UIC Law Review

Volume 41 | Issue 1 Article 7

Fall 2007

Curing the BOP Plague with Booker: Addressing Inadequate Medical Treatment in the Bureau of Prisons, 41 J. Marshall L. Rev. 219 (2007)

Natalie Hinton

CURING THE BOP PLAGUE WITH *BOOKER*: ADDRESSING INADEQUATE MEDICAL TREATMENT IN THE BUREAU OF PRISONS

NATALIE HINTON*

I. INTRODUCTION

> The most unstable inmates are housed in "Fantasy Island," the nickname for the acute-care unit [in Oklahoma] . . . . There is a four-point restraint table where uncontrollable inmates can be tied down until they're calm.
>
> . . .
>
> Many [inmates] mill . . . around a recreation area in the zombie-like gait of the heavily medicated. Others, visibly agitated, pace . . . back and forth and stare . . . through the glass.
>
> Those considered too unpredictable and uncontrollable ever to be free are locked behind thick doors with small windows. Screams, moans and chanting are normal . . . . One inmate believes he is in a prisoner of war camp in Vietnam while another screams that communists are taking over the facility. He believes two of the officers on the unit are Nikita Khrushchev and Fidel Castro.
>
> . . .
>
> [O]ne resident of the acute-care unit sculpt[s] figurines out of his feces. Another feign[s] a catatonic episode and nearly bit[es] off the tip of an officer's nose.[1]

Our prisons constitute the nation's largest mental institutions and hospitals, housing nearly three times as many individuals as

* J.D. Candidate, May 2008, The John Marshall Law School; B.A., May 2004, University of Missouri-Columbia. Thank you to Helen and Mary for opening my eyes to current issues that plague our justice system and for the invaluable knowledge I gained from working with you. Thank you also to my parents and Alex for their continuous encouragement and help, and to Eric for his never-ending support and patience over the past three years. I am forever grateful.

1. Gary Fields, *No Way Out: Trapped by Rules, The Mentally Ill Languish in Prison*, WALL ST. J., May 3, 2006, at A1.

in actual psychiatric hospitals.[2] Much to the prisoners' dismay, once they have been convicted and sentenced to a bleak future of imprisonment, the unfortunate trend of society is to toss these individuals aside as "criminals." Society has little, if any, concern for the health of these "mere prisoners."[3] What society does not realize, or rather chooses to ignore, are the vicious cycles and overwhelming problems this collective outlook causes. Eventually, most prisoners will return to their respective communities. Therefore, why not provide inmates with needed treatment in prison to ensure a successful future after their release and to combat the likelihood of recidivism, unemployment, and further medical problems?

Part II of this Comment will lay out the path leading to *United States v. Booker*,[4] a case capable of solving this crisis. Part III will detail the inadequacy of the Federal Bureau of Prisons' ("BOP") current medical treatment programs. Part IV will discuss how courts consistently choose to ignore the physical and mental conditions of individuals during the sentencing process. Finally, Part V will bring to light new policies that must be embraced in order to better provide adequate medical treatment to all defendants.

II. THE ROAD TO *BOOKER*

Now, in the wake of *Booker*, one cannot begin to persuade judges to exercise their sentencing discretion without first understanding the history of the U.S. Sentencing Guidelines ("Guidelines"), the crucial decisions leading up to *Booker*, and the *Booker* decision itself. Only after this historical roadmap has been laid can one begin to comprehend the harsh truth in the post-*Booker* world of federal sentencing and its relation to the BOP problem plaguing our prisons today.

2. Barbara Bergman, *The Mental Health Crisis*, THE CHAMPION, June 2006, at 4; *see* JOHN J. GIBBONS & NICHOLAS DE B. KATZENBACH, COMM'N ON SAFETY AND ABUSE IN AM.'S PRISONS, CONFRONTING CONFINEMENT 38 (2006) (reporting that 300,000 to 400,000 inmates suffer from a severe mental illness, which is "three times the population of state mental hospitals nationwide").

3. *See* NAT'L COAL. FOR THE MENTALLY ILL IN THE CRIMINAL JUSTICE SYS., JAIL DIVERSIONS FOR THE MENTALLY ILL 1 (Henry J. Steadman, ed. 1990) (discussing the lack of societal concern for the health of inmates). "[D]etainees tend to be seen as receiving their just desserts, which do not include quality health or mental health services." *Id.*

4. 543 U.S. 220 (2005).

A. The Sentencing Reform Act: Establishing the U.S. Sentencing Guidelines

The U.S. Sentencing Commission was established under the Sentencing Reform Act of 1984.[5] This Act created a Commission composed of seven voting members and one non-voting member appointed by the President of the United States and subject to the suggestions and approval of the Senate.[6] Congress empowered the Sentencing Commission to devise specific sentencing guidelines and policy statements for every federal offense.[7]

Prior to the Sentencing Reform Act, perceived disparities existed among sentences primarily because judges lacked statutory guidance on how to exercise their discretion when determining a sentence.[8] As a result, the Sentencing Commission crafted the Guidelines, which set forth prescribed categories to assist in determining the proper sentencing range for a

---

5. Pub. L. No. 98-473, § 211-39, 98 Stat. 1987, 1987-2040 (codified as 28 U.S.C. § 991-998 (2000)). The Sentencing Reform Act was signed into law on October 12, 1984 as Chapter II of the Comprehensive Crime Control Act of 1984. *Id.* § 201-39, 98 Stat. 1976, 1976-2040 (1984).

6. 28 U.S.C. § 991(a). The Sentencing Commission was created as an "independent" body under the Judicial Branch. *Id.* The Sentencing Reform Act further limits the membership provisions of the Sentencing Commission by stipulating that up to three of the members may be federal judges and up to four of the total members may be from the same political faction. *Id.*

7. 28 U.S.C. § 994(a)(1) (2000). These Guidelines were, and still remain, a principal part of the Act's sentencing system. Some of the matters to be determined by the Sentencing Commission included: (1) whether the sentence should involve a fine, probation, or a term of imprisonment; (2) how much of a fine should be imposed; (3) how long a term of probation or imprisonment should be; (4) whether the defendant should be placed on supervised release after his or her term of imprisonment had concluded; and (5) whether numerous prison sentences for one defendant should proceed consecutively, one after the other, or be allowed to overlap. *Id.*

8. *See* Mistretta v. United States, 488 U.S. 361, 365-66 (1989) (acknowledging the lack of guidance for judges in deciding what type of punishment to impose and the length of that sentence). The need for the Sentencing Commission was increasingly clear due to the wide ranges of sentences that were being imposed in cases involving similar crimes and circumstances. *Id.* at 366. "[T]he indeterminate-sentencing system had two 'unjustifi[ed]' and 'shameful' consequences. The first was the great variation among sentences imposed by different judges upon similarly situated offenders. The second was the uncertainty as to the time the offender would spend in prison." *Id.*

Under the Sentencing Reform Act, the Sentencing Commission was to carry out its duty in devising Sentencing Guidelines in order to: "(A) assure the meeting of the purposes of sentencing . . . ; (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities . . . ; [and] (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1).

defendant.[9] Most importantly, the Commission devised a chart for calculating appropriate sentencing ranges based primarily on two main factors: (1) the defendant's criminal history and (2) the type of offense committed.[10] Notably, the statute created a presumption in favor of a sentence within the Guideline range, dramatically altering judicial sentencing discretion.[11]

One of the earliest decisions to solidify the constitutionality of the Guidelines was *Mistretta v. United States*.[12] In *Mistretta*, the defendant challenged the constitutionality of the Guidelines and

---

9. *Mistretta*, 488 U.S. at 374; *see also infra* note 10 (providing several examples of categories used in calculating a defendant's criminal history category and the offense level).

10. *Id.* This grid consists of forty-three offense levels and six criminal history categories ("I" to "VI") for calculating each defendant's sentence range. U.S. SENTENCING GUIDELINES MANUAL [hereinafter "GUIDELINES MANUAL"] ch. 5, pt. A (2006). The Guidelines Manual also provides various offense characteristics and adjustments that may be applied in each case. *Id.* at ch. 3. A defendant's offense level may be increased or decreased by the specified amount of points based on the type of victim involved in the offense, the defendant's role in the offense, whether the defendant obstructed the administration of justice, and/or whether the defendant accepted responsibility for his actions. *Id.* For example, the offense level may be decreased if the defendant played a minor role in carrying out the crime, or if he or she accepted responsibility for his or her actions. *Id.* §§ 3B1.2, 3E1.1. On the other hand, if the offense involved a victim who was a government officer, if the defendant was an "organizer" or "leader" in carrying out the crime, or if the defendant used a child in committing the crime, the offender's offense level may be increased by the stipulated number of levels provided under those provisions. *Id.* §§ 3A1.2; 3B1.1; 3B1.4.
Once the offense level has been determined (and appropriate adjustments have been made according to chapter three of the Guidelines Manual), the judge applies the final offense level and the defendant's Criminal History category to the Sentencing Table in order to determine the guideline range sentence. *Id.* at ch. 5, pt. A. However, at sentencing, a judge was allowed to depart from the Guideline range if it was warranted. For example, if the government filed a motion asserting that the defendant had significantly aided authorities in another case, the judge could issue a sentence below the Guideline range. *Id.* § 5K1.1. When a judge chose to depart from the Guidelines based on aggravating or mitigating circumstances that were not considered by the Sentencing Commission in formulating the Guidelines, he or she was required to give "specific reasons for departure in open court at the time of sentencing and . . . state those reasons with specificity in the written judgment and commitment order." *Id.* § 5K2.0(e); *see also* GUIDELINES MANUAL *infra* note 29 (illustrating the application of the Guidelines to calculate a sentence range).

11. *See* 18 U.S.C. § 3553(b)(1) (2000) ("The court shall impose a sentence of the kind, and within the range . . . .").

