A "GALL-ING" APPROACH TO REASONABLENESS REVIEW: THE EIGHTH CIRCUIT'S SENTENCING REVIEW IN UNITED STATES V. GALL EXEMPLIFIES THE AGONY (AND ECSTASY) FACING THE POST-BOOKER FEDERAL JUDICIARY

INTRODUCTION

The United States Congress enacted the Sentencing Reform Act of 1984 (SRA) in an attempt to remedy sentencing disparities within the federal court system. The SRA created the United States Sentencing Commission, which in turn issued the mandatory United States Sentencing Guidelines ("Guidelines") to ease the disparities. Over twenty years later in United States v. Booker, the United States Supreme Court attempted to resolve the Sixth Amendment issues posed by the mandatory nature of the Guidelines. When the Booker Court eventually rendered the Guidelines advisory, it also inferred a standard of reasonableness for appellate review of sentences. In the months since the Booker decision, the federal judiciary has imposed sentences in approximately 40,000 cases.

In United States v. Gall, the United States Court of Appeals for the Eighth Circuit determined a downward variance from an advisory Guidelines range was unreasonable. The Gall court presumed a Guidelines sentence was reasonable. The Gall court then determined the district court unreasonably departed from the permissible Guidelines sentence since no extraordinary circumstances justified the non-Guidelines sentence.

This Note will examine the Eighth Circuit's post-Booker appellate review of sentencing decisions and critique Eighth Circuit methodol-
ogy as applied in Gall.11 This Note will first review the facts and holding of Gall.12 This Note will then examine Booker, its progeny in the federal circuits, and applications of reasonableness review in the Eighth Circuit.13 Next, the Note will analyze the effect of a court presuming an advisory Guidelines sentence is reasonable.14 This Note will proceed by exploring the consequences of requiring extraordinary justifications for large variances from the advisory Guidelines.15 In conclusion, this Note will demonstrate the Eighth Circuit's approach to reasonableness review undermines the goal of consistent imposition of federal sentences.16

FACTS AND HOLDING

In United States v. Gall,17 Brian Michael Gall (“Gall”) participated in a conspiracy to distribute methylenedioxymethamphetamine (“MDMA”), popularly known as ecstasy.18 Gall joined the conspiracy in February 2000, when a friend introduced him to Luke Rinderknecht (“Rinderknecht”).19 Gall, Rinderknecht, and several others arranged the sale and transfer of ecstasy.20 At the outset, Rinderknecht sold Gall one-hundred ecstasy tablets at a time, which Gall then distributed.21 From February to May 2000, Gall traveled from his home in Iowa City, Iowa to meet with Rinderknecht in Pella, Iowa a total of six times, each time purchasing 100 tablets of ecstasy.22

11. See infra notes 17-494 and accompanying text.
12. See infra notes 17-94 and accompanying text.
13. See infra notes 95-337 and accompanying text.
14. See infra notes 348-423 and accompanying text.
15. See infra notes 424-80 and accompanying text.
16. See infra notes 481-94 and accompanying text.
17. 446 F.3d 884 (8th Cir. 2006).
18. United States v. Gall, 446 F.3d 884, 885 (8th Cir. 2006). MDMA is a Schedule I controlled substance. Schedule I drugs are described as:
   (A) The drug or other substance has a high potential for abuse.
   (B) The drug or other substance has no currently accepted medical use in treatment in the United States.
   (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision.
20. Gall, 446 F.3d at 885.
21. Id.
22. Id. See also Appellant’s Brief at 3, United States v. Gall, 446 F.3d 884 (8th Cir. 2006) (No. 05-3001SI) (The court stated Gall traveled to “Pell, Iowa,” rather than “Pella, Iowa.”)).
Two months after Gall joined the conspiracy, Rinderknecht introduced Gall to Theodore Sauerberg ("Sauerberg") and then moved to California.\(^{23}\) These three then met to discuss the continued operation of the ecstasy distribution ring.\(^{24}\) After this meeting, Gall's involvement in the distribution ring increased.\(^{25}\) In June 2000, one month after the planning session, Sauerberg received 5,000 ecstasy tablets from Rinderknecht.\(^{26}\) Gall then received ecstasy from Sauerberg in increments of 1,000 tablets.\(^{27}\) Individual customers bought ecstasy from Gall, and Gall paid Sauerberg from the proceeds.\(^{28}\) In total, Gall collected $85,000, which Rinderknecht retrieved from Sauerberg after flying in from California.\(^{29}\)

One or two months after the 5,000-tablet June shipment, Rinderknecht mailed another 5,000-tablet package to Iowa, which Sauerberg accepted and dispensed to Gall in increments of 1,000.\(^{30}\) These transactions operated just as before, with Rinderknecht receiving the final $85,000 from Sauerberg.\(^{31}\) Gall knew his patrons sold the ecstasy throughout the community.\(^{32}\) Various estimates put Gall's total earnings from the sale of ecstasy between $30,000 and $40,000.\(^{33}\)

Concerned with Sauerberg's lack of discretion in discussing the system with outsiders, Gall decided to terminate his involvement in the conspiracy.\(^{34}\) Rinderknecht came to Iowa City, and met with Gall, and Gall advised Rinderknecht of his desire no longer to be included in

\(^{23}\) Appellant's Brief at 3, Gall, 446 F.3d 884 (No. 05-3001SI).

\(^{24}\) Gall, 446 F.3d at 885. The record establishes Rinderknecht as the main player in the Iowa ecstasy distribution scheme. Id. Rinderknecht was concerned with the operation's well-being in his absence. Id. At this meeting, the three established a system whereby Rinderknecht delivered tablets to Sauerberg, Sauerberg transferred the ecstasy to Gall, and Gall then distributed to a wide network of customers. Id. This network included, among others, Ross Harbison, Jason Story, Brooks Robinson, Mark Goodding, and Corey Coleman. Id. Gall received cash payments from these individuals and then gave the money to Sauerberg. Id. Sauerberg in turn paid Rinderknecht. Id.

\(^{25}\) Gall, 446 F.3d at 885.

\(^{26}\) Id.

\(^{27}\) Id. Gall estimated that he bought only 3,000 tablets from Sauerberg during his time in the conspiracy. Appellee's Brief at 3, United States v. Gall, 446 F.3d 884 (8th Cir. 2006) (No. 05-3001SI).

\(^{28}\) Gall, 446 F.3d at 885.

\(^{29}\) Id.

\(^{30}\) Id. at 886.

\(^{31}\) Id.

\(^{32}\) Id. at 885.

\(^{33}\) Id. at 886.

\(^{34}\) Id. Another member of the conspiracy, Mark Gooding, testified that Gall removed himself from the drug trade "in August 2000 because he did not like the trouble of having to deal with people." Id.
the drug trade. After leaving the conspiracy, Gall began studies at the University of Iowa, completed his degree in 2002, and relocated to Arizona. In Arizona, Gall believed he had left his criminal conduct in the past.

Six months after Gall moved to Arizona, federal agents approached him to discuss his involvement in the Iowa ecstasy distribution. Once approached by the agents, Gall admitted he had been a member of the conspiracy. On April 28, 2004, a grand jury indicted Gall on a charge of conspiracy to distribute the MDMA tablets. Upon learning of the indictment and issuance of an arrest warrant, Gall went back to Iowa and turned himself in. On March 2, 2005, Gall entered a guilty plea to one count of conspiracy to distribute MDMA, a Class C felony. At sentencing, the government requested a thirty-month jail sentence, but on May 27, 2005, the United States District Court for the Southern District of Iowa sentenced Gall to three years of probation. Five days later, Judge Robert Pratt issued a Sentencing Memorandum explaining why the court imposed probation rather than time in prison.

In the Sentencing Memorandum, the district court explained that since Gall left the drug trade in September of 2000, the parties agreed the 1999 edition of the United States Sentencing Guidelines, rather than the most recent edition, was applicable, and the government requested the minimum sentence advised by the former. In its Sentencing Memorandum, the court adopted the calculations provided in the Presentence Report ("PSR") presented to the court. The PSR calculations positioned Gall at an ultimate offense level of nineteen. Gall's criminal history was Category I, which, when coupled with the
final offense level, suggested a sentencing Guidelines prison term of thirty to thirty-seven months.\textsuperscript{48}

In meting out Gall’s three-year probation, the court first considered the nature and circumstances of Gall’s offense.\textsuperscript{49} The court noted Gall’s contributions to the conspiracy were not accompanied by any aggravating factors such as violence or firearms.\textsuperscript{50} Rather, the lone reason for the offense level was the quantity of ecstasy involved.\textsuperscript{51}

The court next considered Gall’s character and reasoned that Gall’s criminal history developed due to drug and alcohol dependency.\textsuperscript{52} Further, the court recognized the conspiracy offense, as well as each of Gall’s previous criminal offenses, occurred at or before the age of twenty-one.\textsuperscript{53} The court maintained it could not lightly consider Gall’s age and relative lack of maturity during the time of the drug distribution.\textsuperscript{54} The court noted the United States Supreme Court had previously relied on various studies indicating that maturity levels may determine the likelihood of engaging in criminal activity.\textsuperscript{55} The court conceded the offender’s age did not excuse criminal acts, but did merit consideration during sentencing.\textsuperscript{56} Moreover, the court complimented Gall on his behavior after leaving the ecstasy distribution conspiracy and commended Gall for obtaining a college degree, starting a business, and maintaining his sobriety.\textsuperscript{57} The court also credited Gall for voluntarily leaving the drug trade.\textsuperscript{58}

The court then discussed the need for a sentence of probation.\textsuperscript{59} Explaining that the offense necessitated a sentence reflective of its serious nature, the court stated probation is “a substantial restriction on freedom, it is not forgiveness, and it is not an endorsement of the offense.”\textsuperscript{60} Consistent with statutory provisions, the court recognized Gall’s offense was a Class C felony rather than a Class A or B felony for which the Guidelines precluded probation.\textsuperscript{61} The court stressed

\begin{itemize}
\item \textsuperscript{48} Id. Gall’s criminal history included a minor firearms violation, underage drinking, possession of marijuana, and failure to maintain control of his vehicle. \textit{Id.} at 762.
\item \textsuperscript{49} \textit{Id.} at 761.
\item \textsuperscript{50} \textit{Id.}
\item \textsuperscript{51} \textit{Id.}
\item \textsuperscript{52} \textit{Id.} at 762 n.2.
\item \textsuperscript{53} \textit{Id.}
\item \textsuperscript{54} \textit{Id.}
\item \textsuperscript{55} \textit{Id.} See \textit{Roper v. Simmons}, 543 U.S. 551 (2005) (holding that imposition of the death penalty is unconstitutional for those that committed death-penalty crimes before the age of eighteen).
\item \textsuperscript{56} \textit{Gall}, 374 F. Supp. 2d at 762 n.2.
\item \textsuperscript{57} \textit{Id.} at 762-63.
\item \textsuperscript{58} \textit{Id.} at 762.
\item \textsuperscript{59} \textit{Id.} at 763.
\item \textsuperscript{60} \textit{Id.} (quoting \textit{State v. Peckenschneider}, 236 N.W.2d 344, 353 (Iowa 1975) (McCormick, J., dissenting)).
\item \textsuperscript{61} \textit{Id.} 18 U.S.C. § 3561(a) states in pertinent part:
that probation did not equate with leniency on its part, pointing out
probation required Gall, \textit{inter alia}, to undergo drug and alcohol
screenings, receive clearance for employment and residency changes,
and subject himself to severe penalties if he ever violated its terms.\textsuperscript{62}
The court reasoned Gall had consciously made efforts toward a better
life; thus, a prison term would be counterproductive.\textsuperscript{63}

The court concluded its memorandum acknowledging the sentenc-
ing Guidelines did not recommend probation in this case.\textsuperscript{64} However,
the court supported its reasoning for probation by citing case law ob-
serving that the Guidelines recommendations failed to parallel pro-
perly the severity of the offense conduct when based solely on drug
quantity.\textsuperscript{65} The court found the circumstances surrounding Gall’s
participation in the conspiracy and his character after leaving the con-
spiracy justified choosing probation over imprisonment.\textsuperscript{66} The court
further reasoned probation complied with the statutory factors set
forth in 18 U.S.C. § 3553(a) of the Sentencing Reform Act of 1984
(“SRA”).\textsuperscript{67}

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\footnotesize

\textsuperscript{63} Gall, 374 F. Supp. 2d at 763.
\textsuperscript{64} Id.
\textsuperscript{65} Id. at 764. U.S.S.G. § 5B1.1 provides in pertinent part:
\begin{enumerate}
\item Subject to the statutory restrictions in subsection (b) below, a sentence of
probation is authorized if:
\begin{enumerate}
\item the applicable guideline range is in Zone A of the Sentencing Table; or
\item the applicable guideline range is in Zone B of the Sentencing Table and
the court imposes a condition or combination of conditions requiring inter-
mittent confinement, community confinement, or home detention as pro-
vided in subsection (c)(3) of § 5C1.1 (Imposition of a Term of
Imprisonment).
\end{enumerate}
\end{enumerate}
\item A sentence of probation may not be imposed in the event:
\begin{enumerate}
\item the offense of conviction is a Class A or B felony, 18 U.S.C. § 3561(a)(1);
\item the offense of conviction expressly precludes probation as a sentence, 18
\end{enumerate}
\end{flushright}


U.S.S.G. § 5C1.1(f) reads:

If the applicable guideline range is in Zone D of the Sentencing Table, the mini-
mum term shall be satisfied by a sentence of imprisonment.


