
Docket No. 05-1698

**IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

UNITED STATES OF AMERICA,

v.

SEAN MICHAEL GRIER,

On Appeal From
The United States District Court for the Middle District of Pennsylvania
District Court Criminal No. 03-cr-00284
Sat Below: Honorable Sylvia H. Rambo, U.S.D.J.

**BRIEF ON REHEARING *EN BANC* FOR *AMICI CURIAE*
THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AND
THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF APPELLANT**

Of Counsel:

Peter Goldberger, Esq.
50 Rittenhouse Place
Ardmore, Pennsylvania 19003

David L. McColgin, Esq.
601 Walnut Street, Suite 540-W
Philadelphia, Pennsylvania 19101

GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
A Professional Corporation
One Riverfront Plaza
Newark, New Jersey 07102
(973) 596-4753

Attorneys for Amici Curiae

On the Brief:

Lawrence S. Lustberg, Esq.
Michael A. Baldassare, Esq.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF INTEREST OF <i>AMICI CURIAE</i>	1
I. THE FIFTH AMENDMENT’S DUE PROCESS CLAUSE REQUIRES THAT THE DETERMINATION OF A DEFENDANT’S FINAL GUIDELINE RANGE BE BASED ONLY UPON FACTS NECESSARILY ESTABLISHED BY A JURY’S VERDICT, ADMITTED BY THE DEFENDANT, OR OTHERWISE PROVEN BEYOND A REASONABLE DOUBT.....	3
A. <i>Apprendi v. New Jersey, United States v. Booker</i> and the Fifth And Sixth Amendments.....	5
B. The Defendant’s Liberty Interest.....	9
C. The Danger Of Unjustified Stigma.....	13
D. The Allocation Of Risk Regarding Erroneous Determinations And The Importance of The Decision.	14
E. The Technically Advisory Nature Of The Guidelines Does Not Diminish The Threat Posed To The Interests Protected By The Due Process Clause For Over 200 Years.	16
II. AT VERY LEAST, THE GOVERNING STANDARD FOR PROOF OF FACTS WHICH INCREASE A SENTENCE SHOULD BE HIGHER THAN A BARE PREPONDERANCE, THAT IS, CLEAR AND CONVINCING EVIDENCE.	22
III. UNDER THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE, THIS COURT SHOULD INTERPRET 18 U.S.C. § 3553(A) AND USSG § 6A1.3 TO REQUIRE PROOF BEYOND A REASONABLE DOUBT OF FACTS WHICH INCREASE A SENTENCE SO AS TO AVOID THE CONSTITUTIONALLY DOUBTFUL CONSTRUCTION THAT WOULD RESULT FROM APPLICATION OF A LOWER STANDARD OF PROOF.....	25
IV. CONCLUSION.....	28
COMBINED CERTIFICATIONS	29

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Acosta v. Honda Motor Co., Ltd.</i> , 717 F.2d 828 (3d Cir. 1983)	8
<i>Addington v. Texas</i> , 441 U.S. 418 (1979).....	passim
<i>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000).....	passim
<i>Bloom v. Illinois</i> , 391 U.S. 194 (1968).....	7
<i>Burns v. United States</i> , 501 U.S. 129 (1991).....	25
<i>Chaunt v. United States</i> , 364 U.S. 350 (1960).....	8, 23
<i>Clark v. Martinez</i> , 543 U.S. 371 (2005).....	25
<i>Duncan v. Louisiana</i> , 391 U.S. 145 (1968).....	7
<i>Dunn v. HOVIC</i> , 1 F.3d 1371 (3d Cir. 1993)	8
<i>E.B. v. Verniero</i> , 119 F.3d 1077 (3d Cir. 1997)	8, 23
<i>Gardner v. Florida</i> , 430 U.S. 349 (1977).....	9
<i>Gompers v. Buck’s Stove & Range Co.</i> , 221 U.S. 418 (1911).....	7
<i>Grogan v. Garner</i> , 498 U.S. 279 (1991).....	7

<i>I.N.S. v. St. Cyr</i> , 533 U.S. 289 (2001).....	8, 25
<i>In re Winship</i> , 397 U.S. 358 (1970).....	passim
<i>International Union, U.M.W. v. Bagwell</i> , 512 U.S. 821 (1994).....	7
<i>Jones v. United States</i> , 526 U.S. 227 (1999).....	10
<i>Masson v. New Yorker Magazine, Inc.</i> , 501 U.S. 496 (1991).....	8
<i>Mullaney v. Wilbur</i> , 421 U.S. 684 (1975).....	10
<i>Peguero v. United States</i> , 526 U.S. 23 (1999).....	27
<i>Ponnapula v. Ashcroft</i> , 373 F.3d 480 (3d Cir. 2004)	2
<i>Reynolds v. Wagner</i> , 128 F.3d 166 (3d Cir. 1997)	7
<i>Santosky v. Kramer</i> , 455 U.S. 745 (1982).....	8, 23
<i>Speiser v. Randall</i> , 357 U.S. 513 (1958).....	8, 15, 23
<i>Ulster County v. Allen</i> , 442 U.S. 140 (1979).....	20
<i>United States v. Booker</i> , 543 U.S. 220 (2005).....	passim
<i>United States v. Campbell</i> , 295 F.3d 398 (3d Cir. 2002)	15, 26
<i>United States v. Cepero</i> , 224 F.3d 256 (3d Cir. 2000)	2

<i>United States v. Dickler</i> , 64 F.3d 818 (3d Cir. 1995)	19
<i>United States v. Eastern Medical Billing, Inc.</i> , 230 F.3d 600 (3d Cir. 2000)	27
<i>United States v. Edmonds</i> , 80 F.3d 810 (3d Cir. 1996)	25
<i>United States v. Fernandez</i> , 443 F.3d 19 (2d Cir. 2006)	20
<i>United States v. Grier</i> , 449 F.3d 558, vacated, 453 F.3d 554 (3d Cir. 2006)	passim
<i>United States v. Haack</i> , 403 F.3d 997 (8th Cir. 2005)	17
<i>United States v. Hammoud</i> , 381 F.3d 316 (4th Cir. 2004)	11
<i>United States v. Huerta-Rodriguez</i> , 355 F. Supp. 2d 1019 (D. Neb. 2005).....	4, 11, 16
<i>United States v. Hughes</i> , 401 F.3d 540 (4th Cir. 2005)	17, 20
<i>United States v. Jiménez-Beltre</i> , 440 F.3d 514 (1st Cir. 2006).....	20
<i>United States v. Jordan</i> , 256 F.3d 922 (9th Cir. 2001)	24
<i>United States v. Kandirakis</i> , 2006 WL 2147610 (D. Mass., Aug. 1, 2006)	4
<i>United States v. Kikumura</i> , 918 F.2d 1084 (3d Cir. 1990)	10, 24
<i>United States v. Leahy</i> , 438 F.3d 328 (3d Cir. 2006)	2
<i>United States v. Miele</i> , 989 F.2d 659 (3d Cir. 1993)	26

<i>United States v. One 1973 Rolls Royce</i> , 43 F.3d 794 (3d Cir. 1994)	2
<i>United States v. Pimental</i> , 367 F. Supp. 2d 143 (D. Mass. 2005).....	4, 11, 21
<i>United States v. Rodriguez</i> , 73 F.3d 161 (7th Cir. 1996)	4, 11, 27
<i>United States v. Sandini</i> , 816 F.2d 869 (3d Cir. 1987)	27
<i>United States v. Vazquez</i> , 271 F.3d 93 (3d Cir. 2001)	2
<i>Washington v. Harper</i> , 494 U.S. 210 (1990).....	7
<i>Woodby v. I.N.S.</i> , 385 U.S. 276 (1966).....	8, 23
Statutes	
18 U.S.C. § 1111	19
18 U.S.C. § 3006A	1
18 U.S.C. § 3553(a).....	passim
18 U.S.C. § 3553(a)(2)	26
18 U.S.C. § 3553(a)(4)	5
18 U.S.C. § 3553(b)(1).....	5
26 U.S.C. § 7454(a).....	8
USSG § 1B1.3	19
USSG § 2A6.1(b)(3)	19
USSG § 2B1.1	14
USSG § 2B1.1(b)(2).....	14
USSG § 2B1.1(b)(8).....	14

USSG § 2B3.2(c).....	19
USSG § 2D1.1.....	11
USSG § 2G2.2(b)(2)	13
USSG § 2G2.2(b)(4)	13
USSG § 2G2.2(b)(7)	13
USSG § 2K2.1(b)(1)(A).....	12
USSG § 2K2.1(b)(5)	12, 13, 19
USSG § 2L2.1(b)(2).....	12
USSG § 3A1.1(b)(1)	14
USSG § 3B1.1(b)	12
USSG § 3C1.1	19
USSG § 6A1.3.....	26
USSG § 6A1.3(a)	4, 16, 26

STATEMENT OF INTEREST OF AMICI CURIAE

The National Association of Federal Defenders was formed in 1995 to enhance the representation provided under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The Association is a nationwide, nonprofit, volunteer organization whose membership includes attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. One of the guiding principles of the Association is to promote the fair adjudication of justice by appearing as *amicus curiae* in litigation relating to criminal law issues, particularly as those issues affect indigent defendants in federal court. The Association has frequently appeared as *amicus curiae* in litigation before the Supreme Court and the federal courts of appeals.

The National Association of Criminal Defense Lawyers (“NACDL”) is a District of Columbia nonprofit corporation with more than 13,000 members nationwide, including both public and private defenders, active U.S. military defense counsel, law professors, and judges. NACDL’s 90 state, local and international affiliate organizations comprise some 35,000 members in all 50 states. The American Bar Association recognizes NACDL as an affiliate organization and accords it full representation in its House of Delegates. Founded in 1958, NACDL promotes study and research in the field of criminal law and procedure, disseminates and advances legal knowledge in the area of criminal justice and practice, and encourages the integrity, independence and expertise of criminal defense lawyers in the state and federal courts. To promote the proper administration of justice and appropriate measures to safeguard the rights of all persons involved in the criminal justice system, NACDL files approximately 35 *amicus* briefs per year in state and federal appeals courts, including a least ten

amicus briefs in the Supreme Court, on a variety of criminal justice issues affecting the vital interests of its members and their clients. NACDL has appeared as *amicus* in this Court in such cases as *United States v. Leahy*, 438 F.3d 328 (3d Cir. 2006) (en banc); *Ponnapula v. Ashcroft*, 373 F.3d 480 (3d Cir. 2004); *United States v. Vazquez*, 271 F.3d 93 (3d Cir. 2001) (en banc); *United States v. Cepero*, 224 F.3d 256 (3d Cir. 2000) (en banc); and *United States v. One 1973 Rolls Royce*, 43 F.3d 794 (3d Cir. 1994).

Amici curiae file this brief because the issue presented -- the burden of proof applicable to judicial fact-finding when calculating a defendant's Guideline range -- is an issue of vital importance to their members and to almost all of their members' clients. Because *amici curiae* have, in light of their members' experience with the criminal justice system in general and the continued effect of the Guidelines in particular, concluded that proof beyond a reasonable doubt is required for such fact-finding, and because their analysis differs somewhat from that presented by appellant, and relies on different authorities, they offer this brief in support of defendant-appellant in the hope of assisting the Court in its decision of this critical case.

I. THE FIFTH AMENDMENT'S DUE PROCESS CLAUSE REQUIRES THAT THE DETERMINATION OF A DEFENDANT'S FINAL GUIDELINE RANGE BE BASED ONLY UPON FACTS NECESSARILY ESTABLISHED BY A JURY'S VERDICT, ADMITTED BY THE DEFENDANT, OR OTHERWISE PROVEN BEYOND A REASONABLE DOUBT.

The question presented by this rehearing is straightforward: What is the applicable burden of proof by which the Government must establish a fact that affects a defendant's final Guideline range? For the reasons set forth in the dissenting opinion of the Honorable Dolores K. Sloviter, Circuit Judge, in *United States v. Grier*, 449 F.3d 558, 575-88, *vacated*, 453 F.3d 554 (3d Cir. 2006), as well as those advanced by the appellant and those discussed in the following Sections, *amici curiae* -- The National Association of Federal Defenders and The National Association of Criminal Defense Lawyers -- respectfully submit that due process requires the Government to establish facts used to increase a defendant's Guideline range by proof beyond a reasonable doubt.

Since before the founding of our Republic, the requirement that the state in criminal cases bear a burden of proof beyond a reasonable doubt has protected the people's liberty, shielded accused persons from unwarranted stigmatization, allocated the risk of erroneous decisions during the prosecution of criminal charges, acknowledged the extraordinary importance of the underlying decisions being made, and provided society with sound reasons to have faith in the accuracy and reliability of our criminal justice system. As detailed in the following Sections, each of those goals is implicated when a federal criminal defendant's Guidelines range is calculated by the district court, and each is threatened when that range is selected on the basis of facts determined in reliance on a less exacting standard of proof. This Court should therefore hold that as a matter of Fifth Amendment due process, such fact-finding must be subjected to the time-honored

standard of proof beyond a reasonable doubt. *See United States v. Kandirakis*, 2006 WL 2147610, *24-*26, *32-*35 (D. Mass., Aug. 1, 2006) (explaining, while bowing to contrary Circuit authority, why due process requires proof beyond a reasonable doubt of sentence-enhancing facts); *United States v. Pimental*, 367 F. Supp. 2d 143, 153 (D. Mass. 2005) (the Fifth Amendment's Due Process Clause requires facts underlying a sentencing enhancement to be found by proof beyond a reasonable doubt); *United States v. Huerta-Rodriguez*, 355 F. Supp. 2d 1019, 1027 (D. Neb. 2005) ("In order to comply with due process in determining a reasonable sentence, this court will require that a defendant is afforded procedural protections under the Fifth and Sixth Amendments in connection with any facts on which the government seeks to rely to increase a defendant's sentence"). Facts necessarily found by the jury in its verdict at a criminal trial or which were admitted by the defendant in the formal colloquy during plea proceedings may be deemed established beyond a reasonable doubt, without more. The sentencing court must make determinations of any other facts necessary to its sentencing decision by the same the standard. At the very least, the Court should hold that due process requires proof by clear and convincing evidence with respect to judicial fact-finding at sentencing.

Finally, the Court can avoid deciding the substantial constitutional question presented. The Court could interpret 18 U.S.C. § 3553(a) and USSG § 6A1.3(a) (p.s.) to require the application of a reasonable doubt standard of proof in federal sentencing. Alternatively, the Court could impose that standard under its supervisory power. Whatever path the Court chooses, and for the reasons set forth below, it is clear that the current protocol for sentencing defendants in federal court can no longer stand.

A. Apprendi v. New Jersey, United States v. Booker and the Fifth And Sixth Amendments.

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court of the United States sought to vindicate two “constitutional protections of surpassing importance”: due process and the right to a jury trial. *Id.* at 476. The Court reasoned that judicial fact-finding by a preponderance of the evidence when imposing sentence violated those principles and held that:

Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.

Id. at 491. In *United States v. Booker*, 543 U.S. 220 (2005), the Court recognized that because the Federal Sentencing Guidelines were mandatory, the sentencing range provided for by those guidelines was the effective “statutory maximum,” as that term is used in *Apprendi*. *Id.* at 234-35. The mandatory nature of the Guidelines, then, meant that judicial determinations of facts violated the defendant’s Sixth Amendment right to have his charges “confirmed by the unanimous suffrage of twelve ... equals and neighbours” *Apprendi*, 530 U.S. at 477 (quoting 4 W. Blackstone, Commentaries on the Laws of England 343 (1769)). The Court cured the Sixth Amendment problem by excising 18 U.S.C. § 3553(b)(1), thereby rendering the Guidelines advisory under the surviving and controlling terms of 18 U.S.C. § 3553(a)(4), rather than mandatory. *Booker*, 543 U.S. at 259-60.

The *Booker* “fix,” which brought the Sentencing Reform Act within the constitutional limits of *Apprendi* for purposes of a defendant’s right to a jury trial by deleting the statutory mandate of Section 3553(b) to sentence within the Guidelines absent specific findings allowing an upward departure, did not, however, address the Fifth Amendment due process concerns raised by the use of a

lax fact-finding standard at sentencing. *See Apprendi*, 530 U.S. at 477-78 (discussing the distinct “historical foundation[s]” of the right to a jury trial and to due process of law). Indeed, although the Court mentioned the standard of proof of beyond a reasonable doubt in *Booker*, 543 U.S. at 230, there is no dispute but that *Booker*’s analysis and holding was limited to the issue of the Sixth Amendment right to a jury trial. *Id.* at 226 (“The question presented ... is whether an application of the Federal Sentencing Guidelines violated the Sixth Amendment.”); *Grier*, 449 F.3d at 564 (*Booker* did not reach the issue presented by defendant Grier’s appeal). Neither of the lower courts in *Booker* (and the companion *Fanfan* case) had demanded or applied a more elevated burden of proof, so the Government’s petitions for certiorari in those cases did not (and could not have) presented the Fifth Amendment question.

