"""YOUR HONOR, MAY I HAVE THAT IN WRITING?" -- LAW AND POLICY SUPPORTING VACATUR FOR VIOLATION OF THE FEDERAL SENTENCING WRITTEN ORDER REQUIREMENT

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INTRODUCTION

A disturbing trend has emerged in our federal courts.\(^1\) District judges are ignoring the statutory mandate to identify in the written order imposing a sentence the specific reason for deviating from the range recommended by the Federal Sentencing Guidelines.\(^2\) Rather than vacating these out-of-range sentences based on the clear statutory violations, U.S. Courts of Appeal are affirming the sentences despite the fact that the sentences are imposed in violation of law.\(^3\) This article proposes a solution to this problem.\(^4\)

In the wake of *United States v. Booker* when the Supreme Court decided the Sentencing Guidelines were no longer mandatory, lower courts struggled with a host of unresolved issues.\(^5\) In *United States v. Crosby*, the Court of Appeals for the Second Circuit (Second Circuit) clarified that the statutory requirement for a District Court's statement of reasons to justify a sentence survived the *Booker* overhaul; other courts followed suit.\(^6\) This Sentencing Reform Act provision requires sentencing courts, at the time of sentencing, to state in open court the reasons for imposing a particular sentence.\(^7\) For sentences outside the recommended range, there is an additional requirement; the District Court must identify in the written order imposing the sentence the specific reason for deviating from the Guidelines recommended range (written order requirement).\(^8\)

In Part I, this article explores the historical and legal context for the written order requirement.\(^9\) Part I.A tracks the evolution of federal sentencing law.\(^10\) Next, Part I.B outlines reasonableness review of sentences that *Booker* established and distinguishes between substantive and procedural reasonableness.\(^11\) The written order requirement is a component of procedural reasonableness.\(^12\) Part I.C illustrates how revocation sentencing is distinguished from original sentencing and provides general background on probation and supervised release.\(^13\)

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\(^1\) See infra Part II.
\(^2\) 18 U.S.C. §3553(c)(2).
\(^3\) See infra Part II.A.1.
\(^4\) See infra Part III.A-B.
\(^6\) United States v. Crosby, 397 F.3d 103, 116 (2d Cir. 2005); see also United States v. Lewis, 424 F.3d 239, 244 (2d Cir. 2005); United States v. Jones, 460 F.3d 191, 196 (2d Cir. 2006).
\(^7\) 18 U.S.C. §3553(c).
\(^8\) 18 U.S.C. §3553(c)(2).
\(^9\) See infra Part I.
\(^10\) See infra Part I.A.
\(^11\) See infra Part I.B.
\(^12\) See infra Part I.B.1.a.
\(^13\) See infra Part I.C.
Part II explores two circuit splits surrounding the written order requirement. The first circuit split, explored in Part II.A, concerns whether violation of the written order requirement should be an independent cause to vacate the sentence. The Courts of Appeal in a majority of circuits affirm out-of-range sentences even when the District Court violated the written order requirement if the appellate court is able to determine the sentence is "reasonable" based on the district judge's statements on the record. Surprisingly, appellate courts following the majority approach impose lax standards of specificity for the oral explanation necessary to support the out-of-range sentence accompanied by a silent order.

Often, courts following the majority approach first affirm the out-of-range sentence and remand solely for the ministerial purpose of allowing the district judge to revise the order to include a statement of reasons. Because this approach offers no relief to defendants, defendants are beginning to waive their objections to written order requirement violations. A defendant preserving the written order requirement violation error through a timely objection does not enable the defendant to escape the majority approach. Using the Second Circuit as a case study, Part II.A.1 explores one circuit's struggle to respond to written order requirement violations resulting in the Second Circuit joining the majority approach. Part II.A.2 examines *In re Sealed Case*, in which the D.C. Circuit departed from the majority approach and vacated the sentence for violation of the written order requirement.

Part II.B examines the circuit split over whether the written order requirement applies when courts revoke supervised release or probation and impose sentences outside the range suggested by the Guidelines policy statements. The Eighth Circuit decided the written order requirement does not apply in revocation sentencing. The Second Circuit

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14 See infra Part II.
15 See infra Part II.A.
16 See infra Part II.A.1.
17 See, e.g., United States v. Jones, 460 F.3d 191, 195 (2d Cir. 2006) (upholding an out-of-range sentence, despite a silent order when the district judge gave no specific articulation as to why the sentence was appropriate and the judge's colloquy during the hearing revealed he relied on his "gut feeling" about the defendant); United States v. Fuller, 426 F.3d 556, 566 (2d Cir. 2005) (upholding an out-of-range sentence despite a silent order even when the appellate court expressed displeasure with the district judge's oral explanation for the departure and explicitly wished the district judge had provided more detail about why he departed); United States v. Lazzaro, 194 Fed.Appx. 735, 737-38 (11th Cir. 2006) (upholding an out-of-range sentence despite a silent order even when the appellate court expressed displeasure with the district judge's oral explanation for the departure and explicitly wished the district judge had provided more detail about why he departed); United States v. Orbandez-Gamboa, 185 Fed.Appx. 86, 88 (2d Cir. 2006) (in oral argument, defendant declined, through counsel, to insist upon remand for the sole purpose of correcting the order to include a statement of reasons).
18 See infra Part II.A.1.
19 See, e.g., United States v. Orlandez-Gamboa, 185 Fed.Appx. 86, 88 (2d Cir. 2006) (in oral argument, defendant declined, through counsel, to insist upon remand for the sole purpose of correcting the order to include a statement of reasons).
20 See infra note 141.
21 See infra Part II.A.1.
22 *In re Sealed Case*, 527 F.3d 188 (D.C. Cir. 2008).
23 See infra Part II.A.2.
24 See infra Part II.B.
25 United States v. Cotton, 399 F.3d 913, 916 (8th Cir. 2005).
requires less specificity from the written statement of reasons in the revocation context.\textsuperscript{26} The D.C. Circuit,\textsuperscript{27} amongst other circuits decided the requirement is equally applicable in revocation sentencing.\textsuperscript{28}

Part III recommends appellate courts vacate all out-of-range sentences unaccompanied by a statement of reasons in the written order under one of two alternative approaches.\textsuperscript{29} If the hearing transcript specifies the reasons for the departure but the written order is silent, the appellate court should follow the approach inspired by the Second Circuit's ruling in \textit{United States v. Santiago}.\textsuperscript{30} \textit{Santiago} was issued before the Second Circuit joined the majority approach.\textsuperscript{31} Pursuant to the recommended approach inspired by \textit{Santiago}, the appellate court should vacate the sentence and issue a brief order informing the district judge that the judge need not conduct another sentencing hearing.\textsuperscript{32} The order should direct the district judge to review the hearing transcript in order to recollect the reason for the departure.\textsuperscript{33} Then, the district judge should amend the order to specify the precise reason for deviations from the recommended range.\textsuperscript{34} After the appellate court reviews the amended order, it can conduct reasonableness review and decide whether to uphold the sentence based on the statement of reasons in the order.\textsuperscript{35}

Alternatively, if the hearing transcript fails to specify the reasons for the departure, the appellate court should follow the \textit{In re Sealed Case} approach.\textsuperscript{36} Under this alternative, the appellate court vacates the sentence and remands for resentencing.\textsuperscript{37} It instructs the district judge to conduct another sentencing hearing.\textsuperscript{38} After the hearing, the district judge should prepare a written order specifying the reason for the departure while the judge's impressions are fresh. Neither of the recommended alternative approaches unduly burdens the federal court system. The conviction remains undisturbed. The proposed alternatives merely ensure appellate courts affirm out-of-range sentences only after review of a written statement of reasons.

The recommended alternative approaches:

1. Follow the structure, purpose, and history of the Sentencing Reform Act and the Sentencing Commission's guidance.\textsuperscript{39}
2. Follow the plain statutory language which compels equal application of the written order requirement in the revocation context.\textsuperscript{40}

\textsuperscript{26} Verkhoglyad v. United States, 516 F.3d 122, 132-33 (2d Cir. 2008).
\textsuperscript{27} \textit{In re Sealed Case}, 527 F.3d 188, 192 (D.C. Cir. 2008).
\textsuperscript{28} \textit{See infra} Part II.B.2.
\textsuperscript{29} \textit{See infra} Part III.A-B.
\textsuperscript{30} United States v. Santiago, 384 F.3d 31, 37 (2d Cir. 2004).
\textsuperscript{31} \textit{Id.} at 31.
\textsuperscript{32} \textit{See infra} Part III.A.
\textsuperscript{33} \textit{See infra} Part III.A.
\textsuperscript{34} \textit{See infra} Part III.A.
\textsuperscript{35} \textit{See infra} Part III.A.
\textsuperscript{36} \textit{In re Sealed Case}, 527 F.3d 188, 193 (D.C. Cir. 2008).
\textsuperscript{37} \textit{See infra} Part III.B.
\textsuperscript{38} \textit{See infra} Part III.B.
\textsuperscript{39} \textit{See infra} Part III.D.1.
3. Make sense because the justification for refusal to require a written statement of reasons in the revocation context is outdated.  
4. Enable appellate courts to conduct effective review for substantive reasonableness,  
5. Enable appellants to raise meaningful sentencing arguments, 
6. Prevent appellate courts from affirming procedurally unsound sentences and prevent district judges from having unbridled discretion, 
7. Promote the perception of fair sentencing, 
8. Enable the Commission to perform its function thereby promoting sentencing uniformity, 
9. Provide necessary information to the Bureau of Prisons, and 
10. Promote better sentencing practices amongst district judges.

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

This Part describes the evolution of sentencing law. It then explores the Booker reasonableness standard of review of sentences and shows how the written order requirement fits conceptually in the reasonableness inquiry. Finally, this Part generally explains revocation sentencing.

A. Federal Sentencing Generally

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

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40 See infra Part III.D.2.
41 See infra Part III.D.3.
42 See infra Part III.D.4.
43 See infra Part III.D.5.
44 See infra Part III.D.6.
45 See infra Part III.D.7.
46 See infra Part III.D.8.
47 See infra Part III.D.9.
48 See infra Part III.D.10.
49 See infra Part I.A.
50 See infra Part I.B.
52 Id. (citing United States v. Hayes, 589 F.2d 811, 822-23 (5th Cir. 1979) and Gregory v. United States, 585 F.2d 548, 550 (1st Cir. 1978) (both applying a "clearly erroneous" standard)).
54 Id. at 736.
This nearly unbridled judicial discretion resulted in problematic sentencing disparities.\textsuperscript{55} To promote sentencing uniformity and fairness, Congress passed the Sentencing Reform Act of 1984 which led to the establishment of the Sentencing Guidelines in 1989.\textsuperscript{56} Under the new regimented sentencing scheme, judges mechanically located the Sentencing Commission's designated sentence for the defendant on a sentencing grid.\textsuperscript{57} District Courts identified the precise sentence based on the defendant's criminal history, offense and judicial findings of fact at sentencing.\textsuperscript{58} Initially, appellate courts reviewed Guidelines departures under three different standards of review.\textsuperscript{59} The standards depended on what kind of issue the defendant appealed.\textsuperscript{60} In 1996, the Supreme Court rejected the three distinct standards and adopted an abuse of discretion standard for appellate review of federal sentences.\textsuperscript{61}

Then in 2003, Congress passed the Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today Act ("PROTECT Act") which established a de novo standard of review of Guidelines departures.\textsuperscript{62} The de novo standard provides less deference to District Courts than abuse of discretion. It facilitated appellate courts' overturn of departures and furthered Congress' intent that the Guidelines be mandatory. De novo review of departures had a brief reign.\textsuperscript{63} In 2006, in \textit{Booker}, the Supreme Court rejected the mandatory nature of the Guidelines as violating the Sixth Amendment.\textsuperscript{64} District Courts were only required to consider the now advisory Guidelines and could fashion sentences in light of other statutory concerns.\textsuperscript{65}