\textsuperscript{65} Gall, 374 F. Supp. 2d at 764 n.5 (citing United States v. Smith, 359 F. Supp. 2d
771, 776 (E.D. Wis. 2005); United States v. Nellum, No. 2:04-CR-30-PS, 2005 WL
2d 1019, 1026 n.6 (D. Neb. 2005)).
\textsuperscript{66} Id. at 764.
\textsuperscript{67} Id. 18 U.S.C. § 3553(a) reads in relevant part:
Factors to be considered in imposing a sentence.—The court shall impose a
sentence sufficient, but not greater than necessary, to comply with the pur-
poses set forth in paragraph (2) of this subsection. The court, in determining
the particular sentence to be imposed, shall consider—
The government appealed the sentence of the district court to the United States Court of Appeals for the Eighth Circuit, arguing the sentence was unreasonable. The government argued the district court placed too much weight on Gall's voluntary departure from the ecstasy trade and should not have relied on the studies pertaining to adolescent brain maturity. The government also contended Gall's conduct since leaving the conspiracy was neither extraordinary nor atypical. Additionally, the government argued the district court should not have factored Gall's minimal criminal history into its analysis since the sentencing Guidelines accounted for criminal history and reduced Gall's offense level accordingly. The government also disputed the reasonableness of probation because it did not adequately mirror the serious nature of the offense, failed to deter future criminal activity, and negated the congressional intent to remove disparities in sentences handed down by different courts for similar criminal activity.

The Eighth Circuit reversed the district court's sentence, concluding the district court's downward variance from the sentencing Guidelines was unreasonable. Judge Lavenski R. Smith, writing for the court, determined the downward variance was extraordinary.

The court noted that under the United States Supreme Court ruling in *United States v. Booker*, the sentencing Guidelines were no longer a

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(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—
(5) any pertinent policy statement—
(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.

68. *Gall*, 446 F.3d at 888.
69. Appellant's Brief at 19, 22, *Gall*, 446 F.3d 884 (No. 05-3001SI).
70. Id. at 25.
71. Id. at 26-27.
72. Id. at 28-29, 31, 32.
73. *Gall*, 446 F.3d at 885, 890.
74. Id. at 884, 889.
mandatory system for the district courts. Nonetheless, the court acknowledged that under Booker, the district court still had to consult the Guidelines and bear them in mind together with factors outlined in 18 U.S.C. § 3553(a). The court stated that in fashioning the appropriate sentence, the district court must first consult the pertinent range of sentences promulgated by the Guidelines. Next, the court allowed sentencing courts to consult the section 3553(a) factors in order to tailor the sentence to the individual’s unique circumstances. The court then articulated a two-part test to determine a sentence’s reasonableness: 1) a sentence recommended by the Guidelines was presumptively reasonable; 2) a sentence could be unreasonable if the court abuses its discretion by giving substantial weight to an improper factor, giving no weight to an appropriate factor, or committing a clear error of judgment.

The court characterized three years of probation as a “100% downward variance” from the minimum standard recommended by the sentencing Guidelines since Gall would never set foot in prison. The court concluded the sentencing court had to provide extraordinary justifications to sustain a variance of this perceived magnitude, and in this case no such justifications were present.

The court initially addressed the significance of Gall’s departure from the conspiracy and determined the district court weighed this factor too heavily. The court recognized the advantage Gall obtained via the parties’ agreement to adhere to the 1999 version of the sentencing Guidelines; because of the adherence to the 1999 Guidelines, Gall’s base offense level was eight levels lower than it would have been otherwise. Under the 1999 Guidelines, 1 gram of MDMA converted to only 7/100ths of the potency it was subject to under the current Guidelines. Additionally, the court pointed out that, as a member of a conspiracy, the government could have subjected Gall to even more charges. The court reasoned failure to recognize this benefit, coupled with the aforementioned choice of Guidelines, resulted in

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76. Gall, 446 F.3d at 888-89 (quoting United States v. Claiborne, 439 F.3d 479, 480 (8th Cir. 2006)).
77. Id. at 889 (quoting United States v. Claiborne, 439 F.3d 479, 480 (8th Cir. 2006)).
78. Id. (quoting United States v. Claiborne, 439 F.3d 479, 480 (8th Cir. 2006)).
79. Id. (quoting United States v. Claiborne, 439 F.3d 479, 480 (8th Cir. 2006)).
80. Id. (quoting United States v. Myers, 439 F.3d 415, 417 (8th Cir. 2006)).
81. Id.
82. Id. (quoting United States v. Dalton, 404 F.3d 1029, 1033 (8th Cir. 2005)).
83. Id.
84. Id. at 889-90.
85. Id. at 890.
86. Id. “Under U.S.S.G. § 1B1.3, Gall could have been held responsible for other members’ reasonably foreseeable acts.” Id.
the district court giving too much weight to Gall's voluntary departure.\textsuperscript{87} Continuing, the Eighth Circuit contemplated the weight given to the brain maturity studies and determined the district court improperly considered these studies in its examination of Gall's character.\textsuperscript{88} According to the court, the studies did not demonstrate how entering a conspiracy to sell drugs at the adult age of twenty-one was an impetuous, adolescent act.\textsuperscript{89}

In further applying the test prescribed for determining a sentence's reasonableness, the court examined the serious nature of Gall's crime.\textsuperscript{90} Pointing to the dangers created by ecstasy use, the court opined that in sentencing Gall to probation the district court diminished the threat generated by 10,000 tablets of ecstasy.\textsuperscript{91} The court also found the district court should have considered the likelihood that Gall's probation would produce unnecessary variation between sentences imposed for similar offenders.\textsuperscript{92} Finally, recognizing Gall's significant earnings from the sale of ecstasy and his role in the sale and delivery of thousands of tablets, the court maintained any post-offense good behavior failed to justify a sentence of probation.\textsuperscript{93} Thus, the Eighth Circuit determined the district court placed undue weight on Gall's activities since leaving the conspiracy and reversed the sentence and remanded the case to the district court for resentencing.\textsuperscript{94}

BACKGROUND

A. THE UNITED STATES SUPREME COURT REJECTED THE MANDATORY STATUS OF THE SENTENCING GUIDELINES AND INFERRED A REASONABleness STANDARD FOR APPELLATE REVIEW OF SENTENCES

In \textit{United States v. Booker},\textsuperscript{95} the United States Supreme Court rendered advisory the formerly mandatory United States Sentencing Guidelines ("Guidelines").\textsuperscript{96} Authorities charged Freddie Booker ("Booker") in the United States District Court for the Western District of Wisconsin with possessing and intending to distribute fifty grams of

\begin{itemize}
  \item \textsuperscript{87} Id. at 889-90.
  \item \textsuperscript{88} Id. at 890.
  \item \textsuperscript{89} Id.
  \item \textsuperscript{90} Id.
  \item \textsuperscript{91} Id. (citing National Institute on Drug Abuse, (2003), at www.nida.nih.gov/in-fofax/ecstasy/html (last visited March 31, 2006)).
  \item \textsuperscript{92} Id.
  \item \textsuperscript{93} Id.
  \item \textsuperscript{94} Id.
  \item \textsuperscript{95} 543 U.S. 220 (2005).
  \item \textsuperscript{96} United States v. Booker, 543 U.S. 220, 245 (2005).
\end{itemize}
cocaine base ("crack"). The jury returned a guilty verdict convicting Booker under 21 U.S.C. § 841(a)(1), which suggested a statutory sentence between ten years and life imprisonment.

At Booker's sentencing hearing, the court noted the sentencing Guidelines mandated a prison sentence between 210 and 262 months after accounting for Booker's criminal history and the jury's finding regarding the amount of drugs Booker possessed. However, the court concluded, by a preponderance of the evidence, that Booker actually possessed over 500 grams of crack and that he had obstructed justice. Due to these additional findings articulated at the sentencing hearing, the court determined the sentencing Guidelines called for a sentence between 360 months and life. The court decided to impose the 360-month sentence.

Booker appealed his sentence to the United States Court of Appeals for the Seventh Circuit, arguing facts used to increase a sentence beyond the Guidelines range had to be presented to the jury and proven beyond a reasonable doubt. The Seventh Circuit reversed the district court's sentence, holding the district court's fact-finding at the hearing violated Booker's Sixth Amendment right to a jury trial. The court remanded the case, directing the district court to impose a sentence within the range dictated by the jury findings (210 to 262 months), or alternatively, to preside over a jury-based sentencing hearing.

Pursuant to the Supreme Court's decision in Blakely v. Washington, the Seventh Circuit reasoned the district court could not use findings of additional crack possession and obstruction of justice to help determine the length of Booker's sentence. The Blakely Court held a Washington State statute violated the Sixth Amendment by granting sentencing courts the power to sentence longer than the standard range promulgated by the applicable criminal statute if the court found aggravating factors that warranted enhancements. The Seventh Circuit determined the Guidelines, issued by the United States Sentencing Commission, presented the same constitutional

98. Id. at 227.
99. Id.
100. Id.
101. Id.
102. Id. Thus, the resulting sentence of thirty years was over eight years longer than the maximum sentence called for by the Guidelines based on the jury findings. Id.
103. Id. at 227-28.
104. Id. at 220, 227-28.
105. Id. at 228.
108. Booker, 375 F.3d at 510.
problems posed by the Washington State statute in *Blakely*.\textsuperscript{109} The *Blakely* Court held the Washington State statutory maximum sentence had to be based on jury findings or facts admitted by the defendant.\textsuperscript{110} Based on the *Blakely* reasoning, the Seventh Circuit equated the Guidelines to the Washington State sentencing system.\textsuperscript{111}

The government filed a petition for a writ of certiorari with the United States Supreme Court, which granted certiorari to resolve whether a Sixth Amendment violation occurred when district courts handed down Guidelines-based sentences increased due to facts neither confessed by the defendant nor resolved by a jury.\textsuperscript{112} Additionally, the Court addressed the question of whether an affirmative response to the preceding question required determining if the Guidelines remained intact either in their entirety or in part.\textsuperscript{113}

In *United States v. Fanfan*,\textsuperscript{114} a case decided together with *Booker*, Duncan Fanfan was tried and convicted on drug charges and subsequently sentenced to a term of imprisonment within the Guidelines.\textsuperscript{115} Using only the jury's verdict, the longest prison sentence available to the United States District Court for the District of Maine under the Guidelines was seventy-eight months.\textsuperscript{116} At the sentencing hearing, the district court made further findings regarding drug quantity and conspiracy leadership mandating a sentence between 188 and 235 months.\textsuperscript{117} However, the court decided application of *Blakely* principles was appropriate and concluded it must adhere to the jury verdict.\textsuperscript{118} The government appealed directly to the United States Supreme Court, filing a petition for a writ of certiorari, which the Supreme Court granted.\textsuperscript{119}

The Supreme Court affirmed the decision of the Seventh Circuit and vacated and remanded the sentence handed down by the United States District Court for the District of Maine, concluding the mandatory nature of the Guidelines posed a direct affront to the Sixth Amendment.\textsuperscript{120} Justice John Paul Stevens, delivering the majority opinion of the Court in part, first set forth the reasoning guiding the

\textsuperscript{109} Id. at 511.
\textsuperscript{110} Id.
\textsuperscript{111} Id.
\textsuperscript{112} *Booker*, 543 U.S. at 229, 229 n.1.
\textsuperscript{113} Id.
\textsuperscript{114} No. 03-47, 2004 WL 1723114 (D. Me. June 28, 2004).
\textsuperscript{115} *Booker*, 543 U.S. at 228-29.
\textsuperscript{116} Id. at 228.
\textsuperscript{117} Id.
\textsuperscript{118} Id. at 228-29.
\textsuperscript{119} Id. at 229.
\textsuperscript{120} Id. at 233, 267-68.
Court's sentencing jurisprudence preceding *Blakely*. The Court explained the pre-*Blakely* protections guaranteed to criminal defendants included the right to have all facts necessary for conviction proven beyond a reasonable doubt and the right to insist that a jury determine guilt. Further, the Court maintained it previously held in *Apprendi v. New Jersey* any fact outside of past convictions increasing a sentence beyond a statutory maximum had to be presented to and resolved by jurors beyond a reasonable doubt.

After providing a basis for its pre-*Blakely* reasoning, the Court turned to the *Blakely* opinion. Given the tradition of guaranteeing defendants certain jury-trial rights, the *Blakely* Court determined the Washington law enabling sentence enhancement based upon non-jury findings using a preponderance of the evidence standard was inconsistent with Sixth Amendment protections because it handed over the duties of jurors to the judge and lowered the state's burden of proof. The Supreme Court in *Booker* could not differentiate between the application of the Washington law at issue in *Blakely* and the Federal Guidelines used to sentence *Booker*. Thus, the Court required *Booker*’s sentence enhancement determination be made only by the jury's findings and subsequent verdict.

