

Sentencing Discretion in Criminal Tax Cases—Where We Have Been and Where We Are

By *Steven Toscher*

Steven Toscher summarizes the history of judicial discretion under the federal sentencing guidelines and looks at where we are today.

Since the promulgation of the federal sentencing guidelines, effective for tax crimes committed after November 1, 1987, the courts have been struggling with the question of sentencing discretion and review of that discretion. Prior to enactment of the federal sentencing guidelines, the question was clear—the federal district judge had almost unlimited discretion—appellate review was virtually nonexistent. The guidelines changed everything. Sentencing became “by the book” promulgated by the Federal Sentencing Commission. However, after 20 years of living with the guidelines and the legal twists and turns the courts have taken, district court discretion in sentencing has been restored. This article summarizes the history of judicial discretion under the guidelines and looks at where we are today.

Since their promulgation, many saw the guidelines as a straightjacket too inflexible to fit the variety of defendants who pass through the criminal justice system. After the effective date of the guidelines, a number of courts held the guidelines were unconstitutional. However, in *Mistretta*, the Supreme Court held that the guidelines were constitutional in what appeared to be the end of the legal controversy.¹ While there was substantial dissatisfaction among defense practitioners and some courts with the application of the guidelines, they became a way of life in the sentencing of criminal tax defendants.

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Koon

With the Supreme Court upholding the constitutionality of the guidelines, the outlook for judicial discretion in sentencing looked dismal until the Supreme Court in *Koon* revised the method by which trial courts were to consider grounds for sentencing “departures” and how those decisions were then to be reviewed by the appellate courts.² Under *Koon*, the district court’s decision to grant a departure from the guidelines would “in most cases be due substantial deference.”³ “Discretion [was] reserved within the sentencing guidelines.” [Emphasis added.]⁴

Although the law of the land has changed with the guidelines now being “advisory,” what the Court said in *Koon* in 1996 remains relevant today:

The goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach towards the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice. In this respect, the Guidelines provide uniformity, predictability, and a degree of detachment lacking in our earlier system. This too must be remembered, however. It has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue. We do not understand it to have been the Congressional purpose to withdraw all sentencing discretion from the United States District Judge. Discretion is reserved within the Sentencing Guidelines.⁵

While the Supreme Court restored some judicial discretion to the sentencing process, both the Sentencing Commission and the Congress were weighing in to make the sentencing of tax defendants harsher and discretion to deviate from the guidelines more limited. In 2001, the Commission promulgated more harsh tax guidelines, which increased the number of tax offenders who would likely be required to serve time in prison. Making things look more bleak for the criminal tax defendant, Congress enacted the Prosecutorial Remedies and Tools Against Exploitation of Children Today Act of 2003 or PROTECT Act,⁶ which contained the most significant reforms of the federal sentencing framework since the advent of the guidelines themselves. Importantly, the PROTECT Act limited the discretion of the Commission to adopt new downward departures and reduced the discretion of the district court judges to depart from sentences prescribed by the guidelines. The PROTECT Act reversed that portion of the *Koon* decision providing that the reviewing courts give due deference to the decision of the sentencing judge. The discretion restored by the *Koon* decision was in trouble.

The Sixth Amendment and *Blakely*

Just when discretion seemed to be slipping away again from the district courts, the Supreme Court in *Blakely v. Washington* held that the enhancement scheme of the Washington State Sentencing Guidelines violated the Sixth Amendment to the Constitution. While the Court stated it was not expressing an opinion on the impact *Blakely* would have on the federal sentencing guidelines, *Blakely* caused chaos in the federal criminal justice system, raising numerous issues affecting the administration of justice. Recognizing the chaotic state of affairs, the Supreme Court promptly granted *certiorari* in two cases to resolve the problem.

