

Where Procedure Meets Substance: Making the Most of the Need for Adequate Explanation

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When courts of appeals insist that a district court fully address the evidence and arguments presented by the parties regarding the appropriate sentence, and then explain its decision to accept or reject those arguments, actual outcomes are different on remand, sometimes significantly so. In exercising the review power accorded to them in *Booker* and further elucidated in *Rita*, appellate courts can not only promote more fair and reasoned sentences in individual cases, but can also exercise a meaningful role in the evolution of the guidelines envisioned by the Supreme Court. The narrow purpose of this paper is to demonstrate that reversal for procedural error under the abuse of discretion standard leads more often than not to substantively better results.

Part I briefly summarizes the language and rationale of the Supreme Court's decision in *Rita*, placing particular focus on its discussion of the district court's obligation to subject the parties' evidence and arguments to thorough adversarial testing and then to explain its sentence to the degree required by the circumstances. Part II describes in broad terms the current state of appellate review, and provides reasons why the procedural review emphasized in *Rita* is perhaps the most important aspect of review for abuse of discretion, both as a matter of policy and in individual cases. Part III collects a large number of cases showing that it is not an empty exercise to insist on these procedural components, but instead often leads to substantively different outcomes on appeal. This paper is intended to serve as inspiration and support as we continue to press district courts to address arguments and explain them, and to press the appellate courts to reverse them when they do not.

I. *Rita*, Appellate Review, and the Need for Adequate Explanation

In *Rita v. United States*, the Supreme Court held that courts of appeals may presume that a within-guideline sentence is reasonable.¹ Justice Breyer, writing for the Court, said that the presumption is not binding, places no burden of persuasion on either party, and has no independent legal effect.² This is an appellate presumption only and may not be applied by the judge at sentencing.³ The premise of the holding is that it is possible for a judge to reach the same conclusion as the Commission regarding the appropriate sentence because “the sentencing

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¹ *Rita v. United States*, 551 U.S. 338 (2007).

² *Id.* at 347, 350.

³ *Id.* at 351.

statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale.”⁴ Judges, unlike the Commission, must ensure that the sentence is “not greater than necessary” to satisfy the purposes of sentencing. The Court described how guideline development was intended to work, and did not differentiate between guidelines that were developed as directed by the Sentencing Reform Act and those that were not.⁵ It made clear that when *Booker* held that courts now review sentences for “reasonableness,” it “restored the abuse-of-discretion standard identified in three earlier cases: *Pierce v. Underwood*, 487 U.S. 552, 558-560 [] (1988), *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 403-405[] . . . (1990), and *Koon*.”⁶

More important than its holding, *Rita* invited new challenges to the guidelines. As before, a judge may “depart” because the case “falls outside the ‘heartland’ to which the Commission intends individual Guidelines to apply.”⁷ But judges may consider arguments that the guidelines, even when applied as intended in an ordinary case, fail to comply with the statutory objectives. Defendants can “contest the Guidelines sentence generally under §3553(a),” arguing that “the Guidelines sentence itself fails properly to reflect § 3553(a) considerations,” that “the Guidelines reflect an unsound judgment,” or “that they do not generally treat certain offender characteristics in the proper way,” or that “the case warrants a different sentence regardless.”⁸

Rita made clear that when district court judges undertake a critical review of a guideline, they have authority to engage in wide-ranging fact-finding, considering, for example, empirical evidence relating to the harmfulness of difference drugs, whether or not lengthy sentences actually deter or prevent crime, and whether certain characteristics of the defendant or treatment options reduce recidivism.⁹ The Court explained one of the limits of the presumption of reasonableness for within-guideline sentences: “Nor does the presumption reflect strong judicial deference of the kind that leads appeals courts to grant greater factfinding leeway to an expert agency than to a district judge.”¹⁰ Here, the Court is contrasting the Commission with a typical agency. A typical agency is accorded deference by the courts with respect to policy matters within its expertise.¹¹ The Commission is not a typical agency. While guideline amendments

⁴ *Id.* at 348.

⁵ *Id.* at 348-50.

⁶ *Id.* at 362 (citing *United States v. Booker*, 543 U.S. 220, 260 (2005)).

⁷ *Id.* at 351.

⁸ *Id.* at 351, 357.

⁹ See generally Amy Baron-Evans, *Sentencing By the Statute* (April 2009) (revised), available at http://www.fd.org/pdf_lib/Sentencing_By_the_Statute.pdf.

¹⁰ *Rita* at 347.

¹¹ Justice Breyer contended in his dissent in *LaBonte* that the Commission’s choices in interpreting and implementing the directives in the SRA were “subject, of course, to the kind of judicial supervision and review that courts would undertake were the Commission a typical administrative

must undergo notice and comment,¹² the Commission is otherwise not subject to the Administrative Procedure Act. Unlike a typical agency, it deliberates in private meetings,¹³ and is not subject to the Freedom of Information Act.¹⁴ It receives and discusses information from its Executive Branch *ex officio* commissioners or their designees and from law enforcement agencies in private meetings.¹⁵ The “public comment file” does not include a record of these private communications and deliberations.¹⁶ The Commission has not always followed the “logical outgrowth” principle,¹⁷ which requires a second notice and comment period if a proposed amendment differs significantly from an initial proposal or does not represent the logical outgrowth of the original request for comment.¹⁸ Thus, the Commission has promulgated amendments that are different from those published for comment, to which stakeholders and the public have not had an opportunity to respond.¹⁹ Although required to provide a “statement of reasons” for amendments sent to Congress, 28 U.S.C. § 994(p), the Commission ordinarily provides a conclusory statement without explanation or rationale,²⁰ and comments from the

agency,” and that this “would give the Commission considerable interpretive leeway in [choices that lie within] the Commission’s policy-related ‘expertise.’” *United States v. LaBonte*, 520 U.S. 751, 778 (1997) (Breyer, J., dissenting).

