due process. In each, the majority rejected some of the juries' underlying conclusions in support of the awards, but at a most basic level, the majority opinions reflect a disagreement with the "commonsense judgment" of the jury. For one thing, nothing in either opinion suggests that the juries were instructed to apply the "guideposts" identified and applied by the Court in BMW. The importance of some system of standards restraining the jury's discretion was underscored by Justice Breyer in a concurring opinion in BMW:

[A system of standards] has special importance where courts review a jury-determined punitive damages award. That is because one cannot expect to direct jurors like legislators through the ballot box; nor can one expect those jurors to interpret law like judges, who work within a disciplined and hierarchical organization that normally promotes roughly uniform interpretation and application of the law. Yet here Alabama expects jurors to act, at least a little, like legislators or judges, for it

89. Id. at 359-62 (Breyer, J., dissenting).
90. Id. at 360-64.
91. Of course, these decisions implicate the Seventh Amendment right to a jury trial, which does not provide a precise analogue to the history or purposes to the Sixth Amendment right at issue in Booker.
94. Id. at 429; BMW, 517 U.S. at 586-87.
95. See, e.g., BMW, 517 U.S. at 575-85 (noting indicia of reasonableness for punitive damage awards and holding the jury's implicit findings unsupported); State Farm, 538 U.S. at 418-29 (evaluating jury award in light of BMW guideposts and finding award not reasonably supported).
96. See State Farm, 538 U.S. at 430-31 (Ginsburg, J., dissenting) ("Neither the amount of the award nor the trial record, however, justifies this Court's substitution of its judgment for that of Utah's competent decisionmakers."); BMW, 517 U.S. at 600 (Scalia, J., dissenting).
permits them, to a certain extent, to create public policy and to apply that policy, not to compensate a victim, but to achieve a policy-related objective outside the confines of the particular case.  

By evaluating the jury’s determination in light of standards of which the jury was never apprised, however, the majority discounts the role the civil jury is asked to perform when awarding punitive damages. Indeed, a civil jury awarding punitive damages plays a role much like a criminal jury in a capital case determining punishment. As Justice Scalia explained, “[a]t the time of the adoption of the Fourteenth Amendment, it was well understood that punitive damages represent the assessment of the jury, as the voice of the community, of the measure of punishment the defendant deserves.” Thus, the degree of mistrust of a jury’s ability to make sound judgments in inflammatory civil cases is akin to the unwillingness to permit jurors to make judgments in criminal sentencing.

Doubts about jurors’ competence and abilities have also driven much of the jury reform movement. Among the concerns underlying jury reform are whether jurors adequately understand the evidence and jury instructions and whether jurors are too easily and frequently misled. Thus, various reform movements have permitted juror notetaking, juror questions being presented to witnesses, pre-deliberation discussions, and reopening arguments (or the evidence) when jurors become deadlocked; other reforms have focused on improving jury instructions to increase jurors’ understanding of the tasks they are asked to perform. While the merits of some of these reforms may be questionable, there is little doubt that the goal of jury reform is to address doubts about jurors’ abilities by improving the information and instruction they receive. Those members of the Court with similar doubts about jurors’ abilities seem to have taken a more drastic approach—cutting the jury out of the process when the risks presented by poor juror performance are most likely to have serious consequences. Thus, the members of the Court who mistrust jurors have not caught up with the reform movement and the extent to which reform measures may alleviate their concerns.

III. THE REMEDY—MAKING THE GUIDELINES “NON-MANDATORY”

In Booker, the Court acknowledged that the sole reason the Guidelines implicated the jury trial right was that application of the Guidelines was mandatory and the Guideline provisions relied on facts never found by the jury in reaching its verdict. The Booker remedy decision preserves a central role for

97. BMW, 517 U.S. at 596 (Breyer, J., concurring).
98. Id. at 600 (Scalia, J., dissenting).
99. See, e.g., Courselle, supra note 5, at 208-09, 208 n.18.
100. Id. at 209-10 n.26, 237, 237 nn.166-67.
101. See supra notes 67-68.
the Guidelines, without a jury, in the sentencing process. So long as the Guidelines are not mandatory, district judges can (and indeed must) continue to apply them and make necessary fact-findings without running afoul of the jury trial right. 102

