

## *Booker's* Impact on the Standard of Review Governing Supervised Release and Probation Revocation Sentences

Leigha Simonton<sup>†</sup>

Traditionally, federal appellate courts have applied a “plainly unreasonable” standard of review to appeals of probation and supervised-release revocation sentences. This standard is found in 18 U.S.C. § 3742(e), which contains review standards for all federal sentences and provides that the “plainly unreasonable” standard applies specifically to sentences for which there are no Sentencing Guidelines. Because the Guidelines dealing with postrevocation sentences are, and have always been, advisory policy statements, appellate courts have almost universally determined that they should apply the “plainly unreasonable” standard to such sentences. *United States v. Booker*<sup>1</sup> potentially affected this standard because it made the entire Guidelines scheme advisory by severing and excising both 18 U.S.C. § 3553(b), the provision requiring district courts to apply the Guidelines in a mandatory fashion, and § 3742(e). In place of § 3742(e), *Booker* explained that appellate courts should apply a reasonableness standard to their review of sentencing decisions.

Since *Booker*, several appellate courts have considered whether this new reasonableness standard supersedes the “plainly unreasonable” standard in the context of reviewing supervised release and probation revocation sentences. They have taken three different approaches. The first assumes that the old “plainly unreasonable” standard is the same as the new reasonableness standard. The second concludes that *Booker's* reasonableness standard is different from, and supersedes, the “plainly unreasonable” standard. The third

---

<sup>†</sup> Assistant U.S. Attorney, Appellate Division, Northern District of Texas. Prior to joining the U.S. Attorney's Office, she clerked for the Honorable Patrick E. Higginbotham of the U.S. Court of Appeals for the Fifth Circuit and the Honorable Barbara M.G. Lynn of the U.S. District Court for the Northern District of Texas. She is a 2001 graduate of the Yale Law School. Thanks to David Horan for his helpful insights into this issue. The views expressed in this article are the author's own and do not necessarily reflect the views of the Justice Department or any previous employers.

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

also finds that the two standards differ but reasons that, notwithstanding *Booker*, courts should continue to apply the “plainly unreasonable” standard to postrevocation sentences.

In Part I, this Article gives an overview of probation and supervised release revocation proceedings, and focuses on the differences between postrevocation sentencing procedure and the ordinary sentencing procedure at issue in *Booker*. Part II discusses the “plainly unreasonable” standard of review and its traditional application to postrevocation appeals. Part III analyzes the three approaches circuit courts have followed in deciding whether the “plainly unreasonable” standard survives *Booker*, and concludes, first, that the “plainly unreasonable” standard differs from the ordinary reasonableness standard, and, second, that the “plainly unreasonable” standard survives *Booker*. Parts IV and V discuss potential criticisms of the continued application of the standard and posit a straightforward definition of the standard that transforms what has been a vague, amorphous concept into a practical framework courts can consistently apply.

# 1. OVERVIEW OF PROBATION AND SUPERVISED RELEASE REVOCATION SENTENCING

Probation, which has existed in the federal system since 1925,<sup>2</sup> is a specific term of community supervision handed down in lieu of incarceration.<sup>3</sup> In contrast, supervised release, which first appeared in the Sentencing Reform Act of 1984 (SRA),<sup>4</sup> is a specific term of community supervision occurring after the prisoner finishes serving a term of incarceration.<sup>5</sup> No longer part of the federal system, parole is different from both of these concepts, involving the supervised release of a prisoner from incarceration *before* the sentence of incarceration expires.<sup>6</sup> Both probation and supervised release involve specified conditions by which a defendant must abide.<sup>7</sup> If he violates any of these

2. See *Burns v. United States*, 287 U.S. 216, 220 (1932) (discussing the Federal Probation Act (FPA) of 1925, 43 Stat. 1259 (1925) (repealed)); *United States v. Murray*, 275 U.S. 347, 352-55 (1928) (same).

3. See U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A (2005).

4. 18 U.S.C. § 3583 (2006).

5. See *United States v. Marmolejo*, 915 F.2d 981, 982 (5th Cir. 1990); see also U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A (2005).

6. See *Marmolejo*, 915 F.2d at 982. The Sentencing Reform Act of 1984 abolished parole and the U.S. Parole Commission. See *Stange v. U.S. Parole Comm’n*, 875 F.2d 760, 761 (9th Cir. 1989). The Act became effective on November 1, 1987, but provided for the continued operation of the Commission and certain parts of the parole system for an additional five years. *Id.*

7. Mandatory conditions of probation and supervised release include not committing another federal, state, or local crime; not unlawfully possessing a controlled substance; submitting to drug tests; making restitution; and notifying the court of any change in the defendant’s economic circumstances. 18 U.S.C. § 3563(a) (2002); § 3583(d). In its discretion, the court may also impose several other enumerated conditions, such as remaining within the jurisdiction of the court and permitting a probation officer to visit the defendant at his or her home or elsewhere as specified by the court. §§ 3563(b), 3583(d).

conditions, his probation officer will notify the court, which will then usually issue an arrest warrant and schedule a revocation hearing.<sup>8</sup>

The revocation hearing combines elements of arraignment, trial, and sentencing.<sup>9</sup> The court begins by discussing the alleged violations and asking the defendant whether he admits to them.<sup>10</sup> If he denies any of them, the government will present its case, usually including testimony by the probation officer; the defendant may cross-examine the government's witnesses and present his own evidence.<sup>11</sup> The government must prove the violations by a preponderance of the evidence.<sup>12</sup> The court is entitled to revoke the defendant's probation or supervised release if the defendant admits the violations or if it determines that the government proved some or all of the allegations.<sup>13</sup>

After the guilt phase of the hearing, the court turns to sentencing.<sup>14</sup> If the court decides to revoke the supervision and sentence the defendant to prison, it must consult Chapter 7 of the Guidelines,<sup>15</sup> which contains the Sentencing Commission's only statements regarding postrevocation sentences.<sup>16</sup> Totalling only twelve pages, it is little more than a needle in the Guidelines' 600-page

8. Usually, the probation officer initiates revocation proceedings by filing a report with the district court listing the specific release conditions that the defendant has violated and the facts substantiating the violations. *See, e.g.,* United States v. Gammarano, 321 F.3d 311, 313 (2d Cir. 2003). At other times, the government, instead of the probation officer, may initiate revocation proceedings by filing a petition or motion to revoke supervised release. *See, e.g.,* United States v. English, 400 F.3d 273, 274 (5th Cir. 2005). For a good general overview of the revocation process, see 3 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 542 (3d ed. 2004).

9. *See* FED. R. CRIM. P. 32.1(b).

10. *See, e.g.,* United States v. Brown, 224 F.3d 1237, 1238 (11th Cir. 2000).

11. FED. R. CRIM. P. 32.1(b)(2)(B)-(C).

12. 18 U.S.C. § 3583(e)(3) (supervised release); *see* United States v. Bujak, 347 F.3d 607, 609 (6th Cir. 2003) (probation). Other courts have phrased the burden of proof at a probation violation hearing slightly differently, but with little, if any, practical effects. *See* United States v. Spraglin, 418 F.3d 479, 481 (5th Cir. 2005) ("[R]evocation of probation does not require proof sufficient to sustain a criminal conviction. All that is required is enough evidence, within a sound judicial discretion, to satisfy the district judge that the conduct of the probationer has not met the conditions of probation."); United States v. Taylor, 931 F.2d 842, 848 (11th Cir. 1991) ("[T]he evidence [must] reasonably satisfy the judge that the conduct of the probationer has not been as good as required by the conditions of probation.").

13. In most cases, the court can, as an alternative to imposing a term of incarceration, continue the defendant on release, extend his release if less than the maximum was previously imposed, or modify the release terms. 18 U.S.C. § 3565(a) (2002); § 3583(e)(2). The court must, however, revoke a defendant's release if he possessed a controlled substance or a firearm, refused to comply with his drug testing conditions, or tested positive for illegal controlled substances more than three times over the course of one year. § 3565(b); § 3583(g)(1)-(4).

14. *See, e.g.,* United States v. Farrell, 393 F.3d 498, 499 (4th Cir. 2005).

15. U.S. SENTENCING GUIDELINES MANUAL ch. 7 (2005); *see, e.g.,* United States v. Bermudez, 974 F.2d 12, 14 (2d Cir. 1992); United States v. Headrick, 963 F.2d 777, 782 (5th Cir. 1992); United States v. Lee, 957 F.2d 770, 774 (10th Cir. 1992).