Moreover, the Sixth Amendment right to trial by jury is, in fact, fully vindicated by the *Booker* holding. That is, a defendant’s right to a jury trial is determined based upon a binary inquiry: if a “fact” is (or operates in the manner of) an element of an offense in that it increases the defendant’s potential exposure to punishment, then the jury must decide whether the Government has proven that fact; if the “fact” does not increase the legally available maximum punishment, the defendant has no right under the Sixth Amendment to a jury determination on that issue. *Apprendi*, 530 U.S. at 490. Accordingly, *Booker* cured the Sixth Amendment violation by simply avoiding mandatory potential-sentence increases based upon facts not found by a jury.

But the absence of any Sixth Amendment right to jury determination of Guideline sentencing facts after *Booker* in no way determines the outcome of the due process question under the Fifth Amendment. The defendant’s right to insist on proof beyond a reasonable doubt exists in criminal cases entirely independently

of the right to jury trial. Thus, for example, it is enjoyed by respondents in juvenile delinquency proceedings, as held in *Winship* itself. *In re Winship*, 397 U.S. 358 (1970). Similarly, an alleged contemnor cannot be convicted without proof beyond a reasonable doubt, even when there is no right to jury trial of a summary contempt charge. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 444 (1911) (“it is certain that in proceedings for criminal contempt the defendant ... must be proved to be guilty beyond a reasonable doubt”) (citations omitted); *International Union, U.M.W. v. Bagwell*, 512 U.S. 821, 827 (1994) (no right to a jury trial in criminal contempt proceeding involving imprisonment of less than six months) (citing *Bloom v. Illinois*, 391 U.S. 194, 199 (1968)). Finally, even a petty misdemeanor facing no prospect of jail, who enjoys no right to jury trial, still may not be convicted without proof beyond a reasonable doubt. *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968). Thus, the burden and standard of proof question was not determined, either expressly or implicitly, by the remedial holding of *Booker*.

By contrast to the either/or character of the Sixth Amendment criminal jury trial right, the Fifth Amendment’s Due Process Clause requires that the burden of proof applicable to any judicial factual determination reflect the importance of the interests placed at stake by the underlying decision, whenever the consequence may be a deprivation of life, liberty, or property. *Washington v. Harper*, 494 U.S. 210, 229 (1990) (“The procedural protections required by the Due Process Clause must be determined with reference to the rights and interests at stake in the particular case.”); *Reynolds v. Wagner*, 128 F.3d 166, 179 (3d Cir. 1997) (same). Burdens of proof, therefore, exist along a continuum. *Addington*, 441 U.S. at 423. At one end, the preponderance standard applies to decisions implicating relatively unimportant societal interests, such as “civil cases involving a monetary dispute between private parties.” *Id.* See also *Grogan v. Garner*, 498 U.S. 279 (1991). At

the other end of the spectrum lies the beyond a reasonable doubt standard, utilized exclusively for decisions which involve an interest of “transcending value,” that is, an individual’s freedom. *Speiser v. Randall*, 357 U.S. 513, 525-26 (1958).

Along the due process continuum between those standards of proof and the significance attached to the ultimate decisions in such matters, lies the standard of proof by clear and convincing evidence, which is used when a fundamental interest -- more important than money but less important than a total deprivation of freedom -- will be affected by fact-finding. *E.g.*, *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 510 (1991) (First Amendment requires that actual malice be proved by clear and convincing evidence to establish libel of public figure); *Santosky v. Kramer*, 455 U.S. 745, 769-70 (1982) (clear and convincing evidence standard held appropriate for termination of parental rights); *Addington v. Texas*, 441 U.S. 418, 432-33 (1979) (clear and convincing evidence standard held constitutionally sufficient for civil commitments); *Woodby v. I.N.S.*, 385 U.S. 276, 285 (1966) (clear and convincing standard applies to deportation decisions); *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (clear and convincing standard applies to denaturalization decisions); *E.B. v. Verniero*, 119 F.3d 1077, 1111 (3d Cir. 1997) (clear and convincing standard applies to determination of an individual’s tier classification under Megan’s Law); *Dunn v. HOVIC*, 1 F.3d 1371, 1381-82 (3d Cir. 1993) (clear and convincing evidence required to establish punitive damages in civil action); *Acosta v. Honda Motor Co., Ltd.*, 717 F.2d 828 (3d Cir. 1983) (punitive damages permissible in strict products liability case only if outrageous conduct is proven by clear and convincing evidence); 26 U.S.C. § 7454(a) (IRS has burden to establish taxpayer’s civil fraud by clear and convincing evidence). Thus, and unlike the “yes or no” inquiry regarding a defendant’s Sixth Amendment jury right, the decision regarding which burden of

proof should apply requires a careful analysis of the interests that will be affected by the fact-finding.

With respect to which burden of proof should apply to a court's fact-finding under the Federal Sentencing Guidelines, the societal and individual interests at issue in light of the probability and risks of error, as well as the importance of the ultimate decisions to be made, require that the Government's proofs be judged by the beyond a reasonable doubt standard. Those interests, discussed below, make clear that while the preponderance of evidence standard is appropriate when interests like money are at stake, a higher standard -- proof beyond a reasonable doubt -- is, as a matter of due process, required when a defendant's life, physical liberty and future are placed in jeopardy.

B. The Defendant's Liberty Interest

The Fifth Amendment to the United States Constitution guarantees that no person may be deprived of liberty without due process of law. U.S. Const. amend. V. That constitutional protection exists because "[t]he accused during a criminal prosecution has at stake [an] interest of immense importance ... because of the possibility that he may lose his liberty upon conviction" *Winship*, 397 U.S. 363. Thus, part of the process to which a criminal defendant is due is a system containing procedural safeguards to ensure that he will not be erroneously deprived of liberty. *Apprendi*, 530 U.S. at 484 (citing *Winship*, 397 U.S. at 363). *See also Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion) (noting that due process applies during sentencing). To protect against erroneous decisions, and thereby provide constitutionally adequate process under the law, courts employ a beyond a reasonable doubt standard, which applies not only to the jury's determination of guilt, but also to certain determinations regarding the extent of criminal culpability assigned to a defendant. *Apprendi*, 530 U.S. at 484 (citing

Mullaney v. Wilbur, 421 U.S. 684 (1975)). Indeed, as the Court noted in *Mullaney*, criminal law “is concerned not only with guilt or innocence in the abstract, but also with the degree of criminal culpability” assigned to a defendant. 421 U.S. at 697-98. Thus, for example, where factual determinations increase the amount of time a defendant spends behind bars, the fact-finding process has “more than a nominal effect” for Fifth Amendment purposes. *Apprendi*, 530 U.S. at 495. For this primary reason, such decisions must be subjected to a beyond a reasonable doubt standard. And because a defendant’s freedom (both in terms of whether he will be incarcerated and in terms of the length of any sentence) is squarely at risk when a court makes factual findings in connection with selecting the applicable Guideline range, those findings must be made based upon this higher, constitutionally mandated standard of proof.

The problem is not a new one: courts have long recognized the constitutional problem of increasing the length of a defendant’s sentence based upon judicial fact-finding by a preponderance of the evidence. *E.g.*, *Booker*, 543 U.S. at 236-37 (citing *Jones v. United States*, 526 U.S. 227, 230 (1999) (district court’s findings increased potential maximum sentence from 15 to 25 years)). Thus, this Court previously held that when a sentence deviates significantly from the Guidelines, the fact-finding underlying the sentence “must be established *at least* by clear and convincing evidence.” *United States v. Kikumura*, 918 F.2d 1084, 1101 (3d Cir. 1990) (emphasis added). In *Kikumura*, the Court vacated the district court’s decision to increase a defendant’s sentence from the 27-33 months suggested by the Guidelines and impose a 30 year sentence based upon judicial fact-finding by a preponderance of the evidence. *Id.* at 1089. Judge Becker’s opinion for the Court explicitly left open the question of whether a higher standard, *i.e.*, proof beyond a reasonable doubt, is, in fact, required. *Id.* at 1101. Other

appellate judges, as well as district courts, have similarly questioned whether increases in a defendant's sentence may lawfully be based upon judicial fact-finding by a preponderance of the evidence. *See United States v. Hammoud*, 381 F.3d 316, 361-62 (4th Cir. 2004) (en banc) (Motz, J., dissenting in case where the actual sentence was increased from 57 months to 155 years); *United States v. Rodriguez*, 73 F.3d 161, 162-63 (7th Cir. 1996) (Posner, C.J., dissenting from denial of rehearing en banc in case where maximum was increased from 54 months to life and stating that the court should decide whether proof beyond a reasonable doubt is required for certain sentencing decisions); *Huerta-Rodriguez*, 355 F. Supp. 2d at 1028 (requiring proof beyond a reasonable doubt for sentencing enhancements beyond those admitted by the defendant); *Pimental*, 367 F. Supp. 2d at 153 (“Certain facts like the amount of loss continue to assume inordinate importance in the sentencing outcome. So long as they do, they should be tested by our highest standard of proof”).

Nonetheless, under the Guidelines regime, just such increases have become, and remain a fact of life. In *Booker* itself, for example, the defendant was, because it was a drug case, sentenced pursuant to USSG § 2D1.1, by far the most frequently applied Guideline. *See* Addendum at 2 (stating that USSG § 2D1.1 was applied in 13,912 of the 35,508 cases sentenced in the first six months of 2006). There, the district court's finding of drug quantity increased defendant Booker's maximum sentence from a range of 210-262 months to 360 months-life, while defendant Fanfan's maximum sentence, in the companion case before the Court, was increased from 78 to 235 months, all based upon a preponderance standard. *Booker*, 543 U.S. at 220.

Aside from drug cases and their focus on judicial fact-finding of drug quantity, it is simple to construct a (not so) hypothetical case in which a district

court increases a defendant's Guideline range by four levels because a firearm was used (as happened in Appellant Grier's case), USSG § 2K2.1(b)(5), three levels for his role in the offense, USSG § 3B1.1(b), three levels because the victims were vulnerable, USSG § 3A1.1(b), and/or additional levels based upon either the number of firearms involved, USSG § 2K2.1(b)(1)(A), documents used, USSG § 2L2.1(b)(2), or individuals involved, USSG § 2L1.1(b)(2), all based upon allegations in a Presentence Report that have been demonstrated by no more than a preponderance of the evidence. Those increases are significant. Indeed, an addition of four levels for a defendant with no criminal history who has pleaded guilty to a moderately severe offense (*i.e.*, with an offense level of 19 after a reduction for acceptance of responsibility), raises the sentencing range from 30-37 months to 46-57 months. USSG Ch. 5, Pt. A. A six level increase would raise the applicable range for that individual to 57-71 months. *Id.* Such elementary examples serve, very simply, to demonstrate the extent to which an individual's freedom is at stake when a district court makes factual determinations at sentencing. *See Apprendi*, 530 U.S. at 495 (noting the constitutional significance of a fact-finding process that doubles a defendant's potential sentence); *Grier*, 449 F.3d at 562 (noting that the Guideline enhancement at issue -- a 4 level increase pursuant to USSG § 2K2.1(b)(5) -- resulted in a "fifty percent increase in the recommended imprisonment range"); *id.* at 583 (Sloviter, J., dissenting) (PSR's conclusions raised defendant Grier's sentencing range from 84-105 months to a statutory maximum of 120 months).

And, of course, permitting district courts to make such determinations based upon statements in "bureaucratically prepared, hearsay-riddled presentence reports[.]" *Booker*, 543 U.S. at 304 (Scalia, J., dissenting in part); *Grier*, 449 F.3d at 576 (Sloviter, J., dissenting) (noting that PSR's conclusion to enhance the

defendant's sentence pursuant to USSG § 2K2.1(b)(5) "played a role in Grier's ultimate sentence"), based upon a mere preponderance of evidence, creates significant danger of the erroneous deprivation of liberty against which the Due Process Clause -- and its ancient common law ancestors, *Apprendi*, 530 U.S. at 478 -- were intended to protect. The significance of any deprivation of additional liberty, even as applied to a person lawfully subject to some deprivation by virtue of a valid criminal conviction, mandates a heightened standard of proof. *See also* Section I.D, *infra*.

C. The Danger Of Unjustified Stigma

A criminal conviction carries a certainty of stigma. *Winship*, 397 U.S. at 363. The factual determinations made by a district court at sentencing, however, as well as the fact of a longer sentence itself, stigmatize a defendant as much if not more than the offense of conviction. *Apprendi*, 530 U.S. at 495 (a "more severe stigma" attaches to a longer sentence, even when it is based upon judicial fact-finding by a preponderance of evidence). Consider, for example, a prosecution for possession of child pornography, one of the most stigmatizing offenses sentenced under the Guidelines. Unquestionably, the conviction itself will stigmatize the defendant, but equal, if not more, stigma flows from factual determinations -- currently made by the district court under the preponderance of evidence standard -- that the defendant possessed hundreds of images, USSG § 2G2.2(b)(7), which portrayed sadistic conduct, USSG § 2G2.2(b)(4), and/or children under the age of 12, USSG § 2G2.2(b)(2). Those "facts" will not only result in greater punishment, but would also make the defendant far more of a pariah in his community than would the underlying conviction alone.

Even less emotionally charged prosecutions carry a similar danger. For example, consider a defendant who has pled guilty to a \$200,000 fraud, and who

will be sentenced pursuant to USSG § 2B1.1. The stigma flowing from that conviction would pale in comparison to a district court's determination that there were more than 50 victims, USSG § 2B1.1(b)(2), that the defendant falsely stated that he was working for a church, USSG § 2B1.1(b)(8), or that he had targeted elderly individuals as his victim, USSG § 3A1.1(b)(1). Thus, the very real danger (given that USSG § 2B1.1 is the third most frequently used Guideline, Addendum at 2) that convicted defendants will be additionally stigmatized by the determinations made in connection with sentencing requires that such determinations be proven beyond a reasonable doubt. To do otherwise would be to deny the defendant the protections to which he is entitled by the Due Process Clause.

D. The Allocation Of Risk Regarding Erroneous Determinations And The Importance of The Decision.

The burden of proof “serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.” *Addington*, 441 U.S. at 423. Indeed,

[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to “instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.”

Id. (quoting *Winship*, 397 U.S. at 370 (Harlan, J., concurring)).

In a civil case, where money -- as opposed to a person's freedom -- is at issue, the preponderance of evidence standard is appropriate because it is “no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor.” *Winship*, 397 U.S. at 371 (Harlan, J., concurring). *See also Addington*, 441 U.S. at 423 (preponderance

standard is warranted because society has “a minimal concern with the outcome” of private civil suits). In a criminal case, however, “society imposes almost the entire risk of error upon itself” by employing the reasonable doubt requirement “to exclude as nearly as possible the likelihood of an erroneous judgment.” *Id.* By thus lessening the risk of erroneous sentences, the reasonable doubt standard therefore “plays a vital role in the American scheme of criminal procedure” and is “indispensable to command the respect and confidence of the community in applications of the criminal law.” *Winship*, 397 U.S. at 364. That standard is, therefore, a recognition of the fact that, unlike a private party’s money, a defendant’s freedom is “an interest of transcending value,” *id.* at 364 (quoting *Randall*, 357 U.S. at 525-26). It stands as a reminder and an implementation of the venerable principle that our system operates with an overriding concern that “it is far worse to convict an innocent man than to let a guilty man go free.” *Winship*, 397 U.S. at 372. The effect is similar, if not precisely the same, when a guilty person is sentenced excessively on account of a finding that does not accord with actual fact. Indeed, because factual findings by a preponderance of the evidence can significantly affect a defendant’s prison sentence “in terms of absolute years behind bars,” *Apprendi*, 530 U.S. at 495, the Due Process Clause requires application of a heightened burden of proof. Thus, both the interest at stake and the importance of the underlying decision require that the burden of proof allocate the risk of an error in such a way that it is less likely that a defendant will be punished incorrectly.

The problematic risk of error, necessitating a higher standard of proof, is exacerbated in this context by statutes and Rules of Procedure which render inapplicable the time-tested rules of evidence designed to ensure reliability in judicial factfinding. Fed. R. Evid. 1101(d)(3). *See United States v. Campbell*, 295

F.3d 398, 407 (3d Cir. 2002) (as a general matter, the Federal Rules of Evidence do not apply at sentencing); USSG § 6A1.3(a) (Federal Rules of Evidence do not apply at sentencing proceedings); 18 U.S.C. § 3661 (same); 21 U.S.C. § 850 (same). By requiring facts affecting a defendant's Guideline range to be proven beyond a reasonable doubt, the risk of erroneous determinations would be properly allocated to minimize their occurrence, as the Due Process Clause has sought to do for over 200 years.

E. The Technically Advisory Nature Of The Guidelines Does Not Diminish The Threat Posed To The Interests Protected By The Due Process Clause For Over 200 Years.

