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COMMENT

United States v. Pho: Reasons and Reasonableness in Post-*Booker* Appellate Review

In *United States v. Pho*,[1] the federal government appealed two crack-cocaine sentences that the district court had justified on its perception of unfairness in the 100:1 crack-to-powder sentencing disparity. Though the fairness of the 100:1 ratio had been a dead issue, the judge in these cases believed that his freshly minted, post-*Booker* discretion allowed him to revive it, and to review and reject the ratio for the unwarranted disparities it created. Echoing many other district courts using their *Booker* discretion in this way,[2] Judge Torres determined that a 20:1 ratio was more appropriate and that he would apply that lower ratio in subsequent cases. This yielded sizable reductions for the two defendants, Sambath Pho and Shawn Lewis, the latter of whom was spared almost four years despite the court's determination that the ratio's unfairness was the "only" reason for a lower sentence in his case.[3] *Pho* was the first appellate case to consider this burgeoning ratio-reduction movement, and it roundly rejected Torres's recalculations as working an unreasonable usurpation of congressional sentencing authority.[4]

This Comment argues that a proper understanding of *Booker*'s reasonableness review validates the appellate court's rejection of these reduced-ratio sentences in *Pho*, and should do so despite the fact that the sentences issued by Judge Torres were eminently "reasonable" in any colloquial sense of

1. 433 F.3d 53 (1st Cir. 2006).

2. *See, e.g.*, United States v. Smith, 359 F. Supp. 2d 771 (E.D. Wis. 2005); Simon v. United States, 361 F. Supp. 2d 35 (E.D.N.Y. 2005).

3. *See* 433 F.3d at 64; Consolidated Opening Brief for the Appellant at 4-7, *Pho*, 433 F.3d 53 (Nos. 05-2455 & 05-2461) [hereinafter Brief for Appellant].

4. *See* 433 F.3d at 63. The Fourth Circuit recently added its approval to the rule in *Pho*, echoing its language of judicial "usurpation." United States v. Eura, Nos. 05-4437 & 05-4533, 2006 WL 440099 (4th Cir. Feb. 24, 2006).

the term. Two possible conceptions of reasonableness review must be distinguished—"reasonable-length" review and "reasons-based" review—and the latter should be preferred. Reasons-based review focuses not on the terms imposed but on the reasons given for imposing them, insisting that those reasons comport with Congress's sentencing priorities. This paradigm, more so than the vague reasonableness standard, acknowledges congressional authority over sentencing rationales and preserves a central role for Congress's much-beloved Sentencing Guidelines going forward. At the same time, by seeing the Guidelines as providing reasons rather than outcome-oriented formulae, it avoids the rote view of the Guidelines that rendered them unconstitutional under *Booker*.[5] It is thus not only the most appropriate view on the law, but also capable of reconciling Congress's obvious desire for rule-bound sentencing with the advisory role of the Guidelines as they now stand.

I. REASONS REVIEW EXPLAINED

The core idea of the reasons-based model is that appellate sentencing scrutiny should be focused on the reasons invoked by the sentencing judge rather than the numerical outcome those reasons produced. Thus, an appellate court should not uphold a sentence based on insufficient reasons even if, in terms of length, the sentence appears to be appropriate.[6] On the other hand, if the reasons for the sentence are correctly and completely articulated, a sentence should be presumed reasonable, with appellate judges policing only those adjustments that are so large vis-à-vis their justifying reasons as to make them appear pretextual. In short, appellate courts should carefully and critically examine the reasons district courts place on the sentencing scale, but should show deference as to the balance actually struck.[7]

An example will highlight the difference between the two paradigms and explain why we should prefer reasons review. Imagine a sentencing hearing at which the judge states: "Mr. Smith, given your clean record, community

5. United States v. Booker, 543 U.S. 220 (2005).

6. *See* United States v. Cunningham, 429 F.3d 673 (7th Cir. 2005).

