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## *Rita v. United States* Leaves More Open Than it Answers

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# Rita v. United States Leaves More Open Than it Answers



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### I. The Issues Swirling Around before *Rita*

As every judge who has not been living in a cave for the last seven years knows, *Apprendi*, *Blakely*, and *Booker* have thrown federal sentencing into a tizzy. The Sixth Amendment, a bare majority of the Supreme Court insists, requires federal indictments to charge and prosecutors to prove to juries every fact legally required to authorize a particular punishment. In other words, if a fact raises a statutory or binding guidelines maximum sentence, prosecutors must prove that fact to a jury beyond a reasonable doubt. The only exceptions are for defendants who have admitted facts, say as part of a guilty plea, and for facts that relate to recidivism.

Of course, in *Booker* the remedial majority—consisting of the *Apprendi/Blakely* dissenters plus Justice Ginsburg—solved the *Apprendi* problem in the Federal Sentencing Guidelines not by submitting a plethora of guidelines facts to juries but by striking down the Guidelines' binding force, rendering them advisory. This remedy seemed startling, in part, because it knocked out one of the key pillars of the Guidelines—its effort to bind sentencing judges within a fairly narrow range to ensure consistency and uniformity—while leaving the rest supposedly intact. Yet it left judges, rather than juries, with the power to determine countless guidelines facts. For a line of cases that purported to increase juries' power against judicial encroachment, it seemed bizarre that the ultimate remedy was simply to return more discretion to judges.

*Booker* raised more problems than it solved. What would appellate review of compliance with no-longer-mandatory guidelines mean? What would the standard of review be? Could appellate courts privilege or defer to sentences within the Guidelines range computed by judges without violating the Sixth Amendment? Could they scrutinize out-of-range sentences more closely consistently with the Sixth Amendment? How much weight could the Guidelines retain without crossing some ill-defined boundary between true guidelines and impermissible laws?

This past Term, the Supreme Court was to consider two companion cases on the appropriate appellate review of within-range and below-range Guidelines sentences. *Claiborne v. United States* presented the issue of how appel-

late courts should review sentences outside the Guidelines ranges. Unfortunately, while his case was pending, Mario Claiborne chased a stolen pickup truck and was shot and killed in the ensuing firefight, requiring the Court to dismiss his case as moot. The Court will return to the strength of the justification needed to sustain a beyond-Guidelines sentence in *United States v. Gall* this Term.

The Court did, however, decide *Rita v. United States*<sup>1</sup> while Mr. Rita remained in fair health. Rita, convicted of making false statements under oath before a grand jury, sought a sentence below the thirty-three-to-forty-one-month Guidelines range because of his physical condition, likely vulnerability in prison, and military experience. The trial judge declined to depart or deviate downward and sentenced him to thirty-three months, the bottom of the range. The Fourth Circuit, applying a presumption of reasonableness because the sentence was within the properly calculated Guidelines range, affirmed. The question presented to the Court was whether an appellate court may presume a within-Guidelines sentence to be reasonable.

Several paths were open to the Court. It could have been purist about the Sixth Amendment, declaring that giving any weight to minima and maxima that depend on facts found by judges would violate the Sixth Amendment. This is the path that Justices Scalia and Thomas advocated in their separate concurrence in the judgment, which verged on a dissent. It could have wrung its hands about the due process unfairness of propping up a judge-run system and encouraging judges to keep sentencing as they did in the bad old mandatory-Guidelines days. This was the lonely, unheeded call of Justice Souter's dissent. Or it could have embraced the presumptive reasonableness of within-Guidelines sentences and the presumptive unreasonableness of beyond-Guideline sentences, with little more than a nod toward the marginally greater flexibility judges should enjoy today. The Court, however, did not choose any of these paths or anything so clear-cut.

