Additional Circuit and Supreme Court Case Law, Viewpoints on Appellate Procedure, and Appeals Data Analysis

Leading Supreme Court Cases Discussing the Validity of the Guidelines and the Constitutionality of the Commission

Leading Case	Determination
Mistretta v. United States, 488 U.S. 361 (1989).	The Supreme Court upheld the constitutionality of both the guidelines and the Commission against nondelegation and separation of powers challenges, finding that "Congress neither delegated excessive legislative power [to the Commission] nor upset the constitutionally mandated balance of powers among the coordinate branches" by placing the Commission within the Judicial Branch. Likening the role of the Commission to that of the courts in promulgating rules of procedure, the Supreme Court stated that "[the Guidelines] do not bind or regulate the primary conduct of the public or vest in the Judicial Branch the legislative responsibility for establishing minimum or maximum penalties for every crime. They do no more than fetter the discretion of sentencing judges to do what they have done for generations–impose sentences within the broad limits set by Congress."
United States v. Dunnigan, 507 U.S. 87 (1993).	The Supreme Court rejected a claim that the obstruction of justice enhancement undermined a defendant's right to testify in his or her own defense, concluding that a defendant's right to testify does not include the right to commit perjury.
Witte v. United States, 515 U.S. 389 (1995).	The Supreme Court rejected the contention that the use of relevant conduct that would later form the basis of a subsequent prosecution violated the double jeopardy clause.
Neal v. United States, 516 U.S. 284 (1996).	The Supreme Court rejected a defendant's claim that the weight of LSD necessary to trigger the statutory mandatory minimum penalty should be calculated using the Commission's amended method of the presumptive weight of LSD on a carrier medium, rather than the actual weight of the LSD and its carrier medium. The Supreme Court held that the Commission had not purported to interpret the statute and, in any event, could not overturn the Supreme Court's earlier decision holding that the weight of the LSD for mandatory minimum purposes includes the carrier medium.
United States v. Watts, 519 U.S. 148 (1997).	The Supreme Court held that sentencing courts could sentence defendants based on relevant conduct, even if the defendant had been acquitted of the conduct, as long as it was proved by a preponderance of evidence.
United States v. LaBonte, 520 U.S. 751 (1997).	The Supreme Court rejected the Commission's interpretation of the directive in 28 U.S.C. § 994(h), which requires that the Commission ensure that certain "career offenders" are sentenced at or near the statutory maximum. Contrary to the Commission's interpretation, the Court held that the statutory phrase "maximum authorized term" included statutory enhancement provisions based on recidivism. Thus the Court rejected a retroactive sentence reduction on this basis, finding that the Commission's amendment was not consistent with congressional intent.

Pre-*Booker* Supreme Court Sixth Amendment Decisions

Leading Case	Determination
Apprendi v. New Jersey, 530 U.S. 466 (2000).	The Supreme Court found unconstitutional a New Jersey statute that increased the maximum penalty of the defendant's weapon possession offense from 10 to 20 years based on the trial court's finding by a preponderance of evidence that the defendant committed a hate crime. The Court held: "Other 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."
Ring v. Arizona, 536 U.S. 584 (2002).	The Supreme Court held that the Sixth Amendment entitles defendants in capital cases to a jury determination of any aggravating factors that increase their maximum punishment from life imprisonment to death.
Harris v. United States, 536 U.S. 545 (2002).	The Supreme Court held that the "brandishing" and "discharging" elements of 18 U.S.C. § 924(c)(1)(A) are sentencing factors to be found by the judge, not offense elements to be found by the jury. Although any fact extending a defendant's sentence beyond the maximum authorized by a jury's verdict would be an element of an aggravated crime (and thus the domain of the jury), facts increasing the mandatory minimum (but not extending the sentence beyond the statutory maximum) are different in that "the jury has authorized the judge to impose the minimum with or without the finding" at sentencing.
Blakely v. Washington, 542 U.S. 296 (2004).	The Supreme Court considered whether state sentencing guidelines that rely upon judicial factfinding violate the Sixth Amendment. Under the Washington State's sentencing scheme, judges sentenced defendants above the standard statutory ranges based on findings of fact. The sentencing judge found that Blakely had acted with deliberate cruelty, a finding that subjected him to an enhanced sentencing range. Even though the sentence imposed was within the ten year statutory maximum, the Supreme Court invalidated the sentence because it exceeded the standard sentencing range set forth in Washington's sentencing guidelines, based on a factual finding that was not submitted to the jury and was not admitted by the defendant.

Leading Post-*Booker* Supreme Court Decisions

Leading Case	Determination
Rita v. United States, 551 U.S. 338 (2007).	The Supreme Court held that courts of appeals may apply a presumption of reasonableness when reviewing a sentence imposed within the sentencing guideline range. In so holding, the Supreme Court explained that "[] the sentencing statutes [28 U.S.C. § 991, *et seq.* and 18 U.S.C. § 3553] envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale," the guidelines "seek to embody the § 3553(a) considerations, both in principle and in practice," and the guidelines "reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives."
Kimbrough v. United States, 552 U.S. 85 (2007).	The Supreme Court held that a sentencing judge may consider the disparity between the guidelines' treatment of crack and powder cocaine when determining a sentencing range. The Court held that the crack cocaine guidelines "do not exemplify the Commission's exercise of its characteristic institutional role" and noted the Commission's opinion that the crack cocaine guidelines produce "disproportionately harsh sanctions." The Court noted, however, that "while the Guidelines are no longer binding, closer review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range fails properly to reflect § 3553(a) considerations even in a mine-run case." (Internal quotations omitted).
Gall v. United States, 552 U.S. 38 (2007).	The Supreme Court held that the "courts of appeals must review all sentences--whether inside, just outside, or significantly outside the Guidelines range--under a deferential abuse of discretion standard." The Court held that an appellate rule "requiring 'proportion' justifications for departures from the Guidelines range is not consistent with" *Booker*. Courts of appeals may take the degree of variance and the extent of a deviation from the guidelines into account when reviewing for reasonableness. However, the Supreme Court rejected an appellate rule that "requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range" or the "use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence[,]" reasoning that these approaches would "come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range."
Irizarry v. United States, 553 U.S. 708 (2008).	The Supreme Court held that a district court was not required to provide advance notice to the parties when imposing a sentence that represents a variance from the guideline range. According to the Court, "[t]he due process concerns that motivated the Court to require notice in a world of mandatory Guidelines no longer provide a basis for this Court to extend the rule . . . either through an interpretation of Rule 32(h) itself or through Rule 32(i)(1)(c)." The Court also voiced more practical concerns that a special notice requirement in such circumstances might "create unnecessary delay." The Court stated that the proper approach to cases in which "the factual basis for a particular sentence will come as a surprise to a defendant or the Government" is for the "district court to consider granting a continuance when a party has a legitimate basis for claiming that the surprise was prejudicial."

Spears v. United States, 555 U.S. 261 (2009).	The Supreme Court affirmed the district court's substitution of a 20-to-1 crack to powder ratio instead of the 100:1 crack to powder ratio inherent in the guidelines range. The Court made clear that the *Kimbrough* decision "holds that with respect to the crack cocaine Guidelines, a categorical disagreement with and variance from the Guidelines in not suspect." The Court explained that this "was indeed the point of *Kimbrough*: a recognition of district courts' authority to vary from the crack cocaine Guidelines based on *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case." It necessarily follows from this authority, the Court held, that a district court also has authority to substitute "a different ratio which, in his judgment, corrects the disparity."
Dillon v. United States, 130 S. Ct. 2683 (2010).	The Supreme Court considered what the impact of its *Booker* decision should be on sentence reductions under 18 U.S.C. § 3582(c)(2) and concluded that *Booker* does not apply to proceedings under section 3582(c)(2) and that USSG §1B1.10 is binding on courts reducing sentences under that provision. The Court held that section 3582(c)(2) proceedings do not implicate the Sixth Amendment right at issue in *Booker* because they "represent[] a congressional act of lenity intended to give prisoners the benefit of later enacted adjustments to the judgments reflected in the Guidelines."
Pepper v. United States, 131 S. Ct. 1229 (2011).	The Supreme Court held that "when a defendant's sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant's postsentencing rehabilitation and that such evidence may, in appropriate cases, support a downward variance from the now-advisory Federal Sentencing Guidelines." Because this conclusion conflicted with 18 U.S.C. § 3742(g)(2), which precludes a court on resentencing from imposing a sentence outside the guidelines range except upon a "'ground of departure' that was expressly relied upon in the prior sentencing," the Court invalidated it as inconsistent with *Booker*. Similarly, even though the guidelines expressly precluded a district court from considering postsentencing rehabilitation, the Court made clear that a district court "may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views," especially "where, as here, the Commission's views rest on wholly unconvincing policy rationales not reflected in the sentencing statutes Congress enacted."
Tapia v. United States, 131 S. Ct. 2382 (2011).	The Supreme Court held that the Sentencing Reform Act precludes a sentencing court from imposing or lengthening a prison term in order to promote a criminal defendant's rehabilitation. The Court made clear that a sentencing court commits no error by discussing options for prison rehabilitation or urging the Bureau of Prisons to place an offender in a prison treatment program. What it may not do, however, is "impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise promote rehabilitation."
Southern Union Co. v. United States, 132 S. Ct. 2344 (2012).	The Supreme Court held that the proposition established in *Apprendi v. New Jersey* – that the Sixth Amendment reserves to juries the determination of any fact (other than the fact of prior conviction) that increases a criminal defendant's maximum potential sentence – applies to criminal fines.

Setser v. United States, 132 S. Ct. 1463 (2012).	The Supreme Court held that a district court has authority to order that a federal sentence be served consecutive to an anticipated (*i.e.*, yet-to-be-imposed) state sentence. The Court explained that judges have long had discretion to impose sentences that will run concurrently or consecutively to other sentences, including those imposed in state proceedings, and that nothing in the Sentencing Reform Act indicates otherwise.
Dorsey v. United States, 132 S. Ct. 2321 (2012).	The Supreme Court held that the more lenient mandatory minimum sentencing provisions in Fair Sentencing Act (FSA), which reduced the crack-to-powder cocaine sentencing disparity from 100-to-1 to 18-to-1, applied to offenders who committed crack cocaine offenses prior to the FSA's effective date but were sentenced after that date. In holding that there was "indicia of clear congressional intent" to apply the FSA's new minimum penalties, the Court explained, *inter alia*, that Congress must have been aware of the SRA's "background principle" directing judges to apply the guidelines in effect at the time of sentencing when it passed the FSA; applying the prior drug law's mandatory minimums to pre-FSA offenders sentenced post-FSA "would create disparities of a kind that Congress enacted the [SRA] and the [FSA] to prevent"; and not applying the FSA to these offenders "would do more than preserve a disproportionate status quo; it would make matters worse" by creating "a new disparate sentencing 'cliff.'"

Leading Appellate Cases in Circuits Discussing the Three-Step Process

Circuit	Leading Case	Determination
D.C.	*United States v. Akhigbe*, 642 F.3d 1078 (D.C. Cir. 2011).	"A district court begins by calculating the appropriate Guidelines range, which it treats as the starting point and the initial benchmark for sentencing. Then, after giving both parties an opportunity to argue for whatever sentence they deem appropriate, the court considers all of the section 3553(a) sentencing factors and undertakes an individualized assessment based on the facts presented. If the court decides that an outside-Guidelines sentence is warranted, it must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." (Internal quotations and citations omitted).
First	*United States v. Dixon*, 449 F.3d 194 (1st Cir. 2006).	"Although the guidelines have become advisory rather than mandatory, determining the correct GSR [guideline sentencing range] remains an appropriate starting point for constructing a defendant's sentence. [] Once the sentencing court has established the GSR (including a consideration of any applicable departures), it must then evaluate the sentencing factors set out in 18 U.S.C. § 3553(a), along with any other relevant considerations. Finally, it must determine, in light of that assessment, whether a sentence above, within, or below the GSR is warranted." (Internal citations omitted).
Second	*United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005).	"[T]he sentencing judge must consider the Guidelines and all of the other factors listed in [§] 3553(a). [C]onsideration of the Guidelines will normally require determination of the applicable Guidelines range, or at least identification of the arguably applicable ranges, and consideration of applicable policy statements. [T]he sentencing judge should decide, after considering the Guidelines and all the other factors set forth in [§] 3553(a), whether (i) to impose the sentence that would have been imposed under the Guidelines, *i.e.* a sentence within the applicable Guidelines range or within permissible departure authority, or (ii) to impose a non-Guidelines sentence."
Third	*United States v. Gunter*, 462 F.3d 237 (3d Cir. 2006).	"(1) Courts must continue to calculate a defendant's Guidelines sentence precisely as they would have before *Booker*. [] (2) In doing so, they must formally rule on the motions of both parties and state on the record whether they are granting a departure and how that departure affects the Guidelines calculation, and take into account our Circuit's pre-*Booker* case law, which continues to have advisory force. [] (3) Finally, they are required to exercise their discretion by considering the relevant § 3553(a) factors[.]" (Internal citations omitted). *See also United States v. Jackson*, 467 F.3d 834 (3d Cir. 2006) ("we require that the entirety of the Guidelines calculation be done correctly, including rulings on Guidelines departures.")

Fourth	*United States v. Green*, 436 F.3d 449 (4th Cir. 2006).	"[T]o sentence a defendant, district courts must (1) properly calculate the sentence range recommended by the Sentencing Guidelines; (2) determine whether a sentence within that range and within statutory limits serves the factors set forth in § 3553(a) and, if not, select a sentence that does serve those factors; (3) implement mandatory statutory limitations; and (4) articulate the reasons for selecting the particular sentence, especially explaining why a sentence outside of the Sentencing Guideline range better serves the relevant sentencing purposes set forth in § 3553(a)." *See also United States v. Moreland*, 437 F.3d 424 (4th Cir. 2006) (departures "remain an important part of sentencing even after Booker").
Fifth	*United States v. Tzep-Mejia*, 461 F.3d 522 (5th Cir. 2006).	"Post-*Booker* case law recognizes three types of sentences under the new advisory sentencing regime: (1) a sentence within a properly calculated Guideline range; (2) a sentence that includes an upward or downward departure as allowed by the Guidelines, which sentence is also a Guideline sentence; or (3) a non-Guideline sentence which is either higher or lower than the relevant Guideline sentence."
Sixth	*United States v. McBride*, 434 F.3d 470 (6th Cir. 2006).	"To effectuate the Supreme Court's mandate, district courts are still required to *consider* the appropriate Guideline sentencing range. Within this Guideline calculation is the determination of whether a Chapter 5 departure is appropriate. . . . Once the appropriate advisory Guideline range is calculated, the district court throws this ingredient into the section 3553(a) mix." In addition, "the appropriate Guideline range -- including Guideline departures -- must still be considered. Because Guideline 'departures' are a part of the appropriate Guideline range calculation, we believe that Guideline departures are still a relevant consideration for determining the appropriate Guideline sentence. This Guideline sentence is then considered in the context of the section 3553(a) factors."
Seventh	*United States v. Johnson*, 427 F.3d 423 (7th Cir. 2006).	The second step of the three-step process is "obsolete": "[F]raming of the issue as one about 'departures' has been rendered 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. . . . A sentence within a properly calculated guidelines range is presumptively reasonable. [] Sentences varying from the guidelines range, as this one does, are reasonable so long as the judge offers appropriate justification under the factors specified in 18 U.S.C. § 3553(a)." (Internal quotations and citations omitted).
Eighth	*United States v. Rivera*, 439 F.3d 446 (8th Cir. 2006).	"First, the district court should determine the Guidelines 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 Guidelines or non-Guidelines sentence."

Ninth	*United States v. Mohamed*, 459 F.3d 979 (9th Cir. 2006).	The second step of the three-step process has been replaced by reasonableness review: "We think the better view is to treat the scheme of downward and upward 'departures' as essentially replaced by the requirement that judges impose a 'reasonable' sentence . . . the use and review of post-*Booker* departures would result in wasted time and resources in the courts of appeal, with little or no effect on sentencing decisions."
Tenth	*United States v. Sierra-Castillo*, 405 F.3d 932 (10th Cir. 2005).	"[D]istrict courts must still consult the guidelines and take them into account when sentencing. . . . The guidelines provide for departures from the applicable sentencing range in certain specified situations. . . . Although district courts post-*Booker* have discretion to assign sentences outside of the guidelines-authorized range, they should also continue to apply the guidelines departure provisions in appropriate cases." (Internal quotations and citations omitted).
Eleventh	*United States v. Jordi*, 418 F.3d 1212 (11th Cir. 2005).	"[A] sentencing court under *Booker* still must consider the Guidelines, and such consideration necessarily requires the sentencing court to calculate the Guidelines sentencing range in the same manner as before *Booker*. . . . After it has made this calculation, the district court may impose a more severe or more lenient sentence as long as the sentence is reasonable, but the requirement of consultation itself is inescapable." (Internal quotations and citations omitted).

