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A NEW SYSTEM OF FEDERAL SENTENCING: THE IMPACT ON THIRD CIRCUIT SENTENCING PROCEDURE IN THE WAKE OF THE SUPREME COURT'S LANDMARK DECISION IN UNITED STATES V. BOOKER

I. Introduction

For nearly two decades, the Federal Sentencing Guidelines have established a set of uniform sentencing rules for defendants convicted in the United States federal court system. The Guidelines play a vital role in the district court sentencing process as nearly 1200 sentences are imposed each week and approximately ninety-seven percent of cases are plea bargained. In 1984, concerned by a lack of uniformity in judicial sentencing, Congress created the United States Sentencing Commission, which established the Guidelines to promote consistency in criminal sentencing.

1. See U.S. Sentencing Comm'n, An Overview of the United States Sentencing Commission 1-2 (2005) [hereinafter Sentencing Comm'n Overview], available at http://www.ussc.gov/general/USSCoverview_2005.pdf (discussing creation and purpose of United States Sentencing Commission Federal Sentencing Guidelines). Disparities in sentencing, certainty of punishment and crime control have long been issues of interest for Congress, the criminal justice community and the public. See id. at 1-2 (explaining history of Federal Sentencing Guidelines). Before the Guidelines were developed, judges could give a defendant a sentence that ranged anywhere from probation to the maximum penalty for the offense. See id. at 2 (demonstrating how federal trial judges had expansive sentencing discretion before Guidelines). After more than a decade of research and debate, Congress decided that (1) the previously unfettered discretion accorded federal trial judges needed structure, (2) the administration of punishment needed more certainty and (3) specific offenders needed to receive more serious penalties. See id. at 3 (providing justification for United States Sentencing Commission’s creation of Sentencing Guidelines).

2. See Linda Greenhouse, Justices Show Inclination to Scrap Sentencing Rules, N.Y. Times, Oct. 4, 2004, at A14 (observing that 97% of federal criminal cases are resolved by plea bargain); David Stout, Court Orders Changes to Sentencing in Federal Cases, Int'l. Herald Trib., Jan. 13, 2005, at 5 (“[F]ederal courts impose some 1200 sentences each week, and the solicitor general’s office had predicted chaos in the federal criminal-justice system if the sentencing procedures were overturned.”); see also Richard T. Boylan, Do the Sentencing Guidelines Influence the Retirement Decisions of Federal Judges?, 33 J. Legal Stud. 231, 234-35 (2004) (claiming that “[t]he sentencing guidelines, by drastically reducing the range of sentences for a particular offense and facts, transferred much of the sentencing authority from judges to prosecutors”). Before “the sentencing guidelines, judges were unwilling to accept plea-bargaining proposals that did not provide the judge with discretion over the sentence[.]” Id.

3. See Madeline Yanford, Targeting the Criminally Depraved Mind: The Inherent Meaning of a “Vulnerable Victim” Under Federal Sentencing Guideline § 3A1.1, 9 Suffolk J. Trial & App. Advoc. 103, 105 (2004) (noting that former sentencing system "allowed judges broad authority to implement sentences based on personal theories and underlying bias" resulting in "disparate outcomes because judges did not have to explain or justify the reasoning behind each sentence"); see also Kathryn A.
The result was a mandatory set of Sentencing Guidelines that reduced the "amount of discretion of judges[ ] and increased the severity of the sentences."4 In its recent decision in United States v. Booker,5 however, the Supreme Court found that the mandatory nature of the Guidelines violated defendants' Sixth Amendment right to trial by jury.6 Thus, as of January 12, 2005, the Guidelines became "effectively advisory" and are now merely one of many factors that federal courts may consider when determining an appropriate sentence.7

Although the Court's holding restored sentencing discretion to judges, it also created a multitude of new problems for circuit courts because they must determine what constitutes a reasonable sentence for current defendants and determine which defendants convicted before Booker are entitled to resentencing.8 Circuit courts are split over whether defendants who failed to raise Sixth Amendment claims before Booker have a right to resentencing and over what factors judges may consider in determining a reasonable sentence.9 In the Third Circuit, recent decisions have out-


4. Boylan, supra note 2, at 234 (suggesting that after 1989, Guidelines "reduced the amount of discretion of judges" and "increased the severity of the sentences"); see also Peter B. Krupp, The Return of Judicial Discretion: Federal Sentencing Under "Advisory" Guidelines After United States v. Booker, 49 B.B.J. 18, 21 (2005) (claiming federal sentencing rules are "less certain than they have been" because judges have "greater discretion while sentencing defendants than they had under the mandatory Guidelines system"). Because the Guidelines no longer constrain the sentencing discretion of judges, the "opportunity for effective and effective sentencing advocacy in the federal courts is greater now than anytime since 1987." Id.


6. See id. at 244-45 (explaining that Sixth Amendment requires juries, not judges, to "find facts relevant to sentencing").

7. See United States v. Davis, 407 F.3d 162, 163 (3d Cir. 2005) (explaining that "the Court excised that provision of the statute making application of the Guidelines mandatory"). "[U]nder the post-Booker sentencing framework, District Courts will consider the applicable advisory Guidelines range in addition to factors set forth in 18 U.S.C. § 3553(a)." Id.; see also THE FEDERALIST SOCIETY FOR L. & PUB. POL'Y STUD., SUPREME COURT STRIKES DOWN MANDATORY PROVISIONS OF FEDERAL SENTENCING GUIDELINES 2 (2005), available at http://www.fed-soc.org/Publications/White%20Papers/booker.pdf (noting that although "the Guidelines are no longer mandatory and binding on federal courts, [they] must still consult them in exercising their discretion in tailoring appropriate sentences, subject to a 'reasonableness' standard of review" (citation omitted)).

8. See Pamela A. MacLean, Circuits Wrestle with Fallout from Booker: Courts Issue a Flurry of Differing Calls on Sentencings, NAT'L L.J., Feb. 14, 2005, at 1 (explaining Booker has restored sentencing discretion but also created new problems regarding resentencing and what constitutes reasonable sentences). Circuit courts, including one Sixth Circuit intra-circuit panel, have split "over whether defendants who failed to raise Booker-style claims nonetheless have a right to seek resentencing." Id.

9. See, e.g., United States v. Hughes, 401 F.3d 540, 552 (4th Cir. 2005) (noting appellate court could not know how district court would have sentenced defendant had it been operating under Booker remedial scheme). The Fourth Circuit holding mandated resentencing of all defendants with direct appeals pending even if they
lined which defendants may receive resentencing consideration and have substantially changed the roles of judges, practicing attorneys and prosecutors in the sentencing process.\textsuperscript{10}

Part II of this Casebrief reviews the ways in which \textit{Booker} redefined the role of the Guidelines in determining appropriate federal sentences.\textsuperscript{11} Part II also identifies and discusses Third Circuit cases that have interpreted and applied \textit{Booker}.\textsuperscript{12} Part III provides advice for practitioners involved in Third Circuit federal sentencing litigation at the trial level by identifying changes in the roles of judges, practicing attorneys and prosecutors under the new system.\textsuperscript{13} Part III also provides advice for practitioner-

failed to raise \textit{Booker}, finding that ignoring the error in light of \textit{Booker} would be "tantamount to performing the sentencing function ourselves." See id. at 556 (explaining that possibility defendant would receive same sentence on remand was irrelevant). The Ninth Circuit agreed, holding that all but "the truly exceptional case" will require remand for resentencing while also cautioning "[s]entencing discretion is not boundless." United States v. Ameline, 400 F.3d 646, 656 (9th Cir. 2005) (agreeing that simply affirming pre-\textit{Booker} sentences as reasonable "would be tantamount to performing the sentencing function" at appellate level). In the Second Circuit, the court will remand for resentencing if the defendant properly preserved the objection for appellate review unless the government can prove that the sentencing error was harmless. See United States v. Lake, 419 F.3d 111, 113 n.2 (2d Cir. 2005) (establishing current Second Circuit approach to resentencing). \textit{Lake} reversed the Circuit's previous approach articulated in \textit{United States v. Crosby}, 397 F.3d 103 (2d Cir. 2005). See id. (acknowledging abrogation of earlier resentencing doctrine). Under the \textit{Crosby} approach, the circuit had remanded pre-\textit{Booker} sentences to review whether the sentence under the mandatory Guidelines deviated in a "non-trivial manner" from the sentence the court would have imposed under an advisory system. See \textit{Crosby}, 397 F.3d at 103 (advocating intermediate approach, which remained for "limited purpose of permitting the sentencing judge to determine whether to resentence, now fully informed of the new sentencing regime"), abrogated by \textit{United States v. Fagans}, 406 F.3d 158 (2d Cir. 2005), as recognized by \textit{Lake}, 419 F.3d 111 (2d Cir. 2005). In the Sixth Circuit, the court took a broad approach holding that all sentences necessarily fail plain-error review and all cases on direct review must be remanded for resentencing. See United States v. Barnett, 398 F.3d 516, 525 (6th Cir. 2005) (holding sentence should be remanded for resentencing "in light of the fact that the district court judge was sentencing the defendant as if the guidelines were mandatory"). In reviewing for plain error, "the appellate court must consider whether there was plain error that affects substantial rights and that, in its discretionary view, seriously affects the fundamental fairness, integrity, or public reputation of judicial proceedings." Id.

