RECENT CASES

SENTENCING — APPELLATE REVIEW — SEVENTH CIRCUIT HOLDS ABOVE-GUIDELINES SENTENCE WAS INADEQUATELY JUSTIFIED, BUT FORESHADOWS SAME SENTENCE ON REMAND. — *United States v. Jones*, 962 F.3d 956 (7th Cir. 2020).

In *United States v. Booker*,[1] the Supreme Court invalidated the mandatory nature of the United States Sentencing Guidelines, restoring district court judges' discretion to impose sentences anywhere within the statutory sentencing range.[2] *Booker* invited both procedural and substantive appellate review of criminal sentencing, but subsequent decisions did not clarify the substantive review part of the equation.[3] Today, appellate courts police district courts for adherence to procedural formalities but do little to promote substantive reasonableness in sentencing.[4] Recently, in *United States v. Jones*,[5] the Seventh Circuit vacated a district court's sentence that significantly exceeded the range suggested by the Guidelines.[6] However, the panel seemed to pave the way for the district court to impose the same sentence on remand, as long as it hewed more closely to procedural formalities.[7] *Jones* illustrates the drawbacks of the post-*Booker* federal sentencing scheme. Even if procedural appellate review ensures that district courts provide an explanation for the sentences they choose, defendants are left vulnerable to district judges' personal sentencing philosophies and subjective assessments, undermining sentencing uniformity and frustrating Congress's ability to implement criminal justice reform.

In early autumn 1997, Jerry Jones and two associates hijacked a UPS truck at gunpoint to rob a bank.[8] After the robbery, they raced away,

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

[2] *Id.* at 245–46 (Breyer, J., delivering the opinion of the Court in part). *See generally* M.K.B. Darmer, *The Federal Sentencing Guidelines After* Blakely *and* Booker*: The Limits of Congressional Tolerance and a Greater Role for Juries*, 56 S.C. L. REV. 533, 540–43 (2005) (discussing how judges' discretion in sentencing was curtailed by the Sentencing Reform Act, Pub. L. No. 98-473, tit. II, ch. II, 98 Stat. 1987 (1984) (codified as amended in scattered sections of 18 and 28 U.S.C.)); Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225–26 (1993) (describing the nearly unfettered discretion judges had in sentencing prior to the enactment of the Sentencing Reform Act).

[3] D. Michael Fisher, *Still in Balance? Federal District Court Discretion and Appellate Review Six Years After* Booker, 49 DUQ. L. REV. 641, 644 (2011); Lindsay C. Harrison, *Appellate Discretion and Sentencing After* Booker, 62 U. MIA. L. REV. 1115, 1137–38 (2008).

[4] *See* Nancy Gertner, Essay, *On Competence, Legitimacy, and Proportionality*, 160 U. PA. L. REV. 1585, 1595 (2012).

[5] 962 F.3d 956 (7th Cir. 2020).

[6] *Id.* at 958.

[7] *See id.* at 962.

[8] *Id.* at 958.

leaving the UPS driver manacled in the back of his vehicle.[9] Law enforcement quickly identified the robbers, but Jones and his compatriots fled from the police, eventually hiding inside a nearby farmhouse.[10] One of the conspirators disappeared into the bedroom closet of the homeowners' eighteen-year-old daughter.[11] That evening, after the girl came home from school, she opened her closet door to find a stranger brandishing a gun in her face.[12] The robbers tied the family up before forcing the father to drive them home, threatening to kill him if anyone notified the police.[13]

Ultimately, law enforcement caught up with Jones and his compatriots. At trial, Jones was convicted of armed bank robbery, carjacking, and three counts of using a firearm during a crime of violence.[14] He was sentenced to 840 months, or seventy years, in prison.[15] This sentence took into account the fact that his criminal history meant that he qualified as a career offender under the Sentencing Guidelines, which resulted in a significant increase in the applicable Guidelines range.[16] It also included three consecutive mandatory minimum sentences for the counts of use of a firearm during a crime of violence.[17] The sentence necessarily fell within the Guidelines range because at the time, before *Booker*, the Guidelines were binding on district courts.[18]

In 2018, Jones petitioned for a writ of habeas corpus, contending that his sentence should be reduced because he no longer qualified as a career offender due to a recent Supreme Court decision.[19] The U.S. District Court for the Southern District of Indiana ordered that Jones be resentenced.[20] At resentencing, Jones argued that his sentence should be lowered not only

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *Id.* at 959.

[15] *Id.*

[16] *Id. See generally* Amy Baron-Evans et al., *Deconstructing the Career Offender Guideline*, 2 CHARLOTTE L. REV. 39, 42 (2010) (explaining the impact of a career-offender designation for the Sentencing Guidelines).