¹² See 28 U.S.C. § 994(x); 5 U.S.C. § 553.

¹³ Cf. 5 U.S.C. § 552b (except in specified circumstances, agency deliberations must be conducted in meetings, “every portion” of which “shall be open to public observation”).

¹⁴ Compare 5 U.S.C. § 552(f) with *Washington Legal Found. v. United States Sentencing Comm’n*, 17 F.3d 1446, 1450 (D.C. Cir. 1994) (Sentencing Commission is not an “agency” for purposes of the APA); see also U.S. Sentencing Comm’n, Rules of Practice and Procedure, Rule 1.1, available at http://www.ussc.gov/general/rules11_01.pdf.

¹⁵ *Id.*, Rule 3.3.

¹⁶ *Id.*, Rule 5.1.

¹⁷ *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 174 (2007).

¹⁸ See Joseph W. Luby, *Reining in the “Junior Varsity Congress”: A Call for Meaningful Judicial Review of the Federal Sentencing Guidelines*, 77 Wash. U.L. Q. 1199, 1222 (1999).

¹⁹ See, e.g., Amy Baron-Evans, *The Continuing Struggle for Just, Effective, and Constitutional Sentencing After United States v. Booker*, at 42-46 (2006) (describing this process with respect to amendments to firearms guideline), available at http://www.fd.org/pdf_lib/EvansStruggle.pdf; Samuel J. Buffone, *The Federal Sentencing Commission’s Proposed Rules of Practice and Procedure*, 9 Fed. Sent’g Rep. 67 (1996) (same regarding environmental and organizational guidelines); Brief of the Federal Public and Community Defenders and the National Association of Federal Defenders as *Amici Curiae* in Support of Petitioner in the Supreme Court of the United States, *Dillon v. United States*, No. 09-6338 (Feb. 1, 2010) (same regarding mandatory policy statement regarding retroactive amendments to the guidelines).

²⁰ See Kate Stith & Karen Dunn, *A Second Chance for Sentencing Reform: Establishing a Sentencing Agency in the Judicial Branch*, 58 Stan. L. Rev. 217, 232 (2005).

defense bar, the judiciary and probation officers are often not addressed.²¹ An ordinary agency, in contrast, is required to produce a detailed statements of reasons, responding to comments, stating the factual predicates for its rules, explaining its reasons for resolving issues as it did, relating its findings and reasoning to factors made relevant by the enabling statute, and giving reasons for rejecting plausible alternatives to the rule it adopted.²² Apparently for these reasons, appeals courts may not “grant greater factfinding leeway to [the Commission] than to a district judge.”²³

The Supreme Court also made clear that in engaging in the process set forth in *Rita*, “the sentencing court subjects the defendant’s sentence to the thorough adversarial testing contemplated by federal sentencing procedure,”²⁴ and provided guidance regarding the level explanation required of the district court:

The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties’ arguments and has a reasoned basis for exercising his own legal decisionmaking authority. Nonetheless, when a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation. Circumstances may well make clear that the judge rests his decision upon the Commission's own reasoning that the Guidelines sentence is a proper sentence (in terms of § 3553(a) and other congressional mandates) in the typical case, and that the judge has found that the case before him is typical. Unless a party contests the Guidelines sentence generally under § 3553(a) – that is, argues that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat certain defendant characteristics in the proper way – or argues for departure, the judge normally need say no more.

Where the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence, however, the judge will normally go further and explain why he has rejected those arguments.²⁵

Applying these principles, the Supreme Court in *Kimbrough v. United States* held that is not an abuse of discretion for a district court to disagree with the 100:1 crack-to-powder ratio in

²¹ See Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 Colum. L. Rev. 1315, 1336-41 (2005).

²² See Richard J. Pierce, Jr., *Administrative Law Treatise*, vol. I, § 7.1, at 413 (2002); *id.* § 7.4 at 442, 449 (discussing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) and collecting cases).

²³ *Id.* at 347.

²⁴ *Rita*, 551 U.S. at 351 (citing Fed. R. Crim. P. 32(f), (h), (i)(1)(C), (i)(1)(D) and *Burns v. United States*, 501 U.S. 129, 136, (1991)).

²⁵ *Id.* at 356-57 (internal citations omitted)

the guidelines as a matter of policy.²⁶ Where a guideline “do[es] not exemplify the Commission’s exercise of its characteristic institutional role,” because the Commission “did not take account of ‘empirical data and national experience,’” the court is free to conclude that the guideline “yields a sentence ‘greater than necessary’ to achieve § 3553(a)’s purposes, even in a mine-run case.”²⁷ And in *Gall*, the Court clarified the deferential abuse-of-discretion standard to be applied to the procedural and substantive components of a sentence, upholding as within the district court’s discretion a probationary sentence based on offender characteristics the guidelines deem “not ordinarily relevant” and where the guidelines called for a term of imprisonment.