### II. The *Rita* Straddle

*Rita* did answer the question presented, but in a bizarrely narrow way. The Court held that a circuit court *may* apply a presumption of reasonableness to a district court sentence

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within the Guidelines. It did not hold that a circuit court must or should apply this presumption, leaving open the door to the very disuniformity of lower-court practices that the Sentencing Reform Act was designed to counteract. (In practice, though, all circuits strongly presume that within-Guidelines sentences are reasonable even if they do not say that is what they are doing. That is why it took more than two and a half years after *Booker* for a reported within-Guidelines sentence to be reversed on appeal as substantively unreasonable.<sup>2</sup>)

The Court also left observers in a bit of a fog about exactly what this presumption of reasonableness is. We know much more about what it is not. It is not binding.<sup>3</sup> It does not put a burden on one party or the other to prove or disprove a fact or else lose a case. Nor is it as strong as *Chevron*-type deference to agencies. Nor is it a trial court presumption that the Guidelines sentence is correct. On the contrary, the Court disavowed any trial-court presumption in favor of the Guidelines: "In determining the merits of [the parties' arguments about whether to sentence within the Guidelines range], the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply."<sup>4</sup> All that we know about the presumption of reasonableness is that, in applying it, an appellate court is asking whether the trial court abused its discretion.<sup>5</sup>

As Professor Kate Stith of Yale Law School has noted, this is the fifth time that Justice Breyer has given basically the same set of instructions to appellate courts: where possible, defer to the Commission and the District Court by affirming within-Guidelines sentences; where that is not possible, defer to the sentencing judge who offers a good reason for a different sentence, by affirming reasonable non-Guidelines sentences. The Sentencing Reform Act, Part I of the original Guidelines, *Koon*, the *Booker* remedial majority opinion, and now *Rita* repeat these instructions. Professor Stith predicts that once again courts of appeals will hear the first part of this message but not the second part.<sup>6</sup> Judges have likewise observed that the presumption of reasonableness was rebuttable more in theory than in practice.<sup>7</sup> But *Rita* aims to change that. A more sanguine reader would predict that the presumption of reasonableness is couched carefully enough to inject more needed flexibility into the system, without destroying it, if lower courts listen and take *Rita's* reasoning seriously. And Justice Stevens goes out of his way to allay this concern, as I will discuss shortly.

Why allow this presumption? Justice Breyer's opinion for the Court has a four-page hymn to the beauty and rationality of the Guidelines, which embody the expertise and wisdom of the Commission's judgment in implementing the statutory objectives and purposes of punishment. (Justice Breyer is about the only person who still writes full-throated hymns to the Guidelines anymore.) They filter the statutory purposes and translate them into practice. When a district judge imposes a sentence within the Guidelines range, the Court reasoned, his

judgment confirms the Commission's judgment that the Guidelines sentence fits this typical case and is probably reasonable.<sup>8</sup>

The Court rejected Justice Scalia and Thomas's objection that the Sixth Amendment forbids sentence increases that take into account facts found by judges rather than juries.<sup>9</sup> A nonbinding appellate presumption, the Court reasoned, does not require or forbid a higher sentence, differentiating *Rita* from *Blakely* and *Booker*. In other words, the Sixth Amendment appears to forbid judicial findings of facts that trigger or unlock binding maxima but not of those facts that judges weigh and factor into a complex, reasoned judgment. Apparently, the *Apprendi* train goes this far and no further. As a matter of pure abstract logic, Justices Scalia and Thomas have a point: either way, the defendant spends extra years in prison without the safeguards of jury and proof beyond a reasonable doubt. But the majority of the Court is being far more practical and respectful of nuanced, contextual judicial findings, of the sort that have long been buried in judges' indeterminate sentencing decisions. Practicality trumps theoretical purity.

