

## Appellate Discretion and Sentencing After *Booker*

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### I. INTRODUCTION

When the Supreme Court in *United States v. Booker*<sup>1</sup> rendered the United States Sentencing Guidelines advisory, most analysts initially predicted that federal sentencing would be invigorated by a “surge of judicial discretion.”<sup>2</sup> Many defense attorneys and members of the news media hailed the decision a victory for criminal defendants,<sup>3</sup> while others celebrated *Booker* for its emancipation of district court judges from the tyranny of the Guidelines.<sup>4</sup> Less explored in *Booker*’s immediate aftermath was how the decision would affect the courts of appeals’ review of district court sentencing decisions.<sup>5</sup> What has resulted is pri-

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1. 543 U.S. 220 (2005).

2. See Susan R. Klein, *The Return of Federal Judicial Discretion in Criminal Sentencing*, 39 VAL. U. L. REV. 693, 695–96 (2005).

3. Testifying before the United States Sentencing Commission just after the *Booker* opinion was issued, Jon Sands, Chair of the Federal Defender Sentencing Guideline Committee and Federal Public Defender for the District of Arizona, stated that “*Booker* is the latest in a series of Supreme Court decisions that have given greater protection to the constitutional rights of criminal defendants in sentencing.” *Hearing Before the U.S. Sentencing Comm.*, 113th Cong. 1 (2005) (testimony of Jon Sands, Chair, Federal Defender Sentencing Guidelines Committee), available at [http://www.ussc.gov/hearings/02\\_15\\_05/Sands\\_testimony.pdf](http://www.ussc.gov/hearings/02_15_05/Sands_testimony.pdf); see also Mark Hamblett, *Defense Lawyers Hail Sentencing Decisions*, N.Y. L.J., Jan. 13, 2005, at 1; Carl Hulse & Adam Liptak, *New Fight over Controlling Punishments Is Widely Seen*, N.Y. TIMES, Jan. 13, 2005, at A29; Tony Mauro, *Sentence Fragment: A Supreme Court Decision Last Week Turned Back the Clock 20 Years on Sentencing*, LEGAL TIMES, Jan. 17, 2005, at 1; Lorraine Woellert & Mike France, *Corporate Cases: Time To Cut a Deal?; A New Ruling Could Empower Defendants—Until Congress Rewrites Sentencing Rules*, BUS. WK., Jan. 24, 2005, at 43 (noting that *Booker* “warmed the hearts of many criminal defense lawyers—and their clients”).

4. Frank O. Bowman, III, *The Year of Jubilee . . . or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After Booker*, 43 Hous. L. REV. 279, 280 (2006) (noting that “[s]ome observers greeted the decision in *United States v. Booker* as a sort of Emancipation Proclamation for federal sentencing judges”); see also Hulse & Liptak, *supra* note 3, at A29 (quoting one district court judge as stating in response to *Booker*, “I’m really elated, and I think most judges will be, too”).

5. Although much has been written about judicial discretion after *Booker*, most of the focus has been on the discretion of the district courts to issue sentences under a system of advisory Guidelines, as opposed to the discretion of the courts of appeals to review those sentences. See,

marily confusion about the role of the appellate courts in reviewing sentences.<sup>6</sup> Several often seemingly conflicting imperatives are at play after *Booker*: the district court's discretion to impose a sentence unconstrained by the Guidelines, the obligation of the court of appeals to show deference to the substantive judgment of the district court, and the simultaneous authority of the court of appeals to review (and thus to disagree with) the substantive reasonableness of the sentence the district court has imposed. The challenge after *Booker* is, in light of these imperatives, how to define the scope of the courts of appeals' authority with respect to sentencing, or how to define what I call "appellate discretion" to review district court sentencing decisions.<sup>7</sup> Although there is a logical way to balance appellate discretion with deference to the district court, too often after *Booker* the courts of appeals—and the Eleventh Circuit in particular—have tipped to one extreme or the other.

Before *Booker*, appellate discretion was primarily exercised to ensure that district courts properly calculated the Guidelines range. When a district court departed from the Guidelines, appellate discretion was exercised to review the departure for reasonableness, which was primarily defined in terms of whether a departure would lead to unwarranted sentencing disparities. After *Booker* made the Guidelines advisory, however, sentencing disparities were inevitable. District courts were made free to vary from the Guidelines or sentence within the Guidelines range, so long as the sentence itself was reasonable and grounded in the sentencing factors set forth in 18 U.S.C. § 3553(a), which calls for the imposition of a sentence "sufficient, but not greater than necessary" to comply with the purposes of sentencing.<sup>8</sup> These pur-

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*e.g.*, Klein, *supra* note 2; see also Sandra D. Jordan, *Have We Come Full Circle? Judicial Sentencing Discretion Revived in Booker and Fanfan*, 33 PEPP. L. REV. 615, 616 (2006). But see Jeffrey S. Sutton, *An Appellate Perspective on Federal Sentencing After Booker and Rita*, 85 DENV. U. L. REV. 79 (2007); Kevin J. Doyle, *Criminal Sentencing in the Second Circuit After Booker: Theoretical and Practical Considerations*, 21 ST. JOHN'S J. LEGAL COMMENT. 653 (2007); see also Rosemary Barkett, *Judicial Discretion and Judicious Deliberation*, 59 FLA. L. REV. 905 (2007) (generally discussing judicial discretion and criminal sentencing).

6. Judge Gregory recently stated:

While I have closely studied the post-*Booker* Supreme Court triumvirate of *Rita*, *Kimbrough*, 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. Inevitably, as is the nature of appellate courts, vacuums of legal uncertainty left by the Supreme Court are quickly filled in a circuit by circuit manner, sometimes resulting in a grab bag of possible solutions.

United States v. Evans, No. 06-4789, 2008 WL 2174237, at \*10 (4th Cir. May 27, 2008) (Gregory, J., concurring in the judgment) (citation omitted).

7. I use the term "discretion" in the sense of the ability to choose between two or more permissible courses of action. When the range of permissible options, or the means by which a court may elect one as opposed to another, is constrained, discretion is limited.

8. 18 U.S.C. § 3553(a) (2000).

poses include, inter alia, the need for the sentence imposed to reflect the seriousness of the offense and to afford adequate deterrence to criminal conduct.<sup>9</sup> After *Booker*, then, the purpose of appellate review shifted. Rather than reviewing the reasonableness of departures in order to ensure uniformity, the courts of appeals were charged with the less defined task of reviewing the reasonableness of sentences themselves.<sup>10</sup>

Beyond the tagline of “reasonableness” review, the Supreme Court in *Booker* provided very little guidance to appellate courts about the nature and scope of their discretion to review the sentencing decisions of district courts. Must they review sentences only for procedural error such as incorrect calculation of the Guidelines range or consideration of factors beyond those outlined in § 3553(a), or may they also review sentences for substantive errors, and if so, under what standard? Multiple circuit splits have arisen on these and related questions. These splits reveal the inadequacy of the Supreme Court’s recent suggestion that its “explanation of ‘reasonableness’ review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions.”<sup>11</sup>

In fact, questions concerning the appellate standard of review have so profoundly dominated the case law since *Booker* that each of the Supreme Court’s three major post-*Booker* decisions—*Rita*,<sup>12</sup> *Gall*,<sup>13</sup> and *Kimbrough*<sup>14</sup>—has addressed, whether explicitly or implicitly, questions concerning the discretion of appellate courts to review sentences for reasonableness. What was predicted to be a struggle for power between the Sentencing Commission and the district courts has instead become a

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9. *Id.* § 3553(a)(2)(A), (a)(2)(B).

10. Indeed, the Seventh Circuit has suggested that “after *Booker*, which rendered the Guidelines advisory, departures have become obsolete.” *United States v. Blue*, 453 F.3d 948, 952 (7th Cir. 2006); see also *Booker* Discussion Topic: Are Departures Obsolete?, [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2005/12/booker\\_discussi.html](http://sentencing.typepad.com/sentencing_law_and_policy/2005/12/booker_discussi.html) (Dec. 2, 2005, 2:28 EST). But see *United States v. Moreland*, 437 F.3d 424, 433 (4th Cir. 2006) (“We believe, however, that so-called ‘traditional departures’—i.e., those made pursuant to specific guideline provisions or case law—remain an important part of sentencing even after *Booker*.”) (citation omitted).

11. *Gall v. United States*, 128 S. Ct. 586, 594 (2007).

12. *Rita v. United States*, 127 S. Ct. 2456 (2007). The three questions presented in *Rita* were directly about the district court’s ability to accord a presumption of reasonableness to within-Guidelines sentences, but as I explain *infra* pp. 715–17, the Court also addressed whether courts of appeals could accord the same presumption in reviewing sentences imposed by the district court.

13. The question presented in *Gall* was whether it is appropriate for the courts of appeals to require district courts to justify a sentence outside the Guidelines range with a finding of extraordinary circumstances.

14. *Kimbrough v. United States*, 128 S. Ct. 558 (2007). In the interest of candor, the author submitted an amicus curiae brief to the Supreme Court in support of the petitioner in *Kimbrough*. See Brief Amicus Curiae of the NAACP Legal Defense & Educational Fund, Inc., *Kimbrough v. United States*, 128 S. Ct. 558 (2007) (No. 06-6330).

struggle between discretion in the courts of appeals and deference to the district courts.

This struggle has quite clearly manifested in the Eleventh Circuit. In particular, the Eleventh Circuit has inconsistently reviewed the sentencing decisions of the district courts to determine their substantive reasonableness. In a small number of cases, the panel<sup>15</sup> has conducted its own, functionally *de novo* review of the sentencing factors applied by the district court. Other panels have evaluated the district court's analysis of the sentencing factors set forth in § 3553(a) without reviewing the factors anew. And the majority of panels have issued short, unpublished *per curiam* opinions that simply affirm the sentence imposed by the district court in a conclusory manner with no meaningful analysis at all. In all three categories of cases, the panel has purported to apply abuse-of-discretion review, but the nature of appellate review has been wildly inconsistent.

To some extent, the Eleventh Circuit's difficulties are inherent in the indeterminacy of the reasonableness standard itself. Reasonableness is adjudged by reviewing for an abuse of discretion, a standard that Professor Rosenberg has stated "has no meaning or idea content that I have ever been able to discern."<sup>16</sup> Yet the Supreme Court has begun to provide guidance as to how the courts of appeals should balance their own discretion with deference to the district courts when reviewing the substantive reasonableness of sentences. The Court has now made clear three times since *Booker* that while the courts of appeals should endeavor to review the substantive reasonableness of sentences, they should err on the side of deference to the district courts, particularly

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15. Although it is normally proper to refer to decisions of the Eleventh Circuit as decisions of the "court," throughout this article I refer to decisions of various "panels" rather than "courts." I do this in order to emphasize how in its substantive-reasonableness decisions, the Eleventh Circuit is not speaking as one court, but rather as disparate and sometimes conflicting panels.

16. Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 180 (1978). Professor Rosenberg's complete explanation for the indeterminacy of the abuse-of-discretion standard is quite colorful:

What are the standards or factors that lead to a finding that there has been an abuse of discretion? The decided cases are not especially informative. Their idea content and occasion for utterance are at about the same level as the sounds made by my college roommate, who was a boxer. While practicing in the room—shadow boxing and sparring—he would explode with noises like, 'ugh! ugh! ugh!' as he threw punches, hitting his shadow opponent. The term, 'abuse of discretion,' seems to me to be the same sort of phenomenon. It is the noise made by an appellate court while delivering a figurative blow to the trial judge's solar plexus. It is a way of saying to the trial judge, 'This one's on you.' The term has no meaning or idea content that I have ever been able to discern. It is just a way of recording the delivery of a punch to the judicial midriff.

*Id.*

when the district court's sentence is based on the individualized facts and circumstances of a particular case.

The Eleventh Circuit's sentencing cases since *Rita*, *Gall*, and *Kimbrough* suggest that the court has not completely come to terms with this message. In particular, the cases in which the court has applied functionally de novo review suggest that, at least sometimes, the Eleventh Circuit has continued to accord less deference to the district courts and to reach for more discretion than the Supreme Court has envisioned for the courts of appeals following *Booker*.<sup>17</sup>

In this article, I explore these cases and how they comport with the Supreme Court's envisioned role for the courts of appeals in sentencing cases since *Booker*. In Part II, I provide a brief history of sentencing law from before the adoption of the Sentencing Guidelines up through *Booker*, highlighting the changes in appellate discretion over this period coinciding with the shift from no Guidelines to mandatory Guidelines to the current advisory-Guidelines system. In Part III, I explore the confusion that has resulted since *Booker*, which has manifested in a series of circuit splits centering largely on the circuits' different understandings of their own discretion after *Booker*. I also explain how certain of those splits were resolved in the Supreme Court's decisions in *Rita*, *Gall*, and *Kimbrough*. In Part IV, I focus on the Eleventh Circuit's sentencing cases since *Booker*, *Rita*, *Gall*, and *Kimbrough*, exploring the underlying theme of the Eleventh Circuit's struggle to define its own discretion. Finally, in Part V, I advance a modest proposal for what I view as the proper appellate role in sentencing decisions after *Booker*, proposing specific rules for appellate review based on the Supreme Court's decisions in *Rita*, *Gall*, and *Kimbrough*. By observing these rules, the Eleventh Circuit would more faithfully execute the type of limited abuse-of-discretion review that the Supreme Court has envisioned for the courts of appeals after *Booker*.

## II. A BRIEF HISTORY OF SENTENCING DISCRETION

### A. *Federal Sentencing Before the Establishment of Guidelines*

Before the Sentencing Reform Act of 1984 called for the creation of Sentencing Guidelines, district court judges enjoyed virtually unfettered discretion to set federal sentences, limited only by the statutory

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17. See, e.g., *United States v. Pugh*, 515 F.3d 1179 (11th Cir. 2008); *United States v. McBride*, 511 F.3d 1293, 1298–1300 (11th Cir. 2007) (Dubina, J., dissenting) (arguing that the court should have reversed as substantively unreasonable a below-Guidelines sentence for distributing child pornography).

minimum and maximum.<sup>18</sup> “[S]entences were rarely appealed,”<sup>19</sup> and when they were, the role of appellate courts was limited to reviewing the district court’s sentence to determine if it was clearly erroneous.<sup>20</sup> As Judge Friendly explained in 1982, in setting criminal sentences, “the trial court is accorded broad, virtually unreviewable discretion.”<sup>21</sup>

This federal sentencing scheme came under scrutiny because it produced widespread disparity, with similarly situated defendants often sentenced by different district courts to widely varying terms of imprisonment.<sup>22</sup> Frustration with these disparities eventually led Congress to pass the Sentencing Reform Act in 1984.

