Rebellion: The Courts of Appeals' Latest Anti-*Booker* Backlash

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This Essay addresses the latest phase of an ongoing rebellion that the federal courts of appeals are staging against the Supreme Court's sentencing jurisprudence. Although a decade has passed since the Supreme Court declared the US Sentencing Guidelines advisory, the courts of appeals continue to promote sentences within the Guidelines. The Supreme Court has repeatedly reversed circuit courts for overpolicing outside-Guidelines sentences. The courts of appeals are now rebelling by creating appellate rules—carveouts—that enable the courts to underpolice within-Guidelines sentences. This Essay focuses on two problematic carveouts—the "stock carveout" and the "§ 3553(a)(6) carveout"—that circuit courts employ to reject meritorious appeals of within-Guidelines sentences in violation of the sentencing statute, Supreme Court precedent, and the Sixth Amendment.

INTRODUCTION

For over twenty-five years, federal courts of appeals have rebelled against every Supreme Court mandate that weakens the US Sentencing Guidelines ("Guidelines"). Ever since the Court made the Guidelines advisory in the 2005 opinion *United States v Booker*,[1] the rebellion has intensified, with the appellate courts consistently ensuring adherence to the Guidelines by overpolicing sentences that fall outside the Guidelines and underpolicing within-Guidelines sentences. The courts of appeals are now staging a new revolt, creating appellate rules—carveouts—that enable the courts to reject meritorious challenges to within-Guidelines sentences.

Part I describes the previous rebellions. Part II then introduces the current rebellion. Part II.A discusses what I term the "stock carveout," an appellate rule that violates the sentencing statute[2] and the Sixth Amendment by allowing sentencing

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1 543 US 220 (2005).

2 18 USC § 3553(a).

judges to ignore mitigating arguments regarding defendants' personal characteristics. Part II.B discusses what I refer to as the "18 USC § 3553(a)(6) carveout" (or the "(a)(6) carveout"), a rule that similarly violates the sentencing statute and precedent by allowing sentencing judges to ignore disparity arguments.

I. THE PREVIOUS REBELLIONS

From 1987 to 2005, district judges were constrained by the Guidelines.[3] During this time, the Guidelines were mandatory and appellate courts policed sentencing courts closely, engaging in "rigorous," "guidelines-centric appellate review."[4] In 1996, the Supreme Court expanded district court discretion to "depart" from and issue sentences below the Guidelines by limiting appellate review of outside-Guidelines sentences to the deferential abuse of discretion standard.[5] The circuits rebelled by continuing to closely police such sentences.[6] In 2003, Congress essentially "[o]verturned" the 1996 case and mandated a de novo standard of review, giving the appellate courts more power to enforce adherence to the Guidelines.[7] Two years later, in *Booker*, the Court deemed the mandatory Guidelines unconstitutional and made them purely advisory, dramatically limiting appellate authority to reverse outside-Guidelines sentences.[8] *Booker* heralded "[t]he fall of the Guidelines,"[9] a decline that the courts of appeals have vociferously fought.

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3 See Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 Yale L J 1420, 1426–29 (2008).

4 Jeffrey S. Sutton, *An Appellate Perspective on Federal Sentencing after* Booker *and* Rita, 85 Denver U L Rev 79, 81 (2007). See also 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, 80 (2010).

5 *Koon v United States*, 518 US 81, 98–100 (1996).

6 See Stith, 117 Yale L J at 1445, 1447 (cited in note 3) (showing that the courts of appeals remanded the vast majority of below-Guidelines sentences that the government appealed during this time, resulting in "a body of circuit case law that on its face signals to district judges to sentence as prescribed by the Guidelines").

7 Id at 1467 (explaining that certain provisions of the PROTECT Act "[o]verturned" *Koon* by introducing a new standard of review for sentences outside the Guidelines range). See also Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act of 2003 (PROTECT Act) § 401(d)(2), Pub L No 108-21, 117 Stat 650, 670, codified at 18 USC § 3742(e)(4).

8 See *Booker*, 543 US at 245.

9 Frank O. Bowman III, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 Houston L Rev 1227, 1231 (2014).

Since *Booker*, the circuit courts—abetted by the DOJ—have repeatedly rebelled against the Supreme Court by overpolicing below-Guidelines sentences and underpolicing within-Guidelines sentences.[10] The Court typically responds to these mutinies with stinging reversals that emphasize the advisory nature of the Guidelines.[11] Once one revolt is put down, the appellate courts rebel again, and the next battle begins.

The first overpolicing rebellion involved numerous circuits creating "an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range."[12] In 2007, the Court fought back in *Gall v United States*,[13] rejecting that rule as creating an impermissible presumption of unreasonableness for outside-Guidelines sentences.[14] Around the same time, at least seven circuits overpoliced outside-Guidelines sentences via a different appellate rule that prohibited district judges from accounting for the disparity between crack and powder cocaine at sentencing[15]—a rule that the Court also rejected in 2007.[16]

Some circuits rebelled in a different direction, *underpolicing* within-Guidelines sentences by allowing district judges to accord the Guidelines a presumption of reasonableness.[17] In 2009, the

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[10] Various scholars have critiqued what I term the "overpolicing" of below-Guidelines sentences. See, for example, Adam Shajnfeld, *The Eleventh Circuit's Selective Assault on Sentencing Discretion*, 65 U Miami L Rev 1133, 1149–57 (2011). Others implicitly observe the underpolicing phenomenon by arguing for more-robust procedural-reasonableness review at the appellate level. See, for example, Michael M. O'Hear, *Explaining Sentences*, 36 Fla St U L Rev 459, 470–71, 485 (2009) (arguing that courts of appeals "can and should be more demanding" in requiring district judges to explain their sentences); Sarah M.R. Cravens, *Judging Discretion: Contexts for Understanding the Role of Judgment*, 64 U Miami L Rev 947, 965 (2010) (advocating for "more stringency in the appellate enforcement of the requirement of providing reasoning to support the determination of the sentence").

[11] See, for example, *Gall v United States*, 552 US 38, 56, 59 (2007) (reversing the Eighth Circuit's finding that the lower court's below-Guidelines sentence was unreasonable and asserting that the circuit's reasoning was "flawed" and "ignore[d] the critical relevance" of certain factors).

[12] Id at 47. See also *Rita v United States*, 551 US 338, 355 (2007) (citing cases from the First, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits).

[13] 552 US 38 (2007).

[14] Id at 47.

[15] See *Kimbrough v United States*, 552 US 85, 93 n 4 (2007).

[16] See id at 110–11.

[17] See, for example, *Nelson v United States*, 555 US 350, 350–51 (2009); *United States v Bain*, 537 F3d 876, 880 (8th Cir 2008), vacd and remd, 556 US 1218 (2009); *United States v Covington*, 284 Fed Appx 579, 581 (10th Cir 2008), vacd and remd, 556 US 1123 (2009).

