of the law.[78] It is a common conceit among legal commentators that a rule for trial judges is meaningless without the specter of searching appellate review to enforce it, but AEDPA necessitates a change in that way of thinking. To faithfully follow Congress's directive, the Court must be able to defer to a state court's judgment, even one that may have applied an existing standard erroneously, without altering the underlying standard. It did so in *Brown*.

6. Sixth Amendment — Federal Sentencing Guidelines — Presumption of Reasonableness. — In *United States v. Booker*,[1] the Supreme Court found that the Federal Sentencing Guidelines violated the Sixth Amendment.[2] It held the Guidelines unconstitutional because they required judges to increase sentences above the level authorized by facts conceded by the defendant or found by a jury beyond a reasonable doubt.[3] Its remedy — making the Guidelines advisory rather than mandatory and changing the standard of review on appeal to reasonableness[4] — created a host of contested legal questions, including whether appellate courts could apply a presumption of reasonableness in reviewing sentences falling within the applicable Guidelines range. Last Term, in *Rita v. United States*,[5] the Supreme Court held that an appellate court could apply such a presumption.[6] But by also articulating a weak standard for the requirement that a sentencing judge provide a statement of reasons for the penalty she imposes, the Court undermined the rationale justifying the presumption. In so doing, it implicitly sanctioned lower court treatment of the Guidelines as de facto mandatory after *Booker*. To justify an appellate presumption founded on the exercise of independent trial-level judgment and to make real the constitutional promise of *Booker*, trial judges should be required to express in writing their precise reasons for choosing a particular sentence and rejecting any departures sought by the defendant.

In January 2003, Victor Rita purchased a machine gun parts kit from InterOrdnance of America, Inc., the target of a Bureau of Alcohol, Tobacco, Firearms, and Explosives investigation.[7] That October, Rita provided testimony before a grand jury that was contradicted by separate evidence.[8] The government indicted Rita in the United States District Court for the District of North Carolina on various charges,

[78] *See, e.g.*, Lockhart v. McCree, 476 U.S. 162, 176 (1986).
[1] 543 U.S. 220 (2005).
[2] *Id.* at 244 (Stevens, J., delivering the opinion of the Court in part).
[3] *Id.* at 226–27, 232, 244.
[4] *Id.* at 245, 260–63 (Breyer, J., delivering the opinion of the Court in part).
[5] 127 S. Ct. 2456 (2007).
[6] *Id.* at 2459.
[7] Brief for the United States at 2, *Rita*, 127 S. Ct. 2456 (No. 06-5754), 2007 WL 186288.
[8] *Id.* at 3.

including making false statements under oath to a federal grand jury.[9] The jury convicted Rita on all counts.[10]

Rita's presentence report stated that the Guidelines recommended a sentence of thirty-three to forty-one months and that Rita's personal circumstances did not warrant a departure.[11] At the sentencing hearing, Rita argued that the court should depart downward from the Guidelines for three reasons: he would be vulnerable in prison because he had worked for the government in a capacity that led to the conviction of many people; he had served in the military for over twenty-five years, earning more than thirty-five awards and medals; and he was in poor physical condition.[12] The judge ruled that he was "unable to find that the . . . sentencing guideline range . . . is an inappropriate guideline range," that "the public needs to be protected," and that a thirty-three-month sentence was "appropriate."[13]

Rita appealed, arguing that the sentence was unreasonable because it did not "give adequate weight to all the factors and purposes of sentencing of [18 U.S.C.] § 3553" and was "greater than necessary to comply with the statute."[14] The Fourth Circuit affirmed without oral argument.[15] In an unpublished per curiam opinion, the court noted that after *Booker*, sentencing courts must still consider the appropriate Guidelines range, and restated its post-*Booker* intuition that "we have no reason to doubt that most sentences will continue to fall within the applicable guideline range."[16] It then reaffirmed its precedent that "a sentence imposed 'within the properly calculated Guidelines range . . . is presumptively reasonable.'"[17] Applying that presumption, the panel affirmed the sentence.[18]

The Supreme Court affirmed.[19] Writing for the Court, Justice Breyer[20] held that a court of appeals may apply a presumption of reasonableness to sentences that fall within the appropriately calculated

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[9] *Rita*, 127 S. Ct. at 2549.

