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Circuit Circus: What is the Correct Standard of Review Applicable to Supervised Release Appeals after United States v. Booker?

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CIRCUIT CIRCUS: WHAT IS THE CORRECT STANDARD OF REVIEW APPLICABLE TO SUPERVISED RELEASE APPEALS AFTER *UNITED STATES V. BOOKER*?

I. INTRODUCTION

"In a final irony, he had to kill the [Sentencing] [G]uidelines to save them."[1]

Luci is a young woman with a troubled past.[2] She was convicted nearly nine years ago of possessing ammunition as a felon and sentenced to 120 months imprisonment, followed by three years of supervised release. Supervised release functions as a distinct form of punishment, which is imposed by a trial court and served in addition to a prison term.[3] Luci executed her prison time and was discharged to complete her three-year term of supervised release in the community. She served two years of that punishment successfully before being convicted in a state court of attempting to elude police on a motorcycle, a crime which placed her in violation of a condition of her release. As a result, an Indiana federal district court ordered Luci to serve a sentence of twenty months re-imprisonment, which she has decided to appeal. When Luci appeals that determination to the Seventh Circuit Court of Appeals, she needs to be able to argue that either: (1) the district court's determination should be set aside because it is "unreasonable"; or (2) it should be set aside because it is "plainly unreasonable."[4] It is imperative to have a consistent and uniform standard so that Luci knows if, when, and how to plead her appeal, and additionally, so that the proper degree of deference is afforded to the district court.[5] At the present time, given the Seventh Circuit's standard, Luci will argue that her sentence is

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1 Cliff Sloan, *Supreme Court Brief: Judge vs. Jury*, NEWSWEEK (Jan. 18, 2005, 7:00 PM), http://www.thedailybeast.com/newsweek/2005/01/18/supreme-court-brief-judge-vs-jury.html (discussing the paradox in the *United States v. Booker* decision given Justice Stephen Breyer's role in creating the Sentencing Guidelines as chief counsel of the Senate Judiciary Committee in the 1970s and as a member of the U.S. Sentencing Commission in the 1980s). Breyer's remedial opinion saves the Sentencing Guidelines' handiwork for judges, but makes them optional rather than compulsory. *Id.*

2 Luci is a hypothetical defendant. This narrative is loosely based on the case of *United States v. Kizeart*, 505 F.3d 672 (7th Cir. 2007). The facts have been changed slightly by the author.

3 *See infra* Part II.A (explaining the concept of supervised release).

4 Sloan, *supra* note 1.

5 *Id.*

"plainly unreasonable."[6] However, if she were a defendant in the Sixth Circuit, for example, the standard would be one of "reasonableness."[7] Such inconsistent standards of review among the circuits reflect negatively on the evenhandness of the judiciary.[8]

United States v. Booker imparted both constitutional clarity and utter confusion to the United States sentencing system.[9] The waters remain murky regarding the review of sentences imposed following the revocation of a defendant's supervised release. Since *Booker*, ten of the nation's thirteen federal circuits have confronted the issue, and nine have taken a stance on which standard is correct.[10] When analyzing this issue, the courts have chiefly confronted two broad questions: (1) whether, by announcing a standard of "reasonableness" review in *Booker*, the Supreme Court meant to replace the "plainly unreasonable" standard that the courts had been using in hearing appeals of supervised release revocations; and (2) whether there is any real distinction between these two standards.[11]

This Note specifically addresses the current state of the circuit split as well as ideas on the correct standard of review for revocations of supervised release. While most of the circuits have gravitated toward the "reasonableness" standard, they continue to struggle internally over whether there is an actual difference between the "plainly unreasonable"

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6 *See infra* Part II.C–D (detailing the division among the circuits and the two basic standards of review currently utilized).

7 *See infra* Part II.D (discussing the "reasonableness" standard of review, which has been adopted by the Sixth, Eighth, Tenth, and Eleventh Circuits).

8 *See* WORLD TRADE ORG., KEY ISSUES IN WTO DISPUTE SETTLEMENT: THE FIRST TEN YEARS 161–62 (Rufus Yerxa & Bruce Wilson eds., 2005) (noting that standards of review are a very large part of procedural law in general). They play an important role in judicial review. *Id.* "However, standards of review fulfil [sic] not only a procedural function but can also represent a deliberate allocation of power between an authority taking a measure and a judicial organ reviewing it." *Id.* at 162.

9 United States v. Booker, 543 U.S. 220 (2005). "[T]he Supreme Court's decisions in *United States v. Blakely*, 542 U.S. 296 (2004), and *United States v. Booker*, 543 U.S. 220 (2005) . . . converted the mandatory sentencing regime that had been in place since 1984 to an advisory one . . . ." DEP'T OF JUSTICE, FACT SHEET: THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING (2006), *available at* http://www.justice.gov/opa/documents/United_States_v_Booker_Fact_Sheet.pdf.

10 Elizabeth Stewart Hall, Comment, *Determining the Proper Standard of Review for Sentences Imposed After Revocation of Supervised Release in* United States v. Bolds, 32 AM. J. TRIAL ADVOC. 405, 410–11 (2008). "Though some of the circuits have refused to make a decision on the issue, a majority of the circuits have chosen a standard to apply, albeit not the same." *Id.*; *see* United States v. Smith, 255 F. App'x 867, 868 (5th Cir. 2007) (explaining that *Booker* left numerous issues unsettled for the circuit courts and that the federal judiciary has wrestled to identify the correct standard of review for revocations of supervised release).

11 Hall, *supra* note 10, at 410–11.

and the "reasonableness" standards.[12] Furthermore, some circuits have gone the opposite direction, choosing "plainly unreasonable" as the correct standard.[13] In addition, some circuits have not yet addressed what the correct standard is, and one circuit has refused to decide the question at this time.[14]

Much activity has taken place at the federal appellate level post-*Booker*, and most circuits have key cases announcing an opinion on the correct standard—either contributing to the arrival of a standard in a meaningful way or simply refusing to confront the issue.[15] Significant strengths and weaknesses are present in each of the stances and it remains unclear what the Supreme Court views to be the correct standard.[16]

This Note attempts to give a voice to defendants like Luci and resolve the split among the circuits. Part II of this Note describes supervised release and gives the historical foundation of the split.[17] Part III analyzes the current state of the circuit split.[18] Part IV concludes with a proposed application note and model judicial reasoning.[19]

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[12] *See infra* Part II.D (explaining the "reasonableness" approach and detailing the subscribing circuits).

[13] *See infra* Part II.C (describing the "plainly unreasonable" approach as the minority position).

[14] *See infra* Part II.B (noting that some circuits have not yet taken a stance as to the correct approach).

[15] *See* United States v. Bungar, 478 F.3d 540, 541 (3d Cir. 2007) (holding that the proper standard is "reasonableness"); United States v. Bolds, 511 F.3d 568, 578 (6th Cir. 2007) (holding that the proper standard is "reasonableness"); United States v. Kizeart, 505 F.3d 672, 675 (7th Cir. 2007) (holding that the proper standard is "plainly unreasonable"); United States v. Crudup, 461 F.3d 433, 437 (4th Cir. 2006) (holding that the proper standard is "plainly unreasonable"); United States v. Sweeting, 437 F.3d 1105, 1106–07 (11th Cir. 2006) (holding that the proper standard is "reasonableness"); United States v. Miqbel, 444 F.3d 1173, 1176 (9th Cir. 2006) (holding that the proper standard is "reasonableness"); United States v. Fleming, 397 F.3d 95, 96 (2d Cir. 2005) (holding that the proper standard is "reasonableness"); United States v. Cotton, 399 F.3d 913, 917 (8th Cir. 2005) (holding that the proper standard is "reasonableness"); United States v. Tedford, 405 F.3d 1159, 1161 (10th Cir. 2005) (holding that the proper standard is "reasonableness"); *infra* Part II (laying the foundation for an analysis of the split among the circuits).

[16] For example, this Note proposes that *Rita* and *Gall* have added a further layer of confusion, rather than clarity, to the analysis. Rita v. United States, 551 U.S. 338 (2007); Gall v. United States, 552 U.S. 38 (2007); *see infra* Part III.C.1 (detailing *Rita* and *Gall*'s impacts on the analysis of the correct post-*Booker* standard of review).

[17] *See infra* Part II (giving background on this topic).

[18] *See infra* Part III (analyzing potential criticisms of the plainly unreasonable standard, *Booker*, and the ease with which a portion of the SRA can be severed).

[19] *See infra* Part IV (offering a potential solution to the split among the circuits utilizing the "plainly unreasonable" standard).

II. BACKGROUND

United States v. Booker has been a watershed in the United States sentencing system.[20] Since *Booker*, the appellate courts have attempted to resolve whether the Supreme Court meant to replace the "plainly unreasonable" standard used by courts in hearing post-revocation appeals, and whether there is a real difference between the "plainly unreasonable" and "reasonableness" standards.[21] This Note specifically focuses on the current state of the circuit split and advances ideas on the correct standard of review for revocations of supervised release; each of the stances taken by the different circuits have both strengths and weaknesses, and the Supreme Court's views about the proper standard remain ambiguous.[22]

Part II of this Note gives a summary and history of supervised release and explains the impact of *Booker* on the current state of affairs in the federal appellate courts respecting their standards of review for supervised release revocations. Part II.A gives details regarding supervised release as a sentencing concept and the "plainly unreasonable" standard that came about with the Sentencing Reform Act ("SRA") and the United States Sentencing Guidelines ("Sentencing Guidelines").[23] Part II.B reveals how *Booker* sent this system into a state of unrest.[24] It also shows the gradual unfolding in the aftermath of *Booker* and the formation of an uneven circuit split.[25] The circuits have utilized two main approaches in an attempt to choose a standard of review for revocations of supervised release: the "plainly unreasonable" standard and the "reasonableness" standard.[26] Part II.C focuses on the "plainly unreasonable" standard.[27] Part II.D discusses the "reasonableness" standard and shows the internal division among the circuits that use the "reasonableness" standard: some circuits find no

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20 United States v. Booker, 543 U.S. 220 (2005). As the *Booker* majority noted, sentencing appeals, sentencing departures, and revocations of supervised release are important concerns within the United States' criminal justice system. *Id*. at 262.

21 Hall, *supra* note 10, at 410–11.

22 *See infra* Part III.C.1 (detailing *Rita* and *Gall*'s impacts on the analysis of the rightful standard of review).

23 *See infra* Part II.A (giving a summary of supervised release and the "plainly unreasonable" standard).

24 *See infra* Part II.B (explaining what *Booker* did to the "plainly unreasonable" standard and what happened in the wake of *Booker*).

25 *See infra* Part II.B (describing *Booker*'s impact on the "plainly unreasonable" standard).

26 *See infra* Part II.C–D (detailing the division among the circuits and the two basic standards of review currently utilized).

27 *See infra* Part II.C (explaining the "plainly unreasonable" standard and the methodologies and theories of the subscribing circuits).

difference between the two standards while others see a difference, but nevertheless choose to follow the "reasonableness" guidepost.[28]

A. Summary of Supervised Release and the "Plainly Unreasonable" Standard

Supervised release is unique because it functions as an additional phase of punishment following a period of incarceration.[29] After being found guilty of a crime at the trial court level, a defendant may be sentenced to both a term of incarceration and a term of supervised release.[30] Supervised release sentences, as seen in Luci's case above, are served after completion of the incarceration period.[31] Supervised release comes with conditions, which, if violated, can lead to consequences including re-imprisonment or an extension or modification of the terms of the supervised release period.[32] The determination that a violation has occurred is made by a trial court and is appealable, and, as with all appeals, the amount of discretion that the appellate court shall afford the trial court's decision is governed by a standard of review.[33]

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28 *See infra* Part II.D (discussing the "reasonableness" standard).

29 *See infra* Part II.A.1 (differentiating between parole and supervised release).

30 *See infra* Part II.A.1 (expounding on the imposition of supervised release).

31 *See supra* notes 2–8 and accompanying text (introducing this hypothetical).

32 *See Understanding the Requirements of Supervised Release and Probation Supervision*, U.S. PROBATION & PRETRIAL SERVICES OFF. DISTRICT R.I., http://www.rip.uscourts.gov/rip/supervision/understandingthereqs/UnderstandingtheRequirements.pdf (last visited Oct. 2, 2011) (stating that imposition of a prison sentence and more supervised release likely follows revocation of a term of supervised release to ensure that an offender's re-entry is both safe for the community and successful for the participant). According to this source, nationwide supervised revocation rates are approximately twelve to fifteen percent (meaning that somewhere between eighty-five and eighty-eight percent of offenders successfully complete their term of supervised release without revocation). *Id.* Violations of supervised release leading to revocation do not constitute separate charges because supervised release is only "a continuation of the original charge." United States v. Valdez-Sanchez, 414 F.3d 539, 542 (5th Cir. 2005). "The supervised release period is an independent element of the [original] sentence. It is not carved out of the maximum permissible time allotted for incarceration under some other criminal statute." United States v. Work, 409 F.3d 484, 489 (1st Cir. 2005); *see also* Douglas A. Morris, *Representing a Client Charged with Violating Conditions of Supervised Release – Part I*, NAT'L ASS'N CRIM. DEF. LAW., Nov. 2006, at 28, *available at* http://www.nacdl.org/Champion.aspx?id=927&terms=douglas+morris+and+representing+a+client+charged+with+violating (giving a practitioner's view of supervised release mechanics).

33 *See* Thomas A. Sheehan, *Standard of Review on Appeal*, 53 J. MO. B. 281, 281 (1997), *available at* http://www.mobar.org/journal/1997/sepoct/sheehan.htm ("The standard of review determines the degree of scrutiny the appellate court will apply when reviewing the rulings made below. . . . The impact of the standard of review is enormous.").

The concept of supervised release is not old, as it originated with the introduction of the SRA and the Sentencing Guidelines.[34] Similar to other types of sentences, there are specific repercussions for a breach of the terms of a defendant's supervised release.[35] However, the policy statements outlining the requirements of supervised release are significantly different from the Sentencing Guidelines controlling other types of sentences.[36] 18 U.S.C. § 3742 housed the traditional standard of review pertaining to revocations of supervised release pre-*Booker*.[37]

1. The Creation of Supervised Release and What Happens When a Person Violates the Terms of Their Supervised Release

The SRA, which accompanied the implementation of the Sentencing Guidelines, created supervised release in 1984.[38] Supervised release is essentially a form of post-imprisonment supervision that may be imposed by a trial court as a part of an initial sentence of imprisonment.[39] It differs from parole in that supervised release does not replace a portion of an imprisonment term.[40] Supervised release is

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[34] *See infra* note 38 and accompanying text (explaining the origin of supervised release as a sentencing concept).

[35] *See infra* Part II.A.1 (detailing what happens after a defendant violates his or her supervised release terms).

[36] *See infra* Part II.A.1 (outlining the differences between policy statements and the once mandatory Sentencing Guidelines).

