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

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July 2010

(Revised and updated through August 15, 2016)

Some may believe that challenging a district court's sentencing procedure on appeal is not likely to result in better outcomes because the court will just do a better job on remand addressing arguments and explaining its decision, but still impose the same sentence. But this is not so. When courts of appeals insist that the district courts fully address the evidence and arguments presented by the parties regarding the appropriate sentence, and then explain their 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 a properly framed appeal resulting in reversal for procedural error under the abuse-of-discretion standard leads more often than not to substantively different results.

Part I briefly summarizes the applicable abuse-of-discretion standard and the Supreme Court's decision in *Rita v. United States*, placing particular focus on its discussion of the district court's factfinding authority and 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 sentencing process (and appellate review of that process) described in *Rita* is perhaps the most important aspect of review for abuse of discretion. Part III collects a large number of cases showing that to insist that courts follow these procedural requirements is not an empty exercise, but instead leads to substantively different outcomes in the majority of cases remanded for resentencing. This paper is intended to serve as inspiration and support as we continue to press district courts to address our arguments and explain their decisions to accept or reject them, and to press the appellate courts to reverse them when they do not.

I. *Rita*, District Court Factfinding, and the Need for Adequate Explanation

There are two components of reasonableness review, procedural and substantive. The court of appeals "must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guideline range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on

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Portions of Part I are drawn from the work of Amy Baron-Evans, Sentencing Resource Counsel, and Paul J. Hofer, Policy Analyst, Sentencing Resource Counsel Project. Special thanks are also owed to James C. Thomas, Emory University School of Law, Class of 2012, for his research assistance.

clearly erroneous facts, or failing to adequately explain--including an explanation for any deviation from the Guidelines range."[1]

If the sentence "is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard."[2] Under that standard, the court of appeals reviews for reasonableness the district court's discretionary decision, involving a mixed question of law and fact[3] and based on its consideration of the factors set forth at § 3553(a) and in light of the evidence and arguments presented, that the sentence imposed, whether within or outside the advisory guideline range, is "sufficient but not greater than necessary" to serve the statutory purposes of sentencing.[4]

In *Rita v. United States*, the Supreme Court held that the court of appeals may, but is not required to, apply a presumption of reasonableness when reviewing a within-guideline sentence.[5] This rebuttable presumption is "not binding," does not reflect greater deference to the Commission than to a district judge, and has no "independent legal effect."[6]

Possibly 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 now consider arguments that the guideline range, in light of the individualized circumstances of the case or as applied in the ordinary case, fails to comply with the statutory objectives. Defendants may "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] The Court also made clear that "the

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[1] *Gall v. United States*, 552 U.S. 38, 51 (2007).

[2] *Id*.

[3] *United States v. Booker*, 543 U.S. 220, 260 (2005) (citing *Pierce v. Underwood*, 487 U.S. 552, 558-62 (1988) (applying abuse-of-discretion standard when district court resolves "fact-dependent" questions involving "multifarious, fleeting, special, narrow facts that utterly resist generalization"); *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 401, 403 (1990) (applying abuse-of-discretion standard when district court applies a "fact-dependent legal standard" regarding issues "rooted in factual determinations")); *see also Koon v United States*, 518 U.S. 81, 99 (1996) (citing abuse-of-discretion standard in *Pierce* and *Cooter & Gell* with approval).

[4] 18 U.S.C. § 3553(a)(2).

[5] *Rita v. United States*, 551 U.S. 338 (2007).

[6] *Id.* at 347, 350.

[7] *Id*. at 351.

[8] *Id*. at 351, 357.

sentencing court subjects the defendant's sentence to the thorough adversarial testing contemplated by federal sentencing procedure."[9]

When district court judges consider these challenges, they have authority to engage in factfinding regarding whether the sentencing range recommended by the guideline serves the purposes of sentencing. They may consider, for example, empirical evidence relating to the harmfulness of different drugs, whether or not lengthy sentences actually deter or prevent crime, and whether certain characteristics of the defendant or treatment options reduce recidivism.[10] Thus, for example, based on evidence and arguments presented at the sentencing hearing, a district court found that the Commission set base offense levels for the drug MDMA (ecstasy) based on a determination of relative harmfulness that is not supported by empirical evidence, and that the Commission's determination was contrary to such evidence.[11] The court then relied on the evidence presented to devise a different ratio of relative harmfulness for use in all ecstasy cases.[12] Or, for example, the court may consider empirical evidence indicating that treatment outside of prison would reduce the likelihood of future criminal conduct, while lengthy imprisonment would increase that likelihood.[13] It may consider evidence that mitigating factors

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[9] *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)).

[10] *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.

[11] In *United States v. McCarthy*, 2011 WL 1991146 (S.D.N.Y. May 19, 2011), the defendant challenged the Commission's conclusion that MDMA offenses should be punished more severely than powder cocaine offenses, with 1 gram of MDMA punished the same as 2.5 grams of powder cocaine. Based on expert testimony, scientific reports, and empirical data, the district court accepted the Commission's conclusion that MDMA is aggressively marketed to youth, rejected its finding that MDMA is a hallucinogen, and found that current scientific evidence showed MDMA to be less neurotoxic than the science upon which the Commission had relied. The court found that the Commission had selectively focused on neurotoxicity to the exclusion of several factors showing that powder cocaine is more harmful than MDMA in its addictiveness, rate of hospitalizations, prevalence of cardiovascular and respiratory damage, deaths, violence, and prevalence of use.

[12] *Id.* The court found that the Commission's "selective analysis is incompatible with the goal of uniform sentencing based on empirical data," and determined that 1 gram of MDMA should be punished the same as 1 gram of powder cocaine. *Id.* at *4 (adopting a MDMA-to-marijuana equivalency of 200:1, the same as that for powder cocaine). Though it acknowledged that much of the evidence "indicates that MDMA is less harmful than cocaine," the court declined to adopt a lower ratio, as the defendant urged but suggested it may adopt a lower equivalency "given a sufficient factual foundation." *Id.* at *4 n.2.

[13] A wealth of research has shown that imprisonment is not needed in a large portion of cases to achieve the purposes of sentencing and is often counterproductive by increasing recidivism and failing to prepare prisoners for successful re-entry. *See, e.g.*, Miles D. Harer, *Do Guideline Sentences for Low-Risk Drug Traffickers Achieve Their Stated Purposes*?, 7 Fed. Sent'g Rep. 22 (1994) ("[T]he alienation, deteriorated family relations, and reduced employment prospects resulting from the extremely long removal from family and regular employment may well increase recidivism."); Lynne M. Vieraitis *et al.*, *The Criminogenic Effects of Imprisonment: Evidence from State Panel* Data 1974-2002, 6 Criminology & Pub. Pol'y 589 (2007); Sentencing Project, Incarceration and Crime: A Complex Relationship 7-8 (2005),

deemed by the Commission as "not relevant" or "not ordinarily relevant" are in fact highly relevant to the appropriate sentence.[14] It may consider empirical research showing that no particular amount of imprisonment – or any imprisonment – is necessary for deterrence, contrary to popular belief.[15]

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http://www.sentencingproject.org/doc/publications/inc_iandc_complex.pdf ("The rapid growth of incarceration has had profoundly disruptive effects that radiate into other spheres of society. The persistent removal of persons from the community to prison and their eventual return has a destabilizing effect that has been demonstrated to fray family and community bonds, and contribute to an increase in recidivism and future criminality."); U.S. Sent'g Comm'n, *Staff Discussion Paper, Sentencing Options under the Guidelines* (1996).

[14] The Commission's own research and substantial other research demonstrates that employment, education, abstinence from alcohol and drugs, and family ties and responsibilities all predict reduced recidivism. U.S. Sent'g Comm'n, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 12-13 & Ex. 10 (2004); U.S. Sent'g Comm'n, *Recidivism and the "First Offender"* 8 (2004); Miles D. Harer, Federal Bureau of Prisons, Office of Research and Evaluation, *Recidivism Among Federal Prisoners Released in 1987*, at 5-6, 54 (1994), http://www.bop.gov/news/research_projects/published_reports/recidivism/oreprrecid87.pdf; Correctional Service Canada, *Does Getting Married Reduce the Likelihood of Criminality*, Forum on Corrections Research, Vol. 7, No. 2 (2005) (citing Robert J. Sampson & John H. Laub, *Crime and Deviance Over Life Course: The Salience of Adult Social Bonds*, 55 Am. Soc. Rev. 609 (1990)); Robert J. Sampson *et al.*, *Does Marriage Reduce Crime? A Counterfactual Approach to Within-Individual Causal Effects*, 44 Criminology 465, 497-500 (2006); Shirley R. Klein *et al.*, *Inmate Family Functioning*, 46 Int'l J. Offender Therapy & Comp. Criminology 95, 99-100 (2002). For research supporting the relevance of these factors to the purposes of sentencing, *see* Amy Baron-Evans & Jennifer Niles Coffin, *No More Math Without Subtraction: Deconstructing the Guidelines' Prohibitions and Restrictions on Mitigating Factors* (April 2011), http://www.fd.org/pdf_lib/No_More_Math_Without_Subtraction.pdf.

[15] All reliable research shows that increasing sentences has no effect on deterrence. *See* Nat'l Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* 134-40, 337 (2014) (examining empirical studies and concluding that because the marginal deterrent effect of long sentences, if any, is so small and so far outweighed by the increased costs of incarceration, long sentences are "not an effective deterrent"); Daniel S. Nagin, *Deterrence in the Twenty-First Century*, 42 Crime & Justice 199, 202 (2013) "[L]engthy prison sentences cannot be justified on a deterrence-based, crime prevention basis."); *see also* Francis T. Cullen *et al*., *Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science*, Prison Journal 91: 48S (2011); Steven N. Durlauf & Daniel S. Nagin, *Imprisonment and Crime: Can Both Be Reduced*? 10 Criminology & Pub. Pol'y 13, 37 (2011); Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime & Justice: A Review of Research 28-29 (2006); Ilyana Kuziemko & Steven D. Levitt, *An Empirical Analysis of Imprisoning Drug Offenders*, 88 J. of Pub. Econ. 2043, 2043 (2004) ("it is unlikely that the dramatic increase in drug imprisonment was cost-effective"); David Weisburd *et al.*, *Specific Deterrence in a Sample of Offenders Convicted of White-Collar Crimes*, 33 Criminology 587 (1995); Andrew von Hirsch *et al.*, *Criminal Deterrence and Sentence Severity: An Analysis of Recent Research* (1999); Gary Kleck *et al.*, *The Missing Link in General Deterrence Theory*, 43 Criminology 623 (2005); Michael Tonry, *Purposes and Functions of Sentencing*, 34 Crime and Justice: A Review of Research 28-29 (2006). Moreover, current research does not support the theory that a longer term of incarceration will reduce the risk that an offender will commit further crimes. A study involving federal white-collar offenders in the pre-guideline era found no difference in deterrent effect even between probation and imprisonment. *See Weisburd et al.*, *supra*; *see also* Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White-Collar Crime*, 8 Cardozo J.

