Is *Booker* a "Loss" for White-Collar Defendants?

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I. Introduction

For defendants convicted of white-collar federal crimes, such as securities fraud, tax evasion, mail or wire fraud, or certain types of RICO claims (to name just a few), the single most important determinant of the length of the sentence is often the amount of monetary loss attributable to the defendant's conduct. Under the Sentencing Guidelines, the appropriate sentence for a single count of mail fraud, for example, can vary from probation to nearly twenty years in prison, depending on how much monetary loss the judge finds is traceable to the conduct that formed the basis for the conviction, even in the absence of other aggravating factors.

Of course, since the Supreme Court's landmark decision in *United States v. Booker*,[1] the Guidelines have ceased to be mandatory and are now simply advisory. Still, judges are required to "consider" the Guidelines—including the loss tables—when deciding what sentence is most reasonable given the defendant's conduct.[2] And most federal judges, even since *Booker*, continue to impose sentences in conformance with the recommendations of the Guidelines.

This article discusses some of the most important issues surrounding calculation of loss under the Guidelines, with a particular focus on the interplay between loss calculation and judges' newfound sentencing discretion after *Booker*. Given *Booker*'s status as a constitutional win for defendants, it is noteworthy (and not a little surprising) that in many ways, loss calculation in the post-*Booker* era is a rather more perilous exercise for defendants than it was before.

II. Basic Parameters: Post-Verdict Calculation of Loss by the Judge

Sentencing calculations for most white-collar crimes (including embezzlement, "other forms of theft," and fraud) generally are governed by U.S.S.G. § 2B1.1. That section sets a base offense level of either 6 or 7 depending on the statutory maximum sentence for the offense of conviction. It then lists a variety of specific offense characteristics that can, if found by the judge, increase the base level by specified amounts. For example, if the crime involved "sophisticated means," receipt of stolen property, or misappropriation of trade secrets for the benefit of a foreign agent, the Guidelines require a 2-level increase to the base offense level. If the crime involved a securities violation and the defendant was a director or an officer of a public company, a 4-level increase is required.

Monetary loss is by far the most important of the specific offense characteristics listed in Section 2B1.1. Nearly every such characteristic other than loss calls for a 2-level increase; a handful call for 4-level increases; and one (if the crime affected more than 250 victims) calls for a 6-level increase. Monetary loss, on the other hand, if found to be considerable, can result in a 30-level increase over the base offense level. For a first-time offender, such an increase alone (exclusive of other aggravating factors) could yield a prison term of nearly 20 years.[3] As the commentary to Section 2B1.1 notes, loss is "a principal factor in determining the offense level under this guideline."

Despite the fact that monetary loss is such a pivotal element of the sentencing calculations for theft- and fraud-based crimes, the actual amount of loss is rarely a fact determined by juries. Instead, like the other factors guiding sentencing in federal cases, loss is determined post-trial, by the sentencing judge, who is directed by the Guidelines to "make a reasonable estimate" of the actual amount.[4]

The commentary to Section 2B1.1 explains that "loss serves as a measure of the seriousness of the offense and the defendant's relative culpability."[5] In other words, amount of loss is in some ways a rough stand-in for a more general determination of the magnitude of the defendant's criminal conduct. For this reason, courts are directed to calculate not just the actual loss that resulted from the defendant's conduct but also the "intended loss." The ultimate measure of loss is "the greater of actual loss or intended loss."[6] Even "pecuniary harm that would have been impossible or unlikely to occur" is an acceptable component of a court's loss calculation.

Based on this broad mandate to estimate loss in order to measure the severity of the defendant's crimes, the Guidelines themselves (as well as judicial decisions interpreting these provisions) permit the sentencing judge to consider relevant conduct that was related to the crime of

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conviction, even if that conduct was not charged in the indictment or presented to the jury.[7] The Guidelines also allow the court, when determining how much loss was traceable to the defendant's activities, to consider conduct that was charged and as to which the jury *acquitted* the defendant.[8] So long as the Government is able to demonstrate—by a preponderance of the evidence, not beyond a reasonable doubt—that the defendant caused or intended to cause loss through conduct related to the offense of conviction, the judge may take that loss into account when determining a Guidelines sentence.