In *Booker*, the Supreme Court of the United States held 18 U.S.C. § 3553(b), a key provision of the Sentencing Reform Act, unconstitutional under the Sixth Amendment's jury clause. Severing that subsection, rather than striking down the entire Act, left Section 3553(a) in place as the operative statutory guide to federal sentencing. As a result, the Federal Sentencing Guidelines remained in effect, albeit as one of several factors to be considered, 18 U.S.C. § 3553(a)(4), and thus advisory. Thus, *Booker* did not return federal sentencing procedure to the pre-Guidelines era in which the trial court had virtually unfettered discretion to sentence a defendant within the statutory range. *Huerta-Rodriguez*, 355 F. Supp. 2d at 1024-25. Rather, as a matter of both post-*Booker* jurisprudence and of fact, the Guidelines continue to play a dominant role in sentencing decisions. Accordingly, in post-*Booker* sentencing, district courts ordinarily continue, although they are not required to do so as a matter of law, to start with a Guidelines calculation. *See United States v. Cooper*, 437 F.3d 324, 331 (3d Cir. 2006) (the Guidelines "provide a natural starting point for the determination of the appropriate level of punishment for criminal conduct"). *See also United States v. Dixon*, 449

F.3d 194, 203-04 (1st Cir. 2006) (the Guidelines are “an appropriate starting point” for post-*Booker* sentencing).¹

Given that district courts generally begin their implementation of Section 3553(a) with a Guidelines calculation, it is not surprising that sentencing results end up reflecting them as well. Thus, statistics collected by the United States Sentencing Commission show that during the first six months of 2006, the Guidelines operated just as they would have pre-*Booker* approximately 92% of the time (*i.e.*, in all but 8% of the cases studied). Addendum at 7.² In 2005, the Guidelines controlled 88.9% of the time (*i.e.*, all but 11.1%).³ Furthermore, the number of cases that ends up being sentenced within the Guideline range itself has changed but little, as there has been a relatively constant number of sentences within the Guidelines range, above that range, below that range based upon a Government motion to reward the defendant’s cooperation pursuant to USSG

¹ Some courts, however, have gone further and thus drifted into error by deviating from the clear language of Section 3553(a) into the creation of baseless *ipse dixit* rules: *e.g.*, *United States v. Haack*, 403 F.3d 997, 1003 (8th Cir. 2005) (a “sentencing court must first determine the advisory guidelines range” and then consider the factors set forth in 18 U.S.C. § 3553(a)); *United States v. Hughes*, 401 F.3d 540, 546-47 (4th Cir. 2005) (in calculating the appropriate sentence, district courts “shall first calculate (after making the appropriate findings of fact) the range prescribed by the guidelines”). But nothing in Section 3553(a) could be construed to *require* a sentencing judge to calculate the guidelines range “first,” no matter how convenient or sensible that may be in many cases, nor are the Guidelines, after *Booker*, something other than one of the “factors set forth in ... § 3553(a),” that is, Subsection (a)(4), just as the Commission’s “policy statements” (including those concerning departures) are to be considered as Subsection (a)(5).

² The 92% is comprised of sentences within the Guideline range (61.9%), upward departures (.9%), downward departures for substantial assistance (14.3%), other Government sponsored (non-*Booker* based) departures (9.9%), and departures that relied at least in part upon Guidelines analyses (5.2%). Addendum at 7.

³ The 88.9% is comprised of sentences within the Guideline range (61.6%), upward departures (.3%), downward departures for substantial assistance (14.7%), other Government sponsored (non-*Booker* based) departures (9.1%), and departures that relied at least in part upon Guidelines analyses (3.2%). Addendum at 7.

§ 5K1.1, as well as other departures. *Id.* Nor are these statistics significantly different in this, as opposed to other, Circuits.

Thus, despite the advisory nature of the Guidelines, they continue to play a defining, and very significant role in determining a defendant's sentence, thereby posing a continued threat to the interests traditionally protected by a reasonable doubt standard. The reasons that these dangers persist, post-*Booker*, are straightforward. First, district courts must consider the sentencing range established by the Guidelines. 18 U.S.C. § 3553(a)(4)(A)(i) (the court "shall consider ... the sentencing range" resulting from an application of the Guidelines); *Booker*, 543 U.S. at 224 (the district court "must consult" the Guidelines) (citing 18 U.S.C. § 3553(a)(4) & (5)). In determining the sentencing range, the district court must, by necessity, make factual determinations as to disputed issues regarding the factors presented by the specific offense characteristics set forth in nearly every Chapter Two Guideline, as well as, for example, Chapter Three adjustments based upon a defendant's role in the offense, USSG § 3B1.1, and/or whether the victims were vulnerable, USSG § 3A1.1. *Cooper*, 437 F.3d at 329-30 (the district court "must calculate the correct guidelines range applicable to a defendant's particular circumstances") (citing *United States v. Garcia*, 413 F.3d 201, 220 n.15 (2d Cir. 2005)). *See also United States v. Wallace*, --- F.3d ---, 2006 WL 2336923, at *12 (7th Cir. Aug. 14, 2006) (reversing district court because it imposed a sentence based on the other factors set forth in 18 U.S.C. § 3553(a) without conducting an adequate Guidelines analysis); *United States v. Mohamed*, --- F.3d ---, 2006 WL 2328722, at *5 (9th Cir. Aug. 11, 2006) (stating that when reviewing sentencing decisions post-*Booker*, the Court of Appeals considers "whether the district court properly calculated the applicable range" before evaluating whether the sentence is otherwise reasonable). Thus, despite the

advisory nature of the Guidelines, the district court is required to make factual determinations, and thereby often deprive a defendant of his or her freedom for a time period longer than would otherwise occur, based upon Guidelines determinations.⁴

Second, courts of appeals have likewise overweighted the Guidelines, vis-à-vis the other factors listed by Congress in 18 U.S.C. § 3553(a). Indeed, in numerous circuits, “the farther the judge’s sentence departs from the guidelines sentence ... the more compelling the justification” which must be provided to render the sentence reasonable. *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005). *See Davis*, --- F.3d ---, 2006 WL 2335240, at *4 (same); *United States v. Cage*, 451 F.3d 585, 594 (10th Cir. 2006) (same); *United States v. Smith*, 445 F.3d 1, 4 (1st Cir. 2006) (same); *United States v. Duhon*, 440 F.3d 711, 715 (5th Cir. 2006) (same); *United States v. Lazenby*, 439 F.3d 928, 932 (8th Cir. 2006) (same); *United States v. Moreland*, 437 F.3d 424, 434 (4th Cir. 2006) (same).

Thus, as this Court has said, “it is less likely that a within-guidelines sentence, as opposed to an outside-guidelines sentence, will be unreasonable.” *Cooper*, 437 F.3d at 331. Many other courts of appeal have taken an even more extreme position and have instructed the district courts that a Guidelines sentence

⁴ Many of the determinations are, as Judge Sloviter recognized in dissent, to the effect that the defendant committed a crime other than the offense of conviction. *Grier*, 449 F.3d at 575-88 (Sloviter, J., dissenting). For example, in *Grier*, the defendant received an increased sentence pursuant to USSG § 2K2.1(b)(5), based upon a finding that he had possessed a firearm in connection with a separate, unproven felony offense. *Grier*, 449 F.3d at 562-63. The Guidelines contain numerous other examples of such determinations, including, an increase for obstruction of justice, USSG § 3C1.1, for violating a court order in connection with the offense, USSG § 2A6.1(b)(3), for cross-references if the crime involved murder as defined by 18 U.S.C. § 1111, USSG § 2B3.2(c), and for acts considered relevant conduct (which must always constitute criminal activity), USSG § 1B1.3, Appl. Note 9 (aggregable conduct must consist of “offenses”); *see United States v. Dickler*, 64 F.3d 818, 830-31 (3d Cir. 1995) (government must prove that all “relevant conduct” was criminal in nature).

is presumptively reasonable. *United States v. Williams*, 436 F.3d 706, 708) (6th Cir. 2006) (within the Guidelines sentence is presumed reasonable); *United States v. Dorcely*, --- F.3d ---, 2006 WL 2034245, at *7 (D.C. Cir. July 21, 2006) (within the Guidelines sentence is presumptively reasonable); *United States v. Caldwell*, 448 F.3d 287, 290 (5th Cir. 2006) (within Guidelines sentence “enjoys a presumption of reasonableness”); *United States v. Sullivan*, --- F.3d ---, Nos. 03-4601, 03-4610, 2006 WL 1891792, at * 3 (4th Cir. July 11, 2006) (“in the ordinary case” a within Guidelines sentence should be affirmed if it is reasonable) (citing *Hughes*, 401 F.3d at 546-47); *United States v. Kristl*, 437 F.3d 1050, 1054-55 (10th Cir. 2006) (“a sentence that is properly calculated under the Guidelines is entitled to a rebuttable presumption of reasonableness”); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005) (adopting a rebuttable presumption that a within-guidelines sentence is reasonable).⁵

As discussed, *supra*, *Booker* addressed and corrected infringements upon the Sixth Amendment’s right to a jury trial by making the Guidelines non-mandatory. It did not, however, analyze or remediate the due process violations visited upon defendants when a district court continues to utilize the Guidelines and makes critical Guideline-based factual determinations that directly affect a sentence based upon a mere preponderance of the evidence. In sum, post-*Booker*, individuals

⁵ The burden shifting effected by employing such a rebuttable presumption of reasonableness regarding a Guidelines sentence is a “troublesome evidentiary device” that may significantly impair the protections afforded by the reasonable doubt standard. *See Ulster County v. Allen*, 442 U.S. 140, 157 (1979). Indeed, this Court and others have properly refused to take such an extreme stance and have rightly endorsed a more nuanced analysis when evaluating the manner in which the Guidelines should be applied post-*Booker*. *See Cooper*, 437 F.3d at 331-32 (rejecting position that a Guidelines sentence is presumptively reasonable); *United States v. Fernandez*, 443 F.3d 19, 27-28 (2d Cir. 2006) (same); *United States v. Jiménez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc) (it is not “helpful to talk about the guidelines as ‘presumptively’ controlling or a guidelines sentence as ‘per se reasonable,’ ” because such a conclusion comes too close to restoring the mandatory nature of the Guidelines).

continue to lose their liberty for longer periods of time based upon factual determinations made using a preponderance standard.

This state of affairs is unconstitutional. The Fifth Amendment's Due Process Clause demands a more exacting standard for, in the words of the Supreme Court of the United States, it is the "manifest duty of the courts" to vindicate the due process protections guaranteed by the Fifth Amendment to the United States Constitution. *United States v. Nixon*, 418 U.S. 683, 711 (1974). As one court to have carefully considered this issue has put it:

We cannot have it both ways: We cannot say that facts found by the judge are only advisory, that as a result, few procedural protections are necessary and also say that the Guidelines are critically important. If the Guidelines continue to be important, if facts the Guidelines make significant continue to be extremely relevant, then Due Process requires procedural safeguards and a heightened standard of proof, namely, proof beyond a reasonable doubt.

Pimental, 367 F. Supp. 2d at 154. In sum, "[w]hen a judge's finding based on a mere preponderance of the evidence authorizes an increase in the maximum punishment, it is appropriately characterized as 'a tail which wags the dog of the substantive offense.'" *Apprendi*, 530 U.S. at 495 (quoting *McMillan*, 477 U.S. at 88).

In this case, the threat posed by fact-finding at sentencing to the interests long protected by the reasonable doubt standard remains very real and, a defendant is entitled to have that standard applied when a district court makes factual findings in calculating his applicable sentencing range. Respectfully, this Court should not hesitate to affirm that an individual whose life, liberty and future is at stake is entitled to that protection under the Fifth Amendment to the United States Constitution.

II. AT VERY LEAST, THE GOVERNING STANDARD FOR PROOF OF FACTS WHICH INCREASE A SENTENCE SHOULD BE HIGHER THAN A BARE PREPONDERANCE, THAT IS, CLEAR AND CONVINCING EVIDENCE.

If the Court concludes that the Due Process Clause does not require proof beyond a reasonable doubt for judicial fact-finding at sentencing, it should hold, at the very least, that proof by clear and convincing evidence is required. As discussed above, burdens of proof exist along a continuum, from the least exacting (preponderance) to the most (beyond a reasonable doubt). *Addington*, 441 U.S. at 423. The “intermediate standard” requires proof by clear and convincing evidence. *Id.* at 424. To determine which standard of proof is appropriate for a particular inquiry, courts evaluate “the relative importance attached to the ultimate decision,” *i.e.*, what is at stake for the individual litigant, and “the degree of confidence” society should have in the outcome. *Id.* at 423 (quoting *Winship*, 397 U.S. at 370 (Harlan, J., concurring)). The interests at stake when a judge makes factual findings at sentencing, and the need for public confidence in those results, establish that, at a minimum, proof by clear and convincing evidence is required to provide a defendant with the due process of law. A simple comparison proves the point.

An individual’s freedom and future -- as well as the need for the public to believe that our criminal justice system works -- is vastly more significant than what is at stake in the cases in which the preponderance standard applies. For example, the determination of whether a person’s prison sentence is increased by 50%, *e.g.*, Appellant Grier, 449 F.3d at 562, and society’s need to be sure that such a decision was based upon accurate information, is much more important than deciding whether a party has demonstrated diversity of citizenship, *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936), whether an employee was wrongly fired, *Ryder v. Westinghouse Elec. Corp.*, 128 F.3d 128, 136 (3d Cir. 1997), whether certain evidence is admissible, *Bourjaily v. United States*, 483 U.S.

171, 175-76 (1987), whether property is forfeited to the Government, *United States v. Voigt*, 89 F.3d 1050, 1084 (3d Cir. 1996), whether a person has committed civil fraud, 12 U.S.C. § 1833a(f), or whether someone has registered a website domain name in bad faith, *Harrods Limited v. Sixty Internet Domain Names*, 302 F.3d 214, 227 (4th Cir. 2002). Thus, given the significance of what is at stake when a judge finds facts at sentencing, and by contrasting that with what is traditionally determined using the preponderance standard, it is clear that such a minimal showing is not sufficient to provide the defendant with due process.

Indeed, proof by clear and convincing evidence has long been required when interests which are less substantial than a defendant's freedom and future are at stake. Specifically, that standard of proof is required before an individual can be involuntarily committed for mental health reasons, *Addington*, 441 U.S. at 433, or classified under Megan's Law, *E.B.*, 119 F.3d at 1111, and it applies when the state seeks to terminate an individual's parental rights, *Santosky*, 455 U.S. at 769-70, strip an individual of her citizenship, *Woodby*, 385 U.S. at 285, or deport her, *Chaunt*, 364 U.S. at 353. All of those interests implicate the manner in which a person is free to live her life, move about society, and plan for her future. They are, however, not as important as an individual's freedom, something which has always been the most sacrosanct of interests protected by the law. *Randall*, 357 U.S. at 525-26 (an individual's freedom is of "transcending value"). Thus, at the very least, judicial fact-finding at sentencing should require proof by clear and

convincing evidence. *Kikumura*, 918 F.2d at 1101;⁶ *United States v. Jordan*, 256 F.3d 922, 927-29 (9th Cir. 2001) (enhancements that have a disproportionate impact on sentences must be established by clear and convincing evidence).

⁶ In *Kikumura* the issue was whether a standard of proof higher than a preponderance should be required if a defendant's sentence was increased from a range of 27-33 months to a sentence of 30 years. 918 F.2d at 1089. This Court held that under such circumstances, clear and convincing evidence was required to support such an upward departure. *Id.* at 1102. Unlike defendant *Kikumura*'s 1090% increase, however, Appellant Grier's sentence was increased by approximately 50% (from a range of 84 to 105 months to 120 to 150 months), 449 F.3d at 562. Thus, the issue of whether an eleven-fold or similar increase, in and of itself, requires a higher burden of proof is, respectfully, not before the Court on the facts of this case. For this reason, the panel erred in announcing it was "overruling" Judge Becker's landmark decision for the Court in *Kikumura*.

III. UNDER THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE, THIS COURT SHOULD INTERPRET 18 U.S.C. § 3553(a) AND USSG § 6A1.3 TO REQUIRE PROOF BEYOND A REASONABLE DOUBT OF FACTS WHICH INCREASE A SENTENCE SO AS TO AVOID THE CONSTITUTIONALLY DOUBTFUL CONSTRUCTION THAT WOULD RESULT FROM APPLICATION OF A LOWER STANDARD OF PROOF.

In the absence of a sentencing statute adopting a standard of proof, the Doctrine of Constitutional Avoidance requires that sentencing statutes be interpreted to incorporate the Fifth Amendment's reasonable doubt standard to avoid the serious constitutional questions discussed above that inhere in increased incarceration based on facts established by less than proof beyond a reasonable doubt. As the Supreme Court explained in a decision issued on the same day as *Booker*, "when deciding which of two plausible statutory constructions to adopt, ... [i]f one of them would raise a multitude of constitutional problems, the other should prevail" *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005). *See also I.N.S. v. St. Cyr*, 533 U.S. 289, 299-300 (2001) (court is obliged to construe statute to avoid serious constitutional problems "where an alternative interpretation of the statute is fairly possible"); *Burns v. United States*, 501 U.S. 129, 138 (1991) (interpreting Federal Rule of Criminal Procedure 32, in part to avoid due process question, as including a notice requirement regarding a district court's intent to give notice of an upward departure under the Guidelines); *United States v. Edmonds*, 80 F.3d 810, 819 (3d Cir. 1996) (en banc) (interpretation of statute should avoid any construction that renders it of doubtful constitutional validity).

