NOTES

DEATH BY A THOUSAND CASES: AFTER *BOOKER*, *RITA*, AND *GALL*, THE GUIDELINES STILL VIOLATE THE SIXTH AMENDMENT

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INTRODUCTION

Paul Sedore defrauded the Internal Revenue Service. Using names and social security numbers obtained from preparing legitimate tax returns for his friends while incarcerated, Sedore submitted false tax returns and received about $50,000 from the IRS.[1] Indicted by a federal grand jury on four counts, Sedore pled guilty to two of them, conspiracy to defraud the IRS and identity theft.[2] Based only on what Sedore admitted in his guilty plea and his criminal history, the Federal Sentencing Guidelines would have recommended a sentence of twelve to eighteen months in prison.[3] But the sentencing judge found, by a preponderance of the evidence, that Sedore used a special skill to facilitate his offense, obstructed justice, and harmed between 50 and 250 victims.[4] Based on those judge-found facts, which the defendant did not admit and which the jury did not find beyond a reasonable doubt, the Guidelines advised a range of 84 to 105 months.[5] The court sentenced Sedore to 84 months.[6]

Consider another scenario. A hypothetical judge sentences another criminal, convicted of the same offenses as Sedore, with the same criminal history. This judge sentences this hypothetical criminal to 84 months in prison without finding any additional facts. The court of appeals would likely reverse this hypothetical sentence. Why? Because the judge did not follow the Guidelines, and, hence, the sentence was not "reasonable." This is hardly the "advisory" system that the Supreme Court imagines it is.

In *United States v. Booker*,[7] the Supreme Court found that the mandatory Guidelines violated the Sixth Amendment right to a jury trial because they necessarily increased the maximum available sentence based on facts found by the judge, not the jury, by a

1. United States v. Sedore, 512 F.3d 819, 821 (6th Cir. 2008).
2. *Id.*
3. *Id.* at 829 (Merritt, J., dissenting).
4. *Id.* at 821 (majority opinion).
5. *Id.* at 821-22.
6. *Id.* at 821.
7. 543 U.S. 220 (2005).

preponderance of the evidence.[8] Under the mandatory Guidelines, judges found extra facts at sentencing, such as acquitted conduct, uncharged conduct, or aggravating or mitigating factors of the crime itself.[9] Those facts, never presented to a jury, mechanically increased the defendant's sentence.[10] Therefore, the mandatory Guidelines violated the right to be tried by a jury.

Booker was supposed to correct this constitutional flaw. Rather than preserve the mandatory Guidelines and require the Government to prove each fact beyond a reasonable doubt to the jury, the Court rendered the Guidelines advisory and instructed the appellate courts to review for "unreasonableness."[11] The meaning and appropriate boundaries of appellate reasonableness review gave rise to "a confusing battle royale over a wide array of modern federal sentencing laws and practices."[12] At the heart of this battle is the tension between constitutional constraints, advisory Guidelines, and the circuits' efforts to impose sentencing uniformity.

Booker's inherent conflicts allowed the circuits to try to resurrect the mandatory Guidelines, prompting the Supreme Court to revisit *Booker* twice in the last year, in *Rita v. United States*[13] and *Gall v. United States*.[14] In those cases, the Court attempted, with little success, to rein in the chief tools that the circuits use to enforce the Guidelines: the presumption of reasonableness and proportionality review. In *Rita*, the Court allowed circuits to apply a presumption of reasonableness to within-Guidelines sentences and to require from trial courts merely an abrupt, conclusory explanation of within-Guidelines sentences.[15] In *Gall*, the Court prohibited the most egregious de novo reviews of sentences outside the Guidelines range, but effectively, and unfortunately, permitted proportionality review to continue.[16]

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8. *Id.* at 226.
9. *Id.* at 233-37.
10. *Id.*
11. *Id.* at 260-61.
12. Douglas A. Berman, Rita, *Reasoned Sentencing, and Resistance to Change*, 85 DENV. U. L. REV. 7, 8 (2007).
13. 127 S. Ct. 2456 (2007).
14. 128 S. Ct. 586 (2007).
15. *Rita*, 127 S. Ct. at 2462-63.
16. *Gall*, 128 S. Ct. at 597-98.

The current system clearly encourages federal district courts to obey the Sentencing Guidelines, and strongly discourages straying from them. Nonetheless, the Court persists in the fiction that the Guidelines are "advisory." Instead of chipping away at reasonableness review term-by-term, the Court should impose a clear, constitutional solution. In order to bring reasonableness review into compliance with the Sixth Amendment, the Court should allow appellate courts to review sentencing decisions only for procedural correctness, and require uniform explanations from the district courts as to whether the sentence falls within or outside the Guidelines range.

Part I of this Note reviews the history of the Sentencing Guidelines, the legal developments before *Booker*, *Booker*'s tentative solution, and the lower courts' reaction to *Booker*. Part II examines the Supreme Court's recent opinions in *Rita* and *Gall* and argues that these ambiguous decisions only perpetuated the Guidelines' Sixth Amendment violations. Part III separates and analyzes the three tools that appellate courts use to enforce the Guidelines, namely: the presumption of reasonableness, the double standard of procedural reasonableness, and proportionality review. This Part demonstrates how each tool contributes to the unconstitutionality of the current Guidelines regime. Part IV argues that all three tools together defeat the advisory nature of the Guidelines and violate the Sixth Amendment right to a jury trial. Part V proposes a two-part solution: (1) prohibiting substantive reasonableness review and (2) requiring uniform explanations for sentences both within and outside the Guidelines range. This Part also considers objections to that solution. Uniform, procedural appellate review would end the illusion that the Guidelines are advisory and initiate a constitutional federal sentencing regime.

I. BACKGROUND

A. The Sentencing Reform Act

The Sentencing Guidelines began with the 1984 Sentencing Reform Act (SRA), originally conceived to curtail wide disparities in

sentences for similar crimes.[17] The SRA established the United States Sentencing Commission and directed the Commission to formulate the Sentencing Guidelines according to the Act's ambiguous[18] directives.[19] The Commission mostly based the Sentencing Guidelines on sentences of federal defendants in 1985.[20] To these existing sentencing practices, the Commission added a level of severity "to correct the fact that current federal sentences often did not accurately reflect the seriousness of the offense."[21]

The SRA stripped the sentencing judge of most of his discretion. To calculate the correct sentence, the judge would find the relevant facts by a preponderance of the evidence. Those facts mechanically produced an offense level and a criminal history level. The judge consulted a matrix with an axis for offense level and another axis for criminal history.[22] At the intersection of these levels on the matrix, the judge located the corresponding range of months from which he chose a sentence.[23] Despite 18 U.S.C. § 3553(a)'s mandate to impose "a sentence sufficient, but not greater than necessary,"[24]

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17. Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 885 (1990).

18. KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 51 (1998) (describing the SRA's directives as "ambiguous"). *Contra* Nagel, *supra* note 17, at 905 ("Congress thus gave the Commission a specific mandate to determine what combination of offense and offender characteristics should result in what sentence.").

19. *See* 28 U.S.C. § 994(a)-(n) (2006). The SRA instructed the Sentencing Commission to "establish sentencing policies and practices" that: (1) meet the general purposes of sentencing in 18 U.S.C. § 3553(a)(2); (2) "provide certainty and fairness," "avoid[] unwarranted sentencing disparities ... while maintaining sufficient flexibility to permit individualized sentences"; and (3) "reflect ... advancement in knowledge of human behavior as it relates to the criminal justice process." 28 U.S.C. § 991(b)(1)(A)-(C) (2006). For the purposes of sentencing in 18 U.S.C. § 3553(a), see *infra* note 24.

20. STITH & CABRANES, *supra* note 18, at 59.

21. Nagel, *supra* note 17, at 905 (citing 28 U.S.C. § 994(m)).

22. *See, e.g.*, 2 UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL 1207 (2006); Ed Hagen, Booker *101*, 54 UNITED STATES ATTORNEYS' BULLETIN 6, Sept. 2006, at 2. For such fact-finding, judges mostly relied on the probation officer's presentence report. STITH & CABRANES, *supra* note 18, at 86-89.

23. UNITED STATES SENTENCING COMMISSION, *supra* note 22, at 1207.

24. 18 U.S.C. § 3553(a) (2006). This section requires that the court "impose a sentence sufficient, but not greater than necessary" in light of "the nature and circumstances of the offense and the history and characteristics of the defendant," the seriousness of the offense, the need to promote respect for the law and to provide just punishment, adequate deterrence, protecting the public, rehabilitation, the kinds of sentences available, the appropriate Guidelines range, the Sentencing Commission's policy statements, the need to avoid unwarranted sentencing disparities, and the need for restitution. 18 U.S.C. § 3553(a)(1)-(7)

to fulfill the sentencing purposes that the statute establishes, judges had very little leeway to sentence outside of the Guidelines range. Judges could depart from the range by finding additional aggravating or mitigating factors that the Guidelines listed as grounds for departure.[25] Although these grounds were not exhaustive, the Commission prohibited the use of certain other factors as bases for departure.[26] The judge could depart for other reasons only if the Commission had not "adequately" considered them.[27] Under the mandatory guidelines, district court judges effectively played a procedural role in sentencing.

B. The Constitutional Problem with Mandatory Guidelines

Beginning with *Apprendi v. New Jersey*[28] in 2000, the revival of the Sixth Amendment right to a jury trial threatened the mandatory Guidelines. Some state and federal sentencing laws allowed judges, not juries, to find specific facts regarding the crime, such as the use of a deadly weapon or the amount of drugs possessed.[29] Such laws required judges, if they found any of these facts, to increase or decrease the sentences by statutorily prescribed periods of time. In *Apprendi*, the Court addressed New Jersey's sentencing laws, which had allowed sentencing judges to find by a preponderance of the evidence that a defendant was motivated by racial bias and enhance his sentence.[30] Such an enhancement violated Apprendi's right to a "jury verdict based on proof beyond a reasonable doubt."[31] The *Apprendi* Court held, "Other than the fact of prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[32] Because many sentencing regimes required

(2006).

25. *See* UNITED STATES SENTENCING COMMISSION, *supra* note 22, § 5K2.1-2.24 (2006).

26. STITH & CABRANES, *supra* note 18, at 98.

27. 18 U.S.C. § 3553(b)(1) (2006).

28. 530 U.S. 466 (2000). For an extended discussion of *Apprendi*, see Kyron Huigens, *Solving the* Apprendi *Puzzle*, 90 GEO. L.J. 387 (2002).

29. *See Apprendi*, 530 U.S. at 555-58 (Breyer, J., dissenting).

30. *Id.* at 471. Apprendi pleaded guilty to three counts involving unlawful possession of firearms and weaponry. *Id.* at 469-70.

31. *Id.* at 478.

32. *Id.* at 490.

judges, rather than juries, to find facts that necessarily increased the mandatory sentencing range, *Apprendi* created serious doubt about their constitutionality.

C. "The Booker *Mess"*[33]

After *Apprendi*, both state and federal guidelines laws were of questionable constitutionality. Typically, under a guidelines sentencing system, when a sentencing judge finds a relevant fact, guidelines laws mandate that the sentencing range increase or decrease accordingly. In *Blakely v. Washington*,[34] the Supreme Court struck down the State of Washington's sentencing guidelines. The Court concluded that the guidelines violated the defendant's Sixth Amendment right because judge-found facts necessarily increased Blakely's sentence.[35] *Blakely* clearly implicated the Federal Sentencing Guidelines, given their similarity to those of Washington.

