An Outline of Selected Appellate Cases After *Gall* and *Kimbrough*

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June 10, 2008

The following outline contains federal appellate court cases decided after December 10, 2007, when the Supreme Court released its opinions in *Gall v. United States,* 128 S. Ct. 586 (2007), and *Kimbrough v. United States,* 128 S. Ct. 558 (2007). The reader's basic familiarity with these cases, as well as with *Rita v. United States,* 127 S. Ct. 2456 (2007), and *United States v. Booker,* 125 S. Ct. 738 (2005), is assumed. Also, note that different courts use different terms for a sentence that is above or below the advisory range calculated under the Guidelines, and this outline uses the terms "variance," "outside the Guidelines range," and "non-Guidelines sentence," among others, to refer to a sentence that is not within the applicable guideline range (and may or may not include a Guidelines departure).

This outline is intended to provide a basic overview of appellate case law in the aftermath of *Gall* and *Kimbrough* by providing an extensive sampling of published appellate opinions. It covers cases through May 29, 2008.

I. Procedure and Review

The Supreme Court's opinion in *Gall*, along with *Kimbrough* and *Rita*, clarified the procedures for sentencing and appellate review of sentences in federal courts. Building on *Booker*, which had made the U.S. Sentencing Guidelines advisory rather than mandatory, the *Gall* Court set out a basic methodology for district courts to use in sentencing and for circuit courts to follow on appeal. [Note: The numbering of the paragraphs in sections A and B below is for convenience only and is not part of the Court's opinion.]

A. Sentencing in the District Court

For sentencing, as set forth in *Gall,* 128 S. Ct. at 594–97:

(1) "As we explained in *Rita*, a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range. . . . As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark. The Guidelines are not the only consideration, however."

(2) The court should "give[] both parties an opportunity to argue for whatever sentence they deem appropriate."

(3) "[T]he district judge should then consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party." The court

(a) "may not presume that the Guidelines range is reasonable," and

(b) "must make an individualized assessment based on the facts presented."

(4) If the judge determines "that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance."

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(a) "[A] major departure should be supported by a more significant justification than a minor one." In other words, "a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications."

(b) However, the Court rejected the rule in some appellate courts "that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range. We also reject the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence."

(5) Whether a sentence within or outside of the guideline range is imposed, the court "must adequately explain the chosen sentence to allow for meaningful appellate review and to promote the perception of fair sentencing."

The Court, in holding that the sentence of probation imposed in *Gall* was reasonable, also noted that although the Guidelines recommend probation only within a limited range, "the Guidelines are not mandatory, and thus the 'range of choice dictated by the facts of the case' is significantly broadened. Moreover, the Guidelines are only one of the factors to consider when imposing sentence, and § 3553(a)(3) directs the judge to consider sentences other than imprisonment." 128 S. Ct. at 602.

In reviewing *Gall*, the First Circuit noted that the decision "was careful not to throw out the baby with the bath water. The Court acknowledged that the guidelines deserve some weight in the sentencing calculus, as they are 'the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.' . . . It made clear, though, that courts of appeals must grant district courts wide latitude in making individualized sentencing determinations, thus guarding against the institutionalization of an impermissible presumption that outside-the-range sentences are unreasonable." *U.S. v. Martin,* 520 F.3d 87, 90–91 (1st Cir. 2008). The court added that sentencing procedure after *Gall* "necessitates a case-by-case approach, the hallmark of which is flexibility. In the last analysis, a sentencing court should not consider itself constrained by the guidelines to the extent that there are sound, case-specific reasons for deviating from them. Nor should a sentencing court operate in the belief that substantial variances from the guidelines are always beyond the pale. Rather, the court should 'consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue.' *Gall,* 128 S. Ct. at 598." *Id.* at 91.

B. Appellate Review

For review of a sentence, as set forth in *Gall,* 128 S. Ct. 594–98:

(1) "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."

(2) First, the appellate court "must ensure that the district court committed no significant procedural error, such as"—

(a) "failing to calculate (or improperly calculating) the Guidelines range,"

(b) "treating the Guidelines as mandatory,"

(c) "failing to consider the § 3553(a) factors,"

(d) "selecting a sentence based on clearly erroneous facts, or"
(e) "failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range."

(3) If the district court sentencing is procedurally sound, "the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard. When conducting this review, the court"—

(a) "will . . . take into account the totality of the circumstances,"
(b) will consider "the extent of any variance from the Guidelines range," and
(c) "[i]f the sentence is within the Guidelines range, . . . may, but is not required to, apply a presumption of reasonableness. . . . But if the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness."

When "reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may . . . take the degree of variance into account and consider the extent of a deviation from the Guidelines." In considering the extent of any deviation from the Guidelines, the court "must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court." As noted in paragraph 4(b) of the previous section, the Court also rejected the requirements in some circuits that large or high-percentage variances require extraordinary circumstances and greater justification: "both the exceptional circumstances requirement and the rigid mathematical formulation reflect a practice—common among courts that have adopted 'proportional review'—of applying a heightened standard of review to sentences outside the Guidelines range. This is inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions—whether inside or outside the Guidelines range." 128 S. Ct. at 595–96.

The Court closed the opinion by reiterating that "it is not for the Court of Appeals to decide *de novo* whether the justification for a variance is sufficient or the sentence reasonable. On abuse-of-discretion review, the Court of Appeals should have given due deference to the District Court's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence." *Id.* at 602.

The Sixth Circuit, in upholding a below-guideline-range sentence against the defendant's appeal that the district court did not go low enough, commented that "the clear, overriding import of [*Rita*, *Gall*, and *Kimbrough*] is that appellate courts must respect the role of district courts and stop substituting their judgment for that of those courts on the front line." *U.S. v. Phinazee,* 515 F.3d 511, 521 (6th Cir. 2008). *See also U.S. v. Evans,* __ F.3d __ (4th Cir. May 27, 2008) (*Gall*, *Kimbrough*, and *Rita* "unequivocally establish that: (1) the advisory Sentencing Guidelines, although important, simply do *not* have the preeminent and dominant role that Evans claims for them, and (2) an appellate court *must* defer to the trial court and can reverse a sentence *only* if it is unreasonable, even if the sentence would not have been the choice of the appellate court."); *U.S. v. Smart,* 518 F.3d 800, 802 (10th Cir. 2008) (noting that *Gall* and *Kimbrough* have "substantially invalidate[d] the rigorous form of review our circuit announced" previously).

II. Procedural Reasonableness

A. District Court Must Correctly Calculate Guideline Range

"As the Supreme Court just recently clarified in *Gall*, 'the Guidelines should be the starting point and the initial benchmark' in determining a sentence and 'a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.' . . . On appeal, we must ensure that the district court properly calculated the advisory Guidelines range as part of its overall consideration of the § 3553(a) factors. *See Gall*, 128 S. Ct. at 597 (directing appellate courts to 'ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range')." *U.S. v. Lalonde,* 509 F.3d 750, 763 & n.5 (6th Cir. 2007) ("we cannot find that a sentencing court has properly considered the § 3553(a) factors if it miscalculated the advisory Guidelines range which it must consider together with the [other] § 3553(a) factors"). *See also U.S. v. Orsburn,* 525 F.3d 543, 547 (7th Cir. 2008) (remanded because district court used guideline for bribery instead of embezzlement: "Starting with the right Guideline is essential.").

The Sixth Circuit added that "[i]n evaluating the district court's calculation of the advisory Guidelines range, we review the district court's factual findings for clear error and its legal conclusion *de novo*." *Lalonde,* 509 F.3d at 763. *Accord U.S. v. Weems,* 517 F.3d 1027, 1030 (8th Cir. 2008) (remanding sentences where district court erred by applying a mitigating role reduction for two defendants and failing to apply an enhancement for another defendant).

The Tenth Circuit agreed that it reviews a sentencing court's "factual findings, including its determination of the quantity of drugs for which the defendant is held accountable under the Guidelines, for clear error." The court added that "[w]hen a district court does err in calculating the applicable Guidelines range, we must remand for resentencing, whether or not the district court's chosen sentence is substantively reasonable, unless we are able to ascertain that the court's calculation error was harmless." Such an error occurred in a case where the district court calculated the guideline range on the basis of 37 grams of methamphetamine, despite an "overwhelming imbalance of the evidence indicating [the defendant]'s possession of much more than 37 grams of methamphetamine." Because the district court "expressly relied upon the lesser [amount] when passing sentence, . . . we cannot say the district court's erroneous calculation was immaterial, and, accordingly, our precedents require us to remand for sentencing." *U.S. v. Todd,* 515 F.3d 1128, 1134–39 (10th Cir. 2008). *See also U.S. v. Dean,* 517 F.3d 1224, 1232 (10th Cir. 2008) (although criminal history calculation was one category too high, sentence affirmed because district court stated it would have imposed the same sentence "regardless of any guidelines miscalculation, because of the facts of the case and the defendant's misleading and shifting testimony").

The Ninth Circuit remanded a case where the district court erroneously applied the vulnerable victim enhancement under section 3A1.1(b)(1) and the obstruction of justice enhancement under section 3C1.1. "Because we conclude that material errors affected the Guidelines calculation that served as the starting point for the district court's sentencing decision, we vacate Rising Sun's sentence and remand this matter for resentencing. *See Gall,* 128 S. Ct. at 597." *U.S. v. Rising Sun,* 522 F.3d 989, 993–97 (9th Cir. 2008). *See also U.S. v. Grissom,* 525 F.3d 691, 697–99 (9th Cir. 2008) (remanded where "district

court erred by refusing to consider the dismissed quantities of crack cocaine in calculating Grissom's sentence"); *U.S. v. Matamoros-Modesta,* 523 F.3d 260, 263–65 (4th Cir. 2008) (remanded where district court "committed significant procedural error" by incorrectly imposing eight-level enhancement under §2L1.2(b)(1)(C)).

Remand was also required where the district court denied enhancements for vulnerable victim and aggravating role but did not provide an adequate explanation for the denial and also declined to hear evidence from the government. "At the very least, the district court must find and articulate sufficient facts and reasons to allow us to review the appropriateness of the enhancement . . . . Failure to provide proper explanation for the chosen sentence is reversible procedural error" under *Gall*. *U.S. v. Pena-Hermosillo,* 522 F.3d 1108, 1111–17 (10th Cir. 2008).

Where the sentencing court acknowledged a dispute over whether a 16-level sentencing enhancement applied, and stated that it would impose the same sentence as an alternative, non-Guidelines sentence under section 3553(a), the appellate court held that applying the 16-level enhancement was error but the miscalculation did not require reversal because the sentencing court adequately explained why it would vary from the guideline range and the resulting sentence was not unreasonable. *U.S. v. Bonilla,* 524 F.3d 647, 656–58 (5th Cir. 2008).

