"*YOUR HONOR, MAY I HAVE THAT IN WRITING*?" A PROPOSED RESPONSE TO VIOLATIONS OF THE FEDERAL SENTENCING WRITTEN REASONS REQUIREMENT

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INTRODUCTION

A disturbing trend has emerged in our federal courts.[1] District judges are ignoring the statutory mandate to state in writing specific reasons for deviating from the range recommended by the Federal Sentencing Guidelines.[2] Rather than vacating these out-of-range sentences, U.S. Courts of Appeals are affirming the sentences despite the fact that they are imposed in violation of law.[3] This article proposes a solution to this problem.[4]

In the wake of *United States v. Booker*, when the Supreme Court decided the Sentencing Guidelines were no longer mandatory, lower courts struggled with a host of unresolved issues.[5] In *United States v. Crosby*, the Court of Appeals for the Second Circuit clarified one requirement that survived the *Booker* overhaul: the statutory requirement that a district court provide a statement of reasons to justify a sentence.[6] The applicable Sentencing Reform Act provision requires sentencing courts, at the time of sentencing, to state in open court the reasons for imposing a particular sentence.[7] For sentences outside the recommended range, there is an additional requirement: The district court must state in writing the specific reasons for deviating from the Guidelines' recommended range (the written reasons requirement).[8]

In Part I, this article explores the historical and legal context for the written reasons requirement.[9] Part I.A tracks the evolution of federal sentencing law.[10]

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1. *See infra* Part II.
2. 18 U.S.C. § 3553(c)(2) (2006).
3. *See infra* Part II.A.1.
4. *See infra* Part III.A-B.
5. 543 U.S. 220, 246 (2005).
6. 397 F.3d 103, 116 (2d Cir. 2005). *See also* Gall v. United States, 552 U.S. 38, 51 (2007); United States v. Jones, 460 F.3d 191, 196 (2d Cir. 2006); United States v. Lewis, 424 F.3d 239, 244 (2d Cir. 2005).
7. 18 U.S.C. § 3553(c) (2006).
8. 18 U.S.C. § 3553(c)(2).
9. *See infra* Part I.

Next, Part I.B outlines the reasonableness review of sentences that *Booker* established and distinguishes between substantive and procedural reasonableness.[11] The written reasons requirement is a component of procedural reasonableness.[12] Part I.C illustrates how revocation sentencing is distinguished from original sentencing and provides general background on probation and supervised release.[13]

Part II explores two circuit splits surrounding the written reasons requirement.[14] The first circuit split, explored in Part II.A, concerns whether a violation of the written reasons requirement should be an independent cause to vacate the sentence.[15] A majority of circuits affirm out-of-range sentences even when the district court violated the written reasons requirement, if the appellate court is able to determine the sentence is "reasonable" based on the district judge's statements on the record.[16] Surprisingly, appellate courts following the majority approach impose lax standards of specificity for the oral explanation necessary to support the out-of-range sentence unaccompanied by a written statement of reasons.[17]

Often, courts following the majority approach first affirm the out-of-range sentence and then remand solely for the ministerial purpose of allowing the district judge to provide a written statement of reasons.[18] Because this approach offers no relief to defendants, they are beginning to waive their objections to written-reasons-requirement violations.[19] A defendant who preserves the written-reasons-requirement-violation error through a timely objection does not escape the majority approach.[20] Part II.A.1 explores the Second Circuit's struggle to respond to written-reasons-requirement violations and its ultimate adoption of the

10. *See infra* Part I.A.

11. *See infra* Part I.B.

12. *See infra* Part I.B.1.

13. *See infra* Part I.C.

14. *See infra* Part II.

15. *See infra* Part II.A.

16. *See infra* Part II.A.1.

17. *See, e.g.*, United States v. Jones, 460 F.3d 191, 195 (2d Cir. 2006) (upholding an out-of-range sentence, despite a silent order when the district judge gave no specific articulation as to why the sentence was appropriate and the judge's colloquy during the hearing revealed he relied on his "gut feeling" about the defendant). *See also* United States v. Fuller, 426 F.3d 556, 566 (2d Cir. 2005) (upholding an out-of-range sentence despite a silent order, even when the appellate court expressed displeasure with the district judge's oral explanation for the departure and explicitly wished the district judge had provided more detail about why he departed); United States v. Robaina, 194 F. App'x 735, 737-38 (11th Cir. 2006) (upholding an out-of-range sentence despite a silent order when the district judge failed to articulate at the hearing or anywhere in the record his consideration of the statutory sentencing factors or the guidelines policy statements, both of which Congress mandated district judges consider).

18. *See infra* Part II.A.1.

19. *See, e.g.*, United States v. Orlandez-Gamboa, 185 F. App'x 86, 88 (2d Cir. 2006) (in oral argument, defendant declined, through counsel, to insist upon remand for the sole purpose of correcting the order to include a statement of reasons).

20. *See infra* note 154 and accompanying text.

majority approach.[21] Part II.A.2 examines *In re Sealed Case*,[22] in which the D.C. Circuit departed from the majority approach and vacated the sentence for a violation of the written reasons requirement.[23]

Part II.B examines the circuit split over whether the written reasons requirement applies when courts revoke supervised release or probation and impose sentences outside the range suggested by the Guidelines policy statements.[24] The Eighth Circuit decided that the written reasons requirement does not apply in revocation sentencing.[25] The D.C. Circuit,[26] amongst other circuits, decided that the requirement is equally applicable in revocation sentencing.[27]

Part III recommends that appellate courts adopt one of two alternative approaches in responding to violations of the written reasons requirement.[28] If the hearing transcript specifies the reasons for the departure but there is no written statement of reasons, the appellate court should follow the approach adopted in *United States v. Santiago*.[29] *Santiago* was issued before the Second Circuit joined the majority approach.[30] Pursuant to the *Santiago* approach, the appellate court should remand to allow the district judge to prepare a written statement of reasons.[31] The appellate court should retain jurisdiction to hear the defendant's challenge to the departure once the defendant is able to review the written statement of reasons.[32] Often, the defendant will not be able to make effective appellate arguments until the defendant has reviewed the written statement of reasons. After the appellate court reviews the written statement of reasons and the defendant's appellate arguments informed by the written reasons, the appellate court can conduct reasonableness review of the sentence.[33]

Alternatively, if the hearing transcript fails to specify the reasons for the departure, the appellate court should follow the *In re Sealed Case* approach. Under this alternative, the appellate court must vacate the sentence and remand for resentencing.[34] It should instruct the district judge to conduct another sentencing hearing.[35] After the hearing, the district judge should prepare a written statement of reasons while the judge's impressions are fresh. Neither of the recommended alternative approaches unduly burdens the federal court

21. *See infra* Part II.A.1.
22. 527 F.3d 188 (D.C. Cir. 2008).
23. *See infra* Part II.A.2.
24. *See infra* Part II.B.
25. United States v. Cotton, 399 F.3d 913, 916 (8th Cir. 2005).
26. *See In re Sealed Case*, 527 F.3d at 192.
27. *See infra* Part II.B.2.
28. *See infra* Part III.A-B.
29. 384 F.3d 31, 37 (2d Cir. 2004).
30. *See id.* at 31.
31. *Id*. at 37.
32. *Id*.
33. *Id*.
34. *See infra* Part III.B.
35. *Id.*

system.[36] The conviction remains undisturbed. The proposed alternatives merely ensure that appellate courts affirm out-of-range sentences only after reviewing a written statement of reasons.

The recommended alternative approaches constitute the best course of action because they:

1. Follow the structure, purpose, and history of the Sentencing Reform Act and the Sentencing Commission's guidance;[37]
2. Follow the plain statutory language, which compels equal application of the written reasons requirement in the revocation context;[38]
3. Make sense because the justification for refusing to require a written statement of reasons in the revocation context is outdated;[39]
4. Enable appellate courts to conduct effective review for substantive reasonableness;[40]
5. Enable appellants to raise meaningful sentencing arguments;[41]
6. Prevent appellate courts from affirming procedurally unsound sentences and prevent district judges from having unbridled discretion;[42]
7. Promote the perception of fair sentencing;[43]
8. Enable the Sentencing Commission to perform its function, thereby promoting sentencing uniformity;[44]
9. Provide necessary information to the Bureau of Prisons;[45] and
10. Promote better sentencing practices amongst district judges.[46]

I. THE HISTORICAL AND LEGAL CONTEXT FOR THE WRITTEN REASONS REQUIREMENT

This part describes the evolution of sentencing law.[47] It then explores the *Booker* reasonableness standard for the review of sentences and shows how the written reasons requirement fits conceptually within the reasonableness inquiry.[48] Finally, this Part generally explains revocation sentencing.

36. *Id.*
37. *See infra* Part III.D.1.
38. *See infra* Part III.D.2.
39. *See infra* Part III.D.3.
40. *See infra* Part III.D.4.
41. *See infra* Part III.D.5.
42. *See infra* Part III.D.6.
43. *See infra* Part III.D.7.
44. *See infra* Part III.D.8.
45. *See infra* Part III.D.9.
46. *See infra* Part III.D.10.
47. *See infra* Part I.A.
48. *See infra* Part I.B.

A. Federal Sentencing Generally

Before 1984, when Congress passed the Sentencing Reform Act, only statutory minimums and maximums reigned over judicial discretion to determine a sentence.[49] Appellate review over federal sentences was highly deferential under the clearly erroneous standard.[50] To meet this standard, a defendant must prove a plain or obvious error that affected the defendant's substantial rights.[51] The error also must have seriously affected the "'fairness, integrity or public reputation of judicial proceedings.'"[52]

This nearly unbridled judicial discretion resulted in problematic sentencing disparities.[53] To promote sentencing uniformity and fairness, Congress passed the Sentencing Reform Act of 1984, which led to the establishment of the Sentencing Guidelines in 1989.[54] Under the new regimented sentencing scheme, judges mechanically located the Sentencing Commission's designated sentence for the defendant on a sentencing grid.[55] District courts identified the precise sentence based on the defendant's criminal history, offense, and judicial findings of fact at sentencing.[56] Initially, appellate courts reviewed Guidelines departures under three different standards of review.[57] The standards depended on what kind of issue the defendant appealed.[58] In 1996, the U.S. Supreme Court rejected the three distinct standards and adopted an abuse of discretion standard for appellate review of federal sentences.[59]

Then, in 2003, Congress passed the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act ("PROTECT Act"), which established a de novo standard of review for Guidelines departures.[60] The de novo standard provided less deference to district courts than abuse of discretion. It facilitated appellate courts' overturn of departures and furthered Congress's

49. *See* Benjamin K. Raybin, Note, "*Objection: Your Honor is Being Unreasonable!"—Law and Policy Opposing the Federal Sentencing Order Objection Requirement*, 63 VAND. L. REV. 235, 238-39 (2010).

50. *Id.* at 239 (citing United States v. Hayes, 589 F.2d 811, 822-23 (5th Cir. 1979)); Gregory v. United States, 585 F.2d 548, 550 (1st Cir. 1978) (both applying a "clearly erroneous" standard)).

51. United States v. Olano, 507 U.S. 725, 732-34 (1993) (quoting FED. R. CRIM. P. 52(b)).

52. *Id.* at 736 (quoting United States v. Atkinson, 297 U.S. 157 (1936)).

53. *See* Raybin, *supra* note 49, at 239. *See also* Lindsay C. Harrison, *Appellate Discretion and Sentencing After* Booker, 62 U. MIAMI L. REV. 1115, 1120 (2008) (asserting that appellate courts have been confused about their roles in reviewing sentences after *Booker* and exploring how the Eleventh Circuit has, on occasion, given itself more discretion than the Supreme Court envisioned appellate courts should have after *Booker*).

54. *See* Raybin, *supra* note 49, at 239.

55. *See id. See also* Harrison, *supra* note 53, at 1120-21 (setting forth a brief history of sentencing discretion).

56. *See* Raybin, *supra* note 49, at 239. *See also* Harrison, *supra* note 53, at 1120-21.

57. *See* Raybin, *supra* note 49, at 239 n.17 (stating that courts reviewed questions of law de novo, findings of fact for clear error, and Guidelines departures under an abuse of discretion standard of review).

58. *See id.*

59. *See id*. at 239 (citing Koon v. United States, 518 U.S. 81 (1996)).

60. United States v. Daychild, 357 F.3d 1082, 1104 (9th Cir. 2004).

intent that the Guidelines be mandatory. De novo review of departures had a brief reign.[61] In 2005, in *Booker*, the Supreme Court rejected the Guidelines' mandatory nature as violating the Sixth Amendment.[62] District courts were only required to consider the now-advisory Guidelines and could fashion sentences in light of other statutory concerns.[63]

B. Reasonableness Review

Booker also required appellate courts to review sentences for reasonableness under an abuse of discretion standard.[64] The sentence must be procedurally and substantively reasonable.[65]

1. *Procedural Reasonableness*

Because *Booker* granted district judges such broad discretion under advisory Guidelines, strict procedural requirements apply.[66] A sentence is procedurally reasonable if the district court fulfilled the procedural requirements. These procedural requirements were designed to ensure that sentencing judges consider each convicted person as an individual and to develop an adequate record for appellate courts to review the sentence.[67]

First, the sentencing judge must correctly calculate the applicable Guidelines recommended range.[68] Next, after hearing arguments from the parties, the sentencing judge must consider all of the so-called "sentencing factors" under 18 U.S.C. § 3553(a),[69] which is part of the Sentencing Reform Act.[70] The § 3553(a) sentencing factors can be summarized as: (1) offense and offender characteristics; (2) the need for the sentence to reflect the basic aims of sentencing; (3) the sentences legally available; (4) the Guidelines; (5) the

61. United States v. Booker, 543 U.S. 220, 259 (2005) (excising the statutory provision setting forth the de novo standard of review for departures from Guidelines ranges).

62. *Id.*

63. *Id.*

64. *Id.* at 262-63. *See also* Gall v. United States, 552 U.S. 38, 51 (2007) ("Regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard.").

65. *See* United States v. Hunt, 459 F.3d 1180, 1182 n.3 (11th Cir. 2006) (sentences can be challenged for both procedural and substantive unreasonableness). *See also* Rita v. United States, 551 U.S. 338, 365 (2007) (Stevens, J., concurring) (stating that *Booker* "contemplated that reasonableness review would [also] contain a substantive component" and noting that "a district judge who gives harsh sentences to Yankees fans and lenient sentences to Red Sox fans would not be acting reasonably even if her procedural rulings were impeccable"); United States v. Autery, 555 F.3d 864, 868-71 (9th Cir. 2009) (exploring the distinction between procedural error and substantive reasonableness).

66. *In re* Sealed Case, 527 F.3d 188, 191 (D.C. Cir. 2008).

67. *Id.* (citing *Gall*, 552 U.S. at 38).

68. *Gall*, 552 U.S. at 49.