The sentencing statutes do not specify the burden of proof required for facts that increase the guideline range. But the controlling sentencing statute, 18 U.S.C. § 3553(a), does instruct district courts to "impose a sentence sufficient, but not greater than necessary" to achieve the sentencing goals set forth in Section

3553(a)(2), *i.e.*, punishment, deterrence, protection of society, and rehabilitation. And USSG § 6A1.3(a) states that any information upon which the Court will rely in resolving sentencing disputes must have “sufficient indicia of reliability to support its probable accuracy.” This Court has repeatedly concluded that the standard for reliability set forth in USSG § 6A1.3(a) “should be applied *rigorously*.” *United States v. Campbell*, 295 F.3d 398, 406 (3d Cir. 2002) (emphasis added) (quoting *United States v. Miele*, 989 F.2d 659, 664 (3d Cir. 1993)). Consistent with that jurisprudence, the Court, in order to avoid the difficult constitutional questions otherwise presented here, should interpret the “sufficient, but not greater than necessary” language of Section 3553(a) and the “sufficient indicia of reliability” language of USSG § 6A1.3(a), to require that the reasonable doubt standard applies to judicial fact-finding at sentencing.⁷ The reasonable doubt standard best effectuates the statutory and Guidelines concerns that the deprivation of liberty not be greater than necessary, and that the determination be based on reliable information. Indeed, nothing can ensure reliability better than the requirement of proof beyond a reasonable doubt.

In sum, the Doctrine of Constitutional Avoidance counsels that the sentencing statutes and Guidelines, in the absence of any specified burden of proof, be interpreted to avoid the due process concerns outlined in the points above by requiring proof beyond a reasonable doubt. Finally, even if the Court is not persuaded that the terms of either Section 3553(a) or USSG § 6A1.3 can fairly be construed to require a higher burden of proof, the Court may, and should, still

⁷ Although the Sentencing Commission in its commentary to USSG § 6A1.3 suggests that a preponderance standard would be sufficient, as Justice Thomas points out, the Commission was clearly “mistaken” in this regard under the mandatory guidelines. *See Booker*, 543 U.S. 220, 319 n.6 (Thomas, J., dissenting in part). In view of the constitutional doubts regarding any lower standard, the Commission’s belief should be considered equally mistaken after *Booker*.

avoid the constitutional question by utilizing its supervisory power. That authority is available to resolve any procedural issues arising in federal cases, which are not addressed by statute or rule. *See Peguero v. United States*, 526 U.S. 23, 29 (1999) (harmless error rule cannot be evaded by invocation of supervisory power); *Ortega-Rodriguez v. United States*, 506 U.S. 234, 248-49 (1993) (supervisory power places limits on scope of fugitive disentitlement doctrine). This Court has employed that power in such matters as disapproval of standard jury instructions, *see United States v. Eastern Medical Billing, Inc.*, 230 F.3d 600, 611 (3d Cir. 2000), and bifurcation of trials, *see United States v. Sandini*, 816 F.2d 869, 874 (3d Cir. 1987). The instant context would be another appropriate one for the exercise of that power, if the matter is found not to be settled by the construction of any statute or rule, to enhance fairness and accuracy in federal sentencing.

IV. CONCLUSION

For the foregoing reasons, *amici curiae*, The National Association of Federal Defenders and The National Association of Criminal Defense Lawyers, urge the Court to hold that the Fifth Amendment's Due Process Clause requires that the determination of a defendant's final Guideline range be based only upon facts necessarily determined by a jury's verdict, facts admitted by the defendant in a plea colloquy, and facts otherwise proven beyond a reasonable doubt.

Respectfully submitted,

GIBBONS, DEL DEO, DOLAN,
GRIFFINGER & VECCHIONE
A Professional Corporation
One Riverfront Plaza
Newark, New Jersey 07102
(973) 596-4500

*Attorneys for Amici Curiae
The National Association of
Federal Defenders and
The National Association of
Criminal Defense Lawyers*

/s/ Lawrence S. Lustberg

Lawrence S. Lustberg, Esq.

/s/ Michael A. Baldassare

Michael A. Baldassare, Esq.

Date: August 21, 2006

COMBINED CERTIFICATIONS

Certification of Bar Membership

I, Lawrence S. Lustberg, Esq., do hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Lawrence S. Lustberg

Lawrence S. Lustberg, Esq.

I, Michael A. Baldassare, Esq., do hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

/s/ Michael A. Baldassare

Michael A. Baldassare, Esq.

Certification of Word Count

I, Michael A. Baldassare, Esq., do hereby certify that this brief contains 8,378 words, exclusive of tables, certifications, and addenda. Because this exceeds the 7,000 word limit, I have filed an appropriate motion.

/s/ Michael A. Baldassare

Michael A. Baldassare, Esq.

Certification of Identical Compliance of Briefs

I, Michael A. Baldassare, Esq., do hereby certify that the text of the electronically filed brief and the hard copies filed with the Clerk of the Court are identical.

/s/ Michael A. Baldassare

Michael A. Baldassare, Esq.

Certification of Virus Check

I, Michael A. Baldassare, Esq., do hereby certify that the PDF file of this brief that has been submitted to the Clerk of the Court electronically has undergone a virus check using Symantec Antivirus Version 9.0.3.1000.

/s/ Michael A. Baldassare

Michael A. Baldassare, Esq.

Certification of Service

I, Michael A. Baldassare, Esq., do hereby certify that on August 21, 2006, I caused to be served two (2) copies of this brief and addendum via Federal Express and electronic mail upon the following parties:

Theodore B. Smith, III, Esq.
United States Attorney's Office
228 Walnut Street, Room 220
Harrisburg, Pennsylvania 17108

theodore.smith@usdoj.gov

Ronald A. Krauss, Esq.
Ass't Federal Public Defender, Appeals
100 Chestnut Street, Suite 306
Harrisburg, Pennsylvania 17101

ronald_krauss@fd.org

/s/ Michael A. Baldassare

Michael A. Baldassare, Esq.

Addendum

United States Sentencing Commission Special Post-Booker Coding Project

Prepared: July 6, 2006

U.S. Sentencing Commission Special Post-Booker Coding Project



Information for All Cases

Cases Sentenced Subsequent to *U.S. v. Booker*
(Data Extraction as of June 1, 2006)

Prepared: July 6, 2006



U.S. SENTENCING COMMISSION
SPECIAL POST-BOOKER CODING PROJECT
DATA EXTRACTION DATE: JUNE 1, 2006

CONTENTS

	page
NATIONAL DATA	
Comparison of Sentence Imposed And Position Relative to the Guideline Range	1
Most Frequently Applied Guidelines: Comparison of Sentence Imposed And Position Relative to the Guideline Range	2
Offenders Sentenced for Each Chapter Two Guideline	3
CIRCUIT AND DISTRICT DATA	
Guideline Offenders in Each Circuit and District	5
Guideline Application Trends: National and Circuit	7
SENTENCE LENGTHS – MOST FREQUENTLY APPLIED GUIDELINES	
Distribution of Offenders Receiving Sentencing Options	12
Average and Median Sentence Imposed: Pre-Blakely FY2003-FY2004	13
Average and Median Sentence Imposed: Post-Blakely FY2004-Pre-Booker FY2005	14
Average and Median Sentence Imposed: Post-Booker FY2005- FY2006	15

DEGREE OF DEPARTURE AND VARIANCE

Sentences Relative to the Guideline Range by Each Circuit and District	16
Substantial Assistance Departures in Each Primary Offense Category	19
Govt Sponsored Downward Departures in Each Primary Offense Category . .	20
Other Downward Departures in Each Primary Offense Category	21
Otherwise Below Guideline Range in Each Primary Offense Category	22
Upward Departures in Each Primary Offense Category	23
Otherwise Above Guideline Range in Each Primary Offense Category	24

**NATIONAL COMPARISON OF SENTENCE IMPOSED AND
POSITION RELATIVE TO THE GUIDELINE RANGE**
Cases Sentenced in FY 2006 with Data Available to USSC on June 1, 2006

	N	%
TOTAL ¹	39,508	100.0
WITHIN GUIDELINE RANGE	24,442	61.9
DEPARTURE ABOVE GUIDELINE RANGE	340	0.9
Upward Departure from the Guideline Range ²	243	0.6
Upward Departure with <i>Booker</i> /18 U.S.C. § 3553 ³	97	0.2
OTHERWISE ABOVE THE GUIDELINE RANGE	308	0.8
Above the Range with <i>Booker</i> /18 U.S.C. § 3553 ⁴	255	0.6
All Remaining Cases Above the Guideline Range ⁵	53	0.1
GOVERNMENT SPONSORED BELOW RANGE	9,541	24.1
§5K1.1 Substantial Assistance Departure	5,636	14.3
§5K3.1 Early Disposition Program Departure	2,839	7.2
Government-Sponsored Departure ⁶	1,066	2.7
DEPARTURE BELOW GUIDELINE RANGE	2,049	5.2
Downward Departure from the Guideline Range ²	1,120	2.8
Downward Departure with <i>Booker</i> /18 U.S.C. § 3553 ³	929	2.4
OTHERWISE BELOW THE GUIDELINE RANGE	2,828	7.2
Below the Range with <i>Booker</i> /18 U.S.C. § 3553 ⁴	2,309	5.8
All Remaining Cases Below the Guideline Range ⁵	519	1.3

¹This table reflects the 40,877 cases sentenced subsequent to October 1, 2005, with court documentation cumulatively received, coded, and edited at the U.S. Sentencing Commission by June 1, 2006. Of this total, there are 1,369 cases excluded for one of two general reasons. Some excluded cases involve certain Class A misdemeanors or other offenses which do not reference a sentencing guideline. Other excluded cases have information missing from the submitted documents that prevents the comparison of the sentence and the guideline range. As missing documents are received, subsequent U.S. Sentencing Commission data releases will incorporate the new information.

²All cases with departures outside of the guideline range which do not cite as a reason either *U.S. v. Booker*, 18 U.S.C. § 3553, or factors or reasons specifically prohibited in the provisions, policy statements, or commentary of the federal *Guidelines Manual*.

³All cases with a sentence outside of the guideline range which includes both a departure (see footnote 2) as well as a sentence outside the guideline system mentioning either *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for sentencing outside of the guideline system.

⁴All cases with a sentence outside of the guideline range with no departure indicated and which cite *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors as one of the reasons for sentencing of the guideline system.

⁵All cases sentenced outside of the guideline range that cannot be classified into any of the three previous outside of the range categories. This category includes for example, cases in which no reason is provided for a sentence outside of the guideline range.

⁶Cases with a reason for departure indicating that the prosecution initiates, proposes, or stipulates to a sentence outside of the guideline range, either pursuant to a plea agreement or as part of a non-plea negotiation with the defendant.

SOURCE: U.S. Sentencing Commission, FY2006 datafile, (data extraction on June 1, 2006; table prepared on July 6, 2006). USSCFY06. Summary numbers may not add up to their component parts due to rounding

MOST FREQUENTLY APPLIED GUIDELINES: COMPARISON OF SENTENCE IMPOSED AND POSITION RELATIVE TO THE GUIDELINE RANGE

Cases Sentenced in FY 2006 with Data Available to USSC on June 1, 2006

	Four Most Frequently Applied Primary Guidelines									
	All Cases		§2D1.1 Drug Trafficking		§2L1.2 Unlawful Entry		§2K2.1 Firearms		§2B1.1 Theft and Fraud	
	N	%	N	%	N	%	N	%	N	%
TOTAL¹	39,508	100.0	13,912	100.0	6,456	100.0	3,732	100.0	4,129	100.0
WITHIN GUIDELINE RANGE	24,442	61.9	7,501	53.9	3,958	61.3	2,646	70.9	2,880	69.8
DEPARTURE ABOVE GUIDELINE	340	0.9	34	0.2	29	0.4	58	1.6	46	1.1
Upward Departure from the Guideline Range ²	243	0.6	20	0.1	24	0.4	42	1.1	25	0.6
Upward Departure with Booker/18 USC §3553 ³	97	0.2	14	0.1	5	0.1	16	0.4	21	0.5
OTHERWISE ABOVE THE RANGE	308	0.8	37	0.3	38	0.6	56	1.5	68	1.6
Above the Range with Booker/18 USC §3553 ⁴	255	0.6	27	0.2	30	0.5	52	1.4	55	1.3
All Remaining Cases Above the Guideline Range ⁵	53	0.1	10	0.1	8	0.1	4	0.1	13	0.3
GOVERNMENT BELOW GUIDELINE	9,541	24.1	4,668	33.6	1,847	28.6	452	12.1	541	13.1
§5K1.1 Substantial Assistance Departure	5,636	14.3	3,598	25.9	53	0.8	342	9.2	457	11.1
§5K3.1 Early Disposition Program Departure	2,839	7.2	712	5.1	1,612	25.0	21	0.6	7	0.2
Government-Sponsored Departure ⁶	1,066	2.7	358	2.6	182	2.8	89	2.4	77	1.9
DEPARTURE BELOW GUIDELINE	2,049	5.2	702	5.0	293	4.5	231	6.2	253	6.1
Downward Departure from the Guideline Range ²	1,120	2.8	361	2.6	211	3.3	134	3.6	122	3.0
Downward Departure with Booker/18 USC §3553 ³	929	2.4	341	2.5	82	1.3	97	2.6	131	3.2
OTHERWISE BELOW THE RANGE	2,828	7.2	970	7.0	291	4.5	289	7.7	341	8.3
Below the Range with Booker/18 USC §3553 ⁴	2,309	5.8	788	5.7	252	3.9	249	6.7	262	6.3
All Remaining Cases Below the Guideline Range ⁵	519	1.3	182	1.3	39	0.6	40	1.1	79	1.9

¹This table reflects the 40,877 cases sentenced subsequent to October 1, 2005, with court documentation cumulatively received, coded, and edited at the U.S. Sentencing Commission by June 1, 2006. Of this total, there are 1,369 cases excluded for one of two general reasons. Some excluded cases involve certain Class A misdemeanors or other offenses which do not reference a sentencing guideline. Other excluded cases have information missing from the submitted documents that prevents the comparison of the sentence and the guideline range. As missing documents are received, subsequent U.S. Sentencing Commission data releases will incorporate the new information.

²All cases with departures outside of the guideline range which do not cite as a reason either *U.S. v. Booker*, 18 U.S.C. § 3553, or factors or reasons specifically prohibited in the provisions, policy statements, or commentary of the federal Guidelines Manual.

³All cases with a sentence outside of the guideline range which includes both a departure (see footnote 2) as well as a sentence outside the guideline system mentioning either *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for sentencing outside of the guideline system.

⁴All cases with a sentence outside of the guideline range with no departure indicated and which cite *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors as one of the reasons for sentencing of the guideline system.

⁵All cases sentenced outside of the guideline range that cannot be classified into any of the three previous outside of the range categories. This category includes for example, cases in which no reason is provided for a sentence outside of the guideline range.

⁶Cases with a reason for departure indicating that the prosecution initiates, proposes, or stipulates to a sentence outside of the guideline range, either pursuant to a plea agreement or as part of a non-plea negotiation with the defendant.

SOURCE: U.S. Sentencing Commission, FY2006 datafile, (data extraction on June 1, 2006; table prepared on July 6, 2006). USSCFY06. Summary numbers may not add up to their component parts due to rounding.