[10] *Id.* at 2460.

[11] *Id.* at 2460–61.

[12] *Id.* at 2461.

[13] *Id.* at 2462 (second omission in original) (internal quotation mark omitted).

[14] Brief of Appellant at 7, United States v. Rita, 177 Fed. App'x 357 (4th Cir. 2006) (No. 05-4674) (per curiam), 2006 WL 481129.

[15] *Rita*, 177 Fed. App'x at 358.

[16] *Id.* (quoting United States v. White, 405 F.3d 208, 219 (4th Cir. 2005)) (internal quotation mark omitted).

[17] *Id.* (omission in original) (quoting United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006)).

[18] *Id.*

[19] *Rita*, 127 S. Ct. at 2470.

[20] Chief Justice Roberts and Justices Stevens, Kennedy, Ginsburg, and Alito joined Justice Breyer's opinion in full. Justices Scalia and Thomas joined only Part III, which held that the district court judge properly analyzed the sentencing factors.

Guidelines range.[21] Justice Breyer stated the underlying rationale for such a presumption:

> [B]y the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case. That double determination significantly increases the likelihood that the sentence is a reasonable one.[22]

Justice Breyer next explained that the basic sentencing statute, 18 U.S.C. § 3553, instructs sentencing judges to prescribe penalties in line with certain objectives, and that Congress further instructed the U.S. Sentencing Commission to craft Guidelines that reflect those same objectives.[23] Given the Sentencing Commission's multiyear examination of "tens of thousands of sentences," Justice Breyer stated, "it is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3353(a)'s objectives."[24]

At the same time, Justice Breyer held that the presumption is nonbinding, that it does not operate as an evidentiary presumption imposing a burden of persuasion or proof on the appellant, and that it does not provide the sort of deference that courts give to facts found by expert administrative agencies.[25] Moreover, the presumption pertains only to appellate courts: "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply."[26] Justice Breyer emphasized that in allowing the presumption of reasonableness for sentences within the Guidelines, the Court did not rule on whether a court may presume that sentences falling outside of the guidelines are unreasonable.[27]

Justice Breyer also noted that applying an appellate presumption of reasonableness did not create any Sixth Amendment problems.[28] He explained that the Sixth Amendment will not tolerate a law that "*forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find (and the offender did not concede)."[29] Because the appellate presumption is rebuttable, it neither requires nor forbids a judge to impose a particular sentence.[30]

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[21] *See Rita*, 127 S. Ct. at 2462.
[22] *Id.* at 2463.
[23] *See id.*
[24] *Id.* at 2464–65.
[25] *Id.* at 2463.
[26] *Id.* at 2465.
[27] *Id.* at 2467. Next Term, the Court will take up the related question of whether sentences substantially below the Guidelines must be justified by extraordinary circumstances. *See* Gall v. United States, No. 06-7949 (U.S. argued Oct. 2, 2007).
[28] *See Rita*, 127 S. Ct. at 2465–67.
[29] *Id.* at 2466.
[30] *See id.*

Justice Breyer next held that the district court judge had properly analyzed the relevant sentencing factors and that his statement of reasons — required by 18 U.S.C. § 3553(c)[31] — "though brief, was legally sufficient."[32] He wrote that the statute does not require a full opinion, and that the length and detail of the statement will depend on the circumstances of the case.[33] Justice Breyer clarified that in general, "the sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority."[34] In cases in which a judge "decides simply to apply the Guidelines to a particular case," however, "doing so will not necessarily require lengthy explanation."[35] Unless the defendant argues for a departure, "[t]he judge normally need say no more" than that he sees the case as typical when applying a Guidelines sentence.[36] In this case, Rita did ask for a downward departure, but because the matter was "conceptually simple" and the record made clear that "the sentencing judge considered the evidence and arguments," a brief statement was sufficient.[37] Reviewing the facts, Justice Breyer held that the thirty-three-month sentence was reasonable.[38]