The Third Circuit remanded a case where the district court had miscalculated the defendant's criminal history category. "[A] district court's incorrect Guidelines calculation will thwart not only its ability to accomplish the analysis it is to undertake, but our reasonableness review as well." The court rejected the government's argument that the error was harmless because the sentence imposed fell within the overlap of the correct and incorrect ranges. "The record must show that the sentencing judge would have imposed the same sentence under a correct Guidelines range, that is, that the sentencing Guidelines range did not affect the sentence actually imposed. The overlap may be helpful, but it is the sentencing judge's reasoning, not the overlap alone, that will be determinative. . . . There is absolutely nothing in the record to indicate that the District Court would have imposed the same sentence under a lower Guidelines range." *U.S. v. Langford,* 516 F.3d 205, 211–19 (3d Cir. 2008). *See also U.S. v. Smalley,* 517 F.3d 208, 211–12 (3d Cir. 2008) (where district court improperly imposed a four-level enhancement instead of a three-level increase, and then sentenced defendant at the top of the erroneous guideline range, sentence must be remanded unless error was harmless, which it was not here: "in accordance with the dictates of the Supreme Court and this Court, a district court errs when it fails to calculate the Guidelines range correctly or begins from an improper Guidelines range in determining the appropriate sentence").

The Sixth Circuit rejected a similar argument by the government where the sentence fell within both the correct and incorrect guideline ranges. Citing *Langford* approvingly, and noting its own precedent that the guideline range must be correctly calculated, the court held that "in this case there is no indication that the district court would have selected the same sentence even without the one-level enhancement. Thus, the miscalculation, even though Goodman's sentence would be within the Guidelines range either with or without the one-level enhancement, was not a harmless error." *U.S. v. Goodman,* 519 F.3d 310, 323 (6th Cir. 2008). *See also U.S. v. Anderson,* __ F.3d __ (6th Cir. May 27, 2008) (remanding where district court sentenced defendant within incorrectly calculated

guideline range and it was unclear whether court would have imposed same sentence if guideline range had been correctly determined).

In a case in which, at the time of sentencing, there was no specific guideline for the defendant's offense but a proposed new guideline that would result in a significantly lower guideline range had been approved by the Sentencing Commission and submitted to Congress, the Fifth Circuit held that it was error for the district court to not consider the proposed guideline in calculating the guideline range. Emphasizing the narrowness of its holding, the court stated that "where, at the time of sentencing there is no guideline in effect for the particular offense of conviction, and the Sentencing Commission has promulgated a proposed guideline applicable to the offense of conviction, the district court's failure to consider the proposed guideline when sentencing the defendant may result in reversible plain error." *U.S. v. Sanchez,* __ F.3d __ (5th Cir. May 13, 2008).

B. Proper Consideration of Guidelines and Guideline Range

As stated in *Rita* and reiterated in *Gall*, the presumption that the applicable guideline range is a reasonable sentence "is an *appellate* court presumption" and "the sentencing court does not enjoy the benefit of a legal presumption that the Guidelines sentence should apply." *Rita,* 127 S. Ct. at 2465. *See also Gall,* 128 S. Ct. at 596–97 (district court "may not presume that the Guidelines range is reasonable").

In an Eighth Circuit case in which the defendant was sentenced before *Rita* was decided, the district court wanted to impose a sentence below the guideline range, but believed it had very limited discretion to vary from the Guidelines under circuit precedent at the time of sentencing. The appellate court remanded for resentencing. "The record in this case makes clear the district court applied a presumption of reasonableness to the applicable guidelines range. . . . In light of *Rita*, the district court's application of a presumption of reasonableness was a significant procedural error. . . . The district court imposed the sentence, not as a result of the district court's assessment of the relevant factors and determination of the minimally adequate sentence, as required by § 3553(a), but as a direct consequence of the court's incorrect conclusion it was bound by Eighth Circuit precedent to accord the guidelines range presumptive weight." *U.S. v. Greene,* 513 F.3d 904, 907–08 (8th Cir. 2008). *See also U.S. v. Huff,* 514 F.3d 818, 820–21 (8th Cir. 2008) (same).

However, the court later held that if the defendant does not object at sentencing, review will be for plain error and the defendant "must produce evidence from the record that the district court might have imposed a more favorable sentence except for the application of the erroneous presumption." *U.S. v. Marston,* 517 F.3d 996, 1005–06 (8th Cir. 2008) (affirmed: nothing in record indicated district court felt constrained by presumption or was otherwise inclined to impose lower sentence). *Accord U.S. v. Dallman,* __ F.3d __ (9th Cir. May 19, 2008) (although defendant failed to object at sentencing, "district court plainly erred by presuming that a sentence within the Guidelines range is reasonable"; defendant "did not, however, show a reasonable probability that he would have received a different sentence if the district court had not concluded that a sentence within the Guidelines range is presumptively reasonable").

Cf. U.S. v. Conatser, 514 F.3d 508, 520 (6th Cir. 2008) ("As we have recognized and *Rita* made explicit, reasonableness is an appellate standard of review. . . . The sentencing judge may not presume that the guidelines range is reasonable . . . ."); *U.S. v. Platter,* 514

F.3d 782, 788–89 (8th Cir. 2008) (defendant's claim that district court treated guidelines as presumptively reasonable "is unsupported by the record. The sentencing transcript clearly indicates that the district court treated the Guidelines as its starting point and gave them no presumptive weight. The district court recognized that it is 'required to consider all of the applicable factors under 18 [U.S.C. §] 3553(a).' . . . And the record makes clear that the district court considered the advisory Guidelines, other available sentences, the nature and circumstances of [the defendant]'s offense, [the defendant]'s history and characteristics, and the remaining sentencing factors before imposing its sentence.").

The Tenth Circuit held that, as long as the Guidelines were not considered mandatory or presumptively reasonable by the district court and the proper sentencing procedures were followed, it was not error for the district court to accord the applicable guideline range "considerable weight" in determining the sentence. "[N]either *Rita* nor our case law suggests that a district court is precluded from, in its individualized judgment, attributing considerable weight to a Guidelines sentence in a given case. . . . The district court balanced all of the § 3553(a) factors, including the policy considerations reflected in the Guidelines. And, given the facts of the case, the district court reasonably attached considerable weight to the applicable Guidelines range." *U.S. v. Zamora-Solorzano,* __ F.3d __ (10th Cir. May 13, 2008).

C. Consideration of Section 3553(a) Factors

"There is no need for the court to discuss each § 3553(a) factor individually, as long as it is clear from the court's opinion that it considered the factors in determining the appropriate sentence." *U.S. v. Sanders,* 520 F.3d 699, 703 (7th Cir. 2008). *See also U.S. v. Martinez,* 520 F.3d 749, 753 (7th Cir. 2008) (where defendant does not "point to any other factor that should have been addressed by the sentencing court but was not" and "simply declares that the court did not address any of the § 3553(a) factors," all that district court had to do "was *consider* the factors listed in § 3553(a) and *address* explicitly any substantial argument" by defendant, which it did).

"[W]e have held that a court's explicit acknowledgment that it has considered a defendant's arguments and the § 3553(a) factors is sufficient to demonstrate that it has adequately and properly considered those factors." *U.S. v. Ellisor,* 522 F.3d 1255, 1278 (11th Cir. 2008).

A defendant's "contention that the district court failed to consider the § 3553(a) sentencing factors [was found to be] meritless. . . . [W]e have not required a sentencing judge to engage in robotic incantations either to demonstrate that he has discharged his duty to 'consider' the required factors or to 'address every argument relating to those factors that the defendant advanced.' . . . In the present case, the record . . . reveals that the court was aware both of the statutory requirements and of the recommended sentencing range and that it considered the required factors. Nothing in the record indicates that the court misunderstood the sentencing factors or their relevance." *U.S. v. Brown,* 514 F.3d 256, 270 (2d Cir. 2008).

At least when the sentence is within the advisory guideline range, a defendant must make a sufficiently specific objection to require a detailed explanation of how the district court considered a sentencing factor. "[I]t is not enough to say, as Appellants do here, that the court failed for instance to 'discuss the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty or [sic] simi-

lar conduct.' . . . Appellants must have raised a nonfrivolous argument below showing, by more than hand-waving or conclusory statements, the likelihood of a sentencing disparity if the Guidelines were followed." *U.S. v. Verdin-Garcia,* 516 F.3d 884, 898 (10th Cir. 2008). *See also U.S. v. Thomas,* 520 F.3d 729, 737 (7th Cir. 2008) ("Thomas argues his sentence is unreasonable because the district court failed to adequately address his arguments for leniency and the sentencing factors in 18 U.S.C. § 3553(a). It is a boilerplate argument, unaccompanied by any discussion of particular mitigating factors the court supposedly overlooked or inadequately addressed."); *U.S. v. Wheaton,* 517 F.3d 350, 370–71 (6th Cir. 2008) ("Wheaton claims that the district court failed to adequately explain the sentence, but fails to provide any argument or explanation of what, precisely, the court failed to mention. . . . A review of the record, however, establishes that the court's discussion of the section 3553(a) factors accounted for most if not all of the arguments Wheaton failed to make but now argues that the court should have considered."); *U.S. v. Sedore,* 512 F.3d 819, 827–28 (6th Cir. 2008) (affirmed: "Defendant does not convince us that this presumption of reasonableness does not apply to his case simply by stating that his sentence was too long. . . . Defendant fails to offer any explanation as to why 84 months is an unreasonably lengthy sentence.").

The Sixth Circuit held that "when the judge makes only a 'conclusory reference' to the § 3553(a) factors and does not address the defendant's arguments regarding application of those factors, then this court will find the sentence unreasonable." *U.S. v. Klups,* 514 F.3d 532, 537 (6th Cir. 2008). However, the Sixth Circuit also held that, if the defendant fails to object to the sentence, a claim that the sentence is procedurally unreasonable because the district court failed to adequately consider the section 3553(a) factors or explain why it rejected the defendant's arguments for a lower sentence will be reviewed for plain error. *U.S. v. Vonner,* 516 F.3d 382, 385–89 (6th Cir. 2008) (en banc). *Cf. U.S. v. Williams,* 524 F.3d 209, 214–16 (2d Cir. 2008) (remanding downward variance from 70–87-month range to 36 months where decrease was based on judge's estimation of sentence defendant would have received in state court for same offense rather than the required analysis of relevant section 3553(a) factors).

D. Statement of Reasons and Findings

"The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority. . . . Where the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence, however, the judge will normally go further and explain why he has rejected those arguments. Sometimes the circumstances will call for a brief explanation; sometimes they will call for a lengthier explanation. Where the judge imposes a sentence outside the Guidelines, the judge will explain why he has done so." *Rita,* 127 S. Ct. at 2468.

In discussing what was needed for an adequate statement of reasons, the Eighth Circuit wrote that "[t]he appropriate length of the statement will vary by case and may be relatively brief if the district court rests its decision on the Sentencing Commission's reasoning and 'decides simply to apply the Guidelines to a particular case.' More may be appropriate in an atypical situation or in response to non-frivolous arguments for a different sentence. While it is preferable that district courts address each § 3553(a) factor at sentencing, that degree of specificity is not necessarily required." *U.S. v. Roberson,* 517

F.3d 990, 994 (8th Cir. 2008). "In light of *Gall*, it is imperative that district courts provide an adequate explanation of their sentencing decisions so this court can ensure there is no significant procedural error." *U.S. v. Guarino,* 517 F.3d 1067, 1069 (8th Cir. 2008).