After addressing the substantive constitutional answer proffered by Stevens’ majority, the Court shifted its focus to the fate of the sentencing Guidelines. Justice Stephen Breyer, writing the Court's remedial majority opinion, concluded severance and excision of certain provisions of the federal sentencing statutes were necessary for the implementation of a constitutional scheme of federal sentencing. Thus, the Court declared unconstitutional 18 U.S.C. § 3553(b)(1), which mandated adherence to the Guidelines. Similarly, the Court

121. *Id.* at 225, 236-37. Justice Steven's authored the majority opinion addressing the Sixth Amendment constitutional question joined by Justices Scalia, Souter, Thomas, and Ginsburg. *Id.* at 225. Justice Breyer's majority opinion, discussed infra, addressed the appropriate remedy to the constitutional infirmity and was joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Ginsburg. *Id.*


123. 530 U.S. 466 (2000).

124. *Booker*, 543 U.S. at 231. See also *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (reasoning any fact outside of past convictions increasing a sentence beyond a statutory maximum had to be presented to and resolved by jurors beyond a reasonable doubt).


126. *Id.*

127. *Id.* at 235.

128. *Id.*

129. *Id.* at 244, 245.

130. *Id.* at 245.

131. *Id.* 18 U.S.C. § 3553(b)(1) reads:
eliminated 18 U.S.C. § 3742(e), which laid down appellate standards of review for sentencing cases.132

The Court considered two methods for resolving the Sixth Amendment issue.133 The first approach, rejected by the Breyer majority and offered in a dissent from the remedial majority by Justice Stevens, advocated leaving the Guidelines intact and subjecting the federal courts to Blakely requirements.134 In other words, the Stevens

(b) Application of guidelines in imposing a sentence.—

(1) In general.—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.


132. Booker, 543 U.S. at 245. 18 U.S.C. § 3742(e) reads:

(e) Consideration.—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 sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 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 guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 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 section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

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 guidelines 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 guidelines to the facts.


133. Booker, 543 U.S. at 246.

134. Id.
dissent offered a method prohibiting the district courts from increasing sentences based on facts not averred by the defendant or found by the jury.\textsuperscript{135}

The severability approach adopted by the remedial majority removed the mandatory nature of the Guidelines.\textsuperscript{136} In doing so, the Court asserted that it crafted a system in tune with the legislative intent driving the initial adoption of the Guidelines.\textsuperscript{137} Justice Breyer's remedial majority offered five reasons for adopting the severability method.\textsuperscript{138} The Court first provided a textual consideration in favor of severability, reasoning the text of sections 3553(a)(1) and 3661, referring to the role of the "court" in sentencing decisions, confirmed Congress' intent to enable sentencing judges, when considering a penalty, to receive information about the defendant absent any finding from a jury.\textsuperscript{139} Second, the Court stated sentencing courts accomplished one of Congress' goals in enacting the Guidelines - lessening sentencing disparities - when they considered the real conduct of defendants.\textsuperscript{140} The Court decided severability allowed judges to continue considering presentence reports prepared using information perhaps not revealed at trial.\textsuperscript{141} The Breyer remedial majority reasoned adoption of the Blakely-guided approach offered in the Stevens dissent would disallow this information, thereby creating a disconnect between sentencing and real conduct.\textsuperscript{142} Third, according to the Court, severability eliminated complexities the Stevens approach created for the entire judicial system.\textsuperscript{143} The Court offered several examples, explaining that indictments would require far greater detail, defense strategies would be hindered when forced to challenge the detailed indictment, juries would be unable to account for every nuance in a case, and courts would be prohibited from considering an of-

\begin{itemize}
\item \textsuperscript{135} Id.
\item \textsuperscript{136} Id. at 246-247.
\item \textsuperscript{137} Id. at 249.
\item \textsuperscript{138} Id. at 249-58.
\item \textsuperscript{139} Id. at 249-50. 18 U.S.C. § 3553(a)(1) reads in pertinent part:
\begin{quote}
The court, in determining the particular sentence to be imposed, shall consider—
\begin{enumerate}
\item the nature and circumstances of the offense and the history and characteristics of the defendant.
\end{enumerate}
\end{quote}
\item \textsuperscript{140} Id. at 246-247.
\item \textsuperscript{141} Id. at 249-50.
\item \textsuperscript{142} Id. at 249-50.
\item \textsuperscript{143} Id. at 249-50.
\end{itemize}
fender's disdainful conduct at trial.\textsuperscript{144} Fourth, the Court examined a jury trial requirement effect on plea bargains.\textsuperscript{145} Since a jury-trial approach would disallow thorough sentencing consideration of real conduct after tried cases, the Court reasoned the same pattern would apply to plea-bargained cases.\textsuperscript{146} For instance, the Court reasoned a prosecutor could decide which defendants deserved weightier sentences, given a judge could no longer consider any factor a jury did not resolve.\textsuperscript{147} Finally, the Court noted a jury-trial approach allowed for easier downward sentencing adjustments while rendering upward adjustments more problematic.\textsuperscript{148}

Having summarily rejected the jury-trial remedy, the Court explained why it decided to sever and excise the selected provisions.\textsuperscript{149} The Court reasoned section 3553(b)(1), mandating sentences prescribed by the Guidelines (with limited departure capability) was the lynchpin of any constitutional problem.\textsuperscript{150} The Court noted that because the Guidelines were mandatory, judges must sentence within the applicable Guidelines range.\textsuperscript{151} The Court reasoned that if judges were able to free themselves from the mandatory nature of the Guidelines no constitutional question would arise.\textsuperscript{152} The Court further noted a mandatory system allowed sentence enhancements beyond a statutory maximum based on facts not found by a jury.\textsuperscript{153} If the Guidelines only recommended sentences, the Court reasoned judges could exercise discretion and use the Guidelines as an aid rather than as a mandate, presumably eliminating the constitutional issue.\textsuperscript{154} However, even with the severance and excision of section 3553 (b)(1), the Court stated judges would still be required to consult the Guidelines along with factors expressed in section 3553(a).\textsuperscript{155}

The Court recognized section 3742(e), setting forth a \textit{de novo} appellate review standard for departures from prescribed ranges, relied on the compulsory character of the Guidelines.\textsuperscript{156} The Court reasoned that because section 3742(e) included key cross-references to section

\textsuperscript{144. Id.}
\textsuperscript{145. Id. at 255.}
\textsuperscript{146. Id. at 256.}
\textsuperscript{147. Id. at 257.}
\textsuperscript{148. Id.}
\textsuperscript{149. Id. at 258.}
\textsuperscript{150. Id. at 259.}
\textsuperscript{151. Id.}
\textsuperscript{152. Id.}
\textsuperscript{153. Id. The substantive majority opinion authored by Justice Stevens, as well as each dissenting Justice, agreed on this point. Id. at 231, 259.}
\textsuperscript{154. Id. at 259.}
\textsuperscript{155. Id. at 259-60.}
\textsuperscript{156. Id. at 245, 259.}
The Court therefore addressed the appropriate appellate standard of review needed to replace the *de novo* standard set forth in section 3742(e). Downplaying future difficulties for appellate review of sentencing cases caused by severance and excision of section 3742(e), the Court inferred an unreasonableness standard of review which it determined was well-known to the judiciary. The Court inferred this standard of review from four sources: 1) associated text from the statute, 2) the sound administration of justice, 3) statutory structure and 4) nearly twenty years of appellate review in sentencing Guidelines departure cases.

The Court examined the text of section 3742(e), noting that before 2003, this section of the Sentencing Reform Act of 1984 (SRA) plainly directed courts to review Guidelines departures for unreasonableness. The pre-2003 SRA called for reasonableness review of departures from the mandatory Guidelines with respect to section 3553(a) objectives. With the severability approach removing the *de novo* standard while keeping section 3553(a) intact, the remedial majority of the Court declared it presented a practical, traditional standard that provided guidance to appellate courts and complied with Congressional objectives.

The Court rejected any misgivings regarding the new standard's practicality. Noting the history of the SRA's use of a reasonableness standard for departures, the Court declared it rational to assume judiciary comfort with the inferred standard. Further, pointing to the continued data collection and study of sentencing appeals by the United States Sentencing Commission, the Court determined the new standard would promote inter-circuit consistency because this data would guide future advisory ranges. The Court reasoned the post-*Booker* Sentencing Commission would modify the Guidelines, and in so doing, endorse consistent sentencing. The Court stated that while it could not guarantee uniformity, severability at least allowed
for appeals whereas invalidating the entire SRA would not. The Court further stated its approach preserved a sentencing system, albeit now advisory, allowing for just sentences that could be personalized on a case-by-case basis.

Justice John Paul Stevens, joined by Justice David Souter and joined in part by Justice Antonin Scalia, dissented in part, disagreeing with the remedial majority’s approach. Justice Stevens first noted no change to the Guidelines was necessary when applied to Booker. The Stevens dissent further explained the Guidelines, while making sentencing ranges mandatory, allowed for discretion within those ranges.

Justice Stevens then labeled the remedial majority’s approach a legislative tactic, and he stated that a jury-trial remedy would create minimal problems and apply to very few cases. Justice Stevens opined it was clear many defendants waive their right to a jury trial and, therefore, severability was unnecessary since few cases were subject to the Blakely-guided, jury-trial remedy. Justice Stevens maintained that in the remainder of cases, the complexities advanced by the remedial majority would not pose significant problems due to simple solutions such as more specific language in indictments.

Justice Scalia, dissenting in part, addressed the effects of the remedial majority’s approach on appellate review. Justice Scalia determined if the Guidelines were not mandatory, the sentencing system reverted to the time prior to enactment of the SRA, which operated without a federal sentencing scheme. However, Justice Scalia could not reconcile severance and excision of section 3553(b)(1) with the identical treatment given to section 3742(e), reasoning that it was inconsistent to remove subsection (e) while letting the rest of the section remain. Noting specifically that section 3742(f) directed appel-
late courts' disposition of the decisions mandated in subsection (e), Justice Scalia questioned this piece-meal severance.179

Justice Scalia's dissent also questioned the remedial majority's implication of a reasonableness standard of review, when an explicit standard was already present.180 Justice Scalia stated the reasonableness standard would produce a system wrought with uncertainty.181 Justice Scalia reasoned courts might hold non-Guidelines sentences per se unreasonable, making the Guidelines quasi-mandatory.182 The Scalia dissent provided a theoretical polarity: Since appellate panels had to review each appealed sentence for unreasonableness they would either treat the Guidelines as they had prior to severance of the SRA provisions or approve any sentence where the district court utilized its discretion and supported its discretion appropriately.183

Justice Clarence Thomas, dissenting in part, defended the jury-trial remedy advanced by Justice Stevens and questioned the remedial majority's adherence to legislative intent.184 Justice Thomas noted a discretionary sentencing scheme negated Congressional goals of mandatory sentences and limited departures.185

Justice Stephen Breyer, joined by Chief Justice William Rehnquist and Justices Sandra Day O'Connor and Anthony Kennedy, dissented in part, speaking to deficiencies in the Court's substantive majority opinion.186 Justice Breyer determined the Guidelines, unlike the disputed state laws in the Apprendi-Blakely line, had an administrative rather than statutory character, therefore application of a Blakely-rule to federal sentencing was unnecessary.187 Noting Blakely sought to eliminate legislative efforts creatively to label criminal elements as sentencing factors, Justice Breyer explained that the

179. Id. (Scalia, J., dissenting). Justice Scalia noted that the remedial holding was "[l]ike a black-robed Alexander cutting the Gordian knot," as it "simply severs the purpose of the review provisions from their text." Id. (Scalia, J., dissenting). Justice Scalia further remarked that, "[i]t this is rather like deleting the ingredients portion of a recipe and telling the cook to proceed with the preparation portion." Id. (Scalia, J., dissenting).

180. Id. at 309 (Scalia, J., dissenting). Justice Scalia opined that "[o]nly in Wonderland" does implying a standard of review when an explicit standard already exists make sense. Id. (Scalia, J., dissenting). Justice Scalia explained that none of the amici briefs in this case proposed severability, and thus must have filed on his "side of the looking-glass." Id. (Scalia, J., dissenting).

181. Id. at 312 (Scalia, J., dissenting). "The worst feature of the scheme is no one knows . . . how advisory Guidelines and 'unreasonableness' review will function in practice." Id. at 311 (Scalia, J., dissenting).