10. See MacLean, \textit{supra} note 8, at 1 (citing Professor David N. Yellen's comments that "[t]he whole future of advisory [sentencing] guidelines will depend on how appellate courts interpret \textit{Booker's} status" in determining whether "judges have very broad freedom to substitute their judgments" or are "bound to normally apply the guidelines").

11. For a discussion of the Supreme Court's decision in \textit{Booker}, see \textit{infra} notes 15-25 and accompanying text.

12. For a discussion of the recent Third Circuit Court of Appeals interpretation and application of \textit{Booker}, see \textit{infra} notes 26-76 and accompanying text.

13. For advice to practitioners involved in Third Circuit federal sentencing litigation at the trial level identifying and explaining the substantial changes for judges, practicing attorneys and prosecutors in the new system, see \textit{infra} notes 77-120 and accompanying text.
ers involved in federal sentencing litigation at the appellate level by explaining which cases will be remanded for resentencing and describing effective litigation strategy for convincing the court to adjust an imposed sentence.  

II. A NEW SYSTEM OF FEDERAL SENTENCING

A. The Supreme Court's Booker Decision

In Booker, the Supreme Court held the mandatory application of the Federal Sentencing Guidelines unconstitutional. Analyzing the Sentencing Guidelines at issue in Booker, the Court held that the Sixth Amendment requires juries—not judges—to find facts relevant to sentencing.

14. For advice to practitioners involved in federal sentencing at the appellate level identifying which cases will be remanded for resentencing and outlining litigation strategy, see infra notes 121-35 and accompanying text.

15. See United States v. Booker, 543 U.S. 220, 244-45 (2005) (reaffirming its previous holding in Apprendi v. New Jersey, 530 U.S. 466 (2000), that any fact, other than prior conviction, “which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt”).

16. See Booker, 543 U.S. at 244 (evaluating constitutionality of mandatory sentencing scheme). The Court reviewed Booker under the precedent cases Jones v. United States, 526 U.S. 227 (1999), Apprendi v. New Jersey, 530 U.S. 466 (2000), and Blakely v. Washington, 542 U.S. 296 (2004). In Jones, the Supreme Court held that the federal carjacking statute set forth three separate offenses by the specification of elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict. See Jones, 526 U.S. at 252 (holding that because elements were not proven beyond reasonable doubt defendant’s constitutional rights had been violated). In Apprendi, the Supreme Court held that the Fourteenth Amendment’s Due Process Clause required that “any fact that increased the penalty for a state crime beyond the prescribed statutory maximum—other than the fact of a prior conviction—had to be submitted to a jury and proved beyond a reasonable doubt.” Apprendi, 530 U.S. at 489. In Blakely, the Supreme Court held that a judge’s imposition of the ninety-month sentence violated the accused’s right to a jury trial under the Sixth Amendment because the purported facts supporting the finding of deliberate cruelty had been neither admitted by the accused nor found by a jury. See Blakely, 542 U.S. at 301 (holding that trial court unconstitutionally considered facts supporting defendant’s sentence). The Court cited the Apprendi rule “that other than the fact of a prior conviction, any fact that increased the penalty for a crime beyond the prescribed statutory maximum had to be submitted to a jury[ ] and proved beyond a reasonable doubt.” Id. (ensuring that judge’s authority to sentence is derived wholly from jury’s verdict).

17. U.S. Const. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Id.
tencing. Specifically, the Guidelines violated the Sixth Amendment because they required judges to increase sentences above the statutory maximum on the basis of facts other than those admitted by the defendant, based on a prior conviction or found by a jury beyond a reasonable doubt. The Court noted that the Guidelines effectively "had the force and effect of laws" because they were "mandatory and binding[.]" If the Guidelines had been merely advisory, "their use would not implicate the Sixth Amendment" because judges would be free to consider "any unusual blameworthiness" in imposing a sentence within the range of the statute.

Under the mandatory Guidelines, judges effectively "determined the upper limits of sentencing," a violation of the Sixth Amendment right to be tried by an impartial jury. Additionally, in defining the appropriate standard of review for sentencing appeals, the Court instructed appellate courts to apply a reasonableness standard "across the board . . . irrespective of whether the trial judge sentences within or outside the Guideline

18. See Booker, 543 U.S. at 244 (noting that denial of "the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment"—would be "fundamentally opposite to the spirit of our [C]onstitution").

19. See id. (holding Sixth Amendment right to jury trial applies to Federal Sentencing Guidelines). In Booker, the defendant was charged with possessing fifty grams of cocaine with intent to distribute and was found guilty of violating 21 U.S.C. § 841(a)(1), which prescribed a sentence of ten years to life imprisonment. See id. at 227 (providing background on Booker's criminal prosecution). Due to Booker's criminal history and the quantity of drugs, the Guidelines called for a "base" sentence of 17 years and 6 months to 21 years and 9 months. See id. (describing mandatory sentence range required under mandatory Guidelines). At the sentencing hearing, however, the judge found by a preponderance of the evidence that additional facts mandated a sentence of thirty years to life imprisonment under the Guidelines. See id. (reiterating trial judge's sentencing determination within mandatory Guideline range). The judge imposed a sentence at the low end of the Guidelines range, "based solely on the guilty verdict in this case." Id. at 229.

20. See id. at 233-34 (citing 18 U.S.C. § 3553(b) of Sentencing Guidelines that direct that courts shall "impose a sentence of the kind, and within the range" established by Guidelines, "subject to departures in specific, limited cases").

21. See id. ("If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment.").

22. See id. at 234-35 (discussing Sixth Amendment violation under facts of Booker). In Booker, the judge increased the defendant's sentence based on facts that the court found by a preponderance of the evidence at sentencing but that were not found by the jury beyond a reasonable doubt. See id. at 227 (concluding by preponderance of evidence that Booker had possessed additional 596 grams of crack and that he was guilty of obstructing justice). This violated the defendant's Sixth Amendment rights because the judge may impose a sentence "solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." Id. at 231-32.
range."²³ In a separate majority opinion,²⁴ the Court rendered the Guidelines advisory by invalidating two statutory provisions that made them mandatory and by permitting judges to consider other statutory concerns when selecting appropriate sentences.²⁵

B. Recent Third Circuit Cases Interpreting and Applying Booker

Following the Court's drastic alteration of the Guidelines, recent Third Circuit decisions have defined Booker's application and scope.²⁶ In subsequent cases, the Third Circuit addressed several issues unresolved by Booker, including remands for resentencing in light of Booker;²⁷ whether defendants have the right to challenge the reasonableness of their sentence in appellate courts;²⁸ and whether Booker is retroactive for purposes of collateral habeas review under 28 U.S.C. § 2255.²⁹ Additionally, the Third Circuit determined that defendants sentenced pre-Booker who have waived the right to raise sentencing issues on appeal are not eligible for

²³ See id. at 242-44 (holding that appellate judges will be more than capable of applying reasonableness standard "across the board").

²⁴ See id. at 220 (providing constitutional analysis of Guidelines in first opinion and remedy in second opinion). The Booker decision consisted of two separate majority opinions. See id. at 226, 244 (providing holding in each decision). The first majority opinion addressed the constitutionality of the federal Guidelines and was authored by Justice Stevens and joined by Justices Scalia, Souter, Thomas and Ginsburg. See id. at 226 (rendering Sentencing Guidelines unconstitutional).

²⁵ See id. at 245-46 (determining that "provision of the federal sentencing statute that makes the Guidelines mandatory" was "incompatible with [the court's] constitutional holding" and therefore was "severed and excised"). The Court modified the Federal Sentencing Act by making the Guidelines advisory and requiring a sentencing court to consider the Guidelines ranges pursuant to 18 U.S.C. § 3553(a)(4) while permitting "the court to tailor the sentence in light of other statutory concerns as well[.]") Id. at 245-46.

²⁶ For a further discussion of recent Third Circuit decisions that have defined Booker's application and scope, see infra notes 32-76.

²⁷ See United States v. Davis, 407 F.3d 162, 166 (3d Cir. 2005) (holding that when appellant has raised Booker claim and established plain error, court will "vacate the sentence[ ] and remand for consideration of the appropriate sentence by the District Court").

²⁸ See United States v. Cooper, 437 F.3d 324, 332 (3d Cir. 2006) (holding that even though defendant's sentence was at highest end of Guidelines range, defendant "did not meet her burden of showing that the sentence imposed was unreasonable").

