CRIMINAL LAW — SENTENCING GUIDELINES — SEVENTH CIRCUIT UPHOLDS REJECTION OF DIMINISHED CAPACITY AS MITIGATING FACTOR. — *United States v. Garthus*, 652 F.3d 715 (7th Cir. 2011).

In *United States v. Booker*,[1] the Supreme Court made the Federal Sentencing Guidelines advisory.[2] It remains unclear, however, exactly how much weight district courts must place on the "advisory" Guidelines.[3] Recently, in *United States v. Garthus*,[4] the Seventh Circuit upheld a district court's decision to reject the Guidelines' policy of treating diminished capacity as a mitigating factor.[5] Although other grounds existed for upholding the sentence, the Seventh Circuit treated the district court's sentence as a policy-based disagreement with the Guidelines. The Seventh Circuit's willingness to defer to the district court's categorical rejection of this guideline, without applying any form of closer review, expands sentencing discretion and increases uncertainty for defendants. Moreover, the result is in tension with *Booker*'s underlying goal of "ensuring similar sentences for those who have committed similar crimes in similar ways"[6] without offending defendants' Sixth Amendment rights.[7]

Dennis Garthus pled guilty to the federal crimes of transporting, receiving, and possessing child pornography.[8] The statutory minimum sentence was 180 months,[9] but because Garthus had been convicted of molesting a minor ten years earlier,[10] the Federal Sentencing Guidelines recommended a sentence between 360 months and life.[11] Arguing that the judge should impose a sentence below the Guidelines range, Garthus's lawyer presented evidence of "diminished capacity,"[12] including Garthus's IQ of 83 and his various psychological conditions.[13] She also presented evidence that Garthus was unlikely to reci-

[1] 543 U.S. 220 (2005).

[2] *Id.* at 245.

[3] *See, e.g.*, Adam Lamparello, *Incorporating the Procedural Justice Model into Federal Sentencing Jurisprudence in the Aftermath of* United States v. Booker*: Establishing United States Sentencing Courts*, 4 N.Y.U. J.L. & LIBERTY 112, 130 (2009).

[4] 652 F.3d 715 (7th Cir. 2011).

[5] *Id.* at 722.

[6] *Booker*, 543 U.S. at 252 (Breyer, J., delivering the opinion of the Court in part).

[7] *See id.* at 250–54.

[8] *Garthus*, 652 F.3d at 716–17.

[9] *Id.* at 717.

[10] *Id.* Garthus served a year in state prison for this offense. *Id.*

[11] *Id.*

[12] *Id.* Under the Guidelines, diminished capacity is a basis for a downward departure from the recommended sentence. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2010).

[13] *Garthus*, 652 F.3d at 718. The conditions included "attention-deficit disorder/hyperactivity disorder, dyslexia, depression, and anxiety." *Id.* Although Garthus's lawyer presented evidence of these conditions, she never used the words "diminished capacity" at the sentencing hearing. *Id.*

divate if imprisoned for only 180 months[14] and argued that the Guidelines range was "empirically unsupported, vindictive, and excessively harsh."[15] The district court was not persuaded: concluding that there was no "guarantee . . . that this urge which Mr. Garthus has will not reemerge once . . . given the opportunity,"[16] the court imposed a sentence of 360 months.[17] The court never specifically mentioned diminished capacity,[18] leading Garthus to appeal.[19]

The Seventh Circuit affirmed.[20] Writing for a unanimous panel, Judge Posner[21] explained that this case highlighted a conflict between two theories of punishment: retribution (or just deserts) and incapacitation.[22] In terms of just deserts, Garthus's diminished capacity would suggest that he deserved a lesser sentence.[23] At the same time, diminished capacity "makes a defendant more likely to repeat his crime when he is released from prison," so diminished capacity is an aggravating factor under an incapacitation theory of punishment.[24] The court explained that this problem was especially acute for defendants convicted of "crime[s] involv[ing] compulsive behavior, such as behavior driven by sexual desire," because "[s]uch behavior requires active resistance by the person tempted to engage in it . . . and diminished capacity weakens the ability to resist."[25]

Turning to the specifics of Garthus's case, the court concluded that there was a high risk of recidivism.[26] The court explained that "the best predictor of recidivism is . . . sexual interest in children."[27] The court also cited studies showing that offenders like Garthus are "more dangerous than the average consumer of child pornography" because "[a] pedophilic sex offender who has committed both a child-pornography offense and a hands-on sex crime is more likely to com-

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[14] *Id.* at 719. After 180 months, Garthus would be nearly sixty years old. *Id.*

[15] *Id.* at 721.

[16] *Id.* at 718.