The Court also rejected Justice Souter's fear in dissent that the presumption of reasonableness will create a safe harbor that district judges find irresistible, in his words exerting "substantial gravitational pull" back toward the Guidelines.<sup>10</sup> The majority's response was to disavow the negative implication of its holding. "The fact that we permit courts of appeals to adopt a presumption of reasonableness does not mean that courts may adopt a presumption of unreasonableness. Even the Government concedes that appellate courts may not presume that every variance from the advisory Guidelines is unreasonable."<sup>11</sup> Justice Stevens's concurrence, joined by Justice Ginsburg, was even more emphatic in denying that the Guidelines' pull is inexorable. "Our decision today makes clear, however, that the rebuttability of the presumption is real. It should also be clear that appellate courts must review sentences individually and deferentially whether they are inside the Guidelines range . . . or outside that range. . . . [T]he Guidelines are [now] truly advisory."<sup>12</sup>

Probably the most interesting and least controversial aspect of Justice Breyer's opinion for the Court is Part III, where he discussed at length the procedures that a district judge should follow in imposing sentence. The key is a reasoned, articulable judgment. Of course a sentencing judge need not always issue a full opinion, particularly where the case is simple and uncontested. But "[t]he sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decision-making authority."<sup>13</sup> In some circumstances, the judge can simply rest on the Commission's own reasoning that the Guidelines sentence is appropriate for the typical case and that this case is typical. But where either party presents a nonfrivolous argument for a different sentence, "the judge will normally go further and

explain why he has rejected those arguments.”<sup>14</sup> The adversarial clash of opposing arguments should illumine the judge’s reasoning and call for his response.

Circuit courts had already begun to develop a jurisprudence of procedural and substantive reasonableness, and *Rita* will probably foster this development. For example, the Tenth Circuit already required Rule 32(h) advance notice before a district judge departed or varied from the Guidelines, as well as detailed analysis of the 18 U.S.C. § 3553(a) statutory factors that support a proposed variance.<sup>15</sup> Although some judges disagree with these procedural hoops, *Rita* endorses at least a modest amount of this review.

The judge who sentenced *Rita* listened to each of the parties’ arguments, considered the supporting evidence, and then simply found the circumstances insufficient and found the thirty-three-month sentence “appropriate.” He could have said more, noting explicitly that he had heard and considered the evidence and argument, that he thought the Commission’s Guideline sentence was appropriate in the typical case, and that *Rita*’s personal circumstances were simply not different enough from the typical case to warrant a different sentence. But the law does not require a sentencing judge to write more than he did.<sup>16</sup>

### III. The (Controlling?) Concurrence

Three of the *Apprendi* five disagreed with the majority. As mentioned earlier, Justices Scalia and Thomas’s concurrence in the judgment advocated denying any substantive weight to any judge-found fact at sentencing, leaving appellate courts only to police the procedures by which sentencing judges reach their conclusions.<sup>17</sup> And Justice Souter’s dissent wrung its hands about the unfairness of allowing the Guidelines to retain their strong “gravitational pull,” in his words.<sup>18</sup> But Justices Stevens and Ginsburg defected to form the fifth and sixth votes for the majority. They joined Justice Breyer’s opinion in full, making it the law of the land. But at the same time, they both signed Justice Stevens’s concurrence, which has a notably different tenor. The outcome resembles some of Justice O’Connor’s famous moments, when her concurrence would amplify and qualify her deciding vote, leading some lower courts to treat her solo musings as the law of the land. It remains to be seen how much weight lower courts will give to the opinion of the Court and how much they will qualify it in light of Justice Stevens’s spin.

Justice Stevens accepted the *Booker* remedial majority opinion as the law of the land despite his previous dissent from it. He laid more stress on appellate deference “to the sentencing judge’s individualized sentencing determination.”<sup>19</sup> Yet he recognized that *Booker*’s remedial holding contemplates substantive and not merely procedural appellate review.<sup>20</sup> As for Justice Scalia’s parade of horrible sentencing hypotheticals, he sensibly responded that we need not worry about those problems until we get there.<sup>21</sup> Ironically, while *Booker* invalidated the Guidelines across the board and not just in those cases raising enhancement

issues, *Rita* treats any Sixth Amendment concerns as issues to be raised in as-applied challenges to sentences that depend on enhancements based on facts found by judges.<sup>22</sup> It is hard to say what these as-applied challenges might look like or in what kinds of cases they might succeed, because neither the majority nor Justice Stevens’s concurrence discussed the meat of substantive reasonableness review and its relationship to facts found by a jury or admitted by a defendant.