Justice Stevens concurred.[39] Explaining that *Booker* changed the standard of review in sentencing cases from de novo to abuse of discretion (reasonableness review), he wrote that although he would have imposed a lower sentence, he could not find that the district court judge abused his discretion.[40] Observing that since *Booker*, many federal judges have continued to "treat the Guidelines as virtually mandatory," Justice Stevens insisted that "the rebuttability of the presumption is real" and that judges should "now recognize that the Guidelines are truly advisory."[41] Finally, he opined that the sentencing judge should have spoken to Rita about the impact of his military service on his sentence, as that would have helped convince Rita that "justice ha[d] been done" and thus increased the likelihood of his rehabilitation.[42]

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[31] The statute requires that "[t]he court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence." 18 U.S.C. § 3553(c) (2000 & Supp. IV 2004).

[32] *Rita*, 127 S. Ct. at 2468.

[33] *See id.*

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *See id.* at 2469–70.

[39] Justice Ginsburg joined Justice Stevens's concurrence, except for the part suggesting that the trial court should have spoken about the impact of Rita's military service on his sentence.

[40] *Rita*, 127 S. Ct. at 2470–71, 2474 (Stevens, J., concurring).

[41] *Id.* at 2474.

[42] *Id.*

Justice Scalia concurred in part and concurred in the judgment.[43] He charged that "[t]he Court has reintroduced the constitutional defect that *Booker* purported to eliminate" — the possibility that some sentences will violate the Sixth Amendment right to jury trial.[44] He objected that a system of substantive reasonableness review would result in the affirmance of some sentences in excess of the maximum sentence that could have been imposed in the absence of certain judge-found facts.[45] To reconcile the Sixth Amendment jury trial right with the *Booker* remedy of reasonableness review, Justice Scalia proposed eliminating the substantive component of review altogether.[46] Instead, reasonableness review would be limited to "the sentencing *procedures* mandated by statute."[47] Procedural review, Justice Scalia wrote, would mean reversing a district court that "appears not to have considered § 3553(a); considers impermissible factors; selects a sentence based on clearly erroneous facts; or does not comply with § 3553(c)'s requirement for a statement of reasons."[48] Because he found no procedural problem with the district court's sentence in *Rita*, he concurred in affirming the decision of the court of appeals.[49]

Justice Souter dissented. He rejected the presumption of reasonableness, finding that it contributed to a "gravitational pull" that would "tend to produce Guidelines sentences almost as regularly as mandatory Guidelines had done" and "open the door to undermining *Apprendi* itself."[50] The *Booker* remedy for Sixth Amendment violations would be no remedy at all, he argued, if the district courts continued to treat the Guidelines as mandatory.[51] Moreover, Justice Souter explained, the Court's limitation of the presumption to appellate courts would not slow this course, as judges fearing reversal

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[43] Justice Thomas joined Justice Scalia's concurrence.

[44] *Rita*, 127 S. Ct. at 2476 (Scalia, J., concurring in part and concurring in the judgment).

[45] *Id.* at 2478.

[46] *Id.* at 2476.

[47] *Id.* at 2482.

[48] *Id.* at 2483.

[49] *Id.* at 2484.