[17] *Id.* at 717.

[18] *Id.* at 718.

[19] *Id.* at 717.

[20] *Id.* at 722.

[21] Judge Posner was joined by Judges Rovner and Wood.

[22] *See Garthus*, 652 F.3d at 717–18.

[23] *See id.* at 717. Under a just deserts theory of punishment, a defendant with diminished capacity is less morally accountable, and therefore less deserving of a harsh sentence, than ordinary defendants would be. *See* Joshua Dressler, *Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse*, 75 J. CRIM. L. & CRIMINOLOGY 953, 959–60 (1984).

[24] *Garthus*, 652 F.3d at 717.

[25] *Id.*

[26] *See id.* at 717, 719.

[27] *Id.* at 720.

mit a future crime, including another hands-on offense, than a defendant who has committed only a child-pornography offense."[28]

Against these arguments in favor of a higher sentence, the court noted that the Guidelines had "embraced a just-deserts theory" with regard to diminished capacity, treating it as a mitigating factor.[29] In light of post-*Booker* jurisprudence, however, the court concluded that sentencing judges are free to ignore the general policies expressed in the Guidelines and apply their own penal philosophies instead.[30] Depending on which penal philosophy a judge adopts, "he can disregard the guidelines' classification of diminished capacity as a mitigating factor, regard it as an aggravating factor, or regard it as a wash."[31]

In this case, although the district judge had not specifically mentioned diminished capacity in his sentencing remarks,[32] the court found it "clear that he was more concerned with the risk of the defendant's repeating his crimes . . . than with the defendant's 'issues.'"[33] The court concluded that the district judge's sentencing remarks expressed a policy in favor of incapacitation, and it held that no more was required to dispense with the diminished capacity argument.[34] Finally, the Court summarily rejected Garthus's argument that the child pornography guidelines were unreasonable and empirically unsupported, explaining that this "argument is more properly addressed to the Sentencing Commission, or to Congress."[35]

Judge Posner's opinion treated the district court's decision as a categorical rejection of the "just deserts" treatment of diminished capacity as a mitigating factor.[36] Therefore, although Judge Posner devoted less than a paragraph to this issue, the opinion hinges on the conclusion that "a sentencing judge can adopt his own penal philosophy" even when it contradicts the Guidelines' policy.[37] The court's cursory discussion of this issue and its willingness to defer to the district court threaten to expand sentencing courts' discretion, even measured against the highly discretionary post-*Booker* standard. This expansion creates additional uncertainty in the sentencing process, forcing defendants to gamble on sentencing judges' penal theories when arguing for reduced sentences. More broadly, the result increases the likelihood

[28] *Id.*

[29] *See id.* at 718; *see also* U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2010).

[30] *See Garthus*, 652 F.3d at 718.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 720.

[34] *See id.* at 720–21.

[35] *Id.* at 721. The court also expressed substantive disagreement with this argument. *See id.* at 721–22.

[36] *See id.* at 720–21.

[37] *Id.* at 718.

that sentences will vary according to district judges' differing philosophical preferences rather than defendants' real conduct, an outcome that is in tension with the justifications for *Booker* itself. Given the court's conclusion that the district judge categorically rejected the Guidelines, the court should have engaged in closer review of the district court's reasoning.

As a preliminary matter, the court did not have to treat the district court's decision as a categorical rejection of the Guidelines. The guideline at issue, section 5K2.13, expressly provides that it does not apply in child pornography cases.[38] Thus, Garthus's primary argument — that the district judge failed to consider the possible departure recommended by the Guidelines — would have failed even if the Guidelines were mandatory.[39] Rather than taking this easy route, however, the court treated the district court's sentence as a policy-based disagreement with the guideline.[40] In doing so, the court entered into an area of law that has been a source of confusion since *Booker* was decided.

Prior to *Booker*, the Guidelines required judges to sentence within narrow ranges set according to the defendant's conduct and criminal history.[41] In order to encourage sentencing based on the defendant's "real conduct"[42] — rather than on the conduct charged by the prosecutor — the Guidelines allowed judicial factfinding and authorized sentences based on facts never presented to a jury.[43] In an opinion by Justice Stevens, the *Booker* "constitutional majority" found that this aspect of the Guidelines violated defendants' Sixth Amendment right to a trial by jury;[44] in a separate majority opinion by Justice Breyer, the "remedial majority" resolved this problem by making the Guidelines "effectively advisory."[45] The remedial majority authorized judges, after calculating the appropriate Guidelines range and consid-

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[38] U.S. SENTENCING GUIDELINES MANUAL § 5K2.13 (2010) ("However, the court may not depart below the applicable guideline range if . . . the defendant has been convicted of an offense under [the sexual exploitation of children chapter] . . . of title 18, United States Code."); *see also* United States v. Mark, 425 F.3d 505, 507 (8th Cir. 2005).

