# WHEN "REASONABLENESS" IS NOT SO REASONABLE: THE NEED TO RESTORE CLARITY TO THE APPELLATE REVIEW OF FEDERAL SENTENCING DECISIONS AFTER *RITA*, *GALL*, AND *KIMBROUGH*

*Craig D. Rust*[*]

## INTRODUCTION

"[A] district judge who gives harsh sentences to Yankees fans and lenient sentences to Red Sox fans would not be acting reasonably even if her procedural rulings were impeccable."[1] This is the guidance that Justice Stevens provides the judges of the United States Circuit Courts of Appeals who frequently face the unenviable task of attempting to decipher just what the "reasonableness" test laid out in *United States v. Booker*[2] means when evaluating criminal sentences imposed by district courts. Was Justice Stevens implying that, absent an astonishingly brazen display of bias, appellate courts should universally defer to the wisdom of the district court judge? Or, was Justice Stevens simply illustrating one of many possible ways that a trial judge could err in determining a sentence for a given defendant?

Circuit courts across the country are currently grappling with these very questions. The Supreme Court's decision in *Booker* declared the system of mandatory sentencing guidelines, in place for over twenty years, unconstitutional.[3] However, rather than discard the guidelines entirely, a divided Court decided to make those same

[*] George Mason University School of Law, Juris Doctor Candidate, May 2010; Notes Editor, *George Mason Law Review*, 2009-2010; University of California, Davis, B.S., Managerial Economics, 2005. I would like to thank Phillip Talbert, Chief of Appeals for the Office of the U.S. Attorney in the Eastern District of California, and Professor Michael O'Neill for all of their guidance and helpful insight. I would also like to thank Rosanne Rust for all of her continual support and assistance in writing this Comment.

[1] Rita v. United States, 551 U.S. 338, 365 (2007) (Stevens, J., concurring).

[2] 543 U.S. 220, 261 (2005).

[3] *Id.* at 226-27.

guidelines "advisory."[4] The lack of a clear consensus on this issue among the Supreme Court Justices has resulted in a series of post-*Booker* decisions that have done little to clarify what role, if any, appellate courts should play in sentencing decisions.[5] With district court judges departing from the congressionally-approved guidelines on their own volition in over fifteen percent of federal criminal cases,[6] this is a matter of some urgency in the criminal justice system and not merely fodder for academic debate.[7] Given the heavy volume of appeals, circuit court judges need a standard that they can consistently apply, preferably one that effectively accounts for both the Supreme Court's constitutional concerns and Congress's legislative intent in establishing the Sentencing Guidelines in the first place.

Justice Stevens himself has acknowledged that judicial standards for reasonableness in sentencing are "yet-to-be-defined."[8] Judge Sykes of the Seventh Circuit recently noted that because "the contours of substantive reasonableness review are still emerging," we cannot target a fixed point at which a sentence turns from reasonable to unreasonable.[9] In the absence of clear guidance in terms of policy goals or procedural directives from the Supreme Court (or post-*Booker* sentencing reform by Congress), the circuit courts have largely been left to their own devices to craft rules and standards for the review of sentences. This confusion threatens to undermine the policy goals Congress sought to promote in overwhelmingly passing sweeping sentencing reform more than twenty years ago. Circuit court judges need to know what this "reasonableness" standard truly means in order to properly review these cases. Does it mean that sentences that are unusually lenient or harsh need to be carefully reviewed to ensure the district judge complied with congressional man-

[4] *Id.* at 246.

[5] *See infra* Part I.D.

[6] As of September of 2008, there had been 5,960 cases where district court judges had departed from the Guidelines since *Gall* and *Kimbrough* were decided in 2007, excluding Government-sponsored departures. U.S. SENTENCING COMMISSION, PRELIMINARY POST-KIMBROUGH/GALL DATA REPORT 3 (2008), http://www.ussc.gov/USSC_Kimbrough_Gall_Report_September_08_Final.pdf.

[7] *See, e.g.*, Emily Lounsberry, *Federal Judges Freed from Sentencing Rules*, PHILA. INQUIRER, July 26, 2009, *available at* http://www.philly.com/philly/news/homepage/51709512 (noting the wide disparities in sentences recently received by defendants in federal corruption cases).

[8] *Rita*, 551 U.S. at 365 (Stevens, J., concurring).

[9] United States v. Wachowiak, 496 F.3d 744, 750-51 (7th Cir. 2007).

dates? Or, does it mean that district court judges are free to impose any type of sentence they see fit, without fear of interference from appellate courts? While many courts seem to gravitate toward one extreme or another, this Comment argues that a more nuanced approach that attempts to find a middle ground between these two positions would better reflect both the Supreme Court's *Booker* concerns and Congress's legislative goals.

Part I of this Comment provides a brief history of the appellate review of sentencing decisions during the rise and fall of the mandatory sentencing guideline regime, explains why the Supreme Court ultimately decided to employ a reasonableness test, and summarizes what the Court has said that test means. Part II looks at several recent circuit court decisions in an effort to identify how this test is being employed in practice, and what sources of disagreement have manifested themselves in these decisions. Part III argues that these sources of tension could be alleviated by prioritizing certain sentencing goals, such as the need to avoid sentencing disparities between defendants in similar circumstances found in 18 U.S.C. § 3553(a)(6). This type of analysis would ensure that district courts remain free to use their post-*Booker* discretion, while paying respect to the legitimate policy goals that led Congress to implement a system of mandatory sentencing guidelines in the first place.

## I. BACKGROUND

### A. Federal Sentencing Prior to 1984

Although the mandatory federal Sentencing Guidelines were perhaps not as successful as reformers had initially hoped,[10] knowing why Congress decided to initially implement them helps to appreciate the current need for meaningful appellate review in the post-*Booker* criminal justice system.[11] After all, if the pre-Guidelines system was so effective, presumably the Sentencing Reform Act that installed the Guidelines would not have passed both Houses of Congress with

[10] *See* Nancy Gertner, Rita *Needs* Gall–*How to Make the Guidelines Advisory*, 85 DENV. U. L. REV. 63, 63 (2007) (stating that the Guidelines are now "widely regarded as a failure").

[11] For a far more comprehensive and authoritative look at the problems with the pre-Guidelines indeterminate sentencing, *see generally* MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER (1973).

overwhelming majorities.[12]

Prior to the implementation of the mandatory Guidelines, federal district court judges were given "virtually unreviewable discretion" in their sentencing decisions.[13] Once a judge received a guilty verdict from the jury or a guilty plea from the defendant, the judge wielded nearly total control over the sentencing process.[14] Acting alone, the judge made decisions as to what evidence to consider and whether to hold hearings.[15] Judges had no standards to assist them in making decisions, and were not required to explain why they selected a given sentence.[16] Few attempts were made to appeal sentencing decisions, since it was understood that circuit courts would defer to district court judges in this area.[17] In 1974, the Supreme Court stated that "well-established doctrine bars review . . . of sentencing discretion."[18]

According to some prominent critics, this pre-Guidelines period was one of "arbitrary cruelt[y]."[19] Studies found that judges' nearly unchecked power led to great disparities in sentencing based on, among other things, "geography, race, gender, socioeconomic status, and judicial philosophy."[20] In one experiment, fifty federal trial judges from the Second Circuit were all asked to issue sentences for twenty different defendants convicted of various crimes.[21] In the case of one hypothetical defendant, the sentences varied from three to twenty years imprisonment;[22] in another, from probation to seven and

[12] Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 223 (1993).

[13] Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747, 755 (1982).

[14] Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 693 (2005).

[15] *Id.*

[16] *Id.*

[17] Cynthia K.Y. Lee, *A New "Sliding Scale of Deference" Approach to Abuse of Discretion: Appellate Review of District Court Departures Under the Federal Sentencing Guidelines*, 35 AM. CRIM. L. REV. 1, 3 (1997).

[18] Dorszynski v. United States, 418 U.S. 424, 443 (1974).

[19] FRANKEL, *supra* note 11, at 103. Judge Frankel was himself a district court judge in the Southern District of New York. Steven Greenhouse, *Marvin Frankel, Federal Judge and Pioneer of Sentencing Guidelines, Dies at 81*, N.Y. TIMES, Mar. 5, 2002, at C15.

[20] *See* Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223, 229 (2002).

[21] *See* PIERCE O'DONNELL ET AL., TOWARDS A JUST AND EFFECTIVE SENTENCING SYSTEM 7-10 (1977).

[22] *Id.* at 8.

a half years imprisonment.[23] Judges disagreed even on whether a defendant deserved imprisonment or mere probation in sixteen of the twenty cases.[24]

The lack of appellate review of sentencing decisions contributed to these disparities by not subjecting district court judges to the "uniform requirements of procedural regularity and prescribed substantive criteria that appellate review lends to almost every other area of the law."[25] Famed sentencing reformer Judge Marvin Frankel described the absurdity that a $2000 civil judgment is reviewable by at least one appellate court in every state, but a prison sentence of twenty years and a $10,000 fine is not subject to review in federal appellate courts.[26]

In short, the problems with sentencing disparities in the pre-Guidelines era were real. In early 1984, Senator Edward Kennedy introduced a proposal calling for an overhaul of the sentencing system which passed the Senate by a vote of eighty-five to three.[27] This issue was serious enough to galvanize representatives, from both sides of the aisle and different ideological backgrounds, to pass a bill that made sweeping changes to the criminal justice system.[28]

### B. The Sentencing Reform Act of 1984

Congress responded to the problem of sentencing disparities by passing the Sentencing Reform Act of 1984 ("SRA").[29] The SRA

[23] *Id.*

[24] *Id.* at 10.

[25] *Id.*

[26] FRANKEL, *supra* note 11, at 76-77. In fact, a key part of Judge Frankel's proposed sentencing reform included the establishment of meaningful appellate review. *Id.* at 85.

[27] Stith & Koh, *supra* note 12, at 261.

[28] *Id.* at 285. *See also* Tom Goldstein, *Judicial Discretion Faces Curb in Senate Bill on Sentencing Methods*, N.Y. TIMES, June 16, 1977, at D14 (stating that early legislation addressing sentencing reform had been met with "surprising unanimity along the ideological and political spectrum").