### B. *The Sentencing Reform Act and the Establishment of Mandatory Sentencing Guidelines*

The Sentencing Reform Act (“SRA”) established a system of guidelines to restrict the discretion afforded to federal district courts. The Act delegated to the United States Sentencing Commission<sup>23</sup> the authority to create the Guidelines and established a standard for appellate review of district courts’ departures from the Guidelines.<sup>24</sup>

After the Commission was established, its members set about drafting the first set of Guidelines. The Guidelines set forth tables of sentencing ranges based not only on the charged offense and defendant’s criminal history, but also on post-conviction judicial findings of fact warranting upward or downward departures within the various sentencing ranges. The Guidelines were presented to and adopted by Congress

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18. Jordan, *supra* note 5, at 621.

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

20. *Id.*; see also *United States v. Booker*, 543 U.S. 220, 307 (Scalia, J., dissenting) (“Before the Guidelines, federal appellate courts had little experience reviewing sentences for anything but legal error. ‘[W]ell-established doctrine,’ this Court said, ‘bars [appellate] review of the exercise of sentencing discretion.’”) (quoting *Dorszynski v. United States*, 418 U.S. 424, 443 (1974)); Nancy Gertner, *Federal Sentencing Survey: Rita Needs Gall—How To Make the Guidelines Advisory*, 85 DENV. U. L. REV. 63, 67 (2007) (noting that “the appellate courts . . . had never addressed sentencing at all before the Guidelines”).

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

22. Jordan, *supra* note 5, at 616–17.

23. The Sentencing Commission is an independent commission composed of seven voting members appointed by the President and confirmed by the Senate to serve six-year terms. In developing the Guidelines, the Commission works with a staff of approximately 100 employees who compile a tremendous amount of data in setting sentencing ranges designed to promote uniformity for similarly situated offenders, accounting for similarities in the nature of the offense and the offender’s criminal history. See U.S. SENTENCING COMMISSION, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 3 (2007), available at [http://www.ussc.gov/general/USSC\\_Overview\\_Dec07.pdf](http://www.ussc.gov/general/USSC_Overview_Dec07.pdf).

24. 18 U.S.C. § 3742 (2000).

in 1987, and went into full effect once declared constitutional by the Supreme Court in 1989.<sup>25</sup>

The Guidelines limited the district court's role in sentencing to an almost entirely mechanical task of reviewing the sentencing grid to locate the Commission's intended sentence for an individual defendant.<sup>26</sup> As Sandra Jordan has observed, "The Guidelines reduced all federal sentences to a mathematical grid, and, almost without exception, the United States Department of Justice ('DOJ') predetermined the outcome by the way in which it charged a defendant."<sup>27</sup> The Guidelines system thus shifted discretion from the district courts to the executive branch.<sup>28</sup> This shift was so radical that over two hundred district courts initially declared the Guidelines unconstitutional,<sup>29</sup> though the Supreme Court subsequently clarified their constitutionality.<sup>30</sup> Nevertheless, district courts were so widely dissatisfied with the new system that one study showed a marked increase in the rate of retirement among district court judges operating under the Guidelines.<sup>31</sup>

Though this dissatisfaction was understandable, Congress had not completely deprived the district courts of discretion to depart from the Guidelines. A district court was permitted to depart from the Guidelines, but only based on a limited set of factors.<sup>32</sup> Specifically, the district court was bound by the Guidelines unless it determined that

an aggravating or mitigating circumstance of a kind, or to a degree,

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25. *Mistretta v. United States*, 488 U.S. 361, 412 (1989).

26. The horizontal axis of the sentencing grid represents the defendant's criminal history score, and the vertical axis represents the seriousness of the defendant's offense. There are forty-three offense levels and six criminal-history categories. To sentence a defendant under the Guidelines, a district court judge must measure the defendant's criminal-history score and offense level and locate the point at which they intersect on the grid. That point denotes a defendant's Guideline range. See U.S. SENTENCING COMMISSION, *supra* note 23, at 2–3.

27. Jordan, *supra* note 5, at 624 (citation omitted).

28. *Id.* ("With the advent of the mandatory Guidelines, judicial sentencing discretion in the federal court system virtually evaporated.").

29. Nancy Gertner, *From Omnipotence to Impotence: American Judges and Sentencing*, 4 OHIO ST. J. CRIM. L. 523, 524 (2007) ("Sentencing discretion was central to their work, a pillar of judicial independence. So clear were they on this point that between 1987 and 1989, after the United States Sentencing Guidelines were enacted, two hundred judges declared them to be unconstitutional."). One of the federal district court judges to declare the Guidelines unconstitutional was then district court Judge Stanley Marcus, who wrote the opinion on behalf of a 12–4 majority of the district judges of the Southern District of Florida, who had convened en banc to ascertain the constitutionality of the Guidelines. See *United States v. Bogle*, 689 F. Supp. 1121, 1125 (S.D. Fla. 1988) (en banc).

30. *Mistretta*, 488 U.S. at 412.

31. See Richard T. Boylan, *Do the Sentencing Guidelines Influence the Retirement Decisions of Federal Judges?*, 33 J. LEGAL STUD. 231, 251 (2004) (finding that district court judges took senior status 2.6 years sooner under the Guidelines system than in the period preceding their adoption).

32. U.S. SENTENCING COMMISSION: GUIDELINES MANUAL §§ 5K1.1–2.0 (2007).

not adequately taken into consideration by the Sentencing Commission in formulating the guidelines . . . should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court [could] consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission.<sup>33</sup>

However, even as Congress granted district courts this limited discretion to depart, it also expanded appellate discretion to review those departures.<sup>34</sup> Under the Sentencing Reform Act, once a district court completed the “difficult task”<sup>35</sup> of demonstrating that a departure from the Guidelines was warranted, its decision to depart was appealable to the court of appeals.<sup>36</sup>

Initially, appellate courts reviewed these departures from the Guidelines using three different standards of review. They reviewed *de novo* the question of law, i.e., the existence of aggravating or mitigating factors not considered by the Sentencing Commission; they reviewed findings of fact for clear error; and they reviewed the direction and degree of the district court’s departure for reasonableness under an abuse-of-discretion standard.<sup>37</sup> These three standards were used until 1996, when the Supreme Court in *Koon v. United States*<sup>38</sup> rejected the three in favor a single, unitary abuse-of-discretion standard.<sup>39</sup>

In *Koon*, the Court explained that the Sentencing Reform Act included discretion to depart in order “that district courts [would] retain much of their traditional sentencing discretion.”<sup>40</sup> According to the Court, deferential review was appropriate when reviewing a district court’s decision to depart because it would afford “the district court the

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33. 18 U.S.C. § 3553(b)(1) (2000).

34. Additionally, if a district court sentenced a defendant for a crime, which did not have a corresponding Guideline, the courts of appeals could also review that sentence if it was “plainly unreasonable.” 18 U.S.C. § 3742(a)(4), (b)(4) (2000); *see also* *United States v. Booker*, 543 U.S. 220, 262 (2005) (citing §§ 3742(a)(4), (b)(4), (e)(4)). For a general discussion of appellate review following the passage of the SRA, *see* Lee, *supra* note 19, at 3.

35. *United States v. Rodriguez*, 406 F.3d 1261, 1286 (11th Cir. 2005) (Tjoflat, J., dissenting from the denial of rehearing en banc).

36. 18 U.S.C. § 3742(a)(3), (b)(3) (2000); *see also Booker*, 543 U.S. at 262 (noting that the Sentencing Reform Act required the use of reasonableness review when reviewing departures from the Guidelines); *United States v. Winingear*, 422 F.3d 1241, 1246 (11th Cir. 2005) (per curiam) (“Before *Booker*, we reviewed departures from the Guidelines for reasonableness.”). *But see Williams v. United States*, 503 U.S. 193, 205 (1992) (recognizing that Congress’s grant of “limited appellate review of sentencing decisions . . . did not alter a court of appeals’ traditional deference to a district court’s exercise of its sentencing discretion”).

37. *See, e.g., United States v. Weaver*, 920 F.2d 1570, 1573 (11th Cir. 1991); *see also* Lee, *supra* note 19, at 26 n.155.

38. 518 U.S. 81 (1996).

39. *Id.* at 91.

40. *Id.* at 97.

necessary flexibility to resolve questions involving multifarious, fleeting, special, narrow facts that utterly resist generalization.”<sup>41</sup> However, as Professor Berman has noted, this call for deference “may have been more wishful thinking than a statement of actual fact by the Court.”<sup>42</sup> Many commentators have explained that *Koon* only purported to establish unitary deferential review, but in reality left de novo appellate review in place under many circumstances.<sup>43</sup>

In any event, Congress legislatively overruled *Koon* in 2003 when it passed the PROTECT Act in order to guarantee greater discretion to the courts of appeals.<sup>44</sup> That statute established de novo review of departures from the Guideline range. Appellate courts could now overturn any departure that “does not advance the objectives set forth in section 3553(a)(2),” or “departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a).”<sup>45</sup> Starting in 2003, then, appellate courts reviewed de novo the district courts’ decisions to depart from the Guidelines—decisions, which were the sole source of a district court’s discretion to impose a non-Guidelines sentence until *Booker*.

### C. Booker and the Establishment of Advisory Sentencing Guidelines

In *Booker*, the Court held that mandatory Sentencing Guidelines violated the Sixth Amendment of the United States Constitution because the Guidelines required judges to enhance defendants’ sentences based upon facts such as drug quantity that are found by judges rather than juries.<sup>46</sup> This aspect of the Guidelines, according to the majority opinion authored by Justice Stevens, violated the defendant’s Sixth Amendment right to a jury trial. To remedy the violation, the Court did not find the Guidelines as a whole unconstitutional, nor did the Court mandate that juries make findings of fact giving rise to enhancements under the Guidelines. Instead, in a separate majority opinion authored by Justice Breyer, the Court excised the provision that rendered the Guidelines

41. *Id.* at 99 (quoting *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 404 (1990)) (internal quotation marks omitted).

42. Douglas A. Berman, *Federal Sentencing Survey: Rita, Reasoned Sentencing, and Resistance to Change*, 85 DENV. U. L. REV. 7, 11 n.24 (2007) (citing Mark D. Harris & Douglas A. Berman, *The Koon Case: Departures and Discretion*, 9 FED. SENT’G REP. 4 (1996)).

43. *See, e.g.*, Lee, *supra* note 19, at 4 (arguing that “*Koon*’s abuse of discretion umbrella is wide enough to include de novo review”); *see also* Harris & Berman, *supra* note 42; Kate Stith, *The Hegemony of the Sentencing Commission*, 9 FED. SENT’G REP. 14, 14 (1996).

44. Prosecutorial Remedies and Other Tools To End the Exploitation of Children Today Act of 2003, Pub. L. No. 108-21, § 401(d)(1)–(2), 117 Stat. 650, 670.

45. *Id.* §§ 401(d)(1)(B)(i), 401(d)(1)(C), 117 Stat. at 670.

46. *United States v. Booker*, 543 U.S. 220, 226–27 (2005).

mandatory from the statute.<sup>47</sup>

Excising the mandatoriness of the Guidelines necessarily required the Court also to excise the provision of the statute setting forth the standard of review on appeal. That section depended on the mandatory nature of the Guidelines as it required the courts of appeals to determine, *inter alia*, whether a sentence was “as a result of an incorrect application of the sentencing guidelines” or was “outside the applicable guideline range.”<sup>48</sup> Accordingly, the Court felt it necessary to excise the appellate standard of review from the statute when it excised the provision that had rendered the Guidelines mandatory.

After excising the appellate standard from the statute, the Court explained that the courts of appeals going forward should review all sentences for unreasonableness.<sup>49</sup> The reasonableness standard requires the appellate court to determine if the district court abused its discretion.<sup>50</sup> The Court noted that an appellate court’s reasonableness review would be guided by the sentencing factors set forth in section 3553(a).<sup>51</sup> The Court also noted that reasonableness was “a practical standard of review already familiar to appellate courts,”<sup>52</sup> having applied a reasonableness standard in past sentencing cases on review of departures,<sup>53</sup> and of sentences imposed where there was no applicable Guideline.<sup>54</sup>

Justice Scalia dissented. Although he dissented from the entire remedial opinion authored by Justice Breyer, the main target of his dissent was “the change that the remedial majority’s handiwork has wrought (or perhaps—who can tell?—has not wrought) upon appellate review of federal sentencing.”<sup>55</sup> Justice Scalia argued that the majority’s excision of the appellate standard of review was equivalent to “deleting the ingredients portion of a recipe and telling the cook to proceed with

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47. *Id.* at 259 (excising 18 U.S.C. § 3553(b)(1) (2000)).

48. *Id.* at 260, 271 (excising 18 U.S.C. § 3742(e) (2000 & Supp. 2004)).

49. *Id.* at 260–62.

50. *Id.* at 262; *see also* *Rita v. United States*, 127 S. Ct. 2456, 2470–71 (2007) (Stevens, J., concurring) (“Simply stated, *Booker* replaced the *de novo* standard of review required by 18 U.S.C. § 3742(e) with an abuse-of-discretion standard that we called ‘reasonableness’ review.”) (quoting *Booker*, 543 U.S. at 262).

51. *See Booker*, 543 U.S. at 261.

52. *Id.*

53. *Id.* at 262 (citing 18 U.S.C. § 3742(e)(3) (1994)).

54. *Id.* (citing §§ 3742(a)(4), (b)(4), (e)(4)). The Court stated:

Together, these cases account for about 16.7% of sentencing appeals. *See* United States Sentencing Commission, 2002 Sourcebook of Federal Sentencing Statistics 107, n. 1, 111 (at least 711 of 5,018 sentencing appeals involved departures), 108 (at least 126 of 5,018 sentencing appeals involved the imposition of a term of imprisonment after the revocation of supervised release).

*Id.*

55. *Id.* at 303 (Scalia, J., dissenting).

the preparation portion.”<sup>56</sup> According to Justice Scalia, “[t]here is no one-size-fits-all ‘unreasonableness’ review.”<sup>57</sup> “Only in Wonderland” could the majority imply an unreasonableness standard after having excised a separate and explicit standard of appellate review from the statute.<sup>58</sup>

Justice Scalia predicted that the establishment of a reasonableness standard would result in widespread disparities. Some district courts would respond to the reasonableness standard by continuing to apply the Guidelines, “seek[ing] refuge in the familiar.”<sup>59</sup> Others would view the standard as license to wholly disregard the Guidelines so long as the sentence imposed could be characterized as reasonable.<sup>60</sup> In sum, Justice Scalia anticipated that “‘unreasonableness’ review will produce a discordant symphony of different standards, varying from court to court and judge to judge, giving the lie to the remedial majority’s sanguine claim that ‘no feature’ of its avant-garde Guidelines system will ‘ten[d] to hinder’ the avoidance of ‘excessive sentencing disparities.’”<sup>61</sup>

Justice Breyer’s opinion attempted to respond to these predictions of doom, noting the other contexts in which courts of appeals have applied a reasonableness standard of review,<sup>62</sup> arguing that the district courts must still consult the Guidelines when imposing sentences, and suggesting that the Sentencing Commission would take note of any disparities and resolve them by proposing modifications to the Guidelines in order to restore uniformity.<sup>63</sup> Ultimately, Justice Breyer noted, some disparity was going to be inevitable in a world of advisory as opposed to mandatory Guidelines. But given the Court’s invalidation of mandatory Guidelines as unconstitutional, the best constitutional alternative was reasonableness review, conducted by the courts of appeals and observed with scrutiny by the Sentencing Commission.