Leading Appellate Case in Circuits Discussing Fast-Track Disparity

Circuit	Leading Case	Determination
First	*United States v. Rodriquez*, 527 F.3d 221 (1st Cir. 2008).	District courts may vary based on fast-track disparity because, "[l]ike the crack/powder ratio, the fast-track departure scheme does not exemplify the [Sentencing] Commission's exercise of its characteristic institutional role."
Second	*United States v. Mejia*, 461 F.3d 158 (2d Cir. 2006).	Holding that a district court's refusal to vary based on fast-track disparity is not necessarily unreasonable, without deciding whether district court has the authority to so vary if it deems such a reduced sentence to be warranted. *See also United States v. Hendry*, 522 F.3d 239 (2d Cir. 2011) (within district court's discretion to refuse to vary based on § 3553(a)'s parsimony clause because defendants in fast-track districts are not similarly situated to defendants in non-fast track districts).
Third	*United States v. Arrelucea-Zamudio*, 581 F.3d 142 (3d Cir. 2009).	District courts have "the discretion to consider a variance under the totality of the § 3553(a) factors . . . on the basis of a defendant's fast track argument, and [] such a variance would be reasonable in an appropriate case."
Fifth	*United States v. Gomez-Herrera*, 523 F.3d 554 (5th Cir. 2008).	District courts may not vary on the basis of fast-track disparity because "any sentencing disparity resulting from fast track disposition programs is not unwarranted as the disparity was also intended by Congress."
Sixth	*United States v. Camacho-Arellano*, 614 F.3d 244 (6th Cir. 2010).	Districts courts may vary on the basis of fast-track disparity because *Kimbrough* "permits district court judges to impose a variance based on disagreement with the policy underlying a guideline."
Seventh	*United States v. Reyes-Hernandez*, 624 F.3d 405 (7th Cir. 2010).	District courts may vary based on fast-track disparity but a variance based solely on fast-track disparity may still be unreasonable because it must result from a holistic and meaningful review of all relevant § 3553(a) factors. *See also United States v. Ramirez*, 675 F.3d 634 (7th Cir. 2011) ("We hold that a district court need not address a fast-track argument unless the defendant has shown that he is similarly situated to persons who actually would receive a benefit in a fast-track district. That means that the defendant must promptly plead guilty, agree to the factual basis proffered by the government, and execute an enforceable waiver of specific rights before or during the plea colloquy. It also means that the defendant must establish that he would be eligible to receive a fast-track sentence in at least one district offering the program and submit the likely imprisonment range in that district.")

Eighth	*United States v. Jimenez-Perez*, 659 F.3d 704 (8th Cir. 2011).	District courts may vary on the basis of fast-track disparity because *Kimbrough* undermined circuit present holding otherwise.
Ninth	*United States v. Gonzalez-Zotelo*, 556 F.3d 736 (9th Cir. 2009).	"Under our cases the disparity in question is indeed warranted, because it is justified by Congress's approval of fast-track plea bargaining programs. This conclusion is not undermined by *Kimbrough v. United States*, which allows judges to disagree with Guidelines sentencing policy, not with congressional sentencing policy."
Tenth	*United States v. Lopez-Macias*, 661 F.3d 485 (10th Cir. 2011).	District courts may vary based on fast-track disparity because *Kimbrough*'s holding extends to a policy disagreement with §5K2.1.
Eleventh	*United States v. Vega-Castillo*, 540 F.3d 1235 (11th Cir. 2008).	District courts may not vary on the basis of fast-track disparity, because the reasoning of *Kimbrough* did not undermine prior precedent holding that any disparity created by the Fast Track program does not fall within the scope of § 3553(a)(6).

Leading Cases Discussing Level of Deference Due Guidelines Resulting from Congressional Directives

CHILD PORNOGRAPHY

Circuit	Leading Case	Determination
First	*United States v. Stone*, 575 F.3d 83 (1st Cir. 2009).	A district court may vary on the basis of disagreement with the child pornography guidelines, but a district court is also "free to agree with the guidelines (or, at least, some particular guideline). Part of this freedom must be a freedom to agree with the guidelines because the sentencing court believes that the guidelines express some societal wisdom beyond what an entirely unrestricted sentencing judge might possess. Thus, part of the sentencing court's broad discretion must be the discretion to conclude that guidelines are convincing for various reasons, including that they reflect popular will."
Second	*United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010).	A district court may vary on the basis of disagreement with the child pornography guidelines. "Sentencing Guidelines are typically developed by the Sentencing Commission using an empirical approach based on data about past sentencing practices. However, the Commission did not use this empirical approach in formulating the Guidelines for child pornography. Instead, at the direction of Congress, the Sentencing Commission has amended the Guidelines under §2G2.2 several times since their introduction in 1987, each time recommending harsher penalties." (Internal citations omitted).
Third	*United States v. Grober*, 624 F.3d 592 (3d Cir. 2010).	A district court may vary on the basis of disagreement with the child pornography guidelines. "Notably, the *Kimbrough* Court concluded that 'closer review' there was unnecessary because the crack cocaine Guidelines at issue 'do not exemplify the Commission's exercise of its characteristic institutional role.' Similarly here, [] the Commission did not do what 'an exercise of its characteristic institutional role' required — develop §2G2.2 based on research and study rather than reacting to changes adopted or directed by Congress." (Internal citations omitted).
Sixth	*United States v. Bistline*, 665 F.3d 758 (6th Cir. 2012)	Although a district court may disagree with the child pornography guidelines on policy grounds, "the fact of Congress' role in amending a guideline is not itself a valid reason to disagree with the guideline."
Seventh	*United States v. Huffstatler*, 571 F.3d 620 (7th Cir. 2009).	A district court "perhaps" has the freedom to sentence below the child pornography guidelines, but it is "certainly not required to do so." "[P]erhaps for good reason, the government did not take issue with Huffstatler's premise that the child-exploitation guidelines lack an empirical basis. As the Sentencing Commission itself stated, '[m]uch like policymaking in the area of drug trafficking, Congress has used a mix of mandatory minimum penalty increases and directives to the Commission to change sentencing policy for sex offenses.'"

FAST-TRACK

Circuit	Leading Case	Determination
First	*United States v. Rodriguez*, 527 F.3d 221 (1st Cir. 2008)	A district court may vary on the basis of fast track disparity. "Like the crack/powder ratio, fast-track departure authority has been both blessed by Congress and openly criticized by the Sentencing Commission. Like the crack/powder ratio, the fast-track departure scheme does not 'exemplify the [Sentencing] Commission's exercise of its characteristic institutional role.' In other words, the Commission has 'not take[n] account of empirical data and national experience' in formulating them. Thus, guidelines and policy statements embodying these judgments deserve less deference than the sentencing guidelines normally attract. . . . While the *Kimbrough* Court acknowledged that a sentencing court can be constrained by express congressional directives, such as statutory mandatory maximum and minimum prison terms, the PROTECT Act . . . contains no such express imperative. The Act, by its terms, neither forbids nor discourages the use of a particular sentencing rationale, and it says nothing about a district court's discretion to deviate from the guidelines based on fast-track disparity." (Internal citations omitted).
Third	*United States v. Arrelucea-Zamudio*, 581 F.3d 142 (3d Cir. 2009).	A district court is not barred from considering fast-track disparity when evaluating the applicable 18 U.S.C. § 3553(a) factors. "In *Kimbrough*, the Supreme Court rejected the Government's argument that the 100-to-1 crack/powder cocaine ratio represented a 'specific policy determinatio[n] that Congress has directed sentencing courts to observe,' thus making it 'an exception to the general freedom that sentencing courts have to apply the [§ 3553(a)] factors.' . . . We think the Supreme Court's rejection of the Government's argument in *Kimbrough* crosses over to apply to the implicit congressional directive argument made to support fast-track sentencing disparities."
Fifth	*United States v. Gomez-Herrera*, 523 F.3d 554 (5th Cir. 2008).	A district court may not vary on the basis of fast-track disparity. "[] *Kimbrough*, which concerned a district court's ability to sentence in disagreement with Guideline policy, does not control this case, which concerns a district court's ability to sentence in disagreement with Congressional policy. . . . [B]ecause any disparity that results from fast-track programs is intended by Congress, it is not 'unwarranted' within the meaning of § 3553(a)(6)."
Sixth	*United States v. Camacho-Arellano*, 614 F.3d 244 (6th Cir. 2010).	A district court may vary on the basis of fast-track disparity: "[W]hile Congress intended to create room for courts in fast-track jurisdictions to treat defendants in a certain manner, it did nothing to prohibit judges in non-fast-track districts from treating defendants the same way. . . . [T]o the extent that Congress impliedly communicated that the disparity was warranted [], that fact does not distinguish this case from *Kimbrough*."
Seventh	*United States v. Reyes-Hernandez*, 624 F.3d 405 (7th Cir. 2010).	A district court may vary on the basis of fast-track disparity. "If Congress wanted to prohibit judges from disagreeing with §5K3.1 based on policy, Congress could have issued such a directive in unequivocal terminology."

Eighth	*United States v. Jimenez-Perez*, 659 F.3d 704 (8th Cir. 2011).	A district court may vary on the basis of fast track disparity: "The focus [] should not be whether Congress, through the PROTECT Act, blessed a sentencing disparity, making it warranted and thereby consistent with 18 U.S.C. § 3553(a)(6). Rather, the question is whether Congress, through the PROTECT Act, expressly curtailed a district court's sentencing discretion under the *entire array* of the § 3553(a) factors. . . . [N]owhere in the PROTECT Act does Congress purport to limit a district court's sentencing discretion under all § 3553(a) factors."
Ninth	*United States v. Gonzalez-Zotelo*, 556 F.3d 736 (9th Cir. 2009).	A district court may not vary on the basis of fast-track disparity. "The district court's failure to [follow precedent disallowing a departure on the basis of fast-track disparity] was [] error even after *Kimbrough* because the judge's downward departure reflected not a disagreement with the Guidelines, but with congressional policy authorizing downward departures for fast-track defendants. While *Kimbrough* permits a district court to consider its policy disagreements with the Guidelines, it does not authorize a district judge to take into account his disagreements with congressional policy."
Eleventh	*United States v. Vega-Castillo*, 540 F.3d 1235 (11th Cir. 2008).	District courts are prohibited from considering fast-track disparity in imposing sentence. "[W]e note that *Kimbrough* addressed only a district court's discretion to vary from the Guidelines based on a disagreement with Guideline, not Congressional, policy. Moreover, *Kimbrough* dealt only with certain Guidelines -- those that, like the crack cocaine Guidelines, do not exemplify the Commission's exercise of its characteristic institutional role." (Internal quotations and citations omitted).

CAREER OFFENDER

Circuit	Leading Case	Determination
D.C.	*United States v. Bailey*, 622 F.3d 1 (D.C. Cir. 2010).	The district court erred in failing to address the defendant's policy objection to the career offender guideline. Because it was "unclear whether the district court exercised the option afforded by *Kimbrough* and either rejected appellant's policy objection to §4B1.1 on the merits or regarded the objection as inappropriate in view of appellant's criminal record[,]" the circuit court remanded for the district court "to address appellant's policy objections to §4B1.1 of the Guidelines and to determine whether it would have imposed a different sentence materially more favorable to the defendant had it been fully aware of its authority[.]" (Internal quotations omitted).
First	*United States v. Boardman*, 528 F.3d 86 (1st Cir. 2008)	A district court may vary on the basis of the career offender guideline. "[W]e do not see why disagreement the Commission's policy judgment . . . would be any less permissible a reason to deviate than disagreement with the guideline policy judgment at issue in *Kimbrough*."
Second	*United States v. Sanchez*, 517 F.3d 651 (2d Cir. 2008)	A district court may vary on the basis of the career offender guideline. "Section 994(h), [] by its terms, is a direction to the Sentencing Commission, not to the courts, and it finds no express analog in Title 18 or Title 21. While 21 U.S.C. § 841(b) expressly establishes the minimum and maximum prison terms that the court is allowed to impose for violations of § 841(a), there is no statutory provision instructing the court to sentence a career offender at or near the statutory maximum."
Third	*United States v. Merced*, 603 F.3d 203 (3d Cir. 2010).	After the government conceded that "a sentencing court may vary downward from the Guidelines range generated by the career offender provision based solely on a policy disagreement with the scope of that provision," the Third Circuit "proceed[ed] on the assumption that the government's concession is well-grounded," but held that "[t]he freedom to vary from the career offender Guidelines, assuming it exists, is not free. Its price is a reasoned, coherent, and sufficiently compelling explanation of the basis for the court's disagreement," an explanation that the district court had failed to give in this case. (Internal citations omitted).
Sixth	*United States v. Michael*, 576 F.3d 323 (6th Cir. 2009).	A district court may vary on the basis of the career offender guideline because it "may lawfully conclude[] that the policies underlying the career-offender provisions -- including their implicit incorporation of the 100:1 ratio -- yield a sentence greater than necessary to serve the objectives of sentencing." (Internal quotations omitted).
Seventh	*United States v. Corner*, 598 F.3d 411 (7th Cir. 2010).	A district court may vary based on disagreement with the career offender guidelines. "Because §4B1.1 is just a Guideline, judges are as free to disagree with it as they are with §2D1.1(c) (which sets the crack/powder ratio). No judge is *required* to sentence at variance with a Guideline, but every judge is at liberty to do so."

Eleventh	*United States v. Vazquez*, 558 F.3d 1224 (11th Cir. 2009), *cert. granted, judgment vacated*, 130 S. Ct. 1135 (Jan. 19, 2010)	A district court may not vary on the basis of a disagreement with the career offender guideline. "[] *Kimbrough* does not gut our analysis in *Williams* [that variances based on a disagreement with the career offender guideline are improper]. To the contrary, the Supreme Court expressly made a distinction between the Guidelines' disparate treatment of crack and powder cocaine offenses -- where Congress did not direct the Sentencing Commission to create this disparity -- and the Guideline's punishment of career offenders -- which was explicitly directed by Congress." *Note:* The Supreme Court vacated the judgment and remanded for rehearing on the basis of the Solicitor General's position that "*Kimbrough*'s reference to Section 994(h) as an example of Congress directing 'the Sentencing Commission' to adopt a Guideline reflecting a particular policy, 552 U.S. at 103, did not suggest that Congress had bound sentencing courts through Section 994. The court of appeals' reliance on Kimbrough's reference to Section 994(h) therefore depends on the additional, unstated, premise that congressional directives to the Sentencing Commission are equally binding on sentencing courts. That premise is incorrect."

Leading Appellate Case in Each Circuit Discussing Presumption of Reasonableness

Circuit	Leading Case	Determination
D.C.	*United States v. Dorcely*, 454 F.3d 366 (D.C. Cir. 2006).	"We agree with our sister circuits that a sentence within a properly calculated Guidelines range is entitled to a rebuttable presumption of reasonableness."
First	*United States v. Jimenez-Beltre*, 440 F.3d 514 (1st Cir. 2006).	"Although making the guidelines 'presumptive' or 'per se reasonable' does not make them mandatory, it tends in that direction; and anyway terms like 'presumptive' and 'per se' are more ambiguous labels than they at first appear."
Second	*United States v. Fernandez*, 443 F.3d 19 (2d Cir. 2006).	Although "[w]e recognize that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances . . . [w]e [] decline to establish any presumption, rebuttable or otherwise, that a Guidelines sentence is reasonable."
Third	*United States v. Cooper*, 437 F.3d 324 (3d Cir. 2006), *abrogated on other grounds as recognized in United States v. Wells*, 279 F. App'x 100 (3d Cir. 2008).	"Although a within-guidelines range sentence is more likely to be reasonable than one that lies outside the advisory guidelines range," it is not *per se* or presumed reasonable.
Fourth	*United States v. Green*, 436 F.3d 449 (4th Cir. 2006).	"We agree with the Seventh Circuit, which has concluded that a sentence imposed 'within the properly calculated Guidelines range . . . is presumptively reasonable.'"
Fifth	*United States v. Alonzo*, 435 F.3d 551 (5th Cir. 2006).	"We agree with our sister circuits that have held that a sentence within a properly calculated Guideline range is presumptively reasonable."
Sixth	*United States v. Williams*, 436 F.3d 706 (6th Cir. 2006).	"We now join several sister circuits in crediting sentences properly calculated under the Guidelines with a rebuttable presumption of reasonableness. Such a presumption comports with the Supreme Court's remedial decision in *Booker*."

Seventh	*United States v. Mykytiuk*, 415 F.3d 606 (7th Cir. 2005).	"[A]ny sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness. . . . While we fully expect that it will be a rare Guidelines sentence that is unreasonable, the Court's charge that we measure each defendant's sentence against the factors set forth in § 3553(a) requires the door to be left open for this possibility." *Note:* In *United States v. Mantanes,* 632 F.3d 372 (7th Cir. 2011), the Seventh Circuit explicitly cited the presumption of reasonableness as a factor in distinguishing an out-of-circuit case cited by a defendant on appeal. The defendant, in support of his argument that his bottom of the range sentence for receiving child pornography was substantively unreasonable, cited to *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010), in which the Second Circuit found a within-range child pornography sentence substantively unreasonable. The Seventh Circuit rejected the defendant's arguments, noting several factual differences between the cases and explaining, as "[o]ne last point," that "[u]nlike the Second Circuit, we apply a presumption of reasonableness to a within-guideline sentence, and it is up to the defendant to overcome this presumption."
Eighth	*United States v. Lincoln*, 413 F.3d 716 (8th Cir. 2005).	The defendant's sentence was within a properly calculated guidelines range, "and as a result, we think that it is presumptively reasonable."
Ninth	*United States v. Carty*, 520 F.3d 984 (9th Cir. 2008).	"[W]e decline to embrace a presumption. . . . A 'presumption' carries baggage as an evidentiary concept that we prefer not to import. An appellate presumption, in any event, does little work; even in jurisdictions where reasonableness is presumed, the presumption is not binding, it does not shift the burden of persuasion or proof, and it lacks independent legal effect." *See also United States v. Treadwell*, 593 F.3d 990 (9th Cir. 2010) (discussing presumption).
Tenth	*United States v. Kristl*, 437 F.3d 1050 (10th Cir. 2006).	"[I]n light of [the guidelines' purpose to promote uniformity in sentencing], as well as the Supreme Court's instruction that district courts continue to consider the Guidelines after *Booker*, we join our sister circuits and hold that a sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness."
Eleventh	*United States v. Hunt*, 459 F.3d 1180 (11th Cir. 2006)	"Nor do we find a presumption to be useful in this context. Presumptions are burden-shifting tools, and operate effectively where the party against whom the presumption operates is better situated to come forward with evidence. To say that the Guidelines are 'presumptively' reasonable is to charge the defendant with the responsibility of establishing that the Guidelines range does not fulfill the remaining section 3553(a) factors in a particular case." (Internal citations omitted).