Supreme Court responded in *Nelson v United States*,[18] emphasizing that "[t]he Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable" by sentencing judges.[19] Thereafter, circuit courts once again overpoliced below-Guidelines sentences, forbidding district judges from accounting for postsentencing rehabilitation when resentencing a defendant.[20] The Court quashed that rebellion in *Pepper v United States*.[21]

Numerous rules emerged from these rebellions. At sentencing, a district judge must calculate the Guidelines and "then consider all of the § 3553(a) factors."[22] As noted above, she "may not presume that the Guidelines range is reasonable."[23] On appeal, a circuit court must engage in a two-step process, reviewing the sentence for procedural error and then substantive error. The appellate court "must first ensure that the district court committed no significant procedural error, such as . . . failing to consider the § 3553(a) factors."[24] The court "should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard."[25]

Crucially, at the first step—procedural review—the court of appeals may not presume that the sentencing judge followed the proper procedures. While appellate courts are allowed to apply a presumption of *reasonableness* to *within*-Guidelines sentences,[26] this is a presumption of *substantive* reasonableness only,[27] not a presumption of *procedural* reasonableness.[28] The presumption

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18 555 US 350 (2009).

19 Id at 352.

20 See, for example, *Pepper v United States*, 131 S Ct 1229, 1235–36 (2011).

21 131 S Ct 1229 (2011).

22 *Gall*, 552 US at 49–50.

23 Id at 50. See also *Nelson*, 555 US at 352; *Rita*, 551 US at 351.

24 *Gall*, 552 US at 51.

25 Id.

26 See *Rita*, 551 US at 347.

27 See *United States v Harris*, 702 F3d 226, 229 (5th Cir 2012), cert denied, 133 S Ct 1845 (2013) ("A sentence within the Guidelines range may be presumed *substantively reasonable*.") (emphasis added).

28 This point has not been made in the literature and will be fleshed out in a future paper. Several courts have recognized this distinction. See, for example, *Harris*, 702 F3d at 229; *United States v Cavera*, 550 F3d 180, 189–90 (2d Cir 2008). The distinction is also supported by the fact that appellate courts that apply the presumption of reasonableness typically review *procedural* errors de novo rather than deferentially. See, for example, *United States v Marin-Castano*, 688 F3d 899, 902 (7th Cir 2012), cert denied, 133 S Ct 967 (2013) ("First, we conduct a *de novo* review for any procedural error. If we determine that the district court committed no procedural error, we review the sentence for substantive reasonableness under an abuse-of-discretion standard.") (citations omitted);

therefore does not insulate the *procedural* error that a sentencing judge commits by failing to consider the § 3553(a) factors from reversal. Moreover, appellate courts are forbidden from applying a presumption of *unreasonableness* to *outside*-Guidelines sentences.[29] Appellate courts are now staging a new rebellion that disregards these rules.

II. THE CURRENT REBELLION: UNDERPOLICING WITHIN-GUIDELINES SENTENCES

The courts of appeals have created new appellate rules that ensure adherence to the Guidelines. As in *Nelson*, these rules underpolice within-Guidelines sentences, enabling appellate courts to reject legitimate procedural challenges. These carveouts typically come about after a defendant raises a § 3553(a) argument at sentencing and the judge ignores that argument, thereby committing reversible procedural error. Instead of reversing the procedurally erroneous sentence, the appellate court creates a carveout to affirm it. These carveouts are not justified by the presumption of reasonableness, because an appellate court is not allowed to presume that a sentence is *procedurally* reasonable.

I will address two appellate carveouts: the stock carveout and the § 3553(a)(6) carveout. These appellate rules violate the sentencing statute and Supreme Court precedent, and the stock carveout also runs afoul of the Sixth Amendment.[30] Moreover, these carveouts lead district courts to ignore meritorious mitigating arguments in violation of the sentencing laws.

A. The Stock Carveout

The Seventh Circuit has invented a carveout that allows sentencing judges to disregard defendants' mitigating arguments regarding personal characteristics, even though these characteristics relate to § 3553(a) and are often highly relevant at sentencing.[31] For example, in *United States v Chapman*,[32] the

United States v Strieper, 666 F3d 288, 292 (4th Cir 2012) (same); *Harris*, 702 F3d at 229 (same).

[29] See *Gall*, 552 US at 47; *Rita*, 551 US at 354–55.

[30] See US Const Amend VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.").

[31] See *United States v Tahzib*, 513 F3d 692, 695 (7th Cir 2008). See also notes 38–40. The Seventh Circuit appears to be the only circuit that employs the stock carveout,

sentencing judge gave a one-paragraph explanation for the forty-year sentence that he imposed on Rondale Lee Chapman,[33] entirely ignoring numerous mitigating factors in Mr. Chapman's sentencing filing, including "his 'sincere desire for treatment,' his 'deep remorse,' his history of gainful employment, and the support of family and friends."[34] This result should have been reversed, because *Gall* deems "failing to consider the § 3553(a) factors" a "significant procedural error."[35] Instead, the Seventh Circuit affirmed the astronomical within-Guidelines sentence by relying on the stock carveout, holding that Mr. Chapman's mitigating arguments "are generic or *stock arguments* that required no mention by the district court because they do not distinguish Chapman from many other defendants."[36]

The Seventh Circuit has applied the stock carveout in nearly twenty published cases and numerous unpublished ones.[37] The circuit defines "stock" arguments as "near-meritless arguments that a sentencing court frequently encounters."[38] In addition, the circuit categorizes stock arguments as "non-principal" and "frivolous."[39] This categorization has a determinative effect on the procedural requirements for sentencing judges: although a judge is required to consider and address principal arguments

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although the Fourth Circuit has used it in an unpublished case. See *United States v Lewis*, 494 Fed Appx 372, 374 (4th Cir 2012).

32 694 F3d 908 (7th Cir 2012).

33 Id at 913.

34 Id at 916.

35 *Gall*, 552 US at 51.

36 *Chapman*, 694 F3d at 916 (emphasis added and quotation marks omitted).

37 See, for example, *United States v Cheek*, 740 F3d 440, 455 (7th Cir 2014); *United States v Moreno-Padilla*, 602 F3d 802, 811 (7th Cir 2010); *Tahzib*, 513 F3d at 695. The complete universe of stock-carveout cases is on file with the author.

38 *United States v Ramirez-Mendoza*, 683 F3d 771, 775 (7th Cir 2012). See also *Tahzib*, 513 F3d at 695 (describing "stock arguments" as those that "sentencing courts see routinely").