Despite these decisions, some district courts were still not getting the message, continuing to view the guidelines uncritically and to presume that their recommendations complied with § 3553(a). And some courts of appeals reversed district courts’ reasoned policy disagreements with demonstrably unsound guidelines. Thus, in *Nelson v. United States*,²⁸ the Supreme Court reversed the Fourth Circuit’s decision upholding a guideline sentence where the district court stated that “the Guidelines are considered presumptively reasonable,” so that “unless there’s a good reason in the [statutory sentencing] factors . . . , the Guideline sentence is the reasonable sentence.” In a *per curiam* opinion, the Court forcefully reiterated: “The Guidelines are not only *not mandatory* on sentencing courts; they are also not to be *presumed* reasonable.”²⁹

And in *Spears v. United States*,³⁰ the Court reversed the Eighth Circuit’s ruling that a district court cannot categorically reject the 100:1 crack-to-powder ratio and substitute a different ratio based on decisions from other district courts and the Commission’s reports. In a brusque *per curiam* opinion, the Supreme Court “promptly remove[d] from the menu the Eighth Circuit’s offering, a smuggled-in dish that is indigestible.” A “categorical disagreement with and variance from the Guidelines is not suspect,” which “was indeed the point of *Kimbrough*: a recognition of district courts’ authority to vary from the crack cocaine Guidelines based on a *policy* disagreement with them, and not simply based on an individualized determination that they yield an excessive sentence in a particular case.”³¹

II. The Abuse of Discretion Standard As Applied by the Courts of Appeals

Since *Rita*, *Kimbrough*, and *Gall* were decided, legions of appellate decisions have relied on the abuse-of-discretion standard to recognize the district court as the primary sentencing authority, empowered with the discretion to sentence outside the advisory guideline range

²⁶ *Kimbrough v. United States*, 552 U.S. 85, 101-02 (2007).

²⁷ *Id.* at 109-10.

²⁸ 129 S. Ct. 890, 892 (2009) (emphasis in original).

²⁹ *Id.* at 892 (emphasis in original).

³⁰ *Spears v. United States*, 129 S. Ct. 840 (1009).

³¹ *Id.* at 843.

because it does not serve the purposes of sentencing under § 3553(a) as applied to the individual case or because it is unsound policy. Courts of appeals have affirmed non-guideline sentences that they would have reversed (or in fact did reverse) as unreasonable before *Gall* and *Kimbrough*.³² And they have vacated a significant number of sentences, both within and outside the guideline range and many that they almost certainly would not have vacated before *Gall* and *Kimbrough*, on the ground that the district court failed to address nonfrivolous arguments regarding the appropriate sentence, including challenges to the policy underlying a guideline; or failed to adequately explain the sentence imposed; or because the sentence imposed was “greater than necessary to achieve the purposes of sentencing,” and was thus substantively unreasonable.³³

But the courts of appeals have also relied on the deferential abuse of discretion standard to hold that a district court is not *required* to reject a guideline, even when substantial evidence was presented to the district court demonstrating its unsoundness as a matter of policy, which was not only wholly unrebutted in the district court but is, in fact, un rebuttable. This is best shown by the significant proportion of sentences within the crack guidelines that have been affirmed as “reasonable” after *Kimbrough*, despite the universal recognition (including by the Sentencing Commission) that the crack guidelines produce sentences that are unjust and do not advance the purposes of sentencing. At least one appellate panel brushed aside a policy challenge to the crack guideline that was not addressed by the district court as a “conceptually straightforward legal argument” that need not be expressly addressed.³⁴ Another has said that, although a district court may properly exercise its discretion to “reject[] a guideline as lacking a basis in data, experience, or expertise,” there is “no harm done” if the district court does not consider the argument that a guideline is invalid, as that is an “issue[] of law”:

[W]e do not think a judge is *required* to consider . . . an argument that a guideline is unworthy of application in any case because it was promulgated without adequate deliberation. He should not have to delve into the history of a guideline so that he can satisfy himself that the process that produced it was adequate to

³² For example, it was only in March of 2009, after the Eight Circuit had twice been reversed for refusing to recognize the district court’s discretion (in *Gall* and then in *Spears*), that it finally held that the Commission’s restrictive policy statements do not override § 3553(a) and may not be used to deny a sentence outside the guideline range. *United States v. Chase*, 560 F.3d 828, 830-32 (8th Cir. 2009) (reversing within-guideline sentence where district court failed to properly exercise its discretion under § 3553(a) by analyzing defendant’s variance arguments (age, medical condition, prior military service, family obligations and employment history) under same standards required for departures).

³³ See cases collected in Part III.

³⁴ See, e.g., *United States v. Simmons*, 587 F.3d 348, 362 (6th Cir. 2009) (“Although Simmons’s argument [for a variance based on the crack-powder disparity] was non-frivolous, defendants convicted for possession of crack have routinely made the same underlying substantive claim, and therefore the sentencing judge was no doubt familiar with this line of reasoning. Moreover, it involved a legal, not factual, matter. Where a party makes a conceptually straightforward legal argument for a lower sentence under one of the § 3553(a) factors, the district court’s decision not to address the party’s argument expressly is not an error when the court otherwise discussed the specific factor and appears to have considered and implicitly rejected the argument.”).

produce a good guideline. For if he is required to do that, sentencing hearings will become unmanageable, as the focus shifts from the defendant's conduct to the "legislative" history of the guidelines.³⁵

According to this court, an argument that a guideline is not the product of the Commission's characteristic institutional role or does not advance the purposes of sentencing is "a legal argument in the guise of an appeal to sentencing discretion,"³⁶ suggesting that the system created by *Booker* and *Rita* does not apply to these "legal arguments."