²⁹ See Lloyd v. United States, 407 F.3d 608, 615-16 (3d Cir. 2005) (affirming dismissal of inmate's motion to vacate his sentence because "Booker did not apply retroactively" if judgment was final pre-Booker), cert. denied, 126 S. Ct. 288 (2005).
resentencing after *Booker* and that application of the mandatory Guidelines to alternative sentences does not raise *Booker* concerns.

1. Determining Which Sentences to Reconsider

In *United States v. Davis*, the Third Circuit first articulated its standard for reconsidering sentences in light of *Booker*. Prior to *Davis*, the court had remanded cases for resentencing in accordance with *Booker* by providing a standardized explanation that lacked guidance for dealing with plain error issues. In *Davis*, the court held that all defendants with direct appeals pending, even those who failed to raise *Booker*-style claims in the lower court, were entitled to resentencing. The court rejected the government’s position that defendants must meet a “plain error standard” in which each defendant has the burden of showing prejudice, meaning that his or her sentence would have been different had the defendant been sentenced under the nonmandatory Guidelines.

Instead, the court held that although the plain error test generally places the burden on the criminal defendant to demonstrate “specific prejudice” resulting from the district court’s error, “prejudice can be pre-

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31. See United States v. Hill, 411 F.3d 425, 426-27 (3d Cir. 2005) (rejecting argument that alternative sentence was unconstitutional under Guidelines pursuant to Supreme Court’s holding in *Booker*).
32. 407 F.3d 162 (3d Cir. 2005).
33. See id. at 163 (denying government’s motion to defer disposition of all sentencing appeals pending resolution of its petition for rehearing en banc). Under *Davis*, all defendants challenging their sentence on direct appeal must be given the opportunity “to demonstrate plain error and prejudice” and each case will be individually evaluated and remanded on a case-by-case basis. See id. at 163 (providing guidance about which defendants may receive resentencing consideration post-*Booker*).
34. See, e.g., United States v. Bruce, 405 F.3d 145, 150 (3d Cir. 2005) (“In light of the determination of the judges of this court that the sentencing issues appellant raises are best determined by the District Court in the first instance, we will vacate the sentence and remand for resentencing in accordance with *Booker*.”).
35. See *Davis*, 407 F.3d at 165-66 (holding that because defendants were able to demonstrate plain error on appeal that affected their substantial rights, court may remedy sentencing error to preserve “fairness, integrity, or public reputation” of affected proceeding).
36. See id. at 163-64 (acknowledging that review of post-*Booker* cases requires plain error analysis because many defendants did not raise sentencing issue before district court). The Court further noted that “[d]irect appeals of sentences imposed before *Booker* generally present two kinds of claims: first, defendants whose sentences were enhanced by judicial fact-finding raise Sixth Amendment claims; second, defendants who contend the District Courts erroneously treated the Guidelines as mandatory rather than advisory.” Id. The court cited a Sixth Circuit holding that found an appellate court would be “usurping the discretionary power granted to the district courts by *Booker* if [the appellate court] were to assume that the district court would have given [the defendant] the same sentence post-*Booker*.” Id. at 165 (citing United States v. Oliver, 297 F.3d 369, 380 n.3 (6th Cir. 2005)) (explaining judicial purpose for allowing sentencing reconsideration post-*Booker*).
sumed” because the courts sentenced under an erroneous mandatory scheme.37 The court found that defendants sufficiently demonstrate that their substantial rights have been affected if “the District Court erred by treating the Guidelines as mandatory rather than advisory.”38 The court noted that this prejudice exists in sentences issued before Booker even if the defendant made no objection to the sentence while the Guidelines were still mandatory.39 The Davis court held, therefore, that Booker applies to all cases pending on direct review.40 By remanding the cases, the court ensures that each defendant to whom Booker applies is sentenced in accordance with it.41 This approach results in uniform treatment of post-Booker defendants on direct appeal, “fostering certainty in the administration of justice and efficient use of judicial resources.”42

37. See id. at 165 (noting that certain types of error on plain error review should be presumed prejudicial even if defendant cannot make specific showing of prejudice). The court articulated its rationale as follows:

[W]e cannot ascertain whether the District Court would have imposed a greater or lesser sentence under an advisory framework. But the mandatory nature of the Guidelines controlled the District Court’s analysis. Because the sentencing calculus was governed by a guidelines framework erroneously believed to be mandatory, the outcome of each sentencing hearing conducted under this framework was necessarily affected. Although plain error jurisprudence generally places the burden on an appellant to demonstrate specific prejudice flowing from the District Court’s error, in this context—where mandatory sentencing was governed by an erroneous scheme—prejudice can be presumed.

Id.

38. See id. (noting that failure to remand for resentencing could “adversely affect the fairness and integrity of the proceedings” and therefore defendants sentenced under mandatory system and challenging sentences on direct appeal “may be able to demonstrate plain error and prejudice”). In the Booker context, prejudice can be presumed because the district court sentenced all defendants under the mandatory Guidelines that were later found to be merely advisory. See id. at 164-65 (providing rationale for finding plain error and prejudice in all cases on direct appeal).

39. See id. at 165-64 (citing United States v. Barnett, 398 F.3d 516, 528 (6th Cir. 2005)) (holding that prejudice should be presumed if “it would be exceedingly difficult” for defendant raising Booker claim to show that district court’s failure to treat Sentencing Guidelines as advisory affected defendant’s sentence).

40. See id. at 165 (noting that remanding all cases on direct review ensures each defendant is sentenced appropriately under Booker).

41. See id. at 165-66 (opining that homogenous treatment of post-Booker defendants on direct appeal promotes consistency in administration of justice).

42. Id. (explaining that remanding post-Booker defendants on direct appeal establishes efficient use of justice and correcting sentencing errors does not result in excessive difficulties on remand); see also United States v. Booker, 543 U.S. 220, 244 (2005) (noting that in some cases, judge factfinding may effect expedient and efficient defendant sentencing but “the interest of fairness and reliability protected by the right to a jury trial . . . has always outweighed the interest in concluding trials swiftly”). The Supreme Court held as follows:

However convenient new methods of trial may appear at first (as doubtless all arbitrary powers, well executed, are the most convenient) yet let it be again remembered, that delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in
2. **Standard of Review on Appeal: Evaluating the Reasonableness of the Sentence**

When sentencing a defendant, the district court must consider the factors listed in 18 U.S.C. § 3553(a). These factors include: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed; (3) the kinds of sentences available; (4) the kinds of sentences and the sentencing range established for each; (5) any pertinent policy statement; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.

more substantial matters; that these inroads upon this sacred bulwark of the nation are fundamentally opposite to the spirit of the Constitution; and that, though begun in trifles, the precedent may gradually increase and spread, to the utter disuse of juries in questions of the most momentous concerns.

Id.


44. See id. § 3553(a)(1) (allowing sentencing judges to consider various factors indicating nature of defendant’s crime, including use or possession of weapon, impact on victim, premeditation, proximity to school, racial or ethnic hatred, participation of defendant, scope or magnitude of offense, number of victims, quantity or purity of drugs and vulnerability of victim).

45. See id. § 3553(a)(2)(A)-(D) (providing sentencing considerations that promote goals criminal punishment). In reviewing “the need for the sentence imposed,” the court will evaluate whether the sentence reflect[s] the seriousness of the offense, . . . promote[s] respect for the law, . . . provide[s] just punishment for the offense, . . . afford[s] adequate deterrence to criminal conduct, . . . protect[s] the public from further crimes of the defendant and . . . provide[s] the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

Id.

46. See, e.g., United States v. Wollenzen, 972 F.2d 890, 892 (8th Cir. 1992) (finding that although trial court satisfied statute’s command to consider “the kinds of sentences available,” case should be remanded for specific consideration of probation where presentence report clearly excluded probation option).


48. See § 3553(a)(5)(A)-(B) (requiring judges to consider pertinent public policy). Pertinent policy statements include those “issued by the Sentencing Commission pursuant to [the] United States Code.” Id.

49. See, e.g., United States v. Wilson, 350 F. Supp. 2d 910, 912 (C.D. Utah 2005) (holding that while Booker renders Guidelines advisory, courts are still obligated to consider need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct).

50. See, e.g., United States v. Lucas, 889 F.2d 697, 698 (6th Cir. 1989) (upholding upward departure where bank robber forced tellers and customers to disrobe because statute directs departure based on extent of injury to victims).
In *United States v. Cooper*, the Third Circuit declined to hold that a sentencing judge is presumed to have considered all of the § 3553(a) factors if a sentence is imposed within the applicable Guidelines range. Instead, the court held that it would hear direct appeals in which defendants could challenge the reasonableness of a sentence. The court held that appellate courts must apply a deferential standard of review to ensure the trial court considered the § 3553(a) factors and also "ascertain whether those factors were reasonably applied to the circumstances of the case." In determining the reasonableness of sentences, the appellate court must "be satisfied the sentencing court has exercised its discretion by considering the relevant factors" and must ascertain whether those factors were "reasonably applied to the circumstances of the case."