69. *In re Sealed Case*, 527 F.3d at 191 (citing *Gall*, 552 U.S. at 49-50; 18 U.S.C. § 3553(a) (2006)).

70. *See* Raybin, *supra* note 49, at 239.

Guidelines policy statements; (6) the need to avoid unwarranted disparities; and (7) the need for restitution.[71] The district court may not select a sentence based on clearly erroneous facts.[72]

Finally, the sentencing judge '"must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing.'"[73] The most detailed explanation should be set forth for sentences beyond the Guideline range.[74] The greater the departure, the more specific the explanation and the more compelling the justification must be. Explanations for sentencing outside the range must track Guidelines language.[75]

As amended by the PROTECT Act, § 3553(c) imposes several obligations on sentencing courts to state the reasons for a sentence.[76] First, in every case, the district court must state the reasons for a particular sentence.[77] Second, the sentencing judge must state "the reason for imposing a sentence at a particular point within the range" for all sentences within the applicable range exceeding 24 months.[78] Third, the sentencing judge must state "the specific reason for the imposition of a sentence different from that" prescribed by the Guideline range.[79] The sentencing court must comply with these requirements in open court at the time of sentencing.[80]

For sentences outside the recommended range, the PROTECT Act amended § 3553(c) to require courts to describe with specificity in the written judgment the reasons for departing from the Guidelines.[81] This novel requirement was a procedural change to increase the efficacy of district court sentencing and appellate review.[82] This is why until recently, courts referred to the written reasons requirement as the "written order requirement."[83] The PROTECT Act also amended 28 U.S.C. § 994(w) to require a written statement of reasons for the sentence (including reasons for any departures) to be submitted to the Sentencing Commission.[84] The USA PATRIOT Improvement and Reauthorization Act of 2005, further amended 28 U.S.C. § 994(w) to require the written statement of reasons to be submitted to the Commission on forms issued by the Judicial Conference of the United States and approved by the

71. 18 U.S.C. § 3553(a).

72. *Gall*, 552 U.S. at 51.

73. *In re Sealed Case*, 527 F.3d at 191 (quoting *Gall*, 552 U.S. at 50).

74. United States v. Lewis, 593 F.3d 765, 772 (8th Cir. 2010) (quoting *Rita*, 551 U.S. at 356 ("[W]hen a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation.")).

75. *See infra* note 87 and accompanying text.

76. 18 U.S.C. § 3553(c) (2006).

77. *Id.*

78. 18 U.S.C. § 3553(c)(1).

79. 18 U.S.C. § 3553(c)(2).

80. 18 U.S.C. § 3553(c).

81. 18 U.S.C. § 3553(c).

82. United States v. Daychild, 357 F.3d 1082, 1107 (9th Cir. 2004).

83. *See infra* Part II.

84. 28 U.S.C. § 994(w) (2006).

Commission.[85] The statement of reasons form is four pages long, not for public disclosure, and requires detailed explanations for sentences outside the recommended range.[86] The district court must specify each of the sentencing factors that motivated the judge to sentence outside the recommended range and explain the facts justifying sentences outside the Guidelines.[87]

When all of these statutory requirements converged, district courts were left in an untenable position.[88] The statement of reasons form, which is not available to the public, appeared to be a required part of the judgment form because of the written order requirement.[89] The judgment form is generally available to the public.[90] The written order requirement left district judges in the difficult position of being required to disclose reasons for sentencing outside the recommended range on the publicly available judgment form.[91] Often, district judges sentence outside the recommended range based on the defendant's assistance to the government.[92] Information revealing a defendant's assistance to the government is confidential; disclosure to the public can endanger the safety of defendants and witnesses.[93] To protect from public disclosure sensitive information concerning a defendant's assistance to the government, the Judicial Conference sought legislative relief.[94] The relief came through the Federal Judiciary Administrative Improvements Act of 2010 ("2010 amendment") which authorized separation of the written statement of reasons from the judgment.[95]

If the defendant appeals the sentence, the appellate court reviews the sentencing court's factual findings for clear error and reviews de novo the district court's legal interpretations.[96] Therefore, appellate courts review de novo challenges to the sentencing court's compliance with the requirement for a written statement of reasons.[97] When a defendant fails to properly preserve an objection to the sentence at the time of sentencing, however, courts typically

85. *Id*.

86. Judgment in a Criminal Case Attachment—Statement of Reasons, Form AO 245B (rev. 09/08), *available at* http://207.41.14.192/forms/ao245B.PDF.

87. *Id*.

88. REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 14 (Mar. 2007), http://www.uscourts.gov/judconf/07MarchProceedings.pdf.

89. *Id*.

90. *Id*.

91. *Id*.

92. *Id*.

93. *Id*.

94. *Id*.

95. Pub. L. No. 111-174, 124 Stat. 1216 (codified as amended at 18 U.S.C. § 3553(c)(2) (2010)). *See also* 156 CONG. REC. H3500 (daily ed. May 18, 2010) (statement of Rep. Rooney), 156 Cong Rec H 3500 (LEXIS).

96. United States v. Bonilla, 463 F.3d 1176, 1181 (11th Cir. 2006). *See also* United States v. Orchard, 332 F.3d 1133, 1139 (8th Cir. 2003).

97. *Bonilla*, 463 F.3d at 1181.

review the claim on appeal for plain error, an onerous standard for a defendant to meet.[98]

2. *Substantive Reasonableness*

After the appellate court finds the sentence procedurally sound, it considers the sentence's substantive reasonableness under an abuse of discretion standard.[99] The appellate court evaluates the totality of the circumstances, including the amount of any variance from the Guidelines recommended range.[100] If the sentence is within the range, the appellate court may, but is not required to, presume it is reasonable.[101] If the sentence is outside the range, the appellate court may not presume unreasonableness:[102] "It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on the whole, justify the extent of the variance."[103]

Substantive reasonableness concerns whether the sentence is sufficient but not greater than necessary to serve the purposes of sentencing.[104] The purposes of sentencing are the need for the sentence to reflect the seriousness of the offense, promote respect for the law, and provide just punishment; adequately deter criminal conduct; protect the public from the defendant's future crimes; and provide the defendant needed educational or vocational training, medical care, or correctional treatment.[105] The determination as to whether a sentence is substantively reasonable depends on whether the length of the sentence is reasonable in light of the sentencing factors.[106]

C. Revocation Sentencing

This section explores revocation sentencing. It begins with general background on probation and supervised release and then describes appellate review of revocation sentences in the post-*Booker* world.

1. *Probation and Supervised Release Generally*

Probation and supervised release are similar in many ways.[107] Their violation reports are the same[108] and both probationers and persons serving a term

98. *E.g.*, *In re* Sealed Case, 527 F.3d 188, 191-92 (D.C. Cir. 2008); United States v. Robaina, 194 F. App'x 735, 737 (11th Cir. 2006); United States v. Lewis, 424 F.3d 239, 249 (2d Cir. 2005).

99. Gall v. United States, 552 U.S. 38, 51 (2007).

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 50 n.6.

105. 18 U.S.C. § 3553(a)(2) (2006). *See also Gall*, 552 U.S. at 50 n.6 (quoting 18 U.S.C. § 3553(a)(2) (2006)).

106. United States v. Miley, 257 F. App'x 416, 418 (2d Cir. 2007).

107. Douglas A. Morris, *Representing a Client Charged with Violating Conditions of Supervised Release—Part One*, CHAMPION, Nov. 2006, at 28.

of supervised release report to a probation officer.[109] District courts must consider the Chapter 7 policy statements of the Guidelines when determining the sentence for both revocation of probation and supervised release.[110] However, probation and supervised release differ in a few key ways.[111] Courts impose probation instead of imprisonment, while supervised release is served after the term of imprisonment has expired.[112] Supervised release is the court's "mechanism to improve the odds of a successful transition from the prison to liberty."[113] Separate statutes govern probation and supervised release.[114]

When a defendant violates the conditions of supervised release or probation, the probation officer issues a petition to revoke supervised release or probation.[115] Then, the defendant must make an appearance.[116] A revocation hearing is scheduled.[117] At the revocation hearing, the district judge hears arguments from defense counsel and the prosecution concerning what sentence the defendant should receive upon revocation.[118] If a term of probation is revoked, the court may impose the original statutory maximum sentence.[119] The sentence could include a term of supervised release following imprisonment.[120] Upon revocation of supervised release, however, the court may only impose a term of imprisonment up to the maximum term found in 18 U.S.C. § 3583(e)(3), and under some circumstances, impose a continued term of supervised release pursuant to 18 U.S.C. § 3583(h).[121] Whereas the district judge imposes the original sentence at the sentencing hearing, the judge imposes the revocation sentence at the revocation hearing.[122] The order that revokes the supervised release or probation also sets forth the sentence.[123] If the district judge complies with the written reasons requirement, the judge will have provided a thorough statement of reasons on the required form for sentencing outside the range recommended by the Guidelines policy statements.[124]

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id. See also* United States v. Chavez, 204 F.3d 1305, 1312 (11th Cir. 2000); United States v. Colacurcio, 84 F.3d 326, 331 (9th Cir. 1996); United States v. Reyes, 48 F.3d 435, 438 (9th Cir. 1995).

113. Morris, *supra* note 107, at 28 (quoting United States v. Huerta-Pimental, 445 F.3d 1220, 1222 (9th Cir. 2006)).

114. *Id.* (asking the reader to compare 18 U.S.C. §§ 3561–3566 with 18 U.S.C. § 3583 (2006)).

115. *Id.*

116. *Id.* at 29.

117. *Id.* at 29-30.

118. *Id.* at 32 (noting that courts will hear arguments and decide revocation penalty).

119. *Id.* at 28 (citing 18 U.S.C. § 3565 (2006); 18 U.S.C. §§ 3551–3559 (2006)).

120. *Id.*

121. *Id.*

122. *Id.* at 29 (noting the distinction between the original sentencing and the proceedings that take place subsequent to violation of the terms of release).

123. *See infra* Part II.B.

124. *See infra* Part II.B.

2. *Appellate Review of Revocation Sentences*

After the Supreme Court made the Guidelines advisory instead of mandatory in *Booker*, revocation sentencing was a body of law to which federal courts could look for guidance on how sentencing should work under advisory Guidelines.[125] As stated by the Guidelines, "District courts imposing sentences following revocation of probation or supervised release have long used advisory guidelines."[126] Before and after *Booker*, district courts were required to consider the Chapter 7 policy statements when sentencing defendants following revocation of supervised release or probation.[127] Unlike the Guidelines themselves, the policy statements have never been mandatory but advisory only.[128] Even before *Booker*, courts did not consider revocation sentences outside the policy statements' recommended ranges to be "departures" from mandatory ranges.[129]

In order to determine the reasonableness of a revocation sentence, the appellate court must ensure that the district court considered the appropriate factors.[130] For regular sentencing, district courts must consider all of the 18 U.S.C. § 3553(a) factors.[131] For revocation sentencing, district courts must consider the factors listed in 18 U.S.C. § 3583(e), which does not incorporate two of the factors listed in § 3553(a).[132] One of the factors Congress omitted from revocation sentencing is § 3553(a)(2)(A), which requires consideration of the need for the imposed sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense.[133] Therefore, appellate courts should vacate revocation sentences imposed primarily to achieve just punishment for any new criminal conduct.[134]

Before *Booker*, appellate courts reviewed revocation sentences under the "plainly unreasonable" standard set out in 18 U.S.C. § 3742(e)(4).[135] After *Booker*, a judicial and scholarly debate ensued as to the appropriate standard of review for revocation sentences.[136] The Fourth and Seventh Circuits decided that

125. United States v. Roen, 360 F. Supp. 2d 926, 927 (E.D. Wis. 2005).

126. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A (2007)).

127. *Id.*

128. *Id.* at 927-28.

129. *Id.*

130. *See infra* Part II.B.

131. 18 U.S.C. § 3553(a) (2006).

132. 18 U.S.C. § 3583(e). *See also* United States v. Miqbel, 444 F.3d 1173, 1183 (9th Cir. 2006).

133. 18 U.S.C. § 3583(e) (the other factor omitted is the kinds of sentences available). *See also Miqbel*, 444 F.3d at 1183.

134. *Miqbel*, 444 F.3d at 1183.

135. 18 U.S.C. § 3742(e)(4) (2006). *See also* United States v. Scroggins, 910 F.2d 768, 769 (11th Cir. 1990) (per curiam).

136. *See generally* Elizabeth Stewart Hall, Comment, *Determining the Proper Standard of Review for Sentences Imposed After Revocation of Supervised Release in* United States v. Bolds, 32 AM. J. TRIAL ADVOC. 405 (2008) (asserting that the federal appellate courts are split on the issue of which standard of review to apply to revocation sentences); Leigha Simonton, Booker's *Impact on*

the "plainly unreasonable" standard of review and the *Booker* "unreasonableness" standard of review were similar, but slightly different.[137] These circuits determined that the *Booker* standard did not replace the traditional "plainly unreasonable" standard and continued to apply the old standard to revocation sentences.[138] Without exploring the similarities and differences between the two standards, the Second,[139] Third,[140] and Ninth[141] Circuits held that, in the post-*Booker* world, the *Booker* "unreasonableness" standard replaced the "plainly unreasonable" standard for revocation sentencing. The Eighth,[142] Tenth,[143] and Eleventh[144] Circuits decided that *Booker* did not change the standard of review for revocation sentences. They applied the *Booker* standard because they concluded that the old "plainly unreasonable" standard and the new *Booker* standard were essentially the same.[145] Similarly, the Sixth Circuit decided that, after *Booker*, revocation sentences should be reviewed under the same standard as all other sentences: the *Booker*-mandated abuse of discretion review for reasonableness.[146]

II. THE CIRCUIT SPLITS

This Part explores two circuit splits involving the written reasons requirement. Part II.A examines the circuit split over whether an appellate court should affirm an out-of-range sentence when the district judge failed to provide a written statement of reasons explaining the deviation from the recommended range. The majority of circuits affirm out-of-range sentences even when the

the Standard of Review Governing Supervised Release and Probation Revocation Sentences, 11 BERKELEY J. CRIM. L. 129 (2006) (stating that since *Booker*, many appellate courts have analyzed whether *Booker*'s new reasonableness standard replaced the "plainly unreasonable" standard traditionally used for revocation sentencing). Circuits have taken three different approaches to revocation sentencing. The first has decided that the old "plainly unreasonable" standard is essentially the same as the new *Booker* reasonableness standard. The second contended that *Booker*'s reasonableness standard is distinct from the old "plainly unreasonable" standard for revocation sentencing and that *Booker*'s reasonableness standard should replace the old "plainly unreasonable" standard. The third and final approach concluded that the two standards differ but decided that courts should continue to apply the "plainly unreasonable" standard to revocation sentencing. Simonton, *supra*, at 129-30.

137. *See* United States v. Crudup, 461 F.3d 433, 436-39 (4th Cir. 2006); United States v. Kizeart, 505 F.3d 672, 674 (7th Cir. 2007).

