# CHAPTER THREE

# Legal Issues

## Introduction

The Commission closely monitors the sentencing decisions of the federal courts to identify areas in which guideline amendments, research, or legislative action may be needed. This chapter addresses some of the more significant sentencing-related issues decided by the Supreme Court of the United States and the courts of appeals during fiscal year 2006.

## United States Supreme Court Decisions on Sentencing Issues

***Decision***

In *Washington v. Recuenco*,[2] the Supreme Court determined that failure to submit a sentencing factor to the jury is not a "structural" error which always invalidates a conviction. In a 7-2 decision,[3] the Supreme Court reversed Washington's Supreme Court and held that *Blakely*[4] violations are subject to harmless error review.

Recuenco was convicted of second-degree assault based on the jury's finding that he was armed with a "deadly weapon." Rather than requesting the one-year sentence enhancement corresponding to a finding of the involvement of a deadly weapon, the state sought a mandatory three-year enhancement because the defendant was armed with a firearm. Under Washington law, a firearm qualifies as a deadly weapon, but the jury instructions did not require the jury to make the specific finding that the defendant was armed with a firearm. The trial court found that the weapon was a firearm and imposed the higher penalty. The state conceded before the Washington Supreme Court that, pursuant to *Blakely v. Washington*, this constituted a Sixth Amendment violation, but argued that the error was harmless. The Washington Supreme Court refused to apply harmless-error analysis to the violation, vacated the sentence, and remanded for sentencing based on the deadly weapon enhancement.

In reversing the state court, the Court noted that it has "repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal. Instead, most constitutional errors can be harmless."[5] The court relied heavily on its analysis in

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[2] 126 S. Ct. 2546 (2006).

[3] Justice Thomas wrote on behalf of Chief Justice Roberts and Justices Scalia, Kennedy, Souter, Breyer, and Alito; Justice Kennedy concurred, and Justices Ginsburg and Stevens dissented.

[4] 542 U.S. 296 (2004).

[5] 126 S. Ct. at 2551.

*Neder v. United States*,[6] in which it had held that the failure to submit to the jury an element of a crime was not a "structural" error and could therefore be harmless.[7]

### *Petitions for Certiorari Granted*

The Supreme Court granted *certiorari* in *Cunningham v. California*[8] in order to determine "[w]hether California's Determinate Sentencing Law, by permitting sentencing judges to impose enhanced sentences based on their determination of facts not found by the jury or admitted by the defendant, violates the Sixth and Fourteenth Amendments."[9]

The Supreme Court also granted *certiorari* in *Burton v. Stewart*[10] in order to address the issue of whether the ruling in *Blakely* should be applied retroactively.

## Decisions of the United States Courts of Appeals

Much of the sentencing jurisprudence in the courts of appeal relating to *United States v. Booker*[11] centered on the appropriate relationship between the guideline range and the other factors set forth in 18 U.S.C. § 3553(a). The majority of circuits have adopted a three-step process for applying section 3553(a). Although the particular phrasing varies, this process generally requires that district courts (1) calculate a defendant's guideline range as they would have before *Booker*; (2) rule on any guideline departure motions, explaining the reasons for such rulings on the record; and (3) consider the section 3553(a) factors (including the guideline range) in determining the sentence.[12]

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6 527 U.S. 1 (1999).

7 527 U.S. 1, 9 ("Unlike such defects as the complete deprivation of counsel or trial before a biased judge, an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence.")(Emphasis in original.)

8 126 S. Ct. 1329 (2006) (opinion below at 2005 WL 880983 (9th Cir. 2005)).

9 Petition for Writ of Certiorari, *Cunningham v. California*, 2005 WL 3785203 (Sept. 17, 2005) (No. 05-6551).

10 126 S. Ct. 2352 (2006) (opinion below at *Burton v. Waddington*, 142 F. App'x 297 (9th Cir. 2005)).

11 543 U.S. 220 (2005). *See* Chapter One, page 2, for a discussion of the *Booker* decision.