Selected Appellate Cases Discussing Reasonableness Review

Circuit	Case Name	Discussion
D.C.	*United States v. Gardellini*, 545 F.3d 1089 (D.C. Cir. 2008).	"[D]ifferent district courts can and will sentence differently—differently from the Sentencing Guidelines range, differently from the sentence an appellate court might have imposed, and differently from how other district courts might have sentenced that defendant."
First	*United States v. Morales-Machuca*, 546 F.3d 13 (1st Cir. 2008).	"[T]here is not a single reasonable sentence but, rather, a range of reasonable sentences."
Third	*United States v. Tomko*, 562 F.3d 558 (3d Cir. 2009) (en banc).	"[I]f the district court's sentence is procedurally sound, we will affirm it unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided."
Fourth	*United States v. Green*, 436 F.3d 449 (4th Cir. 2006).	"[T]he overarching standard of review for unreasonableness will not depend on whether we agree with the particular sentence selected, but whether the sentence was selected pursuant to a reasoned process in accordance with law, in which the court did not give excessive weight to any relevant factor, and which effected a fair and just result in light of the relevant facts and law."
Fifth	*United States v. Williams*, 517 F.3d 801 (5th Cir. 2008).	"[T]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court."
Eighth	*United States v. Garate*, 543 F.3d 1026 (8th Cir. 2008).	"[T]he fact that [the appeals court] may have weighed some facts differently . . . is insufficient to justify reversal of the district court."
Ninth	*United States v. Carty*, 520 F.3d 984 (2008).	"All sentencing proceedings are to begin by determining the applicable Guidelines range. The range must be calculated correctly. In this sense, the Guidelines are the starting point and the initial benchmark, and are to be kept in mind throughout the process[.] . . . The district court should then consider the § 3553(a) factors to decide if they support the sentence suggested by the parties[.] . . . If a district judge decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." [Internal quotations and citations omitted].

Tenth	*United States v. Yanez-Rodriguez*, 555 F.3d 931 (10th Cir. 2009).	Where “the district court decides to vary from the Guideline sentence range after a careful, reasoned, and reasonable consideration of the § 3553(a) factors, we cannot say the district court abused its discretion” even where the appellate court “could conclude a different sentence was reasonable.”
Eleventh	*United States v. McBride*, 511 F.3d 1293 (11th Cir. 2007).	“Although we accept that a sentence may be unreasonable even where the district court followed the proper sentencing procedure, an appellate court should not simply substitute its judgment for that of the sentencing court.”

Representative Appellate Cases Illustrating Procedural Reasonableness Issues

ISSUE	REPRESENTATIVE CASE RULING IN THE AFFIRMATIVE	REPRESENTATIVE CASE RULING IN THE NEGATIVE
SUA SPONTE **DUTY TO REVIEW** for procedural reasonableness absent argument by parties?	*United States v. Evans-Martinez*, 611 F.3d 635 (9th Cir. 2010). The Ninth Circuit held that "appellate courts have a *sua sponte* duty to undertake a review for procedural error even where . . . no such error is expressly asserted by the [parties]." (Internal quotations omitted).	*United States v. Friedman*, 554 F.3d 1301 (10th Cir. 2009). The Tenth Circuit examined only the substantive reasonableness of the sentence where the appellant did not challenge the procedural reasonableness of the sentence.
REVIEW FOR SUBSTANTIAL REASONABLENESS if procedural errors are found?	*United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010). The Second Circuit indicated that "nothing in our existing sentencing law prevents us from reaching both the procedural and substantive reasonableness of the sentence in the course of an appeal where we find both types of error. It is especially appropriate to reach the matter of substantive unreasonableness now because we have found and identify here certain serious flaws . . . which are squarely presented on *this* appeal and which must be dealt with by the district court at resentencing." (Internal citations omitted).	*United States v. Cantrell*, 433 F.3d 1269 (9th Cir. 2006). The Ninth Circuit explained that "the new reasonableness standard of review established in *Booker* comes into play only if there was no material error in the district court's calculation of the appropriate Guidelines range." *See also United States v. Vickers*, 528 F.3d 1116 (8th Cir. 2008) ("Absent reversible procedural error, we then review the reasonableness of the court's sentence for abuse of discretion.").
ARE ERRONEOUS GUIDELINES CALCULATIONS HARMLESS ERROR where district court recognized potential error and would have imposed sentence anyway?	*United States v. O'Georgia*, 569 F.3d 281 (6th Cir. 2009). The Sixth Circuit explained that "[w]here a Guidelines departure provision has been erroneously applied, the resulting sentence may still be procedurally reasonable if the district court has adequately explained it by reference to the 18 U.S.C. § 3553(a) factors. In such a case, the sentence would be unreasonable as a departure but reasonable as a variance from the advisory Guidelines range." *See also United States v. Barner*, 572 F. 3d 1239 (11th Cir. 2009); *United States v. Abbas*, 560 F.3d 660 (7th Cir. 2009); *United States v. Henson*, 550 F.3d 739 (8th Cir. 2008).	*United States v. Ibarra-Luna*, 628 F.3d 712 (5th Cir. 2010). The Fifth Circuit indicated that "an incorrect Guidelines calculation will usually invalidate the sentence, even when the district court chose to impose a sentence outside the Guidelines range." *See also United States v. Fumo*, 655 F.3d 288 (3d Cir. 2011); *United States v. Bah*, 439 F.3d 423 (8th Cir. 2006); *United States v. Pham*, 545 F.3d 712 (9th Cir. 2008).

Selected Appellate Cases Discussing the Specificity Required in the Sentencing Decision

CIRCUIT	CASE NAME	DETERMINATION
D.C.	*United States v. Akhigbe*, 642 F.3d 1078 (D.C. Cir. 2011).	"Given the broad substantive discretion afforded to district courts in sentencing, there are concomitant procedural requirements they must follow[,]" including the requirement that once the district court determines the sentence, it must "state in open court the reasons for its imposition of the particular sentence," and if the sentence falls outside the advisory Guidelines range, "provide the 'specific reason' for the departure or variance." (Internal quotations omitted). "[U]nder the circumstances of this case, where the district court imposed a sentence that varied significantly from both the advisory Guidelines range and from the sentences the parties sought, the brief and generalized explanation the court provided is plainly inadequate to satisfy section 3553(c)'s requirements." *But see United States v. Bras*, 483 F.3d 103 (D.C. Cir. 2007) (in imposing sentence, "[t]he district court is not required to refer specifically 'to *each* factor listed in § 3553(a),' nor is it required to 'explain sua sponte why it did not find [a particular] factor relevant to its discretionary decision' if 'a defendant has not asserted the import of [that] factor.'")
First	*United States v. Vargas*, 560 F.3d 45 (1st Cir. 2009).	"There is no doubt but that, in sentencing, the district court should treat the [guidelines range] merely as a starting point," after which it should "hear[] argument from the parties as to the proper sentence in the particular case, weigh[] the applicability of the sundry factors delineated in 18 U.S.C. § 3553(a), reach[] an ultimate sentencing determination, and explicat[e] that decision on the record. . . . None of this means, however, that a sentencing court is required to provide a lengthy and detailed statement of its reasons for refusing to deviate from the [guidelines range]. The opposite is true. There is no need for the sentencing court to engage in some sort of rote incantation when explicating its sentencing decision." (Internal quotations and citations omitted).
Sixth	*United States v. Wallace*, 597 F.3d 794 (6th Cir. 2010).	"When a defendant raises a particular, nonfrivolous argument in seeking a lower sentence, the record must reflect both that the district judge considered the defendant's argument and that the judge explained the basis for rejecting it. On this record, the district judge's failure to properly address this issue is apparent because we are unable to answer the simple question of why the district judge decided to impose a sentence more than twice as long as [her co-defendant's]. The disparity in the proposed sentences was the central point of [the defendant's] argument for a lower sentence, but we have no way of knowing how or to what extent the disparity argument influenced the district judge's eventual sentence." (Internal quotations and citations omitted). *See also United States v. Gale*, 468 F.3d 929 (6th Cir. 2006) ("when a district court adequately explains why it imposed a particular sentence . . . we do not further require that it exhaustively explain the obverse—why an alternative sentence was not selected—in every instance"); *but see United States v. Lapsins*, 570 F.3d 758 (6th Cir. 2009) ("Although the district judge did not articulate his reasons for rejecting [the defendant's] arguments, his reasoning was sufficiently detailed to reflect the considerations listed in § 3553(a) and to

		allow for meaningful appellate review. The district court is not required to give the reasons for rejecting any and all arguments [made] by the parties for alternative sentences.") (Internal citations and quotations omitted).
Seventh	*United States v. Marion*, 590 F.3d 475 (7th Cir. 2010).	"Our opinion in this case should not be read to expand what is required of a district court when sentencing a defendant or considering a motion to reduce a sentence under § 3582(c)(2). We have no intention of counting words or applying some rigid formulation to statements of reasons, particularly on a motion to reduce a sentence. The problem with the order here is not that the district court used a form order, or even that the order contained only a one-sentence explanation. The problem arises from the fact that it is impossible for us to ensure that the district court did not abuse its discretion if the order shows only that the district court exercised its discretion rather than showing how it exercised that discretion. Some minimal explanation is required."
Ninth	*United States v. Carty*, 520 F.3d 984 (9th Cir. 2008).	"The district court need not tick off each of the § 3553(a) factors to show that it has considered them. We assume that district judges know the law and understand their obligation to consider all of the § 3553(a) factors, not just the Guidelines. Nor need the district court articulate in a vacuum how each § 3553(a) factor influences its determination of an appropriate sentence. However, when a party raises a specific, nonfrivolous argument tethered to a relevant § 3553(a) factor in support of a requested sentence, then the judge should normally explain why he accepts or rejects the party's position."

Examples of Cases in Which Procedural Errors Render Sentence Substantively Unreasonable

CIRCUIT	CASE NAME	DETERMINATION
Second	*United States v. Cutler*, 520 F.3d 136 (2d Cir. 2008).	The Second Circuit vacated below range sentences for two bank fraud defendants in which one defendant was sentenced to a year and a day imprisonment after a guidelines calculation of 78-97 months and the other was sentenced to probation after a guidelines calculation of 108-135 months, concluding that "[g]iven the procedural errors, the clear factual errors, and the misinterpretations of the §3553(a) factors – in particular the need to provide just punishment, to afford adequate deterrence of crimes by others, to avoid unwarranted disparities among similarly situated defendants, and to promote respect for the law," the sentences were substantively unreasonable. *But see*, *United States v. Carera*, 550 F.3d (2d Cir. 2008) (describing standard of review for substantive reasonableness and stating, citing *Cutler*, "[t]o the extent that our prior cases may be read to imply a more searching form of substantive review, we today depart from that understanding."
Third	*United States v. Lychock*, 578 F.3d 214 (3d Cir. 2009).	The Third Circuit found below range sentence of five years' probation for possession of child pornography substantive unreasonable because, while "[t]he District Court correctly calculated Lychock's advisory Guidelines range and considered several of the § 3553 factors[,] . . . the court's analysis was procedurally flawed and resulted in a substantively unreasonable sentence."
Third	*United States v. Goff,* 501 F.3d 250 (3d Cir. 2007).	The Third Circuit vacated a sentence of four months of imprisonment and three years' supervised release for possession of child pornography as procedurally and substantively unreasonable, explaining that "[a]ll of these [errors identified by the circuit court] are substantive problems, . . . but they are a product of the District Court's procedurally flawed approach."
Tenth	*United States v. Friedman*, 554 F.3d 1301 (10th Cir. 2009).	The Tenth Circuit vacated below range sentence of 57 months' imprisonment for defendant convicted of bank robbery and facing a guidelines range of 151-188 months based on the career offender provisions, explaining that, "although the government did not lodge a challenge to the procedural reasonableness of the district court's sentence, the very limited nature of the record and the paucity of reasoning on the part of the district court most certainly bear on our review of the substantive reasonableness of Friedman's sentence."

Substantive Reasonableness Review of Child Pornography Non-Production Cases

Affirmances

United States v. Autery, 555 F.3d 864 (9th Cir. 2009). The Ninth Circuit affirmed as substantively reasonable a below range sentence of five years' probation for possession of child pornography, where the guidelines range was 41-51 months of imprisonment, concluding, *inter alia*, that the district court's assessment that the defendant was not a pedophile and had "redeeming personal characteristics" was sufficient to support the conclusion that the defendant's case was not a mine-run child pornography possession case and rejecting the government's position that the sentence failed to provide just punishment or adequate deterrence.

United States v. Aumais, 656 F.3d 147 (2d Cir. 2011). The Second Circuit held that a 121-month within range sentence under §2G2.2 for child pornography was substantively reasonable because, unlike in *Dorvee* where the various child pornography enhancements resulted in a sentence well in excess of the statutory maximum, the guidelines range in this case was well short of the statutory maximum and the court found that a sentence at the bottom of the range was sufficient but not greater than necessary given the violent nature of the images, the number of them, and other considerations.

United States v. Mantanes, 632 F.3d 372 (7th Cir. 2011). The Seventh Circuit affirmed as substantively reasonable a within range sentence of 210 months of imprisonment, distinguishing the case from *Dorvee* on several factual and legal grounds, explaining that "[w]hether one agrees or disagrees with the concerns expressed by the Second Circuit, it is ultimately for Congress and the Commission to consider these concerns," and noting that, unlike the Second Circuit, the Seventh Circuit applies a presumption of reasonableness to within-guideline sentences, and the defendant had not overcome this presumption.

Reversals

United States v. Pugh, 515 F.3d 1179 (11th Cir. 2008). The Eleventh Circuit reversed as substantively unreasonable a below range sentence of five years' probation for possession of child pornography, where the guidelines range was 97-120 months of imprisonment, concluding, *inter alia*, that the mitigating factors of the defendant's characteristics and motive were insufficient to justify a variance of this magnitude and finding that the sentence failed to accord any weight to the need to provide general deterrence and did not adequately protect the public.

United States v. Dorvee, 616 F.3d 174 (2d Cir. 2010). The Second Circuit vacated the within range sentence of 20 years, finding it procedurally and substantively unreasonable and explaining that §2G2.2 is "fundamentally different" from most other guidelines and that "unless applied with great care, can lead to unreasonable sentences that are inconsistent with what § 3553 requires"; that the Commission did not use an empirical approach when it amended the guideline at the direction of Congress; and that, in keeping with *Kimbrough*, "a district court may vary from the Guidelines range based solely on a policy disagreement with the Guidelines, even where that disagreement applies to a wide class of offenders or offenses."

United States v. Bistline, 665 F.3d 758 (6th Cir. 2012). The Sixth Circuit reversed a sentence of one night's confinement in a courthouse lockup and ten years of supervised release for possession of child pornography as substantively unreasonable, holding that a district court cannot reasonably reject §2G2.2 or any guideline based merely on the ground that Congress exercised its power to set the policies reflected therein and stating that although the Commission did not act in its usual institutional role with respect to the guideline, Congress was the relevant actor, therefore putting §2G2.2 on stronger ground than the crack cocaine guideline at issue in *Kimbrough*.

United States v. Regan, 627 F.3d 1348 (10th Cir. 2010). The Tenth Circuit affirmed a 97-month within range sentence for receipt of child pornography as substantively reasonable, noting that the circuit applies a presumption of reasonableness to within range sentences but declining to reach whether the presumption was rebutted by the defendant's policy arguments based on *Dorvee* and holding instead that the district court did not abuse its discretion whether or not the presumption applied.

United States v. Robinson, 669 F.3d 767 (6th Cir. 2012). The Sixth Circuit vacated as substantively unreasonable a sentence of one day in custody for possession of child pornography, finding that the district court failed to afford the proper weight to those § 3553(a) factors other than the defendant's history and characteristics and had improperly based the sentence on a prediction of the defendant's future dangerousness to children, which was a crime that was not at issue in the case.