OFFENDERS SENTENCED FOR EACH CHAPTER TWO GUIDELINE¹
Cases Sentenced in FY 2006 with Data Available to USSC on June 1, 2006

Guideline	As Primary Guideline		As Any Guideline		Guideline	As Primary Guideline		As Any Guideline	
	n	%	n	%		n	%	n	%
2A1.1	91	0.2	97	0.2	2D1.7	7	0.0	8	0.0
2A1.2	24	0.1	26	0.1	2D1.8	41	0.1	60	0.1
2A1.3	14	0.0	15	0.0	2D1.9	0	0.0	0	0.0
2A1.4	18	0.0	22	0.1	2D1.10	10	0.0	10	0.0
2A1.5	12	0.0	20	0.0	2D1.11	91	0.2	105	0.3
2A2.1	43	0.1	53	0.1	2D1.12	35	0.1	40	0.1
2A2.2	200	0.5	226	0.5	2D1.13	1	0.0	2	0.0
2A2.3	28	0.1	30	0.1	2D2.1	220	0.6	274	0.7
2A2.4	78	0.2	88	0.2	2D2.2	38	0.1	46	0.1
2A3.1	76	0.2	80	0.2	2D2.3	1	0.0	1	0.0
2A3.2	51	0.1	57	0.1	2D3.1	2	0.0	2	0.0
2A3.3	3	0.0	3	0.0	2D3.2	1	0.0	1	0.0
2A3.4	15	0.0	20	0.0	2D3.3	0	0.0	0	0.0
2A4.1	37	0.1	46	0.1	2D3.4	0	0.0	0	0.0
2A4.2	0	0.0	0	0.0	2D3.5	0	0.0	0	0.0
2A5.1	1	0.0	1	0.0	2E1.1	18	0.0	46	0.1
2A5.2	14	0.0	15	0.0	2E1.2	11	0.0	47	0.1
2A5.3	0	0.0	0	0.0	2E1.3	1	0.0	24	0.1
2A6.1	106	0.3	110	0.3	2E1.4	3	0.0	4	0.0
2A6.2	2	0.0	6	0.0	2E1.5	0	0.0	0	0.0
2B1.1	4,189	11.0	4,600	11.2	2E2.1	11	0.0	12	0.0
2B1.2	0	0.0	0	0.0	2E3.1	55	0.1	66	0.2
2B1.3	3	0.0	3	0.0	2E3.2	0	0.0	0	0.0
2B1.4	13	0.0	13	0.0	2E3.3	0	0.0	0	0.0
2B1.5	8	0.0	9	0.0	2E4.1	17	0.0	21	0.1
2B2.1	42	0.1	49	0.1	2E5.1	4	0.0	4	0.0
2B2.2	0	0.0	0	0.0	2E5.2	0	0.0	0	0.0
2B2.3	3	0.0	4	0.0	2E5.3	3	0.0	7	0.0
2B3.1	980	2.6	1,053	2.6	2E5.4	0	0.0	0	0.0
2B3.2	26	0.1	39	0.1	2E5.5	0	0.0	0	0.0
2B3.3	6	0.0	8	0.0	2E5.6	0	0.0	0	0.0
2B4.1	18	0.0	19	0.0	2F1.1	506	1.3	535	1.3
2B5.1	374	1.0	394	1.0	2F1.2	8	0.0	8	0.0
2B5.2	0	0.0	0	0.0	2G1.1	34	0.1	52	0.1
2B5.3	94	0.2	98	0.2	2G1.2	0	0.0	0	0.0
2B5.4	0	0.0	0	0.0	2G1.3	82	0.2	93	0.2
2B6.1	6	0.0	8	0.0	2G2.1	49	0.1	56	0.1
2C1.1	92	0.2	106	0.3	2G2.2	406	1.1	417	1.0
2C1.2	23	0.1	23	0.1	2G2.3	1	0.0	1	0.0
2C1.3	10	0.0	10	0.0	2G2.4	173	0.5	185	0.4
2C1.4	0	0.0	0	0.0	2G2.5	0	0.0	0	0.0
2C1.5	0	0.0	0	0.0	2G3.1	6	0.0	9	0.0
2C1.6	1	0.0	1	0.0	2G3.2	0	0.0	0	0.0
2C1.7	10	0.0	16	0.0	2H1.1	12	0.0	13	0.0
2C1.8	6	0.0	7	0.0	2H1.2	0	0.0	0	0.0
2D1.1	14,071	36.9	14,767	35.9	2H1.3	0	0.0	0	0.0
2D1.2	190	0.5	200	0.5	2H1.4	0	0.0	0	0.0
2D1.3	0	0.0	0	0.0	2H1.5	0	0.0	0	0.0
2D1.4	0	0.0	0	0.0	2H2.1	20	0.1	22	0.1
2D1.5	11	0.0	12	0.0	2H3.1	8	0.0	9	0.0
2D1.6	25	0.1	92	0.2	2H3.2	3	0.0	3	0.0

(continued)

Guideline	As Primary Guideline		As Any Guideline		Guideline	As Primary Guideline		As Any Guideline	
	n	%	n	%		n	%	n	%
2H3.3	5	0.0	5	0.0	2M4.1	0	0.0	0	0.0
2H4.1	8	0.0	9	0.0	2M5.1	9	0.0	13	0.0
2H4.2	0	0.0	0	0.0	2M5.2	14	0.0	15	0.0
2J1.1	0	0.0	10	0.0	2M5.3	3	0.0	4	0.0
2J1.2	75	0.2	98	0.2	2M6.1	3	0.0	3	0.0
2J1.3	42	0.1	58	0.1	2M6.2	0	0.0	0	0.0
2J1.4	7	0.0	12	0.0	2N1.1	3	0.0	3	0.0
2J1.5	0	0.0	0	0.0	2N1.2	0	0.0	0	0.0
2J1.6	38	0.1	50	0.1	2N1.3	0	0.0	0	0.0
2J1.7	82	0.2	90	0.2	2N2.1	14	0.0	25	0.1
2J1.8	0	0.0	0	0.0	2N3.1	0	0.0	0	0.0
2J1.9	0	0.0	0	0.0	2P1.1	130	0.3	139	0.3
2K1.1	8	0.0	8	0.0	2P1.2	53	0.1	66	0.2
2K1.2	0	0.0	0	0.0	2P1.3	4	0.0	4	0.0
2K1.3	30	0.1	33	0.1	2P1.4	0	0.0	0	0.0
2K1.4	36	0.1	48	0.1	2Q1.1	0	0.0	0	0.0
2K1.5	6	0.0	7	0.0	2Q1.2	36	0.1	36	0.1
2K1.6	0	0.0	0	0.0	2Q1.3	18	0.0	18	0.0
2K1.7	0	0.0	0	0.0	2Q1.4	0	0.0	0	0.0
2K2.1	3,759	9.9	3,996	9.7	2Q1.5	0	0.0	0	0.0
2K2.2	0	0.0	0	0.0	2Q1.6	0	0.0	0	0.0
2K2.3	0	0.0	0	0.0	2Q2.1	57	0.1	60	0.1
2K2.4	0	0.0	3	0.0	2Q2.2	0	0.0	0	0.0
2K2.5	6	0.0	7	0.0	2R1.1	7	0.0	12	0.0
2K2.6	4	0.0	6	0.0	2S1.1	567	1.5	615	1.5
2K3.1	0	0.0	0	0.0	2S1.2	17	0.0	18	0.0
2L1.1	1,890	5.0	1,930	4.7	2S1.3	145	0.4	158	0.4
2L1.2	6,503	17.1	6,574	16.0	2S1.4	0	0.0	0	0.0
2L1.3	0	0.0	0	0.0	2T1.1	254	0.7	314	0.8
2L2.1	211	0.6	225	0.5	2T1.2	0	0.0	0	0.0
2L2.2	551	1.4	578	1.4	2T1.3	1	0.0	1	0.0
2L2.3	0	0.0	0	0.0	2T1.4	79	0.2	88	0.2
2L2.4	0	0.0	0	0.0	2T1.5	0	0.0	0	0.0
2L2.5	0	0.0	0	0.0	2T1.6	10	0.0	12	0.0
2M1.1	0	0.0	0	0.0	2T1.7	0	0.0	0	0.0
2M2.1	0	0.0	0	0.0	2T1.8	0	0.0	0	0.0
2M2.2	0	0.0	0	0.0	2T1.9	19	0.0	23	0.1
2M2.3	0	0.0	0	0.0	2T2.1	1	0.0	1	0.0
2M2.4	0	0.0	0	0.0	2T2.2	0	0.0	0	0.0
2M3.1	0	0.0	0	0.0	2T3.1	25	0.1	27	0.1
2M3.2	1	0.0	1	0.0	2T3.2	0	0.0	0	0.0
2M3.3	1	0.0	2	0.0	2T4.1	0	0.0	0	0.0
2M3.4	0	0.0	0	0.0	2X1.1	111	0.3	687	1.7
2M3.5	0	0.0	0	0.0	2X2.1	0	0.0	19	0.0
2M3.6	0	0.0	0	0.0	2X3.1	73	0.2	83	0.2
2M3.7	0	0.0	0	0.0	2X4.1	285	0.7	292	0.7
2M3.8	0	0.0	0	0.0	2X5.1	0	0.0	19	0.0
2M3.9	0	0.0	0	0.0					
Total number of guidelines applied:						41,134			
Number of cases with at least one guideline applied:						38,093			

¹Of the 40,877 cases, 2,784 were excluded due to missing guideline applied. The total for any guideline can exceed that for primary guideline because a case can have several guidelines applied, but only one primary guideline.

SOURCE: U.S. Sentencing Commission, FY2006 datafile, (data extraction on June 1, 2006; table prepared on July 6, 2006). USSCFY06. Summary numbers may not add up to their component parts due to rounding.

GUIDELINE OFFENDERS IN EACH CIRCUIT AND DISTRICT¹
Cases Sentenced in FY 2006 with Data Available to USSC on June 1, 2006

CIRCUIT			CIRCUIT		
District	Number	Percent	District	Number	Percent
TOTAL	40,877	100.0			
D.C. CIRCUIT	273	0.7	FIFTH CIRCUIT	8,918	21.8
District of Columbia	273	0.7	Louisiana		
FIRST CIRCUIT	953	2.3	Eastern	187	0.5
Maine	131	0.3	Middle	97	0.2
Massachusetts	295	0.7	Western	273	0.7
New Hampshire	132	0.3	Mississippi		
Puerto Rico	324	0.8	Northern	95	0.2
Rhode Island	71	0.2	Southern	177	0.4
SECOND CIRCUIT	2,458	6.0	Texas		
Connecticut	201	0.5	Eastern	497	1.2
New York			Northern	666	1.6
Eastern	610	1.5	Southern	3,704	9.1
Northern	204	0.5	Western	3,222	7.9
Southern	996	2.4	SIXTH CIRCUIT	3,062	7.5
Western	313	0.8	Kentucky		
Vermont	134	0.3	Eastern	340	0.8
THIRD CIRCUIT	1,779	4.4	Western	217	0.5
Delaware	65	0.2	Michigan		
New Jersey	554	1.4	Eastern	500	1.2
Pennsylvania			Western	267	0.7
Eastern	509	1.2	Ohio		
Middle	295	0.7	Northern	608	1.5
Western	276	0.7	Southern	363	0.9
Virgin Islands	80	0.2	Tennessee		
FOURTH CIRCUIT	3,632	8.9	Eastern	322	0.8
Maryland	388	0.9	Middle	134	0.3
North Carolina			Western	311	0.8
Eastern	326	0.8	SEVENTH CIRCUIT	1,769	4.3
Middle	187	0.5	Illinois		
Western	443	1.1	Central	183	0.4
South Carolina	563	1.4	Northern	602	1.5
Virginia			Southern	205	0.5
Eastern	1,012	2.5	Indiana		
Western	328	0.8	Northern	256	0.6
West Virginia			Southern	179	0.4
Northern	233	0.6	Wisconsin		
Southern	152	0.4	Eastern	209	0.5
			Western	135	0.3

(continued)

CIRCUIT			CIRCUIT		
District	Number	Percent	District	Number	Percent
EIGHTH CIRCUIT	3,096	7.6	TENTH CIRCUIT	3,466	8.5
Arkansas			Colorado	435	1.1
Eastern	191	0.5	Kansas	399	1.0
Western	125	0.3	New Mexico	1,656	4.1
Iowa			Oklahoma		
Northern	239	0.6	Eastern	46	0.1
Southern	198	0.5	Northern	113	0.3
Minnesota	363	0.9	Western	235	0.6
Missouri			Utah	482	1.2
Eastern	554	1.4	Wyoming	100	0.2
Western	548	1.3			
Nebraska	467	1.1	ELEVENTH CIRCUIT	3,864	9.5
North Dakota	151	0.4	Alabama		
South Dakota	260	0.6	Middle	120	0.3
			Northern	303	0.7
NINTH CIRCUIT	7,607	18.6	Southern	176	0.4
Alaska	84	0.2	Florida		
Arizona	2,539	6.2	Middle	916	2.2
California			Northern	216	0.5
Central	820	2.0	Southern	1,196	2.9
Eastern	550	1.3	Georgia		
Northern	350	0.9	Middle	271	0.7
Southern	1,428	3.5	Northern	422	1.0
Guam	61	0.1	Southern	244	0.6
Hawaii	289	0.7			
Idaho	171	0.4			
Montana	246	0.6			
Nevada	128	0.3			
Northern Mariana Islands	7	0.0			
Oregon	279	0.7			
Washington					
Eastern	185	0.5			
Western	470	1.1			

SOURCE: U.S. Sentencing Commission, FY2006 Datafile (data extraction on June 1, 2006; table prepared on July 6, 2006). USSCFY06. Summary numbers may not add up to their component parts due to rounding.

Guideline Application Trends, National and Circuit

FY 2003, Pre- and Post-Blakely FY 2004, Pre- and Post-Booker FY 2005, and FY 2006¹
(FY2006 data extracted June 1, 2006)

NATIONAL

Position of Sentence Relative to Guideline Range	FY2003	FY2004 (Pre-Blakely)	FY2004 (Post-Blakely)	FY2005 (Pre-Booker)	FY2005 (Post-Booker)	FY2006
Within Range	69.4%	72.2%	71.8%	70.9%	61.6%	61.9%
Upward Departures	0.8%	0.8%	0.6%	0.7%	0.3%	0.9% ²
Otherwise Above Range	—	—	—	—	1.4%	0.8% ³
Substantial Assistance Departures	15.9%	15.5%	14.4%	14.7%	14.7%	14.3%
Other Gov't Sponsored Departures	6.3% ⁴	6.4%	8.6%	9.4%	9.1%	9.9% ⁴
Other Downward Departures	7.5%	5.2%	4.6%	4.3%	3.2%	5.2% ²
Otherwise Below Range	—	—	—	—	9.7%	7.2% ³

DC CIRCUIT

Position of Sentence Relative to Guideline Range	FY2003	FY2004 (Pre-Blakely)	FY2004 (Post-Blakely)	FY2005 (Pre-Booker)	FY2005 (Post-Booker)	FY2006
Within Range	64.6%	59.2%	64.1%	71.6%	52.9%	52.6%
Upward Departures	0.2%	1.0%	0.0%	0.0%	0.0%	1.8% ²
Otherwise Above Range	—	—	—	—	1.9%	1.5% ³
Substantial Assistance Departures	26.4%	31.3%	29.6%	24.8%	27.2%	15.8%
Other Gov't Sponsored Departures	4.4% ⁴	3.9%	3.5%	2.8%	6.1%	14.0% ⁴
Other Downward Departures	4.4%	4.7%	2.8%	0.7%	2.7%	5.9% ²
Otherwise Below Range	—	—	—	—	9.2%	8.5% ³

FIRST CIRCUIT

Position of Sentence Relative to Guideline Range	FY2003	FY2004 (Pre-Blakely)	FY2004 (Post-Blakely)	FY2005 (Pre-Booker)	FY2005 (Post-Booker)	FY2006
Within Range	77.3%	79.6%	77.1%	80.8%	63.3%	69.3%
Upward Departures	0.7%	0.9%	0.7%	0.8%	0.2%	0.4% ²
Otherwise Above Range	—	—	—	—	2.6%	1.0% ³
Substantial Assistance Departures	13.5%	13.8%	16.6%	14.1%	11.5%	13.2%
Other Gov't Sponsored Departures	0.7% ⁴	0.5%	0.0%	0.5%	2.4%	2.6% ⁴
Other Downward Departures	7.8%	5.2%	5.6%	3.8%	4.0%	4.5% ²
Otherwise Below Range	—	—	—	—	16.0%	9.1% ³

(continued on next page)

Guideline Application Trends, National and Circuit

FY 2003, Pre- and Post-Blakely FY 2004, Pre- and Post-Booker FY 2005, and FY 2006¹

SECOND CIRCUIT

Position of Sentence Relative to Guideline Range	FY2003	FY2004 (Pre-Blakely)	FY2004 (Post-Blakely)	FY2005 (Pre-Booker)	FY2005 (Post-Booker)	FY2006
Within Range	63.2%	63.8%	62.0%	59.8%	50.6%	50.5%
Upward Departures	0.5%	0.9%	0.3%	0.3%	0.1%	0.7% ²
Otherwise Above Range	—	—	—	—	1.0%	0.3% ³
Substantial Assistance Departures	17.5%	19.2%	23.0%	24.4%	21.4%	21.3%
Other Gov't Sponsored Departures	2.8% ⁴	2.5%	2.7%	2.4%	3.1%	2.0% ⁴
Other Downward Departures	16.0%	13.6%	12.0%	13.1%	6.3%	11.4% ²
Otherwise Below Range	—	—	—	—	17.5%	13.9% ³

THIRD CIRCUIT

Position of Sentence Relative to Guideline Range	FY2003	FY2004 (Pre-Blakely)	FY2004 (Post-Blakely)	FY2005 (Pre-Booker)	FY2005 (Post-Booker)	FY2006
Within Range	62.3%	62.6%	65.2%	67.5%	51.0%	51.8%
Upward Departures	0.9%	0.6%	0.2 %	0.4%	0.3%	0.6% ²
Otherwise Above Range	—	—	—	—	1.1%	1.0% ³
Substantial Assistance Departures	28.8%	30.3%	26.7%	26.9%	27.7%	27.5%
Other Gov't Sponsored Departures	0.6% ⁴	0.8%	0.5%	1.5%	1.8%	2.2% ⁴
Other Downward Departures	7.4%	5..8%	7.4%	3.6%	3.6%	5.6% ²
Otherwise Below Range	—	—	—	—	14.5%	11.2% ³

FOURTH CIRCUIT

Position of Sentence Relative to Guideline Range	FY2003	FY2004 (Pre-Blakely)	FY2004 (Post-Blakely)	FY2005 (Pre-Booker)	FY2005 (Post-Booker)	FY2006
Within Range	77.0%	79.0%	78.8%	77.1%	66.2%	69.5%
Upward Departures	0.6%	1.0%	0.6%	0.7%	0.3%	1.0% ²
Otherwise Above Range	—	—	—	—	1.1%	0.8% ³
Substantial Assistance Departures	18.3%	16.7%	16.8%	18.7%	18.4%	16.0%
Other Gov't Sponsored Departures	0.3% ⁴	0.3%	0.5%	0.6%	1.5%	1.0% ⁴
Other Downward Departures	3.8%	3.0%	3.3%	2.9%	2.5%	4.0% ²
Otherwise Below Range	—	—	—	—	10.0%	7.8% ³