138. *Crudup*, 461 F.3d at 436-39; *Kizeart*, 505 F.3d at 674.

139. *See* United States v. Fleming, 397 F.3d 95, 97-99 (2d Cir. 2005); Hall, *supra* note 136, at 413.

140. *See* United States v. Bungar, 478 F.3d 540, 542 (3d Cir. 2007); Hall, *supra* note 136, at 413.

141. *Miqbel*, 444 F.3d 1173, 1176 (9th Cir. 2006); Hall, *supra* note 136, at 413.

142. United States v. Cotton, 399 F.3d 913, 916 (8th Cir. 2005); Hall, *supra* note 136, at 414.

143. United States v. Tedford, 405 F.3d 1159, 1161 (10th Cir. 2005); Hall, *supra* note 136, at 414.

144. United States v. Sweeting, 437 F.3d 1105, 1106 (11th Cir. 2006); Hall, *supra* note 136, at 414.

145. *See* Hall, *supra* note 136, at 414.

146. United States v. Bolds, 511 F.3d 568, 575 (6th Cir. 2007); Hall, *supra* note 136, at 420.

district judge failed to provide written reasons supporting a departure if the appellate court can determine the reasonableness of the sentence from the sentencing hearing transcript.

Part II.B discusses the circuit split over whether the written reasons requirement applies in the context of revocation sentencing. Whereas the Eighth and Seventh Circuit decided that the written reasons requirement did not apply in the revocation context, other circuits, such as the D.C., Second and Ninth Circuits have imposed the requirement when they sentence upon revocation of supervised release or probation. Still other circuits such as the Fifth, Sixth, and Eleventh have remained undecided or issued inconsistent guidance.

A. The Circuit Split Over Whether Violation of the Written Reasons Requirement Should Be an Independent Cause to Vacate the Sentence

1. *The Majority Approach: Affirm Out-of-Range Sentences Based on the Record, Despite Failure to Provide a Written Statement of Reasons*

The Courts of Appeals for the Second,[147] Third,[148] Fifth,[149] Sixth,[150] Eighth,[151] and Ninth[152] Circuits determined that, where an appellate court finds an out-of-range sentence to be reasonable based on the district court's statements in the record, violation of the written reasons requirement is not an independent cause for vacatur. In an unpublished opinion, the Eleventh Circuit also adopted the majority approach.[153] The majority follows this approach whether applying a de novo or plain error standard of review to the claim that there was a written-reasons-requirement violation.[154] Making a timely objection to the written-reasons-requirement violation does not enable a defendant to avoid the majority approach.[155] Before the 2010 amendment authorizing separation of the written statement of reasons from the judgment form, courts had refined the majority approach to remand only for the ministerial purpose of allowing the district judge

147. *See infra* Part II.A.1.

148. United States v. Cooper, 394 F.3d 172, 176 (3d Cir. 2005).

149. United States v. Zuniga-Peralta, 442 F.3d 345, 349 n.3 (5th Cir. 2006) (remedy for inadequate written explanation is remand for correction of written judgment, not resentencing).

150. United States v. Grams, 566 F.3d 683, 685-86 (6th Cir. 2009); United States v. Poynter, 344 F. App'x 171, 181 (6th Cir. 2009); United States v. Blackie, 548 F.3d 395, 401-02 (6th Cir. 2008); United States v. Fuson, 116 F. App'x 588, 590 (6th Cir. 2004).

151. United States v. Orchard, 332 F.3d 1133, 1141 n.7 (8th Cir. 2003).

152. United States v. Daychild, 357 F.3d 1082, 1107-08 (9th Cir. 2004).

153. United States v. Loggins, 165 F. App'x 785, 788-89 (11th Cir. 2006).

154. *See, e.g.*, *Orchard*, 332 F.3d at 1139 (stating an appellate court reviews de novo whether the judge provided a requisite written statement of reasons for a departure and holding that, because the district court made a detailed explanation for the departure at the hearing, remand was not required, even though the district judge violated the written order requirement). *See also* United States v. Whitelaw, 580 F.3d 256, 264 (5th Cir. 2009) (stating that district judge's failure to state specific reasons for imposing a sentence outside the recommended range did not affect the defendant's substantial rights and therefore did not meet the plain error test).

155. *See supra* note 154 and accompanying text.

to amend the judgment to include a statement of reasons.[156] The sentence remains undisturbed. Now, after the 2010 amendment, under the majority approach, courts will likely affirm out-of-range sentences despite the district court's failure to state reasons in writing and remand only for the ministerial purpose of allowing the district court to fill out the written statement of reasons form. The defendant will not be able to use the written statement of reasons in preparing his appeal because his sentence will already be affirmed. Because the remedy for violating the written reasons requirement offers no relief to defendants, it is increasingly common for defendants to waive their objections to the district judge's failure to state in writing the reasons for sentencing outside the range.[157] In these instances, there is no remand; the district court never provides a written explanation for sentencing outside the range.[158]

i. Adopting the majority approach: United States v. Santiago *and* United States v. Lewis*: A better beginning*

Before adopting the majority approach, the Second Circuit struggled with the issue of whether to vacate for violation of the written reasons requirement.[159] In *United States v. Santiago*, both the defendant and the Government argued that because the district court violated the written reasons requirement, the sentence was '"imposed in violation of law.'"[160] Therefore, the Sentencing Reform Act's vacatur provision, 18 U.S.C. § 3742(f)(1), required remand for further sentencing proceedings.[161] The court in *Santiago* acknowledged Second Circuit precedent requiring vacatur for failure to provide an oral statement of reasons.[162] Considering that Congress mandated an oral statement of reasons, a sentence imposed without such a statement was imposed in violation of law.[163] The *Santiago* court concluded that this case law could be interpreted to support vacatur for failure to meet the written reasons requirement.[164]

The court also acknowledged that in a report to Congress, the Sentencing Commission stated that the appropriate remedy for written-reasons-requirement

156. *See*, *e.g.*, United States v. Massengill, 319 F. App'x 879, 880 (11th Cir. 2009); United States v. Jones, 460 F.3d 191, 197 (2d Cir. 2006).

157. *See supra* note 19 and *infra* Part II.A.1.

158. United States v. Orlandez-Gamboa, 185 F. App'x 86, 88 (2d Cir. 2006) (defendant declining through counsel to insist upon remand for the sole purpose of correcting the order); United States v. Poynter, 344 F. App'x 171, 181 (6th Cir. 2009) (defendant only wanted the relief of resentencing and was not interested in amendment of the order).

159. *See infra* Part II.A.1.

160. 384 F.3d 31, 35 (2d Cir. 2004) (quoting 18 U.S.C. § 3742(f)(1) (2006)).

161. *Id.*

162. *Id.* (quoting United States v. Gonzalez, 110 F.3d 936, 948 (2d Cir. 1997) ("The law in this circuit is clear that a district judge must state his or her reasons for a departure from the applicable Guidelines range.")).

163. *Id.* at 35-36 (quoting United States v. Zackson, 6 F.3d 911, 923-24 (2d Cir. 1993) (interpreting 18 U.S.C. § 3553(c)(1)).

164. *Id.* at 36 (but noting that there is a difference between giving no statement of reasons at all and reciting reasons on the transcript).

violations was vacatur of the sentence.[165] The Commission required appellate courts to set aside a sentence and remand with specific instructions for resentencing if the district court neglected to provide a written statement of reasons.[166] According to U.S. Supreme Court precedent, courts must defer to the Commission's reasonable interpretation of the Guidelines.[167] The Supreme Court indicated that commentary in the Guidelines manual was authoritative unless it violated the Constitution, a federal statute, or was a plainly erroneous reading of the Guidelines.[168]

However, the court in *Santiago* was uncomfortable deferring to the Commission's interpretation because of its own reading of the Sentencing Reform Act's vacatur provision.[169] The Second Circuit's construction of the vacatur provision is the purported statutory rationale for the majority approach.[170] The first subpart of the vacatur provision requires remand if the appellate court finds the district court imposed the sentence "in violation of law" or as a result of incorrect Guidelines application.[171] The third subpart of the vacatur provision requires the appellate court to affirm all sentences not described in the first two subparts.[172]

The court in *Santiago* found the second subpart of the vacatur provision applicable.[173] This second subpart is far more convoluted than the first and third subparts.[174] According to the second subpart of the vacatur provision, if the appellate court finds

> the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—(A) if it determines that the sentence is too high … it shall set aside the sentence and remand the case …; [or] (B) if it determines that the sentence is too low … it shall set aside the sentence and remand the case ….[175]

At least two other circuits concluded that the vacatur provision's second subpart suggested there was no duty to remand merely because there was no

165. *Id.*

166. *Id.*

167. *Id.* (quoting United States v. Canales, 91 F.3d 363, 369 (2d Cir. 1996) (stating courts "defer to reasonable interpretations by the Sentencing Commission")); Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844 (1984); 18 U.S.C. § 3553(a)(5) (2006) (directing sentencing courts to consider "pertinent" policy statements issued by the Sentencing Commission).

168. *Santiago*, 384 F.3d at 36 (quoting Stinson v. United States, 508 U.S. 36, 38 (1993)).

169. *Id*.

170. United States v. Santiago, 384 F.3d 31, 36 (2d Cir. 2004).

171. 18 U.S.C. § 3742(f)(1) (2006).

172. 18 U.S.C. § 3742(f)(3).

173. *Santiago*, 384 F.3d at 36-37 (citing 18 U.S.C. § 3742(f)(2) (2006)).

174. *Id.*

175. 18 U.S.C. § 3742(f)(2).

written statement of reasons, if the appellate court found the sentence reasonable based on the hearing transcript.[176] The Second Circuit concluded that interpreting the first subpart of the vacatur provision to imply that failure to provide a written statement of reasons rendered an otherwise reasonable sentence "in violation of law" would leave the second subpart of the vacatur provision "entirely superfluous."[177]

The *Santiago* court declined to resolve "this problematic question of statutory interpretation."[178] Instead, the Second Circuit remanded the case to allow the district judge to provide a written statement of reasons.[179] The court stated it did not vacate the sentence;[180] however, it also did not affirm the sentence as reasonable.[181] Instead, the *Santiago* court retained jurisdiction to hear the defendant's challenge to the upward departure once the district judge had provided a written statement of reasons.[182] The court emphasized that remand was not tantamount to a ruling that the Second Circuit lacked the authority to affirm the sentence in absence of a written statement of reasons.[183] The limited remand enabled the Second Circuit to avoid deciding that contentious question of law.[184] Under this approach, the Second Circuit did not determine the reasonableness of the sentence until it reviewed the written statement of reasons.[185]

Approximately a year after *Santiago*, in *United States v. Lewis*, the Second Circuit gave great weight to the requirement that the district judge provide a statement of reasons in open court.[186] In *Lewis*, the Second Circuit did not have an opportunity to rule on whether failure to provide a written statement of reasons was an independent reason to vacate the sentence.[187] There was no written explanation for sentencing outside the range, and the district judge's oral explanation for the departure was also woefully vague.[188] The *Lewis* holding was premised on the district judge's complete failure to provide an adequate statement of reasons, either orally or in writing.[189] However, the Second Circuit's discussion left the impression that, when presented with different facts, it would vacate for violation of the written reasons requirement even when the hearing transcript provided a statement of reasons.[190] The recommended range in

176. *Santiago*, 384 F.3d at 37 (citing United States v. Daychild, 357 F.3d 1082, 1107-08 (9th Cir. 2004); United States v. Orchard, 332 F.3d 1133, 1141 n.7 (8th Cir. 2003)).

177. *Id.*

178. *Id.*

179. *Id.*

180. United States v. Santiago, 384 F.3d 31, 37 (2d Cir. 2004).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. 424 F.3d 239, 246 (2d Cir. 2005).

187. *See id.* at 245.

188. *Id.*

189. *Id.*

190. *Id.*

Lewis was 3 to 9 months.[191] At the time of sentencing, the district judge explained that he had considered all the applicable statutory factors and the defendant's eligibility to avoid incarceration if there was an available and appropriate substance abuse prevention program.[192] Considering the defendant's poor history with such programs, the district judge sentenced the defendant to 24 months imprisonment, followed by a period of supervised release.[193]

Even though the defendant failed to object to the omission of a statement of reasons at the time of sentencing, the Second Circuit decided that it was unclear what standard of review to apply.[194] The court could not decide whether to review her claim that the district judge failed to state reasons for the sentence under the stringent four-part plain error test, under a less stringent standard, or whether the sentence was invalid as a matter of law.[195] Second Circuit precedent required vacatur for departure sentences unaccompanied by a statement of reasons.[196] Such sentences were imposed in violation of law.[197] The court determined that remand was required even under the most stringent four-part plain error standard.[198] However, the court declined to decide the appropriate standard of review for an appellant's claim that the district judge failed to state reasons for an out-of-range sentence when the appellant failed to preserve the claim with a timely objection.[199]

Even though the district judge stated a reason for mandating imprisonment rather than requiring participation in a substance abuse prevention program, the district judge gave no explanation for imposing an out-of-range sentence.[200] The district judge thus failed to meet the statement-of-reasons requirement for sentences within the recommended range.[201] Indeed, the judge fell far short of articulating the specific reason for departures from the range.[202] The court in *Lewis* rejected the Government's argument that the district judge committed no error because the record permitted adequate appellate review for reasonableness.[203] A sentence explicitly based on a nonexistent statutory provision, even if reasonable in length, constituted error.[204] The sentence was selected by an erroneous method.[205] Similarly, sentences imposed without

191. *Id.* at 241-42.
192. *Id.* at 242.
193. *Id.*
194. *Id.* at 243.
195. *Id.*
196. United States v. Lewis, 424 F.3d 239, 245-46 (2d Cir. 2005) (citing United States v. Molina, 356 F.3d 269, 276 (2d Cir. 2004)).
197. *Id.* at 246 (quoting United States v. Crosby, 397 F.3d 103, 114-15 (2d Cir. 2005)).
198. *Id.* at 243.
199. *Id.*
200. *Id.* at 245.
201. *Id.* at 246.
202. *Id.*
203. *Id.*
204. *Id.* (citing *Crosby*, 397 F.3d at 114-15).
205. *Id.*

meeting the requirement for a statement of reasons constituted error, even if the length was reasonable.[206]

The omission of a statement of reasons met the other requirements for the plain error test.[207] Failure to comply with the requirement for a statement of reasons affected the fairness, integrity, and public reputation of judicial proceedings.[208] Although district judges retain discretion, they must demonstrate thoughtful discharge of their statutory obligations to explain a sentence with the degree of care commensurate with the severity of the sentence.[209] District judges must enable the public to appreciate why the defendant received a sentence.[210] Providing a statement of reasons to justify an out-of-range sentence tends to promote the public understanding of, trust in, and respect for our court system.[211] The public does not demand infallibility from its court system, but it is difficult for the public to accept what it cannot comprehend.[212] When the court provides a statement of reasons, at least the public and the parties have an opportunity to understand the system in general, and what happened in the particular case.[213] This is why the public has a presumptive right of access to sentencing proceedings.[214] The requirement for a statement of reasons is not a mere formalism.[215]