United States v. Booker[36] solved the Federal Sentencing Guidelines' constitutional problems, at least in theory. In practice, however, Sixth Amendment issues persist even after two additional significant Supreme Court decisions regarding sentencing. *Booker* consists of two very different majority opinions. The first, the merits opinion, extended *Apprendi* to the Federal Sentencing Guidelines and declared them unconstitutional; the second, the remedial opinion, rendered the Guidelines advisory.[37]

According to the Court's merits opinion, the mandatory Guidelines violated Freddie Booker's Sixth Amendment rights because judge-found facts necessarily increased his sentence.[38] The jury convicted Booker of possession of 92.5 grams of crack cocaine.[39] Under the Guidelines, that conviction alone merited a Guidelines

33. *See* Michael W. McConnell, *The* Booker *Mess*, 83 DENV. U. L. REV. 665 (2006).

34. 542 U.S. 296 (2004).

35. *Id.* at 305.

36. 543 U.S. 220 (2005).

37. Justices Scalia, Souter, Thomas, and Ginsburg joined Justice Stevens's majority opinion. Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Ginsburg joined Justice Breyer's majority opinion.

38. *Booker*, 543 U.S. at 243-44.

39. *Id.* at 227.

range of 210 to 262 months in prison.[40] But when the judge found by a preponderance of the evidence that Booker possessed an additional 566 grams, the Guidelines mandated a range of 360 months to life.[41] If the Guidelines had allowed the sentencing judge to "exercise[] his discretion to select a specific sentence," they would not have violated the Sixth Amendment because "the defendant has no right to a jury determination of the facts that the judge deems relevant."[42] But the judge lacked that discretion. When he found the additional facts, the SRA and the Guidelines required the judge to increase the Guidelines range. Therefore, Booker's sentence was unconstitutional.[43] Despite the merits majority's willingness to affirm and apply *Apprendi*,[44] it lacked the votes for a corresponding remedy.[45]

The remedial majority provided a complex solution by rendering the Guidelines advisory. The Court attempted to divine which solution Congress would choose so that the SRA did not violate the Sixth Amendment: requiring the jury to find each relevant fact for the Guidelines calculation, or rendering the Guidelines advisory.[46] Congress desired two features, the Court said: (1) a system in which the judge, not the jury, considers the defendant and circumstances of the crime; and (2) a system that diminishes unwarranted sentencing disparity.[47] Fearing that requiring the jury to find each fact necessary for the Guidelines sentence "would destroy the

40. *Id.* The jury did not find Booker guilty of possessing the other 566 grams of crack. United States v. Booker, 375 F.3d 508, 509 (7th Cir. 2004). Although there are serious constitutional concerns regarding sentences enhanced for acquitted conduct, it was not at issue in *Booker*. For more about acquitted conduct sentencing and the Sixth Amendment, see James J. Bilsborrow, Note, *Sentencing Acquitted Conduct to the Post-*Booker *Dustbin*, 49 WM. & MARY L. REV. 289 (2007).

41. *Booker*, 543 U.S. at 227.

42. *Id.* at 233.

43. *Id.* at 235.

44. *Id.* at 244 ("Any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.").

45. Justice Ginsburg joined both majority opinions, choosing Justice Breyer's remedy over the preferred solution of the merits majority. *See supra* note 37.

46. *Booker*, 543 U.S. at 244.

47. *Id.* at 249-50.

system,"[48] the remedial majority excised the mandatory provision from the SRA[49] and the appellate standard of review.[50] The Court still expected judges to sentence according to 18 U.S.C. § 3553(a).[51] Though the Guidelines would be merely advisory, judges must still "take them into account when sentencing."[52] In theory, advisory Guidelines are constitutional because sentences do not necessarily require judge-found facts, and the judge is free to impose a sentence anywhere between the statutory minimum and maximum. The Court hoped its solution would accomplish its twin goals of fewer unwarranted sentencing disparities and constitutional, individualized sentences.[53]

The advisory Guidelines and uniform sentencing are in tension, however. District courts will reduce sentencing disparities only to the extent that they follow the Guidelines. Therefore, the *Booker* remedial majority created an appellate standard of review, instructing the appellate courts to "review for 'unreasonable[ness]."'[54] But if the circuit courts still enforced the Guidelines, that would unravel *Booker*'s constitutional solution, because the constitutionality of the post-*Booker* Guidelines depends on their advisory nature.

Justice Scalia suspected that reasonableness review was a poison pill. Truly advisory Guidelines would not require reasonableness review.[55] Because appellate courts previously reviewed only deliberate departures from the Guidelines,[56] Justice Scalia wrote, not even the remedial majority "knows—and perhaps no one is meant to know—how advisory Guidelines and 'unreasonableness' review

48. *Id*. at 252.

49. 18 U.S.C. § 3553(b)(1) (2006).

50. *Booker*, 543 U.S. at 259. *See* 18 U.S.C. § 3742(e) (2006).

51. *Booker*, 543 U.S. at 259.

52. *Id*. at 264.

53. *Id*. at 264-65.

54. *Id*. at 261. The remedial majority crafted the appellate standard of review, it said, by finding an implied standard of review in the statutory text, and with an eye toward historical tradition and practical considerations. *Id.* at 260-61. The Court effectively imported pre-*Booker* appellate review when it noted that the post-*Booker* standard "was consistent with appellate sentencing practice during the last two decades." *Id*. at 262. As Justice Scalia noted in his dissent to the remedial opinion, however, pre-*Booker* reasonableness review "never extended beyond review of deliberate departures from the Guidelines range." *Id*. at 310 (Scalia, J., dissenting).

55. *Id*. at 306 (Scalia, J., dissenting).

56. *See supra* note 54.

will function in practice."[57] Faced with "unreasonableness" review, the courts "might seek refuge in the familiar" and continue the previous appellate practice of enforcing adherence to the Guidelines.[58] Justice Scalia's prediction of "a discordant symphony of different standards"[59] was prescient.

D. After Booker

In many respects, the advisory Guidelines system looks much like the pre-*Booker* mandatory system. At the district court level, little has changed. "[P]re-*Booker* and post-*Booker* sentencing are identical, right up to the determination of a Guidelines range."[60] The probation officer still bases the presentence report on facts relevant to the Guidelines calculation.[61] Upon review of the report, the sentencing judge makes findings of fact and calculates the corresponding Guidelines range.[62] Then the judge determines whether such a sentence is consistent with the factors set forth in 18 U.S.C. § 3553(a),[63] and either sentences within the range or chooses a sentence outside the range that serves the § 3553(a) factors.[64] Lastly, the judge must explain his sentence in terms of the § 3553(a) factors.[65] Pre- and post-*Booker* sentences are also substantively similar. One study found that district courts sentence below the

57. *Booker*, 543 U.S. at 311 (Scalia, J., dissenting).

58. *Id.* at 312; *see also id.* at 311-12 ("[T]he remedial majority's gross exaggerations [that the reasonableness standard is 'already familiar to appellate courts'] may lead some courts of appeals to conclude—may indeed be designed to lead courts of appeals to conclude—that little has changed.").

59. *Id.* at 312.

60. Graham C. Mullen & J.P. Davis, *Mandatory Guidelines: The Oxymoronic State of Sentencing After* United States v. Booker, 41 U. RICH. L. REV. 625, 639 (2007).

61. *See* Rita v. United States, 127 S. Ct. 2456, 2460 (2007).

62. Mullen & Davis, *supra* note 60, at 631 (describing post-*Booker* sentencing procedures in the Fourth Circuit); *see also* UNITED STATES SENTENCING COMMISSION, FINAL REPORT ON THE IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING, at v (2006) [hereinafter POST-BOOKER FINAL REPORT] ("[C]ircuit courts have now uniformly agreed that all post-*Booker* sentencing must begin with calculation of the applicable guideline range.").

63. *See supra* note 24.

64. Mullen & Davis, *supra* note 60, at 631-32.

65. *Id.* at 632. *See also* 18 U.S.C. § 3553(c) (2006) ("The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence.").

Guidelines range only about seven to eight percent more often than before *Booker*.[66]

Circuit courts have tried to reconcile *Booker*'s "seemingly internally inconsistent holdings"[67] and determine what constitutes unreasonable sentences. Some circuits reached for familiar appellate tools. Believing that the Sentencing Commission based the Guidelines on all the § 3553(a) factors, one group of judges "held that courts should continue to follow the Guidelines in all but extraordinary cases. The position of [this] school later morphed into the notion that appellate courts should 'presume'" that within-Guidelines sentences are reasonable.[68] Seven circuits adopted a presumption that within-Guidelines sentences are reasonable.[69] Nine circuits adopted an aggressive system for policing outside-Guidelines sentences:[70] a "proportionality" review that requires increased justification for a sentence the further it is from the

66. The U.S. Sentencing Commission compared the year following *Booker* to the pre-*Booker* period and found that within-Guidelines range sentences decreased by 8.9 percent, and below-range sentences increased by 6.7 percent. POST-BOOKER FINAL REPORT, *supra* note 62, at 57. Using a later period, another study found that *Booker* increased below-Guidelines sentences by about 8 percent. Alexander P. Robbins & Lynda Lao, The Effect of Presumptions: An Empirical Examination of Inter-Circuit Sentencing Disparities After *United States v. Booker* 22 (Nov. 4, 2007), *available at* http://ssrn.com/abstract=1027541.

67. United States v. Cage, 451 F.3d 585, 591 (10th Cir. 2006) (noting *Booker*'s "confusing nature").

68. Lynn Adelman & Jon Deitrich, Rita, *District Court Discretion, and Fairness in Federal Sentencing*, 85 DENV. U. L. REV. 51, 52 (2007) (citing Amy Baron-Evans, *The Continuing Struggle for Just, Effective and Constitutional Sentencing After* United States v. Booker, CHAMPION, Sept.-Oct. 2006, at 32-33) (footnote omitted). The idea that the Guidelines account for the § 3553(a) factors "appeared in a district court decision the day after *Booker* was decided," then in the Sentencing Commission's congressional testimony, then in a Commission training program for judges, probation officers, and prosecutors, and then in judicial opinions across the country. Baron-Evans, *supra*, at 33. This idea runs counter to "the Commission's own reports, the guidelines manual, and reliable historical sources." *Id.*

69. Rita v. United States, 127 S. Ct. 2456, 2462 (2007) (citing United States v. Dorcely, 454 F.3d 366, 376 (D.C. Cir. 2006); United States v. Green, 436 F.3d 449, 457 (4th Cir. 2006); United States v. Alonzo, 435 F.3d 551, 554 (5th Cir. 2006); United States v. Williams, 436 F.3d 706, 708 (6th Cir. 2006); United States v. Mykytiuk, 415 F.3d 606, 608 (7th Cir. 2005); United States v. Lincoln, 413 F.3d 716, 717 (8th Cir. 2005); and United States v. Kristl, 437 F.3d 1050, 1053-54 (10th Cir. 2006) (per curiam)). The First, Second, Third, and Eleventh Circuits have rejected the presumption. *Id.*

70. Before *Gall*, the First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits adopted proportionality review, and no circuit rejected it. Brief for the United States at 13 n.3, Gall v. United States, 128 S. Ct. 586 (2007) (No. 06-7949).

Guidelines range.[71] These standards of review have led the circuit courts to affirm essentially all within-Guidelines sentences as reasonable.[72] Between *Booker* and *Rita*, circuits reversed below-range sentences twenty times as often as above-range sentences.[73] The courts' responses to *Booker* showed that "the federal sentencing system [is] almost impervious to dramatic doctrinal change in the status of the Guidelines."[74] This lack of change suggests that the Guidelines are not truly advisory.