On appeal, the district court's factfinding regarding whether a guideline range serves the purposes of sentencing is not subject to less deference than the Commission's fact-based decision on the same question. The Supreme Court said as much when it 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."[16] The facts referred to here are not just "facts about the case," but "empirical facts" about the guidelines and their "success or failure at achieving [their] purposes."[17] Here, the Court seems to be contrasting the Commission with an ordinary agency. Under the law applicable to ordinary agencies, a court of appeals grants somewhat greater deference to an agency's factfinding than to a district court judge's factfinding at least in certain contexts.[18] The opposite is true in the sentencing context. A court of appeals may not grant greater deference to the Commission's factfinding than to the factfinding of a district court judge when the two conflict. The Court hammered this home by holding that a court of appeals may *not* apply a presumption of unreasonableness to a sentence outside the guideline range.[19]

This prohibition against greater factfinding deference to the Commission on appeal is not

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Conflict Resol. 421, 448-49 (2007) ("[T]here is no decisive evidence to support the conclusion that harsh sentences actually have a general and specific deterrent effect on potential white-collar offenders."). In a recent study of drug offenders sentenced in the District of Columbia, researchers tracked over a thousand offenders whose sentences varied substantially in terms of prison and probation time. The results showed that variations in prison and probation time "have no detectable effect on rates of re-arrest." Donald P. Green & Daniel Winik, *Using Random Judge Assignments to Estimate the Effects of Incarceration and Probation on Recidivism among Drug Offenders*, 48 Criminology 357 (2010) ("[A]t least among those facing drug-related charges, incarceration and supervision seem not to deter subsequent criminal behavior.").

[16] *Rita*, 551 U.S. at 347.

[17] Paul J. Hofer, *Empirical Questions and Evidence in* Rita v. United States, 85 Denv. U. L. Rev. 27, 50 n.128 (2007).

[18] Justice Breyer appears to be referring to *Dickinson v. Zurko*, 527 U.S. 150 (1999), a decision he authored. There, the Court held that the Administrative Procedures Act requires a court of appeals to review findings of fact by the Patent and Trademark Office (PTO) in support of a denial of a patent under the "substantial evidence" standard (or the apparently equivalent "arbitrary and capricious" standard that applies to informal rulemaking) that applies when a court reviews agency action. The Court rejected the view of the Court of Appeals for the Federal Circuit that the agency's factfinding should be reviewed under the "clearly erroneous" standard that would apply to district court factfinding had the patent seeker chosen to seek trial *de novo* in the district court and present additional evidence. The "substantial evidence" standard is more deferential to the agency, if slightly, than the "clearly erroneous" standard. *Id*. at 152-54, 162-63. The Federal Circuit and its *amici* argued that applicants would take the latter path in order to obtain stricter review of the agency's factfinding and that the "clearly erroneous" standard should thus apply on direct review by the court of appeals in the interest of efficiency and consistency, but the Court was unmoved. *Id*. at 164.

[19] *Rita*, 551 U.S. at 354-55; *Gall*, 552 U.S. at 47, 51.

only required to ensure that the guidelines are truly advisory, but makes sense. The underpinning of the more deferential standard of review of an ordinary agency's factfinding is the assumption that the agency is better able to deal with technically complex matters.[20] But the guidelines apply to the sentencing of criminal defendants, a subject well within the experience and expertise of district court judges. And the Commission is no typical expert agency. While guideline amendments must undergo notice and comment,[21] the Commission is otherwise not subject to the Administrative Procedure Act. Unlike a typical agency, it deliberates in private meetings,[22] and is not subject to the Freedom of Information Act.[23] In private meetings, it receives and discusses information from its Executive Branch *ex officio* commissioners, their staff, and law enforcement agencies.[24] The "public comment file" does not include a record of these private communications and deliberations.[25]

Nor has the Commission always followed the "logical outgrowth" principle,[26] 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.[27] 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.[28] Although required to provide a "statement of reasons" for amendments sent to

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[20] *Dickinson*, 527 U.S. at 161.

[21] *See* 28 U.S.C. § 994(x); 5 U.S.C. § 553.

[22] *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").

[23] *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. Sent'g Comm'n, Rules of Practice and Procedure, Rule 1.1, http://www.ussc.gov/general/rules11_01.pdf.

[24] *Id*., Rule 3.3.

[25] *Id*., Rule 5.1.

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

[27] *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).

[28] *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), 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).

Congress, 28 U.S.C. § 994(p), the Commission ordinarily provides a conclusory statement without explanation or rationale,[29] and comments from the defense bar, the judiciary and probation officers are often not addressed.[30] An ordinary agency, in contrast, is required to produce a detailed statement 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.[31]

In the sentencing context, the district court's factfinding leeway not only serves the purpose of ensuring outcomes in individual cases that are independently tied to the statutory purposes of sentencing, but also serves a systemic purpose. According to the Supreme Court, the reasons it was "fair to assume" that the guidelines "reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives" were that (1) the initial guidelines were purportedly based on an "empirical approach" beginning "with an empirical examination of 10,000 presentence reports setting forth what judges had done in the past" (often described as the Commission's "past practice study") and (2) the guidelines can "evolve" in response to judicial decisions and sentencing data.[32] But the initial guidelines were not tied to the past practice study,[33] and have not evolved as Congress envisioned. Congress directed the Commission in the Sentencing Reform Act to measure whether the guidelines were effective in meeting the purposes of sentencing,[34] and to ensure that the guidelines reflected advancement in knowledge of human behavior.[35] The Commission was to "review and revise" the guidelines "in consideration of data and comments coming to its attention," and after consultation with the frontline participants in the criminal justice system.[36] Congress expected that data and reasons

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[29] *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).

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

[31] *See* Richard J. Pierce, Jr., *Administrative Law Treatise*, vol. I, § 7.1, at 559 (2010); *id.* § 7.4 at 592-94, 597-601 (discussing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983), and collecting cases).

[32] *Rita*, 551 U.S. at 349-50. The Commission's past practice study is reported in U.S. Sent'g Comm'n, *Supplementary Report on the Initial Guidelines and Policy Statements* (1987), available at http://www.fd.org/pdf_lib/Supplementary%20Report.pdf.

[33] *Gall*, 552 U.S. at 46 n.2 ("Notably, not all of the Guidelines are tied to this empirical evidence."); U.S. Sent'g Comm'n, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform* 47 (2004) (initial guidelines were "significantly more severe than past practice" for "the most frequently sentenced offenses in the federal courts").

[34] 28 U.S.C. § 991(b)(2).

[35] *Id*. § 991(b)(1)(C).

[36] *Id.* § 994(o).

from departures would alert the Commission to problems with the guidelines in operation.[37] District courts would state their reasons,[38] appellate courts would uphold "reasonable" departures,[39] and the Commission would collect and study the resulting data and reasons, their relationship to the factors set forth in § 3553(a), and their effectiveness in meeting the purposes of sentencing.[40] The Commission would revise the guidelines based on what it learned.[41] But this rarely ever happened. Under the current standard of review, this important mechanism has been revived[42] and is beginning to work.[43]

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[37] *See* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 8 (1988) ("[T]he system is 'evolutionary' – the Commission issues Guidelines, gathers data from actual practice, analyzes the data, and revises the Guidelines over time."); Edward M. Kennedy, *Sentencing Reform—An Evolutionary Process*, 3 Fed. Sent'g Rep. 271 (1991) ("[T]he structure of the guidelines system draws upon the expertise of the judiciary in addressing [key] issues," departures "will lead to a common law of sentencing," and "the guideline system [will] be evolutionary in nature."); *United States v. Rivera*, 994 F.2d 942, 949-50 (1st Cir. 1993) (Breyer, C.J.) ("[T]he very theory of the guidelines system is that when courts, drawing upon experience and informed judgment in cases, decide to depart, they will explain their departures," the "courts of appeals and the Sentencing Commission, will examine, and learn from, those reasons," and "the resulting knowledge will help the Commission to change, to refine, and to improve, the Guidelines themselves.").

[38] 18 U.S.C. § 3553(c).

[39] 18 U.S.C. § 3742(e)(3), (f)(3) (1988) (amended 2003).

[40] 28 U.S.C. § 995(a)(13)-(16).

[41] *See* S. Rep. No. 98-225, at 80 (1983) ("The statement of reasons . . . assists the Sentencing Commission in its continuous reexamination of its guidelines and policy statements."); *id*. at 151 ("Appellate review of sentences is essential . . . to provide case law development of the appropriate reasons for sentencing outside the guidelines," which "will assist the Sentencing Commission in refining the sentencing guidelines."); *id*. at 182 ("[R]esearch and data collection . . . functions are essential to the ability of the Sentencing Commission to carry out two of its purposes: the development of a means of measuring the degree to which various sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing set forth in . . . 18 U.S.C. § 3553(a)(2), and the establishment (and refinement) of sentencing guidelines and policy statements that reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process.").

[42] *See Booker*, 543 U.S. at 264 ("[T]he Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly."); *Rita*, 551 U.S. at 358 (The courts' "reasoned sentencing judgment[s], resting upon an effort to filter the Guidelines' general advice through § 3553(a)'s list of factors . . . should help the Guidelines constructively evolve over time, as both Congress and the Commission foresaw.").