[17] *Jones*, 962 F.3d at 959.

[18] *See* United States v. Booker, 543 U.S. 220, 245 (2005) (Breyer, J., delivering the opinion of the Court in part).

[19] *Jones,* 962 F.3d at 959. By 2015, the Supreme Court had decided that a number of crimes no longer counted for determining career-offender status under the Sentencing Guidelines. *See* Johnson v. United States, 135 S. Ct. 2551, 2557 (2015); *see also* Ann E. Marimow, *One of Scalia's Final Opinions Will Shorten Some Federal Prison Sentences*, WASH. POST (June 24, 2016), https://www.washingtonpost.com/local/public-safety/small-words-big-consequences-for-possibly-thousands-of-federal-prisoners/2016/06/23/0d3d7934-3199-11e6-95c0-2a6873031302_story.html [https://perma.cc/2WGA-UAVC] (explaining how the Court's decision in *Johnson* would affect the prison sentences of those convicted as career offenders).

[20] Transcript of Re-sentencing Hearing at 3, United States v. Jones, No. 97-CR-00118 (S.D. Ind. Mar. 14, 2019), ECF No. 82.

because he no longer counted as a career offender, but also because the First Step Act[21] had decreased the mandatory minimum sentence for use of a firearm during a crime of violence to five years per count.[22] Combining these and other factors, the Guidelines recommended a range of up to 390 months of imprisonment.[23]

However, at resentencing the district court again imposed the statutory maximum sentence of 840 months, identical to the sentence Jones had received over twenty years earlier.[24] Even though the court accepted Jones's argument that the First Step Act had reduced the mandatory minimum sentence, it more than doubled the applicable Guidelines range.[25] The court considered the sentencing factors listed in 18 U.S.C. § 3553(a),[26] noting that Jones "put [his] victims in great fear" during "horrific crimes of violence,"[27] that he had a "history as a violent predatory individual" because of his criminal record,[28] and that it had considered sentencing disparities among similarly situated defendants.[29] It concluded that "the statutory maximum sentence will reflect the seriousness of the offense."[30]

Jones appealed, challenging the district court's significant departure from the Sentencing Guidelines on procedural grounds.[31] The Seventh Circuit vacated the district court's sentence and remanded the case for resentencing.[32] Writing for the panel, Judge Flaum[33] began by outlining the Seventh Circuit's requirements for sentencing explanations. The panel acknowledged that the more a district court deviated from the Sentencing Guidelines, "the more detailed the district court's explanation must be."[34] It noted that the district court needed to demonstrate that it had given "respectful consideration to the judgment embodied in

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[21] First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194 (codified as amended in scattered sections of 18, 21, 34, and 42 U.S.C.). The First Step Act was passed in an attempt to reform the federal criminal justice system by decreasing the applicable Sentencing Guidelines range in many cases, as well as by opening avenues for early release. *See* German Lopez, *The First Step Act, Explained*, VOX (Feb. 5, 2019, 9:42 PM), https://www.vox.com/future-perfect/2018/12/18/18140973/state-of-the-union-trump-first-step-act-criminal-justice-reform [https://perma.cc/953J-WA88].

[22] *See* Transcript of Re-sentencing Hearing, *supra* note 20, at 27–28.

[23] *Jones*, 962 F.3d at 959.

[24] *See id.* at 959–60.

[25] *See* Transcript of Re-sentencing Hearing, *supra* note 20, at 72.

[26] *Id.* at 64–65.

[27] *Id.* at 65.

[28] *Id.* at 66.

[29] *Id.* at 67.

[30] *Id.* at 66.

[31] *Jones*, 962 F.3d at 960.

[32] *Id.* at 963.

[33] Judge Flaum was joined by Judges Barrett and St. Eve.

[34] *Jones*, 962 F.3d at 960 (quoting United States v. Padilla, 520 F.3d 766, 775 (7th Cir. 2008)).

the guidelines range" and had to include a justification for why the district court nevertheless felt that the Guidelines should not apply.[35]

Ultimately, the panel concluded that the district court's explanation did not meet these requirements[36] because it failed to "give a reason, however brief, for ignoring [the Sentencing Guidelines's] recommendations."[37] Consequently, the panel was "left to speculate whether the court fully appreciated that it was adding 450 months to the range and why it thought it was appropriate to do so."[38] It recognized that the district court had focused on Jones's criminal history and the circumstances of his offense.[39] But that was not enough. The panel stated that "[t]he district court needed to specify 'the reasons why [Jones] is different from the vast majority of defendants — many of whom also have criminal histories, are dangerous, and must be incapacitated to protect society . . . .'"[40] Without this clear indication, the panel would not uphold the sentence imposed.