In a similar vein, the Ninth Circuit explained that "[w]hat constitutes a sufficient explanation will necessarily vary depending upon the complexity of the particular case, whether the sentence chosen is inside or outside the Guidelines, and the strength and seriousness of the proffered reasons for imposing a sentence that differs from the Guidelines range. A within-Guidelines sentence ordinarily needs little explanation unless a party has requested a specific departure, argued that a different sentence is otherwise warranted, or challenged the Guidelines calculation itself as contrary to § 3553(a). . . . The district court need not tick off each of the § 3553(a) factors to show that it has considered them. . . . Nor need the district court articulate in a vacuum how each § 3553(a) factor influences its determination of an appropriate sentence. However, when a party raises a specific, nonfrivolous argument tethered to a relevant § 3553(a) factor in support of a requested sentence, then the judge should normally explain why he accepts or rejects the party's position." *U.S. v. Carty,* 520 F.3d 984, 992–93 (9th Cir. 2008) (en banc).

"A court's brief explanation for a Guidelines sentence may be sufficient," the Tenth Circuit explained, "when the context and the record clearly show that the court listened to and considered the evidence and arguments. . . . Like the sentencing court in *Rita*, although the District court did not specifically respond to Mr. Hamilton's arguments for a variance, . . . the record and context demonstrate that the court considered Mr. Hamilton's arguments for a variance and rejected them because it determined that a Guidelines sentence is appropriate based on the particular facts of this case." *U.S. v. Hamilton,* 510 F.3d 1209, 1218–19 (10th Cir. 2007). *See also U.S. v. Tindall,* 519 F.3d 1057, 1065 (10th Cir. 2008) ("In sentencing Tindall within the advisory guidelines range, the district court explained, 'the sentence I am about to impose is the most reasonable sentence upon consideration of all factors enumerated in 18 United States Code 3553.' . . . A one-sentence explanation accompanying a within-guidelines sentence—in the absence of the need to address specific § 3553(a) arguments brought to the court's attention—satisfies the district court's duty to impose a procedurally reasonable sentence.").

The Sixth Circuit followed *Rita* in remanding a sentence where the district court failed to adequately address the defendant's arguments for a lower sentence. "Besides a cursory statement acknowledging Peters' arguments, the District Court did not address the defendant's 'time-served' argument or the mitigating factors indicating that a 'time-served' sentence would satisfy the so-called 'parsimony provision' of 18 U.S.C. § 3553(a) requiring a 'sentence sufficient *but not greater than necessary*' to comply with the purposes of sentencing outlined in the statute. The failure . . . to address [defendant's] argument does not satisfy the 'procedural reasonableness' requirement outlined in" *Rita*. *U.S. v. Peters,* 512 F.3d 787, 788–89 (6th Cir. 2008) (emphasis in court's opinion, not statute). *See also U.S. v. Penson,* __ F.3d __ (6th Cir. May 27, 2008) (remanded: "we are compelled under *Gall* and [our own precedents] to hold that Penson's sentence did not meet the minimum standards for procedural reasonableness. The district court did not give the defense counsel an opportunity to argue for a particular sentence, did not consider the § 3553(a) factors, and did not adequately explain the basis for the sentence selected.").

In a later case, the Sixth Circuit acknowledged that the district court "did not specifically address each of the reasons for a lower sentence that [the defendant] set forth in her motion," and that "the court's actual ruling on [the defendant's] motion was brief and somewhat opaque." However, "a sentencing judge is not required to explicitly address every mitigating argument that a defendant makes, particularly when those arguments are raised only in passing" and the court had "addressed the majority of [the defendant]'s arguments for a lower sentence. Even if the court's explanation was imperfect, the record as a whole shows that the court adequately considered [the defendant]'s mitigating arguments and provided a reasoned basis for the sentence that it imposed." *U.S. v. Madden,* 515 F.3d 601, 610–13 (6th Cir. 2008). *See also U.S. v. Smith,* 510 F.3d 603, 607–08 (6th Cir. 2007) ("Even though the district court did not explicitly discuss the Sentencing Guidelines range, it is clear from the record that the district court was well aware of the range and considered it. . . . In light of the district court's discussion of the § 3553(a) factors and its obvious consideration of the Guidelines range, the district court set forth enough explanation to satisfy this court that it considered the parties' arguments and had a reasoned basis for exercising its legal decisionmaking authority."). Note that the en banc Sixth Circuit found that, if the defendant failed to object to the district court's rejection of arguments for a downward variance, review of the district court's decision would be for plain error. *U.S. v. Vonner,* 516 F.3d 382, 385–89 (6th Cir. 2008) (en banc).

In rejecting an alternative below-guidelines sentence offered by the sentencing court in case "the advisory guideline range was determined to be improperly calculated," the Tenth Circuit held that "the district court's cursory explanation for its alternative rationale—that its 121-month 'sentence is the most reasonable sentence upon consideration of all the factors enumerated in 18 U.S. Code Section 3553,' . . .—falls short of the explanation necessary for sentencing under § 3553, especially where the variance from the guidelines range is as large as this." *U.S. v. Pena-Hermosillo,* 522 F.3d 1108, 1117 (10th Cir. 2008).

The Fifth Circuit affirmed an "alternative sentence" despite a sentencing miscalculation and a somewhat cursory statement of reasons, noting that a more comprehensive statement would have been preferred: "Examining the full sentencing record reveals the district court's reasons for the chosen sentence and allows for effective review by this court. Our task would have been easier had the district court stated its reasons explicitly on the record, a procedure we strongly recommend. A clear statement of reasons on the record also serves to prevent the inefficiency that would result from remand and resentencing if on appeal we had been unable to determine the court's reasons from the record." *U.S. v. Bonilla,* 524 F.3d 647, 658 (5th Cir. 2008).

In a Third Circuit case, where the original sentence was partly based on a guideline calculation error, the district court attempted to correct the judgment to state that it would have imposed the same sentence without the error. However, the court's "bare statement" to that effect was insufficient explanation for the sentence under *Gall* and would not allow the appellate court to undertake "any meaningful review of the reasonableness of the sentence." *U.S. v. Smalley,* 517 F.3d 208, 215 (3d Cir. 2008).

III. Substantive Reasonableness

A. Extent of Deviation from Guideline Range

In *Gall*, which approved a sentence imposing thirty-six months of probation where the guideline minimum was thirty months of imprisonment, the Court stated that "a district judge must give serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications. . . . In reviewing the reasonableness of a sentence outside the Guidelines range, appellate courts may therefore take the degree of variance into account and consider the extent of a deviation from the Guidelines. We reject, however, an appellate rule that requires 'extraordinary' circumstances to justify a sentence outside the Guidelines range. We also reject the use of a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence." 128 S. Ct. at 594–95. *See also U.S. v. Verkhoglyad,* 516 F.3d 122, 134 (2d Cir. 2008) ("The Supreme Court has expressly rejected the use of mathematical formulas to gauge substantive unreasonableness. . . . [T]he Court noted that percentages can be particularly deceiving where . . . the sentencing range is measured in months."); *U.S. v. Bolds,* 511 F.3d 568, 581 (6th Cir. 2008) ("we no longer apply a form of proportionality review to outside-Guidelines sentences, which would require the strength of the justification for a departure to vary in proportion to the amount of deviation from the Guidelines, and find our prior cases applying this rule . . . to have been effectively overturned by *Gall*").

The Eighth Circuit relied on *Gall* to affirm a variance of similar degree, from 37–46 months' imprisonment to a sentence of five years' probation with six months of community confinement. In an "extraordinary, exceptional" felon-in-possession case, the defendant had hidden a gun in her house to keep it away from an ex-boyfriend, but her fourteen-year-old daughter found it and used it to commit suicide. The defendant had a nine-year-old son who suffered from severe emotional problems and the evidence indicated that he would suffer a severe setback if the defendant were incarcerated. The government argued that the sentence was "substantively unreasonable," but the appellate court disagreed. "Our precedents prior to *Gall* 'routinely' rejected as unreasonable those variances that resulted in a sentence of probation when the guidelines recommend a term of imprisonment . . . . *Gall*, however, emphasized that '[o]ffenders on probation are subject to several standard conditions that substantially affect their liberty,' . . . and affirmed a sentence of probation for a drug trafficker with an advisory guidelines range of 30–37 months' imprisonment. The Court also indicated that a sentence of probation would be permissible for a drug trafficking offense with a guidelines range of 30–37 months' imprisonment, if there were 'compelling family circumstances where individuals [would] be very badly hurt in the defendant's family if no one is available to take care of them.' . . . [T]he district court accepted expert testimony that sending Lehman to prison would have a very negative effect on the emotional development of her young son, which is not materially different from the sort of 'compelling family circumstance' that the Supreme Court indicated would justify probation for a drug trafficker with a similar advisory guidelines range. . . . Given the impermissibility of 'proportionality' review, and the requisite deference due to the district court, we cannot conclude that the sentence was substantively un-

reasonable in light of § 3553(a) and *Gall*." *U.S. v. Lehman,* 513 F.3d 805, 808–09 (8th Cir. 2008).

In another case shortly after *Gall*, the Eighth Circuit affirmed a combination downward departure and variance to a 132-month sentence from the guideline range of 235–292 months. The court held that "[t]he government's argument that the sentence is unreasonably lenient due to the absence of 'extraordinary circumstances' fails in light of *Gall*" and the district court did not abuse its discretion. *U.S. v. McGhee,* 512 F.3d 1050, 1051–52 (8th Cir. 2008) (per curiam). The court reached a similar conclusion in an above-guideline-range case, rejecting the defendant's argument that the sentencing court "erred by failing to provide adequate justification for the upward variance because the circumstances relied upon were not sufficiently unusual in kind or degree" and that "[a]n extraordinary reduction must be supported by extraordinary circumstances." The court affirmed the increase from a guideline range of 15–21 months to a 48-month sentence, stating that, after *Gall*, "our standard of review is more deferential than when we employed the 'extraordinary circumstances' method," and that the district court did not abuse its discretion. *U.S. v. Braggs,* 511 F.3d 808, 812–13 (8th Cir. 2008).

However, in a case that it had already remanded twice, the Eighth Circuit held that the district court did not adequately explain the extent of its downward variance and also considered an improper factor. The defendant was subject to a guideline range of 97–121 months. His first sentence of 24 months, which included a substantial assistance departure, was remanded because the district court considered factors unrelated to that assistance. The second sentence included a substantial assistance departure down to 58 months, then a downward variance to 24 months based on "no history of violence," the need to avoid unwarranted disparity with sentences of codefendants, and post-sentencing rehabilitation. The appellate court held that the first two factors were not adequately explained, and noted that "*Gall* requires a district judge to explain adequately and provide sufficient justifications for why an unusually lenient sentence such as [this] is appropriate." The court then held that "*Gall* does not alter our circuit precedent . . . that post-sentence rehabilitation is an impermissible factor to consider in granting a downward variance." *U.S. v. Pepper,* 518 F.3d 949, 952–53 (8th Cir. 2008).