Even before Booker, there was inherent tension within the Sentencing Reform Act about proper sentencing considerations. Section 3553(a) lists the Guidelines as one factor, among many, for sentencing courts to consider in imposing a sentence, 103 while subsection (b) provides that sentencing courts “shall impose a sentence of the kind, and within the range” established by the Guidelines. 104 Moreover, although § 3553(a)(1) asks the court to consider such things as the nature and circumstances of the offense and the offender, subsections (b)(4) and (b)(5) require consideration of the Guidelines and their policy statements. These, in turn, limit the conduct and characteristics that may be properly considered under subsection (a)(1). So, pre-Booker, in practice, the focus of the sentencing courts was almost exclusively on the Guidelines as directed by subsection (b). The Booker remedy excised the provision of the Sentencing Reform Act, § 3553(b)(1), that made application of the Guidelines mandatory. 105 After this modification, sentencing courts still are “require[d]” to consider Guidelines ranges, but are “permit[ted]” to tailor the sentence in light of § 3553(a) considerations. 106

Excising alone the provision requiring the application of the Guidelines was not sufficient to make the Guidelines merely advisory. The provision defining appellate standards of review, § 3742(e), operated on the assumption that the Guidelines were mandatory and evaluated sentences in relation to how they related to the applicable Guidelines. 107 Thus, it too could no longer apply to an advisory Guidelines regime. Once the standard of review was excised, the Court had to determine what the controlling standard should be under an advisory Guidelines regime. The Court’s decision was to resurrect the pre-PROTECT Act

103. 18 U.S.C. § 3553(a) (2000). This provision asks sentencing courts to consider “the nature and circumstances of the offense and the history and characteristics of the defendant,” id. § 3553(a)(1), the need to “reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense,” id. § 3553(a)(2)(A), deterring criminal conduct, id. § 3553(a)(2)(B), protecting the public, id. § 3553(a)(2)(C), providing the defendant “with needed educational or vocational training, medical care, or other correctional treatment,” id. § 3553(a)(2)(D), the sentencing range established by the Guidelines, id. § 3553(a)(4), Guidelines policy statements, id. § 3553(a)(5), “the need to avoid unwarranted disparities,” id. § 3553(a)(6), and “the need to provide restitution to any victims,” id. § 3553(a)(7).
104. Id. § 3553(b). “Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. . . .” Id. § 3553(b)(1) (emphasis added).
105. Booker, 543 U.S. at 244-47.
106. Id. at 245-47.
107. Id. at 260-61.
standard\textsuperscript{108} that sentences "outside the applicable Guideline range" be reviewed for a determination whether they are "unreasonable, having regard for . . . the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title . . . ."\textsuperscript{109} In other words, in determining reasonableness post-Booker, appellate courts are to be guided by the § 3553(a) factors.\textsuperscript{110} And, the Guidelines are an important part of § 3553(a): “[D]istrict courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.”\textsuperscript{111}

While the remedy decision in Booker may have pushed issues about the jury’s role in sentencing to a back burner, there is reason to believe that these issues will return to the forefront in the not-too-distant future. Booker makes the Guidelines “effectively advisory” in name, but in practice, they remain largely mandatory. Even under the advisory Guidelines regime, district courts, pursuant to § 3553(a), are not permitted to ignore the Guidelines. And, the “new” standard of review does more to complicate rather than resolve the problem it was intended to fix. Even the remedy majority acknowledged that, pre-Booker, the ability of sentencing courts to depart from the Guidelines made the Guidelines no less mandatory.\textsuperscript{112} The “reasonableness” inquiry adopted by the Court as a substitute for the excised standard of review, however, does little more than replicate the prior standards for reviewing departures.\textsuperscript{113} Post-Booker, the ability of a sentencing court to depart from the applicable Guidelines seems no more or less circumscribed than it was before.