12. *Mistretta*, 488 U.S. 361 (1989). The defendant, John M. Mistretta, was indicted for selling cocaine. *Id.* at 370. Mistretta pled guilty and was sentenced to eighteen months imprisonment and three years of supervised release. *Id.* at 370-71. The Supreme Court granted certiorari due to the "'imperative public importance' of the issues" involved in Mistretta's case, and the disparities in sentences among the federal district courts. *Id.* at 371.

their creation under the Sentencing Reform Act.[13] However, the Supreme Court affirmed the constitutionality of the Sentencing Reform Act and the Guidelines on two grounds.[14] First, the Court determined that the legislature's creation of the Sentencing Commission was not an excessive use of congressional power.[15] Second, the Court held that the Sentencing Commission could carry out its duties without overstepping its judicial boundaries; that is, without creating a separation of powers issue.[16] The Court declared that the Guidelines were intended to be mandatory, meaning they were "binding on the courts."[17] Furthermore, 18 U.S.C. § 3553(b) proclaimed that "the court *shall* impose a sentence of the kind, and *within the range*" prescribed by the Guidelines.[18]

The next milestone on the road to *Booker* involved a narrow issue decided in *Apprendi v. New Jersey.*[19] The Court questioned whether a judge's enhancement of a sentence above the statutory maximum could be based on his own findings – findings that had not been proved to a jury beyond a reasonable doubt.[20]

---

13. *Id.* at 362, 370-71. While the district court rejected Mistretta's constitutional challenge, the Court expressed its doubt as to the constitutionality of the Sentencing Reform Act and the Guidelines. *Id.* at 370. Mistretta argued that Congress provided the Sentencing Commission too much legislative authority. *Id.* By entrusting the Sentencing Commission with the task of creating sentencing guidelines for each major crime, Mistretta argued that the separation of powers doctrine had been violated. *Id.* at 371.

14. *Id.* at 412.

15. *See id.* (ruling Congress did not delegate excessive legislative power).

16. *Id.* The Supreme Court in *Mistretta* further reasoned that the Sentencing Commission, being a body under the judicial branch, was the most appropriate body to "creat[e] policy on a matter uniquely within the ken of the judges" since district court judges had the "accumulated wisdom and experience" directly related to the issues involved in sentencing. *Id.*

17. *See id.* at 367-68 (providing that the Guidelines are "determinate" and that judges must lay out in full their basis for any departure from the Guidelines); *see also* GUIDELINES MANUAL, *supra* note 10, at 5 (discussing sentencing departures).

18. 18 U.S.C. § 3553(b)(1) (emphasis added). While this provision clearly had a predominantly mandatory tone, it also granted judges limited authority to impose a sentence outside the guideline range if they found an aggravating or mitigating factor that was not already accounted for in the Guidelines Manual. *Id.* This statutory provision played a vital role in the *Booker* decision and was ultimately ruled invalid. *See Booker*, 543 U.S. at 245 (holding that 18 U.S.C. § 3553(b)(1), making the Guidelines mandatory, was unconstitutional because it was inconsistent with the Sixth Amendment).

19. 530 U.S. 466 (2000).

20. *Apprendi*, 530 U.S. at 468, 471. In this case, Charles C. Apprendi, Jr. pleaded guilty to firing several shots into an African-American family's residence after they moved into a predominantly white neighborhood. *Id.* at 469-70. Police reported that Apprendi made the remark that "because they are black in color he does not want them in the neighborhood." *Id.* at 469. At the hearing, the judge rejected Apprendi's argument that he was not acting out of racial bias when he committed the crime and that his statements to the

The Court reaffirmed the long-standing notion that judges may exercise their discretion when sentencing *within* the Guidelines, or *within* the statutory limits.[21] However, the Court also reiterated its prior holding in *Jones v. United States*[22] that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[23] Accordingly, the Supreme Court reversed the sentence because the district judge's determinations were not proven beyond a reasonable doubt and, therefore, deprived Apprendi of his Sixth Amendment right to a jury.[24]

The Supreme Court continued to stress the Sixth Amendment protections afforded criminal defendants, as evidenced in *Blakely v. Washington*.[25] The Court's focus was not on "whether determinate sentencing is constitutional, [but] only about how it can be implemented in a way that respects the Sixth Amendment."[26] In applying the rule from *Apprendi*, the Court held the trial judge overstepped his authority in sentencing the defendant to a term of imprisonment thirty-seven months longer than the statutory maximum. Again, the Court stated that the judge used determinations at sentencing that were not submitted to a jury or proven beyond a reasonable doubt.[27] Ultimately, the

---

police officers were incorrectly portrayed. *Id.* at 471. The judge himself found that Apprendi's actions were "motivated by racial bias" and enhanced his sentence to twelve years, which was above and beyond the statutory maximum for the count to which he pleaded guilty. *Id.*

21. *Id.* at 481.

22. 526 U.S. 227 (1999).

23. *Apprendi*, 530 U.S. at 490. This rule invalidated the New Jersey practice where a defendant could be found guilty of an offense by the jury but subsequently punished for a *more* serious crime based on the judge's own determinations, imposing a much higher sentence without submitting his further findings to the jury and proving them beyond a reasonable doubt. *Id.* at 491.

24. *Id.* at 497. Essentially, the holding in *Apprendi* prevented a judge from sentencing a defendant to more than the statutory maximum, unless the jury found beyond a reasonable doubt that a certain sentence-enhancing fact existed. *Id.* at 491, 494, 497. Therefore, a judge could not find that sentencing-enhancing fact on his own determination. This "bright-line rule" was recently reaffirmed in *Cunningham v. California*, 127 S. Ct. 856, 868 (2007). In *Cunningham*, the Court held that California's sentencing law violated the Sixth Amendment because it allowed judges the "sole authority to find facts" in elevating a sentence. *Id.* at 870.

25. 542 U.S. 296 (2004).

26. *Id.* at 308. In this case, Blakely's guilty plea contained facts that he kidnapped his wife, which subjected him to a sentence of not more than fifty-three months under the statute. *Id.* at 298. The judge then sentenced him to ninety months, based on the judge's own finding that Blakely acted with "deliberate cruelty;" an allowed departure under a Washington statute. *Id.* at 298, 300.

27. *See id.* at 301, 304 ("[w]hen a judge inflicts punishment that the jury's

Court reversed the trial court's sentence because it was based on a disputed fact that had not been presented to a jury.[28] At this point, with *Booker* just over the horizon, *Apprendi* and *Mistretta* still reigned supreme. Both decisions rendered the Guidelines mandatory and required that judges submit facts that enhance a defendant's sentence beyond the statutory maximum to the jury.

B. The Bare Bones of Booker

Prior to *Booker*, the Guidelines were strictly imposed as mandatory prescribed sentences, transforming each sentence into a mathematical equation.[29] In *Booker*, the district court sentenced two defendants convicted on drug charges – one received an

---

verdict alone does not allow, the jury has not found all the facts 'which the law makes essential to the punishment,' . . . and the judge exceeds his proper authority." (quoting J. BISHOP, CRIMINAL PROCEDURE § 87 (2d ed. 1872)). The *Blakely* Court went on to explain the purposes behind the new sentencing regime, reasoning that it provides notice to a defendant of the maximum sentence that he is truly eligible to receive. *Id.* at 311-12. The former practice in sentencing, which gave judges the right to enhance a sentence based on facts that have not been proved to a jury beyond a reasonable doubt, afforded no notice to a defendant that his sentence could "balloon from as little as five years to as much as life imprisonment." *Id.*

28. *Id.* at 313-14. In clarifying what constitutes a maximum sentence, the Court said, "Our precedents make clear . . . the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id.* at 303. The Court concluded its majority decision by emphasizing that the original intent of the Framers would not have considered "it too much to demand that, before depriving a man of three more years of his liberty, the State should suffer the modest inconvenience of submitting its accusation to 'the unanimous suffrage of twelve of his equals and neighbors' . . . rather than a lone employee of the State." *Id.* at 313-14 (citing 4 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 343 (1769)).

29. Taking into account the two main factors – (1) the defendant's criminal history and (2) the type of offense – a defendant who, for example, has no criminal history would have zero criminal history points, therefore qualifying for Criminal History Category I. GUIDELINES MANUAL, *supra* note 10, § 4A1.1 (2006). Further, if that defendant committed, say, fraud in the amount of 250,000 dollars, he or she would be assigned a base offense level of seven. *Id.* § 2B1.1. When the amount involved in the offense is more than 5,000 dollars, the Guidelines dictate the number of points to add to the base offense level depending on the total loss amount involved. *Id.* § 2B1.1(b)(1). In this example, a loss amount of 250,000 dollars would require that twelve points be added to the base offense level, totaling nineteen for the offense level. *Id.* § 2B1.1(b)(1)(a). With a Criminal History Category I and no reductions in the offense level, the defendant is in Zone D of the Sentencing Table and in the range of thirty to thirty-seven months imprisonment. *Id.* at ch.5, pt. A. When a defendant qualifies for Zone D, he or she would not be eligible for probation under the mandatory Guidelines scheme. *Id.* § 5B1.1 cmt. n.2.; *see also id.* § 5C1.1(f) (requiring that the minimum sentence for a defendant in Zone D be satisfied by imprisonment).

enhanced sentence,[30] the other received a sentence within the Guidelines range.[31] The problem, however, was that *both* defendants were eligible for enhanced sentences based on the judge's own findings.[32] Once again, the Sixth Amendment played a critical role as Booker questioned whether the *Apprendi* rule invalidated any part of the Guidelines.[33] Most importantly, the Court pointed out that these issues as addressed would not have arisen had the Guidelines not been mandatory.[34]

In *Booker*, the Court reaffirmed its holding in *Apprendi*, that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[35] However, the Court also held that the statutory

30. *Booker*, 543 U.S. at 227-29. *Booker* involved two defendants, Freddie J. Booker and Ducan Fanfan. *Id.* at 220. The first, Freddie Booker, was convicted of possession with the intent to distribute at least fifty grams of cocaine base (crack). *Id.* at 227. Based on Booker's criminal history and the amount of drugs involved as determined by the jury, the sentencing range provided by the Guidelines was 210 to 262 months of imprisonment. *Id.* At sentencing, the judge sentenced Booker to 360 months based on his own determination by a preponderance of the evidence that Booker actually possessed 566 grams more than what the jury determined. *Id.* The Seventh Circuit Court of Appeals found that the sentence was inconsistent with the *Apprendi* rule and reversed. *Id.* at 227-28.

31. The second defendant, Ducan Fanfan, was found guilty of possessing with intent to distribute at least five hundred grams of cocaine. *Id.* at 228. The Guidelines provided for a sentence of not more than seventy-eight months without additional findings of fact. *Id.* At sentencing, the judge maintained Fanfan's sentence within the Guidelines, even though he found additional facts supported by a preponderance of the evidence that would justify an enhanced sentence of fifteen or sixteen years. *Id.* at 228-29.