The constitutional analysis striking at the heart of the guidelines was authored by Justice Scalia in the *Blakely* decision. In *Blakely*, Justice Scalia concluded that the defendant's Sixth Amendment right to trial was violated when the court enhanced the defendant's guideline sentence based upon a factual finding that his kidnapping offense involved "deliberate cruelty." The Court then stated:

Our precedents make clear ... that the statutory maximum for *Apprendi* purposes is the maximum

sentence a judge may impose *solely on the basis of facts reflected in the jury verdict or admitted by the defendant*. In other words, the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* additional findings. When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all facts which the laws make essential to the punishment ... , and the judge exceeds his proper authority.⁷

The Court went on to note:

This commitment to *Apprendi* in this context reflects not just respect for longstanding precedent, but the need to give intelligible content to the right of jury trial. That right is no mere procedural formality, but a fundamental reservation of power in our constitutional structure.⁸

Booker—Guidelines Become Advisory

In *Booker*,⁹ Justice Stevens, writing for the 5-4 majority, followed *Blakely* and found that the Sixth Amendment as construed in *Blakely* applies to the federal sentencing guidelines and concluded that "any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond the reasonable doubt." The Court responded to concerns about the resulting disruption on the federal criminal justice system by noting that:

[I]n some cases jury fact finding may impair the most expedient and efficient sentencing of defendants. But the interest of fairness and reliability protected by the right to a jury trial—a common-law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—has always outweighed the interest of concluding trials swiftly.

Having determined that the federal sentencing guidelines suffered the same constitutional infirmity as the Washington State guidelines, there were a number of possible remedies. The Court could have held that the guidelines as a

whole were not severable and the entire statute was unconstitutional. We would have been back to the pre-guideline discretionary sentencing system. The Court could have found the objectionable portions severable from the guidelines and required any additional fact finding be made by juries—the preferred choice of Justice Scalia. The Court, consisting of a separate majority opinion authored by Justice Breyer, in what has come to be known as the “remedy” opinion, chose neither and instead found that the guidelines could be made compatible with the Constitution by severing the provision of the sentencing statute (18 USC §3553(b)(1)) that made the guidelines mandatory. The Court concluded that provision must be “severed and excised” as must one other statutory section, § 3742(e), that depends upon the guidelines mandatory nature. The Court held:

So modified, the Federal Sentencing Act, the Sentencing Reform Act of 1984, as amended, 18 U.S.C. Section 3551 *et seq.*, 28 U.S.C. Section 991 *et seq.*, makes the guidelines effectively advisory. It requires a sentencing court to consider guideline ranges, see 18 U.S.C. A. Section 3553(a)(4) (Supp. 2004), but it permits the court to tailor the sentence in light of other statutory concerns as well. See Section 3553(a) (Supp. 2004). [Emphasis added.]¹⁰

Justice Scalia, the intellectual architect of the guidelines incompatibility with the Sixth Amendment, did not join in the remedy opinion and found the Court’s remedy at odds with Congressional intent. The remedy did not seem to satisfy Justice Scalia’s concern for the Sixth Amendment and the right to a jury trial or to follow Congressional intent to limit judicial discretion in sentencing. As noted by Justice Scalia in his dissent:

Inexplicably, however, the opinion concludes that the *manner* of achieving uniform sentences was more important to Congress than actually achieving uniformity—that Congress was so attached to having *Judges* determine ‘real conduct’ on the basis of bureaucratically prepared, hearsay-riddled presentence reports that it would rather lose the binding nature of the Guidelines than adhere to the old fashioned process of having *juries* find the facts that expose a defendant to increased prison

time. ... The majority’s remedial choice is thus wonderfully ironic: in order to rescue from nullification a statutory scheme designed to eliminate discretionary sentencing, it discards the provisions that eliminate discretionary sentencing.¹¹

Under the Court’s decision, both the government and the defendant continue to have the right to appeal the sentence. The Court looked to the text of 18 USC §3553(c) and held that while the statute does not expressly provide for a standard of review, the appellate courts can review the trial court’s sentence to determine whether it is “unreasonable” taking in to consideration the sentencing factors enumerated by 18 USC §3553(a). “Those factors ... will guide appellate courts as they have in the past, in determining whether a sentence is unreasonable.”¹²

The Court was careful to note that Congress intended a mandatory guideline system and Congress was free to modify the system consistent with the Constitution. As noted by the Court:

Ours, of course, is not the last word. The ball now lies in Congress’ court. The National Legislature is equipped to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice.¹³

Since the Supreme Court’s decision in *Booker*, the courts have been wrestling with the implications of the now *advisory* guidelines and what it means to review a sentence for “reasonableness.” Under *Booker*, the federal courts of appeals review sentences and set those aside they find “unreasonable.”¹⁴ While appearing to be rather straight forward statement by the Supreme Court setting forth the standard to be employed in reviewing the decisions of the district courts, it has proven, as Justice Scalia predicted, more difficult to apply in practice.