And courts of appeals generally have been reluctant to give any guidance on exactly how the appellate presumption of reasonableness can be rebutted *in the court of appeals*, despite Justice Stevens' emphasis that "the rebuttability of the presumption is real."³⁷

While this more "hands-off" approach may be understandable after the sustained series of Supreme Court cases admonishing appellate courts to stop using overbearing review to interfere with individualized sentencing and the evolution of sentencing policy, it has meant that appellate courts have not always fully exercised the meaningful role still available to them. Appellate courts retain the authority, under the abuse of discretion standard, to determine whether the district court based its decision on the evidence before it, including evidence of the development of guideline policy. Under the "familiar" abuse-of-discretion standard, a district court "would necessarily abuse its discretion if it based its ruling . . . on a clearly erroneous assessment of the evidence."³⁸ And as emphasized by the Court in *Rita*, district courts are tasked with "subject[ing] the defendant's sentence to [] thorough adversarial testing" by hearing argument from both the prosecution and the defense about whether "the Guidelines sentence should [] apply."³⁹

Although *Rita* is often cited for the general proposition that a district need not provide much explanation when imposing a sentence within the guideline, this is only true when it is "clear that the judge rests his decision upon the Commission's own reasoning that the Guidelines sentence is a proper sentence."⁴⁰ Because the Commission often fails to provide any reasoning

³⁵ *United States v. Aguilar-Huerta*, 576 F.3d 365, 367-68 (7th Cir. 2009).

³⁶ *Id.*

³⁷ *Rita v. United States*, 551 U.S. 338, 367 (2007) (Stevens, J. concurring) ("Our decision today makes clear, however, that the rebuttability of the presumption is real.").

³⁸ *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990) (cited in *United States v. Booker*, 543 U.S. 220, 260-62 (2005), and *Rita v. United States*, 551 U.S. 338, 362 (2007) (Stevens, J., concurring)); see also *Gall v. United States*, 552 U.S. 38, 46 (2007) ("Our explanation of 'reasonableness' review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions."). As *Gall* put it, a district court commits "significant procedural error" if it "select[s] a sentence based on clearly erroneous facts." *Gall* at 51. The Court also emphasized that the district court "must make an individualized assessment *based on the facts presented*." *Id.* at 50 (emphasis added).

³⁹ *Rita*, 551 U.S. at 351 (internal citations omitted).

⁴⁰ *Id.* at 356-57.

for the recommended guideline sentence, it should rarely be “clear” that a guideline sentence rests on its reasoning.

Rita also emphasizes that *more* explanation is required to justify a within-guideline sentence when a party has challenged it as unsound policy or has argued for a variance or departure: “Unless a party contests the Guidelines sentence generally under § 3553(a) – that is, argues that the Guidelines reflect an unsound judgment, or, for example, that they do not generally treat certain defendant characteristics in the proper way-- or argues for departure, the judge normally need say no more.”⁴¹ But “[w]here the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence, however, the judge will normally go further and explain why he has rejected those arguments.”⁴²

As courts of appeals settle into routine analysis of sentencing decisions, the language and rationale of *Rita* deserve fresh emphasis, particularly its discussion of the requirement that the district court adequately explain its sentence. Read as a whole, *Rita* says that when a guideline has been challenged as a matter policy or when the Commission has not provided any reasoning for an applicable guideline provision, the courts of appeals should be requiring district courts to grapple seriously with the often unrebutted evidence presented to it and to explain, as part of an independent, evidence-based evaluation tied to the purposes of sentencing, why it has nevertheless followed the guideline.

Requiring a district court to explain the reason for the sentence imposed, including its reason for accepting or rejecting a party’s nonfrivolous argument for a different sentence, is perhaps the most important aspect of procedural review. The adequacy of explanation has a direct bearing on the appellate court’s ability to determine whether a sentence is substantively unreasonable, *i.e.*, whether, taking into account the totality of the circumstances, the sentence imposed is not greater than necessary to achieve the purposes of sentencing.⁴³ Adequate explanations also guard against arbitrariness and promote confidence in the justice system because both the parties and the public can understand why a defendant received a particular

⁴¹ *Id.*

⁴² *Id.* at 357.

⁴³ *United States v. Calderon-Minchola*, 351 Fed. App’x 610, 612 (3d Cir. 2009) (in an immigration case, reversing as substantively unreasonable below-guideline sentence of 5 years in prison because the court could not “conclude, given the totality of circumstances here, that a sentence of 5 years imprisonment is ‘not greater than necessary’ under § 3553(a)); *see also United States v. Cavera*, 550 F.3d 180, 189-190 (2d Cir. 2008) (en banc), *cert. denied*, 129. S. Ct. 2735 (2009) (court will defer to district court’s substantive determination only if it is “satisfied that the district court complied with the Sentencing Reform Act’s *procedural* requirements,” which requires that appeals court “be confident that the sentence resulted from the district court’s considered judgment”); *United States v. Friedman*, 554 F.3d 1301, 1308 n.10 (10th Cir. 2009) (“the undeniably sparse record certainly bears on the question whether Friedman’s sentence is substantively unreasonable”).

sentence.⁴⁴ When judges articulate reasons for sentences outside the guideline range, they “not only assure[] reviewing courts (and the public) that the sentencing process is a reasoned process,” but also provide “relevant information to both the court of appeals and ultimately the Sentencing Commission,” which “should help the Guidelines constructively evolve over time, as both Congress and the Commission foresaw.”⁴⁵ As Justice Breyer emphasized, the Commission’s work is “ongoing,” and “[t]he statutes and the Guidelines themselves foresee continuous evolution” based on collection and examination of sentencing results and judges’ stated reasons for imposing sentences outside the guideline range.⁴⁶