32. According to the sentencing judge's findings, both Booker and Fanfan qualified for an enhanced sentence. *Id.* at 227-28. Yet, only Booker received an enhanced sentence, while Fanfan was sentenced under the original Guideline range. *Id.* at 227-29. The Government challenged the judge's decision not to sentence according to the enhancements. *Id.* at 229.

33. *Id.* at 229.

34. *Id.* at 233. Basically, the Court was faced with a conflict in which one defendant received an enhanced sentence based on additional findings made by the judge, whereas the other defendant's sentence was based solely on the jury's verdict and was within the Guidelines. *Id.* at 227, 229.

35. *Id.* at 244. This meant that Booker's sentence violated the Sixth Amendment since the judge had enhanced Booker's sentence based on his own findings, in addition to the jury's verdict. *Id.* at 267. However, because the judge chose not to enhance Fanfan's sentence based on his own findings, Fanfan's sentence was solely based on the jury's verdict and did not violate the Sixth Amendment. *Id.* Nevertheless, the judge remanded Fanfan's case for re-sentencing in order to apply the new rules set forth in *Booker*. *Id.* at 267-68.

provisions that made the Guidelines mandatory, specifically 18 U.S.C. §§ 3553(b)(1) and 3742(e), must now be invalidated.[36]

Significantly, and most relevant to the issue at hand, *Booker* emphasized that the Guidelines are merely advisory.[37] Nevertheless, *Booker* required that judges *must* consider all of the other factors laid out in 18 U.S.C. § 3553(a) in addition to the Guidelines, which include:

> (1) the nature and circumstances of the offense and *the history and characteristics of the defendant*; (2) the need for the sentence imposed . . . ; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range established for . . .the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines . . . ; (5) any pertinent policy statement . . . issued by the Sentencing Commission . . . (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.[38]

Booker forces judges to consider each defendant's circumstances and "sentence the person before them as an individual."[39] Moreover, 18 U.S.C. § 3553(a) includes specific

---

36. *Id.* at 245. Section 3742(e) sets forth numerous provisions intended to guide an appellate court in considering an appeal. 18 U.S.C. § 3742(e) (2000). For example, the court of appeals may consider factors such as whether the Guidelines were correctly applied to the case at hand or whether the sentence "was imposed in violation of law". 18 U.S.C. § 3742(a)(1). In omitting the standards of review for appeal set forth in section 3742(e), *Booker* provides that the same standard of review used in the past may still be used post-*Booker*, namely the "review for 'unreasonable[ness].'" *Booker*, 543 U.S. at 261. After *Booker*, either party may appeal regardless of whether the sentence is within the Guideline range or not. *Id.* at 260.

37. *See id.* at 245 (stating that the Guidelines shall no longer be treated as mandatory).

38. 18 U.S.C. § 3553(a) (emphasis added). Recent cases emphasize that the Guidelines are only one of the factors to be considered, and that sentencing courts may not overlook the factors set forth in section 3553(a). United States v. Vaughn, 433 F.3d 917, 924 (7th Cir. 2006). Another case that was decided in the wake of *Booker* is United States v. Cunningham, 429 F.3d 673, 676 (7th Cir. 2005) (not to be confused with the aforementioned *Cunningham v. California*, 127 S. Ct. 856 (2007), which requires a sentencing judge to consider the circumstances of the case, the factors under section 3553(a), and then determine if the Guideline range fairly accounts for those circumstances and factors). The Court stated that a sentencing court "may not rest on the guidelines alone." *Id.* The *Cunningham* Court further requires judges to analyze the factors under section 3553(a) in relation to the circumstances of the case at hand, rather than just reciting the factors in their opinions. *Id.* at 675-76, 679.

39. United States v. Ranum, 353 F. Supp. 2d 984, 987 (E.D. Wis. 2005). The court in *Ranum* emphasized that when sentencing under *Booker*, courts can no longer merely calculate the defendant's sentence range relying only on the numbers and the Guidelines chart, but must consider the other statutory factors. *Id.* at 987. For example, the court should also take into consideration

language which embodies the principle of parsimony in punishment, requiring that the judge impose a sentence "sufficient, but not greater than necessary," to satisfy the four statutory purposes of sentencing.[40] These purposes are:

> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, *medical care*, or other correctional treatment in the *most effective manner*.[41]

Because the Court in *Booker* stressed the importance of these other factors, it is incumbent upon judges to consider the physical or mental health of a defendant during the sentencing phase, where it ordinarily would not have been allowed pre-*Booker* when the Guidelines were mandatory.[42]

*C. The Harsh Truth Post-*Booker

In the post-*Booker* era, the Guidelines are merely advisory, thereby allowing judges to exercise much more discretion.[43] However, this does not seem to be the case in reality as this permittable exercise of discretion has not resulted in judges granting lower sentences, save for a few exceptions.[44] In fact, the

---

the "history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1).

40. 18 U.S.C. § 3553(a).

41. 18 U.S.C. § 3553(a)(2) (emphasis added).

42. Prior to *Booker*, courts were required to refrain from considering certain characteristics specific to the defendant, such as age, education, mental and physical conditions, employment history, and family relationships, unless they were dealing with "exceptional cases." *See* GUIDELINES MANUAL, *supra* note 10, §§ 5H1.1-5H1.6 (stipulating that a sentencing court may not consider these specific offender characteristics when deciding whether or not to give a lower sentence because they are "not ordinarily relevant").

43. *Booker*, 543 U.S. at 245.

44. While most courts' sentences continue to climb, there has been a small trend in a very limited number of courts which have developed a pattern of granting lower sentences for defendants post-*Booker*. The district court for the Southern District of New York provides numerous cases in which the court granted the defendant a lower sentence due to his or her physical condition. *See, e.g.*, United States v. Carmona-Rodriguez, No. 04 CR 667(RWS), 2005 U.S. Dist. LEXIS 6254, at *11-12 (S.D.N.Y. Apr. 11, 2005) (imposing lower sentence when defendant suffered from diabetes, high blood pressure, anxiety, and depression); United States v. Jiminez, 212 F. Supp. 2d 214, 220 (S.D.N.Y. 2002) (sentencing defendant to lower sentence when she suffered from a brain aneurism, severe memory loss, and psychotic symptoms); United States v. Roth, No. 94 CR 726(RWS), 1995 U.S. Dist. LEXIS 996, at *2 (S.D.N.Y. Jan. 30, 1995) (granting lower sentence for a defendant battling a severely

average sentence length has increased post-*Booker* for most major crimes.[45] Moreover, in most cases, the courts have generally held the bar extremely high, requiring that the defendant have extraordinarily serious medical conditions before considering a non-prison sentence.[46] What is perhaps more alarming is the

---

debilitating disease known as amyotrophic lateral sclerosis).
The district court for the District of Massachusetts has consistently taken into account defendants' medical conditions and, on numerous occasions, granted downward departures. *See, e.g.*, United States v. Pineyro, 372 F. Supp. 2d 133, 136-37, 139-40 (D. Mass. 2005) (sentencing defendant to "time served" when he suffered from heterotrophic ossification, accompanied by chronic back pain, as well as impulse control disorder and severe depression); United States v. Willis, 322 F. Supp. 2d 76, 79-80, 84-85 (D. Mass. 2004) (listing over twenty troubling medical conditions of defendant and finding home confinement more appropriate than a prison sentence); United States v. Baron, 914 F. Supp. 660, 663 (D. Mass. 1995) (addressing each of defendant's serious medical conditions, including his severe problems with pituitary tumors, kidney disease, potential prostate cancer, coronary artery disease, and hypertension, and ultimately granting downward departure). Despite the advances that these courts have made toward using their discretion to provide more effective medical treatment for defendants, these advances are the exception, not the mainstream majority.

45. U.S. SENTENCING COMM'N, U.S. SENTENCING COMM'N SPECIAL POST-BOOKER CODING PROJECT 13-15 (2006). According to the Sentencing Commission's most recent report, the average sentence length for offenses such as drug trafficking, firearms, theft, and fraud have continued to climb, showing an especially significant increase in sentence length from 2003 to 2004. *Id.*; *see also* David McColgin & Brett G. Sweitzer, *Grid & Bear It: Post-Booker Sentencing Litigation Strategies – Part One*, THE CHAMPION, Nov. 2005, at 50 (recognizing that the duration of sentences has steadily increased). While it was expected that post-*Booker* sentencing would mean "increased judicial discretion leading to sentences customized to individual defendants' circumstances" (in effect, leading to overall lower sentences), what has actually happened is quite the contrary. *Id.*; *see also* Kathleen M. Williams, Fed. Pub. Defender for S.D. Fla., Public Hearing on Proposed Amendments Before the U.S. Sentencing Comm'n (Mar. 15, 2006) (urging the Sentencing Commission to recognize the increasing length in sentences, in particular, bringing notice to the fact that the length of sentences has doubled over the past twenty years). Moreover, the Commission continues to amend the Guidelines, consistently inserting more "aggravating factors" into the Guidelines that would increase a defendant's sentence, and hardly ever incorporating new "mitigating factors" that would lower a defendant's sentence. *Id.* In fact, over the years, the Sentencing Commission has even eliminated numerous provisions that set forth mitigating factors. *Id.*

46. *See, e.g.*, United States v. Sherman, 53 F.3d 782, 788 (7th Cir. 1995) (discussing various prior court rulings on what constituted "extraordinary physical impairment"). In previous cases, it was *not* extraordinary enough for the defendant to suffer from a heart condition that was manageable with medicine or that the defendant was a "wheelchair bound quadriplegic." *Id.* (citing Weinstein v. United States, 115 S. Ct. 250 (1994); United States v. Goff, 6 F.3d 363, 366 (6th Cir. 1993)). The Fourth Circuit Court of Appeals stipulated that the following conditions would not be extraordinary enough without particularized findings: "borderline mental retardation, chronic major depressive disorder, scoliosis and disabling back pain." *Id.* (citing United

recently proposed "Sentencing Fairness and Equity Restoration Act," which would rob judges of their newfound sentencing discretion by inhibiting judges from sentencing a defendant below a certain range.[47]

D. When Did Our Prisons Become Our Hospitals and Asylums?

In 2005, the total inmate population across the United States soared past the two million mark, with approximately 191,000 inmates in federal prisons alone.[48] Astonishingly, nearly forty-five percent of those federal inmates reported suffering from a mental illness.[49] Likewise, the percentage of those reporting physical medical problems was nearly thirty-nine percent of federal inmates aged forty-five years or older.[50] What is even more unsettling is the inadequate medical treatment in prison and the devastating effects it has had on these inmates.[51] So the

---

States v. Slater, 971 F.2d 626, 634-35 (10th Cir. 1992)). The one example the *Sherman* court provided which *would* warrant a lower sentence is a case involving the "double amputee whose treatment would be jeopardized in prison." *Id.* (citing United States v. Greenwood, 928 F.2d 645, 646 (4th Cir. 1991)).