II. *RITA* AND *GALL*: USING AMBIGUITY TO SOLVE CONFUSION

The Supreme Court addressed post-*Booker* sentencing in two major opinions in 2007, *Rita v. United States* and *Gall v. United States*. Although both decisions clarified appellate reasonableness review in some ways, their ambiguous and even contradictory language allows the Guidelines' constitutional problems to persist.

A. Rita*: Something for Everyone*

Confronting the tension between uniformity and the advisory Guidelines, the Supreme Court in *Rita v. United States* sided with uniformity and sanctioned the presumption of reasonableness.[75] This result is unstable because of *Rita*'s internal contradictions, and undesirable because the presumption strongly encourages within-Guidelines sentences.

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71. The Court heard oral arguments regarding proportionality review in early October 2007. Gall v. United States, 128 S. Ct. 586, 586 (2007).

72. *United States v. Lazenby* is the exception. POST-BOOKER FINAL REPORT, *supra* note 62, at 35 (citing United States v. Lazenby, 439 F.3d 928 (8th Cir. 2006)). On remand, the district court applied the same sentence as before to Lazenby and his co-conspirator, which the Eighth Circuit affirmed. United States v. Goodwin, 486 F.3d 449 (8th Cir. 2007).

73. POST-BOOKER FINAL REPORT, *supra* note 62, at 35. A recent analysis of post-*Booker* appellate review shows that circuit courts reverse "78.3 percent of below-range sentences appealed by the government ... compared to 3.5 percent of above-range sentences appealed by the defense." Paul J. Hofer, *Empirical Questions and Evidence in* Rita v. United States, 85 DENV. U. L. REV. 27, 36 (2007) (citing Brief for the Federal Public and Community Defenders and the National Association of Federal Defenders as Amicus Curiae Supporting Petitioners, Rita v. United States, 127 S. Ct. 2456 (2007) (No. 06-5754)).

74. Berman, *supra* note 12, at 22.

75. 127 S. Ct. 2456, 2459 (2007).

Victor Rita was a poster case for a non-Guidelines sentence. In 2004, Rita was convicted of perjury, making false statements, and obstructing justice for lying under oath about whether he had bought and returned a machine gun parts kit from a gun company under federal investigation.[76] The Guidelines offense level for perjury is based on the "underlying offense" being investigated.[77] The district court judge found that the Government investigated the company for importing machine guns without authorization, so Rita's offense level increased accordingly.[78] Rita's criminal history consisted of a prior conviction in 1986 which earned him probation, resulting in the lowest criminal history level.[79] Based on his offense and criminal history, the Guidelines recommended thirty-three to forty-one months in prison.[80] Rita argued that he merited a below-Guidelines sentence because of his poor physical condition, twenty-five years of highly awarded military service, and his potential to be a vulnerable target in prison because of his criminal justice work.[81] "Unable to find" that the Guidelines range was "inappropriate," the district court judge sentenced Rita to thirty-three months.[82] Rita argued on appeal that his sentence was greater than necessary and unreasonable because the district court did not adequately consider his history and characteristics. Despite Rita's argument, the Fourth Circuit presumed that the sentence was reasonable and affirmed.[83]

In some ways, *Rita* strengthened the advisory nature of the Guidelines by limiting the presumption of reasonableness. First, district courts may not presume that a Guidelines sentence is appropriate.[84] Second, the Court did not require circuits to adopt the presumption, or even suggest that they do so.[85] Third, the appellate courts are not bound by the presumption, as they are with a burden-shifting "trial-related evidentiary presumption"[86]—by which the

76. *Id.* at 2459-60.
77. *Id.* at 2460.
78. *Id.*
79. *Id.* at 2460-61.
80. *Id.* at 2461.
81. *Id.*
82. *Id.* at 2462.
83. *Id.*
84. *Id.* at 2465.
85. Berman, *supra* note 12, at 13.
86. *Rita*, 127 S. Ct. at 2463.

Court seemed to mean that the presumption is a non-binding suggestion that the sentence is correct. Fourth, *Rita*'s holding "does not mean that [circuit] courts may adopt a presumption of unreasonableness" to variances from the Guidelines range.[87] Fifth, the Court acknowledged the sentencing judge's "access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court."[88] Given these aspects of *Rita*, district courts should tailor sentences to each individual defendant, taking account of the Guidelines range, but not using the range as the default sentence.

Despite the Court's emphasis on the discretion of sentencing courts, circuit courts could just as easily use *Rita* to encourage within-Guidelines sentences. The district judge in *Rita* treated the Guidelines sentence as the presumptive sentence when he said that he was "unable to find" that it was "an inappropriate guideline range."[89] Surprisingly, the Court regarded this very limited record as sufficient to show that the judge adequately considered the defendant's arguments.[90] Such an analysis allows judges to provide fewer reasons for within-Guidelines sentences.

The Court encouraged district courts to treat the Guidelines as the benchmark.[91] The presumption of reasonableness, the Court said,

> reflects the fact that, by the time an appeals court is considering a within-Guidelines sentence on review, *both* the sentencing judge and the Sentencing Commission will have reached the *same* conclusion as to the proper sentence in the particular case. That *double determination* significantly increases the likelihood that the sentence is a reasonable one.[92]

This approach is theoretically reasonable, if the sentence and the Guidelines calculation are *independently* determined. But because

87. *Id.* at 2467.
88. *Id.* at 2469.
89. *Id.* at 2462.
90. *Id.* at 2469.
91. In *Gall*, the Court used the term "benchmark" in instructing the district courts to begin sentencing with the appropriate Guidelines calculation. Gall v. United States, 128 S. Ct. 586, 596 (2007).
92. *Rita*, 127 S. Ct. at 2463 (third emphasis added).

judges assume that the Guidelines already account for the § 3553(a) factors, these decisions are not necessarily separate or independent.

The Court then undercut the idea that the two determinations are independent. The Court repeatedly asserted that because the Sentencing Commission built the § 3553(a) factors into the Guidelines,[93] "it is fair to assume that the Guidelines ... reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives."[94] These arguments, even if dicta, allow district courts to assume that a Guidelines sentence embodies the § 3553(a) factors. Furthermore, the Court's own instructions for sentencing presume that within-Guidelines sentences are appropriate.[95] And procedurally, although § 3553 requires explanations for all sentences, within-Guidelines sentences require only a limited explanation. If "the judge has found that the case before him is typical" and decides to sentence within the Guidelines range, and a party does not contest the Guidelines sentence, "the judge normally need say no more."[96] The judge has little to justify if he sentences within-range, which has all the trappings of a procedural presumption. Despite *Rita*'s holding that the presumption of reasonableness does not apply at the district court level, the decision provides many tools for circuit courts to favor within-Guidelines sentences.[97]

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93. *Id.* at 2463. Amy Baron-Evans argues that this argument does not withstand historical scrutiny. *See supra* note 68.

94. *Rita*, 127 S. Ct. at 2464-65; *see also id.* at 2463 ("The upshot is that the sentencing statutes envision both the sentencing judge and the Commission carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale.").

95. *Id.* at 2465 ("The sentencing judge, as a matter of process, will normally begin by considering the presentence report and its interpretation of the Guidelines. He may hear arguments by prosecution or defense that the Guidelines sentence should not apply, perhaps because ... the case at hand falls outside the 'heartland' to which the Commission intends the individual Guidelines to apply, perhaps because the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps because the case warrants a different sentence regardless." (citations ommitted)).

96. *Id.* at 2468.

97. In his concurring opinion, Justice Stevens acknowledged the courts' failure to treat the Guidelines as truly advisory but hoped that *Rita* would sufficiently reform the system. "Given the clarity of our holding, I trust that those judges who had treated the Guidelines as virtually mandatory during the post-*Booker* interregnum will now recognize that the Guidelines are truly advisory." *Id.* at 2474 (Stevens, J., concurring).

B. Gall*: Proportionality Review Prohibited?*

Gall v. United States did for outside-Guidelines sentences what *Rita* did for within-Guidelines sentences: helpfully clarified the limits of reasonableness review while leaving open many opportunities for abuse. In *Gall*, the Supreme Court considered whether the circuit courts could apply proportionality review—an aggressive standard requiring "justification ... 'proportional to the extent of the difference between the advisory range and the sentence imposed'"[98] —to outside-Guidelines sentences.[99] Some circuits employed mathematical formulas, requiring district judges to meet increasingly higher bars of justification at each benchmark.[100] Commonly, a certain percentage variance from the Guidelines range triggered a requirement of "extraordinary circumstances."[101] Circuits adopting the "extraordinary circumstances" test reversed outside-Guidelines sentences as unreasonable three times as often as within-Guidelines sentences.[102] By foreclosing a range of available sentences and

98. Gall v. United States, 128 S. Ct. 586, 594 (2007) (quoting United States v. Gall, 446 F.3d 884, 889 (8th Cir. 2006)).

99. In addition to the Eighth Circuit, seven other circuits had adopted proportionality review, and none had rejected it. *See supra* note 70.

100. *United States v. Hildreth* displays the review at its most absurd and arbitrary. 485 F.3d 1120 (10th Cir. 2007). Comparing Hildreth's sentence to similar defendants, the court established a common law of percentages by comparison to other sentences: a 471 percent upward variance from the Guidelines range is an "extreme divergence" requiring "dramatic facts" to be substantively reasonable. *Id.* at 1127. "Substantial" divergences, such as a 122 percent upward variance from the Guidelines range, require "compelling reasons"; and "significant" divergences, such as a 37 percent upward variance, require "sufficient explanation and justification." *Id.* at 1127-28.

101. *See* United States v. Goff, 501 F.3d 250, 261 n.16 (3d Cir. 2007) (requiring "extraordinary circumstances" for a four-month sentence where the Guidelines range was thirty-seven to forty-six months); United States v. Richardson, No. 05-4817, 2007 WL 1413075, at *2 (4th Cir. May 11, 2007) (finding insufficient "extraordinary" factors for a 180-month sentence where the Guidelines range was 324 to 405 months); United States v. Davis, 458 F.3d 491, 496 (6th Cir. 2006) (requiring "extraordinary circumstances" for a 99.89 percent variance); United States v. Wallace, 458 F.3d 606, 612 (7th Cir. 2006) (requiring "extraordinary circumstances" for a sentence of probation, a 100 percent variance); *Gall*, 446 F.3d at 889 (same); United States v. Claiborne, 439 F.3d 479, 481 (8th Cir. 2006) (requiring "extraordinary circumstances" for a 60 percent downward variance).