(continued on next page)

Guideline Application Trends, National and Circuit

FY 2003, Pre- and Post-Blakely FY 2004, Pre- and Post-Booker FY 2005, and FY 2006¹

FIFTH CIRCUIT

Position of Sentence		FY2004	FY2004	FY2005	FY2005	
Relative to Guideline Range	FY2003	(Pre-Blakely)	(Post-Blakely)	(Pre-Booker)	(Post-Booker)	FY2006
Within Range	73.7%	80.2%	78.4%	77.2%	71.5%	74.1%
Upward Departures	0.9%	0.8%	0.4%	0.9%	0.3%	0.8% ²
Otherwise Above Range	—	—	—	—	1.6%	1.1% ³
Substantial Assistance Departures	12.5%	10.3%	9.6%	8.3%	8.2%	7.6%
Other Gov't Sponsored Departures	5.4%	5.2%	9.1%	11.1%	9.6%	9.1% ⁴
Other Downward Departures	7.5%	3.5%	2.5%	2.5%	2.5%	3.1% ²
Otherwise Below Range	—	—	—	—	6.4%	4.2% ³

SIXTH CIRCUIT

Position of Sentence		FY2004	FY2004	FY2005	FY2005	
Relative to Guideline Range	FY2003	(Pre-Blakely)	(Post-Blakely)	(Pre-Booker)	(Post-Booker)	FY2006
Within Range	69.1%	69.7%	70.9%	69.7%	57.7%	57.4%
Upward Departures	0.4%	0.5%	0.6%	0.5%	0.2%	0.6% ²
Otherwise Above Range	—	—	—	—	1.2%	0.8% ³
Substantial Assistance Departures	24.6%	24.3%	22.6%	24.2%	25.0%	25.0%
Other Gov't Sponsored Departures	0.5%	0.4%	1.5%	0.6%	1.9%	1.6% ⁴
Other Downward Departures	5.3%	5.1%	4.4%	5.0%	3.0%	5.8% ²
Otherwise Below Range	—	—	—	—	11.0%	8.9% ³

SEVENTH CIRCUIT

Position of Sentence		FY2004	FY2004	FY2005	FY2005	
Relative to Guideline Range	FY2003	(Pre-Blakely)	(Post-Blakely)	(Pre-Booker)	(Post-Booker)	FY2006
Within Range	72.5%	75.4%	77.2%	74.8%	62.1%	67.2%
Upward Departures	1.0%	1.3%	1.1%	1.0%	0.3%	0.6% ²
Otherwise Above Range	—	—	—	—	1.2%	0.5% ³
Substantial Assistance Departures	21.2%	19.0%	17.0%	18.8%	17.5%	15.9%
Other Gov't Sponsored Departures	0.8%	0.8%	0.9%	1.3%	2.4%	2.1% ⁴
Other Downward Departures	4.5%	3.6%	3.8%	4.2%	3.8%	6.1% ²
Otherwise Below Range	—	—	—	—	12.7%	7.8% ³

(continued on next page)

Guideline Application Trends, National and Circuit

FY 2003, Pre- and Post-Blakely FY 2004, Pre- and Post-Booker FY 2005, and FY 2006¹

EIGHTH CIRCUIT

Position of Sentence		FY2004	FY2004	FY2005	FY2005	
Relative to Guideline Range	FY2003	(Pre-Blakely)	(Post-Blakely)	(Pre-Booker)	(Post-Booker)	FY2006
Within Range	72.2%	77.0%	77.9%	74.3%	64.1%	64.0%
Upward Departures	1.1%	0.9%	0.9%	0.5%	0.2%	1.0% ²
Otherwise Above Range	—	—	—	—	1.7%	0.8% ³
Substantial Assistance Departures	17.6%	15.3%	14.0%	16.2%	14.4%	15.7%
Other Gov't Sponsored Departures	2.0%	2.1%	2.0%	3.7%	4.2%	3.8% ⁴
Other Downward Departures	7.1%	4.7%	5.2%	5.3%	3.4%	4.6% ²
Otherwise Below Range	—	—	—	—	12.1%	10.1% ³

NINTH CIRCUIT

Position of Sentence		FY2004	FY2004	FY2005	FY2005	
Relative to Guideline Range	FY2003	(Pre-Blakely)	(Post-Blakely)	(Pre-Booker)	(Post-Booker)	FY2006
Within Range	59.6%	61.8%	61.0%	58.8%	49.7%	43.8%
Upward Departures	1.1%	0.8%	0.7%	1.0%	0.4%	1.3% ²
Otherwise Above Range	—	—	—	—	1.3%	0.4% ³
Substantial Assistance Departures	10.2%	10.6%	9.5%	10.4%	10.4%	10.8%
Other Gov't Sponsored Departures	19.2%	20.4%	22.9%	24.9%	25.9%	31.1% ⁴
Other Downward Departures	9.9%	6.5%	5.9%	5.0%	3.7%	7.3% ²
Otherwise Below Range	—	—	—	—	8.7%	5.3% ³

TENTH CIRCUIT

Position of Sentence		FY2004	FY2004	FY2005	FY2005	
Relative to Guideline Range	FY2003	(Pre-Blakely)	(Post-Blakely)	(Pre-Booker)	(Post-Booker)	FY2006
Within Range	73.1%	73.9%	70.7%	70.9%	66.2%	62.7%
Upward Departures	0.6%	0.7%	0.6%	0.7%	0.1%	0.5% ²
Otherwise Above Range	—	—	—	—	0.8%	0.9% ³
Substantial Assistance Departures	9.4%	10.3%	10.8%	10.5%	9.5%	9.1%
Other Gov't Sponsored Departures	11.4%	10.7%	14.5%	14.6%	13.9%	15.4% ⁴
Other Downward Departures	5.5%	4.5%	3.3%	3.2%	2.7%	5.6% ²
Otherwise Below Range	—	—	—	—	6.8%	5.9% ³

(continued on next page)

Guideline Application Trends, National and Circuit

FY 2003, Pre- and Post-Blakely FY 2004, Pre- and Post-Booker FY 2005, and FY 2006¹

ELEVENTH CIRCUIT

Position of Sentence Relative to Guideline Range	FY2003	FY2004 (Pre-Blakely)	FY2004 (Post-Blakely)	FY2005 (Pre-Booker)	FY2005 (Post-Booker)	FY2006
Within Range	74.5%	74.7%	77.0%	77.9%	68.1%	69.1%
Upward Departures	0.8%	0.8%	0.6%	0.7%	0.3%	1.0% ²
Otherwise Above Range	—	—	—	—	1.4%	0.9% ³
Substantial Assistance Departures	19.9%	21.0%	19.0%	17.5%	17.5%	18.3%
Other Gov't Sponsored Departures	0.3%	0.2%	0.2%	0.3%	1.2%	1.0% ⁴
Other Downward Departures	4.5%	3.3%	3.2%	3.5%	3.0%	2.6% ²
Otherwise Below Range	—	—	—	—	8.3%	7.3% ³

¹ For FY2004, this table distinguishes between cases sentenced prior to and subsequent to the *Blakely v. Washington* decision on June 24, 2004. Similarly, for FY2005, this table distinguishes between cases sentenced prior to and subsequent to the *U.S. v. Booker* decision on January 12, 2005. For FY2006, this table reflects cases with court documentation cumulatively received, coded, and edited at the U.S. Sentencing Commission by June 1, 2006.

² Combines two outside-of-the-range categories: 1) cases with departures which do not cite either *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors specifically prohibited in the provisions, policy statements, or commentary of the federal *Guidelines Manual*; and, 2) cases which include a departure as well as a sentence outside the guideline system mentioning *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for sentencing outside the guideline system.

³ Combines two outside-of-the-range categories: 1) cases without a departure that cite *U.S. v. Booker*, 18 U.S.C. § 3553, or related factors as a reason for sentencing outside the guideline system; and 2) outside-of-the-range cases that cannot be classified into any other category. The latter category includes outside-of-the-range cases with no reason provided for a sentence outside the guideline range.

⁴ Cases with a reason for departure indicating that the prosecution initiates, proposes, or stipulates to a sentence outside of the guideline range, either pursuant to a plea agreement or as part of a non-plea negotiation with the defendant. Note that §5K3.1 (Early Disposition Program) cases are included in this category.

SOURCE: U.S. Sentencing Commission *Sourcebook of Federal Sentencing*, FY2003-FY2005, Table 26; FY2006 datafile, (data extraction on June 1, 2006; table prepared on July 6, 2006). USSCFY06. Percents may not sum to 100 percent due to rounding.

Distribution of Offenders Receiving Sentencing Options for the Most Frequently Applied Guidelines
 FY 2003, Pre and Post-Blakely FY 2004, Pre and Post-Booker FY 2005, and FY 2006 (data extracted June 1, 2006)

	FY 2003		Pre-Blakely FY 2004		Post-Blakely FY 2004		Pre-Booker FY 2005		Post-Booker FY 2005		FY 2006	
	N	%	N	%	N	%	N	%	N	%	N	%
Drug Trafficking §2D1.1¹	23,833	100.0	16,955	100.0	5,648	100.0	5,695	100.0	17,524	100.0	13,772	100.0
Prison only ²	22,455	94.2	16,081	94.9	5,359	94.9	5,377	94.4	16,511	94.2	13,121	95.3
Prison plus confinement conditions ³	402	1.7	337	2.0	100	1.8	116	2.0	408	2.3	253	1.8
Probation plus confinement conditions ⁴	469	2.0	227	1.3	90	1.6	90	1.6	266	1.5	174	1.3
Probation only ⁵	507	2.1	310	1.8	99	1.8	112	2.0	339	1.9	224	1.6
Immigration Unlawful Entry §2L1.2¹	9,167	100.0	7,058	100.0	2,564	100.0	2,745	100.0	7,694	100.0	6,465	100.0
Prison only ²	9,132	99.6	7,032	99.6	2,559	99.8	2,735	99.6	7,631	99.2	6,437	99.6
Prison plus confinement conditions ³	11	0.1	10	0.1	3	0.1	5	0.2	16	0.2	8	0.1
Probation plus confinement conditions ⁴	2	0.0	0	0.0	0	0.0	1	0.0	1	0.0	1	0.0
Probation only ⁵	22	0.2	16	0.2	2	0.1	4	0.2	46	0.6	19	0.3
Firearms §2K2.1¹	5,425	100.0	4,782	100.0	1,608	100.0	1,727	100.0	4,970	100.0	3,624	100.0
Prison only ²	4,779	88.1	4,292	89.8	1,454	90.4	1,565	90.6	4,435	89.2	3,285	90.6
Prison plus confinement conditions ³	174	3.2	128	2.7	44	2.7	47	2.7	159	3.2	101	2.8
Probation plus confinement conditions ⁴	224	4.1	160	3.4	44	2.7	52	3.0	190	3.8	121	3.3
Probation only ⁵	248	4.6	202	4.2	66	4.1	63	3.7	186	3.7	117	3.2
Theft/Fraud §2B1.1 or §2F1.1¹	9,606	100.0	6,909	100.0	2,100	100.0	2,130	100.0	6,191	100.0	4,549	100.0
Prison only ²	4,803	50.0	3,574	51.7	1,026	48.9	1,067	50.1	3,263	52.7	2,471	54.3
Prison plus confinement conditions ³	840	8.7	629	9.1	168	8.0	189	8.9	561	9.1	413	9.1
Probation plus confinement conditions ⁴	1,463	15.2	997	14.4	312	14.9	291	13.7	811	13.1	621	13.7
Probation only ⁵	2,500	26.0	1,709	24.7	594	28.3	583	27.4	1,556	25.1	1,044	23.0

¹Sections report only cases with one single guideline application using the indicated guideline. Cases receiving only monetary sentences are excluded.

²Prison only cases receive straight prison time.

³Prison plus confinement cases receive a combination of prison time and alternative confinement time as defined in USSG §5C1.1.

⁴Probation plus confinement cases receive, as a condition of probation, alternative confinement time as defined in USSG §5C1.1.

⁵Probation only cases receive straight probation time.

SOURCE: U.S. Sentencing Commission, 2003-2005 Fiscal Year Datafiles, USSCFY03, USSCFY04, USSCFY05, FY2006 datafile, (data extraction on June 1, 2006; table prepared on July 6, 2006). USSCFY06. Numbers may not sum to 100 percent due to rounding.

Average and Median Sentence Imposed¹ for the Most Frequently Applied Guidelines

FY 2003 and Pre-Blakely FY 2004

	FY 2003				Pre-Blakely FY 2004			
	Average Months	Median Months	GL Median ²	N	Average Months	Median Months	GL Median ²	N
All Cases (one guideline computation)³	52	30		60,786	56	33		44,895
Drug Trafficking §2D1.1⁴	77	57	63	23,833	83	60	70	16,955
Prison only ⁵	79	60	70	22,455	86	60	70	16,081
Prison plus confinement conditions ⁶	20	10	15	402	22	10	12	337
Probation plus confinement conditions ⁷	6	6	12	469	6	6	12	227
Probation only ⁸	0	0	—	507	0	0	—	310
Immigration Unlawful Entry §2L1.2⁴	28	24	27	9,167	29	24	24	7,058
Prison only ⁵	28	24	27	9,132	29	24	24	7,032
Prison plus confinement conditions ⁶	22	10	10	11	40	34	29	10
Probation plus confinement conditions ⁷	—	—	—	2	—	—	—	0
Probation only ⁸	0	0	—	22	0	0	—	16
Firearms §2K2.1⁴	56	37	37	5,425	59	40	41	4,782
Prison only ⁵	59	41	41	4,779	63	42	46	4,292
Prison plus confinement conditions ⁶	21	10	12	174	21	10	10	128
Probation plus confinement conditions ⁷	6	6	12	224	6	6	10	160
Probation only ⁸	0	0	—	248	0	0	—	202
Theft/Fraud §2B1.1 or §2F1.1⁴	16	12	12	9,606	19	12	12	6,909
Prison only ⁵	21	16	18	4,803	25	18	18	3,574
Prison plus confinement conditions ⁶	9	10	10	840	9	10	10	629
Probation plus confinement conditions ⁷	6	6	6	1,463	6	6	6	997
Probation only ⁸	0	0	—	2,500	0	0	—	1,709

¹Sentence data report the sum of imprisonment and any type of confinement as defined in USSG §5C1.1.

²For the guideline range of the sentencing table applied to the case, the lower value of the sentencing range.

³All statistics in the table report data for cases with one single guideline computation for the specified fiscal year. The "All Cases" row reports all cases regardless of the one guideline applied. Cases receiving only monetary sentences are excluded.

⁴Each guideline-specific section reports only cases with one single guideline application using the indicated guideline.

⁵Prison only sentence categories report straight prison time.

⁶Prison plus confinement sentence categories report the sum of prison time and alternative confinement time as defined in USSG §5C1.1.

⁷Probation plus confinement categories report statistics for cases receiving, as a condition of probation, alternative confinement time as defined in USSG §5C1.1.

⁸Probation only categories report cases receiving straight probation time. By definition, the confinement time is zero months for these cases.

Average and Median Sentence Imposed¹ for the Most Frequently Applied Guidelines

Post-Blakely FY 2004 and Pre-Booker FY 2005

	Post-Blakely FY 2004				Pre-Booker FY 2005			
	Average Months	Median Months	GL Median ²	N	Average Months	Median Months	GL Median ²	N
All Cases (one guideline computation)³	51	30		15,262	51	30		15,948
Drug Trafficking §2D1.1⁴	75	60	70	5,648	78	57	63	5,695
Prison only ⁵	77	60	70	5,359	80	60	70	5,377
Prison plus confinement conditions ⁶	18	10	10	100	22	10	10	116
Probation plus confinement conditions ⁷	7	6	12	90	6	6	10	90
Probation only ⁸	0	0	—	99	0	0	—	112
Immigration Unlawful Entry §2L1.2⁴	28	24	24	2,564	27	24	24	2,745
Prison only ⁵	28	24	24	2,559	27	24	24	2,735
Prison plus confinement conditions ⁶	—	—	—	3	—	—	—	5
Probation plus confinement conditions ⁷	—	—	—	0	—	—	—	1
Probation only ⁸	—	—	—	2	—	—	—	4
Firearms §2K2.1⁴	57	37	37	1,608	57	38	37	1,727
Prison only ⁵	60	41	41	1,454	60	41	41	1,565
Prison plus confinement conditions ⁶	20	10	10	44	21	10	12	47
Probation plus confinement conditions ⁷	6	6	12	44	7	6	12	52
Probation only ⁸	0	0	—	66	0	0	—	63
Theft/Fraud §2B1.1 or §2F1.1⁴	16	10	12	2,100	18	12	12	2,130
Prison only ⁵	21	15	15	1,026	23	17	18	1,067
Prison plus confinement conditions ⁶	9	8	8	168	9	8	10	189
Probation plus confinement conditions ⁷	6	6	6	312	6	6	6	291
Probation only ⁸	0	0	—	594	0	0	—	583

¹Sentence data report the sum of imprisonment and any type of confinement as defined in USSG §5C1.1.