The balance of power in the *Apprendi* cases now seems to rest with Justices Stevens’s and Ginsburg’s practical concerns rather than any effort to return to an idealized eighteenth-century Sixth Amendment without judicial sentencing discretion. To the extent one can hazard a guess, this development suggests that the era of major sentencing upheavals has ended, and we are now in the realm of less ambitious tinkering to make sentencing moderately more procedurally and substantively fair.

### IV. Questions Left Open by *Rita*

*Rita* does not change much, at least in the short term; at most it nudges judges inclined to depart toward moderately more flexibility in applying the Guidelines, while affirming a safe harbor for those inclined to cruise close to shore. The result may be moderately less consistency, more disparity, and more individualization. Already, a few district courts, relying on *Rita*, are beginning to refer explicitly to the statutory purposes and justifications for punishment under 18 U.S.C. § 3553(a) and what punishment will achieve in the individual case, in addition to crunching the usual Guidelines calculations.<sup>23</sup> But *Rita* contains hints about the future of the Guidelines that may portend bigger changes.

First, the Court and especially Justice Stevens’s concurrence insisted that the presumption of reasonableness is truly rebuttable. That suggests that at least some within-Guidelines sentences are unreasonable, and conversely that outside-Guidelines sentences are reasonable for those cases.

Now, the Court could mean one of two things by that. First, it could mean that the Guidelines are probably reasonable for the mine-run of cases within each crime or category, to use the Court’s phrase, but there will be some individual defendants and circumstances that make a Guidelines sentence unreasonable in that particular case. It seems pretty clear that the Court’s presumption of reasonableness is meant to be genuinely rebuttable at least for these specific cases. To use Judge McConnell’s terminology, these are as-applied challenges; an example is the argument that a particular defendant is atypical for the class of career criminals.<sup>24</sup> Second, the Court could also go further and suggest that the Guidelines themselves lead to unreasonable sentences in certain recurring categories of cases. These facial challenges, to use Judge McConnell’s term, attack head-on the sentencing policy underlying a particular guideline, such as the crack/powder cocaine disparity.<sup>25</sup> This latter substantive policy disagreement, on the

one hand, seems to fit within a broad, contextual assessment of reasonableness but, on the other hand, could undermine sentencing consistency and predictability and deference to legislative judgment. The Tenth Circuit has suggested that the Guidelines themselves enjoy democratic legitimacy because they reflect “popular political will,”<sup>26</sup> which would make facial challenges especially troubling, but I question how democratic and responsive the Sentencing Commission really is. Surprisingly, *Rita* appears to empower district judges to second-guess these policy choices, which weakens the Guidelines’ emphasis on uniformity across judges. District judges can now entertain arguments “that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat certain defendant characteristics in the proper way.”<sup>27</sup> Though some lower courts are still resisting the implication of this language,<sup>28</sup> the Solicitor General’s brief in the pending *Gall* case concedes that district courts may vary from the Guidelines based in part on policy disagreements with the Guidelines.<sup>29</sup> This approach could lead to a strange disparity of different precedents in different districts and circuits, unless the Court envisions allowing appellate case law to substitute for or amend Sentencing Commission policy. Only time will tell whether five members of the Court agree.

Review of outside-Guidelines sentences is likely to be most contentious in drug cases, where many judges disagree with the severity of the Guidelines. Moreover, the Sentencing Commission itself has unsuccessfully sought to reduce the disparity in sentences between crack and powder cocaine, contradicting its own Guidelines and weakening any suggestion that the cocaine Guidelines embody the Commission’s sober expertise, reflection, and final judgment. Keep an eye on two cases that the Court will decide this Term: In *Gall v. United States*, the district court imposed probation rather than thirty months’ imprisonment on an ecstasy dealer based on his youth, immaturity, lack of criminal history, support of friends and family, withdrawal from the conspiracy, and post-offense rehabilitation.<sup>30</sup> The Court will consider whether “the strength of the justification needed to sustain an outside-Guidelines sentence varies in proportion to the degree of the variance.”<sup>31</sup> *Kimbrough v. United States*, also to be decided this Term, will address whether a district court may depart downward from the Guidelines sentence for crack cocaine based on its disagreement with the disparity between crack and powder cocaine sentences.<sup>32</sup>