12 *United States v. Jiménez-Beltre,* 440 F.3d 514 (1st Cir. 2006) (en banc), *petition for cert. filed* (U.S. Aug. 4, 2006) (No. 06-5727); *United States v. Rattoballi*, 452 F.3d 127 (2d Cir. 2006); *United States v. Gunter*, 462 F.3d 237, 247 (3d Cir. 2006); *United States v. Perez-Pena,* 453 F.3d 236 (4th Cir. 2006); *United States v. Mares*, 402 F.3d 511 (5th Cir. 2005); *United States v. Collington,* 461 F.3d 805 (6th Cir. 2006); *United States v. Shannon*, 414 F.3d 921, 923-24 (8th Cir. 2005); *United States v. Kristl*, 437 F.3d 1050, 1056 (10th Cir. 2006); *but see United States v. Robinson*, 435 F.3d 699, 700-701 (7th Cir. 2006); *United States v. Mohamed*, 459 F.3d 979 (9th Cir. 2006); *United States v. Talley*, 431 F.3d 784 (11th Cir. 2005).

### *Calculating the Guideline Range*

In limited circumstances, some courts have upheld sentences imposed without a final guideline calculation.[13] If a district court improperly fails to calculate the guideline range, or does so erroneously, some circuits have held this to render the sentence "procedurally unreasonable."[14]

### *Motions for Guideline Departures*

In *Booker*, the Supreme Court excised 18 U.S.C. § 3742(e), which prescribed a *de novo* standard of review for guideline departures and replaced it with the reasonableness standard of review.[15] *Booker*, however, did not speak to the issue of whether appellate courts should also review district courts' decisions *not* to depart from the guideline for reasonableness. Several courts held that this particular aspect of departure review survived *Booker*, meaning that appellate courts do not disturb a court's denial of a departure motion unless the record demonstrates that the district court "was not aware of or did not understand its discretion" to depart.[16] Unlike the circuits that apply the three-part test described above, the Seventh Circuit has held that, in light of *Booker*, the traditional departure analysis is obsolete: "It is now clear that after *Booker* what is at stake is the reasonableness of the sentence, not the correctness of the 'departures' as measured against pre-*Booker* decisions that cabined the discretion of sentencing courts to depart from guidelines that were then mandatory."[17] In the Seventh Circuit, therefore, the sentencing analysis occurs in two steps: calculating the guideline range without departure motions, and then considering the section 3553(a) factors.[18] In evaluating a sentence for reasonableness, however, the Seventh Circuit has analogized to guideline departure provisions.[19] The Ninth Circuit has also adopted an approach to departures that differs from the majority: "[W]e elect to review the district court's application of the advisory sentencing guidelines only insofar as they do not involve departures. To the extent that a district court has framed its analysis in terms of a downward or upward departure, we will treat such

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[13] *See United States v. Haack*, 403 F.3d 997 (8th Cir. 2006) and *United States v. Tzep-Mejia*, 461 F.3d 522 (5th Cir. 2006).

[14] *See*, *e.g.*, *United States v. Kristl*, 437 F.3d 1050, 1055 (10th Cir. 2006).

[15] *United States v. Booker*, 543 U.S. at 260-61 (2005); *but see United States v. Selitousky,* 409 F.3d 114, 119 (D.C. Cir. 2005) (reviewing for abuse of discretion) and *United States v. Crawford*, 407 F.3d 1174, 1178 (11th Cir. 2005) (reviewing *de novo* as a question of law).

[16] *United States v. McBride*, 434 F.3d 470, 474 (6th Cir. 2006) (*citing United States v. Puckett*, 422 F.3d 340 (6th Cir. 2005); *see also United States v. Meléndez-Torres,* 420 F.3d 45, (1st Cir. 2005); *United States v. Cooper*, 437 F.3d 324 (3d Cir. 2006); *United States v. Kiertzner*, 460 F.3d 988 (8th Cir. 2006); *United States v. Chavez-Diaz*, 444 F.3d 1223 (10th Cir. 2006); *United States v. Norris*, 452 F.3d 1275 (11th Cir. 2006); *but see United States v. Vaughn*, 433 F.3d 917 (7th Cir. 2006).