[37] *See infra* Part II.A.2 (discussing the traditional pre-*Booker* standard of review).

[38] U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A (2009).

[39] *Id.*; *see* Bob Katzen, *Beacon Hill Roll Call: Local Senators' 2010 Per Diems Announced*, TAUNTON DAILY GAZETTE (Jan. 16, 2011, 9:00 PM), http://www.tauntongazette.com/state_news/x512660834/BEACON-HILL-ROLL-CALL-Local-senators-2010-per-diems-announced (exemplifying that supervised release is a common sentencing tool, even for defendants who have not spent much time in the system). For example, the U.S. Attorney's office announced in 2010 "that Patrice Tierney, wife of Congressman John Tierney, was sentenced to [thirty] days in prison and then two years of supervised release, including five months of home confinement, on charges of aiding and abetting the filing of false federal tax returns for her brother." *Id.*; *see also* Eric Tucker, *Judge: 'Survivor' Winner Broke Terms of Release*, ABC NEWS (Jan. 10, 2011), http://abcnews.go.com/Entertainment/wireStory?id=12579156 (demonstrating that even the rich and famous are sometimes sentenced to supervised release). "Reality TV star Richard Hatch violated the terms of his supervised release by failing to refile his tax returns, a judge ruled Monday, but he said he hadn't decided whether to put the 'Survivor' winner back behind bars. He delayed sentencing until he could receive additional arguments." *Id.*

[40] U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A (2009). According to the Sentencing Guidelines, "[u]nlike parole, a term of supervised release does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court." *Id.* "[S]upervised release is more analogous to the additional 'special parole term' previously authorized for certain drug offenses." *Id.* A strict definition of supervised release is as follows: "**[**s]upervised release [is] the period of time when an offender, serving a determinate sentence, is supervised in

also different from probation because it is imposed following imprisonment, whereas probation is imposed in place of imprisonment.[41] Once a defendant is adjudged to have violated a condition of his or her supervised release, the court has the option of continuing the defendant on supervised release, with the choice of extending or modifying the conditions of the term, or revoking the supervised release altogether and imposing an additional term of incarceration.[42] The periods of imprisonment authorized by statute for violating a stipulation of supervised release are normally more limited than those available for a violation of probation.[43]

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the community following release from the prison portion of the offender's sentence. It is expressed in terms of a set number of months." *Victim Assistance Program: Terms/Definitions*, MINN. DEP'T CORRECTIONS, http://www.corr.state.mn.us/crimevictim/terms.htm (last visited Oct. 2, 2011).

41 *See* Morris, *supra* note 32 (highlighting the differences between supervised release and probation).

42 U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A (2009); *see* Brendan Kirby, *Judge Sentences 'Bonnie and Clyde' Couple for String of Drug-Fueled Bank Robberies*, PRESS-REGISTER (Jan. 30, 2011, 7:10 AM), http://blog.al.com/live/2011/01/judge_sentences_bonnie-and-cly.html (giving just one example of how a defendant can break the terms of his or her supervised release). Jerry Tinsely violated his supervised release by going on a drug-fueled robbery spree with his girlfriend in "Bonnie and Clyde" fashion in March of 2010. *Id*. The judge gave Tinsley a six year and five month prison sentence for his new charges, and also "revoked his supervised release on a federal gun charge and ordered him to go to prison for [two] years in that case." *Id.*; *see also* Ty Tagami, *Doctor Who Didn't Want to Work Going Back to Prison*, ATLANTA J.-CONST. (Jan. 27, 2011, 7:18 PM), http://www.ajc.com/news/doctor-who-didnt-want-818257.html (giving an example of an unusual revocation of supervised release). "A doctor released from prison after serving time for tax evasion will be going back because of a scheme he concocted to avoid getting a job." *Id*. Dr. Brown was out on supervised release after serving time in prison for federal tax evasion. *Id*. "A condition of his release was that he look for a job. His release already had been revoked once for failure to look for work, so he dreamed up a scheme to fake a job." *Id*. The judge apparently didn't think that the scheme was funny, as he sentenced Dr. Brown to three more years in federal prison after revoking his supervised release for giving false information to a federal officer. *Id.*

43 U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A (2009). For instance, the maximum penalty able to be imposed for a violation of supervised release given for a class A felony is a five-year prison term. *Id*. 18 U.S.C. § 3583(b) states the terms for supervised release after imprisonment as follows:

> (b) AUTHORIZED TERMS OF SUPERVISED RELEASE.—Except as otherwise provided, the authorized terms of supervised release are—
>
> (1) for a Class A or Class B felony, not more than five years;
>
> (2) for a Class C or Class D felony, not more than three years; and
>
> (3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

18 U.S.C. § 3583 (2006 & Supp. 2009). Both supervised release and probation "occur after imprisonment, and . . . involve governmental supervision after release." United States v. Reyes, 48 F.3d 435, 438 (9th Cir. 1995). However, there are at least two important differences between supervised release and probation. *Id.* One "is that supervised release

From the outset, the United States Sentencing Commission chose to promulgate policy statements creating and governing revocations of supervised release.[44] They did this rather than issuing Sentencing Guidelines administering to supervised release because it gave courts more flexibility in devising revocation sentences.[45] Consequently, differing from the Sentencing Guidelines, which were mandatory for the sentencing courts (pre-*Booker*), the policy statements for sentences stemming from revocations of supervised release were always purely advisory.[46] As a result, the Chapter Seven policy statements have always

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is a form of post-imprisonment supervision that is in addition to the term of imprisonment, while probation is supervision in lieu of incarceration." *Id*. (citation omitted). This difference may change the length of the sentence served. *Id.* The second difference, at least in some states, is that "the focus of probation has been shifted from rehabilitation to deterrence." *Id.* at 438–39.

44 U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A, introductory cmts. 1, 3(a) (2009).

45 *Id.*; *see* United States v. Kelley, 956 F.2d 748, 763–66 (8th Cir. 1992). The Eighth Circuit stated that:

> When Congress directed the Sentencing Commission to formulate "[G]uidelines," it also told the courts to follow the [G]uidelines. . . . Congress also provided that an incorrect application of the [G]uidelines was grounds for reversal.
>
> Congress did not, however, impose the same requirements with respect to policy statements. Although Congress directed the Commission to promulgate "general policy statements," it never stated that courts were bound to follow them. Instead, Congress provided that a sentencing court need only "consider" applicable policy statements when imposing sentence. . . . Not a single statute states that incorrect application of a policy statement is grounds for reversal. Not a single statute states that policy statements *must* be followed, nor does any guideline approved by Congress. . . . In sum, Congress has said nothing to indicate that policy statements are anything other than advisory. . . .
>
> It is plain that Congress has made a clear distinction between [G]uidelines, which have the force of law, and policy statements, which are only advisory. There are good reasons for this distinction. Guidelines, unlike policy statements, must be submitted to Congress before taking effect. The review procedure applies only to [G]uidelines proper, not policy statements. Congress must have deemed it desirable to have a mix of controlling and advisory material under the [G]uidelines system, giving the Commission and the courts the flexibility required in sentencing.

Id. at 763–64 (footnote omitted) (citations omitted); *see also* U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A, introductory cmt. 3(a) (2009) (stating that the United States Sentencing Commission has itself characterized its policy statements as advisory). For a discussion of sentencing discretion after *Booker* and *Gall*, see Alan Ellis & James H. Feldman, Jr., *Feature: Federal Sentencing Under the Advisory Guidelines: A Primer for the Occasional Federal Practitioner – Part Two*, 32 CHAMPION 36, 40 (2008).

46 *See* Hall, *supra* note 10, at 408 (discussing the advisory nature of the policy statements); *see also* U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A, introductory cmts.

been more concise and elementary than the Sentencing Guidelines that apply to original sentences.[47]

2. 18 U.S.C. § 3742: The Traditional Standard of Review Pre-*Booker*

Before 2005, a defendant's appeal of a revocation of supervised release was reviewed under the standard found in 18 U.S.C. § 3742(e).[48]

1, 3(a) (2009) (explaining that, from the very beginning, the United States Sentencing Commission chose to promulgate policy statements for supervised release rather than binding Sentencing Guidelines).

[47] *See* U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A, introductory cmt. 1 (2009). According to the United States Sentencing Guidelines Manual:

> Under 28 U.S.C. § 994(a)(3), the Sentencing Commission is required to issue [G]uidelines or policy statements applicable to the revocation of probation and supervised release. At this time, the Commission has chosen to promulgate policy statements only. These policy statements will provide guidance while allowing for the identification of any substantive or procedural issues that require further review. The Commission views these policy statements as evolutionary and will review relevant data and materials concerning revocation determinations under these policy statements.

Id. Furthermore:

> At the outset, the Commission faced a choice between promulgating [G]uidelines or issuing advisory policy statements for the revocation of probation and supervised release. After considered debate and input from judges, probation officers, and prosecuting and defense attorneys, the Commission decided, for a variety of reasons, initially to issue policy statements. Not only was the policy statement option expressly authorized by statute, but this approach provided greater flexibility to both the Commission and the courts. Unlike [G]uidelines, policy statements are not subject to the May 1 statutory deadline for submission to Congress, and the Commission believed that it would benefit from the additional time to consider complex issues relating to revocation [G]uidelines provided by the policy statement option. Moreover, the Commission anticipates that, because of its greater flexibility, the policy statement option will provide better opportunities for evaluation by the courts and the Commission. This flexibility is important, given that supervised release as a method of post-incarceration supervision and transformation of probation from a suspension of sentence to a sentence in itself represent recent changes in federal sentencing practices.

Id. at introductory cmt. 3(a).

[48] 18 U.S.C. § 3742(e) (2006 & Supp. 2009). This statute established that the court of appeals should decide whether the sentence:

> (1) was imposed in violation of law;
> (2) was imposed as a result of an incorrect application of the [S]entencing [G]uidelines;
> (3) is outside the applicable guideline range, and
> (A) the district court failed to provide the written statement of reasons required by [§] 3553(c);

That section also provides for *de novo* review of the trial court's decision to depart from the policy statements.[49] Thus, the traditional standard of review utilized by appellate courts in reviewing post-revocation sentences was "plainly unreasonable."[50] This is because a violation of supervised release is a non-Sentencing Guideline offense (i.e., it falls under 18 U.S.C. § 3742(e)(4)).[51]

B. The "Plainly Unreasonable" Standard and the Aftermath of Booker

The "plainly unreasonable" standard of 18 U.S.C. § 3742(e) mentioned above was questioned by the landmark case of *United States v. Booker*, which considered the effect of mandatory Sentencing Guidelines on defendants' sentences.[52] In *Booker*, the Supreme Court concluded that two decisions—*Apprendi*[53] and *Blakely*[54]—applied to the Sentencing

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> (B) the sentence departs from the applicable guideline range based on a factor that—
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> (i) does not advance the objectives set forth in [§] 3553(a)(2); or
>
> (ii) is not authorized under [§] 3553(b); or
>
> (iii) is not justified by the facts of the case; or
>
> (C) the sentence departs to an unreasonable degree from the applicable [G]uidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in [§] 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of [§] 3553(c); or
>
> (4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

Id.

[49] *Id*. § 3742(e). It states:

> The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the [G]uidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review *de novo* the district court's application of the [G]uidelines to the facts.

Id. (emphasis added).

[50] *See* Hall, *supra* note 10, at 408 (explaining the split among the circuits after *Booker*).

[51] 18 U.S.C. § 3742(e); *see* Hall, *supra* note 10, at 408 (expounding on this statement and noting that it is an offense governed by policy statements).

[52] United States v. Booker, 543 U.S. 220, 226 (2005).

[53] In *Apprendi*, the Court found that, under the Due Process Clause of the Fourteenth Amendment, "any fact [other than a prior conviction] that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Apprendi v. New Jersey, 530 U.S. 466, 490 (2000).

Guidelines and that, under the Sixth Amendment to the United States Constitution, 18 U.S.C. §§ 3553(b)(1) and 3742(e) were unconstitutional.[55] The five-to-four *Booker* decision rendered two idiosyncratic opinions addressing overlapping constitutional issues: (1) whether the mandatory Sentencing Guidelines set out in the SRA violated defendants' right to a jury under the Sixth Amendment; and (2) if the Sentencing Guidelines infringed those rights, whether the Court should invalidate the entire SRA.[56] The substantive constitutional opinion delivered by Justice Stevens addressed the first of the above questions.[57] He explained, reminiscent of *Apprendi*, that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict

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[54] In invalidating a petitioner's sentence, the *Blakely* Court found that Washington's sentencing procedure did not comply with the Sixth Amendment, consistent with its holding in *Apprendi*. Blakely v. Washington, 542 U.S. 296, 303 (2004). "Our precedents make clear . . . that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Id.* Ultimately, "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." *Id*. at 303–04. A judge exceeds his proper authority if he "inflicts punishment that the jury's verdict alone does not allow [because] the jury has not found all the facts 'which the law makes essential to the punishment . . . .'" *Id*.

[55] *Booker*, 543 U.S. at 220. The Sentencing Guidelines were, in effect, only advisory. *Id*. Trial courts were required to take the Sentencing Guidelines into consideration but were not bound by them. *Id*. Review of sentencing determinations was thus to be subjected to a "reasonableness" standard. *Id.*; *see* U.S. CONST. amend. VI (delineating the rights of defendants in these types of situations).

[56] *See* Hall, *supra* note 10, at 409 (explaining that the *Booker* Court handed down a split-decision—with the first opinion addressing whether the application of the Guidelines was violative of the Sixth Amendment, and the second dealing with how to remedy the Sixth Amendment infringement found by the Court); *see also* United States v. Bolds, 511 F.3d 568, 575 (6th Cir. 2007) (delineating a case where a defendant challenged, on "reasonableness" grounds, the sentence imposed following the trial court's revocation of the defendant's four-year period of supervised release).

[57] *Booker*, 543 U.S. at 244.

> Stevens, J., delivered the opinion of the Court in part, in which Scalia, Souter, Thomas, and Ginsburg, JJ., joined. Breyer, J., delivered the opinion of the Court in part, in which Rehnquist, C. J., and O'Connor, Kennedy, and Ginsburg, JJ., joined. Stevens, J., filed an opinion dissenting in part, in which Souter, J., joined, and in which Scalia, J., joined except for Part III and footnote 17, and Thomas, J., filed opinions dissenting in part. Breyer, J., filed an opinion dissenting in part, in which Rehnquist, C. J., and O'Connor and Kennedy, JJ., joined.