7. The First Circuit's recent en banc opinion, while not distinguishing between reasons-based and reasonableness review, presents its proposed methodology in helpful language consistent with the reasons-based approach: "[O]ur emphasis in reviewing such claims will be on the provision of a reasoned explanation, a plausible outcome and—where these criteria are met—some deference to different judgments by the district judges on the scene." United States v. Jiménez-Beltre, No. 05-1268, slip op. at 9 (1st Cir. Mar. 9, 2006). This procedure applies regardless of whether the sentence is within the Guideline range or not, and I take it to prioritize a fully "reasoned" sentence over other considerations by requiring only a "plausible outcome" on the basis of acceptable reasons.

involvement, and contrition, I would ordinarily be inclined to sentence you to a term of sixty months. However, because your Syrian background means there is an outside chance you are a terrorist, I sentence you to seventy-two." This judge has invoked a most inappropriate reason. Yet further assume that the applicable Guideline range is sixty-six to seventy-eight months, and that the last ten post-*Booker* defrauders have received a sentence within roughly that range. There is something desperately awry with this situation despite the fact that the defendant's sentence lies directly in the middle of both the range and the recent sentencing pattern. The sentence itself may be reasonable, but the reasoning is not. The problem would be just as acute if the court had picked different criteria that were irrational rather than blatantly unconstitutional—say, that the defendant had no middle name or preferred carrots to peas. The lesson is clear: Reasons matter more than outcomes; a reasonable-length term plays second fiddle to a well-reasoned sentence.

The real question is thus what makes a sentence well reasoned, and the answer is congressional intent. All federal sentencing authority derives from Congress, and courts thus have the responsibility of deferring to legislatively expressed sentencing purposes. Particular sentencing decisions are thus not acts of mystical judgment, but rather ordinary acts of judicial interpretation. In other words, courts must use their usual set of interpretive tools to divine the congressional will.

After *Booker*, two sets of materials are especially relevant to this interpretive task. The first is 18 U.S.C. § 3553(a), which enumerates certain broad goals of sentencing and directs courts to impose a sentence "sufficient, but not greater than necessary" to make those ends meet.[8] The other is the Guidelines. Though not a statute, the Guidelines are themselves statements of valid sentencing reasons, enacted by Congress's chosen agent, requiring a congressional stamp of approval, and enumerated as a relevant factor in § 3553(a)(5). The *Guidelines Manual*, moreover, is not just a set of mathematical exercises, but includes detailed commentary on why and how certain enhancements and reductions apply—insights that, when coupled with the specific adjustments and other available sources, disclose underlying principles for sentencing that merit judicial consideration.[9] Guideline provisions also incorporate their authorizing

8. 18 U.S.C. § 3553(a) (2000).

9. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2D1.1 (2004) (including commentary and notes on drug guidelines); Paul J. Hofer & Mark H. Allenbaugh, *The Reason Behind the Rules: Finding and Using the Philosophy of the Federal Sentencing Guidelines*, 40 AM. CRIM. L. REV. 19 (2003).

criminal statutes, and may have layered and relevant "legislative" histories.[10] A proper sentence thus requires a careful weighing of the principles presented in and associated with these two sources, with the ultimate goal of reaching a result animated by the ends and priorities of Congress as best as courts can know them. Reasons review is meant to ensure that these general and specific sources of congressional reasons get their full due in the sentencing courts.

II. *PHO* AS REASONS-BASED REVIEW

Pho is a real-world example of the hypothetical recited above. While the First Circuit was concerned that the reasons behind Judge Torres's ratio reduction did not comport with Congress's sentencing priorities, it was utterly unconcerned with whether the lengths of the sentences finally imposed were reasonable. Moreover, *Pho* involved a kind of contest between the reasons expressed in § 3553(a) and the reasons found in the Guidelines. This is because the district courts that opted for a 20:1 ratio justified their rejection of the crack Guidelines on § 3553(a) itself. Ultimately, the appellate court in *Pho* appears to favor the crack Guidelines as the more specific or telling communication of congressionally validated sentencing reasons, and thus may teach us a lesson about the proper role for the Guidelines as a source of sentencing authority going forward.

Pho held that a judge may not prospectively reject the 100:1 ratio in favor of a lower ratio that he believes is more appropriate. The case framed the issue perfectly because (1) Judge Torres had made clear that using the 20:1 ratio was going to be his general practice, and (2) unlike the fact-specific situations that usually confront reviewing courts, the judge here had explained that the unfairness of the disparity provided the "only" reason for a lower sentence.[11] That reason, said the First Circuit, was to be ignored.