In varying from the applicable guideline range, the First Circuit explained that "the reasons for deviation should typically be rooted either in the nature and circumstances of the offense or the characteristics of the offender; must add up to a plausible rationale; and must justify a variance of the magnitude in question. . . . We hasten to add, however, that notwithstanding this need for an increased degree of justification commensurate with an increased degree of variance, there is no stringent mathematical formula that cabins the exercise of the sentencing court's discretion. . . . Indeed, after *Gall* the sentencing inquiry—once the court has duly calculated the GSR—ideally is broad, open-ended, and significantly discretionary. . . . At that point, sentencing becomes a judgment call, and a variant sentence may be constructed 'based on a complex of factors whose interplay and precise weight cannot even be precisely described.'" The court added that "reasonableness is a protean concept, not an absolute. We think it follows that there is not a single reasonable sentence but, rather, a range of reasonable sentences. . . . Consequently, reversal will result if—and only if—the sentencing court's ultimate determination falls outside the expansive boundaries of that universe." *U.S. v. Martin,* 520 F.3d 87, 91–96 (1st Cir. 2008) (affirming downward reduction from 235–293-month range to sentence of 144

months based on family circumstances, potential for rehabilitation, and avoiding unwarranted disparity with codefendants' sentences, all factors adequately supported by the record).

The Fourth Circuit had held in a pre-*Gall* case that the "farther the court diverges from the advisory Guideline range, the more compelling the reasons for the divergence must be." In a later case, the court noted that this language was consistent with *Gall*'s directive to "consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *U.S. v. Pauley,* 511 F.3d 468, 475 (4th Cir. 2007) (affirming 42-month sentence, down from range of 78–97 months). *See also U.S. v. Evans,* __ F.3d __ (4th Cir. May 27, 2008) (in affirming upward variance from 24–30-month range to 125-month sentence, finding that *Gall* mandates that "we cannot disregard the considered reasoning of the district court and require 'exceptionally compelling' justification for a sentence significantly outside the Guidelines range"; opinion includes lengthy discussion of post-*Gall* sentencing).

The Eleventh Circuit, however, remanded a sentence of probation that the government had argued "was so disproportionately light in view of the seriousness of the offense that it amounted to an abuse of discretion, and was, therefore, unreasonable." The defendant pled guilty to possession of dozens of images of child pornography, plus some similar videos, and was subject to a guideline range of 97–120 months. He posed as a teenage girl in Internet chat rooms, and claimed that others sent the images and videos to him even though he requested adult pornography. A psychologist testified that the defendant was at "low-risk" for re-offending, was not a pedophile, and suggested that the defendant would be "easy pickings" in prison. At the sentencing hearing, the district court noted that the defendant had "no significant criminal history, and no history to suggest he had or would abuse children." The court also determined that the defendant's possession of child pornography was "'passive' and 'incidental' to his actual goal of developing online relationships," that he had taken steps to minimize the receipt of images, that he would not benefit from imprisonment, and that, compared with the circumstances of other defendants who actively solicit child pornography, the circumstances of this defendant called for "an 'unusual sentence for an unusual case.'" The court sentenced the defendant to a five-year term of probation, with several conditions, including continuation of mental health treatment and avoiding the Internet.

In a lengthy opinion examining appellate review after *Gall*, the Eleventh Circuit held that "the district court did not provide a sufficiently compelling justification to support the degree of its variance, nor did it give any apparent weight to many other important statutory factors . . . in 18 U.S.C. § 3553(a) that must be considered at sentencing. As we see it, this probationary sentence utterly failed to adequately promote general deterrence, reflect the seriousness of Pugh's offense, show respect for the law, or address in any way the relevant Guidelines policy statements and directives. Accordingly, we hold that this sentence is unreasonable." Noting that *Gall* had stated that "a major departure should be supported by a more significant justification than a minor one," the court concluded that the district court's relying on the defendant's characteristics and motive, while insufficiently addressing other section 3553(a) factors, made the extent of the variance unreasonable. *U.S. v. Pugh,* 515 F.3d 1179, 1182–1203 (11th Cir. 2008).

The Sixth Circuit has interpreted *Gall* to require appellate courts to give "due deference to the sentencing judge's on-the-scene assessment of the competing considerations,

. . . which is to say, not just abuse-of-discretion review to the reasonableness of a sentence but abuse-of-discretion review to the district court's determination that there is a legitimate correlation between the size of the variance and the reasons given for it." In affirming a downward variance from a 120-month sentence to 66 months plus a ten-year term of supervised release, the appellate court found that the sentencing court "accounted for § 3553(a)'s concerns that the sentence protect society and deter future criminal conduct, [and] opted to pursue those goals, not through a longer term of imprisonment, but through extensive counseling and treatment and an extensive period of supervised release, which itself contains substantial limitations on an individual's freedom. . . . The district court never lost sight of the sentence recommended by the guidelines and gave ample reasons for reducing the sentence as far as [it] did." *U.S. v. Grossman,* 592, 596–97 (6th Cir. 2008).

The Sixth Circuit gave "due deference" to another district court in affirming a decision to impose a significant upward variance. The defendant had a guideline range of 188–235 months for two counts, but a minimum of 25 years on count one and ten years on count two. The court sentenced him to 45 years on count one, and twenty years consecutive on count two. The court explained at length why it felt the longer sentence was needed, covering the defendant's conduct and history, and the section 3553(a) factors, although it did not explain how it chose the particular length of the variance. The appellate court affirmed:

> We cannot ask more of a district court, in terms of weighing the § 3553(a) factors and explaining the reasons for its sentence, than the district court did in this case. Clearly, the district court did not arbitrarily choose a sentence, but chose a sentence it considered sufficient but not greater than necessary to comply with the purposes of § 3553(a). That is, the district court selected a punishment that it believed fit Vowell's crimes, and provided sufficient reasons to justify it. On abuse of discretion review, we will give 'due deference to the [d]istrict [c]ourt's reasoned and reasonable decision that the § 3553(a) factors, on the whole, justified the sentence.' *Gall*, 128 S. Ct. at 602. We find no abuse of discretion either in the district court's determination that Vowell's conduct required a term of imprisonment significantly greater than the statutory minimum sentence or in its determination of the appropriate sentence under the circumstances. We hold, therefore, that the sentence imposed is substantively reasonable.

The court similarly affirmed the sentence for a codefendant, who had a guideline range of 121–151 months but a statutory minimum of 180 months on that count, and received an upward variance to a sentence of 240 months. *U.S. v. Vowell,* 516 F.3d 503, 511–14 (6th Cir. 2008). *See also U.S. v. Gordon,* 513 F.3d 659, 666–67 (7th Cir. 2008) (in affirming sentence of 96 months instead of applicable 70–87 months guideline range, appellate court stated that district court "was not required to explain each day, week, or month above the guidelines range it imposed").

B. Defendant's Appeal of Extent of Downward Variance

In the Ninth Circuit, a defendant received a sentence 53 months below the guideline range. He claimed that the sentence was unreasonable and that the district court did not adequately consider the section 3553(a) factors. The appellate court affirmed. "[T]he district court gave careful consideration to the section 3553 factors and supported its conclu-

sions with reasoned analysis. In particular, it carefully considered the nature and circumstances of Garro's offense and the need to protect the public and deter crime. It listened to and considered Garro's arguments concerning his history and personal characteristics, including his psychological state and age, and awarded Garro a nearly three-level downward departure based on those factors. . . . The district court did everything required by the Supreme Court and its chosen sentence was neither unreasonable nor reflective of an abuse of the ample discretion we afford to the district court under *Gall*." *U.S. v. Garro,* 517 F.3d 1163, 1171–72 (9th Cir. 2008).

A defendant in the Sixth Circuit was subject to a guideline range of 360 months to life. The district court imposed a sentence of 300 months. The defendant appealed, claiming that his sentence was substantively unreasonable because "it improperly deferred to the Sentencing Guidelines with respect to two of the factors, namely deterrence and retribution, and that the court improperly weighed those same factors over the others." The appellate court disagreed and affirmed, finding that "the district court engaged in the prudent balancing of relevant factors that § 3553(a) contemplates . . . and provided a reasoned explanation for the sentence," while the defendant "points us to no factors that would require the imposition of an even shorter sentence." *U.S. v. Phinazee,* 515 F.3d 511, 516–21 (6th Cir. 2008). *Cf. U.S. v. Montgomery,* 525 F.3d 627, 629 (8th Cir. 2008) (rejecting defendant's argument for a downward variance in addition to 50% reduction already received under safety valve provision: "The district court articulated its reason for imposing the sentence and properly considered the § 3553(a) factors. There is nothing to indicate the district court abused its discretion.").

The Fourth Circuit affirmed a sentence where the district court indicated it felt constrained by a prior reversal of a larger variance (to 12 months) for a defendant. On remand the court reduced the sentence by five months from the 41–51-month range and indicated that it would have gone lower if it were not "laboring under the Fourth Circuit's restraints." The appellate court, noting that the basis for the previous variance—the sentencing court's belief, despite the jury verdict to the contrary, that the defendant had not actually intended to defraud his victims—was invalid, and "the only remaining factor that the district court could use to justify a downward departure . . . was not so strong a factor as to reasonably justify the dramatic downward departure of the initial sentence." Although the district court "expressed frustration with the law[, that] does not make the law any less binding," and the sentence on remand was properly imposed. *U.S. v. Curry,* 523 F.3d 436, 440–41 (4th Cir. 2008).

IV. Examples of Appellate Review

A. Downward Variance

1. Remanded

U.S. v. Pugh, 515 F.3d 1179, 1182–1203 (11th Cir. 2008) (remanding as unreasonable a downward variance to probation from a guideline range of 97–120 months, finding that sentencing court did not adequately address several of the section 3553(a) factors or sufficiently justify the extent of departure).

U.S. v. Cutler, 520 F.3d 136, 146–76 (2d Cir. 2008) (sentences of two defendants convicted in $100 million fraud and tax evasion scheme, reduced from a range of 78–97 months to a year and a day for one defendant, and from a 108–135-month range to three

years' probation for the other, remanded for "procedural errors, clear factual errors, and the misinterpretations of the § 3553(a) factors" that resulted in sentences that "are substantively unreasonable and constitute an abuse of discretion").

U.S. v. Hunt, 521 F.3d 636, 649–50 (6th Cir. 2008) (finding downward variance to probation from a range of 27–33 months was substantively unreasonable where district court appeared to have based its decision in part on its belief that defendant "was not guilty as found by the jury. . . . [A] factual determination is necessarily clearly erroneous where a jury has previously found to the contrary beyond a reasonable doubt. Nothing in § 3553(a) suggests that Congress intended that sentencing judges should rely on a defendant's innocence when the defendant has already been found guilty beyond a reasonable doubt.").

U.S. v. Omole, 523 F.3d 691, 697–700 (7th Cir. 2008) (downward variance to a 12-month sentence from a 63–78-month range was unreasonable: "Without a compelling justification for the 'break' Davis caught at sentencing—which the judge in this case did not provide—the 12-month sentence for wire fraud can only be viewed as substantively unreasonable. . . . We are not saying that any below-guidelines sentence for Davis would have been unreasonable. . . . However, based on the sentencing transcript and the clearly disparaging comments the judge made about Davis, we find that the district court abused its discretion by imposing the 12-month sentence").