While there are "no magic words" that a sentencing judge must use in imposing a sentence, the sentencing court must consider the factors in § 3553(a) as well as any other case-factors raised by the parties. Establishing this case-by-case analysis, the Third Circuit rejected the lower court’s approach that suggested "a sentencing judge is presumed to have considered all of the § 3553(a) factors if a sentence is imposed within the applicable guidelines range." Instead, the court held that although a sentence within the Guideline range is "more likely to be reasonable than one that lies outside the advisory guidelines range, a within guidelines sentence is not necessarily reasonable per se."  

51. 437 F.3d 324 (3d Cir. 2006).
52. Id. at 333 (determining appropriate standard of review for post-Booker sentencing appeals in Third Circuit).
53. See id. at 327 (holding “[w]e have jurisdiction to review Cooper’s sentence for reasonableness under 18 U.S.C. § 3742(a) (1),” which authorizes appeal of sentences “imposed in violation of law”).
54. Id. at 333 (citing United States v. Booker, 543 U.S. 220, 258-65 (2005)) (noting Sentencing Reform Act “continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range”).
55. Id. at 329 (finding record “must demonstrate the trial court gave meaningful consideration to the § 3553(a) factors”). The court need not “discuss every argument made by a litigant if an argument is clearly without merit[,]” nor must it consider each § 3553(a) factor “if the record makes clear the court took the factors into account in sentencing[.]” Id.
56. Id. at 329-30 (holding that because trial court is “in the best position to determine the appropriate sentence in light of the particular circumstances of the case,” appellate court should apply “deferential standard” of review).
57. See id. at 332 (acknowledging that sentence within Guidelines has greater probability of being reasonable than one outside Guidelines).
58. Id. at 329-330 (citing United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005)) (holding that “[a]lthough a within-guidelines sentence demonstrates the court considered one of the § 3553(a) factors . . . [i]t does not show the court considered the other standards reflected in that section”), cert. denied, 126 S. Ct. 43 (2005).
59. Id. at 331 (noting such per se rules “would come close to restoring the mandatory nature of the guidelines” and would “risk being invalidated as contrary to the Supreme Court’s holding in [Booker]”).
3. Booker’s Retroactivity in Habeas Proceedings

In *Lloyd v. United States*, the Third Circuit followed other circuits in holding that *Booker* is not retroactive for purposes of collateral attack under 28 U.S.C. § 2255. In its analysis, the court noted that a new rule of criminal procedure such as *Booker* will generally “not be applicable to those cases which have become final before the new [rule is] announced.” A new rule will, however, apply retroactively if it is a “watershed [rule] of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding.” The court declined to characterize *Booker* as a watershed change because it did not create a new criminal procedure rule that considerably increased the certainty or accuracy of the sentencing process. For purposes of habeas petitions, therefore, *Booker* does not apply retroactively to cases that became final before it was issued.


61. See id. at 610 (noting that “[a]ll courts of appeals have considered the issue of whether the rule of law announced in [Booker] applies retroactively to prisoners” in initial § 2255 motion stage when *Booker* was issued “have concluded it does not”). Section 2255 states that if a right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review, the limitation period for a motion to vacate runs from the later of the date on which the judgment of conviction becomes final or the date on which the right asserted was initially recognized by the Supreme Court. See 28 U.S.C. § 2255 (2000) (providing procedure for prisoners to assert right to be released because sentence imposed was in violation of Constitution and to move court that imposed sentence to vacate, set aside or correct sentence).

62. *Lloyd*, 407 F.3d at 611 (citation omitted) (noting this general rule applies “equally to a federal habeas corpus petitioner who wishes to collaterally attack his conviction, unless an exception applies”).

63. *Id.* at 611-12 (citing *Teague v. Lane*, 489 U.S. 288, 310 (1989)) (explaining test for retroactivity). The three-criterion *Teague* test determines whether a new criminal procedure rule applies retroactively. See *Id.* (describing elements of test). Under the *Teague* test, the court must first determine whether the inmate’s conviction became final prior to the Supreme Court’s decision in *Booker*. See *Id.* (explaining and applying *Teague* test). Second, the court must determine whether the rule announced in *Booker* qualifies as “new.” See *Id.* (noting that *Teague* differentiates between new substantive rules and new procedural rules and that *Booker* qualifies as new procedural rule). Third, the court must examine whether the new procedural rule qualifies under one of *Teague*’s two narrow exceptions to the non-retroactive application of such rules. See *Id.* (explaining and applying *Teague* test).

64. See *Id.* at 615-16 (finding sole change to criminal process post-*Booker* is “the degree of flexibility judges would enjoy in applying the guideline system”).

65. *Id.* (announcing holding of case). The court justified its holding by finding that “[b]y creating an advisory federal sentencing regime, the *Booker* Court did not announce a new rule of criminal procedure that significantly increases the ‘certitude’ or ‘accuracy’ of the sentencing process[,] nor did *Booker* fundamentally improve the accuracy of the criminal process.” *Id.* at 613-15 (explaining that *Booker* is not retroactive for purposes of collateral attack under *Teague* test). The court also cited the Seventh Circuit’s holding that *Booker* was not a “watershed” change that fundamentally improves the accuracy of the criminal process because criminal sentences would be determined in the same way if they were sentenced today; the only change would be the degree of flexibility judges would enjoy in applying
4. Waiver of Right to Appeal Sentence

In United States v. Lockett,66 the Third Circuit refused to remand a case for resentencing in light of Booker because the appellant waived the right to raise sentencing issues on appeal, having reserved only the right to appeal a motion to suppress.67 The court reasoned that the subsequent change in the sentencing law invalidated neither the appellate waiver nor the guilty plea itself.68 The court noted that the Supreme Court has found that "where subsequent developments in the law expand a right that a defendant has waived in a plea agreement, that change does not make the plea involuntary or unknowing or otherwise undo its binding nature."69 A defendant who pleads guilty and waives the right to appeal assumes the risk that future developments in the law will arise that the defendant will be unable to utilize.70 A pre-Booker waiver of appeal does not become unknowing or involuntary simply because of Booker's unanticipated ruling and will remain binding on the defendant.71

5. Alternative Sentences

In United States v. Hill,72 the Third Circuit evaluated the constitutionality of alternative sentences imposed under the mandatory Guidelines.73 the guideline system." Id. at 615 (quoting McReynolds v. United States, 397 F.3d 479, 481 (7th Cir. 2005)).

66. 406 F.3d 207 (3d Cir. 2005).

67. See id. at 214 ("[W]here a criminal defendant has voluntarily and knowingly entered into a plea agreement in which he or she waives the right to appeal, the defendant is not entitled to resentencing in light of Booker.").

68. See id. at 213 ("Just as subsequent changes in the law do not undercut the validity of an appellate waiver, they do not render the plea itself invalid.").

69. Id. (explicating that, as Supreme Court has indicated, "absent misrepresentation or other impermissible conduct by state agents, ... a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise." (alteration in original) (citing United States v. Bradley, 400 F.3d 459, 463 (6th Cir. 2005), cert. denied, 126 S. Ct. 145 (2005)).

70. See id. at 214 (finding that "[t]he possibility of a favorable change in the law occurring after a plea agreement is merely one of the risks that accompanies a guilty plea").

71. See id. (joining four other courts of appeals in finding that when defendant enters into plea agreement "voluntarily and knowingly," defendant waives right to appeal and is "not entitled to resentencing in light of Booker").

72. 411 F.3d 425 (3d Cir. 2005).

73. See id. at 426 (rejecting argument of appellant, who contended his alternative sentence under Guidelines was unconstitutional pursuant to Supreme Court's holding in Blakely and Booker). Even though Booker was still pending before the Supreme Court at the time of trial, the district court opted to apply the Guidelines to the defendant's sentence rather than deviate from them. See id. (explaining district court's reasoning in opting to await further guidance and sentence defendant under pre-Booker scheme). The court also issued an alternative sentence following the suggestions of Blakely v. Washington basing the sentence "on an indeterminate sentencing scheme." See id. (providing district court's choice to impose alternative sentence).
Provided that a defendant’s alternative sentence is based on the defendant’s criminal history and factual stipulations in a plea agreement, the sentence does not violate the Sixth Amendment. Moreover, errors in alternative sentences constitute harmless error under *Booker* because the alternative sentence would be the same as a sentence imposed under *Booker*. The court joined several sister circuits in holding that if a “District Court clearly indicates that an alternative sentence would be identical to the sentence imposed under the Guidelines, any error that may attach to a defendant’s sentence under *Booker* is harmless.”