[50] *Id.* at 2487 (Souter, J., dissenting). Responding to Justice Souter's worry about the impact of the presumption, Justice Stevens wrote: "[H]e overestimates the 'gravitational pull' towards the advisory Guidelines that will result from a presumption of reasonableness. *Booker*'s standard of review allows — indeed, requires — district judges to consider *all* of the factors listed in § 3553(a) and to apply them to the individual defendants before them." *Id.* at 2473–74 (Stevens, J., concurring) (citation omitted). Justice Scalia, by contrast, called Justice Souter's goal of assuring district courts that the Guidelines are advisory "an essential one to prevent the *Booker* remedy from effectively overturning *Apprendi* and *Blakely*," but believed that "eliminating the presumption of reasonableness will not achieve it," as evidenced by data showing that no within-Guidelines sentence has ever been reversed as substantively unreasonable by an appellate court that *declined* to apply the presumption. *Id.* at 2478 n.3 (Scalia, J., concurring in part and concurring in the judgment).

[51] *See id.* at 2487 (Souter, J., dissenting).

would opt for Guidelines sentences.[52] With the Court's adoption of a presumption likely to incentivize judges to find the additional facts needed to sentence defendants within the Guidelines, Justice Souter argued, "it seems fair to ask just what has been accomplished in real terms by all the judicial labor imposed by *Apprendi* and its associated cases."[53]

In upholding the use of an appellate presumption of reasonableness for within-Guidelines sentences, the Supreme Court also sanctioned the issuance of abbreviated and even wholly implicit "statements" of reasons at the trial level. The Court's failure to require sentencing judges to explain their sentences in detail undermines the rationale for the presumption — that the Sentencing Commission and the trial judge independently came to the same assessment. Furthermore, *Rita*'s weak statement requirement hamstrings appellate review and threatens to entrench trial courts' treatment of the Guidelines as mandatory, in violation of *Booker*. To achieve the principled sentencing regime envisioned by the Sentencing Guidelines and promised by *Booker*'s remedial opinion, appellate courts should adopt a prudential requirement that sentencing judges explain in writing their reasons for imposing any sentence, including a within-Guidelines one, and for rejecting any arguments made by a defendant for a downward departure.

In establishing the permissibility of an appellate court presumption of substantive reasonableness for within-Guidelines sentences, the Court in *Rita* relied primarily on the idea that such a sentence reflects the consistent wisdom of both the U.S. Sentencing Commission and the sentencing judge.[54] It called this a "double determination" because the Commission and the judge "will have reached the *same* conclusion as to the proper sentence in the particular case."[55] The Court emphasized that only an appellate court may apply the presumption.[56] If a sentencing court were to presume that the Guidelines were reasonable, there would be no true "double determination"; rather, there would be a single determination and a double deferral to that determination.

Strikingly, however, the Court undermined the double-determination rationale by allowing trial courts to provide minimal explanation for within-Guidelines sentences. After clarifying Rita's arguments, Rita's sentencing judge explained only that "under 3553, certainly the public needs to be protected" and that he was "unable to find that the sentencing guideline range . . . is an inappropriate guide-

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[52] *Id.* at 2488.
[53] *Id.*
[54] *See id.* at 2463 (majority opinion).
[55] *Id.*
[56] *See id.* at 2465.

line range."[57] The Court considered this sufficient to satisfy § 3553(c)'s requirement of a statement of reasons. It also held that when a defendant argues for a downward departure, it is enough that it be evident from the record that the judge considered those arguments.[58] But if such consideration was evident in *Rita*, in which the judge said nothing about the persuasiveness of the defendant's arguments, then it will be evident in almost every case, and judges may never have to address meritorious sentencing arguments. And if district court judges do not explain how they arrived at their sentences, appellate courts will have no way of knowing that they truly conducted an independent analysis. *Rita*'s unexacting statement-of-reasons requirement thus makes it probable that appellate courts will fail to provide meaningful substantive review of within-Guidelines sentences, and this uncertainty calls the presumption itself into question.