Next, the omission of a statement of reasons affected Lewis's substantial rights.[216] The purposes of the statement-of-reasons requirement are to enable the defendant to effectively appeal the sentence and enable the appellate court to decide the appeal.[217] The *Lewis* court decided this right was clearly substantial.[218] Unlike other errors, a procedural error such as failure to meet the requirement for a statement of reasons need not have affected the outcome of the proceedings in order to be "plain."[219] First, the First Amendment's guarantee of a public trial applies to sentencing proceedings.[220] Failure to provide a statement of reasons is akin to abrogation of a defendant's right to a public trial.[221] Second, in sentencing, appellate courts may relax the rigorous standards of plain error analysis.[222] When appellants fail to object to errors at trial, appellate courts can

206. United States v. Lewis, 424 F.3d 239, 246 (2d Cir. 2005).
207. *Id.* at 246-49.
208. *Id.* at 247.
209. *Id.* (quoting United States v. Chartier, 933 F.2d 111, 117 (2d Cir. 1991)).
210. *Id.* (quoting United States v. Alcantara, 396 F.3d 189, 206 (2d Cir. 2005)).
211. *Id.*
212. *Id.* (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980)).
213. *Id.*
214. *Id.* (citing *Alcantara*, 396 F.3d at 196).
215. *Id.*
216. United States v. Lewis, 424 F.3d 239, 247 (2d Cir. 2005).
217. *Id.*
218. *Id.*
219. *Id.* at 248.
220. *Id.*
221. *Id.* (citing Arizona v. Fulminante, 499 U.S. 279, 310 (1991)).
222. *Id*. (quoting United States v. Sofsky, 287 F.3d 122, 125 (2d Cir. 2002)).

only correct these errors by ordering a new trial.[223] It is simpler to correct sentencing errors; the judgment remains intact and the appellate court merely orders resentencing.[224] A strict requirement for a statement of reasons does not interfere with trials or affect their finality.[225] Finally, the court in *Lewis* theorized that district judges would rarely impose a materially different sentence if required to state reasons.[226] If the Second Circuit required omission of a statement of reasons to materially affect the sentence imposed, the § 3553(c) error would never be "plain."[227] Even if the defendant preserved the error with a timely objection, the error would remain uncorrected on appeal.[228] The error would usually be harmless.[229] Treatment of an omission of a statement of reasons as "plain error," which may be corrected on appeal, would maintain the statement of reasons requirement as truly mandatory, as Congress intended.[230]

ii. United States v. Fuller *and* United States v. Jones*: A Change of Course and a Turn for the Worse*

In the wake of *Santiago* and *Lewis*, the Second Circuit seemed poised to vacate for failure to meet the written reasons requirement.[231] However, in *United States v. Fuller*, the Second Circuit joined its sister circuits.[232] The court in *Fuller* remanded with instructions to vacate the sentence and resentence for other reasons, unrelated to failure to fulfill the written reasons requirement.[233] The court expressed some displeasure with the district court's oral explanation for the departure sentence.[234] It would have been preferable if the district judge had provided more detail about the extent of the departure from the recommended range.[235] Disturbingly, despite the explanation's inadequacies, the *Fuller* court determined the oral statement of reasons was sufficient to provide the defendant a platform to build an argument that the sentence was unreasonable.[236] The court relied on the statutory analysis of the vacatur provision explored in *Santiago* to conclude that omission of a written statement of reasons was not an independent

223. *Id.*

224. *Id.*

225. *Id.*

226. United States v. Lewis, 424 F.3d 239, 248 (2d Cir. 2005).

227. *Id.* at 248-49.

228. *Id.* at 249.

229. *Id.*

230. *Id.* (quoting United States v. Canady, 126 F.3d 352, 364 (2d Cir. 1997) ("[I]f we were to hold that the error was not structural and thus subject to harmless error analysis, it would almost always be held to be harmless. In this way, the right would become a right in name only, since its denial would be without consequence.")).

231. *See supra* Part II.A.1.i.

232. 426 F.3d 556, 567 (2d Cir. 2005).

233. *Id.*

234. *Id.* at 566.

235. *Id.*

236. *Id.*

cause to vacate the sentence.[237] The court stated that the better practice was to affirm the sentence, but remand only to allow the district judge to amend the order to include an explanation.[238]

In *United States v. Jones*, the Second Circuit solidified its adoption of the majority approach.[239] Based on the hearing transcript, it affirmed an out-of-range sentence unsupported by a written statement of reasons.[240] As in *Fuller*, the Second Circuit imposed lax standards of specificity for the oral explanation necessary to support an out-of-range sentence unaccompanied by a written statement of reasons.[241] The oral explanation in *Jones* was even more inconclusive than the explanation in *Fuller*.[242] The Second Circuit acknowledged that the sentencing judge "gave no specific articulation" as to why the length of the sentence was appropriate.[243] The sentencing judge's colloquy revealed he relied on his "gut feeling" about the defendant and considered factors the Guidelines deemed irrelevant.[244] Discussion in *Jones* implied that the Government properly preserved the objection to the omission of a written statement of reasons.[245] However, the court failed to specify the standard of review it applied to the claim that the district judge violated the written reasons requirement.[246]

The Government challenged the sentence on three grounds.[247] First, the sentencing judge relied on several factors the Commission deemed irrelevant to support a sentence.[248] The Second Circuit rejected this argument.[249] After *Booker*, the Guidelines were only advisory.[250] Guidelines limitations on the use of factors authorizing departures were no longer binding.[251]

Second, the Government argued that the sentencing judge inappropriately weighed his subjective assessment of the defendant.[252] A gut feeling should not be sufficient to support a sentence outside the recommended range.[253] The Second Circuit rejected the Government's argument in the post-*Booker* world.[254] Although the district judge must consider the statutory factors, the judge is not

237. *Id.* (quoting United States v. Santiago, 384 F.3d 31, 36-37 (2d Cir. 2004)).
238. *Id.* at 567.
239. 460 F.3d 191, 197 (2d Cir. 2006).
240. *Id.* at 198.
241. *Id.* at 195.
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.* at 194.
246. *Id.*
247. *Id.* at 194-96.
248. *Id.* at 194.
249. United States v. Jones, 460 F.3d 191, 194 (2d Cir. 2006).
250. *Id.*
251. *Id.*
252. *Id.* at 195.
253. *Id.*
254. *Id.*

precluded from weighing the judge's own sense of fairness.[255] The Second Circuit acknowledged that the district judge's reasons were not ordinarily grounds for a pre-*Booker* departure and that the judge's "gut feeling" influenced his judgment.[256] However, the court concluded that after *Booker*, these reasons adequately supported rejecting the Guidelines recommendation.[257]

Finally, the Government argued that the district court violated the written reasons requirement.[258] The *Jones* court determined that the best course was to affirm the sentence but remand with instructions to the district judge to amend the written judgment to include a statement of reasons.[259] The court acknowledged that it would be "*helpful*" to reviewing courts, the Commission, and the Bureau of Prisons to have the judge's statement of reasons "*conveniently* set forth" in the order.[260] Under *Jones*, the written reasons requirement is treated as little more than a ministerial mechanism to provide statistical data to the Commission and Bureau of Prisons.[261]

Thus, in both *Fuller* and *Jones*, the Second Circuit viewed the written reasons requirement as a mere ministerial requirement.[262] Based on an inconclusive hearing transcript, the Second Circuit presumed the district court provided an adequate oral explanation for deviating from the recommended range.[263] However, in *United States v. Hall*, issued after *Fuller* and *Jones*, the Second Circuit seemed to take the written reasons requirement a bit more seriously.[264] *Hall* held that in an appeal subject to an *Anders* motion, the district court must have provided a written statement of reasons.[265] Pursuant to *Anders*, court-appointed appellate counsel may move to be relieved from duties to represent the appellant if "'counsel is convinced, after conscientious investigation, that the appeal is frivolous.'"[266] Appellate courts will not grant *Anders* motions unless they are satisfied that appellate counsel diligently reviewed the record for any possibly meritorious issues on appeal.[267] The court must agree with counsel's declaration that the appeal would be frivolous.[268] Counsel could not withdraw until she ensured a written statement of reasons supporting an out-of-range sentence was part of the record and considered as part of the *Anders* analysis.[269]

255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.* at 196.
259. United States v. Jones, 460 F.3d 191, 197 (2d Cir. 2006).
260. *Id.* (emphasis added).
261. *Id.*
262. *See supra* Part II.A.1.ii.
263. *See supra* Part II.A.1.ii.
264. 499 F.3d 152, 154 (2d Cir. 2007).
265. *Id.*
266. *Id.* at 155 (quoting United States v. Williams, 475 F.3d 468, 478 (2d Cir. 2007)).
267. *Id.* at 156 (quoting United States v. Burnett, 989 F.2d 100, 104 (2d Cir. 1993)).
268. *Id.*
269. *Id.*

The preceding discussion demonstrates that the Second Circuit has wrestled with how to respond to written-reasons-requirement violations.[270] In the beginning, in *Santiago* and *Lewis*, the Second Circuit was unwilling to affirm out-of-range sentences without first reviewing a written statement of reasons.[271] In *Fuller* and *Jones*, however, the Second Circuit joined the majority and affirmed out-of-range sentences without having the benefit of reviewing a written statement of reasons.[272] Disturbingly, the Second Circuit was willing to affirm these out-of-range sentences despite omission of a written statement of reasons, even when the Second Circuit expressed displeasure with the district judge's oral explanation for the departure,[273] the district judge gave no specific articulation as to why the sentence was appropriate,[274] and the district judge's colloquy revealed he relied on his "gut feeling" about the defendant.[275]

2. *The D.C. Circuit Implicitly Diverges from the Majority Approach*

The D.C. Circuit seems to have departed from the majority approach.[276] In *In re Sealed Case*, the D.C. Circuit vacated an out-of-range sentence that failed to comply with the written reasons requirement and remanded for resentencing.[277] The court of appeals stated that "[w]ithout a statement of reasons, we are 'unable to determine' whether Appellant's sentence is reasonable."[278] Although the D.C. Circuit fell short of explicitly rejecting the majority approach, it refused to accept the judge's oral statements at the sentencing hearing as sufficient to satisfy the written reasons requirement.[279]

Strikingly, the oral statements of *In re Sealed Case* were far more clear and appropriate under the statutory sentencing scheme than the oral statements the Second Circuit accepted as sufficient in *Jones*.[280] In *In re Sealed Case*, the district judge imposed the sentence upon revocation of supervised release.[281] At the revocation hearing, the district judge: (1) detailed the defense violations; (2) correctly calculated the Guidelines range; (3) articulated his discretion to sentence outside the range; (4) correctly stated the statutory maximum; (5) gave each side an opportunity to make its case for the appropriate sentence; and (6) listed several reasons for departing from the range before stating the sentence.[282] If the sentencing judge had provided a written statement including

270. *See supra* Part II.A.1.

271. United States v. Santiago, 384 F.3d 31, 37 (2d Cir. 2004); United States v. Lewis, 424 F.3d 239, 246 (2d Cir. 2005).

272. United States v. Fuller, 426 F.3d 556, 567 (2d Cir. 2005).

273. *Id.*

274. United States v. Jones, 460 F.3d 191, 195 (2d Cir. 2006).

275. *Id.*

276. *In re* Sealed Case, 527 F.3d 188, 191 (D.C. Cir. 2008).

277. *Id.* at 193.

278. *Id.*

279. *Id.* at 192.

280. *See supra* Part II.A.1.ii.

281. 527 F.3d at 189.

282. *Id.* at 195-96 (Kavanaugh, C.J., dissenting).

those reasons, there is little doubt the judge would have satisfied the written reasons requirement.[283]

In fact, in the dissent from *In re Sealed Case*, Judge Kavanaugh stated that a fair reading of the hearing transcript revealed that the district court clearly articulated its specific reason for imposing an out-of-range sentence.[284] After the district court stated that it would revoke the defendant's supervised release, the court heard arguments about the sentence length and reiterated several reasons justifying the sentence.[285] The district court also supported its decision with reasons the Guidelines deemed permissible to support upward departures.[286]

The district court in *In re Sealed Case* more clearly articulated the reason for the departure on the hearing transcript than did the district court in *Jones*.[287] Moreover, in *In re Sealed Case*, the rationale for the out-of-range sentence was Guidelines based and objective.[288] In *Jones*, the Second Circuit admitted that some of the reasons for the out-of-range sentence were not Guidelines authorized and were subjective.[289] One explanation for the different treatment in the two cases is that the Court of Appeals for the District of Columbia takes the written reasons requirement more seriously. Even if the D.C. Circuit fell short of explicitly rejecting the majority approach, *In re Sealed Case* supports the conclusion that the circuit is likely to vacate a sentence for failure to meet the written reasons requirement.[290] Without qualification, the D.C. Circuit stated the sentence failed under § 3553(c)(2).[291] *In re Sealed Case* held that the district court must provide a written statement of reasons.[292] At a minimum, the statement must disclose why a stated statutory factor justified the departure.[293] The defendant did not object to the judge's failure to explain his reasons for the sentence.[294] The appellate court applied the plain error standard of review and concluded that the procedural errors met the standard.[295]

B. The Circuit Split over Whether the Written Reasons Requirement Applies to Sentences Imposed upon Revocation of Supervised Release or Probation

Below is a survey of circuit courts' treatment of the written reasons requirement in the context of revocation sentencing. The Eighth and Seventh Circuits have decided not to apply the requirement. The D.C., Ninth, and Second

283. *Id.* at 197.
284. *Id.* at 196.
285. *Id.* at 195.
286. *In re* Sealed Case, 527 F.3d 188, 195 (D.C. Cir. 2008).
287. *See supra* Part II.A.1.ii.
288. 527 F.3d at 196.
289. United States v. Jones, 460 F.3d 191, 195 (2d Cir. 2006).
290. *In re Sealed Case*, 527 F.3d at 193.
291. *Id.*
292. *Id.* at 192.
293. *Id.* at 191 (quoting United States v. Ogbeide, 911 F.2d 793, 795 (D.C. Cir. 1990)).
294. *Id.*
295. *Id.* at 193.

Circuits chose to apply the requirement. The Fifth, Sixth, and Eleventh Circuits either remained undecided or issued inconsistent guidance.