47. *Sensenbrenner Introduces Legislation to Restore Fairness and Equity to Federal Sentencing*, U.S. NEWSWIRE, Sept. 29, 2006. This bill directly attacks a judge's right to grant downward departures from the Guidelines. Rep. Sensenbrenner proposed in this bill what is known as "the *Booker* fix," which would restrict sentencing courts by requiring them to sentence within a certain range. On the low end, judges could not sentence anywhere below the Guidelines range applicable to that defendant and his offense; on the high end, judges could not sentence above the statutory maximum for that particular offense. *Id.* The bill would place further restrictions on downward departures, mainly effectuating a more stringent standard of review (Sensenbrenner pushes for de novo review, as opposed to the "reasonableness" review set forth in *Booker*) and more requirements for filing motions for downward departures. *Id.* This bill, if passed, would ultimately return us to a system of mandatory sentences, which is directly contrary to *Booker's* holding. While this bill was not passed in the last session of Congress, its supporters introduced it again in the 110th Congress where it sits for consideration. GovTrack.us, H.R. 993 [110th]: Sentencing Fairness and Equity Restoration Act of 2007, 110th Congress (2007), *available at* http://www.govtrack.us/congress/bill.xpd?bill=h110-993.

48. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: PRISON AND JAIL INMATES AT MIDYEAR 2006 2, tbl. 1 (2007).

49. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES 3, tbl.2 (2006).

50. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, MEDICAL PROBLEMS OF INMATES, 1997 3, tbl.2 (2001).

51. *See infra* Part III (discussing the inadequacy of BOP's medical treatment). *See generally* HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 1 (2003); B. Jaye Anno, et al., *Correctional Health Care: Addressing the Needs of Elderly, Chronically Ill, and Terminally Ill Inmates* NAT'L INST. OF CORR. (Washington, D.C.), February 2004, at 10; United States v. Sherman, 53 F.3d 782, 786 (7th Cir.

unavoidable question remains: Why continue to overpopulate our prisons when defendants would receive better medical treatment outside of prison, and the objectives of punishment can still be fulfilled through non-prison sentences? Although *Booker* grants judges the discretion to impose more non-prison sentences, the harsh truth is that prison populations are still rising exponentially, that the prisons themselves continue to operate understaffed and under-financed,[52] and, most disturbingly, that mentally and physically ill prisoners are slowly wasting away in these prisons.[53]

III. UNCOVERING THE "BOP PLAGUE": THE BUREAU OF PRISONS' INABILITY TO TREAT THE MENTALLY AND PHYSICALLY ILL

When considering the factors under 18 U.S.C. § 3553(a), as required by *Booker*, courts must sentence an individual to a punishment that is "sufficient but not greater than necessary to satisfy the purposes of sentencing."[54] Moreover, a sentencing court must take into account the most *effective* medical treatment for the defendant when determining a sentence.[55] Now, what courts must begin to recognize are the devastating consequences that flow from sentencing a mentally or physically ill defendant to a term of imprisonment, especially where the facility is understaffed and not equipped to handle such conditions.

The BOP cannot claim to meet the medical needs of its inmates when it has been overpopulated and understaffed for years. According to a report from the Bureau of Justice Statistics, federal prisons were operating at one hundred and forty percent capacity in 2004, and have been operating above capacity for over a decade.[56] In 2005, the federal prison system held the largest

---

1995).

52. GIBBONS & KATZENBACH, *supra* note 2, at 43; *see also* HUMAN RIGHTS WATCH, *supra* note 51, at 95-100 (uncovering the numerous repercussions suffered by mentally ill inmates due to the inadequate medical staffing in prisons).

53. *See, e.g.*, NAT'L INST. OF CORR., U.S. DEP'T OF JUSTICE, PROVISION OF MENTAL HEALTH CARE IN PRISONS 1 (Feb. 2001) (reporting that "previously recognized mental health issues may be exacerbated in the stressful environment of the prison"); HUMAN RIGHTS WATCH, *supra* note 51, at 53 (arguing that prisons are "toxic" for the mentally ill, as they struggle to survive in a "brutalizing" setting in which they are "ill-equipped to navigate").

54. 18 U.S.C. § 3553(a).

55. 18 U.S.C. § 3553(a)(2)(D) (emphasis added); *see also* United States v. Spigner, 416 F.3d 708, 712 (8th Cir. 2005) (recognizing that a sentencing court must sentence defendant in a way that contemplates the defendant's need for treatment).

56. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: PRISONERS IN 2004 7, tbl. 8 (2005). This represents an overpopulation by a gut-wrenching forty percent. *Id.* It places the federal prison system in the top five most overpopulated facilities out of all of the jails and prisons in the entire

population of inmates among all prison and jail facilities, housing nearly 185,000 inmates – growing over twice as fast as the state inmate population.[57] Additionally, a recent report concluded that the "federal system account[ed] for over twenty-five percent" of the exponential population growth within the entire jail and prison system from June 2004 to June 2005.[58]

Even worse, the BOP has continued to eliminate many of the medical programs utilized in treating defendants with mental and physical problems, as well as those programs used for rehabilitation.[59] These reductions made by the BOP "make punishment harsher and eliminate treatment and rehabilitation opportunities that judges have recommended or assumed were available in the past, for reasons that have nothing to do with the purposes of punishment."[60] The most significant problem, however, is that the prisons are understaffed.[61] Due to a high

---

nation, including state and federal together. *Id.* Sadly enough, this has been the trend for the past several years; yet another report showed that the federal prisons were operating at 134% capacity in 2000. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CENSUS OF STATE AND FEDERAL CORRECTIONAL FACILITIES, 2000 4, tbl. 6 (2003); *see also* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: PRISONERS IN 1994 7, tbl. 8 (1995) (reporting that the federal prison system was operating at 125% capacity). The most recent report, dated in 2005, stated that federal prisons were operating at 134% capacity. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: PRISONERS IN 2005 7, tbl. 8 (2006).

57. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN: PRISON AND JAIL INMATES AT MIDYEAR 2005 1 (2006). It is estimated that this figure had already risen to 188,000 by the time the report was released. Williams, *supra* note 45.

58. *Id.* at 3. In fact, the prison population is now four times the size it was in 1980. Bergman, *supra* note 2, at 4.

59. Williams, *supra* note 45.

60. Amy Baron-Evans, *Sentencing Post-Booker*, SENT'G RESOURCE COUNSEL (Oct. 12, 2005), *available at* http://www.fd.org/pdf_lib/sentencing%20post booker101205.pdf. The "quality and regularity of medical and mental health care" have plummeted as a result of these drastic restrictions. *Id.*

61. HUMAN RIGHTS WATCH, *supra* note 51, at 95. The ratio of available medical staff to inmates is so overwhelming that they cannot possibly provide adequate treatment to the inmates who need it. *Id.* at 96-97. Because of the poor pay and the overwhelming amount of work, turnover rates have skyrocketed. *Id.* at 97. In turn, prison patients suffer the repercussions of their physicians or psychologists constantly being replaced, having to rebuild trust and familiarizing the new doctor with their specific medical problems and histories. *Id.* Even worse, this leads to under-familiarized, "under-trained, and under-qualified personnel . . . making clinical decisions about appropriate treatment[s]" of prisoner patients. *Id.* at 100.

Additionally, the ramifications of understaffing are clearly evident when taking a closer look at the psychological services provided in federal prison. Only *one* federal prison met the authorized staffing requirements to satisfy an appropriate patient-psychologist ratio. U.S. GENERAL ACCOUNTING OFFICE, HEALTH, EDUC., AND HUMAN SERVICES DIV., BUREAU OF PRISONS HEALTH CARE: INMATES' ACCESS TO HEALTH CARE IS LIMITED BY LACK OF

turnover rate and a dearth of funding, the BOP lacks qualified physicians to treat mentally and physically ill patients in prison. The majority of physicians' assistants employed by the BOP in prisons are unlicensed and non-certified.[62]

A. Physical Health Concerns and the BOP

1. Age Does Matter

One of the most crucial, and most relevant characteristics of a person's physical well-being, is his or her age. While the Guidelines state that age should normally not be considered when sentencing a defendant,[63] age is relevant to an older defendant and should be considered in relation to the first factor under 18 U.S.C. § 3553(a): "the history and characteristics of the defendant."[64] The population of elderly inmates has drastically climbed since 1992.[65] Unfortunately, the BOP is not well-equipped to handle inmates with "mobility impairments," which are usually attributed to arthritis or diabetes.[66] Older female inmates, who make up a rapidly growing portion of the prison population, pose immense treatment challenges to the BOP due to their "unique set of health care needs."[67] Imprisonment also accelerates the aging process, and does so at an even higher rate when the inmate is suffering

---

CLINICAL STAFF 6 (1994). In order to meet the proper ratio of twenty to twenty-five patients per psychiatrist, a prison with three hundred mentally ill patients would need to employ twelve psychiatrists. *Id.* at 5. Shockingly, one prison that held 300 mentally ill inmates only authorized seven psychiatrist positions, and maintained only four psychiatrists on staff. *Id.* For an entire month, this same prison had only one psychiatrist on staff, and later lowered the authorized number of psychiatrists to five for the entire facility. *Id.*

62. *Id.* at 2. Reports indicate that the inmates were being treated by unsupervised physicians' assistants, not actually licensed physicians, because of understaffing and lack of time. *Id.* However, to the inmates' dismay, "many physician assistants did not meet the training and certification requirements of the medical community outside of BOP." *Id.* at 3. Some federal facilities were only treating inmates afflicted with severe illnesses, ignoring inmates battling serious, but not severe enough, illnesses. *Id.* Because of the failure to employ an adequate number of psychiatrists for each facility, mentally ill inmates were not receiving the recommended therapy sessions. *Id.* As a direct result, inmates suffering from physical or mental illness were "at risk of serious deterioration." *Id.* at 2-3.