Three years later, it is evident that Justice Scalia’s comments were prophetic (if a bit melodramatic). The implementation of reasonableness review has proved far more complicated than *Booker*’s remedial majority seemed to anticipate.

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56. *Id.* at 307.

57. *Id.* at 309.

58. *Id.* at 311–12.

59. *Id.* at 312.

60. *Id.*

61. *Id.*

62. *Id.* at 262–63.

63. *Id.* at 263 (citing 28 U.S.C. § 994 (2000 & Supp. 2004)).

### III. THE MANY QUESTIONS CONCERNING APPELLATE DISCRETION AFTER *BOOKER*

Even though the courts of appeals had reviewed certain sentencing decisions for reasonableness in the past, *Booker* set off a series of debates about how to apply reasonableness review to sentences imposed using advisory rather than mandatory Guidelines. Whereas in the past the courts of appeals had reviewed departures for reasonableness, now they were to review the reasonableness of all sentences, whether or not they varied (or departed) from the Guidelines—indeed, whether they were based in any way upon the Guidelines *or not*. The questions that followed *Booker* included both how to review sentences on appeal that had already been imposed using mandatory Guidelines—so-called *Booker* “pipeline” cases—and how to review sentences imposed after *Booker* using advisory Guidelines. A series of two- and sometimes three-way circuit splits commenced. The Eleventh Circuit, in nearly every instance, has ended up on the side of the split favoring greater appellate discretion and lessened deference to the district courts.

#### A. *How To Review the Booker Pipeline Cases*

The first set of post-*Booker* cases involved the question of how appellate courts should review so-called “pipeline” cases—cases in which the sentence was imposed by district courts before *Booker* using Guidelines that, at the time, were mandatory. The Supreme Court stated in *Booker* that it did not anticipate that “every appeal will lead to a new sentencing hearing” because courts would apply “ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the ‘plain-error’ test.”<sup>64</sup> Yet the application of the plain-error test was not so straightforward.

Under that test, appellate courts may only correct an error that a defendant failed to raise in the district court if there is “(1) error, (2) that is plain, and (3) that affect[s] substantial rights.”<sup>65</sup> The circuits split on the third step, with the split centering on whether to presume prejudice to substantial rights in pipeline cases or whether a defendant had to demonstrate specific prejudice from the district court’s use of mandatory Guidelines. Essentially, the question presented to courts of appeals was whether the district court would have imposed approximately the same sentence had the Guidelines been advisory at the time of sentencing.

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64. *Id.* at 268.

65. *United States v. Cotton*, 535 U.S. 625, 631 (2002) (internal quotation marks omitted). “If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” *Id.* (internal quotation marks omitted).

The First, Fifth, Eighth, Tenth, and Eleventh Circuits elected to presume that a district court's use of mandatory Guidelines was harmless error absent a specific showing by the appellant that the district court would have imposed a different sentence if the Guidelines were not mandatory.<sup>66</sup> Under this approach, unless a district court expressed dissatisfaction with the Guidelines in open court, almost nothing would permit a defendant to meet this strict plain-error rule on appeal. As a result, almost no defendants were resentenced on the basis of *Booker* error in these circuits.

The Third, Fourth, and Sixth Circuits took the opposite approach, presuming prejudice from the district court's application of the Guidelines as mandatory, and thus reversing and remanding most pipeline sentences as plainly erroneous.<sup>67</sup>

The Second, Seventh, Ninth, and D.C. Circuits took an approach falling somewhere between the other circuits, remanding in all cases where the effect of the district court having used mandatory Guidelines was unclear.<sup>68</sup>

First articulated by the Eleventh Circuit in *Rodriguez*, the rationale for the strict plain-error rule was that, without evidence that the district court would have ruled differently had the Guidelines been advisory, a defendant could not meet his or her burden to demonstrate prejudicial plain error.<sup>69</sup> The court explained that it had to determine if there was "a reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion by the sentencing judge in this case."<sup>70</sup> The court's response was that "[w]e just don't know."<sup>71</sup> As a result, the court found that the defendant had not met his burden of demonstrating prejudice, and the court declined to remand for resentencing.

The Eleventh Circuit's interpretation was seemingly based on appellate courts' limited discretion to find plain error. Yet other circuits

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66. *United States v. Antonakopoulos*, 399 F.3d 68, 75–76 (1st Cir. 2005); *United States v. Mares*, 402 F.3d 511, 521 (5th Cir. 2005); *United States v. Pirani*, 406 F.3d 543, 550–51 (8th Cir. 2005) (en banc); *United States v. Gonzalez-Huerta*, 403 F.3d 727, 739 (10th Cir. 2005); *United States v. Rodriguez*, 398 F.3d 1291, 1300–01 (11th Cir. 2005), *aff'd en banc*, 406 F.3d 1261 (11th Cir. 2005), *cert. denied*, 545 U.S. 1127 (2005).

67. *United States v. Davis*, 407 F.3d 162, 164 (3d Cir. 2005); *United States v. Hughes*, 401 F.3d 540, 548 (4th Cir. 2005); *United States v. Oliver*, 397 F.3d 369, 379 (6th Cir. 2005).

68. *United States v. Paladino*, 401 F.3d 471, 488 (7th Cir. 2005), *cert. denied*, 546 U.S. 1175 (2006); *United States v. Crosby*, 397 F.3d 103, 119–20 (2d Cir. 2005); *United States v. Coles*, 403 F.3d 764, 767, 771 (D.C. Cir. 2005); *United States v. Ameline*, 409 F.3d 1073, 1079 (9th Cir. 2005).

69. *See Rodriguez*, 398 F.3d at 1301.

70. *Id.*

71. *Id.*

and dissenting judges within the circuit levied harsh criticism against the Eleventh Circuit for substituting its judgment for that of the district court. In large part, this criticism was aimed at the extraordinarily low probability that a district judge would have openly expressed disagreement with the Guidelines when imposing a sentence at a time when the Guidelines were undeniably mandatory. As Judge Posner stated, "Given the alternative of simply asking the district judge to tell us whether he would have given a different sentence, and thus dispelling the epistemic fog, we cannot fathom why the Eleventh Circuit wants to condemn some unknown fraction of criminal defendants to serve an illegal sentence."<sup>72</sup> Within the Eleventh Circuit, Judges Tjoflat and Barkett shared this view, dissenting in published opinions from the denial of rehearing en banc in *Rodriguez*.<sup>73</sup> Judge Barkett's dissent in particular emphasized deference to the district courts, arguing that the circuit's approach to plain error "impermissibly trenches upon the Federal Sentencing Act's policy of allowing 'the district court, not the court of appeals, to determine, in the first instance, the sentence that should be imposed in light of certain factors properly considered under the Guidelines.'"<sup>74</sup>

It was in large part this concern for deference to the district courts that motivated the liberal plain-error rule applied by the Third, Fourth, and Sixth Circuits. Before *Booker*, district courts were not always vocal about the sentence they would have imposed had the Guidelines been advisory rather than mandatory since there was no reason to express, on the record, disagreement with controlling law. In articulating the rationale for its approach to plain error, the Sixth Circuit explained, "Remand is the only appropriate way . . . to allow the parties to argue for the exercise of the district court's discretion as authorized by *Booker*. . . . As appellate courts should review—and not determine—the decisions of the district court, we must vacate and remand for re-sentencing."<sup>75</sup>

The Supreme Court declined to resolve the circuit split on the plain-error standard for reviewing pipeline cases.<sup>76</sup> They were of limited quantity and would eventually work their way out of the system.<sup>77</sup> Yet the circuit split over these cases portended additional conflicts that

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72. *Paladino*, 401 F.3d at 484.

73. See *Rodriguez*, 406 F.3d at 1281 (Tjoflat, J., dissenting from the denial of rehearing en banc); *id.* at 1298 (Barkett, J., dissenting from the denial of rehearing en banc).

74. *Id.* at 1302 (quoting *Williams v. United States*, 503 U.S. 193, 205 (1992)).

75. *United States v. Hines*, 398 F.3d 713, 722 (6th Cir. 2005).

76. See, e.g., *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. 2005), *aff'd en banc*, 406 F.3d 1261 (2005), *cert. denied*, 545 U.S. 1127 (2005).

77. It is unclear whether all of the pipeline cases have, in fact, worked their way through the system yet. See *How Many Booker Pipeline Cases Are Still in the System?*, [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2008/01/how-many-booker.html](http://sentencing.typepad.com/sentencing_law_and_policy/2008/01/how-many-booker.html) (Jan. 10, 2008 15:11 EST).

were to come. They also signaled how the Eleventh Circuit would resolve questions about its own discretion and that of the district courts following *Booker*.

### B. *Whether To Presume Guidelines Sentences Reasonable*

The next major question on which the courts of appeals split was whether to apply a presumption of reasonableness to a sentence falling within an advisory Guidelines range. The D.C., Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits all have elected to presume a sentence within the Guidelines range to be reasonable,<sup>78</sup> while the First, Second, Third, and Eleventh Circuits have chosen not to apply such a presumption.<sup>79</sup>

The circuits that apply a presumption of reasonableness to within-Guidelines sentences reason that the Sentencing Commission conducted substantial work in arriving at sentencing ranges that are appropriate for specific crimes committed by specific offenders. According to these circuits, presuming the Commission's recommended range is reasonable does not mean that a defendant cannot rebut that presumption. After all, the Guidelines are advisory. In their view, the presumption merely credits the work that went into the creation of the Guidelines by presuming the Commission's recommendations to be reasonable. It is worth noting, however, that no defendant to date has successfully rebutted the presumption of reasonableness,<sup>80</sup> and it has been roundly criticized by, among others, Judge Michael McConnell of the Tenth Circuit for being essentially irrebuttable.<sup>81</sup>

The circuits that do not apply a presumption of reasonableness counter that *Booker* prohibited such a presumption. The Eleventh Circuit, for example, has stated that “[t]o say that a sentence within the

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78. See *United States v. Dorcely*, 454 F.3d 366, 376 (D.C. Cir. 2006), *cert. denied*, 127 S. Ct. 691 (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. Kristl*, 437 F.3d 1050, 1054 (10th Cir. 2006) (per curiam); *United States v. Mykytiuk*, 415 F.3d 606, 608 (7th Cir. 2005); *United States v. Lincoln*, 413 F.3d 716, 717 (8th Cir. 2005); see also *Rita v. United States*, 127 S. Ct. 2456, 2462 (2007) (collecting cases).

79. *United States v. Jiménez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc); *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006); *United States v. Cooper*, 437 F.3d 324, 331–32 (3d Cir. 2006); *United States v. Talley*, 431 F.3d 784, 786–88 (11th Cir. 2005) (per curiam).

80. Technically, one court of appeals has reversed a Guidelines sentence as unreasonable. See *United States v. Lazenby*, 439 F.3d 928, 934 (8th Cir. 2006). However, that within-Guidelines sentence was reinstated by the district court on remand and affirmed by the Circuit on appeal after the district court more fully explained its reasoning. See *United States v. Goodwin*, 486 F.3d 449, 451 (8th Cir. 2007).

81. *United States v. Pruitt*, 502 F.3d 1154, 1171–74 (10th Cir. 2007) (McConnell, J., concurring).

Guidelines range is ‘by itself’ reasonable is to ignore the requirement that the district court, when determining a sentence, take into account the other factors listed in section 3553(a).”<sup>82</sup> Further, there will be “many instances where the Guidelines range will not yield a reasonable sentence.”<sup>83</sup> Notwithstanding its rejection of a presumption of reasonableness, the Eleventh Circuit—like all of the circuits that have rejected a presumption of reasonableness—has yet to reverse a within-Guidelines sentence as unreasonable. This is likely because although it does not formally apply a presumption, the Eleventh Circuit has clarified that “ordinarily we would expect a sentence within the Guidelines range to be reasonable.”<sup>84</sup> Given the distinction without a difference between “presuming” a within-Guidelines sentence reasonable and “expect[ing]”<sup>85</sup> a Guidelines sentence to be reasonable, it is not surprising that the decision whether to apply a presumption of reasonableness has had no measurable effect on the outcome of sentencing appeals.

Notwithstanding the presumption’s negligible effect on sentencing outcomes, the Supreme Court granted certiorari to resolve the circuit split in *Rita v. United States*.<sup>86</sup> The Court held that the law permits, but does not require, the courts of appeals to presume a within-Guidelines sentence reasonable. The Court reasoned that when a district court imposes a sentence within the Guidelines range, two independent decisionmakers—both the district court and Sentencing Commission—have determined the sentence to be reasonable.<sup>87</sup> Accordingly, it is reasonable for the court of appeals to conclude that the Guidelines range sentence is a reasonable one.<sup>88</sup>

In the Supreme Court’s view, then, the presumption of reasonableness is a form of deference to the district courts. In a concurring opinion joined by Justice Ginsburg, Justice Stevens emphasized that the Court, in *Booker*, did not alter

the portions of § 3742(e) requiring appellate courts to “give due regard to the opportunity of the district court to judge the credibility of the witnesses,” to “accept the findings of fact of the district court

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82. *Talley*, 431 F.3d at 786.

83. *United States v. Hunt*, 459 F.3d 1180, 1184 (11th Cir. 2006).

84. *Talley*, 431 F.3d at 788.

85. *Id.*

86. 127 S. Ct. 2456 (2007).

87. *Id.* at 2463–64.

88. The Court emphasized, however, that the presumption of reasonableness is rebuttable, and the courts of appeals may not apply a presumption of unreasonableness to a sentence outside of the Guidelines range. *Id.* at 2467. The Court also clarified that, unlike the courts of appeals, a district court may not apply a presumption of reasonableness. *Id.* at 2465 (“Given our explanation in *Booker* that appellate ‘reasonableness’ review merely asks whether the trial court abused its discretion, the presumption applies only on appellate review.”).

unless they are clearly erroneous,” and to “give due deference to the district court’s application of the guidelines to the facts.”<sup>89</sup>

In so doing, the Court intended the courts of appeals to review district court sentencing decisions only for an abuse of discretion.<sup>90</sup> Presuming a district court’s within-Guidelines sentence to be reasonable is part and parcel of the deferential, abuse-of-discretion standard through which the appellate courts are to review *all* sentences.<sup>91</sup>

The Supreme Court in *Rita* thus cast a presumption of reasonableness as a form of deference to the district courts. The circuits that have elected not to presume a within-Guidelines sentence reasonable—including the Eleventh Circuit—are not wrong for declining to apply the presumption. The Court made quite clear that a presumption of reasonableness is not required after *Booker*. And in all likelihood, whether to presume a within-Guidelines sentence reasonable has no effect whatsoever on the outcome of sentencing appeals—at least, it has not had such an effect to date. Nevertheless, at least in theory, the decision not to presume a district court’s within-Guidelines sentences as reasonable accords less deference to district courts than the decision to apply this presumption. The Eleventh Circuit’s approach to the circuit split resolved in *Rita* is thus consistent with its approach in other sentencing cases, which provides for less deference to district courts and thereby assumes a greater role for the courts of appeals.