An Example: "Schemes to Defraud"

Given the centrality of loss to the sentencing determination—and the sentencing judge's role both as interpreter of the jury's verdict and as postverdict finder of fact—the Government and defense counsel often differ dramatically in their characterizations of the conduct underlying a conviction. After all, the sentencing court is permitted to make its own determinations of loss, taking into account uncharged or acquitted conduct, but its fact-finding is confined to conduct related to the offense of conviction. Prosecutors and defendants, therefore, each have an incentive to characterize the jury's verdict in a manner that favors their position: the Government is likely to urge the court to find that the defendant has been convicted of participating in a broadly defined criminal enterprise to which a great deal of loss can be attributed, whereas the defense has an incentive to characterize the offense of conviction much more narrowly.

These postverdict interpretive battles can be quite dramatic when the offense of conviction requires the jury to find not only an overt criminal act but also the existence of a common scheme to defraud. In prosecutions for mail fraud, wire fraud, bank fraud, or health care fraud, for example, one element of the crime is that the defendant conceived of a scheme to defraud. (The other element is an actual mailing or wire transmission furthering or executing the scheme.)[9] Similar elements are required to prove RICO violations and conspiracy charges. (Conspiracy, for example, requires proof of a conspiracy and at least one overt act in furtherance of the conspiracy.) The indictments in such cases, therefore, often describe elaborate and broad-ranging schemes involving massive amounts of alleged monetary loss and then ultimately charge the defendant with having executed only small parts of those schemes.

After a conviction on such charges, the question often becomes how broad a scheme the jury found. If circumstances make clear that the entire scheme or plan described in the indictment was found by the jury, then the entire amount of loss—even that associated with uncharged executions of the scheme—can legitimately be associated with the defendant's conduct. On the other hand, if the jury's verdict did not involve an endorsement of the Government's entire theory of the crime, the court is free to disregard (and in some cases must disregard) nonessential elements of the charging document—that is, losses not traceable to the "course of conduct" that underlay the conviction.

In some cases, particularly where the scheme described in the indictment involved a repeated pattern of rather uniform criminal conduct, district courts often assume that the Government has proven the existence of a broad scheme, even where the jury has been asked to determine only whether the defendant actually executed a small part of that scheme. For example, the Government may charge the defendant with only some of many similar or identical mailings carried out in furtherance of the scheme to defraud. In such cases, courts have been willing to attribute large amounts of monetary loss to the defendant even though the actual offenses of conviction may have involved relatively small amounts.[10] In other cases, however, especially when the described scheme is broad-ranging and involves a number of disparate acts, courts are somewhat more circumspect.[11]

In sum, loss calculations under the Guidelines are performed by the judge, not the jury, employing a low standard of proof. These determinations carry the risk of significant sentencing enhancements, and depending on how the parties are able to characterize the offense of conviction, they can often be based on facts never considered—or considered and rejected—by the jury.

III. The Effect of *Booker*

In *Booker*, the Supreme Court held that it is a constitutional violation for district courts to be bound to impose the sentences prescribed by the Guidelines. The case focused precisely on the sort of post-verdict fact-finding discussed above: judicial determinations regarding conduct not necessarily found by the jury but nonetheless, in the court's determination, part of the same "common scheme" or "course of conduct" as the offense of conviction. For those factual determinations to drive sentencing by operation of law, *Booker* held, violates the defendant's right to have juries determine criminal culpability based on proof beyond a reasonable doubt.[12]

The Supreme Court's solution to this problem was to strike the portion of the Guidelines that rendered them mandatory. Courts still are required to "consider" the Guidelines, but they are not required to follow them.[13] Instead, district courts are to be guided by their own sound discretion, and the sentences they impose are reviewed for "reasonableness."

It is noteworthy, however, that particularly in the arena of loss calculation, there were mechanisms built into the Guidelines (and imposed as judicial glosses) prior to *Booker* that attempted to cabin judges' ability to find large amounts of loss based on slim evidence. Since *Booker* rendered the Guidelines "advisory," some courts have begun to rule that these sorts of protections no longer are necessary, because departures from the Guidelines are now broadly permitted as exercises of the sentencing court's discretion. To the extent, however, that sentencing judges continue to apply

the Guidelines, the loss of these protections—justified by the fact that *Booker*'s holding is seen as protection enough—actually can disadvantage defendants in ways that were not concerns under the mandatory sentencing regime. The two most prominent examples of this phenomenon involve the standard of proof used at sentencing and the choice of which Guidelines manual to apply.

