

RECENT DEVELOPMENT: Troubling Trifles: United States v. Whitelaw Divines a Sentencing Court's Reasons for an Above Guidelines Sentence in the Fifth Circuit

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Reporter

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Text

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I. Overview

Based on Alan Whitelaw's previous experience, his decision to steal some copper wire while serving a five-year term of supervised release was rational. ¹ After all, Whitelaw only served five years of the sixty-year sentence he received from his previous conviction for theft exceeding \$ 200,000 and bank fraud. ² Unfortunately for Whitelaw, the United States District Court for the Western District of Texas granted the government's motion to revoke (MTR) his supervised release. ³ In the MTR, the government alleged Whitelaw stole over \$ 1000 of copper wire, lied to his probation officer concerning the wire, and failed to report required information to that officer, including two arrests during his term of supervised release. ⁴ At his sentencing hearing, the district court declined to rule on whether Whitelaw failed to report one of the arrests, but

¹ United States v. Whitelaw, 580 F.3d 256, 258 (5th Cir. 2009).

² Id.

³ Id.

⁴ Id. at 258-59.

found Whitelaw committed the other violations.⁵ Under the United States Federal Sentencing Guidelines (Guidelines) the applicable sentence range was four to ten months of imprisonment, and the statutory maximum sentence was thirty-six months.⁶ Despite Whitelaw's previous sentencing experience, the [*1318] court denied his request for a sentence at the low end of the Guidelines range, instead sentencing him to the statutory maximum that the government recommended in the MTR.⁷ The court did not offer a statement explaining its decision to impose the statutory maximum sentence.⁸

On appeal, Whitelaw argued that the district court committed procedural plain error by failing to give reasons for imposing a sentence above the Guideline's range.⁹ Because Whitelaw did not properly raise any objections during sentencing, the United States Court of Appeals for the Fifth Circuit applied a plain error standard of review to Whitelaw's claim.¹⁰ The plain error standard required that Whitelaw show any error by the district court: (1) was clear or obvious; (2) affected his substantial rights; and (3) seriously affected the fairness, integrity, or public reputation of judicial proceedings.¹¹ The Fifth Circuit held that the district court's failure to state reasons for the sentence explicitly was a clear error that did not affect Whitelaw's substantial rights because, by adopting the sentence the government recommended in the MTR, the court impliedly adopted the government's reasoning for that sentence. *United States v. Whitelaw*, 580 F.3d 256, 264 (5th Cir. 2009).

II. Background

A. The Sentencing Reform Act of 1984 and Subsequent Supreme Court Reinterpretation

Prior to the Sentencing Reform Act of 1984 (Act), courts sentenced defendants using an indeterminate sentencing system of statutes containing specific penalty ranges.¹² These statutes allowed for broad judicial discretion in determining the nature and duration of the actual sentence imposed.¹³ Congress designed the Act to limit this discretion in order to increase sentence uniformity among defendants found guilty of similar violations.¹⁴ The Act created a "sentencing cycle" in which the United States Sentencing Commission [*1319] (Commission) developed sentencing guidelines that were binding on sentencing courts, with limited exceptions

⁵ *Id.* at 259.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 261.

⁹ *Id.*

¹⁰ *Id.* at 259 (explaining that Whitelaw improperly filed a pro se motion after the revocation hearing, which the district court dismissed because Whitelaw was represented by counsel, thus there was no properly raised objections he could appeal).

¹¹ *Id.* at 260.

¹² *Mistretta v. United States*, 488 U.S. 361, 363 (1989).

¹³ *Id.* at 363-64.

¹⁴ *Apprendi v. New Jersey*, 530 U.S. 466, 550 (2000) (O'Connor, J., dissenting).

for departures.¹⁵ When sentencing under the Act, courts had to provide reasons for a specific sentence, including a specific reason for a departure from the Guidelines.¹⁶ Further, the Act significantly limited the scope of appellate review, setting out specific criteria for the reviewing court to consider.¹⁷ Finally, under the Act the Commission had a duty to review the reasoning and sentences of sentencing courts and revise the Guidelines accordingly.¹⁸

The regimented sentencing process created by the Act and Guidelines remained relatively unfettered until the United States Supreme Court's decision in *United States v. Booker*, which held that the Act was advisory.¹⁹ In that case, the Court excised 18 U.S.C. § 3553(b)(1) of the Act requiring sentencing judges to impose a sentence within the Guidelines range, and 18 U.S.C. § 3742(e) mandating *de novo* appellate review to determine whether the sentencing judge applied the Guidelines as required.²⁰ Despite this change, in *Booker* and subsequent decisions, the Court sought to preserve the "sentencing cycle" the Act established.²¹ This cycle envisions a discreet function for sentencing courts, appellate courts, and the Commission in the evolution of the Guidelines.²² These functions, determined by the unique institutional capacity of each, are (1) a reasoning requirement for sentencing courts that justifies a particular sentence, (2) appellate review limited to a reasonableness determination of whether abuse of discretion occurred, and (3) a review and revise duty for the Commission.²³