Substantive Reasonableness Review of Sentences for White Collar Fraud

AFFIRMANCES

CIRCUIT	CASE NAME	MAJORITY OPINION	DISSENT
D.C.	*United States v. Gardellini*, 545 F.3d 1089 (D.C. Cir. 2008).	The majority of a three-judge panel affirmed a below range sentence of probation for defendant's tax offense, where the guidelines range was 10−16 months of imprisonment. The majority explained that the government's "Guidelines-centric" challenge to the sentence of probation "overlooks the twin points that the Supreme Court has stressed in its recent sentencing decisions: The Guidelines now are advisory only and substantive appellate review in sentencing cases is narrow and deferential." "[I]t will be the unusual case when we reverse a district court sentence—whether within, above, or below the applicable Guidelines range—as substantively unreasonable."	Judge Williams dissented, explaining that he would have reversed and remanded for resentencing because of the district court's "disregard of the deterrence factor." "Although imprecise, the abuse-of-discretion standard is no mere rubberstamping. At a minimum, it includes making sure the district judge consider[ed] all of the § 3553(a) factors to determine whether they support the sentence requested by a party." Because the district court "appeared to deny any weight to the statutory goal of deterring others from the commission of similar crimes," the court abused its discretion.
Ninth	*United States v. Whitehead*, 532 F.3d 991 (9th Cir. 2008).	The majority of a three-judge panel affirmed a below range sentence of five years' supervised release for copyright violations, where the guidelines called for a range of 41-51 months of imprisonment, finding no abuse of discretion with the district court's conclusion that a non-imprisonment sentence was more appropriate than prison, given that "[t]he district court was intimately familiar with the nature of the crime and the defendant's role in it, as we are not."	Judge Bybee dissented, asserting that the district court's decision was "not an exercise of discretion so much as an abdication of responsibility," and stating that "Whitehead's non-sentence surely becomes an important starting point for defendants in this circuit willing to claim close family ties and post-conviction remorse to avoid prison. As a circuit, we have an obligation to ensure roughly equal sentences both among our judicial districts and within each judicial district. Deferring equally to district court sentences is not the same as securing equal sentences in district court."

Ninth	*United States v. Ruff*, 535 F.3d 999 (9th Cir. 2008).	The majority of a three-judge panel affirmed as both procedurally and substantively reasonable a below range sentence of one day in prison for health care fraud, where the guidelines range was 30-37 months, emphasizing *Gall*'s "clear message" that circuit courts must defer "to the District Court's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence" and underscoring the Supreme Court's description in *Gall* of probationary sentences as a "substantial restriction on freedom."	In dissent, Judge Gould argued that the defendant's sentence was not reasonable and the court "should say so in no uncertain terms." Judge Gould asserted that "[t]he abuse of discretion standard of review is not a rubber stamp of all sentencing decisions made by a district court," and asserted that "[t]o provide for a mere slap on the wrist of those convicted of serious economic crimes, with no or virtually no time imprisoned as punishment, strikes a blow to the integrity of our criminal justice system" and is "dangerous to respect for our legal system."
Ninth	*United States v. Edwards*, 595 F.3d 1004 (9th Cir. 2010).	The majority of a three-judge panel upheld as substantively reasonable a below range sentence of five years' probation, where the guidelines range was 27-33 months of imprisonment for the defendant's crimes of bankruptcy fraud and making a false statement to a bank. The majority held that the district court properly weighed the defendant's history and characteristics and the likelihood that the defendant would reoffend.	In dissent, Judge Bea asserted that the majority's opinion evidenced both "an ever-widening split" between the Ninth Circuit and other circuits analysis of below range white collar sentences, and within the Ninth Circuit itself, given that the circuit had ruled that a within guidelines sentence was unduly harsh, but that, with one exception, the circuit had "consistently refused to hold that sentences significantly below the advisory Guidelines range are unduly lenient, hence substantively unreasonable."
	Rehearing denied in *United States v. Edwards*, 622 F.3d 1215 (9th Cir. 2010).	A judge of the Ninth Circuit *sua sponte* called for the case to be reheard en banc, but a majority of the active judges on the Ninth Circuit denied rehearing.	In dissent, Judge Gould, joined by Judges Bybee, Callahan, and Bea, wrote "to emphasize a larger and recurrent problem," the Ninth Circuit's "practice of uncritically affirming unreasonably lenient sentences for white-collar criminals renders the Sentencing Guidelines a nullity, makes us an outlier among the circuit courts, and impairs our ability to effectively review sentences for substantive reasonableness."

Reversals

Circuit	Case Name	Determination
Second	*United States v. Cutler*, 520 F.3d 136 (2d Cir. 2008).	The Second Circuit vacated below range sentences for two bank fraud defendants in which one defendant was sentenced to a year and a day imprisonment after a guidelines calculation of 78-97 months and the other was sentenced to probation after a guidelines calculation of 108-135 months, concluding that "[g]iven the procedural errors, the clear factual errors, and the misinterpretations of the §3553(a) factors – in particular the need to provide just punishment, to afford adequate deterrence of crimes by others, to avoid unwarranted disparities among similarly situated defendants, and to promote respect for the law," the sentences were substantively unreasonable.
Fourth	*United States v. Engle*, 592 F.3d 495 (4th Cir. 2010).	The Fourth Circuit vacated a below range sentence of four years' probation for a defendant who pleaded guilty to tax evasion and had a guidelines range of 24–30 months, holding that the district court's near-total focus on the defendant's ability to repay his debt was substantively unreasonable. Noting that the district court made it clear that, but for the defendant's earning capacity, it would have imposed a within guidelines sentence of imprisonment, the Fourth Circuit found that, "[r]educed to its essence, the district court's approach means that rich tax-evaders will avoid prison, but poor tax-evaders will almost certainly go to jail." The circuit court explained that such an approach based on socioeconomic status was impermissible pre-*Booker* and it did not believe that *Booker* and *Gall* had wrought a change so great that they "permit[] district courts to rest a sentencing decision exclusively on such constitutional suspect grounds."
Sixth	*United States v. Davis*, 537 F.3d 611 (6th Cir. 2008).	The Sixth Circuit reversed a below range sentence of one day in prison for a bank fraud defendant whose guidelines range was 30-37 months' imprisonment, holding that the defendant's age and the gap in time between the crimes and his sentencing hearing did not justify such a substantial variance, and that the district court had failed to explain its findings that the defendant's sentence would promote respect for the law and serve the goals of societal deterrence or to address how a one-day sentence "meshed" with Congress's view of the seriousness of white collar crime.
Seventh	*United States v. Omole*, 523 F.3d 691 (7th Cir. 2008).	The Seventh Circuit vacated a below range sentence of 12 months of imprisonment for a wire fraud defendant facing a guidelines range of 63-78 months, stating that the sentence was 81 percent lower than the low end of the guidelines range, and "as such, the district judge had to enunciate persuasive reasons, based on the factors listed in § 3553(a), for the variance," which it failed to do.

Eighth	*United States v. Givens*, 443 F.3d 642 (8th Cir. 2006).	The Eighth Circuit reversed a below range sentence of supervised release including 12 months of house arrest for a bank fraud defendant facing 24-30 months of imprisonment, concluding that the district court had given "too much weight" to the defendant's history and characteristics and "not enough to the other portions of section 3553(a)," especially the need to avoid unwarranted sentencing disparities, reflect the seriousness of the offense, promote respect for the law, and provide just punishment.
Eleventh	*United States v. Crisp*, 454 F.3d 1285 (11th Cir. 2006).	The Eleventh Circuit vacated below range sentence of five hours in the custody of the United States Marshall for a bank fraud defendant facing 24-30 months of imprisonment under the guidelines, on the basis that the scheme that the defendant engaged in was a serious one and the loss was substantial and because "the district court focused single-mindedly on the goal of restitution to the detriment of all of the other sentencing factors." Acknowledging that its review was deferential, the circuit court remarked that "[t]here is, however, a difference between deference and abdication."
Eleventh	*United States v. Martin*, 455 F.3d 1227 (11th Cir. 2006).	The Eleventh Circuit vacated below range sentence of seven days' imprisonment for a securities and mail fraud defendant whose guidelines range was 9-11 years as "shockingly short and wholly fail[ing] to serve the purposes of sentencing as set forth by Congress in § 3553(a)."
Eleventh	*United States v. Livesay*, 587 F.3d 1274 (11th Cir. 2009)	The Eleventh Circuit vacated below range sentence of five years' probation for a securities and wire fraud defendant who faced a guidelines range of 78-97 months, finding that a sentence of probation for a high-ranking official of a corporation involved in such a massive fraud was "patently unreasonable" in light of the criteria found in § 3553(a).

VIEWPOINTS ON APPELLATE PROCEDURE

In the years following the *Booker* decision, some circuit judges expressed concern over the lack of clarity *Booker* and its progeny provided, particularly with respect to substantive reasonableness, with judges in two circuits with particularly robust criminal appellate dockets, the Fifth Circuit and the Ninth Circuit, questioning both the lack of clarity concerning substantive reasonableness and the resulting deference to the district court's sentencing determination.[1] Moreover, some judges in circuits with a high volume of sentencing appeals viewed the development of a reasonableness standard based on a review of past cases as "unrealistic."[2]

Some circuit judges have expressed support for the advisory guideline system.[3] However, some of those judges who describe the post-*Booker* advisory guideline system as "working" have sought additional guidance regarding the standard for substantive reasonableness.[4] Other circuit court judges suggest that the standards are adequate, but exhort circuit courts to more often use their power to review sentences for reasonableness to "deal[] with outlier sentences."[5]

In dissenting opinions, several circuit judges have voiced concerns regarding the courts' inability to apply a consistent standard of reasonableness review

[1] *See, e.g.*, *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Austin, TX (Nov. 19-20, 2009) (Testimony of the Honorable Edith Jones, Chief Circuit Judge, United States Court of Appeals for the Fifth Circuit, Austin transcript at 219, 249) [hereinafter *E. Jones 25th Anniversary Testimony*] (describing "the sense of futility" in remanding cases for procedural unreasonableness); *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984,* Stanford, CA (May 27, 2009) (Testimony of the Honorable Alex Kozinski, Chief Circuit Judge, United States Court of Appeals for the Ninth Circuit, Stanford transcript at 43-49) [hereinafter *Kozinski 25th Anniversary Testimony*] (stating "there's nothing that I have figured out on appeal that we can really do to constrain the outlier judges").

[2] *E. Jones 25th Anniversary Testimony*, Austin transcript at 219; *see also* *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Chicago, IL (Sept. 9-10, 2009) (Testimony of the Honorable Jeffrey S. Sutton, Circuit Judge, United States Court of Appeals for the Sixth Circuit, Chicago transcript at 209) [hereinafter *Sutton 25th Anniversary Testimony*] (describing reasoning on substantive reasonableness as "good for one train and one train only"). The individualized nature of the substantive reasonableness analysis has also been expressed in circuit opinions. *See, e.g.*, United States v. Dixon, 449 F.3d 194, 205 (1st Cir. 2006) ("sentencing determinations hinge primarily on case-specific and defendant-specific considerations").

[3] *U.S. Sent'g Comm'n Public Hearing on Federal Sentencing Options After* Booker, Washington, DC (Feb. 16, 2012) (Testimony of the Honorable Gerard Lynch, Circuit Judge, United States Court of Appeals for the Second Circuit, transcript at 99) [hereinafter *Lynch 2012 Public Hearing Testimony*] ("I'm much more optimistic about advisory guidelines than I think the tone of the Commission's testimony and questions have been."); *U.S. Sent'g Comm'n Public Hearing on Federal Sentencing Options After* Booker, Washington, DC (Feb. 16, 2012) (Testimony of the Honorable Theodore McKee, Chief Circuit Judge, United States Court of Appeals for the Third Circuit, on behalf of the Judicial Conference of the United States Committee on Criminal Law, written statement at 18) ("In sum, the available evidence seems to suggest that the advisory guideline system is working."); *U.S. Sent'g Comm'n Public Hearing on Federal Sentencing Options After* Booker, Washington, DC (Feb. 16, 2012) (Testimony of the Honorable Andre M. Davis, Circuit Judge, United States Court of Appeals for the Fourth Circuit, transcript at 113) ("[W]e've only really had about five years of post-Booker experience. . . . So let's not rush to fix what might not be broken. Let's see how judges do.")

[4] *See, e.g., E. Jones 25th Anniversary Testimony*, Austin transcript at 212, 219) (stating that "the guidelines, as a practical matter, after Booker, are working well" but that "it is very difficult to find a principle[d] basis . . . for saying that a sentence is unreasonable"); *Sutton 25th Anniversary Testimony*, Chicago transcript at 207; *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Denver, CO (Oct. 20-21, 2009) (Testimony of the Honorable James B. Loken, Chief Circuit Judge, United States Court of Appeals for the Eighth Circuit, Denver transcript at 57) [hereinafter *Loken 25th Anniversary Testimony*].

[5] *Lynch 2012 Public Hearing Testimony*, transcript at 147 ("Well I think the other way in which I would favor beefed up appellate review is, I'm not sure how to do this, is to encourage courts of appeals to be more aggressive in dealing with outlier sentences.").

that gives the proper deference to the district court without abdicating the appellate court's role. For example, in one case, a Ninth Circuit judge dissented from the denial of rehearing en banc, criticizing the panel opinion for "[e]mploying what amounts to a de novo standard of review" in reversing a within range sentence as unreasonable.[6] In another Ninth Circuit case, a dissent from the denial of a rehearing en banc noted that "the desirable principle of deference to the sentencing judge, if taken too far, is transformed into an undesirable principle of no review in effect for substantive reasonableness of a sentence."[7] Similarly, a judge in the Eighth Circuit described the affirmance of a sentence as "establish[ing], effectively, a standard of no appellate review of all."[8] The judge went on to state that his circuit "adopt[ed] a posture today that is so deferential that, so long as the district court gives lip service and a bit of discussion to the relevant 18 U.S.C. § 3553(a) factors, a sentence will almost never be reversed, procedurally or otherwise."[9]

Some judges caution that the exceedingly lenient standard of review applied by their courts will lead to increased disparities in sentencing. For example, in *United States v. Tomko*, a Third Circuit judge dissented from an en banc opinion affirming a sentence.[10] In the dissent, the judge stated,

> [W]hen we are faced with a substantively unreasonable sentence, our hands are not tied and we need not resign ourselves to a sentencing regime which tolerates unwarranted disparities. The Supreme Court in *Booker* did not sanction a return to the unfettered sentencing discretion districts courts enjoyed during the pre-Sentencing Reform Act era. Rather, in *Booker*, the Court recognized Congress's goal of achieving "greater uniformity in sentencing" and was confident that courts of appeals would be able to "iron out sentencing differences" through reasonableness review. Because neither Congress nor the Supreme Court has abandoned the goal of uniformity in sentencing, neither should we.[11]

Perhaps because some judges perceive a lack of clarity about the level of deference afforded to the district court in the standard for substantive reasonableness, the vast majority of sentencing appeals are decided not on substantive reasonableness, but on procedural issues such as guidelines application issues or the failure to provide an adequate explanation of the § 3553(a) factors.[12] As one judge described it, courts of appeals will usually look for any "procedural hook" to justify vacating a sentence that the court of appeals believes to be too high or too low rather than holding that the sentence is substantively unreasonable.[13] The same judge described this practice as "intellectually dishonest."[14]

At the same time, some circuit judges express frustration with remanding cases for resentencing based on procedural issues, because on remand the sentencing judge is likely to provide a more detailed explanation for the same sentence, which will satisfy procedural reasonableness.[15] This frustration has led

[6] United States v. Amezcua-Vasquez, 586 F.3d 1176, 1179-80 (9th Cir. 2009) (O'Scannlain, J., dissenting from denial of rehearing en banc).

[7] *See* United States v. Whitehead*,* 559 F.3d 918, 918 (9th Cir. 2009) (Gould, J., dissenting from denial of rehearing en banc).

[8] United States v. Feemster, 572 F.3d 455, 471 (8th Cir. 2009) (Beam, J., dissenting from denial of rehearing en banc).

[9] *Id.*

[10] United States v. Tomko, 562 F.3d 558 (3d Cir. 2009) (en banc) (Fisher, J., dissenting).

[11] *Id*., at 590-91 (internal citations omitted).

[12] U.S. SENT'G COMM'N, 2009 ANNUAL REPORT, at 44-46 [hereinafter 2009 ANNUAL REPORT].

[13] *U.S. Sent'g Comm'n National Training Seminar,* New Orleans, LA (June 17, 2010) (Remarks of the Honorable Gerald Lynch, Circuit Judge, United States Court of Appeals for the Second Circuit) [hereinafter *Lynch 2010 National Training Remarks*].

[14] *Lynch 2010 National Training Remarks.*

[15] *See, e.g.*, *E. Jones 25th Anniversary Testimony*, Austin transcript at 249 (describing reversal on procedural grounds

some appellate judges to describe the appellate role as "a waste of time"[16] or "make work."[17] Moreover, appellate judges have described a system in which procedural issues are fruitlessly over-litigated because those are the issues addressed by the appellate courts.[18]

Some appellate judges have already noted an increase in sentencing disparity based on the increased discretion at the district court level and the limited power of the appellate court to reverse sentences under the reasonableness standard.[19] Other judges express concern over growing disparities in the long term.[20] Some judges predict that as new sentencing judges with no experience under the mandatory guideline system come to the bench, more disparities will result.[21] Others worry that over time the lack of appellate control over sentences will lead judges who sentence at the upper and lower extremes to "become more frequent outliers."[22]

Prosecutors have expressed significant concern with increasing disparities in sentencing following *Booker*[23] and have questioned the efficacy of appellate reasonableness review for ensuring

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as futile); *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Chicago, IL (Sept. 9-10, 2009) (Testimony of the Honorable Frank Easterbrook, Chief Circuit Judge, United States Court of Appeals for the Seventh Circuit, Chicago transcript at 193) [hereinafter *Easterbrook 25th Anniversary Testimony*] (describing remand on procedural reasonableness as "an exercise that has a limited, if any, effect on the sentence" and "a make work prescription"); *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Denver, CO (Oct. 20-21, 2009) (Testimony of the Honorable Harris Hartz, Circuit Judge, United States Court of Appeals for the Tenth Circuit, Denver transcript at 45-46) [hereinafter *Hartz 25th Anniversary Testimony*].