Id. at 225 (citations omitted).

must be admitted by the defendant or proved to a jury beyond a reasonable doubt."[58]

Justice Breyer concentrated on the second question in a separate remedial opinion, where he declared that two provisions, 18 U.S.C. § 3553(b)(1) and 18 U.S.C. § 3742(e),[59] must be severed and deleted to implement the constitutional holding.[60] The Court made clear that instead of applying the *de novo* standard of review found in 18 U.S.C. § 3742(e), appellate courts needed to apply the recognizable standard of "reasonableness."[61] "Reasonableness" was the standard administered to Sentencing Guideline departures until 2003, when Congress substituted the *de novo* standard.[62] However, the Court did not spell out whether, by excising 18 U.S.C. § 3742(e), it meant to alter the "plainly unreasonable" standard of review used for sentences with no applicable Sentencing Guidelines, including sentences for violations of supervised release.[63]

Soon after the decision was handed down, defendants appealing revocations of supervised release began to assert that the *Booker* "reasonableness" standard of review had replaced the more deferential standard of "plainly unreasonable."[64] The split among the circuits

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[58] *See id*. at 244 (reaffirming the Court's holding in *Apprendi* and applying *Blakely* to the Sentencing Guidelines); *Apprendi*, 530 U.S. at 497 (holding that it was unconstitutional to take from the jury the appraisal of facts that increased the prescribed range of penalties to which the petitioner was subjected); *Blakely*, 542 U.S. at 313–14 (finding that the jury's verdict alone did not authorize the sentence and so the sentencing procedure did not comply with the Sixth Amendment).

[59] *See* 18 U.S.C. § 3553(b)(1) (2006 & Supp. 2009) (providing the provision making Sentencing Guidelines mandatory); 18 U.S.C. § 3742(e) (2006 Supp.).

[60] *Booker*, 543 U.S. at 244–45; *see* Leigha Simonton, Booker*'s Impact on the Standard of Review Governing Supervised Release and Probation Revocation Sentences*, 11 BERKELEY J. CRIM. L. 129, 136 (2006) (quoting *Booker* and discussing the excision of the unconstitutional portions of the Sentencing Guidelines, as well as the ruling's impact on supervised release appeals). *But see* Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945, 1950 n.26 (1997) (relating that courts can sever uses or portions of a statute that are decidedly unconstitutional or wrong from applications that are valid and can continue to apply the constitutional or lawful portions), *cited in Booker*, 543 U.S. at 247.

[61] Simonton, *supra* note 60, at 136.

[62] *Id*. "In 2003, Congress modified the pre-existing text [of 18 U.S.C. § 3742(e)], adding a *de novo* standard of review for departures and inserting cross-references to [18 U.S.C.] § 3553(b)(1)." *Booker*, 543 U.S. at 261.

[63] Simonton, *supra* note 60, at 136; *see* U.S. CONST. amend. VI (giving the rights to defendants, which the *Booker* Court announced were violated by mandatory Sentencing Guidelines); 18 U.S.C. § 3742(e) (2006 & Supp. 2009) (codifying the Sentencing Guidelines).

[64] Simonton, *supra* note 60, at 136; *see* Gilles R. Bissonnette, Comment, "*Consulting*" *the Federal Sentencing Guidelines After* Booker, 53 UCLA L. REV. 1497, 1516 (2006) (reading *Booker* to create an egalitarian sentencing system whereby all sentences are governed by advisory Sentencing Guidelines and judged by the same appellate standard of review); *see also* JAMES Q. WHITMAN, HARSH JUSTICE: CRIMINAL PUNISHMENT AND THE WIDENING

regarding the correct standard of review in supervised release revocation cases was a direct outgrowth of the confusion spawned by *Booker*.[65]

Since *Booker*, ten circuits have confronted which standard to use in reviewing appeals of sentences imposed post-revocation.[66] Nine of these ten circuits have taken a stance on the issue, with the Fifth Circuit being the only one to remain undecided.[67] When analyzing this issue, the courts have generally confronted two broad questions: (1) whether, by announcing a standard of "unreasonableness" review in *Booker*, the Supreme Court had meant to replace the "plainly unreasonable" standard; and (2) whether there is any real distinction between these standards.[68] The circuits' answers to these questions follow.

C. The "Plainly Unreasonable" Standard

When faced with appellate cases post-*Booker*, only two circuits have held that the "plainly unreasonable" standard of review has survived *Booker*.[69] The Fourth and the Seventh Circuits have announced that the two standards, though similar, are not factually the same.[70] They have also concluded that *Booker* did not displace the traditional "plainly unreasonable" standard of review applied to post-revocation sentences in favor of another standard.[71]

The decisive case addressing the proper standard of review for post-revocation sentencing in the Fourth Circuit is *United States v. Crudup*.[72]

DIVIDE BETWEEN AMERICA AND EUROPE 53–54 (2003) (evidencing an emerging egalitarian approach).

65 *See* Hall, *supra* note 10, at 410 (discussing the resulting split among the circuits).

66 *See id*. at 410–11 (including all of the circuits except for the First, the D.C., and the Federal).

67 *See* United States v. Breland, 647 F.3d 284, 286–87 (5th Cir. 2011) (citations omitted) ("We will affirm a sentence of imprisonment imposed upon revocation of supervised release unless it is 'unreasonable' or 'plainly unreasonable.' We have not yet decided which of the above standards of review apply in the wake of *Booker*, and we decline to do so today . . . ."); United States v. Smith, 255 F. App'x 867, 868 (5th Cir. 2007) (citation omitted) ("This court has yet to decide which standard of review is applicable to revocation sentences. We decline to address this issue now as Smith's argument fails under both the 'reasonable' and the 'plainly unreasonable' standards of review."); United States v. Jones, 484 F.3d 783, 791–92 (5th Cir. 2007) (acknowledging that there is a split among the circuits regarding the standard of review for revocation of supervised release sentences and declining to reach the issue).

68 Hall, *supra* note 10, at 411.

69 *Id*.

70 *Id*.

71 *Id*.

72 461 F.3d 433 (4th Cir. 2006). In *Crudup*, the Court of Appeals for the Fourth Circuit reviewed a district court decision in which a defendant was sentenced to a thirty-six month term of imprisonment after his supervised release sentence was revoked. *Id*. at 434–35. The defendant claimed that the length of his revocation sentence was "plainly

Though acknowledging the dissimilar position taken by many of its fellow circuits, the Fourth Circuit relied on implications derived from the language and structure of portions of 18 U.S.C. § 3742 not stricken by *Booker* to conclude that the "plainly unreasonable" standard had survived.[73] The court inferred from 18 U.S.C. §§ 3742(a)(4) and (b)(4) that the proper standard was "plainly unreasonable."[74] It stated that "[i]t would seem incongruous that a defendant limited to asserting that his revocation sentence is 'plainly unreasonable,' would be allowed to argue that his sentence should be reversed because it is 'unreasonable.'"[75] Employing Sentencing Guidelines commentary and statutory provisions, the court distinguished revocation sentences from original sentences and suggested that the deviations perhaps warranted different standards of review, "reasonableness" for original sentences and "plainly unreasonable" for revocation sentences.[76]

The Fourth Circuit subsequently addressed whether there was any actual difference between the two standards, finding them to be similar though not identical, and concluding that Congress distinguished the two expressions.[77] The appellate court then gave its definition of the "plainly unreasonable" standard.[78] According to the Fourth Circuit, the first step in the review process is to determine if the original sentence is

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unreasonable" pursuant to 18 U.S.C. § 3742(a)(4). *Id*. at 435. After reviewing the structure of § 3742 and interrelated statutory and guideline provisions, the court held that revocation sentences should be reviewed under a "plainly unreasonable" standard using the 18 U.S.C. § 3553(a) factors. *Id*. at 439. Deciding that the defendant's sentence was not "plainly unreasonable," the court affirmed. *Id*. at 440; *see* United States v. Moulden, 478 F.3d 652, 656 (4th Cir. 2007) (recognizing the holding in *Crudup*).

73 *See* Hall, *supra* note 10, at 411 (explaining that the Fourth Circuit rejected the adoption of a "reasonableness" standard).

74 18 U.S.C. § 3742 (2006 & Supp. 2009). Specifically, 18 U.S.C. § 3742(a) states: "A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence . . . (4) was imposed for an offense for which there is no [S]entencing [G]uideline and is plainly unreasonable." *Id.* § 3742(a); 18 U.S.C. § 3742(b) states: "The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence . . . (4) was imposed for an offense for which there is no [S]entencing [G]uideline and is plainly unreasonable." 18 U.S.C. § 3742(b); *see* Hall, *supra* note 10, at 411–12 (noting that § (b)(4) "also mandates the 'plainly unreasonable' standard for similar appeals by the government"); *see also Crudup*, 461 F.3d at 438 (noting flaws with the "reasonableness" standard).

75 *Crudup*, 461 F.3d at 437.

76 *Id*.

77 *See id*. at 438. The Fourth Circuit held that "Congress used both terms—'unreasonable' and 'plainly unreasonable'—in [18 U.S.C.] § 3742(e), the standard of review section that *Booker* excised." *Id.* As "there is no indication that Congress intended the word 'plainly' to be surplusage, the best interpretation of these two terms in their context is that they are not coterminous." *Id*.

78 Simonton, *supra* note 60, at 151.

"unreasonable."[79] If not, the sentence should be affirmed; but, if the sentence is "unreasonable," the court must resolve whether it is "plainly" so, using the same definition of "plain" utilized in the plain error analysis.[80]

After refusing to answer the question of which standard was correct in *United States v. Rush* and *United States v. Flagg* (likely hoping that the other circuits or the Supreme Court would sort out the issue in the interim), the Seventh Circuit decided to preserve the "plainly unreasonable" standard of review for revocations of supervised release in *United States v. Kizeart*.[81] Like the Fourth Circuit in *Crudup*, the Seventh Circuit Court of Appeals noticed that the "plainly unreasonable" standard existed in statutory text other than the portions excised by *Booker*.[82] The court reasoned, "[w]e are not disregarding a Supreme Court dictum . . . for apart from the omission of a reference to subsection (e)(4), there is nothing . . . to suggest that the [*Booker*] Court was altering the statutory standard of appellate review of sentences for

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[79] *Crudup*, 461 F.3d at 438.

[80] *Id*. at 439. Hence, for purposes of deciding whether an unreasonable sentence is plainly unreasonable, "[p]lain is synonymous with clear or, equivalently, obvious." *Id*. at 439 (alteration in original) (quoting United States v. Hughes, 401 F.3d 540, 547 (4th Cir. 2005)) (internal quotation marks omitted).

[81] *See* United States v. Flagg, 481 F.3d 946, 949 (7th Cir. 2007) ("We have not squarely addressed this issue and need not resolve it today as we conclude that Flagg's sentence is appropriate regardless of whether we review it under the 'plainly unreasonable' standard . . . or the reasonableness standard . . . ."); United States v. Rush, 132 F. App'x 54, 56 (7th Cir. 2005). In *Rush*, the court stated:

> [C]ounsel considers whether Rush might argue that his new term of imprisonment is not "reasonable" under *United States v. Booker*. It is not clear that *Booker* requires any change in our evaluation of prison terms imposed upon revocation of supervised release, since the revocation policy statements have always been advisory only. Two of our sister circuits have concluded that *Booker* replaced the "plainly unreasonable" standard we formerly applied with its new "reasonableness" standard, [referring to *United States v. Fleming* in the Second Circuit and *United States v. Edwards* in the Eighth Circuit], but even if the two formulations are qualitatively different we would not find error under either.

Id. (citations omitted); *see also* United States v. Kizeart, 505 F.3d 672, 673 (7th Cir. 2007) (finding that the defendant violated his supervised release by committing a felony). The only issue raised by counsel on appeal was whether *Booker* had altered the standard of review for sentences imposed post-revocation of supervised release, i.e., whether *Booker* changed the standard from "plainly unreasonable" to "reasonableness." *Id*. The Court of Appeals for the Seventh Circuit concluded that although *Booker* invalidated 18 U.S.C. § 3742(e), it did not directly address § 3742(e)(4), the portion providing that post-revocation sentences dealing with supervised release could be reversed only if they were "plainly unreasonable." *Id*. at 675.

[82] Hall, *supra* note 10, at 412. The author explains that the "plainly unreasonable" standard existed in parts of 18 U.S.C. § 3742 not touched by *Booker*. *Id*.

violating conditions of supervised release."[83] The court also focused on the use of the plural form of the word "standards" referenced by the *Booker* Court (i.e., at least two—"plainly unreasonable" and "reasonableness").[84] Concluding that nothing suggested that the Supreme Court had aimed to merge the two standards mentioned in *Booker*, the Seventh Circuit decided that "plainly unreasonable" was the correct standard of review for cases without applicable Sentencing Guidelines, including revocations of supervised release.[85]

The Seventh Circuit, while recognizing that the difference between the two standards is marginal, referenced *Crudup*, acknowledging that "the courts must respect Congress's wish to curtail appellate review of non-[G]uidelines sentences particularly sharply, and so must seek to give meaning to the difference between 'unreasonable' and 'plainly unreasonable.'"[86] One basis mentioned by the Seventh Circuit for why a more limited scope of review is apt for non-Guidelines sentences is that the United States Sentencing Commission's decision not to issue

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[83] *Kizeart*, 505 F.3d at 674 (declining to adopt a new standard post-*Booker* for revocations of supervised release). "We shall therefore adhere to our [earlier] ruling[s] . . . requiring that a defendant who challenges his sentence for violating supervised release show that the sentence is plainly unreasonable." *Id*.

[84] *Id*. (quoting *Booker*, 543 U.S. at 262) (internal citations omitted) (providing that the *Kizeart* court stated that "reasonableness standards [not standard] are not foreign to sentencing law").

[85] *Id*.

[86] *Id*. (citing United States v. Crudup, 461 F.3d 433, 437–39 (4th Cir. 2006)); *see id*. at 674–75 (approving *Crudup*'s stance); *see also* Duncan v. Walker, 533 U.S. 167, 174 (2001) (noting that it is a fundamental tenant of statutory construction that a statute should not be interpreted so as to render language within it superfluous); Ratzlaf v. United States, 510 U.S. 135, 140–41 (1994) (observing that language in statutes should not be construed so as to render any part mere surplus); Bowsher v. Merck & Co., 460 U.S. 824, 833 (1983) ("[T]he settled principle of statutory construction [is] that we must give effect . . . to every word of the statute."); Sch. Dist. of Wisconsin Dells v. Littlegeorge, 295 F.3d 671, 674 (7th Cir. 2002) (citing Aegerter v. City of Delafield, 174 F.3d 886, 890 (7th Cir. 1999)) (stating that "'it is possible, though not always easy,' to distinguish among the canonical standards of review and acknowledging the 'skepticism' which has emerged 'in the past about the ability of judges to apply more than a few standards of review'"). The canon of construction and interpretation, which directs the courts to give full effect to every word in a statute so long as it does not render it contradictory proves that it is not up to the courts to disregard language inserted by the legislature and left intact after *Booker*. YULE KIM, CONG. RESEARCH SERV., 97-589, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 4 (2008), *available at* http://www.fas.org/sgp/crs/misc/97-589.pdf. "A basic principle of statutory interpretation is that courts should 'give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed.'" *Id.* at 12. The modern version of this "is that statutes should be construed 'so as to avoid rendering superfluous' any statutory language." *Id*.; *see also infra* Part III.A.3 (discussing canons of construction).