[43] For example, in 2010 the Commission eliminated recency points in the computation of the criminal history score in response to reasons for below-range sentences and empirical research regarding recidivism, USSG App. C, amend. 742 (Nov. 1, 2010) (Reason for Amendment). In response to an appellate decision holding that an enhanced sentence under the illegal reentry guideline was substantively unreasonable because it was based on a 25-year-old prior conviction, the Commission reduced by 4 levels the 16- and 12-level increases in illegal reentry cases based on a prior conviction when the conviction is

The Supreme Court also provided important guidance regarding the level of explanation required of the district court. In general, "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,"[44] "[W]hen a judge decides simply to apply the Guidelines to a particular case, doing so will not necessarily require lengthy explanation," but this general rule applies only when "circumstances" make "clear that the judge rests his decision upon the Commission's own reasoning that the Guidelines sentence is a proper sentence."[45] Because the Commission rarely provides reasoning for the recommended guideline sentence, it should rarely be "clear" that a guideline sentence rests on its reasoning. Indeed, the Court emphasized 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."[46] "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."[47]

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 directly bears on the appellate court's ability to determine whether a sentence is substantively reasonable, *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.[48] Adequate explanations also

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too old to count under the criminal history rules. USSG App. C, amend. 754 (Nov. 1, 2011) (Reason for Amendment) (citing *United States v. Amezcua-Vazquez*, 567 F.3d 1050, 1055 (9th Cir. 2009)). The Commission conducted a review of the guideline for possession of child pornography, prompted by a high rate of variances and numerous written opinions by judges and courts of appeals explaining flaws in that guideline, *see* U.S. Sent'g Comm'n, Notice of Final Priorities, 75 Fed. Reg. 54,699, 54,699-700 (Sept. 8, 2010), and reported its findings to Congress, U.S. Sent'g Comm'n, *Federal Child Pornography Offenses* (2012). Courts, in turn, have relied on the Commission's findings to justify sentences below the guideline range. *See, e.g.*, *United States v. Klear*, 3 F. Supp. 3d 1298 (M.D. Ala. 2014); *United States v. E.L.*, __ F. Supp. 3d __, No. 15-CR-137, 2016 WL 2939152 (E.D.N.Y. May 19, 2016).

[44] *Rita*, 551 U.S. at 356.

[45] *Id.* at 356-57.

[46] *Id.*

[47] *Id.* at 357.

[48] *United States v. Calderon-Minchola*, 351 F. 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

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 sentence.[49] When judges articulate reasons for sentences, 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."[50] 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.[51]

Having invited district courts to engage in factfinding regarding the soundness of applicable guideline ranges, and having emphasized that the sentence based on that factfinding would be entitled to deference if adequately explained, the Supreme Court in *Kimbrough v. United States* held that it would not be an abuse of discretion for a district court to disagree with the 100:1 crack-to-powder ratio in the guidelines.[52] 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,'" it is not an abuse of discretion to conclude that the guideline "yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case."[53] 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.[54]

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

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(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").

[49] *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).

[50] *Rita*, 551 U.S. at 357-58.

[51] *Id.* at 350.

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

[53] *Id*. at 109-10.

[54] *Gall v. United States*, 552 U.S. 38, 53-60 (2007).

disagreements with unsound guidelines. Thus, in *Nelson v. United States*, the Supreme Court reversed the Fourth Circuit's decision upholding a guideline sentence imposed under the crack cocaine guidelines where the district court stated that "the Guidelines are considered presumptively reasonable," so "unless there's a good reason in the [statutory sentencing] factors . . ., the Guideline sentence is the reasonable sentence."[55] 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."[56]

And in *Spears v. United States*,[57] the Court reversed the Eighth Circuit's ruling that a district court cannot 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 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."[58]

Although *Rita* itself affirmed a within-guideline sentence when the district court did not say much by way of explanation, more refined development of *Rita*'s description of the level of required explanation has taken place in the courts of appeals, as shown below.

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 because it does not serve the purposes of sentencing under § 3553(a). Courts of appeals have affirmed non-guideline sentences that they would have reversed (or in fact did reverse) as unreasonable before *Gall* and *Kimbrough*.[59] They have vacated a significant number of

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[55] 555 U.S. 350 (2009).

[56] *Id.* at 352 (emphasis in original).

[57] *Spears v. United States*, 555 U.S. 261 (2009).

[58] *Id.* at 264 (emphasis in original).

[59] For example, it was not until March 2009, after the Eighth 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).

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.[60] They have breathed meaningful life into the overarching parsimony command of 18 U.S.C. § 3553(a), directing district courts that the sentence must not be greater than necessary to serve the statutory sentencing purposes. For example, in *United States v. Johnson*, the district court imposed a within-guideline sentence of life in prison in a crack case while at the same time indicating that it thought the crack/powder disparity would likely be reduced by Congress at a later date and that the defendant "deserved" relief if so.[61] The Seventh Circuit vacated the sentence because, "[c]onsidered in their totality, the district court's comments create an unacceptable risk that, in imposing a life sentence, it did not account appropriately for the parsimony clause in the governing statute or for the individual circumstances of Mr. Johnson's case."[62] The court remanded the case for a "redetermination of the sentence in light of the parsimony principle of 18 U.S.C. § 3553(a)."[63]

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 wholly unrebutted in the district court. This is best shown by the significant proportion of sentences within the crack guidelines that were affirmed as "reasonable" after *Kimbrough*, despite the universal recognition 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.[64] Fortunately, that court has since taken care to confine the language used there to cases reviewed for plain error only.[65]

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[60] *See* cases collected in Part III, *infra*.

[61] *United States v. Johnson*, 635 F.3d 983 (7th Cir. 2011).

[62] *Id.* at 988 ("[W]e also must be able to infer that the court, in exercising its discretion, determined that the sentence conformed with the parsimony principle of § 3553(a): The sentence must be 'sufficient, but not greater than necessary, to comply with" the sentencing purposes set forth in § 3553(a)(2).'"); *see also, e.g., United States v. Dorvee*, 616 F.3d 174, 188 (2d Cir. 2010) (applying § 3553(a)'s parsimony clause to vacate a within-guideline sentence as unreasonable in part because the guideline for child pornography offenses "typically yields a sentence 'greater than necessary' to achieve the goals of § 3553(a)").

[63] *Johnson*, 635 F.3d at 990.

[64] *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

Courts of appeals have also dismissed the argument that a district court was *required* to consider an argument that a guideline is unsound and thus should not be followed *in any case*,[66] or that the presumption of reasonableness should never apply to a guideline not based on empirical data.[67] Thus, it is important to carefully frame the issue. The reason the district court should vary from a guideline not based on "empirical data or national experience" is not simply that it is not empirically based or was promulgated without any reason tied to statutory sentencing purposes, but that it recommends a sentence that is greater than necessary to serve those purposes.[68] At the same time the defendant shows an absence of rationale underlying the guideline in terms of the statutory sentencing purposes, she should present evidence that the guideline range is greater than necessary to serve those purposes, and that the sentence she seeks *does* serve those purposes.[69] So, for example, a defendant might present evidence that the career offender guideline is not tied to past practice but was required by a congressional directive, that the Commission for no stated reason went well beyond the directive in a manner that directly impacted him, and that the Commission itself has found that the guideline places defendants such as himself in a criminal history category that overstates their risk of recidivism.[70] At the same

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expressly is not an error when the court otherwise discussed the specific factor and appears to have considered and implicitly rejected the argument.").

[65] *United States v. Davy*, 2011 WL 2711045, *5 n.6 (6th Cir. July 12, 2011).

[66] *See, e.g.*, *United States v. Aguilar-Huerta*, 576 F.3d 365, 367-68 (7th Cir. 2009) ("rejecting a guideline [because it] lack[s] a basis in data, experience, or expertise would [] be proper," but a district court is not "*required* to consider . . . an argument that a guideline is unworthy of application in *any* case because it was promulgated without adequate deliberation." (emphasis in original)).

[67] *See, e.g.*, *United States v. Mondragon-Santiago*, 564 F.3d 357, 366 (5th Cir. 2009) ("*Kimbrough* did not question the appellate presumption, however, and its holding does not require discarding the presumption for sentences based on non-empirically-grounded Guidelines."); *United States v. Miller*, 665 F.3d 114, 120-21 (5th Cir. 2011) (applying presumption of reasonableness though acknowledging that §2G2.2 is not based on empirical data, and affirming within-guideline sentence as substantively reasonable).

[68] *See Kimbrough*, 552 U.S. at 109-10. The court explained that the reason it would "not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case" is that the Commission looked only to the mandatory minimum sentences in formulating guideline ranges for crack, did not account for "empirical data and national experience," and has since "reported that the crack/powder disparity produces disproportionately harsh sanctions, i.e., sentences for crack cocaine offenses 'greater than necessary' in light of the purposes of sentencing set forth in § 3553(a)."

[69] *See generally* Amy Baron-Evans, *Sentencing by the Statute*, *supra* note 10.

[70] For a complete description of the history and development of the career offender guideline, and the evidence that it does not serve statutory sentencing purposes, *see* Amy Baron-Evans *et al.*, *Deconstructing the Career Offender Guideline*, 2 Charlotte L. Rev. 39 (2010). This paper is updated occasionally and is posted at http://www.fd.org/odstb_SentDECON.htm.

time, he might present evidence that he needs drug treatment and job training, that drug treatment works even for those with criminal history, and that drug treatment is more effective in the community. Or, as in *United States v. Preacely*,[71] he might present evidence of a childhood of poverty, drug abuse, and failed education, but that in the time since his arrest, he has successfully treated his addiction, transformed his professional life by participating in a workforce development program, and transformed his personal life by becoming a responsible husband and father, indicating that he has been rehabilitated and is thus unlikely to recidivate.[72] When framed in this manner, the district court must squarely face the evidence and arguments as it decides on the appropriate sentence under § 3553(a).

That the court may have heard these arguments before makes no difference. It must still explain the sentence imposed in light of the arguments presented and § 3553(a). The Seventh Circuit recently vacated a within-guideline sentence imposed in the face of arguments in mitigation – including an argument that the 16-level enhancement under the illegal reentry guideline was excessively severe – because the district court failed to address the arguments "or give any reason at all to explain the prison sentence imposed."[73] Though the court said these arguments were "stock" and not "unusual," "the district court still was required to explain why its choice of 46 months is appropriate in light of the factors in 18 U.S.C. § 3553(a)."[74] Our task is to remind courts that the question is not whether an argument is "unusual" or "stock," but whether the evidence and arguments we present support the sentence requested in light of the statutory purposes of sentencing. Does a lengthy sentence of imprisonment deter, as a matter of fact? Is the defendant likely to recidivate, as a matter of fact? Does he need treatment, and if so, would treatment reduce the likelihood that he will commit further crimes, as a matter of fact? When the evidence shows that the Commission did not tailor the guideline to serve these purposes, and plenty of evidence shows that the guideline is contrary to these purposes, the "guideline" is not a useful guide for fulfilling the district court's obligation under § 3553(a).

With proper framing by defense counsel, courts of appeals can exercise a meaningful role in promoting substantively better sentencing outcomes tied to the statutory sentencing purposes. Appellate courts have the authority, under the abuse of discretion standard, to determine whether the district court based its fact-dependent discretionary determination of the appropriate sentence on an assessment the evidence before it that is not clearly erroneous or based on an erroneous view of the law. And the district court's explanation of its ultimate determination, in terms of § 3553(a) and the overarching parsimony command, is subject to real review.