### C. *Whether To Review Variances with Greater Scrutiny than Guidelines Sentences*

Later in 2007, the Supreme Court granted certiorari to *Gall v. United States*<sup>92</sup> in order to resolve yet another circuit split—over whether substantial variances from the Guidelines must be justified by extraordinary circumstances.<sup>93</sup> This showing of extraordinary circum-

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89. *Id.* at 2471 (Stevens, J., concurring).

90. *Id.* at 2472–74.

91. Justice Scalia, joined by Justice Thomas, filed a concurring opinion in order to decry the appellate review of sentences for substantive, as opposed to procedural, reasonableness. *Id.* at 2475–76, 2478 (Scalia, J., concurring). Justice Scalia did not view *Booker* as authorizing the courts of appeals to review the substantive reasonableness of sentences, and viewed substantive review as inconsistent with the statute and with the deference owed to the district courts after *Booker*. *Id.* at 2476, 2478.

Justice Souter expressed similar concerns in his dissenting opinion. *Id.* at 2488 (Souter, J., dissenting). He explained that a presumption of reasonableness would be nearly impossible to rebut and would thus encourage district courts to impose functionally appeal-proof sentences within the Guidelines range—sentences reached through judge-made findings of fact, thus producing the very Sixth Amendment violation that *Booker* intended to remedy. *Id.*

92. 128 S. Ct. 586 (2007).

93. The Supreme Court had intended *Rita* to be heard with another case in order to resolve the split. See *United States v. Claiborne*, 439 F.3d 479 (8th Cir. 2006), *cert. granted*, 127 S. Ct. 551

stances was termed a “proportionality test” because the courts that applied it held that the farther a district court varied from the Guidelines range, the more compelling the extraordinary circumstances must have been in order to justify the variance.

The majority of the circuits, including the Eleventh, applied this proportionality test.<sup>94</sup> The Second Circuit declined to adopt it.<sup>95</sup>

In *Gall*, the Supreme Court held the proportionality test unlawful, explaining that “while the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential, abuse-of-discretion standard.”<sup>96</sup> The Court found that requiring a showing of extraordinary circumstances came too close to applying a presumption of unreasonableness to sentences outside the Guidelines range—something the Court explicitly prohibited in *Rita*.

The Court explained that even in cases involving substantial variances from the Guidelines range, practical considerations support deference to the district court. Specifically, the district courts are in a “superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights

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(2006). Mario Claiborne was killed while his case was pending before the Court, and the Court vacated the grant of certiorari. *See Claiborne v. United States*, 127 S. Ct. 2245 (2007) (mem.) (vacating the order granting the petition for certiorari as moot).

94. *See United States v. Smith*, 474 F.3d 888, 892 (6th Cir. 2007); *United States v. Smith*, 445 F.3d 1, 4 (1st Cir. 2006); *United States v. Moreland*, 437 F.3d 424, 434 (4th Cir. 2006); *United States v. Smith*, 440 F.3d 704, 707 (5th Cir. 2006); *United States v. Dean*, 414 F.3d 725, 729 (7th Cir. 2005); *United States v. McMannus*, 436 F.3d 871, 874 (8th Cir. 2006); *United States v. Valtierra-Rojas*, 468 F.3d 1235, 1239 (10th Cir. 2006), *cert. denied*, 127 S. Ct. 2935 (2007); *United States v. McVay*, 447 F.3d 1348, 1357 (11th Cir. 2006); *United States v. Simpson*, 430 F.3d 1177 (D.C. Cir. 2005). The Third Circuit’s proportionality test differed slightly in that it did not purport to apply a mathematical formula to ascertain reasonableness. *See United States v. Tomko*, 498 F.3d 157, 168 (3d Cir. 2007).

[W]e do not mean to suggest a formulaic application of the “proportionality principle” that has been adopted by so many of our sister circuits. However, we do believe that closer appellate scrutiny of sentences that deviate from the norm is necessary to prevent the unwarranted disparities that bedeviled the pre-Sentencing Reform Act discretionary sentencing regime and prompted reform.

*Id.* The dissenting judge in *Tomko* pointed out that the majority “implicitly adopt[ed]” the proportionality test. *Id.* at 174 (Smith, J., dissenting). As further evidence that the Third Circuit had indeed adopted the proportionality test in *Tomko*, the Third Circuit granted the defendant’s motion for rehearing and vacated its opinion following the Supreme Court’s decision in *Gall* holding the proportionality test to be unlawful. *See United States v. Tomko*, 513 F.3d 360 (3d Cir. 2008).

95. *United States v. Rattoballi*, 452 F.3d 127, 134 (2d Cir. 2006).

96. *Gall v. United States*, 128 S. Ct. 586, 591 (2007).

not conveyed by the record.”<sup>97</sup> The courts of appeals should not play a greater role in cases where the district court has observed cause for a substantial variance from the Guidelines.

Thus, in *Gall*, as in *Rita* and *Booker*, the Supreme Court articulated the need for appellate courts to defer to the sentencing decisions of the district courts. And once again, the Eleventh Circuit was on the side of the circuit split favoring less deference to the district courts and greater discretion for the courts of appeals.

D. *Whether District Courts May Vary Based on Disagreement with the Guidelines*

On the same day that the Supreme Court decided *Gall*, it also resolved yet another a circuit split<sup>98</sup> concerning the tension between deference to the district courts and discretion in the courts of appeals when it issued its opinion in *Kimbrough v. United States*.<sup>99</sup>

On its face, *Kimbrough* concerned the ability of district courts to sentence below the Guidelines range for crack-cocaine offenses based on disapproval of the Guidelines themselves. The crack-cocaine Guidelines, and more specifically the disparity between the Guidelines for crack-cocaine and powder-cocaine offenses, had been subject to widespread scrutiny almost since their inception, with academics,<sup>100</sup>

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97. *Id.* at 597 (quoting Brief for Federal Public and Community Defenders et al. as Amici Curiae 16, *Gall*, 128 S. Ct. 526 (No. 06-7949)) (internal quotation marks omitted).

98. *Id.* at 566 n.4 (describing the circuit split).

99. 128 S. Ct. 558 (2007).

100. See, e.g., William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1835 (1998) (“If there is anything at all to the proposition that biased enforcement and punishment undermine the law’s normative force, this sentencing disparity ought to be abolished, or at least dramatically reduced.”); see also Alfred Blumstein, *The Notorious 100:1 Crack: Powder Disparity—The Data Tell Us that It Is Time To Restore the Balance*, 16 FED. SENT’G REP. 87, 87 (2003); David A. Sklansky, *Cocaine, Race, and Equal Protection*, 47 STAN. L. REV. 1283, 1288–99 (1995); William J. Spade, Jr., *Beyond the 100:1 Ratio: Towards A Rational Cocaine Sentencing Policy*, 38 ARIZ. L. REV. 1233, 1255 (1996); Michael Tonry, *Rethinking Unthinkable Punishment Policies in America*, 46 UCLA L. REV. 1751, 1787 (1999).

judges,<sup>101</sup> and even the Sentencing Commission itself<sup>102</sup> criticizing the disparity between powder- and crack-cocaine sentences. Although the two drugs are pharmacologically identical, a defendant convicted of possessing one gram of crack was subject to the same punishment as a defendant convicted of possessing 100 grams of powder cocaine. This 100:1 ratio particularly affected African Americans, who constituted the defendants in the vast majority of crack-cocaine convictions and were sentenced to disproportionately longer prison terms than Caucasian drug offenders.<sup>103</sup> Because of this disparity and the severity of the Guidelines for crack offenses, the critics argued that the Guidelines for crack offenses produced sentences far “greater than necessary” to punish offenders fairly.

After *Booker*, some district courts began to filter some of these criticisms into their sentencing decisions because they were suddenly free to vary from the crack Guidelines when the Guidelines conflicted with § 3553’s call for sentences no greater than necessary to effect fair punishment. As a result, some district courts began sentencing defendants below the Guidelines range in crack-cocaine cases, at least in part based on disagreement with the crack-cocaine Guidelines themselves rather than the specific facts of a particular case.

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101. In 1997, for example, twenty-seven federal judges sent a letter to the U.S. Senate and House Judiciary Committees stating, “It is our strongly held view that the current disparity between powder cocaine and crack cocaine in . . . the guidelines can not be justified and results in sentences that are unjust and do not serve society’s interest.” Letter from John S. Martin, Jr., Judge for the Southern District of New York, to Senator Orrin Hatch, Chairman of the Senate Judiciary Committee, and Congressman Henry Hyde, Chairman of the House Judiciary Committee (Sept. 16, 1997), reprinted in 10 FED. SENT’G REP. 194 (1998); see also *United States v. Ricks*, 494 F.3d 394, 403 (3d Cir. 2007) (100:1 ratio “leads to unjust sentences”); *United States v. Moore*, 54 F.3d 92, 102 (2d Cir. 1995); *United States v. Singleterry*, 29 F.3d 733, 741 (1st Cir. 1994); *United States v. Willis*, 967 F.2d 1220, 1226 (8th Cir. 1992) (Heaney, J., concurring); *United States v. Walls*, 841 F. Supp. 24, 31 (D.D.C. 1994), *aff’d in part*, 70 F.3d 1323 (D.C. Cir. 1995); *United States v. Clary*, 846 F. Supp. 768, 792 (E.D. Mo. 1994), *rev’d*, 34 F.3d 709 (8th Cir. 1994); *United States v. Patillo*, 817 F. Supp. 839, 843–44 & n.6 (C.D. Cal. 1993).

102. The Commission issued multiple reports criticizing the crack Guidelines. See generally U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2007); U.S. SENTENCING COMM’N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (2002); U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1997); U.S. SENTENCING COMM’N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995) (issued after a review of cocaine penalties as directed by the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280006, 108 Stat. 1796, 1805). All of these reports are available at <http://www.ussc.gov/reports.htm>. The Commission has since modified the crack Guidelines and voted to apply the amended Guidelines retroactively. See U.S. Sentencing Commission, U.S. Sentencing Commission Votes Unanimously to Apply Amendment Retroactively for Crack Cocaine Offenses (Dec. 11, 2007), available at <http://www.ussc.gov/PRESS/rel121107.htm>.

103. MARC MAUER & RYAN S. KING, THE SENTENCING PROJECT: A 25-YEAR QUAGMIRE: THE WAR ON DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 21–23 (2007), available at [http://www.sentencingproject.org/Admin/Documents/publications/dp\\_25yearquagmire.pdf](http://www.sentencingproject.org/Admin/Documents/publications/dp_25yearquagmire.pdf).

Appellate review of these cases resulted in yet another circuit split. A majority of the circuits, including the Eleventh Circuit, held that a sentencing court may not vary from the Guidelines range based on its disagreement with the 100:1 ratio.<sup>104</sup> These circuits distinguished between “categorical rejection of Congress’s clearly expressed, unambiguous sentencing policy embedded in the Guidelines and sentencing based on factors specific to the individual defendant and his offense conduct.”<sup>105</sup> The former was considered reversible error, while the latter was seen as the proper method of applying advisory Guidelines.<sup>106</sup>

These circuits viewed policing the difference between the former and the latter as the proper role of the courts of appeals in conducting reasonableness review. In the Eleventh Circuit, the question of how to review these cases was resolved in *United States v. Williams*.<sup>107</sup> As several Eleventh Circuit judges explained in an opinion concurring in the denial of rehearing en banc, “the determination of the gray area between case-specific, individualized facts and categorical rejections of Congress’s clear sentencing policy will naturally involve an extensive review of the record.”<sup>108</sup> The Circuits on this side of the split thus established as a role for themselves in sentencing cases to monitor and regulate the district courts in case they overstepped their role by rejecting Congress’s “sentencing policy embedded in the Guidelines.”<sup>109</sup>

Two circuits disagreed with that approach.<sup>110</sup> The D.C. Circuit<sup>111</sup> and Third Circuit<sup>112</sup> held that district courts erred in concluding that they lacked the discretion to consider the disparity between crack and cocaine Guidelines when sentencing crack offenders. These circuits thus approached the question of district court discretion from a different angle than the others. Whereas the other circuits examined their *own* discretion to review the district court’s consideration of impermissible

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104. *United States v. Leatch*, 482 F.3d 790, 791 (5th Cir. 2007); *United States v. Johnson*, 474 F.3d 515, 522 (8th Cir. 2007); *United States v. Pho*, 433 F.3d 53, 62–63 (1st Cir. 2006); *United States v. Castillo*, 460 F.3d 337, 361 (2d Cir. 2006); *United States v. Eura*, 440 F.3d 625, 633–34 (4th Cir. 2006); *United States v. Miller*, 450 F.3d 270, 275–76 (7th Cir. 2006); *United States v. Williams*, 456 F.3d 1353, 1369 (11th Cir. 2006).

105. *United States v. Williams*, 472 F.3d 835, 839 (11th Cir. 2006) (Black, J., concurring in the denial of rehearing en banc).

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. In addition, Judge Barkett dissented from the denial of rehearing en banc in *Williams*, on the basis that, inter alia, the Eleventh Circuit’s approach was insufficiently deferential to the district courts. *See id.* at 846–47 (Barkett, J., dissenting from the denial of rehearing en banc); *see also id.* at 842 (Black, J., concurring in the denial of rehearing en banc).

111. *United States v. Pickett*, 475 F.3d 1347, 1355–56 (D.C. Cir. 2007).

112. *United States v. Gunter*, 462 F.3d 237, 248–49 (3d Cir. 2006).

factors, these circuits instead examined the discretion of the district courts to consider those factors. Ultimately, these circuits saw *Booker* as expanding district court discretion to permit deviation from the Guidelines based on policy rationales. Under the approach of the D.C. and Third Circuits, district courts are not *required* to consider the disparity, but they *may* do so, and by implication, it would be improper for a court of appeals to reverse the district court for so deviating.