16. U.S. SENTENCING GUIDELINES MANUAL ch. 7 (2005); *see, e.g.,* United States v. Lewis, 424 F.3d 239, 244 (2d Cir. 2005).

haystack.<sup>17</sup> Unlike the Guidelines devoted to sentences directly following criminal prosecution, which contain hundreds of pages of instructions on adding one offense level here and deducting another there, Chapter 7 offers little to aid the court in sentencing a postrevocation defendant.<sup>18</sup> Instead, it bases its Guideline ranges for such defendants on only two factors: the severity of the supervised release violation(s), and the defendant's criminal history category.<sup>19</sup> It divides the release violations into three "broad classifications."<sup>20</sup> Grade A violations, the most serious, include conduct constituting a drug, firearm, or violent crime punishable by a term of imprisonment exceeding one year or any other crime punishable by over twenty years' imprisonment.<sup>21</sup> Grade B violations include conduct constituting any other crime punishable by a term of imprisonment exceeding one year.<sup>22</sup> Grade C violations, the most minor, include crimes punishable by imprisonment of one year or less or violation of any other condition of supervision.<sup>23</sup> To reach the postrevocation sentencing range, the court combines the grade of the violation with the defendant's criminal history using the sentencing table found in § 7B1.4.<sup>24</sup>

17. Compare U.S. SENTENCING GUIDELINES MANUAL (2005) with U.S. SENTENCING GUIDELINES MANUAL ch. 7 (2005).

18. See U.S. SENTENCING GUIDELINES MANUAL (2005); U.S. SENTENCING GUIDELINES MANUAL ch. 7 (2005).

19. U.S. SENTENCING GUIDELINES MANUAL §§ 7B1.1, 7B1.4 (2005); see, e.g., United States v. Carter, 408 F.3d 852, 854 (7th Cir. 2005) ("The Sentencing Commission has promulgated a series of policy statements for sentencing following a revocation of supervised release, including a Revocation Table of recommended sentencing ranges tied to the severity of a defendant's violations and his criminal history category.") (citations omitted).

20. U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A (2005).

21. *Id.* § 7B1.1(a)(1).

22. *Id.* § 7B1.1(a)(2).

23. *Id.* § 7B1.1(a)(3).

24. *Id.* § 7B1.4(a). The table is as follows:

**Revocation Table**  
(in months of imprisonment)

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

*Id.* (footnote omitted).

Unlike the Guidelines applying to ordinary offenses, the provisions in Chapter 7 have always been “advisory” policy statements.<sup>25</sup> Thus, traditionally, only the statutory maximum has limited the length of a postrevocation sentence. 18 U.S.C. § 3583(e)(3), which sets forth the maximum supervised-release revocation sentence, provides that even the most serious offense warrants only a five-year prison term.<sup>26</sup> 18 U.S.C. § 3565, which sets forth the maximum probation revocation sentence, allows a court to impose any other sentence that initially could have been imposed, thus incorporating the statutory maximum for the initial offense.<sup>27</sup> When determining the appropriate sentence within these statutory limits, district courts must consider not only the Chapter 7 policy statements, but also most of the sentencing factors listed in 18 U.S.C. § 3553(a). These factors include the nature and circumstances of the offense and the history and characteristics of the defendant; the need for the sentence imposed to afford adequate deterrence to criminal conduct, to protect the public from further crimes by the defendant, and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner; the applicable Guidelines policy statements; the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and the need to provide restitution to any victims of the offense.<sup>28</sup> As these procedures demonstrate, postrevocation sentencing has traditionally afforded significant discretion to the district court to choose a sentence within the statutory maximum range.

---

25. U.S. SENTENCING GUIDELINES MANUAL Ch. 7 (2005); *see, e.g.*, *United States v. Nace*, 418 F.3d 945, 949 (8th Cir. 2005) (reasoning that the policy statements are advisory); *United States v. Work*, 409 F.3d 484, 492 (1st Cir. 2005) (same); *United States v. Escamilla*, 70 F.3d 835, 835 (5th Cir. 1995) (same).

26. 18 U.S.C. § 3583(e)(3) (2002).

27. 18 U.S.C. § 3565 (2002); U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A (2005).

28. 18 U.S.C. § 3565(a) (probation); 18 U.S.C. § 3583(e) (supervised release); 18 U.S.C. § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) (2003). Significantly, § 3583(e), the supervised release provision, does not instruct courts to consider § 3553(a)(2)(A), “the need for the sentence imposed . . . to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense,” or § 3553(a)(3), “the kinds of sentences available.” § 3583(e) (“The court may [modify or revoke a term of supervised release] after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).”). In contrast, § 3565(a), the probation provision, suggests that courts may consider all of the statutory factors in its sentencing determination. § 3565(a) (“If the defendant violates a condition of probation at any time prior to the expiration or termination of the term of probation, the court may [continue the defendant on probation or revoke his probation] . . . after considering the factors set forth in section 3553(a) to the extent that they are applicable . . . .”); *see also* § 3553(a)(2)(A), (a)(3).

## II. APPLICATION OF 18 U.S.C. § 3742(e)(4)'S "PLAINLY UNREASONABLE" STANDARD TO POSTREVOCATION SENTENCES ON APPEAL

The defendant can appeal the revocation, the sentence, or both.<sup>29</sup> As with appeals of ordinary sentences, circuit courts have looked to 18 U.S.C. § 3742, the portion of the SRA governing sentencing appeals, to determine what standard of review applies to postrevocation sentencing decisions.<sup>30</sup> Section 3742(e), which contains the relevant standards of review, provides that an appellate court shall determine whether the sentence (1) was imposed in violation of law; (2) was imposed as a result of an incorrect application of the Guidelines; (3) is outside the applicable Guideline range and (A) the district court failed to provide a written statement of reasons, (B) the departure is based on an impermissible factor, or (C) the sentence departs in an unreasonable amount; or (4) was imposed for an offense for which there is no applicable Guideline and is "plainly unreasonable."<sup>31</sup> The section's last paragraph, which is unnumbered, provides that the appellate court should review *de novo* the district court's decision to depart.<sup>32</sup>

Because the only Guidelines that apply to postrevocation sentences are advisory policy statements, virtually all circuit courts concluded, pre-*Booker*, that revocations were "offense[s] for which there is no applicable sentencing guideline" under § 3742(e)(4) and therefore applied the "plainly unreasonable" standard of review.<sup>33</sup> Despite their agreement on which standard applied, however, they could not reach consensus on how to define it. As the Seventh Circuit noted, "'[p]lainly unreasonable' is an unusual standard of review, and other panels of the court have not been entirely consistent in describing the appellate task."<sup>34</sup> The First Circuit has reasoned only that it is "extremely deferential,"<sup>35</sup> something more lenient than abuse of discretion.<sup>36</sup> Other courts

29. See, e.g., *United States v. Huerta-Pimental*, 445 F.3d 1220, 1221 (9th Cir. 2006) (appealing both).

30. 18 U.S.C. § 3742 (2003); see, e.g., *United States v. Webb*, 30 F.3d 687, 689 (6th Cir. 1994); *United States v. Headrick*, 963 F.2d 777, 779 (5th Cir. 1992); *United States v. Blackston*, 940 F.2d 877, 894 (3d Cir. 1991); *United States v. Scroggins*, 910 F.2d 768, 769 (11th Cir. 1990).

31. 18 U.S.C. § 3742(e).

32. *Id.*

33. See, e.g., *United States v. White Face*, 383 F.3d 733, 737 (8th Cir. 2004); *United States v. Salinas*, 365 F.3d 582, 588 (7th Cir. 2004); *United States v. De Jesus*, 277 F.3d 609, 611-12 (1st Cir. 2002); *United States v. Olabanji*, 268 F.3d 636, 637 (9th Cir. 2001); *United States v. Wirth*, 250 F.3d 165, 169 (2d Cir. 2001); *United States v. White*, 244 F.3d 1199, 1204 (10th Cir. 2001); *Webb*, 30 F.3d at 689; *Headrick*, 963 F.2d at 779; *Blackston*, 940 F.2d at 894; *Scroggins*, 910 F.2d at 769. Pre-*Booker*, the Fourth Circuit never issued a reported case adopting the "plainly unreasonable" standard of review for postrevocation sentences, but myriad unreported cases from that circuit used that standard. See, e.g., *United States v. Hewlett*, 79 Fed. App'x 593, 593-94 (4th Cir. 2003); *United States v. King*, 76 F. App'x 513, 513-14 (4th Cir. 2003). The District of Columbia Circuit has no published or unpublished cases adopting any particular standard of review for postrevocation sentences.

34. *United States v. Marvin*, 135 F.3d 1129, 1136 (7th Cir. 1998).

35. *De Jesus*, 277 F.3d at 611-12; see also *United States v. Jones*, No. 97-3457, 1998 WL

have characterized it as “a deferential appellate posture concerning issues of fact and the exercise of discretion.”<sup>37</sup> This failure to reach a uniform definition created the potential for inconsistent treatment of postrevocation sentencing appeals.