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[71] 628 F.3d 72 (2d Cir. 2011).

[72] *See id.* at 81-83 (reversing for procedural error where the district court failed to adequately consider evidence of the defendant's rehabilitation after arrest, which was "particularly relevant to determining whether the Career Offender Guideline was appropriate").

[73] *United States v. Garcia-Oliveros*, 639 F.3d 380, 382 (7th Cir. 2011).

[74] *Id.*

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. As set forth above, *Rita* says that when a party challenges the guideline sentence 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 evidence-based evaluation, independent of the guidelines and tied to the purposes of sentencing, why it has nevertheless followed the guideline. Recently, a panel of the Sixth Circuit expressly acknowledged that the "brevity" of explanation permitted by *Rita* for within-guideline sentences "may be unacceptable" when a party makes a "policy-based challenge to the Guidelines—i.e., 'that the Guidelines reflect an unsound judgment,'" describing such challenges as "among those nonfrivolous arguments that may require a lengthier response."[75] There, the panel vacated the sentence and remanded for resentencing because the district did not explain why it rejected the defendant's challenge to the 2-level enhancement under the firearms guideline that applies if the offense involved a stolen firearm, regardless whether the defendant knew or should have known it was stolen.[76]

Finally, the presumption that a guideline sentence is reasonable is rebuttable *in the court of appeals*.[77] 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 unreasonable[78] or to insist that the district court better explain its sentence in the face of a well-supported challenge that went unrebutted in the district court.[79] They have also recognized their authority to require

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[75] *United States v. Davy*, 2011 WL 2711045, *5 n.6 (6th Cir. July 12, 2011).

[76] *Id.* at *7.

[77] *Rita*, 551 U.S. at 366-67 (Stevens, J., concurring).

[78] *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 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 16-level enhancement based on old convictions that are not counted under the criminal history rules).

[79] *See United States v. Steward*, 339 F. App'x 650, 653 (7th Cir. 2009) (in a career offender case involving a small-time drug dealer, reversing for procedural error sentence of 200 months where defendant mounted an unrebutted, "well-supported" attack on the career offender guideline based on the "Sentencing Commission's own report, questioning the efficacy of using drug trafficking convictions, especially for retail-level traffickers, to qualify a defendant for career offender status," which the district court passed over "in silence"); *United States v. Tutty*, 612 F.3d 128 (2d Cir. 2010) (in child pornography case, reversing for procedural error within-guideline sentence of 168 months because the district court did

district 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.[80] And if there is evidence that the Commission *did* base its guideline on careful study, courts of appeals have the authority to rely on such evidence to reverse an above-guideline sentence as unreasonable.[81]

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 Part III, reversal for failure to engage in this process often leads to substantively different results. 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 past practice or any empirical evidence, and does not advance the purposes of sentencing. In *United States v. Santillanes*, 274 F. 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

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not address the defendant's 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'"); *United States v. Davy*, 2011 WL 2711045, *5 n.6 (6th Cir. July 12, 2011) (in a felon-in-possession case, reversing for procedural error within-guideline sentence because district court failed to address the defendant's challenge to the stolen gun enhancement, or to explain why it rejected that argument).

[80] *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. Calderon-Minchola*, 351 F. App'x 610, 612 (3d Cir. 2009) (because it could not conclude that the sentence was not greater than necessary, reversing 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). In *United States v. Bragg*, 582 F.3d 965, 969-70 (9th Cir. 2009), the Ninth Circuit reversed a probationary sentence in part 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 to others. The judge was correct, *see supra* note 15, but did not rely on evidence to support his view.

[81] *See, e.g., United States v. Lente*, 323 F. App'x 698 (10th Cir. 2009) (Holmes, J., concurring in the judgment) (engaging in extensive discussion regarding the history and development of the manslaughter guideline and concluding that "the district court's decision here to deviate from the Guidelines cannot survive scrutiny because the court completely failed to establish the requisite nexus between its policy disagreement and [the defendant's] sentence," and concluding that a sentence of 216 months (nearly four times the top of the guideline range) for drunk driving offenses committed on Indian Country and resulting in three deaths was substantively unreasonable).

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. [82]

When appellate courts require judges to critically evaluate the arguments and 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 frequent reason for reversal on appeal for defendants and the government alike.

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

Collected in the tables below are a large number of cases decided after *Gall* in which the sentence was reversed for procedural error for (a) failing to adequately address or consider a nonfrivolous argument, (b) failing to adequately explain why it accepted or rejected such an argument, or (c) failing to explain the ultimate sentence imposed in light of the factors, sentencing purposes, or parsimony mandate in § 3553(a).[83] The cases were followed through

[82] Transcript of Sentencing Hr'g at 24-33, *United States v. Santillanes*, No. 07-619 (D.N.M. Sept. 19, 2009), available on PACER at https://ecf.nmd.uscourts.gov/doc1/12111917143.

[83] 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. This list does not include cases in which it is clear from the opinion of the appellate court that the district court did not address an argument

resentencing (for those resentenced as of August 15, 2016), and the original sentence imposed was compared to the sentence imposed on remand.

Overall, the sentence imposed on remand differed from the original sentence, often significantly, in the *majority* (61.4%) of cases reversed for these forms of procedural error. Looking only at within-guideline sentences reversed on the defendant's appeal, which represent the largest number of such reversals, 58.1% of sentences (61 of 105) were less severe on remand. For sentences outside the guideline range, 73.7% of sentences (42 of 57) appealed by the defendant (both above and below the guideline range) were less severe on remand, and 45.5% of sentences (10 of 22) appealed by the government (all below the guideline range) were more severe on remand.

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because circuit precedent precluded it from doing so. Also note that this list does not include sentences imposed on the revocation of probation or supervised release.

Sentences within the guideline range reversed for procedural error where court failed to adequately explain sentence or address a nonfrivolous argument or failed to explain reason for rejecting such an argument – Defendant's appeal

Case Name	Original Sentence[84]	Reason	Sentence on Remand
United States v. Corsey, 723 F.3d 366 (2d Cir. 2013) [John Gilbert Juncal]	240 months	Record is "ambiguous" whether district court understood the available options, and it "gave only a passing mention to any of the section 3553(a) factors," "relying almost exclusively on one word—deterrence." Also failed to make individualized determination under § 3553(a) for each defendant.	240 months
[Zechariah Sampsonl]	240 months		**180 months**
[James Anderson Campbell, Jr.]	240 months		**192 months**
United States v. McLean, 518 F. App'x 30 (2d Cir. 2013)	18 months	"Especially in light of the submissions of defense counsel demonstrating McLean's psychiatric and cognitive deficits, and defense counsel's specific request for the court's reasons for the sentence imposed, [] erred by failing to explain why he has rejected those arguments." (Internal quotation marks omitted.)	18 months
United States v. Echeverri, 460 F. App'x 54 (2d Cir. 2012)	97 months	Failed to articulate any reasons for its chosen sentence.	**78 months**
United States v. Cossey, 632 F.3d 82 (2d Cir. 2011)	78 months	Failed to explain adequately, with evidentiary support, basis for sentence in terms of § 3553(a): "[H]ere, the sentencing hearing focused nearly entirely on the court's [unsupported] belief that Cossey could not but return to viewing child pornography, because of an as-of-yet undiscovered gene."	78 months
United States v. Tutty, 612 F.3d 128 (2d Cir. 2010)	168 months	Failed to consider policy-based challenge to child pornography guideline.	**84 months**
United States v. Hernandez, 604 F.3d 48 (2d Cir. 2010)	405 months	Failed "to consider how intervening developments – in particular, Hernandez's rehabilitation – affected the Section 3553(a) analysis."	**384 months**
United States v. Johnson, 273 F. App'x 95 (2d Cir. 2008)	Life	Failed to provide adequate explanation.	Life
United States v. Palillero, 525 F. App'x 92 (3d Cir. 2013)	70 months	Failed to consider request for policy-based variance from the methamphetamine guideline because it "erroneously believed it did not have the legal authority [the argument]."	**48 months**

[84] All sentences are stated as terms of imprisonment, except as otherwise noted.

United States v. Salinas-Cortez, 660 F.3d 695 (3d Cir. 2011)	156 months	Failed to address adequately Salinas-Cortez's request for variance based on post-sentencing rehabilitation.	**144 months**
United States v. Friedman, 658 F.3d 342 (3d Cir. 2011)	34 months	Failed to address adequately Friedman's request for a variance based on sentencing disparity.	**24 months**
United States v. Byrd, 415 F. App'x 437 (3d Cir. 2011)	151 months	Failed to respond to request for a downward variance based on the crack/powder disparity.	**121 months**
United States v. Carver, 347 F. App'x 830 (3d Cir. 2009)	66 months	Failed to address defendant's argument for a lesser sentence based on the crack/powder disparity.	**48 months**
United States v. Sevilla, 541 F.3d 226 (3d Cir. 2008)	72 months	Failed to address defendant's arguments for below guideline sentence and did not adequately explain sentence.	**57 months**
United States v. DeYoung, 571 F. App'x 231 (4th Cir. 2014)	70 months	Rejected DeYoung's requests for a lower sentence "without explanation."	**15 months (time served)**
United States v. Williams, 571 F. App'x 220 (4th Cir. 2014)	42 months	"[F]ailed to adequately explain in open court its sentencing determination. Specifically, the district court failed to conduct an individualized application of the § 3553(a) factors."	42 months
United States v. Smith, 541 F. App'x 306 (4th Cir. 2013)	228 months	"[P]rovided scant explanation of its reasons for denying the requested variance and for the within-Guidelines sentence it ultimately selected. [P]rovided only a brief response to Smith's argument that his limited criminal history warranted a downward variance sentence, and it did not specifically address Smith's assertion that his criminal history score was exaggerated. [Did not] specifically address counsel's arguments regarding Smith's history and characteristics, including Smith's loving relationships with his family and post-incarceration rehabilitation. [D]id not refer at any point to the § 3553(a) factors or indicate its calculus under those factors."	[Not yet resentenced]
United States v. Torres-Aguirre, 481 F. App'x 803 (4th Cir. 2012)	144 months	"[D]id not explain its selected sentence in any detail, made no reference to any of the factors enumerated in 18 U.S.C. § 3553(a), and failed to give Torres-Aguirre's nonfriviolous reasons for imposing a different sentence explicit consideration." (Internal quotation marks omitted.)	**136 months**
United States v. Gay, 466 F. App'x 183 (4th Cir. 2012)	120 months	"[D]id not state any reasons to support its chosen sentence or make any reference to the Guidelines, the § 353(a) factors, or the arguments of the parties. [D]id not otherwise indicate that it had made an individualized	**87 months**