In the meantime, the courts of appeals have ample authority to promote the work of the district courts in reaching better outcomes. As Justice Stevens emphasized in *Rita*, the presumption that a guideline sentence is reasonable is rebuttable *in the court of appeals*.⁴⁷ Although so far appellate courts have largely affirmed the decisions of district courts to accept or reject evidence and arguments that a guideline does not meet the purposes of sentencing, some have begun to recognize that their review authority allows them to consider such evidence on appeal, and to rely on it to find sentences substantively unreasonable⁴⁸ or to insist that the district court better explain its sentence in the face of a well-supported policy challenge that went unrebutted in the district court.⁴⁹ They have also recognized their authority to require district

⁴⁴ See, e.g., *In re Sealed Case*, 527 F.3d 188, 193 (D.C. Cir. 2008); *United States v. Llamas*, 599 F.3d 381, 388 (4th Cir. 2010) (“An adequate explanation of such a rationale not only allows for meaningful appellate review, it also promotes the perception of fair sentencing.”) (internal quotation marks omitted).

⁴⁵ *Rita*, 551 U.S. at 357-58.

⁴⁶ *Id.* at 350.

⁴⁷ *Id.* at 366-67 (Stevens, J., concurring).

⁴⁸ See *United States v. Dorvee*, 604 F.3d 84, 93-98 (2d Cir. 2010) (reversing within-guideline sentence because district court made assumptions regarding the defendant’s risk to public safety and deterrence that were not supported by the record evidence or sufficient explanation, and “errors were compounded” by the known policy problems with the child pornography guideline, which it described as an “eccentric Guideline of highly unusual provenance which, unless carefully applied, can easily generate unreasonable results”); *United States v. Amezcua-Vasquez*, 567 F.3d 1050 (9th Cir. 2009) (reversing as substantively unreasonable a within-guideline sentence in an illegal reentry case based on a finding unreasonable the Commission’s policy of basing a 16-level enhancement on old convictions that would otherwise not be counted under the criminal history rules).

⁴⁹ *United States v. Steward*, 339 Fed. App’x 650, 653 (7th Cir. 2009) (in a career offender case involving a small-time drug dealer, reversing as procedurally unreasonable sentence of 200 months where defendant was classified as a career offender under the advisory guidelines and mounted an unrebutted, “well-supported” sweeping policy attack on the career offender guideline that the district court passed over “in silence”); *United States v. Tutty*, 2010 U.S. App. LEXIS 14574 (2d Cir. July 16, 2010) (in child pornography case, reversing as procedurally unreasonable within-guideline sentence of 168 months because the district court did not address the defendant’s policy-based challenge, describing the policy problems with the guideline as set forth in *Dorvee*, and instructing court to “take note of these policy considerations, which do apply to a wide class of defendants or offenses, and bear in mind that the ‘eccentric’ child pornography Guidelines, with their ‘highly unusual provenance,’ ‘can easily generate unreasonable results’ if they are not ‘carefully applied’).

courts to base their decisions on the evidence before them, as opposed to a “hunch” or other unsupported view regarding whether the sentence imposed will promote the purposes of sentencing, such as deterrence or the need to reduce the risk of recidivism.⁵⁰ And if there is evidence that the Commission *did* base its guideline on the “empirical approach” of past practice and then further developed it in its characteristic institutional role, courts of appeals have the authority to rely on it to reverse an above-guideline sentence as unreasonable.

With this in mind, counsel should develop the record in the district court with the role of the court of appeals in mind. In particular, counsel should make the most of *Rita*’s requirement that a district court subject those arguments to “thorough adversarial testing” and provide the appropriate level of explanation. As shown in the Part III, reversal for failure to engage in this process often leads to substantively better results.

III. Reversal for Failure to Address and Argument or to Explain Sentence Leads More Often than Not to Substantively Different Results on Remand.

Some have expressed the view that the current abuse-of-discretion standard is ineffective and creates “needless litigation” because the judge usually imposes the same sentence on remand if the sentence is reversed as unreasonable.⁵¹ Even some defense counsel may believe that challenging the district court’s procedure is unlikely to benefit the defendant in the end. But actual outcomes in cases in which the sentence was vacated because the district court did not adequately explain its reasons for either accepting or rejecting a party’s argument for a different sentence, or how the sentence imposed would further the purposes of sentencing under 18 U.S.C. § 3553(a) show that procedural review often has substantive results.

Collected below are a substantial number of cases decided after *Gall* in which the sentence was reversed (1) for procedural error for (a) failing to address an argument, (b) failing to adequately explain why it accepted or rejected an argument, or (c) failing to explain the ultimate sentence imposed.⁵² The cases were followed through resentencing, and the original sentence imposed was compared to the sentence imposed on remand.

⁵⁰ See *United States v. Miller*, 601 F.3d 734, 739-40 (7th Cir. 2010) (reversing above-guideline sentence where district court’s views regarding recidivism and treatment of sex offenders were unsupported by the record); *United States v. Bragg*, 582 F.3d 965, 969-70 (9th Cir. 2009) (reversing probationary sentence because the district court based its disagreement with the Commission’s policy advising imprisonment for tax offenders on a “hunch” that prison is not a deterrent); *United States v. Calderon-Minchola*, 351 Fed. App’x 610, 612 (3d Cir. 2009) (because it could not conclude that the sentence was not greater than necessary, reversing a below-guideline sentence of five years in an illegal reentry case because the district court’s concerns about recidivism based on the defendant’s prior contact with the criminal justice system were “greatly attenuated” by the fact that the defendant would be deported to Peru within thirty days of any removal order).