### III. *BOOKER*'S “SEVERANCE AND EXCISION” OF § 3742(e) AND ITS EFFECT ON THE “PLAINLY UNREASONABLE” STANDARD

*United States v. Booker*<sup>38</sup> created more questions regarding appellate courts' application of the “plainly unreasonable” standard. There, the Court considered the effect of mandatory Guidelines on two defendants' sentences. Freddie Booker was convicted of possession with intent to distribute at least fifty grams of crack, which, under the Guidelines, would have resulted in a maximum sentence of twenty-one years and ten months.<sup>39</sup> At sentencing, however, the district court found by a preponderance of the evidence that he had possessed an additional 566 grams of crack and was guilty of obstructing justice, which, under the Guidelines, required the court to increase the defendant's offense level so that the resulting sentencing range was thirty years to life.<sup>40</sup> The court sentenced Booker to the bottom of the range – thirty years.<sup>41</sup> The second defendant, Duncan Fanfan, was convicted of conspiring to distribute and to possess with intent to distribute at least 500 grams of powder cocaine.<sup>42</sup> Under the Guidelines, this amount would have resulted in a sentencing range of five to six years.<sup>43</sup> But, at sentencing, the court found by a preponderance of the evidence that Fanfan was responsible for 2.5 kilograms of cocaine and 261.6 grams of crack, and that he was a leader in the conspiracy.<sup>44</sup> These findings mandated a new Guideline range of fifteen to sixteen years.<sup>45</sup> Nevertheless, the court ignored this range and sentenced him according to the original range.<sup>46</sup>

The issues before the *Booker* Court were, first, whether the mandatory Guidelines system, which required judges to base sentencing minimums and maximums on facts not admitted by the defendant or proven to a jury beyond a reasonable doubt, violated the defendants' Sixth Amendment jury-trial rights,

---

246693, at \*2 (7th Cir. May 12, 1998) (also characterizing “plainly unreasonable” as an “extremely deferential standard”).

36. *United States v. Darby*, 17 F. App'x 6, 6 (1st Cir. 2001).

37. *United States v. Compton*, 47 F. App'x 735, 738 (6th Cir. 2002) (quoting *Marvin*, 135 F.3d at 1136).

38. 543 U.S. 220 (2005).

39. *Id.* at 227.

40. *Id.*

41. *Id.*

42. *Id.* at 228.

43. *Id.*

44. *Id.*

45. *Id.* at 228-29.

46. *Id.*

and second, if the Guidelines did run afoul of the Constitution, whether the Court could or should salvage any of the scheme.<sup>47</sup> The Court answered these questions in two separate opinions.<sup>48</sup> In the substantive opinion, authored by Justice Stevens, the Court concluded that “[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”<sup>49</sup> In a separate remedial opinion written by Justice Breyer, the Court held that the proper way to implement the constitutional holding was to excise 18 U.S.C. § 3553(b)(1), the provision of the Sentencing Guidelines that made its application mandatory, and § 3742(e), the provision that set forth standards of review on appeal, including the *de novo* review standard for sentences that departed from the Guidelines.<sup>50</sup> The Court explained that, instead of applying the *de novo* standard of review found in § 3742(e), appellate courts should apply the “familiar” standard of reasonableness – the same standard that governed Guidelines departures until 2003, when Congress replaced it with the *de novo* standard.<sup>51</sup>

The Court did not explain whether its severing and excising of § 3742(e) affected the “plainly unreasonable” standard of review. Soon after the decision, revocation defendants began asserting on appeal that *Booker*’s reasonableness standard, which they perceived to be less deferential than the “plainly unreasonable” standard, governed following *Booker*’s severance and excision of § 3742(e) because the “plainly unreasonable” standard is found in § 3742(e)(4).<sup>52</sup> In addressing this issue, circuit courts have reached different conclusions. The Eighth, Tenth, and Eleventh Circuits have held that *Booker*’s reasonableness standard is the same as the “plainly unreasonable” standard.<sup>53</sup> The Second and Ninth Circuits have implicitly concluded that the standards are distinct and that *Booker*’s reasonableness standard overrides the “plainly

---

47. *Id.* at 226-27.

48. *Id.* at 227.

49. *Id.* at 244 (Stevens, J.).

50. *Id.* at 245 (Breyer, J.).

51. *Id.* at 260-63.

52. *See, e.g.*, Brief of Appellant at 1-2, No. 05-30135, *United States v. Gable*, 2005 WL 2175353 (9th Cir. June 29, 2005) (“[O]nce the [*Booker*] Court in its Remedy Opinion excised section 3742(e), which included subsections 3742(e)(4)’s standard of ‘plainly unreasonable’ for review of a sentence for which there is no Guideline, the Court is fairly understood as requiring that its announced standard of reasonableness now be applied not only for review of sentences for which there are Guidelines but also to review of sentences for which there are no applicable Guidelines. Thus, the standard of review as to the District Court’s sentence in a revocation hearing is reasonableness.”); Brief for Appellant at 8, No. 05-4495, *United States v. Hackett*, 2005 WL 2044840 (4th Cir. July 25, 2005) (making same argument).

53. *See United States v. Sweeting*, 437 F.3d 1105, 1106 (11th Cir. 2006); *United States v. Tedford*, 405 F.3d 1159, 1161 (10th Cir. 2005); *United States v. Cotton*, 399 F.3d 913, 916 (8th Cir. 2005).



unreasonable” standard.<sup>54</sup> Finally, the Fourth Circuit has agreed that the standards differ but has found that the old “plainly unreasonable” standard survives *Booker*.<sup>55</sup> In dicta, the Sixth Circuit suggested its agreement with the Fourth Circuit’s approach.<sup>56</sup> This section discusses the various approaches in detail, and concludes that the Fourth and Sixth Circuits are correct in suggesting that *Booker* does not affect the “plainly unreasonable” standard.

*A. Is Booker’s Reasonableness Standard the Same as the Plainly Unreasonable Standard?*

Most of the circuits addressing this issue have concluded that § 3742(e)(4)’s “plainly unreasonable” standard is the same as *Booker*’s reasonableness standard.<sup>57</sup> In *United States v. Cotton*,<sup>58</sup> the Eighth Circuit laid out the reasoning behind this approach:

In [*United States v.*] *White Face* we stated: When there is no applicable sentencing guideline, as in the case of a revocation sentence [under 18 U.S.C. § 3742(e)(4)], we review to determine whether the sentence was plainly unreasonable. . . .

. . . .

The Supreme Court has just handed down its opinion in *United States v. Booker*, which vitally affects the standard of review in guidelines cases. Justice Breyer, writing for the court, excised [§ 3742(e)] and prescribed a new standard of review for guidelines cases generally. However, the new standard of review will not change the result in this case, because the new standard is actually *the same as the one we would have used otherwise*. The new standard is review for unreasonableness with regard to § 3553(a). This is the same standard prescribed in § 3742(e)(4). Indeed, the Supreme Court cited *White Face* as an example of the use of the standard.<sup>59</sup>

In *United States v. Tedford*,<sup>60</sup> the Tenth Circuit reached the same conclusion, pointing out that *Booker* also cited one of its supervised release revocation cases, *United States v. Tsosie*,<sup>61</sup> in the same passage as *White Face*.<sup>62</sup> In *United*

54. See *United States v. Miquel*, 444 F.3d 1173, 1176 n.5 (9th Cir. 2006); *United States v. Fleming*, 397 F.3d 95, 99 (2d Cir. 2005).

55. See *United States v. Crudup*, 461 F.3d 433, 437 (4th Cir. 2006).

56. See *United States v. Johnson*, 403 F.3d 813, 816-17 (6th Cir. 2005). The Third and Fifth Circuits have expressly refused to weigh in on the issue. *United States v. Hinson*, 429 F.3d 114, 120 (5th Cir. 2005); *United States v. Rose*, 176 F. App’x 295, 298 (3d Cir. 2006).

57. *Sweeting*, 437 F.3d at 1106 (Eleventh Circuit); *Tedford*, 405 F.3d at 1161 (Tenth Circuit); *Cotton*, 399 F.3d at 916 (Eighth Circuit).

58. 399 F.3d 913 (8th Cir. 2005).

59. *Id.* at 916 (citing *United States v. White Face*, 383 F.3d 733, 738-39 (8th Cir. 2004)) (emphasis added) (citations and footnotes omitted).

60. 405 F.3d 1159 (10th Cir. 2005).

61. *United States v. Tsosie*, 376 F.3d 1210, 1218-19 (10th Cir. 2004) (cited in *United States v. Booker*, 543 U.S. 220, 262 (2004)).

*States v. Sweeting*,<sup>63</sup> the Eleventh Circuit followed suit, adopting the reasoning of *Tedford* and *Cotton*.<sup>64</sup>

In basic terms, these courts concluded that *Booker* equated the “plainly unreasonable” standard with its new reasonableness standard, as evidenced by *Booker*’s citation to *White Face* and *Tsosie* in its discussion of the new reasonableness standard.<sup>65</sup> This approach has surface appeal because even before *Booker*, circuit courts were unsure how to define the “plainly unreasonable” standard.<sup>66</sup> *Tedford*, *Cotton*, and *Sweeting* reach a clear definition of the standard by concluding that it is nothing more than a paraphrase of the normal reasonableness standard.