U.S. v. Williams, 524 F.3d 209, 214–16 (2d Cir. 2008) (remanding a downward variance from a 70–87-month range to 36 months based on judge's estimation of the sentence the defendant would have received in state court for same offense rather than an analysis of the relevant section 3553(a) factors; also remanding a similar sentence for a codefendant sentenced by a different judge, who imposed lower sentence only to avoid disparity with first defendant's).

U.S. v. Livesay, 525 F.3d 1081, 1092–94 (11th Cir. 2008) (where guideline range was 78–97 months and sentence was 60 months' probation with six months' home confinement, remanded for procedural error because district court based extent of departure under §5K1.1 on an improper factor and, even though it also imposed an alternative sentence in case its §5K1.1 departure was erroneous, "another *Gall* procedural error occurred because the district court failed to adequately explain its variance from the advisory Guidelines range to its chosen [alternative] sentence in a way that allows for any meaningful appellate review").

2. Affirmed

U.S. v. Pauley, 511 F.3d 468, 474–75 (4th Cir. 2007) (affirming downward variance from range of 78–97 months to sentence of 42 months for possession of child pornography, holding that mitigating factors, "in their totality," were "sufficiently compelling" to support extent of variance where district court cited, among other factors, that the victim instigated the offense, the photos had not been transmitted over the Internet, there was no indication that the defendant had ever possessed any other child pornography, he was deeply remorseful, and he had lost his teaching certificate and state pension).

U.S. v. McBride, 511 F.3d 1293, 1297–98 (11th Cir. 2007) (per curiam) (sentence of 84 months, a downward reduction from the guideline minimum of 151 months, which was

based on the child pornography defendant's personal history of serious abuse and the availability of treatment, was not substantively unreasonable; opinion was released after *Gall* but majority did not refer to it).

U.S. v. Grossman, 513 F.3d 592, 595–98 (6th Cir. 2008) (affirming sentence of 66 months where sentencing court concluded that guideline enhancements "almost repeat one another" in producing 120-month sentence "that's not reflective of what [Grossman] did"; finding that sentencing judge "ultimately rested his decision on a number of individualized considerations" that "suffice to uphold this sentence," appellate court also noted that "the [sentencing] court said that the enhancements '*almost* repeat one another' in this case, . . . (emphasis added), which speaks not to a problem of double counting but to a perception that the guidelines sentence is higher than this conduct deserves—a concern that *Booker* aptly allows a court to consider in applying advisory guidelines").

U.S. v. Lehman, 513 F.3d 805, 808–09 (8th Cir. 2008) (affirmed sentence of five years' probation with six months of community confinement, a downward reduction from the guideline range of 37–46 months, that was based on "the extraordinary, exceptional situation" involved; namely, that the defendant, a previously convicted felon, had hidden a gun in her house to keep it away from an ex-boyfriend and her fourteen-year-old daughter had used it to commit suicide, making it "[not] a simple felon in possession case," and that defendant's nine-year-old son suffered from severe emotional problems and the evidence indicated he would suffer a severe setback if defendant were incarcerated).

U.S. v. Smart, 518 F.3d 800, 809–10 (10th Cir. 2008) (affirmed 120-month sentence, a downward reduction from the guideline range of 168–210 months, holding that the district court could properly base sentence partly on a desire to avoid unwarranted disparity with more culpable codefendant where it also found the sentence was justified under several other section 3553(a) factors).

U.S. v. Martin, 520 F.3d 87, 93–96 (1st Cir. 2008) (affirming downward reduction from 235–293-month range to sentence of 144 months based on family circumstances, potential for rehabilitation, and avoiding unwarranted disparity with codefendants' sentences).

U.S. v. Munoz-Nava, 524 F.3d 1137, 1147–49 & n.6 (10th Cir. 2008) (affirming sentence of year and a day in prison, one year of home confinement, and five years of supervised release, a downward reduction from the guideline range of 46–57 months, largely based on defendant's personal characteristics and "extraordinary" family circumstances; appellate court also noted that, "[u]nder our pre-*Gall* precedent, consideration of family circumstances were . . . disfavored in the § 3553(a) analysis because of the Guidelines. . . . *Gall*, however, indicates that factors disfavored by the Sentencing Commission may be relied on by the district court in fashioning an appropriate sentence. . . . A factor's disfavor by the Guidelines, therefore, no longer excludes it from consideration under § 3553(a).").

B. Above Guideline Range

1. Affirmed

U.S. v. Braggs, 511 F.3d 808, 812–13 (8th Cir. 2008) (in sentencing defendant to 48 months instead of within the guideline range of 15–21 months, district court "properly considered the factors in 18 U.S.C. § 3553(a) when it imposed Braggs's sentence, par-

ticularly the need to promote respect for the law, to provide just punishment, to afford adequate deterrence, and to protect the public from further crimes by the defendant").

U.S. v. Gordon, 513 F.3d 659, 666–67 (7th Cir. 2008) (defendant was sentenced to 96 months instead of applicable 70–87 months guideline range, based on defendant's criminal history and sentencing court's belief that defendant's explanation of his illegal reentry was deceitful and that he was likely to do it again; appellate court held that "district court's explanation was sufficient reasoning for the variance from the guidelines range; it was not required to explain each day, week, or month above the guidelines range it imposed").

U.S. v. Hill, 513 F.3d 894, 898–99 (8th Cir. 2008) (in affirming increase of sentence from guideline range of 33–41 months to sentence of 84 months, finding that sentence was reasonably based on a combination of criminal history departure—because the Guidelines calculation did not adequately account for defendant's extensive criminal past—and a variance under section 3553(a)—to reflect the seriousness of the offense, provide adequate deterrence, and protect the public).

U.S. v. Klups, 514 F.3d 532, 536–39 (6th Cir. 2008) (sentence of 60 months instead of guideline range of 24–30 months was reasonable in light of severe impact of repeated sexual abuse of defendant's granddaughter).

U.S. v. Washington, 515 F.3d 861, 866–67 (8th Cir. 2008) (affirmed increase of sentence from 37–46-month range to 72 months: "The district court appropriately considered the relevant factors of § 3553(a) and noted additional facts relevant to the nature and circumstances of the offense and Washington's history and characteristics under § 3553(a)(1), such as his return to the same crime within five months of his release despite enjoying an unusually supportive family and the upcoming responsibility for a new child. The district court provided an adequate explanation for the variance that went beyond the facts taken into account in the criminal history calculation.").

U.S. v. Tate, 516 F.3d 459, 469–71 (6th Cir. 2008) (reasonable to increase sentence from 84–105-month guideline range to statutory maximum of 120 months based on the defendant's lengthy criminal history—"a pattern that includes physical violence, attempt to avoid arrest, situations that risk the lives of individuals, . . . and a general lack of respect for the law"—as well as a "continuing desire to avoid the consequences of his conduct"; the district court "engaged in a thoughtful and painstakingly detailed review of how the § 3553(a) factors applied to Tate's case").

U.S. v. Smith, 516 F.3d 473, 478 (6th Cir. 2008) (not an abuse of discretion to increase sentence to 72 months from 41–51-month range for defendant who defrauded local chapter of American Red Cross after terrorist attacks of September 11, 2001, stealing over $300,000 and driving a once solvent and thriving charity to debt and near-ruin; defendant had history of fraudulent conduct and even continued it while out on bond after arrest).

U.S. v. Vowell, 516 F.3d 503, 509–14 (6th Cir. 2008) (affirming upward variance for defendant—from minimum 300 months to sixty-five years—and for codefendant—from 168–210 months to twenty years—for repeated sexual abuse by defendant of codefendant's then eight-year-old daughter, which they filmed and planned to sell).

U.S. v. Austad, 519 F.3d 431, 435–36 (8th Cir. 2008) (affirming upward variance from 37–46-month range to 84 months for a defendant who threatened a federal judge: "the district court . . . supported the upward variance with sufficient and proportionate justifications," such as the extreme nature of defendant's threats, his poor disciplinary record in prison (including some acts of a "violent nature"), and the likelihood of reoffending).

U.S. v. Politano, 522 F.3d 69, 73–75 (1st Cir. 2008) (affirming increase in sentence from 12–18-month range to 24 months for a defendant convicted of selling weapons without a license; district court sufficiently explained it based decision on the likelihood of recidivism and the need for deterrence because of the impact of the crime on the community).

*U.S. v. Lopez-Velasquez,*__ F.3d __ (5th Cir. April 29, 2008) (where "the district court thoroughly and adequately articulated several § 3553(a) factors that justified the variance," affirming upward variance to 72 months from 24–30-month range based on illegal reentry defendant's "two prior drug convictions, his eleven separate arrests by immigration officials, and his seven deportations prior to the case at hand," and the sentencing court's conclusion that defendant "obviously has no respect for the law of the United States, nor of the borders of the United States").

U.S. v. Evans, __ F.3d __ (4th Cir. May 27, 2008) (affirming 125-month sentence for forgery, fraud, and theft defendant whose guideline range was 24–30 months; district court committed no procedural errors, and extent of variance was reasonable in light of defendant's extensive criminal history and risk of recidivism, and the serious impact of his offenses on the victims).

C. Sentences Within the Guideline Range

"After *Gall* . . . stressed the extent of a district judge's discretion in sentencing, and the limits of appellate review, it is difficult to see how a mid-Guideline sentence could be upset unless the judge refuses to entertain the defendant's arguments or resorts to an irrational extra-statutory consideration." *U.S. v. Shrake,* 515 F.3d 743, 747–48 (7th Cir. 2008) (affirming 330-month sentence for defendant convicted of child pornography charge).

1. Remanded

See cases in section II.A, *supra*, for within-guideline range sentences that were remanded because of errors in determining the applicable guideline range.

2. Affirmed

[Note: Because of the large number of cases, the opinions in this section are organized by circuit.]

D.C. Circuit

U.S. v. Reed, 522 F.3d 354, 363–64 (D.C. Cir. 2008) (in affirming 25-year sentence for defendant convicted of armed bank robbery and carjacking, noting that sentencing court "specifically considered the sentencing factors set forth in 18 U.S.C. § 3553. The court considered (1) the seriousness of Reed's crimes and their effect on the community . . . ; (2) Reed's history and characteristics . . . ; (3) the likelihood of recidivism . . . ; (4) Reed's need of mental health and drug treatment . . . ; (5) Reed's need of a literacy program . . . ; (6) the availability of consecutive sentences, which it rejected . . . ; and (7) the

need for restitution to the victims . . . . Furthermore, the court explained how the Guidelines affected its analysis.")

First Circuit

U.S. v. Innarelli, 524 F.3d 286, 292 (1st Cir. 2008) (in imposing within-range sentence of 72 months, district court "considered each of [defendant's arguments for a lower sentence] in great detail through the lens of § 3553(a). We find the court's examination of Innarelli's personal characteristics, and the explanation of its reasons for not varying his sentence downward, to be clear, thoughtful, and eminently plausible").