III. THE IMPACT ON FEDERAL SENTENCING IN THE THIRD CIRCUIT AFTER THE CIRCUIT’S RECENT INTERPRETATIONS OF *BOOKER*

Federal sentencing in the Third Circuit will be substantially different after cases interpreting *Booker*. Recent data obtained from Third Circuit

74. See id. (relying on precedent that held facts of prior convictions need not be submitted to jury). Because only those facts “necessary to support a sentence exceeding the maximum authorized by the facts” need to be “admitted by the defendant or proved to a jury beyond a reasonable doubt,” the Sixth Amendment was not implicated. *Id.* at 426 n.1 (citing United States v. Booker, 543 U.S. 240, 244 (2005)).

75. See id. at 426 (holding that if alternative sentence imposed under indeterminate sentencing scheme would be identical to Guidelines sentence, any error that attaches to defendant’s sentence under *Booker* is harmless).

76. *Id.* (finding that “it is clear that the District Court believed Appellant’s sentence was justified both, and alternatively, by the Sentencing Guidelines and under an indeterminate sentencing scheme”).

Other circuits have also held that alternative sentences will be affirmed if the trial court has stated that it would have imposed the same sentence even absent the mandatory Guidelines. See, e.g., United States v. Antonakopoulos, 399 F.3d 68, 80 (1st Cir. 2005) (holding that a pre-*Booker* sentence does not necessarily “threaten[ ] the fairness, integrity, or public reputation of judicial proceedings, or undermine our confidence in the outcome of the sentence”); see also United States v. Marcussen, 403 F.3d 982, 985 (8th Cir. 2005), *cert. denied*, 126 S. Ct. 457 (2005) (stating that because district court “would have imposed [the same sentence] were the mandatory guidelines scheme not in place . . . any error in imposing the alternative sentence . . . was harmless”); United States v. Thompson, 403 F.3d 533, 536 (8th Cir. 2005) (finding that “the district court’s announcement that it would sentence [defendant] to 46 months’ imprisonment regardless of whether the Guidelines were mandatory renders any remand futile” and thus “any error stemming from *Booker* was harmless”); United States v. Paladino, 401 F.3d 471, 483 (7th Cir. 2005) (declaring that because same sentence would have been imposed regardless of mandatory Guidelines “there is no prejudice to the defendant”), *cert. denied*, 126 S. Ct. 1343 (2005).


Prior to *Booker*, the Third Circuit evaluated sentencing errors to determine whether they were harmless before remanding for resentencing. See *Vazquez*, 271 F.3d at 105 (upholding defendant’s sentence because any error did not affect sentence). In *Vazquez*, defendant was convicted of drug conspiracy under 21 U.S.C. §§ 846 and 841’ (b) (1) (A), which prescribed a maximum sentence of 20 years. See
sentencing courts indicates that the new advisory Guidelines are having a noticeable effect on federal sentencings. In order to effectively litigate cases involving federal sentencing, practitioners should be familiar with changes to the sentencing system at the trial level and understand that the roles of judges, defense attorneys and prosecutors are substantially different than under the pre-Booker mandatory Guidelines. Finally, in determining whether to appeal a defendant's federal sentence in light of Booker, practitioners should know which sentences can be appealed and should be familiar with effective litigation tactics at the appellate level.

id. at 96 (providing base sentence that court disregarded in imposing 292-month sentence). Because of three facts found by the judge, the district court sentenced him to more than twenty-four years' imprisonment. See id. at 96-97 (increasing defendant's sentence to over twenty-four years based on judicially found facts regarding drug quantity, defendant's leadership role and attempted obstruction of justice). The court found the sentence erroneous under Apprendi because the "judge, rather than the jury, determined drug quantity and then sentenced Vasquez to ... a term in excess of his ... statutory maximum." Id. at 99. Despite the sentencing error, the court held that the defendant failed to show an effect on his substantial rights because the drug quantity was never in dispute. See id. at 105 (discussing appellate court's rationale under pre-Booker regime). Accordingly, the court held that the sentence would not have changed if the government had submitted drug quantity for a jury determination. See id. at 104-06 (finding that drug quantity would nonetheless be consistent because "the lab report which was admitted into evidence in this cases substantiates the amount, and there [was] never any question about the amount").

In Davis, the court noted that it "did not have the benefit of Booker when deciding Vasquez." Davis, 407 F.3d at 164 n.3. If tried today, Vasquez would be considered under the present standard, which requires that, if the "District Court imposed a sentence greater than the maximum authorized by the facts found by the jury," then the outcome "was altered to the defendant's detriment." Id. Thus, the mandatory enhancement of a sentence in violation of the Sixth Amendment is prejudicial and affects the substantial rights of the defendant. See id. at 164-65 (noting that ascertaining whether court would have imposed greater or lesser sentence under advisory framework is irrelevant to inquiry). The court's opposite holding in Vasquez would no longer be accurate. See id. (holding that defendant whose "sentence was enhanced based on facts neither admitted to nor found by a jury ... can demonstrate plain error and may be entitled to resentencing"); see also id. at 163 n.3 (explaining that Vasquez court did not hold that constitutional violation "at sentencing will never affect a defendant's substantial rights" but rather that "substantial rights of the individual defendant in that case were not affected").


79. For a discussion of the new roles of judges, defense attorneys and prosecutors in Third Circuit federal sentencing cases, see infra notes 88-122 and accompanying text.

80. For a discussion of the instances in which an imposed sentence can be appealed and recommendations for effective litigation tactics at the appellate level, see infra notes 121-35 and accompanying text.
A. Post-Booker Statistical Changes to Federal Sentences

Although recent data suggests that sentences may not be changing dramatically on the national level, data from the Third Circuit indicates a noticeable change in the percentage of sentences that deviate from the Guideline range. Data collected by the United States Sentencing Commission from 2001 through 2005 shows a departure from sentencing trends in the Third Circuit after Booker. Over the period from 2004 to 2005, a substantial percentage of sentences fell outside the Guideline range. The following chart represents the relationship between post-Booker sentences and the now-advisory Guidelines range within the Third Circuit.

<table>
<thead>
<tr>
<th>Length of Sentence Relative to Guideline Range</th>
<th>2001</th>
<th>2002</th>
<th>2003</th>
<th>2004</th>
<th>2005-06 (Booker)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Within Range</td>
<td>60.2%</td>
<td>58.9%</td>
<td>62.3%</td>
<td>62.6%</td>
<td>51.9%</td>
</tr>
<tr>
<td>Upward Departures</td>
<td>0.5%</td>
<td>0.9%</td>
<td>0.9%</td>
<td>0.6%</td>
<td>0.2%</td>
</tr>
<tr>
<td>Otherwise Above Range</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>1.2%</td>
</tr>
<tr>
<td>Substantial Assistance Departures</td>
<td>30.6%</td>
<td>32.3%</td>
<td>28.8%</td>
<td>30.3%</td>
<td>27.5%</td>
</tr>
<tr>
<td>Other Gov't Sponsored Departures</td>
<td></td>
<td></td>
<td>0.6%</td>
<td>0.8%</td>
<td>1.7%</td>
</tr>
<tr>
<td>Other Downward Departures</td>
<td>8.8%</td>
<td>7.9%</td>
<td>7.4%</td>
<td>5.8%</td>
<td>4.1%</td>
</tr>
<tr>
<td>Otherwise Below Range</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>13.5%</td>
</tr>
</tbody>
</table>

The category “Within Range” represents the proportion of sentences falling within the range suggested by the Guidelines. "Upward Departures" are those more severe than the Guidelines suggestions. "Otherwise Above Range" includes sentences imposed above range for reasons that are not affirmatively and specifically identified in the provisions, policy statements or commentary of the federal Guidelines Manual as well as cases for which the sentencing judge provided no reason for sentencing outside the range. "Substantial Assistance Departures" are those cases in which a defendant’s substantial government assistance was considered in imposing the sentence. See U.S. Sentencing Guidelines Manual § 5K1.1 (2004), held advisory by United States v. Booker, 543 U.S. 220, 244-45 (2005) (indicating consistent percentages in this category both before and after Booker). “Other Government Sponsored Departures” are those cases where a sentencing departure occurred because prosecution initi-
2006, the Third Circuit saw an 11% decrease in the number of sentences within the range recommended by the Guidelines. Additionally, the elimination of the mandatory nature of the Guidelines resulted in a 1.2% increase in sentences above the Guideline range and a 13.5% increase in sentences below the range. This data indicates that the previously restricted sentencing judges are exercising their newfound discretion to impose sentences below the Guideline range in roughly one out of seven cases. With a new federal sentencing system that results in mitigated sentences in such a large number of cases, Third Circuit practitioners should be well-informed about the reasons for these sentencing departures.