⁵¹ Comments of Jonathan Wroblewski, Director of the Office of Policy and Legislation, Criminal Division, Department of Justice, at the Nineteenth Annual National Seminar on the Federal Sentencing Guidelines, St. Petersburg, Florida (May 15, 2010).

⁵² Although this collection is meant to be comprehensive, there may be cases that were not captured by our several searches and cross-searches of electronic databases. Also note that this list does not include sentences imposed on the revocation of probation or supervised release.

The sentence imposed on remand differed from the original sentence, often significantly, in a *majority* of cases reversed for procedural error (approximately 55%). Although each of these cases is no doubt rich with its own case history, one in particular stands as a perfect illustration of how reversal for procedural error can have substantive results. It also illustrates how the government often cannot rebut evidence that a guideline was not developed in the exercise of the Commission's characteristic institutional role, is not based on any empirical evidence or past practice, and does not advance the purposes of sentencing. In *United States v. Santillanes*, 274 Fed. App'x 718, 718-19 (10th Cir. 2008), the Tenth Circuit remanded the case for resentencing because the government conceded that it was error for court to refuse to address defendant's argument that it should reject the guidelines' treatment of mixed methamphetamine differently from pure methamphetamine. On remand, the prosecutor was unable to show that the four-level increase based on the actual amount of methamphetamine (150 g) contained in a mixture of methamphetamine (400 g), *see* USSG § 2D1.1(c) (Note B to Drug Quantity Table), was the result of the Commission's exercise of its characteristic institutional role:

AUSA: But the Sentencing Commission has evolved its calculation of the guidelines based upon the evolution of whatever information was available to them.

THE COURT: Which may or may not be politics.

AUSA: Right, sir. . . . I don't know that it has any scientific basis. All I know, Your Honor, it's been looked at over time and has changed and evolved, which would imply that there has been -- it could have been political, but it would certainly imply that somebody has looked at something . . .

THE COURT: I find that there is no empirical data or study to suggest that actual purity should be punished more severely by an arbitrary increase of the four levels in this case or at the higher level. It seems to be black box science, as best I can determine. I probably would not allow it under *Daubert*, based on what I know at present. It seems to be contrary to any empirical evidence, and really undermines Section 3553(a), as it does create an unwarranted disparity. It seems to me that this is not even a rough approximation to comply with 3553, and is not really based on any consultation or criminal justice goals or data.⁵³

When appellate courts require judges to critically evaluate the evidence presented regarding the guideline sentence as it relates to the purposes of sentencing, and to subject it to thorough adversarial testing, sentences in individual cases will be more fair and effective. Indeed, the failure to explain a sentence has been a particularly fruitful reason for reversal on appeal.

⁵³ Transcript of Sentencing Hr'g, *United States v. Santillanes*, No. 07-619 (D.N.M. Sept. 19, 2009), available on PACER at <https://ecf.nmd.uscourts.gov/doc1/12111917143>.

Sentences reversed for procedural error because the district court failed to address a nonfrivolous argument or failed to adequately explain reasons for accepting or rejecting arguments – Defendant’s appeal

United States v. Persico, 293 Fed. App’x 24, 27 (2d Cir. 2008) (in an organized crime case, reversing sentence as procedurally flawed where court failed to give any reason for a 50-month upward variance in the consecutive sentence for a § 924(c) conviction). **[Same sentence on remand.]**

United States v. Johnson, 273 Fed. Appx. 95 (2d Cir. 2008) (reversing for inadequate explanation where judge at first trial sentenced defendant to 30 years because he found life sentence was too harsh and different judge at second trial (following successful appeal) sentenced defendant to life imprisonment). **[Resentenced to life on remand].**

United States v. Brown, 578 F.3d 221 (3d Cir. 2009) (in a child porn case, reversing above-guideline sentence of 180 months “[b]ecause it is unclear whether the District Court sentence was the result of an upward departure authorized by the United States Sentencing Guidelines or a variance from those guidelines pursuant to 18 U.S.C. § 3553”). **[Resentenced to 121 months on remand.]**

United States v. Sevilla, 541 F.3d 226, 232-33 (3d Cir. 2008) (reversing within-guideline sentence of 72 months where district court failed to address defendant’s arguments for below guideline sentence and did not adequately explain sentence) **[Resentenced to 57 months].**

United States v. Grant, 323 Fed. App’x 189, 192 (3d Cir. 2009) (reversing for procedural reasons an above-guideline sentence of 36 months where district court failed to “explain why the variance is justified in terms of this particular defendant and this particular offense”). **[Resentenced to 30 months on remand (9 months above the top of the guideline range).]**

United States v. Swift, 357 Fed. App’x 489 (3d Cir. 2009) (in a bank robbery case, reversing as procedurally unreasonable a below-guideline sentence of 130 months because the district court did not clearly explain the basis for its sentence). **[Resentenced to 120 months on remand.]**

United States v. Taylor, 2010 WL 1141423, 2010 U.S. App. LEXIS 5871 (4th Cir. Mar. 22, 2010) (in a drug trafficking case, reversing defendant Cedric Taylor’s near-the-bottom guidelines sentence of 20 years (guidelines range: 235-293 months) because “the court never explicated its reasons for imposing” the sentence, and noting that the “court’s failure is especially striking in light of the non-spurious bases identified in detail by counsel for a variance sentence, to which the court never adverts”). **[Same sentence on remand.]**