182. Id. at 311-12 (Scalia, J., dissenting).

183. Id. at 312-13 (Scalia, J., dissenting).

184. Id. at 324-25 (Thomas, J., dissenting).

185. Id. (Thomas, J., dissenting).

186. Id. at 326 (Breyer, J., dissenting).

187. Id. at 331-32 (Breyer, J., dissenting).
Sentencing Commission was unable to write criminal statutes.\textsuperscript{188} Rather, Justice Breyer noted, since the Commission did not draft criminal statutes but instead attempted to codify sentencing factors and standards into guidelines, the substantive majority's reasoning was misplaced; the substantive majority failed to recognize the non-legislative nature of the Commission's work.\textsuperscript{189}

\textbf{B. Immediate Reaction to Booker: Two Bank Robbers}

\textit{1. Utah District Court Gave the Sentencing Guidelines Great Weight}

In \textit{United States v. Wilson},\textsuperscript{190} the United States District Court for the District of Utah concluded that post-\textit{Booker} sentencing decisions should give substantial weight to the Guidelines.\textsuperscript{191} In \textit{Wilson}, James Joseph Wilson ("Wilson") entered a guilty plea to a charge of armed robbery.\textsuperscript{192} The district court found that Wilson, masked and armed with a sawed-off shotgun, robbed the Intermountain Credit Union of Salt Lake City, Utah of nearly \$14,000.\textsuperscript{193} The three tellers working at the bank were able to describe Wilson's face to the Salt Lake City police due to the poor quality of his mask.\textsuperscript{194} Authorities later arrested Wilson on separate charges and implicated him in the bank robbery due to the sawed-off shotgun used in both crimes.\textsuperscript{195} The bank tellers recognized Wilson, and his shoes matched shoeprints left at the bank.\textsuperscript{196}

The day after the Supreme Court decided \textit{Booker}, the district court sentenced Wilson to the Guidelines' minimum recommendation of 188 months in prison, determining post-\textit{Booker} sentences would normally follow the Guidelines.\textsuperscript{197} In his sentencing memorandum, Judge Paul Cassell, noting no other standards existed to achieve Congress' desired sentencing homogeny, stated the court would vary from the Guidelines only when a case was unusual and supported by clear and persuasive grounds.\textsuperscript{198} Recognizing district courts were still

\begin{itemize}
\item \textsuperscript{188} \textit{Id.} at 332-33 (Breyer, J., dissenting).
\item \textsuperscript{189} \textit{Id.} (Breyer, J., dissenting).
\item \textsuperscript{190} 350 F. Supp. 2d 910 (D. Utah 2005).
\item \textsuperscript{191} United States v. Wilson, 350 F. Supp. 2d 910, 912 (D. Utah 2005).
\item \textsuperscript{192} Wilson, 350 F. Supp. 2d at 911-12.
\item \textsuperscript{193} \textit{Id.} at 926.
\item \textsuperscript{194} \textit{Id.} "Wilson's hooded mask had unusually large holes for the mouth and eyes."
\item \textsuperscript{195} \textit{Id.} Wilson was arrested after a fight with his girlfriend. \textit{Id.} He aimed a sawed-off shotgun at her head during the fight. \textit{Id.}
\item \textsuperscript{196} \textit{Id.}
\item \textsuperscript{198} Wilson, 350 F. Supp. 2d at 912.
\end{itemize}
obliged to consult and consider the Guidelines when imposing sentences after \textit{Booker}, the court determined the Guidelines were the best way to strike a balance between allowing judicial discretion and achieving Congressional sentencing goals.\textsuperscript{199} The court declared Guidelines sentences met the sentencing purposes outlined in section 3553(a).\textsuperscript{200}

The court agreed with Justice Scalia's dissent in \textit{Booker}, where he noted judges had complete discretion to sentence anywhere within a statutory range.\textsuperscript{201} However, the court reasoned that discretion operated with an eye toward the serious nature of the crime, deterrence, just punishment, public protection from the convicted person, and the desire to offer academic or technical instruction and physical and mental therapy.\textsuperscript{202} The court explained that this occurred by following the Guidelines.\textsuperscript{203}

The court required consideration of societal observations as to what constituted a just sentence.\textsuperscript{204} Citing public opinion data, the court stated polls generally indicate strong correlations between a Guidelines sentence and the public's view of appropriate punishment.\textsuperscript{205} The court further stated that due to its continuing sophisticated study of sentencing patterns and revision of the Guidelines, the Sentencing Commission was better suited than individual judges to determine what types of sentences provided the most deterrence.\textsuperscript{206} Moreover, the court reasoned rehabilitation goals furthered by educational training and medical treatment were subordinate to punishment and lowered crime rates.\textsuperscript{207} The court explained it was unable to determine when, or if, a prisoner had been reformed, especially since the SRA did away with parole.\textsuperscript{208} Nonetheless, the court argued a parole system should not be reinstated because it would lead to sentencing disparities.\textsuperscript{209} The court also addressed the provision in section 3553(a) calling for sufficient sentences that were no greater than necessary.\textsuperscript{210} The court explained that just as sentencing judges were

\begin{itemize}
\item \textsuperscript{199} \textit{Id.} at 913, 914.
\item \textsuperscript{200} \textit{Id.} at 914.
\item \textsuperscript{201} \textit{Id.} at 913-14.
\item \textsuperscript{202} \textit{Id.} at 914 (citing 18 U.S.C. § 3553(a)(2)(A)-(D)).
\item \textsuperscript{203} \textit{Id.} at 914.
\item \textsuperscript{204} \textit{Id.} at 917.
\item \textsuperscript{205} \textit{Id.} at 917-18.
\item \textsuperscript{206} \textit{Id.} at 920.
\item \textsuperscript{207} \textit{Id.} at 921.
\item \textsuperscript{208} \textit{Id.} at 922.
\item \textsuperscript{209} \textit{Id.}.
\item \textsuperscript{210} \textit{Id.} at 922-24. 18 U.S.C. § 3553(a) reads in pertinent part:
\end{itemize}

\begin{quote}
\textit{The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes of punishment set forth in ... this subsection.}
\end{quote}

compelled to impose parsimonious sentences, the Sentencing Commission, when promulgating the Guidelines, was statutorily obligated to promote parsimony. Therefore, the court concluded that a within-Guidelines sentence was parsimonious. Finally, the court reiterated that since no other criteria were available, the Guidelines constituted the only mechanism for ensuring sentencing parity.

After setting forth its interpretation of Booker, the court applied its reasoning to Wilson’s case. The court noted Wilson’s extensive, violent criminal history and his misconduct while imprisoned were relevant when determining a sentence. The court also considered a bank teller’s victim impact statement in its evaluation of the seriousness of Wilson’s crime and determined the crime had devastating repercussions. In light of these facts, the court reasoned Wilson’s case did not justify characterization as an “unusual” case meriting an outside-Guidelines sentence.

2. Wisconsin District Court Declined to Give the Guidelines the Weight Afforded in Wilson

In United States v. Ranum, Mark Ranum (“Ranum”) was a loan officer convicted of misapplication of bank funds and other banking crimes. While Ranum was free to independently authorize loans less than $150,000, Ranum’s employer required him to report any loan beyond this figure to a committee. Over the course of fourteen months, Ranum wrongly authorized loans totaling over $1,000,000 to a fledgling lake cruise charter company.

Judge Lynn Adelman of the United States District Court for the Eastern District of Wisconsin sentenced Ranum two days after the Booker decision and shortly thereafter delivered a sentencing memo-

211. Wilson, 350 F. Supp. 2d at 923. 28 U.S.C. § 994(b)(1) reads in pertinent part: The Commission, in the guidelines promulgated pursuant to subsection (a)(1), shall, for each category of offense involving each category of defendant, establish a sentencing range that is consistent with all pertinent provisions of title 18, United States Code. 28 U.S.C.A. § 994(b)(1) (West 2006).
212. Wilson, 350 F. Supp. 2d at 924.
213. Id.
214. Id. at 926.
215. Id. at 926-28. Wilson had previously raped a fourteen-year-old girl, beat a robbery victim, attempted to sexually assault a twelve-year-old girl, robbed a Salt Lake City citizen at simulated gunpoint, violated parole, received 100 disciplinary actions or warnings while imprisoned, and smuggled drugs into prison. Id.
216. Id. at 927-28. The teller stated that her “life turned 180 degrees,” her family was “shocked so badly,” and she was left “a little paranoid.” Id.
217. Id. at 932.
220. Ranum, 353 F. Supp. 2d at 988.
221. Id. at 987-88.
The district court declined the Guidelines' recommended sentence, reasoning the *Booker* holding required it to deal with the Guidelines as one of many considerations. In doing so, the court stated the *Wilson* approach conflicted with both the substantive and remedial *Booker* opinions.

The court explained how the Guidelines often neglected or proscribed consideration of many of the factors outlined in section 3553(a). Unable to reconcile the Guidelines' broad exclusionary nature with section 3553(a)'s required consideration of a defendant's history and characteristics, the court reasoned this contradiction negated positive aspects that possibly merited non-Guidelines range sentences. The court further reasoned the community was often the better provider of rehabilitation, education, and treatment options, whereas the Guidelines often recommend prison-only sentencing options. Additionally, the court noted inmates were unable to offer restitution to victims, and case-by-case adherence to the Guidelines would lead to inevitable violations of the parsimony provision.

In recognizing the expertise of the Sentencing Commission, the court cautioned against non-Guidelines sentences by courts that did not thoroughly explain their decisions and buttress them with supporting section 3553(a) factors. The court declared that post-*Booker* sentencing courts were not obligated to agree with the Guidelines, but could use appropriate judicial discretion and diverge from the Guidelines when section 3553(a) factors provided justifications. In applying this logic to *Ranum*, the court considered the Guidelines, categorized and analyzed section 3553(a) factors, and imposed a sentence below the Guidelines range.

The court stated *Ranum*'s conduct was serious but was not for personal profit. Noting *Ranum*'s offense level was determined mainly by the amount of improper loans, the court rejected the Guide-

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222. *Id.* at 985.
223. *Id.*
224. *Id.* at 985-86.
225. *Id.*
226. *Id.* at 986. The Guidelines do not allow for consideration of age, education, mental or physical infirmity, chemical addictions, work record, family connections and responsibilities, socioeconomic status, civic contributions, or lack of adolescent direction. U.S. *SENTENCING GUIDELINES MANUAL* §§ 5H1.1-12 (2006).
228. *Id.*
229. *Id.*
230. *Id.*
231. *Id.* at 989. The sentence recommended by the Guidelines was 37-46 months. *Id.* The government requested a Guidelines sentence while the defense asked for home confinement. *Id.* The final sentence was one year and one day. *Id.*
232. *Id.* at 990.
lines mechanical relationship between this figure and offense level.\textsuperscript{233} The court further noted Ranum’s lack of criminal history, his commitment to his children and his ill, elderly parents, and his personal health problems and concluded that he was not likely to engage in criminal activity again or endanger the general public.\textsuperscript{234} The court ended its memorandum by considering the need for deterrence of other offenders and the call for a sentence that promoted respect for the law.\textsuperscript{235} The court reasoned loan officers were not normally prone to this type of behavior; thus, deterrence was not an issue.\textsuperscript{236} Also, the court concluded the Guidelines sentence was too harsh, and a shorter sentence of adequate length would still achieve the goal of endorsing appropriate respect for the law while still reflecting the severity of Ranum’s actions.\textsuperscript{237}

C. OUTLINING PROCEDURES FOR DETERMINING BOOKER REASONABLENESS

1. Eighth Circuit Reasonableness Review Primer: The Requirement of Extraordinary Justifications

In \textit{United States v. Dalton},\textsuperscript{238} the United States District Court for the Northern District of Iowa sentenced Deborah Dalton (“Dalton”) to sixty months in prison for her involvement in a conspiracy to distribute methamphetamine.\textsuperscript{239} The sentence represented a seventy-five percent reduction from the statutory minimum.\textsuperscript{240}

The government appealed to the United States Court of Appeals for the Eighth Circuit, arguing Dalton’s sentence departed to an unreasonable degree from what the Guidelines recommended.\textsuperscript{241} The court reversed the sentence, stating the district court abused its discretion by departing to an unreasonable degree from the Guidelines suggested sentence.\textsuperscript{242} The Eighth Circuit reasoned the district court based its Guidelines departure on two grounds: 1) the weight granted by the district court to Dalton’s cooperation with authorities, and 2)

\textsuperscript{233} Id. The court stated, “the guidelines treat a person who steals $100,000 to finance a lavish lifestyle the same as someone who steals the same amount to pay for an operation for a sick child.” \textit{Id}.

\textsuperscript{234} \textit{Id.} at 990-91. Ranum was a single father, suffered from diabetes and a sleep disorder, and his father had Alzheimer’s disease while his mother suffered from depression. \textit{Id}.

\textsuperscript{235} \textit{Id.} at 991.

\textsuperscript{236} \textit{Id}.

\textsuperscript{237} \textit{Id}.

\textsuperscript{238} 404 F.3d 1029 (8th Cir. 2005).

\textsuperscript{239} \textit{United States v. Dalton}, 404 F.3d 1029, 1029-30 (8th Cir. 2005).

\textsuperscript{240} \textit{Dalton}, 404 F.3d at 1030.

\textsuperscript{241} \textit{Id}.