		assessment; for example, [] did not address defense counsel's argument that, at the time of the offense, Gay had suffered from a mental infirmity rendering him less culpable for his conduct."	
United States v. Medel-Moran, 422 F. App'x 262 (4th Cir. 2011)	52 months	Failed to explain chosen sentence or address defendant's arguments.	52 months
United States v. Gonzalez-Villatoro, 417 F. App'x 297 (4th Cir. 2011)	24 months	Failed to addressed defendant's § 3553(a) arguments or explain its reasons for the chosen sentence; failed to "articulate an individualized assessment of the factors and could have made the same recitation during any sentencing hearing."	24 months
United States v. Leech, 409 F. App'x 633 (4th Cir. 2011)	151 months	Failed to make an individualized assessment and failed to articulate a reason for the sentence imposed.	151 months
United States v. Taylor, 371 F. App'x 375 (4th Cir. 2010)	240 months	Failed to "explicate[] its reasons for imposing" the sentence, or to address "the non-spurious bases identified in detail by counsel for a variance sentence."	240 months
United States v. Walker, 403 F. App'x 803 (4th Cir. 2010)	480 months	Failed to reference the guideline range, the statutory factors, or Walker's arguments regarding his criminal history and the nature of his crimes.	480 months
United States v. Martinez-Martinez, 378 F. App'x 302 (4th Cir. 2010)	89 months	Failed to adequately explain the chosen sentence and failed to address mitigating factors raised by defendant.	89 months
United States v. Jackson, 397 F. App'x 924 (4th Cir. 2010)	57 months	Failed to provide adequate explanation; did not address the "undisputed mitigating factors raised by Jackson."	57 months
United States v. Hardee, 396 F. App'x 17 (4th Cir. 2010)	108 months	Failed to adequately explain the sentence.	108 months
United States v. Ricketts, 395 F. App'x 69 (4th Cir. 2010)	70 months	Failed to address nonfrivolous argument for a variance (regarding the crack to powder ratio); did not permit Ricketts to argue for a sentence outside the guideline range; failed to provide adequate explanation for the sentence.	**60 months**
United States v. Cornette, 396 F. App'x 8 (4th Cir. 2010)	220 months	Provided no explanation whatsoever for its chosen sentence, but merely stated in conclusory terms that it had considered the § 3553(a) factors.	220 months
United States v. Black, 389 F. App'x 256 (4th Cir. 2010)	50 months	Failed to explain why it imposed the chosen sentence, did not address the mitigating factors raised by Black, or provide any other reason for choosing the sentence imposed.	50 months

United States v. Lynn, 592 F.3d 572 (4th Cir. 2010)	396 months	"[I]gnor[ed] Lynn's non-frivolous arguments for a different sentence and fail[ed] to explain the sentencing choice."	**360 months**
United States v. Pacheco Mayen, 383 F. App'x 352 (4th Cir. 2010)	51 months	Failed to provide adequate explanation for the sentence imposed, failed to address the mitigating factors raised by Mayen, and did not provide any other reason for choosing the sentence imposed.	**46 months**
United States v. Clark, 383 F. App'x 310 (4th Cir. 2010)	200 months	Failed to "address Clark's sentencing disparity argument, to explain its individualized assessment of the applicable § 3553(a) factors considered in imposing the chosen sentence, or to articulate why it rejected Clark's argument for a below guidelines sentence."	**175 months**
United States v. Olislager, 383 F. App'x 314 (4th Cir. 2010)	235 months	Failed to address any of the § 3553(a) factors or "place on the record an individualized assessment based on the particular facts of the case before it."	235 months
United States v. Murphy, 380 F. App'x 344 (4th Cir. 2010)	117 months	Failed to explain "how it determined that the 117-month sentence would accomplish the sentencing goals set out in § 3553(a)" or to "consider[] Murphy's nonfrivolous arguments."	**108 months**
United States v. Herder, 594 F.3d 352 (4th Cir. 2010)	41 months	Failed to consider argument for a lower sentence based on the crack/powder disparity.	**33 months**
United States v. Dury, 336 F. App'x 371 (4th Cir. 2009)	204 months	Failed to adequately explain the sentence imposed as it related to the § 3553(a) factors.	204 months
United States v. Shambry, 343 F. App'x 941 (4th Cir. 2009)	30 months 30 months	Failed to state reasons supporting sentences and made no response to defense arguments for below-guideline sentences for two defendants.	30 months **24 months**
United States v. Harris, 337 F. App'x 371 (4th Cir. 2009)	46 months	Failed to adequately explain sentence or address defendant's arguments for below-guideline sentence.	46 months
United States v. Sanders, 340 F. App'x 162 (4th Cir. 2009)	63 months	Failed to adequately explain sentence.	63 months
Unites States v. Clay, 787 F.3d 328 (5th Cir. 2015)	151 months	Failed to adequately consider arguments because it "did not recognize its discretion to vary from the [career offender] guidelines range" based on a policy disagreement.	**72 months**
United States v. Simmons, 568 F.3d 564 (5th Cir. 2009)	Life	Failed to adequately consider disagreement with guideline policy regarding the relevance of age.	**240 months**
United States v. Tisdale, 264 F. App'x 403 (5th Cir. 2008)	97 months 97 months	Failed to give any indication it had considered any of the § 3553(a) factors or articulate sufficient reasons why it was rejecting the defendants' arguments for a sentence below the guidelines.	**72 months** **84 months**
United States v. Ferguson, 518	200 months	"[D]id not: 1) consider all of the defendant's	**140 months**

F. App'x 458 (6th Cir. 2013)		arguments in support of a downward variance; 2) consider all of the § 3553(a) factors[;] and 3) adequately express his reasons, in light of those factors, for imposing a sentence of 200 months."	
United States v. McAllister [Stanley Hughes], 491 F. App'x 569 (6th Cir. 2012)	78 months	Failed to acknowledge crack/powder disparity argument.	78 months
United States v. Bugg, 483 F. App'x 166 (6th Cir. 2012)	510 months	"[T]he record does not reflect that the court considered Bugg's non-frivolous argument for a concurrent sentence and, if considered, its reasons for rejecting it."	510 months
United States v. Watkins, 450 F. App'x 511 (6th Cir. 2011)	360 months	"[N]ot only failed to provide *adequate* reasoning, it failed to provide *any* reasoning."	360 months
United States v. Montague, 438 F. App'x 478 (6th Cir. 2011)	110 months	Failed to adequately address request for variance from the stolen-firearm enhancement where the defendant did not know the firearm was stolen due to district court's "mistaken belief that it lacks authority to reject or vary on policy grounds."	110 months
United States v. Davy, 2011 WL 2711045 (6th Cir. July 12, 2011)	92 months	Failed to provide an adequate explanation for the sentence imposed; not clear "whether the district court adequately considered and rejected [Davy's] arguments' or, instead, 'misconstrued, ignored, or forgot [Davy's] arguments."	**84 months**
United States v. Taylor, 648 F.3d 417 (6th Cir. 2011)	120 months	Did not adequately consider the merits of Taylor's nonfrivolous arguments regarding how "postsentencing amendments to the Guidelines relate to the determination of an appropriate sentence under § 3553(a)."	**90 months**
United States v. Pizzino, 419 F. App'x 579 (6th Cir. 2011)	180 months	Failed to address nonfrivolous arguments for leniency.	180 months
United States v. Johnson, 407 F. App'x 8 (6th Cir. 2010)	110 months	Failed to address adequately (due to failure to recognize scope of its discretion under § 3553(a)) defendant's request for variance from the crack-to-powder ratio: Was "not free to cede [its] discretion by concluding that [its] courtroom[] [is] the wrong forum for setting a crack-to-powder ratio."	**80 months**
United States v. Ross, 375 F. App'x 502 (6th Cir. 2010)	262 months *consecutive* to 168-month undischarged federal sentence in another district	Insufficient consideration of § 3553(a) factors, providing "nothing more than conclusory statements" and making "no attempt to actually apply any of these factors to the specific facts of this case or explain why those sentencing factors actually counseled in favor of the imposed sentence."	**262 months *concurrent* to the undischarged term**

United States v. Goff, 400 F. App'x 1 (6th Cir. 2010)	360 months	Failed to adequately explain decision to impose consecutive sentences; failed to consider arguments in mitigation.	360 months
United States v. Johnson, 407 F. App'x 8 (6th Cir. 2010)	110 months	Failed to "appreciate the scope of its discretion" or explain with adequate reasons its rejection of request to vary from the crack/powder ratio.	**80 months**
United States v. Wallace, 597 F.3d 794 (6th Cir. 2010)	78 months	Failed to adequately explain why it rejected the defendant's nonfrivolous argument for a lower sentence based on co-defendant disparity.	78 months
United States v. Rhodes, 410 F. App'x 856 (6th Cir. 2010)	30 months	Failed to address nonfrivolous arguments in mitigation.	30 months
United States v. Temple, 404 F. App'x 15 (6th Cir. 2010)	327 months	Failed to "articulate[e] how the facts of Temple's childhood" affected the sentencing decision.	**288 months**
United States v. Pritchard, 392 F. App'x 433 (6th Cir. 2010)	50 months	Failed to address argument and testimony regarding risk of recidivism.	50 months
United States v. Fenderson, 354 F. App'x 236 (6th Cir. 2009)	262 months	"[T]he district court's review of the 3553(a) factors was insufficient."	**244 months**
United States v. Howell, 352 F. App'x 55 (6th Cir. 2009)	90 months	Failed to explain its application of the § 3553(a) factors: "If trial courts were permitted to simply recite the statutory language in § 3553(a), any substantive reasonableness review would effectively be precluded."	**78 months**
United States v. Delgadillo, 318 F. App'x 380 (6th Cir. 2009)	235 months	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.	235 months
United States v. Robertson, 309 F. App'x 918 (6th Cir. 2009)	84 months	Failed to address defendant's 3553(a) arguments about double counting.	**60 months**
United States v. Recla, 560 F.3d 539 (6th Cir. 2009)	70 months	Failed to address the defendant's nonfrivolous argument for a lower sentence.	70 months
United States v. Penson, 526 F.3d 331 (6th Cir. 2008)	310 months	Failed to consider the § 3553(a) factors and "provided virtually no explanation giving insight into the reasons for the specific sentence given."	310 months
United States v. Stephens, 549 F.3d 459 (6th Cir. 2008)	270 months	Failed to adequately respond to the defendant's arguments for a downward variance.	270 months
United States v. Peters, 512 F.3d 787 (6th Cir. 2008)	71 months	Made only a cursory statement acknowledging defendant's arguments in mitigation, but never addressed them explaining why it was rejecting those arguments.	71 months
United States v. Presley, 790 F.3d 699 (7th Cir. 2015)	440 months	"[G]ave no reason to think that imposing a 37-year sentence on Presley would have a greater deterrent effect on current or prospective heroin	**360 months**