B. Implications for Third Circuit Practitioners in Federal Sentencing Cases at the Trial Level

In order to effectively argue a federal sentencing case, Third Circuit practitioners should be aware of changes to the federal sentencing system at the trial level and understand that the roles of judges, defense attorneys and prosecutors are substantially different than in pre-Booker cases. First, while judges have regained substantial sentencing discretion and are

ated, proposed or stipulated to a sentence outside of the range pursuant to a plea agreement or as part of a non-plea negotiation. See SENTENCING UPDATE, Feb. 14, 2006, supra note 78, at 2 n.6 (reflecting slight increase in this category post-Booker). “Other Downward Departures” are cases with sentences imposed below range for reasons limited to, and specifically identified in the provisions, policy statements or commentary of the Federal Guidelines Manual. See id. at 2 nn.2-3 (showing gradual decrease over last five years). “Otherwise Below Range” are those sentences that are less severe than the Guidelines suggestions. See id. at 2 n.5 (indicating substantial increase of post-Booker sentences being imposed below range).

84. See SENTENCING UPDATE, Feb. 14, 2006, supra note 78, at 8 (reporting data on sentences imposed within Guideline range before and after Booker). The percentage calculation represents the number of sentences imposed above and below the Guideline range that would have been prohibited under the pre-Booker system. See id. (documenting sentences imposed within range fell from 62.6% to 51.9% post-Booker).

85. See id. (reflecting data showing percentages of sentences imposed above range rose to 1.2% and sentences imposed below range rose to 13.5%, none of which could not have been imposed in pre-Booker regime).

86. See, e.g., id. (documenting effects of judicial discretion in sentencing). Judges imposed sentences above and below the Guideline range in 15.1% of the cases—roughly one out of seven sentences. See id. (reporting sentencing statistics). None of these sentences would have been proper under the pre-Booker Sentencing Guidelines. Cf. id. (showing zero cases of sentences imposed below or above Guideline range pre-Booker).


88. See Krupp, supra note 4, at 18 (claiming "trial judges will have greater discretion while sentencing defendants"); Jeffrey Standen, The End of the Era of Sentencing Guidelines: Apprendi v. New Jersey, 87 IOWA L. REV. 775, 788-89 (2002) (claiming mandatory Guidelines increased prosecutorial discretion over charging and plea bargaining). For a further discussion of the Third Circuit's recent sentencing decisions, see supra notes 26-76 and accompanying text; for a further dis-
merely required to "take [the Guidelines] into account when sentencing," this discretion is not without limitation. Second, defense counsel may now introduce proof of mitigating characteristics that were formerly ignored by the Guidelines. Third, prosecutors will now have to make decisions about charges and plea bargains in light of the increase in judicial discretion and the newly admissible evidence of a defendant's mitigating personal characteristics.

1. The Post-Booker Role of Judges

While judges have regained substantial sentencing discretion, this discretion is not unfettered. Although the Supreme Court has rendered the Guidelines advisory, it has also made clear that they remain a crucial factor in determining individual sentences. Booker does not repeal nor repudiate the Guidelines and instead merely restores limited judicial discretion within the Guideline framework. Using the Guidelines in this advisory capacity acts as a safeguard against the reemergence of the pre-Guideline sentencing problems of grossly disparate and inconsistent sentences. District courts will now consider the applicable advisory Guidelines range in addition to the statutorily defined factors in 18 U.S.C.

cussion of the new changes to the Federal Sentencing Guidelines in the Third Circuit, see supra notes 77-87 and infra notes 89-142 and accompanying text.

89. See United States v. Booker, 543 U.S. 220, 264 (2005) ("[D]istrict courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing."). For a discussion of the new role of judges post-Booker, see infra notes 92-99 and accompanying text.

90. For a discussion of the new role of defense counsel post-Booker, see infra notes 100-07 and accompanying text.

91. For a discussion of the new role of the prosecutor post-Booker, see infra notes 108-20 and accompanying text.

92. See Krupp, supra note 4, at 18-19 (noting that despite increased judicial discretion, § 3553(a) "remains in effect and sets forth numerous factors that guide sentencing").

93. See Booker, 543 U.S. at 244 (reminding that Guidelines should still be thoughtfully and meaningfully "considered"); see also Kevin R. Reitz, The Enforceability of Sentencing Guidelines, 58 Stan. L. Rev. 155, 156 (2005) (claiming that although Booker "reduced the mandatory character of the Federal Guidelines," degree of change should not be overstated because "[t]he Court has not made the Federal Guidelines toothless, nor has it reinstated the kind of sentencing discretion held by district court judges in the days of indeterminate sentencing").

94. See James G. Carr, Some Thoughts on Sentencing Post-Booker, 17 Fed. Sent’g Rep. 295, 295 (2005) (claiming that Booker restores "substantial but not unlimited judicial discretion, while restraining that discretion within the Guideline framework"). The Court's ruling "that the Guidelines are advisory makes clear that the Guidelines necessarily play a crucial role in the determination of individual sentences." Id.

95. See id. (arguing that maintaining Guidelines as advisory will "result in less disparity in the sentences of like offenders engaging in like criminal conduct than under the pre-Booker mandatory Guideline system"); see also Walton, supra note 3, at 389 (illustrating United States Sentencing Commission's task to create uniform, honest and proportionate sentencing Guidelines to avoid gross sentencing aberration).
§ 3553(a).96 Judges must confine themselves to the statute’s factors, but they may use their discretion in determining which of the factors to consider in formulating a sufficient sentence.97 With this judicial discretion, judges are no longer required to focus strictly on the offense but can also consider the characteristics of the individual defendant in imposing the proper sentence.98 Consequently, district courts can no longer simply “add up figures and pick a number within a narrow range” but instead “must consider all of the applicable factors, listen carefully to defense and government counsel, and sentence the person before them as an individual.”99

2. The Post-Booker Role of Defense Counsel

The discretionary framework changes federal sentencing by allowing criminal defendants to introduce proof of mitigating characteristics that were formerly ignored by the Guidelines.100 Consequently, defense counsel should alter litigation strategies to introduce any relevant mitigating evidence.101 Courts will usually impose a sentence within the advisory range unless defense counsel presents “an aggravating or mitigating circumstance” that the Sentencing Commission did not consider when creat-

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96. See United States v. Davis, 407 F.3d 162, 163 (3d Cir. 2005) (noting that “[u]nder the post-Booker sentencing framework, District Courts will consider the applicable advisory Guidelines range in addition to factors set forth in 18 U.S.C. § 3553(a)”).


99. See Margareth Etienne, Into the Briar Patch?: Power Shifts Between Prosecution and Defense After United States v. Booker, 39 VAL. U. L. REV. 741, 741 n.54 (2005) (explaining that “good judging is difficult, time-consuming work” and post-Booker system will require greater judicial consideration than under systematic Guidelines); see also Ranum, 353 F. Supp. 2d at 987 (claiming sentencing will be “harder now than it was” pre-Booker).

100. See David L. McColgin & Brett G. Sweitzer, Grid and Bear It: Post-Booker Sentencing Litigation Strategies—Part 2, CHAMPION, Dec. 2005, at 42 (explaining that “[f]rom an advocacy perspective, Booker returns sentencing to the pre-guidelines days in which there were no limits on what could be considered (and could actually have an impact) at sentencing”). Given district courts’ new ability to hear arguments that humanize the defendant, defense counsel “should make any and all arguments that will ... mitigate guilt.” Id.

101. See id. (advising defense counsel to “make any and all arguments that will humanize the defendant, mitigate guilt, and encourage the judge to impose the lowest possible sentence”). For a further discussion on how defense counsel should alter their previous litigation strategies to reflect the advisory Guidelines, see infra notes 103-07 and accompanying text.
ing the Guideline sentencing range. Defense counsel, therefore, must raise any argument that will highlight the defendant’s positive attributes to persuade the sentencing judge to impose the lowest possible punishment. Defense counsel can now argue and prove any mitigating characteristics about the defendant, the facts of the case, or the defendant’s family or business that were previously irrelevant to sentencing.

In post-Booker sentencing arguments, lawyers should advance arguments explaining why the advisory range for a particular crime does not adequately consider a particular defendant’s situation. Additionally, defense counsel may be able to claim a particular sentence is improper because of a lack of public policy substantiating the sentence. Thus, in light of the Third Circuit cases interpreting Booker, defense attorneys, who were previously restricted by the Guidelines, can now articulate arguments addressing the defendant as an individual.

102. See § 3553(b). The court will impose a sentence within the range, “unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.” Id.

103. See McColgin & Sweitzer, supra note 100, at 42 (discussing issues court may consider in sentencing defendant). After Booker, judges now have a “longer list of factors (only one of which is the advisory guideline range) that they must ‘consider’ before imposing a sentence that is ‘sufficient but not greater than necessary.’” See id. (citing § 3553(a)). Defense counsel can “protect favorable sentences from reversal for ‘unreasonableness’” by “couch[ing] sentencing arguments explicitly in terms of the Section 3553(a) factors and in relation to the purposes of sentencing.” Id.