A. *Kikumura* and the Post-Verdict Standard of Proof

As noted above, facts relevant to sentencing need not be proven beyond a reasonable doubt. Rather, in most cases, the Government need prove such facts only by a preponderance of the evidence. In the case of monetary loss, the post-verdict factual determination can have a decisive effect upon the ultimate punishment imposed—often at least as great an impact as the fact of conviction itself. The same is occasionally true of other similar sentencing factors (like drug amount) applicable to non-white-collar offenses.

Recognizing this potential for post-verdict fact-finding to overwhelm a defendant's sentence, pre-*Booker* case law around the country imposed certain protections against runaway judicial fact-finding based on less than convincing evidence. Perhaps the most frequently cited case was a 1990 Third Circuit decision called *United States v. Kikumura*.[14] The defendant in *Kikumura* was convicted of interstate transportation of explosive devices and passport offenses. The Guidelines prescribed a sentencing range of between 27 and 33 months. But evidence produced at the sentencing hearing indicated that Kikumura had manufactured bombs in preparation for a major terrorist attack on American soil. Based on extensive fact-finding at the sentencing hearing, all conducted under a "preponderance" standard of proof, the district court imposed a 22-level increase for "relevant conduct." This resulted in a sentence not of 30 months, but of 30 *years*.

On appeal, the Third Circuit looked askance at this dramatic increase, based as it was on the defendant's relevant conduct rather than the underlying conviction. While noting that a convicted criminal is entitled to less process than a presumptively innocent defendant, the Third Circuit nonetheless held that in an extreme situation such as Kikumura's, "a court cannot reflexively apply the truncated procedures that are perfectly adequate for all of the more mundane, familiar sentencing determinations." The court found that the Guidelines contained an implicit mandate that a sentencing court find the presence of relevant conduct by "clear and convincing evidence" when a dramatic departure is requested by the prosecution. The court explained:

> We recognize that there is overwhelming authority in our sister circuits for the proposition that guideline sentencing factors need only be proven by a preponderance of evidence, but we note that in none of these cases did the operative facts involve anything remotely resembling a twelve-fold, 330-month departure from the median of an applicable guideline range. We hold that the clear and convincing standard is, under these circumstances, implicit in the statutory requirement that a sentencing court "find" certain considerations in order to justify a departure, and we reserve judgment on the question whether it is also implicit in the due process clause itself.

In the years following *Kikumura*, courts around the country adopted its reasoning in a wide variety of factual circumstances, holding that an enhanced standard of proof was necessary when facts found at sentencing would overwhelm the Guidelines calculation applicable to the conduct found by the jury.[15]

In the wake of *Booker*, however, the Third Circuit reexamined and ultimately rejected its holding in *Kikumura*. In *United States v. Fisher*,[16] the Court held that under an advisory Guidelines regime, where the sentencing judge is not bound to apply any particular Guidelines-suggested range, the increased procedural protections adopted in *Kikumura* are no longer necessary. With the Guidelines no longer mandatory, facts relevant to enhancements under the Guidelines no longer increase the maximum punishment to which the defendant is exposed. Instead, they simply inform the judge's discretion as to the appropriate sentence. In other words, the maximum legislatively authorized punishment to which a defendant is exposed is no longer the maximum prescribed by the Guidelines; instead, it is the maximum prescribed by the substantive criminal statutes themselves. Accordingly, sentencing judges are at liberty to find facts by a preponderance of the evidence, provided that the sentence actually imposed is within the statutory range and is reasonable.

This decision, especially if it is followed by other Circuits, could have a considerable impact on defendants in cases like those discussed above, where there is a dispute over whether to calculate loss based on uncharged or acquitted relevant conduct. Given the dramatic impact of the loss tables, these important factual determinations become considerably more treacherous for defendants if there are no checks on the court's ability to find facts based on equivocal evidence. Not all Circuits appear poised to go in this direction—indeed, the Ninth Circuit recently reaffirmed its *Kikumura*-equivalent case law in the wake of *Booker*[17]—but given the original influence of *Kikumura* itself, *Fisher* is bound to reverberate beyond the confines of the Third Circuit. That is unfortunate, in our view, because the practical result will likely be that post-*Booker* white-collar defendants will serve longer sentences than they would have served had *Booker* not changed the nature of the Guidelines. The judicial instinct underlying *Kikumura* and its progeny was that defendants need a certain degree of extra procedural protection when facing the possibility of considerable punishment based solely on the fact-finding of a single judge. The Guidelines' changed status does not seem to us to obviate that concern,

particularly in a world in which district judges, by and large, still apply the Guidelines to determine sentences.