\textsuperscript{242} \textit{Id.} at 1033.
the district court’s characterization of Dalton as an unusual defendant with the potential to reform herself.\textsuperscript{243} The court opined the district court failed to state why it placed more importance on Dalton’s assistance than the government prosecutors.\textsuperscript{244} The court declared extraordinary reductions required the support of extraordinary circumstances.\textsuperscript{245} The court determined no such circumstances existed to warrant the seventy-five percent reduction.\textsuperscript{246} The court reasoned Dalton’s cooperation was limited, narrow in its scope, and safe.\textsuperscript{247} Furthermore, the court acknowledged Dalton’s involvement in the methamphetamine conspiracy occurred while she was on parole.\textsuperscript{248} While recognizing district court discretion, the Eighth Circuit stated there were boundaries on judicial discretion and such discretion was subject to appellate review.\textsuperscript{249} Convinced the facts in \textit{Dalton} provided no extraordinary circumstances, the court determined the sentence was unreasonable.\textsuperscript{250}

2. \textit{Reasonableness Review Principles Espoused By the Seventh and Sixth Circuits}

In \textit{United States v. Johnson},\textsuperscript{251} the United States Court of Appeals for the Seventh Circuit affirmed the 236-month sentence of Allan Johnson ("Johnson"), a convicted possessor of child pornography.\textsuperscript{252} In \textit{Johnson}, Johnson possessed thousands of images of child pornography.\textsuperscript{253} Based on Johnson’s criminal history and calculation of a base offense level, the Guidelines range sentence called for a prison term between seventy and eighty-seven months.\textsuperscript{254} However, the United States District Court for the Northern District of Indiana decided to triple Johnson’s sentence due to the graphic nature of the images, the sheer volume of images, and its conclusion that the criminal history category assigned to Johnson was an inadequate measure of his past and his future propensity to commit crimes.\textsuperscript{255}

\begin{itemize}
\item \textsuperscript{243} \textit{Id.} at 1032.
\item \textsuperscript{244} \textit{Id.} at 1033.
\item \textsuperscript{245} \textit{Id.}
\item \textsuperscript{246} \textit{Id.}
\item \textsuperscript{247} \textit{Id.} The court noted she did not put herself in any danger or go undercover. \textit{Id.}
\item \textsuperscript{248} \textit{Id.}
\item \textsuperscript{249} \textit{Id.} at 1034.
\item \textsuperscript{250} \textit{Id.}
\item \textsuperscript{251} 427 F.3d 423 (7th Cir. 2005).
\item \textsuperscript{252} United States v. Johnson, 427 F.3d 423, 424, 425 (7th Cir. 2005).
\item \textsuperscript{253} \textit{Johnson}, 427 F.3d at 424. Johnson possessed 10,000 to 12,000 sexually explicit images of children. \textit{Id.}
\item \textsuperscript{254} \textit{Id.} at 425.
\item \textsuperscript{255} \textit{Id.} at 423, 425. Over 40 images depicted bestiality, 4,000 images contained children under age 12, and he admitted to videotaping a young girl taking a shower. \textit{Id.}
Johnson appealed his sentence to the United States Court of Appeals for the Seventh Circuit, arguing the district court erred by departing from the Guidelines range. In affirming the sentence, Judge Diane Sykes authored an opinion explaining that while a Guidelines sentence was presumed reasonable, sentences outside of the Guidelines range were also reasonable if the sentencing judge properly explained his or her variance with respect to section 3553 (a). When ascertaining proper justification of section 3553(a) factors, the court stated it would utilize a justification to departure ratio, whereby greater departures required more convincing justifications.

In judging the reasonableness of Johnson’s sentence, the court noted Johnson committed his crimes before various child protective measures were added to the Guidelines in 2003. Therefore, the court reasoned Johnson’s much longer sentence would have been presumptively reasonable under the amended Guidelines. The court also reasoned the district court’s examination of the facts and subsequent section 3553(a) explanations adequately supported the judgment.

In United States v. Buchanan, the United States Court of Appeals for the Sixth Circuit praised a district court’s sentencing methods as a model approach. In Buchanan, convicted felon Paul Buchanan (“Buchanan”) possessed a firearm, thereby violating 18 U.S.C. § 922(g). In May of 2004, Memphis police officers spotted Buchanan outside of a known drug location. When the officers stopped, Buchanan removed his shirt. Before being questioned,

256. Id. at 423, 426.
257. Id.
258. Id. at 426-27.
259. Id. at 427. The PROTECT Act of 2003 reflected congressional judgment that child pornography punishments were insufficient under the Guidelines. Id.
260. Id.
261. Id. at 429.
262. 449 F.3d 731 (6th Cir. 2006)
263. United States v. Buchanan, 449 F.3d 731, 731, 734 (6th Cir. 2006).
264. Buchanan, 449 F.3d at 732. 18 U.S.C. § 922(g) reads in pertinent part:
   (g) It shall be unlawful for any person—
   (1) who has been convicted in any court of a crime punishable by imprison-
   ment for a term exceeding one year;
   (2) who is a fugitive from justice;
   ... to ship or transport in interstate or foreign commerce, or possess in or af-
   fecting commerce, any firearm or ammunition; or to receive any firearm or
   ammunition which has been shipped or transported in interstate or foreign
   commerce.
265. Buchanan, 449 F.3d at 732.
266. Id.
Buchanan readily admitted that he was under the influence of drugs. The officers then detained Buchanan and looked under the shirt he previously removed, finding a handgun therein.

At sentencing, the United States District Court for the Western District of Tennessee imposed a sentence consistent with the advisory range in the Guidelines. Buchanan appealed the sentence to the United States Court of Appeals for the Sixth Circuit, arguing the district court misinterpreted Booker, gave improper presumptive reasonableness to the Guidelines, and imposed a sentence that violated the section 3553(a) parsimony provision. In a per curiam opinion the court affirmed the sentence, viewing the district court's methodology as demonstrative of ideal post-Booker sentencing.

The court noted the district court was mindful of the advisory character of the Guidelines and properly demonstrated its consideration of section 3553(a) factors. The court explained the district court's approach did not improperly presume the Guidelines were reasonable. The court noted that an irrebuttable presumption was inconsistent with Booker's remedy, as it effectively rendered the Guidelines mandatory. However, the court declared a Guidelines range sentence merited a Booker-consistent, rebuttable presumption of reasonableness. The court also resisted Buchanan's contention that the district court imposed a sentence that was unnecessarily punitive.

In a concurring opinion, Judge Jeffrey Sutton discussed the Guidelines presumptively reasonable nature and defended the court's position, noting that five other circuits adopted a similar view. The concurrence offered several justifications for the presumption, initially positing the notion that the Guidelines encompass each section 3553(a) factor. The concurrence also stated that Congress directed

267. *Id.*
268. *Id.*
269. *Id.* at 731. The sentence was 77 months in prison and 3 years supervised release. *Id.* at 732.
270. *Id.* at 731, 734.
271. *Id.* at 732, 734.
272. *Id.* at 733, 734.
273. *Id.* at 734.
274. *Id.*
275. *Id.* (citing United States v. Williams, 436 F.3d 706 (6th Cir. 2006)).
276. *Id.* at 734-35.
277. *Id.* at 735 (Sutton, J., concurring). Judge Sutton noted the five other circuits adopting the presumption were the Fourth, Fifth, Tenth, Seventh, and Eighth. *Id.* (Sutton, J., concurring) (citing United States v. Johnson, 445 F.3d 339 (4th Cir. 2006); United States v. Alonzo, 435 F.3d 551 (5th Cir. 2006); United States v. Kristl, 437 F.3d 1050 (10th Cir. 2006); United States v. Mykytiuk, 415 F.3d 606 (7th Cir. 2005); United States v. Lincoln, 413 F.3d 716 (8th Cir. 2005)).
278. Buchanan, 449 F.3d at 735. (Sutton, J., concurring).
the Sentencing Commission to consider the very same factors in forming the Guidelines that sentencing courts had to bear in mind when imposing a sentence. 279

Next, the concurrence reasoned the current Guidelines were the product of eighteen years of study and therefore articulated the best measure of section 3553(a) applications to federal sentencing. 280 The concurrence also determined presumptive reasonableness did not conflict with judicial discretion, but rather kept the Guidelines as well-reasoned recommendations that worked in tandem with an autonomous judge. 281 Similarly, the concurrence stated presumptive reasonableness mirrored sentencing realities 282

The concurrence also expressed some trepidation regarding the presumption of reasonableness afforded the Guidelines, stating judges would likely cease to grant variances in the face of likely appellate reversal. 283 Thus, the concurrence stressed that reasonableness was an instrument for appellate review rather than for sentencing judges. 284 The concurrence noted that whereas appellate courts were directed to review for reasonableness, the district courts were not directed to impose reasonable sentences, but rather to comport with the parsimony provision of section 3553(a). 285 The concurrence explained that Booker gave sentencing judges greater discretion through the power to apply section 3553(a) factors to respective defendants. 286 Therefore, the concurrence promoted a system whereby appellate courts would give substantial deference to district courts and where review of a judge's sentence would not be based upon the extent of his discussion of section 3553(a) factors, but rather would begin with the presumption that the court considered and properly applied these factors 287 When given this deference, the concurrence reasoned, sentencing courts were able to impose a sentence independently, without the fear of reversal due to the Guidelines presumptive reasonableness. 288

279. Id. (Sutton, J., concurring).
280. Id. at 736. (Sutton, J., concurring).
281. Id. at 736-37 (Sutton, J., concurring).
282. Id. at 737. (Sutton, J., concurring).
283. Id. at 740. (Sutton, J., concurring).
284. Id. (Sutton, J., concurring).
285. Id. (Sutton, J., concurring).
286. Id. at 741 (Sutton, J., concurring).
287. Id. (Sutton, J., concurring).
288. Id. (Sutton, J., concurring). Judge Sutton stated that trial judges could discuss § 3553(a) until they were "blue in the face" or "reference them briefly." Id. (Sutton, J., concurring). He stated that neither method should be used as a litmus test for determining the degree of a judge's reasoned deliberations. Id. (Sutton, J., concurring).
D. Eighth Circuit Applications of Reasonableness Review

1. Downward Departure to Probation Affirmed as Reasonable

In United States v. Hadash, the United States Court of Appeals for the Eighth Circuit affirmed a district court's decision to depart from the Guidelines in a downward variance by sentencing the defendant to probation. In Hadash, Dennis Hadash ("Hadash") stole several handguns from a United States Postal Service storage facility where he worked. After Hadash had used the guns for target practice and sold or gave away two of the guns, he was questioned about the missing firearms. After he admitted to the theft, the United States District Court for the District of Minnesota convicted and sentenced Hadash.

In a plea agreement, the prosecution and defense agreed upon a base offense level of twelve. After calculating the applicable offense level adjustments available under the Guidelines, Hadash's resulting offense level was a thirteen which, given Hadash's criminal history, resulted in a mandatory sentence between one year and eighteen months' imprisonment. The district court adjusted even further downward, applying a provision that allowed for adjustments when firearms were either collected or used for sport, thereby resulting in an offense level that mandated a prison term between zero and six months. The court stated that even if this departure were not available, it still would have found mitigating circumstances warranting a departure. The district court then imposed a sentence of probation for a term of four years.

The government appealed to the United States Court of Appeals for the Eighth Circuit, arguing the district court misapplied the firearms collection departure Guideline and unjustifiably stated its intent.
to depart downward regardless of the collection provision's availability. Judge Roger Wollman, writing for the court, affirmed the sentence, concluding that while the collection Guideline was misapplied, the error was harmless, and the probation sentence was reasonable in light of section 3553(a). The court stated it would properly defer to a district court's judgment due to the sentencing judge's enhanced familiarity with both witnesses and facts. The court tempered appellate deference when a judge abused his or her discretion and failed to consider proper factors, improperly weighed factors not relevant to the case, or committed a clear error in judgment in choosing a non-Guidelines sentence. The court determined the district court properly considered section 3553(a) and explained its reasons for imposing probation.

First, the court noted the sentencing memorandum's statement that Hadash, while law-abiding, had simply made a mistake evidenced consideration of section 3553(a)(1)'s instruction to consider a defendant's history and characteristics. Next, the court determined the district court properly considered section 3553(a)(2) because the district court stated that Hadash's case was different in that he did not use the guns he stole in any illegal activities or with malevolence. Finally, the court explained the district court properly recognized the Guidelines were not formulated to penalize offenders like Hadash. Overall, the court determined due to the district court's listing of section 3553(a) factors that the sentence was reasonable and would not cause different sentencing treatment among similarly situated defendants.

2. Upward Variance Reversed as Unreasonable

In United States v. Kendall, the United States Court of Appeals for the Eighth Circuit reversed and remanded the sentence of Dan Kendall ("Kendall"). In Kendall, Kendall pled guilty to possession of methamphetamine production materials. The United

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299. Id. at 1080, 1081.
300. Id. at 1084.
301. Id.
302. Id.
303. Id.
304. Id. The district court stated Hadash was "a law abiding citizen, who [did] an incredibly dumb thing." Id.
305. Id.
306. Id.
307. Id.
308. 446 F.3d 782 (8th Cir. 2006).
309. United States v. Kendall, 446 F.3d 782, 782, 783 (8th Cir. 2006).
310. Kendall, 446 F.3d at 783.
States District Court for the Eastern District of Missouri sentenced Kendall to eighty-four months' imprisonment, a 155% increase from the Guidelines advisory range. The district court based its decision to vary upwards from the advisory range on its assessment of Kendall's criminal history and its evaluation of the severity of the offense.