1. *Circuits That Do Not Impose the Written Reasons Requirement*

i. The Eighth Circuit

The Eighth Circuit unambiguously decided that the written reasons requirement does not apply when courts revoke supervised release or probation and impose out-of-range sentences.[296] Just a few months before *Booker*, the Eighth Circuit refused to impose the written reasons requirement to revocation sentences in *United States v. White Face*.[297] In *White Face*, a group of appellants requested remand with instructions to sentence within the Chapter 7 range or give notice of the court's intent to depart from that range and provide written reasons.[298] At the time, Congress had just passed the PROTECT Act and the written reasons requirement was new.[299] The Government countered that Chapter 7 policy statements were not binding; therefore, the district court was not required to provide written reasons for revocation sentences.[300]

Pivotal to the Eighth Circuit's refusal to apply the written reasons requirement to revocation sentences was the pre-*Booker* distinction between the binding nature of the Guidelines and the advisory nature of the Chapter 7 policy statements.[301] The court in *White Face* noted that the Commission issued advisory policy statements for revocation sentences instead of binding Guidelines to provide "greater flexibility" to district courts.[302] According to the *White Face* court, the Commission indicated it would issue Guidelines for revocation of supervised release in the future but had never done so.[303]

Along with all other circuits,[304] the Eighth Circuit did not consider the Chapter 7 policy statements binding. However, district courts were required to at least consider them, even though the suggested ranges were only advisory.[305]

296. *See, e.g.*, United States v. Cotton, 399 F.3d 913, 915-16 (8th Cir. 2005); United States v. White Face, 383 F.3d 733, 738-39 (8th Cir. 2004).

297. *White Face*, 383 F.3d at 739.

298. *Id.* at 735.

299. *Id.*

300. *Id.*

301. *Id.* at 739.

302. *Id.* at 735 (citing U.S. SENTENCING GUIDELINES MANUAL ch. 7, pt. A, introductory cmt. (2004); United States v. Levi, 2 F.3d 842, 845 (8th Cir. 1993)).

303. *Id.*

304. *Id.* at 738 n.4 (citing United States v. Davis, 53 F.3d 638, 642 (4th Cir. 1995); United States v. Hill, 48 F.3d 228, 231-32 (7th Cir. 1995); United States v. Sparks, 19 F.3d 1099, 1101-02 & n.3 (6th Cir. 1994); United States v. Forrester, 19 F.3d 482, 484 (9th Cir. 1994); United States v. Anderson, 15 F.3d 278, 283-84 (2d Cir. 1994); United States v. O'Neil, 11 F.3d 292, 301 n.11 (1st Cir. 1993); United States v. Hooker, 993 F.2d 898, 900-01 (D.C. Cir. 1993); United States v. Thompson, 976 F.2d 1380, 1381 (11th Cir. 1992) (per curiam); United States v. Headrick, 963 F.2d 777, 782 (5th Cir. 1992); United States v. Lee, 957 F.2d 770, 773 (10th Cir. 1992); United States v. Blackston, 940 F.2d 877, 893 (3d Cir. 1991)).

305. *Id.* at 738 (citing United States v. Hensley, 36 F.3d 39, 42 (8th Cir. 1994)).

Because of the distinction between advisory policy statements and Guidelines, which were "'regulations with the force of law,'"[306] the Eighth Circuit did not consider revocation sentences exceeding the suggested range to be upward departures from the Guidelines.[307]

The court in *White Face* claimed it maintained this approach even after the PROTECT Act.[308] Pursuant to the PROTECT Act's vacatur provision, an appellate court should set aside and remand a sentence if it is outside the "'applicable guideline range and the District Court failed to provide the required statement of reasons in the order of judgment and commitment.'"[309] The Eighth Circuit held that the new vacatur provision did not specify that the policy statements were binding, impose new requirements for revocation sentencing, or require remand for failure to provide a written statement of reasons for out-of-range revocation sentences.[310] The *White Face* court also interpreted the legislative history to support its conclusion that the written reasons requirement applied only to "departures from the [G]uidelines" and not to revocation sentences outside the policy statement range.[311] Although it refused to impose the written reasons requirement, the *White Face* court encouraged district courts to include statements of reasons in revocation orders[312] and acknowledged that such statements are helpful to parties, reviewing courts, and the Commission.[313]

Even post-*Booker,* the Eighth Circuit followed *White Face*, despite the fact that *Booker* destroyed the rationale for its refusal to impose the written reasons requirement in the revocation context. *Booker* destroyed the justification for refusing to impose the written reasons requirement in revocation sentencing because *Booker* ended the distinction between the advisory nature of the policy statements and the mandatory nature of the Guidelines.[314] Just months after *Booker*, in *United States v. Cotton*, the Eighth Circuit followed *White Face* when it refused to impose the written reasons requirement to out-of-range revocation sentences.[315] Surprisingly, the court in *Cotton* based its holding on the theory that advisory policy statements, rather than binding Guidelines, govern revocation sentencing.[316] The court did not acknowledge that its rationale was

306. United States v. White Face, 383 F.3d 733, 738 (8th Cir. 2004) (quoting *Levi*, 2 F.3d at 845).

307. *Id.* (citing United States v. Shaw, 180 F.3d 920, 922 (8th Cir. 1999) (per curiam)).

308. *Id.*

309. *Id.* at 739 (quoting 18 U.S.C. § 3742(f)(2) (2000)).

310. *Id.* (claiming § 3742 clarifies that failure to provide written reasons under § 3553(c)(2) is not reversible error).

311. *Id*. (quoting H.R. REP. NO. 108-66, at 59 (2003)).

312. *Id.*

313. *Id.*

314. *See* United States v. Cotton, 399 F.3d 913, 916 (8th Cir. 2005).

315. *Id.*

316. *Id.* (citing United States v. White Face, 383 F.3d 733, 738-39 (8th Cir. 2004)) ("We reasoned that the written-order requirement applies to departures from the guidelines range, whereas revocation of supervised release is not governed by guidelines, but only policy statements which are not binding on the court (although the court must consider them).").

outdated in the post-*Booker* world.[317] Even after *Booker*, the written reasons requirement clearly applies to departures from advisory Guidelines; therefore, the fact that the policy statements are advisory only in no way leads to the conclusion that the written reasons requirement has no place in the revocation context.[318]

ii. The Seventh Circuit

In *United States v. Garner*, an unpublished opinion, the Seventh Circuit held that the written reasons requirement applied only to sentencing under the Guidelines, not to sentencing following revocation.[319] Citing *Cotton*, the court in *Garner* stated that it was not aware of a court that extended the written reasons requirement to sentencing following revocation.[320] The court rejected as frivolous the appellant's argument that the Seventh Circuit should vacate the sentence and remand for resentencing due to the district court's failure to provide a written statement of reasons.[321] The Seventh Circuit concluded that the enactments governing revocation of supervised release do not require a written statement of reasons and do not refer to 18 U.S.C. § 3553(c)(2).[322]

2. *Circuits that Impose the Requirement*

i. The D.C. Circuit

Even in the revocation context, the D.C. Circuit applied the written reasons requirement with full force and was loath to affirm a sentence in which the district court omitted a statement of reasons.[323] The D.C. Circuit was reluctant to look to colloquy at the revocation hearing in an attempt to justify as reasonable an out-of-range revocation sentence unsupported by a clear statement of reasons in the written order.[324] The D.C. Circuit has vacated out-of-range revocation sentences unaccompanied by a written statement of reasons.[325]

317. *Id.*

318. *See* United States v. Miqbel, 444 F.3d 1173, 1177 n.6 (9th Cir. 2006) (citing United States v. Fifield, 432 F.3d 1056, 1063-66 (9th Cir. 2005) (applying the § 3553(c) requirement post-*Booker*)). *See also* United States v. Booker, 543 U.S. 220, 259, 266 (2004) (holding that after the excision of 18 U.S.C. § 3553(b)(1) and § 3742(e), "the remainder of the [Federal Sentencing] Act functions independently'" and "remain[s] intact" (citation omitted) (second alteration in original)).

319. 133 F. App'x 319, 321 (7th Cir. 2005).

320. *Id.*

321. *Id.*

322. *Id.*

323. *In re* Sealed Case, 527 F.3d 188, 192 (D.C. Cir. 2008).

324. *Id.*

325. *Id.* at 193.

ii. The Ninth Circuit

The Ninth Circuit applied the written reasons requirement to revocation sentencing just as it applied the requirement to other types of sentencing.[326] Similar to its approach with regular sentencing, the Ninth Circuit affirmed an out-of-range revocation sentence unsupported by a written statement of reasons if it found that the sentence was reasonable based on the district judge's statements in the record.[327] Failure to meet the written reasons requirement did not provide an independent cause for remand.[328]

Even before *Booker*, the Ninth Circuit held that the statutory requirement for a statement of reasons applied equally to revocation sentencing.[329] In *United States v. Musa*, the defendant claimed the trial court failed to "adequately set forth its reasons for departing from the recommended guidelines as required by 18 U.S.C. § 3553(c)."[330] Considering that the defendant's sentence was outside the policy statement range, the Ninth Circuit held that the district judge was statutorily required to provide the specific reasons for departing from the recommended sentencing range.[331] The *Musa* court did not distinguish between the burdens 18 U.S.C. § 3553(c)(2) places on a district court in the context of out-of-range revocation sentences and Guidelines departures.[332]

Post-*Booker*, the Ninth Circuit held in *United States v. Miqbel* that all the statutory requirements for a statement of reasons applied equally to revocation sentencing.[333] *Miqbel* concerned the issue of whether the sentencing judge articulated a sufficiently specific reason to support an out-of-range revocation sentence.[334] The Ninth Circuit analyzed the sentencing judge's colloquy and did not direct its attention to whether the district judge provided a sufficient written statement of reasons.[335] *Miqbel* stands for the proposition that all of 18 U.S.C. § 3553(c), including the written reasons requirement, applies equally to revocation sentencing.[336] Even though *Miqbel* analyzed the judge's colloquy instead of a written statement of reasons, *Miqbel* quoted the entirety of 18 U.S.C. § 3553(c), including the written reasons requirement.[337]

The *Miqbel* court outlined the essential characteristics of an adequate statement supporting an out-of-range revocation sentence.[338] Namely, the statement must be sufficiently specific to provide the appellate court an

326. *See infra* Part II.B.2.ii.
327. *See infra* Part II.B.2.ii.
328. *See infra* Part II.B.2.ii.
329. *See* United States v. Musa, 220 F.3d 1096 (9th Cir. 2000).
330. *Id.* at 1101.
331. *Id.*
332. *Id.*
333. 444 F.3d 1173, 1176 n.5 (9th Cir. 2006).
334. *Id.* at 1176.
335. *See id.* at 1178.
336. *Id.* at 1177.
337. *Id.*
338. *Id.* at 1178.

opportunity to determine whether the district judge considered permissible factors.[339] The district judge stated that he imposed an out-of-range sentence because the Guidelines recommendation was insufficient to achieve the purposes of sentencing under the circumstances.[340] The *Miqbel* court rejected this statement of reasons as insufficient to allow for meaningful appellate review.[341] A sufficiently specific justification would have enabled the appellate court to determine whether the district court weighed the sentencing factors for which Congress mandated consideration in the revocation context.[342]

The colloquy at the bail hearing led the Ninth Circuit to determine that the district judge used punishment as the primary basis for the increased sentence.[343] Punishment for the criminal conduct underlying the revocation is one of the two factors Congress deliberately omitted from consideration in revocation sentencing.[344] The district court's consideration of an impermissible factor may have been reversible error;[345] however, the *Miqbel* court vacated the sentence because the sentencing judge failed to specify the reasons for the out-of-range sentence at the time of sentencing.[346]

The court in *Miqbel* held that a district judge is statutorily required to provide specific reasons "at the time of sentencing."[347] The Ninth Circuit rejected the Government's contention that the district judge's explanation for the out-of-range sentence at the bail hearing fulfilled the requirement for a statement of reasons.[348] Post hoc reasoning provided in later proceedings cannot satisfy the statement-of-reasons requirement.[349] Defendants are usually present at revocation hearings, but often absent from bail hearings.[350] Allowing courts to meet the statement-of-reasons requirement through colloquy at a bail hearing deprives defendants of the right to hear directly from the court the rationale for their sentences.[351]

339. *Id.* at 1178 n.8 (quoting United States v. Montenegro-Rojo, 908 F.2d 425 (9th Cir. 1990) (holding that the reasons for the departure "must be sufficiently specific to allow this court to conduct a meaningful review")).

340. *Id.* at 1178.

341. *Id.*

342. *Id.* at 1183 n.21 (because of record's failure to show that the district court considered the appropriate § 3583(e) factors, the court would likely be required to vacate and remand for resentencing just to permit the sentencing judge to impose a sentence based on proper factors and quoting *Montenegro-Rojo*, 908 F.2d at 428) ("[If] the district court considered both proper and improper bases for departure, 'we have no way to determine whether any portion of the sentence was based upon consideration of the improper factors,' and must therefore vacate the sentence and remand for resentencing." (citations omitted)).

343. United States v. Miqbel, 444 F.3d 1173, 1183 (9th Cir. 2006).

344. *Id.* at 1181-82.

345. *Id.* at 1183.

346. *Id.*

347. *Id.* at 1179 (pointing out 18 U.S.C. § 3553(c) specifically states "at the time of sentencing").

348. *Id.* at 1179-80.

349. *Id.*

350. *Id.* at 1180.