[29] Sentencing Reform Act, Pub. L. No. 98-473, 98 Stat. 1987 (1984) (codified as amended at 18 U.S.C.A. §§ 3551-86 (West 2000) and 28 U.S.C.A. §§ 991-98 (West 2000)). The Senate Report relating to the SRA makes it crystal clear that eliminating unwarranted sentencing discretion was a driving force behind the bill. The Report criticizes the pre-SRA system for allowing "each judge . . . to apply his own notions of the purposes of sentencing." S. Rep. No. 98-225, at 31 (1984). The Report claimed that the result was that "every day federal judges mete out an unjustifiably wide range of sentences to offenders with similar histories, convicted of similar crimes, [and] committed under similar circumstances." *Id.* Further, the Report pins the blame for these disparities directly on the "unfettered discretion" of federal

established the Federal Sentencing Commission, which in turn had the authority to establish the Sentencing Guidelines.[30] District court judges were generally required to impose a sentence within the range set forth by the Guidelines for a given offense, absent "aggravating or mitigating circumstance[s] . . . not adequately taken into consideration by the Sentencing Commission."[31] The Guidelines went into effect in 1987 and were declared constitutional by the Supreme Court in 1989.[32]

Although it is unnecessary to detail here exactly how the Guidelines worked in practice,[33] it is important to understand that they limited the role of the federal trial judge to that of a fact-finder.[34] The Sentencing Guidelines contained a comprehensive list of aggravating or mitigating factors that warranted consideration for a given offense; the judge then determined whether those factors were present in the current case.[35] Once these findings were made, the judge used a sentencing grid to calculate the appropriate range of punishment for the particular defendant.[36] At that point, the judge could either select a sentence within the given range, or depart from it on the basis of one of the grounds for departure provided for in the Guidelines.[37]

In sharp contrast to the pre-Guidelines system, the SRA provided for appeal mechanisms allowing appellate courts to ensure that district courts rigorously adhered to the Guidelines.[38] To accomplish this task, appellate courts reviewed Guideline sentencing decisions under three separate standards of review.[39] The most stringent of

judges. *Id.*

[30] Klein, *supra* note 13, at 699.

[31] 18 U.S.C.A. § 3553(b)(1) (West 2009).

[32] Mistretta v. United States, 488 U.S. 361, 412 (1989).

[33] *See generally* William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 After* Booker *and its Progeny*, 40 CONN. L. REV. 631, 641-44 (2008) (summarizing district court use of the Guidelines to calculate sentencing ranges).

[34] Klein, *supra* note 14, at 694.

[35] *Id.*

[36] Berry, *supra* note 33, at 643.

[37] *Id.*

[38] Jeffrey S. Sutton, *An Appellate Perspective on Federal Sentencing After* Booker *and* Rita, 85 DENV. U. L. REV. 79, 80-81 (2007). *See also* S. REP. No. 98-225, at 60 (1984) (stating that appellate courts were to review the reasonableness of any departures from the Guidelines, and to ensure the district court properly calculated the Guideline range).

[39] Lee, *supra* note 17, at 3.

these standards was the *de novo* review of a district court's decision to depart from the Guidelines on the basis of circumstances "not adequately considered by the Sentencing Commission" under 18 U.S.C. § 3553(b)(1).[40] In evaluating the extent of a district court's departure from the Guidelines, appellate courts applied an abuse of discretion standard.[41] Lastly, appellate courts could only reverse a trial court's fact-finding if it was clearly erroneous.[42]

Appellate courts took their congressional mandate to heart.[43] In 1996, the government won remand of 85% of the cases that it appealed on the basis of the district court's downward departure from the Guidelines.[44] Thus, the appellate case law clearly indicated that the Guidelines needed to be taken seriously by district court judges.[45]

However, in the 1996 case *Koon v. United States,*[46] the Supreme Court rejected the three-tiered standard of review in favor of a universal "abuse of discretion" standard that afforded the district courts more sentencing discretion.[47] Although the Court's reading of the SRA in this case has been called into question,[48] district courts nonetheless have increasingly began departing from the Guidelines once the threat of appellate review had been weakened.[49]

Congress reacted by passing the PROTECT Act in 2003,[50] which expressly overturned *Koon* and established *de novo* review for

---

[40] *Id. De novo* judicial review is "[a] court's nondeferential review of [a] . . . decision, usu[ally] through a review of the administrative record plus any additional evidence the parties present." BLACK'S LAW DICTIONARY 705 (8th ed. 2004).

[41] Lee, *supra* note 17, at 3. Abuse of discretion is defined by Black's as "[a]n adjudicator's failure to exercise sound, reasonable, and legal decision-making." BLACK'S LAW DICTIONARY 9 (8th ed. 2004).

[42] Lee, *supra* note 17, at 3. Under the "clearly-erroneous" standard, "a judgment will be upheld unless the appellate court is left with the firm conviction that an error has been committed." BLACK'S LAW DICTIONARY 210 (8th ed. 2004).

[43] *See* Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1445-46 (2008).

[44] *Id.* at 1445.

[45] *Id.* at 1447.

[46] 518 U.S. 81 (1996).

[47] *Id.* at 99. *But see* Lee, *supra* note 17, at 4 (arguing that *Koon* still allowed for *de novo* review in certain cases).

[48] Commentators have described the Court's reading in *Koon* of the SRA as "more wishful thinking than a statement of actual fact." Douglas A. Berman, Rita*, Reasoned Sentencing, and Resistance to Change*, 85 DENV. U. L. REV. 7, 11 n.24 (2007).

[49] Stith, *supra* note 43, at 1465.

[50] Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act, Pub. L. No. 108-21, 117 Stat. 650 (2003).

Guideline departures.[51] With the specter of stringent appellate review again looming, district courts recommitted themselves to the Guidelines, lowering their—non-government sponsored—downward departure rate from 18.3% in 2001[52] to 5% in 2004.[53]

However, this renewed era of heightened appellate review did not last long. Within two years, the Supreme Court struck back in its landmark *Booker* decision.

### C. United States v. Booker

In 2005, the Supreme Court decided that it had finally had enough with the mandatory Sentencing Guidelines and declared them unconstitutional in *United States v. Booker*.[54] While the Court's discomfort with mandatory guidelines in general had been apparent since at least 2000,[55] it was not until *Booker* that the Court was willing to put an end to the mandatory nature of the Federal Guidelines.

To say that *Booker* was narrowly decided would be an under-

[51] Stith, *supra* note 43, at 1470-71. The legislative history also indicates that Congress's intent to overrule *Koon* was unequivocal.

> [T]his section would for all cases require courts to . . . change the standard of review for appellate courts to a de novo review to allow appellate courts more effectively to review illegal and inappropriate downward departures [and] prevent sentencing courts, upon remand, from imposing the same illegal departure on a different theory . . . .

H.R. REP. NO. 108-66, at 694 (2003). Regarding crimes that victimize minors, Congress noted that it wanted the Sentencing Commission to "promulgate amendments to ensure that the incident of downward departure are substantially reduced." *Id.* In testimony to the House Judiciary Committee, an official from the U.S. Department of Justice expressed outrage over the subsequent effects of *Koon*, noting in one case that a man convicted of accessing 1,300 pictures of child pornography received a downward departure from the Guidelines because he would be unusually susceptible to abuse in prison. *Child Abduction Prevention Act and Child Obscenity and Pornography Act of 2003: Hearing on H.R. 1104 and H.R. 1161 Before the H. Comm. of the Judiciary*, 108th Cong. (2003) (statement of Daniel P. Collins, Associate Deputy Attorney General) (referring to United States v. Parish, 308 F.3d 1025 (9th Cir. 2002)).

[52] Stith, *supra* note 43, at 1456 n.137.

[53] *Id.* at 1471.

[54] *Booker*, 543 U.S. at 226.

[55] *See* Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (holding that the Sixth Amendment prohibited judges from making factual determinations in the absence of a jury in order to justify a sentence above the statutory maximum); *see also* Blakely v. Washington, 542 U.S. 296, 305 (2004) (holding that a state court judge could not impose an above-guidelines sentence based on facts not found by a jury, but refusing to express an opinion on the Federal Guidelines).

statement. In an unusual[56] dual decision, the Court first addressed whether the Federal Guidelines were constitutional under the Sixth Amendment.[57] Freddie Booker had been convicted in federal court by a jury of possessing at least fifty grams of crack, based on evidence presented at trial that Booker had 92.5 grams in his duffel bag.[58] The Guidelines sentencing range for Booker's offense (based on possessing this quantity of drugs) was 210 to 262 months imprisonment.[59] At sentencing, the judge found, by a preponderance of the evidence, that Booker had actually possessed 566 grams of crack in addition to the 92.5 grams found beyond a reasonable doubt by the jury.[60] This finding empowered the district court judge to sentence Booker to a 360 month prison term, ten years longer than the Guidelines range that was supported by the jury's findings.[61]

Five justices held that the Sixth Amendment requires any fact used by a judge to impose a sentence above the statutory maximum to be proven beyond a reasonable doubt.[62] Since Congress made the Federal Guidelines binding under 18 U.S.C. § 3553, the Guidelines range effectively served as a statutory maximum.[63] Since the Guidelines often required district court judges to make these types of sentence-enhancing factual findings that increased sentences beyond these statutory maximums based on an evidentiary standard less than "beyond a reasonable doubt," the Guidelines (at least in a mandatory form) were incompatible with the Sixth Amendment.[64]

In Part Two of the opinion—the "remedial opinion"—, Justice Ginsburg switched sides and joined the Part One dissenters led by Justice Breyer.[65] Bound by the Part One holding that the Guidelines were unconstitutional, the question became what—if any—role the Guidelines would play going forward.[66] The fact that the five jus-

[56] Sandra D. Jordan, *Have We Come Full Circle? Judicial Sentencing Discretion Revived in* Booker *and* Fanfan, 33 PEPP. L. REV. 615, 628 (2006).

[57] *Booker*, 543 U.S. at 226.

[58] *Id.* at 235.

[59] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Booker*, 543 U.S. at 244 (demonstrating that Justices Stevens, Scalia, Souter, Thomas, and Ginsburg formed the Part I majority).