In reaching this conclusion, the *Pho* panel made a crucial insight regarding the congressional pedigree of the 100:1 ratio. The court recognized that the 100:1 ratio was the kind of policy judgment to which judges must ordinarily

10. I mean to include within consideration of the Guidelines any materials directly relevant to their interpretation, including, but not limited to, other policy statements from the Commission. With respect to the crack guidelines at issue in *Pho*, such materials abound. *See, e.g.*, U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2002) [hereinafter 2002 REPORT]; U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1997); U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995).

11. *See* Brief for Appellant, *supra* note 3, at 4.

defer,[12] and further noted that, unlike many Guideline provisions, the ratio was not an invention solely, or even largely, of the Sentencing Commission. Rather, it was "Congress [that] incorporated the 100:1 ratio in the statutory scheme, rejected the Sentencing Commission's 1995 proposal to rid the Guidelines of it, and failed to adopt any of the Commission's subsequent recommendations for easing the differential."[13] Recognizing that Congress has frequently supported the 100:1 ratio over the past two decades, the court reasoned that Judge Torres's rejection of the ratio as generally unfair represented little more than an open "disagreement with broad-based policies enunciated" by Congress.[14] Such open rejections, the First Circuit panel said, are inappropriate.

Yet district court judges in the 20:1 movement did not represent themselves as in open "disagreement with broad-based policies" announced by Congress. Courts participating in this *Pho* phenomenon have expressed more careful reasons for their actions. While many judges have rejected the Guidelines' 100:1 ratio in general and prospectively adopted a lower rate,[15] they have nonetheless invoked both the Commission and the Congress as supporting their decision. Indeed, the 20:1 rate was not conjured from mere judicial preferences: It had been endorsed by the Sentencing Commission itself. The Commission has repeatedly concluded that there is little justification for the yawning divide between crack and powder sentences, and has sent several recommendations to Congress to decrease the disparity.[16] Though its sole attempt to formally reduce the disparity in the Guidelines was rejected,[17] the Commission has revisited the issue time and again, often at congressional invitation.[18] In short, the 20:1 ratio is not a judicial pipedream, but the Commission's going rate.[19]

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12. United States v. Pho, 433 F.3d 53, 62 (1st Cir. 2006) ("The decision to employ a 100:1 crack-to-powder ratio rather than a 20:1 ratio . . . is a policy judgment, pure and simple.").

13. *Id.* at 62-63. The Guidelines track the ratio enacted in the statutory mandatory minima. *See* 21 U.S.C. § 841(b) (2000).

14. *Pho*, 433 F.3d at 65. The key fact is that Congress has voted on the ratio twice: when it enacted the statutory mandatory minima, and then when it rejected the recommended reduction in 1995. *See* United States v. Tabor, 365 F. Supp. 2d 1052, 1056-58 (D. Neb. 2005), *aff'd*, 439 F.3d 826 (8th Cir. 2006).

15. *See Pho*, 433 F.3d at 64 (citing district courts' prospective choice of a 20:1 ratio).

16. For a judicial account of the Commission's recommendations, see United States v. Smith, 359 F. Supp. 2d 771, 781-82 (E.D. Wisc. 2005); and the reports cited *supra* note 10.

17. *See* Simon v. United States, 361 F. Supp. 2d 35, 45 (E.D.N.Y. 2005).

18. *Id.*; *see also supra* note 10.

19. *See* 2002 REPORT, *supra* note 10, at 106.

Not content to rely solely upon the unfairness of the disparity as decried by the Commission, the district courts further sought to hook their use of the 20:1 ratio into the congressional sentencing statute itself. Their view was that the 100:1 Guideline ratio created an "unwarranted disparity between defendants" in contravention of § 3553(a)(6).[20] Insisting on a fair ratio was not their idea, they argued, but Congress's.[21]

The First Circuit panel was unpersuaded, finding this reasoning inattentive to the more specific expressions of congressional will in the crack Guidelines and their legislative history. The key point was expressed by Judge Selya when he noted that "whether apples are being compared with apples for purposes of disparity is in the first instance up to Congress, not up to the courts."[22] Thus, even though district courts grounded their objections to the 100:1 ratio in the congressional language of "unwarranted disparity," they in fact ignored Congress's prerogative to determine which forms of disparity are warranted at sentencing. The crux of the case is therefore the separation of powers, in the form of Congress's exclusive right to determine what ultimately counts as a disparity, and therefore as a valid sentencing consideration.[23]

Having thus acknowledged the special status of the 100:1 ratio as a congressional policy determination, and the unassailable prerogative of Congress to set sentencing policy, *Pho* struck down the reduced sentences—without regard to the reasonableness of their length. If the First Circuit had been conducting reasonable-length review, it is unlikely that it could have struck down the sentences at all. Nearly everyone (save Congress), from the Commission to the public opinion pollsters, agrees that crack sentences are far too high, both in themselves and relative to powder punishments.[24] Outcome-oriented reasonableness review would thus command upholding the sentences in *Pho*. It was only reasons-based review, with its directive that sentencers hew tightly to Congress's chosen sentencing reasons, that demanded remand. The

20. *E.g.*, *Smith*, 359 F. Supp. 2d at 781.