		dealers than a 20-year or perhaps even a 10-year sentence, or that incapacitating him into his sixties is necessary to prevent his resuming his criminal activities at that advanced age." **Note:** Technically, the panel did not reverse the sentence for procedural error in this case. In an unusual move, the panel did its own empirical research on deterrence and aging inmates, "invite[d] the district judge to consider resentencing the defendant in light of the concerns we've expressed in this opinion," and remanded to enable the district court to do so.	
United States v. Estrada-Mederos, 784 F.3d 1086 (7th Cir. 2015)	57 months	Failed to address potentially meritorious argument in mitigation based on a delay in charging and time served in immigration detention.	**49 months**
United States v. Washington, 739 F.3d 1080 (7th Cir. 2014)	97 months	"[D]id not meaningfully explain why 97 months was an appropriate sentence"; the "summary assertion" that it had considered the § 3553(a) factors "is procedurally insufficient."	97 months
United States v. Lyons, 733 F.3d 777 (7th Cir. 2013)	210 months	"The only elaboration" on its "rote statement" that it considered the § 3553(a) factors, "was its remark that the 'sentence was sufficient, but not greater than necessary.' This partial boilerplate naturally raises the question of which particular goals the sentence achieved—'necessary' for what?—and why this precise sentence met those ends. The record gives no indication of how the district court weighted the various sentencing factors, or what facts supported the exercise of hits discretion."	210 months
United States v. Patrick, 707 F.3d 815 (7th Cir. 2013)	360 months *consecutive* to state sentence	"[P]assed by" Patrick's apparently meaningful cooperation with "only a conclusory remark" without explaining why an effective life sentence was the only alternative to serve the (assumed) purpose of marginal deterrence. Also unclear whether the district court "appreciated the severity of the sentence."	**265 months *concurrent* to state sentence**
United States v. Martin, 718 F.3d 684 (7th Cir. 2013)	120 months	(1) Failed "to address Martin's arguments regarding his likelihood of recidivism—particularly in regard to his mental-health issues"; and (2) failed to address Martin's "argument that the child-pornography guidelines do not approximate the goals of sentencing when applied to defendants convicted only of possession who have no history of contact offenses."	**84 months**

United States v. Baca-Baca, 519 F. App'x 933 (7th Cir. 2013)	57 months	"[I]mproperly cabined its discretion by stating that it could not consider Baca-Baca's specific argument for rejecting the 16-level adjustment and that it was 'compelled to follow the law.'"	**29 months**
United States v. Halliday, 672 F.3d 462 (7th Cir. 2012)	240 months	Failed to adequately explain sentence in light of § 3553(a) where judge relied on its "pure speculation" and "belief" that Halliday was remorseless. Sentencing court is "not permitted to rely upon a false or undeveloped assumption in applying the § 3553(a) factors."	**210 months**
United States v. Robertson, 662 F.3d 871 (7th Cir. 2011) [Henry Robertson] [Elizabeth Robertson]	63 months 41 months	"[F]ailed to address" evidence of the Robertsons' principal argument that they had rehabilitated themselves: "[T]he court's silence makes it impossible to discern that it appropriately balanced the Robertsons' rehabilitated lives and characters against the seriousness of their offense for purposes of 18 U.S.C. § 3553(a)."	**37 months** **30 months**
United States v. [Henry] Johnson, 635 F.3d 983 (7th Cir. 2011)	Life	"[D]id not determine, after considering the sentencing factors under 18 U.S.C. § 3553(a), that resentencing Mr. Johnson under his guideline range of natural life in prison was 'sufficient, but not greater than necessary, to comply with' § 3553(a)(2)."	**293 months**
United States v. Garcia-Oliveros, 639 F.3d 380 (7th Cir. 2011)	46 months	Failed to explain what considerations influenced sentencing decision or its view of Garcia-Oliveros' arguments in mitigation: "[T]he district court still was required to explain why its choice of 46 months is appropriate in light of the factors in 18 U.S.C. § 3553(a)."	**24 months**
United States v. Figueroa, 622 F.3d 739 (7th Cir. 2010)	235 months	Failed to explain sentence; based decision on extraneous, inflammatory and idiosyncratic views.	**200 months**
United States v. Panice, 598 F.3d 426 (7th Cir. 2010)	360 months	"[I]t is not clear that the judge gave meaningful consideration to the factors argued by Panice – his history and characteristics, including his lack of criminal history, his offense was nonviolent, and other positive characteristics supported" by the record.	**132 months**
United States v. Smith, 400 F. App'x 96 (7th Cir. 2010)	176 months	Failed to adequately explain in terms of § 3553(a) as sentence may have been influenced by extraneous comments without factual basis regarding issues of broad local, national, and international topics only tangentially related to defendant's offense conduct.	**96 months**
United States v. Arberry, 612	151 months	Failed to address defendant's argument for a	**120 months**

F.3d 898 (7th Cir. 2010)		lower sentence based on crack/powder disparity.	
United States v. Harris, 567 F.3d 846 (7th Cir. 2009)	504 months	Failed to adequately explain sentence in light of 3553(a) factors, particularly with regard to defendant's health complications.	504 months
United States v. Steward, 339 F. App'x 650 (7th Cir. 2009)	200 months	Failed to address an unrebutted, "well-supported" sweeping policy attack on the career offender guideline.	**144 months**
United States v. [Clinton] Williams, 553 F.3d 1073 (7th Cir. 2009)	552 months	Failed to explain its reason for rejecting defendant's uncontested mitigating evidence.	**444 months**
United States v. Villegas-Miranda, 579 F.3d 798 (7th Cir. 2009)	90 months	Failed to address defendant's argument that he should receive a below-guideline sentence to compensate for the concurrent and uncredited time he spent in state prison.	90 months
United States v. Hopkins, 338 F. App'x 528 (7th Cir. 2009)	210 months	Failed to adequately consider argument that the guideline range produces a sentence greater than necessary to serve sentencing purposes, and would be counterproductive to the defendant's rehabilitation.	210 months
United States v. Jackson, 546 F.3d 465 (7th Cir. 2008)	170 months	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."	**151 months**
United States v. Skinner, 303 F. App'x 369 (7th Cir. 2008)	720 months	"Skinner submitted a lengthy and detailed psychologist's report quite relevant to several of the 3553(a) factors as the cornerstone of his argument for leniency, and the district court 'passed over in silence' that argument. This presentation was by no means trivial or frivolous. In this circumstance, the sentencing judge's silence is equivocal and does not assure us that the defendant's argument was considered and rejected."	720 months
United States v. Smith, 573 F.3d 639 (8th Cir. 2009)	360 months	Failed to adequately consider defendant's argument for a lower sentence, despite that it had "some merit," out of a concern that it would be reversed.	**240 months**
United States v. Garcia II, 491 F. App'x 815 (9th Cir. 2012)	51 months	"[F]ailed to set forth enough to satisfy the appellate court that [it] considered the parties' arguments and ha[d] a reasoned basis for exercising [its] own legal decisionmaking authority.' [quoting *Rita v. United States*, 551 U.S. 336, 256 (2007)] . . . Most important, the district court entirely ignored one of Garcia's principal arguments for mitigation. . . . [T]he	51 months

		record does not support the conclusion that the district court made a 'reasoned' decision."	
United States v. Garcia I, 426 F. App'x 530 (9th Cir. 2011)	51 months	As conceded by the government, "district court plainly erred to failing to discuss any of the applicable sentencing factors, explain how it resolved the parties' dispute with respect to the Guidelines calculations, or address Garcia's request for a sentence below the Guidelines range."	51 months
United States v. Mota, 2011 WL 2003433 (9th Cir. May 24, 2011)	120 months	Failed to adequately address defendant's arguments or to explain sentence: "Given the strength of the factors supporting a mid-statutory range sentence for Mota, it is likely that had the district judge specifically considered those factors, the sentence would have been lower than the statutory maximum term of incarceration followed by lifetime supervised release."	**65 months**
Untied States v. Ferguson, 412 F. App'x 974 (9th Cir. 2011)	130 months	"[D]id not mention what § 3553 requires the district court to consider, and did not discuss any of the considerations, so we do not know whether they were considered."	130 months
United States v. Waknine, 543 F.3d 546 (9th Cir. 2008)	121 months	Failed "to abide by the required sentencing procedures" or provide sufficient reasoning in light of the § 3553(a) factors.	**57 months + $100,000 fine**
United States v. Santillanes, 274 F. App'x 718 (10th Cir. 2008)	121 months	Failed to address the defendant's policy-based 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).	**78 months**
United States v. Cerno, 529 F.3d 926 (10th Cir. 2008)	Life	Failed to consider relative amount of force used.	**180 months**
United States v. Solano-Ramirez, 506 F. App'x 871 (11th Cir. 2013)	46 months	"[D]id not mention any of Mr. Solano-Ramirez's arguments in support of mitigation or otherwise indicate that he had considered them. [Did not] cite to § 3553(a) or discuss any of the applicable sentencing factors. [S]aid absolutely nothing about why he thought 46 months was the appropriate prison term."	**30 months**
United States v. Luster, 388 F. App'x 936 (11th Cir. 2010)	63 months	Failed to "mention the § 3553(a) factors, did not state that it had considered the parties' arguments, and did not provide an explanation for selecting a sentence of 63 months' imprisonment."	**50 months**
United States v. Prather [Terry Outlaw], 279 F. App'x 761	110 months	Failed to explain adequately the reason for the sentence imposed.	**85 months**

(11th Cir. 2008)			
United States v. Narvaez, 285 F. App'x 720 (11th Cir. 2008)	210 months	"[G]ave absolutely no reason for imposing the 210-month sentence" despite defense arguments relating to several 3553(a) factors.	210 months
United States v. Hall, 610 F.3d 727 (D.C. Cir. 2010)	188 months	Failed to "explain why, in view of the factors in 18 U.S.C. § 3553(a), a sentence of 188 months was necessary, much less why the lower sentence that Hall requested would be insufficient."	**121 months**