U.S. v. Rodriguez, 525 F.3d 85, 110 (1st Cir. 2008) (affirming life sentence for drug conspiracy defendant, finding that "[t]he district court expressly stated at sentencing that it had considered the factors set forth in Section 3553(a), recited the factors, and then gave a specific explanation for the sentence. . . . That the court chose to allocate greater weight to the aggravating factors of Appellant's crimes, and less to potentially mitigating factors such as the unfortunate circumstances of Appellant's upbringing, 'entailed a choice of emphasis, not a sin of omission' and 'is not a basis for a founded claim of sentencing error.'").

Second Circuit

U.S. v. Hall, 515 F.3d 186, 202–03 (2d Cir. 2008) (affirming, with little discussion, 12-month, within-guideline range sentence, because "we are satisfied that we cannot hold that the district court abused its discretion in the imposition of the sentence").

U.S. v. Tran, 519 F.3d 98, 106 (2d Cir. 2008) ("The record makes clear that the district court considered all of Tran's argument, the applicable Guidelines range, and the factors enumerated in § 3553(a).").

U.S. v. Stoterau, 524 F.3d 988, 998–1000 (2d Cir. 2008) ("the record makes clear that the district court considered the evidence and arguments of the defendant and based its sentence on an analysis of the advisory Guidelines range and the provisions of 18 U.S.C. § 3553(a). . . . The district court reasonably concluded that Stoterau's 151-month sentence was necessary to reflect the seriousness of the offense, promote respect for the law, and to provide adequate deterrence for this type of criminal conduct.").

Third Circuit

U.S. v. Jimenez, 513 F.3d 62, 90–91 (3d Cir. 2008) (in sentencing defendant within guideline range, "[t]he district court discussed the § 3553(a) factors and considered the issues raised by Nieves, namely his prior service in the military and his strong family ties. Ultimately, however, the district court was led to its sentencing decision by the length of the conspiracy, the position of trust held by Mr. Nieves as a senior bank officer, and the seriousness of the offense based on the banking industry's reliance on officials in Nieves' position to maintain the integrity of the banking system. . . . [T]he district court properly exercised its discretion by imposing a sentence within the range of reasonableness that is logically based upon, and consistent with, the § 3553(a) factors.")

U.S. Wise, 515 F.3d 207, 223 (3d Cir. 2008) (in case sentenced before *Kimbrough*, affirming within guidelines sentence for defendant convicted of possessing crack cocaine with intent to distribute plus two weapons charges: "The District Court's decision was a

result of its reasonable conclusion that, upon consideration of the § 3553(a) factors and even taking the crack/powder cocaine disparity into account, a sentence of 324 months is justified.").

Fourth Circuit

U.S. v. Go, 517 F.3d 216, 220 (4th Cir. 2008) ("district court considered the § 3553(a) factors and gave due consideration to whether there were any circumstances in Go's case that would warrant imposing a sentence below the Guidelines range" before imposing a sentence at the bottom of the range).

U.S. v. Brewer, 520 F.3d 367, 372–73 (4th Cir. 2008) (district court recognized that defendant was suffering from seriously diminished capacity, but in light of other section 3553(a) factors, especially the need to protect the public, it was not unreasonable to sentence defendant at the bottom of the guideline range rather than below it).

Fifth Circuit

U.S. v. Moon, 513 F.3d 527, 543–44 (5th Cir. 2008) (district court correctly calculated guideline range and "properly considered relevant factors as part of its required inquiry under § 3553(a)").

U.S. v. Cisneros-Gutierrez, 517 F.3d 751, 766 (5th Cir. 2008) (affirming sentence at bottom of range where sentencing court "addressed Defendant's objections to the presentence report, noted that it had considered the 18 U.S.C. § 3553(a) factors, and briefly explained why it was unpersuaded by defendant's pleas for leniency").

U.S. v. Rodriguez, 523 F.3d 519, 526 (5th Cir. 2008) ("Based on our review of the record, the district court clearly considered and rejected [defendant's] arguments as a basis for a non-Guideline sentence.").

Sixth Circuit

U.S. v. Lalonde, 509 F.3d 750, 769–71 (6th Cir. 2007) (defendant had argued poor physical health warranted lower sentence, but "has not provided [the appellate court] with sufficient reasons to overturn the conclusions of the district court and the Sentencing Commission regarding the reasonableness of his sentence").

U.S. v. Carter, 510 F.3d 593, 600–02 (6th Cir. 2007) (district court reasonably concluded that sentence at lower end of guideline range was appropriate after adequately considering defendant's mitigating circumstances).

U.S. v. Smith, 510 F.3d 603, 609 (6th Cir. 2007) (citing *Gall* and *Rita*, appellate court found that presumption of reasonableness "cannot be overcome here because there is no indication that the district court selected the sentence arbitrarily, based the sentence on impermissible factors, failed to consider pertinent § 3553(a) factors, or gave an unreasonable amount of weight to any pertinent factor").

U.S. v. Sexton, 512 F.3d 326, 331–32 (6th Cir. 2008) ("Here, the record demonstrates that the district court sufficiently considered and addressed the Guidelines, the § 3553(a) factors, as well as Sexton's mitigating circumstances in arriving at Sexton's sentence.").

U.S. v. Sedore, 512 F.3d 819, 827–28 (6th Cir. 2008) ("Defendant does not convince us that this presumption of reasonableness does not apply to his case simply by stating that

his sentence was too long. . . . Defendant fails to offer any explanation as to why 84 months is an unreasonably lengthy sentence.").

U.S. v. Conatser, 514 F.3d 508, 520–27 (6th Cir. 2008) (sentence at bottom of guideline range was not unreasonable where district court properly considered section 3553(a) factors and defendant's arguments for lower sentence; same for codefendant who received guidelines sentence of life).

U.S. v. Madden, 515 F.3d 601, 610–13 (6th Cir. 2008) (although district court's ruling on defendant's motion for below guideline range sentence "was brief and somewhat opaque, . . . the record as a whole shows that the court adequately considered [the defendant]'s mitigating arguments and provided a reasoned basis" for sentence at top of guideline range).

U.S. v. Vonner, 516 F.3d 382, 389–90 (6th Cir. 2008) (en banc) (on plain error review because defendant failed to object at the sentencing hearing, affirming within guideline range sentence after district court declined to lower sentence without directly addressing defendant's arguments for leniency).

U.S. v. Phillips, 516 F.3d 479, 486–89 (6th Cir. 2008) (on plain error review, sentence at high end of guideline range was not unreasonable for felon-in-possession defendant who possessed numerous firearms on several occasions).

U.S. v. Wheaton, 517 F.3d 350, 371 (6th Cir. 2008) (in imposing sentence at bottom of guideline range, district court "weighed the § 3553(a) factors and imposed a sentence that it believed was necessary to 'protect the public' and to provide Wheaton with an opportunity to rehabilitate himself").

Seventh Circuit

U.S. v. Haskins, 511 F.3d 688, 695–96 (7th Cir. 2007) (rejecting defendant's claims that sentencing court "erroneously relied on improper and irrelevant factors when determining his sentence" and "improperly weighed the 3553(a) factors," concluding that district court "adequately explained its sentence in light of the 3553(a) factors").

U.S. v. McIlrath, 512 F.3d 421, 426–27 (7th Cir. 2008) (district court sentenced defendant to bottom of guideline range after finding that seriousness of crime offset various mitigating factors).

U.S. v. Garcia, 512 F.3d 1004, 1006 (7th Cir. 2008) (district court adequately considered defendant's arguments for a lower sentence and did not abuse its discretion by imposing a sentence at the bottom of the guideline range).

U.S. v. Allan, 513 F.3d 712, 716 (7th Cir. 2008) (district court reasonably sentenced defendant at top of guideline range based on defendant's greed and the extent of his fraud, as well as the need to promote deterrence and respect for the law: "[B]ecause Allan has offered nothing to indicate that his sentence offends the § 3553(a) factors, he has failed to rebut the presumption that his Guidelines sentence is reasonable.").

U.S. v. Anderson, 517 F.3d 953, 966 (7th Cir. 2008) (sentence in middle of range for bribery defendant was adequately explained—among other factors, court mentioned other recent public corruption scandals and corrosive effect they have on public trust).

U.S. v. Shannon, 518 F.3d 494, 496–97 (7th Cir. 2008) (sentence of 46 months—the low end of the guideline range—plus the maximum supervised release term of life, for defendant convicted of possession of child pornography was reasonable: the court considered defendant's limited criminal history, the serious nature of the offense, that his interest in child pornography demonstrated a "substantial need to protect the public," and his need for sex offender treatment and supervision).

Eighth Circuit

U.S. v. Perez-Perez, 512 F.3d 514, 516 (8th Cir. 2008) (did not mention *Gaul*, instead finding that, under *Rita*, district court reasonably concluded that seriousness of crime and need for deterrence offset mitigating factors).

U.S. v. Fields, 512 F.3d 1009, 1012–13 (8th Cir. 2008) ("district court carefully considered all the information" presented by defendant, "did [not] consider any improper or irrelevant factors," and "did not abuse its discretion when it imposed a sentence at the bottom of the applicable guidelines range").

U.S. v. McPike, 512 F.3d 1052, 1056 (8th Cir. 2008) (in sentencing defendant to top of guideline range, "the district court explicitly addressed the § 3553(a) factors in imposing the sentence and found that, considering McPike's history and characteristics, the seriousness of the offense, and the need to protect the public, provide just punishment, deter further crimes and avoid sentencing disparities, the advisory guidelines sentence of 120 months' imprisonment was appropriate. The district court adequately explained the sentence 'to allow for meaningful appellate review and to promote the perception of fair sentencing.'").

U.S. v. Banks, 514 F.3d 769, 781–82 (8th Cir. 2008) (in sentencing felon-in-possession defendant to 100 months, the low end of the guideline range, "the district court considered each § 3553(a) factor . . . [and] we cannot say that the district court failed to give them proper weight").

U.S. v. Platter, 514 F.3d 782, 788–89 (8th Cir. 2008) (in sentencing defendant to top of guideline range, "the record makes clear that the district court considered the advisory Guidelines, other available sentences, the nature and circumstances of [the defendant]'s offense, [the defendant]'s history and characteristics, and the remaining sentencing factors before imposing its sentence").

U.S. v. Hernandez, 518 F.3d 613, 616–17 (8th Cir. 2008) (although district court said it gave "substantial weight" to the Guidelines, it also "acknowledged that the [guidelines] range was advisory" and "the sentencing transcript makes clear that the court properly considered the § 3553(a) factors" in sentencing at the low end of the guideline range).

U.S. v. Burnette, 518 F.3d 942, 947–49 (8th Cir. 2008) (on plain error review, affirming sentence where district court adequately considered section 3553(a) factors and "[n]othing in the record indicates that the district court abused its discretion, or that a 188 month sentence is unreasonable in this case").

Ninth Circuit

U.S. v. Cherer, 513 F.3d 1150, 1160 (9th Cir. 2008) (reasonable to sentence defendant at top of guideline range where "the record clearly establishes that the judge considered the

circumstances of Cherer's crime and the nature of his prior offense for which he was serving probation," and the court considered defendant's arguments in favor of a shorter sentence).