[63] *Id.* at 233-34.

[64] *Id.* at 235-36.

[65] *Id.* at 244-45.

[66] *Id.* at 245.

tices forming the Part One majority splintered off and wrote or joined no fewer than four different opinions on the remedial question perhaps explains the confusion over the proper function of the Guidelines today.[67]

In the remedial opinion, the Court concluded that the portion of the federal sentencing statute that made the Guidelines mandatory needed to be severed, and that the Guidelines should continue to operate in an advisory role.[68] While a district court judge would still be required to calculate the appropriate Guidelines range for a given defendant, that range would only be one of the factors a judge needed to consider in his sentencing decision.[69] The other factors to be considered are listed in 18 U.S.C. § 3553(a),[70] and include several broad categories such as the need for the sentence to reflect the nature of the offense, the defendant's personal characteristics, the seriousness of the offense, promoting respect for the law, providing restitution for the victims, and eliminating unwarranted sentencing disparities.[71] However, the Court acknowledged that Congress's primary purpose in passing the SRA was to eliminate the unwarranted sentencing disparities.[72]

Having established that the Guidelines would no longer be mandatory, the Court then excised the related portion of the statute giving appellate courts the authority to review any departures from the Guidelines under a *de novo* standard as required by the PROTECT Act.[73] Instead, the Court installed a system of appellate review for "unreasonableness."[74] Essentially, appellate courts were now to look at the district court's application of all the § 3553(a) factors, and reverse only if the district court came to an unreasonable conclusion after considering those factors.[75] The Court argued that

[67] *Booker*, 543 U.S. at 245; *id.* (Stevens, J., dissenting in part) (stating that the appropriate remedy would be to simply have all relevant sentencing facts proven before a jury); *id.* at 303 (Scalia, J., dissenting in part) (agreeing with Stevens' remedy but disagreeing with some of his reasoning); *id.* at 313 (Thomas, J., dissenting in part) (agreeing with Stevens' remedy but disagreeing with his severability analysis).

[68] *Booker*, 543 U.S. at 245.

[69] *Id.*

[70] *Id.*

[71] 18 U.S.C.A. § 3553(a)(1)-(7).

[72] *Booker*, 543 U.S. at 253.

[73] *Id.* at 259.

[74] *Id.* at 261.

[75] *Id.*

the use of a reasonableness standard would "promote uniformity in . . . sentencing," although it admitted that this system would not be as effective at policing this uniformity as the mandatory Guidelines.[76] Dismissing the dissenters' concerns that this would be an impracticable standard for appellate courts to wield effectively, the Court stated it had confidence that "appellate judges will prove capable . . . of applying such a standard across the board."[77]

One dissenter in particular, Justice Scalia, devoted much of his opinion to his predictions that this system of appellate review would be unworkable in practice.[78] Justice Scalia noted that the broad list of § 3553(a) factors, taken as a whole, amounted to little more than instructions for district judges to apply their own theories of "just punishment," "deterrence," and "protect[ion] [of] the public."[79] Under this system, Justice Scalia argued, sentencing judges who merely stated that they had "considered" the relevant factors would have the same complete discretionary authority of sentencing as they did prior to the SRA.[80] Thus, Justice Scalia anticipated that reasonableness review would "produce a discordant symphony of different standards, varying from court to court and judge to judge," while doing nothing to further the SRA's intended purpose of reducing sentencing disparities.[81] Judging by the number of post-*Booker* circuit court cases—several of which are discussed in Part II—offering different interpretations of what is "reasonable," it appears that Justice Scalia's concerns were well-founded.

### D. Post-Booker Supreme Court Decisions "Clarifying" Reasonableness Review

One of the first Supreme Court cases to revisit appellate review in the sentencing context was *Rita v. United States*.[82] Prompted by a circuit split, the *Rita* Court considered whether a district court's decision to impose a sentence within the advisory Guidelines range

[76] *Id.* at 263.
[77] *Booker*, 543 U.S. at 263.
[78] *Id.* at 303-13 (Scalia, J., dissenting in part).
[79] *Id.* at 304.
[80] *Id.* at 305.
[81] *Id.* at 312.
[82] 551 U.S. 338 (2007).

carried a presumption of reasonableness.[83] The Court held that a non-binding appellate presumption of reasonableness for Guidelines sentences was appropriate,[84] while emphasizing that only the circuit courts were entitled to make such a presumption.[85] The majority opinion explained that when both the sentencing judge and the Sentencing Commission have reached the same conclusion as to the proper sentence in a given case, there is a high likelihood that the sentence is reasonable.[86] Given that the Sentencing Commission had examined "tens of thousands" of sentences over a long period of time, the Court stated that it is "fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives."[87] In contrast, the Court stated that an appellate court could not presume a sentence *outside* the Guidelines was unreasonable.[88]

While the majority opinion limited itself to addressing a narrow issue in a relatively clear fashion, the concurring opinions in *Rita* added confusion as to what reasonableness review entails.[89] In one concurring opinion, Justice Stevens noted that *Booker* had "plainly" established a substantive review component, even though he was unwilling to define what that was beyond stating that a "judge who gives harsh sentences to Yankees fans and lenient sentences to Red Sox fans would not be acting reasonably."[90] In a separate concurring opinion, however, Justice Scalia disagreed that appellate review should include a substantive component, advocating a purely procedural review.[91]

Less than six months later, the Court again addressed the scope of appellate review of sentencing in *Gall v. United States*.[92] This time, the circuit courts were split over the amount of deference a district court was entitled to when substantially varying from the rec-

[83] *Id.* at 341.
[84] *Id.* at 347.
[85] *Id.* at 350. *See also* Nelson v. United States, 129 S. Ct. 890, 892 (2009) (per curiam) (noting that a district judge could not presume a Guidelines sentence to be reasonable).
[86] *Rita*, 551 U.S. at 347.
[87] *Id.* at 349-50.
[88] *Id.* at 354-55.
[89] *Id.* at 361-84 (Stevens & Scalia, JJ., concurring).
[90] *Id.* at 365 (Stevens, J., concurring).
[91] *Rita*, 551 U.S. at 381 (Scalia, J., concurring).
[92] 552 U.S. 38 (2007).

ommended Sentencing Guidelines range.[93] A majority of circuits had previously held that the "farther a district court varied from the Guidelines range, the more compelling the extraordinary circumstances must have been in order to justify the variance." [94] In other words, the district court judge's justification of the departure had to be proportional to the extent of that departure.

The Supreme Court rejected this approach, stating that a rule that requires " 'extraordinary circumstances' to justify a sentence outside the Guidelines range" was invalid.[95] Neither could appellate courts apply a "mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence."[96] However, the Court also stated, in a somewhat contradictory fashion, that it is "uncontroversial that a major departure should be supported by a more significant justification than a minor one."[97] Attempting to reconcile these views, the Court later stated that appellate courts could consider the extent of the deviation, but must give the district court deference as to whether the circumstances justified that deviation.[98]

On the same day that *Gall* was decided, the Court attempted to resolve yet another circuit split in *Kimbrough v. United States*.[99] In *Kimbrough*, the Supreme Court addressed whether a district court could depart from the Guidelines on the basis of a judge's disagreement with the Guidelines' sentencing disparity for crack and powder cocaine offenses.[100] Recognizing that the Sentencing Commission's crack cocaine sentencing recommendations were derived from the differences in statutory minimums for the two offenses, and not on "empirical data and national experience," the Court held that the Guidelines were not entitled to any special deference in this case.[101] As a general rule, however, "closer review may be in order when the

[93] *Id.* at 40-41.

[94] Lindsay C. Harrison, *Appellate Discretion and Sentencing After* Booker, 62 U. MIAMI L. REV. 1115, 1132 (2008).

[95] *Gall*, 552 U.S. at 47.

[96] *Id.*

[97] *Id.* at 50.

[98] *Id.* at 50-51

[99] 552 U.S. 85 (2007).

[100] *Id.* at 92-93.

[101] *Id.* at 109 (quoting United States v. Pruitt, 502 F.3d 1154, 1171 (10th Cir. 2007) (McConnell, J., concurring)).

sentencing judge varies from the Guidelines based solely on the judge's view that the Guidelines range 'fails properly to reflect § 3553(a) considerations.' "[102] Therefore, while the Court allowed the district court to deviate from the Guidelines based on a policy disagreement with the Sentencing Commission in *Kimbrough*, it signaled that district judges should not interpret this decision as a green light to make these policy determinations more generally.

### E. The Current Standard of Review: A Brief Summary

After *Booker*, *Rita*, *Gall*, and *Kimbrough*, federal appellate court judges are left with one question: what now?

Given the Supreme Court's confusing jurisprudence on the issue,[103] it is best to start with what the circuit courts have been expressly told. The Court has held that appellate review of sentencing has both a procedural and a substantive component.[104] Procedural review consists of determining whether or not the district court properly calculated the Guidelines range, ensuring the judge did not treat the Guidelines as mandatory, and making sure that the court both adequately explained its reasons for imposing the sentence, and considered the factors in § 3553(a) in doing so.[105]

Substantively, the appellate court is to review whether the sentence imposed was reasonable using an abuse of discretion standard, taking into account the totality of the circumstances.[106] A within-Guidelines sentence *can* be treated as presumptively reasonable, but does not *have* to be.[107] On the other hand, appellate judges are forbidden from presuming that a departure from the Guidelines is

[102] *Kimbrough*, 552 U.S. at 109.

[103] *See id.* at 114-15 (Thomas, J., dissenting) (stating that the recent sentencing review jurisprudence has "no basis in law," and that there is "no principled way to apply the *Booker* remedy"); s*ee also* Richard G. Kopf, *The Top Ten Things I Learned From* Apprendi*,* Blakely*,* Booker*,* Rita*,* Kimbrough*, and* Gall, OHIO ST. J. CRIM. L. AMICI: VIEWS FROM THE FIELD (Jan. 2008), *available at* http://osjcl.blogspot.com (stating that the Court's *Booker* opinion "reveal[s] 'the power of holding two contradictory beliefs in one's mind simultaneously, and accepting both of them.' ").

[104] *Gall*, 552 U.S. at 51.