39 *Moreno-Padilla*, 602 F3d at 811 (labeling arguments "stock" and "non-principal"); *United States v Ramirez-Fuentes*, 703 F3d 1038, 1047 (7th Cir 2013) (labeling arguments "stock" and "frivolous"). See also O'Hear, 36 Fla St U L Rev at 470 & n 71 (cited in note 10) (noting the distinction between principal and stock arguments). The Supreme Court draws a distinction between nonfrivolous and frivolous arguments, and it expects sentencing judges to consider all "nonfrivolous" arguments. *Rita v United States*, 551 US 338, 357 (2007). The Seventh Circuit has complicated this distinction by requiring sentencing judges to consider all "principal arguments," which are sometimes called "nonfrivolous arguments." *United States v Robertson*, 662 F3d 871, 880 (7th Cir 2011). The Seventh Circuit defines a "principal argument" as "a ground of recognized legal merit that is supported by a factual basis." *United States v Miranda*, 505 F3d 785, 792 (7th Cir 2007). In contrast, nonprincipal or frivolous "arguments clearly without merit can . . . be passed over in silence." *United States v Cunningham*, 429 F3d 673, 678 (7th Cir 2005).

upon penalty of reversal,[40] she may entirely ignore stock arguments.[41] The stock carveout violates the Sixth Amendment and Supreme Court precedent, ignores § 3553(a), and disregards the procedural-error rules.

1. The reincarnation of the unconstitutional extraordinary-circumstances requirement.

The stock carveout contravenes Supreme Court precedent and the Constitution by requiring a defendant to demonstrate extraordinary circumstances before a sentencing judge must consider the defendant's request for a below-Guidelines sentence. *Gall* unequivocally "reject[ed] [ ] an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range."[42] The stock carveout is just a new iteration of the very rule invalidated in *Gall*. In employing the carveout, the Seventh Circuit improperly affirms within-Guidelines sentences on the ground that defendants' mitigating evidence is not extraordinary or exceptional. In *United States v Gary*,[43] for example, the court stated: "[Mr. Gary] did not argue that his imprisonment would affect his children to a degree beyond the effects that any child must suffer when a parent is imprisoned, and he did not present evidence of any *exceptional circumstances*."[44] Without a showing of something exceptional or unusual, the *Gary* court concluded, "[m]itigating arguments about such general hardships typically do not require any

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40 A sentencing judge is required to "address all of a defendant's principal arguments that are not so weak as to not merit discussion." *United States v Villegas-Miranda*, 579 F3d 798, 801 (7th Cir 2009) (quotation marks omitted). A sentencing judge commits reversible procedural error by "either pass[ing] over a colorable argument in silence" or engaging in a "discussion [ ] so cursory that [the appellate court] cannot discern its reasons for rejecting the argument." *United States v Martin*, 718 F3d 684, 687 (7th Cir 2013).

41 See *Tahzib*, 513 F3d at 695 ("[S]tock arguments . . . are the type of argument that a sentencing court is certainly free to reject without discussion."). See also *Cheek*, 740 F3d at 455; *United States v Gary*, 613 F3d 706, 709 (7th Cir 2010).

42 *Gall*, 552 US at 47. See also id at 49–50 (explaining that the proper appellate practice is to "consider the extent of the deviation [from the Guidelines] and ensure that the justification is sufficiently compelling to support the degree of the variance").

43 613 F3d 706 (7th Cir 2010).

44 Id at 710 (emphasis added). Notably, Mr. Gary did not frame his family-circumstances argument as a request for a Guidelines-based "extraordinary family circumstances" departure, but rather as a request for a § 3553(a) variance. Brief of Defendant-Appellant Keith A. Gary, *United States v Gary*, No 09-2862, *8–12 (7th Cir filed Oct 19, 2009) (available on Westlaw at 2009 WL 5862141).

discussion at all."[45] Other cases quote *Gary* for the requirement that family circumstances must be "extraordinary" and uphold within-Guidelines sentences regardless of the fact that the sentencing judges entirely ignored the defendants' arguments.[46]

The stock carveout's exceptional-circumstances corollary also comes close to recreating the unconstitutional pre-*Booker* system, in which the Guidelines were mandatory and courts could impose below-Guidelines sentences only upon a showing of exceptional circumstances.[47] *Gall* held that *any* appellate extraordinary-circumstances requirement "come[s] too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range."[48] An appellate presumption of unreasonableness for outside-Guidelines sentences, in turn, "transform[s] an 'effectively advisory' system into an effectively mandatory one."[49] When they were mandatory, the Guidelines

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[45] *Gary*, 613 F3d at 710. When Mr. Gary's lawyer pointed out to the sentencing judge that he had not considered the family-circumstances argument, the district judge cursorily replied, "I consider the fact of the kids in this case." Id at 709.

[46] See, for example, *United States v Runyan*, 639 F3d 382, 384 (7th Cir 2011); *United States v Pilon*, 734 F3d 649, 655–56 (7th Cir 2013) (quoting *Gary* for the requirement that family circumstances be "extraordinary" and concluding that the defendant's "arguments about her health and age were not *exceptional*") (emphasis added). In contrast, other courts of appeals have recognized that *Gall* prohibits an appellate rule requiring defendants to demonstrate extraordinary circumstances when requesting below-Guidelines sentences. See, for example, *United States v Irey*, 612 F3d 1160, 1186 (11th Cir 2010) ("[The Court] rejected any requirement that an outside-the-guidelines sentence must be justified by 'extraordinary' circumstances."); *United States v Smart*, 518 F3d 800, 806 (10th Cir 2008) (noting that, before *Gall*, the court "permitted a variance only if [it] agreed that it was justified by particular characteristics of the defendant that [were] sufficiently uncommon to distinguish him from the ordinary defendant," but acknowledging that this requirement "has now been invalidated by the Supreme Court") (quotation marks omitted); *United States v Gardellini*, 545 F3d 1089, 1093 (DC Cir 2008) (noting that, in *Gall*, the Court declined to require "a showing of 'extraordinary circumstances'" for "outside-the-Guidelines sentences").

[47] See *Rita*, 551 US at 354 ("*Booker* held unconstitutional that portion of the Guidelines that made them mandatory."); id at 364–65 (Stevens concurring) ("Matters such as . . . employment history . . . [and] family ties . . . are not ordinarily considered under the Guidelines."). *Booker* emphasized that the availability of "departures" for extraordinary circumstances did not save the Guidelines from being mandatory and therefore did not cure the constitutional problem. See *Booker*, 543 US at 234.

[48] *Gall*, 552 US at 47.

[49] *United States v Moreland*, 437 F3d 424, 433 (4th Cir 2006), quoting *Booker*, 543 US at 245 (citation omitted). See also Scott Michelman and Jay Rorty, *Doing* Kimbrough *Justice: Implementing Policy Disagreements with the Federal Sentencing Guidelines*, 45 Suffolk U L Rev 1083, 1097 (2012) ("A presumption of unreasonableness for sentences outside the Guidelines would . . . create [a] de facto mandatory system."); Harry Sandick, Gall *and* Kimbrough *and Their Relevance to Sentencing in White-Collar Cases*, 20 Fed Sent Rptr (Vera) 159, 160 (2008) (asserting that an appellate presumption of unreasonableness is inconsistent with *Booker*'s ruling that mandatory Guidelines are

were held to violate the Sixth Amendment.[50] Because presuming non-Guidelines sentences unreasonable on appeal renders the Guidelines system mandatory, such an appellate presumption likewise violates the Sixth Amendment. The stock carveout creates this same impermissible and unconstitutional presumption of unreasonableness for outside-Guidelines sentences.