63. GUIDELINES MANUAL, *supra* note 10, § 5H1.1.

64. 18 U.S.C. § 3553(a)(1).

65. Anno, et al., *supra* note 51, at 7, exh. 1. The number of elderly inmates imprisoned in 2001 reached well over 100,000 in the entire prison system. *Id.*

66. *Id.* at 20.

67. Rebecca Reviere & Vernetta D. Young, *Aging Behind Bars: Health Care for Older Female Inmates*, 16 J. OF WOMEN & AGING 55, 64 (2004). Moreover, the number of female prisoners is rapidly increasing. *See* BUREAU OF JUSTICE STATISTICS, *supra* note 56, at 4 (noting that the female population is rising more than twice as fast as the male prison population).

from a chronic illness (e.g., arthritis, hypertension, or diabetes), increasing the physical age of a person by eleven-and-a-half years *more* than one's actual age.[68] Furthermore, high emotional stress and physical deterioration are common results of imprisonment of elderly defendants due to their "vulnerability to abuse and predation."[69]

2. *Disease Running Rampant*

Because of the small, enclosed spaces and overpopulation, prisons have become "serious incubator[s] of disease."[70] Those diseases of greatest concern are HIV, hepatitis C, hepatitis B, and tuberculosis.[71] Yet, the data collected on prison populations' physical well-being is meager, to say the least.[72] Nevertheless, the incidences of these serious diseases in prison are exceedingly higher than in the common population.[73]

B. Mental Illness and the BOP

The amount of information regarding the inadequacy of the BOP in treating mentally ill prisoners is overwhelming. In 2006, the federal inmate population has been estimated to hold 70,200 individuals with a history of mental illness issues.[74] Mental

---

68. Anno, et al., *supra* note 51, at 10. In terms of physical aging, every year an elderly person spends in prison is equivalent to eleven-and-a-half years. For example, a sixty-eight year old woman, who was also combating a chronic illness would likely have the physical well-being of *at least* an eighty year old woman after *only one year* of imprisonment. In theory, sentencing an elderly defendant to five years in prison could actually have the effect of sentencing him or her to over *fifty-five years*. Clearly, these statistics show that the BOP is not equipped to handle elderly defendants.

69. *Id.* at 9.

70. Alan Elsner, *Prison Health Issues*, THE CHAMPION, Aug. 2004, at 36, 40.

71. *Id.* This is partially due to the fact that inmates have no source for clean needles or condoms since the prisons refuse to provide them. *Id.*

72. *See id.* (discussing how the prison systems generally fail to adequately and accurately obtain figures on their own inmates and the sicknesses and diseases that inflict them).

73. *Id.* The occurrences of HIV inside prison were reported as four times higher than outside prison. *Id.* On a grander scale, rates of tuberculosis inside prison were eleven times as high as that in the general population. *Id.*

74. Stephanie Lambidakis, *Mentally Ill, And Behind Bars*, CBS NEWS (Sept. 6, 2006), http://www.cbsnews.com/stories/2006/09/06/health/main/1980075.shtml. The most prevalent occurrences of mental illnesses were found among the female state prison population, with seventy-three percent reporting a mental illness. *Id.* Further statistics gathered from state facilities showed that over seventy-five percent of the prison population had issues with substance abuse, and twenty-five percent had experienced physical or sexual abuse. *Id.* Using the mid-2006 federal population figure of 188,000, this would mean that nearly forty percent of federal inmates were suffering from a mental illness. Public Hearing on Proposed Amendments Before the U.S. Sentencing Commission, *supra* note 45.

Health America[75] instructs that "there is now widespread concern regarding the unmet needs of persons with mental illness in the nation's jails and prisons and the toll it exacts on these individuals, their families, service agencies, and the criminal justice system."[76] First, there are a limited number of beds, which are reserved only for those inmates with the most serious mental illnesses.[77] This forces others with significant, but less serious, mental illnesses to live in the general population in prison.[78] This unjust situation illustrates a need for a level of "intermediate care" for those who may not have a completely debilitating mental illness, but still experience problems functioning with inmates in the general population.[79]

In terms of policy, the BOP's goals are misplaced.[80] Most mentally ill inmates are usually provided treatment involving nothing more than mere medication, rarely receiving any meaningful type of therapy or counseling to help with their mental illness.[81] A pre-existing mental illness will undoubtedly grow

---

75. Mental Health America ("MHA"), *History of the Organization and the Movement*, http://www.nmha.org/index.cfm?objectid=DA2F000D-1372-4D20-C8882D19A97973AA (last visited Feb. 14, 2008). MHA was formerly known as National Mental Health Assiciation. *Id.* The institution changed to its current name in November 2006. *Id.*

76. MHA, *Position Statement 52: In Support of Maximum Diversion of Persons with Serious Mental Illness from the Criminal Justice System* (2003) http://www.mentalhealthamerica.net/go/position-statements/52.

MHA strongly promotes "maximum diversion" for mentally ill defendants. *Id.* The MHA primarily advocates for placement in a mental facility rather than a prison. *Id.* Barbara Bergman further points out in her article that nearly half of mentally ill inmates are doing time for non-violent crimes. Bergman, *supra* note 2, at 4.

77. HUMAN RIGHTS WATCH, *supra* note 51, at 128.

78. *Id.*

79. *Id.*

80. Many of the BOP's facilities are specifically "designed for punishment." Bergman, *supra* note 2, at 4. Prison staff members, who generally have not received sufficient training for dealing with mentally ill inmates, often mistake a mentally ill inmate who is acting out as disobeying orders in order to cause trouble. Press Release, Human Rights Watch, United States: Mentally Ill Mistreated in Prison (Oct. 22, 2003) available at: http://hrw.org/english/docs/2003/10/22/usdom6472.htm. Prisoners have actually been punished for what should have been seen as a cry for help. *Id.* For instance, where an inmate tried to commit suicide or self-mutilation, he was punished for "destroying state property." *Id.* Likewise, when a defendant was having a delusional fit, he was punished for a "battery," and where a defendant was kicking and screaming in response to hearing voices, he was punished for "creating a disturbance." *Id.*

81. Bergman, *supra* note 2, at 4. In addition, live sessions with psychologists and psychiatrists are being replaced with computer consultations, referred to as Telemedicine. NAT'L. INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, TELEMEDICINE CAN REDUCE CORRECTIONAL HEALTH CARE COSTS: AN EVALUATION OF A PRISON TELEMEDICINE NETWORK 11 (1999). As a result, previous patient-physician relationships are broken and the patient is

exceedingly worse in a prison setting.[82] Just as the elderly are more likely to be victimized in prison,[83] so are mentally ill inmates.[84] Inevitably, mentally ill inmates face a bleak future due to the "deep-rooted patterns of neglect, mistreatment, and even cavalier disregard for the well-being of vulnerable and sick human beings."[85] Because of the significant problems that have continued to plague the BOP, certain inmates, such as the elderly, women, and those suffering from a chronic illness, are being sentenced to a debilitating lifestyle, and, just as the statistics show, they *will* physically and mentally deteriorate due to the lack of adequate healthcare within the BOP.

IV. SENTENCING: ARE JUDGES TURNING A BLIND EYE?

To reiterate, *Booker* provided that judges must take into account the statutory factors set forth in 18 U.S.C. § 3553(a) when sentencing,[86] which includes the specific characteristics of the defendant.[87] In addition, there are several other sources that urge judges to consider the physical and mental health of the defendant when sentencing.

A. Statutory Provisions

The first relevant statutory provision, 28 U.S.C. § 994(k), emphasizes that courts should not use a prison sentence as a means to provide medical treatment for a person.[88] Furthermore, Congress provides under 18 U.S.C. § 3582 that "imprisonment is not an appropriate means of promoting correction and

---

forced to spill his emotions to a computer screen. Physicians have criticized Telemedicine thus far, claiming that it cannot accurately evaluate patients, and foreseeing a deterioration in the already poor quality of healthcare in prisons. Kirsten Rabe Smolensky, *Telemedicine Reimbursement: Raising the Iron Triangle to a New Plateau*, 13 HEALTH MATRIX 371, 394-95 (2003).

82. *See* NAT'L INST. OF CORR., *supra* note 53, at 1 (emphasizing that mental conditions "may be exacerbated" due to the stress the prison setting places on an individual); *see also* Press Release, Human Rights Watch, *supra* note 80 (quoting director of Human Rights Watch, Jamie Fellner, who stated that "prison can be the worst place to be" for those defendants suffering from a mental illness).

83. Anno, et al., *supra* note 51, at 9.

84. HUMAN RIGHTS WATCH, *supra* note 51, at 2.

85. *Id.* at 2.

86. *Booker*, 543 U.S. at 245-46.

87. 18 U.S.C. § 3553(a)(1).

88. *See* 28 U.S.C. § 994(k) (requiring that "the guidelines reflect the inappropriateness of imposing a sentence of a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, *medical care*, or other correctional treatment") (emphasis added).

rehabilitation."[89] This evinces that prison is primarily, and, above all, meant for punishment.

A more recent development in several state legislatures is the introduction of the Mentally Ill Offender Treatment and Crime Reduction Act of 2004, which has been implemented in Ohio.[90] This Act establishes a "mental health court" used to separately assess the treatment needs of mentally ill defendants and provides means of "alternative prosecution."[91] This Act only applies at the state and local levels,[92] leaving the federal system in its traditional post, holding mentally and physically ill defendants to the same standards as a person in perfect health. Moreover, the Act does not address those individuals with serious *physical* health problems.[93] Those individuals, in substantial need of consistent and ongoing medical care, are sentenced in the same way as a physically fit defendant in both the state and federal criminal systems.

B. Paving the Way for a More Adequate Sentencing Regime for Physically and Mentally Ill Defendants

Judges are just beginning to more carefully consider the physical and mental conditions of the individuals before them. In many cases, courts still overlook alternatives to imprisonment based on where a defendant falls on the Guidelines Sentencing Table, when they could easily grant a modest departure or variance from the Guideline range to impose a non-prison sentence.[94] During the sentencing phase in a few cases, though, judges have shown concern for defendants that were afflicted with severe medical problems.[95]

---

89. 18 U.S.C. § 3582(a). Congress specifies that the factors under 18 U.S.C. § 3553(a) must be considered when a judge is deciding if a defendant should be sentenced to prison at all, implying that there are definitely instances in which prison would be completely inappropriate after taking into account the 3553(a) factors. *Id.*

90. Pub. L. No. 108-414, §§ 1-2991, 118 Stat. 2327, 2327-36 (2004); *see infra* note 127 (discussing the system implemented in Ohio).