[105] *Id.*

[106] *Id.*

[107] *Rita*, 551 U.S. at 347.

unreasonable.[108] The appellate court can take into account the extent of any deviation from the Guidelines, but must give the district court deference as to whether the departure was warranted.[109] The fact that another sentence would have been reasonable under the circumstances is not grounds for reversal.[110] Close appellate scrutiny is warranted when the sentencing judge bases a departure on a policy disagreement with the Guidelines, but such a disagreement does not constitute automatic grounds for reversal.[111]

How post-*Booker* appellate review should be implemented, and even what its goals are, is unclear beyond the rudimentary framework described above. It is clear that Congress has directed the courts to consider a variety of sentencing goals,[112] and as recently as 2003, reducing sentencing disparities was at the top of the list.[113] It is equally evident that the Court has rejected Congress's intended method of implementing such goals (i.e., the mandatory Sentencing Guidelines) on constitutional grounds.[114] However, the Court's *Booker* opinion was so vague that, according to at least one justice, it can be reasonably interpreted as either making the Guidelines meaningless, or preserving the power of appellate courts to "police compliance" with them.[115] When given the opportunity to clarify what *Booker*'s reasonableness test meant in *Rita*, members of the Court frankly admitted that they could not articulate a precise standard.[116] As a result, appellate courts currently bear the burden of reading their own meaning into what makes a given criminal punishment "reasonable."

---

[108] *Id.* at 354-55.

[109] *Gall*, 552 U.S. at 51.

[110] *Id.*

[111] *Kimbrough*, 552 U.S. at 109.

[112] *See* 18 U.S.C.A. § 3553(a)(1)-(7).

[113] *See* Stith, *supra* note 43, at 1470-71 (stating that Congress passed the PROTECT Act to reduce judicial sentencing discretion).

[114] *Booker*, 543 U.S. at 226-27.

[115] *Gall*, 552 U.S. at 62-63 (Alito, J., dissenting).

[116] *See Rita*, 551 U.S. at 365 (Stevens, J., concurring) (stating reasonableness in this context was "yet-to-be-defined"); *see also id.* at 368 (Scalia, J., concurring) ("[W]hat 'reasonableness' review entails is not dictated by *Booker*.").

## II. COMPETING APPROACHES TO REASONABLENESS REVIEW IN THE CIRCUIT COURTS

As Justice Alito noted in his *Gall* dissent, the Supreme Court has not clearly or consistently articulated what function it envisions circuit courts serving in the post-*Booker* world.[117] The opinions that follow, all issued since the Court decided the triumvirate of related cases in *Rita*, *Gall*, and *Kimbrough*, are intended to serve as examples of how circuit courts have interpreted the Court's recent decisions. The experiences of the federal appellate courts in sorting through the rubble of the mandatory Guidelines regime should be strongly considered in determining what changes or clarifications need to be implemented in the federal sentencing system going forward.

As the *Booker* remedial opinion noted, the Court's decision to weaken the means through which sentencing uniformity had been enforced plainly did not further Congress's goal of eliminating unwarranted disparities.[118] However, the remedial opinion's surgical removal of only the mandatory portion of the SRA was explicitly designed to promote Congress's goals as much as was possible given the Court's constitutional rulings in the case.[119] The result is that circuit courts have been instructed to pursue two goals that seem to be at odds with one another: appellate courts are to find ways to eliminate sentencing uniformity, but are forbidden from relying too heavily on the—now unconstitutional—tool that Congress provided to accomplish that task.

In analyzing the circuit courts' post-*Gall* and *Kimbrough* jurisprudence, it appears that, generally speaking, appellate judges are split into two camps. The first, by prioritizing the Court's Sixth Amendment concerns over possible disparity issues, appears to favor the purely procedural review advocated by Justice Scalia in *Rita*.[120] While perhaps paying lip service to the Court's instructions to also engage in meaningful substantive appellate review, this approach is in practice extremely deferential to the district court so long as the proper procedures have been followed.[121]

---

[117] *Gall*, 552 U.S. at 61-64 (Alito, J., dissenting).

[118] *Booker*, 543 U.S. at 263.

[119] *Id.*

[120] *Rita*, 551 U.S. at 381 (Scalia, J., concurring).

[121] Less charitably, Judge Gould of the Ninth Circuit has referred to this as the "rubber

The second group of judges appear to advocate a standard that is less deferential to the district court, which practically amounts to a "re-weighing of the facts in the context of §3553(a)," at least when the trial court has deviated substantially from the Sentencing Guidelines.[122] This group generally tends to express greater concern for Congress's intent to reduce sentencing disparities.[123] The following sections will discuss each approach in turn.

### A. The Deferential Approach

Many of the post-*Gall* appellate decisions appear to apply an extremely deferential standard of review. This approach is certainly the easiest to utilize from the perspective of an appellate judge, who does not need to delve too deeply into the record in order to decide whether the district court made a "reasoned" decision.[124] *Gall* chastised appellate courts for requiring "extraordinary" circumstances for Guidelines departures,[125] and required those courts to apply a deferential, but nebulous, "abuse-of-discretion" standard of review.[126] As a result, many appellate courts have found this relatively hands-off approach attractive.

Little more than two weeks after *Gall* and *Kimbrough*, the Eleventh Circuit applied this type of deferential review in *United States v. McBride*.[127] The defendant in this case, a diagnosed pedophile, pled guilty to distributing child pornography.[128] The district court calculated the appropriate Guidelines sentencing range at 151–188 months imprisonment, but decided to sentence the defendant to only eighty-four months imprisonment.[129] On appeal, the majority declined the government's invitation to reassess the weight that the district judge had assigned to the various § 3553(a) factors, holding

stamp" approach. United States v. Ruff, 535 F.3d 999, 1005 (9th Cir. 2008) (Gould, J., dissenting).

[122] United States v. Evans, 526 F.3d 155, 169 (4th Cir. 2008) (Gregory, J., concurring).

[123] *Id.* at 167.

[124] *Gall*, 552 U.S. at 59-60.

[125] *Id.* at 47.

[126] *Id.* at 59-60.

[127] 511 F.3d 1293 (11th Cir. 2007).

[128] *Id.* at 1295-96.

[129] *Id.*

that the district court had not made a "clear error of judgment."[130]

Judge Dubina dissented, claiming that a departure of almost fifty percent from the Guidelines minimum was unreasonable given that the defendant had a lengthy history of recidivism and the district judge had "unjustly fixated" on the defendant's tragic personal history.[131] Echoing Justice Scalia's *Booker* predictions,[132] Judge Dubina claimed that the majority was allowing the district judge to give "lip-service" to the many § 3553(a) factors while focusing almost exclusively on the personal history of the defendant.[133]

In *United States v. Grossman*,[134] the Sixth Circuit considered a case where a defendant had also pled guilty to the charge of distributing child pornography.[135] After properly calculating a Guidelines range of 135–168 months, the district court similarly decided to make a downward departure, this time sentencing the defendant to sixty-six months in prison and ten years of supervised release.[136] While the district court noted the defendant's education and potential for rehabilitation,[137] the district judge also railed against the Sentencing Guidelines themselves, stating that "[t]his is what happens when you take judging, which is a judge's job, and give it to a commission and say, [a]dd mathematical calculations and come up with a presumed sentence."[138] The court noted that the district judge, by making a point of his policy disagreements with the Guidelines, had possibly opened the door for heightened appellate scrutiny of the sentence under *Kimbrough*.[139] However, even though the majority conceded that the district judge's frustration with the Guidelines "may have gotten the best of him,"[140] the majority found that the district judge had made enough "individualized and rationally based" determinations about the defendant to justify upholding the sentence.[141] Thus, the

[130] *Id.* at 1297.
[131] *Id.* at 1299 (Dubina, J., dissenting).
[132] *Booker*, 543 U.S. at 312 (Scalia, J., dissenting).
[133] *McBride*, 511 F.3d at 1299 (Dubina, J., dissenting).
[134] 513 F.3d 592 (6th Cir. 2008).
[135] *Id.* at 594.
[136] *Id.* at 594-95.
[137] *Id.* at 596-97.
[138] *Id.* at 594.
[139] *Grossman*, 513 F.3d at 597-98.
[140] *Id.* at 598.
[141] *Id.* at 597-98.

panel was forced to choose between the conflicting directives of *Kimbrough*, which would suggest that the court carefully scrutinize departures based on policy disagreements,[142] and *Rita*, which directed appellate courts to give the trial judge "the benefit of the doubt,"[143] and clearly the court chose *Rita*'s approach.

*United States v. Evans*,[144] an identity fraud case argued in the Fourth Circuit, was decided a few months after *Gall* and *Kimbrough*. Unlike the previous two cases, here the defendant appealed his sentence after the district judge imposed a sentence of 125 months imprisonment—316% longer than the maximum under the Guidelines.[145] The prosecutor in the case had even moved "for a downward departure from the Guidelines range" of twenty-four to thirty months, because of the defendant's assistance in prosecuting another co-conspirator.[146]

Applying *Gall*, the Fourth Circuit found that it "must accord to the considered judgment of the district court."[147] Here the district judge had offered two separate reasons for the upward departure: the defendant's lengthy criminal history and the application of upward departure provisions in the Guidelines.[148] The panel held that where a district judge offers two or more reasons for imposing a given sentence, the fact that one of them may be invalid is not sufficient to justify reversing the judgment.[149] Turning to *Gall*, the Fourth Circuit noted that the Supreme Court had rejected a rule that would " 'require[] extraordinary circumstances to justify' " a Guidelines departure.[150] The court did mention that *Gall* also required the district judge's justification for the departure to be sufficiently compelling to support the degree of the variance,[151] but was apparently satisfied in this regard by the district judge's fifteen page opinion detailing the reasoning behind the sentence.[152]

---

142 *Kimbrough*, 128 S. Ct. at 574-75.
143 *Grossman*, 513 F.3d at 598 (citing *Gall*, 552 U.S. at 597).
144 526 F.3d 155 (4th Cir. 2008).
145 *Id.* at 158.
146 *Id.* at 160.
147 *Id.* at 164.
148 *Id.* at 165.
149 *Evans*, 526 F.3d at 165.
150 *Id.* at 165-66 (quoting *Gall*, 552 U.S. at 595).
151 *Id.* at 166.
152 *Id.* at 160.