[17] *United States v. Johnson*, 427 F.3d 423, 426 (7th Cir. 2005).

[18] *United States v. Robinson*, 435 F.3d 699, 700-701 (7th Cir. 2006).

[19] *See, e.g., United States v. Castro-Juarez*, 425 F.3d 430 (7th Cir. 2005).

so-called departures as an exercise of post-*Booker* discretion to sentence a defendant outside of the applicable guidelines range. In other words, any post-*Booker* decision to sentence outside of the applicable guidelines range is subject to a unitary review for reasonableness, no matter how the district court styles its sentencing decision."[20] The Ninth Circuit, however, went on to note that if a district court's decision comports with the guidelines' departure provisions, it may be more likely to be deemed reasonable than one that does not.[21] Similarly, the Eleventh Circuit has prescribed a two-step procedure for determining a sentence: "First, the district court must consult the Guidelines and correctly calculate the range provided by the Guidelines. Second, the district court must consider [the section 3553(a)] factors to determine a reasonable sentence."[22] Unlike the Ninth Circuit, however, the Eleventh Circuit considers departure issues to be part of the guideline calculation.[23]

***Reasonableness Review***

Significant conflict among the circuits has arisen regarding the role to be played by the guideline range in the consideration of the section 3553(a) factors once it is properly calculated. Some circuits have instructed district courts to give special weight to the guideline range in light of the considerations reflected in the Commission's promulgation of the guidelines. The Tenth Circuit, for example, interpreted *Booker* to require "deference" to the guidelines.[24] Similar considerations have prompted some circuits to review within-guidelines sentences differently than those not within the guideline range. Specifically, the Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and D.C. circuits have announced a "presumption of reasonableness" for within-guideline range sentences.[25]

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[20] *United States v. Mohamed*, 459 F.3d 979, 987 (9th Cir. 2006).

[21] *Id.*

[22] *United States v. Talley*, 431 F.3d 784, 786 (11th Cir. 2006) (citing *United States v. Crawford*, 403 F.3d 1174, 1178 (11th Cir. 2005)).

[23] *United States v. Crawford*, 403 F.3d 1174 (11th Cir. 2005) (reversing and remanding a sentence on grounds of improper guideline calculation in, *inter alia*, erroneous use of impermissible grounds for downward departure).

[24] *United States v. Crockett*, 435 F.3d 1305, 1318 (10th Cir. 2006).

[25] *United States v. Green*, 436 F.3d 449, 457 (4th Cir. 2006); *United States v. Alonzo*, 435 F.3d 551, 554 (5th Cir. 2006); *United States v. Williams*, 436 F.3d 706 (6th Cir. 2006) (*petition for cert. filed*, No. 06-5275); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005); *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005); *United States v. Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2006); *United States v. Dorcely*, 454 F.3d 366, 376 (D.C. Cir. 2006).

In contrast, the First, Second, Third, Ninth and Eleventh Circuits have declined to establish such a presumption.[26] Courts applying a presumption of reasonableness have held that the party appealing a within-guideline range sentence (typically the defendant) bears the burden of establishing its unreasonableness.[27]

When evaluating non-guideline sentences, courts have taken various approaches to quantifying the degree to which a sentence imposed varies from the guideline range. Some courts have expressed the degree of variance in terms of percentages (*i.e.*, the sentence imposed is equivalent to a certain percentage of the guideline range, or is a certain percentage above or below the range). Other courts have criticized this approach on grounds that it has the potential to overstate the difference between the two sentences,[28] and some courts have expressed the difference in terms of guideline offense levels.[29] Regardless of how they have chosen to express the difference, many courts have held that the presumption of reasonableness implies a principle of proportionality; that is, the larger the difference between the guideline range and the sentence imposed, the more significant the reasons for the variance must be.[30] This principle has also been applied in the First and Eleventh Circuits, which do not use the presumption of reasonableness.[31]