[39] *See Mark*, 425 F.3d at 507.

[40] *See Garthus*, 652 F.3d at 718. The court cited two cases that both deal with judges' authority to categorically reject the Guidelines: *United States v. Corner*, 598 F.3d 411, 416 (7th Cir. 2010) (en banc), and *United States v. Herrera-Zuniga*, 571 F.3d 568, 586 (6th Cir. 2009).

[41] *See* Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 5 (2008).

[42] United States v. Booker, 543 U.S. 220, 254 (2005) (Breyer, J., delivering the opinion of the Court in part).

[43] *See id.* at 250–52; *see also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises upon Which They Rest*, 17 HOFSTRA L. REV. 1, 10–12 (1988).

[44] *Booker*, 543 U.S. at 244 (Stevens, J., delivering the opinion of the Court in part).

[45] *Id.* at 245 (Breyer, J., delivering the opinion of the Court in part).

ering it, to give any sentence within the statutory range,[46] with appellate review for unreasonableness.[47] This solution eliminated the constitutional problem, since judicial factfinding was no longer a prerequisite for any sentence within the statutory range.[48] The remedial majority determined that, in light of the Sixth Amendment holding, Congress would have wanted the Guidelines to become advisory because the increased judicial discretion would allow judges to continue sentencing according to defendants' real conduct.[49]

After *Booker*, although it was clear that district courts were not bound by the Guidelines sentencing range in individual cases, appellate courts disagreed on whether judges were also free to reject Guidelines policies wholesale.[50] This ambiguity was the central question in *Kimbrough v. United States*,[51] in which the Court held that district judges could reject the Guidelines' 100:1 multiplier for crack versus powder cocaine quantities based on a categorical disagreement with that ratio.[52] The Court found that the Sentencing Commission had formulated the crack cocaine guidelines in response to legislative directives rather than empirical data, contrary to its normal practice.[53] Thus, because the crack cocaine guidelines did not "exemplify the Commission's exercise of its characteristic institutional role,"[54] lower courts could categorically reject those guidelines. In other cases, however, the Court emphasized that "closer review may be in order" if a sentencing judge categorically rejects a guideline for policy reasons.[55]

Although appellate courts have since allowed policy disagreements outside the crack cocaine context, they have been inconsistent in their application of "closer review." While a few courts have struck down sentences under this standard,[56] most have engaged in relatively loose

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[46] Judges still must consider the purposes of sentencing set forth in 18 U.S.C. § 3553(a)(2), *see id.* at 260, which correspond to the four penal theories of retribution, deterrence, incapacitation, and rehabilitation, *see* 18 U.S.C. § 3553(a)(2) (2006). Judges must impose a sentence "sufficient, but not greater than necessary," to accomplish these purposes. *Id.* § 3553(a).

[47] *Booker*, 543 U.S. at 264 (Breyer, J., delivering the opinion of the Court in part).

[48] *See id.* at 233 (Stevens, J., delivering the opinion of the Court in part).

[49] *See id.* at 250–54 (Breyer, J., delivering the opinion of the Court in part).

[50] *See, e.g.*, Lindsay C. Harrison, *Appellate Discretion and Sentencing After* Booker, 62 U. MIAMI L. REV. 1115, 1135–36 (2008).

[51] 128 S. Ct. 558 (2007).

[52] *See id.* at 564.

[53] *Id.* at 567.

[54] *Id.* at 575.

[55] *Id.* ("[C]loser review may be in order when the sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations' even in a mine-run case." (quoting Rita v. United States, 127 S. Ct. 2456, 2465 (2007))).

[56] *See, e.g.*, United States v. Irey, 612 F.3d 1160, 1202–03 (11th Cir. 2010) (en banc) (rejecting downward departure stemming from categorical disagreement with child pornography guidelines); United States v. Lychock, 578 F.3d 214, 219–20 (3d Cir. 2009) (same).

review and upheld categorical rejections.[57] For example, the Sixth Circuit, while acknowledging its duty to "scrutinize closely any decision to reject categorically the Sentencing Commission's recommendations,"[58] held that a sentence could pass scrutiny if the district court was "unpersuaded" that a guideline "fulfilled the sentencing goals set forth by Congress"[59] — precisely the condition that *triggers* closer review under *Kimbrough*.[60] The Second Circuit, sitting en banc, upheld a categorical rejection while questioning the "closer review" standard, noting that the Court did not even apply the test in *Kimbrough* itself.[61] In a separate opinion, then-Judge Sotomayor criticized the majority for failing to apply closer review to the district court's decision.[62]