However, the panel acknowledged that an above-Guidelines sentence might have been defensible. It noted that the Guidelines did not account for a "serious" factor — "the break-in to the farmhouse" — concluding that "[w]e in no way question the gravity of Jones's offenses and his criminal history. The Guidelines may well fail to account for the devastating effects Jones's crimes had on his victims."[41] It emphasized that it would be "well within the district court's discretion to determine whether the range is too lenient," as long as it articulated an appropriate justification.[42]

The Seventh Circuit's decision in *United States v. Jones* exemplifies the weaknesses of the post-*Booker* federal sentencing scheme. *Booker* eliminated the binding nature of the Sentencing Guidelines but envisioned both procedural and substantive appellate review to keep district court discretion in check.[43] However, Supreme Court cases following *Booker* have eroded the substantive-review portion of this analysis. As a result, district courts have far more discretion than Congress would have preferred, but appellate courts may not employ the same level of

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[35] *See id.* (quoting United States v. Bradley, 675 F.3d 1021, 1024 (7th Cir. 2012)).

[36] *Id.*

[37] *Id.* at 961 (alteration in original) (quoting United States v. Robertson, 648 F.3d 858, 860 (7th Cir. 2011)).

[38] *Id.* at 962.

[39] *Id.* at 961.

[40] *Id.* (second alteration and omission in original) (quoting United States v. Lockwood, 789 F.3d 773, 782 (7th Cir. 2015)).

[41] *Id.* at 962.

[42] *Id.* The panel also briefly addressed additional issues. First, it stated that the district court's apparent misstatement of certain facts "reinforce[d] the need for remand." *Id.* Second, the panel concluded that the government's argument that the First Step Act should not apply to Jones was improperly presented on appeal. *Id.* at 963.

[43] *See* Harrison, *supra* note 3, at 1137–38.

discretion to provide relief from extreme sentences. This scheme undermines sentencing uniformity, frustrates Congress's ability to implement sentencing reforms like the First Step Act, and makes sentencing outcomes dependent on a defendant's luck in being assigned to a judge with a particular penological philosophy.

Booker imposed significant reforms in the federal sentencing scheme.[44] Before *Booker*, the United States Federal Sentencing Guidelines (which lay out standards that suggest sentencing ranges depending on variables such as a defendant's criminal history and the circumstances of the crime) were binding on district court judges, who had to select a sentence for each defendant from within the range suggested by the Guidelines.[45] After *Booker*, the Sentencing Guidelines became only "advisory" for district courts.[46] To promote sentencing uniformity in this context, the Court introduced two components of appellate reasonableness review: procedural review was meant to ensure that the district court considered the correct sentencing factors, whereas substantive review was intended to evaluate the district court's reasons for its choice of a particular sentence.[47] The Court suggested that this appellate-review structure "would tend to iron out sentencing differences" that might result from district courts' restored discretion.[48]

But decisions in the wake of *Booker* have effectively eviscerated the substantive-review portion of this analysis.[49] In *Gall v. United States*,[50] the Court reframed *Booker*'s "reasonableness" standard of review as abuse of discretion.[51] It noted that "a heightened standard of review [for] sentences outside the Guidelines range" was impermissible,[52] concluding that "[t]he fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court."[53] Then, in *Kimbrough v. United States*,[54] the Court acknowledged that the post-*Booker* sentencing scheme undermined sentencing uniformity, but nevertheless held that a

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[44] *Id.* at 1116.

[45] *See* Darmer, *supra* note 2, at 540–43.

[46] *Id.* at 560.

[47] The Court introduced this standard in *United States v. Booker*, 543 U.S. 220, 261 (2005) (Breyer, J., delivering the opinion of the Court in part), and later clarified the two parts in *Gall v. United States*, 552 U.S. 38, 51 (2007).

[48] *Booker*, 543 U.S. at 263.

[49] For a general overview of the post-*Booker* standard of appellate review in sentencing, see Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 7–8 (2008).

[50] 552 U.S. 38.

[51] *Id.* at 46, 51.

[52] *Id.* at 49.

[53] *Id.* at 51.