Sentencing Guidelines in this area connotes that the district courts should have more flexibility in sentencing.[87] Thus, a short maximum prison term penalty for supervised release violations means that there is less at stake, demanding fewer strata of judicial review crucial to satisfying the constitutional necessities of due process of law.[88]

Judge Posner, writing for the court, noted that appellate courts can comprehend and apply the differences between deferential and nondeferential standards.[89] However, "the making of finer gradations within the category of deferential review strains judicial competence . . . ."[90] Though the tiers exist in a formal nature, in most cases, appellate courts recognize that the level of deference given to the trial court depends less on the announced official standard than on the nature of the question.[91] The perceived competence of the district court in the eyes of the appellate court comes into play as well.[92] *Kizeart* relates that while courts do their best to observe any gradations Congress mandates, they cannot assure immense success in the undertaking.[93]

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87 *Kizeart*, 505 F.3d at 675.

88 *Id.*; *see* Mathews v. Eldridge, 424 U.S. 319, 341 (1976) (explaining that courts consider "the degree of potential deprivation" caused by an administrative adjudication when determining whether the decision-making process violated the plaintiff's due process rights).

89 *Kizeart*, 505 F.3d at 675. Using judicial review of sanctions imposed by prison disciplinary boards, the court analogized the "plainly unreasonable" standard to the standard used in those cases and provided several example cases to emphasize its point. *Id.*; *see* Walpole v. Hill, 472 U.S. 445, 455–57 (1985) (stating "[r]equiring a modicum of evidence to support" the prison disciplinary board's decision and "the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits," and "any evidence" or "meager" evidence will do); Scruggs v. Jordan, 485 F.3d 934, 941 (7th Cir. 2007) (stating that while "'some evidence' . . . must bear some indicia of reliability . . . [it need only cross a] meager threshold."); Webb v. Anderson, 224 F.3d 649, 652 (7th Cir. 2000) (internal quotations omitted) (noting "some evidence in the record," "*any* evidence," "a modicum of evidence," "meager proof will suffice," "not much" evidence, but the evidence "must point to the accused's guilt" through this "lenient standard" of review).

90 *Kizeart*, 505 F.3d at 675.

91 *Id.*

92 *See id.* (stating that, "in most cases, . . . appellate judges are merely giving the benefit of the doubt to the trier of fact . . . [which] depends . . . [in part on] the institutional competence of the first-level decision maker relative to that of the appellate court").

93 *Id.*; *see* Timothy J. Storm, *The Standard of Review Does Matter: Evidence of Judicial Self-Restraint in the Illinois Appellate Court*, 34 S. ILL. U. L.J. 73, 89 (2009) (stating that while all of the different standards of review are stated and seemingly defined with time-honored words, many of those standards use undefined words to define their own expressions). "If the standard to be achieved is consistency of outcome, then more than mere consistency of definition is required for the standards of review to serve their intended function of maintaining the proper relationship between trial courts and appellate courts." *Id.* at 90. It follows that courts must therefore apply a consistent amount of deference to the trial court's decision under each standard. *Id.* "Because that sort of consistency is unlikely to be

D. The "Reasonableness" Standard

The second major approach is one of "reasonableness." Yet, among the circuits that have chosen "reasonableness" as their standard for reviewing post-revocation sentences, there is an additional split.[94] Some circuits have chosen the "reasonableness" standard, yet believe that there is no difference between the "plainly unreasonable" and the "reasonableness" standards.[95] Other circuits have taken the opposite stance, finding that "reasonableness" is the correct standard, yet differentiate between it and "plainly unreasonable."[96] A detailed explanation of this split within a circuit split follows.

1. Following the "Reasonableness" Approach: Finding No Difference Between the "Plainly Unreasonable" and "Reasonableness" Standards

The Sixth, Eighth, Tenth, and Eleventh Circuits have held that *Booker's* "reasonableness" standard of review is equivalent to the "plainly unreasonable" standard, though they have announced "reasonableness" as their official test.[97] After deciding that *Booker* had not changed the standard of review for post-revocation sentences, these circuits have applied the "reasonableness" standard because, in their estimate, it was the same one that had been utilized before *Booker*.[98] In reaching the aforementioned conclusion, these four circuits looked to an excerpt from *Booker*, which explained that "reasonableness" standards were not alien to sentencing law.[99] As illustrations for this position, the

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achieved through the usual route of judicial review, the onus lies upon the individual appellate court . . . to remain faithful to the spirit of the appropriate standard of review in working through the decision-making process." *Id*. Consequently, "the standard of review is effective as a limitation on judicial power only to the extent that reviewing courts consistently interpret the scope of review available under each standard and abide by that limitation in deciding cases." *Id*.

94 *See infra* Part II.D.1–2 (discussing the internal split among the circuits subscribing to "reasonableness").

95 *See infra* Part II.D.1 (discussing the circuits that follow a "reasonableness" approach yet find no difference between the two standards).

96 *See infra* Part II.D.2 (discussing the circuits that follow a "reasonableness" approach while finding a difference between the two standards).

97 Simonton, *supra* note 60, at 136.

98 Hall, *supra* note 10, at 414.

99 United States v. Booker, 543 U.S. 220, 262 (2005). The *Booker* majority stated that "'[r]easonableness' standards are not foreign to sentencing law. The [SRA] has long required their use in important sentencing circumstances—both on review of departures, and on review of sentences imposed where there was no applicable [Sentencing] Guideline. Together, these cases account for about 16.7% of sentencing appeals." *Id*. (citations

Supreme Court cited several cases in which the "plainly unreasonable" standard was used.[100] Accordingly, the Eighth, Tenth, and Eleventh Circuits viewed this as an endorsement of the appropriate standard to be used.[101]

While the Sixth Circuit questioned the foundation of the "reasonableness" standard, it remained ambivalent regarding the proper standard applicable to supervised release revocation appeals until its determination to recognize the "reasonableness" standard in *United States v. Bolds*.[102] First, the appellate court looked to the intent of the Supreme Court in *Booker* and subsequent cases.[103] In *Bolds*, the Sixth Circuit used two decisions that had recently been handed down by the

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omitted). The *Booker* Court then went on to list several examples of cases to further its point. *Id*.

[100] *See id*. at 262 (citing several cases that used the "plainly unreasonable" standard); *see also* United States v. White Face, 383 F.3d 733, 740 (8th Cir. 2004) (holding that the district court did not abuse its discretion in deciding to sentence defendants to longer terms than suggested by the Sentencing Guidelines and that the defendants were not entitled to notice that the district court was contemplating a sentence outside the Sentencing Guidelines range because Chapter Seven policy statements were not binding and the revocation sentences outside their ranges were not departures); United States v. Tsosie, 376 F.3d 1210, 1218 (10th Cir. 2004) (holding that the trial court did not err in considering the special medicinal and correctional needs of the defendant in determining how much time the defendant should be required to serve in prison after he failed to abide by the conditions of his supervised release); United States v. Salinas, 365 F.3d 582, 590 (7th Cir. 2004) (affirming a district court's revocation of the defendant's supervised release and imposition of a twenty-four month prison term after he violated the terms of his release on multiple occasions and finding that the trial court's decision was not "plainly unreasonable"); United States v. Cook, 291 F.3d 1297, 1300 (11th Cir. 2002) (per curiam) (finding that under the plain language of 18 U.S.C. § 3565(a)(2), as amended, the court was authorized to re-sentence the defendant for violating probation without being restricted to the guideline range applicable at the time of the initial sentencing hearing); United States v. Olabanji, 268 F.3d 636, 639 (9th Cir. 2001) (holding that the district court erred by failing to consider the range applicable to the underlying offense after rejecting the range prescribed by the policy statement, and reversing and directing the trial court to consider the Sentencing Guidelines range for the underlying offense as part of the calculus for imposing an appropriate term of incarceration); United States v. Ramirez-Rivera, 241 F.3d 37, 40 (1st Cir. 2001) (stating that the trial court's revocation sentence was not an abuse of discretion and that, even though it was outside the Sentencing Guidelines range, it was within the statutory range).

[101] *See Booker*, 543 U.S. at 262 (listing cases from these circuits that used the "plainly unreasonable" standard).

[102] 511 F.3d 568 (6th Cir. 2007). In *Bolds*, a defendant appealed the decision of the district court challenging, on "reasonableness" grounds, the sentence imposed following the trial court's revocation of the defendant's four-year period of supervised release. *Id*. at 570; *see* United States v. Johnson, 403 F.3d 813, 816–17 (6th Cir. 2005) (explaining that "*Booker* left [18 U.S.C. §§] 3742(a), 3742(b), and 3742(f) on the books, and . . . our cases have relied upon both [§§] 3742(a)(4) and 3742(e)(4) in applying a 'plainly unreasonable' standard. . . . These sections, by themselves, give us pause about accepting the Second Circuit's approach").

[103] *Bolds*, 511 F.3d at 574; *see* Hall, *supra* note 10, at 416 (explaining the Sixth Circuit's analysis).

Supreme Court—*Rita v. United States* and *Gall v. United States*—in resolving the question.[104] The Sixth Circuit used these two cases to plug the voids left by *Booker*.[105] From this standpoint, the *Booker* Court had not created a new standard of review for supervised release revocation sentences.[106] In its estimation, the Supreme Court had, in actuality, directed appellate courts to employ the unchanged "reasonableness" standard in their review of all sentences—Guidelines and non-Guidelines.[107] Hence, a "deferential abuse-of-discretion standard, for reasonableness," is the Sixth Circuit's current standard.[108]

The Sixth Circuit's opinion discussed the fact that the "plainly unreasonable" standard existed in portions of 18 U.S.C. § 3742 that had not been excised by *Booker*.[109] The court also dealt with whether the Supreme Court had intended to replace the former "plainly unreasonable" standard with one of "reasonableness" by exploring the positions taken by other circuits.[110] The court found virtue in an argument made by the Seventh Circuit in *Kizeart*: the "plainly unreasonable" standard was not the focus of the Supreme Court's attention in *Booker* because the advisory policy statements governing supervised release were not repugnant to the Constitution.[111] After

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104 *See* Rita v. United States, 551 U.S. 338, 347 (2007) (holding that the lower appellate court correctly applied a presumption of reasonableness to the defendant's sentence, which was within the Sentencing Guidelines, and that the appellate court's reasoning adequately indicated that defendant's arguments for a lower sentence were taken into consideration and rejected); Gall v. United States, 552 U.S. 38, 47 (2007) (holding that although the Court stated that appellate courts could consider the extent of a deviation and degree of variance from the Sentencing Guidelines, that the court of appeals had erred in requiring "extraordinary" circumstances for such deviation); *Bolds*, 511 F.3d at 568; *see also* Hall, *supra* note 10, at 416–17 (discussing the Sixth Circuit's analysis in *Bolds*).

105 Hall, *supra* note 10, at 418. Although neither *Rita* nor *Gall* grappled with an appeal of a post-revocation sentence, "both cases recognized the confusion and discord displayed by the circuit courts when reviewing sentencing appeals." *Id*. *Rita* shed some light on the Supreme Court's intent in *Booker*, while "*Gall* helped clarify appellate court confusion." *Id*. at 419. The *Gall* Court stated that, because "the Guidelines are now advisory, and appellate review of sentencing decisions is limited to determining whether they are 'reasonable[,]' . . . the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions." *Gall*, 552 U.S. at 46.

106 *Bolds*, 511 F.3d at 575.

107 *Id*.

108 *Id*. at 578 (internal citations omitted).

109 Hall, *supra* note 10, at 417. "[T]he court seemingly agreed with the Fourth Circuit's analysis in *Crudup* that the 'plainly unreasonable' standard of review had not been displaced by *Booker*." *Id*.

110 *Id*.

111 United States v. Kizeart, 505 F.3d 672, 674 (7th Cir. 2007) (citing *Booker*). "The Sixth Circuit also looked at the fact that *Booker* cited several cases that had used the 'plainly unreasonable' standard as examples of the proper standard of review, which was the basis

shifting its attention to discern whether there really was a discrepancy between the two standards and failing, the court concluded that, although the *Booker* Court did not exactly excise the "plainly unreasonable" standard contained in 18 U.S.C. §§ 3742(a)(4) and (b)(4), there is no sensible distinction between *Booker's* "reasonableness" and the "plainly unreasonable" standard in §§ 3742(a)(4) and (b)(4).[112]

United States v. Edwards, *United States v. Cotton*, and *United States v. Tyson* make it apparent that the Eighth Circuit subscribes to the "reasonableness" standard of review; yet, in these cases, the court found no concrete variations between the standards.[113] In *United States v. Cotton*, the Eighth Circuit held that the pre-*Booker* standard of review for supervised release revocations was neither substituted nor discarded in *Booker*; rather, it found that the post-*Booker* standard was equivalent to the "plainly unreasonable" standard.[114] The *Cotton* court reached this

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for the Eighth, Tenth, and Eleventh Circuits' decisions." Hall, *supra* note 10, at 417 (footnotes omitted).

112 *Bolds*, 511 F.3d at 575; *see* 18 U.S.C. § 3742 (2006 & Supp. 2009) (recording the language at issue).

113 United States v. Edwards, 400 F.3d 591, 592–93 (8th Cir. 2005) (per curium). In *Edwards*, the appellate court affirmed the trial court's determination, holding that, given the defendant's admission to violating the terms of his release by unlawfully using a controlled substance, the trial court had not committed clear error in the findings of fact supporting the revocation, nor had it abused its discretion in the decision to revoke his supervised release. *Id*. at 592. The appellate court also stated that, while *Booker* significantly changed the state of federal sentencing, its effect on post-revocation sentences imposed for violations of supervised release was far less dramatic. *Id*. The Sentencing Guidelines associated with supervised release violations were considered advisory even before *Booker*. *Id*. The appellate court determined that the trial court's sentence was not "unreasonable." *Id*. at 593; United States v. Cotton, 399 F.3d 913, 916 (8th Cir. 2005). In *Cotton*, a defendant appealed from an order sentencing her to forty-six months of imprisonment upon revocation of her term of supervised release for possessing and using controlled substances. *Cotton*, 399 F.3d at 914. The defendant entered into a plea agreement, making the basis for revoking supervised release a Grade C violation, the recommended sentence for which was seven to thirteen months of imprisonment; she was later sentenced to forty-six months. *Id*. at 915. The appellate court determined that the sentence imposed was not "unreasonable" as the district court discussed the statutory sentencing goals and gave multiple satisfactory reasons for its sentence. *Id*. at 915–17; United States v. Tyson, 413 F.3d 824, 826 (8th Cir. 2005). In *Tyson*, a defendant appealed from a trial court decision revoking his probation and imposing a sentence of fifteen months of imprisonment and three years of supervised release on the ground that he had violated its terms by using cocaine, assaulting his fiancée, and failing to report to his probation officer. *Tyson*, 413 F.3d at 825. The appellate court noted that prior to *Booker*, 18 U.S.C. § 3742(e)(4) provided that the court was to determine whether the sentence imposed was "plainly unreasonable." *Id*. However, the court concluded that *Booker* had excised § 3742(e) and directed that sentencing decisions should be reviewed for "reasonableness." *Id*. The appellate court then went on to conclude that the defendant's sentence was not "unreasonable." *Id*. at 826.