21. Though "disparity" was at the core of these crack-powder cases, other factors from § 3353(a) might have been relevant as well. *See* 18 U.S.C. § 3553(a)(5) (2000) (directing courts to consider "any pertinent policy statement issued by the Commission"); § 3553(a)(2)(A) (stating that the sentence must "reflect the seriousness of the offense").

22. Audio Recording of Oral Argument, United States v. Pho, 433 F.3d 53 (1st Cir. 2006) (Nos. 05-2455 & 05-2461) (on file with author).

23. *See Pho*, 433 F.3d at 65 ("Our goal is simply to . . . respect the separation of powers between the legislative and judicial branches of government. While we share the district court's concern about the fairness of maintaining the . . . 100:1 crack-to-powder ratio, the proper place to assuage that concern is in the halls of Congress, not in federal courtrooms.").

24. For poll numbers, see *Simon v. United States*, 361 F. Supp. 2d 35, 46-47 (E.D.N.Y. 2005).

unanimous First Circuit panel's vote to vacate and remand in *Pho* should therefore be seen as a strong endorsement of the reasons-based approach.

This reasons-based model is evident in other contexts as well. In *United States v. Cunningham*, for example, Judge Posner held that an appellate court must not uphold a post-*Booker* sentence if a district court fails to state its reasons, even if the sentence is within the Guideline range and otherwise reasonable as a matter of length.[25] Reasons matter, these appellate judges are saying, and they matter so much that a sentence that the appellate court believes is the right length still should be vacated if the wrong reasons were offered in support. Indeed, Posner's rule is that a sentence must be invalidated even without a wrong reason if the right kinds of reasons are absent.

Reasons-based review may also explain the emerging presumption of reasonableness that the circuits have been attaching to within-Guideline sentences. Several circuits have held that within-Guideline sentences are entitled to a rebuttable presumption of reasonableness, and even though some circuits appear to disagree, a year of *Booker* review has seen courts uphold nearly all within-Guideline sentences as reasonable.[26] For the reasons-based reviewer, this is as it should be. The Guidelines are valid statements of sentencing reasons, and if the district court applies them and simultaneously concludes that no other reason from § 3553(a) warrants an adjustment, there is no valid source of reasons left on which to ground a holding that the sentence is unreasonable. A within-Guideline sentence might seem unreasonably high to the ordinary person, but with respect to valid sentencing reasons, only the ordinary congressperson counts.

III. REASONS REVIEW AND THE FUTURE OF THE GUIDELINES

Just as *Pho* helps to distinguish between reasons-based and reasonable-length review, it can also help us to speculate on the future role of the Guidelines. Yet *Pho*'s principle of policy deference to Congress cannot be extended unproblematically from the crack-powder disparity to the Guidelines as a whole because the 100:1 ratio has a congressional stature that little else in the Guidelines shares. Most policy determinations in the Guidelines are in fact

25. 429 F.3d 673 (7th Cir. 2005).

26. *See* Sentencing Law and Policy, http://sentencing.typepad.com (Feb. 20, 2006, 9:50 EST) (collecting and linking various decisions from the courts of appeals on the "presumption of reasonableness" for within-Guideline sentences). There are two exceptions, but both cases arose in extraordinary circumstances, and in circuits that, in any event, apply a presumption of reasonableness. *See* United States v. Lazenby, No. 05-2214 (8th Cir. Mar. 10, 2006); United States v. Cunningham, 429 F.3d 673 (7th Cir. 2005).

those of the Commission, not Congress, and so it is not clear whether they should be treated with the same respect as were the crack Guidelines in *Pho*. Is crack a special case, or should we conclude that judges are never empowered to reject a Guideline in general as unfair or inconsistent with § 3553(a)?