2. Rebellion against the sentencing statute and the procedural-error rules.

Beyond the constitutional problem, the stock carveout also contravenes § 3553(a) and the Supreme Court's procedural-error jurisprudence. The carveout improperly absolves appellate judges of the responsibility to police procedural errors and allows them to wrongly affirm sentences that are, in fact, procedurally erroneous.

a) Underpolicing § 3553(a) violations. The Seventh Circuit's determination that circumstances such as a defendant's "history of gainful employment" and "the support of [his] family and friends" are stock arguments that a judge is entitled to ignore[51] is at odds with § 3553(a). The Supreme Court requires appellate courts to "ensure that the district court committed no significant procedural error, such as . . . failing to consider the § 3553(a) factors . . . or failing to adequately explain the chosen sentence."[52] And § 3553(a) requires sentencing judges to consider the very mitigating facts that the Seventh Circuit has deemed "stock"—the statute requires consideration of a defendant's

unconstitutional); Jeffrey S. Hurd, Comment, *Federal Sentencing and the Uncertain Future of Reasonableness Review*, 84 Denver U L Rev 835, 871–72 (2006) ("The circuit courts that have addressed this question have held that non-guideline sentences are not presumptively unreasonable. The courts recognize that such a holding 'would transform an "effectively advisory" system . . . into an effectively mandatory one' that violates *Booker*.") (citation and emphasis omitted).

50 *Booker*, 543 US at 259 (holding that the statutory provision that made the Guidelines mandatory was "a necessary condition of the constitutional violation" and invalidating the provision on that ground).

51 *Chapman*, 694 F3d at 916. See also *United States v Russell*, 662 F3d 831, 854 (7th Cir 2011) (explaining that the defendant's "college education, job skills, age, marital status, and lack of history of drug abuse" were not sufficiently "remarkable" or "extraordinary," and that the sentencing judge did not err in disregarding these factors when issuing the defendant's sentence); *Cheek*, 740 F3d at 455 ("[M]ost of Cheek's remaining arguments—namely, that he will be elderly when he is released from prison, that his mother died when he was only 16 years old, and that he has children—are the kinds of stock arguments that sentencing courts are not obliged to address.").

52 *Gall*, 552 US at 51.

"history and characteristics,"[53] and the Supreme Court has held that job performance and family relationships are "a critical part of the 'history and characteristics' of a defendant that Congress intended sentencing courts to consider."[54] Because "§ 3553(a) authorizes the sentencing judge to consider [employment history and family ties,] . . . they are factors that an appellate court *must* consider under *Booker*'s abuse-of-discretion standard."[55] The Court also recognizes that facts such as a defendant's strong employment record and family relationships "shed[ ] light on the likelihood that [a defendant] will engage in future criminal conduct, a central factor that district courts must assess [under § 3553(a)(2)(B)–(C)] when imposing sentence."[56] A history of "steady employment . . . also suggest[s] a diminished need for 'educational or vocational training . . . or other correctional treatment'" under § 3553(a)(2)(D).[57] Even the Seventh Circuit has acknowledged that employment history[58] and family circumstances[59] are relevant under § 3553(a).

Accordingly, a sentencing judge who disregards evidence of a defendant's family circumstances or employment record commits reversible procedural error. The stock carveout enables appellate courts to underpolice this error.[60]

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53 18 USC § 3553(a)(1).

54 *Pepper*, 131 S Ct at 1242 (explaining that positive aspects of a defendant's history and characteristics, including his strong employment record and renewed family bonds, diminish the need to protect the public under § 3553(a)(2)(C)).

55 *Rita*, 551 US at 364–65 (Stevens concurring) (emphasis added).

56 *Pepper*, 131 S Ct at 1242. The Sentencing Commission's finding that employment history reduces recidivism means that employment diminishes the § 3553(a)(2)(C) need to protect the public. See *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* *12, 29 (US Sentencing Commission, May 2004), archived at http://perma.cc/6EHN-T5HS.

57 *Pepper*, 131 S Ct at 1242.

58 See *United States v Baker*, 445 F3d 987, 992 (7th Cir 2006) (explaining that, under § 3553(a), a district court may consider a defendant's employment history to arrive at a below-Guidelines sentence).

59 See *United States v Schroeder*, 536 F3d 746, 755–56 (7th Cir 2008).

60 The Seventh Circuit occasionally takes a different approach, recognizing that sentencing judges are not allowed to simply ignore stock arguments. See, for example, *United States v Washington*, 739 F3d 1080, 1082 (7th Cir 2014) ("[E]ven when faced with only stock arguments, the district court . . must provide an independent justification [for the sentence] in accordance with the § 3553(a) factors.") (quotation marks and citations omitted); *United States v Garcia-Oliveros*, 639 F3d 380, 382 (7th Cir 2011) (terming mitigating factors "stock" and "not unusual," but remanding the case given the sentencing judge's failure to address those arguments). The circuit has even held: "The [sentencing] judge must justify, by reference to the . . . § 3553(a) [factors], the sentence he imposes—and must do so whether it is inside or outside the applicable guidelines range." *United States v Spann*, 757 F3d 674, 676 (7th Cir 2014). However, these cases are outliers.

b) Disregarding nonfrivolous sentencing arguments. The stock carveout also conflicts with the procedural requirement announced in *Rita v United States*,[61] which dictates that the sentencing judge must consider all "nonfrivolous reasons for imposing a [non-Guidelines] sentence."[62] The Seventh Circuit recognizes that nonfrivolous arguments must be considered[63] but improperly places the arguments that it terms "stock" into the category of "frivolous" arguments that sentencing judges are entitled to ignore.[64] The circuit thus fails to understand that the frequency with which an argument is raised by defendants, or the fact that a given argument is common to many defendants, says nothing about whether it is a meritorious argument.[65] Contrary to Seventh Circuit case law, the fact that defendants routinely or frequently raise a particular mitigating fact does not in any way render an argument based on that fact frivolous or "clearly without merit."[66] The Supreme Court's recognition of the importance of factors like family ties and employment history demonstrates that there is nothing fundamentally meritless about those aspects of a person's life.[67]

The proper touchstone for determining whether an argument is nonfrivolous is one that the Seventh Circuit itself has articulated: the nonfrivolous argument needs legal merit and a factual basis.[68] Returning to *Chapman*, Mr. Chapman's

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61 551 US 338 (2007).

62 Id at 357 ("Where the defendant or prosecutor presents nonfrivolous reasons for imposing [an outside-Guidelines] sentence, [ ] the judge will normally go further and explain why he has rejected those arguments.").