IV. REASONABLENESS REVIEW

The Booker remedy majority expressed confidence that federal appellate judges are capable of meaningful application of the “reasonableness” standard.\textsuperscript{114} To date, however, there is no uniform approach to reasonableness review.\textsuperscript{115} As one commentator has aptly cautioned:

\begin{itemize}
\item[108.] The PROTECT Act (Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003, Pub. L. 108-21, § 401(d)(1), 117 Stat. 670), added a \textit{de novo} standard of review for departures from the Guidelines. The Court found this addition no longer relevant because the purpose of this provision of the PROTECT Act was to make the Guidelines even more mandatory. Booker, 543 U.S. at 260-61.
\item[109.] Id.
\item[110.] Id. at 261-63.
\item[111.] Id. at 263-65 (citing 18 U.S.C. § 3553(a)(4), (5) (2000)) (emphasis added).
\item[112.] Id. 256-68.
\item[113.] \textit{See}, e.g., United States v. Hadash, 408 F.3d 1080, 1083-85 (8th Cir. 2005).
\item[114.] Booker, 543 U.S. at 261-63.
\item[115.] Another issue arising from Booker as to which there is considerable difference of opinion among the circuits is how to evaluate prejudice arising from a sentence imposed pre-Booker, when reviewed for plain error post-Booker, based on a mandatory application of the Guidelines. \textit{See}, e.g., United States v. Barnett, 398 F.3d 516, 528-30 (6th Cir. 2005) (discussing various approaches); United States v. Hughes, 401 F.3d 540, 549 n.7 (4th Cir. 2005) (discussing the same). Because that class of cases should soon be extinct, and there has been
Appellate review of differences from the now-advisory Guidelines range cannot be exactly what it was before without functionally reintroducing the former Guidelines system and violating the holding of the Booker merits majority. Although the courts of appeals may be able to come close to the old system by setting common law appellate benchmarks for reasonable sentences, it is possible that this, too, would contravene Booker.\textsuperscript{116}

Some federal appellate courts have taken an approach to the "reasonableness" inquiry that implicates these very concerns.

While most appellate courts purport to acknowledge that the Guidelines, as modified in Booker, give added importance to the other § 3553(a) factors\textsuperscript{117} that had not been routinely applied before in practice, their "reasonableness" review has rendered those other factors of little importance.\textsuperscript{118} Nearly every appellate court begins its determination of reasonableness with an inquiry into whether the Guidelines were properly applied.\textsuperscript{119}

Even post-Booker, misapplication of the Guidelines remains a ground to consider a sentence improper, without regard to the other § 3553(a) factors.\textsuperscript{120} Indeed, the Eighth Circuit has held that "[t]he duty to remand all sentences imposed as a result of an incorrect application of the guidelines exists independently of whether we would find the resulting sentence reasonable under the standard of review announced in Booker."\textsuperscript{121} Courts have also held that when considering a "departure" from the non-mandatory Guidelines range, the district


\textsuperscript{117} United States v. Crosby, 397 F.3d 103, 112-13 (2d Cir. 2005); United States v. Hughes, 401 F.3d 540, 546 (4th Cir. 2005); United States v. Jackson, 408 F.3d 301, 304 (6th Cir. 2005); United States v. Lake, 419 F.3d 111, 114 (2d Cir. 2005); United States v. Mathijssen, 406 F.3d 496, 498 (8th Cir. 2005); United States v. Price, 409 F.3d 436, 446 (D.C. Cir. 2005) (Henderson, J., concurring); United States v. Webb, 403 F.3d 373, 84 (6th Cir. 2005).

\textsuperscript{118} See United States v. Haack, 403 F.3d 997, 1003 (8th Cir. 2005) ("[N]othing in Booker . . . require[s] the [district] court to determine the sentence in any manner other than the way the sentence would have been determined pre-Booker.").

\textsuperscript{119} United States v. Sitting Bear, 436 F.3d 929, 935 (8th Cir. 2006); United States v. Crawford, 407 U.S. 1174, 1178 (11th Cir. 2005); Crosby, 397 F.3d at 111-12; United States v. Gonzalez-Huerta, 403 F.3d 727, 738 (10th Cir. 2005) (en banc); Haack, 403 F.3d at 1002-03; Hughes, 410 F.3d at 546, 556; United States v. Lawrence, 405 F.3d 888, 907 n.14 (10th Cir. 2005); United States v. Mares, 402 F.3d 511, 518 (5th Cir. 2005); United State v. Mashek, 406 F.3d 1012, 1016 n.4 (8th Cir. 2005); see also Booker, 543 U.S. at 263-65.