Judge Gregory filed a concurring opinion, agreeing with the result in the case but arguing that "the words 'abuse of discretion' cannot be a legal incantation invoked by appellate courts to dispel *meaningful* substantive review."[153] Judge Gregory further noted that "consistent sentencing remains a significant priority of the [Supreme] Court, and district courts should keep this in mind . . . when they choose to venture beyond the correctly calculated guideline sentence."[154] Judge Gregory proposed his own standard of review, which would entail "assessing the district court's rationale for the sentence and reviewing its application of the facts to the guidelines and § 3553(a)," an approach he referred to as "re-weighing."[155]

In two decisions issued during the summer of 2008, the Ninth Circuit also endorsed an extremely deferential approach to appellate review—albeit over vigorous dissents.[156] The first of these, *United States v. Whitehead*, involved a defendant who had sold over one million dollars worth of counterfeit DirecTV access cards that allowed customers to access the company's satellite feeds for free.[157] After calculating a Guidelines range of forty-one to fifty-one months, the trial court imposed a sentence of probation, community service, and restitution.[158] In a brief two page opinion, the majority reasoned that the district court was simply more familiar with the facts of the case, and therefore, in a better position to " 'judge their import.' "[159]

Dissenting, Judge Bybee called the majority's position an "abdication of responsibility," and accused the majority of "turning a blind eye to an injustice."[160] Judge Bybee took issue with the majority's decision to affirm simply because the trial court was more familiar with the facts, stating that if this were the standard, "the majority's reasoning is true in every case."[161] Judge Bybee then went on to apply his own analysis of the § 3553(a) factors and how they related to

[153] *Id.* at 167 (Gregory, J., concurring).

[154] *Evans*, 526 F.3d at 167 (Gregory, J., concurring).

[155] *Id.* at 169.

[156] United States v. Whitehead, 532 F.3d 991 (9th Cir. 2008); United States v. Ruff, 535 F.3d 999 (9th Cir 2008). *See also* United States v. Carty, 520 F.3d 984, 993 (9th Cir. 2008) (declining to presume that a Guidelines sentence is reasonable, even though this was explicitly permitted in *Rita*).

[157] *Whitehead*, 532 F.3d at 992.

[158] *Id.*

[159] *Id.* at 993 (quoting *Gall*, 552 U.S. at 51).

[160] *Id.* at 994 (Bybee, J., dissenting).

[161] *Id.* at 997.

the case,[162] an approach similar to Judge Gregory's "re-weighing" analysis in *Evans*.[163] Importantly, the dissent noted that the appellate court had an obligation to reduce unwarranted sentencing disparities, and the defendant in this case—who took the case to trial—was being sentenced identically to his co-defendant who had pleaded guilty and cooperated with the government.[164]

The second Ninth Circuit case applying this hands-off approach was *Ruff*.[165] Here, the defendant was convicted of embezzlement and money laundering, having stolen inventory from his employer and sold it on eBay.[166] In imposing a sentence, the district court deviated from the Guidelines range of thirty to thirty-seven months by instead sentencing the defendant to one day of imprisonment and three years of supervised release.[167] The Ninth Circuit affirmed, holding that it is the "reasoned decision itself, not the specific reasons that are cited, [which] triggers our duty to defer."[168]

In his dissent, Judge Gould criticized the majority for replacing the abuse of discretion standard of review with a "rubber stamp."[169] Judge Gould seized on *Gall*'s language requiring that major departures from the Guidelines be supported by " '*significant justification*[s],' " and stated that the district court had erred in weighing the § 3553(a) factors.[170] Further, Judge Gould claimed that failing to meaningfully review sentences, especially in white collar cases, threatened to undermine the public's respect for the legal system.[171] Judge Gould went on to note that one of the key policy objectives of the Sentencing Commission was to "rectify the perceived leniency toward white collar offenders by providing in the Guidelines short but certain terms of imprisonment."[172]

---

[162] *Whitehead*, 532 F.3d at 997-99.

[163] *Id.* at 997 (Bybee, J., dissenting) (arguing this type of analysis led him to believe the district court abused its discretion).

[164] *Id.* at 999.

[165] *See Ruff*, 535 F.3d 999.

[166] *Id.* at 1001.

[167] *Id.* at 1001-02.

[168] *Id.* at 1003.

[169] *Id.* at 1005.

[170] *Ruff*, 535 F.3d at 1006 (Gould, J., dissenting) (quoting *Gall*, 552 U.S. at 50).

[171] *Id.*

[172] *Id.* at 1006-07 (citing Peter Fridirci, *Does Economic Crime Pay in Pennsylvania? The Perception of Leniency in Pennsylvania Economic Offender Sentencing*, 45 VILL. L. REV. 793, 809-18 (2000)). The Majority in *Ruff* attempted to counter Judge Gould's white collar

These cases illustrate some of the tensions in determining what standard of appellate review to apply after *Gall* and *Kimbrough*. In particular, *Gall*'s contradictory rejection of "proportional review" of Guidelines departures and simultaneous acceptance of the principle that a "major departure should be supported by a more significant justification" appear to be the source of much of this friction.[173] While many appellate courts appear to prefer erring on the side of giving district courts a level of deference resembling the pre-Guidelines standards, this view has not gone unchallenged amongst appellate court judges. The next section will discuss appellate decisions that have refused to allow district judges such leniency.

### B. The "Re-Weighing" Approach

Other circuit court decisions appear to interpret the Supreme Court's recent Guidelines-related cases as requiring—or at least allowing—appellate courts to examine the district court's reasoning for imposing a given sentence, especially where there has been a large departure from the recommended Guidelines range. Interestingly, some of these decisions have come from circuits that have also applied the more deferential approach described in the previous section. This indicates that the case law may not even be settled or consistent within many of the circuits, signaling the pervasiveness of the confusion resulting from *Rita*, *Gall*, and *Kimbrough*.

One example of this intra-circuit conflict is *United States v. Pugh*,[174] an Eleventh Circuit decision that was filed little more than a month after its decision in *McBride*. As in *McBride*, the defendant in *Pugh* pleaded guilty to charges relating to child pornography, and the district court calculated his Guidelines range as 97-to-120 months imprisonment.[175] In *Pugh*, however, the district judge gave the defendant a sentence that included no imprisonment and five years of probation.[176]

This time the Eleventh Circuit reversed, holding that this sentence "utterly failed to . . . address in any way the relevant Guidelines

argument by citing several cases from around the country where courts had upheld downward departures for non white-collar crimes. *Ruff*, 535 F.3d at 1003 n.1.

[173] *Gall*, 552 U.S. at 50.

[174] 515 F.3d 1179 (11th Cir. 2008).

[175] *Id.* at 1182.

[176] *Id.*

policy statements and directives."[177] The court stated that "a district court has abused its considerable discretion if it has weighed the factors in a manner that demonstrably yields an unreasonable sentence. We are therefore still required to make the calculus ourselves . . . ."[178] In sharp contrast to *Ruff*, where the fact that the judge had extensively deliberated over the sentencing decision triggered a "duty to defer,"[179] in *Pugh* the fact that the district court had held two sentencing hearings and carefully considered the decision was not dispositive.[180]

While not openly disagreeing with any of the district court's factual findings, the appellate court noted several uncontested facts from the record that the panel felt had not been adequately considered, such as the grotesque nature of the photographs and the fact that the defendant derived a benefit from them.[181] The panel then launched into an exhaustive analysis of the § 3553(a) factors relevant to the case: the need to provide deterrence; promote respect for the law; reflect pertinent policy statements; adequately consider the Guidelines; protect the public through incapacitation; and avoid unwarranted sentencing disparities.[182] Notably, the court found no precedent for giving a non-custodial sentence in a child pornography case.[183]

The Sixth Circuit's opinion in *United States v. Funk*[184] also provides an interesting contrast to its earlier decision in *Grossman*. In *Funk*, the district court decided to impose a sentence on a defendant convicted of conspiracy to distribute cocaine and marijuana that was fifty percent lower than what the Guidelines recommended.[185] As in *Grossman*, the district court appeared to base this departure largely on the basis of a policy disagreement with the Guidelines.[186]

---

[177] *Id.* at 1183.

[178] *Id.* at 1191.

[179] *Ruff*, 535 F.3d at 1003.

[180] *Pugh*, 515 F.3d at 1192.

[181] *Id.* at 1192-93.

[182] *Id.* at 1194-1202.

[183] *Id.* at 1203.

[184] 534 F.3d 522 (6th Cir. 2008), *rehearing en banc granted and judgment vacated* Dec. 18, 2008, *appeal dismissed* 560 F.3d 619 (6th Cir. 2009). Although this opinion has been vacated, the differing views of the panel members remains instructive in highlighting conflicts over what type of review appellate courts should apply in evaluating sentencing decisions.

[185] *Id.* at 524.

[186] *Id.* at 529-30 (quoting the district court's opinion, that "[T]he [Guidelines] career of-

Unlike *Grossman*, the panel in *Funk* accepted the Supreme Court's invitation in *Kimbrough* to subject a sentence based on a policy disagreement to "closer review."[187] The *Funk* court found that the district judge had not sufficiently justified the variance with any fact unique to this defendant, and made it clear that reducing sentencing disparities should be an important consideration for trial courts.[188]

Judge Boggs filed a dissent advocating a more deferential standard of review.[189] Finding it "difficult to express a way in which a judge can adequately say that a sentence is 'too much' or 'too little,' " Judge Boggs argued that the fact the district judge had invoked the appropriate language of § 3553(a) supported a disposition in favor of the district judge on appeal.[190]

In *United States v. Cutler*,[191] the Second Circuit also took the position that it had the authority to examine the weight that the district court assigned to various § 3553(a) factors.[192] In *Cutler*, one of the defendants—Cutler—was convicted of bank and tax fraud, and the district court calculated a Guidelines range of seventy-eight to ninety-seven months.[193] However, the district judge decided to sentence Cutler to only one year and one day in prison.[194]

The Second Circuit took issue with the way the district judge evaluated several of the relevant sentencing factors. For example, the district court felt that the amount of financial loss caused by Cutler's actions overstated his culpability in the crime.[195] The Second Circuit

fender enhancement [is] excessive and unreasonable.").