102. Brief Amici Curiae of the Federal Public and Community Defenders and the National Association of Federal Defenders in Support of Petitioner 13-14, Gall v. United States, 128 S. Ct. 586 (2007) (No. 06-7949).

replacing the district courts' judgment, the circuits' proportionality review "closely resembled *de novo* review."[103]

Like *Rita*, *Gall v. United States* presented an ideal defendant for a below-Guidelines sentence. Brian Gall was involved in an ecstasy sales ring as a college sophomore for seven months in 2000.[104] He stopped using ecstasy within two months of joining the conspiracy and later withdrew from the conspiracy.[105] That was the last of his illegal drug involvement. After his withdrawal, he "self-rehabilitated" by graduating from college, becoming a master carpenter, and starting his own business.[106] When federal agents questioned him about the ecstasy conspiracy, he fully cooperated and admitted his involvement.[107] He was indicted in April 2004 for conspiracy to distribute ecstasy, cocaine, and marijuana.[108] Gall pleaded guilty to his participation in the conspiracy. Based on his involvement and without any criminal history, the Guidelines recommended thirty to thirty-seven months in prison.[109] Because of Gall's withdrawal, his exemplary post-offense conduct, his otherwise clean criminal history, and his age at the time of the offense, the district court judge sentenced him to three years of supervised probation.[110] Applying proportionality review and noting that Gall's sentence was a 100 percent downward variance, not "supported by extraordinary circumstances," the Eighth Circuit reversed his sentence.[111]

The *Gall* Court attempted to end proportionality review. The Court asserted that it had "made it pellucidly clear" in *Booker* and *Rita* that appellate reasonableness review is an abuse-of-discretion standard.[112] Circuit courts may not require "extraordinary" circumstances or use a "rigid mathematical formula that uses the percentage of a variance as the standard for determining the strength of the

103. *Gall*, 128 S. Ct. at 600.
104. *Id.* at 591-92.
105. *Id.*
106. *Id.* at 592.
107. *Id.*
108. *Id.*
109. *Id.* at 592-93.
110. *Id.* at 593.
111. *Id.* at 594.
112. *Id.* at 594-95. Despite *Gall*'s claims about the Court's earlier clarity, neither "abuse" nor "abuse of discretion" appeared in *Booker*. *Rita* only mentioned "abuse of discretion" once in passing, 127 S. Ct. 2456, 2465 (2007), a "new formulation" that surprised the Tenth Circuit. United States v. Angel-Guzman, 506 F.3d 1007, 1014 (10th Cir. 2007).

justifications required for a specific sentence."[113] These tests, the Court instructed, "come too close to creating an impermissible presumption of unreasonableness."[114]

Taken alone, those holdings could preclude any form of proportionality review. But *Gall* created ample room for circuit courts to review outside-Guidelines sentences more stringently. Appellate courts may "consider the extent of a deviation from the Guidelines."[115] The Court even instructed district courts to "give serious consideration to the extent of any departure from the Guidelines and ... explain [the] conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications."[116] This mandate contradicts the Court's argument that a "heightened" standard of review is inconsistent with abuse-of-discretion review.[117] The Court further obscured its holding by stating, matter-of-factly, "We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one."[118] As a whole, *Gall* suggests that circuit courts may impose a heightened standard on outside-Guidelines sentences, so long as the standard does not expressly employ an "extraordinary circumstances" or "rigid mathematical formula" test.

III. *RITA* AND *GALL* APPLIED

A. Standards of Review

As this Note observes with respect to *Booker*, the Supreme Court's decisions and the appellate courts' interpretations of them can be quite different. To examine closely the impact of *Rita* and *Gall* on the appellate review of sentences, this Note focuses on the Sixth and Tenth Circuits, chosen because of their well-developed case law, notable majority and dissenting opinions, and different approaches

113. *Gall*, 128 S. Ct. at 595.

114. *Id.*

115. *Id.*

116. *Id.* at 594. Elsewhere, the Court said that a district judge "must consider the extent of the deviation and ensure that the justification is *sufficiently compelling* to support the degree of the variance." *Id.* at 597 (emphasis added).

117. *Id.* at 596.

118. *Id.* at 597.

to reasonableness. Admittedly, discerning circuits' broad trends through individual cases is an imperfect method. One three-judge panel can destroy a circuit's uniform approach, and one circuit judge's emphasis may slightly alter the case law. Despite these shortcomings, this Note aims to represent accurately each circuit's law and recognize internal differences.

As a whole, reasonableness review is an abuse-of-discretion standard,[119] which means that appellate courts review legal determinations de novo[120] and factual determinations for clear error.[121] The Sixth and Tenth Circuits divide reasonableness review into procedural and substantive components.[122] Generally, as the Supreme Court clarified in *Gall*, a sentence is procedurally reasonable if the judge considered the appropriate factors, correctly calculated the advisory Guidelines range, and adequately stated his reasons.[123] Substantive reasonableness is much more subjective. In the Sixth Circuit, a sentence is substantively unreasonable "when

119. *Id.* at 597. Although *Gall* established that reasonableness review is an abuse-of-discretion review, *see supra* text accompanying note 112, the Sixth and Tenth Circuits implicitly applied abuse-of-discretion review before *Gall* because they reviewed legal determinations de novo and factual determinations for clear error. *See* United States v. Fink, 502 F.3d 585, 587 (6th Cir. 2007); United States v. Garcia-Lara, 499 F.3d 1133, 1135-36 (10th Cir. 2007). Generally, abuse-of-discretion review is appropriate when "[a] decision committed to a trial judge's discretion is a decision with respect to which Congress or the courts have decided that there is no single right or wrong answer, but a range of acceptable choices." HARRY T. EDWARDS & LINDA A. ELLIOTT, FEDERAL COURTS STANDARDS OF REVIEW: APPELLATE COURT REVIEW OF DISTRICT COURT DECISIONS AND AGENCY ACTIONS 16 (2007).

120. Conclusions of law are normally subject to de novo review, which "afford[s] no deference to the trial judge's decision." EDWARDS & ELLIOTT, *supra* note 119, at 5, 7.

121. "Clear error" review presumes that the trial judge's findings of fact are correct. *Id.* at 20. *See, e.g.*, United States v. Ward, 506 F.3d 468, 472 (6th Cir. 2007).

122. *See* United States v. Atencio, 476 F.3d 1099, 1102 (10th Cir. 2007); United States v. Davis, 458 F.3d 505, 510 (6th Cir. 2006). Other circuits also divide reasonableness review into substantive and procedural components. *See, e.g.*, United States v. Tomko, 498 F.3d 157, 164 (3d Cir. 2007), *vacated and reh'g granted*, 513 F.3d 360 (3d Cir. 2008); United States v. Rattoballi, 452 F.3d 127, 131 (2d Cir. 2006); United States v. Moreland, 437 F.3d 424, 434 (4th Cir. 2006).

123. In reviewing procedural reasonableness, appellate courts must ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range. *Gall*, 128 S. Ct. at 597. The Sixth and Tenth Circuits have adopted *Gall*'s language for procedural reasonableness review. *See* United States v. Moon, 513 F.3d 527, 539 (6th Cir. 2008); United States v. Martinez, 512 F.3d 1268, 1275 (10th Cir. 2008).

the district court selects the sentence arbitrarily, bases the sentence on impermissible factors, fails to consider pertinent § 3553(a) factors or gives an unreasonable amount of weight to any pertinent factor."[124] Although the first three prongs of this test are somewhat objective, the fourth is completely subjective because the reasonable amount of weight may vary from judge to judge. The Tenth Circuit's definition of substantive reasonableness is even more vague: "A substantively reasonable sentence ultimately reflects the gravity of the crime and the § 3553(a) factors as applied to the case."[125] If substantive reasonableness depends on such subjective measures, the standard has little to no content. Therefore, an appellate court may easily use the standard to substitute its judgment for the district court's and enforce adherence to the Guidelines.

Despite and because of *Rita* and *Gall*, circuits can enforce adherence to the Guidelines through three primary tools: the presumption of reasonableness and proportionality review, which are both components of substantive reasonableness review, and procedural reasonableness. This Note will now analyze each of those tools and the Sixth and Tenth Circuits' use of them.

B. Presumption of Reasonableness

The presumption of reasonableness may violate the Sixth Amendment because it shields from review sentences that require judge-found facts. The operation of the presumption at the appellate level is relatively simple. The appellate court presumes that a sentence falling within a properly calculated Guidelines range is reasonable.[126] The defendant must rebut the presumption by showing that the sentence is procedurally or substantively unreasonable.[127]

The constitutionality of the presumption rests on the premise that judge-found facts are not *absolutely necessary* to the final sentence.

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124. United States v. Keller, 498 F.3d 316, 322 (6th Cir. 2007) (quotation omitted).

125. *Atencio*, 476 F.3d at 1102.

126. United States v. Madden, 515 F.3d 601, 609 (6th Cir. 2008) ("[A] sentence that falls within a properly calculated Guidelines range is accorded a rebuttable presumption of reasonableness.").

127. *Id.*

> [T]he presumption, even if it increases the likelihood that the judge, not the jury, will find "sentencing facts," does not violate the Sixth Amendment. This Court's Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence.[128]

Because the presumption is a "nonbinding appellate presumption," the sentencing judge is not required to impose a Guidelines sentence.[129] The Court assumed that the district court judge may freely assign any sentence between the statutory minimum and maximum. If that is the case, then judge-found facts and the advisory Guidelines range are mere factors among many that judges may use to select a sentence. A judge could find facts that would triple a Guidelines sentence, but still permissibly sentence the defendant well below the Guidelines range. The constitutionality of the presumption of reasonableness completely depends on the truly advisory nature of the Guidelines.

The Court's defense of the presumption does not withstand even minimal scrutiny, as Justice Scalia demonstrated in his *Rita* dissent. The presumption itself is not unconstitutional, he allowed. In some cases, however, reasonableness review will violate the Sixth Amendment "because there will be some sentences that will be upheld as reasonable only because of the existence of judge-found facts."[130] Justice Scalia offered the hypothetical of a defendant convicted of robbery.[131] With the lowest level of criminal history, the Guidelines range would be thirty-three to forty-one months. If the judge found certain additional facts by a preponderance of the evidence, the Guidelines range would be 235 to 293 months.[132] Given the presumption of reasonableness, the appellate court would affirm a 293-month sentence because the sentence would be within the Guidelines range. But had the judge still varied upward to 293 months without finding those particular facts, "the sentence would

128. *Rita*, 127 S. Ct. at 2465-66.

129. *Id.* at 2466.

130. *Id.* at 2478 (Scalia, J., dissenting).

131. *Id.* at 2477.

132. *Id.* The judge would need to find that the defendant discharged a firearm, inflicted serious bodily injury on a victim, and stole more than $5 million. *Id.*

surely be reversed as unreasonably excessive."[133] While this argument depends on the circuit court using proportionality review to reverse such a sentence, the presumption of reasonableness makes judge-found facts essential to some sentences.

This situation does not exist only in Justice Scalia's hypothetical, contrary to the *Rita* Court's suggestion.[134] Appellate courts regularly use the presumption of reasonableness to affirm within-Guidelines sentences based largely on facts that judges found by a preponderance of the evidence. In one recent case, the judge's fact-finding produced a Guidelines sentence of eighty-four months, which was five times longer than the Guidelines sentence for the crime to which the defendant pleaded guilty.[135] Applying the presumption of reasonableness to the within-Guidelines sentence, the Sixth Circuit affirmed.[136] Other circuits have recently used the presumption to affirm sentences in which the district judge increased the Guidelines range by finding facts by a preponderance of the evidence.[137] Because these sentences were within the Guidelines range, appellate courts affirmed them with very little scrutiny.

In practice, the appellate courts use the presumption of reasonableness as a rubber stamp for Guidelines sentences. For a "rebuttable" presumption, the numbers are astounding: appellate courts have reversed as substantively unreasonable only *one* within-Guidelines sentence since *Booker*.[138] That track record has convinced Judge Michael W. McConnell of the Tenth Circuit "that the rebuttability of the presumption [of reasonableness] is more theoretical than real."[139] He suspects "that a substantively

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133. *Id.*

134. *Id.* at 2467 (majority opinion) ("And [Justice Scalia's] need to rely on *hypotheticals* to make his point is consistent with our view that the approach adopted here will not 'raise a multitude of constitutional problems.'").