U.S. v. Alghazouli, 517 F.3d 1179, 1194 (9th Cir. 2008) (in sentencing defendant to low end of guideline range, district court "discussed at length the factors enumerated in § 3553(a) and their application to Alghazouli's case. The court explained that 'I look to the factors in section 3553(a) to determine a reasonable sentence in your case' and 'I look at all these factors, . . . having benefit of hearing the evidence at trial with respect to . . . the circumstances of this offense.' The court concluded, after a detailed account of its reasoning, that, '[h]aving considered all these factors, the court finds that the guideline range reflects a reasonable range for sentencing in your case.'").

U.S. v. Garcia, 522 F.3d 855, 860 (9th Cir. 2008) ("The district court correctly calculated the guideline ranges for Garcia and for Plascencia-Alvarado, considered all of the 18 U.S.C. § 3553(a) factors and documented its reasoning. The court imposed sentences that were within the ranges stipulated to in their respective plea agreements and were below the statutory maximums.").

Tenth Circuit

U.S. v. Hamilton, 510 F.3d 1209, 1218–19 (10th Cir. 2007) ("the record and context demonstrate that the court considered Mr. Hamilton's arguments for a variance and rejected them because it determined that a Guidelines sentence is appropriate based on the particular facts of this case").

U.S. v. Verdin-Garcia, 516 F.3d 884, 898–99 (10th Cir. 2008) (district court's explanations were sufficient to uphold life sentences under Guidelines for defendants who engaged in large-scale drug conspiracy and demonstrated no remorse or respect for the law).

U.S. v. Thompson, 518 F.3d 832, 869 (10th Cir. 2008) ("we accord [a properly calculated guidelines sentence] a presumption of reasonableness," and defendant "has failed to demonstrate that the sentence is unreasonable in light of the factors listed in § 3553(a)").

U.S. v. McComb, 519 F.3d 1049, 1055 (10th Cir. 2008) (in denying defendant's request for downward variance or departure, district court "entertained substantial written submissions and live testimony . . . , proffered four analytically distinct reasons for choosing its sentence, . . . most of which were supported by case-specific factual findings, . . . expressly acknowledged its power to 'depart or vary' and indicated that . . . it had indeed consulted 'all the factors in Section 3553(a)' associated with variance requests").

Eleventh Circuit

U.S. v. Brown, __ F.3d __ (11th Cir. April 29, 2008) (sentencing court did not err in applying career offender provisions, adequately considered defendant's arguments for a lower sentence and the § 3553(a) factors, and could reasonably impose sentence at top of guideline range).

V. *Kimbrough* and the Crack/Powder Disparity

A. Generally

In *Kimbrough*, the Supreme Court held that "it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case." 128 S. Ct. at 575.

The Eighth Circuit concluded that *Kimbrough* allows, but does not require, district courts to consider the disparity in sentencing for crack and powder cocaine. "We do not believe, though, that *Kimbrough* means that a district court now acts unreasonably, abuses its discretion, or otherwise commits error if it does not consider the crack/powder sentencing disparity. True, the Supreme Court took a dim view of the extent of the disparity and was supportive of the Commission's efforts to reduce it, . . . but it did not appear to mandate that district courts consider the disparity in all sentences for crimes involving crack cocaine. Accordingly, we decline to go beyond the facial holding in *Kimbrough* by requiring that district courts consider the crack/powder disparity." However, district courts must be aware that they have this discretion, and "[w]hen a district court does not consider an argument because it is unaware of its power to do so, . . . a remand is appropriate." In this pre-*Kimbrough* case, the district court ignored the defendants' argument about the crack/powder disparity, so the sentences were remanded to the district court to "reconsider the sentence in light of *Kimbrough*." *U.S. v. Roberson,* 517 F.3d 990, 995 (8th Cir. 2008).

In another case, citing *Kimbrough* but not discussing specifics of the district court's reasoning, the Eighth Circuit affirmed a below guidelines sentence resulting from both a downward variance under section 3553(a)—on a finding that the crack cocaine guideline resulted in a sentence "greater than necessary"—and a downward criminal history departure. *U.S. v. McGhee,* 512 F.3d 1050, 1051 (8th Cir. 2008) (per curiam).

After *Kimbrough*, "[t]he new approach to sentencing . . . is that a district judge should consider the applicable Sentencing Guidelines range and the policy behind the Guidelines, but the judge may deviate from either or both. The judge should tailor any deviations by using the Section 3553(a) factors as a pattern." *U.S. v. Burns,* __ F.3d __ (5th Cir. May 2, 2008) (remanding pre-*Kimbrough* sentence where "[w]e cannot tell from the record whether, if the judge had known that he could consider policy disagreement as an additional factor in the 'array of factors warranting consideration' in his analysis under 18 U.S.C. § 3553(a), it would have affected the ultimate sentence imposed on Burns.").

The Eighth Circuit, in affirming the denial of a request for a downward variance by a career offender, also noted that the defendant was "not eligible for a sentence reduction based on the amendments to the crack sentencing guideline because his sentencing range was determined by the career offender provision in USSG § 4B1.1. . . . Although the recent amendments to the sentencing guidelines lowered the offense levels associated with crack in the drug quantity table in USSG § 2D1.1, they did not change the career offender provision in § 4B1.1 and thus would not lower Clay's sentencing range." *U.S. v. Clay,* 524 F.3d 877, 878–79 (8th Cir. 2008). *See also U.S. v. Jimenez,* 512 F.3d 1, 8–9 (1st Cir. 2007) (affirmed within-guideline sentence for career offender, who tried to make a *Kimbrough* argument—"the crack/powder disparity is irrelevant to the career offender sen-

tence actually imposed in this case" because the applicable career offender guideline range is higher than it would be under the crack guideline).

*B. Procedure for Pre-*Kimbrough *Sentences*

The Second Circuit noted that "when the sentencing of a defendant for a crack cocaine offense occurred before *Kimbrough,* we cannot tell whether the district court would have exercised its now clear discretion to mitigate the sentencing range produced by the 100-to-1 ratio." Therefore, it decided to adopt for pre-*Kimbrough* sentences the limited remand policy it had used earlier for pre-*Booker* cases. "Where a defendant has not preserved the argument that the sentencing range for the crack cocaine offense fails to serve the objectives of sentencing under § 3553(a), we will remand to give the district court an opportunity to indicate whether it would have imposed a non-Guidelines sentence knowing that it had discretion to deviate from the Guidelines to serve those objectives. If so, the court should vacate the original sentence and resentence the defendant. If not, the court should state on the record that it is declining to resentence, and it should provide an appropriate explanation for this decision. On appeal, if we have not already done so, we will review the sentence for reasonableness." *U.S. v. Regalado,* 518 F.3d 143, 148–49 (2d Cir. 2008).

The court went on to add that the Sentencing Commission has now reduced the base offense levels for crack offenses and made the change retroactive. This effectively gives defendants whose sentences are still on appeal the option of taking the limited remand or filing a motion under 18 U.S.C. § 3582(c)(2) for reduction of sentence. The court recognized that "whether we remand now or consign Regalado to seeking relief by motion, the ultimate result"—whether reached by a non-Guidelines sentence on remand or calculating an amended guideline range under § 3582(c)(2)—"may well be the same." The court decided that in this instance, "the best course is to remand to the district court." *Id.* at 150–51.

Where a defendant did raise the disparity issue and it is not clear why it was rejected at sentencing, the Tenth Circuit will also remand for clarification. "We are unable to tell from the sentencing transcript whether the district court's rejection of Defendant's argument was based on its conclusion that the crack/powder disparity did not warrant a below-Guidelines sentence in Defendant's particular case—a permissible conclusion under *Kimbrough*—or on its acceptance of the Government's argument that the disparity could not constitute a valid reason for varying from the Guidelines in any case—a position that has been overruled by *Kimbrough.* We therefore remand this case for the district court to clarify why it rejected Defendant's request for a variance based on the crack/powder disparity. If it rejected this request based on a belief that it did not have discretion to specifically consider whether the disparity resulted in a disproportionately harsh sentence, the court is to conduct resentencing in light of *Kimbrough.*" *U.S. v. Trotter,* 518 F.3d 773, 774 (10th Cir. 2008) (opinion on remand from the United States Supreme Court). *But cf. U.S. v. Moore,* 518 F.3d 577, 580 (8th Cir. 2008) (where defendant raised disparity in pre-*Kimbrough* case and sentencing court rejected his contention that 100:1 ratio, without more, warranted downward variance, "we presume the district court was aware that *Booker* granted it discretion to vary downward . . . but elected not to exercise that discretion; court affirmed, but noted defendant could file section 3582(c)(2) motion).

The Eleventh Circuit remanded, "for the limited purpose of resentencing [the defendant] in light of *Kimbrough,*" a case in which the district court had held that it lacked authority to consider the crack/powder disparity. However, the court emphasized that "this is a limited remand to permit the district court to reconsider the § 3553(a) factors in light of the Supreme Court's holding in *Kimbrough*, Stratton may not re-argue other issues already decided or necessarily decided during his two prior sentencings that either were affirmed on direct appeal or could have been, but were not, raised by him during his direct appeals. . . . However, the district court may, if it wishes to do so, combine this resentencing proceeding on remand with any additional proceeding the district court may determine is appropriate in light of the retroactive application of Amendment 706 to the crack-cocaine guidelines effective March 3, 2008." *U.S. v. Stratton,* 519 F.3d 1305, 1307 (11th Cir. 2008).

The Seventh Circuit also remanded a pre-*Kimbrough* case to allow the district court to decide whether it might have imposed a non-Guidelines sentence based on the crack/powder disparity. Although the district court had not indicated at the original sentencing that it might, and defendant had not objected at sentencing to the disparity, the appellate court acknowledged that before *Kimbrough*, "the rule in this court was that the 100:1 ratio was a statutory *Diktat* that a sentencing judge was not permitted, even under the liberalized regime of the *Booker* decision, to question. . . . [A] sentencing judge could if he wanted rail against the 100:1 ratio, but that would have been spitting against the wind." *U.S. v. Taylor,* 520 F.3d 746, 746–47 (7th Cir. 2008).

However, in another case decided after *Kimbrough*, the court concluded that "such remand is unnecessary given the lower court's firm statement that it would have imposed the same sentence even if there were no Guidelines, thus making clear that the crack/powder disparity reflected in the Guidelines in no way affected the court's sentencing decision." *U.S. v. White,* 519 F.3d 342, 349 (7th Cir. 2008). *See also U.S. v. Wise,* 515 F.3d 207, 222–23 (3d Cir. 2008) (affirming sentence where district court considered disparity and chose sentence in middle of guideline range because of it).

The Eighth Circuit remanded a pre-*Kimbrough* case where the defendant raised the disparity issue and the sentencing court "demonstrate[d] that although it was very concerned about the crack/powder sentencing disparity, it did not feel it could vary from the Guidelines on that basis" for what it termed a "fairly typical crack cocaine conspiracy." The appellate court explained that "*Kimbrough* made clear that sentencing courts can consider the crack/powder disparity 'even in a mine-run case,'" and remanded the case for resentencing. *U.S. v. Lee,* 521 F.3d 911, 914 (8th Cir. 2008). *See also U.S. v. Medina-Casteneda,* 511 F.3d 1246, 1248–49 (9th Cir. 2008) (remanding pre-*Kimbrough* sentence for crack offense for district court "to reconsider the sentence in light of the *Kimbrough* decision and to determine whether the disparity between crack and powder cocaine produced a sentence 'greater than necessary' under § 3553(a)").