Even measured against the loose standard of review applied in other circuits, however, the *Garthus* court seemed especially eager to permit the district court's policy-based disagreement with the Guidelines.[63] Nowhere in the opinion did Judge Posner discuss "closer review." Similarly absent was any discussion of the "discrete institutional strengths"[64] of courts and the Commission, or any finding that, in formulating the diminished capacity guideline, the Commission acted outside "its characteristic institutional role."[65] Indeed, the court did not cite *Kimbrough* at all. The court simply noted that the rationale for the guideline was unexplained,[66] and justified the district court's disagreement with the Guidelines by making a policy argument[67] and by citing a range of studies[68] found nowhere in the sentencing opinion. The court's willingness to accept the district judge's

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[57] *See, e.g.*, United States v. Herrera-Zuniga, 571 F.3d 568, 585–86 (6th Cir. 2009) (upholding above-Guidelines sentence for illegal reentry by deportee); United States v. Cavera, 550 F.3d 180, 194–97 (2d Cir. 2008) (en banc) (upholding above-Guidelines sentence for firearms trafficking); United States v. Evans, 526 F.3d 155, 165 & n.4 (4th Cir. 2008) (upholding above-Guidelines sentence for identity fraud); *see also* United States v. Klups, 514 F.3d 532, 538 n.3 (6th Cir. 2008) (noting that the court would have upheld above-Guidelines sentence for sexual abuse of minor).

[58] *Herrera-Zuniga*, 571 F.3d at 585.

[59] *Id.* at 586.

[60] *See Kimbrough*, 128 S. Ct. at 575.

[61] *See Cavera*, 550 F.3d at 192.

[62] *Id.* at 217–18 (Sotomayor, J., concurring in part and dissenting in part) (arguing that "[c]loser review is warranted where . . . a district court implements a policy decision applicable to a wide class of offenders that is at odds with the Sentencing Commission," *id.* at 217, and where "the judge's sentence . . . was not grounded in the district court's 'discrete institutional strengths,'" *id.* at 218 (quoting *Kimbrough*, 128 S. Ct. at 574)).

[63] *Compare Herrera-Zuniga*, 571 F.3d at 585 ("[W]e must scrutinize closely any decision to reject categorically the Sentencing Commission's recommendations."), *with Garthus*, 652 F.3d at 718 ("In any event, under the *Booker* regime a sentencing judge can adopt his own penal philosophy.").

[64] *Kimbrough*, 128 S. Ct. at 574.

[65] *Id.* at 575.

[66] *Garthus*, 652 F.3d at 718.

[67] *See id.* at 717–18.

[68] *Id.* at 720.

categorical rejection of the guideline without applying a closer review standard marks an expansion of sentencing discretion and an erosion of appellate review under *Booker*.

This expansion of sentencing judges' discretion can have severe consequences for criminal defendants.[69] Under *Garthus*, defendants face the risk that a diminished capacity argument may be considered grounds for increasing the sentence — something courts had previously found impermissible, at least under the Guidelines.[70] The added uncertainty[71] creates a system in which defendants must gamble on the policy preferences of the sentencing judge: some defendants will "win," getting reduced sentences, whereas other defendants suffering from equally debilitating conditions will "lose," receiving longer sentences because of those conditions. The increased risk also undermines the defendant's ability to prepare an effective defense, since the defendant will not know whether the diminished capacity argument will mitigate or enhance the sentence.[72]

On a broader level, this expanded discretion and the resulting uncertainty put *Garthus* in tension with *Booker* itself. *Booker*, after all, did not dispose of mandatory Guidelines for discretion's sake; rather, the *Booker* remedial majority made the Guidelines advisory to further the statutory goal of "ensuring similar sentences for those who have committed similar crimes in similar ways"[73] while preserving defendants' Sixth Amendment right to a jury trial.[74] Justice Breyer, author of the *Booker* remedial opinion, recently explained that "*Booker*'s description of the Guidelines as 'advisory'" is accurate "only if that word is read in light of the Sixth Amendment analysis that precedes it."[75] Post-*Booker* decisions, however, have increased district courts' discre-

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[69] Of course, discretion can benefit defendants as well. *See, e.g.*, Williams v. New York, 337 U.S. 241, 249 (1949).

[70] *See, e.g.*, United States v. Cantu, 12 F.3d 1506, 1516 (9th Cir. 1993) ("A sentencing court may not presume that a defendant with reduced mental capacity is more dangerous than other offenders, or that . . . he is more likely than those who are not impaired to commit future crimes.").