Sentences within the Guideline Range—*Rita*

In *Rita*,¹⁵ the Supreme Court resolved a split among the circuits regarding whether the courts of appeals can apply a presumption of reasonableness to a within-guidelines sentence imposed by a district court.

The Supreme Court held that courts of appeals “may apply a presumption of reasonableness to a district

court sentence” that falls within the properly calculated guidelines range. Such a presumption, the Court reasoned, would not violate the Sixth Amendment. The Court reasoned that this presumption of reasonableness “reflects the fact that, by 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.”¹⁶ As noted by Justice Breyer who authored the majority opinion:

The upshot is that the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic Sec. 3553(a) objectives, the one, at retail, the other at wholesale.

The Supreme Court also made clear that the presumption is an “appellate” court presumption and applies only on appellate review. “[T]he sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply.”¹⁷ Moreover, this presumption is not binding on the courts of appeals. Appellate courts may, but are not required, to apply a presumption of reasonableness to sentences that are within guideline range.

Justice Souter dissented from the *Rita* majority arguing that the *Booker* mandate that the guidelines be advisory rather than mandatory would be eroded under such a presumption. The presumption of reasonableness has the potential to erode the Sixth Amendment right to a jury trial as articulated in *Apprendi*.¹⁸

Notwithstanding the presumption an appellate court may accord a district court’s sentencing determination, where the appellate court believes the district court applied too much deference to the guidelines, such as applying a presumption of reasonableness to the guidelines at the district court level, an appellate court will reverse the sentence. For example, in *Conlan*,¹⁹ the Tenth Circuit recently held that the district court accorded the guideline range a presumption of reasonableness and gave too much weight to the guidelines intent to increase custodial sentences. *Conlan* demonstrates an appellate court’s willingness to scrutinize and reverse a within guideline sentence especially where the error relates to the procedural component of the sentence.

In *Conlan*, the defendant was one of a number of individuals who was involved with an organization

that marketed fraudulent tax shelters. The defendant plead guilty to one count of filing a false return under Code Sec. 7206(1). The Pre-sentence Report (“PSR”) recommended the defendant be sentenced to a term of three years probation, with the six months of home detention. The advisory guideline range was 15 to 21 months, but the PSR concluded the advisory guideline range was “disproportionately long when compared to other defendants involved in the scheme who had greater responsibility and caused greater monetary loss to the government.”²⁰

The government objected to the downward variance and argued the defendant must overcome a presumption that a sentence in the advisory guideline range was a reasonable one. The sentencing court noted its respect for the judgment of the probation office, but sided with the government and concluded that there was no reason for it not to sentence the defendant within the “presumptive range of reasonableness.”²¹ In doing so, the court noted that “the guidelines are pretty clear that the intent was to increase custodial sentences with their adoption”²² The defendant was sentenced to 15 months—the low end of the range.

On appeal, the defendant challenged both the procedural and substantive reasonableness of his sentence. Applying *Rita*, the Tenth Circuit concluded that the sentencing court had erred in affording a presumption of reasonableness to the recommended advisory guidelines sentence. In reaching its decision, the court noted that a “district court’s job is not to impose a reasonable sentence. Rather, a district court’s mandate is to impose a sentence sufficient, but not greater than necessary, to comply with the purposes of section § 3553(a)(2). Reasonableness is the appellate standard of review in judging whether a district court has accomplished its task.”²³

The Tenth Circuit rejected the government’s argument that the sentencing court’s error was harmless because the defendant was “sentenced at the very bottom of his advisory guideline range, a sign [this court had] taken in the past to indicate that the [sentencing] court may have done something differently had it not felt mistakenly bound by the guidelines.”²⁴ Although the appellate panel acknowledged that the sentencing court might still find legitimate reasons for concluding that a guideline range sentence was appropriate, it could only speculate what that court would do absent the illegal presumption, and reversed and remanded the case for further proceedings.