104. See Robert J. Anello & Jodi Mishier Peikin, Evolving Roles in Federal Sentencing: The Post-Booker/Fanfan World, 2005 Fed. Cts. L. Rev. 9, ¶ 1.7 (2005), http://www.fclr.org/2005fedcslrev9.htm (claiming that defense attorneys can provide courts with written submissions on behalf of clients varying “from simple letters to the court[ ] to elaborate Sentencing Memoranda including letters from family, friends, and experts, attesting to the defendant’s good character and the impact a lengthy sentence would have on others”).

105. See Krupp, supra note 4, at 21. Krupp contends [1] lawyers can now advance arguments about why a Guidelines provision does not make sense in, or did not adequately take into account, a particular defendant’s situation; about the lack of sentencing policy analysis behind the selection of a particular Guidelines sentencing range for a particular offense; and about why larger sentencing principles militate against applying a particular guideline to a particular defendant.

106. See id. (claiming that “Booker changes the language of sentencing” and that “[a]lthough the Guidelines post-Booker [are] advisory, [they] will remain a central part of federal sentencing analysis”). Under the post-Booker system, Krupp argues that “the constraints of the Guidelines should not be viewed by the advocate as a bar to creative lawyering.” Id.

107. See Anello & Peikin, supra note 104, at ¶ IV.3 (claiming that Booker will have “monumental impact on the sentencing process [because d]efense attorneys are now free once again meaningfully to advocate the individual characteristics of defendants by providing the court with information about the defendant that is unrelated to the offense conduct”).
3. The Post-Booker Role of the Prosecutor

Finally, the change in federal sentencing has altered the role of the prosecutor.108 In a 2005 memorandum sent to all federal prosecutors by the Deputy Attorney General, the U.S. Department of Justice ("DOJ") acknowledged the "change and uncertainty in federal sentencing" and instructed prosecutors to "take all steps necessary to ensure adherence to the Sentencing Guidelines."109 To ensure accurate execution of the Guidelines, prosecutors were directed to "consult the Guidelines at the charging stage, . . . actively seek sentences within the range established by the Guidelines in all but extraordinary cases, . . . preserve the government's ability to appeal 'unreasonable' sentences," and timely report sentences outside the appropriate Guideline range.110 Despite the DOJ's attempt to cling to continued adherence to the federal Guidelines, the advisory Guidelines nevertheless have reduced prosecutorial discretion in federal sentencings.111

Under the mandatory Guidelines, prosecutors enjoyed a broad discretion in determining the appropriate charge and commanded a "dominance over plea bargaining."112 Because prosecutors alone handled the charging decision, they had direct control over the set of possible sentencing ranges under the Guidelines.113 The narrow and constricted sentencing ranges circumvented judicial authority and "diminished the

108. For a further discussion on the new role of the federal prosecutor in Third Circuit federal sentencing litigation, see infra notes 109-20 and accompanying text.

109. See Memorandum from James B. Comey, Deputy Att'y Gen., U.S. Dep't of Justice, to All Federal Prosecutors, Department Policies and Procedures Concerning Sentencing 1 Jan. 28, 2005, available at http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf (instructing prosecutors to do their part "to ensure that the Guidelines continue to set the standard for federal sentencing"). The DOJ believes that "sentencing is a shared responsibility of all three branches of the federal government." Id. at 2. Under the new system, the DOJ perceives its executive branch role as one that enforces the laws by bringing proper charges and applying consistent sentencing Guidelines and mandatory minimums. See id. (discussing goals of consistent sentencing).

110. See id. at 2-3 (urging prosecutors to comply with Sentencing Guidelines, preserve appeals of unreasonable sentences, report adverse sentencing decisions and remain consistent in charging, pleas and sentencing).

111. See Etienne, supra note 99, at 741 n.54 (quoting United States v. Ranum, 353 F. Supp. 2d 984, 987 (E.D. Wis. 2005)) (claiming power shifted between prosecution and defense after Booker).

112. See Standen, supra note 88, at 788-89 (claiming mandatory Guidelines "significantly narrowed the range within which judges could assign penalties" and "increased the significance of prosecutorial discretion over charging and prosecutorial dominance over plea bargaining").

113. Cf. id. at 783 (noting that prosecutors will need to learn to charge in light of new sentencing factors). Previously, prosecutors could "select the count of conviction with a mind to ensuring that the final result reflected what the prosecutor perceived as an appropriate penalty for the defendant's criminal conduct." Id. at 790.
significance of the judge's potential recharacterization of criminal conduct.\textsuperscript{114} Moreover, the complexities of the federal criminal code gave prosecutors the flexibility to manipulate sentences by strategically making charge and plea decisions.\textsuperscript{115} Often judges were rendered powerless by the Guidelines' mandatory sentencing ranges even if the judge believed the prosecutor "had significantly mischaracterized the offender's criminal conduct."\textsuperscript{116}

Although the Third Circuit's interpretations of Booker did not directly affect the role of plea bargaining, charge bargaining or sentence bargaining, the holdings will nonetheless have an indirect effect on prosecutors.\textsuperscript{117} Prosecutors will now have to make charge and plea bargain decisions in light of the advisory Guidelines, the increase in judicial discretion and the importance of a defendant's mitigating personal characteristics.\textsuperscript{118} Prosecutors still retain the charging decision for individual defendants, but judges are no longer powerless under the mandatory sen-

\textsuperscript{114} See id. at 788-89 (noting often judicial authority was circumvented because in many cases "the relevant sentencing range [was] in substantial part a product of the count of conviction").

\textsuperscript{115} See id. at 798 (explaining sentencing range can be assessed by judge only after prosecutor decides whether to indict or agrees to guilty plea on statute that determines applicable Guideline range).

\textsuperscript{116} See id. at 789 (claiming that judges felt compelled to announce sentences that prosecutors selected, which led to "widespread judicial complaining . . . emblematic of the federal Guidelines sentencing era"); see also Jeffrey Standen, Plea Bargaining in the Shadow of the Guidelines, 81 CAL. L. REV. 1471, 1472-73 (1993) (claiming prosecutors were "agents of a monopsonist" government, "represent[ing] the sole purchasers of the convictions and incriminating information that a multitude of criminal defendants have to sell"). Thus, prosecutors had "great bargaining power over defendants" and were able to "obtain exchanges of pleas at subcompetitive prices[,]" essentially imposing more extreme sentences than would have otherwise been possible. Id. at 1473. Prosecutors also had "an incentive to discriminate against particular defendants or subgroups of defendants by attempting to settle like cases differently depending on defendants' personal characteristics unrelated to culpability." Id.

\textsuperscript{117} See Standen, supra note 116, at 1472 (explaining prosecutor's power to affect sentences through plea bargaining technique). Previously, prosecutors were not "constrained to shape bargains according to judge-determined sentencing parameters," thus the prosecutor could "determine[ ] . . . the sentencing parameters." Id. at 1475. The prosecutor was able to set "the range from which the prosecutor and defense counsel discount to reflect the likelihood of conviction and the costs of trial." Id. Booker changed this by allowing the judge to deviate from the Guideline range of the charge chosen by the prosecutor. See United States v. Booker, 543 U.S. 220, 267-68 (2005) (neglecting to discuss change to role of plea bargaining, charge bargaining or sentence bargaining).

\textsuperscript{118} See Krupp, supra note 4, at 21 (claiming Guidelines will not constrict counsel from asserting creative lawyering that focuses on individual defendant after Booker); see also McColgin & Sweitzer, supra note 100, at 42 (suggesting defense counsel should raise arguments that will "humanize the defendant, mitigate guilt" and argue for lowest possible sentence); Standen, supra note 88, at 776 (claiming prosecutor had power to determine charging decisions under former sentencing system).
tencing ranges of the Guidelines.\textsuperscript{119} Therefore, under the new federal sentencing system, Third Circuit prosecutors have an entirely new set of considerations both in determining whether to plea bargain and in determining the precise criminal charge to pursue.\textsuperscript{120}

C. \textit{Implications for Third Circuit Practitioners in Federal Sentencing Cases at the Appellate Level}

In determining whether to appeal a defendant's federal sentence, Third Circuit practitioners should be aware of the instances in which an imposed sentence can and cannot be appealed.\textsuperscript{121} Under \textit{Davis}, the majority of cases pending on direct review will be granted the right to appeal.\textsuperscript{122} Additionally, failing to raise the issue before the district court will not preclude defendants from appealing the imposed sentence.\textsuperscript{123} Finally, the court can review both sentences within and outside the Guideline range for reasonableness because "within-range sentencing[s are] not necessarily reasonable \textit{per se}."\textsuperscript{124} In effect, \textit{Booker} applies to each case pending on direct review so long as the case does not fall within one of the Third Circuit's exceptions.\textsuperscript{125}

First, under \textit{Lloyd}, \textit{Booker} is not retroactive for purposes of collateral attack under 28 U.S.C. § 2255 in the Third Circuit.\textsuperscript{126} Therefore, practitioners should be aware that any sentences that reached final judgment before \textit{Booker}'s issuance on January 12, 2005 cannot be appealed on the basis of an unreasonable sentence.\textsuperscript{127} Second, under \textit{Lockett}, any defen-

\textsuperscript{119} For a discussion on the increase in judicial power under the advisory sentencing ranges of the Guidelines, see supra notes 92-99 and accompanying text.