[71] This uncertainty is not merely theoretical: at least one study has shown that sentencing disparities attributable to differences between individual judges have been increasing since *Booker* and *Kimbrough*. *See* Ryan W. Scott, *Inter-Judge Sentencing Disparity After* Booker*: A First Look*, 63 STAN. L. REV. 1, 34 (2010).

[72] *Cf.* Apprendi v. New Jersey, 530 U.S. 466, 478 (2000) (noting that in order to prepare a defense, the defendant has the right to know which factors will enhance the final sentence). The Supreme Court has suggested in the death penalty context that allowing juries to consider statutory mitigating factors as aggravating factors might violate due process. *See* Zant v. Stephens, 462 U.S. 862, 885 (1983); *see also* Note, *Mental Illness as an Aggravating Circumstance in Capital Sentencing*, 89 COLUM. L. REV. 291, 302–05 (1989).

[73] United States v. Booker, 543 U.S. 220, 252 (2005) (Breyer, J., delivering the opinion of the Court in part).

[74] *See id.* at 245, 250–54.

[75] Pepper v. United States, 131 S. Ct. 1229, 1253 (2011) (Breyer, J., concurring in part and concurring in the judgment).

tion with barely any reference to this original rationale,[76] treating discretion not as a means to avoid a Sixth Amendment problem but as an end in itself. Thus, without mentioning the Sixth Amendment or the need to ensure similar sentences for similar criminal conduct, *Garthus* expanded discretion and invited increased sentencing variation, which is difficult to reconcile with *Booker*'s goal of providing as much uniformity as possible without violating the Sixth Amendment.

A better approach would have been to review more closely the district court's decision to reject the Guidelines categorically.[77] This strategy would have been more consistent with *Kimbrough* and the goals of *Booker*. Moreover, scrutinizing wholesale rejections of Guidelines policy would not result in Sixth Amendment violations.[78] District judges would remain free to sentence outside the Guidelines' recommended length — thus avoiding the constitutional problem[79] — but they would be required either to follow general Guidelines policies or to explain why, given the institutional capacities of the courts and the Commission, they chose not to follow a particular policy.[80]

In the end, the result in *Garthus* is almost certainly correct: the court upheld a within-Guidelines sentence and rejected a basis for departure that probably did not apply. But by treating the district court's decision as a policy-based rejection of the Guidelines, and then going to great lengths to justify that rejection instead of subjecting it to closer review, the court has expanded sentencing judges' discretion in a way that creates additional uncertainty and risks for defendants, while further undermining the original principles underlying *Booker*.

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[76] This trend has not gone unnoticed by all members of the Court. *See, e.g.*, Gall v. United States, 128 S. Ct. 586, 605 (2007) (Alito, J., dissenting).

[77] *See* Craig D. Rust, Comment, *When "Reasonableness" Is Not So Reasonable: The Need to Restore Clarity to the Appellate Review of Federal Sentencing Decisions After* Rita, Gall*, and* Kimbrough, 26 TOURO L. REV. 75, 104–05 (2010).

[78] *See Pepper*, 131 S. Ct. at 1256 (Alito, J., concurring in part, concurring in the judgment in part, and dissenting in part) ("[R]equiring judges to give significant weight to the Commission's policy decisions does not run afoul of the Sixth Amendment right that the mandatory Guidelines system was found to violate . . . ."); *see also id.* at 1255 (Breyer, J., concurring in part and concurring in the judgment). *But see* Kimbrough v. United States, 128 S. Ct. 558, 577 (2007) (Scalia, J., concurring) (noting that if the "closer review" test required judges to adhere to the Guidelines range, it would lead to Sixth Amendment violations under *Booker*).

[79] *See* United States v. Booker, 543 U.S. 220, 233 (2005) (Stevens, J., delivering the opinion of the Court in part). The "closer review" standard for policy-based departures is unlike heightened scrutiny for departures from the specific sentence *lengths* recommended by the Guidelines, which is not permitted. *See Gall*, 128 S. Ct. at 595 (holding that appellate courts may not apply a presumption of unreasonableness for any sentence outside the Guidelines range).

[80] Some language in *Booker* implies that the Guidelines are entirely advisory, even in instances where applying the Guidelines would not violate the Sixth Amendment. *See* 543 U.S. at 266–67 (Breyer, J., delivering the opinion of the Court in part). The Court has since held, however, that where the Sixth Amendment is not implicated, *Booker* does not necessarily require courts to treat all aspects of the Guidelines as advisory. *See* Dillon v. United States, 130 S. Ct. 2683, 2693 (2010).