135. United States v. Sedore, 512 F.3d 819, 829 (6th Cir. 2008) (Merritt, J., dissenting).

136. *Id.* at 827-28 (majority opinion). The Sixth Circuit recently affirmed another sentence in which the judge applied sentencing enhancements based on a preponderance of the evidence. United States v. Moon, 513 F.3d 527, 541 (6th Cir. 2008).

137. *See* United States v. Lopez-DeLeon, 513 F.3d 472, 473, 475-76 (5th Cir. 2008); United States v. Carter, 510 F.3d 593, 596-97, 601-03 (7th Cir. 2007); United States v. Ramirez-Vazquez, No. 07-2074, 2007 WL 3194102, at *1, *3 (10th Cir. Oct. 25, 2007).

138. *See* POST-BOOKER FINAL REPORT, *supra* note 62, at 30.

139. United States v. Pruitt, 502 F.3d 1154, 1166 (10th Cir. 2007) (McConnell, J., concurring). McConnell writes,

> The process reminds me of the "snipe hunts" of my boyhood years in the Scouts,

unreasonable within-Guidelines sentence does not exist."[140] *Rita* only exacerbated the practice of blindly applying the presumption, as both the Sixth and the Tenth Circuits interpreted the decision as confirming the validity of their reasonableness review.[141] Moreover, *Gall*'s holding that appellate courts must apply an abuse-of-discretion standard reinforced the presumption of reasonableness.

The presumption creates a strong "gravitational pull"[142] toward the Guidelines at the district court level. Some district judges have treated the Guidelines as presumptively reasonable at sentencing.[143] *Rita*'s express prohibition of this practice will prevent district courts from *explicitly* presuming that a Guidelines sentence is appropriate. If anything, though, *Rita* encourages district courts to treat the Guidelines range as the default sentence.[144] The Sixth Circuit has further entrenched the presumption at the district court level by requiring the defendant to object to his sentence as procedurally unreasonable at sentencing, or essentially waive that objection on appeal.[145] If reasonableness is the standard by which a sentence will

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> where the older boys would take the younger ones out in the woods at night in search for creatures that turned out not to exist. Great fun, for Boy Scouts. So far, in the post-*Booker* forest, only one apparent snipe has been found, and it turned out, on remand, not to be a snipe after all.

Id. at 1173.

140. *Id.*

141. United States v. Garcia-Lara, 499 F.3d 1133, 1135 (10th Cir. 2007); United States v. Liou, 491 F.3d 334, 339 (6th Cir. 2007). Most other circuits have done the same. Berman, *supra* note 12, at 22 n.90 (citing United States v. Conlan, 500 F.3d 1167, 1169 (10th Cir. 2007); United States v. Goff, 501 F.3d 250, 257 (3rd Cir. 2007); United States v. Boleware, 498 F.3d 859, 861-62 (8th Cir. 2007); United States v. D'Amico, 496 F.3d 95, 106 n.10 (1st Cir. 2007); United States v. Wachowiak, 496 F.3d 744, 745 (7th Cir. 2007); United States v. Campbell, 491 F.3d 1306, 1314 n.11 (11th Cir. 2007)).

142. Justice Souter used the term "gravitational pull" for district court judges' attraction toward the Guidelines range after *Booker*. Rita v. United States, 127 S. Ct. 2456, 2487 (2007) (Souter, J., dissenting).

143. *See, e.g.*, United States v. Ross, 501 F.3d 851, 852 (7th Cir. 2007); United States v. Conlan, 500 F.3d 1167, 1168 (10th Cir. 2007); United States v. Wilms, 495 F.3d 277, 279 (6th Cir. 2007).

144. *See supra* notes 89-97 and accompanying text; *see also* United States v. Birkett, 501 F. Supp. 2d 269, 280 (D. Mass. 2007) (arguing that *Rita* "encourages and insulates a within-guideline sentence"); Berman, *supra* note 12, at 18 (arguing that, in light of *Rita*'s conflicting language, "lower courts still cannot be sure if they should embrace further expansion of judicial sentencing discretion").

145. United States v. Vonner, 516 F.3d 382, 385 (6th Cir. 2008) (en banc) (applying plain error review to a sentence's procedural reasonableness where the district court judge completely failed to address the defendant's arguments for a downward variance, and the

be judged on appeal, a district court will understandably follow that standard. The Guidelines create a very alluring option for district courts: why risk reversal when a Guidelines sentence is practically unassailable? For that reason, *Rita* and the presumption of reasonableness bias the sentencing regime in favor of within-Guidelines sentences.

C. Disparate Sentencing Explanations

Rita approved the relaxed procedural reasonableness review of within-Guidelines sentences, another key element of the Guidelines' gravitational pull. One of the requirements of procedural reasonableness is that the district court "adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range."[146] That requirement is derived from the SRA.[147] Some circuits, however, have created two different standards: within-Guidelines sentences require only a cursory explanation, but outside-Guidelines sentences require a detailed explanation.[148]

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defendant declined to raise any additional objections at the end of the hearing).

146. *See supra* note 123.

147. "The court ... shall state in open court the reasons for ... the particular sentence." 18 U.S.C. § 3553(c) (2006). Within-Guidelines sentences require "the reason for imposing a sentence at a particular point within the range," whereas outside-Guidelines sentences require "the *specific* reason for the imposition of a sentence different from [the Guidelines range]." § 3553(c)(1)-(2) (emphasis added).

148. Berman, *supra* note 12, at 15. *See also* United States v. Carty, 520 F.3d 984, 990-94 (8th Cir. 2008) (en banc); United States v. Ausburn, 502 F.3d 313, 331 n.36 (3rd Cir. 2007) (noting that "a sentencing court must provide a 'fuller explanation' when it 'imposes a sentence that varies significantly from the advisory Guidelines range'" (quoting United States v. Kononchuk, 485 F.3d 199, 204 (3d Cir. 2007)); United States v. Battle, 499 F.3d 315, 323 (4th Cir. 2007) ("In some cases, applying a Guidelines sentence will in itself be sufficient to demonstrate that the district court has considered the § 3553(a) factors."); United States v. Tyra 454 F.3d 686, 688 (7th Cir. 2006) (same); United States v. Myers, 439 F.3d 415, 418 (8th Cir. 2006) (observing that the Eighth Circuit affirms within-Guidelines sentences where the district court did not "categorically rehearse" each § 3553(a) factor); United States v. Simpson, 430 F.3d 1177, 1187 (D.C. Cir. 2005) ("'[I]t is enough to calculate the range accurately and explain why (if the sentence lies outside it) this defendant deserves more or less.'" (quoting United States v. George, 403 F.3d 470, 473 (7th Cir. 2005)); United States v. Mares, 402 F.3d 511, 519 (5th Cir. 2005) (holding that a sentence within the properly calculated Guidelines range requires "little explanation").

Appellate courts often use the double standard to push sentences toward the Guidelines range.[149]

To the *Rita* Court, the double standard is uncontroversial. If the judge sentences within the Guidelines range, and neither party contests the sentence, then no further explanation is necessary.[150] This lower bar for procedural reasonableness creates three main problems. First, it is contrary to the SRA. Although 18 U.S.C. § 3553(c) requires judges to provide "the specific reason" for outside-Guidelines sentences, they must still provide "the reason" for within-Guidelines sentences.[151] Judges must explain *all* sentences, not only outside-Guidelines sentences, indicating that judges must weigh factors other than the Guidelines. Conveniently, those factors are listed nearby at § 3553(a), and the Guidelines range is only one factor among nine.[152] Based on the statute, judges sentencing within the Guidelines should explain *why* such a sentence is appropriate in light of the listed criminal justice goals.

Second, the double standard for sentencing explanations helps to create a presumption of reasonableness at the district court level in some circuits. According to one district court judge, one prime reason that judges did not "eagerly exercise their newfound discretion" after *Booker* is "the fact that it is easier to sentence within the Guidelines."[153] According to another district court judge, this rule effectively extends the presumption of reasonableness to the sentencing court.[154] Outside-Guidelines sentences require more procedural labor from the district courts. "To busy courts, *that alone*

149. *See, e.g.*, *In re* Sealed Case, 527 F.3d 188, 194 (D.C. Cir. 2008) (Kavanaugh, J., dissenting) (arguing that, where the majority found an above-Guidelines sentence procedurally unreasonable because the district court did not sufficiently detail its reasoning, despite the court plainly setting out its reasons, the reversal "illustrates the magnetic pull that the Guidelines still occasionally exert over appellate courts in cases involving sentences outside the Guidelines range"); United States v. Peña-Hermosillo, 522 F.3d 1108, 1117 (10th Cir. 2008) (finding sentence of 121 months where Guidelines advised 324 to 405 months procedurally unreasonable because the explanation was inadequate "especially where the variance from the guidelines range is as large as this").

150. *See supra* text accompanying note 96.

151. *See supra* note 147.

152. *See supra* note 24.

153. Adelman & Deitrich, *supra* note 68, at 54.

154. Mullen & Davis, *supra* note 60, at 633 (noting that, "at the absolute most," the judge "is required to state that he has considered the factors in § 3553(a) with no further elaboration").

has a gravitational pull,"[155] wrote a third district court judge. The additional labor creates a disincentive to sentence outside the Guidelines range.

Third, despite *Rita*'s language supporting the rule, *Gall* requires more from the district court. Under *Gall*, the district court "must make an individualized assessment" and "adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing."[156] Simply "utter[ing] one sentence indicating that [the sentencing factors] had been considered"[157] is neither individualized nor adequate for meaningful review.[158] Yet the Tenth Circuit found a sentence with such an explanation procedurally reasonable.[159] Although some circuits require more detailed explanations of within-Guidelines sentences from their district courts,[160] the Supreme Court's ambiguity undermines its own holdings and allows the circuits to favor heavily the Guidelines.

D. Proportionality Review

If the presumption of reasonableness is the carrot of reasonableness review, then proportionality review is the stick that circuit courts use to police outside-Guidelines sentences. After *Gall*, proportionality review is still in flux. The initial appellate decisions indicate that *Gall* did not end proportionality review and its

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155. Nancy Gertner, Rita *Needs* Gall—*How to Make the Guidelines Advisory*, 85 DENV. U. L. REV. 63, 70 (2007).

156. Gall v. United States, 128 S. Ct. 586, 597 (2007).

157. United States v. Rivera-Morales, No. 07-2003, 2008 WL 80661, at *5 (10th Cir. Jan. 8, 2008).

158. The exemption from providing explanations for within-Guidelines sentences effectively prevents any substantive reasonableness review of them, further strengthening the presumption of reasonableness. *See The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 245, 251 (2007).

159. *Rivera-Morales*, 2008 WL 80661, at *6.

160. *See, e.g.*, United States v. Johnson, 488 F.3d 690, 700 (6th Cir. 2007) (finding a sentence procedurally unreasonable where the Sixth Circuit was "unable to find any discussion of the reasons for which the district court chose the sentence"); United States v. Mitchell, No. 06-1070, 2007 WL 1544230, at *8 (6th Cir. May 25, 2007) (holding that a district court cannot "[s]imply stat[e] that there is 'no persuasive reason' to depart from the Guidelines range" without analyzing the § 3553(a) factors).

constitutional abuses, but rather only reined in its most extreme versions.

*1. Pre-*Gall *Proportionality Review*

Before *Gall*, nine circuits had adopted proportionality review.[161] Generally, the further that a sentence fell outside the Guidelines range, the more justification a circuit court would require.[162] The circuits' applications of the standard differed, however. The Sixth Circuit crafted a relatively deferential proportionality review. The court usually allowed district courts to treat the Guidelines as advisory, repeatedly affirming sentences well below the Guidelines range.[163] The court was especially cognizant that although it might have imposed a different judgment than the district court, reasonableness review is not de novo.[164] If the district court sufficiently justified a particular sentence, the Sixth Circuit "hesitate[d] to 'second guess' [its] determination."[165] For the most part, the Sixth Circuit allowed outside-Guidelines sentences.