The crack cocaine issue exemplifies a broader concern. *Rita* speaks only to the situation where both the Sentencing Commission and the district judge agree that the within-Guidelines sentence is reasonable. Appellate courts may defer to this agreement. *Kimbrough* is an example where neither the Commission nor the district judge agrees that the within-Guidelines sentence is appropriate. There will be other such situations, where for example the district judge stresses a factor that the Commission overlooked or to which it gave less weight. *Rita* simply does

not address whether or how much to defer to the Commission or district judge in these situations.

It is also worth considering what will become of *Rita*’s procedural requirements. *Rita* suggests that Guidelines calculations, departures, variances, and Rule 32(h) advance notice remain alive and well as procedural components of adversarial decision making, though some circuits had earlier questioned the continuing relevance of these procedures. District judges should continue to use correct Guidelines calculations as anchors and starting points for their analysis, as these computations generally embody the Commission’s expertise and reasoned judgment. District judges who decide to depart or vary from the Guidelines sentence probably need to offer more written justification than those who stay closer to the Guidelines’ safe(r) harbor, but that was the case in practice anyway. My hope is that the renewed emphasis on serving the statutory purposes of punishment will lead to sentencing decisions that not only articulate the Guidelines mathematics but also offer some plain-English explanations of how much retribution, deterrence, incapacitation, restitution, et cetera are needed in particular cases and why. The Guidelines ranges are important and weighty starting points, and beginning with these calculations helps to promote uniformity and consistency, but *Rita* suggests that they are starting points and not necessarily ending ones. Statements of reasons improve the sentencing process and help the defendant, victim, and public to understand it and respect its legitimacy. As *Rita* notes, “[b]y articulating reasons, even if brief, the sentencing judge not only assures reviewing courts (and the public) that the sentencing process is a reasoned process but also helps that process evolve.”<sup>33</sup> One must not read too much into this statement, though, as the district judge in *Rita* itself did not give much in the way of reasons.

At this point my crystal ball peters out. Second-guessing the direction of the Court is always hazardous, even more so when the Court’s coalitions are so fragmentary, shifting, and motivated by varying concerns. On the whole, though, *Rita* portends moderate improvement and moderately more flexibility in the status quo, more procedural review and substantive deference by appellate courts, and the preservation of Guidelines systems that carry some weight so long as they do not harden into binding rules. *Gall* and *Kimbrough* will tell much more, in particular how much wiggle room district courts have to depart or vary downward in drug cases.

## V. What about the Sixth Amendment?

What is most puzzling about *Rita* is the dog that did not bark, namely the Sixth Amendment. Justices Scalia and Thomas seem driven by an extreme vision of the Sixth Amendment, but none of the other Justices truly engaged their argument, let alone offered a competing understanding of what the Sixth Amendment requires. (The original *Apprendi* coalition comprised these two Sixth Amendment purists and three other Justices who were driven more by

due process concerns about fairness to defendants; now that coalition has splintered.) Amid all the discussion of the Sentencing Commission, Congress, district judges, and appellate review, somehow juries are noticeably absent. *Apprendi*, *Blakely*, and *Booker* upset structured-sentencing law in the name of protecting the jury's historic role, but oddly the remedy has been to give district judges more leeway rather than returning sentencing power to juries. The objection to sentencing rules has morphed from a Sixth Amendment need to protect juries' sacred role to a flexible due process assurance that someone in the system has the power to tailor sentences to an individual defendant's crime and characteristics.

In the end, then, this line of cases has judicially revised the Sentencing Guidelines to create more flexibility, along the lines that many commentators and judges had been suggesting for years. These revisions may perhaps be wise as a matter of policy. But what these changes have to do with the Constitution, how the Supreme Court can force these changes upon state systems that never suffered from the pathologies of the Federal Guidelines, the Court cannot say.