114 *See* Hall, *supra* note 10, at 415 (discussing that the Eighth Circuit concluded that *Booker* had not altered the standard used for review of revocations of supervised release).

decision by referencing *Booker*'s citation to an Eighth Circuit case, *United States v. White Face*, as an illustration of an appellate court's capacity to apply the "reasonableness" standard.[115] Using the standard advanced in *Booker*, the Eighth Circuit in *Cotton* found that the "reasonableness" standard was the same as the standard of review set forth in 18 U.S.C. § 3742(e)(4).[116] The court declared that the new standard was, in reality, the same as the one they would have used otherwise.[117]

United States v. Tedford established that the Tenth Circuit's current standard of review is "reasonableness."[118] The *Tedford* court agreed with the Eighth Circuit's holding in *Cotton*, "that *Booker* did not change the 'plainly unreasonable' standard of review."[119] The court held that when a trial court imposes a sentence in surfeit of that recommended by the Chapter Seven policy statements of the Sentencing Guidelines manual, the sentence shall be affirmed if it was "'reasoned and reasonable.'"[120] Similar to the logic employed by the *Cotton* court (using *White Face*), the Tenth Circuit utilized *United States v. Tsosie* in its analysis.[121]

The Eleventh Circuit followed the path laid by the Second, Eighth, and Tenth Circuits in deciding *United States v. Sweeting* and in adopting the "reasonableness" standard of review.[122] Even though, pre-*Booker*, the Eleventh Circuit had reviewed supervised release revocation sentences under the "plainly unreasonable" standard of 18 U.S.C. § 3742(e)(4), the court determined that, post-*Booker*, the proper standard was one of "reasonableness."[123] Using *Tedford* and *Cotton* as examples, the Eleventh Circuit chose its side—*Booker* had similarly held out a 2002 Eleventh

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115 United States v. White Face, 383 F.3d 733, 737–40 (8th Cir. 2004), *cited in Booker*, 543 U.S. at 262; *see Cotton*, 399 F.3d at 916 (citing *Booker*, 543 U.S. at 262). *White Face* involved a post-revocation appeal and was decided by the Eighth Circuit in 2004, "when 'plainly unreasonable' was the unquestioned standard of review." Hall, *supra* note 10, at 415.

116 *Cotton*, 399 F.3d at 916.

117 *Id.*

118 405 F.3d 1159 (10th Cir. 2005). The defendant in *Tedford* was sentenced to thirty-six months of incarceration and a subsequent sixty-month period of supervised release. *Id.* at 1160. Upon revocation of the supervised release, the trial court imposed a sentence of forty-eight months of incarceration. *Id.* The defendant appealed the sentence, contending that her sentence was "unreasonable" because the district court did not adequately consider the Chapter Seven policy statements of the Guidelines. *Id.*; *see* Hall, *supra* note 10, at 415 (discussing *Tedford*).

119 Hall, *supra* note 10, at 415.

120 *Tedford*, 405 F.3d at 1161.

121 United States v. Tsosie, 376 F.3d 1210 (10th Cir. 2004), *cited in Booker*, 543 U.S. at 262; *see Tedford*, 405 F.3d at 1161 (deciding to follow the standard articulated by *Tsosie*). "In *Booker*, the Supreme Court cited *United States v. Tsosie,* a pre-*Booker* supervised release revocation appeal in the Tenth Circuit, as an example of the 'reasonableness' standard." Hall, *supra* note 10, at 416.

122 437 F.3d 1105, 1105–07 (11th Cir. 2006).

123 *Id.* at 1106–07.

Circuit decision, *United States v. Cook*, as an example of the appropriate standard of review for cases involving supervised release revocation sentences.[124]

2. Following the "Reasonableness" Approach: Finding a Difference between the "Plainly Unreasonable" and "Reasonableness" Standards

Though also choosing to use the "reasonableness" standard of review, the Second, Third, and Ninth Circuits have implicitly held that the standards are different.[125] While avoiding discussion of the similarities and variations in the standards, these three circuits have held that the "reasonableness" standard replaced the "plainly unreasonable" standard formerly found in § 3742(e)(4).[126]

Days after *Booker* was decided, the Second Circuit made its stance known in *United States v. Fleming*.[127] The *Fleming* Court reasoned that §§ 3742(a)(4) and (b)(4), containing "plainly unreasonable" language, were not touched by *Booker*.[128] Yet, the Second Circuit held that once the Supreme Court expunged § 3742(e), it "is fairly understood as requiring that its announced standard of reasonableness [is] now [to] be applied not only to [the] review of sentences for which there are [G]uidelines but also to review of sentences for which there are no applicable [G]uidelines."[129] The court explained that "reasonableness" is an elastic notion, and remarked that appellate courts "should exhibit restraint, not micromanagement" when reviewing post-revocation sentencing

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124 United States v. Cook, 291 F.3d 1297 (11th Cir. 2002), *cited in Booker*, 543 U.S. at 262. In *Cook*, a defendant appealed her sentence of twenty-four months in prison, imposed by the district court after her probation was revoked. *Id*. at 1298. She argued that the sentence exceeded both her initial sentencing range and the range in the Sentencing Guidelines. *Id*. at 1299. The appellate court affirmed the trial court's decision and found that under the plain language of 18 U.S.C. § 3565(a)(2), as amended, the trial court had the authority to re-sentence her for violating probation without being restricted to the guideline range applicable at the time of the initial sentencing hearing. *Id*. at 1299–1302. The trial court instead must only comply with 18 U.S.C. §§ 3551–3559. *Id*. at 1302–03; *see* Hall, *supra* note 10, at 416 (expounding on *Cook*).

125 Simonton, *supra* note 60, at 136–37.

126 Hall, *supra* note 10, at 413.

127 397 F.3d 95 (2d Cir. 2005). In *Fleming*, a defendant appealed a judgment of the district court sentencing him to two years of imprisonment for his third violation of the conditions of his term of supervised release. *Id*. at 96. The court found no error and that the sentence was "reasonable." *Id*.

128 *Id*. at 99.

129 *Id*.

appeals.[130] The Second Circuit further solidified its position in a later case, *United States v. Lewis*.[131]

Without adding much to the analysis used by the Second Circuit in *Fleming*, the Third and Ninth Circuits followed suit.[132] In the germinal case of *United States v. Bungar*,[133] the Third Circuit held that the proper standard of review for sentences imposed for violations of supervised release in its jurisdiction is "reasonableness."[134] In deciding the case in this manner, the court cited numerous other jurisdictions that had reached the same conclusion regarding the proper standard.[135]

In *United States v. Miqbel*,[136] the Ninth Circuit held that, following *Booker*, the relevant standard is "reasonableness."[137] The Ninth Circuit also adopted the reasoning the Second Circuit had used in *Fleming* without significant elaboration.[138] *Miqbel* stated, "[this circuit] join[s] the [United States Courts of Appeals for the] Second and Eighth Circuits in concluding that *Booker*'s 'reasonableness' standard has displaced the former 'plainly unreasonable' standard in the context of revocation sentencing."[139] Thus, the Second, Third, and Ninth Circuits have implicitly recognized a distinction between the "reasonable" and

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130 *Id*. at 100.

131 424 F.3d 239 (2d Cir. 2005). In *Lewis*, a defendant "pleaded guilty to the three charges of violating her supervised release." *Id*. at 242. In response, the district court revoked her supervised release term and sentenced her principally to a term of imprisonment of twenty-four months. *Id*. at 241. She appealed, asserting that remand was required because the sentence was "plainly unreasonable." *Id*. The appellate court stated that, after *Booker*, the standard for reviewing sentences imposed for violations of supervised release was that of "reasonableness." *Id*. at 242; *see* United States v. Pelensky, 129 F.3d 63, 69 (2d Cir. 1997) (discussing sentencing under policy statements versus under Sentencing Guidelines).

132 Hall, *supra* note 10, at 414.

133 478 F.3d 540 (3d Cir. 2007). In *Bungar*, a trial court found the defendant guilty of a violation of the conditions of his supervised release. *Id*. at 541. He appealed after the revocation, contending that the subsequently imposed sixty-month prison term was "unreasonable." *Id*.; *see* United States v. Smith, 419 Fed. App'x 200, 200–01 (3d Cir. 2011) (following *Bungar*).

134 *Bungar*, 478 F.3d at 541. "The dust has settled, post-*Booker*, and it is now well understood that an appellate court reviews a sentence for reasonableness with regard to the factors set forth in 18 U.S.C. § 3553(a)." *Id*. at 542 (citations omitted). The court saw "no reason why that standard should not also apply to a sentence imposed upon a revocation of supervised release . . . ." *Id*.

135 *Id*. at 542 n.1.

136 444 F.3d 1173 (9th Cir. 2006). In *Miqbel*, a defendant pleaded guilty to violating four conditions of his term of supervised release. *Id*. at 1174. The court revoked his supervised release and imposed the statutory maximum term. *Id*. The defendant appealed, arguing that the sentence was "unreasonable." *Id*.

137 *Id*. at 1176 n.5.

138 Simonton, *supra* note 60, at 140.

139 *Miqbel*, 444 F.3d at 1176 n.5.

"plainly unreasonable" standards but have concluded that *Booker* anticipated that the former would replace the latter standard.[140]

Consequently, the circuits are divided both in their postures and in their ideologies.[141] There are inherent strengths and weaknesses in each stance, but it is important for the judiciary to choose a consistent standard so that it may be applied in a uniform way to all defendants.[142] Against the backdrop of the origin of supervised release, the pre-*Booker* standard, and the post-*Booker* confusion, the following analysis scrutinizes the positions taken at the appellate level as to what *Booker* means for defendants like Luci appealing revocations of supervised release.[143]

III. ANALYSIS

Part III primarily focuses on the activity that has taken place within the circuits post-*Booker*. It also delves into some of the strengths and weaknesses of the differing stances and answers whether any subsequent Supreme Court cases have shed light on what the Supreme Court views to be the correct standard. Part III.A explains why the "plainly unreasonable" standard is the correct one and attempts to provide a resolution of potential criticisms of this standard.[144] It also reveals that some of the courts that have chosen "reasonableness" as their standard have employed logical flaws in their analysis of *Booker*.[145] Part III.A also exposes why the differences between policy statements and Sentencing Guidelines make a difference in the analysis.[146] It further investigates the topic using canons of construction and statutory schematics.[147] Part III.B asks whether the "plainly unreasonable" standard survived *Booker*.[148] It also discusses the ease of severability of

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140 *Id.*

141 *See supra* Part II.C–D (detailing both the "plainly unreasonable" and the "reasonableness" approaches).

142 *See infra* Part IV (suggesting a model for judicial reasoning in this area).

143 *See supra* notes 2–8 and accompanying text (introducing this hypothetical); *see infra* Part III (analyzing the standards).

144 *See infra* Part III.A (suggesting why the "plainly unreasonable" standard is correct and attempting to resolve potential criticisms of the standard).

145 *See infra* Part III.A.1 (expounding on the correct mode of analysis for the different standards).

146 *See infra* Part III.A.2 (differentiating between purely advisory policy statements and Sentencing Guidelines which were, pre-*Booker*, binding on the courts).

147 *See infra* Part III.A.3 (analyzing the standards using canons of construction and general statutory interpretation principles).

148 *See infra* Part III.B (asking whether the "plainly unreasonable" standard survived *Booker* and discussing the ease of severability of the section of the SRA that houses the "plainly unreasonable" standard).

the section of the SRA that houses the "plainly unreasonable" standard.[149] Lastly, Part III.C addresses further questions surrounding the split among the circuits.[150] It explains *Rita* and *Gall*'s impacts on the analysis of the correct post-*Booker* standard of review.[151] It then deciphers whether *Booker* was trying to create an egalitarian sentencing system.[152] Finally, it seeks to resolve whether a "plainly unreasonable" standard would result in greater sentencing disparities due to the larger degree of discretion afforded to trial courts (compared to the "reasonableness" standard).[153]

A. The "Plainly Unreasonable" Standard as the Correct Standard

In assessing whether the plainly unreasonable standard is correct, this Part first delves into the logical flaws present in some circuits' decisions.[154] Next, it compares the Chapter Seven Policy Statements and Sentencing Guidelines.[155] Finally, it briefly explores canons of construction and statutory schematics.[156]

1. The Logical Flaws Employed by Some of the Circuits

Although the position taken by the Eighth, Tenth, and Eleventh Circuits in *Tedford*, *Cotton*, and *Sweeting* has initial allure because, even before *Booker*, appellate courts were uncertain how to define the "plainly unreasonable" standard, this logic does not survive close scrutiny.[157] A

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149 *See infra* Part III.B (discussing the ease of severability of the section of the SRA that houses the "plainly unreasonable" standard).

150 *See infra* Part III.C (addressing some further peripheral questions surrounding the *Booker* decision and its aftermath).

151 *See infra* Part III.C.1 (proposing that *Rita* and *Gall* did not solve the quandary confronted by this Note).

152 *See infra* Part III.C.2 (suggesting that egalitarian sentencing was not *Booker*'s goal).

153 *See infra* Part III.C.3 (dealing with the dilemma of sentencing disparities under the "reasonableness" standard).

154 *See infra* Part III.A.1 (exploring weaknesses in some circuit court decisions).

155 *See infra* Part III.A.2 (examining the policy statements and Sentencing Guidelines).

156 *See infra* Part III.A.3 (dealing with various aspects of statutory construction).

157 *See generally* United States v. Sweeting, 437 F.3d 1105 (11th Cir. 2006) (providing a partial basis for the Eleventh Circuit's position); United States v. Tedford, 405 F.3d 1159 (10th Cir. 2005) (providing a partial basis for the Tenth Circuit's position); United States v. Cotton, 399 F.3d 913 (8th Cir. 2005) (providing a partial basis for the Eighth Circuit's position); Simonton, *supra* note 60, at 138 ("*Tedford*, *Cotton*, and *Sweeting* reach a clear definition of the standard by concluding that it is nothing more than a paraphrase of the normal reasonableness standard."). The appellate courts in these cases decided that 18 U.S.C. § 3742(e)(4)'s "plainly unreasonable" standard was synonymous with *Booker*'s "reasonableness" standard. Simonton, *supra* note 60, at 138. The courts made this determination by noting that *Booker* had cited earlier cases from their respective circuits

more careful look at the *Booker* passage relied on by the Eighth, Tenth, and Eleventh Circuits demonstrates that they misinterpreted the reason for Justice Breyer's citation to *White Face*, *Tsosie*, and other similar cases.[158] In referencing "reasonableness" standards, *Booker* was actually recognizing a difference between 18 U.S.C. § 3742(e)(4)'s "plainly unreasonable" standard and bare "reasonableness."[159] "Reasonableness" was the barometer that governed departures from the Sentencing Guidelines before 2003, "when Congress amended the statute to provide for *de novo* review of such decisions."[160] *Booker* actually referred to multiple standards, and, consequently, the Eighth, Tenth, and Eleventh Circuits were wrong to assume that because *Booker* referenced cases from

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apparently applying the "plainly unreasonable" standard as illustrations of an appellate court's capacity in applying the "reasonableness" standard. *Id.* at 137.