Despite the benefit of the approach, it simply does not pass muster. A closer look at the *Booker* passage relied on by the courts demonstrates that they misinterpret the reason for Justice Breyer’s citation to *White Face*, *Tsosie*, and other similar cases. That excerpt reads:

[W]e [do not] share the dissenters’ doubts about the practicality of a “reasonableness” standard of review. “Reasonableness” standards are not foreign to sentencing law. The [SRA] has long required their use in important sentencing circumstances – both on review of departures [under 18 U.S.C. § 3742(e)(3)] and on review of sentences imposed where there was no applicable Guideline [under §§ 3742(e)(4)] . . . .<sup>67</sup>

As examples of appellate courts’ general familiarity with these “reasonableness standards” – plural – it then went on to cite cases including *White Face* and *Tsosie* that apply either § 3742(e)(3)’s reasonableness standard or § 3742(e)(4)’s “plainly unreasonable” standard.<sup>68</sup> After proving that courts have time and time again applied various reasonableness standards, the Court then concluded, “That is why we think it fair (and not, in Justice Scalia’s words, a ‘gross exaggeration’) to assume judicial familiarity” with a reasonableness standard like it was asking courts to apply.<sup>69</sup>

It is not just a matter of semantics that the Court referred to reasonableness standards. Instead, it was recognizing a difference between the

62. *Tedford*, 405 F.3d at 1161; see *Booker*, 543 U.S. at 262 (citing *White Face*, 383 F.3d at 737-40).

63. 437 F.3d 1105.

64. *Id.* at 1106-07.

65. *Id.*; *Tedford*, 405 F.3d at 1161; *Cotton*, 399 F.3d at 916.

66. See *United States v. Booker*, 543 U.S. 220, 228 (2005).

67. *Id.* (Breyer, J.).

68. *Id.* at 262-63 (Breyer, J.) (citing *United States v. White Face*, 383 F.3d 733, 737-40 (8th Cir. 2004); *United States v. Tsosie*, 376 F.3d 1210, 1218-19 (10th Cir. 2004); *United States v. Salinas*, 365 F.3d 582, 588-90 (7th Cir. 2004); *United States v. Cook*, 291 F.3d 1297, 1300-02 (11th Cir. 2002); *United States v. Olabanji*, 268 F.3d 636, 637-39 (9th Cir. 2001); *United States v. Ramirez-Rivera*, 241 F.3d 37, 40-41 (1st Cir. 2001)).

69. *Booker*, 543 U.S. at 262-63 (Breyer, J.) (citing *White Face*, 383 F.3d at 737-40; *Tsosie*, 376 F.3d at 1218-19; *Salinas*, 365 F.3d at 588-90; *Cook*, 291 F.3d at 1300-02; *Olabanji*, 268 F.3d at 637-39; *Ramirez-Rivera*, 241 F.3d at 40-41).

“plainly unreasonable” standard in § 3742(e)(4) and the simple reasonableness standard that governed Guideline departures prior to 2003, when Congress amended the statute to provide for *de novo* review of such decisions.<sup>70</sup> Thus, the Eighth, Tenth, and Eleventh Circuits were wrong to assume that, because the Court cited cases from those courts that applied the plainly unreasonable standard, it was equating the plainly unreasonableness standard with the reasonableness standard *Booker* was introducing.

To the contrary, Justice Breyer not only acknowledged the existence of these two reasonableness standards, he specified that it was § 3742(e)(3)’s reasonableness standard, not § 3742(e)(4)’s “plainly unreasonable” standard, that was the template for the new reasonableness standard *Booker* was implementing.<sup>71</sup> In the passage immediately preceding the one recounted above, Justice Breyer explained:

[We] imply a practical standard of review already familiar to appellate courts: review for “unreasonable[ness].”

*Until 2003, § 3742(e) explicitly set forth that standard.* In 2003, Congress modified the pre-existing text, adding a *de novo* standard of review for departures and inserting cross-references to § 3553(b)(1). In light of today’s holding, the reasons for these revisions – to make Guidelines sentencing even more mandatory than it had been – have ceased to be relevant. The pre-2003 text directed appellate courts to review sentences that reflected an applicable Guidelines range for correctness, but to review other sentences – those that fell “outside the applicable Guideline range” – with a view toward determining whether such a sentence “*is unreasonable*, having regard for . . . the factors to be considered in imposing a sentence, as set forth in chapter 227 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).”

In other words, the text told appellate courts to determine whether the sentence “is unreasonable” with regard to § 3553(a). Section 3553(a) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.

. . . [W]e read the statute as implying this appellate review standard – a standard *consistent with appellate sentencing practice during the last two decades*.<sup>72</sup>

Given this reasoning, the Eighth, Tenth, and Eleventh Circuits’ equation of § 3742(e)(4)’s “plainly unreasonable” standard with *Booker*’s new standard,

---

70. *Booker*, 543 U.S. at 261-62.

71. *Id.*

72. *Id.* (first and third emphases added) (third and fourth alterations in original) (citations omitted).

rather than with § 3742(e)(3)'s reasonableness standard, simply makes no sense. Although *Booker* reasons that courts' familiarity with the "plainly unreasonable" standard may assist with their application of the new standard, the opinion does not suggest that the relationship between the two standards goes any deeper. Thus, the approach taken by these courts does not accurately resolve the question of what becomes of the "plainly unreasonable" standard after *Booker*.

*B. Does Booker's Reasonableness Standard Supersede the "Plainly Unreasonable" Standard?*

It is easiest to address the approach of the Second and Ninth Circuits together with the approach suggested by the Fourth and Sixth Circuits, as they are two sides of the same coin. In *United States v. Fleming*,<sup>73</sup> the Second Circuit held that "once the Court . . . excised section 3742(e) . . . [it] is fairly understood as requiring that its announced standard of reasonableness now be applied not only to review of sentences for which there are guidelines but also to review of sentences for which there are no applicable guidelines."<sup>74</sup> In *United States v. Migbel*, the Ninth Circuit adopted *Fleming*'s reasoning without further elaboration.<sup>75</sup> Thus, these courts implicitly acknowledged a difference between the reasonable and plainly unreasonable standards, but concluded that *Booker* intended the former to replace the latter.

The merits of this approach are clear. First, it appears to be wholly supported by *Booker*, which, with its sweeping "severance and excision" of § 3742(e), seemingly erased the phrase "plainly unreasonable" from the vocabulary of appellate courts.<sup>76</sup> Second, it promotes consistency by mandating that a unitary standard of review be applied to all sentencing appeals. Finally, it allows appellate courts to apply the more familiar reasonableness standard instead of the rather "unusual"<sup>77</sup> standard of review of "plainly unreasonable."

In contrast to the Second and Ninth Circuits, the Fourth and Sixth Circuits have reasoned that *Booker* did not replace the plainly unreasonable standard. They based this conclusion on two premises: First, the plainly unreasonable standard exists in parts of § 3742 that *Booker* did not touch, and second, unlike the guidelines that apply to ordinary sentences, Chapter 7 has always been merely advisory and therefore did not violate the Sixth Amendment.<sup>78</sup> These

---

73. 397 F.3d 95 (2d Cir. 2005).

74. *Id.* at 99.

75. 444 F.3d 1173, 1176 n.5 (9th Cir. 2006).

76. See *United States v. Booker*, 543 U.S. 220, 245 (2005) (Breyer, J.).

77. *United States v. Marvin*, 135 F.3d 1129, 1136 (7th Cir. 1998).

78. *United States v. Johnson*, 403 F.3d 813, 816-17 (6th Cir. 2005); *United States v. Diamond*, No. 05-4368, 2005 WL 2764762, at \*1 n.\* (4th Cir. Oct. 16, 2005); *United States v. Murphy*, 133 F. App'x 903, 904 n.\* (4th Cir. 2005).

issues will be addressed in turn.