[54] 552 U.S. 85 (2007).

district court could impose an outside-Guidelines sentence based primarily on a simple policy disagreement with the Guidelines.[55] As a result of these decisions, "courts typically review robustly for procedural reasonableness . . . and stop there," treating substantive review as a "rubber stamp."[56] Tellingly, 98.3% of sentences that appellate courts reversed or remanded on reasonableness review in 2019 were decided on procedural, not substantive, grounds.[57]

Given this scheme, *United States v. Jones* was doctrinally sound. The panel correctly determined that the district court's explanation for its sentencing decision was insufficient under Seventh Circuit precedent.[58] However, the opinion seemed to point a clear path forward for the district court to impose the exact same sentence on remand, as long as it spends more time justifying its decision. In fact, the panel even seemed to provide the district court with potential acceptable justifications, including that the Guidelines did not consider the circumstances surrounding Jones's break-in to the farmhouse,[59] or that the Guidelines "fail[ed] to account for the devastating effects Jones's crimes had on his victims."[60] Noting that the district court was "free to conclude" that such factors "aggravated the offenses," the panel reiterated that it would be deferential to the district court's judgment that an above-Guidelines sentence was necessary.[61] The fact that the panel presented the district court with these explanations suggests that the panel would be willing to uphold the district court's harsh sentence on remand — just as long as the district court recited the reasons that the panel provided in advance.

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[55] *See id.* at 106–08. After *Kimbrough*, "a given offender's sentence might depend entirely on the luck of the judicial draw." Note, *More than a Formality: The Case for Meaningful Substantive Reasonableness Review*, 127 HARV. L. REV. 951, 968 (2014).

[56] Note, *supra* note 55, at 961–62; *see also id.* at 960 (noting appellate judges have characterized appellate sentencing review as a "waste of time" and stating that "[r]easonableness review has essentially become no appellate review" (first quoting *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After* U.S. v. Booker*: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the Comm. on the Judiciary H.R.*, 112th Cong. 27 n.107 (2011) (statement of Hon. Patti B. Saris, Chair, U.S. Sent'g Comm'n (quoting Hon. William Riley, C.J., U.S. Court of Appeals for the Eighth Circuit)); then quoting Memorandum from Hon. Edith H. Jones, C.J., U.S. Court of Appeals for the Fifth Circuit, to the U.S. Sent'g Comm'n 4 (Nov. 20, 2009), https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-hearings-and-meetings/20091119-20/Jones.pdf [https://perma.cc/4CS4-SPAF])); *cf.* Gertner, *supra* note 4, at 1595 ("Substantive reasonableness foundered on the same shoals as Eighth Amendment jurisprudence."); Harrison, *supra* note 3, at 1156 ("When a court of appeals begins questioning how the district court weighs the statutory factors, it crosses the threshold of necessary deference that the Supreme Court has articulated in *Rita*, *Gall*, and *Kimbrough*.").

[57] *See* U.S. SENT'G COMM'N, 2019 ANNUAL REPORT AND SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 188 (2019).

[58] *See* 962 F.3d at 961–62. The district court's explanation appears in the Transcript of Resentencing Hearing, *supra* note 20, at 65–69.

[59] *See Jones*, 962 F.3d at 962.

[60] *Id.*

[61] *Id.*

Of course, the outcome of Jones's case remains uncertain. And even if the district court reimposes the statutory maximum sentence, the requirement that it give a fuller explanation — meant "to allow for meaningful appellate review and to promote the perception of fair sentencing"[62] — will benefit the sentencing process. So perhaps procedural review will work to further the perception of fairness in sentencing in this case. If the district court spends more time laying out its reasoning on remand (even if it simply repeats one of the justifications provided by the panel), the sentence imposed — even if it is the same — will seem less arbitrary. However, given the deterioration of substantive appellate review since *Gall* and *Kimbrough*, the explanation requirement does little "to allow for meaningful appellate review,"[63] because the Seventh Circuit has adopted a "rubber-stamp approach" to substantive review of sentencing, policing district courts for the adequacy of their explanations and stopping there.[64] Though the adequate-explanation requirement might promote the justice system's appearance of legitimacy, that must be small comfort to a defendant — like Jones — who remains vulnerable to an above-Guidelines sentence.[65]

Jones's likely consequences exemplify the downsides of the post-*Booker* federal sentencing scheme. Because district courts are no longer limited to the Guidelines range, uniformity in sentencing has eroded since *Booker*.[66] Sentences are left to the purview of individual district

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[62] Gall v. United States, 552 U.S. 38, 50 (2007).