The Supreme Court granted certiorari to *Kimbrough* in order to resolve the split between the circuits, siding with the D.C. and Third Circuits. The Court held that district courts may rely in part on policy disagreements with the Guidelines in imposing sentence. Although “closer review may be in order” when a district court bases a sentence solely on a policy disagreement with the Guidelines, doing so is not automatic grounds for reversal.<sup>113</sup> With respect to crack offenses specifically, the Court noted the extensive criticisms leveled at the crack Guidelines and explained that, in light of those criticisms (in particular those of the Sentencing Commission itself), the crack Guidelines “do not exemplify the Commission’s exercise of its characteristic institutional role.”<sup>114</sup> As a result, a district court may vary from the Guidelines based on those criticisms, and a crack sentence below the Guidelines range would not be an abuse of discretion “even in a mine-run case.”<sup>115</sup> The Court thus held that the district court, in sentencing Derrick Kimbrough, had properly considered the disparity between crack- and powder-cocaine sentences, among the other factors in § 3553(a), and “a reviewing court could not rationally conclude that the 4.5-year sentence reduction Kimbrough received qualified as an abuse of discretion.”<sup>116</sup>

Even though it noted that a variance from the Guidelines would be appropriate in even the most mine-run of crack cases, the Court went on to emphasize the district courts’ superior ability to distinguish an unusual case from a mine-run case. As it had done in *Rita* and *Gall*, the Court explained that the courts of appeals ought to defer to the sentencing judgments of the district courts because district courts are “in a superior position to find facts and judge their import under § 3553(a) in each particular case.”<sup>117</sup> And a district court’s variance from the Guidelines is entitled to “greatest respect” when a case is “outside the heartland” to which the Guidelines are intended to apply because the determination of which cases are inside and outside the heartland is best made by the district courts, which have special expertise and institutional superiority

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113. *Id.* at 563.

114. *Kimbrough v. United States*, 128 S. Ct. 558, 575 (2007).

115. *Id.*

116. *Id.* at 576.

117. *Id.* at 563 (quoting *Gall v. United States*, 128 S. Ct. 586, 597 (2007)).

with respect to sentencing decisions.<sup>118</sup>

In *Kimbrough*, then, as in *Rita* and *Gall*, the Supreme Court's decision emphasized deference to the district courts and contemplated a minimal role for courts of appeals in light of that deference. And as in *Gall*, the Eleventh Circuit's interpretation of its role in reviewing sentences and policing the district courts was once again reversed as overly ambitious.<sup>119</sup>

#### IV. SUBSTANTIVE-REASONABLENESS REVIEW IN THE ELEVENTH CIRCUIT AFTER *BOOKER*, *RITA*, *GALL*, AND *KIMBROUGH*

The trio of *Rita*, *Gall*, and *Kimbrough* made clearer the Supreme Court's view of how to balance deference to the district courts' sentencing decisions with discretion in the courts of appeals. In each case, the Court emphasized the need for stronger deference to the district courts and a minimal role for the courts of appeals when reviewing the reasonableness of sentences. However, these cases did not resolve every question, or even every circuit split, arising out of *Booker*.<sup>120</sup> In particular, the scope and nature of reasonableness review remains largely open to interpretation.

That the courts of appeals may review the *procedural* reasonableness of a district court's sentencing decision is by now uncontroversial. Reversible procedural error includes "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

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118. *Id.* at 574–75.

119. The Eleventh Circuit has acknowledged that *Kimbrough* overruled *Williams*. See *United States v. Stratton*, 519 F.3d 1305, 1306 (11th Cir. 2008) ("In *Kimbrough*, the Supreme Court overruled *Williams* . . ."); *United States v. Dawson*, No. 06-16372, 2008 WL 194914, at \*5 (11th Cir. Jan. 24, 2008) ("The Supreme Court's decision abrogated our holding in *United States v. Williams*, that a court could not take into account the disparity between the Guidelines' treatment of crack and powder cocaine offenses when imposing a defendant's sentence."); see also *United States v. Peterson*, No. 06-14783, 2008 WL 647032, at \*1 (11th Cir. Mar. 11, 2008) (acknowledging that the Supreme Court had granted defendant's petition for writ of certiorari, vacated the Eleventh Circuit's judgment, and remanded the matters for further consideration in light of *Kimbrough*).

120. Still more circuit splits exist on other questions relating to review of sentencing decisions after *Booker*. For instance, with the circuits split on whether Rule 32(h) requires advance notice by a district court before varying from the Guidelines range, the Supreme Court granted certiorari and recently decided a case from the Eleventh Circuit to resolve this split. See *Irizarry v. United States*, No. 06-7517, 2008 WL 2369164 (June 12, 2008). For a discussion of this and other Circuit splits, see *Circuit Splitting Headaches After Rita*, [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2007/06/circuit-splitti.html](http://sentencing.typepad.com/sentencing_law_and_policy/2007/06/circuit-splitti.html) (June 23, 2007 8:58 EST).

range.”<sup>121</sup> These are discrete tasks for the courts of appeals to perform in reviewing the district court’s sentencing decision, which do not seriously implicate the tension between deference and discretion. These tasks are also nothing new for courts of appeals, which were frequently called upon to check the district court’s calculation of the Guidelines in sentencing appeals prior to *Booker*.

The far less determinate question is how to review the *substantive* reasonableness of a sentence for an abuse of discretion. Although the courts of appeals did conduct reasonableness review prior to *Booker*, it has become clear that review after *Booker* is a more complex endeavor. Unlike procedural reasonableness, the Supreme Court has not provided a checklist for substantive-reasonableness review. And it is substantive-reasonableness review that directly implicates the tension between deference and discretion. The case law of the Eleventh Circuit illustrates both the indeterminacy of substantive-reasonableness review and the tension between deference and discretion that is embedded within that review.

The Eleventh Circuit uses a two-step process to evaluate sentences for reasonableness. First, it evaluates whether the district court consulted and correctly determined the Guidelines range.<sup>122</sup> Second, it asks whether the district court imposed a reasonable sentence in light of the factors enumerated in 18 U.S.C. § 3553(a).<sup>123</sup> The second step is the appellate court’s opportunity to review a sentence’s substantive reasonableness.

The Eleventh Circuit has stated that it will reverse a sentence as substantively unreasonable only when “we are left with the definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case.”<sup>124</sup> Yet different panels have taken conflicting approaches as to how to reach such a decision.<sup>125</sup> The step has been approached in conflicting ways because the standard for substantive reasonableness, as expressed by the Eleventh Circuit, leaves open multiple possibilities as

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121. *Gall*, 128 S. Ct. at 597.

122. *United States v. McBride*, 511 F.3d 1293, 1297 (11th Cir. 2007).

123. *Id.*

124. *United States v. Puente*, No. 07-13260, 2008 WL 565023, at \*4 (11th Cir. Mar. 4, 2008) (quoting *United States v. Williams*, 456 F.3d 1353, 1363 (11th Cir. 2006)) (internal quotation marks omitted).

125. Although it is normally proper to refer to decisions of the Eleventh Circuit as decisions of the “court,” in the paragraphs that follow I refer to decisions of various “panels” rather than “courts.” I do this in order to emphasize how in its substantive reasonableness decisions, the Eleventh Circuit is not speaking as one court, but rather as disparate and sometimes conflicting panels.

to *how* an appellate court goes about determining whether the district court's sentence is reasonable in light of the § 3553(a) factors (and correspondingly, *when* a sentence is unreasonable in light of those factors).

Panels have generally taken three approaches. First, panels have elected to conduct their own, *de novo* review of the sentencing factors to determine what is reasonable. Second, other panels have chosen only to review what the district court said and did and assess whether it is persuasive and rational in light of the statutory factors. Third, still other panels have simply announced that the district court's sentence is reasonable without further elaboration. The approach that a panel has selected tends to directly implicate the balance between discretion and deference, with the third approach nearly abdicating appellate discretion in favor of total deference, the first approach according almost no deference to the district court, and the middle approach falling somewhere in between.

Perhaps reading the tea leaves based on *Rita*, *Gall*, and *Kimbrough*, a majority of Eleventh Circuit opinions take one of the latter two approaches, with a vast majority of the third, unpublished, *per curiam* variety. These decisions involve little analysis by the court of appeals. The panel generally announces that the district court took into account the § 3553(a) factors and states that the sentence is affirmed. For example, in one case, *United States v. McPherson*,<sup>126</sup> the panel noted only that “[t]he district court addressed the factors and concerns in § 3553(a), and McPherson has failed to show how the sentence is higher than necessary to achieve the goals of § 3553(a)(2).”<sup>127</sup> Accordingly, the panel affirmed a sentence within the Guidelines range.

This approach is by no means limited only to sentences within the Guidelines range. For example, in *United States v. Ramirez*,<sup>128</sup> the panel affirmed with little discussion or explanation a sixty-month sentence which was at the statutory maximum for larceny of personal property and was forty-eight months above the top of the Guidelines range.<sup>129</sup> Although the defendant had appealed on the basis that the sentence was substantively unreasonable, the panel did not discuss the defendant's arguments that the district court had failed to properly weigh the § 3553(a) factors. Instead, it stated that “[t]he weight to be accorded any given § 3553(a) factor is a matter committed to the sound discretion

126. No. 07-13069, 2008 WL 541501 (11th Cir. Feb. 29, 2008).

127. *Id.* at \*1.

128. No. 07-13060, 2008 WL 185509 (11th Cir. Jan. 23, 2008) (*per curiam*).

129. *Id.* at \*1. As Professor Berman has pointed out, there is no such Guidelines range. *See Explaining More Fully My Concern About the Eleventh Circuit's Work in Ramirez*, [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2008/01/explaining-more.html](http://sentencing.typepad.com/sentencing_law_and_policy/2008/01/explaining-more.html) (Jan. 24, 2008, 12:17 EST),

of the district court[.]’ and we ‘will not substitute our judgment in weighing the relevant factors because ‘our review is not de novo.’”<sup>130</sup> The panel went on to summarily conclude that “the district court properly calculated the advisory guideline range, considered the relevant § 3553(a) factors, articulated its reasons in open court, considered Ramirez’s arguments, and had a reasoned basis for its decision.”<sup>131</sup> Accordingly, the sentence was affirmed.

Certainly, short, unpublished per curiam opinions are sometimes appropriate in sentencing cases. Many sentencing appeals raise straightforward issues that the Eleventh Circuit has already decided in published opinions. In those instances, a redundant published opinion would neither maximize judicial efficiency nor add anything of great value to the Sentencing Commission’s review of sentencing appeals.

At other times, as in *Ramirez*, cases raise novel questions of fact or law or sentences deviate greatly from the Guidelines, in which case a published opinion is almost certainly warranted. In those cases, an unpublished per curiam opinion seems to conflict with the purposes of appellate review in sentencing cases as set forth in *Booker*, *Gall*, and *Rita*. On the spectrum of balancing appellate discretion with deference to the district courts, an unpublished, per curiam opinion is deferential to an extreme. In fact, this approach has been criticized as not even purporting to address an appellant’s argument that the sentence imposed by the district court was substantively unreasonable, with the court of appeals in effect abdicating what substantive discretion it was given in *Booker*.<sup>132</sup>

The unpublished per curiam approach is further subject to the criticism that it denies the Sentencing Commission an explanation for the appellate ruling, without which the Commission cannot carry out its responsibility to constantly review sentencing decisions in order to evaluate and revise the Guidelines.<sup>133</sup> The Supreme Court expressed the importance of this process in its opinion in *Rita*, and short, per curiam affirmances by definition say very little to the Commission about how the Guidelines are being applied in practice.

An additional criticism levied at these unpublished per curiam affir-

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130. *Ramirez*, 2008 WL 185509, at \*2 (quoting *United States v. Williams*, 456 F.3d (11th Cir. 2006)).

131. *Id.* at \*3.

132. Explaining More Fully, *supra* note 129; see also Two Troubling Rulings from the Circuits, [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2008/01/two-troubling-r.html](http://sentencing.typepad.com/sentencing_law_and_policy/2008/01/two-troubling-r.html) (Jan. 24, 2008, 02:07 EST).

133. See *Rita v. United States*, 127 S. Ct. 2456, 2464 (2007) (“The Commission’s work is ongoing. The statutes and the Guidelines themselves foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. . . . The Commission will collect and examine the results. . . . And it can revise the Guidelines accordingly.”).

mances is that they typically originate as draft opinions written by an office of staff attorneys that issues a recommendation in every sentencing appeal.<sup>134</sup> The courts of appeals handle so many cases that staff attorneys frequently serve an important role in reviewing, among other things, sentencing appeals and providing recommendations and draft opinions to the judges.<sup>135</sup> As one Eleventh Circuit judge has acknowledged, “The staff attorney office is an integral part of our court.”<sup>136</sup> However, the opinions produced by the staff attorneys’ office tend to offer minimal analysis and explanation, and critics have observed “a general concern over a perceived increased reliance by the courts on staff attorneys and law clerks for screening and preliminary determinations.”<sup>137</sup> Certainly the staff attorney office serves a critical purpose in assisting with a tremendous caseload, but the courts of appeals must be careful not to abdicate too much authority to them, particularly in cases

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134. Pursuant to 28 U.S.C. § 715, the chief judge of the Eleventh Circuit appoints a senior staff attorney, who, with the approval of the chief judge, acts as the director of the staff attorneys’ office and may appoint additional staff attorneys. According to the website of the Eleventh Circuit,

The Staff Attorneys’ Office assists the Court by conducting research into specific areas of law as determined by the Court, and communicates its work product to the Court by way of written memoranda of law. This work encompasses both substantive and procedural issues. The substantive areas of the law include . . . motions to vacate, set aside, or correct sentences (28 U.S.C. § 2255).

United States Court of Appeals for the Eleventh Circuit, Staff Attorneys’ Office, <http://www.ca11.uscourts.gov/offices/staffattorney.php> (last visited June 12, 2008). A job posting for a staff attorney position in the staff attorneys’ office stated that “[t]he types of cases the office presently handles include (1) direct criminal appeals involving sentencing guidelines and guilt/innocence issues.” See United States Court of Appeals for the Eleventh Circuit, Staff Attorneys’ Office Job Posting, <http://www.ca11.uscourts.gov/hr/listings/Staff%20Attorney.2008.pdf> (last visited Mar. 30, 2008).

135. See Carolyn Dineen King, *Current Challenges to the Federal Judiciary*, 66 LA. L. REV. 661, 677 (2006) (discussing how the Fifth and Eleventh Circuits have been able to more efficiently dispose of criminal appeals by relying on memoranda and draft opinions written by staff attorneys); see also JUDITH A. MCKENNA, STRUCTURAL AND OTHER ALTERNATIVES FOR THE FEDERAL COURTS OF APPEALS: REPORT TO THE UNITED STATES CONGRESS AND THE JUDICIAL CONFERENCE OF THE UNITED STATES 49–52 (1993); Paul D. Carrington, Book Review, *A Critical Assessment of the Cultural and Institutional Roles of Appellate Courts*, 9 J. APP. PRAC. & PROCESS 231, 233–34 (2007) (reviewing APPELLATE COURTS: STRUCTURES FUNCTIONS, PROCESSES, AND PERSONNEL (David J. Meador, Thomas E. Baker & Joan E. Steinman eds. 2d ed. 2006)); John B. Oakley, *The Screening of Appeals: The Ninth Circuit’s Experience in the Eighties and Innovations for the Nineties*, 1991 BYU L. REV. 859, 922 (1991); Michael E. Tigar, Book Review, 2007 FED. CTS. L. REV. 133, 134 (reviewing APPELLATE COURTS: STRUCTURES, FUNCTIONS, PROCESSES, AND PERSONNEL (2006)).