*1. Does the "Plainly Unreasonable" Standard Survive Given That It Appears in Parts of § 3742 That Booker Did Not Affect?*

As both the Fourth and Sixth Circuits have pointed out, other subsections in § 3742 besides § 3742(e)(4) contain the "plainly unreasonable" standard. In *United States v. Crudup*, the Fourth Circuit reasoned:

Under § 3742(a)(4) – a provision not invalidated by *Booker* – a defendant sentenced for violating supervised release is authorized to appeal only on the ground that his sentence is "plainly unreasonable." We infer from this provision that revocation sentence should be reviewed under this same standard. It would seem incongruous that a defendant limited to asserting that his revocation sentence was "plainly unreasonable" [for jurisdictional purpose] would be allowed to argue that his sentence should be reversed because it is "unreasonable."<sup>79</sup>

Similarly, in *United States v. Johnson*,<sup>80</sup> the Sixth Circuit explained:

While the Second Circuit's interpretation properly attempts to account for the excision of § 3742(e), it fails to account for the fact that *Booker* left sections 3742(a), 3742(b), and 3742(f) on the books, and it fails to account for the fact that (at least as far as our Circuit is concerned) our cases have relied upon both sections 3742(a)(4) and 3742(e)(4) in applying a "plainly unreasonable" standard. While section 3742(e), the standard of review section of the statute, may be gone, sections 3742(a) and 3742(b), which remain, still say that an appeal may not be brought unless the sentence is "plainly unreasonable," and section 3742(f) directs courts to invalidate a "sentence . . . imposed for an offense for which there is no applicable sentencing guideline and [if the sentence] is plainly unreasonable." These sections, by themselves, give us pause about accepting the Second Circuit's approach.<sup>81</sup>

Both *Crudup* and *Johnson* hit upon the same key issue: whether the "plainly unreasonable" standard continues to apply given that it appears not just in § 3742(e)(4), but also in § 3742(a) (authorizing a defendant to appeal his sentence if it "was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable"); § 3742(b) (authorizing a government appeal on the same grounds); and § 3742(f) (instructing that, if the sentence the appellate court is reviewing "was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable," the court "shall state specific reasons for its conclusions, set aside the sentence, and remand the case for further sentencing proceedings").<sup>82</sup> Other provisions in § 3742(e) also

---

79. *United States v. Crudup*, 461 F.3d 433, 437 (4th Cir. 2006).

80. 403 F.3d 813.

81. *Id.* at 816-17 (ellipsis in original).

82. 18 U.S.C. § 3742(a), (b)(4), (f)(2).

appear in these other subsections: § 3742(e)(1) (allowing review of sentences imposed “in violation of law”) and § 3742(e)(2) (allowing review of sentences resulting from an incorrect application of the Guidelines) are repeated in §§ 3742(a), (b), and (f), and § 3742(e)(3) (allowing review of sentences outside the applicable guideline range where the district court failed to provide the required statement of reasons, where or the departure is based on an impermissible factor or is to an unreasonable degree) is repeated in § 3742(f).<sup>83</sup>

Significantly, the only part of § 3742(e) that does not appear anywhere else in the statute is the provision Congress appended to the bottom of the subsection in 2003 that requires *de novo* review of departures.<sup>84</sup> Indeed, prior to the congressional amendments to § 3742(e) that added the *de novo* review provision, the Supreme Court recognized that “§ 3742(e) simply mirror[ed] the four separate grounds for appeal available to a defendant, § 3742(a), and to the Government, § 3742(b).”<sup>85</sup> It was this addition of the *de novo* standard that effectively set § 3742(e) apart from the other subsections in the statute.

Since *Booker*, appellate courts have continued to apply the other standards that are found in both § 3742(a) and (e), including §§ 3742(a)(1), (e)(1), which provide for appellate review of sentences imposed “in violation of law,”<sup>86</sup> and § 3742(a)(2)/(e)(2), which allow appellate review of sentences resulting from an incorrect application of the Guidelines.<sup>87</sup> The unstated reason why courts have continued to apply § 3742(a)(1)/(e)(1) and § 3742(a)(2)/(e)(2) post-*Booker*, while hesitating to apply § 3742(a)(4)/(e)(4), is that the latter contains something that more closely resembles a standard of review, and therefore appears to conflict more readily with *Booker*’s reasonableness standard. Nevertheless, because *Booker* did not eliminate the references to “plainly unreasonable” in §§ 3742(a), (b), and (f), it seems clear that the “plainly unreasonable” standard does indeed survive *Booker*.

This textual analysis is not the only evidence that the Court’s intention in

83. *Id.*

84. 18 U.S.C. § 3742.

85. *Williams v. United States*, 503 U.S. 193, 211 n.5 (1992).

86. Many courts have actually found that § 3742(a)(1) provides them with jurisdiction to review sentences for *Booker* reasonableness. *See, e.g., United States v. Dorcely*, 454 F.3d 366, 373 (D.C. Cir. 2006) (“The *Booker* Court directed the circuit courts . . . to review sentences for reasonableness, but it did not expressly describe the jurisdictional basis there for. Section 3742(a)(1) . . . provides us with jurisdiction to review a sentence that ‘was imposed in violation of law’ and we believe our jurisdiction to review for reasonableness must come from this provision.”) (citations omitted); *United States v. Fernandez*, 443 F.3d 19, 25-26 (2d Cir. 2006) (same); *United States v. Martinez*, 434 F.3d 1318, 1322 (11th Cir. 2006) (same); *United States v. Frokjer*, 415 F.3d 865, 875 & n.3 (8th Cir. 2005) (same).

87. *See, e.g., United States v. Abrogar*, 459 F.3d 430, 433 (3d Cir. 2006) (“We exercise appellate review under . . . 18 U.S.C. § 3742(a)(2), granting U.S. courts of appeals jurisdiction to review sentences ‘imposed as a result of an incorrect application of the sentencing guidelines.’ We review the District Court’s interpretation of the Guidelines *de novo*.”) (citations omitted); *United States v. Owens*, 447 F.3d 1345, 1346 (11th Cir. 2006) (same); *United States v. Mashek*, 406 F.3d 1012, 1017 (8th Cir. 2005) (same).

severing and excising § 3742(e) was to erase only the *de novo* review provision in § 3742(e). Indeed, Justice Breyer's Remedy Opinion explicitly stated that the Court was focused on eradicating the *de novo* standard. First, it reasoned: "[W]e must sever and excise two specific statutory provisions: the provision that requires sentencing courts to impose a sentence within the applicable Guideline range (in the absence of circumstances that justify a departure), *see* 18 U.S.C. § 3553(b)(1) . . . , and the provision that sets forth standards of review on appeal, *including de novo review of departures from the applicable Guidelines range, see* § 3742(e) . . . ." <sup>88</sup> Later, it explained that the Court chose to sever and excise § 3742(e) because the 2003 amendments to the section, which added *de novo* review of departures, "ma[d]e Guidelines sentencing even more mandatory than it had been." <sup>89</sup> Because the Court severed and excised § 3553(b)(1), the provision making the Guidelines mandatory, the amendment adding the *de novo* review standard "ceased to be relevant." <sup>90</sup>

Justice Stevens's dissent further confirmed that the sole target within § 3742(e) was the *de novo* standard: "The majority concludes that our constitutional holding requires the invalidation of §§ 3553(b)(1) and 3742(e). The first of these sections uses the word 'shall' to make the substantive provisions of the Guidelines mandatory. *The second authorizes de novo review of sentencing judges' applications of relevant Guidelines provisions.*" <sup>91</sup>

Thus, both of the structure of § 3742 and *Booker* itself suggest that, in actuality, the only part of § 3742(e) the Court sought to sever and excise was § 3742(e)'s *de novo* review provision – not § 3742(e)(4)'s "plainly unreasonable" standard or any of the other numbered subparts of § 3742(e). This analysis supports the Fourth and Sixth Circuits' conclusion that *Booker* did not intend to eliminate the "plainly unreasonable" standard.

## 2. Does Booker's Holding Apply to Postrevocation Sentences Even Though the Guidelines for Such Sentences Have Always Been Advisory?

A second reason the Fourth and Sixth Circuits doubted that *Booker*'s reasonableness standard applied to postrevocation sentences was that, as the *Johnson* court explained, "[W]e are not dealing with the traditional *Booker* problem (mandatory Sentencing Guidelines), but with a form of sentencing (resentencing after violations of supervised release) that was discretionary

88. *United States v. Booker*, 543 U.S. 220, 259 (2005) (Breyer, J.) (emphasis added).

89. *Id.* at 261 (Breyer, J.).

90. *Id.*

91. *Id.* at 281-82 (Stevens, J., dissenting) (emphasis added). Of course, one might argue that, if the Court had truly intended to sever and excise only the *de novo* standard within § 3742(e), it could have easily said so. However, the *de novo* standard was not contained in a specific subsection within § 3742(e), but instead was simply appended to a paragraph at the end of the section. *See* § 3742(e). Therefore, aside from stating that it was excising only "the last paragraph of section 3742(e)," Justice Breyer's statement that the Court was excising § 3742(e) was the most precise way of excising the *de novo* standard.

before *Booker* and is discretionary after it.”<sup>92</sup> The Seventh Circuit echoed the same concern in *United States v. Rush*, an unpublished decision.<sup>93</sup> Expanding upon this point, *Crudup* reasoned:

The fact that the Sentencing Commission chose to promulgate less precise, nonbinding policy statements and to focus punishment on violations of a court order rather than on the particular conduct giving rise to the revocation, clearly suggests that the Sentencing Commission intended to give district courts substantial latitude in devising revocation sentences for those defendants who violate a district court’s orders governing their conduct during supervised release.<sup>94</sup>

The distinction that *Crudup* and *Johnson* draw between postrevocation sentencing and ordinary sentencing is important: Although the Court termed its holding a “severance and excision” of § 3742(e),<sup>95</sup> it never stated that it was declaring the provision invalid in cases other than appeals from standard Guideline sentences.<sup>96</sup> As these opinions explain, critical differences exist between ordinary sentences and those intended as sanctions for violations of supervised release.<sup>97</sup> Thus, the question becomes whether the *Booker* Court’s severance of § 3742(e) should apply to postrevocation sentencing in addition to standard sentencing.