Moreover, in not requiring more from trial judges, the Court acquiesced in the reality that the Sentencing Guidelines have remained de facto mandatory — a reality that mocks the constitutional remedy of *Booker*. In the first eleven months following *Booker*, 61.2% of all sentences submitted to the U.S. Sentencing Commission fell within the applicable Guidelines range, down just ten percentage points from the year before.[59] Most departures that were granted were initiated by the Department of Justice, not by defendants.[60] During the first year of post-*Booker* sentencing, the average length of a federal sentence stayed exactly what it was the year before.[61] Former U.S. District Court Judge Paul Cassell has commented that "[t]he data show that sentencing practices have not changed substantially. There is some variation in some cases, but it's a matter of several percentage points."[62] And in the almost three years since *Booker*, only twice have appellate courts vacated a within-Guidelines sentence as substantively unreasonable — once resulting in the exact same sentence on remand[63] and once in a nonprecedential, unpublished opinion.[64] In practice, appellate review

[57] Brief for the Petitioner at 5, *Rita*, 127 S. Ct. 2456 (No. 06-5754), 2006 WL 3740371.

[58] *See Rita*, 127 S. Ct. at 2469.

[59] Frank O. Bowman, III, *The Year of Jubilee . . . Or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After* Booker, 43 HOUS. L. REV. 279, 297 (2006).

[60] *Id.* at 305.

[61] *Id.* at 309.

[62] *A Year after* Booker*: Most Sentences Still Within Guidelines,* THIRD BRANCH, Feb. 2006, http://www.uscourts.gov/ttb/02-06/indepth/index.html.

[63] United States v. Goodwin, 486 F.3d 449, 451 (8th Cir. 2007).

[64] United States v. Paul, No. 06-30506, 2007 WL 2384234, at *2 (9th Cir. Aug. 17, 2007) (reversing defendant's sixteen-month sentence for theft as substantively unreasonable).

for substantively unreasonable within-Guidelines sentences has been a "search for creatures that turned out not to exist."[65]

The Guidelines continue to function as mandatory because appellate courts defer to trial courts, and trial courts in turn defer to the Guidelines. In *Rita*, the sentencing judge heard arguments from the prosecution and defense and "concluded that he was 'unable to find [that the Guidelines sentence range was] inappropriate.'"[66] The judge took the Guidelines recommendation as his starting point and effectively put the burden on the defendant to convince him to depart downward. If this approach does not constitute a trial-level presumption of reasonableness, it is not clear what would.[67] Though *Rita* emphasizes that trial courts may not presume the Guidelines are reasonable, not requiring them to detail the reasons for their sentences allows them to make exactly that presumption.

Given this culture of deference to the Guidelines, there is a danger that appellate courts will relax *Rita*'s prohibition on a presumption of reasonableness at the trial level. The month after the Court decided *Rita*, for example, the Third Circuit in *United States v. Hankerson*[68] rejected a defendant's ineffective assistance of counsel complaint that his lawyer had made a "guidelines-centric" argument.[69] The court denied the claim, commenting that because "a sentence within the range is more likely to be reasonable than one without, it was entirely reasonable for defense counsel to focus much of his argument on the guidelines."[70] The defense counsel was arguing before the trial judge, so under the letter of *Rita*, he should have expected no presumption there that the Guidelines sentence range was reasonable. Nonetheless, the Third Circuit appeared to view such a trial-level presumption as perfectly appropriate. Such a response may become increasingly common if courts focus less on *Rita*'s formal prohibition on trial-level presumptions and more on its approval of judges' reliance on the Guidelines at the initial stages of sentencing.

To make good on *Booker*'s attempt to salvage the constitutionality of the Guidelines by making them merely advisory, Congress should modify § 3553(c) to require trial judges to provide detailed explanations of how they arrived at their sentences, whether those sentences

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[65] United States v. Pruitt, No. 06-3152, 2007 WL 2430125, at *17 (10th Cir. Aug. 29, 2007) (McConnell, J., concurring).

[66] *Rita*, 127 S. Ct. at 2462.