\textbf{B. Reasonableness Review}

\textit{Booker} also required appellate courts to review sentences for reasonableness under an abuse of discretion standard.\textsuperscript{66} The sentence must be procedurally and substantively reasonable.\textsuperscript{67}

\begin{itemize}
  \item \textsuperscript{55} See Raybin, \textit{supra} note 51, at 239; see also Lindsay C. Harrison, \textit{Appellate Discretion and Sentencing After Booker}, 62 U. Miami L. Rev. 1115, 1119-20 (2008).
  \item \textsuperscript{56} See \textit{supra} note 51 and accompanying text.
  \item \textsuperscript{57} See Raybin, \textit{supra} note 51, at 239; Harrison, \textit{supra} note 55, at 1120-21.
  \item \textsuperscript{58} See Raybin, \textit{supra} note 51, at 239; Harrison, \textit{supra} note 55, at 1120-21.
  \item \textsuperscript{59} See Raybin, \textit{supra} note 51, at 239, note 17 (stating courts reviewed questions of law de novo, findings of fact for clear error, and Guidelines departures under an abuse of discretion standard of review).
  \item \textsuperscript{60} See \textit{supra} note 51 and accompanying text.
  \item \textsuperscript{61} See Raybin, \textit{supra} note 51, at 239 (citing Koon v. United States, 518 U.S. 81 (1996)).
  \item \textsuperscript{62} United States v. Daychild, 357 F.3d 1082, 1104 (citing Pub.L. No. 108-21, 117. 650 (2003)).
  \item \textsuperscript{63} United States v. Booker, 543 U.S. 220, 259 (2005) (excising the statutory provision setting forth the de novo standard of review for departures from Guidelines ranges).
  \item \textsuperscript{64} \textit{Id}.
  \item \textsuperscript{65} \textit{Id}. at 259.
  \item \textsuperscript{66} \textit{Id}. at 262, 263; see also Gall v. United States, 552 U.S. 38, 51 (2007) ("regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse of discretion standard.").
  \item \textsuperscript{67} See United States v. Hunt, 459 F.3d 1180, 1182 n. 3 (11th Cir. 2006) (sentences can be challenged for both procedural and substantive unreasonableness); United States v. Autery, 555 F.3d 864, 868-71 (9th Cir. 2009) (exploring the distinction between procedural error and substantive reasonableness); Rita v. United States, 551 U.S. 338, 365 (Stevens, J., concurring) (stating that \textit{Booker} "contemplated that reasonableness review would [also] contain a substantive component" and noting that a district judge "who gives harsh
1. Procedural Reasonableness

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

First, the sentencing judge must correctly calculate the applicable Guidelines recommended range. Next, after hearing arguments from the parties, the sentencing judge must consider all the so-called "sentencing factors" under 18 U.S.C. §3553(a). Section 3553(a) is part of the Sentencing Reform Act. The §3553(a) sentencing factors are: (1) offense and offender characteristics; (2) the need for the sentence to reflect the basic aims of sentencing; (3) the sentences legally available; (4) the Guidelines; (5) the Guidelines policy statements; (6) the need to avoid unwarranted disparities; and (7) the need for restitution. The District Court may not select a sentence based on clearly erroneous facts.

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

i. The Written Order Requirement, a Component of Procedural Reasonableness

Section 18 U.S.C. §3553(c) outlines the content to be included in the District Court's explanation. The PROTECT Act addition of the written order requirement
survived *Booker.* This novel requirement, contained in §18 U.S.C. §3553(c)(2), states the District Court's "reasons [for departing] must... be stated with specificity in the written order of judgment and commitment." This was "a procedural change to increase the efficacy of district court sentencing and appellate review."

As amended by the PROTECT Act, §3553(c) imposes several obligations on sentencing courts to state the reasons for a sentence. First, in every case, the District Court must state the reasons for a particular sentence. Second, the sentencing judge must state "the reason for imposing a sentence at a particular point within the range" for all sentences within the applicable range exceeding 24 months. Third, the sentencing judge must state "the specific reason for the imposition of a sentence different from that prescribed by the Guideline range." The sentencing court must comply with these requirements in open court at the time of sentencing. For sentences outside the recommended range, the district judge must also state with specificity in the written order imposing the sentence the specific reason for imposing a sentence outside the recommended range (written order requirement).

If the defendant appeals the sentence, the appellate court reviews the sentencing court's factual findings for clear error and reviews de novo the district court's legal interpretations. Therefore, appellate courts review de novo challenges to the sentencing court's compliance with §3553(c). However, when a defendant fails to properly preserve a particular objection to the sentence at the time of sentencing, courts typically review the claim on appeal for plain error, an onerous standard for a defendant to meet.

2. Substantive Reasonableness

After the appellate court finds the sentence procedurally sound, it considers substantive reasonableness under an abuse of discretion standard. The appellate court evaluates the totality of the circumstances, including the amount of any variance from the Guidelines recommended range. If the sentence is within the range, the appellate court may, but is not required to, presume it is reasonable. If the sentence is outside the range,
the appellate court may not presume unreasonableness. It may consider the extent of the deviation but must give due deference to the District Court's conclusion the sentencing factors, on the whole, justified the variance.

Substantive reasonableness concerns whether the sentence is sufficient but not greater than necessary to serve the purposes of sentencing. The purposes of sentencing are the need for the sentence to: (1) reflect the seriousness of the offense, promote respect for the law, and provide just punishment; (2) adequately deter criminal conduct; (3) protect the public from future crimes from the defendant; and (4) provide the defendant needed educational or vocational training, medical care, or correctional treatment. The determination of whether a sentence is substantively reasonable depends on whether the length of the sentence is reasonable in light of the sentencing factors.

C. Revocation Sentencing

1. Probation and Supervised Release Generally

Probation and supervised release are similar in many ways. Both probationers and persons serving a term of supervised release report to a probation officer. Their violation reports are the same. District Courts must consider the Chapter 7 policy statements of the Guidelines when determining the sentence for both revocation of probation and supervised release. However, probation and supervised release are distinguished in a few key ways. Courts impose probation instead of imprisonment; supervised release is imposed after imprisonment. Therefore, supervised release is the court's "mechanism to improve the odds of a successful transition from prison to liberty." Separate statutes govern probation and supervised release.

When a defendant violates the conditions of supervised release or probation, the probation officer issues a petition to revoke supervised release or probation. The defendant is then arrested pursuant to the petition. A revocation hearing is scheduled. At the revocation hearing, the district judge hears arguments from defense counsel and the
prosecutor concerning the sentence the defendant should receive upon revocation. Upon revocation of a term of probation, the court may impose the original statutory maximum sentence.\footnote{Id. (citing 18 U.S.C. §3565 and 18 U.S.C. §§3551-3559).} The sentence could include a term of supervised release following imprisonment.\footnote{Id.} However, upon revocation of supervised release, the court may only impose a term of imprisonment up to the maximum term found in 18 U.S.C. §3583(e)(3), and under some circumstances, impose a continued term of supervised release pursuant to 18 U.S.C. §3583(h).\footnote{Id.} Whereas the district judge imposes the original sentence at the sentencing hearing, the judge imposes the revocation sentence at the revocation hearing. The order that revokes the revocation also sets forth the sentence.\footnote{See infra Part II.B.} If the district judge complies with the written order requirement, that order will specify any reasons for sentencing outside the range recommended by the Guidelines policy statements.\footnote{Id.}

2. Appellate Review of Revocation Sentences

After the Supreme Court made the Guidelines advisory instead of mandatory in \textit{Booker}, revocation sentencing was a body of law to which federal courts could look for guidance on how sentencing should work under advisory Guidelines.\footnote{United States v. Roen, 360 F.Supp.2d 926, 927 (E.D. Wis. 2005).} "District courts imposing sentences following revocation of probation or supervised release have long used advisory guidelines."\footnote{Id.} Before and after \textit{Booker}, District Courts were required to consider the Chapter 7 policy statements when sentencing following revocation of supervised release or probation.\footnote{Id.} Unlike the Guidelines themselves, the policy statements have never been mandatory but advisory only.\footnote{Id.} Even before \textit{Booker}, courts did not consider revocation sentences outside the policy statements' recommended ranges to be "departures" from mandatory ranges.\footnote{See infra Part II.B.}

In order to determine the reasonableness of a revocation sentence, the appellate court must ensure the District Court considered the appropriate factors.\footnote{18 U.S.C. §3553(a).} For regular sentencing, District Courts must consider all of the 18 U.S.C. §3553(a) factors.\footnote{18 U.S.C. §3583(e); see United States v. Miqbel, 444 F.3d 1173, 1183 (9th Cir. 2006).} For revocation sentencing, District Courts must consider the factors listed in 18 U.S.C. §3583(e) which does not incorporate two of the factors listed in 18 U.S.C. §3553(a).\footnote{18 U.S.C. §3553(a).} One of the factors Congress omitted from revocation sentencing is §3553(a)(2)(A) which requires consideration of the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the
offense. Therefore, appellate courts should vacate revocation sentences imposed primarily to achieve deterrence.

Before *Booker*, appellate courts reviewed revocation sentences under the "plainly unreasonable" standard set out in 18 U.S.C. §3742(e)(4). After *Booker*, a judicial and scholarly debate ensued as to the appropriate standard of review of revocation sentences. The Fourth and Seventh Circuits decided the "plainly unreasonable" standard of review and the *Booker* "unreasonableness" standard of review were similar but slightly different. These circuits decided the *Booker* standard did not replace the traditional "plainly unreasonable" standard and continued to apply the old standard to revocation sentences. Without exploring the similarities and differences between the two standards, the Second, Third, and Ninth Circuits held that, in the post-*Booker* world, the *Booker* "unreasonableness" standard replaced the "plainly unreasonable" standard used before *Booker* for revocation sentencing. The Eighth, Tenth, and Eleventh Circuits decided *Booker* did not change the standard of review for revocation sentences. They applied the *Booker* standard because they concluded the old "plainly unreasonable" standard and the new *Booker* standard were essentially the same. Similarly, the Sixth Circuit decided that, after *Booker*, revocation sentences should be reviewed under the same standard as all other sentences: the *Booker*-mandated review for abuse of discretion for reasonableness.

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120 18 U.S.C. §3583(e) (the other factor omitted in the kinds of sentences available); see *Miqbel*, 444 F.3d at 1183.
121 *Miqbel*, 444 F.3d at 1183.
122 See 18 U.S.C. §3742(e)(4); see also United States v. Scroggins, 910 F.2d 768, 769 (11th Cir. 1990) (*per curiam*).
123 See Elizabeth S. Hall, *Determining the Proper Standard of Review for Sentences Imposed After Revocation of Supervised Release in United States v. Bolds*, 32 Am. J. Trial Advoc. 405 (2008) (asserting the federal appellate courts are split on the issue of which standard of review to apply to revocation sentences); Leigha Simonton, *Booker's Impact on the Standard of Review Governing Supervised Release and Probation Revocation Sentences*, 11 Berkeley J. Crim. L. 129 (2006) (stating that since *Booker*, many appellate courts have analyzed whether *Booker's* new reasonableness standard replaced the "plainly unreasonable" standard traditionally used for revocation sentencing. Circuits have taken three different approaches. The first has decided the old "plainly unreasonable" standard is essentially the same as the new *Booker* reasonableness standard. The second contended that *Booker's* reasonableness standard is distinct from the old "plainly unreasonable" standard for revocation sentencing and that *Booker's* reasonableness standard should replace the old "plainly unreasonable" standard. The third and final approach concluded that the two standards differ but decided that courts should continue to apply the "plainly unreasonable" standard to revocation sentencing).
124 See United States v. Crudup, 461 F.3d 433, 436-39 (4th Cir. 2006); United States v. Kizeart, 505 F.3d 672, 674 (7th Cir. 2007).
125 *Kizeart*, 505 F.3d at 674; *Crudup*, 461 F.3d at 436-39.
126 See United States v. Fleming, 397 F.3d 95, 97-99 (2d Cir. 2005); Hall, *supra* note 123, at 413.
127 United States v. Bungar, 478 F.3d 540, 542 (3d Cir. 2007); Hall, *supra* note 123, at 413.
128 United States v. Miqbel, 444 F.3d 1173, 1176 (9th Cir. 2006); Hall, *supra* note 123, at 413.
129 United States v. Cotton, 399 F.3d 913 (8th Cir. 2005); Hall, *supra* note 123, at 415.
130 United States v. Tedford, 405 F.3d 1159 (10th Cir. 2005); Hall, *supra* note 123, at 414.
131 United States v. Sweeting, 437 F.3d 1105 (11th Cir. 2006); Hall, *supra* note 123, at 414.
132 See *supra* note 123 and accompanying text.
133 United States v. Bolds, 511 F.3d 568, 575 (6th Cir. 2007); Hall, *supra* note 123, at 420.
II. THE CIRCUIT SPLITS

This Part explores two circuit splits involving the written order requirement. Part I.A examines the circuit split over whether omission of a statement of reasons from the order should be an independent cause to vacate an out-of-range sentence. Part I.B discusses the circuit split over whether the written order requirement applies in the context of revocation sentencing.