Sentences outside the guideline range reversed for procedural error where court failed to adequately explain sentence or address nonfrivolous argument or explain reason for rejecting such an argument – Defendant's appeal

Case	Original Sentence	Reason	Sentence on Remand
United States v. Rivera-Gonzalez, 809 F.3d 706 (1st Cir. 2016)	366 months (above)	"[O]ffered no explanation as to why a sentence of 360 months [on the § 924(c) count] was justified," while at the same time suggesting that if it were to run consecutively to a Puerto Rico sentence, it would be "unfair."	**63 months** [consecutive to Puerto Rico sentence]
United States v. Barrera [Wilber Baires], __ F. App'x __, 2016 WL 362517 (2d Cir. Jan. 29, 2016)	36 months (above)	"[T]he district court plainly did not meet its obligation to state its reasons, particularly one that exceeds the guideline recommendation. . . . Certainly where, as here, the district court gave absolutely no indication as to its reasons for the sentence imposed, we have no meaningful basis upon which to review the reasonableness of the sentence."	**30 months**
United States v. Fama, __ F. App'x __, 2016 WL 277750 (2d Cir. Jan. 22, 2016)	420 months (above)	"While a brief explanation such as the present one may have sufficed for a more limited upward variance from the Guidelines, we conclude it does not afford an adequate basis for a reviewing court to understand why the considerations used as justifications for the sentence are sufficiently compelling or present to the degree necessary to support the sentence imposed." (Internal quotation marks, citations, and alterations omitted.)	[not yet resentenced]
United States v. Culver, 514 F. App'x 61 (2d Cir. 2013)	96 months (below)	Failed to explain adequately where "the court's lengthy discussion of Facebook had no clear connection to the facts of her case. It is plain error for a district court to rely upon its own unsupported theory of deterrence at sentencing."	**84 months**
L.M. v. United States, 456 F. App'x 25 (2d Cir. 2011)	1 year and 1 day	"The district court did not adequately explain its sentence. Particularly troubling, given the	**30 days' probation**

	(below)	passage of fifteen years between L.M.'s arrest and sentencing, is the court's failure to discuss the extent to which it considered evidence of L.M.'s rehabilitation in fashioning the sentence."	
United States v. Preacely, 628 F.3d 72 (2d Cir. 2010)	94 months (below)	Failed to adequately address request for a variance from the career offender guideline.	**72 months**
United States v. Persico, 293 F. App'x 24 (2d Cir. 2008)	170 months (above)	Failed to give any reason for a 50-month upward variance in the consecutive sentence for a § 924(c) conviction.	170 months
United States v. Pearson, 275 F. App'x 48 (2d Cir. 2008)	216 months (below)	Failed to adequately consider arguments for a lower sentence based on crack/powder disparity.	**151 months**
United States v. Brown II, 429 F. App'x 82 (3d Cir. 2011)	90 months (below)	Failed to consider "(1) whether the sentence imposed was greater than necessary (the so-called parsimony provision), (2) the "kinds of sentences available" (and why prison was chosen over, for example, home confinement), and (3) "the need for the sentence imposed ... to protect the public from further crimes of the defendant" (taking into account Brown's advanced age)." [Citations omitted.] "[G]iven the abundance of testimony on these issues," failed to adequately explain how BOP could provide needed care in the most effective manner.	**60 months**
United States v. Brown I, 595 F.3d 498 (3d Cir. 2010)	120 months (below)	Failed "to explain, in the manner now required, how it considered the factors listed in section 3553(a) in imposing Brown's sentence."	**90 months**
United States v. Brown, 578 F.3d 221 (3d Cir. 2009)	180 months (above)	Failed to adequately explain above-guideline sentence.	**121 months**
United States v. Grant, 323 F. App'x 189 (3d Cir. 2009)	36 months (above)	Failed to "explain why the variance is justified in terms of this particular defendant and this particular offense."	**30 months**
United States v. Swift, 357 F. App'x 489 (3d Cir. 2009)	130 months (below)	Failed to clearly explain the basis for its sentence.	**120 months**
United States v. Lymas, 781 F.3d 106 (4th Cir. 2015) [Xavier Lymas] [Bernard Newman]	200 months 200 months	(1) "[F]ailed to sufficiently explain why it rejected the guideline"; and (2) "failed to sufficiently explain the sentences imposed" in terms of an individualized assessment under § 3553(a).	**123 months** **180 months**

[Jessie Gomez]	200 months (all above)		**170 months**
United States v. Hutchison, 545 F. App'x 253 (4th Cir. 2013)	21 months (above)	"[T]he court's explanation for its sentence did not address Hutchison's arguments against a departure. Nor did the court address those arguments at any other point in the sentencing proceedings."	21 months
United States v. Strickland, 2010 WL 235080 (4th Cir. Jan. 21, 2010)	84 months (above)	"[D]id 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."	**40 months**
United States v. Lynn [Tucker], 592 F.3d 572 (4th Cir. 2010)	101 months (above)	Provided "no individualized explanation for its substantial departure."	**63 months**
United States v. Cameron, 340 F. App'x 872 (4th Cir. 2009)	144 months (above)	Failed "to provide a sufficient, individualized assessment of the § 3553(a) factors" and failed to adequately explain sentence, particularly given extent of upward variance.	**84 months**
United States v. Maynor, 310 F. App'x 595 (4th Cir. 2009)	72 months (above)	Did not explicitly address § 3553(a) factors or defendant's arguments and failed to adequately explain sentence.	**24 months**
United States v. Monroe [Rogers], 396 F. App'x 33 (4th Cir. 2010)	240 months (above)	Failed to make an individualized assessment, failed "to address Rogers' argument that, in light of certain § 3553(a) factors, he should be sentenced at the low end of his Guidelines range."	**210 months**
United States v. Dillon, 355 F. App'x 732 (4th Cir. 2009)	87 months (above)	Failed to "disclose its reasons for the sentence actually imposed."	**68 months**
United States v. Phillips, 415 F. App'x 557 (5th Cir. 2011)	92 months (above)	Failed to "review the Guidelines calculation or discuss whether the sentence imposed was within the recommended range"; "gave no reasons for the upward departure which doubled the Guidelines maximum."	**60 months**
United States v. Aguilar-Rodriguez, 288 F. App'x 918	18 months	Failed to adequately explain reasons for upward variance.	**Time served**

(5th Cir. 2008)	(above)		
United States v. Daniels, __ F. App'x __, 2016 WL 463459 (6th Cir. Feb. 8, 2016)	120 months (above)	"[I]mposed a sentence significantly above the Guidelines range[,] and its statement at the sentencing hearing is insufficient to permit meaningful appellate review . . . ."	[Resentencing scheduled for Sept 8, 2016]
United States v. Payton, 754 F.3d 375 (6th Cir. 2014)	540 mos. (above)	In imposing 45-year sentence, "failed to adequately respond to Payton's argument that his advanced age diminishes the public safety benefit of keeping Payton in prison an extra twenty years," and instead may have "made [its] decision without adequately considering the personal and individualized circumstances that determine when a sentence is sufficient but not greater than necessary."	**240 months**
United States v. Barahona-Montenegro, 565 F.3d 980 (6th Cir. 2009)	48 months (above)	Failed to adequately address the defendant's arguments or explain its chosen sentence.	**37 months**
United States v. Simpson, 346 F. App'x 10 (6th Cir. 2009)	84 months (below)	Failed to address or consider defendant's request for a downward variance based on the defendant's history and characteristics.	84 months
United States v. Grams, 566 F.3d 683 (6th Cir. 2009)	72 months (above)	Failed to adequately explain sentence.	**71 months**
United States v. Gapinksi, 561 F.3d 467 (6th Cir. 2009)	120 months (below)	Court of appeals 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."	120 months
United States v. Blackie, 548 F.3d 395 (6th Cir. 2008)	42 months (above)	"[D]id 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."	**41 months**
United States v. Morris, 775 F.3d 882 (7th Cir. 2015)	48 months (below)	"[F]ailed to address Morris's argument that his sentence was unfairly driven by the crack/powder disparity, by the inclusion of a large amount of a counterfeit substance in the drug calculation, and by the actions of the informant's police handlers."	**40 months**
United States v. Lockwood, 789 F.3d 773 (7th Cir. 2015)	120 months (above)	(1) In imposing a sentence "that is multiple times above the Guidelines," failed to "explain why that particular defendant requires a more severe punishment than most defendants[.] In other words, the facts recounted by the court must address the *disparity*—i.e., why this	120 months

		defendant deserves a significantly higher sentence than others who commit the same offense"; and (2) failed to mention mitigation arguments before announcing the sentence.	
United States v. Patterson, 557 F. App'x 558 (7th Cir. 2014)	120 months (below)	Failed to weigh evidence of the defendant's drug addiction, offered in mitigation, "within the proper legal framework" under § 3553(a).	**110 months**
United States v. Ramirez-Mendoza, 683 F.3d 771 (7th Cir. 2012)	144 months (above)	Failed to address a "meritorious argument" in mitigation that he was coerced into participating in a kidnapping.	**144 months**
United States v. Bradley II, 675 F.3d 1021 (7th Cir. 2012)	240 months (above)	"[F]ailed to provide a 'more significant justification' to support a 240-month sentence and a lifetime of supervised release."	**71 months**
United States v. Hann, 407 F. App'x 953 (7th Cir. 2011)	57 months (above)	Failed to provide explanation for the sentence imposed.	**46 months**
United States v. Johnson, 612 F.3d 369 (7th Cir. 2010)	96 months (above)	Failed to adequately explain the chosen sentence.	96 months
United States v. Davis, 375 F. App'x 604 (7th Cir. 2010)	201 months	Failed to adequately explain sentence. Court of appeals was unable to tell if district court considered defendant's argument for a lower sentence based on subsequent ameliorative guideline amendment.	**188 months**
United States v. Kirkpatrick, 589 F.3d 414 (7th Cir. 2009)	108 months (above)	Failed to provide adequate explanation for a sentence double that of the guideline range: "[E]very sentence must be justified under the criteria in § 3553(a)."	**78 months**
United States v. Bartlett, 567 F.3d 901 (7th Cir. 2009)	208 months (above)	Failed to adequately explain sentence 20 months higher than the top of the guideline range.	208 months
United States v. Moore, 683 F.3d 927 (8th Cir. 2012)	264 months (above)	"[D]id not explain why it varied from the Guidelines range, or even note that such a variance occurred."	262 months
United States v. Azure, 536 F.3d 922 (8th Cir. 2008)	180 months (above)	Failed to adequately explain significant upward departure based on underrepresented criminal history, and relying on dismissed conduct without holding the government to its burden of proof.	180 months
United States v. Henderson, 649 F.3d 955 (9th Cir. 2011)	78 months (below)	Failed to consider argument that the district court can disagree with the guideline for child pornography because it produces sentences greater than necessary to serve sentencing purposes under § 3553(a).	78 months
United States v. Oba, 2009 WL 604936 (9th Cir. Mar. 9, 2009)	72 months	Failed to adequately explain upward variance where factors were already considered in	**51 months**