> Nor do we share the dissenters' doubts about the practicality of a "reasonableness" standard of review. . . . The Act has long required their use in important sentencing circumstances—both on review of departures, and on review of sentences imposed where there was no applicable Guideline. Together, these cases account for about 16.7% of sentencing appeals. . . . See also, *e.g.*, *United States v. White Face*, *United States v. Tsosie*. That is why we think it fair (and not, in Justice SCALIA's words, a "gross exaggeratio[n]," to assume judicial familiarity with a "reasonableness" standard. And that is why we believe that appellate judges will prove capable of facing with greater equanimity than would Justice SCALIA what he calls the "daunting prospect" of applying such a standard across the board.

United States v. Booker, 543 U.S. 220, 262–63 (2005) (citations omitted); *see generally* United States v. White Face, 383 F.3d 733 (8th Cir. 2004) (providing a source for the Eighth Circuit's arguments), *cited in Booker*, 543 U.S. at 262); United States v. Tsosie, 376 F.3d 1210 (10th Cir. 2004) (providing a source for the Tenth Circuit's arguments), *cited in Booker*, 543 U.S. at 262.

158 Simonton, *supra* note 60, at 138; *see White Face*, 383 F.3d at 737 (emphasis added) ("When there is no applicable sentencing guideline, as in the case of a revocation sentence, we review to determine whether the sentence was *plainly unreasonable*."); *Tsosie*, 376 F.3d at 1218 (quoting United States v. Lee, 957 F.2d 770, 774 (10th Cir. 1992)) ("Although the policy statements regarding revocation of supervised release are advisory rather than mandatory in nature, they must be 'considered by the trial court in its deliberations concerning punishment for violation of conditions of supervised release.'"). If the trial court "imposes a sentence in excess of that recommended in Chapter 7, 'we will not reverse if it can be determined from the record to have been *reasoned and reasonable*.'" *Id*. (emphasis added). "Mr. Tsosie argues the district court's decision was *plainly unreasonable* . . . ." *Id*. (emphasis added); *see also* Simonton, *supra* note 60, at 138 (explaining how the Supreme Court in *Booker* gave instances of the appellate courts' wide-ranging acquaintance with and knowledge of "reasonableness" *standards* (not *standard*)). *Booker* cited cases—including *White Face* and *Tsosie*—that apply either 18 U.S.C. § 3742(e)(3) ("reasonableness" standard) or 18 U.S.C. § 3742(e)(4) ("plainly unreasonable" standard). *Id*. (citing *Booker* at 261–63). The *Booker* Court then went on to prove that appellate courts recurrently utilized a variety of different "reasonableness" standards. *Id*.

159 *See id.* (pointing out the importance of the usage of the plural "standards").

160 *Id*. at 139.

those circuits that used the "plainly unreasonable" benchmark, it was likening "plainly unreasonable" to "reasonableness."[161]

2. Policy Statements v. Guidelines

A second potential criticism of the "plainly unreasonable" standard is the argument that it may not make sense for judges, in theory, to have greater discretion in post-revocation sentencing than in everyday, ordinary sentencing of defendants.[162] This is because, after *Booker*, advisory Sentencing Guidelines and policy statements apply similarly to defendants.[163] Nonetheless, this argument does not recognize that there is still a difference between the Sentencing Guidelines governing ordinary sentences and the advisory statements governing post-revocation sentences.[164]

The Chapter Seven policy statements are more "brief and rudimentary" than the Sentencing Guidelines that apply to original sentences, and they do not "take account of the myriad individual factors that could warrant a higher or lower postrevocation sentence . . . ."[165]

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[161] *Id*. at 138–39. Justice Breyer, concurring, recognized two "reasonableness" standards, and even he specified that it was 18 U.S.C. § 3742(e)(3)'s reasonableness standard (not 18 U.S.C. § 3742(e)(4)'s "plainly unreasonable" standard) that was the guide for *Booker*'s reasonableness standard. *Id*. at 139. "Although *Booker* reasons that courts' familiarity with the 'plainly unreasonable' standard may assist with their application of the new standard, the opinion does not suggest that the relationship between the two standards goes any deeper." *Id*. at 140. Therefore, "the approach taken by these courts does not accurately resolve the question of what becomes of the 'plainly unreasonable' standard after *Booker*." *Id*.

[162] *Id*. at 148–49 (using the "plainly unreasonable" standard for post-revocation review and the "reasonableness" standard for ordinary appellate review of sentencing determinations).

[163] *See* United States v. Booker, 543 U.S. 220, 220 (2005) (holding that the Sentencing Guidelines were purely advisory and that trial courts were required to take the Sentencing Guidelines into consideration, but were not bound by them); *supra* note 46 and accompanying text (explaining that the policy statements for sentences stemming from revocations of supervised release were, from the very beginning, purely advisory).

[164] *See* United States v. Kelley, 956 F.2d 748, 763–66 (8th Cir. 1992) (detailing the difference between "general policy statements" and the Sentencing Guidelines).

[165] Simonton, *supra* note 60, at 149. The Sentencing Guidelines Manual notes that:

> Given the relatively narrow ranges of incarceration available in many cases, combined with the potential difficulty in obtaining information necessary to determine specific offense characteristics, the Commission felt that it was undesirable at this time to develop [G]uidelines that attempt to distinguish, in detail, the wide variety of behavior that can lead to revocation. Indeed, with the relatively low ceilings set by statute, revocation policy statements that attempted to delineate with great particularity the gradations of conduct leading to revocation would frequently result in a sentence at the statutory maximum penalty.

The policy statements were designed to give the district courts more discretion in post-revocation sentencing than in original sentencing.[166] This inherent flexibility distinguishes advisory policy statements from binding (pre-*Booker*) Sentencing Guidelines.[167] Consequently, trial courts should still be able to exercise more discretion in sentencing a violator of a term of supervised release than in sentencing a Guideline offense violator.[168]

3. Canons of Construction and Statutory Schematics

Judge Posner's sentiments in *Kizeart* about the incredible difficulty of differentiating and making fine-tooth distinctions between standards of review may also pose hurdles for the "plainly unreasonable" standard.[169] However, it is not up to appellate courts to dispose of intentional language inserted by the legislature and left in the statutory scheme after *Booker*.[170] A classical canon of statutory construction directs courts to give full effect to every word in a statute so long as it does not render it contradictory.[171] Therefore, despite the general trouble of distinguishing

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U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A(3)(b) (2009).

166 *See* Simonton, *supra* note 60, at 149 (discussing the enhanced flexibility built into the discretionary policy statements).

167 *See* U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A (2009) (noting the binding nature of Sentencing Guidelines).

168 *See* Simonton, *supra* note 60, at 149 (focusing on the intrinsic differences between Sentencing Guidelines and policy statements).

169 United States v. Kizeart, 505 F.3d 672, 675 (7th Cir. 2007); *see supra* note 86 (elaborating on canons of statutory construction).

170 *Kizeart*, 505 F.3d at 675. "[W]hile appellate courts understand and can implement the difference between deferential and nondeferential review, the making of finer gradations within the category of deferential review strains judicial competence . . . ." *Id*. It is true that

> [t]he gradations exist formally: there is clear-error review, substantial-evidence review, review for rationality (as of jury verdicts, where the test is whether any rational trier of fact could have arrived at the jury's verdict), arbitrary-and-capricious review, abuse-of-discretion review, ultra-narrow review of credibility determinations based on a witness's demeanor, and more.

Id. Yet in a majority of the cases, without regard to "the formal gradation of deferential review, the appellate judges are merely giving the benefit of the doubt to the trier of fact or other first-level decision maker . . . ." *Id*. "So while we must do our best to mark any gradations prescribed by Congress, we cannot promise great success in the endeavor." *Id*.

171 *See* Duncan v. Walker, 533 U.S. 167, 174 (2001) (internal quotation marks omitted) ("It is our duty to give effect . . . to every clause and word of a statute. . . . We are thus reluctan[t] to treat statutory terms as surplusage in any setting."); *see also* cases cited *supra* note 86 (discussing statutory construction).

between the two potential standards, "plainly unreasonable" is the more convincing position.[172]

B. Did the "Plainly Unreasonable" Standard Survive Booker*?*

The Fourth and Sixth Circuits have reasoned that *Booker* did not replace the "plainly unreasonable" standard based on the propositions that "the plainly unreasonable standard exists in parts of [18 U.S.C.] § 3742 that *Booker* did not touch, and second, unlike the [Sentencing] [G]uidelines that apply to ordinary sentences, Chapter [Seven] has always been merely advisory and therefore did not violate the Sixth Amendment."[173] Other segments of 18 U.S.C. § 3742 besides § 3742(e)(4) (the section severed and excised by *Booker*) contain the "plainly unreasonable" standard.[174]

Since *Booker*, appellate courts have continued to apply the other standards that are found in both 18 U.S.C. §§ 3742(a) and (e), including 3742(a)(1), (a)(2), (e)(1) and (e)(2), which allow for appellate review of sentences resulting from "an incorrect application of the [S]entencing [G]uidelines."[175] The implicit reason why courts have continued to

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172 *See Kizeart*, 505 F.3d at 675 (supporting the "plainly unreasonable" standard).

173 *See* Simonton, *supra* note 60, at 140 (explaining that the Fourth and Sixth Circuits have found that *Booker* had no effect on the pertinent standard).

174 *See* United States v. Crudup, 461 F.3d 433, 436 (4th Cir. 2006). The Fourth Circuit explained the standard this way:

> [T]he structure of [18 U.S.C.] § 3742 suggests that "plainly unreasonable" is the proper standard of review for revocation sentences. Under [18 U.S.C.] § 3742(a)(4)—a provision not invalidated by *Booker*—a defendant sentenced for violating supervised release is authorized to appeal only on the ground that his sentence is "plainly unreasonable."

Id. at 437. The court inferred from this provision that revocation sentences should be reviewed under this same standard. *Id*. at 437–38. "It would seem incongruous that a defendant limited to asserting that his revocation sentence is 'plainly unreasonable,' would be allowed to argue that his sentence should be reversed because it is 'unreasonable.'" *Id*. at 437. Pertinent "[G]uideline commentary and statutory provisions also suggest that revocation sentences should not be treated exactly the same as original sentences." *Id*.; *see* United States v. Johnson, 403 F.3d 813, 816 (6th Cir. 2005) (explaining that "*Booker* left [18 U.S.C. §§] 3742(a), 3742(b), and 3742(f) on the books"); *see also* U.S. SENTENCING GUIDELINES MANUAL, ch. 7, pt. A, introductory cmt. 3(b) (2009) (noting that the imposition of an apt punishment for any new criminal activity is not the main goal of a revocation sentence, rather, the sentence imposed following revocation is meant to sanction the violator for failing to abide by the conditions of his or her supervised release).

175 18 U.S.C. § 3742(b)(2) (2006 & Supp. 2009). 18 U.S.C. § 3742(a)(1), (a)(2) and 3742 (e)(1), (e)(2) provide:

> § 3742. Review of a sentence

apply these sections post-*Booker*, while shying away from the application of 18 U.S.C. §§ 3742(a)(4) and (e)(4), is that "the latter contains something that more closely resembles a standard of review, and therefore appears to conflict more readily with *Booker's* reasonableness standard."[176] Yet, because *Booker* did not eliminate all mention of "plainly unreasonable" in the statutory scheme, the standard lives on post-*Booker*.[177]

Both Justice Breyer's remedial opinion and Justice Stevens' dissent suggest that the only part of 18 U.S.C. § 3742(e) that *Booker* sought to remove was the *de novo* review provision, which made the Sentencing Guidelines even more mandatory than they had been before the 2003 amendments to the section, and which was found to violate the Sixth Amendment to the United States Constitution, not § 3742(e)(4)'s "plainly unreasonable" standard.[178] Therefore, the Court did not intend *Booker* to eliminate the "plainly unreasonable" standard.[179]

> (a) APPEAL BY A DEFENDANT.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the [S]entencing [G]uidelines . . . .
>
> . . . .
>
> (e) . . . Upon review of the record, the court of appeals shall determine whether the sentence—
>
> (1) was imposed in violation of law;
>
> (2) was imposed as a result of an incorrect application of the [S]entencing [G]uidelines . . .

18 U.S.C. § 3742(a)(1)–(a)(2), (e)(1)–(e)(2) (2006 & Supp. 2009); *see* Simonton, *supra* note 60, at 142 (noting the activity in the appellate courts).

176 Simonton, *supra* note 60, at 142.

177 *Id.*

178 United States v. Booker, 543 U.S. 220, 259 (2005). The *Booker* Court related that the application of these criteria indicates that they "must sever and excise two" provisions: "the provision that requires sentencing courts to impose a sentence within the applicable Guidelines range (in the absence of circumstances that justify a departure) and the provision that sets forth standards of review on appeal, including *de novo* review of departures from the applicable Guidelines range." *Id.* (citation omitted). With the excision of these two statutory sections "(and statutory cross-references to the two sections consequently invalidated), the remainder of the Act satisfies the Court's constitutional requirements." *Id.* "[T]he majority creates a new category of cases in which this Court may invalidate any part or parts of a statute (and add others) when it concludes that Congress would have preferred a modified system to administering the statute in compliance with the Constitution." *Id.* at 282 (Stevens, J., dissenting). The Sixth Amendment to the United States Constitution states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

Furthermore, the Fourth, Sixth, and Seventh Circuits have doubted that *Booker*'s "reasonableness" standard applied to post-revocation sentences, as these sentences were *never* administered according to the troublesome mandatory Sentencing Guidelines; the sentencing for post-revocation appeals "was discretionary before *Booker* and is discretionary after it."[180] While the *Booker* Court expressed its holding as "a 'severance and excision' of [18 U.S.C.] § 3742(e), it never stated that it was declaring the provision invalid in . . . appeals from [non-standard Sentencing] Guideline sentences. . . . Thus, the question becomes whether . . . [*Booker's*] severance . . . should apply to postrevocation sentencing" as well.[181] *Booker* suggests that the answer is no.[182]

Booker did not directly address whether it could sever 18 U.S.C. § 3742(e)'s function in ordinary sentencing appeals (for which it was found to be unconstitutional) from its application to post-revocation sentencing appeals.[183] "However, it is too simplistic and mechanical to assume . . . that the Court's invalidation of [18 U.S.C.] § 3742(e) extends to the postrevocation context just because the Court used the words 'severed' and 'excised' in the context of ordinary sentencing appeals."[184] Conversely, *Booker* stated that it was necessary to "retain those portions of the Act that are (1) constitutionally valid, (2) capable of 'functioning independently,' and (3) consistent with Congress' basic objectives in enacting the statute," and that courts need to abstain from nullifying any more of a statute or statutory scheme than is required.[185]

Because the policy statements that apply to post-revocation sentences are only advisory provisions that suggest, not require, the imposition of particular sentences, post-revocation sentences have never posed the problems of mandatory Sentencing Guidelines that were the focus of the *Booker* Court; therefore, the severance of the unconstitutional

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> against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defen[s]e.