63 See, for example, *Chapman*, 694 F3d at 913 ("In selecting an appropriate sentence, district courts are expected to address principal, nonfrivolous arguments in mitigation."); *Martin*, 718 F3d at 687 ("At sentencing, a district court must consider a defendant's principal, nonfrivolous arguments for lenience."); *Ramirez-Mendoza*, 683 F3d at 775–76 (finding a mitigation argument "non-frivolous" and remanding given the judge's failure to "confront[ ] [it] head-on").

64 See, for example, *Ramirez-Fuentes*, 703 F3d at 1047 (reaffirming that sentencing judges can ignore "stock arguments that sentencing courts see routinely," including "arguments that are frivolous" or that do not have "specific application to the defendant") (quotation marks and citation omitted).

65 See Jennifer Niles Coffin, *Where Procedure Meets Substance: Making the Most of the Need for Adequate Explanation in Federal Sentencing*, 36 Champion 36, 43–47 (Mar 2012) ("That the court may have heard these arguments before makes no difference. It must still explain the sentence imposed in light of the arguments presented and § 3553(a).").

66 *Cunningham*, 429 F3d at 678.

67 See *Pepper*, 131 S Ct at 1242.

68 See *Cunningham*, 429 F3d at 679; *Miranda*, 505 F3d at 792; *Robertson*, 662 F3d at 880.

argument had both: the mitigating factors of employment history and family support had legal merit—because they are relevant under § 3553(a)—and he provided factual support through a statement in the presentence report and through a friend's testimony.[69] The sentencing judge was therefore required to consider Mr. Chapman's arguments and explain why the court was rejecting them.[70] Because the sentencing judge failed to follow these procedures, the Seventh Circuit should have reversed for procedural error.

3. The stock rebellion's unconstitutional consequences.

The stock carveout at the appellate level in turn authorizes and emboldens *district courts* to violate the Constitution and the sentencing statute. The carveout sends a clear message that sentencing judges are free to ignore entire categories of § 3553(a) evidence without fear of reversal. A judge can be fairly confident of affirmance on appeal even if she ignores a defendant's argument that his employment history, family ties, or other personal characteristic warrants a below-Guidelines sentence. She need simply parrot back the appellate carveout and label any mitigating evidence that the defendant submits as "stock."

The problem, however, is that a sentencing judge who refuses to consider factually supported, legally grounded arguments for an outside-Guidelines sentence violates the Sixth Amendment. If a judge refuses to grant a below-Guidelines sentence without a showing of an extraordinary work history or family structure, she reenacts the old departure regime and treats the Guidelines as mandatory for the purposes of that particular mitigation argument.[71] She also presumes the Guidelines sentence to be reasonable with regard to that mitigation argument, itself a constitutional violation.[72] Ignoring the evidence that the

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69 See *Chapman*, 694 F3d at 911–13.

70 See *Rita*, 551 US at 357.

71 See *Booker*, 543 US at 234 ("The availability of a departure in specified circumstances does not avoid the constitutional issue.").

72 See *United States v Mendoza-Mendoza*, 597 F3d 212, 217 (4th Cir 2010) ("The reason *Rita* presumptions are forbidden in sentencing courts is that they confer the force of law upon the Guidelines. . . . Giving mandatory effect to the Guidelines in this way revives the Sixth Amendment problems *Booker* laid to rest."); *United States v Jones*, 531 F3d 163, 170 (2d Cir 2008) ("[T]he Supreme Court has now explained that, as a necessary corollary to the constitutional proscription on treating the Guidelines as mandatory, sentencing courts 'may not presume that the Guidelines range is reasonable.'"). The Seventh Circuit has alluded to this particular problem of a district judge applying the appellate carveout at sentencing. See *Washington*, 739 F3d at 1082 ("Our concern here is

Seventh Circuit labels "stock" also flies in the face of the Court's encouragement that "sentencing courts [ ] consider the widest possible breadth of information about a defendant."[73]

B. The § 3553(a)(6) Carveout

Numerous circuits are rebelling against *Booker* and underpolicing within-Guidelines sentences with a second carveout, one that improperly authorizes sentencing judges to ignore meritorious arguments arising under § 3553(a)(6): the "(a)(6) carveout." The statute states: "The court, in determining the particular sentence to be imposed, shall consider . . . the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct."[74] Because the statute uses the mandatory word "shall," its plain language *requires*—rather than merely suggests—that judges consider any (a)(6) argument raised by the parties.[75] The Supreme Court has emphasized that a sentencing judge may not ignore an (a)(6) challenge: § 3553(a)(6) "*requires judges to consider* . . . the need to avoid unwarranted sentencing disparities."[76] Moreover, "district courts *must* take account of sentencing practices in other courts" under (a)(6),[77] meaning that a judge must address a defendant's argument that a within-Guidelines sentence will create unwarranted disparities with defendants sentenced elsewhere.

Despite these clear statements by Congress and the Court, the circuits remain divided about what a judge must do when an

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that even when faced with only stock arguments, the district court may not presume that a within-guidelines sentence is reasonable and must provide an independent justification in accordance with the § 3553(a) factors for the term of imprisonment imposed.") (quotation marks and citations omitted); *United States v Lyons*, 733 F3d 777, 785–86 (7th Cir 2013) (reversing a within-Guidelines sentence out of concern that the district judge applied a presumption of reasonableness). Yet the Seventh Circuit has not abandoned its stock carveout, thus perpetuating the problematic message to district courts.

73 *Pepper*, 131 S Ct at 1240.

74 18 USC § 3553(a)(6).

75 See *Lopez v Davis*, 531 US 230, 241 (2001) (referring to congressional use of the language "shall" as "mandatory" and "impos[ing] discretionless obligations").

76 *Booker*, 543 US at 259–60 (emphasis added). See also *Kimbrough v United States*, 552 US 85, 108 (2007) ("Section 3553(a)(6) directs *district courts* to consider the need to avoid unwarranted disparities."). A sentencing judge is, of course, entitled to consider a § 3553(a)(6) argument and reject it.

77 *Kimbrough*, 552 US at 108 (emphasis added). See also *Rita*, 551 US at 366 ("*Booker*[ ] . . . requires [ ] district judges to consider all of the factors listed in § 3553(a)") (emphasis omitted); *Pepper*, 131 S Ct at 1249 (rejecting the lower court's effort "to elevate [certain] § 3553(a) factors above all others").

(a)(6) argument is raised. The Third Circuit requires sentencing judges to address all (a)(6) arguments,[78] and the Second and Sixth Circuits require consideration of at least some (a)(6) arguments.[79] In contrast, six other circuits have created an (a)(6) carveout based on a misinterpretation of *Gall*.[80] This (a)(6) carveout, in turn, encourages district courts to violate the Sixth Amendment and § 3553(a).