91. *See id.* § 3(2), (3), 118 Stat. 2328 (establishing a mental health judicial system); *see also* § 2991(b)(5)(c)(ii)(V), 118 Stat. 2332 (providing alternatives to prosecution, such as placing the defendant in "community-based mental health services" rather than in prison); 42 U.S.C. § 3796ii (Supp. 2006) (setting forth generally the organization, administration, and financial grants for a mental health court).

92. § 2991(a)(1),(3), 118 Stat. 2328-29.

93. *See id.* at § 2991(a)(9), 118 Stat. 2330 (defining a "preliminary qualified offender" as one with a diagnosed "mental illness").

94. *See* United States v. Wright, 218 F.3d 812, 815 (7th Cir. 2000) (explaining the appropriateness of sentencing a defendant to probation instead of incarceration when it involves only a small departure); 18 U.S.C. § 3553(a)(2).

95. *See, e.g.*, United States v. Martin, 363 F.3d 25, 58 (1st Cir. 2004)

Another step towards more appropriate sentencing for the mentally and physically ill has been the recent rejection of generalized letters from the BOP touting its purported ability to treat a wide variety of medical illnesses.[96] In the past, letters from the BOP were submitted by the prosecution at sentencing to

---

(showing concern about prison's ability to treat defendant with Crohn's disease); United States v. Derbes, 369 F.3d 579, 581 (1st Cir. 2004) (recognizing the possibility of a great degree of individualized care required for a defendant suffering from psychiatric problems).

In *Martin*, the district court sentenced defendant, Daniel Martin, to three years of probation after departing downwards three levels due to his "exceptional physical impairments." *Martin*, 363 F.3d at 33. Suffering from Crohn's disease, suppression of his immune system, Bell's palsy, and osteoporosis, Martin satisfied the definition of "extraordinary physical impairment." *Id.* at 49-50. Martin's treating physician testified that if Martin was not able to receive immediate attention at the onset of an episode involving great abdominal pain, and further, if there was an interruption in his medication regimen, urgent and major surgery would be inevitable. *Id.* The First Circuit found that the BOP would not be able to sufficiently care for Martin's fragile physical health conditions and upheld the district court's three level departure based on physical impairment. *Id.* at 50. However, Martin's sentence was vacated on other grounds. *Id.* at 51.

In *Derbes*, Frank Derbes was dealing with serious depression and suicidal thoughts, needing extensive medical care. *Derbes*, 369 F.3d at 581. The district judge took into account Derbes' mental conditions in evaluating his sentence and recognized that while the BOP may be able to treat those mental conditions, it would definitely not be able to fill the void left from stripping the defendant of his longtime connection with his psychiatrist were the court to impose a prison sentence. *Id.* at 580. For over seven years, Derbe's psychiatrist had been providing "individual therapy as well as medication monitoring." *Id.* at 581. The psychiatrist testified that it had been extremely difficult to discover the best method of treating Derbes' mental conditions, taking years before they found an effective medication regimen, and that he was especially worried that this regimen would not be able to continue in prison. *Id.* The BOP also would not be able to provide the same monitoring and close care as Derbes needed (and was, in fact, already receiving). *Id.*

Based on its review of the decision below, the First Circuit remanded the *Derbes* case in order to further explore the record for more evidence that the BOP would not be able to treat Derbes. *Id.* at 582-83. On remand, the defendant pursued other grounds for departure rather than on a mental health basis. United States v. Derbes, No. 02-10391-RGS, 2004 U.S. Dist. LEXIS 19666, at *4 (D. Mass. Oct. 1, 2004). Both the *Martin* and *Derbes* cases illustrate the very beginnings of judges using their discretion to find more effective means of punishment and deterrence while also attempting to assure proper healthcare to the defendant.

96. *See, e.g.*, *Martin*, 363 F.3d at 50 (rejecting the BOP's letters because they did not distinctly focus on Martin's medical condition, and requiring more than mere "boilerplate language" from the BOP in order to determine if it can adequately treat a defendant); *Derbes*, 369 F.3d at 582 (noting that "general assurances" made by the BOP or the government are not "given much weight"); United States v. Gee, 226 F.3d 885, 902 (7th Cir. 2000) (rejecting another "boilerplate" letter in which the BOP boasted that it could treat "medical conditions of all kinds").

appease any hesitation a judge might have as to the treatment of a physically or mentally ill defendant.[97] A court's rejection of such letters is still a recent concept, and BOP letters continue to be submitted in cases involving physically or mentally ill defendants. Sadly, some courts are unable to see past these misleading letters, which claim the ability to provide ample treatment. Many times, the BOP knows well that such treatment may not even be available to the defendant.[98]

C. Holding the Bar High

Despite these efforts, in most cases, such as in *United States v. Sherman*,[99] the courts have generally required extraordinary medical conditions before considering a non-prison sentence.[100] In *Sherman*, the court vacated a below-Guidelines sentence when the defendant testified that he weighed over four hundred pounds, suffered from arthritis, and had great difficulty breathing.[101] The district court had sentenced defendant Sherman below the Guidelines range due to his medical conditions by reasoning that the BOP tends to overlook asthma as a medical condition and that his weight met the requirement of being extraordinary.[102] The Court of Appeals for the Seventh Circuit vacated the sentence and remanded, requiring a much stronger basis for warranting a downward departure from the Guidelines, such as medical findings that either the defendant would require extremely

97. In the *Martin* case, the government provided two letters from the BOP to attempt to show that the BOP could treat Crohn's disease. *Martin,* 363 F.3d at 50. The first gave a brief overview of the BOP's medical screening process and then concluded that it had the ability to treat the defendant, despite his individual difficulties setting him apart from others suffering from the same disease. *Id.* The second letter generally addressed the nutrition regimen for other inmates suffering from Crohn's disease, but failed to propose any sort of individualized treatment for the defendant. *Id.* In *Derbes*, the government submitted a letter from the BOP stating that the "BOP offers inmates a full range of mental health services." *Derbes*, 369 F.3d at 582 (citing FED. BUREAU OF PRISONS, U.S. DEPT. OF JUSTICE LEGAL RESOURCE GUIDE TO THE FEDERAL BUREAU OF PRISONS 31 (2003)). In the *Gee* case, the government offered a letter from the BOP in which it boasted that it could treat "all kinds" of medical problems. *Gee*, 226 F.3d at 902.

98. *See also infra* note 137 (describing the BOP's manipulative and tricky ways in trying to appease judges' hesitations about available healthcare programs in prison).

99. 53 F.3d 782, 788 (7th Cir. 2005).

100. *See id.* at 788 (using various findings from other courts in order to determine what constituted "extraordinary physical impairment"). Raymond Sherman pled guilty to possession of a sawed-off shotgun. *Id.* at 783. At his sentencing, Sherman stated that he suffered from obesity, weighed over 400 pounds, had asthma, and experienced breathing problems when undertaking extremely minor activities. *Id.* at 784-85.

101. *Sherman*, 53 F.3d at 784-85.

102. *Id.* at 785.

extensive care and that the BOP would not be able to provide such care.[103] This second requirement lies more aptly in the hands of the government because it has better access to obtaining that type of information from the BOP. However, this would then pose a "Catch 22" scenario. Relying on the government's own representations would allow the government to provide self-serving support. Moreover, the government certainly would not be willing to admit the downfalls of the prison system to which it hopes to send the defendant, nor would it admit the likelihood that a defendant's poor medical condition would deteriorate in prison. Either way, the burden is too great for a defendant to bear and proves to be an unfair and unreliable method for determining whether a lower sentence is warranted.

D. No Such Thing as "Wait and See"

Another possible option is a "wait and see" approach. However, upon close examination, this proves to be yet another faulty alternative. Once a judge has imposed a sentence, the court does not have the power to later modify that sentence unless the BOP first files a motion.[104] Thus, the "wait and see" approach is not an effective resolution of the problem because it is counter-dependant on the BOP system taking the initial action.[105] This

103. *Id.* at 786-88; *see also supra* note 46 (illustrating how the Court has wrestled with defining "extraordinary physical impairment"). The definition of "extraordinary physical impairment" has grown exceedingly more difficult to meet. In the more recent case, *Martin*, the court further attempts to define an "extraordinary physical impairment," imposing an extremely difficult burden on the defendant, and requiring him/her to show one of two things: (1) that his/her life would be threatened while in prison due to his condition or (2) that the BOP would not be able to treat his/her conditions. *Martin*, 363 F.3d at 49.

104. 18 U.S.C. § 3582(c). More so, even after the motion has been filed, the court may only lower the sentence if it determines that "extraordinary and compelling reasons" allow that reduction, and that reduction is consistent with the factors under 18 U.S.C. § 3553(a) and the policy statements of the U.S. Sentencing Commission. 18 U.S.C. § 3582(c)(1)(A).

105. *See, e.g.*, Jeremiah Stettler, *Dying Woman Denied Prison Release*, SALT LAKE TRIBUNE, Nov. 10, 2006, at Local (portraying the case of a woman who brought a due process claim after her medical needs were not met once she was sentenced to prison). In this case, Tracy Sanchez was convicted of heading a drug trafficking ring and sentenced to 360 months of imprisonment. *Id.* Sanchez requested "compassionate release" from the BOP because she was suffering from a terminal illness, which left her only two months to live. *Id.* She was only thirty-six years old and would obviously not live to finish her term in prison. *Id.* Sanchez claimed that the lower court "violated her due process rights by promising her adequate medical coverage at the time of sentencing, and then not providing it." *Id.* Unfortunately, the Court of Appeals ruled against her. *Id.* The court failed to sympathize with Sanchez's two-part battle: a terminal illness and a lack of appropriate medical care in prison. *Id.* Shockingly the Court of Appeals reasoned that Sanchez "failed to articulate why her condition should result in a different sentence." *Id.*

approach ignores the realities of the very system it operates in and does not provide for an appropriate sentence for mentally and physically ill defendants.