[16] *U.S. Sent'g Comm'n National Training Seminar*, New Orleans, LA (June 17, 2010) (Remarks of the Honorable William Riley, Circuit Judge, United States Court of Appeals for the Eighth Circuit) (stating that the appellate role has been diminished to the point of being "a waste of time").

[17] *Easterbrook 25th Anniversary Testimony*, Chicago transcript at 193 (describing remand on procedural reasonableness as "a make-work prescription").

[18] *See, e.g.*, *Loken 25th Anniversary Testimony,* Denver transcript at 35; *Sutton 25th Anniversary Testimony,* Chicago transcript at 205; *but see Hartz 25th Anniversary Testimony*, Denver transcript at 46-47 (describing practice of "try[ing] not to write more than a paragraph" about substantive reasonableness as an attempt to "send a signal to counsel on both sides [not to] bring these appeals on substantive reasonableness").

[19] *See, e.g.*, *Kozinski 25th Anniversary Testimony*, Stanford transcript at 43; *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Stanford, CA (May 27-28, 2009) (Testimony of the Honorable Richard C. Tallman, Circuit Judge, United States Court of Appeals for the Ninth Circuit, Stanford transcript at 33); *see also* United States v. Gardellini, 545 F.3d 1089 (D.C. Cir. 2008) (noting that after *Gall*, "different district courts can and will sentence differently—differently from the Sentencing Guidelines range, differently from the sentence an appellate court might have imposed, and differently from how other district courts might have sentenced that defendant").

[20] *See, e.g.*, *Sutton 25th Anniversary Testimony*, Chicago transcript at 210.

[21] *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentence Reform Act of 1984,* New York, NY (July 9-10, 2009) (Testimony of the Honorable Brett M. Kavanaugh, Circuit Judge, United States Court of Appeals for the District of Columbia, New York transcript at 39).

[22] *Kozinski 25th Anniversary Testimony*, Stanford transcript at 43.

[23] *See, e.g.*, *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Chicago, IL (Sept. 9-10, 2009) (Statement of the Honorable Patrick J. Fitzgerald, United States Attorney, Northern District of Illinois, Chicago written statement at 3) [hereinafter *Fitzgerald 25th Anniversary Statement*] (noting that following *Gall*, "around 42% of contested sentencings [in the Northern District of Illinois] resulted in below range sentences" while "nationwide, only 19% of contested sentences were below range"); *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984,* Denver, CO (Oct. 20-21, 2009) (Statement of the Honorable David M. Gaouette, United States Attorney, District of Colorado, Denver written statement at 3) (predicting that the deferential standard of review will lead to inequalities that "will have the imprimatur of the courts").

uniformity.[24] Prosecutors have suggested that some appellate courts have taken a "hands-off approach" to the review of sentencing decisions, while others review sentences more closely.[25] Some prosecutors claim to have altered some of their charging, plea bargaining, and litigation practices in response to *Booker*.[26] These practices, which may lead to a prosecutor charging an offense carrying a mandatory minimum, are generally insulated from appellate review.

In contrast, the defense bar generally views the post-*Booker* review for reasonableness as "strik[ing] the appropriate balance between the district and appellate courts."[27] Some defense attorneys describe appellate review after *Booker* as a return of discretion to the district courts and a correction of the appellate courts' previous "overly strict enforcement of the guidelines [which] created unwarranted uniformity."[28] The Federal Public Defenders suggest that circuit courts have all the tools necessary to engage in robust appellate review,[29] and that much of the disparity in sentencing comes from prosecutorial decision-making in charging and plea bargains,[30]

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[24] *See Fitzgerald 25th Anniversary Statement*, Chicago written statement at 6; *see also U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984,* Chicago, IL (Sept. 9-10, 2009) (Statement of the Honorable Edward M. Yarbrough, United States Attorney, Middle District of Tennessee, Chicago written statement at 4).

[25] *U.S. Sent'g Comm'n Public Hearing on Federal Sentencing Options After* Booker*,* Washington, D.C. (Feb. 16, 2012) (Statement of Matthew Axelrod, Associate Deputy Attorney General, United States Department of Justice, written statement at 8) ("Many appellate courts have taken a 'hands-off' approach to their review of district court sentencing decisions and the guidelines; others are scrutinizing the guidelines more closely.").

[26] *See, e.g.*, *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984,* Stanford, CA (May 27-28, 2009) (Statement of the Honorable Karin J. Immergut, United States Attorney, District of Oregon, Stanford written statement at 13) (stating that "*Booker* has had a significant impact on how we negotiate pleas and litigate sentencing issues"); *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Denver, CO (Oct. 20-21, 2009) (Statement of the Honorable B. Todd Jones, United States Attorney, District of Minnesota, Denver written statement at 8) [hereinafter *B.T. Jones 25th Anniversary Statement*] (discussing "charging alternatives in cases where below range sentences are otherwise likely" and the practice of charging defendants "as armed career criminal[s] when possible because of the certainty of the sentence under that statute" and working to "establish grounds for a charge of 'receipt' [of child pornography] because that offense has a mandatory minimum").

[27] *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Austin, TX (Nov. 19-20, 2009) (Statement of Jason Hawkins, Federal Public Defender, Northern District of Texas, Austin written statement at 23).

[28] *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Chicago, IL (Sept. 9-10, 2009) (Statement of Jacqueline Johnson, First Assistant Federal Public Defender, Northern District of Ohio, Chicago written statement at 4).

[29] *Moore 2012 Public Hearing Statement*, written statement at 36 ("Some, including the Commission, have suggested that there is uncertainty and disagreement among the courts of appeals regarding the operation of the current standard of review, or that there is 'no appellate review at all.' This is simply not the case. . . . [T]he courts of appeals are in no way hamstrung from ensuring that district courts properly exercise their discretion under § 3553(a). They are in no way unable to exercise substantive review. They have all the tools necessary to facilitate judicial participation in the feedback loop envisioned by Congress in the SRA and the Supreme Court, and they use them. Their decisions lead to fairer sentences not just for the parties but for all those later sentenced, and help to promote respect for the law.").

[30] *See, e.g.*, *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, Denver, CO (Oct. 20-21, 2009) (Statement of Nick Drees, Federal Public Defender, Northern and Southern Districts of Iowa, Denver written statement at 6-12); *U.S. Sent'g Comm'n Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984*, New York, N.Y. (July 9-10, 2009) (Statement of Michael Nachmanoff, Federal Public Defender, Eastern District of Virginia, New York written statement at 20-21) ("The government insulates sentences from appellate review by extracting appeal waivers, often in return for dropping or foregoing mandatory minimum charges or enhancements."); *see also B.T. Jones 25th Anniversary Statement*, Denver written statement at 8 (discussing "charging alternatives in cases

decisions which generally are not subject to appellate review. Likewise, some district court judges view as proper the deferential standard of review afforded to them post-*Booker*.[31]

where below range sentences are otherwise likely" and the practice of charging defendants "as armed career criminal[s] when possible because of the certainty of the sentence under that statute" and working to "establish grounds for a charge of 'receipt' [of child pornography] because that offense has a mandatory minimum"); U.S. SENT'G COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES: JANUARY 2010 THROUGH MARCH 2010 (June 2010), at 21 (Question 16, Table 16) (32 percent of respondents chose charging decisions as the most significant contributor to sentencing disparities, with 25 percent choosing charging decisions as the second most significant contributor).

[31] *See, e.g.*, *USSC Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984,* Chicago, IL (Sept. 9-10, 2009) (Testimony of the Honorable Philip Simon, District Judge, Northern District of Indiana, Chicago transcript at 102-03); *USSC Public Regional Hearing on the Twenty-Fifth Anniversary of the Passage of the Sentencing Reform Act of 1984,* Austin, TX (Nov. 19-20, 2009) (Statement of the Honorable Robin J. Cauthron, District Judge, Western District of Oklahoma, Austin written statement at 3).

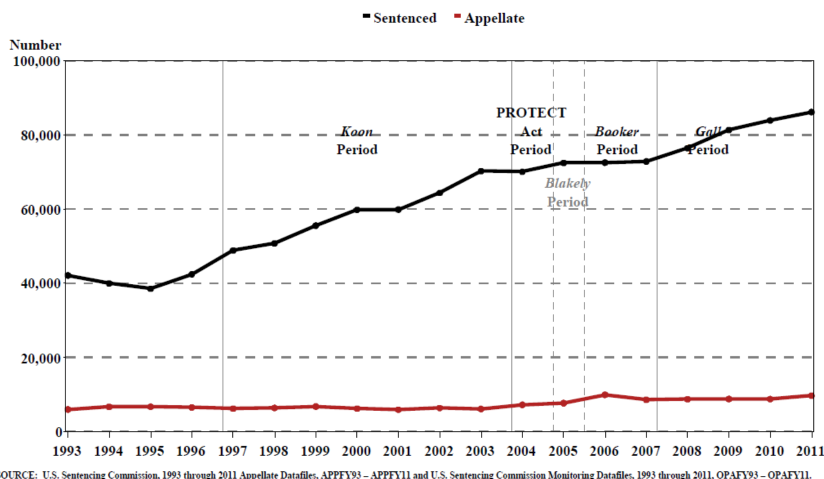
DATA ON SENTENCING APPEALS

In 1992, the Commission implemented a data collection system to track appellate review of sentencing decisions. The Commission uses the data collected to determine the nature, frequency and outcome of sentencing issues raised on appeal. Over the years, the appeals database has also assisted the Commission's efforts to resolve splits among the circuits on guideline interpretation issues.[32]

The Commission revises its data collection method annually in order to keep abreast of developing legal issues in the Supreme Court and in the circuit courts of appeals. Following the Supreme Court's decision in *Booker*, the Commission expanded its data collection efforts to capture additional information on non-guidelines issues in sentencing appeals, such as arguments about whether the court properly considered offender characteristics under 18 U.S.C. § 3553(a), or whether the sentence imposed was substantively and procedurally reasonable. A more detailed description of the methodology is in Part C of this report.

The data collected on appeals demonstrates that, generally speaking, only a small proportion of sentences imposed are appealed.[33] The vast majority of appeals raising sentencing issues are initiated by defendants rather than the government, and a significant proportion of the sentencing issues raised relate to reasonableness. Overall, most appeals raising sentencing issues are affirmed, although when the government does appeal a sentencing issue it often prevails. The longer a defendant's sentence, the more likely the defendant is to appeal raising a sentencing issue and a defendant whose sentence is within or above the guideline range is more likely to appeal raising a sentencing issue than a defendant whose sentence is below the guideline range.

Figure B-1
Number of Defendants Sentenced and Appeals Decided
Fiscal Years 1993 - 2011



Number of Appeals

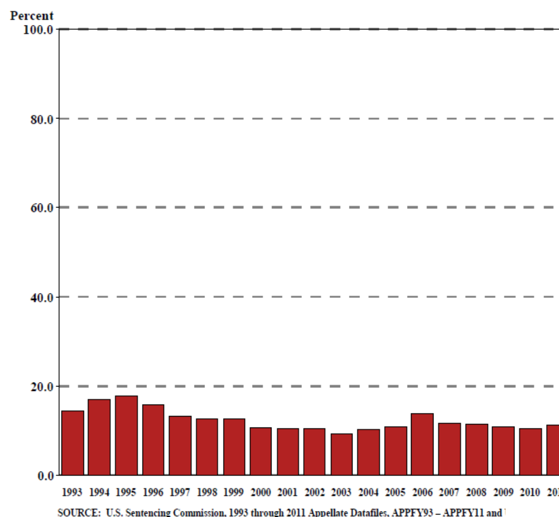
Figure B-1 compares the number of sentences imposed by district courts in each of the listed fiscal years to the number of criminal appeals of all of the four types discussed in the methodology section in Part C of this report online (conviction only, sentencing only, conviction and sentencing, and *Anders*) decided in those same periods. The black line represents the number of sentences imposed by district courts, and the red line represents the number of criminal appeals, with the exclusions discussed in the methodology section in Part C.

It should be noted that the appellate decision in any given case may not be issued during the same fiscal year in which the sentence was imposed, because the appellate process may not be completed that fiscal year. Therefore, these two lines cannot be compared directly to determine how many sentences imposed in any given fiscal year are appealed. The chart illustrates that the number of offenders sentenced began to increase steadily in 1996, but the number of criminal appeals did not increase correspondingly. The black line demonstrates that the federal criminal caseload at the district court level has nearly doubled over this time, whereas the number of direct criminal appeals has increased much more modestly.

[32] For more discussion of the Commission's authority to resolve circuit splits, *see* Braxton v. United States, 500 U.S. 344 (1991).

[33] Many factors likely contribute to the overall rate of appeal, including the prevalence of waivers of the right to appeal in plea agreements. *See* New York Times Editorial, "Trial Judge to Appeals Court: Review Me," June 16, 2012, http://www.nytimes.com/2012/07/17/opinion/trial-judge-to-appeals-court-review-me.html?_r=3& (noting that "[i]n a sample of almost 1,000 federal cases around the country, agreements included waivers about two-thirds of the time and more often in some places.").

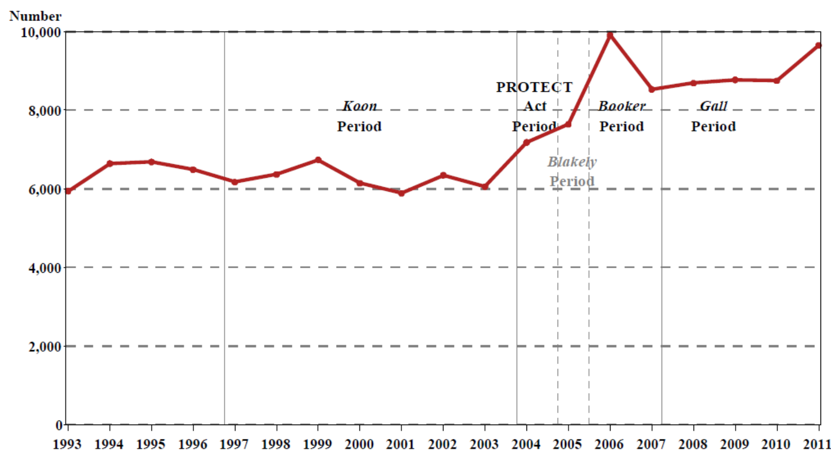
Figure B-2
Proportion of Appellate Defendants to Sentenced Defendants
Fiscal Years 1993 - 2011



SOURCE: U.S. Sentencing Commission, 1993 through 2011 Appellate Datafiles, APPFY93 – APPFY11 and

Figure B-2 depicts this same relationship — the proportion of direct criminal appeals to sentences imposed — in a different way. The percentage of direct criminal appeals has been consistently below 20 percent of all sentences imposed and has generally declined over time.

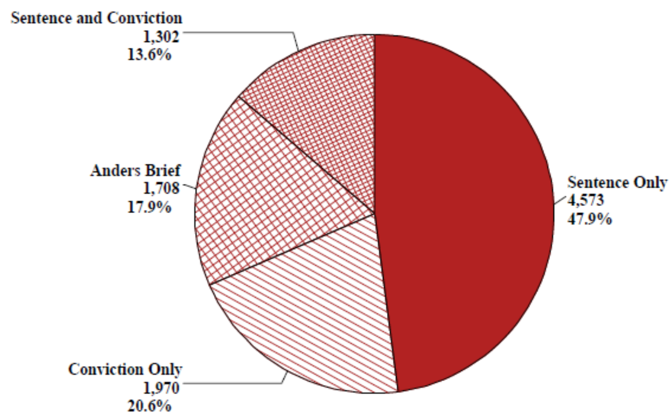
Figure B-3
Number of Appellate Defendants
Fiscal Years 1993 - 2011



SOURCE: U.S. Sentencing Commission, 1993 through 2011 Appellate Datafiles, APPFY93 – APPFY11.