1. Loyalty to the sentencing statute and precedent.

The Third Circuit follows the sentencing statute and Supreme Court precedent by explicitly requiring sentencing judges to consider and address (a)(6) arguments, holding that ignoring or failing to sufficiently consider a colorable (a)(6) argument "constitutes procedural error" and is ground for reversal and remand.[81] The Third Circuit deems an (a)(6) argument to be "a colorable legal argument with a factual basis in the record," the kind of nonfrivolous argument that a district court is required to consider under *Rita*.[82] For example, when the sentencing judge in *United States v Merced*[83] ignored the government's argument that a below-Guidelines sentence would run afoul of (a)(6),[84] the Third Circuit reversed, holding: "One factor the court must consider is the need to avoid 'unwarranted sentencing disparities.' Its failure to do so in the face of a colorable argument that an outside-the-Guidelines sentence will create a risk of such disparities constitutes procedural error."[85] The Third Circuit reached the same conclusion when a judge ignored a *defendant's* (a)(6)

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78 See, for example, *United States v Merced*, 603 F3d 203, 222, 224 (3d Cir 2010).

79 See, for example, *United States v Frias*, 521 F3d 229, 236 (2d Cir 2008); *United States v Wallace*, 597 F3d 794, 803 (6th Cir 2010).

80 See note 91 and accompanying text.

81 *Merced*, 603 F3d at 222, 224. See also *United States v Lychock*, 578 F3d 214, 219 (3d Cir 2009); *United States v Ausburn*, 502 F3d 313, 329–31 (3d Cir 2007); *United States v Goff*, 501 F3d 250, 256 (3d Cir 2007). But see *United States v Kluger*, 722 F3d 549, 568–69 (3d Cir 2013) ("[W]ithin-guidelines sentences . . . generally do not lead to disparities requiring that a defendant be granted relief because avoidance of unwarranted disparities was clearly considered by the Sentencing Commission.") (quotation marks omitted).

82 *Merced*, 603 F3d at 224 (quotation marks omitted). See also *Ausburn*, 502 F3d at 329.

83 603 F3d 203 (3d Cir 2010).

84 Id at 212–13.

85 Id at 222, quoting § 3553(a)(6) (citation omitted). See also *Goff*, 501 F3d at 256 (explaining that failing to address the need to prevent sentencing disparities among similarly situated defendants constitutes procedural error).

argument.[86] The Third Circuit not only requires consideration of (a)(6) arguments but has also explained that a judge cannot escape her (a)(6) duties either by "thorough[ly] and thoughtful[ly]" considering other § 3553(a) factors[87] or by engaging in a "rote recitation of § 3553(a)(6)."[88]

While the Second and Sixth Circuits do not go as far as the Third, they do require sentencing judges to consider certain (a)(6) arguments, and they deem any failure to do so procedural error. Both circuits hold that judges must consider the need to avoid unwarranted sentence disparities among similarly situated individuals, at least at the nationwide level.[89] In one case, the Sixth Circuit went further, holding that even an argument aimed at avoiding disparities among codefendants "is certainly non-frivolous" and concluding that the sentencing judge's failure to consider that (a)(6) argument constituted procedural error.[90]

2. Decontextualizing *Gall* to ignore the sentencing statute and precedent.

In contrast to the Second, Third, and Sixth Circuits, six circuits have created an appellate carveout that improperly

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86 See *Ausburn*, 502 F3d at 329–31.

87 *Merced*, 603 F3d at 224.

88 *United States v Begin*, 696 F3d 405, 414 (3d Cir 2012).

89 See *Frias*, 521 F3d at 236 ("In imposing a sentence, the district court is required to consider, among other things, [§ 3553(a)(6)]."); *United States v Wills*, 476 F3d 103, 109–11 (2d Cir 2007) (referencing "the mandate to take into account nationwide disparities under § 3553(a)(6)"); *Wallace*, 597 F3d at 803 (noting "a sentencing judge's obligation to address sentencing disparities under § 3553(a)(6)"). Both circuits engage in a subtler carveout, creating a dichotomy between nationwide disparities and codefendant disparities. See *United States v Ghailani*, 733 F3d 29, 55 (2d Cir 2013) ("[W]e have repeatedly made clear that section 3553(a)(6) requires a district court to consider nationwide sentence disparities, but does not require a district court to consider disparities between codefendants.") (quotation marks omitted); *United States v Greco*, 734 F3d 441, 451 (6th Cir 2013) ("[A]lthough 18 U.S.C. § 3553(a)(6) requires a sentencing judge to consider the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct, courts need consider only national disparities between defendants with similar criminal histories convicted of similar criminal conduct.") (quotation marks and emphasis omitted). Other circuits, in contrast, recognize that "[s]uch a categorical rule is now foreclosed by *Gall*" and allow, but do not require, consideration of codefendant disparities. See, for example, *United States v Statham*, 581 F3d 548, 556 (7th Cir 2009). See also generally Alison Siegler, *Review of Co-defendant Sentencing Disparities by the Seventh Circuit: Two Divergent Lines of Cases*, The Circuit Rider 22 (May 2012). While the "codefendant carveout" employed by some circuits is as erroneous as the other carveouts discussed here, it is beyond the scope of this Essay and will be addressed in a future paper.

90 *Wallace*, 597 F3d at 803, 808.

exempts sentencing judges from addressing (a)(6) arguments.[91] This (a)(6) carveout rests on a misreading of the following passage from *Gall*: "[A]voidance of unwarranted disparities was clearly considered by the Sentencing Commission when setting the Guidelines ranges. Since the District Judge correctly calculated and carefully reviewed the Guidelines range, he necessarily gave significant weight and consideration to the need to avoid unwarranted disparities."[92] Numerous courts take this passage to mean that "[a] sentence within a Guideline range 'necessarily' complies with § 3553(a)(6)," and they hold that as long as a judge correctly calculates the Guidelines, she is not required to consider a party's (a)(6) arguments.[93] These courts refuse to reverse for procedural error when a sentencing judge completely ignores an (a)(6) argument.[94] The Seventh Circuit has gone even further, explicitly informing district courts that they are free to "pass[ ] over [(a)(6) arguments] in silence."[95]

Chapman illustrates this carveout as well. Mr. Chapman argued that any sentence above fifteen years would cause an unwarranted disparity under (a)(6), pointing to four cases in which judges had imposed terms of approximately fifteen years for the same offense.[96] The circuit court acknowledged that "the

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91 See *United States v Aldawsari*, 740 F3d 1015, 1021 (5th Cir 2014); *United States v Cisneros-Gutierrez*, 517 F3d 751, 767 (5th Cir 2008); *United States v Bartlett*, 567 F3d 901, 908 (7th Cir 2009); *United States v Shy*, 538 F3d 933, 938 (8th Cir 2008); *United States v Hill*, 513 F3d 894, 899 (8th Cir 2008); *United States v Osinger*, 753 F3d 939, 949 (9th Cir 2014); *United States v Treadwell*, 593 F3d 990, 1011 (9th Cir 2010); *United States v Gantt*, 679 F3d 1240, 1248–49 (10th Cir 2012); *United States v Hill*, 643 F3d 807, 885 (11th Cir 2011). The Fourth Circuit has also utilized such a carveout, though the decision is not binding precedent. See *United States v Mota-Campos*, 294 Fed Appx 774, 777 (4th Cir 2008).