[187] *Id.* at 529.

[188] *Id.* at 530.

[189] *Funk*, 534 F.3d at 531 (Boggs, J., dissenting).

[190] *Id.* In another more recent case, Judge Boggs wrote a majority opinion along similar lines. *See* United States v. Stall, 581 F.3d 276 (6th Cir. 2009). Upholding a sentence that departed from the Guidelines, Judge Boggs noted, that "despite problems with this sentence, the factual findings on which it was based were not clearly erroneous and gave a reasonable explanation for the extent of the variance." *Id.* at 283. Judge Boggs continued, "even though we might have been inclined to impose a different sentence were we re-viewing the record de novo, it is not our job to wear 'the district judge's robe.' " *Id.* at 286 (citing *Whitehead*, 532 F.3d at 993 (discussed *supra* Part II.A)). Judge Rogers issued a dissent in this case, stating that the sentence issued by the district court did not, "with reasonable sufficiency, avoid disparity in sentencing or provide for general deterrence." *Id.* at 290 (Rogers, J., dissenting).

[191] 520 F.3d 136 (2d Cir. 2008).

[192] *Id.* at 154.

[193] *Id.* at 139.

[194] *Id.*

[195] *Id.* at 161.

attacked this reasoning as an erroneous interpretation of "just" punishment and found it "antithetical to the need to 'promote the perception of fair sentencing.' "[196] Next, the appellate court discussed the district court's contention that a harsh sentence in this type of case—involving tax fraud—was unlikely to promote deterrence.[197] Noting that the district court's position was directly in conflict with the policy statements issued by the Sentencing Commission, the panel ruled that this decision failed to "promote respect for the . . . laws" by appearing to let a specific type of defendant off too easily.[198] Although the panel did not explicitly mention its concern about sentencing disparities, its focus on the related concepts of fair sentencing and promoting respect for the laws indicate it was conscious of the need to apply penalties consistently among similarly situated defendants.

The Seventh Circuit also found reason to reevaluate the district judge's application of sentencing factors in *United States v. Omole*.[199] In this case, Davis Omole, one of the defendants, pleaded guilty to crimes relating to an identity theft scheme.[200] Omole's Guidelines range was 87 to 102 months, but the district court sentenced him to only thirty-six months imprisonment based on Omole's youth and lack of criminal history.[201] The district court judge also made "scathing" comments, however, regarding Omole's arrogance and lack of remorse, stating that Omole had "caught a break that I'm not at all sure [he] deserve[d]."[202]

On appeal, the Seventh Circuit vacated the sentence.[203] The panel noted that the district court had made factual findings of several mitigating factors, such as scholastic performance, but the panel found it impossible to reconcile these findings with the district judge's harsh assessment of Omole's character at sentencing.[204] Further, the appellate court dismissed the district judge's concern that a long prison sentence would destroy Davis' rehabilitative potential as

196 *Cutler*, 520 F.3d 136 at 161 (quoting *Gall*, 552 U.S. at 39).
197 *Cutler*, 520 F.3d at 162.
198 *Id.* at 163-64.
199 523 F.3d 691 (7th Cir. 2008).
200 *Id.* at 693.
201 *Id.* at 694-95.
202 *Id.* at 694-95, 700.
203 *Id.* at 700.
204 *Omole*, 523 F.3d at 700.

"completely speculative."[205] More generally, the panel held that "[a] variant sentence based on factors that are particularized to the individual defendant may be found reasonable, but we are wary of divergent sentences based on characteristics that are common to similarly situated offenders."[206] Thus, the panel demonstrated reluctance to give trial judges unchecked discretion, because it was worried about an increase in unwarranted sentencing disparities.

In *United States v. Howe*,[207] the Third Circuit demonstrated that taking a "re-weighing" approach does not always lead to the reversal of the district court's judgment. In *Howe*, the defendant was convicted of wire fraud and sentenced to two years of probation, despite receiving a Guidelines recommendation of eighteen to twenty-four months imprisonment.[208] In its appeal, the government claimed that the reasons the district judge used to justify the departure, including the defendant's lack of criminal history, positive attributes at sentencing, military service, family devotion, community reputation and church service, were not unusual enough in a white collar defendant to warrant a significant variance from the Guidelines.[209]

The Third Circuit carefully analyzed the district court's rationale, including his acceptance of responsibility, remorse, personal history and characteristics.[210] The panel held that, when analyzed under the totality of the circumstances, the district court had not abused its discretion in weighing these factors.[211] Addressing the issue of sentencing disparities, the panel noted that defendants receiving harsher sentences in other cases involving wire fraud were not as remorseful or as sympathetic as the defendant was in this case.[212] Therefore, the defendant here was sufficiently distinguishable from the typical defendant in this situation to warrant a departure.[213]

---

[205] *Id.*
[206] *Id.* at 698.
[207] 543 F.3d 128 (3d Cir. 2008).
[208] *Id.* at 130.
[209] *Id.* at 137.
[210] *Id.* at 137-40.
[211] *Id.* at 139.
[212] *Howe*, 543 F.3d at 140.
[213] *Id.*

### C. Summary of Post-*Gall* and *Kimbrough* Circuit Court Cases

As these cases demonstrate, several circuit courts have concluded that the threshold question when considering the substantive reasonableness of a sentence is whether there is any evidence of a "considered"[214] or "reasoned"[215] decision by the district court judge. If so, this is generally sufficient to avoid reversal on appeal. Other circuits—even panels within the same circuit—have decided they are responsible for reevaluating the district court's decision-making "calculus"[216] in terms of the weight the judge assigned to each of Congress's stated sentencing goals, as set forth in § 3553(a).

Additionally, there is widespread confusion as to how to apply the Supreme Court's reasoning in *Kimbrough* and *Gall*, decisions ostensibly rendered in order to clarify *Booker*. In *Funk*, the Sixth Circuit applied a strict standard of review based on *Kimbrough*'s statement that the district judge's sentencing decision invited greater scrutiny when based on policy disagreements with the Guidelines.[217] However, another Sixth Circuit panel disregarded this directive in *Grossman*, because the panel decided that these instructions were not compatible with the Court's decision in *Rita*.[218]

*Gall* has generated similar confusion. In *Evans*, the Fourth Circuit relied on *Gall*'s rejection of the rule that extraordinary circumstances were required to justify large variations from the Guidelines recommendations.[219] In *Omole*, the Seventh Circuit noted that the extent of departure played a role in its determination and required that the judge state "persuasive reasons" to justify such a departure.[220] These two cases seize on language from the exact same opinion and come to radically different conclusions as to which test the Supreme Court has instructed circuit courts to apply.

The Supreme Court's lack of clarity is unsurprising, because the Court is pursuing two goals that are not easily reconciled. The Court wants to uphold Congress's SRA policy goals and at the same

---

[214] *Evans*, 526 F.3d at 164.
[215] *Ruff*, 535 F.3d at 1003.
[216] *Pugh*, 515 F.3d at 1191.
[217] *Funk*, 534 F.3d at 528-29.
[218] *Grossman*, 513 F.3d at 598.
[219] *Evans*, 526 F.3d at 166.
[220] *Omole*, 523 F.3d at 698.

time pursue a line of Sixth Amendment jurisprudence that undermines the mechanisms for enforcing the SRA.[221] *Booker* invalidated the mandatory Guidelines, but still directed appellate courts to find some other way to " 'provide certainty and fairness' " and avoid unwarranted disparities in sentencing.[222] *Rita* held that appellate courts *could* presume the Guidelines were reasonable, but did not *have* to.[223] *Gall* rejected proportional review of sentences outside the Guidelines range, but still required that major departures be supported by more significant justifications than minor ones.[224] *Kimbrough* upheld one particular district court's decision to depart from the Guidelines, on the basis of policy disagreements, but stated that such disagreements are generally subject to "closer review."[225]

Since these decisions have left the law in this area "charitably speaking, unclear,"[226] it is hard to fault the circuit courts for not being able to apply all of these contradictory sentencing goals in every case. In *Funk*, Judge Boggs succinctly pointed out that, in light of the Court's decisions, it is "difficult to express a way in which a judge can adequately say that a sentence is 'too much' or 'too little.' "[227] On the other hand, as Judge Gould compellingly argued, Congress has clearly directed the courts—both through the SRA and the PROTECT Act—to reduce unwarranted sentencing disparities.[228] Until the Supreme Court decides to provide a straightforward set of rules for appellate courts, or Congress enacts sentencing reform in response to *Booker*, it is unlikely that these conflicts will be resolved.

## III. SUGGESTIONS TO RESTORE CLARITY TO THE REVIEW PROCESS

If the Supreme Court's only goal was to provide more consistency to the post-*Booker* appellate review of sentencing, it could do so relatively easily. The difficultly lies in implementing a straight-

[221] *See Booker*, 543 U.S. at 263-64 (acknowledging the reasonableness standard would fail to provide Congress's intended level of uniformity).

[222] *Id.* at 264 (quoting 28 U.S.C.A. § 991(b)(1)(B) (West 2009)).

[223] *Rita*, 551 U.S. at 353.

[224] *Gall*, 552 U.S. at 41.

[225] *Kimbrough*, 552 U.S. at 109.

[226] *Evans*, 526 F.3d at 168 (Gregory, J., concurring).

[227] *Funk*, 534 F.3d at 531 (Boggs, J., dissenting).

[228] *Ruff*, 535 F.3d at 1006 (Gould, J., dissenting).

forward system of review that adequately balances the Court's constitutional concerns, administrability issues, and the principles set forth in more than thirty years of legislative reform. As this Comment illustrates, a solution needs to be crafted to reduce confusion among the circuit courts as to what role they should play in the current sentencing regime.