136. U.S. Courts Newsroom, Staff Attorney Offices Help Manage Rising Caseloads, <http://www.uscourts.gov/newsroom/stffattys.htm> (last visited June 12, 2008) (quoting Judge Dubina).

137. Statement from Laurie Webb Daniel, Chair of Holland & Knight LLP Appellate Practice Group, to Commission on Structural Alternatives for the Federal Courts of Appeals (Mar. 23, 1998), available at <http://www.library.unt.edu/gpo/csafca/hearings/atlanta/daniels.htm>. See generally Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 ARIZ. ST. L.J. 1 (2007).

where the district court sentence is far above or below the Guidelines range. Such a sentence indicates a high likelihood that the case presents novel questions of fact or law, in which case a full and complete review by the court of appeals is appropriate.

The second, middle-ground approach taken by the Eleventh Circuit in sentencing appeals is not subject to these same criticisms. The panels that take the second approach review sentences with the understanding that “[s]ubstantive reasonableness involves inquiring whether the court abused its discretion in determining that the statutory factors in 18 U.S.C. § 3553(a) support the sentence in question.”<sup>138</sup> That is, the focus of the appellate court’s inquiry is the district court’s evaluation of the statutory factors, specifically how well that determination supports the sentence imposed. In *United States v. Anderson*,<sup>139</sup> for example, the government appealed Patrick Anderson’s sentence of three years probation with no term of imprisonment based on his plea of guilty to one count of insider trading.<sup>140</sup> The probationary sentence was well below the Guidelines range of eighteen to twenty-four months. Prior to *Gall*, the Eleventh Circuit concluded that Anderson’s sentence was unsupported by extraordinary circumstances and was thus unreasonable. After *Gall*, the Eleventh Circuit granted Anderson’s petition for rehearing, vacated its original opinion, and substituted a new opinion, which affirmed Anderson’s sentence.<sup>141</sup>

The panel in *Anderson II* evinced a new understanding of its limited role in reviewing sentences for substantive reasonableness. The panel noted that *Gall* clarified that

the district court has the authority, based on its individualized assessment of the facts, to weigh the factors listed in section 3553(a) and fashion a sentence outside the guidelines. As long as the district court provides justification . . . sufficiently compelling to support the degree of the variance from the guidelines range, and the term imposed adequately achieves the purposes of sentencing stated in §3553(a), *Gall* requires that we affirm.<sup>142</sup>

The district court had considered relevant the fact that Anderson had promptly paid restitution and a substantial civil penalty to the SEC, the economic hardship that the settlement had imposed on him, and the fact that the civil penalty had damaged his reputation sufficiently to

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138. *United States v. McPherson*, No. 07-13069, 2008 WL 541501, at \*1 (11th Cir. Feb. 29, 2008) (per curiam) (citing *Gall v. United States*, 128 S. Ct. 586, 597, 600 (2007)).

139. No. 07-11848, 2007 WL 3036868 (11th Cir. Oct. 19, 2007).

140. See 15 U.S.C. §§ 78j(b), 78ff(a) (2000); 17 C.F.R. § 240.10b-5 (2007).

141. *United States v. Anderson (Anderson II)*, No. 07-11848, 2008 WL 525669 (11th Cir. Feb. 28, 2008).

142. *Id.* at \*2 (citations and internal quotation marks omitted).

deter him from committing future crimes.<sup>143</sup> Rather than review the § 3553(a) factors de novo, the panel in *Anderson II* focused on what facts the district court found relevant and concluded that they supported the sentence sufficiently to affirm. The panel's approach was deferential but not lacking in teeth.

Similarly, in *United States v. McBride*,<sup>144</sup> another post-*Gall* decision, a divided panel affirmed a below-Guidelines sentence, providing a more lengthy explanation for its decision. Over the dissent of Judge Dubina, Chief Judge Edmondson and Judge Story<sup>145</sup> affirmed a below-Guidelines sentence of eighty-four months' imprisonment and ten years' supervised release for distribution of child pornography based on, among other factors, the defendant's traumatic childhood.<sup>146</sup> This sentence fell below the bottom of the Guidelines range, which was 151 months, and below the lifetime term of supervised release recommended in the Sentencing Commission's policy statements.<sup>147</sup> Although the government argued on appeal that the district court underweighted certain of the statutory factors while overemphasizing others, the panel declined to reverse because "a district court need not account for every § 3553(a) factor, nor must it discuss each factor and the role that it played in sentencing."<sup>148</sup> The panel found nothing unreasonable about the district court's balancing of the statutory factors, even though it might not have reached the same sentence had it been charged with sentencing the defendant. As the panel explained, "Whatever sentence we might have imposed, we do not believe an 84-months' sentence lies outside the range of reasonable in this case."<sup>149</sup>

Judge Dubina dissented, explaining that he would have placed less emphasis on the defendant's horrible childhood in arriving at a reasonable sentence. He stated that he would have imposed a lifetime of supervised release rather than the ten years imposed by the district court based on his conclusion that "the only way to satisfy the § 3553(a) requirement of protecting the public is to impose a sentence that includes lifetime

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143. *Id.* at \*3.

144. 511 F.3d 1293, 1297–98 (11th Cir. 2007).

145. Judge Story is a district court judge for the Northern District of Georgia who sat on the panel by designation. *See id.* at 1295 n.\*.

146. *Id.* at 1295.

147. *See, e.g.*, U.S. SENTENCING COMMISSION: GUIDELINES MANUAL §§ 5D1.2(b)(2), 5D1.2(c) (2007) ("If the instant offense of conviction is a sex offense . . . , the statutory maximum term of supervised release is recommended.").

148. *McBride*, 511 F.3d. at 1297; *see also* *United States v. Mole*, No. 07-12266, 2008 WL 216082, at \*3 (11th Cir. Jan. 28, 2008) ("[N]othing in Booker or elsewhere requires the district court to state on the record that it has explicitly considered each of the § 3553(a) factors or to discuss each of the § 3553(a) factors.") (quoting *United States v. Thomas*, 446 F.3d 1348, 1357 (11th Cir. 2006)).

149. *Id.* at 1298.

supervised release.”<sup>150</sup> In Judge Dubina’s view, then, any district court sentence in a child-pornography case that failed to include a lifetime term of supervised release was unreasonable as a matter of law. He repeated this refrain again in his dissent: “The only reasonable sentence for this defendant must include a term of lifetime supervised release.”<sup>151</sup> In contrast to the more deferential approach of the majority—which, incidentally, seemed to agree that it would have imposed a different sentence had it been charged with that responsibility—Judge Dubina’s way was the “only way” that he found to be reasonable as a matter of law.

Judge Dubina’s dissent in *McBride* previews the final approach taken by a minority of panels in the Eleventh Circuit—the approach in which the panel conducts its own review of the sentencing factors to determine what, in its judgment, is reasonable and compares its result to that of the district court. In practice, this approach invests substantially more discretion in the appellate court and provides substantially less deference to the district court.

The Eleventh Circuit’s decision in *United States v. Pugh* best illustrates this last approach.<sup>152</sup> In *Pugh*, the defendant pleaded guilty to knowing possession of images of child pornography that were mailed, shipped, or transported by computer in violation of 18 U.S.C. §§ 2252A(a)(5)(B) and 2256(8)(A). The advisory Guidelines range for the offense was 97 to 120 months’ imprisonment. After holding two sentencing hearings, the district court imposed a sentence of only five years probation.

As one might gather from the sentence imposed, the facts of the case were quite unusual. The defendant, Bruce Pugh, was addicted to adult pornography and in the course of seeking out adult pornography, came into possession of child pornography. The district court found that Pugh’s goal was never to receive child pornography, and that his possession of it was “passive.”<sup>153</sup> Essentially, Pugh would enter chat rooms to obtain adult pornography, and would receive child pornography instead of or in addition to adult pornography. Thus, to the district court, it appeared that the possession of child pornography was only “incidental” to Pugh’s receipt of adult pornography.<sup>154</sup>

Furthermore, the district court noted that “Mr. Pugh took . . . affirmative steps to ascertain ways to prevent receipt and to report the

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150. *Id.* at 1299 (Dubina, J., dissenting).

151. *Id.* at 1300.

152. 515 F.3d 1179 (11th Cir. 2008).

153. Transcript of Continuation of Sentencing Hearing at 53–54, *Pugh*, 515 F.3d 1179 (No. 06-0009-WS) (“There’s no evidence here that he actively sought it. . . . [T]he evidence is that that was not his goal.”) [hereinafter Sentencing Transcript II].

154. *Id.* at 54.

receipt of this child pornography, including having a discussion with his mother about ways in which to discard and report this child pornography.”<sup>155</sup> He also reported child pornography he received to AOL,<sup>156</sup> and responded to one man who had sent him child pornography by emailing him, “That was a little girl. I don’t like child porn.”<sup>157</sup> In addition to taking these steps to avoid possessing child pornography, Pugh had sought treatment, even prior to his arrest, for his addiction to adult pornography.<sup>158</sup>

Despite these measures, Pugh was found to have downloaded approximately ten images known by law enforcement to be child pornography,<sup>159</sup> as well as graphic videos depicting violent sex with children. He was arrested and pleaded guilty, his crime giving rise to an advisory Guidelines range of 97 to 120 months’ imprisonment.

In two separate sentencing hearings, the district court heard testimony from numerous witnesses, including Pugh’s mother and sister, two FBI agents, and Pugh himself. In addition, an expert psychologist testified that Pugh had been sexually victimized as a child and became extremely isolated socially.<sup>160</sup> As he reached puberty, he became addicted to adult pornography. He sought pornography in chat rooms online both because pornography was his only sexual outlet and because talking to people in online chat rooms was his only social outlet.<sup>161</sup> The expert concluded that Pugh was not a pedophile and highly unlikely to ever become one.<sup>162</sup> He also recommended that Pugh not be sentenced to imprisonment, as he would be more likely to be victimized in prison than rehabilitated.<sup>163</sup> The district court credited all of this testimony as credible.<sup>164</sup>

In announcing its sentencing judgment, the district court noted first what an unusual case this was,<sup>165</sup> and then it acknowledged the Guidelines range and the public policy considerations behind the Guidelines

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155. *Id.*

156. *Id.* at 15, 16, 32–33.

157. Transcript of Sentencing Hearing at 66, *Pugh*, 515 F.3d 1179 (No. 06-0009-WS) [hereinafter Sentencing Transcript I].

158. Sentencing Transcript II at 54.

159. *Id.* at 10. In addition, the FBI found other images that may or may not have depicted children because the age of the persons in the images was unknown. FBI Agent Glaser testified that he found “approximately 61 pictures that in my mind could qualify as child pornography,” *id.* at 23, but only ten of those images were “known child porn,” *id.* at 28, 29. That is, only ten of the persons depicted were identified by the FBI as actual children.

160. Sentencing Transcript I at 11, 12, 20.

161. *Id.* at 14.

162. *Id.* at 16, 17.

163. *Id.* at 24–25.

164. Sentencing Transcript II at 55.

165. *Id.* at 51–52 (“I don’t think there’s any question or little question that this is an unusual

and Congress's child-pornography laws. The court even noted that it had imposed harsh but appropriate sentences in past child-pornography cases.<sup>166</sup> But the court explained that because of the extremely unusual facts in Pugh's case, a substantial deviation from the Guidelines range was warranted. After asking rhetorically whether Pugh was deserving of a ninety-seven month Guidelines sentence, the court concluded, "[T]he answer, quite frankly, is no."<sup>167</sup>

Most importantly, the district court explained that Pugh's case was outside the heartland of child-pornography-possession cases because his possession was passive and incidental.<sup>168</sup> Furthermore, Pugh had no criminal history at all.<sup>169</sup> He was not a pedophile, and the court accepted expert testimony that he posed virtually zero risk of becoming one. Pugh had complied completely with the terms and conditions of his pretrial supervision. The interests of sentencing, according to the court, would not be served by imprisoning Pugh. And the district court was "convinced" that Pugh would not appear as a defendant ever again.<sup>170</sup>

For these reasons, the district court sentenced Pugh to five years probation, imposing multiple conditions of probation such as continued mental-health treatment, registering as sex offender, not possessing or using a computer with access to the internet, and being subject to random and unannounced computer searches and other searches based on reasonable suspicion.<sup>171</sup>

The government appealed the sentence to the Eleventh Circuit, arguing that it was substantively unreasonable. The panel found that the district court "deliberated extensively over its sentencing decision," exercising "thoughtfulness and care . . . in sentencing Pugh."<sup>172</sup> And the panel could discern no clear error in any findings of fact made by the district court.<sup>173</sup> Yet it nevertheless vacated the sentence and remanded

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case. This is not the case that I see before me where individuals stand in this Court accused of possession of child pornography. It's an unusual case.").

166. *Id.* at 52.

I'm quite aware of those public policy reasons and considerations, and I have used, articulated those public policy reasons and considerations to impose harsh but what I have discerned to be appropriate sentences in other cases. So, I'm well aware of why we have that law and well aware of why Congress deems the offense to be such that it deserves harsh punishment.

*Id.*

167. *Id.* at 53.

168. *Id.* at 56 ("I've got a situation that is quite different from those that I normally see. . . . [T]his is an unusual sentence for an unusual case. . . .").

169. *Id.* at 53.

170. *Id.* at 57.

171. *Id.* at 57-58; *see also* United States v. Pugh, 515 F.3d 1179, 1187 (11th Cir. 2008).

172. *Pugh*, 515 F.3d at 1192.

173. *Id.*

for resentencing.<sup>174</sup>

The panel began by emphasizing the scope of its own discretion to review sentences: “[W]e may find that a district court has abused its considerable discretion if it has weighed the factors in a manner that demonstrably yields an unreasonable sentence. We are therefore still required to make the calculus ourselves.”<sup>175</sup> In contrast to the earlier panel in *McBride*, which had stated that “a district court need not account for every § 3553(a) factor, nor must it discuss each factor and the role that it played in sentencing,”<sup>176</sup> the panel in *Pugh* stated that “*Gall* makes clear that the district court is obliged to consider *all* of the § 3553(a) factors.”<sup>177</sup> The emphasis on the word “all” was not added by the Supreme Court in *Gall*, but rather by the panel in *Pugh*.