92 *Gall*, 552 US at 54.

93 *Bartlett*, 567 F3d at 908, quoting *Gall*, 552 US at 54. See also Matthew Benjamin, *Beyond Anecdote: Informing the Sentencing Court's 3553(a)(6) Duty*, 26 Fed Sent Rptr (Vera) 35, 36 (2013) ("This rationale . . . is commonly sounded by federal courts that reject post-*Booker* (a)(6) challenges."). The Fourth and Tenth Circuits rely on the *Gall* passage to deny procedural-reasonableness challenges, while the Fifth, Eighth, Ninth, and Eleventh Circuits use the same rationale to affirm within-Guidelines sentences as *substantively* reasonable. See note 91.

94 See, for example, *Chapman*, 694 F3d at 916 ("Challenging a within-range sentence as disparate is a 'pointless' exercise; Chapman does not dispute that his guidelines range was properly calculated, and so § 3553(a)(6) cannot be a basis to deem the sentence unreasonable.").

95 *Martin*, 718 F3d at 688.

96 *Chapman*, 694 F3d at 912–13. See also Brief and Required Short Appendix of Defendant-Appellant, Rondale L. Chapman, *United States v Chapman*, No 11-3619, *31–32 (7th Cir filed Feb 6, 2012), citing *United States v Richards*, 659 F3d 527 (6th Cir 2011), *United States v Earle*, 216 Fed Appx 824 (10th Cir 2007), *United States v*

district court failed to address the specter of an unwarranted sentencing disparity," but the circuit court applied the (a)(6) carveout to contend that this was not error, determining: "[(a)(6)] is already taken into account whenever, as here, the sentencing court imposes a prison term within the guidelines range."[97]

Examining the *Gall* passage in context shows that it does not support an (a)(6) carveout and has little precedential value. The passage essentially states that, because the Sentencing Commission considered avoidance of unwarranted disparities in setting the Guidelines ranges, the sentencing judge's mere calculation of the Guidelines "necessarily gave significant weight and consideration to the need to avoid unwarranted disparities."[98]

First, this statement is arguably dicta because the sentencing judge in *Gall* went well beyond mere consideration of the Guidelines range, directly responding to the government's (a)(6) argument that a probationary sentence would result in unwarranted disparities.[99] Because the *Gall* district court judge fully considered the government's (a)(6) challenge, the passage provides no basis for an appellate carveout authorizing sentencing judges to completely ignore (a)(6) arguments.

Second, if the *Gall* passage merits any precedential weight, it simply means that a sentencing judge can insulate an *outside-Guidelines* sentence from an (a)(6) challenge on appeal by merely considering the Guidelines range. The Court certainly did not make the inverse point that appellate courts have since extrapolated from the passage—namely, that mere consideration of the Guidelines range, standing alone, will insulate a *within-Guidelines* sentence from an (a)(6) challenge on appeal. That is, *Gall* simply prevents (a)(6) from being used as a *shield* to ward off outside-Guidelines sentences on appeal. But in the district

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Pountney, 191 Fed Appx 679 (10th Cir 2006), and Judgment in a Criminal Case, *United States v Jenson*, No 3:07-CR-219-N (ND Tex Jan 23, 2008).

97 *Chapman*, 694 F3d at 916. The Seventh Circuit has since added a nuance to this holding, explaining that, while § 3553(a)(6) does not *require* a sentencing judge to consider disparity arguments, a judge "has the discretion to go beyond the Sentencing Commission's generalized considerations" and is therefore *permitted* to consider disparity arguments and grant outside-Guidelines sentences based on those arguments. *United States v Prado*, 743 F3d 248, 252 (7th Cir 2014) (reaffirming the (a)(6) carveout but reversing for procedural error because the district court "thought it lacked the discretion to consider disparities among defendants as a matter of law").

98 *Gall*, 552 US at 54.

99 See id at 54–55.

court, either party may use (a)(6) as a *sword* to request an outside-Guidelines sentence, and *Gall* in no way absolves the sentencing court of its duty to consider that request.

One additional aspect of *Gall* clearly permits (a)(6) to be used as a sword at sentencing and further demonstrates that a within-Guidelines sentence does not "necessarily compl[y] with § 3553(a)(6)":[100] *Gall* itself endorsed (a)(6) as a legitimate basis for outside-Guidelines sentences.[101] The *Gall* Court upheld a below-Guidelines sentence based on "the need to avoid unwarranted similarities among other co-conspirators who [are] not similarly situated," concluding that granting Mr. Gall a lower sentence than his codefendants was consistent with (a)(6) because he was "not similarly situated" to them.[102] The *Gall* Court thus held that, when a defendant is *differently situated* than others, a within-Guidelines sentence can create "unwarranted similarities" in violation of (a)(6).[103] The (a)(6) carveout runs afoul of *Gall* because it allows a sentencing judge to calculate the Guidelines range and entirely skip the additional, factual question whether a given defendant is differently situated than defendants who receive within-Guidelines sentences for the same offense.

In addition, the (a)(6) carveout is legally erroneous in several ways. First, the (a)(6) carveout is contrary to the plain language of the sentencing statute. Section 3553(a)(4) requires sentencing judges to consider the Guidelines, and § 3553(a)(6) requires judges to consider the need to avoid unwarranted disparities among similarly situated defendants.[104] If Congress had believed that a judge who considers the Guidelines range under § 3553(a)(4) necessarily avoids unwarranted disparities, then it would not have included the additional directive in § 3553(a)(6). By holding that a judge who considers the Guidelines under (a)(4) *necessarily* considers disparity concerns under (a)(6), the courts fail to treat (a)(6) as a separate and independent statutory consideration and deprive that subsection of any meaning or force.[105] The carveout renders (a)(6) completely superfluous and thus also violates the canon against surplusage.[106]

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[100] *Bartlett*, 567 F3d at 908 (quotation marks omitted).

[101] See *Gall*, 552 US at 55.

[102] Id at 55–56 (emphasis omitted).

[103] Id at 55 (emphasis omitted).

[104] 18 USC § 3553(a)(4), (a)(6).

[105] See *Wills*, 476 F3d at 110 ("[I]n order to avoid redundancy with § 3553(a)(4), [§ 3553(a)(6)] must require something different than mere consideration of the

Second, the (a)(6) carveout is inconsistent with Supreme Court precedent[107] and conflicts with *Rita*'s requirement that sentencing judges consider all nonfrivolous arguments.[108] The notion that "[a] sentence within a properly ascertained range [ ] cannot be treated as unreasonable by reference to § 3553(a)(6)"[109] also contravenes *Kimbrough v United States*.[110] In that case, the Court explicitly recognized that a within-Guidelines sentence can *itself* create an unwarranted disparity, and the Court authorized judges to grant below-Guidelines sentences to avoid this disparity.[111] *Kimbrough* thus made clear that a properly calculated Guidelines sentence can certainly be challenged under (a)(6).