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

1. The Majority Approach: Affirm Out-of-Range Sentences Based on the Record Despite Omission of Reasons in the Judgment

The Courts of Appeals for the Second, Third, Fifth, Sixth, Eighth, and Ninth Circuits determined that where an appellate court finds an out-of-range sentence to be reasonable based on the District Court's statements in the record, violation of the written order requirement is not an independent cause for vacatur. In an unpublished opinion, the Eleventh Circuit also adopted the majority approach. The majority follows this approach whether applying a de novo or plain error standard of review to the claim that there was a written order requirement violation. Making a timely objection to the written order requirement violation does not enable a defendant to avoid the majority approach. Now that courts have refined the majority approach, they remand only for the ministerial purpose of allowing the district judge to amend the judgment to include a statement of reasons. Because the remedy for violation of the written order requirement offers no relief to defendants, defendants are now beginning to waive their objections to the district judge's

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134 See infra Part II.A.1.i.
135 United States v. Cooper, 394 F.3d 172 (3d Cir. 2005).
136 United States v. Zuniga-Peralta, 442 F.3d 345, 349 n. 3 (5th Cir. 2006) (remedy for inadequate written explanation is remand for correction of written judgment, not resentencing).
138 United States v. Orchard, 332 F.3d 1133, 1141 n. 7 (8th Cir. 2003).
139 United States v. Daychild, 357 F.3d 1082, 1107-08 (9th Cir. 2004).
141 See, e.g., United States v. Orchard, 332 F.3d 1133, 1139 (8th Cir.) (stating an appellate court reviews de novo whether the judge provided a requisite written statement of reasons for a departure and holding that because the district court made a detailed explanation for the departure at the hearing, remand was not required even though the district judge violated the written order requirement); United States v. Whitelaw, 580 F.3d 256, 264 (5th Cir. 2009) (stating that district judge's failure to state specific reasons for imposing a sentence outside the recommended range did not affect the defendant's substantial rights and therefore did not meet the plain error test).
142 See supra note 141 and accompanying text.
143 See, e.g., United States v. Jones, 460 F.3d 191, 197 (2d Cir. 2006); United States v. Massengill, 319 Fed.Appx. 879, 880 (11th Cir. 2009).
144 See supra note 143 and accompanying text.
omission of reasons from the order. In these instances, there is no remand; orders are not amended.

i. A Case Study: How One Circuit Adopted the Majority Approach

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

*Santiago* also acknowledged that in a report to Congress, the Sentencing Commission stated that the appropriate remedy for written order requirement violations was vacatur of the sentence. The Commission required appellate courts to set aside a sentence and remand with specific instructions for resentencing if the District Court neglected to provide a statement of reasons in the judgment. According to U.S. Supreme Court precedent, courts must defer to the Commission's reasonable interpretation of the Guidelines. The Supreme Court indicated that commentary in the

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145 See infra note and accompanying text.
146 United States v. Orlandez-Gamboa, 185 Fed.Appx. 86, 88 (2d Cir. 2006) (defendant declining through counsel to insist upon remand for the sole purpose of correcting the order); United States v. Poynter, 344 Fed.Appx. 171, 181 (6th Cir.) (defendant only wanted the relief of resentencing and was not interested in amendment of the order).
147 See infra Part II.A.1.
149 Id.
150 *Id.* (citing United States v. Gonzalez, 110 F.3d 936, 948 (2d Cir. 1997) ("The law in this circuit is clear that the district judge must state his or her reasons for a departure from the applicable Guidelines range").
151 *Id.* (citing United States v. Zackson, 6 F.3d 911, 923-24 (2d Cir. 1993) (interpreting 18 U.S.C. §3553(c)(1)).
152 *Id.* at 36 (but noting that there is a difference between giving no statement of reasons at all and reciting reasons on the transcript).
153 *Id.* (quoting U.S. SENTENCING COMMISSION, DOWNWARD DEPARTURES FROM THE FEDERAL SENTENCING GUIDELINES 9, 57 (2003) which states, "[t]he appellate court shall set aside the sentence and remand the case with specific instructions if it finds that the district court failed to provide the required statement of reasons in the judgment and commitment order, the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.").
154 See supra note and accompanying text.
Guidelines manual was authoritative unless it violated the Constitution, a federal statute, or was a plainly erroneous reading of the Guidelines.\footnote{156}{Id. (citing Stinson v. United States, 508 U.S. 36, 38, 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993)).}

However, \textit{Santiago} was uncomfortable deferring to the Commission's interpretation because of its own reading of the Sentencing Reform Act's vacatur provision.\footnote{157}{Id.} The Second Circuit construction of the vacatur provision is the purported statutory rationale for the majority approach\footnote{158}{Id. at 37 (citing 18 U.S.C. §3742(f)(1)).} The first subpart of the vacatur provision requires remand if the appellate court finds the District Court imposed the sentence "in violation of law" or as a result of incorrect Guidelines application.\footnote{159}{Id. at 36 (citing 18 U.S.C. §3742(f)(2)).} The third subpart of the vacatur provision requires the appellate court to affirm all sentences not described in the first two subparts.\footnote{160}{Id.}

\textit{Santiago} found the second subpart of the vacatur provision applicable.\footnote{161}{Id. at 37 (citing 18 U.S.C. §3742(f)(3)).} This second subpart is far more convoluted than the first and third subparts.\footnote{162}{Id.} According to the second subpart of the vacatur provision, if the appellate court finds

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

At least two other circuits concluded that the second subpart of the vacatur provision suggested there was no duty to remand merely because the order omitted a statement of reasons if the appellate court found the sentence reasonable based on the hearing transcript.\footnote{163}{18 U.S.C. §3742(f)(2).} The Second Circuit concluded that interpreting the first subpart of the vacatur provision to imply omission of reasons from the written order rendered an otherwise reasonable sentence "in violation of law" would render the second subpart of the vacatur provision "entirely superfluous."
Santiago declined to resolve "this problematic question of statutory interpretation." Instead, the Second Circuit remanded to allow the district judge to amend the judgment to include a statement of reasons. Santiago stated it did not vacate the sentence. However, Santiago also did not affirm the sentence as reasonable. Instead, Santiago retained jurisdiction to hear the defendant's challenge to the upward departure once the district judge had amended the judgment. Santiago emphasized that remand was not tantamount to a ruling that the Second Circuit lacked the authority to affirm the sentence in absence of a written statement of reasons. The limited remand enabled the Second Circuit to avoid deciding that contentious question of law. Under this approach, the Second Circuit did not determine the reasonableness of the sentence until it reviewed the statement of reasons included in the written order.

Approximately a year after Santiago, in United States v. Lewis, the Second Circuit gave great weight to the requirement that the district judge provide a statement of reasons in open court. In Lewis, the Second Circuit did not have an opportunity to rule on whether omission of reasons from the written order was an independent reason to vacate the sentence. The written judgment was silent, but the district judge's oral explanation for the departure was also woefully vague. Lewis was premised on the district judge's complete failure to provide an adequate statement of reasons, either orally or in writing. However, the Second Circuit's discussion left the impression that, when presented with different facts, the Second Circuit would vacate for violation of the written order requirement even when the hearing transcript provided a statement of reasons. The recommended range was three to nine months. At the time of sentencing, the district judge explained that he had considered all the applicable statutory factors and the defendant's eligibility to avoid incarceration if there was an available and appropriate substance abuse prevention program. Considering the defendant's poor history with such programs, the district judge sentenced the defendant to 24 months imprisonment followed by a period of supervised release.

Even though the defendant failed to object to the omission of a statement of reasons at the time of sentencing, Lewis decided that it was unclear what standard of

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166 Id.
167 Id.
168 Id.
169 Id.
170 Id.
171 Id.
172 Id.
173 Id.
174 United States v. Lewis, 424 F.3d 239, 246 (2d Cir. 2005).
175 Id. at 245.
176 Id.
177 Id.
178 Id.
179 Id. at 241-42.
180 Id. at 245.
181 Id.
review to apply. The court could not decide whether to review her claim that the district judge failed to state reasons for the sentence under the stringent four-part plain error test, under a less stringent standard, or whether the sentence was invalid as a matter of law. Second Circuit precedent required vacatur for departure sentences unaccompanied by a statement of reasons. Such sentences were imposed in violation of law. Lewis required remand even under the most stringent four-part plain error standard. Lewis declined to decide the appropriate standard of review for an appellant’s claim that the district judge failed to state reasons for an out-of-range sentence when the appellant failed to preserve the claim with a timely objection.

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

Omission of a statement of reasons met the other requirements for the plain error test. Failure to comply with the requirement for a statement of reasons affected the fairness, integrity, and public reputation of judicial proceedings. Although district judges retain discretion, they must demonstrate thoughtful discharge of their statutory obligations to explain a sentence with the degree of care commensurate with the severity of the sentence. District judges must enable the public to learn why the defendant received a sentence. Providing a statement of reasons to justify an out-of-range sentence tends to promote the public understanding of, trust in, and respect for our court.

\[\text{\textsuperscript{182} Id. at 244}\]
\[\text{\textsuperscript{183} Id.}\]
\[\text{\textsuperscript{184} Id. at 245 (citing United States v. Molina, 356 F.3d 269, 276 (2d Cir. 2004)).}\]
\[\text{\textsuperscript{185} Id. at 246 (citing United States v. Crosby, 397 F.3d 103, 114-15 (2d Cir. 2005)).}\]
\[\text{\textsuperscript{186} Id. at 249.}\]
\[\text{\textsuperscript{187} Id. at 243.}\]
\[\text{\textsuperscript{188} Id. at 245.}\]
\[\text{\textsuperscript{189} Id. at 246.}\]
\[\text{\textsuperscript{189} Id.}\]
\[\text{\textsuperscript{190} Id. (citing United States v. Crosby, 397 F.3d 103, 114-15 (2d Cir. 2005)).}\]
\[\text{\textsuperscript{191} Id.}\]
\[\text{\textsuperscript{192} Id.}\]
\[\text{\textsuperscript{193} Id.}\]
\[\text{\textsuperscript{194} Id. at 246-249.}\]
\[\text{\textsuperscript{195} Id. at 247.}\]
\[\text{\textsuperscript{196} Id. (citing United States v. Chartier, 933 Fed.2d 111, 117 (2d Cir. 1991)).}\]
\[\text{\textsuperscript{197} Id. (citing United States v. Alcantara, 396 F.3d 189, 206 (2d. Cir. 2005)).}\]
system. The public does not demand infallibly from its court system, but it is difficult for the public to accept what it cannot understand. When the court provides a statement of reasons, at least the public and the parties have an opportunity to understand the system in general and what happened in the particular case. This is why the public has a presumptive right of access to sentencing proceedings.

The requirement for a statement of reasons is not a mere formalism.