V. IS *BOOKER* THE LIGHT AT THE END OF OUR TUNNEL?

> We are products of our past, but we don't have to be prisoners of it.[106]

Even though *Booker* explicitly abolished the mandatory nature of the Guidelines, judges consistently sentence defendants within the Guideline range because they are fearful to sentence "outside the box."[107] Therefore, a two-fold problem still remains: How do we achieve fairer sentencing procedures under *Booker*, and remedy the overcrowding and inadequate medical care in prison? As discussed in previous sections, the attempts to correct the problem either leave enormous holes to be filled, or simply overlook the problem.[108] This Comment proposes several new remedies for attacking the BOP plague by delegating specific approaches to, first, the courts and judges, second, to Congress and the Sentencing Commission, and lastly, to the BOP.

*A. A Call to Judges to Break Free from the Shackles of the Pre-*Booker *Era.*

Upon closer examination, it becomes evident that judges are acting as "prisoners" in this conflict. Judges restrict themselves to sentencing defendants within the Guidelines, even though the Guidelines are to be treated as advisory post *Booker*. Because judges are granted much more discretion under *Booker*, they must not be fearful of imposing sentences below the Guideline range. In light of *Booker* and the factors to be considered under 18 U.S.C. § 3553(a), judges must be more open-minded to sentences involving home confinement and probation for physically and mentally ill defendants.[109] To impose a reasonable and just

106. RICK WARREN, THE PURPOSE-DRIVEN LIFE JOURNAL Day 3 (Janice Jacobson ed. 2002).

107. Hon. Tim Leonard, *2004-2005 Supreme Court Review: Symposium Foreword*, 41 TULSA L. REV. 117, 120 (2005) (pointing out that many judges today treat the Guidelines as if they were still mandatory).

108. *See supra* Part IV (discussing the various efforts toward a solution to the lack of medical care in prison and attempts at providing fairer sentencing procedures, and how these attempts have failed to adequately address the problem).

109. Section 3553(a)(1) requires that sentencing courts consider the characteristics of the defendant, while section 3553(a)(2) stipulates that one of the main goals of sentencing is to provide the defendant with needed medical care in the "most effective manner." 18 U.S.C. §§ 3553(a)(1), (2). Taken together, these two provisions, mandate that characteristics, such as having a chronic illness, physical ailments, or mental or emotional conditions, must be

sentence, the courts cannot ignore the *individual* circumstances of each defendant, and therefore must impose a sentence that will most effectively treat the individual's conditions. In effect, judges can and must fashion a pattern of non-prison sentences for those battling physical and mental illnesses.

1. Combating the "Extraordinary" Requirement: Creating a Middle Ground Between a Non-existent and an "Extraordinary" Medical Impairment

Even after *Booker*, courts today require that the defendant suffer from an "extraordinary" medical impairment for the judge to consider a non-prison sentence.[110] To maintain this stringent view presently imposed by judges is to impose an "all or nothing" viewpoint: Either the defendant has an extraordinary impairment, or he or she is treated the same as any other healthy defendant. Using their discretion under *Booker*, judges must create a middle ground to provide a sentence for defendants suffering from a *significant* physical or mental illness (even though it may not be extraordinary), especially where a defendant has an effective treatment plan already in place.[111] Judges must balance the objectives of punishment and deterrence while also allowing those defendants to receive adequate medical treatment.[112]

---

taken into account. Thus, judges cannot ignore the crucial question of how the defendant will receive the most effective healthcare. Clearly, based on the statistics set forth in Part III, prison is not the answer. *See supra* Part III (discussing the inadequate healthcare in the BOP).

110. *See Sherman*, 53 F.3d at 788 (attempting to dissect the meaning of "extraordinary physical impairment"). The various cases discussed in *Sherman* mandated a shockingly high standard for the defendant to meet in order for his mental or physical illness to qualify as "extraordinary." *Id.* The prior decisions blatantly rejected heart conditions, paralysis, borderline mental retardation, chronic major depressive disorder, and scoliosis as "extraordinary" enough to meet that standard. *Id.*

111. *See, e.g.*, *Derbes*, 369 F.3d at 580-81 (discussing the lower court's emphasis on the importance of maintaining the defendant's treatment plan by his psychiatrist and the significance of enabling him to continue treatment under the same psychiatrist).

112. The objectives of sentencing are to provide punishment, deter others from engaging in the same behavior, and to protect others, while also enabling the defendant to receive proper treatment for any medical, mental, or substance abuse disorder. 18 U.S.C. § 3553(a)(2). Sentencing judges are also required to impose a sentence that is "sufficient but not greater than necessary" in order to satisfy those goals. 18 U.S.C. § 3553(a). Therefore, in formulating a "middle ground" theory, it may be helpful to implement a test that applies several factors, a balancing test, or a sliding scale approach.

Under a multi-factor test, sentencing courts would consider certain factors, such as the degree of diminished capacity due to the physical or mental illness, the defendant's ability to function in everyday activities, the extent of medical care required by the defendant in treating his or her illness, the availability and quality of medication and/or treatment programs in the BOP, and the current treatment and medication received by the defendant

2. Addressing the Downfalls

One downfall in this proposed approach is that establishing a new category for those defendants battling *significant* but not extraordinary physical or mental illness will allow for greater exercise of discretion on the part of judges. However, the courts can build precedent, as they have done in the past, by establishing, breaking down, and re-establishing effective rules in assessing the medical needs of defendants until a workable and effective approach is fashioned.[113]

This creation of a new category may invoke a separation of powers issue in which the judges may be viewed as infringing on the powers vested in the BOP. The response to this downfall lies in one of the very milestones of *Booker*'s history – the *Mistretta* case.[114] *Mistretta* explicitly provided the Judicial Branch with discretion in sentencing and held that this discretion would not undermine other duties vested in other branches of government.[115] Allowing judges to use their discretion to sentence a defendant to

---

outside of prison. Other factors to be considered would include the lowered life expectancy of the defendant due to the physical or mental illness, or whether the defendant is deteriorating because he or she is elderly. *See* Mary Price, *The Other Safety Valve: Sentence Reduction Motions under 18 U.S.C. § 3582(c)(1)(A)*, 13 FED. SENT'G REP. 188, 191 (2001) (proposing similar factors to be considered in deciding whether to reduce a defendant's time in prison when he has already been sentenced and is currently serving time in prison).

Under the proposed balancing approach, judges would weigh the effects, or injury, of incarcerating the physically/mentally ill defendant against the sufficiency, or appropriateness, of sentencing the defendant to imprisonment. Similarly, in a sliding scale approach, the decision of whether or not to impose a prison sentence (as opposed to a non-prison sentence), and the length of a sentence (if prison is chosen), would depend on, for example, the seriousness of the defendant's medical condition and/or the extensiveness of the medical treatment required to accommodate the defendant's health. In theory, the more serious the defendant's ailments or mental illness (or the more extensive the required treatment is), the more appropriate a non-prison sentence would be. Note that under these approaches, the defendant is not limited to the all-or-nothing "extraordinary impairment" requirement.

113. For example, suitable approach may be a five factor test where all five factors must be addressed in relation to the defendant's physical or mental health. A subsequent court may decide that one of those factors should not be addressed, or that two additional factors should be incorporated into the test. This, in and of itself, would create precedent for future courts to follow.

114. *See Mistretta*, 488 U.S. at 380 (addressing the defendant's argument that the Sentencing Reform Act and the creation of the Sentencing Commission by Congress violated the separation of powers doctrine). The Court found that granting legislative powers to the Sentencing Commission, which was an "independent body" under the Judicial Branch, did not violate the separation powers because the powers granted were not excessive. *Id.* at 412.

115. *Id.* at 385. The *Mistretta* court further reasoned that the theory of separation of powers, which is so firmly rooted in our constitutional history, is not contravened "by mere anomaly or innovation." *Id.*

an alternative to imprisonment due to physical or mental health concerns requires no more power than what is already afforded the courts during sentencing. Thus, the only repercussion the BOP would feel would be a decrease in the number of incoming inmates, which would actually be an improvement to the overcrowding problem.

3. *Is the Ball in the Judges' Court?: Moving Away from* Booker

Booker stands on shaky ground.[116] Several Circuit Courts have chosen to adopt a presumption of reasonableness when the sentence lies within the Guideline range.[117] Most recently, the Supreme Court granted certiorari in two cases to determine two specific issues relating directly to the Guidelines.[118] The first issue considered by the Supreme Court was whether a sentence within the Guidelines should be granted a presumption of reasonableness.[119] The second issue was whether a judge is required to show "extraordinary circumstances" when sentencing a defendant substantially below the range under the Guidelines.[120] In reviewing these issues, the Supreme Court found that a presumption of reasonableness is given to sentences that are within the Guideline range.[121] However, this presumption consequently reverts the Guidelines back to a mandatory nature, which was expressly prohibited under *Booker*.[122]

---

116. *See* Hon. Tim Leonard, *supra* note 107, at 119 (predicting that the *Booker* decision is the case most likely to be revisited by the Supreme Court). Courts are still anticipating more guidance as to what exactly is meant by "advisory" Guidelines. Linda Greenhouse, *Supreme Court to Revisit Federal Sentencing Issues*, N.Y. TIMES, Nov. 3, 2006, at 17.

117. United States v. Morris, 448 F.3d 929, 931-32 (6th Cir. 2006); United States v. Wurzinger, No. 05-3803, 2006 U.S. App. LEXIS 26917, at *4 (7th Cir. Oct. 30, 2006); United States v. Myers, 439 F.3d 415, 417 (8th Cir. 2006); United States v. Kristl, 437 F.3d 1050, 1054 (10th Cir. 2006).

118. Greenhouse, *supra* note 117. These two highly anticipated cases were *United States v. Rita*, 127 S. Ct. 2456 (2007), and *Claiborne v. United States*, 127 S. Ct. 551 (2006). Sadly, Mr. Claiborne's case was later dismissed by the Supreme Court, vacating the Eighth Circuit's judgment as moot, due to the truly unfortunate death of the defendant, Mr. Mario Claiborne. *Claiborne*, 127 S. Ct. 2245 (2007). The Supreme Court subsequently granted certiorari in *United States v. Gall*, 127 S. Ct. 2933 (2007), as a replacement for *Claiborne*.

119. Greenhouse, *supra* note 117, at A.1; *Claiborne*, 127 S. Ct. at 551.

120. Greenhouse, *supra* note 117, at A.1; *Claiborne*, 127 S. Ct. at 551.

121. *Rita*, 127 S. Ct. at 2459, 2465 (holding that this presumption only applies to appellate review and emphasizing that district courts do not enjoy this presumption when determining a sentence).