*Booker* itself suggests the answer. In discussing severability analysis in general, the Court cited a passage from Professor Adrian Vermeule’s law review article, *Saving Constructions*,<sup>98</sup> which recognizes that courts can sever applications of a statute that are deemed unconstitutional or unacceptable from applications that are deemed legally valid, and can continue to apply the latter.<sup>99</sup> In the passage, Vermeule writes:

Although eminent jurists have occasionally suggested that a statute held unconstitutional in some applications should be void altogether, longstanding doctrine forecloses this view. Rather, courts presume that the constitutionally valid applications of statutes should be severed from any constitutionally invalid applications, leaving the valid applications in force, unless Congress would not have intended the valid applications to stand alone. Although all forms of severability are triggered only by a ruling on the merits of a constitutional question, severability, like avoidance, is more than one operation.<sup>100</sup>

---

92. *Johnson*, 403 F.3d at 816-17 (citations omitted).

93. 132 F. App’x 54, 56 (7th Cir. 2005) (“It is not clear that *Booker* requires any change in our evaluation of prison terms imposed upon revocation of supervised release, since the revocation policy statements have always been advisory only.”).

94. *United States v. Crudup*, 461 F.3d 433, 437-38 (4th Cir. 2006).

95. *United States v. Booker*, 543 U.S. 220, 245 (2005) (Breyer, J.).

96. *See Crudup*, 461 F.3d at 437-38; *Johnson*, 403 F.3d at 816-17.

97. *See Crudup*, 461 F.3d at 437-38; *Johnson*, 403 F.3d at 816-17.

98. Adrian Vermeule, *Saving Constructions*, 85 GEO. L.J. 1945 (1997).

99. *Id.* at 1950 & n.26 (cited in *Booker*, 543 U.S. at 247).

100. *Id.* at 1950 (footnotes omitted).



In a footnote, Vermeule adds:

There is a common misconception that severability analysis refers only to the severance of provisions or subsections enumerated or labeled independently in the official text of the statute. In fact, however, severability problems arise not only with respect to different sections, clauses or provisions of a statute, but *also with respect to applications of a particular statutory provision when some (but not all) of those applications are unconstitutional*.<sup>101</sup>

Unfortunately, the *Booker* Court did not take up the question whether it could sever § 3742(e)'s application to ordinary sentencing appeals (which it deemed unconstitutional and therefore unacceptable) from its application to postrevocation sentencing appeals. However, it is too simplistic and mechanical to assume, as did the Second and Ninth Circuits, that the Court's invalidation of § 3742(e) extends to the postrevocation context just because the Court used the words "severed" and "excised" in the context of ordinary sentencing appeals.<sup>102</sup> On the contrary, applying the same criteria used by the Court to invalidate §§ 3553(a) and 3742(e) in the context of ordinary sentences reveals that § 3742(e)'s "plainly unreasonable" standard of review remains valid for postrevocation sentencing appeals. *Booker* reasoned that, in applying severability analysis, it "must retain those portions of the Act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress's basic objectives in enacting the statute."<sup>103</sup> It then concluded that, as applied to ordinary Guideline sentences, the criteria required it to invalidate §§ 3553(b) and 3742(e).<sup>104</sup> However, given *Booker*'s instruction that courts must "refrain from invalidating more of the statute than is necessary,"<sup>105</sup> if § 3742(e)'s application to postrevocation sentences meets these three criteria, courts reviewing postrevocation sentences should continue to apply § 3742(e).

*a. Section 3742(e)'s Application to Postrevocation Sentences Is Constitutional and Capable of Functioning Independently*

Applying § 3742(e) to postrevocation sentencing appeals meets the first criterion because § 3742(e) is clearly constitutional in the context of postrevocation appeals. This is so because the constitutional provision at issue in *Booker*, the Sixth Amendment jury-trial right,<sup>106</sup> does not apply in revocation

101. *Id.* at n.26 (emphasis added).

102. *See Booker*, 543 U.S. at 245 (Breyer, J.).

103. *Id.* at 258-59 (internal quotation marks omitted).

104. *Id.* at 259.

105. *Id.* at 258.

106. *Id.* at 248 (Breyer, J.) ("[T]he constitutional jury trial requirement is not compatible with the Act as written and . . . some severance and excision are necessary.").

proceedings. The Sixth Amendment applies only in “criminal prosecutions,”<sup>107</sup> and revocation proceedings are not criminal in nature.<sup>108</sup> Instead, the Supreme Court has explained that revocation proceedings “arise[] after the end of the criminal prosecution, including imposition of sentence.”<sup>109</sup> Because of this, “there are critical differences between criminal trials and probation or parole revocation hearings.”<sup>110</sup> At the time of the revocation proceeding, the defendant has already been

found . . . guilty of a crime against the people. That finding justifies imposing extensive restrictions on the individual’s liberty. Given the previous conviction and the proper imposition of conditions [of release], the [government] has an overwhelming interest in being able to return the individual to imprisonment without the burden of a new adversary criminal trial if in fact he has failed to abide by [his release conditions].<sup>111</sup>

On this basis, courts have held that defendants are not entitled to trial by jury or to proof beyond a reasonable doubt at a revocation hearing.<sup>112</sup>

Even if the Sixth Amendment applied to revocation proceedings, the other half of the problem at issue in *Booker*, mandatory Guidelines, has never existed in the context of supervised release and probation revocation proceedings.<sup>113</sup> As previously explained, Chapter 7 of the Guidelines Manual contains only policy statements which district courts are encouraged – but not required – to apply in rendering a decision.<sup>114</sup> This advisory Guidelines scheme conforms to the constitutional system *Booker* envisioned.<sup>115</sup> Because the Guidelines that

107. U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.”).

108. See *Morrissey v. Brewer*, 408 U.S. 471, 480 (1972) (“[T]he revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations.”); *United States v. Tipples*, 39 F.3d 88, 89 (5th Cir. 1994) (reasoning that revocation proceedings “are not stages of a criminal prosecution”); *United States v. Marmolejo*, 915 F.2d 981, 982 (5th Cir. 1990) (“Supervised release revocation hearings are not criminal proceedings.”); *Maddox v. Elzie*, 238 F.3d 437, 445 (D.C. Cir. 2001) (“[P]arole revocation is not the continuation of a criminal trial but a separate administrative proceeding at which the parolee does not possess the same rights as a criminal defendant at trial.”).

109. *Morrissey*, 408 U.S. at 480.

110. *Gagnon v. Scarpelli*, 411 U.S. 778, 788-89 (1973).

111. *Morrissey*, 408 U.S. at 483.

112. See, e.g., *United States v. Hinson*, 429 F.3d 114, 119 (5th Cir. 2005).

113. U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A, intro. comment. (2005) (explaining that Chapter 7 is advisory only); see *United States v. Booker*, 543 U.S. 220, 233 (2005) (reasoning that the Guidelines pose Sixth Amendment concerns because they “are not advisory; they are mandatory and binding on all judges”).

114. See, e.g., *United States v. Escamilla*, 70 F.3d 835, 835 (5th Cir. 1995).

115. See *United States v. Coleman*, 404 F.3d 1103, 1104 (8th Cir. 2005) (“[T]he advisory sentencing guidelines scheme that *Booker* creates is precisely what prevailed before *Booker* with respect to fixing penalties for violating the kind of release conditions that Mr. Coleman violated by not obtaining employment.”) (citation omitted); see *Booker*, 543 U.S. at 233 (“If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than

apply to postrevocation sentences are “merely advisory provisions that recommend[], rather than require[], the selection of particular sentences,” such sentences have never posed the mandatory Guidelines problem identified in *Booker*.<sup>116</sup>

The second requirement, that § 3742(e)’s application to postrevocation sentences be capable of functioning independently from its unconstitutional applications, is also satisfied. The only part of § 3742(e) that is relevant to postrevocation sentences is the “plainly unreasonable” standard of review in subsection (e)(4).<sup>117</sup> That subsection applies only to offenses for which there are no Guidelines,<sup>118</sup> and it functioned independent of the mandatory Guidelines’ standard of review prior to *Booker*.