Sentences Outside the Guideline Range

Rita did not address the standards for reviewing sentences which are outside the guideline range. That issue has particular relevance in criminal tax cases because in many such cases, there are good reasons not to incarcerate the offender before the court. These good reasons, however, run head on into efforts by the Department of Justice and the Sentencing Commission to cause more tax offenders to be incarcerated than under pre-guideline practice. Under pre-guideline practice, many tax offenders were not incarcerated—but the guidelines sought to change that. As noted in the following introductory commentary to the guidelines from the Sentencing Commission:

The criminal tax laws are designed to protect the public interest in preserving the integrity of the nation's tax system. Criminal tax prosecutions serve to punish the violator and promote respect for the tax laws. Because of the limited number of criminal tax prosecutions relative to the estimated incidence of such violations, deterring others from violating the tax laws is a primary consideration underlying these guidelines. Recognition that the sentence for a criminal tax case will be commensurate with the gravity of the offense should act as a deterrent to would-be violators.²⁵

The Commission reiterated its goal of increasing incarceration for tax offenders in its background commentary:

Under pre-guidelines practice, roughly half of all tax evaders were sentenced to probation without imprisonment, while the other half received sentences that required them to serve an average prison term of twelve months. This guideline is intended to reduce disparity in sentencing for tax offenses and to somewhat increase average sentence length. As a result, the number of purely probationary sentences will be reduced. The Commission believes that any additional costs of imprisonment that may be incurred as a result of the increase in the average term of imprisonment for tax offenses are inconsequential in relating to the potential increase in revenue. According to estimates current at the time this guideline was originally developed (1987), income taxes are

underpaid by approximately \$90 billion [now closer to \$300 billion] annually. Guideline sentences should result in small increases in the average length of imprisonment for most tax cases that involved less than \$100,000 in tax loss. The increase is expected to be somewhat larger for cases involving more taxes.²⁶

As Justice Breyer noted in *Rita*, it is a question of “wholesale” sentencing by the book under the guidelines versus individualized or “retail” sentencing taking into consideration all the sentencing factors the courts must consider under 18 USC §3553(a). In the case of sentences that are within the guideline range, the individualized sentence imposed by the district court presumably co-insides with the “wholesale” sentence articulated by the guidelines—justifying the appellate court applying a presumption of reasonableness to the sentence. A more difficult question arises when the sentence is outside the guideline range.

That issue was taken up by the Supreme Court in *United States v. Gall*, No. 06-7949, argued on October 1, 2007. The Supreme Court considered those appellate decisions that have held the strength of the justification needed to sustain an outside-guidelines sentence varies in proportion to the degree of the variance—or the so-called proportional test.

Gall involved a college student who was involved in a conspiracy to sell the illegal drug “ecstasy.” He had withdrawn from the drug conspiracy early on, graduated college and was leading a drug-free productive life when the long arm of the law caught up with him. He pled guilty to his crime and cooperated with law enforcement. The guideline range was about three years, but the district court found that factors under 18 USC §3553(a)—including the defendant's age at the time of the offense, his withdrawal from the conspiracy, his graduation from college and the fact he was leading a law-abiding productive life and operating a successful business—suggested a term of probation was appropriate. The government appealed and the Eighth Circuit reversed, finding the facts of this case did not justify the substantial variance from the guideline range. The Supreme Court recently provided guidance on what appellate court “reasonableness” review means in cases where district courts impose a sentence outside the guideline range.

On December 10, 2007, the Supreme Court decided *Gall* [552 US ___ (2007)], reversing the Eight Circuit, rejecting the proportional test and holding

that the district court had discretion to impose a sentence that was at substantial variance to the guideline range. The Supreme Court stated that “while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard. We also hold that the sentence imposed by the experienced District Court in this case was reasonable.”

Appellate review of below guideline sentences in criminal tax cases issued prior to *Gall* reflect a willingness of appellate courts to scrutinize sentencing decisions by the district courts and reverse those “retail” determinations. Tax cases do not stand alone in this regard. One federal district court and author has described the willingness of appellate courts to scrutinize below guideline sentences as “unwarranted zeal.”²⁷ The recent cases—even post-*Rita*—suggest a continuing vitality of the guidelines and the extent to which appellate courts will review sentencing decisions by the district courts, although their continued persuasiveness of these decisions in light of *Gall* is questionable.