351. *Id.*

The *Miqbel* court did not focus on the written reasons requirement, but instead focused on the requirement for an oral statement at the time of sentencing.[352] Other cases reveal that the Ninth Circuit has adopted the majority approach in the revocation context.[353] The Ninth Circuit affirms out-of-range revocation sentences despite violation of the written reasons requirement if the appellate court can find the sentence reasonable based on the sentencing judge's colloquy at the sentencing hearing.[354]

However, the facts of *Miqbel* underscore the importance of the written reasons requirement and illustrate that appellate courts should never affirm out-of-range sentences until after they have reviewed a written statement of reasons.[355] The Government cited several instances in which the sentencing judge's colloquy revealed that the judge considered the statutory sentencing factors.[356] The numerous sentencing discussions that occurred in *Miqbel* supported the rationale for the written reasons requirement.[357] A host of issues and factors are discussed during a revocation hearing, such as the defendant's behavior that might indicate a potential for danger to the community, the defendant's history of pretrial and supervised release violations, and the defendant's work history and family ties. The topics that may arise are limitless. Depending on whether the judge relates the factors discussed to its decision to sentence outside of the range, the timing of the discussions in relation to imposition of the sentence, and each party's characterization of the discussion, it is difficult to discern whether the discussion reveals that the judge considered the appropriate factors.[358] Requiring the district judge to articulate in writing the specific reasons for the out-of-range sentence creates a clear record of the factors the judge considered.[359]

iii. The Second Circuit

Like the Ninth Circuit,[360] the Second Circuit affirmed an out-of-range revocation sentence unaccompanied by a written statement of reasons if the appellate court could find the sentence was reasonable based on the sentencing judge's statements in the record.[361] In the Second Circuit, the written reasons requirement was not as strong a requirement in the revocation context as it is for original sentencing.[362] In *United States v. Verkhoglyad*, the Second Circuit held that the district court's statement of reasons for an out-of-range revocation

352. *Id.*
353. United States v. Daychild, 357 F.3d 1082, 1108 (9th Cir. 2004).
354. *Id.*
355. United States v. Miqbel, 444 F.3d 1173, 1181 (9th Cir. 2006).
356. *Id.* at 1175-76 n.3, 1180 n.2.
357. *See id.* at 1175-76 n.3, 1180.
358. *Id.* at 1176 n.3, 1179 n.11.
359. *See infra* Part III.
360. *See supra* Part II.B.2.ii.
361. *See supra* Part II.A.1.
362. United States v. Verkhoglyad, 516 F.3d 122 (2d Cir. 2008).

sentence need not be as specific as a statement of reasons supporting a Guidelines departure.[363] The court in *Verkhoglyad* found that the sentencing judge's omission of a written statement of reasons did not render the out-of-range revocation sentence procedurally unreasonable.[364] The Second Circuit affirmed the sentence as reasonable based on the colloquy at the revocation hearing and remanded only to allow the sentencing judge to amend the written order.[365]

Before *Verkhoglyad* in 2008, the Second Circuit was undecided about whether the written reasons requirement applied in the revocation context.[366] In a few unpublished opinions, the Second Circuit declined to decide whether the written reasons requirement applied in revocation sentencing.[367] It noted with interest the Eighth Circuit's refusal to apply the requirement in the revocation sentencing.[368]

3. *Circuits that Remain Undecided or Have Issued Inconsistent Guidance*

i. The Fifth Circuit

In *United States v. Russell*, an unpublished opinion, the Fifth Circuit applied the written reasons requirement in the context of revocation sentencing.[369] The defendant raised the written-reasons-requirement violation for the first time on appeal, so the court applied plain error review.[370] The *Russell* court followed the majority approach[371] and found the district judge's oral explanation for deviating from the recommended range adequate.[372] Therefore, the court affirmed the sentence.[373] The written-reasons-requirement violation was not plain error.[374]

Once again, in *United States v. Perez*, an unpublished opinion, the Fifth Circuit applied the plain error standard of review because the defendant raised the claim that the district judge provided an inadequate rationale for the out-of-range sentence for the first time on appeal.[375] Because it was applying plain error review, the *Perez* court claimed that it did not need to address what oral or written disclosure requirements are necessary in a supervised release revocation sentencing hearing.[376] The only rationale the district judge provided for exceeding the recommended range was the following statement, "The Court has

363. *Id.* at 132-33 (quoting United States v. Lewis, 424 F.3d 239, 245 (2d Cir. 2005)).

364. *Id.* at 133 (quoting United States v. Jones, 460 F.3d 191, 197 (2d Cir. 2006)).

365. *Id.* at 134.

366. *See* United States v. Velasco, 136 F. App'x 419, 421 (2d Cir. 2005). *See also* United States v. Medina, 143 F. App'x 400, 401 (2d Cir. 2005).

367. *See* cases cited *supra* note 366.

368. *Velasco*, 136 F. App'x at 421.

369. 337 F. App'x 425, 426-27 (5th Cir. 2009).

370. *Id.* at 426.

371. *See supra* Part II.A.1.

372. *Russell*, 337 F. App'x at 426.

373. *Id.* at 427.

374. *Id.*

375. 260 F. App'x 720, 723 (5th Cir. 2007).

376. *Id*.

considered the policy statements contained in Chapter 7 of the Guidelines and finds that they do not adequately address the defendant's repeated violations of the conditions of supervised release."[377] The *Perez* court acknowledged that this general statement was only a "minimal disclosure of the rationale" for exceeding the recommended range.[378] Despite the insufficient oral explanation, the *Perez* court decided that even implicit consideration of the sentencing factors was acceptable for sentences imposed upon revocation of supervised release.[379] *Perez* is just another example of the vague and imprecise oral statements upon which courts rely to affirm sentences despite written-reasons-requirement violations.

Two years later, in 2009, in *United States v. Wright*, another unpublished opinion, the Fifth Circuit affirmed an out-of-range revocation sentence despite the district judge's failure to state specific reasons for exceeding the recommended range.[380] The *Wright* court cited *Perez* for the proposition that applicability of § 3553(c)(2) to revocation sentencing was unsettled in the Fifth Circuit and therefore the district judge's failure to state specific reasons for selecting a revocation sentence did not constitute plain error.[381]

ii. The Sixth Circuit

The Sixth Circuit stated it was undecided on whether the written reasons requirement applied to revocation sentences in an unpublished opinion, *United States v. Malone*.[382] The *Malone* court asserted that it was unclear whether the written reasons requirement applied in the context of sentences imposed upon revocation of supervised release.[383] In *Malone*, the Sixth Circuit declined to resolve the question of whether the requirement applied to revocation sentencing but acknowledged that the Eighth Circuit refused to impose the requirement in revocation sentencing and the Ninth Circuit reached the opposite conclusion.[384]

iii. The Eleventh Circuit

The Eleventh Circuit has rendered internally inconsistent guidance as to whether the written reasons requirement applies in the revocation context.[385] Most recently in 2011, in *United States v. Matthews*, the Eleventh Circuit vacated the judgment and remanded for the limited purpose of providing a written statement of reasons for the upward departure.[386] The *Matthews* court found that by failing to provide written reasons for a revocation sentence exceeding the

377. *Id*. at 722.
378. *Id*. at 723.
379. *Id*.
380. 344 F. App'x 33, 36 (5th Cir. 2009).
381. *Id.*
382. 404 F. App'x 964 (6th Cir. 2010).
383. *Id.* at 968.
384. *Id.* at 968-69.
385. *See infra* Part II.B.3.iii.
386. No. 10-11410, 2011 WL 182134 (11th Cir. Jan. 21, 2011).

range suggested by the Guidelines policy statements, the district court committed plain error.[387] The court did not address whether there was an adequate oral explanation for exceeding the range.[388] It did state that it made its decision based on its review of the record which presumably contained the revocation hearing transcript as well as the parties' briefs.[389]

In another recent case, *United States v. Freeman*,[390] an unpublished opinion, the Eleventh Circuit affirmed the revocation sentence despite violation of the written reasons requirement. In *Freeman*, the Eleventh Circuit found that failure to provide written reasons had no effect on the defendant's revocation sentence and was harmless error because the court provided an adequate oral explanation for exceeding the recommended range.[391] In *Freeman*, the court affirmed the sentence and did not even remand to enable the district judge to provide written reasons.[392] The *Freeman* court accepted as adequate the district judge's pronouncement at the revocation hearing that Freeman's case warranted a sentence above the recommended range because Freeman had received a reduced sentence for his original offense and because of his continued drug distribution.[393] This oral explanation was sufficient despite the fact that the order was silent and the statement of reasons form was not part of the record.[394]

In another recent unpublished opinion, *United States v. Massengill*, the Eleventh Circuit affirmed the revocation sentence because it found the oral explanation adequate but remanded to obtain written reasons.[395] In *Massengill*, defense counsel moved to withdraw from further representation of the defendant because counsel asserted that there were no meritorious issues on appeal and filed an *Anders* brief.[396] In reviewing the *Anders* motion, the Eleventh Circuit noted that the district judge omitted a statement of reasons from the order.[397] The court in *Massengill* decided that this omission was arguably a meritorious issue.[398] The Eleventh Circuit denied the motion to withdraw.[399] Considering that the district judge's oral explanation of the sentence was adequate, the Eleventh Circuit determined the district court validly revoked the defendant's supervised release.[400] The Eleventh Circuit remanded to the district court for the limited purpose of amending the written judgment to include a statement of reasons for imposing an outside-the-range sentence.[401] The *Massengill* court

387. *Id.*
388. *Id.*
389. *Id.*
390. 396 F. App'x 674 (11th Cir. 2011).
391. *Id.* at 678.
392. *Id.*
393. *Id.*
394. *Id.*
395. 319 F. App'x 879, 880 (11th Cir. 2009).
396. *Id.*
397. *Id.*
398. *Id.*
399. *Id.*
400. *Id.*
401. *Id.* at 880-81.

denied the *Anders* motion in order to ensure that the defendant had the benefit of counsel to review the written statement of reasons once it was filed so that counsel could evaluate whether any meritorious issues arose.[402]

Prior to *Massengill* and *Freeman*, in an unpublished opinion, *United States v. Spence*, the Eleventh Circuit stated that its previous precedent, *United States v. Hofierka*,[403] pointed toward following the Eighth Circuit's refusal to apply the requirement in revocation sentencing.[404] In *Spence*, the Eleventh Circuit decided that the district judge's omission of a written statement of reasons supporting an out-of-range revocation sentence was not plain error.[405] The *Spence* court acknowledged that the Eighth Circuit had unequivocally held that the written reasons requirement did not apply in revocation sentencing.[406] Although the court stated that neither the Supreme Court nor the Eleventh Circuit had addressed the issue, *Hofierka* pointed toward following the Eighth Circuit's approach.[407] Although issued after *Booker*, the *Spence* court failed to acknowledge that the *Hofierka* rationale was outdated because it was premised on the distinction between the advisory policy statements and mandatory Guidelines, a distinction that ended after *Booker*.[408] The court applied the plain error standard because the appellant never raised a timely objection to the written-reasons-requirement violation.[409] The court noted that the district judge explained the reasons for the departure in colloquy but failed to include those reasons in the order.[410] The Eleventh Circuit doubted that the district judge had committed any error when he failed to provide a written statement of reasons.[411]

402. *Id.* at 884 (quoting United States v. Hall, 499 F.3d 152, 157 (2d Cir. 2007) (per curiam) ("Having counsel continue to represent his client on remand will ensure that the defendant has the benefit of counsel to review the written statement of reasons once it is filed and ensure that no meritorious issues that arise in connection with that written entry are overlooked.")).

403. United States v. Hofierka, 83 F.3d 357, 362 (11th Cir. 1996).

404. United States v. Spence, 151 F. App'x 836, 841 (11th Cir. 2005).

405. *Id.*

406. *Id.* at 841-42.

407. *Id.* at 842.

408. *Hofierka*, 83 F.3d at 360. *Hofierka*, decided years before *Booker*, did not specifically address applicability of the written order requirement in the revocation context. Rather, *Hofierka* concerned issues of whether the Chapter 7 policy statements were binding and whether district judges are required to provide advance notice of their intent to depart from the recommended ranges. *Hofierka* required district judges to consider the policy statements, but refused to find district courts bound by ranges in the policy statements. *Hofierka* also declined to require district judges to provide advance notice of intent to impose an out-of-range sentence in the revocation context. *Id.* at 362. *Hofierka* acknowledged that district judges are required to provide such notice for Guidelines departures. However, *Hofierka* claimed the Eleventh Circuit had never decided whether a district court must give such notice before exceeding the Chapter 7 recommended range. Because the policy statements were merely advisory, the Eleventh Circuit determined that since sentences outside the policy statement range were not "departures," district courts were not required to provide notice or make specific findings normally associated with departures.

409. *Spence*, 151 F. App'x at 840.

410. *Id.* at 842 n.8.

411. *Id.* at 842.

Even if error occurred, the court concluded that the written-reasons-requirement violation was not plain error.[412]

Finally, in *United States v. Robaina*, an unpublished opinion, the Eleventh Circuit once again determined that a written-reasons-requirement violation was not plain error.[413] Neither the Supreme Court nor the Eleventh Circuit had addressed whether the requirement applied to revocation sentencing.[414] The district judge failed to articulate any consideration of the policy statements and sentencing factors in his order, at the revocation hearing, or anywhere in the record.[415] The *Robaina* court presumed that the district judge must have considered the factors because he acknowledged the advisory range before sentencing.[416] The Eleventh Circuit also presumed the district judge considered the policy statements based only on the fact that the probation report was part of the file he reviewed.[417]

Robaina is a stark illustration of the risks of ignoring the written reasons requirement in revocation sentencing.[418] Without a requirement that the district judge state in writing the reasons for imposing an out-of-range sentence, appellate courts have no reliable record indicating why the judge rejected the Commission's well-studied recommendation.[419] Relying on colloquy is unreliable. During a revocation hearing, the district judge and parties discuss a host of issues at various times.[420] Appellate courts are left guessing as to the district judge's basis for departing. Congress has made it clear that not every reason for imposing an out-of-range revocation sentence is appropriate.[421] In *Robaina*, the court of appeals made several unsupported guesses about what the district judge might have considered, without knowing any of the judge's actual considerations.[422] This is not effective appellate review. Allowing sentencing judges to ignore the recommended range without stating a rationale undermines the policies of sentencing uniformity and fairness.[423] Sentences cannot be uniform or fair if district judges can exceed recommended ranges without articulating any rationale.

Ignoring the written reasons requirement in revocation sentencing is unfair to the individual defendant.[424] A defendant cannot effectively appeal his sentence if the appellate court presumes that the sentencing judge considered the

412. *Id.*
413. United States v. Robaina, 194 F. App'x 735, 737 (11th Cir. 2006).
414. *Id.* at 739.
415. *Id.* at 737.
416. *Id.*
417. *Id.* at 738.
418. *See id.*
419. *See infra* Part III.D.4.
420. *See, e.g.*, United States v. Verkhoglyad, 516 F.3d 122, 126 (2d Cir. 2008).
421. *See supra* Part I.C.2.
422. *Robaina*, 195 F. App'x at 737-38.
423. *See infra* Part III.D.
424. *See infra* Part III.D.

sentencing factors and policy statements without evidence on the record.[425] Courts are statutorily required to consider the sentencing factors and policy statements.[426] The *Robaina* court permitted the sentencing judge to avoid this statutory duty.[427]

III. A PROPOSED RESPONSE TO VIOLATIONS OF THE FEDERAL SENTENCING WRITTEN REASONS REQUIREMENT

Courts should abandon the majority approach and adopt one of the following two alternative approaches: the *Santiago* approach or the *In re Sealed Case* approach.[428] The choice between the two depends on whether the sentencing hearing transcript specifies the reasons for departure. These alternative approaches should apply regardless of whether the party properly preserved the written-reasons-requirement-violation error with a timely objection.[429]

A. The Santiago *Approach*

In *Santiago*, the Second Circuit adopted a response to written-reasons-requirement violations preferable to the majority approach.[430] The *Santiago* court fell short of vacating the sentence, but it explicitly refused to affirm the sentence until after it reviewed the written statement of reasons.[431] Under the *Santiago* approach, if the sentencing hearing transcript specifies reasons for the departure but there is no written statement of reasons, the appellate court should remand to allow the district judge to prepare a written statement of reasons on the form approved by the Commission.[432] The appellate court should retain jurisdiction to hear the defendant's challenge to the sentence. The defendant will only be able to launch an effective challenge to the sentence after the defendant and defense counsel thoroughly review the written statement of reasons. Only after the appellate court reviews the written statement of reasons and the defendant's appellate arguments informed by the written statement of reasons can the appellate court conduct reasonableness review.[433] If the appellate court determines that the sentence is unreasonable after reviewing the written statement of reasons, the appellate court orders the district judge to conduct another sentencing hearing. However, if the appellate court deems the sentence reasonable based on its review of the written statement of reasons and the

425. *See infra* Part III.D.
426. *See infra* Part III.D.
427. United States v. Robaina, 194 F. App'x 735, 737-38 (11th Cir. 2006).
428. *See infra* Part III.A-B.
429. *See infra* Part III.C.
430. United States v. Santiago, 384 F.3d 31 (2d Cir. 2004).
431. *Id.*
432. *Id.* at 37.
433. *Id.*

defendant's sentencing arguments informed by that statement, the appellate court affirms the sentence.