U.S. CONST. amend. VI.

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

180 United States v. Johnson, 403 F.3d 813, 817 (6th Cir. 2005); United States v. Rush, 132 F.App'x 54, 56 (7th Cir. 2005).

181 *See* Simonton, *supra* note 60, at 144 (posing a question that cuts to the heart of the split among the circuits).

182 *See* Vermeule, *supra* note 60, at 1950 n.26 (stating that courts can sever uses or portions of a statute that are unconstitutional from applications that are valid and can continue to apply the constitutional portions), cited in *Booker*, 543 U.S. at 247.

183 *See* Simonton, *supra* note 60, at 145 (noting that *Booker* did not address the statutory construction issue that contributed to the creation of the split among the circuits).

184 *Id.* at 145.

185 United States v. Booker, 543 U.S. 220, 258–59 (2005) (citations omitted).

portions of the statutory scheme need not affect the post-revocation policy statements and their corresponding standard of review.[186]

C. Further Questions Surrounding the Issue of Choosing a Standard

Part III.C addresses some further peripheral questions surrounding the *Booker* decision and its aftermath. These include: whether subsequent cases have clarified what the Supreme Court sees as the correct standard; whether *Booker* was attempting to create egalitarian sentencing; and lastly, whether the "plainly unreasonable" standard results in larger sentencing disparities due to the greater discretion afforded to trial courts.[187]

1. Did *Rita* and *Gall* Resolve What the Standard Should Be?

In *Bolds*, the Sixth Circuit used two post-*Booker* decisions, *Rita v. United States* and *Gall v. United States*, to decide the proper standard of review for revocations of supervised release.[188] The *Bolds* court

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[186] *See id*. at 233. *Booker* stated:

> If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. We have never doubted the authority of a judge to exercise broad discretion in imposing a sentence within a statutory range. Indeed, everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the SRA the provisions that make the [Sentencing] Guidelines binding on district judges; it is that circumstance that makes the Court's answer to the second question presented possible. For when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant. The [Sentencing] Guidelines as written, however, are not advisory; they are mandatory and binding on all judges.

Id. (footnote omitted) (citations omitted); *see also* Apprendi v. New Jersey, 530 U.S. 466, 481 (2000) (noting that it is possible for judges to exercise discretion within the confines of statutory guidance and the Constitution).

[187] *See infra* Part III.C.1–3 (discussing emerging issues in choosing a uniform standard).

[188] United States v. Bolds, 511 F.3d 568, 573–80 (6th Cir. 2007) (citing Rita v. United States, 551 U.S. 338, 340 (2007); Gall v. United States, 552 U.S. 38, 46 (2007). In *Rita*, the Defendant was convicted of perjury; and, on appeal, he asserted that his sentence was unreasonable. 551 U.S. at 340. The *Gall* Court stated that in two cases argued last term the Court "considered the standard that courts of appeals should apply when reviewing the reasonableness of sentences imposed by district judges." 552. U.S. at 40. "*Rita v. United States*, involved a sentence *within* the range recommended by the Federal Sentencing Guidelines." *Id*. (citation omitted) (citing *Rita*, 551 U.S. at 351). The Court "held that when a district judge's discretionary decision in a particular case accords with the sentence the

determined that the other circuits' analyses failed to fill in all of the fissures left by *Booker*.[189] "For this, the Sixth Circuit looked to the recent opinions by the Supreme Court in *Rita* and *Gall*."[190] However, neither *Rita* nor *Gall* dealt specifically with reviews of revocation of supervised release; both cases, though, acknowledged the bewilderment and dissonance of the appellate courts reviewing sentencing appeals post-*Booker*.[191]

Though it could be argued that *Rita* provided some insight into *Booker* (i.e., that *Booker* replaced the *de novo* standard of review required by 18 U.S.C. § 3742(e) with an abuse-of-discretion standard, the "reasonableness" review), this is an improper inference.[192] That is because *Rita* was not considering a sentence imposed for revocation of supervised release.[193] The Supreme Court was actually, in fact, considering a sentence imposed for testifying falsely before a grand jury, a traditional Sentencing Guideline offense.[194]

The *Bolds* court further looked to *Gall* to attempt to discern the correct standard.[195] The *Bolds* court concluded that the majority of the Supreme Court in *Gall* held that *Booker* had made it clear that the familiar abuse-of-discretion standard of review now applies to appellate review of all sentencing decisions.[196] However, dissenting in *Gall*, Justice Alito stated that *Booker* fell short of "explain[ing] exactly what it meant by a system of 'advisory' [Sentencing] [G]uidelines or by 'reasonableness'

United States Sentencing Commission deems appropriate 'in the mine run of cases,' the court of appeals may presume that the sentence is reasonable." *Id*. The *Gall* Court found that the appellate court's rule requiring "proportional" justifications for departures was inconsistent with *Booker*. Hall, *supra* note 10, at 419. Under the deferential abuse-of-discretion standard that applied to review of sentencing decisions, the appellate court had failed to give due deference to the district court's reasoned and reasonable decision. *Gall*, 552 U.S. at 40; *see* Hall, *supra* note 10, at 416–17 (discussing *Gall*).

189 *Bolds*, 511 F.3d at 577; *see* Hall, *supra* note 10, at 418 (discussing *Bolds*).

190 Hall, *supra* note 10, at 418.

191 *Id*.

192 *Rita*, 551 U.S. at 340; *see* Hall, *supra* note 10, at 418 ("By shedding light on the Court's intent in *Booker*, *Rita* provided the Sixth Circuit with guidance in determining the proper standard of review for sentences imposed after revocation of supervised release."). "Finally, Rita and supporting *amici* here claim that the [Sentencing] Guidelines sentence is not reasonable under [18 U.S.C.] § 3553(a) because it expressly declines to consider various personal characteristics of the defendant . . . . Rita did not make this argument below, and we shall not consider it." *Rita*, 551 U.S. at 360.

193 *Id.*

194 *Id.* "[T]he crimes at issue are perjury and obstruction of justice. In essence those offenses involved the making of knowingly false, material statements under oath before a grand jury, thereby impeding its criminal investigation." *Id*. at 359.

195 United States v. Bolds, 511 F.3d 568, 575 (6th Cir. 2007) (citing *Gall*, 552 U.S. at 38).

196 *Id.*; *see* Hall, *supra* note 10, at 418 (discussing *Gall* and *Bolds*).

review, and [that] the opinion is open to different interpretations."[197] Based on *Gall's* statement that, as "the [Sentencing] Guidelines are now advisory, and appellate review of sentencing decisions is limited to determining whether they are 'reasonable,' . . . [and] the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions," the *Bolds* court found that *Booker* directed appellate courts to apply the "reasonableness" standard to review supervised release revocation sentences.[198]

2. Was *Booker* Trying to Create an Egalitarian Sentencing System?

Some commentators have read *Booker* as endeavoring "to create an egalitarian system by which all sentences are governed by *advisory* [Sentencing] Guidelines and are judged by the same standard of review on appeal."[199] However, *Booker*'s true aim was to ensure that trial courts had more discretion, not less; reducing the discretion afforded district courts on appeals of revocations of supervised release is actually contrary to the spirit of *Booker*'s holding.[200] "Such a reading of *Booker* would place the loose, flexible grid system envisioned by the Sentencing Commission for revocation sentences on the same level as the precise [Sentencing] [G]uideline system devised for original sentences."[201] The inherent differences between Sentencing Guidelines, which were mandatory pre-*Booker*, and advisory policy statements, which have never been mandatory, lends credence to this conclusion. Plainly, curtailing the discretion of trial courts by imposing a less deferential standard of review for examining post-revocation sentences contradicts *Booker*'s intention of broadening the sentencing discretion of district courts "and

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197 *Gall*, 552 U.S. at 62 (2007) (Alito, J., dissenting); *see* Hall, *supra* note 10, at 418 (discussing the dissent in *Gall*).

198 *Gall*, 552 U.S. at 46; *Bolds*, 511 F.3d at 575; *see* Hall, *supra* note 10, at 418 (discussing *Rita* and *Gall*).

199 Simonton, *supra* note 60, at 150 (emphasis added); *see* Bissonnette, *supra* note 64, at 1497 (reading *Booker* to create egalitarian sentencing); *see also* WHITMAN, *supra* note 64, at 53–54 (evidencing an emerging egalitarian approach towards sentencing by liberals in Congress).

200 *See* United States v. Crudup, 461 F.3d 433, 439 n.9 (4th Cir. 2006). The *Cudrup* court explained that:

> It would be an odd result if *Booker* were interpreted to reduce the level of discretion district courts have always had to devise revocation sentences under policy statements that have uniformly been deemed non-binding while giving district courts more discretion to impose original sentences under [G]uidelines that were deemed binding until *Booker*.

Id.

201 *Id.*

ignores the differences in structure between the Chapter [Seven] policy statements and the ordinary [Sentencing] Guidelines."[202]

3. Does a "Plainly Unreasonable" Standard Result in Greater Sentencing Disparities Due to the Larger Degree of Discretion Afforded to Trial Courts?

The concern of unwarranted sentencing disparities due to the greater degree of discretion awarded to trial courts by allowing them to continue to use the "plainly unreasonable" standard can be addressed by an examination of the context of revocations of supervised release.[203] There are low statutory ceilings on sentences for violations of supervised release.[204] Furthermore, supervised release is more akin to probation

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[202] Simonton, *supra* note 60, at 150.

[203] *See id*. at 149 (stating that giving trial courts more discretion in the context of revocations of supervised release poses a good deal less risk of sentencing inconsistencies, than it would in the normal sentencing context due to "the low statutory ceilings on most postrevocation sentences"). "The vast majority of postrevocation sentences are for violations of supervised release." *Id*.

[204] *Id*. There are different grades of supervised release violations:

> § 7B1.1. Classification of Violations (Policy Statement)
> (a) There are three grades of probation and supervised release violations:
>
> (1) Grade A Violations—conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years;
>
> (2) Grade B Violations—conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year;
>
> (3) Grade C Violations—conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of supervision.
>
> (b) Where there is more than one violation of the conditions of supervision, or the violation includes conduct that constitutes more than one offense, the grade of the violation is determined by the violation having the most serious grade.

U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A (2009). These grades correspond to the level of punishment the defendant will receive:

> § 7B1.4. Term of Imprisonment (Policy Statement)
> (a) The range of imprisonment applicable upon revocation is set forth in the following table:

than imprisonment, making violations less serious than those of other sentences.[205] According to the Sentencing Commission, their decision to enact sweeping policy statements instead of strict, meticulous Sentencing Guidelines was based in part on the constricted ranges provided for

		Revocation Table (in months of imprisonment) Criminal History Category*					
Grade of Violation		**I**	**II**	**III**	**IV**	**V**	**VI**
Grade C		3–9	4–10	5–11	6–12	7–13	8–14
Grade B		4–10	6–12	8–14	12–18	18–24	21–27
Grade A	**(1)**	Except as provided in subdivision (2) below:					
		12–18	15–21	18–24	24–30	30–37	33–41
	(2)	Where the defendant was on probation or supervised release as a result of a sentence for a Class A felony:					
		24–30	27–33	30–37	37–46	46–57	51–63.

Id.

[205] *See* U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A (2009). The Guidelines stipulate the following:

> The conditions of supervised release authorized by statute are the same as those for a sentence of probation, except for intermittent confinement. (Intermittent confinement is available for a sentence of probation, but is available as a condition of supervised release only for a violation of a condition of supervised release.) When the court finds that the defendant violated a condition of supervised release, it may continue the defendant on supervised release, with or without extending the term or modifying the conditions, or revoke supervised release and impose a term of imprisonment. The periods of imprisonment authorized by statute for a violation of the conditions of supervised release generally are more limited, however, than those available for a violation of the conditions of probation.

Id. (citing 18 U.S.C. § 3583(e)(3)).

sentencing violators of the terms of their supervised release.[206] Strict Sentencing Guidelines would have laid out specific progressions leading to revocation of supervised release and would have instituted another form of punishment.[207]

Considering all of these issues, this Note proposes a definitive standard for resolving appeals of revocations of supervised release: the standard adopted by a minority of the circuits—"plainly unreasonable."[208] The examination of many of the problems with the analyses performed by some of the circuits, namely the Eighth, Tenth, and Eleventh Circuits, strengthens this proposition.[209] The differences between policy statements and Sentencing Guidelines also weigh into the debate.[210] Furthermore, the canon of construction, which directs the courts to give full effect to every word in a statute so long as it does not render it contradictory, dictates that it is not up to the courts to dispose of intentional language inserted by the legislature and left in the statutory scheme after *Booker*.[211]

IV. CONTRIBUTION

Circuit splits, such as the one presented above, are detrimental to our system of justice and undermine the credibility of the judiciary.[212] It is of paramount importance that such splits are resolved and consistent standards applied.[213] The following model approach, the proposed application note to the Sentencing Guidelines, and explanation and policy arguments strive to choose the best alternative and propose a method for instituting this choice.[214]

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206 Simonton, *supra* note 60, at 134; U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A (2009).

207 Simonton, *supra* note 60, at 134; U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A (2009).

208 *See infra* Part IV (proffering "plainly unreasonable" as the best standard).

209 *See supra* Part III.A (attempting to resolve potential criticisms of the "plainly unreasonable" standard).

210 *See supra* Part III.A.2 (explaining the difference between binding Sentencing Guidelines (pre-*Booker*) and advisory policy statements).

211 *See supra* Part III.A.3 (discussing canons of construction and statutory schematics).

212 *See supra* Parts II–III (outlining and analyzing the split among the circuits).

213 *See infra* Part IV.B (proposing "plainly unreasonable" as the rightful standard and stating the policy arguments in favor of a resolution of the split among the circuits in this area).

214 *See infra* Part IV (advancing the "plainly unreasonable" standard).

A. The Plainly Unreasonable Approach and How to Apply It

Currently, the Fourth and Seventh Circuits utilize the "plainly reasonable" standard for reviewing post-revocation sentences, though it is the minority position among the appellate courts.[215] This uniform standard is the best choice given a balancing of the inherent strengths and weaknesses of both standards.[216] As it is unclear which portion of the SRA *Booker* meant to excise, there would otherwise be construction and interpretation issues, and there are inherent problems with using a "reasonableness" standard; thus, "plainly unreasonable" is the best choice.[217]

Even though the differences between the two standards may, in practice, be difficult to distinguish, the courts should attempt to give the words their full effect, as they were purposefully inserted by Congress.[218] This approach would pay respect to the difference between "reasonableness" and "plainly unreasonable," and return the standardization and regularity to sentencing that existed under the SRA, but which, post-*Booker*, has proven elusive.