[63] *Id.*

[64] Note, *supra* note 55, at 962; *see also, e.g.*, United States v. Huffstatler, 571 F.3d 620, 624 (7th Cir. 2009) ("Huffstatler's sentence, though above the guidelines range, was reasonable. The sentencing judge correctly calculated the guidelines range and then reviewed the § 3553(a) factors . . . in some detail before announcing that a longer sentence was justified. We require nothing more."); United States v. McIntyre, 531 F.3d 481, 483 (7th Cir. 2008) ("[W]e will uphold an above-guidelines sentence so long as the district court offered an adequate statement of its reasons . . . ."); *cf.* United States v. Porraz, 943 F.3d 1099, 1104 (7th Cir. 2019) ("In reviewing sentences for substantive reasonableness, we do not substitute our judgment for that of a district judge . . . .").

[65] Justice Scalia, in his dissent in *Booker*, anticipated the emptiness of procedural appellate review. United States v. Booker, 543 U.S. 220, 312–13 (2005) (Scalia, J., dissenting in part). He warned:

> [A] court of appeals might . . . approv[e] virtually any sentence within the statutory range that the sentencing court imposes, so long as the district judge goes through the appropriate formalities, such as expressing his consideration of and disagreement with the Guidelines sentence. . . . [W]ill [appellate review for reasonableness] be a mere formality, used by busy appellate judges only to ensure that busy district judges say all the right things when they explain how they have exercised their newly restored discretion?

Id. Justice Stevens expressed similar concerns in dissent. *See id.* at 301 (Stevens, J., dissenting in part).

[66] U.S. SENT'G COMM'N, *supra* note 57, at 7 (noting "increasing differences in sentencing practices among judges within the same cities" and concluding that "sentencing outcomes continue to depend at least in part upon the district in which the defendant is sentenced"); Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. 775, 779 (2008) ("The Guidelines used to impose uniformity on divergent policy preferences, but the Court now lets a thousand flowers bloom. District judges . . . are likely to take up this invitation eagerly.").

court judges, meaning that defendants' sentencing outcomes can vary significantly depending on the judges to whom their cases are assigned.[67] This deference to district courts also hinders Congress's potential to achieve meaningful criminal justice reform through the First Step Act or similar legislation. If the panel in *Jones* had meaningfully considered the substantive reasonableness of Jones's sentence, perhaps it would have concluded that Congress's policy judgments — which led to a decrease in Jones's applicable Guidelines range — necessarily had to have an impact on his sentence. As it stands, however, even though the First Step Act has provided relief to other federal offenders,[68] Jones is unable to reap the benefits because of his unluckiness in facing a district judge with harsh penological principles.

Deference to district court judges in sentencing is justified by their greater familiarity with the facts of the case and the personal characteristics of the defendant.[69] But this deference comes at the cost of sacrificing "consistency and uniformity" in sentencing.[70] True, the Guidelines still have considerable influence in the post-*Booker* sentencing scheme. About half of federal sentences fall within the Guidelines range,[71] and appellate courts may freely presume that within-Guidelines sentences are reasonable.[72] However, above-Guidelines sentences — even sentences, like the one imposed on Jones, that deviate widely from the Guidelines range — impact hundreds of defendants each year.[73] Without substantive appellate review, these defendants are left without recourse even if procedural appellate review ensures that the justification provided by the district court checks the obligatory boxes. As long as the discretion of district court judges in sentencing remains constrained only by perfunctory, formalistic procedural review, offenders unlucky enough to be sentenced by a tough-on-crime district court will be unable to benefit from future criminal justice reform.

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[67] This deference to individual judges is especially concerning because the risk of judicial bias is magnified at the district court level, where there is only one decisionmaker who is susceptible to the unconscious emotional influence of visual cues. *See* Michael M. O'Hear, *Appellate Review of Sentences: Reconsidering Deference*, 51 WM. & MARY L. REV. 2123, 2127, 2141–49 (2010). In contrast to individual decisionmaking:

> [G]roup decision making, as is traditionally employed at the appellate level, is better suited to decisions that require taking multiple factors into account. Each member of the group is able to act as a check on the tendency of the others to overlook or downplay relevant information. . . . [A]ppellate courts thus seem to have a greater capacity than trial courts to ensure that important information is not overwhelmed by strong emotional or intuitive responses to just a small number of cues.

Id. at 2158 (footnote omitted).

[68] Lopez, *supra* note 21.

[69] Bibas & Klein, *supra* note 66, at 779.

[70] *Id.* at 780.

[71] U.S. SENT'G COMM'N, *supra* note 57, at 84.

[72] Rita v. United States, 551 U.S. 338, 341 (2007).

[73] In 2019, 364 above-Guidelines sentences were imposed, U.S. SENT'G COMM'N, *supra* note 57, at 84, representing a mean increase of 71.6% above the Guidelines range, *id.* at 96.