Next, the omission of a statement of reasons affected Lewis’s substantial rights. The purposes of the requirement for a statement of reasons are to enable the defendant to effectively appeal the sentence and enable the appellate court to decide the appeal. Lewis decided this right was clearly substantial. Unlike other errors, a procedural error such as failure to meet the requirement for a statement of reasons need not have affected the outcome of the proceedings in order to be "plain." First, the First Amendment guarantees of a public trial apply to sentencing proceedings. Failure to provide a statement of reasons is akin to abrogation of a defendant's right to a public trial. Second, in sentencing, appellate courts may relax the rigorous standards of plain error analysis. When appellants fail to object to errors at trial, appellate courts can only correct these errors by ordering a new trial. It is simpler to correct sentencing errors; the judgment remains intact; the appellate court merely orders resentencing. A strict requirement for a statement of reasons does not interfere with trials or affect their finality. Finally, Lewis theorized that district judges would rarely impose a materially different sentence if required to state reasons. If the Second Circuit required omission of a statement of reasons to materially affect the sentence imposed, the §3553(c) error would never be "plain." Even if the defendant preserved the error with a timely objection, the error would remain uncorrected on appeal. The error would usually be harmless. Treatment of an omission of a statement of reasons as "plain error" which

199 Id. (citing Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980))
200 Id. (citing Richmond Newspapers, 448 U.S. at 572).
201 Id. (citing Richmond Newspapers, 448 U.S. at 572).
202 Id. (citing Alcantara, 396 F.3d at 196).
203 Id.
204 Id.
205 Id.
206 Id.
207 Id. at 248.
208 Id.
209 Id. (citing Arizona v. Fulminante, 499 U.S. 279, 310, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991)).
210 Id. (citing United States v. Sofsky, 287 F.3d 122, 125 (2d Cir. 2002)).
211 Id.
212 Id.
213 Id.
214 Id.
215 Id. at 249.
216 Id.
217 Id.
may be corrected on appeal would maintain the statement of reasons requirement as truly mandatory, as Congress intended.\textsuperscript{218}

In the wake of Santiago and Lewis, the Second Circuit seemed postured to vacate for failure to meet the written order requirement.\textsuperscript{219} However, in United States v. Fuller, the Second Circuit joined its sister circuits.\textsuperscript{220} Fuller remanded with instructions to vacate the sentence and resentence for other reasons, unrelated to failure to fulfill the written order requirement.\textsuperscript{221} Fuller expressed some displeasure with the District Court’s oral explanation for the departure sentence.\textsuperscript{222} It would have been preferable if the district judge provided more detail about the extent of the departure from the recommended range.\textsuperscript{223} Disturbingly, despite the inadequacies of the explanation, Fuller determined the oral statement of reasons was sufficient to provide the defendant a platform to build an argument that the sentence was unreasonable.\textsuperscript{224} Fuller relied on the statutory analysis of the vacatur provision explored in Santiago to conclude that omission of reasons from the judgment was not an independent cause to vacate the sentence.\textsuperscript{225} Fuller stated the better practice was to affirm the sentence but remand only to allow the district judge to amend the order to include an explanation.\textsuperscript{226}

In United States v. Jones, the Second Circuit solidified its adoption of the majority approach.\textsuperscript{227} It affirmed an out-of-range sentence unsupported by a statement of reasons in the written order based on the hearing transcript.\textsuperscript{228} As in Fuller, the Second Circuit imposed lax standards of specificity for the oral explanation necessary to support an out-of-range sentence accompanied by a silent written order.\textsuperscript{229} The oral explanation in Jones was even more inconclusive than the explanation in Fuller.\textsuperscript{230} The Second Circuit acknowledged the sentencing judge "gave no specific articulation" as to why the length of the sentence was appropriate.\textsuperscript{231} The sentencing judge’s colloquy revealed he relied on his "gut feeling" about the defendant and considered factors the Guidelines

\textsuperscript{218} Id. (citing United States v. Canady, 126 F.3d 352, 364 (2d Cir. 1997), cert. denied, 522 U.S. 1134, 118 S.Ct. 1092, 140 L.Ed.2d 148 (1998) ("If we were to hold that the error was not structural and thus subject to harmless error analysis, it would almost always be held to be harmless. In this way, the right would become a right in name only, since its denial would be without consequence.").
\textsuperscript{219} See supra notes 147-218 and accompanying text.
\textsuperscript{220} United States v. Fuller, 426 F.3d 556, 566-567 (2d Cir. 2005) (citing United States v. Cooper, 394 F.3d 172 (3d Cir. 2005) (failure to provide written explanation for departure is not reason for remand when departure is otherwise permissible and the district court’s reasoning is otherwise persuasive); United States v. Daychild, 357 F.3d 1082, 1107-08 (9th Cir. 2004) (remand is not required for failure to meet written order requirement); United States v. Orchard, 332 F.3d 1133, 1141 n. 7 (8th Cir. 2003) (remand not required for failure to state reasons in written order)).
\textsuperscript{221} Fuller, 426 F.3d at 567.
\textsuperscript{222} Id. at 566.
\textsuperscript{223} Id.
\textsuperscript{224} Id.
\textsuperscript{225} Id. (citing United States v. Santiago, 384 F.3d 31 (2d Cir. 2004)).
\textsuperscript{226} Id. at 567.
\textsuperscript{227} United States v. Jones, 460 F.3d 191, 197 (2d Cir. 2006).
\textsuperscript{228} Id. at 198.
\textsuperscript{229} Id. at 195.
\textsuperscript{230} Id.
\textsuperscript{231} Id.
deemed irrelevant.\textsuperscript{232} Discussion in \textit{Jones} implied the government properly preserved the objection to the omission of reasons from the written order.\textsuperscript{233} However, \textit{Jones} failed to specify the standard of review it applied to the claim the district judge violated the written order requirement.\textsuperscript{234}

The government challenged the sentence on three grounds.\textsuperscript{235} First, the sentencing judge relied on several factors the Commission deemed irrelevant to support a sentence.\textsuperscript{236} The Second Circuit rejected this argument.\textsuperscript{237} After \textit{Booker}, the Guidelines were only advisory.\textsuperscript{238} Guidelines limitations on the use of factors authorizing departures were no longer binding.\textsuperscript{239}

Second, the government argued the sentencing judge inappropriately weighed his subjective assessment of the defendant.\textsuperscript{240} A gut feeling should not be sufficient to support a sentence outside the recommended range.\textsuperscript{241} The Second Circuit rejected the government's argument in the post-\textit{Booker} world.\textsuperscript{242} Although the district judge must consider the statutory factors, the judge is not precluded from weighing the judge's own sense of fairness.\textsuperscript{243} The Second Circuit acknowledged the district judge's reasons were not ordinarily grounds for a pre-\textit{Booker} departure and the judge's "gut feeling" influenced his judgment.\textsuperscript{244} However, \textit{Jones} concluded, after \textit{Booker}, these reasons were adequate to support rejecting the Guidelines recommendation.\textsuperscript{245}

Finally, the government argued the District Court violated the written order requirement.\textsuperscript{246} \textit{Jones} determined the best course was to affirm the sentence but remand with instructions to the district judge to amend the written judgment to include a statement of reasons.\textsuperscript{247} \textit{Jones} acknowledged it would be helpful to reviewing courts, the Commission, and the Bureau of Prisons to have the judge's statement of reasons conveniently set forth in the order.\textsuperscript{248} Under \textit{Jones}, the written order requirement is treated as little more than a ministerial mechanism to provide statistical data to the Commission and Bureau of Prisons.\textsuperscript{249}

\begin{flushleft}
\textsuperscript{232} Id. \\
\textsuperscript{233} Id. at 194. \\
\textsuperscript{234} Id. \\
\textsuperscript{235} Id. \\
\textsuperscript{236} Id. \\
\textsuperscript{237} Id. \\
\textsuperscript{238} Id. \\
\textsuperscript{239} Id. \\
\textsuperscript{240} Id. at 195. \\
\textsuperscript{241} Id. \\
\textsuperscript{242} Id. \\
\textsuperscript{243} Id. \\
\textsuperscript{244} Id. \\
\textsuperscript{245} Id. \\
\textsuperscript{246} Id. at 196. \\
\textsuperscript{247} Id. at 197. \\
\textsuperscript{248} Id. \\
\textsuperscript{249} Id. \\
\end{flushleft}
Thus, in both Fuller and Jones, the Second Circuit viewed the written order requirement as a mere ministerial requirement. Based on an inconclusive hearing transcript, the Second Circuit presumed the District Court provided an adequate oral explanation for deviating from the recommended range. However, in United States v. Hall, issued after Fuller and Jones, the Second Circuit seemed to take the written order requirement a bit more seriously. Hall held that in an appeal subject to an Anders motion, the judgment must include a written statement of reasons. Pursuant to Anders, court-appointed appellate counsel may move to be relieved from duties to represent the appellant if "counsel is convinced, after conscientious investigation, that the appeal is frivolous." Appellate courts will not grant Anders motions unless they are satisfied that appellate counsel diligently reviewed the record for any possibly meritorious issues on appeal. The court must agree with counsel's declaration that the appeal would be frivolous. Counsel could not withdraw until she ensured a written statement of reasons supporting an out-of-range sentence was part of the record and considered as part of the Anders analysis.

Therefore, the Second Circuit has wrestled with how to respond to written order requirement violations. In the beginning, in Santiago and Lewis, the Second Circuit was unwilling to affirm out-of-range sentences without first reviewing a written statement of reasons. However, in Fuller and Jones, the Second Circuit joined the majority and was willing to affirm out-of-range sentences without having the benefit of reviewing a statement of reasons in the order. Disturbingly, the Second Circuit was willing to affirm these out-of-range sentences despite silent orders even when: (1) the Second Circuit expressed displeasure with the district judge's oral explanation for the departure, (2) the district judge gave no specific articulation as to why the sentence was appropriate, and (3) the district judge's colloquy revealed he relied on his gut feeling about the defendant.

2. The DC. Circuit Implicitly Diverges from the Majority Approach

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250 See supra note 17 and accompanying text.
251 See supra note 17 and accompanying text.
252 United States v. Hall, 499 F.3d 152 (2d Cir. 2007).
253 Id. at 156-57.
254 Id. (citing Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967)).
255 Id. (citing United States v. Burnett, 989 F.2d 100, 104 (2d Cir. 1993)).
256 Id.
257 Id.
258 See supra Part II.A.1.
259 United States v. Santiago, 384 F.3d 31, 37 (2d Cir. 2004); United States v. Lewis, 424 F.3d 239, 246 (2d Cir. 2005).
260 United States v. Fuller, 426 F.3d 556, 566-67 (2d Cir. 2005); United States v. Jones, 460 F.3d 191, 197 (2d Cir. 2006).
261 Fuller, 426 F.3d at 567.
262 Jones, 460 F.3d at 195.
263 Id.
The D.C. Circuit seems to have departed from the majority approach. In *In re Sealed Case*, the D.C. Circuit vacated an out-of-range sentence that failed to comply with the written order requirement and remanded for resentencing. The Court of Appeals stated that "[w]ithout a statement of reasons, we are "unable to determine" whether Appellant’s sentence is reasonable." Although the D.C. Circuit fell short of explicitly rejecting the majority approach, it refused to accept the oral statements of the judge at the sentencing hearing as sufficient to satisfy the written order requirement.

Strikingly, the oral statements of *In re Sealed Case* were far more clear and appropriate under the statutory sentencing scheme than the oral statements that the Second Circuit accepted as sufficient in *Jones*. In *In re Sealed Case*, the district judge imposed the sentence upon revocation of supervised release. At the revocation hearing, the district judge (i) detailed the defense violations, (ii) correctly calculated the Guidelines range, (iii) articulated its discretion to sentence outside the range, (iv) correctly stated the statutory maximum, (v) gave each side an opportunity to make its case for the appropriate sentence, and (vi) listed several reasons for departing from the range before stating the sentence. If the sentencing judge included those reasons in the written order imposing the sentence, there is little doubt the judge would have satisfied the written order requirement.

In fact, in the dissent from *In re Sealed Case*, Judge Kavanaugh stated that a fair reading of the hearing transcript revealed the District Court clearly articulated its specific reason for imposing an out-of-range sentence. After the District Court stated it would revoke the defendant’s supervised release, the court heard argument about the length of sentence and reiterated several reasons justifying the sentence. The District Court also supported the departure based on reasons the Guidelines deemed permissible to support upward departures.