B. The In re Sealed Case *Approach*

Alternatively, if the sentencing hearing transcript does not identify the specific reasons for the departure, and the district court failed to provide a written statement of reasons, the appellate court should vacate the sentence and remand for resentencing.[434] The appellate court should instruct the district court to conduct another sentencing hearing. After the hearing, the district court should prepare a written statement of reasons on the form approved by the Commission while impressions of the defendant and circumstances are fresh because the hearing has just occurred. Under either alternative, appellate courts refrain from affirming out-of-range sentences until they have reviewed the written statement of reasons.[435]

C. The Alternative Recommended Approaches Should Apply Regardless of Whether the Appellant Made a Timely Objection

Appellate courts should not require a timely objection to avoid plain error review of a claim by a party alleging that the district judge failed to provide a written statement of reasons. Appellate courts should not affirm an out-of-range sentence without having first reviewed a written statement of reasons, regardless of whether an objection preserves the written-reasons-violation error.[436] An out-of-range sentence unaccompanied by a written statement of reasons is a sentence imposed in violation of law.[437] The structure, purpose, and history of the Sentencing Reform Act prohibit appellate courts from affirming an out-of-range sentence without having first reviewed a written statement of reasons.[438] Omitting a written statement of reasons renders an out-of-range sentence procedurally unsound.[439] The Commission explicitly requires vacatur for violations of the written reasons requirement.[440] It is fair to defendants to conclude that an out-of-range sentence unaccompanied by a written statement of reasons is a sentence imposed in violation of law.[441]

434. *See In re* Sealed Case, 527 F.3d 188, 193 (D.C. Cir. 2008).

435. *See id.*; *Santiago*, 384 F.3d at 37.

436. *See* United States v. Lewis, 424 F.3d 239, 246 (2d Cir. 2005) (rejecting the Government's argument that a district judge's commission of the procedural error of imposition of a sentence without compliance with the requirements of 18 U.S.C. § 3553(c) is not error if the sentence is reasonable). *Lewis* determined that such a sentence is imposed in violation of law. In *Lewis*, the district judge failed to explain the reasons for imposing an out-of-range sentence at the hearing. *Id.* at 245.

437. *See infra* Part III.D.

438. *See infra* Part III.D.1.

439. *See infra* Part III.D.6.

440. *See infra* Part III.D.1.

441. *See infra* Part III.D.

Even if appellate courts apply plain error review, however, such sentences meet the plain error test.[442] Violation of the written reasons requirement is an obvious error which affects the defendant's substantial rights.[443] The court of appeals cannot conduct a reasonableness review when the district court failed to provide a written statement of reasons.[444] An appellant cannot build effective reasonableness arguments without a clear written statement of reasons.[445] The obvious error can seriously affect the fairness, integrity, or public reputation of judicial proceedings.[446] A clear written justification for a departure bolsters the perception of fair sentencing[447] and allows the Commission to perform its function, thereby promoting sentencing uniformity.[448] An appellant should not have to prove the sentence would have been different but for the written-reasons-requirement violation.[449] Treatment of a written-reasons-requirement violation as plain error, which may be corrected on appeal, maintains the requirement as mandatory in the manner that Congress intended.[450] Appellate courts should relax the rigorous standards of plain error analysis in the sentencing context.[451] It is easy to correct sentencing errors because the conviction remains intact and no new trial is necessary.[452] If the transcript is clear, the district court need only prepare a written statement of reasons to permit appellate review.

Appellate courts adopting the majority approach also affirm out-of-range sentences unaccompanied by a written statement of reasons even when applying de novo review, which is a far less onerous standard than plain error.[453] Clearly, under this less stringent standard of review, an appellate court should never affirm an out-of-range sentence until after it has reviewed a written statement of reasons.

D. Law and Policy Supporting the Recommended Alternative Approaches

This portion of the article explores the law and policy supporting the *Santiago* and *In re Sealed Case* recommended alternative approaches for responding to written-reasons-requirement violations.

442. *See In re Sealed Case*, 527 F.3d at 193.

443. *Id.*

444. *In re* Sealed Case, 527 F.3d 188, 193 (D.C. Cir. 2008) (citing *Lewis*, 424 F.3d at 247).

445. *Id.*

446. *Id.* (quoting United States v. Williams, 488 F.3d 1004, 1008 (D.C. Cir. 2007)).

447. *See infra* Part III.D.7.

448. *See infra* Part III.D.8.

449. *See* United States v. Lewis, 424 F.3d 239, 247 (2d Cir. 2005).

450. *Id.* (setting forth this plain error analysis for failure to provide a statement of reasons in writing or orally).

451. *Id.* at 248 (making this proposition for failure to provide a statement of reasons in writing or orally).

452. *Id.*

453. *See, e.g.*, United States v. Orchard, 332 F.3d 1133, 1139 (8th Cir. 2003).

1. *Structure, Purpose, and History of the Sentencing Reform Act's Vacatur Provision and Commission's Explicit Guidance*

The conclusion that the Sentencing Reform Act does not require vacatur when a district judge fails to provide a written statement of reasons to explain an out-of-range sentence misconstrues the vacatur provision.[454] This misinterpretation results from construction of the statutory terms "too high" and "too low" to mean that an appellate court must decide the sentence is "unreasonably too high" or "unreasonably too low" before it is required to vacate the sentence.[455] This misconstruction ignores: (1) the placement of the vacatur provision within the Sentencing Reform Act; (2) the history of the vacatur provision; and (3) the Commission's understanding of the purpose of the provision.[456]

Before the 2003 amendment, which added the written reasons requirement, the Sentencing Reform Act mandated vacatur of a sentence that was outside the Guidelines range; unreasonable; and "too high" (above the range) if the defendant appealed, or "too low" (below the range) if the Government appealed.[457] Questions of whether a sentence was reasonable, or "too high" or "too low" were separate inquiries, not to be collapsed.[458] The terms "too low" or "too high" did not assess the reasonableness of a sentence.[459] These phrases established a connection between the direction of the Guidelines departure and the identity of the appellant.[460] "Too high" and "too low" are legal terms of art.[461] Congress tried to connect the appealing party to the direction of the departure.[462] This protected the appealing party from receiving a worse sentence after an appeal.[463] Without this protection, an appellate court could set aside a sentence as unreasonably low even though the defendant appealed the sentence.[464] This is why the Senate Committee report explained that an appeal made by a defendant cannot lead to an increased sentence.[465] Congress did not intend the "too high" and "too low" query as substitute standards of reasonableness.[466]

454. United States v. Jones, 460 F.3d 191, 198 (2d Cir. 2006) (Walker, J., dissenting).

455. *Id.* (quoting 18 U.S.C. § 3742(f)(2)(A)-(B) (2006)).

456. *Id.*

457. *Id.* (quoting Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 213(a), 98 Stat. 1987, 2012 (codified as amended at 18 U.S.C. § 3742(f) (2006)).

458. *Id.*

459. *Id.* at 199.

460. *Id.* at 198-99.

461. *Id.* at 198 (quoting 18 U.S.C. § 3742(f)(2)(A)-(B) (2006)).

462. *Id.* at 199.

463. *Id.*

464. United States v. Jones, 460 F.3d 191, 199 (2d Cir. 2006) (Walker, J., dissenting).

465. *Id.* (quoting S. REP. NO. 98-225, at 155 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3338).

466. *Id.* at 198, 199.

In 2003, Congress amended the Sentencing Reform Act to require district judges to provide specific written reasons for departures.[467] Congress intended to enforce the written reasons requirement by amending the vacatur provision to provide a separate cause for vacatur when a district court violates the requirement.[468] Prior to the 2003 amendment, the Sentencing Reform Act already required vacatur if an appellate court determined a departure was unreasonable.[469] When Congress amended the Sentencing Perform Act in 2003 to require vacatur for violation of the written reasons requirement, Congress left intact the separate cause for vacatur where a departure was unreasonable.[470] Only requiring vacatur for omission of reasons when an appellate court determines the departure is either unreasonably too low or too high renders superfluous the separate grounds for vacatur for violation of the written reasons requirement.[471] Such a statutory construction is internally inconsistent.[472] The statute would only mandate vacatur for violation of the written reasons requirement where the statute already requires vacatur for unreasonableness.[473] After the 2003 amendment, the three criteria for vacatur for violation of the written reasons requirement are: (1) the district court failed to provide a written statement of reasons; (2) the sentence is outside the Guideline range; or (3) the government appealed if the sentence is too low (below the range), or the defendant appealed if the sentence is too high (above the range).[474]

Not only do the structure, history, and purpose of the vacatur provision support this conclusion, the expert agency charged with interpreting the Sentencing Reform Act supports vacatur for failure to meet the written reasons requirement.[475] The Commission interpreted the vacatur provision to require an appellate court to "set aside the sentence and remand the case with specific instructions if it finds that the District Court failed to provide the required statement of reasons in the judgment and commitment order."[476]

Therefore, the Sentencing Reform Act's vacatur provision and the Commission's guidance arguably mandate vacatur of sentences for written-reasons-requirement violations.[477] The *In re Sealed Case* approach fulfills this

467. *Id.* at 199 (quoting H.R. REP. NO. 108-66, at 59 (2003) (Conf. Rep.), *reprinted in* 2003 U.S.C.C.A.N. 683, 694).

468. *Id.*

469. *Id.* (citing 18 U.S.C. § 3742(f)(2) (Supp. 2002) (requiring vacatur where the "sentence is outside the applicable guideline range and is unreasonable").

470. *Id.* (citing PROTECT Act of 2003, Pub. L. No. 108-21, § 401(c), 117 Stat. 650, 670 (codified at 18 U.S.C. § 3742(f)(2) (2006)) (requiring vacatur where a departure is to an "unreasonable degree")).

471. *Id.*

472. *Id.*

473. *Id.*

474. United States v. Jones, 460 F.3d 191, 200 (2d Cir. 2006) (Walker, J., dissenting) (quoting 18 U.S.C. §§ 3742(f)(2)(B), 3553(c)(2) (2006)).

475. *Id.* at 199 (citing U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 56-57 (2003)).

476. *Id.* at 199-200 (citing U.S. SENTENCING COMM'N, *supra* note 475, at 56-57).

477. *See infra* Part III.D.1.

mandate.[478] When the hearing transcript fails to identify the reasons for the departure, and there is no written statement of reasons, the *In re Sealed Case* approach requires the appellate court to vacate the sentence and order the district court to conduct another sentencing hearing.[479] However, a strict requirement for the district court to conduct another sentencing hearing when the district court already provided a thorough, on the record, oral explanation for an out-of-range sentence unnecessarily wastes time and judicial resources.[480] The *Santiago* approach follows the spirit of the Sentencing Reform Act's vacatur provision and Commission's guidance because appellate courts do not affirm out-of-range sentences without having first reviewed written statements of reasons.[481] The defendant is guaranteed the right to review the written statement of reasons before preparation of the sentencing appeal.[482]

2. *The Plain Statutory Language Compels Equal Application of the Written Reasons Requirement in the Revocation Context*

The plain language of the statutory requirement for a statement of reasons makes it clear that the written reasons requirement applies equally in the revocation context.[483] The statutory written reasons requirement explicitly refers to subsection 18 U.S.C. § 3553(a)(4), which includes "'the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to [28 U.S.C. § 994(a)(3)].'"[484] Section 28 U.S.C. § 994(a)(3) covers "'guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in [18 U.S.C. § 3565], and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in [18 U.S.C. § 3583(e)].'"[485] Revocation sentencing is subject to the statutory written reasons requirement because 18 U.S.C. § 3553(a)(4) includes the ranges applicable in revocation sentencing.[486] Therefore, the statutory language dictates that when the district judge imposes an out-of-range revocation sentence, the judge is required to provide the specific reasons for sentencing outside the recommended range.[487]

478. *See supra* Part III.B.
479. *See supra* Part III.B.
480. *See supra* Part III.A.
481. *See supra* Part III.A.
482. *See supra* Part III.A.
483. United States v. Miqbel, 444 F.3d 1173, 1177 n.7 (9th Cir. 2006).
484. *Id.* (quoting 18 U.S.C. § 3553(a)(4)(B) (2006)).
485. *Id.* (quoting 28 U.S.C. § 994(a)(3) (2006)).
486. *Id.* at 1178.
487. *Id.* (quoting 18 U.S.C. § 3553(c)(2)).

3. *The Distinction Between the Advisory Policy Statements and Mandatory Guidelines Is Outdated*

In many ways, the debate in the revocation context has even higher stakes for defendants. This is because the debate is not whether to affirm an out-of-range sentence despite violation of the written reasons requirement when there is an oral explanation for the sentence.[488] Rather, in the revocation context, the debate is whether to apply the written reasons requirement at all.[489] *Booker* ended the distinction between the *advisory* policy statements and the *mandatory* Guidelines when it made the Guidelines themselves advisory only.[490] Therefore, the primary justification for refusal to apply the written reasons requirement in the revocation context is outdated.[491]

4. *An Appellate Court Cannot Review for Substantive Reasonableness when There Is no Written Statement of Reasons*

The absence of a written statement of reasons is prejudicial in and of itself because, as a practical matter, it precludes appellate review for substantive reasonableness.[492] Without the precise statement, the appellate court is left guessing as to what specific reasons led the district court to impose the out-of-range sentence.[493] It is problematic and procedurally unsound for the appellate court to rely only on an ad hoc colloquy at the hearing to guess the reason for an out-of-range sentence.[494] Not only the statute, but also fundamental fairness, demands a more exacting review.[495] District judges have numerous discussions with the defendant, defense counsel, and the government during the sentencing hearing.[496] It is often impossible for the appellate court to survey these discussions to ferret out the specific reason for the departure. An appellate court cannot identify the exact reasons the district judge imposed an out-of-range sentence by reviewing the record presented to the district judge.[497] The appellate court does not know how the record affected the judge. The question of substantive reasonableness is a close call that an appellate court can only decide if the district judge has specified in writing the reasons for imposing an out-of-range sentence, as the statutory written reasons requirement unambiguously mandates.[498] Even courts adopting the majority approach have acknowledged that an attorney cannot certify that there are no potentially meritorious issues on

488. *See supra* Part II.A.
489. *See supra* Part II.B.
490. *See* United States v. Booker, 543 U.S. 220, 246 (2005).
491. *See supra* Part II.B.2.
492. *See In re* Sealed Case, 527 F.3d 188, 193 (D.C. Cir. 2008).
493. *See id.*
494. *See supra* notes 355-359 and accompanying text.
495. *See* 18 U.S.C. § 3553(c)(2) (2006).
496. *See supra* notes 355-359 and accompanying text.
497. United States v. Jones, 460 F.3d 191, 200 (2d Cir. 2006) (Walker, J., dissenting).
498. *Id.*

appeal when there is no written statement of reasons.[499] These courts should realize that if defense counsel is unable to make this certification, neither can an appellate court affirm an out-of-range sentence without having first reviewed a written statement of reasons.