However, where the defendant did not raise the issue of crack/powder disparity in the district court or ask that court to consider it in determining his sentence, he "cannot argue on appeal the district court erred by failing to consider that factor. . . . [R]emand to consider the applicability of *Kimbrough* is inappropriate. . . . [H]owever, our resolution of this appeal is without prejudice to King's ability to move for modification of his sentence pursuant to 18 U.S.C. § 3582(c)(2)." *U.S. v. King,* 518 F.3d 571, 576–77 (8th Cir. 2008).

In an appeal in which the crack/powder disparity had not been an issue, but the defendant's counsel raised the recent crack guideline amendments during the appeal, the Fourth Circuit decided that it is "for the district court to first assess whether and to what extent Brewer's sentence may be thereby affected, and that court is entitled to address this issue either sua sponte or in response to a motion by Brewer or the Bureau of Prisons. *See* 18 U.S.C. § 3582(c)(2). Accordingly, we need not remand for resentencing in order for Brewer to pursue relief in the district court under Amendment 706, and we decline to do so. However, this decision is rendered without prejudice to Brewer's right to pursue such relief in the sentencing court." *U.S. v. Brewer,* 520 F.3d 367, 373 (4th Cir. 2008).

C. Kimbrough-*Related Issues*

The Fifth Circuit stated that the "argument that a disagreement with the Guidelines is not a sufficient reason to impose a non-Guidelines sentence has lost most of its force in the light of recent Supreme Court pronouncements," especially *Kimbrough*. *U.S. v. Herrera-Garduno,* 519 F.3d 526, 530 (5th Cir. 2008). However, "*Rita* and *Kimbrough* do not completely unfetter a district court's sentencing discretion. Sentencing courts are still constrained by Congressional policies, for example the mandatory minimum sentences contained in the Anti-Drug Abuse Act of 1986." In finding that *Rita* or *Kimbrough* did not provide district courts with authority to sentence below the guideline range to account for fast-track disparity, the court noted that those cases "addressed only a district court's discretion to vary from the Guidelines based on a disagreement with *Guideline*, not Congressional, policy." *U.S. v. Gomez-Herrera,* 523 F.3d 554, 559–64 (5th Cir. 2008). *Cf. U.S. v. Hendry,* 522 F.3d 239, 241–42 (2d Cir. 2008) (reaffirming earlier decision that held "we would not find a sentence unreasonable for failing to compensate for [fast-track] disparities" and noting that decision "said nothing as to whether a district judge *could* take such disparities into account"; court also rejected defendant's argument that lack of a fast-track program created unwarranted sentencing disparities with defendants in fast-track districts).

However, relying on *Kimbrough*, the First Circuit abrogated an earlier decision and concluded that a district court can consider fast-track disparity. "Although *Kimbrough* involved the crack/powder ratio, its approach plainly has wider implications arguably affecting a number of our earlier cases, including but not limited to, how we have treated disparities arising out of the selective institution of fast-track programs. . . . *Kimbrough* lends a new flexibility to the scope of the district courts' sentencing authority and, in the bargain, removes a formidable obstacle to the consideration of matters such as fast-track disparity. We refer specifically to the *Kimbrough* Court's enlargement of a sentencing court's capacity to factor into the sentencing calculus its policy disagreements with the guidelines. *Kimbrough,* 128 S. Ct. at 570. This makes plain that a sentencing court can deviate from the guidelines based on general policy considerations. . . . We conclude that the district court, acting without the benefit of the watershed decision in *Kimbrough,* committed procedural error in refusing to consider the appellant's argument that he should receive a variant sentence because of the disparity incident to the lack of a fast-track program in the District of Puerto Rico. *Kimbrough* makes manifest that sentencing courts possess sufficient discretion under section 3553(a) to consider requests for variant sentences premised on disagreements with the manner in which the sentencing guidelines operate." *U.S. v. Rodriguez,* __ F.3d __ (1st Cir. June 4, 2008).

For a defendant convicted in a large, complex, multi-state fraud scheme with a large number of victims, the Fifth Circuit held that a sentence of 172 months instead of the guideline range of 97–121 months was not unreasonable. "In selecting a sentence for Williams, the district court was not prohibited from considering the number of victims, the harm to individuals, the expansive reach of the crimes, or the complexity of the scheme, even though the Guidelines sentencing range for money laundering may implicitly have taken complexity of the scheme and the number of victims into account by basing the term of imprisonment on the amount of loss. We find no merit in Williams's arguments that these factors could not support a sentence outside the guidelines, although we recognize that some of our pre- *Rita,* pre-*Gall* and pre-*Kimbrough* decisions indicate otherwise. . . . For the reasons explained in *Gall* and *Kimbrough,* we give considerable deference to the district court's imposition of the 172-month sentence. The district court saw and heard the evidence, made credibility determinations, had full knowledge of the facts, and gained insights not conveyed by the record." *U.S. v. Williams,* 517 F.3d 801, 809 (5th Cir. 2008) (in discussing *Kimbrough*, noting that "the sentencing court is free to conclude that the applicable Guidelines range gives too much or too little weight to one or more factors, either as applied in a particular case or as a matter of policy").

VI. Other *Gall* or *Kimbrough* Issues

A. Revocation Sentences

The Sixth Circuit held that "there is no practical difference between the pre-*Booker* 'plainly unreasonable' standard of review of supervised release revocation sentences and our post-*Booker* review of sentences for 'unreasonableness.' Sentences imposed following revocation of supervised release are to be reviewed under the same abuse of discretion standard that we apply to sentences imposed following conviction." The sentencing court here did not abuse its discretion in sentencing the defendant to a 24-month term instead of within the 4–10-month recommended range—the court adequately considered the section 3553(a) factors and "provided a sufficiently compelling justification for its departure from the Sentencing Commission's recommendations." *U.S. v. Bolds,* 511 F.3d 568, 578–82 (6th Cir. 2007).

The Eighth Circuit also held that *Gall* procedure should be followed when imposing sentences after revocation of supervised release and when reviewing them. After setting out the district court's duty under *Gall*, the court stated that "we may consider both the procedural soundness of the district court's decision and the substantive reasonableness of the sentence imposed. The statute applicable to revocations of supervised release directs the court of appeal to determine whether a revocation sentence is 'plainly unreasonable,' 18 U.S.C. § 3742(e)(4), but we have held after *Booker* the same 'reasonableness' standard applies to both initial sentencing decisions and revocation proceedings." In this case, the district court properly followed the *Gall* procedure in sentencing the defendant to 24 months where the recommended range under §7B1.4(a) was 3–9 months, and "provided persuasive reasons to justify the sentence imposed." *U.S. v. Bear Robe,* 521 F.3d 909, 910–11 (8th Cir. 2008).

Because a defendant whose probation is revoked is actually being sentenced on the underlying crime of conviction, a revocation sentence "that falls within the range for the underlying crime of conviction will rarely qualify as too severe to be substantively rea-

sonable." *U.S. v. Verkhoglyad,* 516 F.3d 122, 134 (2d Cir. 2008) (affirming sentence of 57 months—the top of the guideline range for the underlying offense—even though the recommended revocation sentence was 5–11 months). The court also noted that the admonition in *Gall* to give due deference to a district court's determination of the sentence, based in part on that court's greater familiarity with the individual defendant and case, "applies with particular force to probation violation proceedings, where the sentencing judge has unique insights into both the circumstances that prompted the initial non-incarceratory sentence and the degree to which the violation represents a serious betrayal of the court's trust and a risk of future criminal conduct."

B. Substantial Assistance Departures

In an Eighth Circuit case, the government filed a section 3553(e) motion on defendant's drug counts, but refused to do so on a count of possessing a weapon during a drug offense. The district court granted the defendant's motion that the government acted in bad faith in refusing to file the motion on the gun count and granted a downward departure on that count, from the mandatory minimum 60 months to 24 months (the same percentage reduction it had made on the drug counts). Alternatively, in case that decision was reversed on appeal, the court granted a conditional variance under section 3553(a) on the gun count to reduce it to 24 months. As a second alternative, in case that decision was also reversed, the court granted a conditional variance on the drug counts to reduce the sentence on them by the same 36 months.

The appellate court reversed on the first two issues, finding that the government did not act in bad faith and that "neither *Booker*, *Gall*, nor § 3553(a) affect a statutory minimum sentence." The court also reversed the alternative sentence reduction on the drug counts: "The district court had already granted a downward departure on the drug counts through the government's substantial assistance motions. The 'reduction below the statutory minimum must be based exclusively on assistance-related considerations.' . . . If the court reduces the sentence further based on § 3553(a) factors, which are unrelated to assistance, the court exceeds the limited authority granted by § 3553(e). . . . We see nothing in *Gall* that would call this holding into question or authorize this panel to overrule the clear holding of a prior panel. As the district court based its variance on a § 3553(a) factor—'the need to avoid unwarranted sentence disparities,' and not § 3553(e), the court erred as a matter of law." *U.S. v. Freemont,* 513 F.3d 882, 889–91 (8th Cir. 2008) (citations omitted).

The Second Circuit remanded a substantial assistance case where the district court "merely stated that it was taking into account 'all the pertinent information including but not limited to the presentence investigation report, submissions by counsel, the factors outlined in 18 U.S.C. Section 3553 and the sentencing guidelines.' When counsel for the Government inquired as to the court's method of 'calculation,' the court responded: 'Based on all the circumstances in the case and the motion by the government, this is the [c]ourt's sentence.' In the context of this case, it seems to us that the District Court did not satisfy its obligation to 'state in open court the reasons for its imposition of the particular sentence.'" It was therefore not possible for the appellate court to review for reasonableness the imposed sentence of 464 days that resulted from a departure from a mandatory minimum of twenty years under section 3553(e), a §5K1.1 departure, and "a variety of specified and unspecified factors." The appellate court also reiterated a prior

holding that, when considering a substantial assistance departure from a statutory minimum, "both the decision to depart and the maximum permissible extent of this departure below the statutory minimum may be based only on substantial assistance to the government and on no other mitigating considerations." *U.S. v. Richardson,* 521 F.3d 149, 158–59 (2d Cir. 2008).

C. Notice of Variance

In a case in which the defendant received a sentence with an upward variance, he appealed on the ground that he received inadequate notice that the court was considering an increase above the guideline range. Noting the circuit split on the issue, and recognizing that the Supreme Court should be resolving the split soon, the First Circuit decided it should provide guidance for the district courts in the meantime. "The preferable solution is . . . not a mechanical rule mandating formal notice in every case where the judge may conceivably vary from the guidelines. Rather, when proposing to adopt a variant sentence relying on some ground or factor that would *unfairly surprise* competent and reasonably prepared counsel, a judge must either provide advance notice or, on request, grant a continuance in order to accommodate a reasonable desire for more evidence or further research." The court held that "unfair surprise has not been established" by the defendant and affirmed. *U.S. v. Vega-Santiago,* 519 F.3d 1, 5–6 (1st Cir. 2008) (en banc).