At the extremes, however, the Sixth Circuit applied a unique, less deferential form of proportionality. Beginning with *United States v. Davis*, the Sixth Circuit required sentences at or near the maximum or minimum prison time to leave "room to make reasoned distinctions" between the defendant and more worthy, future defendants.[166] For example, if the statutory minimum sentence were

161. *See supra* note 70.

162. *See, e.g.*, United States v. Davis, 458 F.3d 491, 496 (6th Cir. 2006) ("'[T]he farther the judge's sentence departs from the guidelines sentence ... the more compelling the justification based on factors in section 3553(a)' must be." (quoting United States v. Dean, 414 F.3d 725, 729 (7th Cir. 2005))).

163. *See* United States v. Baker, 502 F.3d 465, 467 (6th Cir. 2007) (affirming sentence of probation when Guidelines advised 27 to 33 months). The court has proudly catalogued its repeated affirmation of substantial variances. United States v. Poynter, 495 F.3d 349, 352-53 (6th Cir. 2007) (noting the Sixth Circuit's affirmation of variances ranging from a 99.91 percent downward variance to a 177 percent upward variance); United States v. Hairston, 502 F.3d 378, 379 (6th Cir. 2007) (affirming 60-month sentence when Guidelines advised 121 to 151 months); United States v. Cherry, 487 F.3d 366, 371 (6th Cir. 2007) (affirming 120-month sentence when the Guidelines advised 210 to 262 months); United States v. Husein, 478 F.3d 318, 321-22 (6th Cir. 2007) (affirming a sentence of home confinement and supervised release when Guidelines advised 37 to 46 months).

164. *Cherry*, 487 F.3d at 372.

165. *Husein*, 478 F.3d at 328.

166. *Davis*, 458 F.3d at 499.

thirty months, downward variances near that sentence required "compelling justification" and "extraordinary circumstances."[167] To determine whether the circumstances were extraordinary, the appellate court would carefully examine the facts of the case on its own.[168] Because the *Davis* rule required the court to speculate about all past and future defendants, it became an absurd de novo review-by-anecdote.[169] The *Davis* rule demonstrated that proportionality review tempts even otherwise deferential circuits toward de novo review.

In contrast, the Tenth Circuit's proportionality review more aggressively reversed outside-Guidelines sentences. Similar to the Sixth Circuit's *Davis* rule, an "extreme variance" from the Guidelines required "dramatic facts."[170] In *United States v. Hildreth*, the court employed the sort of mathematical analysis that *Gall* now forbids.[171] Even though the district court thoroughly justified the sentence of probation with proper considerations under § 3553(a), the Tenth Circuit concluded that the lower court "essentially ignored the recommendation of the sentencing Guidelines."[172] When the Guidelines advised a sentence of 262 to 327 months, a 140-month sentence required "particular characteristics of the defendant that are sufficiently uncommon."[173] Under such a review, the Tenth Circuit did not ask whether the district court had exceeded its discretion, but rather reweighed the facts and reached its own

167. United States v. Borho, 485 F.3d 904, 913-14 (6th Cir. 2007).

168. *See Davis*, 458 F.3d at 498-99.

169. When a majority of a panel weighed a lenient sentence against the parsimony provision of § 3553(a) instead of the *Davis* rule, and affirmed, United States v. Hairston, 502 F.3d 378, 385-86 (6th Cir. 2007), Judge Batchelder dissented, attempting to determine whether the defendant was "the most worthy crack dealer." *Id.* at 387 (Batchelder, J., dissenting). "If Mother Teresa sold 5 grams of crack then she *could not possibly* get less prison time than the majority opinion approves for [the defendant]." *Id.* at 388.

170. United States v. Cage, 451 F.3d 585, 594, 596 (10th Cir. 2006) (reversing sentence of six days imprisonment when Guidelines advised forty-six to fifty-seven months).

171. Comparing the defendant's sentence to similar defendants, the Tenth Circuit observed: a 471 percent upward variance is an "extreme divergence" requiring "dramatic facts"; "substantial" divergences, such as a 122 percent upward variance, require "compelling reasons"; and "significant" divergences, such as a 37 percent upward variance, require "sufficient explanation and justification." United States v. Hildreth, 485 F.3d 1120, 1127-28 (10th Cir. 2007).

172. *Id.* at 1129.

173. United States v. Garcia-Lara, 499 F.3d 1133, 1140 (10th Cir. 2007) (quotations omitted).

conclusion. One dissenter, Judge Carlos F. Lucero, criticized the circuit's substantive reasonableness review as "hunt[ing] the white whale of disparity, a hunt which has required us to exercise a degree of scrutiny closer to de novo than abuse of discretion."[174] Before *Gall*, the Tenth Circuit's de novo form of proportionality review essentially confined district courts to the Guidelines.

2. Proportionality Review's Constitutional Problems

Judge Lucero's criticism highlights the constitutional problems with proportionality review. The "extraordinary circumstances" form of proportionality review was essentially de novo, as Judge Lucero argued in *Garcia-Lara*, and the Supreme Court noted in *Gall*.[175] It enabled an appellate court to weigh the facts on its own, asking if it would have reached the same sentence, rather than deferring to the district court. Quite often, the appellate courts would have imposed a Guidelines sentence rather than an outside-Guidelines sentence.[176] Although many of the circuit courts employed proportionality review to maintain sentencing uniformity,[177] the review still created what the Supreme Court called an "impermissible presumption of unreasonableness for sentences outside the Guidelines range."[178] Compared to the presumption of reasonableness, proportionality review is the more serious violation of *Booker*. While the presumption of reasonableness creates a preference for Guidelines sentences, proportionality review drives sentences toward the Guidelines and restricts district courts' freedom to sentence outside the Guidelines. As a result, judge-found facts are often necessary to adjust the Guidelines range, so that the resulting sentence withstands an appeal. Such a system closely resembles the mandatory Guidelines that *Booker* supposedly eliminated.

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174. *Id.* at 1145 (Lucero, J., dissenting); *see also* United States v. Atencio, 476 F.3d 1099, 1111 (10th Cir. 2007) (Kelly, J., dissenting) ("The developing case law in this Circuit on the question of appellate review of sentences can only be described as hostile to the advisory Guidelines scheme mandated by *Booker*.").

175. Gall v. United States, 128 S. Ct. 586, 600 (2007).

176. *See supra* note 101.

177. *See Garcia-Lara*, 499 F.3d at 1141.

178. *Gall*, 128 S. Ct. at 595.

3. Proportionality Review After Gall

Though *Gall* may have intended to end proportionality review, its ambiguity may enable appellate courts to continue using the review. As noted earlier, *Gall* only prohibited "rigid mathematical formulas" and an "extraordinary circumstances" test, but expressly allowed appellate courts to consider the extent of the deviation from the Guidelines.[179] Further, the Court required district courts to consider the extent of an "unusually lenient" or "unusually harsh" deviation from the Guidelines.[180] Appellate courts will likely deem a district court's failure to do so a reversible error, or at least note it on the record.

Gall's ambiguity is evident in the circuits' varying reactions. The Tenth Circuit appears to have taken *Gall*'s abuse of discretion language to heart. The court's new, post-*Gall* substantive reasonableness standard accords the district courts wide sentencing discretion.[181] In *United States v. Smart*,[182] a divided Tenth Circuit panel affirmed a 120-month sentence where the Guidelines range was 168 to 210 months' imprisonment.[183] The court held that *Gall* "cannot be reconciled" with its pre-*Gall* reasonableness review[184] and eschewed re-weighing the § 3553(a) factors de novo.[185] More recently, the Tenth Circuit affirmed a defendant's sentence of one year and one day in prison, home confinement, and supervised release, where the Guidelines advised forty-six to fifty-seven months' imprisonment.[186] Rejecting the government's argument that the district court placed undue weight on the defendant's extraordinary family circumstances, the Tenth Circuit found that the district court did not abuse its discretion because the record supported its reasons for a downward variance.[187] Similarly, the Tenth Circuit has

179. *See supra* notes 101, 103 and accompanying text.

180. *See supra* note 116 and accompanying text.

181. United States v. Haley, 529 F.3d 1308, 1311 (10th Cir. 2008) ("A sentence is substantively unreasonable if the length of the sentence is unreasonable given the totality of the circumstances in light of the 18 U.S.C. § 3553(a) factors." (citing United States v. Verdin-Garcia, 516 F.3d 884, 895 (10th Cir. 2008))).

182. 518 F.3d 800 (10th Cir. 2008).

183. *Id.* at 802.

184. *Id.* at 807.

185. *Id.*

186. United States v. Muñoz-Nava, 524 F.3d 1137, 1142, 1149 (10th Cir. 2008).

187. *Id.* at 1148.

affirmed as substantively reasonable a sentence of eighteen months' imprisonment for possession of child pornography where the Guidelines range was seventy-eight to ninety-seven months.[188] Although one of the district judge's reasons for the downward variance was the defendant's lack of a criminal record, a factor discouraged by the Guidelines, the Tenth Circuit still deferred to the lower court: "[A]fter *Gall* and *Kimbrough*, a factor's disfavor by the Guidelines no longer excludes it from consideration under § 3553(a)."[189] The Tenth Circuit's decisions indicate that it is fully willing to defer to the district courts and affirm substantial upward and downward variances.

The Sixth Circuit's reaction was mixed compared to the Tenth's. It strongly endorsed *Gall*, announcing that it would "no longer apply ... proportionality review" and that it considers its cases applying the review, including *Davis*, "effectively overturned."[190] Still, some Sixth Circuit panels may be trying to rebuild proportionality review. The court has held that the "essentials" of its pre-*Gall* substantive reasonableness review are consistent with the requirements of *Gall*.[191] This pre-*Gall* substantive reasonableness review asked whether a sentence gives "an unreasonable amount of weight to any pertinent factor"[192]—a rootless standard ripe for de novo review or even a weak proportionality review. Elsewhere, the court observed that *Gall* allows the circuits "to require some correlation between the extent of a variance and the justification for it."[193] More recently, a panel reversed a sentence of probation as substantively unreasonable because the district court based its sentence on the defendant's lack of culpability relative to the other defendants in the scheme.[194]

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188. United States v. Huckins, 529 F.3d 1312, 1314 (10th Cir. 2008).

189. *Id.* at 1318.

190. When the court directly reconsiders the *Davis* rule, the "room to distinguish" standard may survive, as long as it does not require extraordinary circumstances. United States v. Bolds, 511 F.3d 568, 581 (6th Cir. 2007) ("[W]e no longer apply a form of proportionality review to outside-Guidelines sentences, which would require the strength of the justification for a departure to vary in proportion to the amount of deviation from the Guidelines, and find our prior cases applying this rule, *see, e.g.*, *United States v. Davis*, 458 F.3d 491, 496 (6th Cir. 2006), to have been effectively overturned by *Gall*.").

191. United States v. Vowell, 516 F.3d 503, 510 (6th Cir. 2008).

192. *See supra* note 124 and accompanying text.

193. United States v. Grossman, 513 F.3d 592, 596 (6th Cir. 2008) (citing Gall v. United States, 128 S. Ct. 586, 594-95 (2007)).