\textsuperscript{120} For a discussion of the issues prosecutors should consider when deciding whether to plea bargain and when determining the precise criminal charge to pursue, see supra notes 108-20 and accompanying text.

\textsuperscript{121} For recommendations for practitioners about when to appeal a sentence, see infra notes 121-35 and accompanying text.

\textsuperscript{122} See United States v. Davis, 407 F.3d 162, 165 (3d Cir. 2005) (holding "\textit{Booker} applies to all cases pending on direct review").

\textsuperscript{123} See id. at 165 (holding that prejudice should be presumed if "it would be exceedingly difficult" for defendant raising \textit{Booker} claim to show that district court's failure to treat Sentencing Guidelines as advisory affected sentence).

\textsuperscript{124} See United States v. Cooper, 437 F.3d 324, 331 (3d Cir. 2006) (noting such \textit{per se} rules "would come close to restoring the mandatory nature of the Guidelines" and "would risk being invalidated as contrary to the Supreme Court's holding in \textit{Booker}").

\textsuperscript{125} See Davis, 407 F.3d at 165 ("\textit{Booker} applies to all cases pending on direct review."). For a discussion of the exceptions to appellate review, see supra notes 26-76 and accompanying text.

\textsuperscript{126} See Lloyd v. United States, 407 F.3d 608, 610 (3d Cir. 2005) ("All courts of appeals have considered the issue of whether the rule of law announced in \ldots \textit{Booker} \ldots applies retroactively to prisoners \ldots have concluded that it does not."), cert. denied, 126 S. Ct. 288 (2005). For a further discussion of \textit{Lloyd}, see supra notes 60-65 and accompanying text.

\textsuperscript{127} See id. at 615 (holding that because Booker was not "watershed," it does not retroactively apply to cases that became final before \textit{Booker} was issued).
dant who pled guilty and waived the right to appeal cannot challenge the reasonableness of the sentence under *Booker.*\(^{128}\) Finally, under *Hill*, an alternative sentence determined on the basis of a defendant’s criminal history and the factual stipulations in the plea agreement does not implicate *Booker.*\(^{129}\) Thus, if a district court indicates that a defendant’s alternative sentence is identical to the sentence the court would impose under the Guidelines, any error under *Booker* is harmless, and the sentence cannot be appealed.\(^{130}\)

When appealing a defendant’s federal sentence, practitioners should form an effective litigation strategy by focusing on proving the unreasonableness of the sentence.\(^{131}\) As with all appeals, the appellant bears the “burden of proving [the sentence’s] unreasonableness” and must overcome the appellate court’s “deferential” review of trial court determinations.\(^{132}\) A sentence is reasonable if the appellate court is “satisfied the [trial] court exercised its discretion by considering the relevant factors” under 18 U.S.C. § 3553(a) and if “those factors were reasonably applied to the circumstances of the case.”\(^{133}\) Therefore, in constructing an effective litigation strategy, practitioners should examine the record for “a ground of recognized legal merit (provided it has a factual basis)” that the court neglected when it determined the defendant’s sentence.\(^{134}\) Additionally, because sentences within the Guidelines are not presumed reasonable *per se*.

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128. See United States v. Lockett, 406 F.3d 207, 214 (3d Cir. 2005) (holding that defendant who has entered plea agreement is not entitled to resentencing in light of *Booker*). For a further discussion of *Lockett*, see *supra* notes 66-71 and accompanying text.

129. See United States v. Hill, 411 F.3d 425, 426 (3d Cir. 2005) (determining that alternative sentence is not *per se* unconstitutional under Guidelines pursuant to *Booker*). A sentencing error is harmless if “a District Court clearly indicates that an alternative sentence would be identical to the sentence imposed under the Guidelines.” *Id.*

130. See *id.* (finding that sentence under mandatory Guidelines contained only harmless error because “it is clear that the District Court believed Appellant’s sentence was justified both, and alternatively, by the Sentencing Guidelines and under an indeterminate sentencing scheme”). For a further discussion of *Hill*, see *supra* notes 72-76 and accompanying text.

131. For a further discussion of an effective litigation strategy focusing on proving the unreasonableness of the sentence, see *supra* notes 131-35 and accompanying text.

132. See United States v. Cooper, 437 F.3d 324, 332 (3d Cir. 2006) (citing United States v. Talley, 431 F.3d 784, 788 (11th Cir. 2005)) (holding “party who challenges the sentence bears the burden of establishing that the sentence is unreasonable in the light of both the record and the factors in section 3553(a)”).

133. See *id.* at 329-30 (finding that trial court is “in the best position to determine the appropriate sentence in light of the particular circumstances of the case”). While the trial court must substantiate the sentence it imposes, it is not required to “discuss every argument made by a litigant if an argument is clearly without merit” nor must it consider each § 3553(a) factor “if the record makes clear the court took the factors into account in sentencing.” *Id.* at 329.

134. See *id.* (holding judge’s “rote statement of the § 3553(a) factors should not suffice” at sentencing if defendant or prosecution properly raised “a ground of recognized legal merit” that trial court ignored).
se, exposing unreasonableness provides a useful tactic for challenging sentences both within and outside the Guidelines.135

IV. Conclusion

Under the Third Circuit’s new system of federal sentencing, Booker, as interpreted by the Third Circuit in Davis, has “brought about sweeping changes in the realm of federal sentencing” at the trial and appellate levels.136 A system of uniform sentencing rules for convicted defendants that existed for nearly two decades is no longer applicable law.137 Recent Third Circuit Court of Appeals decisions, however, have interpreted the landmark holding and provided guidance on lingering questions regarding Booker’s impact on federal sentencing.138 These holdings have addressed issues such as the Circuit’s position regarding remands for resentencing in light of Booker, defendants’ rights to challenge the reasonableness of their sentence in appellate courts, Booker’s retroactivity for purposes of collateral attack, defendants’ rights to raise sentencing issues on appeal and Booker’s application to alternative sentences.139 These decisions have substantially changed the roles of judges, defense attorneys and prosecutors in federal sentencing cases.140 Third Circuit practitioners should be familiar with these holdings and their impact on the federal sentencing system at the trial and appellate levels.141 While the doctrine will likely continue to change, practitioners must be aware of the cases that interpret the fundamental aspects of the Booker decision in order to com-

135. Cf. id. at 331-32 (finding “within-guidelines sentence[s are not necessarily reasonable] per se” and rejecting “rebuttable presumption of reasonableness for within-guidelines sentences”).


137. See Sentencing Comm’n Overview, supra note 1, at 2-3 (discussing creation and purpose of Federal Sentencing Guidelines as well as noting district courts are no longer bound to apply Guidelines (emphasis added)).

138. For a discussion of the recent Third Circuit decisions on the application of Booker, see supra notes 26-76 and accompanying text.

139. See Cooper, 437 F.3d at 327-28 (holding defendants have right to challenge reasonableness of sentence in appellate courts); Davis, 407 F.3d at 165-66 (announcing Third Circuit position regarding remands for resentencing in light of Booker); Lloyd v. United States, 407 F.3d 608, 614-16 (3d Cir. 2005) (holding that Booker is not retroactive for purposes of collateral attack), cert. denied, 126 S. Ct. 288 (2005); United States v. Lockett, 406 F.3d 207, 212-14 (3d Cir. 2005) (finding defendants who have waived right to raise sentencing issues on appeal are not eligible for resentencing reconsideration in light of Booker); United States v. Hill, 411 F.3d 425, 426 (3d Cir. 2005) (explaining that applying mandatory Guidelines in alternative sentence did not violate Sixth Amendment concerns of Booker).

140. For a further discussion of the new changes to the Federal Sentencing Guidelines in the Third Circuit, see supra notes 77-135 and accompanying text.

141. See Sentencing Update, Feb. 14, 2006, supra note 78, at 8 (documenting that non-government sponsored downward departures occurred in 17.6% of sentences, suggesting substantial number of sentences have deviated below Guidelines range in post-Booker system).
petently navigate the advisory Sentencing Guidelines and successfully advocate their client’s sentencing objectives.¹⁴²

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