5. *A Written Statement of Reasons Enables the Appellant to Raise Meaningful Sentencing Arguments*

Omission of a written statement of reasons undermines an appellant's ability to raise effective sentencing arguments on appeal.[500] It is difficult for either party to determine from a lengthy hearing transcript the precise reason the district judge imposed an out-of-range sentence.[501] Congress has set forth the appropriate factors district judges must consider when imposing both original sentences and revocation sentences.[502] Not every reason for a departure is permissible.[503] It is much easier for a party to launch an effective sentencing appeal when the district judge has clearly identified in writing an impermissible reason for exceeding the recommended range. For example, it is impermissible for a district judge to impose a revocation sentence primarily for just punishment for any new criminal conduct.[504] Requiring the district judge to clearly identify the specific reasons for sentencing outside the recommended range notifies defense counsel that the judge ignored the Guidelines' recommendation for an improper reason.

6. *Affirming Sentences Without First Remanding to Obtain a Written Statement of Reasons Upholds Procedurally Unsound Sentences and Provides Individual District Judges Unbridled Discretion*

Congress created the Sentencing Reform Act to eliminate unchecked judicial discretion that resulted in sentencing disparity unfair to defendants and the public.[505] The practice of affirming departure sentences without the benefit of a clear written justification provides district judges unchecked discretion. Even though discretion over sentencing lies with district judges, appellate courts cannot review a sentence for abuse of discretion unless the sentence is procedurally sound.[506] Because of the broad substantive discretion provided to individual district judges, strict adherence to procedural requirements must occur.[507] Upholding an out-of-range sentence without a written statement of

499. United States v. Hall, 499 F.3d 152, 157 (2d Cir. 2007).

500. *See In re Sealed Case*, 527 F.3d at 193 (asserting that it is important for the defendant to know the particular reason the defendant received a particular sentence).

501. *See supra* notes 355-359 and accompanying text.

502. 18 U.S.C. § 3553(a) (2006).

503. *See* United States v. Miqbel, 444 F.3d 1173, 1183 (9th Cir. 2006).

504. *See id.*

505. *See supra* note 54 and accompanying text.

506. *In re* Sealed Case, 527 F.3d 188, 191 (D.C. Cir. 2008).

507. *Id.*

reasons affirms a procedurally unsound sentence.[508] Such a practice deprives appellate courts of the benefit of the district judge's written statement.[509] The appellate court is left searching the record for a possible basis for the departure.[510] As illustrated in *Fuller* and *Jones*, appellate courts tend to provide too much deference to district judges.[511] They affirm sentences based on inconclusive hearing transcripts, even when there are no written justifications for out-of-range sentences.[512]

7. *Requiring a Written Statement of Reasons Promotes the Perception of Fair Sentencing*

As a practical matter, it is vital to the defendant to learn why he or she received a particular sentence.[513] Congress assigned the task of writing the Guidelines to the Commission.[514] The Commission was to write Guidelines that carry out the basic objectives articulated in the Sentencing Reform Act.[515] In fulfilling its mandate, the Commission evaluated tens of thousands of sentences and had assistance from the law-enforcement community over a period of years.[516] The Guidelines are therefore the Commission's efforts to implement the congressional intent behind the Sentencing Reform Act and to memorialize the best sentencing practices of the district courts.[517] Thus, a district judge who imposes an out-of-range sentence rejects the framework jointly developed by Congress and the Commission.[518] It is crucial for the district court to specify the reason it rejected the Guidelines' recommendation.[519] An out-of-range sentence is a determination that the recommended sentence was not applicable in the given case.[520] This is the reason that the written reasons requirement only applies to out-of-range sentences: The requirement provides a record to demonstrate that a sentence was not randomly selected.[521]

508. *See id.* at 191 (quoting United States v. Ogbeide, 911 F.3d 793, 795 (D.C. Cir. 1990)).

509. *Id. See also supra* notes 355-359 and accompanying text.

510. *See supra* notes 355-359 and accompanying text.

511. *See supra* Part II.A.1.ii.

512. *See supra* Part II.A.1.ii.

513. *In re Sealed Case*, 527 F.3d at 193 (quoting United States v. Lewis**,** 424 F.3d 239, 247 (2d Cir. 2005)).

514. Rita v. United States, 551 U.S. 338, 347 (2007).

515. *Id.*

516. *Id.* at 349.

517. *Id.* at 348-50.

518. *See id.* at 350 (stating that a judge who imposes a sentence within the range makes a decision fully consistent with the Commission's judgment).

519. *In re* Sealed Case, 527 F.3d 188, 193 (D.C. Cir. 2008).

520. *Id.* at 191.

521. *Id.* at 192-93.

8. *A Written Statement of Reasons Enables the Commission to Perform Its Function and Promotes Sentencing Uniformity*

In a concurring opinion in *Rita v. United States*, issued after *Booker*, Justice Scalia noted that the statutory requirement for a statement of reasons mandates that district judges disclose the reasons for sentences.[522] Justice Scalia clarified that district judges must give more specific reasons when they refuse to follow the advisory Guidelines range and disclose those reasons in writing.[523] He concluded that the written reasons requirement enables the Commission to perform its function of revising the Guidelines to reflect the desirable sentencing practices of district courts.[524] As that process occurs, and the Guidelines are gradually improved, district judges will have fewer reasons to depart from the Commission's recommendations.[525] In turn, this will lead to more sentencing uniformity, one of the primary goals of the Guidelines.[526] The Commission itself has stated that "the usefulness of the sentencing data it gathers depends upon the specificity and extent of the information presented in the statement of reasons."[527]

The written reasons requirement should not, however, become a mere ministerial duty intended only to create a record for the Commission. This approach will produce an unreliable record of the reasons supporting departures. Following the majority approach, the appellate court affirms the sentence and remands only to allow the district judge to provide a written statement of reasons.[528] The district judge has the benefit of reading the appellate court's theories as to the district judge's reasons for the departure. The most obvious course for the district judge is to simply plagiarize the appellate court's theories of his rationale. As illustrated in *Jones*, the appellate court will have concluded from its review of the record that the district judge considered various factors in arriving at a departure.[529] The appellate court's assessment of the district court rationale for the departure may not correctly reflect the actual rationale the district judge applied. It is the appellate court's theory of the district court's analysis, and is unlikely to reflect all the facts of the trial. Because a district judge can ensure that the sentence is not overruled by adopting the appellate court's theories of his rationale, it is unlikely that a district judge who receives on remand a requirement to provide a written statement of reasons will reevaluate the case to recollect the true reasons for the out-of-range sentence.

522. 551 U.S. at 381-82 (Scalia, J., concurring).

523. *Id.* at 382.

524. *Id.* (citing United States v. Booker, 543 U.S. 220, 264 (2005)).

525. *Id.*

526. *Id.* at 382-83.

527. U.S. SENTENCING COMM'N, *supra* note 475, at 24-29. *See also* United States v. Jones, 460 F.3d 191, 198 (2d Cir. 2006) (Walker, J., dissenting) (stating that the Commission requires appellate courts to vacate out-of-range sentences unaccompanied by a statement of reasons).

528. *See supra* Part II.A.

529. *See supra* Part II.A.1.ii.

Even more problematic is the fact that defendants are starting to waive objections to violations of the written reasons requirement.[530] When a defendant waives the objection, the appellate court does not remand to allow the district court to provide a written statement of reasons. No written statement of reasons is ever prepared, and there is no record to enable the Commission to fulfill its role.[531] The majority approach will cause defendants to increasingly waive their objections, seriously undermining the Commission's ability to perform its function.[532]

This article's dual recommendations will create the most accurate record of the true reasons supporting departures.[533] First, when the transcript is relatively clear, district courts prepare the written statement of reasons before the appellate court determines the reasonableness of the sentence. The district judge will not have the benefit of reviewing the appellate court's presumptions about the factors the district judge likely considered when deciding to sentence outside the range.[534] Rather, the district court must revisit its analysis and review the record before it prepares a written statement of reasons.[535] The written statement of reasons form will be the district court's articulation of its analysis instead of its adoption of the appellate court's theories of the lower court's likely analysis.[536]

When the hearing transcript is inconclusive, the district court must conduct a new sentencing hearing.[537] It is no longer in the untenable position of attempting to remember the reason for departure long after the sentencing hearing.[538] The district court reviews the matter again and prepares the written statement of reasons form while impressions are fresh.[539]

9. *A Written Statement of Reasons Is Necessary for the Bureau of Prisons*

The Bureau of Prisons consults the written statement of reasons to locate information relevant to a defendant's service of a sentence.[540] The Designation and Sentence Computation Center ("DSCC"), part of the Bureau of Prisons, designates the appropriate prison for the inmate.[541] In order to select the appropriate prison, the DSCC provides a point score to the inmate and matches the point score to the prison with the appropriate security level.[542] The DSCC

530. *See supra* notes 19 & 158 and accompanying text.

531. *See supra* notes 19 & 158 and accompanying text.

532. *See supra* notes 19 & 158 and accompanying text.

533. *See supra* Part III.A-B.

534. *See supra* Part III.A.

535. *See supra* Part III.A.

536. *See supra* Part III.A.

537. *See supra* Part III.B.

538. *See supra* Part III.B.

539. *See supra* Part III.B.

540. United States v. Hall, 499 F.3d 152, 154-55 (2d Cir. 2007).

541. Manny K. Atwal, Assistant Fed. Pub. Defender, Navigating the Bureau of Prisons from Sentencing through Release (Sentencing Advocacy Workshop, New Orleans, La., Mar. 2010), *available at* http://www.fd.org/pdf_lib/SAW2010/Practical_tips.pdf.

542. *Id*. at 2.

considers security designation data, such as the inmate's criminal history point score, history of violence, history of escape, the severity of the offense, drug and alcohol abuse, and educational level when it designates the prison.[543]

There are five different security levels within the Bureau of Prisons.[544] Life for the inmate changes drastically depending on the security level of the prison that the DSCC selects for the inmate.[545] For example, a minimum security level prison, also known as a federal prison camp, has dormitory housing, a low staff to inmate ratio, and allows inmates to work in large institutions or on military bases.[546] There is a low risk of violence or escape.[547] On the other hand, a high security level prison has tightly secured perimeters, single occupant cell housing, and close control of inmate movement.[548]

The DSCC collects security designation data from such documents as the presentence report, the judgment, and the statement of reasons.[549] Therefore, the DSCC consults the written statement of reasons when it calculates the inmate's criminal history score.[550] For example, if an inmate pled to a drug conspiracy, but the court found that the inmate was responsible for distribution of 10 grams of methamphetamine versus 200 grams, the DSCC may lower the inmate's criminal history point score, which may result in the defendant being placed in a prison with lower security level.[551] Failure to provide a written statement of reasons to the Bureau of Prisons may result in the defendant being placed in a prison with a security level that is not justified in the circumstances.[552] Therefore, omission of a written statement of reasons may have negative consequences in the defendant's future relationship with the Bureau of Prisons as the defendant proceeds to serve the sentence.[553]

10. *The Recommended Alternative Approaches Promote Better Sentencing Practices*

Meeting the written reasons requirement is not overly burdensome on district judges.[554] The district court need only fill out the statement of reasons form required by the Commission.[555] Affirming departure sentences unaccompanied by a written statement of reasons promotes sloppy sentencing practices that are not transparent to the defendant. The district judge is not

543. *Id*. at 4.
544. *Id*. at 1.
545. *Id*.
546. *Id*.
547. *Id*.
548. *Id*.
549. *Id.* at 2.
550. *Id.* at 7.
551. *Id.*
552. *Id.*
553. United States v. Hall, 499 F.3d 152, 154-55 (2d Cir. 2007).
554. United States v. Lewis, 424 F.3d 239, 248-49 (2d Cir. 2005).
555. *Hall*, 499 F.3d at 155 (quoting United States v. Rattoballi, 452 F.3d 127, 138 (2d Cir. 2006)).

required to articulate the precise reasons the court departed from the Guidelines.[556]

The majority approach has the unintended consequence of encouraging district judges to refrain from disclosing in writing the specific reason for an out-of-range sentence.[557] No matter how inconclusive the transcript of the sentencing hearing is, the appellate court will likely presume that the district judge properly justified the out-of-range sentence.[558] It is more challenging for a defendant to raise appellate arguments when there is no written justification for a sentence. A written statement of reasons that specifies an impermissible rationale for a departure is much easier to attack on appeal.

The *In re Sealed Case* and *Santiago* approaches promote better sentencing practices. If district judges realize that violating the written reasons requirement will result in remand, delay, and possibly vacatur, district judges will prepare written statements of reasons. Appellate courts should uphold the statutory requirement for district judges to take a stand by specifying in writing the reason for a departure.[559]

CONCLUSION

The majority of federal circuit courts affirm out-of-range sentences even when the district judge failed to provide a written statement of reasons if the appellate court is able to determine the sentence is reasonable based on the district judge's statements at the hearing. Appellate courts have imposed lax standards on the specificity required from the district judge's oral explanation for deviating from the range recommended by the Guidelines. Several federal circuit courts have determined that the written reasons requirement does not apply to sentences imposed upon revocation of supervised release or probation.

Even in the revocation context, appellate courts should refuse to affirm out-of-range sentences without having first reviewed a written statement of reasons under either the *Santiago* or *In re Sealed Case* alternative approaches. If the hearing transcript specifies the reasons for sentencing outside the recommended range, but there is no written statement of reasons, the appellate court should remand to allow the district judge to prepare a written statement of reasons. The appellate court should retain jurisdiction to hear the defendant's challenge to the sentence after the defendant and defense counsel review the written statement of reasons. If the hearing transcript fails to identify the reasons for sentencing outside the range, the appellate court should order the district judge to conduct another sentencing hearing after which the district judge should prepare a written statement of reasons.

The *Santiago* and *In re Sealed Case* approaches should apply regardless of whether the defendant made a timely objection to the written-reasons-requirement error. The recommended alternative approaches follow the plain

556. *See supra* Part II.A.

557. *See supra* Part II.A.

558. *See supra* Part II.A.

559. 18 U.S.C. § 3553(c)(2) (2006).

language, structure, and purpose of the Sentencing Reform Act, enable appellate courts to conduct effective review and appellants to raise meaningful arguments, provide necessary information to the Bureau of Prisons and the Sentencing Commission, prevent district judges from having unbridled discretion, and promote better sentencing practices.