\textsuperscript{120} See Crawford, 408 F.3d at 1178; United States v. Davidson, 409 F.3d 304, 310 (6th Cir. 2005); Mashek, 406 F.3d at 1015, 1017; Mathijssen, 406 F.3d at 498; Price, 409 F.3d at 442; United States v. Scott, 405 F.3d 615, 617 (7th Cir. 2005); United States v. Villegas, 404 F.3d 355, 360 (5th Cir. 2005). see also 18 U.S.C. § 3742(f)(1); cf. Mares, 402 F.2d at 519 ("The Guideline range should be determined in the same manner as before Booker/FanFan.").

\textsuperscript{121} Mashek, 406 F.3d at 1015.
court must consider and apply the Guidelines' provisions related to departures before looking to the other § 3553(a) factors. Just as incorrect application of the Guidelines may warrant reversal, some courts have suggested that a sentence imposed within the correctly calculated applicable range of the supposedly non-mandatory Guidelines warrants heightened deference. The Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits have held that a pre-Booker sentence within the Guidelines range is "presumptively reasonable." Each of these approaches, particularly the last, elevate the importance of the Guidelines over other § 3553(a) factors in effect reaching something dangerously close to a mandatory requirement. If the sentencing judge acts unreasonably by not applying the Guidelines in determining the sentence to impose, or is unreasonable if she does not adequately justify departure from that range, then the Guidelines are the most important baseline and they inch closer to becoming mandatory. Under such a scenario, the Sixth Amendment jury trial right may be implicated as it was in Booker.

Post-Booker cases have reinforced that sentencing judges retain the ability "to find by a preponderance of the evidence all the facts relevant to the

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122. See Crosby, 397 F.3d at 111-12 n.9; United States v. Sierra-Castillo, 405 F.3d 932, 936 n.2, 939 n.5 (10th Cir. 2005); see also Booker, 543 U.S. at 304-05 (Scalia, J., concurring) (noting that 18 U.S.C. § 3553(c)(2), requiring explanations for departures from the Guidelines, survived the remedy majority opinion); cf. Hughes, 401 F.3d at 546 ("If the court imposes a sentence outside the guideline range, it should explain its reasons for doing so."); United States v. Paladino, 401 F.3d 471, 480 (7th Cir. 2005) ("Under the new sentencing regime the judge must justify departing from the guidelines, and the justification has to be reasonable.").

123. See Mares, 402 F.3d at 519 ("If the sentencing judge exercises her discretion to impose a sentence within a properly calculated Guideline range, in our reasonableness review we will infer that the judge has considered all the factors for a fair sentence set forth in the Guidelines. Given the deference due the sentencing judge's discretion under the Booker/FanFan regime, it will be rare for a reviewing court to say such a sentence is 'unreasonable.'"); Webb, 403 F.3d at 386 (Kennedy, J., concurring in part, dissenting in part) ("I question whether a sentence within the Guidelines' range can ever be anything other than reasonable in light of the Sentencing Commission's congressionally mandated mission to develop appropriate sentences based on all factors related to the conviction."). But see Crosby, 397 F.3d at 115 (declining to adopt a per se reasonableness rule for sentences within the Guideline range, or a per se unreasonableness rule for sentences outside it, because "such per se rules would risk being invalidated as contrary to... Booker/FanFan, because they would effectively re-institute mandatory adherence to the Guidelines"); Webb, 403 F.3d at 385 n.9 (suggesting a per se reasonableness rule would effectively make the Guidelines mandatory).

124. See United States v. Green, 435 F.3d 449, 457 (4th Cir. 2006); United States v. Alonzo, 435 F.3d 551, 555 (5th Cir. 2006); United States v. Williams, 436 F.3d 706, 708 (6th Cir. 2006); United States v. Kristl, 437 F.3d 1050, 1054 (10th Cir. 2006); United States v. Mykytuk, 415 F.3d 606 (7th Cir. 2005); United States v. Lincoln, 413 F.3d 716 (8th Cir. 2005). But see United States v. Jiminez-Beltra, 440 F.3d 514 (1st Cir. 2006) (en banc); United States v. Cooper, 437 F.3d 324 (3d Cir. 2006); United States v. Cantrell, 433 F.3d 1269 (9th Cir. 2006); Crosby, 397 F.3d 103 (2d Cir. 2005). The Eleventh Circuit has not used the "presumptively reasonable" language, but has stated that "ordinarily, we would expect a sentence within the Guidelines range to be reasonable." United States v. Talley, 431 F.3d 784, 787 (11th Cir. 2005).