The District Court in *In re Sealed Case* more clearly articulated the reason for the departure on the hearing transcript than did the District Court in *Jones*. Moreover, in *In re Sealed Case*, the rationale for the out-of-range sentence was Guidelines based and objective. In *Jones*, the Second Circuit admitted some of the reasons for the out-of-range sentence were not Guidelines authorized and were subjective. One explanation for the different treatment in the two cases is that the Court of Appeals for the District of

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264 *In re Sealed Case*, 527 F.3d 188 (D.C. Cir. 2008).
265 Id. at 193.
266 Id.
267 Id. at 192.
268 See supra notes 227-249 and accompanying text.
269 Id. at 189.
270 Id. at 195-96.
271 Id. at 198.
272 Id. at 194-95.
273 Id. at 195.
274 Id.
275 See supra notes 227-249 and accompanying text.
276 Id. at 196.
277 See supra notes 227-249 and accompanying text.
Columbia takes the written order requirement more seriously. Even if the D.C. Circuit fell short of explicit rejection of the majority approach, *In re Sealed Case* supports the conclusion that the circuit vacates for failure to meet the written order requirement. Without qualification, the D.C. Circuit stated the sentence failed under §3553(c)(2). *In re Sealed Case* held the written judgment must contain a statement of reasons. At a minimum, the statement must disclose why a stated statutory factor justified the departure. The defendant did not object to the judge's failure to explain his reasons for the sentence. The appellate court applied the plain error standard of review and concluded the procedural errors met the standard.

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

1. Circuits Which Do Not Impose the Written Order Requirement
   
i. The Eighth Circuit

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

   Pivotal to the Eighth Circuit's refusal to apply the written order requirement to revocation sentences was the pre-*Booker* distinction between the binding nature of the Guidelines and the advisory nature of the Chapter 7 policy statements. *White Face* noted the Commission issued advisory policy statements for revocation sentences instead of binding Guidelines in order to provide "greater flexibility" to District Courts.

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278 *Id.* at 193.
279 *Id.*
280 *Id.* at 192.
281 *Id.* at 191 (citing *United States v. Ogbeide*, 911 F.2d 793, 795 (D.C. Cir. 1990)).
282 *Id.*
283 *Id.* at 193.
284 *Id.* at 193.
286 *White Face*, 383 F.3d at 739.
287 *Id.* at 735.
288 *Id.*
289 *Id.* at 739.
290 *Id.* at 735 (citing U.S.S.G. ch. 7, pt. A, §3(a); *United States v. Levi*, 2 F.3d 842, 845 (8th Cir. 1993)).
According to White Face, the Commission indicated it would issue Guidelines for revocation of supervised release in the future but had never done so.\textsuperscript{291}

Along with all other circuits,\textsuperscript{292} the Eighth Circuit did not consider the Chapter 7 policy statements binding. However, District Courts were required to consider the Chapter 7 policy statements even though the suggested ranges were only advisory.\textsuperscript{293} Because of the distinction between advisory policy statements and Guidelines which are "regulations with the force of law,"\textsuperscript{294} the Eighth Circuit did not consider revocation sentences exceeding the suggested range to be upward departures from the Guidelines.\textsuperscript{295}

White Face claimed it maintained this approach even after the PROTECT Act.\textsuperscript{296} Pursuant to the vacatur provision of the PROTECT Act, an appellate court should set aside and remand a sentence if it is outside the "applicable guideline range and the District Court failed to provide the required statement of reasons in the order of judgment and commitment."\textsuperscript{297} The Eighth Circuit held that the new vacatur provision did not: (1) specify that the policy statements were binding; (2) impose new requirements for revocation sentencing; or (3) require remand for failure to provide a written statement for outside range revocation sentences.\textsuperscript{298} White Face also interpreted the legislative history to support its conclusion that the written order requirement applied only to "departures from the Guidelines" and not to revocation sentences outside the policy statement range.\textsuperscript{299} Although it refused to impose the written order requirement, White Face encouraged District Courts to include statements of reasons in revocation orders\textsuperscript{300} and acknowledged such statements are helpful to parties, reviewing courts and the Commission.\textsuperscript{301}

Even post-Booker, the Eighth Circuit followed White Face despite the fact that Booker destroyed the rationale for its refusal to impose the written order requirement in the revocation context.\textsuperscript{302} Just months after Booker, in United States v. Cotton, the Eighth Circuit followed White Face when it refused to impose the written order requirement to

\textsuperscript{291} Id.
\textsuperscript{292} Id. at 738 (citing United States v. Davis, 53 F.3d 638, 642 (4th Cir. 1995); United States v. Hill, 48 F.3d 228, 231-32 (7th Cir. 1995); United States v. Sparks, 19 F.3d 1099, 1101-02 & n. 3 (6th Cir. 1994); United States v. Forrester, 19 F.3d 482, 484 (9th Cir. 1994); United States v. Anderson, 15 F.3d 278, 283-84 (2d Cir. 1994); United States v. Hensley, 36 F.3d 39, 42 (8th. Cir. 1994)).
\textsuperscript{293} Id. (citing United States v. Levi, 2 F.3d 842, 845 (8th Cir. 1993)).
\textsuperscript{294} Id. (citing United States v. Shaw, 180 F.3d 920, 922 (8th Cir. 1999) (per curiam)).
\textsuperscript{295} Id.
\textsuperscript{296} Id. (citing 18 U.S.C. §3742(f)(2)).
\textsuperscript{297} Id. (claiming §3742 clarifies that failure to provide written reasons under §3553(c)(2) is not reversible error).
\textsuperscript{298} Id. (citing H.R. Rep. No. 108-66 (2003)).
\textsuperscript{299} Id.
\textsuperscript{300} Id.
\textsuperscript{301} See United States v. Cotton, 399 F.3d 913, 916 (8th Cir. 2005).
out-of-range revocation sentences. Surprisingly, Cotton based its holding on the theory that advisory policy statements, rather than binding Guidelines, govern revocation sentencing. Cotton did not acknowledge that its rationale was outdated in the post-Booker world. Even after Booker, the written order requirement clearly applies to Guidelines departures; the debate concerns whether the requirement applies to out-of-range revocation sentences.

ii. The Seventh Circuit

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

2. Circuits Which Impose the Requirement

Below is a survey of circuits that are more willing than the Eighth to require a written statement of reasons to support out-of-range revocation sentences. These circuit approaches range from equal application of the requirement to lessening the specificity requirements to rendering internally inconsistent opinions.

i. The D.C. Circuit

Even in the revocation context, the D.C. Circuit is loathe to affirm a sentence in which the District Court omitted a statement of reasons from the written order. The D.C. Circuit is reluctant to look to colloquy at the revocation hearing in an attempt to

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303 Id.
304 Id. (stating "[w]e reasoned that the written-order requirement applies to departures from the guidelines range, whereas revocation of supervised release is not governed by guidelines, but only policy statements which are not binding on the court (although the court must consider them)").
305 Id.
306 See United States v. Miqbel, 444 F.3d 1173, 1177 (9th Cir. 2006) (citing United States v. Fifield, 432 F.3d 1056, 1063-66 (9th Cir. 2005) (applying the §3553(c) requirement post-Booker); see also 543 U.S. at 259, 266 (holding that after the excision of 18 U.S.C. §3553(b)(1) and §3742(e), "the remainder of the [Federal Sentencing] Act 'functions independently' and 'remains intact' (citation omitted) (second alteration in original)).
308 Id.
309 Id.
310 Id.
311 See infra Part II.B.2.
312 See infra Part II.B.2.
313 In re Sealed Case, 527 F.3d 188 (D.C. Cir. 2008).
justify as reasonable an out-of-range revocation sentence unsupported by a clear statement of reasons in the written order.\textsuperscript{314} In the revocation context, the D.C. Circuit has vacated out-of-range sentences unaccompanied by a statement of reasons in the written order.\textsuperscript{315}

ii. The Ninth Circuit

The Ninth Circuit applies the written order requirement to revocation sentencing just as it applies the requirement to other types of sentencing.\textsuperscript{316} Similar to its approach with regular sentencing, the Ninth Circuit affirms an out-of-range revocation sentence unsupported by a statement of reasons in the written order if it finds the sentence is reasonable based on the district judge's statements in the record.\textsuperscript{317} Failure to meet the written order requirement is not an independent cause for remand.\textsuperscript{318}

Even before \textit{Booker}, the Ninth Circuit held that the statutory requirement for a statement of reasons applied equally to revocation sentencing.\textsuperscript{319} In \textit{United States v. Musa}, the defendant claimed the trial court failed to "adequately set forth its reasons for departing from the recommended guidelines as required by 18 U.S.C. §3553(c)."\textsuperscript{320} Considering the defendant's sentence was outside the policy statement range, the Ninth Circuit held the district judge was statutorily required to provide the specific reasons for the departure from the recommended sentencing range.\textsuperscript{321} \textit{Musa} did not distinguish between the burdens 18 U.S.C. §3553(c)(2) places on a District Court in the context of out-of-range revocation sentences and Guidelines departures.\textsuperscript{322}

Post-\textit{Booker}, the Ninth Circuit held all of the statutory requirements for a statement of reasons applied equally to revocation sentencing in \textit{United States v. Miqbel}.\textsuperscript{323} \textit{Miqbel} concerned the issue of whether the sentencing judge articulated a sufficiently specific reason to support an out-of-range revocation sentence.\textsuperscript{324} The Ninth Circuit analyzed the sentencing judge's colloquy and did not direct its attention to the written order.\textsuperscript{325} \textit{Miqbel} stands for the proposition that all of 18 U.S.C. §3553(c), including the written order requirement, applies equally to revocation sentencing.\textsuperscript{326} Even though \textit{Miqbel} analyzed the judge's colloquy instead of the written order, \textit{Miqbel} quoted the entirety of 18 U.S.C. §3553(c), including the written order requirement.\textsuperscript{327}

\textsuperscript{314} \textit{Id.} at 192.
\textsuperscript{315} \textit{Id.} at 193.
\textsuperscript{316} \textit{See infra} Part II.B.2.ii.
\textsuperscript{317} \textit{See infra} Part II.B.2.ii.
\textsuperscript{318} \textit{See infra} Part II.B.2.ii.
\textsuperscript{319} \textit{See infra} note 320.
\textsuperscript{320} \textit{See United States v. Musa}, 220 F.3d 1096, 1101 (9th Cir. 2000).
\textsuperscript{321} \textit{Id.}
\textsuperscript{322} \textit{Id.}
\textsuperscript{323} United States v. Miqbel, 444 F.3d 1173, n. 7 (9th Cir. 2006).
\textsuperscript{324} \textit{Id.} at 1178.
\textsuperscript{325} \textit{Id.}
\textsuperscript{326} \textit{Id.} at 1177.
\textsuperscript{327} \textit{Id.}
Miqbel outlined the essential characteristics of an adequate statement supporting an outside range revocation sentence. The statement must be sufficiently specific to provide the appellate court an opportunity to determine whether the district judge considered permissible factors. The district judge stated that he imposed an out-of-range sentence because the Guidelines recommendation was insufficient to achieve the purposes of sentencing under the circumstances. Miqbel rejected this statement of reasons as insufficient to allow for meaningful appellate review. A sufficiently specific justification would have enabled the appellate court to determine whether the District Court weighed the sentencing factors for which Congress mandated consideration in the revocation context.

The colloquy at the bail hearing led the Ninth Circuit to determine the district judge used punishment as the primary basis for the increased sentence. Punishment is one of the two factors Congress deliberately omitted from consideration in revocation sentencing. The District Court's consideration of an impermissible factor may have been reversible error. However, Miqbel vacated the sentence because the sentencing judge failed to specify the reasons for the out-of-range sentence at the time of sentencing.