[67] *Cf.* United States v. Jiménez-Beltre, 440 F.3d 514, 530 (1st Cir. 2006) (Lipez, J., dissenting) ("[T]the district court organized all of the information it received from the parties around the wrong proposition — could a non-guidelines sentence be justified? The court never questioned the assumption that the guidelines sentence complied with the statute.").

[68] No. 06-3291, 2007 WL 2177168 (3d Cir. July 31, 2007).

[69] *Id.* at *8.

[70] *Id.* at *7.

fall within the Guidelines or without. Alternatively, appellate courts should impose this demand on trial courts as a prudential requirement. Specifically, sentencing judges should be required (1) to address all seven § 3553(a) factors on the record, (2) to respond to all departure arguments made by the defendant, and (3) to do each of these things in writing.

As Judge Gertner stated after *Booker*, "an 'advisory' regime makes it all the more important that I adhere to my practice of writing opinions, outlining the reasons for the sentences I have imposed."[71] Describing the intent of the U.S. Sentencing Commission in promulgating the Guidelines, she argued that judicial explanation of sentence determination was integral to the proper functioning and evolution of a fair system of guideline sentencing:

> As judges applied the Guidelines, they were supposed to . . . create a common law of sentencing in the interstices of the Guidelines. . . . Judges were to articulate the purposes of sentencing, and to "consider what impact, if any, each particular purpose should have on the sentence in each case." In short, the drafters understood that fairness in the individual case meant something other than rote application of the Guidelines.[72]

A "common law of sentencing" will evolve only if judges explain for the public and for each other what sentence the statutory factors require when applied to particular sets of facts. Several circuit courts have held that sentencing judges are not required to discuss all of the factors listed in § 3553(a).[73] Courts have recognized, however, that "explicit mention of those factors may facilitate review,"[74] and failure to require such careful attention to the § 3553(a) factors may explain undue dependency on the Guidelines.

The Tenth Circuit has acknowledged the benefits of discussing the statutory factors, including "helping to reduce confusion among the parties, facilitate and expedite judicial review, and provide guidance to practitioners and other defendants."[75] In a separate case, the Tenth Circuit "add[ed] another important benefit to this list: to hold open to public scrutiny the judiciary's reasoning behind depriving a person of a most fundamental right — liberty."[76] To this end, the court emphasized the importance of responding to a defendant's specific arguments for downward departure.[77] The court, however, emphasized that "our

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[71] United States v. Jaber, 362 F. Supp. 2d. 365, 367 (D. Mass. 2005).

[72] *Id.* at 373 (citations omitted).

[73] *See, e.g.*, United States v. Fernandez, 443 F.3d 19, 30–31 (2d Cir. 2006); United States v. Williams, 436 F.3d 706, 708–09 (6th Cir. 2006).

[74] *See, e.g.*, *Williams*, 436 F.3d at 709.

[75] United States v. Ruiz-Terrazas, 477 F.3d 1196, 1202 (10th Cir. 2007).

[76] United States v. Pruitt, No. 06-3152, 2007 WL 2430125, at *8 (10th Cir. Aug. 29, 2007).

[77] *See id.*

precedent does not impose this exacting duty of explanation."[78] *Rita* provides two reasons why the law *should* impose such an exacting duty: it is the only way to justify the appellate presumption of reasonableness based on a double determination, and it appears to be the only way to convince judges that the Guidelines "are truly advisory."[79]

Skeptics will raise at least three objections to requiring judges to explain all of their sentences in detail. First, such a requirement may be at odds with the language and purpose of 18 U.S.C. § 3553(c). That statute requires that "the specific reason for the imposition of a sentence" be "stated with specificity in the written order of judgment and commitment" only for non-Guidelines sentences.[80] That is, Congress requires greater explanation when a judge sentences outside the Guidelines. Congress also intended the Guidelines to be mandatory, however, and as they are now advisory, there may no longer exist a persuasive reason for the distinction in § 3553(c). Further, the statute does require that a judge "state in open court the reasons" for her sentence, whether it falls within the applicable Guidelines range or not.[81] Demanding greater specificity and a written format fits comfortably within this language.