### A. Early Proposals

Perhaps the most straightforward method to eliminate confusion would be to adopt the procedural-only review proposed by Justice Scalia in his *Rita* concurrence.[229] Under this approach, the substantive reasonableness test would be discarded altogether, and appellate courts would instead review sentences only to see whether the district court "consider[ed] [any] impermissible factors[,] select[ed] a sentence based on clearly erroneous facts," or did not explicitly apply the § 3553 factors to the facts of the case.[230] While this approach would likely tend to encourage district judges to engage in the "mere formality" of "say[ing] all the right things" at sentencing,[231] there is evidence that this approach would still allow appellate courts to overturn sentences in particularly egregious circumstances.[232] However, this remedy fails to account for Congress's clearly stated goal of reducing sentencing disparities and saps the remaining strength of what was already often an anemic form of appellate review. Additionally, it would likely place pressure on appellate courts to attempt to find some hidden procedural error in order to justify its intervention in the matter when faced with a clearly unreasonable sentence.[233] This in turn could lead to the development of an

[229] *Rita*, 551 U.S. at 370 (Scalia, J., concurring).

[230] *Id.* at 382.

[231] *Booker*, 543 U.S. at 313 (Scalia, J., dissenting).

[232] *See, e.g.*, United States v. Guillen-Esquivel, 534 F.3d 817, 819 (8th Cir. 2008) (vacating the district court's decision when that decision was based on policy disagreements with statutory minimum sentences and the prosecutor's decision to charge certain crimes); United States v. Hunt, 521 F.3d 636, 649 (6th Cir. 2008) (vacating the judgment for relying on facts inconsistent with the jury's verdict); United States v. Livesay, 525 F.3d 1081, 1093 (11th Cir. 2008) (vacating the judgment due to the failure to adequately explain reasons for Guidelines departure); United States v. Roberson, 474 F.3d 432, 434-35 (7th Cir. 2007) (vacating the district court's decision when that decision was based on policy disagreements with statutory minimum sentences and the prosecutor's decision to charge certain crimes).

[233] *See* FRANKEL, *supra* note 11, at 82.

equally confusing and illogical branch of case law as appellate courts become more creative in finding reversible error. In any event, Justice Scalia's proposal has failed to gain traction among his peers on the Court.

A second approach is the one originally developed by several circuit courts in the wake of *Booker*, involving the establishment of a clear rule allowing for strict appellate review when a district court departs significantly from the Guidelines range. This type of analysis is a logical attempt to reconcile *Booker*'s finding that the mandatory Guidelines were unconstitutional, while still giving Congress's policy goals legitimate weight. A "reasonableness" review in this situation would still be deferential to the district court's factual findings, but would not endorse the abject deference to the district court's decision that appears to widely exist now. This approach need not be mathematical like the one struck down in *Gall*; appellate judges are more than capable of determining that a 100% departure from the Guidelines is much more unreasonable when a ten-year recommendation for imprisonment is turned into probation than it is when a three-month imprisonment recommendation is similarly reduced to probation. Holding district court judges to a higher level of scrutiny in the instance of a ten-year departure seems logical and would give appellate courts some limited authority to police a sentencing "baseline" centered around the Guidelines.

*Gall* ostensibly rejected a proportionality standard, but it is difficult to tell if the Court completely closed the door on this type of review. *Gall* clearly stated that requiring "extraordinary" review to justify a departure is not acceptable, but also requires that the justifications for such departures be proportional to the degree of that departure.[234] As the circuit court opinions in Part II highlighted, these conflicting statements simply cannot be applied consistently in a logically coherent manner.[235]

Similarly, stringent appellate review could be encouraged when the district court bases a sentence on a policy disagreement with the Sentencing Commission. This approach was endorsed in dicta by *Kimbrough*,[236] although the impact of this statement was blunted by the fact that the policy disagreement in question in

[234] *Gall*, 552 U.S. at 49-50.

[235] *See supra* Part II.A-B.

[236] *Kimbrough*, 552 U.S. at 109.

*Kimbrough* was upheld as reasonable. Together, these tools would allow appellate courts to more effectively police the policy goals Congress implemented in § 3553(a), in that the circuit courts could ensure large departures from the Guidelines were not promoting unwarranted sentencing disparities or undermining the public's respect for the law.

Of course, the biggest obstacle to reinstating these pre-*Gall* circuit court approaches are Sixth Amendment concerns that led to the downfall of the mandatory Guidelines in the first place. Specifically, the Court does not want the Guidelines, which call for judges to make factual findings in the absence of a jury, to be binding on district court judges in any manner.[237] While some justices clearly would find Sixth Amendment problems with anything resembling a "proportionality" test because they believe this would indirectly make the Guidelines mandatory,[238] six justices approved of *Rita*'s statement that merely encouraging sentencing judges to impose Guidelines sentences does not "change the constitutional calculus."[239] While a detailed Sixth Amendment analysis is outside of the scope of this Comment, arguably the Court has left some room in these cases for appellate review that extends beyond a "rubber stamp" or procedural-only review.[240]

### B. An Alternative Approach

Another possible approach would be to assign different weights or priorities to the factors listed in § 3553(a), instructing district courts to elevate some concerns above others and allowing appellate courts to review decisions under this rubric. The source of much of the disagreement among appellate judges is what level of importance to attach to considerations such as "the need to avoid unwarranted sentencing disparities"[241] and the need "to promote respect

[237] *See Booker*, 543 U.S. at 233.

[238] *Rita*, 551 U.S. at 366 (Stevens, J., concurring).

[239] *Id.* at 354.

[240] It is also worth noting that Justice Thomas argued that the mandatory Guidelines were unconstitutional only "as applied to Booker." *Booker*, 543 U.S. at 326 (Thomas, J., dissenting). Thus, only four justices in *Booker* argued that the mandatory Guidelines were unconstitutional on their face.

[241] 18 U.S.C.A. § 3553(a)(6).

for the law" and "adequate deterrence."[242] Given that the SRA and the relevant portions of the PROTECT Act were clearly passed with the intention of reducing sentencing disparities,[243] and the fact that the *Booker* remedial opinion focused on upholding the SRA's legislative intent to the extent possible given the restraints imposed by the Sixth Amendment, it follows that the goal of reducing sentencing disparities should be given additional weight when evaluating the substantive reasonableness of a sentence.

The problem with the way the Court opted to restructure § 3553(a) is that it now attempts to cover too many different types of often conflicting factors. A district court judge can currently justify any number of sentences that many would consider "unreasonable" by focusing on one of these factors that supports the sentence the judge wants to give.[244] For purposes of illustration, it may be helpful to first look at a hypothetical case that "reasonably" could be evaluated in very different ways under the current sentencing regime. Next, I will propose an alternative to this current system that may significantly reduce the likelihood of unjustified, vastly differentiated sentencing outcomes. Finally, I will discuss how this solution could have simplified the appellate courts' analysis in two of the cases discussed in Part II.

### 1. *How the Current System Errs*

Imagine the hypothetical case of a twenty year old, middle-class defendant who has pleaded guilty in federal court to embezzling a large sum of money from his employer. Suppose that this defendant was an honor roll student in high school and has managed to appear likable during the course of his court proceedings in front of the judge. However, in the years since graduating high school, he has been convicted of several misdemeanor offenses. For purposes of this hypothetical, imagine further that the advisory Guidelines range for the defendant's crime of embezzlement is five to seven years imprisonment.

---

[242] *Id.* § 3553(a)(2)(A-B), (6).

[243] *See supra* notes 29 & 50.

[244] *See* H.R. REP. NO. 108-66, at 694 (2003) (expressing concern during the debate over the PROTECT Act that judges who are reversed on appeal for deviating from the Guidelines for one reason will simply impose the same sentence on remand using a different theory).

If given only the various § 3553(a) factors to work with, all carrying equal weight, one can see how two judges may come to completely opposite conclusions as to what sentence to impose on this defendant. One judge might emphasize the need to provide the defendant with rehabilitation,[245] the defendant's scholastic aptitude, and other positive personal characteristics.[246] The judge might further apply her own personal belief that this defendant has been properly shamed and will no longer be a threat to the community[247] to justify a sentence of only probation without any term of imprisonment. However, the judge in the courtroom next door may be concerned about the defendant's criminal history,[248] the possibility that the defendant may be attempting to charm his way out of punishment for a serious crime,[249] and the fact that a similarly situated defendant in a nearby federal district received a Guidelines sentence.[250] Therefore, in contrast to the first judge, the second judge may be inclined to sentence the same defendant to a full seven-year term of imprisonment as recommended by the Guidelines.

All of the criteria used by both judges are currently equally appropriate and permissible. So long as both judges stated that they had considered all of the relevant § 3553(a) sentencing goals prior to issuing their sentence, all but the most aggressive of the federal appellate courts would likely approve of both sentences. With a few procedural qualifications, such as calculating the Guidelines range, this system differs little from the pre-SRA environment that generated the controversy described in Part I. Further, giving equal weight to all of these factors undermines the *Booker* remedial opinion's focus on the reduction of sentencing disparities.

### 2. *A Possible Solution and its Application*

Clearly, the current system has the potential to give judges the de facto authority to sentence convicted criminals however they want to, assuming they provide some support for their position using one

[245] *See* 18 U.S.C.A. § 3553(a)(2)(D).
[246] *See id.* § 3553(a)(1).
[247] *See id.* § 3553(a)(2)(D).
[248] *See id.* § 3553(a)(1).
[249] *See id.* § 3553(a)(2)(A).
[250] *See* 18 U.S.C.A. § 3553(a)(6).

of the myriad of § 3553(a) factors and, upon review, the appellate court applies a deferential standard.[251] However, if a single § 3553(a) factor, such as reducing unwarranted sentencing disparities, was given an elevated 'status' or priority, the analysis performed by the two judges in the previous example would have much more in common.

For example, the Supreme Court could prioritize a specific factor by interpreting § 3553(a) to require that during sentencing a district court (1) calculate the appropriate Guidelines range, (2) carefully consider whether the proposed sentence would create unwarranted sentencing disparities in light of readily available national sentencing data, and then (3) consider the remaining factors listed in § 3553(a).[252]

After mathematically calculating the appropriate range under the Guidelines, both judges in the previous example would now be instructed to look carefully at what sentences defendants had received in similar factual circumstances in the past, knowing that a decision to depart dramatically from the Guidelines would be reviewed by an appellate court with this data in mind.[253] If, in the above hypothetical, this research led to the discovery that defendants in their early twenties with prior misdemeanor convictions almost always receive Guidelines sentences, then the first judge would know that she needs to establish that there is a compelling reason that this particular defendant does not deserve to be imprisoned. On the other hand, if federal judges were routinely giving probationary sentences in these situations despite the Guidelines recommendations, the second judge may be convinced that his sentence is unnecessarily harsh. Further, if probation was the normal outcome in this situation, the first judge would have little reason to fear reversal on appeal despite her departure from the Guidelines. Prioritizing sentencing factors in this manner would ensure judges were operating from the same analytical baseline,[254] without requiring blind adherence to a mandatory set of

[251] *See supra* Part II.A.