Figure B-3 depicts the number of direct criminal appeals (the red line in the first chart) over time on a different scale. This chart reflects a notable increase in appeals at the end of the *Koon* period, and another notable spike in appeals during the *Blakely* period, when the constitutionality of the guidelines was in question.[34]

Figure B-4
Type of Appeal
Fiscal Year 2011

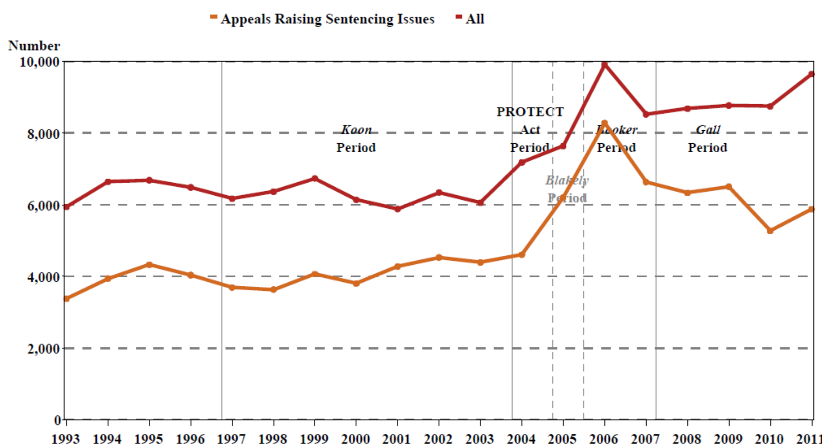


SOURCE: U.S. Sentencing Commission, 2011 Appellate Datafile, APPFY11.

Figure B-4 depicts the percentages of the four types of criminal appeals for fiscal year 2011. Nearly half (47.9%) of the appeals the Commission collected raised only sentencing issues. Slightly over 20 percent (20.6%) raised only conviction issues, and 13.6 percent raised both sentencing and conviction issues. Therefore, 61.5 percent of appeals in fiscal year 2011 raised sentencing issues. In 17.9 percent of cases, counsel for the appellant filed an *Anders* brief asserting that there were no meritorious issues on appeal. To study the impact of sentencing issues on the federal criminal appellate docket, the Commission combines the sentencing only and sentencing and conviction appeals into one category: appeals raising sentencing issues. The remainder of this section will focus on this category.

[34] For explanation of these time periods, *see* Part C: Methodology of the *Booker* Report.

Figure B-5
Number of Appellate Defendants
Fiscal Years 1993 - 2011



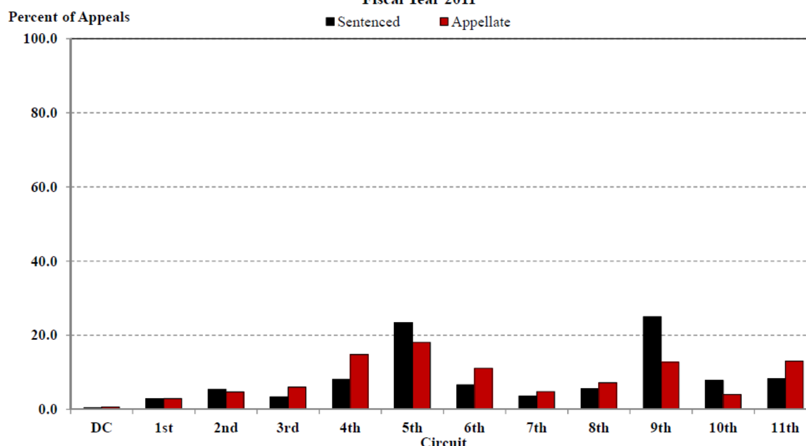
SOURCE: U.S. Sentencing Commission, 1993 through 2011 Appellate Datafiles, APPFY93 – APPFY11.

Figure B-5 compares the number of appeals raising sentencing issues with the overall number of criminal appeals over time. The red line represents all criminal appeals, and the orange line represents appeals raising sentencing issues. The two lines are parallel most of the time, although the number of appeals raising sentencing issues peaked in fiscal year 2006 (at over 8,000) and thereafter declined, while the number of criminal appeals remained relatively constant. No similar decrease is seen in the overall number of criminal appeals during that time. The addition in fiscal year 2010 of the *Anders* category, discussed in the methodology section in Part C, accounts for most, if not all, of the decrease in sentencing appeals in the most recent years. Because any sentencing issues discussed in *Anders* cases are by definition frivolous, the Commission concluded that excluding them more accurately represents the impact of sentencing issues on the federal criminal appellate docket.

Figure B-6 depicts this same relationship, but breaks the information down by circuit for a single fiscal year (2011). In fiscal year 2011, the Ninth and Fifth Circuits sentenced the largest number of offenders, with the judges in the Ninth Circuit sentencing slightly more defendants than judges in the Fifth Circuit. Nonetheless, the Fifth Circuit generated both a higher number of appeals and a higher proportion of appeals relative to the number of sentences imposed, than the Ninth Circuit. The Fourth, Fifth, Ninth, and Eleventh Circuits contributed the largest proportion of appeals in fiscal year 2011.

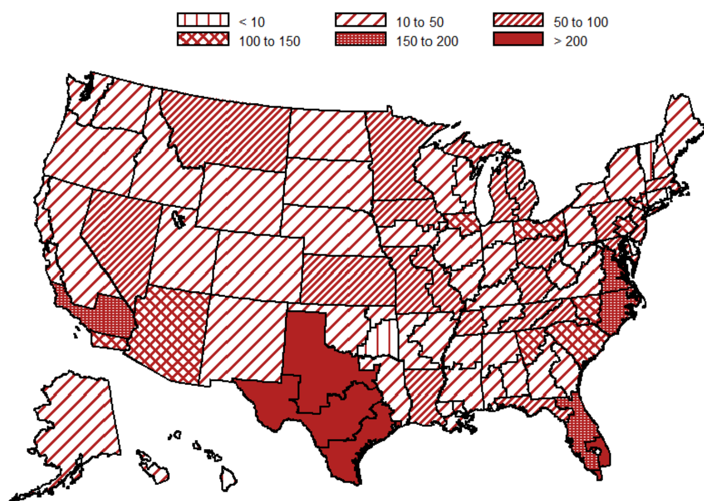
Figure B-7 displays a map of the judicial districts of the United States that indicates by color the number of appeals raising sentencing issues originating from each judicial district. In fiscal year 2011, the Northern, Western, and Southern Districts of Texas and the Southern District of Florida produced the highest number of appeals with more than 200 from each district.

Figure B-6
Percentage of Sentenced Defendants and Appeals Raising Sentencing Issues
Fiscal Year 2011



SOURCE: U.S. Sentencing Commission, 2011 Appellate Datafile, APPFY11.

Figure B-7
Number of Appeals Raising Sentencing Issues by District
Fiscal Year 2011



SOURCE: U.S. Sentencing Commission, 2011 Appellate Datafile, APPFY11.

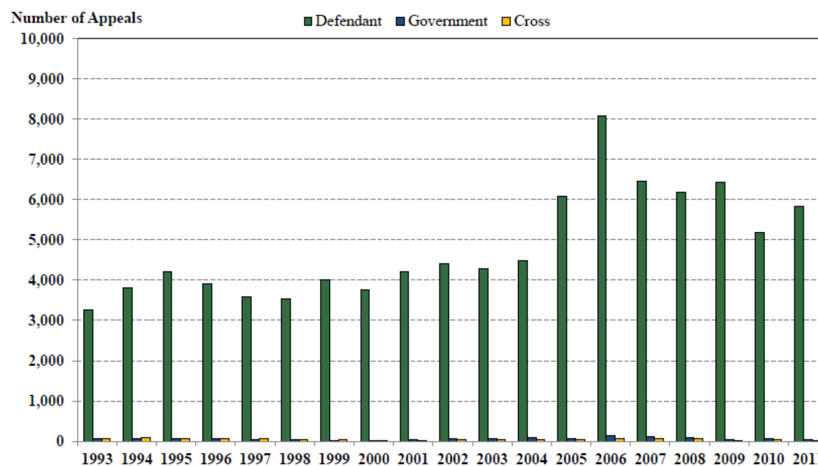
General Characteristics of Appeals Raising Sentencing Issues

Defendant or government initiated

The overwhelming majority of appeals raising sentencing issues are initiated by the defendant in the case, as opposed to the government.

Figure B-8 depicts the number of appeals raising sentencing issues over time: the green bar represents appeals initiated by the defendant, the blue bar represents appeals initiated by the government, and the yellow bar represents a case in which both parties appealed. In each year, defendant-initiated appeals far outnumber both government-initiated appeals and cases in which cross appeals were filed.

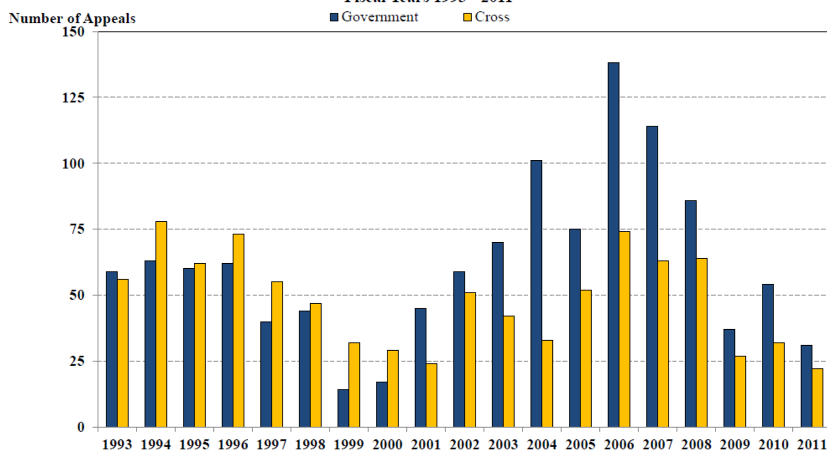
Figure B-8
Number of Defendant, Government and Cross Appeals Raisng Sentencing Issues
Fiscal Years 1993 - 2011



SOURCE: U.S. Sentencing Commission, 1993 through 2011 Appellate Datafiles, APPFY93 – APPFY11.

Figure B-9 displays only the government and cross appeals on a different scale. The number of government appeals raising sentencing issues peaked in 2006 and has decreased since that time.

Figure B-9
Number of Government and Cross Appeals Raising Sentencing Issues
Fiscal Years 1993 - 2011



SOURCE: U.S. Sentencing Commission, 1993 through 2011 Appellate Datafiles, APPFY93 – APPFY11.

Sentencing Issues Raised

Table B-1 depicts the most frequently appealed sentencing issues raised by the defendant and by the government, respectively, in fiscal year 2011. The number of issues exceeds the number of appeals because one appeal may raise multiple issues. This table demonstrates that reasonableness issues constituted a significant proportion of all sentencing issues raised on appeal in fiscal year 2011.

Table B-1
Top Ten Sentencing Issues by Defendant and Government
Fiscal Year 2011

Defendant Appeals	Number	Government Appeals	Number
Overall	13,085	Overall	92
Constitutional/Reasonableness Issues	4,547	Constitutional/Reasonableness Issues	18
18 U.S.C. § 3553(a) Factors	1,405	18 U.S.C. § 3553(a) Factors	11
Other "Non-Guideline" Issues	1,371	§4B1.4 – Armed Career Criminal	9
§2D1.1 – Drug Trafficking	973	Other "Non-Guideline" Issues	8
§1B1.10 – Retroactivity of Amended Guideline Ranges	691	§1B1.10 – Retroactivity of Amended Guideline Ranges	7
§2L1.2 – Unlawful Entering/Remaining in U.S.	320	§2D1.1 – Drug Trafficking	7
§2B1.1 – Larceny, Embezzlement, Theft	259	§5E1.1 – Restitution	7
§3B1.1 – Aggravating Role	189	§1B1.2 – Applicable Guidelines	4
§6A1.3– Resolution of Disputed Factors	186	§2B1.1 – Larceny, Embezzlement, Theft	4
§2K2.1 – Firearms	160	§5C1.2 – Limitation on Applicability of Statutory Minimums	4

SOURCE: U.S. Sentencing Commission, 2011 Appellate Datafile, APPFY11.

Disposition of Appeals Raising Sentencing Issues

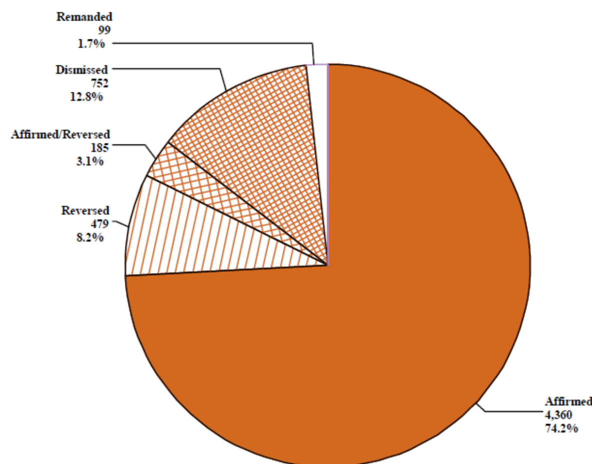
The following figures present information about dispositions of appeals raising sentencing issues for fiscal year 2011. The majority of appeals raising sentencing issues result in an affirmance of the sentence imposed.

Affirmance Rate of Appeals Raising Sentencing Issues

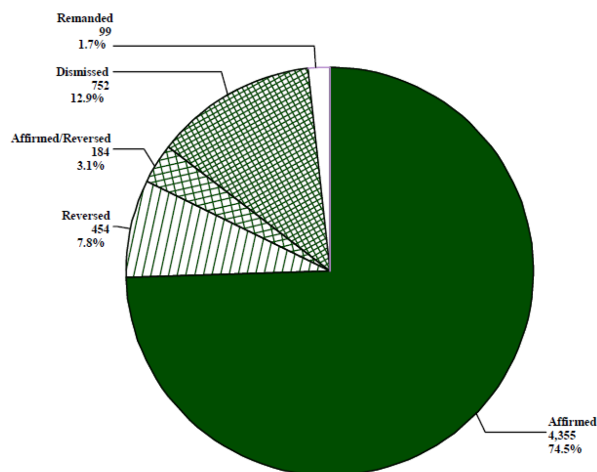
The Commission codes disposition of appeals raising sentencing issues based on the disposition of the sentence. If the court of appeals affirms the sentence imposed, the appeal is coded as affirmed; these appeals are represented in the solid sections of the figures below. If the court of appeals affirms some of the sentencing issues in the case but reverses on one or more other sentencing issues and remands for resentencing in light of the reversals, the appeal is coded as affirmed in part and reversed in part; these appeals are represented in the crosshatched "Affirmed/Reversed" sections of the figures below. If the court of appeals dismisses the appeal (for example, in cases where the court finds that the presence of an enforceable appeal waiver bars the appeal), the appeal is coded as dismissed; these appeals are represented in the smaller crosshatched sections of the figures below. If the court of appeals remands the sentence without resolving the sentencing issue (for example, when additional information is needed from the district court, or when the court of appeals reverses a sentencing and conviction case on conviction grounds without reaching the sentencing issue), the appeal is coded as simply remanded; these cases are represented in the white sections of the figures below. Finally, if the court of appeals reverses the district court's determination of the sentencing issue or all sentencing issues and remanded the case for resentencing, the appeal is coded as reversed; these appeals are represented in the striped sections of the figures below.

Affirmance rates differ depending on whether the government or the defendant appeals. When defendants appeal, a higher percentage of appeals are affirmed than when the government initiates the appeal. In fiscal year 2011, the affirmance rate for defendant-initiated appeals raising sentencing issues exceeded 75 percent, whereas the affirmance rate for government-initiated appeals was less than 25 percent.

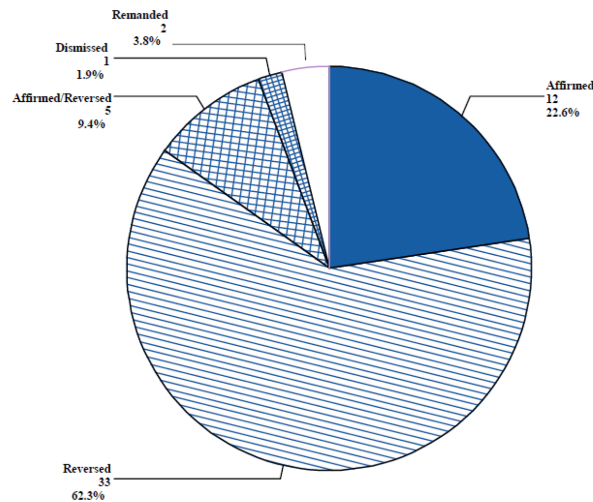
Figure B-10
Disposition of Appeals Raising Sentencing Issues
Fiscal Year 2011
All Appeals Raised Sentencing Issues



Defendant Initiated

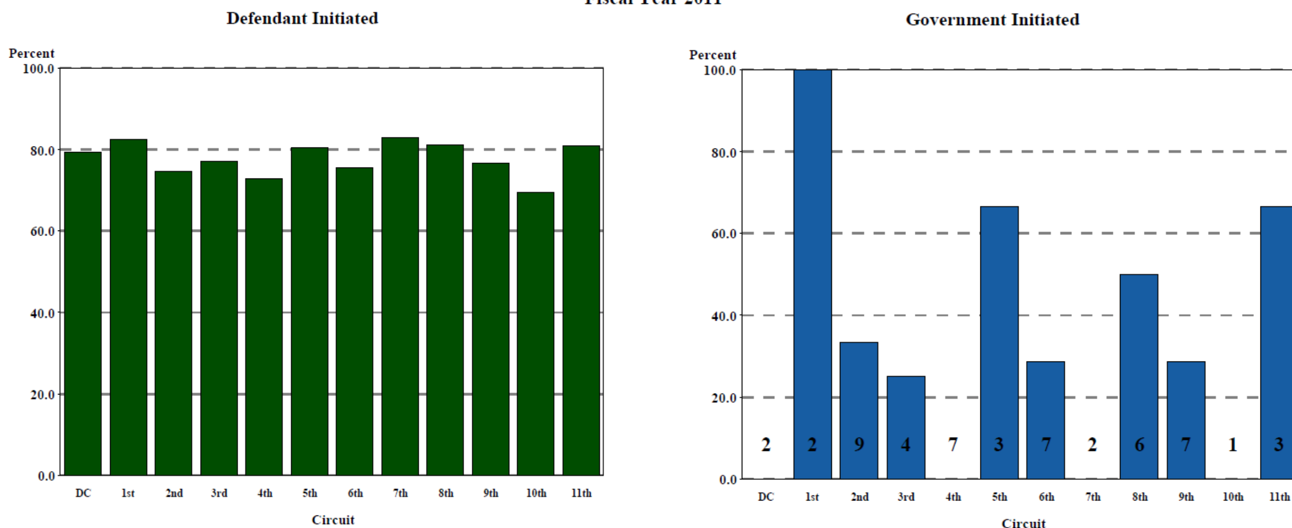


Government Initiated



SOURCE: U.S. Sentencing Commission, 2011 Appellate Datafile, APPFY11.