*b. Applying § 3742(e)(4) to Postrevocation Appeals Is Consistent with Congress’s Basic Objectives*

Third, application of the standard is consistent with Congress’s basic objectives in enacting § 3742(e) and the rest of the SRA. In § 3742(e), Congress distinguished between ordinary Guidelines sentences and sentences for offenses to which the Guidelines do not apply.<sup>119</sup> From the time of its enactment until the 2003 amendments, § 3742(e) required appellate courts to judge departures from Guideline sentences for reasonableness, while reviewing non-Guideline sentences to determine whether they were “plainly

---

required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment. Indeed, everyone agrees that the constitutional issues presented by these cases would have been avoided entirely if Congress had omitted from the [Sentencing Reform Act] the provisions that make the Guidelines binding on district judges.”) (citations omitted).

116. See *Booker*, 543 U.S. at 233. In *United States v. Crudup*, 461 F.3d 433 (4th Cir. 2006), however, the Fourth Circuit suggested that it could not “state with certainty” that *Booker* did not apply to postrevocation sentences because the Supreme Court has never ruled on whether Chapter 7 is advisory, and it has, in the past, found a different policy statement binding. *Id.* at 436 n.3 (citing *Williams v. United States*, 508 U.S. 193, 201 (1992) (finding the prohibition in USSG § 4A1.2 that a court cannot base a departure on a prior arrest record binding upon courts)). However, this ignores that, unlike other policy statements such as USSG § 4A1.2, Chapter 7 specifically instructs that it is “advisory.” See *United States v. Headrick*, 963 F.2d 777, 781 (5th Cir. 1992) (acknowledging that each policy statement in the Guidelines should be analyzed individually to determine if it is advisory or mandatory, but finding the policy statements in Chapter 7 advisory because the introduction to that Chapter states explicitly that they are “advisory”). Indeed, in light of this clear language in Chapter 7, and the fact that all ten circuit courts that have considered the issue have found Chapter 7 advisory, see *United States v. Davis*, 53 F.3d 638, 640-41 n.9 (4th Cir. 1995) (collecting cases), courts should assume that the *Booker* Court did *not* intend to group the Guidelines relating to postrevocation sentences together with those relating to ordinary sentences for purposes of its Sixth Amendment analysis absent an explicit statement to the contrary.

117. 18 U.S.C. § 3742(e)(4) (2003).

118. *Id.*

119. See *id.*

unreasonable.”<sup>120</sup> This was not accidental. Instead, it reflects Congress’s policy-driven determination that offenses for which the Sentencing Commission declined to formulate Guidelines were, as a category, likely to be relatively individualized and fact-intensive, and therefore less capable of falling into established sentencing ranges. For example, two types of non-Guidelines offenses are criminal contempt and release revocations.<sup>121</sup> In both instances, the Sentencing Commission has explicitly declined to promulgate Guidelines because these categories of offenses potentially embrace an exceptionally broad range of conduct.<sup>122</sup> Because § 3742(e) has always distinguished between Guidelines and non-Guidelines offenses, and, through the “plainly unreasonable” standard of review, has allowed district courts more discretion in sentencing defendants who have committed non-Guidelines offenses, it appears that Congress would have intended *Booker*’s reasonableness and § 3742(e)(4)’s “plainly unreasonable” standards to coexist in the post-*Booker* sentencing regime.

In sum, the Fourth and Sixth Circuits reached the right conclusion in finding that the “plainly unreasonable” standard survives *Booker*. First, both the structure of § 3742 and *Booker* itself suggest that the Court’s target in severing and excising § 3742(e) was eliminating the *de novo* standard of review Congress added to the subsection in 2003. Second, even if *Booker* did intend to sever and excise the entirety of § 3742(e) in the context of ordinary sentencing appeals, application of severability analysis reveals that it is both constitutional and faithful to congressional intent for appellate courts to continue applying the “plainly unreasonable” standard to non-Guidelines sentences after *Booker*.

#### IV. POTENTIAL CRITICISMS OF ALLOWING THE “PLAINLY UNREASONABLE” STANDARD TO SURVIVE

Although the *Johnson* and *Crudup* courts’ approach appears to be the legally correct one, their approach has potential shortfalls. First, one might argue that it does not make sense for judges to have more discretion in sentencing postrevocation defendants than in sentencing ordinary defendants,

120. 18 U.S.C. § 3742(e) (1994).

121. See U.S. SENTENCING GUIDELINES MANUAL § 2J1.1, comment (n.1) (2005) (explaining that there are no Guidelines for contempt); *United States v. Cefalu*, 85 F.3d 964, 966 (2d Cir. 1996) (same); *United States v. Underwood*, 880 F.2d 612, 619 (1st Cir. 1989) (same).

122. See U.S. SENTENCING GUIDELINES MANUAL § 2J1.1, comment (n.1) (2005) (“Because misconduct constituting contempt varies significantly and the nature of the contemptuous conduct, the circumstances under which the contempt was committed, the effect the misconduct had on the administration of justice, and the need to vindicate the authority of the court are highly context-dependent, the Commission has not provided a specific Guideline for this offense.”); U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A(3)(b) (2005) (“Given the relatively narrow ranges of incarceration available in many cases, combined with the potential difficulty in obtaining information necessary to determine specific offense characteristics, the Commission felt that it was undesirable at this time to develop guidelines that attempt to distinguish, in detail, the wide variety of behavior that can lead to revocation.”).

because, after *Booker*, advisory Guidelines apply to both categories of defendants. However, this criticism fails to take account of the difference between the Guidelines governing ordinary sentences and those governing postrevocation sentences. As explained earlier, the Chapter 7 policy statements differ from the Guidelines that apply to ordinary sentences. The policy statements are brief and rudimentary, and the Commission has explained that it did not design them to take account of the myriad individual factors that could warrant a higher or lower postrevocation sentence, such as the impact the violations had upon the defendant's victims or the premeditation and willfulness of the violations.<sup>123</sup> Moreover, the Commission has stated explicitly that it chose advisory policy statements, rather than mandatory Guidelines, to govern postrevocation sentences to "provide[] greater flexibility to . . . the courts" in postrevocation sentencing.<sup>124</sup> For these reasons, post-*Booker*, district courts should still be allowed more discretion in meting out a sentence in a revocation proceeding than in meting out a sentence for a traditional Guideline offense.

Additionally, one might question whether allowing district courts greater discretion in postrevocation sentencing could create the danger of unwarranted sentencing disparities. However, yielding courts more discretion in this context poses much less of a risk of sentencing disparities than it would in the ordinary sentencing context because of the low statutory ceilings on most postrevocation sentences. The vast majority of postrevocation sentences are for violations of supervised release.<sup>125</sup> Terms of imprisonment after revocation of supervised release are limited to five years for a Class A felony, three years for a Class B felony, two years for a Class C or D felony, and one year for any other case.<sup>126</sup> The Commission noted that these "narrow ranges" influenced its decision to enact broad policy statements instead of detailed Guidelines that would have "delineate[d] with great particularity the gradations of conduct leading to revocation."<sup>127</sup>

---

123. See U.S. SENTENCING GUIDELINES MANUAL Ch. 7, Pt. A (2005) ("[A]lthough the Commission found desirable several aspects of [an option] that provided for a detailed revocation guideline system similar to that applied at the initial sentencing, extensive testing proved it to be impractical. In particular, with regard to new criminal conduct that constituted a violation of state or local law, working groups . . . noted that it would be difficult in many instances for the court or the parties to obtain the information necessary to apply properly the guidelines to this new conduct. The potential unavailability of information and witnesses necessary for a determination of specific offense characteristics or other guideline adjustments could create questions about the accuracy of factual findings concerning the existence of those factors.").

124. *Id.*

125. According to a Westlaw search of published and unpublished circuit court cases from 2005, 72 defendants appealed supervised release revocation sentences on the basis that they were unreasonable or plainly unreasonable, while only nine defendants appealed their probation revocation sentences on those grounds.

126. 18 U.S.C. § 3583(e)(3) (2002).

127. U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A (2005).

Finally, the argument could be made that allowing the “plainly unreasonable” standard of review to stand does not square with the spirit of *Booker*, which some could read as attempting to create an egalitarian system by which all sentences are governed by advisory Guidelines and are judged by the same standard of review on appeal. Those who might argue this have missed *Booker*’s message: District courts should be allowed *more* discretion in making sentencing determinations, not less.<sup>128</sup> As *Crudup* reasoned:

It would be an odd result if *Booker* were interpreted to reduce the level of discretion district courts have always had to devise revocation sentences under policy statements that have uniformly been deemed non-binding while giving district courts more discretion to impose original sentences under guidelines that were deemed binding until *Booker*. Such a reading of *Booker* would place the loose, flexible grid system envisioned by the Sentencing Commission for revocation sentences on the same level as the precise guideline system devised for original sentences.<sup>129</sup>

Put simply, limiting a district court’s review of postrevocation sentences by reducing the standard from “plainly unreasonable” to reasonableness contradicts *Booker*’s purpose – to enlarge sentencing courts’ discretion – and ignores the differences in structure between the Chapter 7 policy statements and the ordinary Guidelines.