Miqbel held that the district judge is statutorily required to provide specific reasons "at the time of sentencing." The Ninth Circuit rejected the government's contention that the district judge's explanation for an outside range sentence at the bail hearing fulfilled the requirement for a statement of reasons. Post hoc reasoning provided in later proceedings cannot satisfy the statement of reasons requirement. Defendants are usually present at revocation hearings but often absent from bail hearings. Allowing courts to meet the statement of reasons requirement through

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328 Id.
329 Id. at 1178, n. 8 (citing United States v. Montenegro-Rojo, 808 F.2d 425 (9th Cir. 1990) (holding the reasons for the departure "must be sufficiently specific to allow this court to conduct a meaningful review.").
330 Id. at 1179, n. 9.
331 Id.
332 Id. at 1183, n. 21 (because of failure of the record to show that the district court considered the appropriate §3583(e) factors, the court would likely be required to vacate and remand for resentencing just to permit the sentencing judge to impose a sentence based on proper factors and citing Montenegro-Rojo, 908 F.2d at 428 (9th Cir. 1990) ("[i]f the district court considered both proper and improper basis for departure, we have no way to determine whether any portion of the sentence was based upon consideration of the improper factors, and must therefore vacate the sentence and remand for resentencing." (citations omitted))).
333 Id. at 1183, n. 20.
334 Id. at 1183.
335 Id.
336 Id.
337 Id. at 1179 (pointing out 18 U.S.C. §3553(c) specifically states "at the time of sentencing.").
338 Id. at 1180.
339 Id.
340 Id.
colloquy at a bail hearing deprives defendants of the right to hear directly from the court the rationale for their sentences.\footnote{341}{Id.}

\textit{Miqbel} did not focus on the written order requirement but instead focused on the requirement for an oral statement at the time of sentencing.\footnote{342}{Id.} Other cases reveal the Ninth Circuit has adopted the majority approach in the revocation context.\footnote{343}{Id. at 1175, n. 3, 1180, n. 12.} The Ninth Circuit affirms out-of-range revocation sentences despite violation of the written order requirement if the appellate court can find the sentence reasonable based on the sentencing judge's colloquy at the sentencing hearing.\footnote{344}{Id.}

However, the facts of \textit{Miqbel} underscore the importance of the written order requirement and illustrate that omission of a statement of reasons from the order should be an independent cause to vacate the sentence.\footnote{345}{Id.} The government cited several instances in which the sentencing judge's colloquy revealed the judge considered the statutory sentencing factors.\footnote{346}{Id. at 1175, n. 3, 1180, n. 12.} The numerous sentencing discussions that occurred in \textit{Miqbel} support the rationale for the written order requirement.\footnote{347}{Id.} A host of issues and factors are discussed during a revocation hearing such as the defendant's behavior which might indicate a potential for danger to the community, the defendant's history of pretrial and supervised release violations, and the defendant's work history and family ties; the topics that may arise are limitless. Depending on: (1) whether the judge relates the factors discussed to its decision to sentence outside of the range, (2) the timing of the discussions in relation to imposition of the sentence, and (3) each party's characterization of the discussion, it is difficult to discern whether the discussion reveals the judge considered the appropriate factors.\footnote{348}{Id.} Requiring the district judge to articulate in writing the specific reasons for the out-of-range sentence creates a clear record of the factors the judge considered.\footnote{349}{See infra Part III.}

iii. The Second Circuit

Like the Ninth Circuit,\footnote{350}{See supra note 139 and accompanying text.} the Second Circuit affirms an out-of-range revocation sentence unaccompanied by a statement of reasons in the written order if the appellate court can find the sentence is reasonable based on the sentencing judge's statements in the record.\footnote{351}{See infra Part III.} In the Second Circuit, the written order requirement is not as strong a requirement in the revocation context as it is for original sentencing.\footnote{352}{United States v. Verkhoglyad, 516 F.3d 122 (2d Cir. 2008).} In \textit{Verkhoglyad v. United States}, the Second Circuit held the District Court's statement of reasons for an out-
of-range revocation sentence need not be as specific as a statement of reasons supporting a Guidelines departure.  \textsuperscript{353} \textit{Verkhoglyad} found the sentencing judge's omission of reasons from the written order did not render the outside range revocation sentence procedurally unreasonable.\textsuperscript{354} The Second Circuit affirmed the sentence as reasonable based on the colloquy at the revocation hearing and remanded only to allow the sentencing judge to amend the written order.\textsuperscript{355}

Before \textit{Verkhoglyad} in 2008, the Second Circuit was undecided about whether the written order requirement applied in the revocation context.\textsuperscript{356} In a few unpublished opinions, the Second Circuit declined to decide whether the written order requirement applied in revocation sentencing.\textsuperscript{357} It noted with interest the Eighth Circuit's refusal to apply the requirement in revocation sentencing.\textsuperscript{358}

iv. The Fifth Circuit

In \textit{United States v. Russell}, \textsuperscript{359} an unpublished opinion, the Fifth Circuit applied the written order requirement equally in the context of revocation sentencing. The \textit{Russell} court determined that the district judge's failure to articulate reasons for imposing a sentence above the range suggested by the Guidelines policy statements arguably constituted obvious error.\textsuperscript{360} The defendant raised the written order requirement violation for the first time on appeal; so \textit{Russell} applied plain error review.\textsuperscript{361} The \textit{Russell} court followed the majority approach.\textsuperscript{362} \textit{Russell} found that the district judge's oral explanation for deviating from the recommended range was adequate.\textsuperscript{363} Therefore, the \textit{Russell} court affirmed the sentence.\textsuperscript{364} The written order requirement violation was not plain error.\textsuperscript{365}

v. The Eleventh Circuit

The Eleventh Circuit has not directly addressed whether the written order requirement applies in the revocation context in a published opinion.\textsuperscript{366} In a more recent unpublished opinion, \textit{United States v. Massengill}, defense counsel moved to withdraw from further representation of the defendant because counsel asserted there were no meritorious issues on appeal and filed an \textit{Anders} brief.\textsuperscript{367} In reviewing the \textit{Anders
motion, the Eleventh Circuit noted that the district judge omitted a statement of reasons from the order.\textsuperscript{368} \textit{Massengill} decided that this omission was arguably a meritorious issue.\textsuperscript{369} The Eleventh Circuit denied the motion to withdraw.\textsuperscript{370} Considering that the district judge's oral explanation of the sentence was adequate, the Eleventh Circuit determined the District Court validly revoked the defendant's supervised release.\textsuperscript{371} The Eleventh Circuit remanded to the District Court for the limited purpose of amending the written judgment to include a statement of reasons for imposing an outside-the-range sentence.\textsuperscript{372} \textit{Massengill} denied the \textit{Anders} motion in order to ensure the defendant had the benefit of counsel to review the written statement of reasons once it was filed to evaluate whether any meritorious issues arose.\textsuperscript{373}

Prior to \textit{Massengill}, in an unpublished opinion, \textit{United States v. Spence}, the Eleventh Circuit stated its previous precedent, \textit{United States v. Hofierka}\textsuperscript{374} pointed toward following the Eighth Circuit's refusal to apply the requirement in revocation sentencing.\textsuperscript{375} In \textit{Spence}, the Eleventh Circuit decided the district judge's omission of a statement of reasons in the written order supporting an out-of-range revocation sentence was not plain error.\textsuperscript{376} \textit{Spence} acknowledged the Eighth Circuit had unequivocally held the written order requirement did not apply in revocation sentencing.\textsuperscript{377} Although \textit{Spence} stated neither the Supreme Court nor the Eleventh Circuit had addressed the issue, \textit{Spence} stated \textit{Hofierka} pointed toward the Eighth Circuit's approach.\textsuperscript{378} Although issued after \textit{Booker}, \textit{Spence} failed to acknowledge that the \textit{Hofierka} rationale was outdated because it was premised on the distinction between the advisory policy statements and mandatory Guidelines, a distinction that ended after \textit{Booker}.\textsuperscript{379} \textit{Spence} applied the plain error

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id.
\item Id.
\item Id.
\item Id. at 880-81.
\item Id. at 884 (citing \textit{United States v. Hall}, 499 F.3d 152, 157 (2d Cir. 2007) (per curiam) ("[h]aving counsel continue to represent his client on remand will ensure that the defendant has the benefit of counsel to review the written statement of reasons once it is filed and ensure that no meritorious issues that arise in connection with that written entry are overlooked.").)
\item \textit{United States v. Hofierka}, 83 F.3d 357, 362 (11th Cir. 1996).
\item Id.
\item Id.
\item Id.
\item Id.
\item \textit{Hofierka}, 83 F.3d at 357. \textit{Hofierka}, decided years before \textit{Booker}, did not specifically address applicability of the written order requirement in the revocation context. \textit{Id.} at 360. Rather, \textit{Hofierka} concerned issues of whether the Chapter 7 policy statements were binding and whether district judges are required to provide advance notice of their intent to depart from the recommended ranges. \textit{Id.} \textit{Hofierka} required district judges to consider the policy statements but refused to find District Courts bound by ranges in the policy statements. \textit{Id.} \textit{Hofierka} also declined to require district judges to provide advance notice of intent to impose an out-of-range sentence in the revocation context. \textit{Id.} at 362. \textit{Hofierka} acknowledged that district judges are required to provide such notice for Guidelines departure. \textit{Id.} However, \textit{Hofierka} claimed the Eleventh Circuit had never decided whether a District Court must give such notice before exceeding the Chapter 7 recommended range. \textit{Id.} Because the policy statements were merely advisory, the Eleventh Circuit determined that since sentences outside the policy statement range were not "departures," District Courts were not required to provide notice or make specific findings normally associated with departures. \textit{Id.}  
\end{enumerate}
\end{footnotesize}
standard because the appellant never raised a timely objection to the written order requirement by relation.\textsuperscript{380} \textit{Spence} noted that the district judge explained the reasons for the departure in colloquy but failed to include those reasons in the order.\textsuperscript{381} The Eleventh Circuit doubted that the district judge had committed any error when he issued the silent order.\textsuperscript{382} Even if error occurred, \textit{Spence} concluded the written order requirement violation was not plain error.\textsuperscript{383}

Finally, in \textit{United States v. Lazzaro}, an unpublished opinion, the Eleventh Circuit once again determined that a written order requirement violation was not plain error.\textsuperscript{384} Neither the Supreme Court nor the Eleventh Circuit had addressed whether the requirement applied to revocation sentencing.\textsuperscript{385} The district judge failed to articulate consideration of the policy statements and sentencing factors in its order, at the revocation hearing, or anywhere in the record.\textsuperscript{386} \textit{Lazzaro} presumed that the district judge must have considered the factors because he acknowledged the advisory range before sentencing.\textsuperscript{387} The Eleventh Circuit also presumed the district judge considered the policy statements based only on the fact that the probation report was part of the file he reviewed.\textsuperscript{388}

\textit{Lazzaro} is a stark illustration of the risks of ignoring the written order requirement in revocation sentencing.\textsuperscript{389} Without a requirement for the district judge to justify an out-of-range sentence in the written order, appellate courts have no reliable record for why the judge rejected the Commission's well studied recommendation.\textsuperscript{390} Relying on colloquy is unreliable. During a revocation hearing, the district judge and parties discuss a host of issues at various times. Appellate courts are left guessing as to the district judge's basis for departing. Congress has made it clear that not every reason for imposing an out-of-range revocation sentence is appropriate.\textsuperscript{391} In \textit{Lazzaro}, the Court of Appeals made several unsupported guesses about what the district judge might have considered, without knowing any of the judge's actual considerations.\textsuperscript{392} This is not effective appellate review. Allowing sentencing judges to ignore the recommended range without stating a rationale undermines policies of sentencing uniformity and fairness.\textsuperscript{393} Sentences cannot be uniform or fair if district judges can exceed recommended ranges without articulating any rationale.