#### Notes

<sup>1</sup> 127 S. Ct. 2456 (2007).

<sup>2</sup> *United States v. Paul*, No. 06-30506, 2007 WL 2384234 (9th Cir. Aug. 17, 2007) (unpublished *per curiam*).

<sup>3</sup> 27 S. Ct. at 2463.

<sup>4</sup> *Id.* at 2465.

<sup>5</sup> *Id.*

<sup>6</sup> Kate Stith, Rita, *Deja Vu*, and the Real Sentencing Law, SCOTUSBlog, [http://www.scotusblog.com/movabletype/archives/2007/06/rita\\_deja\\_vu\\_an.html](http://www.scotusblog.com/movabletype/archives/2007/06/rita_deja_vu_an.html) (June 21, 2007).

<sup>7</sup> See, e.g., *United States v. Pruitt*, No. 06-3152, 2007 WL 2430125, at \*12 (10th Cir. Aug. 29, 2007) (McConnell, J., concurring) ("Yet after watching this Court—and the other Courts of Appeals, whether they have formally adopted such a presumption or not—affirm hundreds upon hundreds of within-Guidelines sentences, it seems to me that the rebuttability of the presumption is more theoretical than real").

<sup>8</sup> 127 S. Ct. at 2465.

<sup>9</sup> *Id.* at 2466.

<sup>10</sup> *Id.* at 2487-88 (Souter, J., dissenting).

<sup>11</sup> *Id.* at 2467 (opinion of the Court).

<sup>12</sup> *Id.* at 2474 (Stevens, J., concurring).

<sup>13</sup> *Id.* at 2468 (opinion of the Court).

<sup>14</sup> *Id.*

<sup>15</sup> *United States v. Atencio*, 476 F.3d 1099 (10th Cir. 2007).

<sup>16</sup> 127 S. Ct. at 2469-70.

<sup>17</sup> *Id.* at 2476-78, 2482-84 (Scalia, J., concurring in part and concurring in the judgment).

<sup>18</sup> *Id.* at 2487-88 (Souter, J., dissenting).

<sup>19</sup> *Id.* at 2472 (Stevens, J., concurring).

<sup>20</sup> *Id.* at 2473.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> E.g., *United States v. Santoya*, 493 F. Supp. 2d 1075 (E.D. Wis. 2007).

<sup>24</sup> *United States v. Pruitt*, No. 06-3152, 2007 WL 2430125, at \*16 (10th Cir. Aug. 29, 2007) (McConnell, J., concurring).

<sup>25</sup> *Id.*

<sup>26</sup> *United States v. Cage*, 451 F.3d 585, 593 (10th Cir. 2006).

<sup>27</sup> 127 S. Ct. at 2468.

<sup>28</sup> See, e.g., *United States v. Garcia-Lara*, No. 06-3054, slip op. at 8 (10th Cir. Aug. 22, 2007), available at <http://www.ca10.uscourts.gov/opinions/06/063054.pdf>.

<sup>29</sup> Brief for the United States, *Gall v. United States*, No. 06-7949, at 35-37 & n.11 (Aug. 2007) (conceding that "a variance may be justified by atypical facts, by persuasive policy reasons for concluding that the Guidelines do not appropriately reflect Section 3553(a)'s sentencing factors, or by a combination of facts and policy considerations," but noting the Sentencing Commission's "institutional advantage" in making policy and arguing that policy-based variances deserve less appellate deference than do fact-based variances). Note, however, that the Solicitor General maintains that courts may not deviate from the Guidelines based on disagreements with policy choices mandated by Congress, and that the crack/powder cocaine sentencing disparity is in fact a policy choice mandated by Congress. See *Id.* at 37 n.11; Brief for the United States, *Kimrough v. United States*, No. 06-6330, at 19-42 (Aug. 2007).

<sup>30</sup> 374 F. Supp. 2d 758, 761-62 (S. D. Iowa 2005).

<sup>31</sup> *Rita*, 127 S. Ct. at 2467.

<sup>32</sup> No. 06-6330.

<sup>33</sup> 127 S. Ct. at 2469.