122. The Supreme Court recognized in its decision that this presumption may very well "encourage sentencing judges to impose Guidelines sentences," but chose to ignore the constitutional implications this would inevitably cause. *Rita*, 127 S. Ct. at 2467. Clearly, this brings back the recurring issue of a Sixth Amendment violation.

The second issue was just recently decided by the Supreme Court. Previously, the Eighth Circuit held that "[a]n extraordinary reduction [in sentence] must be supported by extraordinary circumstances."[123] However, the Supreme Court reversed the Eighth Circuit, holding that "extraordinary" circumstances are *not* required to justify a sentence outside the Guideline range.[124] The Supreme Court further established that while a sentence within the Guideline range may be treated as presumptively reasonable, a sentence outside the Guideline range is *not* to be treated as presumptively *un*reasonable.[125] Additionally, the *Gall* Court provided support to the argument that probation may be an adequate form of punishment in many cases.[126] The *Gall* decision clearly paves the way for judges who wish to sentence outside the Guideline range but have been hesitant in the wake of *Booker*. Judges should cling to the *Gall* opinion in support of giving lower sentences to those mentally and physically ill defendants whose punishment would be better served through a non-prison sentence.

B. Proposals for Congress

First, Congress must reject any sentencing legislation that would limit judges' discretion granted under *Booker*, such as the "Sentencing Fairness and Equity Restoration Act of 2006" proposed by Rep. Sensenbrenner.[127] This bill is aimed to strip judges of their discretion under *Booker* for imposing below Guidelines sentences, and would restore a mandatory-Guidelines regime. Instead, Congress should adopt a system similar to the Mentally Ill Offender Act.[128] In doing so, Congress can alleviate

123. United States v. Gall, 446 F.3d 884, 889 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 2933 (2007), rev'd, 128 S. Ct. 586 (2007). Just as the Eighth Circuit stated in *Claiborne*'s appellate opinion, the *Gall* court stated that a judge's justification for imposing a below-Guideline range sentence must be stronger the further the judge departs from the Guideline range. *Id.* In Gall's case, the Eighth Circuit found his sentence by the district court of twenty-six months probation unreasonable when his Guidelines range was thirty to thirty-seven months imprisonment. *Id.* at 886, 887, 889.

124. Gall v. United States, 128 S. Ct. 586, 595, 597 (2007). The Court emphasized that the same standard of review on appeal – the deferential abuse-of-discretion standard – applies to appellate review of any sentences, whether within the Guideline range, above it, or below it. *Id.* at 596. The only requirement of the district judge is that he provide an "adequate" explanation for his decision to sentence outside the Guideline range. *Id.* at 597.

125. *Id.* at 595.

126. *See id.* at 593, 595-96 (discussing the substantial restraints on an individual's liberty that are imposed by a sentence of probation).

127. *See supra* note 47 (discussing briefly the proposed legislation and its downfalls).

128. *See supra* Part IV.A. (discussing the introduction of the Mentally Ill Offender Treatment and Crime Reduction Act implemented at the state level).

the prisons of their assumed duty of acting as hospital or asylum for the physically and mentally ill, and focus more on diverting defendants to treatment programs.[129]

C. Proposed Amendments for the Sentencing Commission

The Sentencing Commission is required to publish updated and amended Guidelines each year and to hold public hearings.[130] The Commission must, therefore, embrace the changes taking place after *Booker*. It must realize the needs of individuals who are dealing with medical problems and the toll on the growing prison population to better account for these circumstances in the Guidelines.[131] The Commission can do so by incorporating mitigating provisions for those with physical or mental health problems. In reviewing and revising the Guidelines, the Commission must also keep in mind the goals of sentencing, in particular, the need to provide defendants with adequate medical care in the "most effective way."[132]

Congress should aim to extend the act to those dealing with physical ailments, as well.

129. Mentally Ill Offender Treatment and Crime Reduction Act of 2004, Pub. L. No. 108-414, § 3(3), 118 Stat. 2328; *see also An Examination of S. 1194, The Mentally Ill Offender Treatment and Crime Reduction Act of 2003: Hearing on S. 1194 Before the U.S. S. Comm. On the Judiciary*, (2003) (testimony of J. Evelyn Lundberg Stratton, Chair, Sup. Ct. of Ohio Advisory Comm. On Mentally Ill in the Courts) (praising the effects of the new legislation and discussing the projects that have been implemented in Ohio). Congress should look to the system adopted by the State of Ohio, which combines the efforts of the courts, the police, and the community with other departments and agencies who deal directly with the mentally ill and substance abusers. *Id.* Ohio's system aims at educating prison and court employees about the mentally ill, implementing a crisis intervention program for mentally ill in the community, and improving prison conditions for the mentally ill. *Id.* To reiterate, though, if Congress were to adopt legislation along these lines, it must also incorporate provisions geared towards defendants suffering from a physical impairment.

130. 28 U.S.C. § 994(o), (p), (x) (2000).

131. For example, the Sentencing Commission could provide a specific guideline lowering the sentence range for those defendants who are "at risk," such as the elderly and/or those suffering from a chronic physical condition, such as hypertension, diabetes, or arthritis. The Sentencing Commission could also create a guideline geared toward mentally ill defendants, possibly creating a scale in relation to how extraordinary or minor the impairment may be based on the weight of the expert testimony and other evidence. The Sentencing Commission could also explicitly create a provision advocating for a non-prison sentence, such as home confinement or probation, when it is clear that the defendant would have substantial problems in obtaining proper medical care if sentenced to a term of imprisonment. This provision could also apply if imprisonment would severely disrupt the medical treatment already in place, and if it is shown that the BOP cannot provide an equally effective and continuous alternative to that treatment.

132. 18 U.S.C. § 3553(a)(2). The Guidelines Manual contains numerous provisions that prohibit a defendant from receiving a lower sentence. For

D. Recommendations for the BOP

In general, the focus must be shifted from the BOP to the judges to remedy the problem plaguing our prisons. The BOP's consistent claim that it can address all medical needs of inmates has not proven true.[133] Frankly, the BOP simply does not have the financial capacity to fully address all of the problems within its medical system because of the overwhelming surge of defendants pouring into prison facilities and the under-funded staff and medical programs.[134]

Nevertheless, continuing attempts to address all medical needs of all inmates can and must still be a goal for the BOP. In general, the BOP must strive to achieve a higher standard of mental health treatment and medical care for its prisoners, improve the training and licensing of its medical staff, and increase its staffing. However, the BOP will more likely find more ways to shield the poor medical care provided behind its bars from the public eye, and continue boasting its ability to treat all medical conditions, as it has done in the past.[135] Therefore, the focus must shift to the judges, who *must* require more than a generalized assurance from the BOP that they would be able to treat a

---

example, the Guidelines Manual stipulates that sentencing courts generally are not to take into account a defendant's mental or physical condition, nor may they impose a non-prison sentence for defendant's falling into Zone D of the Sentencing Table. GUIDELINES MANUAL, *supra* note 10, §§ 5H1.3, 5H1.4, 5C1.1(f). Now that the Guidelines are purely advisory, these provisions must either be excised or more fully explained in order to rid its seemingly mandatory nature and allow for more discretion to be exercised by the judge. Even though these provisions are no longer mandatory, the language of the provisions themselves may still hinder defense attorneys from making such arguments and judges from sentencing outside the realm of those provisions. The Sentencing Commission could add a commentary note explaining that these provisions are no longer mandatory under *Booker* and need not be adhered to in every case.

133. *See supra* Part III. (addressing the inadequacy of the BOP's medical treatment for inmates).

134. HUMAN RIGHTS WATCH, *supra* note 51, at 49. What is worse is that the poorly funded medical programs do not seem to account for the drastic increase in cost to provide daily care to a physically or mentally ill inmate as opposed to "the average inmate." *See, e.g.*, *id.* (estimating that the "average daily cost" to care for a mentally ill inmate in a state facility is $140, as opposed to $80 for "the average inmate"); Ryan S. King & Marc Mauer, *Aging Behind Bars: "Three Strikes" Seven Years Later*, SENT'G PROJECT 3, 12 (2001) (reporting that the cost to care for an elderly inmate would total $1.5 million for a twenty-five year sentence, whereas the average inmate would only total $605,000 for a twenty-five year term). One can only assume that these figures have continued to climb over the past five years, and will continue to do so in the near future.

135. *See supra* note 97 (discussing examples of the BOP's efforts in enticing sentencing judges to believe that the BOP will provide adequate health care to the defendants being sentenced).

particular defendant's physical or mental health problem.[136] It would be advantageous to allow both the defense counsel and the prosecutor to research the types of treatment programs and medical care available to a particular defendant after the BOP's submission has been made.[137]

VI. CONCLUSION

How do we provide adequate healthcare and treatment to the mentally and physically ill defendant while maintaining a fair sentencing regime? *Booker* provides a solution to the problem. Prisons must no longer be used as warehouses for the physically and mentally infirm. The inadequacy of the BOP in treating patients in prison must be recognized by the courts. Because the new view set forth in *Booker* explicitly urges judges to see each defendant as an "individual," defendants should be afforded the same medical treatment as any other human being. Sentencing courts must not be "prisoners" of the pre-*Booker* era. Judges must realize the devastating effects a sentence of imprisonment has on a physically or mentally ill defendant, and use the sentencing discretion granted under *Booker* to provide effective medical treatment for these individuals.

136. Courts should require that the BOP submit a detailed report on how it intends to care for a defendant suffering from a physical or mental condition, just as the courts required in *Martin*, 363 F.3d at 50; *Derbes*, 369 F.3d at 582; and *Gee*, 226 F.3d at 902; *see also supra* Part IV.B (discussing several cases in which the courts rejected a "boilerplate" letter from the BOP).

137. The BOP might provide what appears to be a detailed report of numerous treatment programs available in prison, when in actuality, the defendant may not qualify for any of those programs. For example, in response to a judge's inquiry as to whether the BOP will be able to adequately treat a defendant suffering from a mental illness, the government might submit a letter from the BOP listing several treatment programs that are offered throughout the BOP facilities. At first glance, this may seem more than adequate in order to provide medical treatment in the "most effective manner." But after much research, defense counsel may discover that six out of eight of the programs only apply to males, and the remaining treatment programs are only available at high-security facilities. Thus, if the defendant would most likely be sentenced to a minimum security facility, and is female, it is most probable that she would not receive adequate medical care. Defense counsel should be aware of these types of assurances from the BOP and must research the programs to determine if they are truly available to each particular defendant.