On this question I can offer only the following observation, which I take to be the central principle of *Pho*: The problem with the district court's rejection of the crack Guidelines was not that it was a Guideline as such, but rather that it represented a clearly expressed congressional policy judgment. It is thus only insofar as other Guideline provisions manifestly express Congress's sentencing priorities that they should command the kind of strict deference given to the crack Guidelines in *Pho*.

It seems quite natural to assume that, on the reasons-based view, not all Guidelines are created equal. The extent to which a certain Guideline item represents a congressional—and not just a Commission—policy choice varies from provision to provision based on the extent to which the tools of judicial interpretation evince a particular congressional view on the matter. That proviso aside, however, we should not underestimate Congress's high estimation of the Guidelines. Congress created the Commission and must at least tacitly approve of all the content it produces. It is true that the link between Congress and the Commission is attenuated[27] and that Guideline enactment is rife with process failings. Yet this only provides a reason to push for needed procedural reforms, rather than to discredit the Guidelines in general or to ignore the fact that Congress favors them and has played a role in their creation not grossly incongruous with the role it plays in other forms of agency-made law.

Meanwhile, the Guidelines should still be construed as the most comprehensive statement of sentencing reasons that we currently have—a kind of Restatement of Sentencing.[28] A perusal of the Guidelines shows that they provide well-thought-out, crime-specific enhancements and reductions, while simultaneously creating a relative ordering of the magnitude of certain crimes and adjustments. Though it is tempting to envision the *Guidelines Manual* as a

27. *See* Mistretta v. United States, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting) (deriding the Commission as "a sort of junior-varsity Congress").

28. In *United States v. Jiménez-Beltre*, Chief Judge Boudin's majority opinion for the en banc First Circuit adopted the view that "the guidelines cannot be called just 'another factor' in the statutory list because they are the only *integration* of the *multiple* factors." No. 05-1268, slip op. at 7 (1st Cir. Mar. 9, 2006) (citation omitted). This is the correct view, for the Guidelines embody the judgment of Congress's chosen body of experts on how best to synthesize the various statutory sentencing goals. Without this synthetic "Restatement," the sentencing generalities of § 3553(a) would suffer from too easy a slide into limitless platitudes. *See, e.g.*, United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005).

kind of calculus textbook with only rote, mathematical problems for judges to work through, beneath almost every provision lies a policy judgment deserving of some measure of judicial respect. What were once rules must now be parsed for principles, with reasons-based review in place to oversee the interpretive judgments of the district courts. It is the post-*Booker* responsibility of the district courts to apply the Guidelines in a way that is faithful to the principles that animate them and to the policy goals that they explicitly endorse, and to resolve apparent conflicts with the more general statutory goals of § 3553(a) in the Guidelines' favor. This does not mean religious adherence to the numerical dictates of the Guidelines in terms of points, months, and ranges, but it does mean real engagement with the policy statements that underlie those figures. *Booker* discretion in the application of § 3553(a) should invite judges to apply the Guidelines in each case based on individualized considerations, but cannot allow the unmaking of the Guidelines through individualized judicial reconsideration of congressional policy judgments. *Booker* review should thus maintain the Guidelines' continued viability, but in a manner consistent with their flexibility as sentencing reasons rather than with the invisibility of platitudes or the rigidity of numerical rules.

CONCLUSION

There are advantages to this reasons-based approach to reasonableness review. First, as I have tried to demonstrate through *Pho* and with reference to other cases, it happens to be a form of review in which the appellate courts are already comfortably engaged. Second, and more importantly, it is faithful to the inescapable fact that ultimate authority over the nature and purposes of sentencing lies with Congress. Treating the Guidelines as a specific statement of sentencing priorities might take the roles of Congress and the Commission as reasons-givers more seriously than mechanical application of mathematical formulae ever did. Reasons-based review contemplates judges in a deep engagement with the substance of the Guidelines and relevant statutes in an effort to do justice to their internal logic and meaning. It also makes clear—in a way that congressional rulemakers are sure to appreciate—that *Booker* has not set us adrift in a sentencing regime without rules.

At the same time that this approach validates the Guidelines going forward, it also leaves room for discretion, which should give comfort to those who appreciate the flexibility of post-*Booker* sentencing. Not only is reasons review faithful to current approaches and congressional authority, but it can also appeal to Guideline lovers and skeptics alike.

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