²For the guideline range of the sentencing table applied to the case, the lower value of the sentencing range.

³All statistics in the table report data for cases with one single guideline computation for the specified fiscal year. The "All Cases" row reports all cases regardless of the one guideline applied. Cases receiving only monetary sentences are excluded.

⁴Each guideline-specific section reports only cases with one single guideline application using the indicated guideline.

⁵Prison only sentence categories report straight prison time.

⁶Prison plus confinement sentence categories report the sum of prison time and alternative confinement time as defined in USSG §5C1.1.

⁷Probation plus confinement categories report statistics for cases receiving, as a condition of probation, alternative confinement time as defined in USSG §5C1.1.

⁸Probation only categories report cases receiving straight probation time. By definition, the confinement time is zero months for these cases.

Average and Median Sentence Imposed¹ for the Most Frequently Applied Guidelines

Post-Booker FY 2005 and FY 2006 (data extracted June 1, 2006)

	Post-Booker FY 2005				FY 2006			
	Average Months	Median Months	GL Median ²	N	Average Months	Median Months	GL Median ²	N
All Cases (one guideline computation)³	55	33		47,028	55	34		36,651
Drug Trafficking §2D1.1⁴	83	60	70	17,524	82	60	70	13,772
Prison only ⁵	86	63	78	16,511	85	60	70	13,121
Prison plus confinement conditions ⁶	20	10	21	408	16	10	21	253
Probation plus confinement conditions ⁷	6	6	15	266	7	6	12	174
Probation only ⁸	0	0	—	339	0	0	—	224
Immigration Unlawful Entry §2L1.2⁴	28	24	27	7,694	27	24	24	6,465
Prison only ⁵	28	24	27	7,631	27	24	24	6,437
Prison plus confinement conditions ⁶	19	10	15	16	12	10	15	8
Probation plus confinement conditions ⁷	—	—	—	1	—	—	—	1
Probation only ⁸	0	0	—	46	0	0	—	19
Firearms §2K2.1⁴	58	37	37	4,970	58	39	37	3,624
Prison only ⁵	61	41	41	4,435	61	42	46	3,285
Prison plus confinement conditions ⁶	27	10	12	159	15	10	12	101
Probation plus confinement conditions ⁷	6	6	12	190	7	6	12	121
Probation only ⁸	0	0	—	186	0	0	—	117
Theft/Fraud §2B1.1 or §2F1.1⁴	20	12	15	6,191	21	12	15	4,549
Prison only ⁵	26	18	21	3,263	26	18	21	2,471
Prison plus confinement conditions ⁶	10	10	10	561	9	10	10	413
Probation plus confinement conditions ⁷	6	6	6	811	6	6	6	621
Probation only ⁸	0	0	—	1,556	0	0	—	1,044

¹Sentence data report the sum of imprisonment and any type of confinement as defined in USSG §5C1.1.

²For the guideline range of the sentencing table applied to the case, the lower value of the sentencing range.

³All statistics in the table report data for cases with one single guideline computation for the specified fiscal year. The "All Cases" row reports all cases regardless of the one guideline applied. Cases receiving only monetary sentences are excluded.

⁴Each guideline-specific section reports only cases with one single guideline application using the indicated guideline.

⁵Prison only sentence categories report straight prison time.

⁶Prison plus confinement sentence categories report the sum of prison time and alternative confinement time as defined in USSG §5C1.1.

⁷Probation plus confinement categories report statistics for cases receiving, as a condition of probation, alternative confinement time as defined in USSG §5C1.1.

⁸Probation only categories report cases receiving straight probation time. By definition, the confinement time is zero months for these cases.

SOURCE: U.S. Sentencing Commission, USSCFY05 Post-Booker Only Cases (January 12, 2005 - September 30, 2006), FY2006 datafile, (data extraction on June 1, 2006; table prepared on July 6, 2006). USSCFY06.

SENTENCES RELATIVE TO THE GUIDELINE RANGE FOR CIRCUIT AND DISTRICT¹
Cases Sentenced in FY 2006 with Data Available to USSC on June 1, 2006

CIRCUIT District	TOTAL	SENTENCED WITHIN GUIDELINE RANGE		GOVERNMENT SPONSORED BELOW THE GUIDELINE RANGE		DEPARTURES BELOW THE GUIDELINE RANGE		OTHERWISE BELOW THE GUIDELINE RANGE		DEPARTURES ABOVE THE GUIDELINE RANGE		OTHERWISE ABOVE THE GUIDELINE RANGE	
			%		%		%		%		%		%
TOTAL	39,508	24,442	61.9	9,541	24.1	2,049	5.2	2,828	7.2	340	0.9	308	0.8
D.C. CIRCUIT	272	143	52.6	81	29.8	16	5.9	23	8.5	5	1.8	4	1.5
District of Columbia	272	143	52.6	81	29.8	16	5.9	23	8.5	5	1.8	4	1.5
FIRST CIRCUIT	939	651	69.3	148	15.8	42	4.5	85	9.1	4	0.4	9	1.0
Maine	129	94	72.9	26	20.2	4	3.1	4	3.1	0	0.0	1	0.8
Massachusetts	289	174	60.2	48	16.6	27	9.3	40	13.8	0	0.0	0	0.0
New Hampshire	132	73	55.3	46	34.8	3	2.3	6	4.5	2	1.5	2	1.5
Puerto Rico	322	267	82.9	24	7.5	7	2.2	17	5.3	2	0.6	5	1.6
Rhode Island	67	43	64.2	4	6.0	1	1.5	18	26.9	0	0.0	1	1.5
SECOND CIRCUIT	2,436	1,230	50.5	566	23.2	278	11.4	338	13.9	17	0.7	7	0.3
Connecticut	201	99	49.3	41	20.4	41	20.4	17	8.5	3	1.5	0	0.0
New York													
Eastern	609	250	41.1	158	25.9	102	16.7	91	14.9	4	0.7	4	0.7
Northern	201	99	49.3	73	36.3	15	7.5	13	6.5	1	0.5	0	0.0
Southern	979	567	57.9	135	13.8	89	9.1	186	19.0	1	0.1	1	0.1
Western	312	161	51.6	109	34.9	6	1.9	29	9.3	5	1.6	2	0.6
Vermont	134	54	40.3	50	37.3	25	18.7	2	1.5	3	2.2	0	0.0
THIRD CIRCUIT	1,739	901	51.8	518	29.8	98	5.6	195	11.2	10	0.6	17	1.0
Delaware	63	39	61.9	7	11.1	6	9.5	11	17.5	0	0.0	0	0.0
New Jersey	541	271	50.1	191	35.3	21	3.9	55	10.2	0	0.0	3	0.6
Pennsylvania													
Eastern	488	192	39.3	176	36.1	34	7.0	78	16.0	3	0.6	5	1.0
Middle	294	143	48.6	107	36.4	13	4.4	23	7.8	5	1.7	3	1.0
Western	273	189	69.2	32	11.7	20	7.3	25	9.2	1	0.4	6	2.2
Virgin Islands	80	67	83.8	5	6.3	4	5.0	3	3.8	1	1.3	0	0.0
FOURTH CIRCUIT	3,451	2,397	69.5	588	17.0	137	4.0	268	7.8	33	1.0	28	0.8
Maryland	371	202	54.4	99	26.7	27	7.3	35	9.4	5	1.3	3	0.8
North Carolina													
Eastern	322	181	56.2	110	34.2	15	4.7	14	4.3	2	0.6	0	0.0
Middle	187	131	70.1	27	14.4	15	8.0	13	7.0	1	0.5	0	0.0
Western	442	279	63.1	116	26.2	5	1.1	39	8.8	0	0.0	3	0.7
South Carolina	562	404	71.9	78	13.9	26	4.6	46	8.2	2	0.4	6	1.1
Virginia													
Eastern	859	664	77.3	56	6.5	35	4.1	76	8.8	17	2.0	11	1.3
Western	324	215	66.4	73	22.5	8	2.5	22	6.8	5	1.5	1	0.3
West Virginia													
Northern	233	195	83.7	17	7.3	5	2.1	15	6.4	0	0.0	1	0.4
Southern	151	126	83.4	12	7.9	1	0.7	8	5.3	1	0.7	3	2.0

CIRCUIT District	TOTAL	SENTENCED WITHIN GUIDELINE RANGE		GOVERNMENT SPONSORED BELOW THE GUIDELINE RANGE		DEPARTURES BELOW THE GUIDELINE RANGE		OTHERWISE BELOW THE GUIDELINE RANGE		DEPARTURES ABOVE THE GUIDELINE RANGE		OTHERWISE ABOVE THE GUIDELINE RANGE	
		%	%	%	%	%	%	%	%	%	%		
FIFTH CIRCUIT	8,866	6,569	74.1	1,484	16.7	272	3.1	374	4.2	71	0.8	96	1.1
Louisiana													
Eastern	187	147	78.6	19	10.2	7	3.7	10	5.3	2	1.1	2	1.1
Middle	97	75	77.3	14	14.4	2	2.1	2	2.1	2	2.1	2	2.1
Western	268	198	73.9	22	8.2	13	4.9	9	3.4	9	3.4	17	6.3
Mississippi													
Northern	95	55	57.9	28	29.5	4	4.2	2	2.1	4	4.2	2	2.1
Southern	172	145	84.3	15	8.7	1	0.6	8	4.7	0	0.0	3	1.7
Texas													
Eastern	497	408	82.1	39	7.8	29	5.8	12	2.4	3	0.6	6	1.2
Northern	664	514	77.4	78	11.7	13	2.0	29	4.4	10	1.5	20	3.0
Southern	3,698	2,479	67.0	899	24.3	140	3.8	141	3.8	19	0.5	20	0.5
Western	3,188	2,548	79.9	370	11.6	63	2.0	161	5.1	22	0.7	24	0.8
SIXTH CIRCUIT	3,005	1,725	57.4	798	26.6	174	5.8	266	8.9	19	0.6	23	0.8
Kentucky													
Eastern	335	150	44.8	152	45.4	8	2.4	18	5.4	2	0.6	5	1.5
Western	187	137	73.3	31	16.6	5	2.7	14	7.5	0	0.0	0	0.0
Michigan													
Eastern	500	252	50.4	159	31.8	43	8.6	41	8.2	2	0.4	3	0.6
Western	267	163	61.0	45	16.9	20	7.5	28	10.5	6	2.2	5	1.9
Ohio													
Northern	606	358	59.1	145	23.9	46	7.6	50	8.3	1	0.2	6	1.0
Southern	356	183	51.4	103	28.9	31	8.7	33	9.3	5	1.4	1	0.3
Tennessee													
Eastern	319	216	67.7	78	24.5	3	0.9	19	6.0	2	0.6	1	0.3
Middle	125	71	56.8	25	20.0	5	4.0	23	18.4	1	0.8	0	0.0
Western	310	195	62.9	60	19.4	13	4.2	40	12.9	0	0.0	2	0.6
SEVENTH CIRCUIT	1,760	1,182	67.2	316	18.0	107	6.1	137	7.8	10	0.6	8	0.5
Illinois													
Central	182	125	68.7	35	19.2	9	4.9	12	6.6	1	0.5	0	0.0
Northern	600	334	55.7	142	23.7	65	10.8	55	9.2	3	0.5	1	0.2
Southern	205	171	83.4	12	5.9	10	4.9	10	4.9	2	1.0	0	0.0
Indiana													
Northern	251	185	73.7	53	21.1	3	1.2	7	2.8	2	0.8	1	0.4
Southern	179	122	68.2	29	16.2	8	4.5	17	9.5	1	0.6	2	1.1
Wisconsin													
Eastern	209	120	57.4	44	21.1	10	4.8	31	14.8	0	0.0	4	1.9
Western	134	125	93.3	1	0.7	2	1.5	5	3.7	1	0.7	0	0.0
EIGHTH CIRCUIT	3,082	1,971	64.0	602	19.5	141	4.6	311	10.1	32	1.0	25	0.8
Arkansas													
Eastern	191	125	65.4	32	16.8	7	3.7	23	12.0	2	1.0	2	1.0
Western	123	78	63.4	39	31.7	1	0.8	4	3.3	0	0.0	1	0.8
Iowa													
Northern	238	163	68.5	36	15.1	1	0.4	22	9.2	9	3.8	7	2.9
Southern	198	92	46.5	52	26.3	5	2.5	44	22.2	0	0.0	5	2.5
Minnesota	362	188	51.9	72	19.9	45	12.4	56	15.5	1	0.3	0	0.0
Missouri													
Eastern	553	367	66.4	104	18.8	20	3.6	58	10.5	2	0.4	2	0.4
Western	542	353	65.1	111	20.5	17	3.1	54	10.0	2	0.4	5	0.9
Nebraska	467	325	69.6	90	19.3	27	5.8	21	4.5	2	0.4	2	0.4
North Dakota	148	95	64.2	39	26.4	6	4.1	6	4.1	2	1.4	0	0.0
South Dakota	260	185	71.2	27	10.4	12	4.6	23	8.8	12	4.6	1	0.4

CIRCUIT District	TOTAL	SENTENCED WITHIN GUIDELINE RANGE		GOVERNMENT SPONSORED BELOW THE GUIDELINE RANGE		DEPARTURES BELOW THE GUIDELINE RANGE		OTHERWISE BELOW THE GUIDELINE RANGE		DEPARTURES ABOVE THE GUIDELINE RANGE		OTHERWISE ABOVE THE GUIDELINE RANGE	
			%	%	%	%	%	%	%	%	%		
NINTH CIRCUIT	6,947	3,044	43.8	2,914	41.9	504	7.3	369	5.3	88	1.3	28	0.4
Alaska	70	43	61.4	16	22.9	3	4.3	7	10.0	0	0.0	1	1.4
Arizona	2,326	666	28.6	1,454	62.5	114	4.9	40	1.7	48	2.1	4	0.2
California													
Central	556	357	64.2	79	14.2	40	7.2	76	13.7	1	0.2	3	0.5
Eastern	547	296	54.1	191	34.9	28	5.1	26	4.8	4	0.7	2	0.4
Northern	342	189	55.3	78	22.8	39	11.4	28	8.2	3	0.9	5	1.5
Southern	1,318	548	41.6	623	47.3	69	5.2	71	5.4	5	0.4	2	0.2
Guam	60	35	58.3	19	31.7	1	1.7	5	8.3	0	0.0	0	0.0
Hawaii	288	149	51.7	97	33.7	17	5.9	22	7.6	1	0.3	2	0.7
Idaho	169	70	41.4	80	47.3	5	3.0	11	6.5	2	1.2	1	0.6
Montana	245	189	77.1	30	12.2	1	0.4	12	4.9	9	3.7	4	1.6
Nevada	123	87	70.7	17	13.8	4	3.3	12	9.8	2	1.6	1	0.8
Northern Mariana Islands	7	4	57.1	3	42.9	0	0.0	0	0.0	0	0.0	0	0.0
Oregon	267	141	52.8	57	21.3	42	15.7	23	8.6	2	0.7	2	0.7
Washington													
Eastern	183	101	55.2	39	21.3	11	6.0	27	14.8	4	2.2	1	0.5
Western	446	169	37.9	131	29.4	130	29.1	9	2.0	7	1.6	0	0.0
TENTH CIRCUIT	3,342	2,095	62.7	819	24.5	186	5.6	196	5.9	15	0.4	31	0.9
Colorado	430	245	57.0	133	30.9	37	8.6	13	3.0	0	0.0	2	0.5
Kansas	396	243	61.4	77	19.4	8	2.0	45	11.4	7	1.8	16	4.0
New Mexico	1,645	953	57.9	532	32.3	72	4.4	79	4.8	4	0.2	5	0.3
Oklahoma													
Eastern	46	37	80.4	7	15.2	2	4.3	0	0.0	0	0.0	0	0.0
Northern	113	96	85.0	11	9.7	1	0.9	5	4.4	0	0.0	0	0.0
Western	143	99	69.2	7	4.9	2	1.4	28	19.6	1	0.7	6	4.2
Utah	470	345	73.4	42	8.9	59	12.6	19	4.0	3	0.6	2	0.4
Wyoming	99	77	77.8	10	10.1	5	5.1	7	7.1	0	0.0	0	0.0
ELEVENTH CIRCUIT	3,669	2,534	69.1	707	19.3	94	2.6	266	7.2	36	1.0	32	0.9
Alabama													
Middle	120	76	63.3	39	32.5	0	0.0	3	2.5	2	1.7	0	0.0
Northern	293	168	57.3	94	32.1	5	1.7	23	7.8	1	0.3	2	0.7
Southern	176	110	62.5	40	22.7	9	5.1	15	8.5	1	0.6	1	0.6
Florida													
Middle	915	606	66.2	215	23.5	22	2.4	62	6.8	3	0.3	7	0.8
Northern	211	149	70.6	50	23.7	0	0.0	10	4.7	1	0.5	1	0.5
Southern	1,136	869	76.5	143	12.6	22	1.9	89	7.8	6	0.5	7	0.6
Georgia													
Middle	218	156	71.6	38	17.4	2	0.9	18	8.3	2	0.9	2	0.9
Northern	418	271	64.8	74	17.7	26	6.2	35	8.4	9	2.2	3	0.7
Southern	182	129	70.9	14	7.7	8	4.4	11	6.0	11	6.0	9	4.9

¹Of the 40,877 cases, 123 cases with no analogous guidelines were excluded from the table. Of the remaining 40,754 cases, 1,246 were excluded due to missing departure or variance information. Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, FY2006 datafile, (data extraction on June 1, 2006; table prepared on July 6, 2006). USSCFY06. Summary numbers may not add up to their component parts due to rounding.