#### V. DEFINING THE “PLAINLY UNREASONABLE” STANDARD

This analysis leads to one conclusion: Circuit courts should continue to apply the “plainly unreasonable” standard after *Booker*. However, the practical implications of this result are more elusive. Most prominent in appellate judges’ minds may be the question whether applying the “plainly unreasonable” standard would actually lead to a different outcome in a given case than would applying *Booker*’s reasonableness standard.

The answer is yes, in some cases. Congress believed there was a difference between the two standards; otherwise, it would not have included both a reasonableness standard and a “plainly unreasonable” standard in § 3742(e) prior to the 2003 amendments. By juxtaposing the two, Congress clearly intended the “plainly unreasonable” standard of review to be more deferential than the ordinary reasonableness standard. As the *Crudup* court reasoned in finding that there was “a difference between the unreasonableness and plainly unreasonable standard[s]”:

---

128. See, e.g., *United States v. Melendez-Torres*, 420 F.3d 45, 50 (1st Cir. 2005) (“*Booker* . . . has . . . made the Sentencing Guidelines advisory, giving district courts substantially more discretion in sentencing above or below the Guideline range.”); *United States v. Trujillo-Terrazas*, 405 F.3d 814, 819 (10th Cir. 2005) (“After *Booker*, district courts . . . now have more discretion to tailor sentences to the individual circumstances of a defendant.”).

129. *United States v. Crudup*, 461 F.3d 433, 439 n.9 (4th Cir. 2006).

Congress used both terms – “unreasonable” and “plainly unreasonable” – in [the pre-2003 version of] § 3742(e) . . . . Because there is no indication that Congress intended the word “plainly” to be surplusage, the best interpretation of these two terms in their context is that they are not coterminous. Congress clearly intended the word “plainly” to modify “unreasonable” in some way.<sup>130</sup>

In other words, it is a recognized canon of statutory interpretation that a court must give effect to every word of a statute unless giving effect would be repugnant to the remainder of the statute.<sup>131</sup> This requires that courts treat the “plainly unreasonable” standard differently from the ordinary reasonableness standard in the pre-2003 version of § 3742(e), which *Booker* held now applies to ordinary sentencing appeals.

How much the standards differ is less clear. Circuit courts’ previous attempts to define the standard have proven difficult.<sup>132</sup> Most recently, *Crudup* reasoned that determining whether a sentence is “plainly unreasonable” requires, first, that the court analyze whether the sentence is “reasonable.”<sup>133</sup> If the sentence is reasonable, clearly, it cannot be “plainly unreasonable.”<sup>134</sup> If, however, the court concludes that the sentence is unreasonable, it must then ask whether it is plainly so, “relying on the definition of ‘plain’ [used in] ‘plain’ error analysis.”<sup>135</sup> This definition provides that an error is plain if it is “clear” or “obvious.”<sup>136</sup> Unfortunately, the court did not give any examples of what such a clear or obvious error would be in the context of postrevocation sentencing.<sup>137</sup> Instead, it found that the sentence was not unreasonable and therefore did not need to decide whether it was “plainly” unreasonable.<sup>138</sup>

Looking to pre-*Booker* cases, the best definition of “plainly unreasonable” comes from *United States v. Godson*,<sup>139</sup> an unpublished opinion in which the Third Circuit sought to define the standard by looking at how prior panels had applied it. Based on the court’s survey of cases, it found that the “plainly unreasonable” standard mandates that an appellate court affirm a postrevocation sentence if the record shows that the district court (1) considered the recommended sentencing range in Chapter 7 of the Guidelines; (2) gave reasons for the sentence (or the reasons were otherwise clear from the record) that related to the § 3553(a) sentencing factors; and (3) the sentence

---

130. *Id.*

131. *See* *Chickasaw Nation v. United States*, 534 U.S. 84, 85 (2001) (cited in *Crudup*, 461 F.3d at 438).

132. *See* *United States v. Booker*, 543 U.S. 220, 228 (2005).

133. *Crudup*, 461 F.3d at 438.

134. *Id.* at 438-39.

135. *Id.* at 439.

136. *Id.*

137. *See id.*

138. *Id.*

139. 74 F. App’x 210, 216 (3d Cir. 2003).

was within the statutory maximum.<sup>140</sup> At least two other circuits have applied similar criteria in determining whether a sentence is “plainly unreasonable.”<sup>141</sup> Indeed, it appears that all of the circuit courts have been de facto applying these criteria all along: A review of cases in which defendants have appealed their postrevocation sentences shows that no appellate court has ever applied the “plainly unreasonable” standard to vacate a sentence within the statutory maximum, where the district court considered the correctly calculated the Chapter 7 advisory Guideline range and the § 3553(a) sentencing factors.<sup>142</sup> Given the low statutory maximums governing most postrevocation sentences, and the fact that Congress intended such sentences to be judged by a standard of review even more deferential than reasonableness, these criteria appear appropriate.

These requirements are not inflexible, and do not exclude from the realm of “plainly unreasonable” a case in which, for example, a district court sentences a defendant to the statutory maximum, gives no reasons for the decision, and the appellate court can find no evidence in the record justifying the sentence. However, by requiring affirmance in all but the most extreme cases, these criteria would go far in creating a consistent approach to appellate

140. *Id.*

141. *See, e.g.,* *United States v. Offet*, 4 F. App’x 266, 268-69 (6th Cir. 2001) (reasoning that, in reviewing a postrevocation sentence, the court considers “(1) whether the sentencing court considered the policy statements in the guidelines; (2) whether the sentencing court considered the relevant statutory factors; and (3) whether the sentence imposed exceeds the statutory maximum,” and concluding that because the district court considered the policy statements and relevant factors, and the sentence did not exceed the statutory maximum, the sentence was not plainly unreasonable); *United States v. Curtis*, 192 F.3d 126, 126 (5th Cir. 1999) (“[W]e have held that a sentence handed down subsequent to revocation of probation was not unreasonable where the sentence was within the statutory range of punishment for [the defendant’s] offense of conviction. Likewise, the 45-month sentence handed down by the district court was within the statutory range of punishment for Pena’s offense of conspiracy to commit bank fraud. Accordingly, we find that the sentence handed down by the district court is not plainly unreasonable.”) (citations and internal quotation marks omitted).

142. *Cf. United States v. Tschebaum*, 306 F.3d 540, 544-45 (8th Cir. 2002) (vacating the defendant’s postrevocation sentence where the court did not consider the sentencing factors in section 3553(a)); *United States v. McClellan*, 164 F.3d 308, 309-11 (6th Cir. 1999) (vacating the defendant’s sentence and remanding for resentencing where the court imposed a postrevocation sentence above the range recommended in Chapter 7 but provided no reasons for the sentence or discussion of the section 3553(a) statutory factors); *United States v. Sweeney*, 90 F.3d 55, 57-58 (2d Cir. 1996) (finding the sentence plainly unreasonable because the district court believed the Chapter 7 Guidelines were mandatory, not advisory). In the context of probation revocation sentences, an additional facet should be added to the “plainly unreasonable” analysis. As previously explained, courts meting out such sentences have the power to sentence defendants up to the statutory maximum allowed on the original offense. In *United States v. Albright*, 67 F. App’x 751 (3d Cir. 2003), the Third Circuit held a sentence plainly unreasonable when the district court consulted Chapter 7 but nevertheless based the defendant’s sentence on the Guideline range applicable to his original offense, which the court had erroneously calculated. *Id.* at 756-57. The appellate court held that while the district court was free to consult the original Guideline range, as well as the Chapter 7 range, it could not base the defendant’s sentence on an inaccurately calculated original range. *Id.*



evaluation of postrevocation sentences.

## VI. CONCLUSION

Contrary to the conclusions of most of the courts that have decided this issue, *Booker* does not impact the “plainly unreasonable” standard of review traditionally applied to postrevocation sentencing appeals. Although the possibility of replacing the rather “unusual”<sup>143</sup> “plainly unreasonable” standard with a more familiar reasonableness standard is understandably alluring to these courts, *Booker* provides little support for such a result. To do so runs against Congress’s intent as evidenced by its juxtaposition of the reasonableness and “plainly unreasonable” standards of review in the pre-2003 version of § 3742(e). Moreover, it overlooks the fact that courts can easily sever § 3742(e)’s application to postrevocation sentences from its other applications and therefore salvage the “plainly unreasonable” standard for future use. Instead of eradicating the standard, circuit courts should devote themselves to more thoroughly defining it, so that they can apply it uniformly in the future. By interpreting it to require affirmance if a district court considers the statutory sentencing factors and Chapter 7 policy statements and thereafter exercises its discretion to sentence the defendant within the statutory maximum, appellate courts can transform the “plainly unreasonable” standard into a concrete and usable concept capable of consistent application.

---

143. United States v. Marvin, 135 F.3d 1129, 1136 (7th Cir. 1998).