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\begin{footnotes}
\textsuperscript{380} \textit{Spence}, 151 Fed.Appx. at 836.
\textsuperscript{381} \textit{Id.}
\textsuperscript{382} \textit{Id.}
\textsuperscript{383} \textit{Id.}
\textsuperscript{384} \textit{United States v. Lazzaro}, 194 Fed.Appx. 735, 841 (11th Cir. 2006).
\textsuperscript{385} \textit{Id.}
\textsuperscript{386} \textit{Id. at 737.}
\textsuperscript{387} \textit{Id.}
\textsuperscript{388} \textit{Id. at 738.}
\textsuperscript{389} \textit{Id.}
\textsuperscript{390} \textit{See supra} notes 345-349 and accompanying text.
\textsuperscript{391} \textit{See supra} notes 119-121 and accompanying text.
\textsuperscript{392} \textit{Lazzaro}, 195 Fed.Appx. at 738.
\textsuperscript{393} \textit{See infra} Part III.D.
\end{footnotes}
Ignoring the written order requirement in revocation sentencing is unfair to the individual defendant.\textsuperscript{394} A defendant cannot effectively appeal his sentence if the appellate court is willing to presume the sentencing judge considered the sentencing factors and policy statements without evidence on the record.\textsuperscript{395} Courts are statutorily required to consider the sentencing factors and policy statements. \textit{Lazzaro} permitted the sentencing judge to avoid this statutory duty.\textsuperscript{396}

\section*{III. RECOMMENDATION: VACATE FOR WRITTEN ORDER REQUIREMENT VIOLATIONS}

Courts should abandon the majority approach and adopt one of the following two alternative approaches.\textsuperscript{397} These alternative approaches should apply regardless of whether the party properly preserved the written order requirement violation error with a timely objection.\textsuperscript{398}

\subsection*{A. The Santiago Inspired Approach}

In \textit{Santiago}, the Second Circuit adopted a response to written order requirement violations preferable to the majority approach.\textsuperscript{399} \textit{Santiago} fell short of vacating the sentence, but the court explicitly refused to affirm the sentence until after it reviewed the amended written order.\textsuperscript{400} \textit{Santiago} inspired the following approach which goes a step further than \textit{Santiago} by vacating sentences for written order requirement violations (\textit{Santiago} Inspired Approach). Under the \textit{Santiago} Inspired Approach, if the sentencing hearing transcript specifies reasons for the departure but the written order is silent, the appellate court should vacate the sentence and remand.\textsuperscript{401} It should refrain from issuing a written opinion analyzing the hearing transcript. Instead, the appellate court should issue a brief order informing the district judge that she need not conduct another sentencing hearing. The order should direct the district judge to review the hearing transcript in her efforts to recollect the specific reason for the departure. Then, the district judge should amend the order to include the precise reasons for deviating from the range. Only after the appellate court reviews the amended order, can the court conduct reasonableness review.\textsuperscript{402} If the appellate court determines that the sentence is unreasonable after reviewing the amended order, the appellate court orders the district judge to conduct another sentencing hearing. However, if the appellate court deems the sentence reasonable based on its review of the amended order, the appellate court affirms the sentence.

\begin{itemize}
  \item \textsuperscript{394} See infra Part III.D.
  \item \textsuperscript{395} See infra Part III.D.
  \item \textsuperscript{396} \textit{Lazzaro}, 194 Fed.Appx. at 738.
  \item \textsuperscript{397} See infra Part III.A-B.
  \item \textsuperscript{398} See infra Part III.C.
  \item \textsuperscript{399} United States v. Santiago, 384 F.3d 31 (2d Cir. 2004).
  \item \textsuperscript{400} \textit{Id}.
  \item \textsuperscript{401} \textit{Santiago}, 384 F.3d at 37.
  \item \textsuperscript{402} See \textit{Santiago}, 384 F.3d at 37 (retaining jurisdiction to hear Santiago's challenge to the departure once the record had been supplemented with an amended order disclosing a statement of reasons).
\end{itemize}
B. The In re Sealed Case Approach

Alternatively, if the sentencing hearing transcript fails to identify the specific reasons for the departure, the appellate court should vacate the sentence and remand for resentencing. The appellate court should instruct the District Court to conduct another sentencing hearing. After the hearing, the District Court prepares a written order specifying reasons for the departure while impressions of the defendant and circumstances are fresh because the hearing has just occurred. Under either alternative, appellate courts refrain from affirming out-of-range sentences until they have reviewed the statement of reasons in the order.

C. Vacate Regardless of Whether the Appellant Made a Timely Objection

Appellate courts should not require a timely objection to avoid plain error review of a claim of omission of reasons from the order. Vacatur is required regardless of whether an objection preserves the error. An out-of-range sentence unaccompanied by a statement of reasons in the order is a sentence imposed in violation of law. The structure, purpose, and history of the Sentencing Reform Act compels vacatur for written order requirement violations. Omission of reasons from the order renders an out-of-range sentence procedurally unsound. The Commission explicitly requires vacatur for violation of the written order requirement. It is fair to defendants to conclude that an out-of-range sentence unaccompanied by reasons in the order is a sentence imposed in violation of law, requiring vacatur.

However, even if appellate courts apply plain error review, such sentences meet the plain error test. Violation of the written order requirement is an obvious error which affects the defendant's substantial rights. The Court of Appeals cannot review for reasonableness when the District Court omitted reasons from the order. An appellant cannot build effective reasonableness arguments without a clear order. The obvious error seriously affects the fairness, integrity, or public reputation of judicial proceedings. A clear statement in the judgment bolsters the perception of fair

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403 See In re Sealed Case, 527 F.3d 188, 193 (D.C. Cir. 2008).
404 See In re Sealed Case, 527 F.3d at 193; Santiago, 384 F.3d at 37.
405 See United States v. Lewis, 424 F.3d 239, 246 (2d Cir. 2005) (rejecting the government's argument that a district judge's commission of the procedural error of imposition of a sentence without compliance with the requirements of 18 U.S.C. §3553(c) is not error if the sentence is reasonable. Lewis determined that such a sentence is imposed in violation of law. Id. In Lewis the district judge failed to explain at the hearing the reasons for imposing an out-of-range sentence. Id. at 245.).
406 See infra Part III.D.
407 See infra Part III.D.1.
408 See infra Part III.D. 6.
409 See infra Part III.D.1.
410 See infra Part III.D.
411 See In re Sealed Case, 527 F.3d 188, 193 (D.C. Cir. 2008).
412 Id.
413 Id. (citing United States v. Lewis, 424 F.3d 239, 247 (2d Cir. 2005)).
414 Id.
415 Id. (citing United States v. Williams, 488 F.3d 1004, 1008 (D.C. Cir. 2007)).
sentencing and allows the Commission to perform its function thereby promoting sentencing uniformity. An appellant should not have to prove the sentence would have been different but for the silent order. Treatment of a written order requirement violation as plain error which may be corrected on appeal maintains the requirement as mandatory in the manner that Congress intended. Appellate courts should relax the rigorous standards of plain error analysis in the sentencing context. It is easy to correct sentencing errors because the conviction remains intact and no new trial is necessary. If the transcript is clear, the District Court need only amend the judgment to permit appellate review.

Appellate courts adopting the majority approach also affirm out-of-range sentences unaccompanied by clear orders even when applying de novo review which is a far less onerous standard than plain error. Clearly, under this less stringent standard of review, appellate courts should vacate the sentence for violation of the written order requirement.

D. Law and Policy Supporting Vacatur

This Part explores law and policy supporting vacatur for written order requirement violations.


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

Before the 2003 amendment which added the written order requirement, the Sentencing Reform Act mandated vacatur of a sentence that was: (1) outside the

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416 See infra Part III.D.7.
417 See infra Part III.D.8.
418 See United States v. Lewis, 424 F.3d at 247.
419 Id. (setting forth this plain error analysis for failure to provide a statement of reasons in writing or orally).
420 Id. (making this proposition for failure to provide a statement of reasons in writing or orally).
421 Id.
422 See, e.g., United States v. Orchard, 332 F.3d 1133, 1139 (8th Cir.).
423 See infra Part III.D.
425 Id. (citing 18 U.S.C. §3742 (f)(2)(A)).
426 Id.
Guideline range, (2) unreasonable, and (3) "too high" or above the range if the defendant appealed, or "too low" or below the range if the government appealed.\textsuperscript{427} Questions of whether a sentence: (1) was reasonable, or (2) "too high" or "too low" were separate inquiries, not to be collapsed.\textsuperscript{428} The terms "too low" or "too high" do not assess the reasonableness of a sentence.\textsuperscript{429} These phrases establish connection between the direction of the Guidelines departure and the identity of the appellant.\textsuperscript{430} "Too high" and "too low" are legal terms of art.\textsuperscript{431} Congress tried to connect the appealing party to the direction of the departure.\textsuperscript{432} This protected the appealing party from receiving a worse sentence after an appeal.\textsuperscript{433} Without this protection, an appellate court could set aside a sentence as unreasonably low even though the defendant appealed the sentence.\textsuperscript{434} This is why the Senate Committee report explained that the sentence cannot be increased through an appeal made by a defendant.\textsuperscript{435} Congress did not intend the "too high" and "too low" query as substitute standards of reasonableness.\textsuperscript{436}

In 2003, Congress amended the Sentencing Reform Act to require district judges to provide specific written reasons for departures.\textsuperscript{437} Congress intended to enforce the written order requirement by amending the vacatur provision to provide a separate cause for vacatur when a District Court violates the requirement.\textsuperscript{438} Prior to the 2003 amendment, the Sentencing Reform Act already required vacatur if an appellate court determined a departure was unreasonable.\textsuperscript{439} When Congress amended in 2003 to require vacatur for violation of the written order requirement, Congress left intact the separate cause for vacatur where a departure was unreasonable.\textsuperscript{440} Only requiring vacatur for omission of reasons when an appellate court determines the departure is either unreasonably too low or too high renders superfluous the separate grounds for vacatur for violation of the written order requirement.\textsuperscript{441} Such a statutory construction is internally inconsistent.\textsuperscript{442} The statute would only mandate vacatur for violation of the written order requirement where the statute already requires vacatur for unreasonableness.\textsuperscript{443} After the 2003 amendment, the three criteria for vacatur for violation of the written order requirement are: (1) the District Court omitted reasons from the order; (2) the sentence is

\textsuperscript{428} Id. at 199.
\textsuperscript{429} Id. at 198-200.
\textsuperscript{430} Id. at 199.
\textsuperscript{431} Id. at 198.
\textsuperscript{432} Id. at 199.
\textsuperscript{433} Id.
\textsuperscript{434} Id.
\textsuperscript{436} Id. at 198-199.
\textsuperscript{438} Id.
\textsuperscript{439} Id. (citing 18 U.S.C. §3742(f)(2) (supplement 2002) (requiring vacatur where the "sentence is outside the applicable guideline range and is unreasonable").
\textsuperscript{440} Id. (citing PROTECT Act of 2003, Pub.L. No. 108-21, §401(c), 117 Stat. 650, 670 (codified at 18 U.S.C. §2742(f)(2)) (requiring vacatur where a departure is to an "unreasonable degree").
\textsuperscript{441} Id.
\textsuperscript{442} Id.
\textsuperscript{443} Id.
outside the Guideline range; and (3) the government appealed if the sentence is too low (meaning below the range) or the defendant appealed if the sentence is too high (meaning above the range). 444

Not only do the structure and history of the vacatur provision support this conclusion, the expert agency charged with interpreting the Sentencing Reform Act supports vacatur for failure to meet the written order requirement. 445 The Commission interpreted the vacatur provision to require an appellate court to "set aside the sentence and remand the case with specific instructions if it finds that the District Court failed to provide the required statement of reasons in the judgment and commitment order." 446

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

The plain language of the statutory requirement for a statement of reasons makes it clear that the written order requirement applies equally in the revocation context. 447 The statutory written order requirement explicitly refers to subsection 18 U.S.C. 3553(a)(4) which includes "the applicable guidelines and policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. §994(a)(3)." 448 Section 28 U.S.C. 994(a)(3) covers "guidelines or general policy statements regarding the appropriate use of the provisions for revocation of probation set forth in [18 U.S.C. §3565], and the provisions for modification of the term or conditions of supervised release and revocation of supervised release set forth in [18 U.S.C. §3583(e)]." 449 Revocation sentencing is subject to the statutory written order requirement because 18 U.S.C. §3553(a)(4) includes the ranges applicable in revocation sentencing. 450 Therefore, the statutory language dictates that when the district judge imposes an out-of-range revocation sentence, the judge is required to provide the specific reasons for sentencing outside the recommended range. 451

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

In many ways, the debate in the revocation context has even higher stakes for defendants. This is because the debate is not whether to vacate based on omission of a statement of reasons in the order when the District Court has articulated reasons for a departure on the record. 452 Rather, in the revocation context, the debate is whether to

444 Id. at 200 (citing 18 U.S.C. §3742(f)(2)(B) and §3553(c)(2)).
445 Id. (citing U.S. Sentencing Comm'n, Report to the Congress: Downward Departures from the Federal Sentencing Guidelines 9, 56-57 (2003)).
447 Id. at 1177, n. 7.
448 Id. (citing 18 USC §3553(a)(4)(B)).
449 Id. (citing 28 U.S.C. §994(a)(3)).
450 Id. at 1178.
451 18 U.S.C. §3553(c)(2)).
452 See supra Part II.A.
apply the written order requirement at all.\textsuperscript{453} \textit{Booker} ended the distinction between the \textit{advisory} policy statements and the \textit{mandatory} Guidelines when it made the Guidelines themselves advisory only.\textsuperscript{454} Therefore, the primary justification for refusal to apply the written order requirement in the revocation context is outdated.\textsuperscript{455}

4. An Appellate Court Cannot Review for Substantive Reasonableness when the Order is Silent

The absence of a statement of reasons in the written order is prejudicial in and of itself because, as a practical matter it precludes appellate review for substantive reasonableness.\textsuperscript{456} Without the precise statement, the appellate court is left guessing as to what specific reason led the District Court to impose the out-of-range sentence.\textsuperscript{457} It is problematic and procedurally unsound for the appellate court to rely only on an ad hoc colloquy at the hearing to guess the reason for an out-of-range sentence.\textsuperscript{458} Not only the statute, but fundamental fairness, demands a more exacting review.\textsuperscript{459} District judges have numerous discussions with the defendant, defense counsel, and the government during the sentencing hearing.\textsuperscript{460} It is often impossible for the appellate court to survey these discussions to ferret out the specific reason for the departure. An appellate court cannot identify the exact reason the district judge imposed an out-of-range sentence by reviewing the record presented to the district judge.\textsuperscript{461} The appellate court does not know how the record affected the judge. The question of substantive reasonableness is a close call that an appellate court can only decide if the district judge specifies the reason for imposing an out-of-range sentence in the order, as the statutory written order requirement unambiguously mandates.\textsuperscript{462} Even courts adopting the majority approach have acknowledged that an attorney cannot certify that there are no potentially meritorious issues on appeal based on a silent order.\textsuperscript{463} These courts should realize that if defense counsel is unable to make this certification, so then an appellate court cannot affirm an out-of-range sentence when the order is silent.