Kendall appealed his sentence to the United States Court of Appeals for the Eighth Circuit, arguing the district court improperly applied upward variance procedures and imposed an unreasonable sentence given section 3553(a) factors. The court reversed and remanded the sentence, determining the evidence did not sustain the 155% increase. Judge Kermit Bye, writing for the court, rejected Kendall's argument regarding misapplication of variance procedures. The court determined the sentencing judge properly ignored traditional departure methods and instead first used section 3553(a) factors to vary upward. The court explained the district court's methodology was an acceptable alternative to first consulting traditional departure law, provided the end result was reasonable.

Despite the district court's suitable methods, the court deemed the end result unreasonable, declaring no extraordinary circumstances existed to warrant the district court's decision to deviate extraordinarily. The court reasoned it could not distinguish Kendall's situation from a typical methamphetamine case. Furthermore, the court called attention to the district court's recognition of Kendall's relatively low status in the drug trade and that Kendall did not manufacture methamphetamine. The court also reviewed Kendall's criminal history and decided such a history was not worthy of the extraordinary sentence. In sum, the court stated it reviewed section 3553(a) factors and found none of them supported the variance.

311. Id. at 782, 784-85.
312. Id. at 785.
313. Id. at 782, 784-85.
314. Id. at 785.
315. Id. at 783, 784.
316. Id. at 784.
317. Id.
318. Id. at 784, 785.
319. Id. at 785.
320. Id.
321. Id. Kendall had traffic violations, several driving while intoxicated charges, drug possession convictions, and burglary present in his criminal record. Id.
322. Id.
3. Downward Departure to Probation Reversed as Unreasonable

In United States v. Rogers, the United States Court of Appeals for the Eighth Circuit determined a term of probation for a felon convicted of possessing a firearm was unreasonable. In Rogers, James Rogers ("Rogers") was a convicted drug offender who went hunting with a rifle while paroled. A conservation agent found Rogers with the rifle, took the weapon, and notified Rogers' parole officer. Rogers pled guilty to being a felon in possession of a firearm in violation of his parole, and the United States District Court for the Western District of Missouri sentenced him to five years of probation.

After considering the Presentence Report ("PSR"), the court determined the Guidelines required a sentence of fifty-one to sixty-three months' imprisonment. Rogers then submitted over a dozen letters from relatives and friends attesting to his rehabilitation and a similar petition signed by 186 persons to support a motion for departure. The District court based its ultimate decision to depart downward from the Sentencing Guidelines recommended range on U.S.S.G. section 5K2.0, which allows for such departures when an offender exhibits extraordinary rehabilitation.

The government appealed the sentence to the United States Court of Appeals for the Eighth Circuit, arguing that the departure was unreasonable. The court reversed the sentence as Judge William Benton, writing for the court, determined probation was unreasonable when gauged against section 3553(a) factors. Relying on the language found in section 5K2.0, requiring extraordinary or atypical exhibitions of rehabilitation, the court found that Rogers' rehabilitation did not merit the departure. For example, the court deemed sobriety and rekindled familial relationships laudable but not so unusual.

323. 400 F.3d 640 (8th Cir. 2005), cert. denied, 126 S. Ct. 1020 (2006).
325. Rogers, 400 F.3d at 641.
326. Id.
327. Id. at 640, 641.
328. Id. at 641.
329. Id. Rogers cared for his dying father, rebuilt his fiancée's home, and remained sober. Id.
330. Id. U.S.S.G. § 5K2.0(a)(4) reads in pertinent part:
An offender characteristic or other circumstance identified . . . as not ordinarily relevant in determining whether a departure is warranted may be relevant to this determination only if such offender characteristic or other circumstance is present to an exceptional degree.
331. Rogers, 400 F.3d at 640, 641.
332. Id. at 641, 642.
333. Id. at 641-42.
as to merit the departure.334 Moreover, the court noted the firearm violation was not Rogers’ first parole violation, and therefore, probation would not deter him from committing crimes in the future.335 Additionally, the court stated probation did not properly reflect Rogers’ history and characteristics, given his extensive drug use and criminal history.336 Finally, the court suggested the sentence would result in sentencing disparity, since similar defendants would not likely receive a similar, non-prison sentence.337

ANALYSIS

In United States v. Gall,338 the United States Court of Appeals for the Eighth Circuit reversed as unreasonable a downward variance to probation from a recommended minimum Guidelines sentence of thirty months in prison.339 The United States District Court for the Southern District of Iowa sentenced Brian Gall (“Gall”), a participant in an ecstasy distribution conspiracy, to probation due in part to his character, voluntary removal from criminal activity, and rehabilitation.340 The Eighth Circuit in Gall presumed an advisory sentencing Guidelines sentence was reasonable and determined the district court departed to an unreasonable extent.341 The court concluded the variance was extraordinary, and the justifications presented by the district court were not equally extraordinary.342

The Gall court mirrored other circuits when it presumed a Guidelines sentence was reasonable and required extraordinary justifications for large variances from the Guidelines.343 However, these principles and standards either contradicted United States v. Booker344 or were inconsistently applied.345 This Analysis will demonstrate the Eighth Circuit gave too much weight to an advisory Guidelines sentence when it determined such a sentence was presumptively reasonable.346 Additionally, this Analysis will critique the

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334. Id. at 642.
335. Id. Earlier, Rogers went fishing with two felons and was arrested for trespassing while on parole. Id.
336. Id. Rogers admitted to using several types of drugs, and had at least five prior convictions for crimes including assault and resisting arrest. Id.
337. Id.
338. 446 F.3d 884 (8th Cir. 2006).
339. United States v. Gall, 446 F.3d 884, 886, 890 (8th Cir. 2006).
340. Gall, 446 F.3d at 884, 887.
341. Id. at 889.
342. Id.
343. See infra notes 348-480 and accompanying text.
345. See infra notes 348-480 and accompanying text.
346. See infra notes 348-423 and accompanying text.
Gall court's inconsistent requirement of extraordinary justifications and its effect on judicial discretion.\(^{347}\)

A. THE GALL COURT GAVE UNDUE DEFERENCE TO THE GUIDELINES

The United States Supreme Court's decision in Booker removed the mandatory nature of the United States Sentencing Guidelines.\(^{348}\) The Court directed sentencing courts to consult the Guidelines and inferred a standard of reasonableness appellate review.\(^{349}\) In Gall, the United States Court of Appeals for the Eighth Circuit improperly gave the Guidelines a presumption of reasonableness, thereby misinterpreting and misapplying Booker and hamstringing judicial discretion.\(^{350}\) In doing so, the Gall court erroneously gave the Guidelines greater weight than other section 3553(a) factors.\(^{351}\)

In Gall, the Eighth Circuit gave undue deference to the Guidelines by giving them presumptive reasonableness in the review of Gall's sentence.\(^{352}\) The Gall court inappropriately gave the Sentencing Guidelines more weight than other applicable factors.\(^{353}\) The Booker Court demonstrated the Guidelines were one of many considerations the district court had to account for, rather than giving the Guidelines greater weight than other section 3553(a) factors.\(^{354}\) However, the Gall court's decision to presume Guidelines reasonableness eliminated the equality of consideration Booker intended for non-Guidelines factors in section 3553(a).\(^{355}\)

1. The Gall Court's Appellate Presumption of Reasonableness Relies on Rationale Similar to the Sentencing Court in Wilson that Misinterpreted Booker and Section 3553(a)

The Gall court's presumption of reasonableness relied on faulty reasoning similar to the rationale forwarded in United States v. Wilson\(^{356}\) by the United States District Court for the District of Utah.\(^{357}\) The Gall court stated the Guidelines range was presumptively reasonable.\(^{358}\) The court then opined that courts may consider section

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\(^{347}\) See infra notes 424-80 and accompanying text.


\(^{349}\) Booker, 543 U.S. at 259, 260-61.

\(^{350}\) See infra notes 356-74 and accompanying text.

\(^{351}\) See infra notes 375-99 and accompanying text.

\(^{352}\) See infra notes 356-423 and accompanying text.

\(^{353}\) See infra notes 356-423 and accompanying text.

\(^{354}\) See infra notes 356-423 and accompanying text.

\(^{355}\) See infra notes 356-423 and accompanying text.


\(^{357}\) See infra notes 358-74 and accompanying text.

\(^{358}\) Gall, 446 F.3d at 889.
3553(a) factors after a calculation of the Guidelines range. The Wilson court recognized the post-Booker advisory nature of the Guidelines, and determined a sentencing court’s discretion should comply with sentencing purposes outlined by Congress in section 3553(a). The Wilson court stated that Congress created the Sentencing Commission, directed the formation of the Guidelines, passed the Guidelines into law, and adjusted the Guidelines. Therefore, the Wilson court reasoned the Guidelines encompassed the sentencing purposes stated in section 3553(a), and the Guidelines were the proper method of balancing judicial discretion and Congressional intent. The Wilson court stated that while reasonable people might disagree about whether the Guidelines are fair, the Guidelines still should be followed in all cases except those that were particularly exceptional. Similar to the presumption of Guidelines reasonableness and the permissive district court consideration of other section 3553(a) factors allowed by the Gall court, the Wilson court’s reasoning that the Guidelines already encompassed the other section 3553(a) factors provided a basis for post-Booker appellate review that allowed consideration of the non-Guidelines section 3553(a) factors only in unusual cases. As such, the Gall court failed to require district court consideration of, and the Wilson court failed to consider, all of the section 3553(a) factors. Thus, the Wilson court’s reasoning effectively gave the Guidelines a presumption of reasonableness at the district court level by failing to recognize the Guidelines as one of many section 3553(a) factors.

The court in United States v. Ranum exposed the leaps in Wilson’s logic through its interpretation of Booker. The Booker remedial majority adopted severability due in part to a textual consideration, deciding section 3553(a)’s directive that sentencing courts consider all section 3553(a) factors was indicative of Congress’ intent to empower judicial discretion. The Ranum court recognized

359. Id. (emphasis added).
361. Wilson, 350 F. Supp. 2d at 915.
362. Id. at 913-14, 916.
363. Id. at 924-25.
364. Compare Gall, 446 F.3d at 889 (stating a district court must give a clear explanation as to why it departed from the presumptively reasonable Guidelines and may consider the other section 3553(a) factors after a proper Guidelines calculation), with Wilson, 350 F. Supp. 2d at 914 (stating the Guidelines sentence was proper except in unusual cases).
365. See supra notes 356-64 and accompanying text.
366. See supra notes 356-65 and accompanying text.
368. See infra notes 369-73 and accompanying text.
Booker’s remedial majority did not require giving the Guidelines any deference, but instead called for a balanced consideration of each section 3553(a) factor. Furthermore, the Ranum court recognized the absence in the Guidelines of offender characteristic considerations, ample alternatives to imprisonment, and methods for necessitating victim restitution; however, section 3553(a) accounted for these considerations under its non-Guidelines factors. Unlike Wilson, which reasoned the Guidelines encompassed the sentencing purposes in section 3553(a), the Ranum court’s recognition of these absences in the Guidelines adhered to Booker’s call to consider the Guidelines as well as the section 3553(a) factors. Therefore, when the Gall court adopted reasoning similar to Wilson, it relied on faulty rationale because the Guidelines are just one of many section 3553(a) factors. Thus, the Gall court misinterpreted Booker and section 3553(a) when it did not place accompanying statutory text on equal footing with the Guidelines.

2. Contrary to Booker, the Gall Court’s Approach of Granting the Guidelines Presumptive Reasonableness Gave the Guidelines Greater Weight Than Other Section 3553(a) Factors

The presumption of Guidelines reasonableness granted by the Gall court resembles Justice Scalia’s dissenting prediction of per se unreasonableness of non-Guidelines sentences in post-Booker appellate review. Moreover, the presumption fails to balance the Guidelines as one of many section 3553(a) sentencing factors. The Gall court stated a Guidelines sentence would be presumed reasonable, determining that Booker called for sentencing courts to first calculate a Guidelines range and then consider section 3553(a) factors. In his dissent in Booker, Justice Scalia warned against the ramifications of a reasonableness standard of review, stating that a non-Guidelines sen-

371. Id.
372. Compare Wilson, 350 F. Supp. 2d at 914 (stating courts shall comply with congressional mandates of the SRA and the Guidelines sentence satisfies the mandates of section 3553(a) in all but the most unusual cases), with Ranum, 353 F. Supp. 2d at 985-86 (stating Booker directed consideration of all section 3553(a) factors, many of which are ignored or rejected in the Guidelines), and Booker, 543 U.S. at 250 (stating that its severance remedy still required judges to account for the Guidelines together with the sentencing goals in section 3553(a)).
373. See supra notes 367-72 and accompanying text.
374. See supra notes 356-73 and accompanying text.
375. See infra notes 377-99 and accompanying text.
376. See infra notes 377-99 and accompanying text.
377. Gall, 446 F.3d at 888-89.
tence may be held per se unreasonable as a result. While rejecting Justice Scalia's contention that appellate courts could overturn any non-Guidelines sentence, Booker's remedial majority called for a balanced application of the Guidelines together with other section 3553(a) factors. The Gall court's approach revealed the soundness of Justice Scalia's prediction and displayed a disregard for the remedial majority's directive to balance the Guidelines as one of many section 3553(a) factors.