Second, judges may respond to this imposition by mechanically repeating the same justifications in each case. But even if judges end up repeating the same reasons in case after case, the process of recording reasons and rebutting defendants' arguments in writing may cause some of them to think independently of the Guidelines. This in turn may produce more departures, a result that would legitimate the *Booker* remedy. And even if sentencing judges' explanations are rote and overly general, those explanations will give appellate courts a basis for overturning substantively unreasonable sentences.

Third, having to explain every sentence in detail may overburden judges and thus diminish their ability to decide cases efficiently. If they are complying with § 3553(a), however, judges should already consider the diverse factors that go into a sentence, and they will need only to put them on paper. There are good reasons to tolerate this additional cost; depriving a person of her liberty is an awesome punishment, and one to which efficiency at times should yield.

The Supreme Court's holding in *Booker* was the culmination of six years of cases that called into question the role of judges in handing out unlawful sentences. Making the Guidelines advisory, however, resolves the constitutional problem presented in *Booker* only if there is meaningful appellate review of sentences. By simultaneously shoring

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[78] *Id.*

[79] *See Rita*, 127 S. Ct. at 2474 (Stevens, J., concurring).

[80] 18 U.S.C. § 3553(c)(2) (2000 & Supp. IV 2004).

[81] *Id.* § 3553(c).

up the Guidelines as the presumptive measure of lawfulness and requiring too little in the way of explanation from sentencing judges, the *Rita* Court undermined the strength of appellate review. To avoid a system in which unreasonable, within-Guidelines sentences go unchecked, courts should be required to explain their reasons in detail.

7. *Sixth Amendment — Ineffective Assistance of Counsel.* — Capital defendants are not always cooperative or repentant, even at sentencing hearings determinative of their fates. Some death penalty defendants may refuse to aid in investigation of mitigating evidence, or they may actively obstruct presentation of it during the sentencing phase. Others may flaunt the purposeful nature of their killings, their lack of remorse, or their willingness to be put to death for their crimes. Courts must be aware, however, that this behavior may be due to mental illness or caused by physical and emotional abuse, a genetic disorder, or drug addiction — characteristics that may reduce a defendant's moral culpability. Last Term, in *Schriro v. Landrigan*,[1] the Supreme Court upheld a state court's finding that a defendant who refused to allow the presentation of mitigating evidence from his family members was not prejudiced by his counsel's failure to investigate fully or to present other sorts of mitigating evidence.[2] Thus, the Court held, the defendant was not entitled to an evidentiary hearing on the claim of ineffective assistance of counsel.[3] The Court failed to analyze the context of Landrigan's refusal, including unique concerns about particular mitigating evidence and the defendant's background — factors that may have explained his statements and behavior. Moreover, the Court did not consider the defendant's refusal in the context of its waiver precedents or the importance of mitigating evidence. Courts should not expand a limited refusal to present only *some* mitigating evidence into a complete refusal to present *any* mitigating evidence, nor should they allow recalcitrant behavior at sentencing to justify eradication of a defendant's constitutional right to effective assistance of counsel.

Jeffrey Landrigan was convicted of second-degree murder in 1982. While in custody in Oklahoma, he stabbed another inmate, resulting in a conviction for assault and battery with a deadly weapon.[4] Three years later, Landrigan escaped from prison and committed a second murder.[5] An Arizona jury convicted Landrigan of theft, second-degree burglary, and felony murder. At sentencing, defense counsel attempted to present mitigating testimony from Landrigan's ex-wife and birth

[1] 127 S. Ct. 1933 (2007).
[2] *Id.* at 1937.
[3] *Id.* at 1944.
[4] *Id.* at 1937.
[5] *Id.*