While it is important that the appellate courts apply a uniform standard when deciding similar cases, the judiciary should endeavor to more succinctly define what that standard is to ensure consistent results. The *Kizeart* court expounded on this difficulty, and noted that the difference between the "reasonableness" standard and the "plainly unreasonable" standard is "slight."[219] Nevertheless, the Seventh Circuit went on to attempt to explain the fine nuances that exist in the scale of deference applied in different types of cases.[220] While they have

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[215] *See supra* Part II.C (explaining the "plainly unreasonable" approach and methodologies and theories of the subscribing circuits).

[216] *See supra* Part III (focusing on what activity has taken place in the circuits post-*Booker* and delving into some of the strengths and weaknesses of the differing approaches, and whether any subsequent Supreme Court cases have shed light on what the Supreme Court views to be the correct approach).

[217] *See infra* Part IV (proffering "plainly unreasonable" as the best standard).

[218] *See supra* Part III.A.3 (discussing canons of construction and statutory schematics).

[219] United States v. Kizeart, 505 F.3d 672, 674 (7th Cir. 2007).

[220] *Id.* at 675. The court explained that many gradations exist including: clear-error review, substantial-evidence standards, review for rationality, arbitrary-and-capricious review, abuse-of-discretion review, an ultra-narrow type review of credibility determinations, and others. *Id.* However, "regardless of the formal gradation of deferential review," the appellate judge is focused mainly on how much of the benefit of the doubt to give to the lower court decision maker. *Id.* This depends, in addition to the formal standard of review, on "the nature of the issue and the institutional competence of the first-level decision maker relative to that of the appellate court." *Id.* However, in this entire process, an appellate court must do its best to recognize and effectuate any gradations set down by Congress. *Id.*

recognized that there is a difference between the two standards, implementing this difference has proven difficult.[221] This is true even though there are strong reasons why a different standard of review should be applied to appeals of revocations of supervised release than to appeals from sentences imposed under the once mandatory, now discretionary, Sentencing Guidelines.[222] The *Kizeart* court attempted to give a guidepost for sorting through and pithily defining the "plainly unreasonable" standard.[223] The Seventh Circuit borrowed from "the present class of cases [which utilize] the narrowest judicial review of judgments we know, and that is judicial review of the sanctions imposed by prison disciplinary boards."[224] The appellate court concluded that "[s]uch sanctions must indeed be 'plainly' unreasonable to be set aside."[225]

The following is a proposed sequential analysis of an appeal of a revocation of supervised release, taking into account the Seventh Circuit's guidepost of analogizing these types of determinations to the familiar standard of review used in examining sanctions imposed by prison disciplinary review boards. This position also borrows from the Fourth Circuit's sequential outline developed in *Crudup*.[226] This Note proposes that the following sequential analysis be added as an application note to the policy statement governing violations of supervised release within Chapter 7 of the Sentencing Guidelines:

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221 *See* Sch. Dist. of Wisconsin Dells v. Littlegeorge, 295 F.3d 671, 674 (7th Cir. 2002) (citing Aegerter v. City of Delafield, 174 F.3d 886, 890 (7th Cir. 1999)) (stating that "'it is possible, though not always easy,' to distinguish among the canonical standards of review, such as substantial evidence and clear error" review, and acknowledging the "'skepticism'" which has emerged "'in the past about the ability of judges to apply more than a few standards of review'").

222 *See supra* Part III (weighing the strengths and weaknesses of the differing approaches and asking whether any subsequent Supreme Court cases have shed light on what the Supreme Court views to be the correct approach). These strong reasons include: that there are important inherent differences between policy statements and Sentencing Guidelines, that canons of construction and statutory schematics require differentiation between the advisory policy statements and the previously mandatory Sentencing Guidelines, and that reducing the amount of discretion given to trial courts in handing out supervised release revocation sentences is contrary to the spirit of the Supreme Court's holding in *Booker*. *See supra* Part III (presenting the strengths and weaknesses of the differing approaches).

223 *Kizeart*, 505 F.3d at 675.

224 *Id*; *see* cases cited *supra* note 86 (discussing the ability of courts to distinguish among different standards of review).

225 *Kizeart*, 505 F.3d at 675.

226 *See* United States v. Crudup, 461 F.3d 433, 438–39 (4th Cir. 2006) (requiring a reviewing court to first determine if the trial court's sentence is "reasonable," and only moving on to "plainly unreasonable" scrutiny if the sentence does not pass the "reasonableness" threshold).

Application Note:[227]

1. *In deciding whether a sentence is "plainly unreasonable," the first step shall be to determine whether the sentence is "reasonable."*[228] *Both procedure and substance are entered into the equation, as well as the distinct nature of supervised release revocation sentences.*[229] *The court undertakes this analysis keeping in mind the deferential nature of the standard, as well as the Chapter 7 policy statements and statutory constraints of 18 U.S.C. § 3583 and the 18 U.S.C. § 3553(a) factors pertinent to revocation sentences.*[230] *The appellate court, in due course,*

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[227] U.S. SENTENCING GUIDELINES MANUAL ch. 7 (2009). The proposed application note is italicized and is the contribution of the author.

[228] U.S. SENTENCING GUIDELINES MANUAL ch. 7 (2009).

[229] *Id.*

> According to [18 U.S.C.] § 3583(e), in devising a revocation sentence the district court is not authorized to consider whether the revocation sentence "reflect[s] the seriousness of the offense, . . . promote[s] respect for the law, and . . . provide[s] just punishment for the offense,'' [18 U.S.C.] § 3553(a)(2)(A), or whether there are other ''kinds of sentences available,'' [18 U.S.C.] § 3553(a)(3).

Crudup, 461 F.3d at 439.

[230] 18 U.S.C. § 3553(a) (2006 & Supp. 2009); U.S. SENTENCING GUIDELINES MANUAL ch. 7 (2009). 18 U.S.C. § 3553(a) lists the factors to be considered in imposing a sentence:

> The court, in determining the particular sentence to be imposed, shall consider—
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed—
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
> (3) the kinds of sentences available;
> (4) the kinds of sentence and the sentencing range established for—
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
> (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
> (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
> (B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the

has extensive discretion to rescind its sentence and impose a new sentence.[231] *Only if the appellate court determines that a revocation of supervised release is not "reasonable" should it turn to the second step of analyzing whether such sentence is "plainly unreasonable."*[232] *If the sentence satisfies the requirement of "reasonableness," it should be affirmed without further scrutiny; if the revocation of supervised release sentence is substantively or procedurally "unreasonable," then the appellate court must decide if it is "plainly" so.*[233] *"Plain" is synonymous with apparent or evident, and, while a revocation of a supervised release sentence must "bear some indicia of reliability," it need only cross a "meager threshold."*[234]

> Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);
>
> (5) any pertinent policy statement—
>
> (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
>
> (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced[;]
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553.

231 United States v. Lewis, 424 F.3d 239, 244 (2d Cir. 2005); United States v. Pelensky, 129 F.3d 63, 69 (2d Cir. 1997). The *Lewis* court also rightly held that "a court's statement of its reasons for going beyond non-binding *policy statements* in imposing a sentence after revoking a defendant's supervised release term need not be as specific as has been required when courts departed from *[G]uidelines* that were, before *Booker*, considered to be mandatory." *Lewis*, 424 F.3d at 245; *see Crudup*, 461 F.3d at 438–39.

232 *Crudup*, 461 F.3d at 438–39.

233 *Id.*

234 The definition of "plainly unreasonable" from the judicial review of the sanctions imposed by prison disciplinary boards proves useful at this juncture. *Id.*; *see* Scruggs v. Jordan, 485 F.3d 934, 941 (7th Cir. 2007) (affirming the dismissal of an inmate's habeas appeal stemming from discipline imposed by a prison's Conduct Adjustment Board, as the disciplinary decision was "supported by at least 'some evidence'"); United States v. Moulden, 478 F.3d 652, 656 (4th Cir. 2007). The *Moulden* court held that the court, post-*Crudup*, "must first determine whether the sentence is unreasonable." *Moulden*, 478 F.3d at 656 (citing *Crudup*, 461 F.3d at 438). The court additionally stated that:

> This initial inquiry takes a more "deferential appellate posture concerning issues of fact and the exercise of discretion" than

B. Commentary

Confusion and disparate standards among the appellate courts in the federal system is detrimental to our system of justice, which rests on ideals of fairness and even-handed application of the laws to our citizenry. As reviews of revocations of supervised release are criminal matters, striking at the heart of constitutional ideals, coherence is particularly valuable. Moreover, "[t]he standards of review can function as intended only if the meaning of each standard is understood consistently among judges of the reviewing courts."[235]

It follows that a uniform standard must be chosen and applied, with courts paying acute attention to the import of the particular standard involved in that case. The standard of review is significant, as evidenced by the fact that the rules of most courts specifically require the appellant to state the applicable standard of review for each issue addressed in its brief.[236] It is vital that courts do not forget that distinguishing among levels of deference is important, and that their duty is to attempt to give its significance the full force intended by the legislature. It is necessary to gather all of the circuits onto the same page, and to require them to apply a consistent standard of review for revocations of supervised release.

Counter to the theory subscribed to by a majority of the appellate courts deciding the issue, *Booker* did not excise the "plainly unreasonable" standard traditionally applied to sentencing appeals of supervised release revocations.[237] Altering the pre-*Booker* "plainly

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> reasonableness review for [Sentencing] [G]uidelines sentences. Of course, as always, the sentencing court must consider the policy statements contained in Chapter 7, including the policy statement range, as "helpful assistance," and must also consider the applicable [18 U.S.C.] § 3553(a) factors. At the same time, however, the sentencing court retains broad discretion to revoke a defendant's [supervised release] and impose a term of imprisonment up to the statutory maximum. The court must provide a statement of reasons for the sentence imposed, as with the typical sentencing procedure, but this statement "need not be as specific as has been required" for departing from a traditional guidelines range. Only if this modified "reasonableness" analysis leads us to conclude that the sentence was unreasonable, do we ask whether it is "plainly" so, "relying on the definition of 'plain' [used] in our 'plain' error analysis"—that is, "clear" or "obvious."

Id. at 656–57 (citations omitted).

235 Storm, *supra* note 93, at 89 (noting that the standard of review used does matter).

236 *Id*. at 74.

237 Simonton, *supra* note 60, at 153. "Although the possibility of replacing the rather 'unusual' 'plainly unreasonable' standard with a more familiar reasonableness standard is understandably alluring to these courts, *Booker* provides little support for such a result." *Id*.

unreasonable" standard is contradictory to Congress's intent, as shown by its side-by-side comparison of the two different "standards of review in the pre-2003 version of [18 U.S.C.] § 3742(e)."[238] Furthermore, such a conclusion "overlooks the fact that courts can easily sever [18 U.S.C.] § 3742(e)'s application to postrevocation [sic] sentences from its other applications and therefore salvage the 'plainly unreasonable' standard for future use."[239] Rather than erasing the "plainly unreasonable" standard, appellate courts should make an effort to tangibly define and use the standard, which is, as demonstrated by the minority of circuits, capable of application.

V. CONCLUSION

United States v. Booker impacted the United States sentencing system in a forceful way. Two chief questions raised by the appellate courts in this area have proven difficult to answer, though not impossible to resolve: first, whether the *Booker* Court intended to replace the "plainly unreasonable" standard with the "reasonableness" standard in reviewing revocations of supervised release, and, second, whether the two standards are meaningfully different.[240]

This Note has analyzed the current state of the resulting split among the circuits as well as the differing standards currently being utilized in the federal appellate system.[241] Although a majority of the circuits have gravitated toward "reasonableness," they internally diverge regarding whether there is a workable difference between the "plainly unreasonable" and the "reasonableness" standards.[242] A minority of the circuits have conversely chosen the "plainly unreasonable" review as their standard.[243] Furthermore, additional circuits have not addressed this matter or chosen a standard that they see as appropriate for reviewing appeals of revocations of supervised release.[244] There are strengths and weaknesses in both the majority and minority standards,

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238 *Id.*

239 *Id.*

240 *See supra* Part II.B (expanding on these two important questions stemming from *Booker*).

241 *See supra* Part III (focusing on what activity has taken place in the circuits post-*Booker* and discussing some of the strengths and weaknesses of the differing approaches, and whether any subsequent Supreme Court cases have shed any light on what the Supreme Court views to be the correct approach).

242 *See supra* Part II.D (analyzing and expounding upon the current majority standard).

243 *See supra* Part II.C (analyzing the current minority standard).

244 *See supra* Part II.D (noting that not all circuits have undertaken a review of the standards nor decided on a correct approach).

and it remains unclear what the Supreme Court views to be the correct guidepost.[245]

As the minority of the federal circuits has correctly decided, the "plainly unreasonable" standard lives on after *Booker*.[246] This becomes clearer upon a close inspection of the several problems intrinsic to the analyses used by the circuits that have chosen the "reasonableness" standard.[247] The flaws of the "reasonableness" standard render it the weaker of the two positions, and thus "plainly unreasonable" is the correct standard of review applicable to revocations of supervised release.[248]

The result is that Luci will now have a clear understanding of whether and how she should appeal the federal district court's decision to the Seventh Circuit Court of Appeals.[249] Luci will also now know that the district court's determination will be given a large degree of deference, just as it was before *Booker*.[250] She will additionally have a lucid understanding that "plainly unreasonable" is the adopted standard.[251] But most importantly, perhaps, she will know that she is receiving the same treatment as defendants in her shoes in every appellate court across the nation. That is the greatest victory for the resolution of this split among the circuits.

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245 *See supra* Part III (giving an analysis of the standards).

246 *See supra* Part IV (proposing "plainly unreasonable" as the rightful standard).

247 *See supra* Part III (laying out the circuits' analyses of the standards).

248 *See supra* Part IV (advancing "plainly unreasonable" as the appropriate standard).

249 *See supra* notes 2–8 and accompanying text (introducing this hypothetical).

250 *See supra* notes 2–8 and accompanying text (presenting this hypothetical).

251 *See supra* notes 2–8 and accompanying text (providing the facts to this hypothetical).

* J.D. Candidate, Valparaiso University School of Law (2012); B.S., Business Management, Michigan State University (2009). With love and affection, I dedicate this Note to my fiancé Gary Stewart, whose patience and care saw me through this journey, and to my parents Richard and Susan Zygadlo and sister Kathleen Zygadlo, to whom I am grateful for their support and guidance. I am also most thankful to Clare Nuechterlein, Assistant Professor of Law at Valparaiso University School of Law, my mentor and advisor, who graciously encouraged me to research and write to my full potential.