B. Choice of Guidelines Manual

Perhaps the most significant loss-related legal issue for many white-collar defendants is the question of which Guidelines manual the court should examine when calculating the proper sentence. The loss table discussed above—which provides up to a 30-level increase for monetary loss alone—was significantly revised in 2001. The result of this revision is that the current loss table is considerably more severe now than it was seven years ago. For defendants who committed their crimes recently, this is simply an unpleasant reality. However, for defendants whose recent convictions were based on conduct that occurred *prior* to 2001, the intervening sentencing enhancements, if applied, could constitute violations of the Constitution's prohibition on ex post facto laws. For this reason, prior to *Booker*, it was well established that courts applied the most recent version of the Guidelines unless those Guidelines were more severe than the ones in effect on the date the defendant committed his crime. Since *Booker*, that protection has been called into question.

In 2001, the Sentencing Commission adopted a series of Guideline amendments as part of its so-called Economic Crime Package. These amendments radically altered the manner in which fraud- and deceit-based crimes were treated under the Guidelines, particularly with respect to loss calculation. Under the prior Guidelines regime, fraud offenses were covered by a separate loss table from the one governing theft and property destruction. After the amendments, all such crimes were consolidated under the new Section 2B1.1, which was itself significantly revised, primarily to increase the level increments between loss amounts. The Commission explained:

> A principal feature of the new tables is that they expand the previously existing one-level increments into two-level increments, thus increasing the range of losses that correspond to an individual increment, compressing the table, and reducing fact-finding. The new loss tables also provide substantial increases in penalties for moderate and higher loss amounts, even for fraud and theft offenses, notwithstanding the elimination of the two-level enhancement for more than minimal planning.[18]

The upshot of these amendments is that they vastly increased the effect of a judge's conclusion that the defendant is responsible for "moderate or higher loss amounts."

Given the vast differences between the more recent Guidelines and the ones in effect prior to November 2001, the choice of which Guidelines manual to apply is significant. Defendants whose relevant criminal conduct took place before these revisions were adopted but who were tried and are being sentenced after the revisions arguably have a constitutional right to be sentenced with reference to the Guidelines manual in effect on the date they committed their crimes. Indeed, although sentencing judges are required by statute to "consider" the Guidelines "that are in effect on the date the defendant is sentenced,"[19] the Guidelines themselves provide that courts should consult earlier manuals if the alternative "would violate the ex post facto clause of the United States Constitution."[20] Prior to *Booker*, for this reason, the lower courts applied only the Guidelines in effect at the date of the offense if the penalties later increased.

Since *Booker*, at least one Circuit has called this case law into question. In *United States v. Demaree*,[21] the district court considered and applied the 2004 Guidelines manual (which was current at the time of sentencing) to a defendant who had been convicted of wire and tax fraud after having embezzled money in 2000. Because of the effect of the Economic Crime Package, the 2004 Guidelines resulted in a longer sentence for the defendant than the 2000 Guidelines would have recommended. The defendant challenged the district court's approach under the Ex Post Facto Clause, but the Seventh Circuit affirmed the district court's sentence.

Under *Booker*, the court reasoned, the Guidelines are merely "advisory." Therefore, even though the district court "considered" the later Guidelines manual—and chose to apply its more stringent loss calculations—the ultimate sentence was not *mandated* by the Guidelines but was instead simply an exercise of discretion. Because the sentence was driven by the court's discretion rather than by the operation of statute, use of the later book was not barred by the Constitution. "[T]he ex post facto clause," Judge Posner reasoned, "should apply only to laws and regulations that bind rather than advise."

Demaree's holding has not been applied outside the Seventh Circuit, and indeed, most courts that have considered the issue still believe that ex post facto concerns require use of earlier manuals when use of the current manual would result in the imposition of a higher sentence.[22] The majority position certainly seems to be the more reasonable one, at least in situations where the criminal conduct at issue took place prior to the Supreme Court's recent spate of paradigm-altering Guidelines decisions. In our view, the Seventh Circuit is likely correct that the Constitution condones a non-Guidelines sentence for post-*Booker* (or perhaps post-*Blakely*) offenses, but the situation is quite different when the defendant has been convicted of an offense committed prior to 2004. Until, at the very least, the Supreme Court's decision in *Blakely v. Washington*,[23] district courts were obliged to use the Guidelines unless there was a ground for upward departure. We have trouble understanding how a sentence that would have been unlawfully excessive at the time of the offense would not constitute an ex post facto violation, notwithstanding that the Guidelines subsequently became nonmandatory.[24]

Even so, the *Demaree* decision, like *Fisher* in the Third Circuit, is significant because of its holding that pre-*Booker* procedural protections for defendants—protections that

were particularly important for white-collar criminals—no longer are necessary under an advisory sentencing regime.