**SUBSTANTIAL ASSISTANCE CASES: DEGREE OF DEPARTURE
FOR OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY¹
Cases Sentenced in FY 2006 with Data Available to USSC on June 1, 2006**

PRIMARY OFFENSE	n	Median Sentence in Months	DEGREE OF DECREASE FOR SUBSTANTIAL ASSISTANCE	
			Median Decrease in Months From Guideline Minimum	Median Percent Decrease From Guideline Minimum
TOTAL	5,302	36.0	30.0	48.6
Murder	4	51.0	107.0	65.4
Manslaughter	0	--	--	--
Kidnapping/Hostage Taking	2	--	--	--
Sexual Abuse	4	32.5	36.5	47.8
Assault	3	32.7	37.0	55.6
Robbery	85	48.0	27.0	34.6
Arson	9	38.0	36.0	48.1
Drugs - Trafficking	3,452	49.0	39.0	45.5
Drugs - Communication Facility	42	10.0	18.0	67.7
Drugs - Simple Possession	1	--	--	--
Firearms	478	37.0	26.0	49.7
Burglary/B&E	0	--	--	--
Auto Theft	8	60.0	16.5	26.3
Larceny	55	4.4	10.0	66.7
Fraud	529	4.0	12.0	80.0
Embezzlement	9	0.0	10.0	100.0
Forgery/Counterfeiting	50	0.0	8.0	100.0
Bribery	28	0.0	12.0	99.8
Tax	43	0.0	10.0	100.0
Money Laundering	116	13.5	23.9	62.8
Racketeering/Extortion	55	40.0	27.0	35.2
Gambling/Lottery	8	0.0	10.0	100.0
Civil Rights	2	--	--	--
Immigration	170	12.0	9.0	41.0
Pornography/Prostitution	29	50.0	38.0	39.2
Prison Offenses	6	23.5	17.5	34.1
Administration of Justice Offenses	67	0.0	12.0	100.0
Environmental/Wildlife	4	0.0	17.5	100.0
National Defense	3	6.0	30.0	87.0
Antitrust	6	5.0	10.0	66.7
Food & Drug	1	--	--	--
Other Miscellaneous Offenses	33	5.0	12.0	68.8

¹Of the 40,877 cases, 5,636 received a §5K1.1 substantial assistance departure. Of these, 5,376 had complete guideline application information. Due to an inability to calculate the extent of departure for cases with a guideline minimum of life, an additional 49 cases were also excluded from this table. Furthermore, eight cases were excluded due to several logical criteria. Of the remaining 5,319 cases, 17 were excluded due to one or both of the following reasons: missing primary offense category (0) or missing sentence information (17). Note that the information presented in this table does include sentences of probation, but does not include any time of alternative confinement as defined in USSG §5C1.1. Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, FY2006 datafile, (data extraction on June 1, 2006; table prepared on July 6, 2006). USSCFY06. Summary numbers may not add up to their component parts due to rounding.

**GOVERNMENT SPONSORED DOWNWARD DEPARTURE CASES: DEGREE OF
DEPARTURE FOR OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY¹
Cases Sentenced in FY 2006 with Data Available to USSC on June 1, 2006**

PRIMARY OFFENSE	n	Median Sentence in Months	DEGREE OF DECREASE FOR GOVERNMENT SPONSORED DOWNWARD DEPARTURE	
			Median Decrease in Months From Guideline Minimum	Median Percent Decrease From Guideline Minimum
TOTAL	3,725	21.0	8.0	28.1
Murder	3	57.0	40.0	41.0
Manslaughter	1	--	--	--
Kidnapping/Hostage Taking	3	60.0	60.0	23.8
Sexual Abuse	11	84.0	15.0	28.6
Assault	25	12.0	12.0	60.3
Robbery	16	54.0	22.0	31.4
Arson	1	--	--	--
Drugs - Trafficking	1,019	18.0	11.0	36.2
Drugs - Communication Facility	5	41.0	12.0	15.6
Drugs - Simple Possession	3	6.0	4.0	40.0
Firearms	121	30.0	12.0	28.3
Burglary/B&E	0	--	--	--
Auto Theft	0	--	--	--
Larceny	18	0.0	9.8	100.0
Fraud	75	5.0	10.0	66.7
Embezzlement	5	14.0	10.0	46.7
Forgery/Counterfeiting	16	4.2	9.5	66.7
Bribery	2	--	--	--
Tax	11	0.0	8.0	100.0
Money Laundering	21	10.0	6.0	44.4
Racketeering/Extortion	16	54.5	24.0	38.6
Gambling/Lottery	0	--	--	--
Civil Rights	0	--	--	--
Immigration	2,264	21.0	6.0	25.0
Pornography/Prostitution	29	60.0	17.0	20.5
Prison Offenses	7	9.5	6.0	49.9
Administration of Justice Offenses	32	5.9	13.5	65.8
Environmental/Wildlife	2	--	--	--
National Defense	3	12.0	10.0	54.4
Antitrust	0	--	--	--
Food & Drug	2	--	--	--
Other Miscellaneous Offenses	14	0.0	12.0	100.0

¹Of the 40,877 cases, 3,905 received an other government sponsored downward departure. Of these, 3,738 had complete guideline application information. Due to an inability to calculate the extent of departure for cases with a guideline minimum of life, an additional two cases were also excluded from this table. Furthermore, six cases were excluded due to several logical criteria. Of the remaining 3,730 cases, five were excluded due to one or both of the following reasons: missing primary offense category (0) or missing sentence information (5). Note that the information presented in this table does include sentences of probation, but does not include any time of alternative confinement as defined in USSG §5C1.1. Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, Special Post-Booker Coding Project, BOOKER05 (data extracted June 1, 2006; table prepared July 5, 2006). Summary numbers may not add up to their component parts due to rounding.

**OTHER DOWNWARD DEPARTURE CASES: DEGREE OF DEPARTURE
FOR OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY¹
Cases Sentenced in FY 2006 with Data Available to USSC on June 1, 2006**

PRIMARY OFFENSE	n	Median Sentence in Months	DEGREE OF DECREASE FOR OTHER DOWNWARD DEPARTURE	
			Median Decrease in Months From Guideline Minimum	Median Percent Decrease From Guideline Minimum
TOTAL	1,897	24.0	12.0	34.8
Murder	0	--	--	--
Manslaughter	2	--	--	--
Kidnapping/Hostage Taking	0	--	--	--
Sexual Abuse	10	50.5	10.5	16.8
Assault	26	11.5	9.5	61.4
Robbery	58	46.5	13.5	21.7
Arson	0	--	--	--
Drugs - Trafficking	647	52.0	18.0	28.6
Drugs - Communication Facility	9	12.0	20.0	41.7
Drugs - Simple Possession	0	--	--	--
Firearms	246	26.0	12.0	33.2
Burglary/B&E	0	--	--	--
Auto Theft	0	--	--	--
Larceny	41	0.0	8.0	100.0
Fraud	224	5.0	10.0	70.7
Embezzlement	18	0.0	10.0	99.7
Forgery/Counterfeiting	32	3.3	8.0	80.0
Bribery	3	24.0	7.0	18.9
Tax	41	0.0	10.0	100.0
Money Laundering	36	24.0	12.5	46.4
Racketeering/Extortion	14	19.5	14.5	35.2
Gambling/Lottery	0	--	--	--
Civil Rights	3	0.0	6.0	100.0
Immigration	346	24.0	9.0	25.0
Pornography/Prostitution	57	27.0	21.0	41.5
Prison Offenses	6	18.0	3.5	19.8
Administration of Justice Offenses	41	0.0	10.0	99.7
Environmental/Wildlife	5	0.0	6.0	100.0
National Defense	4	33.5	21.5	49.0
Antitrust	0	--	--	--
Food & Drug	0	--	--	--
Other Miscellaneous Offenses	28	0.0	10.0	100.0

¹Of the 40,877 cases, 2,049 received a below the guideline range departure. Of these, 1,910 had complete guideline application information. Due to an inability to calculate the extent of departure for cases with a guideline minimum of life, an additional two cases were also excluded from this table. Furthermore, five cases were excluded due to several logical criteria. Of the remaining 1,903 cases, six were excluded due to one or both of the following reasons: missing primary offense category (0) or missing sentence information (6). Note that the information presented in this table does include sentences of probation, but does not include any time of alternative confinement as defined in USSG §5C1.1. Descriptions of variables used in this table are provided in Appendix A.

**OTHERWISE BELOW GUIDELINE RANGE CASES: DEGREE OF VARIANCE
FOR OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY¹
Cases Sentenced in FY 2006 with Data Available to USSC on June 1, 2006**

PRIMARY OFFENSE	n	DEGREE OF DECREASE FOR OTHERWISE BELOW GUIDELINE RANGE		
		Median Sentence in Months	Median Decrease in Months From Guideline Minimum	Median Percent Decrease From Guideline Minimum
TOTAL	2,546	24.0	12.0	34.8
Murder	1	--	--	--
Manslaughter	1	--	--	--
Kidnapping/Hostage Taking	5	324.0	84.0	20.6
Sexual Abuse	9	29.0	10.0	23.4
Assault	35	6.9	9.0	54.5
Robbery	47	50.0	12.0	20.0
Arson	0	--	--	--
Drugs - Trafficking	888	63.0	20.0	25.5
Drugs - Communication Facility	10	24.0	21.0	38.6
Drugs - Simple Possession	9	3.0	6.2	67.5
Firearms	341	30.0	11.0	28.6
Burglary/B&E	2	--	--	--
Auto Theft	0	--	--	--
Larceny	46	0.0	8.0	100.0
Fraud	324	3.0	8.5	83.6
Embezzlement	28	1.5	8.0	87.1
Forgery/Counterfeiting	66	0.4	9.0	96.3
Bribery	12	2.7	7.5	73.9
Tax	48	0.0	9.5	100.0
Money Laundering	55	23.0	10.0	42.9
Racketeering/Extortion	22	45.0	13.5	26.8
Gambling/Lottery	4	2.0	6.0	75.0
Civil Rights	2	--	--	--
Immigration	384	20.0	9.7	33.2
Pornography/Prostitution	93	39.0	24.0	36.2
Prison Offenses	13	8.0	6.0	33.3
Administration of Justice Offenses	36	9.5	10.0	52.7
Environmental/Wildlife	8	0.0	6.0	100.0
National Defense	3	39.0	24.0	33.3
Antitrust	1	--	--	--
Food & Drug	1	--	--	--
Other Miscellaneous Offenses	52	0.0	9.0	100.0

¹Of the 40,877 cases, 2,828 were otherwise sentenced below the guideline range. Of these, 2,585 had complete guideline application information. Due to an inability to calculate the extent of departure for cases with a guideline minimum of life, an additional 27 cases were also excluded from this table. Furthermore, seven cases were excluded due to several logical criteria. Of the remaining 2,551 cases, 5 were excluded due to one or both of the following reasons: missing primary offense category (0) or missing sentence information (5). Note that the information presented in this table does include sentences of probation, but does not include any time of alternative confinement as defined in USSG §5C1.1. Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, FY2006 datafile, (data extraction on June 1, 2006; table prepared on July 6, 2006). USSCFY06.
Summary numbers may not add up to their component parts due to rounding.

**UPWARD DEPARTURE CASES: DEGREE OF DEPARTURE
FOR OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY¹
Cases Sentenced in FY 2006 with Data Available to USSC on June 1, 2006**

PRIMARY OFFENSE	n	Median Sentence in Months	DEGREE OF INCREASE FOR UPWARD DEPARTURE	
			Median Increase in Months From Guideline Maximum	Median Percent Increase From Guideline Maximum
TOTAL	314	60.0	12.5	34.9
Murder	2	--	--	--
Manslaughter	4	81.0	18.0	38.0
Kidnapping/Hostage Taking	0	--	--	--
Sexual Abuse	6	133.5	31.0	43.3
Assault	14	83.5	16.5	29.4
Robbery	11	171.0	33.0	23.1
Arson	2	--	--	--
Drugs - Trafficking	27	72.0	18.0	42.9
Drugs - Communication Facility	3	48.0	27.0	29.7
Drugs - Simple Possession	4	15.0	9.0	150.0
Firearms	66	75.0	16.0	33.3
Burglary/B&E	2	--	--	--
Auto Theft	1	--	--	--
Larceny	4	35.5	12.0	69.0
Fraud	38	41.0	12.0	50.0
Embezzlement	1	--	--	--
Forgery/Counterfeiting	7	41.0	12.0	53.8
Bribery	0	--	--	--
Tax	2	--	--	--
Money Laundering	9	120.0	57.0	90.5
Racketeering/Extortion	3	78.0	21.0	30.6
Gambling/Lottery	0	--	--	--
Civil Rights	0	--	--	--
Immigration	72	18.0	6.0	27.4
Pornography/Prostitution	17	107.0	24.0	25.0
Prison Offenses	1	--	--	--
Administration of Justice Offenses	15	36.0	8.0	100.0
Environmental/Wildlife	0	--	--	--
National Defense	0	--	--	--
Antitrust	0	--	--	--
Food & Drug	0	--	--	--
Other Miscellaneous Offenses	3	57.0	11.0	20.0

¹Of the 40,877 cases, 340 received an above the guideline range departure. Of these, 319 had complete guideline application information. Due to an inability to calculate the extent of departure for cases with a sentence of life, an additional one case was also excluded from this table. Furthermore, zero cases were excluded due to several logical criteria. Of the remaining 318 cases, four were excluded due to one or both of the following reasons: missing primary offense category (0) or missing sentence information (4). Note that the information presented in this table does not include any time of alternative confinement as defined in USSG §5C1.1. Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, FY2006 datafile, (data extraction on June 1, 2006; table prepared on July 6, 2006). USSCFY06. Summary numbers may not add up to their component parts due to rounding.

**OTHERWISE ABOVE GUIDELINE RANGE CASES: DEGREE OF VARIANCE
FOR OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY¹
Cases Sentenced in FY 2006 with Data Available to USSC on June 1, 2006**

PRIMARY OFFENSE	n	DEGREE OF INCREASE FOR OTHERWISE ABOVE GUIDELINE RANGE		
		Median Sentence in Months	Median Increase in Months From Guideline Maximum	Median Percent Increase From Guideline Maximum
TOTAL	267	57.0	13.0	46.3
Murder	1	--	--	--
Manslaughter	0	--	--	--
Kidnapping/Hostage Taking	0	--	--	--
Sexual Abuse	3	180.0	48.0	39.7
Assault	5	60.0	30.0	75.6
Robbery	5	240.0	99.0	37.3
Arson	1	--	--	--
Drugs - Trafficking	29	60.0	15.0	30.4
Drugs - Communication Facility	3	7.3	1.3	21.0
Drugs - Simple Possession	2	--	--	--
Firearms	60	71.5	15.5	25.0
Burglary/B&E	1	--	--	--
Auto Theft	1	--	--	--
Larceny	12	27.0	14.0	83.3
Fraud	48	48.0	11.5	35.0
Embezzlement	1	--	--	--
Forgery/Counterfeiting	5	36.0	15.0	87.5
Bribery	0	--	--	--
Tax	1	--	--	--
Money Laundering	3	120.0	51.0	42.1
Racketeering/Extortion	3	120.0	13.0	14.3
Gambling/Lottery	0	--	--	--
Civil Rights	1	--	--	--
Immigration	56	18.0	7.0	70.4
Pornography/Prostitution	12	228.0	66.5	54.8
Prison Offenses	2	--	--	--
Administration of Justice Offenses	6	25.5	9.5	63.9
Environmental/Wildlife	0	--	--	--
National Defense	0	--	--	--
Antitrust	0	--	--	--
Food & Drug	2	--	--	--
Other Miscellaneous Offenses	4	36.0	21.0	150.0

¹Of the 40,877 cases, 308 were otherwise sentenced above the guideline range. Of these, 285 had complete guideline application information. Due to an inability to calculate the extent of departure for cases with a sentence of life, an additional one case was also excluded from this table. Furthermore, 17 cases were excluded due to several logical criteria. Of the remaining 267 cases, zero were excluded due to one or both of the following reasons: missing primary offense category (0) or missing sentence information (0). Note that the information presented in this table does not include any time of alternative confinement as defined in USSG §5C1.1. Descriptions of variables used in this table are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, FY2006 datafile, (data extraction on June 1, 2006; table prepared on July 6, 2006). USSCFY06.

Summary numbers may not add up to their component parts due to rounding.