In *W. Tomko*,²⁸ the defendant caused his construction company to pay the costs of building his home. He hid the costs in the company’s books as part of job costs. Numerous contractors assisted the defendant either by creating fictitious invoices or attributing work done for the defendant personally to other legitimate jobs. The tax loss from the defendant’s illegal actions was \$228,557. The advisory guidelines range was 12 to 18 months.

While the government pushed for jail time, the district court sentenced the defendant to 250 hours of community service and three years of probation with one year of home confinement and directed the defendant to pay a \$250,000 fine. The defendant was also ordered to undergo 28 days in-house alcohol treatment. In handing down the sentence, the district court recognizing the sentence it imposed was a variance from the guidelines, but based it on its analysis of the 18 USC §3553(a) factors and specific findings. The government appealed.

The Third Circuit reversed in a two-to-one opinion. The majority focused on the three aspects of the district court’s decision leading to the no-jail-time sentence: first, the defendant’s lack of any prior criminal history; second, the defendant’s extraordinary ties to his community and extensive charitable works; and

third, the defendant’s strong record of employment. The Third Circuit stated that “[v]iewed cumulatively, the three factors considered by the District Court as mitigating factors ... pale[d] in comparison to the numerous § 3553(a) factors suggesting that a term of imprisonment [was] warranted.”²⁹

The dissenting judge stated had he been sentencing the defendant, he would have almost certainly imposed a period of incarceration. He simply could not agree, however, with the manner by which the majority analyzed the reasonableness of the defendant’s sentence. The dissenting judge found three problems with the majority’s opinion. First, the majority adopted a “rigid version” of the proportionality principle never before employed by that court. “The proportionality principle is ‘the proposition that the strength of the justification needed to sustain an outside-Guidelines sentence varies in proportion to the degree of the variance.’”³⁰ Second, the majority departed from the court’s post-*Booker* jurisprudence by conducting what amounted to a *de novo* review of the sentencing court. Third, the majority opinion provided no guidance to the “district courts as to what circumstances would ever justify a substantial variance, regardless of the validity of the reasons for the variance given by the sentencing court.”³¹

Similarly, the below guideline sentence of a moonlighting elementary school teacher who became a part-time tax preparer was rejected by the First Circuit in *Taylor*.³² The defendant was charged with multiple counts of aiding and abetting the preparation of false tax returns in violation of Code Sec. 7206(2). The defendant took the case to trial, during which numerous clients testified that the defendant had prepared the list of phony charitable deductions and asked them to lie to IRS agents if asked about the returns. The defendant testified on his own behalf, denying any involvement in the fraudulent scheme. The jury found the defendant guilty of all counts. The guidelines range of 30 to 37 months, which took into account enhancements for being in the business of preparing tax returns and for obstruction of justice.

At the sentencing, the district court found the defendant was an irreplaceable teacher who gave an exceptional amount of time to his community. The Boston Public School system informed the district court of its willingness to employ the defendant—even though he had been convicted—if he was not incarcerated. Additionally, the defendant, who was an African American,

was a good role model for students in his school. The government, however, argued that while the defendant's contributions might merit a reduction in prison time, the conviction merited a period of incarceration in order to deter other offenders and reflect the seriousness of the offense. The sentencing court imposed a sentence of five years' probation, including five hours a week of community service, one year in a halfway house and a fine of \$10,000. The government appealed.

The government claimed the district court misinterpreted Sentencing Guidelines §5H1.11, the Sentencing Commission's policy statement, which states that "[c]ivic, charitable, or public service; employment-related contributions; and similar prior good works are not ordinarily relevant in determining whether a departure is warranted."³³ The appellate court disagreed with the government, finding that the sentencing court had correctly interpreted §5H1.11 and reasonably applied the facts in determining that the defendant's extraordinary good works militated in favor of a lower sentence.

The First Circuit nevertheless found that the sentence was unreasonable and reversed and remanded. The circuit court noted that the defendant had committed tax crimes over a four-year period and had shown no indication whatsoever that he had accepted responsibility for his actions. Furthermore, the defendant obstructed justice during the investigation. Based on these facts, the appellate court concluded that the defendant's sentence did not reflect the seriousness of his crimes. The appellate court also stated the sentencing judge accorded far too much weight to the effect defendant's incarceration would have had on others and failed to place nearly enough weight on fashioning a sentence that would deter others from committing similar crimes. One wonders whether the appellate court would have felt it necessary to

interfere with the district court's determination if the defendant had not committed obstruction of justice or otherwise demonstrated a real sense of remorse and acceptance of responsibility.