IV. Conclusion

The *Booker* decision gave district courts great freedom to choose appropriate sentences after "consulting" the Guidelines, including the freedom to depart up or down from the suggested range for almost any reason, so long as it is not unreasonable to do so. But this discretion is a double-edged sword. Already, calculation of loss is a fairly defendant-unfriendly exercise, given the sentencing judge's freedom to consider uncharged or acquitted conduct and to find facts based on a low standard of proof. The few protections that were built into the pre-*Booker* system—higher standards of proof if the loss amount dwarfed other considerations, and mandatory use of earlier manuals if Guidelines revisions had increased available penalties—may have been considerably weakened by the change in the Guidelines' status after *Booker*. The decisions that announced the demise of these protections are new, and their effect remains to be seen, but there is at least a fair chance that loss calculations for white-collar defendants will result in longer sentences after *Booker* than they did before.

Notes

* Mr. Gonzalez is a former Assistant United States Attorney in the Southern District of New York and Assistant District Attorney in New York County. The authors thank Victor Olds, an associate of the firm, for research assistance.

1 543 U.S. 220 (2005).

2 *See* 18 U.S.C. § 3553(a)(4)(A)(ii).

3 For a statute that prescribes a 20-year maximum sentence (such as mail fraud, 18 U.S.C. § 1341), the base offense level under § 2B1.1 would be 6. Adding a 30-level enhancement for "over $400 million" of loss, and no other enhancements, would yield a total offense level of 36. For an offender in criminal history category I, the most recent sentencing table would set a sentence of between 188 and 235 months' imprisonment.

4 U.S.S.G. § 2B1.1, cmt. n.3(C).

5 U.S.S.G. § 2B1.1, cmt. Background.

6 U.S.S.G. § 2B1.1, cmt. n.3(A).

7 *See, e.g.*, U.S.S.G. § 2F1.1, cmt. n.7 ("The cumulative loss produced by a common scheme or course of conduct should be used in determining the offense level, regardless of the number of counts of conviction."). As one (admittedly interested) group of commentators has noted, the ability to estimate loss based on the defendant's broadly defined conduct "can result in extraordinarily large increases from uncharged, dismissed, or acquitted offenses." American College of Trial Lawyers, *Proposed Modifications to the Relevant Conduct Provisions of the United States Sentencing Guidelines*, 38 Am. Crim. L. Rev. 1463, 1472 (2001). *See also, e.g., United States v. Mickens*, 453 F.3d 668, 671 (6th Cir. 2006) ("We have previously held (in an unpublished opinion) that the total loss 'amount may include both actual and intended losses where the fraud involved both successful and ultimately unsuccessful attempts.'") (quoting *United States v. Gross*, 84 F. App'x 531, 533 (6th Cir. 2003)).

8 *See, e.g., United States v. Samet*, 200 F. App'x 15 (2d Cir. 2006) ("It is well-settled that acquitted conduct can be taken into account in sentencing and that a preponderance of the evidence is all that is required to prove the amount of loss.") (citing *United States v. Singh*, 390 F.3d 168, 191 (2d Cir. 2004)).

9 *See* 18 U.S.C. §§ 1341 (bank fraud); 1343 (wire fraud); 1344 (bank fraud); 1347 (health care fraud).

10 *See, e.g., United States v. Boesen*, 473 F. Supp. 2d 932 (S.D. Iowa 2007) ("The law does not require the Government to charge a defendant with every execution of a health care fraud scheme, and the Government could indict a defendant for a health care fraud scheme by charging only one execution of that scheme. . . . Each execution does constitute a separate offense, and the Government could in fact have charged Defendant with the hundreds of other executions of the health care fraud scheme. Instead, the Government chose to set forth the scheme in the indictment and specifically charge only 82 separate executions of the overall scheme. The statute criminalizes executions of the scheme; the overall scheme is thus inherently part of the offenses of which Defendant has been convicted."); *United States v. Pless*, 79 F.3d 1217, 1220 (D.C. Cir. 1996) ("[I]t is not necessary for the government to charge every single act of execution of the scheme in order to prove the whole scheme."); *United States v. Hammen*, 977 F.2d 379, 383 (7th Cir. 1992) ("[F]or each count of conviction, there must be an execution. However, the law does not require the converse: each execution need not give rise to a charge in the indictment.").