125. See United States v. Cage, 451 F.3d 585 (10th Cir. 2006) ("[A]lthough the Guidelines are listed as only one of the § 3553(a) factors, they are not just one factor among many... [T]hey are an expression of popular political will about sentencing that is entitled to due consideration when we determine reasonableness."). But see Crosby, 397 F.3d at 113 (declining to define the weight a sentencing judge should give the applicable Guidelines range).
determination of a Guidelines sentencing range and all facts relevant to the
determination of a non-Guidelines sentence.\textsuperscript{126} Indeed, when determining
sentencing facts for purposes of non-mandatory Guidelines applications,
sentencing courts are not bound by the juries' determinations made under the
reasonable doubt standard.\textsuperscript{27} If the facts sentencing courts are permitted to find
are associated with Guidelines that \textit{must} be applied, then the resulting sentences
imposed are not based on facts necessary to the jury's verdict or admitted by the
defendant and they implicate the \textit{Booker} merits decision.

The Court has yet to grant \textit{certiorari} in any case calling upon it to resolve the
differences among the circuits as to what, as a matter of substance and procedure,
makes a post-\textit{Booker} sentence reasonable.\textsuperscript{128} Given the vast array of approaches
taken to resolving these issues, the time will soon come when the Court will have
to step in and provide some guidance. When it does, it will again be confronted
with whether these nominally non-mandatory Guidelines run afoul of the jury
trial right.

In resolving that question, the Court will have to confront head-on its
ambivalence about juries. It also may require members of the Court to consider
whether their doubts about jurors continue to be valid in light of recent jury
reforms. To some degree, however, the Justices' various opinions about the
competence and abilities of lay jurors ought to be beside the point. The Sixth
Amendment right to a jury trial makes jurors an indispensable part of the
criminal justice system, whether the Court likes them or not. What is not so clear,
however, is whether Congress or state legislatures have enough trust in juries to
give them a role in the sentencing process.

The road to \textit{Booker} was neither direct, nor well-paved. But, it has provided
valuable opportunities to think critically about what the goals of sentencing
should be. At the heart of our evaluation of sentencing processes are the
competing interests reflected in the two \textit{Booker} majority opinions. The \textit{Booker}
merits majority addresses sentencing that is based almost exclusively on
historical facts; the remedy majority seeks to retain some degree of judicial
sentencing discretion. Somewhere in the middle may be a sentencing regime that
gives both juries and judges important roles in the sentencing process.

\textsuperscript{126} \textit{Mares}, 402 F.2d at 518-19; \textit{see also Crosby}, 397 F.3d at 113 (stating that post-\textit{Booker}, a sentencing
judge may make all fact findings "appropriate for determining either a Guidelines sentence or a non-Guidelines
sentence); \textit{Mashek}, 406 F.3d at 1017 n.7 ("Based on the surviving provisions of the Sentencing Reform Act, we
believe the better approach is for the district court to continue to calculate the appropriate guidelines range by
resolving all relevant factual disputes, even in complex cases, and for this court to continue to defer to those
factual findings unless they are clearly erroneous.").

\textsuperscript{127} \textit{United States} v. \textit{Magallanez}, 408 F.3d 672, 685 (10th Cir. 2005).

\textsuperscript{128} The Court's decision to grant \textit{certiorari} in \textit{Cunningham} v. \textit{California}, 126 S. Ct. 1329 (2006), may
give the court a chance to resolve some post-\textit{Booker} confusion. \textit{See} Douglas A. Berman & Stephanos Bibas,
\textit{Making Sentencing Sensible}, 4 \textit{Ohio St. J. Crim. L.} 37 (2006). But \textit{Cunningham} does not address the disarray
regarding how federal appellate courts should conduct reasonableness review.