Figure B-11
Affirmance Rate for Appeals Raising Sentencing Issues by Circuit
Fiscal Year 2011



SOURCE: U.S. Sentencing Commission, 2011 Appellate Datafile, APPFY11.

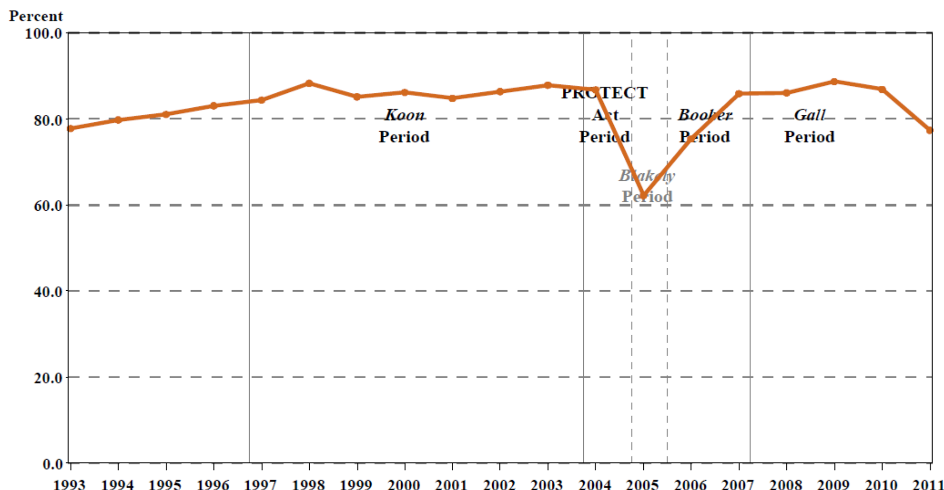
Affirmance Rate by Circuit

When viewed at the circuit level, affirmance rates were similar across circuits in fiscal year 2011 with respect to defendant-initiated appeals, but affirmance rates showed much more variation across circuits for government-initiated appeals. This variation may be a result of the small number of cases the government appeals in each circuit, as printed on each bar. In the case of the Fourth Circuit, for example, the affirmance rate of 0.0 percent reflects the fact that the government prevailed and obtained a reversal in the seven cases it appealed in fiscal year 2011. The 66 percent affirmance rate in the Eleventh Circuit reflects that the government prevailed in one out of the three cases it appealed in that circuit in fiscal year 2011.

Trends in Affirmance Rate

As seen in the figure below, during the entire time the Commission has collected appeals data, affirmance rates in appeals raising sentencing issues exceeded 60 percent, and often were near or above 80 percent. The lowest affirmance rate occurred during the *Blakely* period, when the constitutionality of the guidelines was in question.

Figure B-12
Affirmance Rates for Appeals Raising Sentencing Issues
Fiscal Years 1993 - 2011



SOURCE: U.S. Sentencing Commission, 1993 through 2011 Appellate Datafiles, APPFY93 – APPFY11.

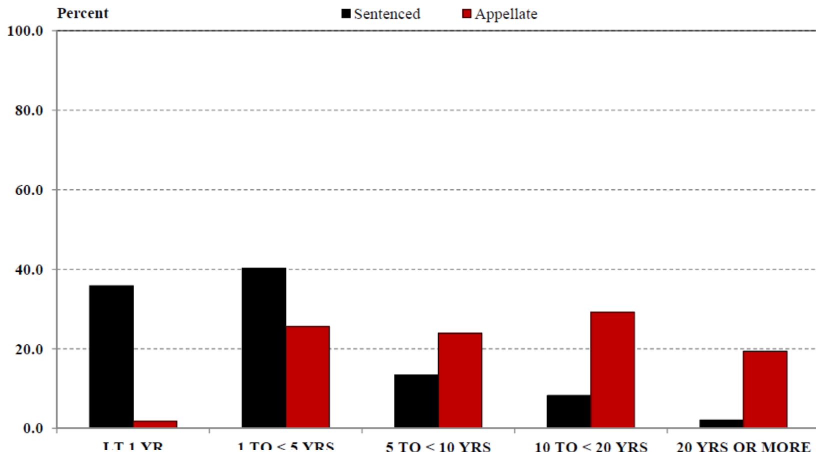
Sentence and Demographic Information for Appeals Raising Sentencing Issues

Basic Sentence Information

The red bars on Figure B-13 below represent the percentage of all appeals raising sentencing issues that came from a sentence in the given length category. To provide context for those percentages, the black bars represent the same breakdown for all sentences imposed during fiscal year 2011. Note that these are not necessarily the same defendants, since a defendant whose appeal was disposed of in fiscal year 2011 may have been sentenced before fiscal year 2011, and only a small percentage of sentences imposed result in an appeal. The chart demonstrates that a disproportionately large percentage of appeals raising sentencing issues result from cases in which a longer sentence was imposed.

Figure B-13
Percentage of Sentenced Defendants and Appeals Raising Sentencing Issues by Sentence Length Fiscal Year 2011

Sentenced Appellate

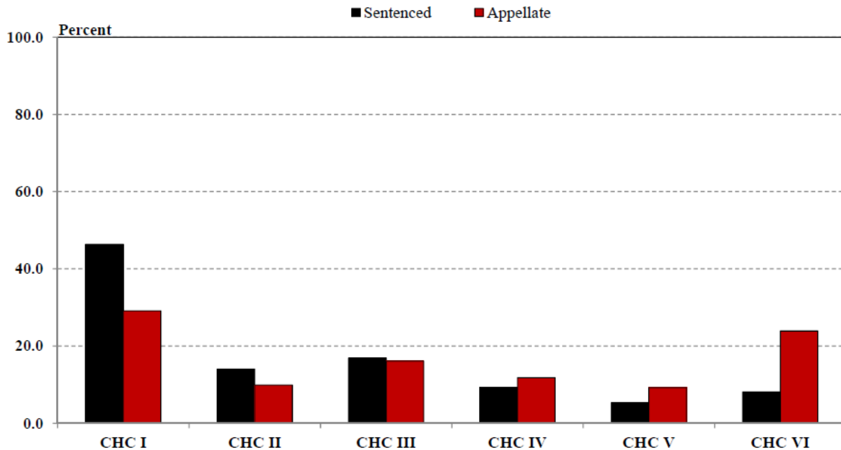


SOURCE: U.S. Sentencing Commission, 2011 Appellate Datafiles, APPFY11.

The Commission conducted a similar comparison of the criminal history of defendants sentenced by district courts in fiscal year 2011 with the criminal history of defendants whose sentences resulted in an appeal raising sentencing issues that was decided in that same year. The red bars on Figure B-14 below represent the percentage of all appeals raising sentencing issues that came from the sentence of a defendant in the given criminal history category.[35] To provide context for those percentages, the black bars represent the same breakdown for all sentences imposed during fiscal year 2011. The chart demonstrates that a disproportionately large percentage of appeals raising sentencing issues result from cases in which a defendant was in a higher criminal history category.

Figure B-14
Percentage of Sentenced Defendants and Appeals Raising Sentencing Issues by Criminal History Category Fiscal Year 2011

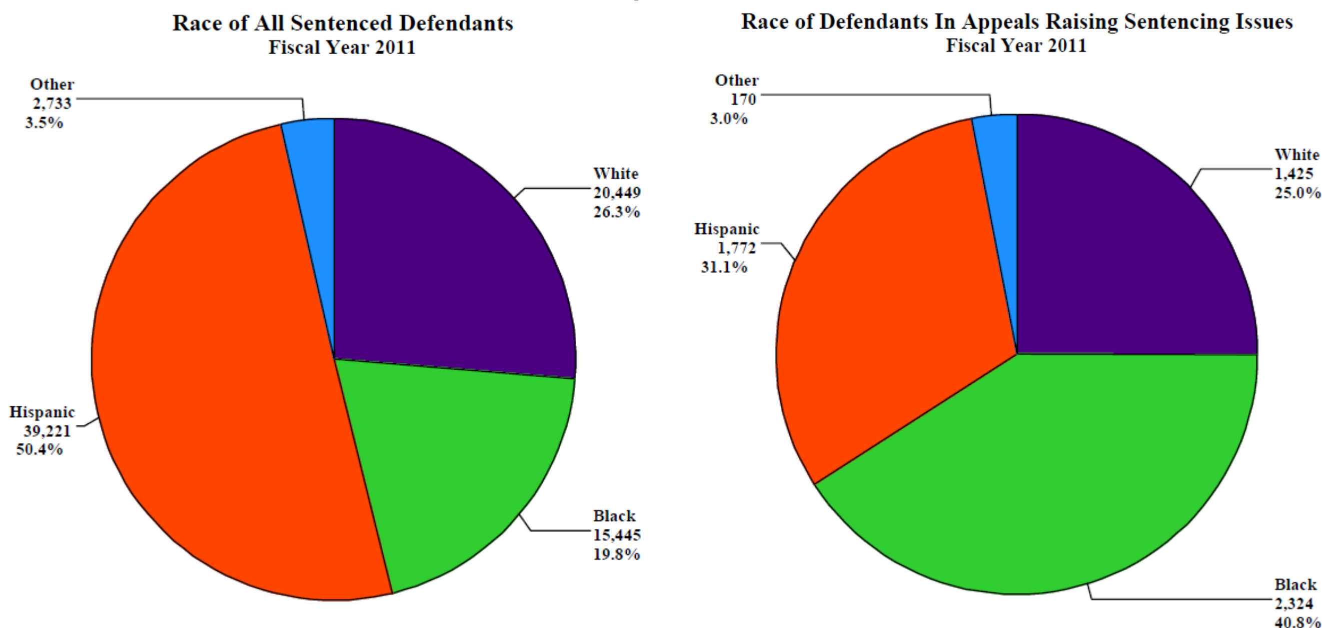
Sentenced Appellate



SOURCE: U.S. Sentencing Commission, 2011 Appellate Datafiles, APPFY11.

[35] A defendant's criminal history category is a measure of the seriousness of the defendant's prior criminal record, as calculated using the rules in Chapter Four of the guidelines. Defendants in criminal history category I have the least serious prior criminal record; defendants in criminal history category VI have the most serious. When combined with the offense level as calculated under Chapters Two and Three of the guidelines, the criminal history category determines the defendant's guideline range. USSG Ch. 4, Pt. A, USSG Ch. 2, USSG Ch. 3, USSG Ch. 5, Pt. A (Nov. 2012).

Figure B-15



SOURCE: U.S. Sentencing Commission, 2011 Appellate Datafile, APPFY11.

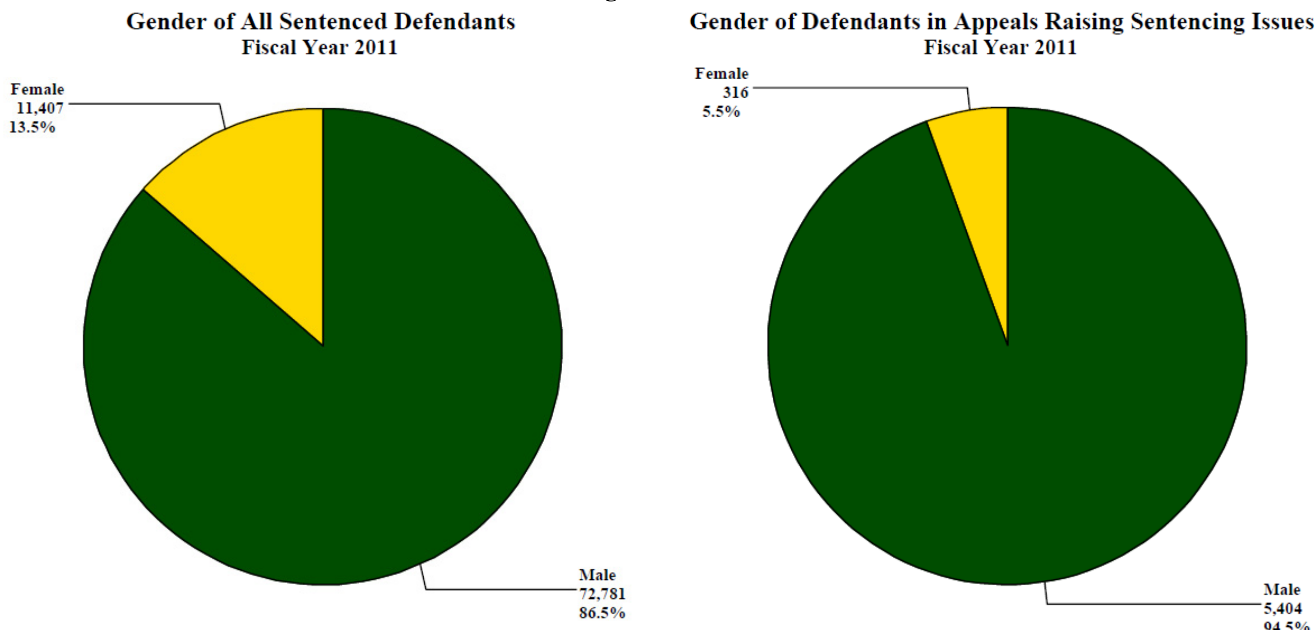
Demographic Information

Figures B-15 through 17 depict certain demographic characteristics of defendants in appeals raising sentencing issues. The pairs of figures compare the defendants sentenced in fiscal year 2011 (the figures on the left) with the defendants whose sentences were appealed with a sentencing issue in that same fiscal year (the figures on the right).

Figure B-15 demonstrates that, while sentences of White and Other race defendants represented roughly the same proportion of overall sentences imposed as they did of appeals raising sentencing issues in fiscal year 2011, sentences of Hispanic defendants represented a lower proportion of appeals raising sentencing issues (31.1%) than of overall sentences imposed (50.4%). Several factors may contribute to this outcome. First, a number of Hispanic defendants are sentenced pursuant to early disposition programs, and such programs often require that the defendant waive the right to appeal a sentence.

Second, a number of Hispanic defendants are convicted of immigration offenses, which may result in relatively shorter sentences. Black defendants, conversely, represented a smaller proportion of sentenced defendants (19.9%) than of defendants whose sentences were appealed raising sentencing issues (40.8%). One factor that may contribute to this difference is the appellate litigation of various issues resulting from the Fair Sentencing Act of 2010, which among other things reduced penalties for crack cocaine defendants, who are primarily Black. A second contributing factor may be that Black defendants, as a group, generally receive longer sentences. As Figure B-13 demonstrates, a larger proportion of appeals raising sentencing issues occur in cases where a longer sentence is imposed.

Figure B-16

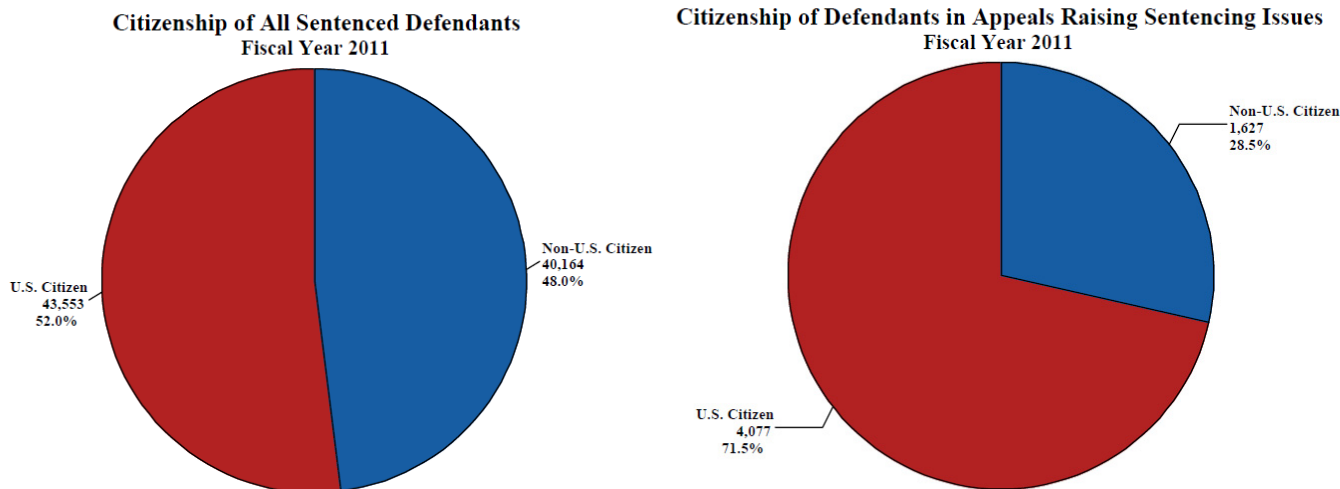


SOURCE: U.S. Sentencing Commission, 2011 Appellate Datafile, APPFY11.