Although it “recognize[d] the wide discretion afforded to district courts in sentencing,”<sup>178</sup> the panel viewed it as its prerogative to weigh different facts differently and to reweigh the facts on its own. Specifically, the panel stated that when considering “whether (when viewed through the prism of abuse of discretion) the district court’s sentence was substantively unreasonable,” appellate courts “are not limited to considering only the factors expounded upon by the district court.”<sup>179</sup> Thus “[a]lthough the district court concluded, on these facts, that Pugh’s conduct was ‘incidental’ and ‘passive,’ his conduct was neither isolated, unintentional nor lawful.”<sup>180</sup>

In tension with the *Ramirez* panel’s statements that “[t]he weight to be accorded any given § 3553(a) factor is a matter committed to the sound discretion of the district court,”<sup>181</sup> and “we will not substitute our judgment in weighing the relevant factors because our review is not de novo,”<sup>182</sup> the panel in *Pugh* went on to conduct its own review of the 3553(a) factors. The panel concluded that although the district court performed an “intensive” analysis, it was overly “narrow” and impermissibly “minimized—and in some instances, ignored—many of the important Section 3553(a) concerns that we are directed to consider by

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174. *Id.* at 1204.

175. *Id.* at 1191.

176. *United States v. McBride*, 511 F.3d 1293, 1297 (11th Cir. 2007).

177. *Pugh*, 515 F.3d at 1191 (quoting *Gall v. United States*, 128 S. Ct. 586, 596 (2007)) (internal quotation marks omitted).

178. *Pugh*, 515 F.3d at 1192.

179. *Id.* at 1193–94.

180. *Id.* at 1193.

181. *United States v. Ramirez*, No. 07-13060, 2008 WL 185509, at \*2 (11th Cir. Jan. 23, 2008) (per curiam) (quoting *United States v. Williams*, 456 F.3d 1353, 1363 (11th Cir. 2006)).

182. *Id.* (internal quotation marks omitted) (quoting *United States v. Williams*, 465 F.3d 1353, 1363 (11th Cir. 2006)).

Congress and the Supreme Court.”<sup>183</sup> The panel explained how it would have weighed the statutory factors, at each turn faulting the district court for failing to arrive at the same conclusion.

First, the panel asserted that the district court’s sentence did not take into account the need to deter crime.<sup>184</sup> The panel cited generally to the need for deterrence of crimes that create an incentive for the production of child pornography. And although Congress set forth no mandatory sentence of imprisonment for the offense to which Mr. Pugh pleaded guilty,<sup>185</sup> the panel made clear that, in its view, a custodial sentence is always required for child-pornography offenses: “Quite simply, by imposing a non-custodial sentence, the district court accorded no weight to general deterrence.”<sup>186</sup>

Second, the panel faulted the district court for failing to account for the purposes of punishment, i.e., promoting respect for the law and providing just punishment for the offense. The panel cited from law review articles describing the general harm to society from all child pornography and recited the history of congressional laws prohibiting possession of child pornography with increasing vigor.<sup>187</sup> Regardless of whether a defendant’s possession is intentional or not, the panel said, the offense is a serious one.<sup>188</sup>

Third, the panel found that the district court failed to account for pertinent policy statements, which recommend a maximum term of supervised release for sex offenses involving a minor victim.<sup>189</sup>

Fourth, the panel found that the district court did not sufficiently account for the Guidelines.<sup>190</sup> Even though the district court had noted numerous times how unusual the case was, at one point stating that it was necessary to provide “an unusual sentence for an unusual case,”<sup>191</sup> the panel concluded that this was insufficient. According to the panel, “the district court did not so much as acknowledge that probation ordinarily was not available for this crime, nor that a life term of supervised release was recommended.”<sup>192</sup>

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183. *Pugh*, 515 F.3d at 1194.

184. *Id.*

185. *See* 18 U.S.C. § 2252A(a)(5)(B) (2000). Under the version of the PROTECT Act applicable in Mr. Pugh’s case, Congress imposed a penalty of a fine or imprisonment from zero to ten years, or both. *Id.* That is, the district court was permitted, under the statute, to sentence Mr. Pugh to merely a fine.

186. *Pugh*, 515 F.3d at 1195.

187. *Id.* at 1195–96.

188. *Id.* at 1197.

189. *Id.* at 1199.

190. *Id.* at 1200.

191. *Id.* at 1187.

192. *Id.* at 1200.

Fifth, the panel found that the five-year probation was not adequate to protect the public from further crimes of the defendant, citing the high rate of recidivism for sex offenders generally. Again, although the panel stated that it found no fault with the district court's findings of fact, it rejected the district court's finding that there was little risk of recidivism.<sup>193</sup>

Sixth and finally, the panel found that the sentence did not adequately reflect the need to avoid sentence disparities. Even though the district court had explained numerous times why Mr. Pugh's case was an extremely unusual one, noting that Pugh was at "the low end of the spectrum of possession," and that the facts in Pugh's case were "quite different from those I normally see," the panel concluded that "it nonetheless did not adequately explain how Pugh's non-custodial sentence avoided profound disparities with other similarly situated defendants."<sup>194</sup>

The panel went on to conclude that any sentence of probation without jail time or supervised release is unreasonable, and thus vacated and remanded for resentencing.<sup>195</sup>

The panel's decision in *Pugh* is problematic for reasons apart from the issue of deference to the district court. For one thing, the panel stated that it found no clear error in the district court's findings of facts but nevertheless proceeded to ignore or contradict these factual findings in making its own sentencing determination. The district court found that Pugh posed no risk of recidivism, but the panel rejected that finding by reference to general evidence that all sex offenders pose a risk of recidivism. The district court found that Pugh's possession of child pornography was "passive" and "incidental," but the panel found that it was nonetheless intentional.

The panel opinion also tends to ignore the repeated declarations of the Supreme Court that sentencing determinations under § 3553(a) must be an *individualized* inquiry.<sup>196</sup> Nearly all of the reasons given by the

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193. *Id.* at 1201 ("The district court brushed aside consideration of this purpose of sentencing—aimed at incapacitation—by simply concluding that it was 'convinced that I will never see you again.'").

194. *Id.* at 1202 (internal quotation marks omitted).

195. *Id.* at 1203–04.

196. *See, e.g.,* *Gall v. United States*, 128 S. Ct. 586, 597 (2007) (stating that the sentencing judge must "make an individualized assessment based on the facts presented"); *Rita v. United States*, 127 S. Ct. 2456, 2472–73 (2007) (Stevens, J., concurring).

While reviewing courts may presume that a sentence within the advisory Guidelines is reasonable, appellate judges must still always defer to the sentencing judge's individualized sentencing determination. As we stated in *Koon*, "[i]t has been uniform and constant in the federal judicial tradition for the sentencing judge to consider every convicted person as an individual and every case as a unique study in

panel for finding the district court's sentence unreasonable have nothing at all to do with the individual facts of the case: the need to deter the crime of child pornography, the need to treat the crime of child pornography seriously, the need to consider policy statements that apply to the crime, the high rate of recidivism for sex offenders generally. These are all rationales that apply in every single case involving possession of child pornography. If the individualized circumstances in Pugh's case were not enough to outweigh these generalized concerns, then it is difficult to imagine circumstances that would *ever* outweigh them. It simply cannot be that Congress proscribed a minimum sentence of zero imprisonment, yet no set of facts would permit a court to sentence a defendant to that minimum in a particular case.<sup>197</sup>

*Pugh* is also problematic because it runs afoul of the specific holdings of *Gall*.<sup>198</sup> Although the Supreme Court in *Gall* rejected a proportionality or "extraordinary circumstances" test, the panel in *Pugh* held that "the district court did not support this 'major departure' with a 'significant justification,'" <sup>199</sup> a standard that sounds remarkably like the extraordinary-circumstances test that the Supreme Court rejected in *Gall* as inconsistent with abuse-of-discretion review.<sup>200</sup> The panel derived this standard by seizing on one isolated statement from *Gall*, wherein the Supreme Court stated, "We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one."<sup>201</sup> This was the Supreme Court's statement of the obvious. It was not an invitation for appellate courts to reintroduce an extraordinary-circumstances requirement by calling it a "significant justification" test.

The *Pugh* decision also appears to ignore a separate holding in *Gall*

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the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue."

*Id.* (quoting *Koon v. United States*, 518 U.S. 81, 113 (1996)).

197. The panel opinion functionally ignores that the statute setting forth the range of sentences for Pugh's offense contemplates a sentence of zero imprisonment and zero supervised release. In a footnote, the panel stated that it recognized that the statute contains no mandatory minimum. *Pugh*, 515 F.3d at 1200 n.14. But the panel's only example of what conduct might qualify for a light sentence was a hypothetical defendant who downloads "a handful of images none showing any prepubescent child or depicting any sexual activity, yet still constituting child pornography." *Id.* (quoting *United States v. Goldberg*, 491 F.3d 668, 672 (7th Cir. 2007)) (internal quotation marks omitted). However, all of the rationales given by the Court for why harsh sentences are necessary—to deter child pornography, to treat the crime seriously, to take into consideration relevant policy statements—apply equally to that hypothetical defendant, so long as what he possessed constituted child pornography. The panel alluded to "other circumstances in which a non-custodial sentence may be reasonable," but did not specify what they might be, only noting that "this is not one of them." *Id.*

198. *Gall*, 128 S. Ct. at 597.

199. *Pugh*, 515 F.3d at 1201.

200. *Gall*, 128 S. Ct. at 596–97.

201. *Id.* at 597.

concerning the reasonableness of noncustodial sentences. Like *Pugh*, *Gall* involved a district court's sentence of probation where the Guidelines recommended imprisonment.<sup>202</sup> The Eighth Circuit had reasoned that a sentence of probation amounted to "a 100% downward variance."<sup>203</sup> The Supreme Court rejected that argument as well, noting that a sentence of probation, while qualitatively less severe than incarceration, is nonetheless a substantial restriction of liberty.<sup>204</sup> In other words, "probation is not merely 'letting an offender off easily.'"<sup>205</sup> *Gall* thus held that courts of appeals cannot reverse a sentence of probation on the basis that it fails to account for the seriousness of an offense unless it considers the substantial liberty restrictions imposed on probationers.<sup>206</sup> In a footnote, the panel in *Pugh* attempted to distinguish *Gall* on the basis that *Gall* "did not involve a child pornography offense."<sup>207</sup> But *Gall* spoke to the severity of the conditions for a probationer rather than the nature of the offense. And if anything, the conditions of probation for a sex offender are far more restrictive of liberty than for a drug offender.<sup>208</sup>

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202. The district court had justified this sentence in part by pointing to Gall's voluntary withdrawal from the drug conspiracy prior to being indicted, but the Eighth Circuit found that the district court had attached "too much weight to Gall's withdrawal from the conspiracy" and "too much emphasis on Gall's post-offense rehabilitation." *United States v. Gall*, 446 F.3d 884, 889–90 (8th Cir. 2006). It also failed to "properly weigh" the seriousness of the drug conspiracy offense. *Id.* at 890. Finally, the Eighth Circuit also found that the district court had failed to consider that a sentence of probation would result in "unwarranted" disparities between Gall and his co-conspirators, who were sentenced to incarceration. *Id.* The Supreme Court reversed, noting that the Eighth Circuit's rationales, "whether viewed separately or in the aggregate, are [in]sufficient to support the conclusion that the District Judge abused his discretion." *Gall*, 128 S. Ct. at 594; *see also* discussion *supra* notes 92–97.

203. *Gall*, 446 F.3d at 889.

204. *Gall*, 128 S. Ct. at 596 (citing U.S. SENTENCING COMMISSION: GUIDELINES MANUAL § 5B1.3 (2007)). The Court explained at length that probationers

may not leave the judicial district, move, or change jobs without notifying, and in some cases receiving permission from, their probation officer or the court. They must report regularly to their probation officer, permit unannounced visits to their homes, refrain from associating with any person convicted of a felony, and refrain from excessive drinking.

*Id.*

205. *Id.* at 596 n.4 (quoting Advisory Council of Judges of National Council on Crime and Delinquency, *Guides for Sentencing* 13–14 (1957)).

206. The Supreme Court has already vacated one pre-*Gall* decision of the Eleventh Circuit in which the panel found the district court's sentence of probation to be substantively unreasonable. *See Livesay v. United States*, 128 S. Ct. 872 (2008) (granting petition for writ of certiorari, vacating judgment, and remanding to the Eleventh Circuit for further consideration in light of *Gall*).

207. *Pugh*, 515 F.3d at 1201 n.16.

208. *See* Richard Tewksbury, *Exile at Home: The Unintended Collateral Consequences of Sex Offender Residency Restrictions*, 42 HARV. C.R.-C.L. L. REV. 531 (2007); Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 17 (2008).

Even if *Pugh* were not questionable for all of these reasons, the panel's view of discretion and deference is at odds both with other decisions of the Eleventh Circuit and with post-*Booker* Supreme Court precedent. The Supreme Court has stated repeatedly that district courts are in a better position to make sentencing judgments based on their familiarity with individual cases and defendants. Because of this institutional advantage, "a district court's decision to vary from the advisory Guidelines may attract *greatest* respect when the sentencing judge finds a particular case 'outside the "heartland" to which the Commission intends individual Guidelines to apply.'"<sup>209</sup> Yet the panel in *Pugh* seemingly reviewed the facts of the case *de novo*, failed to defer to any of the sentencing judgments of the district court, and appeared to treat the district court's sentence with *less* deference because the case fell outside the heartland as opposed to according it *greater* respect.

The panel's stated justification for reviewing the § 3553(a) factors anew is that it could not evaluate the substantive reasonableness of the district court's sentence without evaluating each of the 3553(a) factors. But, as is reflected by the approach taken by the panels in *McBride* and the other cases discussed above, there is a substantial difference between conducting *de novo* review of the sentencing factors and reviewing how the district court evaluated those factors to ensure that its review was reasonable. And as is reflected by the different approaches taken by those same panels and the unpublished, *per curiam* decisions like *Rodriguez*, there is also a substantial difference between abdication of appellate discretion and deferential appellate review.

The very meaningful differences between these three approaches reflects the tension between greater appellate discretion and stronger deference to the district courts that has been the subject of *Rita*, *Gall*, and *Kimbrough*, and so many other sentencing cases since *Booker*. When the Eleventh Circuit has issued short, unpublished, *per curiam* opinions, it has essentially abdicated its role in the sentencing process. When it has reviewed the reasoning of the district court without conducting its own separate review of the § 3553(a) factors, it has extended greater deference to the sentencing judgments of the district courts without abdicating its limited discretion over sentencing. And when it has elected the *Pugh* approach, it has overreached for discretion and its reasonableness review has seemed more like *de novo* review than review for abuse of discretion.<sup>210</sup> Given the repeated and consistent message

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209. *Kimbrough v. United States*, 128 S. Ct. 558, 563 (2007) (emphasis added) (quoting *Rita v. United States*, 127 S. Ct. 2456, 2465 (2007)).