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

A silent written order undermines an appellant’s ability to raise effective sentencing arguments on appeal.\textsuperscript{464} Is it difficult for either party to determine from a lengthy hearing transcript the precise reason the district judge imposed an out-of-range sentence?

\begin{itemize}
\item \textsuperscript{453} See \textit{supra} Part II.B.
\item \textsuperscript{455} See \textit{supra} Part II.B.2.
\item \textsuperscript{456} See \textit{In re} Sealed Case, 527 F.3d 188, 242 (D.C. Cir. 2008).
\item \textsuperscript{457} See \textit{id}. at 191.
\item \textsuperscript{458} See \textit{supra} notes 261-263 and accompanying text.
\item \textsuperscript{459} See 18 U.S.C. §3553(c)(2).
\item \textsuperscript{460} See \textit{supra} notes 345-349 and accompanying text.
\item \textsuperscript{461} United States v. Jones, 460 F.3d 191, 200 (2d. Cir. 2006) (Walker, J., dissenting).
\item \textsuperscript{462} Jones, 460 F.3d at 200.
\item \textsuperscript{463} United States v. Hall, 499 F.3d 152, 157 (2d Cir. 2007).
\item \textsuperscript{464} See \textit{In re} Sealed Case, 527 F.3d 188, 242 (D.C. Cir. 2008) (asserting it is important for the defendant to know the particular reason the defendant received a particular sentence).
\end{itemize}
Congress has set forth the appropriate factors district judges must consider when imposing both original sentences and revocation sentences. Not every reason for a departure is permissible. It is much easier for a party to launch an effective sentencing appeal when the district judge has clearly identified in the order an impermissible reason for exceeding the recommended range. For example, it is impermissible for a district judge to impose a revocation sentence primarily for deterrence purposes. Requiring the district judge to clearly identify the specific reason for sentencing outside the recommended range notifies defense counsel that the judge ignored the Guidelines' recommendation for an improper reason.

6. Affirming Sentences Without First Vacating to Obtain a Statement of Reasons in the Order Upholds Procedurally Unsound Sentences and Provides Individual District Judges Unbridled Discretion

Congress created the Sentencing Reform Act to eliminate unchecked judicial discretion resulting in sentencing disparity that was unfair to defendants and the public. The practice of affirming departure sentences without the benefit of a clear justification in the written order provides district judges unchecked discretion. Even though discretion over sentencing lies with district judges, appellate courts cannot review a sentence for abuse of discretion unless the sentence is procedurally sound. Because of the broad substantive discretion provided to individual district judges, strict adherence to procedural requirements must occur. Upholding an out-of-range sentence without a statement in the judgment is affirming a procedurally unsound sentence. Such a practice deprives appellate courts of the benefit of the district judge's written statement. The appellate court is left searching the record for a possible basis for the departure. As illustrated in Fuller and Jones, appellate courts tend to provide too much deference to individual district judges. They affirm sentences based on inconclusive hearing transcripts even when the orders are silent.

7. Requiring Reasons in the Written Order Promotes the Perception of Fair Sentencing

As a practical matter, it is vital for the public and the defendant to learn why a defendant received a particular sentence. Congress assigned the task of writing the

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465 See supra notes 345-349 and accompanying text.
466 18 U.S.C. §3553(a).
467 See United States v. Miqbel, 444 F.3d 1173, 1183 (9th Cir. 2006).
468 See Miqbel, 444 F.3d at 1183.
469 See supra note 51 and accompanying text.
470 In re Sealed Case, 527 F.3d 188, 191 (D.C. Cir.).
471 Id.
472 Id. at 191-192 (citing United States v. Ogbeide, 911 F.3d 793, 795 (D.C. Cir. 1990)).
473 Id. at 193.
474 See supra notes 345-349 and accompanying text.
475 See supra Part II.A.
476 See supra note 17 and accompanying text.
477 In re Sealed Case, 527 F.3d 188, 193 (D.C. Cir. 2008) (citing United States v. Lewis, F.3d 2d Cir. 2005)).
Guidelines to the Commission. The Commission was to write Guidelines that carry out the basic objectives articulated in the Sentencing Reform Act. In fulfilling its mandate, the Commission evaluated tens of thousands of sentences and had assistance from the law-enforcement community over a period of years. The Guidelines therefore are the Commission's efforts to implement the Congressional intent behind the Sentencing Reform Act and memorialize the best sentencing practices of the District Courts. Thus, a district judge who imposes an out-of-range sentence rejects the framework jointly developed by Congress and the Commission. It is crucial for the District Court to specify the reason it rejected the Guidelines' recommendation. An out-of-range sentence is a determination the recommended sentence was not applicable in the given case. This is the reason that the written order requirement only applies to out-of-range sentences; the requirement provides a record for the public and the defendant to demonstrate that a sentence was not randomly selected.

8. A Statement of Reasons in the Judgment Enables the Commission to Perform its Function and Promotes Sentencing Uniformity

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

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479 Id.
480 Id. at 349.
481 Id. at 349-350.
482 See id. (stating a judge who imposes a sentence within the range makes a decision fully consistent with the Commission's judgment).
483 In re Sealed Case, 527 F.3d 188, 193 (D.C. Cir. 2008).
484 Id.
485 Id.
486 Rita, 551 U.S. at 220.
487 Id. at 233-234.
488 Id. (citing United States v. Booker, 543 U.S. 220, 264 (2005)).
489 Id.
490 Id.
The written order requirement should not become a mere ministerial duty intended only to create a record for the Commission. This approach will produce an unreliable record of the reasons supporting departures. Following the majority approach, the appellate court affirms the sentence and remands only to allow the district judge to amend the order.\textsuperscript{492} The district judge has the benefit of reading the appellate court's theories as to the district judge's reasons for the departure. The most obvious course for the district judge is to simply plagiarize the appellate court's theories of the district judge's rationale. As illustrated in Jones, the appellate court will have concluded from its review of the record the district judge considered various factors in arriving at a departure.\textsuperscript{493} The appellate court's assessment of the District Court rationale for the departure may not correctly reflect the actual rationale the district judge applied. It is the appellate court's theory of the District Court's analysis and is unlikely to reflect all the facts of the trial. Because a district judge can ensure the sentence is not overruled by adopting the appellate court's theories of the district judge's rationale, it is unlikely that a district judge who receives an order on remand will reevaluate the case to recollect the true reasons for the out-of-range sentence.

Even more problematic is the fact that defendants are starting to waive objections to violations of the written order requirement. When a defendant waives the objection, the appellate court does not remand to allow the District Court to amend the order. The orders remain silent and provide no record to enable the Commission to fulfill its role.\textsuperscript{494} The majority approach will cause defendants to increasingly waive their objections, seriously undermining the Commission's ability to perform its function.\textsuperscript{495}

This article's dual recommendations will create the most accurate record of the true reasons supporting departures.\textsuperscript{496} First, when the transcript is relatively clear, District Courts are denied the opportunity to plagiarize the appellate court's presumptively valid reasons for departing from the recommended range.\textsuperscript{497} Rather, the District Court must revisit its analysis and review the record before it amends the order to state reasons.\textsuperscript{498} The statement in the amended order will be the District Court's articulation of its analysis instead of its adoption of the appellate court's theories of the lower court's likely analysis.\textsuperscript{499}

When the hearing transcript is inconclusive, the District Court must conduct a new sentencing hearing.\textsuperscript{500} It is no longer in the untenable position of attempting to

\begin{footnotesize}
\textsuperscript{492} See supra Part II.A.
\textsuperscript{493} See supra note 17 and accompanying text.
\textsuperscript{494} See supra notes and accompanying text.
\textsuperscript{495} See supra notes and accompanying text.
\textsuperscript{496} See supra Part III.A-B.
\textsuperscript{497} See supra Part III.A.
\textsuperscript{498} See supra Part III.A.
\textsuperscript{499} See supra Part III.A.
\textsuperscript{500} See supra Part III.B.
\end{footnotesize}
remember the reason for departure long after the sentencing hearing. The District Court reviews the matter again and prepares the order while impressions are fresh.

9. A Written Statement of Reasons in the Order is Necessary for the Bureau of Prisons

The Bureau of Prisons consults the written judgment to locate information relevant to a defendant's service of a sentence. Absence of reasons in the written order may have negative consequences for the defendant in the defendant's future relationship with the Bureau of Prisons as the defendant proceeds to serve his sentence.


Meeting the written order requirement is not overly burdensome on district judges. The District Court need only provide a brief statement for why the Guidelines range was inadequate to account for a statutory sentencing factor. Affirming departure sentences unaccompanied by a written statement of reasons promotes sloppy sentencing practices that are not transparent to the defendant or the public. The district judge is not required to articulate the precise reasons the court departed from the Guidelines. The majority approach has the unintended consequence of encouraging district judges to withhold the reason for a departure from the order. Under the majority approach, district judges who do not want sentences overruled would be wise to refrain from divulging in the order the specific reason for an out-of-range sentence. No matter how inconclusive the transcript of the sentencing hearing is, the appellate court will likely presume that the district judge properly justified the out-of-range sentence. It is more challenging for a defendant to raise appellate arguments based on a silent order. A judgment that specifies an impermissible rationale for a departure is much easier to attack on appeal.

Vacating the sentence for omission of reasons in the order promotes better sentencing practices. If district judges realize that omitting statements of reasons from orders will result in vacatur of sentences, orders will become clearer. Appellate courts should uphold the statutory requirement for district judges to take a stand by specifying in writing the reason for a departure.

501 See supra Part III.B.
502 See supra Part III.B.
503 United States v. Hall, 499 F.3d 152, 154-155 (2d Cir. 2007).
504 Id.
505 United States v. Lewis, 424 F.3d 239, 248 (2d Cir. 2005).
506 Hall, 499 F.3d at 155 (citing United States v. Rattoballi, 452 F.3d 127, 138 (2d Cir. 2006)).
507 See supra Part II.A.
508 See supra Part II.A.
509 See supra Part II.A.
510 See supra Part II.A.
Conclusion

For the ten policy and legal reasons explored above, appellate courts should vacate out-of-range sentences unaccompanied by a statement of reasons in the written order pursuant to either of the alternative recommended approaches.⁵¹² These alternative approaches refrain from affirming out-of-range sentences until after the appellate court has reviewed a statement of reasons in the written order.⁵¹³

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⁵¹² See supra Part III.
⁵¹³ See supra Part IIIA-B.