Courts have also taken differing positions on what constitute proper reasons for varying from the guideline range. Some courts have held that factors disfavored under guidelines policy statements (especially offender characteristics such as those contained in section 5H of the *Guidelines Manual*) are inappropriate bases for imposing a non-guideline sentence.[32] Other courts have noted that many of the disfavored section 5H characteristics may properly be considered under section 3553(a)(1), and have therefore said that, so long as a district court considered the policy statement, a variance could nevertheless be imposed on such a basis.[33]

Issues have arisen especially around departures requested on grounds that they are necessary to prevent unwarranted disparity. Many defendants have argued that the absence of a "fast-track"

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[26] *United States v. Jiménez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (*en banc*); *United States v. Rattoballi*, 452 F.3d 127, 131 (2d Cir. 2006); *United States v. Cooper*, 437 F.3d 324, 330 (3d Cir. 2006); *United States v. Zavala*, 443 F.3d 1165, 1170 (9th Cir. 2006) (*reh'g en banc granted*); *United States v. Hunt*, 459 F.3d 1180, 1184 (11th Cir. 2006).

[27] *See, e.g., United States v. Alonzo*, 435 F.3d at 554; *United States v. Talley*, 431 F.3d at 788.

[28] *United States v. Wallace*, 458 F.3d 606, 613 (7th Cir. 2006).

[29] *United States v. Saenz*, 428 F.3d 1159, 1162 (8th Cir. 2006).

[30] *United States v. Moreland*, 437 F.3d 424, 434 (4th Cir. 2006); *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005); *United States v. Kendall*, 446 F.3d 782, 785 (8th Cir. 2006).

[31] *United States v. Thurston,* 456 F.3d 211, 215 (1st Cir. 2006); *United States v. McVay*, 447 F.3d 1348, 1357 (11th Cir. 2006).

[32] *See, e.g., United States v. Guidry*, 462 F.3d 373, 377 (5th Cir. 2006) (family ties).

[33] *United States v. Davis*, 458 F.3d 491 (6th Cir. 2006).

program in their district constitutes an unwarranted disparity; courts have uniformly disagreed, holding that a disparity created by Congress is not unwarranted.[34] Courts have also rejected claims based on disparities created by one co-defendant's substantial assistance to the government.[35] Similarly, courts have held that a disparity between the sentence a defendant would have received under state law and the one he would receive under federal law is not the type of disparity for which district courts are to correct.[36] There is some disagreement among courts as to whether a district court may correct for a disparity between the sentences of two co-defendants.[37]

The crack/powder ratio has been an issue as courts determine the proper role of the guidelines in the post-*Booker* era. Courts in the First, Second, Fourth, Seventh and Eleventh Circuits have held that judges may not vary from the guidelines solely on the basis of a policy disagreement with the 100:1 ratio.[38] This was held to be so even when the district judge instead looked to a 20:1 ratio, which has been suggested by the Commission as a possible modification.[39] In *United States v. Gunter*, the Third Circuit faced a slightly different issue – in that case, the district court had declined to issue a non-guideline sentence where the defendant had asked it to consider the crack/powder ratio as a basis for sentencing below the guideline range.[40] The Third Circuit vacated the sentence on grounds that it was procedurally unreasonable because "the District Court here believed that it had no discretion to impose a below-Guidelines sentence on the basis of the crack/powder cocaine differential and, thus, treated the Guidelines range difference as mandatory in deciding the ultimate sentence."[41] Some courts have suggested that district judges may be able to sentence below the guideline range in a crack cocaine case and may consider the crack/powder disparity in so doing, but

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[34] *See, e.g., United States v. Mejia*, 461 F.3d 158, 162-63 (2d Cir. 2006); *United States v. Perez-Pena*, 453 F.3d 236 (4th Cir. 2006).

[35] *See, e.g., United States v. Boscarino*, 437 F.3d 634, 637-38 (7th Cir. 2006).