11 *See, e.g., United States v. Swanson*, 394 F.3d 520, 525-26 (7th Cir. 2005) ("The government . . . maintains that when the jury rendered a guilty verdict on all counts of the indictment, they were, by necessity, accepting the entire amount of loss alleged in the indictment and submitted into evidence at trial. . . . The jury verdict form, however, makes clear that the jury never came to any conclusions regarding a specific amount of loss. . . . Allegations in an indictment that are not essential to prove the crime charged are mere surplusage and need not be proved nor addressed in instructions to the jury. It follows, therefore, that we cannot assume that a jury has made any factual findings regarding non-essential elements of a crime merely by finding a defendant guilty of a particular count described in an indictment."). With respect to the wire fraud conviction, "the jury did not have to find any specific amount of loss. It was enough that the jury found that the defendant had devised and executed a scheme to defraud using wire transmissions.").

12 *See Booker*, 543 U.S. at 245 ("[T]he Sixth Amendment is violated by the imposition of an enhanced sentence under the United States Sentencing Guidelines based on the sentencing judge's determination of a fact (other than a prior conviction) that was not found by the jury or admitted by the defendant."); *id.* at 231 (noting the absence during sentencing proceedings of the "procedural safeguards" available during a jury trial).

13 *Id.* ("We . . . find[] the provision of the federal sentencing statute that makes the Guidelines mandatory incompatible with today's constitutional holding. We conclude that this provision must be severed and excised . . . . So modified, the federal sentencing statute makes the Guidelines effectively advisory. It requires a sentencing court to consider Guidelines ranges, but it permits the court to tailor the sentence in light of other statutory concerns as well.").

14 *United States v. Kikumura*, 918 F.2d 1084 (3d Cir. 1990), *overruled by United States v. Fisher*, 502 F.3d 293 (3d Cir. 2007).

15 *See, e.g., United States v. Jordan*, 256 F.3d 922, 927-29 (9th Cir. 2001) (noting that enhancements that have a disproportionate impact on sentences must be established by clear and convincing evidence).

[16] *Fisher*, 502 F.3d 293 (3d Cir. 2007).

[17] *See United States v. Staten*, 466 F.3d 708, 720 (9th Cir. 2006) ("[N]either the holdings nor the reasoning of our prior case law concerning heightened burdens of proof at sentencing are irreconcilable with *Booker*. We hold, accordingly, that this circuit's established rule, requiring facts found in support of Guidelines enhancements that turn out to have a disproportionate impact on the ultimate sentence imposed to be established by clear and convincing evidence, continues to govern sentencing decisions.").

[18] U.S. Sentencing Commission, *Amendments to the Sentencing Guidelines*, at 22 (May 10, 2001), *available at* http://www.ussc.gov/2001guid/userfriendly2001.pdf.

[19] 18 U.S.C. § 3553(a)(4)(A)(ii).

[20] U.S.S.G. § 1B1.11 provides, in relevant part, the following "policy statement":

(a) The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.

(b) (1) If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the ex post facto clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

[21] 459 F.3d 791 (7th Cir. 2006).

[22] *See, e.g., United States v. Carter*, 490 F.3d 641, 643 (8th Cir. 2007); *United States v. Wood*, 486 F.3d 781, 790-91 (3d Cir. 2007); *United States v. Gilman*, 478 F.3d 440, 449 (1st Cir. 2007).

[23] 542 U.S. 296 (2004). Judicial invalidation of the Guidelines was widely, but not universally, expected after *Blakely*.

[24] The *Demaree* court addressed this concern and dismissed it under the facts of that case by noting that the difference there between the district court's sentence and the one that would have applied under the old regime was only three months. "The sentencing guidelines are so complex," the court reasoned, "and even before they were demoted from mandatory to advisory status incorporated so many leeways for the exercise of judgment by the probation service and district judges, that no criminal could have guessed within three months what her sentence would be if she committed Demaree's offenses." *Demaree*, 459 F.3d at 793. That argument is sensible, but it does not excuse the court's broader pronouncement that the Ex Post Facto Clause simply does not apply to changes in Guidelines sentences after *Booker*—presumably even if the gulf between the old sentence and the new one is considerably greater than three months.