On January 7, 2008, the Supreme Court granted certiorari in *Taylor*, vacated the First Circuit's decision and remanded the case back to the First Circuit in light of its recent decision in *Gall*. The Supreme Court also took similar action in an appeal of a tax case from the Fourth Circuit. *Gall* and the Supreme Court's recent actions vacating the courts of appeals decisions, which reversed sentences outside the guidelines ranges in tax cases, reflect a fact of granting greater discretion to the district courts that have the primary responsibility for sentencing in tax cases. The sentencing discretion of the district courts has been restored.

Conclusion

After 20 years of living with sentencing under the guidelines, the district court's discretion in sentencing tax defendants has been restored. Nevertheless, the courts will continue to struggle with the conflict between the importance of "individualized" sentences, a hallmark of our justice system as noted by the Supreme Court in *Koon* and the uniformity desired by Congress in punishing offenders. Congress still has a say, but it needs to legislate within the limits of the Sixth Amendment to the Constitution and it has been quiet since *Booker*. The district courts will continue to carry the laboring oar of sentencing and should be accorded the discretion and deference their expertise and experience warrant—counseled by the sentencing guidelines and the recognition that appellate courts will continue to be a check on the unfettered discretion which existed under pre-guidelines practice.

ENDNOTES

¹ *Mistretta v. United States*, 488 US 361 (U.S. 1989).

² *Koon v. United States*, 518 US 81, 116 SCt 2035 (1996).

³ *Id.*, at 2046.

⁴ *Id.*, at 2053.

⁵ *Id.*, at 2053.

⁶ Prosecutorial Remedies and Tools Against Exploitation of Children Today Act of 2003 (P.L. 108-21).

⁷ *Blakely v. Washington*, 542 US 296 (2004).

⁸ *Id.*

⁹ *United States v. Booker*, 543 US 220 (2005).

¹⁰ *Id.*, at 246.

¹¹ *Id.*, at 304.

¹² *Id.*, at 261.

¹³ *Id.*, at 265.

¹⁴ *Id.*, at 261.

¹⁵ *Rita v. United States*, 127 SCt 2456 (2007)

¹⁶ *Id.* (emphasis in original).

¹⁷ Citing *Booker*, *supra* note 9, at 259–60.

¹⁸ *Apprendi v. N.J.*, 530 US 466 (2000) (holding that it is a violation of a defendant's Sixth Amendment right to trial by jury for a judge to enhance the sentence based on judicially found facts).

¹⁹ *United States v. Conlan*, 500 F3d 1167 (10th Cir. 2007).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.* (quoting *United States v. Wilms*, 495 F3d 277, at 281 (6th Cir. 2007)).

²⁴ *Id.*

²⁵ United States Sentencing Guidelines (USSG), Part T, Introductory Commentary (2006 Edition).

²⁶ *Id.*, at Section 2T1.1, Background Commentary. Although guideline commentary by the Sentencing Commission had been accorded substantial weight under pre-*Booker* practice, see *Stinson v. United States*, 508 US 36 (1993), commentaries do not appear to rise to the level of commission policy statements required to be considered under 18 USC §3553(a)(5).

²⁷ "Even after *Booker*, appellate courts contin-

ENDNOTES

ued to police the exercise of district court discretion (at least to impose sentences below the guidelines) with unwarranted zeal." [Footnote omitted.] See Adelman and Dietrich, *Rita, District Court Discretion, and Fairness in Federal Sentencing*, 85 DENVER U.

LAW REV. 51, at 54 (2007).

²⁸ *W. Tomko*, CA-3, 2007-2 USTC ¶ 50,654, 498 F3d 157.

²⁹ *Id.*

³⁰ *Id.* (Smith, Cir. J., dissenting) (quoting *Rita v. United States*, 127 SCt 2456, 2467).

³¹ *Id.*

³² *T.R. Taylor*, CA-1, 2007-2 USTC ¶ 50,653, 499 F3d 94.

³³ *Id.* (quoting U.S. Sentencing Guidelines §5H1.11).

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