194. United States v. Hunt, 521 F.3d 636, 641, 649 (6th Cir. 2008).

Although the majority deemed this an "impermissible factor,"[195] the dissent observed ulterior reasons for the reversal. "I am unhappy to report that we have once again begun the slippery slope of agreeing with district court's [sic] who depart upward on the basis that they were reasonable and did not abuse their discretion, but when a judge decides to sentence below the non-binding guidelines, then we reverse and remand."[196] Even in the largely deferential Sixth Circuit, proportionality review probably stands.

Other circuits have reacted similarly, preserving proportionality to the greatest extent possible after *Gall*.[197] The Fourth Circuit is the boldest thus far, reading *Gall* as *affirming* its proportionality review.[198] However, the Fourth Circuit has affirmed a significant downward variance where the district court sufficiently explained its sentence according to the § 3553(a) factors.[199] The Eleventh Circuit confined *Gall* to its narrow prohibitions and focused on the decision's language allowing circuit courts to consider the extent of variances from the Guidelines range.[200] The Second Circuit employed this language to reverse a below-Guidelines sentence as substantively unreasonable.[201] Citing these reversals by the Eleventh and Second Circuits, one circuit judge praised them for "re-weighing ... the facts in the context of § 3553(a)."[202] While district courts are in the best position to weigh the facts, he said,

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195. *Id.* at 649.

196. *Id.* at 654 (Martin, J., dissenting).

197. *See* United States v. Lehmann, 513 F.3d 805, 808 (8th Cir. 2008) ("[A]s we understand *Gall*, we now examine the 'substantive reasonableness of the sentence' by taking into account 'the totality of the circumstances, including the extent of any variance from the Guidelines range' ...." (quoting *Gall*, 128 S. Ct. at 598)).

198. Citing a pre-*Gall* decision in which it held that the "farther the court diverges from the advisory guideline range, the more compelling the reasons for the divergence must be," United States v. Moreland, 437 F.3d 424, 434 (4th Cir. 2006), the Fourth Circuit said, "This statement is consistent with *Gall*'s requirement that, if the district court 'decides that an outside-Guidelines sentence is warranted, [it] must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.'" United States v. Pauley, 511 F.3d 468, 475 (4th Cir. 2007) (quoting *Gall*, 128 S. Ct. at 590-91).

199. United States v. Smith, No. 06-4885, 2008 WL 1816564, at *3 (4th Cir. Apr. 23, 2008) ("While we cannot say we would have varied [the defendant's] sentence to 24 months imprisonment [from the Guidelines range of 78 to 97 months], we also cannot say that the district court abused its discretion in so doing.").

200. United States v. Pugh, 515 F.3d 1179, 1190 (11th Cir. 2008).

201. United States v. Cutler, 520 F.3d 136, 163-64 (2d Cir. 2008).

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

> I can see no way, as a practical matter, to review the substantive reasonableness of a sentence without assessing the district court's rationale for the sentence and reviewing its application of the facts to the guidelines and § 3553(a). Even if a district court reviews each of the § 3553(a) factors individually, its sentence is not inevitably reasonable. To conclude otherwise would make appellate review, in effect, a nullity.[203]

The judge also noted the confusion arising from the Supreme Court's post-*Booker* jurisprudence. "While I have closely studied the post-*Booker* Supreme Court triumverate of *Rita*, *Kimbrough v. United States*, and *Gall*, I must conclude that the Court has left the specifics of how appellate courts are to conduct substantive reasonableness review, charitably speaking, unclear."[204] Given how quickly some appellate courts have taken advantage of *Gall*'s contradictory language, the Court's holding clearly failed to prohibit proportionality review. Proportionality review continues to prevent truly advisory Guidelines, and judge-found facts still are legally necessary for some sentences.

IV. LESS-THAN-ADVISORY GUIDELINES VIOLATE THE SIXTH AMENDMENT

Post-*Booker* appellate review has effectively allowed the mandatory Guidelines to continue in some circuits. Besides the pre- and post-*Booker* statistics already noted,[205] anecdotal evidence demonstrates the striking similarities between the effects of mandatory and "advisory" Guidelines. Consider again the case of Paul Sedore.[206] The sentence based on the facts that the jury found beyond a reasonable doubt was a mere fraction of the eventual sentence, based on judge-found facts. The most significant difference between Paul Sedore's case and Freddie Booker's is that while judge-found facts approximately doubled Booker's sentence, they quintupled Sedore's.[207]

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203. *Id.*
204. *Id.* at 168.
205. *See supra* note 73.
206. *See supra* text accompanying notes 1-6.
207. For the facts of Freddie Booker's sentence, see *supra* text accompanying notes 38-41.

To argue that judge-found facts were not absolutely necessary to Sedore's sentence is to miss the big picture. Without the additional fact-finding, it is highly unlikely that the district judge would have given Sedore a sentence 500 percent higher than the Guidelines range. True, the district judge *could* have attempted to deviate so drastically from the Guidelines without the additional facts. If he did, a strong possibility existed that the Sixth Circuit would have reversed the sentence as unreasonable. In other more Guidelines-centric circuits, such as the Fourth, Eighth, and Eleventh, the chances for reversal would be much greater. District judges have many incentives to sentence within the Guidelines: fewer issues to consider in crafting a sentence, a simpler and quicker sentencing hearing, an even more succinct explanation, and a presumptively reasonable sentence.[208] Proportionality review and its threat of reversal supply the disincentive for judges not to sentence outside the Guidelines. Like thousands of other judges sentencing defendants in the federal courts each year, Paul Sedore's judge was not entirely free to sentence outside the Guidelines.

The essential element of the "advisory" Guidelines' constitutional violation is proportionality review. If the circuits only favored within-Guidelines sentences through the presumption of reasonableness and disparate sentencing explanations, reasonableness review would not violate the Sixth Amendment. While such a system may create concern that district courts would rarely sentence outside the Guidelines, at least they would have the freedom to do so. But when the circuits combine the presumption of reasonableness with proportionality review, the Guidelines are not only easier, but safer. Proportionality review eliminates the complete freedom to sentence outside the Guidelines.

Because of the threat of proportionality review, judge-found facts are legally necessary to a defendant's increased sentence.[209] This regime does not violate the Sixth Amendment, according to *Rita*,

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208. *See* Rita v. United States, 127 S. Ct. 2456, 2488 (2007) (Souter, J., dissenting) ("What works on appeal determines what works at trial ....").

209. *See* Mullen & Davis, *supra* note 60, at 641 ("A judge must still use facts not found by a jury to enhance a sentence beyond what he would be able to impose based on the jury verdict alone, and he has no discretion to go outside of the enhanced range, except with a *further* finding of fact."); McConnell, *supra* note 33, at 678 ("All the things that troubled Sixth Amendment purists about the pre-*Booker* Guidelines system are unchanged.").

because the judge retains discretion to determine the ultimate sentence. That argument is valid if, and only if, the Guidelines are truly advisory. As this Note has demonstrated, however, the Guidelines are not merely advisory. Circuits will uphold some sentences "as reasonable only because of the existence of judge-found facts."[210]

Not only does reasonableness review often deprive defendants of their Sixth Amendment jury right, but it may deprive them of just sentences. As Judge Sutton put it, "no one sentences transcripts."[211] Compared with appellate judges, district judges are more familiar with defendants and the circumstances of their crimes. When a defendant does not receive the sentence he deserves, whether more or less lenient, justice is not served. District judges are not infallible. In most situations, however, the sentencing court is better positioned than the circuit court to see the subtle signs of rehabilitation, a callous criminality, or remorse, and tailor a just sentence accordingly.

V. THE SOLUTION: END SUBSTANTIVE REASONABLENESS REVIEW AND REQUIRE UNIFORM SENTENCING EXPLANATIONS

The Supreme Court can either tolerate an unconstitutional system of its own creation for the sake of consistency, or it can recognize *Booker*'s mistake and impose a new, constitutional solution. The Court is reluctant to reshape drastically the entire sentencing regime and require the jury to find each fact for sentencing purposes. And rightly so—that is Congress's job.[212] Nonetheless, a constitutional solution is within the Court's range of action. For the following reasons, the Supreme Court should prohibit substantive reasonableness review and require a uniform procedural review.

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210. *Rita*, 127 S. Ct. at 2478 (Scalia, J., dissenting).

211. United States v. Poynter, 495 F.3d 349, 351 (6th Cir. 2007) ("While trial judges sentence individuals face to face for a living, we review transcripts for a living. No one sentences transcripts.").

212. *See Rita*, 127 S. Ct. at 2488 (Souter, J., dissenting) ("At this point, only Congress can make good on both its enacted policy of mandatory Guidelines sentencing and the guarantee of a robust right of jury trial."); Gall v. United States, 128 S. Ct. 586, 603 (2007) (Souter, J., concurring) (arguing that the best solution is for Congress to reinstate the mandatory Guidelines and require the jury to find all facts necessary for increased sentences).

A. Prohibit Substantive Reasonableness Review

The best way to render the Guidelines advisory is to eliminate the tools that appellate courts use to enforce them. Prohibiting substantive reasonableness review would eliminate both the presumption of reasonableness and proportionality review. As Justice Scalia wrote in *Rita*, "The only way to assure district courts that they can deviate from the advisory Guidelines, and to ensure that judge-found facts are never legally essential to the sentence, is to prohibit appellate courts from reviewing the *substantive* sentencing choices made by district courts."[213] Substantive review is the real barrier to truly advisory Guidelines with individualized, constitutional sentencing.

Some have argued that eliminating substantive review altogether is unnecessarily radical. Because proportionality review is the essential element to the unconstitutionality of federal sentencing, one might argue, prohibiting proportionality review would grant district courts the freedom to sentence outside the Guidelines. For example, Justice Souter has proposed a uniform standard of substantive unreasonableness.[214] A uniform substantive review would greatly improve the current regime, if appellate courts could apply it faithfully. Unfortunately, however, even a uniform review will not make the "entire sentencing range set by statute available to" the district judges.[215] If the Court completely prohibits proportionality review, the circuit courts will search for some other means of assessing the substantive reasonableness of a sentence. The circuits have amply demonstrated that they are disposed to affirm within-Guidelines sentences and scrutinize outside-Guidelines sentences. In many cases, the circuits treat the Guidelines as mandatory. They implement uneven reasonableness review through substantive review.

The author of the Sixth Circuit's *Davis* rule, Judge Jeffrey S. Sutton, advocates limiting substantive review to extreme sentences.[216] Sutton discourages substantive review of modest variances

213. *Rita*, 127 S. Ct. at 2478 n.3 (Scalia, J., dissenting).

214. *Id.* at 2488 (2007) (Souter, J., dissenting).

215. *See id.* at 2478 n.3.

216. Jeffrey S. Sutton, *An Appellate Perspective on Federal Sentencing After* Booker *and* Rita, 85 DENV. U. L. REV. 79, 83-84 (2007). Sutton sees "little room for appellate review" of

from the Guidelines because "appellate courts are poorly positioned to reassess the application of these factors from a distance."[217] In order for sentences at the extremes to remain somewhat consistent, however, Sutton advocates substantive reasonableness review.[218] At the extremes, appellate courts can better draw "reasoned distinctions" between sentences, and they "should not hesitate" to use substantive review to promote consistency.[219]

Sutton's proposal ultimately fails for two reasons. First, it is a vague standard. The line between "modest" and "extreme" variances is very difficult to draw. Certainly *Davis*'s 99.89 percent downward variance was extreme.[220] But what about 90 percent? eighty percent? Sutton eschews using percentages,[221] but a line is necessary to guide circuit courts. Further, as Sutton himself observed in *Davis* and his article, the sentencing court has a unique perspective of the defendant and the appropriate sentence.[222] Maybe Davis's low sentence *was* warranted. If "no one sentences transcripts," then how can a circuit court confidently recognize extraordinary circumstances? The need to distinguish with future, more deserving defendants is an attractive argument for the *Davis* rule.[223] Yet, that argument provides little guidance for district courts and a fuzzy standard for the appellate courts. Hypothetically, there will *always* be a more deserving defendant. A court cannot anticipate infinity.