[36] *See, e.g., United States v. Clark*, 434 F.3d 684, 687 (4th Cir. 2006).

[37] Compare *United States v. Pisman*, 443 F.3d 912, 916 (7th Cir. 2006) *with United States v. McGee*, 408 F.3d 966, 988 (7th Cir. 2005); *see also United States v. Davis*, 437 F.3d 989 (10th Cir. 2006)(holding that disparities are allowed where explicable by facts on the record); *United States v. Krutsinger*, 449 F.3d 827 (8th Cir. 2006)(holding that district court did not err in imposing a below-guideline range sentence to correct co-defendant disparity); *United States v. Thurston*, 456 F.3d 211 (1st Cir. 2006)(reversing a below-guideline range sentence based on co-defendant disparity on grounds that co-defendant had pleaded *nolo contendere* while defendant had gone to trial); *United States v. Duhon*, 450 F.3d 711 (5th Cir. 2006) (reversing a below-guideline range sentence based on co-defendant disparity when co-defendant, unlike defendant, had provided substantial assistance).

[38] *United States v. Pho*, 433 F.3d 53, 54 (1st Cir. 2006); *United States v. Castillo*, 460 F.3d 337, 361 (2d Cir. 2006); *United States v. Eura*, 440 F.3d 625, 633 (4th Cir. 2006); *United States v. Jointer*, 457 F.3d 682, 687-88 (7th Cir. 2006); *United States v. Williams*, 456 F.3d 1353, 1367 (11th Cir. 2006).

[39] *United States v. Jointer*, 457 F.3d at 678-88.

[40] *United States v. Gunter*, 462 F.3d 237 (3d Cir. 2006).

[41] *Id.* at 246.

they insist that the district judge "must still tie the § 3553(a) factors to the individual characteristics of the defendant and the offense committed."[42]

A circuit split has developed on the issue of whether Fed.R.Crim.P. 32(h) requires a district court to provide advanced notice that it is contemplating imposing a non-guideline sentence (commonly called a "variance," as distinguished from departures provided for under the guidelines scheme).[43] The Third, Seventh, Eighth and Eleventh Circuits have held that Rule 32(h) does not require advance notice for variances based upon the section 3553(a) factors.[44] In contrast, the Second, Fourth, Ninth and Tenth Circuits have held that the rule does apply to such variances.

Although there have been numerous answers to the question of how thorough the district court's discussion of the section 3553(a) factors must be to yield a procedurally reasonable sentence, it is generally agreed that a rote recitation of the section 3553(a) factors is neither required nor sufficient.[45] It is also generally true that district courts have been required to explicitly rule on all non-frivolous arguments for a non-guideline sentence raised by a defendant.[46]

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[42] *Jointer*, 457 F.3d at 688 (citing *Eura*, 440 F.3d at 634).

[43] *See, e.g.*, *United States v. Hampton*, 441 F.3d 284, 287 (4th Cir. 2006)

[44] *United States v. Vampire Nation*, 451 F.3d 189, 196 (3d Cir. 2006); *United States v. Walker*, 447 F.3d 999, 1007 (7th Cir. 2006); *United States v. Long Soldier*, 431 F.3d 1120, 1122 (8th Cir. 2005); *United States v. Irizarry*, 458 F.3d 1208, 1212 (11th Cir. 2006).

[45] *See, e.g., United States v. Scott*, 426 F.3d 1324, 1329 (11th Cir. 2005); *United States v. Dean*, 414 F.3d 725, 728-29; *United States v. Contreras-Martinez*, 409 F.3d 1236, 1242 (10th Cir. 2005); *United States v. Dieken*, 432 F.3d 906, 909 (8th Cir. 2006); *United States v. Charles*, 467 F.3d 828, 831 (3d Cir. 2006); *United States v. Moreland*, 437 F.3d 424, 432-33 (4th Cir. 2006).

[46] For discussion of the scope of this requirement, see *United States v. Cunningham*, 429 F.3d 673, 678-79 (7th Cir. 2005).