[252] Congress could also amend the statute. *See* 73 AM. JUR. 2D *Statutes* § 19 (2009).

[253] *See* 18 U.S.C.A. § 3553(a)(6). As early as 1984, critics of the SRA believed that giving judges access to nationwide sentencing data could help reduce disparities. Stith & Koh, *supra* note 12, at 263 ("It may well be that disparity can be controlled by simply providing Federal judges with more information about the practices of their compatriots.") (citing 130 CONG. REC. 2616 (1984)).

[254] Requiring judges to perform the same analytical steps in determining a sentence should

sentencing guidelines.

A system of targeted appellate review under this approach has the potential to not only allow district courts the discretion to avoid the potential unfairness that inevitably results from mathematical Guidelines computations, but also to further Congress' stated policy goals. The existing presumption of reasonableness given to the "considered" judgment of the trial court judge could be retained, ensuring that appellate judges would approach any given case in a deferential manner. At the same time, explicitly instructing an appellate court to pay special attention to a specific sentencing factor, such as reducing unwarranted disparities, clarifies the review process for both district and appellate courts and allows appellate judges to focus on Congress's legislative goals. In this scenario, the numerous other § 3553(a) factors would still be in play, and thus judges would still have the flexibility to craft an individualized sentence without regard to the Guidelines or their peers when the situation clearly warrants it.

Further, a clarification of this nature eliminates the need for appellate courts to be creative or "stretch" the law to cover a situation where the district court has clearly erred, but there is no readily apparent authority for appellate intervention. As Judge Frankel pointed out, appellate judges will frequently search for "some strained species of 'error' " in the district judge's decision as a pretext for setting aside an unreasonable sentence.[255] One could imagine that this would be especially problematic if Justice Scalia's procedural-only system of review were implemented. Establishment of a clear hierarchy of sentencing factors gives appellate judges justification to police sentencing decisions in a manner consistent with Congress's intent, and also allows trial court judges to confidently make individualized decisions when warranted.

The decision to reverse or affirm currently depends largely on what panel of circuit judges hears a given appeal. Increased consistency will allow district court judges to at least be informed in advance as to which standards their decision will be judged by. It also

not be confused with a return to the type of mandatory guidelines rejected as unconstitutional in both *Booker* and *Rita*. My proposal simply advocates that judges *consider* the same types of nationwide sentencing data as one of the first steps in their analysis, similar to the way judges are currently required to calculate a sentencing range under the current advisory Guidelines. As noted, this additional step may result in judges paying even less attention to the Guidelines, and more to what their peers are doing across the country.

[255] FRANKEL, *supra* note 11, at 82.

provides prosecutors, defendants, and the public generally with greater certainty in terms of the punishment they can expect to see for a given crime, all of which were major goals of the SRA.[256] This greater uniformity will ensure that defendants will not receive vastly different sentences simply based on where they were prosecuted and what judge they appear before.

### 3. *Application to Prior Circuit Cases*

Applying this standard of weighted sentencing factors to some of the cases examined in Part II helps further demonstrate how this solution would work in practice. For example, in *Pugh*, the Eleventh Circuit decided that in departing from a possible ten-year sentence of imprisonment under the Guidelines to one of probation in a child pornography case, the district court made several serious—and reversible—errors in judgment.[257] In justifying the reversal, the *Pugh* court engaged in the complicated and subjective task of re-weighing each of the § 3553 factors as applied to the case, ultimately concluding that the district court judge had weighed those factors unreasonably at trial.[258]

Under this proposed targeted standard, the analysis would simplify considerably. As an initial step, the appellate court would decide whether this was an exceptionally large departure from the Guidelines that would require a "significant justification"[259] for the departure.[260] If not, the district court would be entitled to deference—assuming there were no procedural errors. If such a departure existed, as it clearly did in *Pugh*, the court would continue with its substantive analysis.

In analyzing whether such a departure was reasonable, the next question facing the court would be whether the sentence had the

---

[256] The Senate Report accompanying the SRA explicitly sets forth the goals of "assur[ing] that sentences are fair both to the offender and to society, and that such fairness is reflected . . . in the pattern of sentences in all federal criminal cases." S. REP. NO. 98-225, at 39 (1984). Further, sentencing reform should "assure that the offender, the federal personnel charged with implementing the sentence, and the general public are certain about the sentence and the reasons for it." *Id.*

[257] *Pugh*, 515 F.3d at 1182-83.

[258] *Id.* at 1183.

[259] *Gall*, 552 U.S. at 50.

[260] *Id.* Of course, under *Rita*, a within Guidelines sentence can be presumed reasonable. *Rita*, 551 U.S. at 347.

potential to create unwarranted sentencing disparities relative to similarly situated defendants. In making this determination, the appellate court would look to relevant case law, applicable Guidelines provisions, and any relevant policy statements issued by Congress or the Sentencing Commission. If the district court's sentence was a significant departure, but was adequately supported by case law or other relevant statistics,[261] the district judge would still be entitled to a very deferential standard of review of her application of the remaining § 3553(a) factors in the case; similar to the cases applying a deferential review standard analyzed in Part II.A.[262]

However, if the sentence represented a large Guidelines departure, *and* lacked precedent or another persuasive justification, the appellate court should be allowed to closely review the district court's application of the remaining § 3553(a) factors in the case. The district court's decision would not be presumptively unreasonable, but when the district judge has disregarded not one but two different mechanisms designed to ensure some level of sentencing uniformity, the appellate court should have more leeway to carefully analyze the application of the § 3553 factors.

In *Pugh*, for example, the Eleventh Circuit found that there was no precedent for giving a non-custodial sentence in a child pornography case.[263] Under this proposed solution, it would be this finding that justified a more thorough analysis of the district court's application of the relevant sentencing factors in the case. Having determined that the district court was operating outside of established precedent, the *Pugh* court would not have felt pressured to rebut the district court's opinion line for line, and instead could have focused solely on whether the district judge had adequately supported his or her position. While there is no denying that this type of analysis involves a subjective component, the circuit court would be required to meet two objective criteria to get to this point: (1) that the district court's sentence was a substantial departure from the Guidelines; and

[261] For example, the United States Sentencing Commission publishes quarterly data on the number of federal criminal sentences issued and whether or not they fell within the recommended Guidelines range for the case. Federal Sentencing Statistics, http://www.ussc.gov/LINKTOJP.HTM (last visited Sept. 16, 2009). Resources such as this could prove to be an invaluable resource for a district court judge to see if the Guidelines were typically followed in a case such as the one before them.

[262] *See supra* Part II.A.

[263] *Pugh*, 515 F.3d at 1203.

(2) that the sentence created unwarranted sentencing disparities between similarly situated defendants.

In this manner, this proposed solution finds some middle ground between the "deferential" and the "re-weighing" approaches. This targeted approach clearly provides more deference to the district court than a *Pugh*-style, *de novo*-type review by establishing an additional test that a given sentence must fail in order to trigger this type of review. In *Pugh*, the appellate court saw that the district judge had made a large departure, and immediately launched into a detailed review.[264] Under the "targeted" approach, the appellate court would have to determine that the sentence *also* threatened to create an unwarranted sentencing disparity before delving deeply into the district court's reasoning.

This approach is also more loyal to Congress's SRA policy goals than the deferential approach used in a case such as the Ninth Circuit's decision in *Whitehead*.[265] In *Whitehead*, the circuit court determined that the fact that the district court made a reasoned decision essentially stripped the court of its ability to review the sentence, despite the existence of a fairly substantial departure.[266] Under the proposed approach, the Ninth Circuit would have also needed to determine that such a departure did not represent an unwarranted departure from the sentences similarly situated defendants were receiving before applying such a deferential standard of review.

Obviously, no solution will provide the rigid national uniformity that the pre-*Booker* system of mandatory Guidelines provided. However, by establishing a system of structured, prioritized appellate review with a focus on reducing unwarranted sentencing disparities, the Supreme Court could ensure that appellate courts (1) know what role they are supposed to serve in the current criminal justice system, and (2) help to promote the sentencing policy goals that Congress has emphasized for over twenty years.

## CONCLUSION

In *Evans*, Judge Gregory stated, "I must conclude that the [Supreme] Court has left the specifics of how appellate courts are to

[264] *Id.* at 1194.
[265] *Whitehead*, 532 F.3d at 993.
[266] *Id.*

conduct substantive reasonableness review, charitably speaking, unclear."[267] The Court has sent mixed signals about the desirability of substantive appellate review,[268] while simultaneously demanding it.[269] However, if the Court is going to insist on retaining "meaningful" appellate substantive review, it should ensure that the circuit courts have a clear sense of what that entails.

The circuit court opinions after *Rita*, *Gall*, and *Kimbrough* suggest that there are some common sources of confusion among appellate judges in evaluating district court sentences. Importantly, there are frequently concerns over the sentencing disparities that inevitably result in a system where judges have nearly unlimited discretion to sentence a given defendant however they see fit. The large number of these disparities is what originally led Congress to pass the SRA more than twenty years ago. While *Booker* struck down the means by which Congress intended these disparities to be reduced, the Supreme Court can remain loyal to Congress's legislative intent by establishing a system of substantive appellate review that explicitly instructs appellate court judges to reduce these unwarranted sentencing disparities, while at the same time preserving the Sixth Amendment rights of those defendants.

[267] *Evans*, 526 F.3d at 168 (Gregory, J., concurring).
[268] *Booker*, 543 U.S. at 308-09 (Scalia, J., dissenting in part).
[269] *Rita*, 551 U.S. at 365 (Stevens, J., concurring).