United States v. Lynn, 592 F.3d 572, 581 (4th Cir. 2010) (in three consolidated cases, reversing for procedural error defendant Tucker’s 101-month sentence for possessing a firearm as a convicted felon (range: 51-63) because the district court provided “no individualized explanation for its substantial departure,” and reversing for procedural error defendant Lynn’s within-guidelines 33-year sentence (range, as career offender: 360-life) because the district court

“ignor[ed] Lynn’s non-frivolous arguments for a different sentence and fail[ed] to explain the sentencing choice.) [**Lynn not yet resentenced; Tucker resentenced to 63 months on remand.**]

United States v. Dury, 336 Fed App’x 371 (4th Cir. 2009) (in a child porn case, reversing within-guidelines sentence of 204 months due to inadequate explanation of the sentence imposed as it related to the § 3553(a) factors) [**Same sentence on remand.**]

United States v. Shambry, 343 Fed. App’x 941 (4th Cir. 2009) (reversing two within-guideline sentences of 30 months each where district court failed to state reasons supporting sentences and made no response to defense arguments for below-guideline sentences) [**Same sentence on remand for one, sentence of 24 months on the other.**]

United States v. Cameron, 340 Fed. App’x 872 (4th Cir. 2009) (reversing above-guideline sentence of 144 months where district court failed “to provide a sufficient, individualized assessment of the § 3553(a) factors” and failed to adequately explain sentence, particularly given extent of upward variance) [**Resentenced to 84 months on remand.**]

United States v. Sanders, 340 Fed. App’x 162 (4th Cir. 2009) (reversing within-guideline sentence of 63 months where district court failed to adequately explain sentence). [**Same sentence on remand.**]

United States v. Harris, 337 Fed. App’x 371 (4th Cir. 2009) (reversing within-guideline sentence of 46 months where district court failed to adequately explain sentence or address defendant’s arguments for below-guideline sentence) [**Same sentence on remand; upheld on appeal.**]

United States v. Batts, 317 Fed. App’x 329, 331-33 (4th Cir. 2009) (reversing 168-month sentence on a gun count (consecutive to a 57 month sentence that was not part of the appeal) as procedurally flawed because court failed to move incrementally through Sentencing Table and adequately explain sentence). [**Resentenced to 84 months on this count.**]

United States v. Maynor, 310 Fed. App’x 595, 597 (4th Cir. 2009) (reversing above-guideline sentence of 72 months where district court did not explicitly address § 3553(a) factors or defendant’s arguments and failed to adequately explain sentence) [**Resentenced to 24 months on remand.**]

United States v. Mendoza-Mendoza, 597 F.3d 212, 219 (4th Cir. 2010) (in an illegal reentry case, reversing a within guideline sentence (46 months with 16-level increase) as procedurally flawed where defense counsel presented mitigating evidence and policy challenges to the guideline but “the district court’s comments leads us to believe that the district court accorded the Guidelines a quasi-mandatory effect, and that is impermissible under *Rita*; also stating that “[w]e are acutely conscious of the need to avoid overburdening district courts and ordering pointless remands, and we are compelled to re-emphasize that procedural remands do not carry some hidden appellate message of substantive unreasonableness.”). [**Same sentence on remand.**]

United States v. Strickland, 2010 U.S. App. LEXIS 1309 (4th Cir. Jan. 21, 2010) (in a money laundering case, reversing as procedurally unreasonable an above-guideline sentence of 84 months because court “did not explain how any specific factors corresponded to the sentencing goals of § 3553(a), so as to articulate a basis for arriving at the particular sentence it imposed”: [T]he district court’s discretion in sentencing must still be exercised in a manner that permits a reviewing court to understand the legal and factual basis for its decision. Here, we cannot discern from the district court’s limited allocution what the factual basis for its decision was or what specific considerations the court found relevant to its determination of an appropriate sentence.”) **[Resentenced to 40 months on remand.]**

United States v. Aguilar-Rodriguez, 288 Fed. App’x 918, 921 (5th Cir. 2008) (reversing above-guideline sentence of 18 months where district court failed to adequately explain reasons for upward variance) **[Resentenced to time served].**

United States v. Tisdale, 264 Fed. App’x 403 (5th Cir. 2008) (reversing within-guideline sentences of 97 months for two defendants on procedural grounds because the district court did not give any indication it had considered any of the § 3553(a) factors or articulate sufficient reasons why it was rejecting the defendant’s arguments for a sentence below the guidelines). **[One defendant sentenced to 72 months on remand, the other sentenced to 84 months on remand.]**

United States v. Robertson, 309 Fed. App’x 918 (6th Cir. 2009) (reversing as procedurally unreasonable 84-month sentence for being a felon in possession of a firearm because district court failed to address defendant’s 3553(a) arguments about double counting). **[Resentenced to 60 months on remand.]**

United States v. Delgadillo, 318 Fed. App’x 380, 386-87 (6th Cir. 2009) (reversing as unreasonable a within-guidelines sentence of 235 months for a first-time nonviolent drug offender where the district court only briefly mentioned 18 U.S.C. § 3553(a) and never mentioned the defendant’s mitigating evidence; remanding for a more detailed discussion of the factors in § 3553(a), including rehabilitation, as well as an explanation why the 10-year mandatory minimum sentence was not sufficient to achieve the purposes of sentencing). **[Resentenced to 235 months on remand.]**

United States v. Stephens, 549 F.3d 459, 467 (6th Cir. 2008) (reversing as procedurally unreasonable a within-guidelines sentence because the court was left “in doubt as to whether the court fully considered its discretion to vary from the sentencing Guidelines range” and remanding for a “more thorough response” to the defendant’s arguments for a downward variance”). **[Same sentence on remand.]**