	(above)	guidelines and did not address defendant's § 3553(a) arguments).	
United States v. Lente, 647 F.3d 1021 (10th Cir. 2011)	192 months (above)	(1) Failed to address a "material, non-frivolous" argument based on sentencing data and comparative cases on the need to avoid unwarranted sentencing disparities, and (2) failed to address mitigating circumstances.	192 months
United States v. Gabriel, __ F. App'x __, 2016 WL 1621988 (11th Cir. Apr. 25, 2016) (No. 15-13946)	24 months (above)	"Record evinces no individualized assessment based on the facts presented and contains no comments tailored to explain how the specific sentence imposed is appropriate for this defendant, in the light of the section 3553(a) factors. Instead, the district court concluded that the 'guidelines in this case' were 'inappropriate' and 'totally out of touch' given that credit card fraud has recently 'gone viral.'" Further, "it is not obvious from the record that the court decided on the sentence based on the parties' arguments or the section 3553(a) factors."	24 months
United States v. Linkel, __ F. App'x __, 2016 WL 384703 (11th Cir Feb. 2, 2016)	60 months (above)	(1) Failed to consider the § 3553(a) factors, and (2) failed to adequately explain the forty-two month upward variance.	**18 months**
United States v. Cruz, 2016 U.S. App. LEXIS 2076 (11th Cir. Jan. 6, 2016) (No. 14-15776)	60 months (above)	"[F]ailed . . . to explicitly consider the statutory sentencing factors, or to adequately explain its chosen sentence. We cannot discern the ground on which the district court based its upward variance, which prevents us from determining how much deference to give to the sentence imposed or whether the variance is supported by sufficient justifications." (Internal quotation marks omitted.)	**24 months**
United States v. Valera, 622 F. App'x 876 (11th Cir. 2015)	60 months (above)	"[D]id not hear arguments from the parties as to an appropriate sentence before sentencing Valera to 60 months' imprisonment, and then it failed to elicit fully articulated objections." Further, the "explanation for the chosen sentence fails to allow for meaningful appellate review and to promote the perception of fair sentencing." (Internal quotation marks omitted.)	**26 months**
United States v. Espinoza, 550 F. App'x 690 (11th Cir. 2013)	30 months (above)	(1) Failed to identify a defendant similarly situated; (2) did not provide adequate explanation "as to why there was an unwarranted disparity between [defendant] and his codefendants"; and (3) relied on clearly erroneous facts.	**Time-served (approximately 22 months)**
United States v. Johnson, 520	66 months	Failed to adequately explain the extent to which	**62 months**

F. App'x 841 (11th Cir. 2013)	(above)	the court relied on certain "clearly erroneous facts" (regarding defendant's personal marijuana use).	
United States v. Mattox II, 459 F. App'x 877 (11th Cir. 2012)	84 months (above)	Failed to adequately explain upward variance: "When a district court relies on uncharged criminal conduct, the conduct must be proved by a preponderance of the evidence." The court failed to "take the necessary steps and find by a preponderance of the evidence that [defendant] committed any of the alleged crimes in the original indictment."	**55 months**
United States v. Kirschner, 397 F. App'x 514 (11th Cir. 2010)	120 months (above)	Failed to calculate the guideline range, failed to adequately explain sentence in reference to the § 3553(a) factors.	120 months
United States v. Mattox I, 402 F. App'x 507 (11th Cir. 2010)	84 months (above)	Failed to adequately explain chosen sentence.	84 months
United States v. [Julio] Magana, 279 F. App'x 756 (11th Cir. 2008)	120 months (above)	It was unclear whether the district court was imposing a departure or a variance, nor did it provide findings to justify the upward deviation.	120 months
United States v. Bigley, 786 F.3d 11 (D.C. Cir. 2015)	84 months (below)	Failed to consider a nonfrivolous claim of sentencing manipulation.	**53 months**
United States v. Akhigbe, 642 F.3d 1078 (D.C. Cir. 2011)	53 months (above)	Failed "to provide an adequate explanation for the unsought above-Guidelines sentence it imposed."	**33 months**

Sentences below the guideline range reversed for procedural error where court failed to adequately explain sentence or to address nonfrivolous argument or failed to explain reason for rejecting such an argument – Government's appeal

Case	Original Sentence	Reason	Sentence on Remand
United States v. Ressa, 512 F. App'x 106 (2d Cir. 2013)	Time-served + 5 years' supervised release	Possibility that the district court "was improperly influenced by a philosophical disagreement with the statute of conviction, a factor that would render the sentence imposed procedurally unreasonable." "The record does not clearly reflect […] the extent to which the sentence imposed was influenced by the district court's personal beliefs and concerns . . . ."	Time-served + 5 years' supervised release
United States v. DeSilva, 613 F.3d 352 (2d Cir. 2010)	132 months, supervised	Failed to conduct an "independent evaluation of the defendant in light of the factors set forth in	132 months, supervised

	release for life	18 U.S.C. § 3553(a)."	release for life
United States v. Negroni, 638 F.3d 434 (3d Cir. 2011)	5 years' probation	(1) Failed to provide sufficient explanation for downward variance: "It is not enough to note mitigating factors and then impose sentence. Rather, the chain of reasoning must be complete, explaining how the mitigating factors warrant the sentence imposed." (2) Failed to adequately explain the apparent inconsistency in the court's assessment of defendant's relative culpability.	5 years' probation
United States v. Merced, 603 F.3d 203 (3d Cir. 2010)	60 months	Failed to adequately explain its policy disagreement with the career offender guideline.	**92 months**
United States v. Levinson, 543 F.3d 190 (3d Cir. 2008)	24 months' probation	Failed to articulate why defendant deserved special leniency and did not adequately explain its policy disagreement with the guideline range.	**12 months and a day**
United States v. Moolenaar, 259 F. App'x 433 (3d Cir. 2007)	60 months' probation	Failed to explain its sentence: "[T]he record thoroughly fails to elucidate the basis for the sentence the District Court imposed."	**15 months**
United States v. Morace, 594 F.3d 340 (4th Cir. 2010)	60 months' probation	Failed to provide an adequate explanation why prison was "not warranted in light of applicable policy statements" regarding child pornography offenses or how the sentence comports with the factors under § 3553(a).	**12 months and a day**
United States v. Gaskill, 318 F. App'x 251 (4th Cir. 2009)	36 months' probation	Failed to indicate that it considered all the § 3553(a) factors: "Because a sentencing court should provide a more substantial justification for a probationary sentence when the Advisory Guidelines call for an active sentence of imprisonment, such as in this case, we are unable to conclude that the award of a downward variance was procedurally sound."	**48 months' probation w/ 6 months' home confinement**
United States v. Carter, 564 F.3d 325 (4th Cir. 2009)	60 months' probation	Failed "to articulate how the sentencing factors applied to the facts of the particular case before it."	60 months' probation
United States v. Harris, 339 F. App'x 533 (6th Cir. 2009)	84 months, 3 years' supervised release	Failed to provide a sufficient justification for such a major variance.	**94 months, 10 years' supervised release**
United States v. Henry, 545 F.3d 367 (6th Cir. 2008)	180 months	"[F]ailed to explain how the § 3553(a) factors specifically applied to Henry's non-Guidelines sentence or articulate why the sentence constituted an adequate punishment."	180 months
United States v. Smith, 811 F.3d 907 (7th Cir. 2016)	14 months	Failed to provide sufficient explanation: "[N]o reason for the light sentence he imposed can be found in the transcript of the sentencing	14 months

		hearing."	
United States v. Brown, 610 F.3d 395 (7th Cir. 2010)	120 months	Failed to adequately explain downward variance; failed to explain "how Brown's age was pertinent to any legitimate sentencing consideration."	120 months
United States v. Cole, 721 F.3d 1016 (8th Cir. 2013)	3 years' probation	Failed to provide sufficient explanation for the "magnitude of the downward variance" In addition, "the relatively brief explanation" is "at times contradictory."	3 years' probation
United States v. Kane, 552 F.3d 748 (8th Cir. 2009)	120 months	Failed to adequately explain the chosen sentence and failed to support the degree of downward variance with significant justifications. Procedurally erred by basing sentence on clearly erroneous facts and unsupported determinations (likelihood of recidivism and past issues with mental health and substance abuse) and relied on irrelevant factors (post-sentence rehabilitation efforts).	**146 months**
United States v. Shy, 538 F.3d 933 (8th Cir. 2008)	36 months' probation	Failed to adequately justify downward variance.	36 months' probation
United States v. Bragg, 582 F.3d 965 (9th Cir. 2009)	36 months' probation, $1.2 million restitution	Failed to provide sufficient justification.	**60 months' probation, community service, $1.2 million restitution, fine.**
United States v. Medawar, 270 F. App'x 488 (9th Cir. 2008)	12 months and a day	Failed to calculate the guideline range, failed to consider the § 3553(a) factors: "[A]lthough the district court imposed a term of imprisonment of one year and one day, which was substantially below the 57-71 month range indicated by the Guidelines, the district court did not provide a significant justification for this deviation."	5 years' probation
United States v. Morgan, 635 F. App'x 423 (10th Cir. 2015)	60 months' probation	Failed to provide adequate explanation where sentence was impermissibly based on court's apparent disagreement with the jury's verdict and its view that collateral consequences provided adequate punishment.	**18 months**
United States v. Pena-Hermosillo, 522 F.3d 1108 (10th Cir. 2008)	121 months	Failed to provide "cogent explanation."	**180 months**

United States v. Livesay, 525 F.3d 1081 (11th Cir. 2008)	60 months' probation, first 6 months to be served on home detention.	Failed to adequately explain sentence to allow for meaningful appellate review.	60 months' probation, first 6 months to be served on home detention[85]
United States v. [Jeremiah] Prather, 279 F. App'x 761 (11th Cir. 2008)	180 months	Failed to adequately explain the reason for the sentence imposed.	180 months

[85] The government appealed again, and the sentence was vacated a second time, but now as substantively unreasonable. *United States v. Livesay*, 587 F.3d 1274 (11th Cir. 2009). On remand, the court imposed a sentence of 5 months' imprisonment.