

ment. This Court's Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence. Nor do they prohibit the sentencing judge from taking account of the Sentencing Commission's factual findings or recommended sentences. . . . The Sixth Amendment question, the Court has said, is whether the law *forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find (and the offender did not concede). . . . A nonbinding appellate presumption that a Guidelines sentence is reasonable does not *require* the judge to impose that sentence. Still less does it *forbid* the sentencing judge from imposing a sentence higher than the Guidelines provide for the jury-determined facts standing alone."¹¹⁶

In *United States v. Gall*,¹¹⁷ the Court held that, "while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard."¹¹⁸ The Court rejected "an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range," and also rejected "the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence." These approaches, the Court said, "come too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range."¹¹⁹

¹¹⁶ 551 U.S. at 352, 353 (emphasis in original). The Court added: "The fact that we permit courts of appeals to adopt a presumption of reasonableness does not mean that courts may adopt a presumption of unreasonableness. . . . [A]ppellate courts may not presume that every variance from the advisory Guidelines is unreasonable. . . . Several courts of appeals have also rejected a presumption of unreasonableness. . . . However, a number of circuits adhere to the proposition that the strength of the justification needed to sustain an outside-Guidelines sentence varies in proportion to the degree of the variance." *Id.* at 354–55.

¹¹⁷ 128 S. Ct. 586 (2007) (upholding a sentence of probation where the Guidelines had recommended imprisonment).

¹¹⁸ 128 S. Ct. at 591. "As explained in *Rita* and *Gall*, district courts must treat the Guidelines as the 'starting point and the initial benchmark.'" *Kimbrough v. United States*, 128 S. Ct. 558 (2007) (upholding lower-than-Guidelines sentence for trafficker in crack cocaine, where sentence "is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses"). A district court judge may determine "that, in the particular case, a within-Guidelines sentence is 'greater than necessary' to serve the objectives of sentencing." *Kimbrough*, 128 S. Ct. at 564.

¹¹⁹ 128 S. Ct. at 595. Justice Alito, dissenting, wrote, "we should not forget [that] . . . *Booker* and its antecedents are based on the Sixth Amendment right to trial by jury. . . . It is telling that the rules set out in the Court's opinion in the present case have nothing to do with juries or factfinding and, indeed, that not one of the facts that bears on petitioner's sentence is disputed. What is at issue, instead, is