210. The Eleventh Circuit is not alone in its approach to the probationary sentence for a child-pornography offense in *Pugh*. Other circuits have issued similar decisions reversing as substantively unreasonable sentences of zero or almost zero imprisonment imposed by district

from the Supreme Court that deference ought to win out over discretion yet the courts of appeals ought to play some role in reviewing the substantive reasonableness of sentences, when a case presents the opportunity for nonfrivolous-reasonableness review, it would seem that the middle approach is the only one that truly accords with the Supreme Court's view of the proper appellate role in sentencing cases since *Booker*.

#### V. A MODEST PROPOSAL REGARDING APPELLATE REVIEW AFTER *BOOKER*

Accepting for the sake of argument that the middle-ground approach is most consistent with that envisioned by the Supreme Court, the logical next question is under what circumstances a court of appeals could find a district court sentence to be substantively unreasonable while employing that approach. After all, the examples I have given of the middle-ground approach, *Anderson* and *McBride*, both involved decisions in which the district court's sentence was affirmed. The panel in *Pugh* voiced the concern that if it could not reverse *Pugh*'s sentence of probation,

we would come perilously close to holding that appellate review is limited to procedural irregularity, so long as the district court says it has reviewed all of the Section 3553(a) factors. We do not read Supreme Court precedent as having so eviscerated appellate review at the same time that it has mandated the appellate courts to continue to review sentences for reasonableness.<sup>211</sup>

The panel's words evince frustration that must understandably be shared by many appellate courts with the state of appellate review after *Booker*.

It cannot be that the Supreme Court provided the courts of appeals with the responsibility to conduct substantive-reasonableness review but denied them the discretion to reverse a sentence as substantively unreasonable.<sup>212</sup> In fact, the Court rejected Justice Scalia's position,

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courts for child-pornography offenses. See, e.g., *United States v. Goldberg*, 491 F.3d 668, 672 (7th Cir. 2007), *cert. denied*, 128 S. Ct. 666 (2007); *United States v. Fink*, 502 F.3d 585, 586 (6th Cir. 2007); *United States v. Duhon*, 440 F.3d 711 (5th Cir. 2006), *vacated*, 128 S. Ct. 853 (2008). However, most recently, the Fifth Circuit has affirmed a sentence of five years probation with no period of incarceration for possession of child pornography, taking note of *Gall*'s edict that a court of appeals may not reverse simply because it would have imposed a different sentence in the first instance. See *United States v. Rowan*, No. 05-30536, 2008 WL 2266995, at \*1 (5th Cir. June 4, 2008). Prior to *Gall*, the Fifth Circuit had vacated and remanded for resentencing. *United States v. Rowan*, 169 F. App'x 395 (5th Cir. 2006). After *Rowan* petitioned for certiorari, the Supreme Court granted the petition, vacated the Fifth Circuit's decision, and remanded for reconsideration in light of *Gall*. *Rowan v. United States*, 128 S. Ct. 853 (2008).

211. *Pugh*, 515 F.3d at 1203-04.

212. Sixth Circuit Judge Jeffrey Sutton has expressed this thought in his article on appellate review of sentences after *Booker*. See Sutton, *supra* note 5, at 85.

expressed in his dissenting opinion in *Rita*, that the courts of appeals ought to engage in purely procedural review. Simply stated, there must be some substance to substantive-reasonableness review.

In this section I propose a series of parameters that delineate how substantive-reasonableness review could be conducted consistent with *Rita*, *Gall*, and *Kimbrough*, while permitting the court of appeals the discretion to reverse a sentence as substantively unreasonable. I also articulate principles for when substantive-reasonableness review may run afoul of the Supreme Court's guidance. These principles are not intended to be comprehensive or exhaustive.

First, appellate courts may reverse an irrational or arbitrary sentence as substantively unreasonable. In *Rita*, Justice Stevens articulated one example of such a sentence: “[A] district judge who gives harsh sentences to Yankees fans and lenient sentences to Red Sox fans would not be acting reasonably even if her procedural rulings were impeccable.”<sup>213</sup> The Eleventh Circuit panel in *Pugh* also recognized arbitrary sentences as subject to remand based on substantive-reasonableness review (though it did not identify the sentence imposed by the district court as an example).<sup>214</sup> Not every irrational sentence will be as obvious as Justice Stevens's Red Sox example. A judge might, for example, sentence a defendant based on personal contempt for the defendant (or for one of the attorneys), or based upon built-up frustration with a class of defendants that the judge arbitrarily takes out on a single individual defendant. Perhaps a judge might allow the fact that he or she is having a bad day to influence the sentence imposed. These examples will be

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For my part, so 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. The value of individualized sentencing trumps the minor consistency gains that substantive review might give us.

*Id.*

I see little room for appellate review—little room for a substantive reassessment of the length of the sentence in light of the district court's application of the § 3553(a) factors. Why? It is notoriously difficult to conduct this kind of review in a principled way; appellate courts are poorly positioned to reassess the application of these factors from a distance—think of the challenges of reassessing an individual's prospects for rehabilitation or recidivism; the cost of not conducting substantive review (modest inconsistencies) is low; and the value of not doing it (promoting individualized sentencing) is high.

*Id.* at 84.

213. *Rita*, 127 S. Ct. at 2473 (Stevens, J., concurring).

214. *Pugh*, 515 F.3d at 1191–92 (“Likewise, [a] sentence may be substantively unreasonable when the district court selects the sentence arbitrarily, bases the sentence on impermissible factors [or] fails to consider pertinent section 3553(a) factors.”) (quoting *United States v. Ward*, 506 F.3d 468, 478 (6th Cir. 2007)) (internal quotation marks omitted).

more difficult to detect, and the court of appeals will need to probe the record carefully for evidence that the irrational factor infected the decision of the district court. Nevertheless, there is nothing controversial about a court of appeals reviewing an irrational sentence as substantively unreasonable.

Second, a court of appeals may reverse a sentence as substantively unreasonable if the sentence is inconsistent with the explanation given by the district court. This example of substantive unreasonableness is closely related to the first because the inconsistency between the district court's sentence and its explanation would suggest that the sentence is irrational. For example, if the district court in *Pugh* had given the same explanation as to why Pugh was an unusual defendant whose possession of child pornography was only passive, but then sentenced Pugh to the high end of the Guidelines range or varied above it, the court of appeals could reverse such a sentence as substantively unreasonable. In a way, the court of appeals in this hypothetical case would be according deference to the findings of fact and statements of the sentencing judge by finding the judge's sentence unreasonable in light of these findings.

Third, a court of appeals may reverse a sentence as substantively unreasonable if the sentence is based on impermissible factors. Reliance on impermissible factors is generally accepted to be a valid basis to vacate a sentence as substantively unreasonable, but it begs the question of what is an impermissible factor. The courts of appeals were told in *Kimbrough* that they were wrong to conclude a district court's disagreement with the 100:1 crack-sentencing ratio was an impermissible factor. The Court gave two reasons for finding that such disagreement was a permissible factor. First, the Sentencing Commission had not based the crack Guidelines on the sort of empirical study that informed most other Guidelines. Second, such disagreement was grounded in the factors set forth in § 3553(a)—in the crack cases, the need to avoid unwarranted sentencing disparities. The former is less helpful than the latter as guidance for when a factor is impermissible because it speaks to the types of cases in which policy disagreement may be a permissible factor rather than the types of factors that may or may not be permissible. The latter, however, is a good indication of what types of factors are permissible. Specifically, one can infer from *Kimbrough* that a factor is impermissible when it is not rooted in the factors set forth in § 3553(a).

Several of the § 3553(a) factors are extremely broad, so the courts of appeals must be careful before determining that a factor is impermissibly beyond the scope. For example, § 3553(a)(1) provides that the sentencing court should consider “the nature and circumstances of the

offense and the history and characteristics of the defendant.”<sup>215</sup> There are thousands of potential characteristics that may be considered by a district court in sentencing a defendant. Some of those will be unreasonable bases for a defendant’s sentence, but not because they are outside the scope of § 3553(a)(1). For example, a defendant’s Red Sox fandom is certainly a “characteristic of the defendant”; it just happens to be an irrational (and unreasonable) one for a court to base its sentence on.

Fourth, a court of appeals may reverse a sentence as substantively unreasonable for failure to consider—as opposed to weigh—relevant § 3553(a) factors. It is one thing for a district court and court of appeals to disagree about how to weigh the § 3553(a) factors, and quite another for the district court to completely overlook (some or all of) the factors completely. A court of appeals may not disagree with the weight that a district court gives to the various § 3553(a) factors. But if a district court completely fails to consider relevant factors, then a court of appeals may find the resulting sentence substantively unreasonable. For example, had the defendant in *Pugh* demonstrated a propensity to engage in acts of pedophilia and had the district court failed to discuss § 3553(a)(2)(C)—the need “to protect the public from further crimes of the defendant”<sup>216</sup>—the court of appeals would have cause to reverse the noncustodial sentence as unreasonable. As it was, the district court found no such propensity and articulated its consideration of § 3553(a)(2)(C) in its sentencing decision.

Because courts of appeals are not to substitute their judgment for that of the sentencing court, it is critical that appellate courts distinguish between the failure to *consider* relevant factors and the failure to *weigh* those factors as the courts of appeals would have, had it been the sentencing court in the first instance. When a court of appeals begins questioning how the district court weighs the statutory factors, it crosses the threshold of necessary deference that the Supreme Court has articulated in *Rita*, *Gall*, and *Kimbrough*.

Fifth and finally, appellate courts may not find a sentence substantively unreasonable based on general notions about the proper or improper sentences for certain crimes, especially when the district court has based its sentence on individualized facts and circumstances related to an individual defendant. One theme in the Supreme Court’s sentencing decisions is that sentencing is an individualized inquiry. A sentence must be based on the individual facts and circumstances of the defendant in any given case. An appellate court cannot find a sentence unreasonable when the district court balanced individual facts against general prin-

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215. 18 U.S.C. § 3553 (2000).

216. *Pugh*, 515 F.3d at 1188 n.3.

ciples and determined that the individual facts overwhelmed the general principles.<sup>217</sup> This is the fundamental flaw in *Pugh*. The panel in *Pugh* preferred its own balancing of the § 3553(a) factors to that of the district court, but the panel's balance privileged generally applicable principles about sentencing over individual facts specific to the defendant in that case.

The Supreme Court has stated that sentencing is an area in which the district court has special expertise. The decisions in *Booker*, *Rita*, *Gall*, and *Kimbrough* limit discretion of the courts of appeals and encourage deference to the district courts because of the district courts' institutional competence to make sentencing decisions, or what Professor Rosenberg termed the "you are there" rationale.<sup>218</sup> Judge Sutton of the Sixth Circuit has explained it quite succinctly: "While trial judges sentence individuals face to face for a living, [appellate judges] review transcripts for a living. No one sentences transcripts."<sup>219</sup>

The "you are there" principle is not new to federal-sentencing jurisprudence. While some have criticized it,<sup>220</sup> the principle has persisted since the pre-Guidelines era and in both the mandatory and advisory

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217. A corollary to this rule is the notion that any punishment contemplated by Congress may, under certain circumstances, fit the crime. Appellate courts cannot effectively hold that a sentence contemplated by Congress will *never* be reasonable under any set of facts. See discussion *supra* note 197.

218. See Rosenberg, *supra* note 16, at 182. Professor Rosenberg explains the basis for the "you are there" rationale:

As one trial judge pungently phrased it, he "smells the smoke of battle" and can get a sense of the interpersonal dynamics between the lawyers and the jury. That is a sound and proper reason for conferring a substantial measure of respect to the trial judge's ruling *whenever it is based on facts or circumstances that are critical to decision and that the record imperfectly conveys*.

*Id.* at 183.

219. *United States v. Poynter*, 495 F.3d 349, 351 (6th Cir. 2007). Judge Sutton has expressed this idea in an academic context as well. See Sutton, *supra* note 5, at 79.

Over time, trial judges charged with sentencing criminals day in and day out develop not just experience but expertise in their sentencing practices and in sentencing individuals within typically wide ranges set by Congress. Before imposing each sentence, trial judges also do something that no legislature, commission or appellate court can do: They hear from the defendants, and they sometimes hear from their families and from the victims of the crime as well, after which the judges must explain on the record why they sentenced the defendant the way they did. In the face of these realities, Congress, the United States Sentencing Commission and above all appellate judges ought to respect these individualized sentencing judgments and be exceedingly reluctant to second-guess them—no matter how varied the resulting sentences may be. Let the trial judges be judges, in short, and let them exercise the judgment entrusted to them.

*Id.*

220. *E.g.*, Frank O. Bowman, III, *Places in the Heartland: Departure Jurisprudence After Koon*, 9 FED. SENT'G. REP. 19, 20 (1996). *But see* Lee, *supra* note 19, at 32–34 (rebutting Bowman's arguments against the institutional competence of district courts).

Guidelines eras that followed. Most importantly, it undeniably drove the Court's decisions in *Rita*, *Gall*, and *Kimbrough*. Justice Kennedy articulated the Court's perspective on the institutional advantage of district courts in sentencing over a decade ago in *Koon*. He stated, "District courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines cases than appellate courts do."<sup>221</sup>

The "you are there" rationale for deference to the district courts is nowhere stronger than in sentencing decisions that arise when a district judge looks a defendant in the eye and bases his or her sentence on what he or she sees. For that reason, the courts of appeals may reverse a sentence as substantively unreasonable, but not because they would have balanced the sentencing factors differently, and especially not when the factors that drove the district judge's sentence were specific and unique to the defendant looking the judge in the eye.

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Like the other courts of appeals, the Eleventh Circuit is still coming to terms with its limited discretion to review sentencing decisions after *Booker*. The Supreme Court has stated that after *Booker*, appellate courts' discretion is limited, and they must defer to the sentencing decisions of the district courts. At the same time, the Supreme Court has also stated that the courts of appeals must review sentences for both procedural and substantive reasonableness. These instructions are not irreconcilable, but reconciling them will require the courts of appeals to accept as reasonable sentences that they themselves would not have imposed. Ascribing to the principles articulated in this article would permit this reconciliation, balancing discretion and deference in a manner consistent with the Supreme Court's sentencing cases. It is this balance between deference and discretion that will shape sentencing jurisprudence as it continues to evolve in *Booker*'s wake.

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221. *Koon v. United States*, 518 U.S. 81, 98 (1996). Former Justice Traynor similarly observed:

The appellate court is limited to the mute record made below. Many factors may affect the probative value of testimony . . . . A trial court or jury before whom witnesses appear is at least in a position to take note of such factors. An appellate court has no way of doing so. It cannot know whether a witness answered some questions forthrightly but evaded others. It may find an answer convincing and truthful in written form that may have sounded unreliable at the time it was given. A well-phrased sentence in the record may have seemed rehearsed at the trial. A clumsy sentence in the record may not convey the ring of truth that attended it when the witness groped his way to its articulation. What clues are there in the cold print to indicate where the truth lies? What clues are there to indicate where the half-truth lies?

ROGER J. TRAYNOR, *THE RIDDLE OF HARMLESS ERROR* 20-21 (1970).