Figure B-16 shows that female defendants represented a higher proportion (13.5%) of sentences imposed in fiscal year 2011 than of appeals raising sentencing issues (5.5%) during that time. This may be attributable in part to the fact that female defendants generally receive shorter sentence than their male counterparts.[36]

[36] *See* Part E: Demographic Differences in Sentencing of the *Booker* Report.

Figure B-17



SOURCE: U.S. Sentencing Commission, 2011 Appellate Datafile, APPFY11.

The above figure shows that non-United States citizens represented a higher proportion (48.0%) of sentences imposed during fiscal year 2011 than of appeals raising sentencing issues (28.5%) during that time. One factor that may contribute to this difference is the prevalence of non-United States citizens in immigration offenses, which often result in relatively short sentences. As discussed above, defendants who receive short sentences are less likely to appeal.

Another contributing factor may be the availability of early disposition programs in immigration cases. These programs often require the defendant to waive the right to appeal the sentence in exchange for a reduced sentence.

Position of Sentence Relative to the Guideline Range

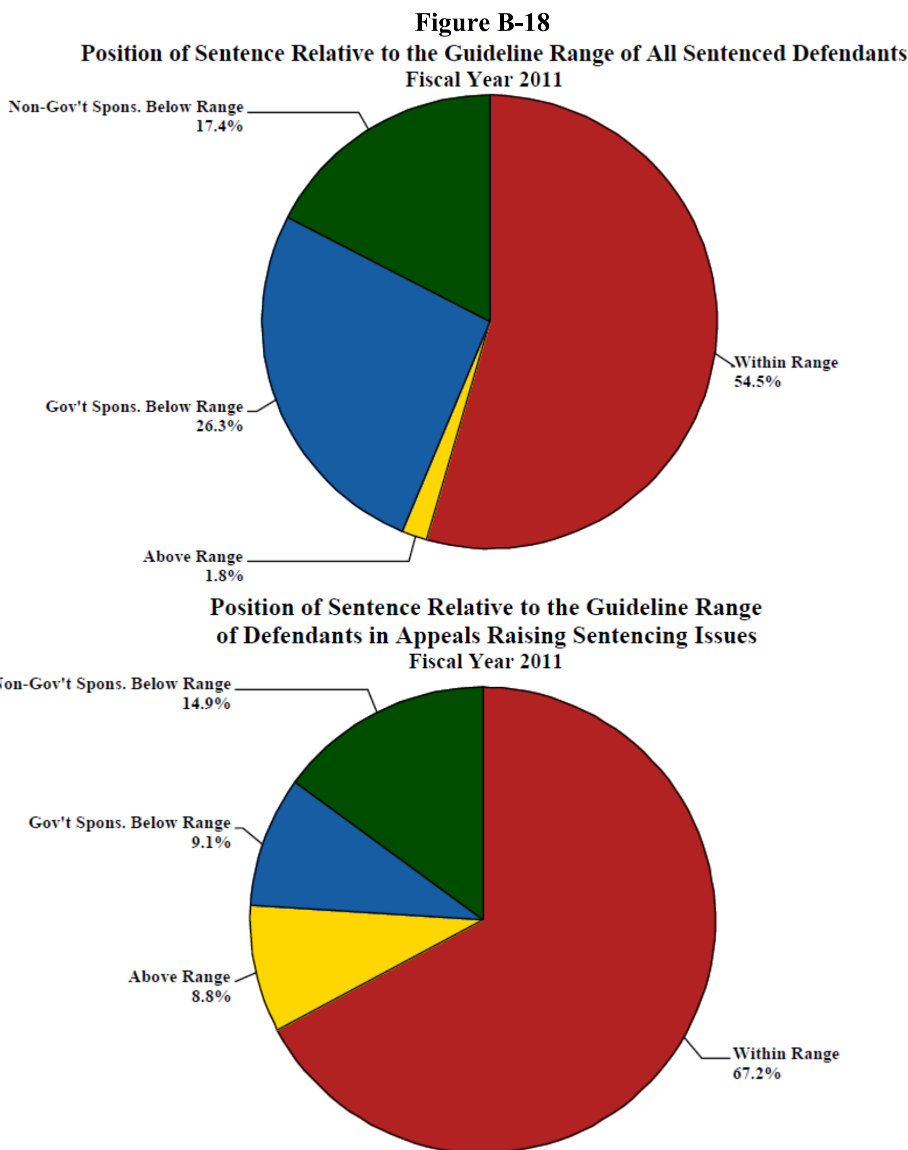
The Commission has also analyzed appeals raising sentencing issues based on the sentence's position relative to the guideline range; that is, whether the sentence imposed was within, above, or below the guideline range.

For comparison purposes, Figure B-18 displays the percentage of all sentences that were imposed during fiscal year 2011 that fell into each of these categories. Figure B-18 then displays the percentage of all appeals raising sentencing issues that resulted from each of these types of sentences.

A higher proportion of appellate defendants were sentenced above the range (8.8%), than the proportion of such defendants of all defendants sentenced by district courts in 2011 (1.8%). Defendants who received a government sponsored below range sentence constituted a smaller proportion of appellate defendants (9.1%) than of defendants sentenced by district courts in fiscal year 2011 (26.3%). Defendants who received a non-government sponsored below range sentence constituted a similar proportion of defendants to the proportion of defendants sentenced by district courts who received a non-government sponsored below range sentence in fiscal year 2011 (14.9% of appellate defendants, 17.4% of sentenced defendants). Defendants sentenced within the range constituted a larger portion of appellate defendants (67.2%) than defendants who were sentenced by district courts (54.5%) in fiscal year 2011.

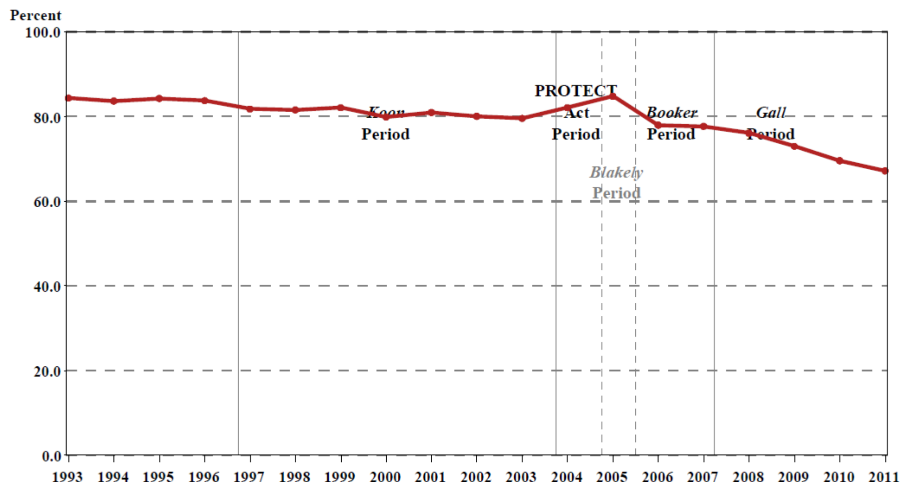
Figure B-18

Position of Sentence Relative to the Guideline Range of All Sentenced Defendants
Fiscal Year 2011



SOURCE: U.S. Sentencing Commission, 2011 Appellate Datafile, APPFY11.

Figure B-19
Percentage of Appellate Defendants Originally Sentenced Within the Guideline Range
Fiscal Years 1993 - 2011

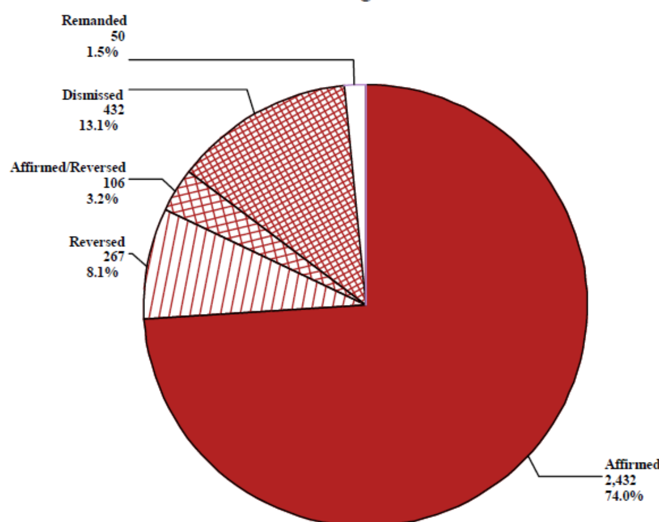


SOURCE: U.S. Sentencing Commission, 1993 through 2011 Appellate Datafiles, APPFY93 – APPFY11.

Figure B-19 above shows the percentage of appellate defendants originally sentenced within the guideline range. The percentage of sentences resulting in an appeal that were originally sentenced within the guideline range exceeded 80 percent until the *Booker* period.

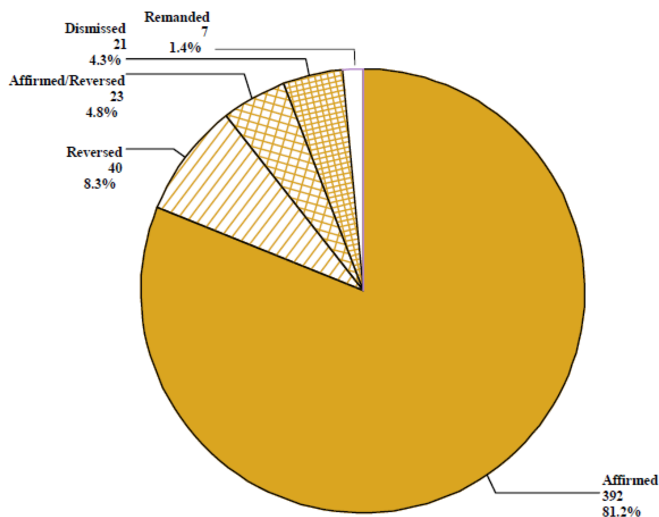
The following figures analyze the disposition of appeals based on the position relative to the guideline range of the sentence imposed. Figure B-20 below shows the disposition of appeals raising sentencing issues in fiscal year 2011 in which the sentence was within the guideline range. As the solid portion of the figure indicates, nearly three-quarters (74.0%) were affirmed.

Figure B-20
Disposition of Appeals Raising Sentencing Issues by Position Relative to the Guideline Range
Fiscal Year 2011
Within Range Sentences



SOURCE: U.S. Sentencing Commission, 2011 Appellate Datafile, APPFY11.

Figure B-21
Disposition of Appeals Raising Sentencing Issues by Position Relative to the Guideline Range
Fiscal Year 2011
Above Range Sentences

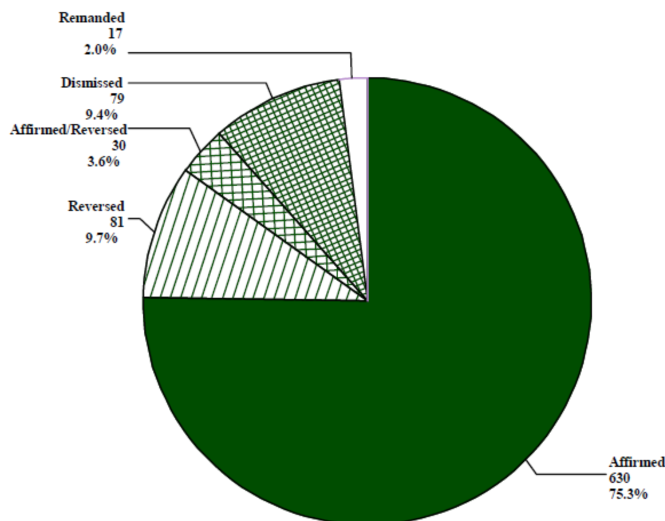


SOURCE: U.S. Sentencing Commission, 2011 Appellate Datafile, APPFY11.

As the solid portion of Figure B-21 indicates, the affirmance rate was higher in appeals raising sentencing issues where the sentence imposed was above the guideline range (81.2%).

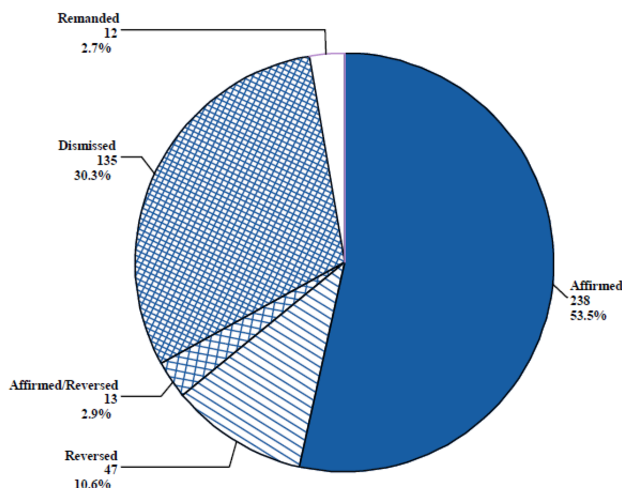
As the solid portion of the figure below indicates, the affirmance rate was 75.3 percent for appeals raising sentencing issues from a non-government sponsored below range sentence.

Figure B-22
Disposition of Appeals Raising Sentencing Issues by Position Relative to the Guideline Range
Fiscal Year 2011
Non-Government Sponsored Below Range Sentences



SOURCE: U.S. Sentencing Commission, 2011 Appellate Datafile, APPFY11.

Figure B-23
Disposition of Appeals Raising Sentencing Issues by Position Relative to the Guideline Range
Fiscal Year 2011
Government Sponsored Below Range Sentences



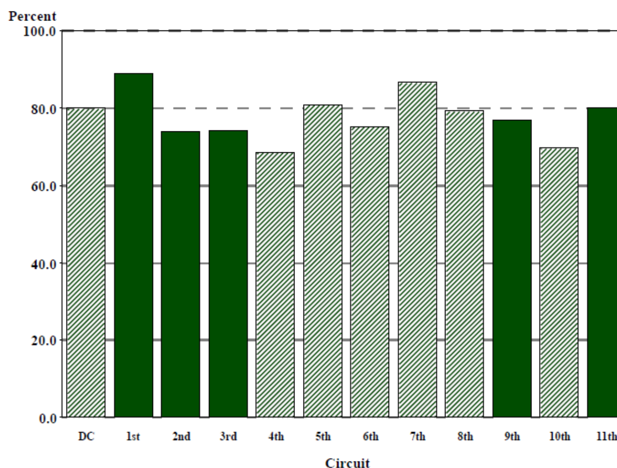
SOURCE: U.S. Sentencing Commission, 2011 Appellate Datafile, APPFY11.

Finally, Figure B-23 above shows the disposition of appeals raising sentencing issues arising from government sponsored below range sentences. The affirmance rate, as depicted in the solid portion of the figure, is significantly lower (53.5%) in appeals raising sentencing issues from a government sponsored below range sentence. However, the corresponding increase in dismissal rate (30.3%) suggests that this difference may be due to the fact that government sponsored below range sentences often require the defendant to waive the right to appeal the sentence in whole or in part, which ordinarily would lead to a dismissal rather than an affirmance. This is supported by the fact that the reversal rate (10.6%) in government sponsored below range cases is similar to the reversal rate for other positions relative to the guideline range (8.1% within, 8.3% above, 9.7% non-government sponsored below).

With respect to within range sentences, some circuits have adopted a presumption of reasonableness on appeal, whereas others have not. Although many factors may contribute to the ultimate affirmance rate in any given circuit, the Commission compared affirmance rates for sentencing appeals from within range sentences across the circuits in order to determine whether any impact of this decision was apparent. Figure B-24 presents the affirmance rates for such sentences, with each bar representing one circuit. The solid bars represent circuits that have *declined* to adopt a presumption of reasonableness; the shaded bars represent circuits that do apply such a presumption.

In fiscal year 2011 the presumption of reasonableness did not appear to outweigh the other factors that influenced that rate, because there was no consistent pattern among the circuits based on whether or not they chose to apply the presumption of reasonableness. The circuit with the highest affirmance rate in fiscal year 2011, the First Circuit, does *not* apply the presumption, whereas the circuit with the next-highest affirmance rate, the Seventh Circuit, does apply the presumption. At the other end of the spectrum, the two circuits with the lowest affirmance rates, the Fourth and Tenth Circuits, *do* apply the presumption.

Figure B-24
Affirmance Rate for Appeals Raising Sentencing Issues Where Defendant Was Originally Sentenced Within the Guideline Range by Circuit
Fiscal Year 2011
Defendant Initiated



Light color denotes circuit has a presumption of reasonableness.
SOURCE: U.S. Sentencing Commission, 2011 Appellate Datafile, APPFY11.