United States v. Peters, 512 F.3d 787, 788-89 (6th Cir. 2008) (reversing as procedurally unreasonable a within-guidelines sentence where the district court made only a cursory statement acknowledging defendant’s arguments in mitigation, but never addressed them explaining why it was rejecting those arguments). **[Same sentence on remand.]**

United States v. Blackie, 548 F.3d 395, 401-02 (6th Cir. 2008) (reversing a 42-month sentence as procedurally unreasonable where the district court “did not refer to the applicable Guidelines range and failed to provide its specific reasons for an upward departure or variance at the time of sentencing or in the written judgment and commitment order”). **[Resentenced to 41 months on remand, which was within the guideline range.]**

United States v. Barahona-Montenegro, 565 F.3d 980 (6th Cir. 2009) (reversing above-guideline sentence of 48 months where district court failed to adequately address the defendant’s arguments or explain its chosen sentence). **[Sentenced to 37 months on remand.]**

United States v. Recla, 560 F.3d 539 (6th Cir. 2009) (reversing as procedurally unreasonable where, *inter alia*, the district court failed to address the defendant’s non-frivolous argument for a lower sentence). **[Same sentence on remand.]**

United States v. Grams, 566 F.3d 683 (6th Cir. 2009) (in a bank robbery case, reversing as procedurally unreasonable an above-guideline sentence of 72 months (one month above the guideline range) for inadequate explanation, particularly regarding whether the district court’s decision amounted to a variance or an upward departure). **[Resentenced to 71 months.]**

United States v. Gapinski, 561 F.3d 467, 474-75 (6th Cir. 2009) (reversing a ten-year, below-guideline sentence for marijuana manufacturing where the court was “not satisfied [] that the district court adequately considered [the defendant’s] argument for a lower sentence based upon his substantial assistance to the government”). **[Same sentence on remand.]**

United States v. Penson, 526 F.3d 331 (6th Cir. 2008) (in a bank robbery case, reversing as procedurally unreasonable within-range sentence of 310 months (down from 365 month sentence on remand after *Booker*) because the district court did not consider the § 3553(a) factors and “provided virtually no explanation giving insight into the reasons for the specific sentence given.”). **[Same sentence on remand.]**

United States v. Harris, 567 F.3d 846 (7th Cir. 2009) (in a drug case, reversing defendant Morrow’s within-guideline sentence of 504 months because of inadequate explanation of 3553(a) factors, particularly with regard to defendant’s health complications). **[Same sentence on remand.]**

United States v. [Clinton] Williams, 553 F.3d 1073, 1084-85 (7th Cir. 2009) (reversing as procedurally unreasonable a 552-month sentence (at the top of the guideline range) in a case involving a series of armed robberies where district court did not explain its reason for rejecting defendant’s uncontested mitigating evidence). **[Resentenced to 444 months on remand.]**

United States v. Steward, 339 Fed. App’x 650, 653 (7th Cir. 2009) (in a career offender case involving a small-time drug dealer, reversing as procedurally unreasonable sentence of 200 months where defendant was classified as a career offender under the advisory guidelines and mounted an unrebutted, “well-supported” sweeping policy attack on the career offender guideline that the district court passed over “in silence”). **[Resentenced to 144 months on remand.]**

United States v. Jackson, 546 F.3d 465 (7th Cir. 2008) (in a drug case, reversing within-guideline sentence of 170 months to run consecutive to a state sentence because the district court's response to the defendant's request that the court exercise its discretion under § 5G1.3(c) was "brief, cryptic" and "does not provide sufficient explanation . . . to determine whether the court abused its discretion"). **[Resentenced to 151 months on remand].**

United States v. Azure, 536 F.3d 922, 932 (8th Cir. 2008) (reversing substantial upward variance to 180 months in an assault case where district court committed a "significant procedural error" by failing to adequately explain upward variance, failing to properly calculate guidelines, and relying on dismissed conduct without holding the government to its burden of proof). **[Resentenced to 180 months].**

United States v. Oba, 2009 WL 604936, at *1 (9th Cir. Mar. 9, 2009) (reversing 72-month sentence as procedurally unreasonable where court failed to adequately explain upward variance where factors were already considered in guidelines and did not address defendant's § 3553(a) arguments). **[Resentenced to 51 months on remand.]**

United States v. Santillanes, 274 Fed. App'x 718, 718-19 (10th Cir. 2008) (reversing as procedurally unreasonable a sentence of 121 months in a methamphetamine case where the district court erroneously stated that he did not have the authority to disagree with the guideline as a matter of policy; remanding for district court to address the defendant's argument that the disparity between the guidelines for a mixture and actual methamphetamine produced a sentence (based on the actual) that was greater than necessary to achieve the purposes in 3553(a)). **[Resentenced to 78 months on remand.]**

United States v. Narvaez, 285 Fed. App'x 720, 725 (11th Cir. 2008) (remanding for resentencing where the "district court gave absolutely no reason for imposing the 210-month [within-guideline] sentence" despite defense arguments relating to several 3553(a) factors). **[Same sentence on remand.]**

United States v. [Julio] Magana, 279 Fed. App'x 756 (11th Cir. 2008) (in a case involving convictions for carjacking and § 924(c), reversing the consecutive sentence of 120 months on the § 924(c) count (where mandatory minimum was 84 months and advisory guideline sentence is the mandatory minimum) because it was unclear if the district court was imposing a departure or a variance, nor did it provide findings to justify the upward deviation). **[Same sentence on remand; affirmed on defendant's appeal.]**