More problematically, Sutton's proposal does not solve the constitutional defects of substantive review, an issue that he does not address in his article. Under his proposal, extreme downward or upward variances are unreasonable unless the judge finds certain mitigating or aggravating facts to distinguish the present case from

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district courts' applications of the § 3553(a) factors. *Id*. at 84.

217. *Id*.

218. *Id*. at 85-86 ("[S]o long as appellate courts ensure that the trial courts meaningfully communicate why a guidelines sentence does not make sense in a given case and so long as they ensure that trial courts comply with the procedural requirements of post-*Booker* sentencing, I see little room for substantive-reasonableness review of such sentences.").

219. *Id*.

220. *See* United States v. Davis, 458 F.3d 491, 498 (6th Cir. 2006).

221. Sutton, *supra* note 216, at 85. Another shortcoming of using percentages is that most courts regard probation as a 100 percent variance, even though probation entails a "substantial restriction of freedom." Gall v. United States, 128 S. Ct. 586, 595 (2007).

222. *See supra* note 217 and accompanying text.

223. *See supra* text accompanying notes 166-69.

future ones.[224] Some judges will react by sentencing closer to the Guidelines range. Others will find the facts necessary for the Guidelines to encompass the sentence they wish to issue, "in disparagement of the jury right."[225] As Justice Scalia points out, it is difficult to see how this "chaos" improves upon the mandatory regime.[226] Regardless of the circumstances in which the circuits use substantive review, across all sentences or only at the extremes, it drives sentences toward the Guidelines, inevitably violating the jury right for some defendants.

No matter its form, substantive review is inherently subjective. If circuit judges inquire into whether a sentence gives an unreasonable amount of weight to any one factor, or if it reflects the gravity of the crime, they must weigh these factors themselves. Substantive review "pressure[s] district courts into either crafting sentences within the Guidelines range or, at a minimum, categorically ignoring substantial upward or downward variances."[227] As long as circuit courts review for substantive reasonableness, they will unevenly apply that standard.

The uneven application will continue to produce unconstitutional sentences. District judges will recognize the risk of reversal of sentencing outside the Guidelines, and will tend to sentence within the Guidelines. If a judge wishes to increase a sentence, he will still do so by finding the facts necessary to move the Guidelines range in line with that sentence.

Alternatively, one might argue that while eliminating substantive review is the solution, the Court should incrementally reach this goal. Perhaps it is better to help the sentencing system gradually improve, rather than advance another failed drastic solution, as *Booker* fashioned. The current approach, though, shows no signs of improvement. The pattern thus far is that the Court considers a feature of reasonableness review, sets out to restrict it, but instead barely restricts and mostly condones the feature. Afterward, the confusion and ambiguity leave the federal courts in a worse state than the Court found them. The Court would be better off not

224. *See* Sutton, *supra* note 216, at 85-90.
225. Rita v. United States, 127 S. Ct. 2456, 2488 (2007) (Souter, J., dissenting).
226. *Id.* at 2480 (Scalia, J., dissenting).
227. United States v. Tomko, 498 F.3d 157, 184 (3d Cir. 2007) (Smith, J., dissenting).

altering reasonableness review in piecemeal fashion until it decides how to clean up its own mess.

Gradual improvement is also unlikely because the federal sentencing institution is highly resistant to the advisory Guidelines. Probation officers draft presentence reports much as they did before *Booker*.[228] Prosecutors and defendants still focus their sentencing haggling on the proper Guidelines calculation.[229] The Department of Justice requires federal prosecutors to request the Guidelines sentence in all but extraordinary cases,[230] and the U.S. Attorneys Office instructs them to argue that the within-Guidelines sentence "necessarily furthers several of the goals of sentencing specified in 18 U.S.C. § 3553(a)."[231] Moreover, the sentencing statute still reflects the mandatory regime for which it was written. *Booker* only excised the mandatory provision and the appellate standard of review, and added the vague "unreasonableness" review. Therefore, the only substantive guide for the appellate and district courts is § 3553(a). Those factors, however, "were not designed as an appellate standard of review and, in reality, provide no practical guidance. The § 3553(a) factors tell judges ... not to sentence too high and not to sentence too low."[232] If the Guidelines were truly advisory, § 3553(a)'s vagueness would give district courts more discretion. But if the circuit courts are so inclined, they can fill that vagueness with their judgments and enforce close adherence to the Guidelines.

A thunderclap from above is required to shock the federal sentencing regime into finally treating the Guidelines as advisory. The boom must come from the Supreme Court and the change must begin with the appellate courts. If the appellate courts stop enforcing the Guidelines, then the district courts will likely sentence

228. *See* Gertner, *supra* note 155, at 70-71; Berman, *supra* note 12, at 21-22.

229. Gertner, *supra* note 155, at 70-71; Berman, *supra* note 12, at 21-22.

230. *See* Memorandum from James B. Comey, Deputy Att'y Gen., U.S. Dep't of Justice 2 (Jan. 28, 2005), *available at* http://sentencing.typepad.com/sentencing_law_and_policy/files/dag_jan_28_comey_memo_on_booker.pdf ("[F]ederal prosecutors must obtain supervisory authorization to recommend or stipulate to a sentence outside the appropriate Guidelines range ....").

231. Elizabeth A. Olson, *The Presumption of Reasonableness for Within-Guidelines Sentences*, UNITED STATES ATTORNEYS BULLETIN, Sept. 2006, at 30.

232. United States v. Pruitt, 502 F.3d 1154, 1175 (10th Cir. 2007) (McConnell, J., concurring); *see also* United States v. Gammicchia, 498 F.3d 467, 468-69 (7th Cir. 2007) (calling § 3553(a) "vague and nondirectional").

according to § 3553(a) and require the probation office, the prosecutors, and the defense bar to do the same.

Purely procedural review would sacrifice some sentencing consistency. But even if purely procedural review abandons substantive review's consistency, it would reduce some disparities. Appellate courts would still reverse sentences based on impermissible factors, that failed to consider § 3553(a), or failed to explain their reasons,[233] necessarily eliminating some errant sentences. Because the Sentencing Commission revises the Guidelines "to reflect the desirable sentencing practices," over time the "district courts will have less reason to depart from the Commission's recommendations, leading to more sentencing uniformity."[234]

Finally, one might argue that prohibiting substantive review is not prudent because the current system only occasionally violates the Sixth Amendment. Indeed, it would be one thing if these violations occurred *in spite of* an otherwise constitutional appellate review. But these violations occur *because of* substantive reasonableness review. Further, as Justice Scalia observed in *Rita*, the presence of constitutional violations "in only a small proportion of cases" was sufficient for the Court to overturn the mandatory Guidelines.[235] Surely such violations justify tweaking an appellate standard of review if they justified the much larger change of rendering the Guidelines advisory.[236]

The current federal sentencing regime so consistently violates the Sixth Amendment right to a jury trial that the Court is obliged to solve it. Admittedly, the Court held this substantive review constitutional in *Rita* and *Gall*. Nonetheless, the Court has acknowledged the infirmities of the advisory Guidelines by frequently reconsidering the *Booker* solution. The Court will likely continue to revisit *Booker* given the internal inconsistencies of that decision and those of *Rita* and *Gall*. As the circuits' reactions to *Rita* and *Gall* have demonstrated, they will continue to supplant the district

233. 18 U.S.C. § 3553(c) (2006) ("The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence ....").

234. Rita v. United States, 127 S. Ct. 2456, 2483 (Scalia, J., dissenting).

235. *Id.* at 2480.

236. *Id.* ("If our conjured-up system does not accomplish [*Booker*'s] goal [of eliminating constitutional violations entirely], then by what right have we supplanted the congressionally enacted mandatory Guidelines?").

courts' judgment with their own judgment, unless and until the Court sets well-defined, constitutional boundaries. Even if the Supreme Court does not immediately overturn *Rita* and *Gall*, it will likely tweak its instructions to the circuit courts in order to fix the obvious defects in the decisions. These defects, and the circuits' tendency to enforce the Guidelines, will eventually force the Court to revise drastically its *Booker* solution. Rather than allow *Booker*'s uncertainty and constitutional violations to persist, the Court should recognize its failure sooner rather than later. Because substantive review is inherently subjective and the circuits are so intent on enforcing the Guidelines, prohibiting substantive review is necessary for a return to constitutional sentencing.

B. Uniform Procedural Review

A uniform procedural review would force district courts to consider *all* the § 3553(a) factors and not heavily favor the Guidelines. The appellate courts should require an adequate explanation of sentencing reasons from the district courts for sentences within or outside the Guidelines. Although not necessary for constitutional sentencing, this solution would clarify that the Guidelines are not the default, but one factor among many that judges must consider according to § 3553(a). Requiring the same specificity would allow "meaningful appellate review" of *all* sentences, and not just outside-Guidelines sentences.[237] Currently, the relaxed within-Guidelines explanation requirement creates the temptation to sentence only within the Guidelines and to rely on judge-found facts. Equalizing the explanation requirement eliminates this temptation—the last aspect of the Guidelines' "gravitational pull."

This solution may require a slight statutory alteration. Without Congress, the Supreme Court can clarify that the circuits must still comply with 18 U.S.C. § 3553(c)(1), which requires the court to state its reason for a within-Guidelines sentence. However, because § 3553(c)(2) requires a "specific reason" for outside-Guidelines sentences instead of only a "reason," the Court alone cannot fix this uneven requirement. Congress should amend § 3553(c) to require

237. *See supra* note 156 and accompanying text.

uniform explanations. These changes would eliminate the district courts' incentive to sentence within the Guidelines.

These changes would also avoid the injustices of the current system. Those judges best positioned to tailor a just sentence to the defendant and his crime—the district court judges—would have full discretion to do so, provided that they follow the correct procedures. This regime would better comply with § 3553(a) and its plain discretionary language, as well as *Booker*'s core holding that the Guidelines are advisory.

CONCLUSION

Because *Booker* failed to guide appellate courts in their reasonableness review, the circuit courts have filled the gap. When exercised, substantive review allows circuit courts to strip district courts of their discretion to sentence outside the Guidelines range. Uneven procedural review violates 18 U.S.C. § 3553, allows the district courts to treat the Guidelines as the default, and enhances the "gravitational pull" of the Guidelines. Reasonableness review often results in the judge, not the jury, finding facts legally necessary for a sentence, violating the defendant's constitutional jury right under the Sixth Amendment.

Until Congress cures the multiple defects in the system, the Supreme Court should correct its own failure and prohibit circuits from reviewing sentences for substantive reasonableness, and require uniform procedural review. While an imperfect solution, it makes the best of a bad situation. Most importantly, sentencing will be constitutional, and in the hands of those best positioned to issue a just sentence: the district courts.

David C. Holman[*]

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* J.D. Candidate 2009, William & Mary School of Law; B.A. 2003, Providence College; M.A. 2004, The University of Chicago. Thanks to my parents Chris and Patty, Jane Elizabeth Hertz, Lindsey Vaala and Jacksy Bilsborrow for their advice and guidance, and to Judge Richard J. Leon for sparking my interest in federal sentencing law.