3. The § 3553(a)(6) rebellion's unconstitutional consequences.

Like the stock carveout, the (a)(6) carveout authorizes sentencing judges to ignore an entire category of § 3553(a) arguments, thus encouraging those judges to both commit procedural error and violate the Constitution. The procedural error is obvious: a judge who ignores an (a)(6) argument commits the error of "failing to consider the § 3553(a) factors."[112] The Sixth Amendment problem is that, by telling sentencing judges that a

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Guidelines."). See also Benjamin, 26 Fed Sent Rptr (Vera) at 41 n 12 (cited in note 93) ("Courts and commentators have observed that this interpretation threatens redundancy with § 3553(a)(4) and ignores the acknowledged reality that a Guidelines sentence can create an unwarranted disparity.").

106 While "[t]he canon against surplusage is not an absolute rule," *Marx v General Revenue Corp*, 133 S Ct 1166, 1177 (2013), it nevertheless "favors that interpretation which avoids surplusage." *Freeman v Quicken Loans, Inc*, 132 S Ct 2034, 2043 (2012) (emphasis omitted).

107 See notes 76–77 and accompanying text.

108 See Part II.A.2.b. A number of circuits have recognized that (a)(6) arguments are nonfrivolous. See, for example, *Wallace*, 597 F3d at 802–05; *United States v Trujillo*, 713 F3d 1003, 1010 (9th Cir 2013); *United States v Lente*, 647 F3d 1021, 1035 (10th Cir 2011). This is strangely inconsistent with the Ninth and Tenth Circuits' position that judges may ignore (a)(6) arguments. See *Treadwell*, 593 F3d at 1011–12; *Gantt*, 679 F3d at 1248–49.

109 *Bartlett*, 567 F3d at 908.

110 552 US 85 (2007).

111 See id at 91, quoting 18 USC § 3553(a) (holding that "the judge may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses" in determining "that . . . a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing"). See also *United States v De La Cruz*, 397 Fed Appx 676, 678–79 (2d Cir 2010) ("[A] Guidelines sentence can create an unwarranted disparity, a proposition supported by . . . *Kimbrough*.").

112 *Gall*, 552 US at 51.

within-Guidelines sentence necessarily avoids disparities under (a)(6), the carveout allows judges to presume the Guidelines reasonable as to (a)(6) and to "[g]iv[e] mandatory effect to the Guidelines" in violation of the Sixth Amendment.[113] This constitutional problem becomes especially clear if the only ground for an outside-Guidelines sentence is an argument arising under § 3553(a)(6), such as when a defendant's sole basis for requesting a below-Guidelines sentence is that nearly every other defendant in the country to be sentenced for that crime has received a below-Guidelines sentence. If the sentencing judge takes the court of appeals at its word and ignores this disparity argument, the Guidelines range becomes essentially mandatory with respect to (a)(6).

CONCLUSION

In their ongoing rebellion against *Booker*, the courts of appeals underpolice within-Guidelines sentences while overpolicing outside-Guidelines sentences. The two carveouts discussed here exemplify the latest phase of this revolt.

It is worth asking why appellate courts continue to act as they did during the era of mandatory Guidelines—when it was arguably "their duty to keep sentencing judges from deviating from the severity called for by the Guidelines"[114]—even though the Supreme Court has time and again emphasized that this is not their role. Perhaps appellate courts are concerned that outside-Guidelines sentences will result in unwarranted disparities, a concern supported by some scholarship.[115] One judge has said that "appellate courts . . . reviewing trial court sentences . . . play an essential role in eliminating, or at least ameliorating, sentencing disparities."[116]

This preference for uniformity does not justify the ongoing rebellion. There has been only a marginal increase in below-Guidelines sentences since *Booker*, and that increase is partially attributable to prosecutorial—rather than judicial—discretion.[117]

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[113] *Mendoza-Mendoza*, 597 F3d at 217.

[114] Stith, 117 Yale L J at 1445 (cited in note 3).

[115] See, for example, Bowman, 51 Houston L Rev at 1261 (cited in note 9) ("[T]he available data strongly suggests . . . that there has indeed been an increase in regional and judge-to-judge disparity.").

[116] Sutton, 85 Denver U L Rev at 80 (cited in note 4).

[117] See Amy Baron-Evans and Kate Stith, Booker *Rules*, 160 U Pa L Rev 1631, 1677–80 (2012).

And empirical data strongly suggest that post-*Booker* sentencing disparities, including racial disparities, are themselves caused by prosecutorial decisionmaking, not judicial discretion.[118]

In addition, the rebellion is at odds with the Court's broader trend toward "individualized sentencing"[119] and its recognition that some disparities are "a necessary cost" of discretion.[120] In contrast to the rebels, the Court recognizes that imposing the same within-Guidelines sentence on two genuinely different offenders results in unwarranted *uniformity*, which is just as problematic as unwarranted disparity.[121] The Court's approach requires sentencing judges to consider the parties' arguments and to reach more granular, transparent, and carefully reasoned sentencing determinations.

If history is any guide, it is unlikely that the courts of appeals will back down. The Supreme Court must therefore step in—as it did in *Gall*, *Kimbrough*, *Nelson*, and *Pepper*—and stop this latest rebellion.

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[118] See id at 1681–1712 (rejecting the claim that judicial discretion creates unwarranted disparities and describing disparities created by the Guidelines); Sonja B. Starr and M. Marit Rehavi, *Mandatory Sentencing and Racial Disparity: Assessing the Role of Prosecutors and the Effects of* Booker, 123 Yale L J 2, 71 (2013) ("[W]e find no evidence that *Booker* increased racial disparity in the exercise of judicial discretion; if anything it may have reduced it."); Joshua B. Fischman and Max M. Schanzenbach, *Racial Disparities under the Federal Sentencing Guidelines: The Role of Judicial Discretion and Mandatory Minimums*, 9 J Empirical Legal Stud 729, 761 (2012) ("[O]ur findings suggest that judicial discretion does not contribute to, and may in fact mitigate, racial disparities in Guidelines sentencing."); Crystal S. Yang, *Have Inter-judge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from* Booker, 89 NYU L Rev 1268, 1278–79 (2014) (finding that "the application of a mandatory minimum is a large contributor to interjudge and interdistrict disparities").

[119] *Miller v Alabama*, 132 S Ct 2455, 2460 (2012).

[120] *Kimbrough*, 552 US at 107–08. This passage has been interpreted to mean that the post-*Booker* Supreme Court is not particularly concerned with ensuring uniformity or avoiding disparities. See Benjamin J. Priester, Apprendi *Land Becomes Bizarro World: "Policy Nullification" and Other Surreal Doctrines in the New Constitutional Law of Sentencing*, 51 Santa Clara L Rev 1, 52 n 210 (2011).

[121] See *Gall*, 552 US at 55–56. See also Baron-Evans and Stith, 160 U Pa L Rev at 1712 (cited in note 117).