The Gall court declared it would not require the district court to recount each section 3553(a) consideration. However, the Gall court stated determination of an appropriate sentence began with calculating the Guidelines range followed by section 3553(a) considerations. Unlike the Booker Court, in which the remedial majority intended for the Guidelines to be considered simultaneously with the other section 3553(a) factors, the Gall court required secondary consideration of these other factors. Thus, the Gall court's approach contravenes the intent of Booker's remedial majority by giving the Guidelines priority of consideration.

The Gall court could have followed the court in Ranum, which also advocated giving the Guidelines the same weight as associated section 3553(a) factors. The Ranum court reasoned equal weight should be given to the other factors due to the many exclusions by the Guidelines of features found within section 3553(a) that sentencing judges must consider. Similar to the Booker remedial majority's intended equality of consideration of the Guidelines and the other section 3553(a) factors, the court in Ranum recognized the Guidelines were one of many section 3553(a) factors. Therefore, the Ranum court represented an appropriate interpretation of the Booker remedial majority since it did not give the Guidelines priority over the

378. *Booker*, 543 U.S. at 311-12 (Scalia, J., dissenting).
380. See infra notes 381-99 and accompanying text.
381. *Gall*, 446 F.3d at 889.
382. Id.
383. Compare Booker, 543 U.S. at 261 (stating that section 3553(a) set forth numerous sentencing factors, of which the Guidelines were one, to guide appellate courts in determining the reasonableness of a sentence), with Gall, 446 F.3d at 889 (stating the sentencing court must justify its reasoning for deviating from a presumptively reasonable Guidelines sentence).
384. See supra notes 381-83 and accompanying text.
385. See infra notes 386-89 and accompanying text.
387. Compare Ranum, 353 F. Supp. 2d at 985-86 (reasoning equal weight should be given to the other factors due to the many exclusions by the Guidelines of sentencing considerations found within section 3553(a)), with Booker, 543 U.S. at 261 (stating that section 3553(a) set forth many factors, of which the Guidelines were one, to guide appellate courts in determining a sentence's reasonableness).
other factors also listed as considerations in section 3553(a).[388] As such, the Gall court could have utilized reasoning similar to Ranum and achieved a result more consistent with the directive from Booker.[389]

However, the Gall court's approach appeared to mirror the position first forwarded by the United States District Court for the District of Utah in United States v. Wilson,[390] which determined the Guidelines were the only method to reduce sentencing disparities and achieve the goals stated within section 3553(a).[391] Similarly, Judge Jeffrey Sutton's concurrence in United States v. Buchanan[392] supported presumptive reasonableness, reasoning the Sentencing Commission formed the Guidelines with section 3553(a) in mind.[393] The Buchanan concurrence determined the Guidelines, which were formed and adjusted by the Commission over nearly two decades, mirrored sentencing reality.[394] The Gall court put forth a sentencing method where the first step was calculating a Guidelines sentence followed by a consideration of other section 3553(a) factors.[395] Similar to the approaches in the Wilson court and the Buchanan concurrence, the Gall court's approach of giving the Guidelines priority of consideration gave the Guidelines greater weight than the other section 3553(a) factors.[396] Therefore, the Gall court's approach of presuming the Guidelines were reasonable and allowing only secondary consideration of other section 3553(a) factors contravened Ranum's accurate Booker interpretation.[397] Rather than take a Ranum-influenced approach, the Gall court yielded to the Guidelines recommendation before considering other factors.[398] Thus, by giving the Guidelines presumptive reasonableness and granting the Guidelines priority of consideration, the

[388] See supra notes 385-87 and accompanying text.

[389] See supra notes 385-88 and accompanying text.


[391] See infra notes 392-99 and accompanying text.

[392] 449 F.3d 731 (6th Cir. 2006).


[394] Buchanan, 449 F.3d at 736, 737 (Sutton, J., concurring).

[395] Gall, 446 F.3d at 889.

[396] Compare Gall, 446 F.3d at 889 (stating the district court should first calculate the Guidelines range to determine an appropriate sentence and then may go outside of the range using the other section 3553(a) factors), with Wilson, 350 F. Supp. 2d at 925 (stating that a district court should give heavy weight to a Guidelines sentence), and Buchanan, 449 F.3d at 735 (stating the Guidelines by themselves accounted for every section 3553(a) factor).

[397] See supra notes 390-96 and accompanying text.

[398] Compare Gall, 446 F.3d at 889 (stating the district court should first calculate the Guidelines range to determine an appropriate sentence and then may go outside of the range using the other section 3553(a) factors), with Ranum, 353 F. Supp. 2d at 985-86 (stating Booker called for district courts to use the Guidelines as one of a number of factors under section 3553(a)).
Gall court placed the Guidelines at the top of the sentencing decision food-chain.\textsuperscript{399}

3. \textit{The Circuit's Are Not a Discordant Symphony, But Part of Justice Scalia's Prediction Rings True: The Gall Court, Like its Sister Circuits, Contravened Booker and Incorrectly Gave the Guidelines Presumptive Reasonableness}

The Gall court began its appellate review with the presumption that a Guidelines sentence was reasonable, thereby failing to apply properly Booker's standard of review.\textsuperscript{400} The Booker Court stated section 3553(a) remained in effect after its remedial severance of the SRA.\textsuperscript{401} The Court determined the factors within section 3553(a) would guide sentencing courts as well as appellate courts in determining the reasonableness of a particular sentence.\textsuperscript{402} The Booker Court deemed the reasonableness standard of review practical and familiar, and therefore rejected Justice Scalia's contentions that the standard could not be applied with consistency by appellate judges.\textsuperscript{403} The Court suggested the standard could be applied to all appeals, whereas it once only applied to departures from the mandatory Guidelines.\textsuperscript{404} Justice Scalia's dissent, however, predicted that several different review standards would emerge, one of which was a system where the Guidelines would be held \textit{per se} reasonable.\textsuperscript{405} Furthermore, Justice Scalia noted that such a system could not be distinguished from the mandatory system that Booker deemed unconstitutional.\textsuperscript{406}

The Gall court determined a sentence within the Guidelines range was presumptively reasonable.\textsuperscript{407} The court also noted that the lack of an appellate challenge to the district court's Guidelines range calculation triggered reasonableness review.\textsuperscript{408} The Gall court's presumption of reasonableness supports Justice Scalia's contention that appellate courts might engage in preservation of \textit{de facto} mandatory Guidelines.\textsuperscript{409} Moreover, contrary to Booker's application of reasonableness review to all sentencing appeals rather than its former appli-

\begin{thebibliography}{99}
\bibitem{399} See \textit{supra} notes 375-98 and accompanying text.
\bibitem{400} See \textit{infra} notes 401-23 and accompanying text.
\bibitem{401} \textit{Booker}, 543 U.S. at 261.
\bibitem{402} \textit{Id.}
\bibitem{403} \textit{Id.} at 262-63.
\bibitem{404} \textit{Id.} at 261, 263.
\bibitem{405} \textit{Id.} at 311 (Scalia, J., dissenting).
\bibitem{406} \textit{Id.} (Scalia, J., dissenting).
\bibitem{407} Gall, 446 F.3d at 889.
\bibitem{408} \textit{Id.}
\bibitem{409} Compare Gall, 446 F.3d at 889 (stating a guidelines sentence is presumptively reasonable), with Booker, 543 U.S. at 313 (Scalia, J., dissenting) (stating courts of appeals were faced with a daunting task of individualized review and might respond by following the Guidelines just as they had before Booker).
\end{thebibliography}
cation to departures from the Guidelines, the Gall court determined that only cases where the Guidelines range calculation went unchallenged merited review for reasonableness.410 Therefore, the Gall court’s presumption of reasonableness runs counter to Booker’s intended application of the reasonableness standard of review for all sentencing appeals.411 Similarly, the presumption is consistent with Scalia’s predicted de facto mandatory Guidelines.412

The Gall court was not alone in its misapplication of Booker’s appellate review standard.413 The Gall court gave the Guidelines the same presumptive reasonableness accorded the Guidelines in other circuits.414 The Seventh Circuit in United States v. Johnson,415 also determined a Guidelines sentence was presumptively reasonable, while also requiring section 3553(a) variance justifications to be in proportion to the extent of the variance from the Guidelines range.416 Over one year later, the Sixth Circuit in United States v. Buchanan417 afforded the Guidelines presumptive reasonableness but noted that defendants could rebut the presumption.418 The Gall court stated it would presume a sentence within the Guidelines range was reasonable.419 Similar to the courts in Johnson and Buchanan, the Gall court streamlined appellate review by announcing that a Guidelines sentence would be presumed reasonable by the appellate court.420 Thus, by presuming on review that a Guidelines sentence was reasonable, the Gall court followed an incorrect standard promoted by its sister circuits.421 While Justice Scalia’s “discordant symphony” of methods of sentencing review does not appear to have emerged, his hypothesis that courts might engage in appellate review just as they had pre-Booker is borne out by the widely-accepted presumption of reasonable-

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410. Compare Booker, 543 U.S. at 263 (stating reasonableness review of sentences would be applied across the board), with Gall, 446 F.3d at 889 (stating neither party challenged the district court’s calculation of the applicable Guidelines range; therefore the sentence would be reviewed for reasonableness).


412. See supra notes 400-11 and accompanying text.

413. See infra notes 414-23 and accompanying text.

414. See infra notes 415-23 and accompanying text.

415. 427 F.3d 423 (7th Cir. 2005).


417. 449 F.3d 731 (6th Cir. 2005).

418. United States v. Buchanan, 449 F.3d 731, 734 (6th Cir. 2006).

419. Gall, 446 F.3d at 889.

420. Compare Gall, 446 F.3d at 889 (stating a sentence within the Guidelines range is presumptively reasonable), with Johnson, 427 F.3d at 426 (stating it would give a properly calculated Guidelines sentence a presumption of reasonableness), and Buchanan, 449 F.3d at 734 (stating the presumption should be rebuttable).

421. See supra notes 413-20 and accompanying text.
ness. As Justice Scalia noted in his Booker dissent, when an appellate court holds a district court’s rejection of the Guidelines to be per se unreasonable, the resulting sentencing system is unconstitutional under Booker.

B. THE REQUIREMENT OF EXTRAORDINARY JUSTIFICATIONS

Discoivered Judicial Discretion Since it was Applied Unpredictably (Just What is Extraordinary Anyway?)

The Gall court applied the requirement of extraordinary justifications for departures from the Guidelines arbitrarily and dissuaded sentencing courts from exercising the discretion granted to them by Booker. The Gall court stated Guidelines sentences were presumptively reasonable and extraordinary deviations from a presumptively reasonable Guidelines sentence required extraordinary justifications. Additionally, the Gall court regarded probation as a 100% downward reduction from a prison sentence and concluded extraordinary justifications did not support this variance. The Gall court decided Gall’s rehabilitation—including getting his college degree, starting a business, and leading a law-abiding life—did not warrant an extraordinary deviation from the Guidelines.

The Gall court’s application of the extraordinary justifications requirement deviates sharply from that of the Seventh Circuit panel in Johnson. In Johnson, the United States Court of Appeals for the Seventh Circuit affirmed an upward variance that more than tripled the maximum sentence advised by the Guidelines. The Guidelines recommended seventy to eighty-seven months in prison, but the district court sentenced Johnson to 236 months. The Johnson court agreed with the district court’s determination that the Guidelines did not adequately account for an offender such as Johnson, as he possessed thousands of images of child pornography, dozens of images of children engaged in bestiality, and admitted at sentencing that he videotaped a young girl in the shower. Conversely, the defendant in Gall was a rehabilitated drug offender. Unlike the Johnson court, which dealt with a habitual, importunate pedophile, the Gall court...
court dealt with a rehabilitated drug offender.\footnote{Compare Gall, 446 F.3d at 890 (stating that even if Gall’s rehabilitation was dramatic and permanent, probation was still unreasonable), \textit{with} Johnson, 427 F.3d at 429 (stating Johnson’s likely risk of recidivism justified the upward departure).} Thus, the \textit{Gall} court’s application of \textit{Johnson}’s extraordinary justifications requirement fails to account for unusual rehabilitative behavior.\footnote{See supra notes 428-33 and accompanying text.}

Comparing \textit{Gall} to other Eighth Circuit applications of the extraordinary justifications requirement revealed marked hostility by the \textit{Gall} court to downward variances and implies various Eighth Circuit panels will treat judicial discretion differently. The \textit{Gall} court determined a term of probation was a reduction unsupported by the factual circumstances.\footnote{See infra notes 436-80 and accompanying text.} The Eighth Circuit in \textit{Dalton} determined that extraordinary circumstances did not exist to justify a seventy-five percent downward variance from the sentence advised by the Guidelines.\footnote{Gall, 446 F.3d at 889.} Dalton was on parole when she was arrested for involvement in a methamphetamine conspiracy, thus she failed to show susceptibility to rehabilitation.\footnote{United States v. Dalton, 404 F.3d 1029, 1031, 1033 (8th Cir. 2005).} Also, the \textit{Dalton} court reasoned Dalton’s cooperation after her arrest was limited.\footnote{Id. at 1033.} Unlike Dalton, who was on parole and provided limited assistance to authorities, Gall was not engaged in criminal activity at the time of his arrest and he cooperated with authorities by turning himself in.\footnote{Compare Gall, 446 F.3d at 886 (explaining Gall admitted his conspiratorial acts and returned to Iowa when he learned of an arrest warrant), \textit{with} Dalton, 404 F.3d at 1033 (stating Dalton’s cooperation was limited, narrow in its scope, and safe).} Further, unlike Dalton, Gall rehabilitated himself, whereas Dalton showed no susceptibility to rehabilitation.\footnote{Compare Gall, 446 F.3d at 886-87 (explaining Gall graduated from college and testimony was presented regarding his reputable new business and assumed a crime-free lifestyle), \textit{with} Dalton, 404 F.3d at 1031 (stating Dalton repeatedly violated probation and never sought employment while on probation).} Thus, the courts in both cases reversed downward variances on completely different factual circumstances relating to offender rehabilitation.\footnote{See supra notes 435-41 and accompanying text.}

Further examination reveals contradictory standards of justification within the Eighth Circuit and the burdensome threshold employed by the \textit{Gall} court.\footnote{See infra notes 444-51 and accompanying text.} The Eighth Circuit in \textit{Hadash} affirmed a downwardly varying sentence of probation as reasonable and deemed recognition of a normal citizen doing a “dumb thing” sufficient justification.\footnote{United States v. Hadash, 408 F.3d 1080, 1081, 1084 (8th Cir. 2005).} The \textit{Hadash} court also noted the probation sentence ac-
counted for the lack of malicious intent associated with the crime. The *Gall* court examined and discussed the record’s inclusion of an examination of scientific studies, recognition of a lack of aggravating factors including the absence of firearms, and a comparison of case-law justifying its observations regarding drug quantity and offense conduct correlations.

Like *Hadash*, in which the lower court sentenced the defendant to probation, the lower court in *Gall* also sentenced Gall to probation. Nonetheless, the *Hadash* court affirmed a sentence of probation as reasonable, whereas the *Gall* court concluded probation was unreasonable. However, unlike *Hadash*, the lower court in *Gall* presented a thorough, in-depth explanation of its justifications for departing downward from the Guidelines sentence. Thus, the *Gall* court’s threshold for justifications was greater than that of the *Hadash* court. Accordingly, Eighth Circuit review of sentencing appeals involves disparate standards for applying the requirement of extraordinary justifications.

Other cases reveal the *Gall* court’s oppressive application of extraordinary justifications. When it determined a downward departure to probation unreasonable, the court in *United States v. Rogers*, examined the district court’s consideration of section 3553(a) factors including offender history and characteristics, crime deterrence, and prevention of sentencing disparity. The *Rogers* court reasoned James Rogers’ (“Rogers”) recurrent drug abuse and trespassing while paroled did not merit probation because he did not respect the law, he was a danger to society, and his history and characteristics indicated he was likely to commit crimes again.

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446. *Gall*, 446 F.3d at 889-90.
447. Compare *Hadash*, 408 F.3d at 1081 (stating the lower court sentenced Hadash to probation), with *Gall*, 446 F.3d at 885 (stating the lower court sentenced Gall to probation).
448. Compare *Hadash*, 408 F.3d at 1081, 1084 (affirming Hadash’s sentence of probation and concluding the sentence was reasonable), with *Gall*, 446 F.3d at 885 (reversing and remanding Gall’s sentence of probation and concluding the sentence was unreasonable).
449. Compare *Gall*, 446 F.3d at 888, 890 (explaining the lower court’s citation of caselaw did not exemplify recognition of the seriousness of the offense), with *Hadash*, 408 F.3d at 1084 (stating the lower court’s statement that bad people do bad things with guns displayed consideration of the need for just punishment and deterrence).
450. See supra notes 443-49 and accompanying text.
451. See supra notes 443-50 and accompanying text.
452. See infra notes 453-73 and accompanying text.
453. 400 F.3d 640 (8th Cir. 2005), cert. denied, 126 S. Ct. 1020 (2006).
455. *Rogers*, 400 F.3d at 642.
Rogers court also stated similar offenders would not likely receive probation, thus the downward departure promoted disparities.\footnote{456} The Rogers court also discounted as commendable, yet not extraordinary, Rogers' discontinued substance abuse, care for his dying father, and rebuilding of his fiancée's house.\footnote{457} The Gall court also reasoned the district court over-emphasized rehabilitation.\footnote{458} Additionally, the Gall court noted Gall's criminal history never involved violence and he had assumed a life free from committing crimes.\footnote{459}

Like Rogers, in which the lower court sentenced the defendant to probation, the lower court in Gall also sentenced Gall to probation.\footnote{460} Similar to the Gall court, the Rogers court reversed a downward departure to probation as unreasonable.\footnote{461} However, whereas the Rogers court and the Gall court produced similar holdings, the offenders in each case were relatively distinct.\footnote{462} Nonetheless, the Gall court applied the extraordinary justifications requirement and concluded probation was unreasonable when the offender exhibited rehabilitation greater than the recurrent offender in Rogers.\footnote{463} Thus, the Gall court applied the extraordinary justifications requirement with little regard for factual circumstances that placed the offender in a positive light.\footnote{464}

The Gall court's application of the extraordinary justifications requirement failed to distinguish Gall from typical drug offenders.\footnote{465} Looking at extraordinary justifications for an upward variance, the Eighth Circuit in United States v. Kendall\footnote{466} reversed and remanded an upward variance.\footnote{467} The Kendall court was unable to distinguish Dan Kendall ("Kendall") from a typical methamphetamine offender, thus no extraordinary circumstances justified a 155% increase over the recommended sentence.\footnote{468} Moreover, the Kendall court stated

\footnotesize{\begin{itemize}
    \item \footnote{456}{Id.}
    \item \footnote{457}{Id. at 641, 642.}
    \item \footnote{458}{Gall, 446 F.3d at 890.}
    \item \footnote{459}{Id. at 886-87.}
    \item \footnote{460}{Compare Rogers, 400 F.3d at 641 (stating the lower court sentenced Rogers to probation), with Gall, 446 F.3d at 885 (stating the lower court sentenced Gall to probation).}
    \item \footnote{461}{Compare Gall, 446 F.3d at 885 (reversing and remanding Gall's sentence of probation and concluding it was unreasonable), with Rogers, 400 F.3d at 640, 642 (reversing and remanding Rogers' sentence of probation as unreasonable).}
    \item \footnote{462}{Compare Gall, 446 F.3d at 886-87 (explaining Gall's criminal history involved no violent acts and Gall assumed a crime-free lifestyle), with Rogers, 400 F.3d at 642 (stating Rogers was once convicted of assault and twice violated parole).}
    \item \footnote{463}{See supra notes 452-62 and accompanying text.}
    \item \footnote{464}{See supra notes 452-63 and accompanying text.}
    \item \footnote{465}{See infra notes 466-73 and accompanying text.}
    \item \footnote{466}{446 F.3d 782 (8th Cir. 2006).}
    \item \footnote{467}{United States v. Kendall, 446 F.3d 782, 782, 785 (8th Cir. 2006).}
    \item \footnote{468}{Kendall, 446 F.3d at 784-85.}
\end{itemize}}
Kendall's criminal history, which included at least six offenses over fifteen years, was not so extraordinary as to justify the large upward variance. Thus, the Kendall court based its reversal of an upward variance on the inability to distinguish the offender from typical cases and a limited criminal history. In Gall, the court noted the district court's observations regarding Gall's voluntary withdrawal from criminal life, lack of violence associated with the offense, and limited criminal history. The Gall court, unlike the Kendall court, was presented with an atypical offender, albeit one with a similar criminal history. Therefore, the Gall court failed to distinguish appropriately Gall from typical drug offenders such as the defendant in Kendall.

The Gall court provided one of many inconsistent applications of the requirement of extraordinary justifications. The Gall court's application of the requirement differed markedly from the Seventh Circuit in Johnson. Moreover, the results in Dalton, Hadash, Rogers, Kendall, and Gall imply contradictory Eighth Circuit standards. Of these cases, the Gall court's enforcement of the extraordinary justifications requirement was the strictest. Standing alone, the Gall court's decision represents an aversion to give discretion to the lower court's decisions. When viewed in light of other Eighth Circuit opinions, Gall represents an aversion to downward variance. Overall, the Gall court's narrow definition of extraordinary justifications demonstrated undue deference to the Guidelines rather than to lower court discretion.

CONCLUSION

In United States v. Gall, the United States Court of Appeals for the Eighth Circuit reversed Brian Michael Gall's sentence of probation

469. Id. at 785.
470. Id. at 784-85.
471. Gall, 446 F.3d at 886-87.
472. Compare Gall, 446 F.3d at 886-87, 890 (stating Gall's behavior -obtaining a college degree, starting a reputable business, and assuming a crime-free life- even if exemplary, did not warrant probation), with Kendall, 446 F.3d at 785 (stating Kendall's case was like any other methamphetamine case, thus the upward variance was unreasonable).
473. See supra notes 465-72 and accompanying text.
474. See supra notes 424-73 and accompanying text.
475. See supra notes 428-34 and accompanying text.
476. See supra notes 435-73 and accompanying text.
477. See supra notes 424-73 and accompanying text.
478. See supra notes 424-73 and accompanying text.
479. See supra notes 435-73 and accompanying text.
480. See supra notes 424-73 and accompanying text.
481. 446 F.3d 884 (8th Cir. 2006).
based upon its application of reasonableness review.\textsuperscript{482} When the United States Supreme Court rendered the United States Sentencing Guidelines advisory in *United States v. Booker*,\textsuperscript{483} it also inferred the reasonableness standard for sentencing review.\textsuperscript{484} The *Gall* court first presumed a Guidelines sentence was reasonable.\textsuperscript{485} When supported by extraordinary justifications, the court declared a non-Guidelines sentence could be reasonable.\textsuperscript{486} The aforementioned presumption, accompanied by what the Court viewed as less-than-extraordinary justifications for the non-Guidelines sentence, led the court to reason the district court abused its discretion when it sentenced Gall to probation.\textsuperscript{487}

In *Gall*, the court gave the Guidelines far greater weight than other section 3553(a) factors when it presumed a Guidelines sentence was reasonable.\textsuperscript{488} While the presumption was consistent with Eighth Circuit precedent, this precedent failed to adhere to *Booker* and the plain meaning of section 3553(a).\textsuperscript{489} Furthermore, the *Gall* court’s requirement that extraordinary circumstances justify non-Guidelines sentences discourages judicial discretion since it applied the requirement arbitrarily.\textsuperscript{489}

The *Booker* decision should have given district court judges more discretion when sentencing, but in fact, since *Booker*, only about seven percent of federal sentences have gone below an advisory Guidelines range.\textsuperscript{491} The *Booker* Court’s inference of a reasonableness standard has done very little to change the formerly mandatory Guidelines system in the Eighth Circuit. A divided Supreme Court, the Court’s inferred remedies, the overwhelming number of sentences and subsequent appeals caused by *Booker*, and the relatively small window of time since *Booker* have combined to create a sentencing system that must sort out a wealth of complexities. The Eighth Circuit, however, has apparently decided to forgo the problems posed in a post-*Booker* world. Rather than view the Guidelines as advisory, the Eighth Circuit views them as reasonable and places them at the top of the hierarchy of sentencing considerations. Rather than defer to lower courts with a more precise knowledge of issues and facts, the Eighth Circuit makes a confusing request: The district court does not

\textsuperscript{482} United States v. Gall, 446 F.3d 884, 889 (8th Cir. 2006).
\textsuperscript{483} 543 U.S. 220 (2005).
\textsuperscript{485} *Gall*, 446 F.3d at 889.
\textsuperscript{486} Id.
\textsuperscript{487} Id. at 889-90.
\textsuperscript{488} See supra notes 348-423 and accompanying text.
\textsuperscript{489} See supra notes 348-423 and accompanying text.
\textsuperscript{490} See supra notes 424-80 and accompanying text.
have to explain itself fully but it must provide extraordinary justifications. The result is not only a system with quasi-mandatory Guidelines, but also a pattern of Eighth Circuit review providing little hope for defendants appealing their sentences and exhibiting a marked hostility toward sentences that are not within or above the Guidelines.

Since *Booker* the Eighth Circuit has affirmed over ninety-two percent of above-Guidelines sentences.\(^{492}\) During that same time, the court has affirmed less than sixteen percent of below-Guidelines sentences.\(^{493}\) Such decisions are consistent with Eighth Circuit precedent, yet they are difficult to reconcile with the goal of eliminating sentencing disparities.\(^{494}\) Indeed, it is difficult to resign oneself to a system in which advisory Guidelines are essentially mandatory, judges abuse their discretion only when they impose sentences below Guidelines standards, extraordinary circumstances can rarely prove helpful to the defendant, and imprisonment often seems the only sufficient punishment.

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492. United States v. Meyer, 452 F.3d 998, 1001 n.3 (8th Cir. 2006). The Eighth Circuit has affirmed twelve above-Guidelines sentences and reversed one such sentence. *Meyer*, 452 F.3d at 1001 n.3.

493. *Id.* The Eighth Circuit has reversed sixteen below-Guidelines sentences while affirming only three such sentences. *Id.*

494. *Id.*