[*1320] Following *Booker*, in *Rita v. United States*, the Court held that appellate courts may apply a presumption of reasonableness when reviewing a properly calculated sentence within the Guidelines' range.²⁴ The decision stressed that sentencing courts did not enjoy the same presumption and must make a reasoned determination of whether the Guidelines sentence was appropriate.²⁵ The Court reasoned that a properly calculated within Guidelines sentence

¹⁵ 18 U.S.C. § 3553 (2006); *Mistretta*, 488 U.S. at 367-68.

¹⁶ 18 U.S.C. § 3553; *Mistretta*, 488 U.S. at 367-68.

¹⁷ 18 U.S.C. § 3742; *Mistretta*, 488 U.S. at 368.

¹⁸ 28 U.S.C. § 994 (2006); *Mistretta*, 488 U.S. at 369-70.

¹⁹ 543 U.S. 220, 245-46 (2005).

²⁰ 18 U.S.C. §§3553(b)(1), 3742(e); *Booker*, 543 U.S. at 245-46.

²¹ *Rita v. United States*, 551 U.S. 338, 348-51 (2007).

²² *Id.* at 350 ("The Guidelines ... foresee continuous evolution helped by the sentencing courts and courts of appeals in that process. The sentencing courts ... will set forth their reasons ... courts of appeals will determine the reasonableness [and] the Commission will collect and examine the results [and] revise the Guidelines accordingly.").

²³ *Gall v. United States*, 552 U.S. 38, 46 (2007) ("[A] district judge ... must explain [why] an unusually lenient or an unusually harsh sentence is appropriate ... with sufficient justifications. For even though the Guidelines are advisory ... they are ... the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions."); *Rita*, 551 U.S. at 356 ("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."); *Booker*, 543 U.S. at 264 (explaining that the Commission continuously collects information and revises the Guidelines based on information collected from actual district court sentencing decisions).

²⁴ *Rita*, 551 U.S. at 340; *Booker*, 543 U.S. 220.

²⁵ *Rita*, 551 U.S. at 351.

undergoes a "double determination" by both the Commission and sentencing court.²⁶ The decision also discussed the importance of the sentencing court's reasoning requirement to the sentencing cycle.²⁷ The Court observed that the reasoning requirement helps the sentencing cycle evolve by assisting subsequent actors in the cycle to improve the Guidelines over time.²⁸ This discussion emphasized that the depth of analysis necessary to satisfy the reasoning requirement varies and some cases may require little to no explanation while others require more.²⁹

The following term, in *Gall v. United States*, the Court held that appellate courts may not apply a presumption of unreasonableness when reviewing a sentence outside the Guidelines' range.³⁰ Rather than requiring a mathematical formula to determine what constitutes adequate reasoning for a sentence outside of the Guidelines, the Court confined appellate review to a determination of whether there was an abuse of discretion by the sentencing court.³¹

B. Circuit Split: Appropriate Standard of Plain Error Review in the Context of Sentencing Appeals

Despite the Court's attempt to define the specific function of sentencing and of appellate courts, ambiguity persisted, especially at the appellate level.³² Under Federal Rule of Criminal Procedure 52(b), if a defendant fails to make a specific objection during sentencing, [*1321] appellate courts review only for plain error.³³ In *United States v. Olano*, the Court defined the term "plain error" as a "limited power to correct errors."³⁴ Plain error exists when an appellate court finds an error that is (1) obvious and (2) affects a defendant's substantial rights.³⁵ If the appellate court finds plain error, it has the discretion to correct it, but should only do so if the impact of the error "seriously affects the fairness, integrity or public reputation of judicial proceedings."³⁶ In the context of sentencing, the first element, whether an obvious error occurred during sentencing, asks appellate courts to determine whether a sentencing court's procedure comports with the role the Court outlined in *Booker*, *Rita*, and *Gall*.³⁷ The second element, whether an error affected a defendant's substantial rights, is less straightforward.³⁸

²⁶ *Id.* at 347.

²⁷ *Id.* at 358-59.

²⁸ *Id.* at 358.

²⁹ *Id.* at 357.

³⁰ 552 U.S. 38, 45, 47 (2007).

³¹ *Id.*

³² *United States v. Booker*, 543 U.S. 220, 268 (2005) (explaining that appellate review of sentences must also incorporate ordinary prudential doctrines and whether any specified violations occurred in the sentencing court).

³³ *Id.*; Fed. R. Crim. P. 52(b).

³⁴ 507 U.S. 725, 731 (1993).

³⁵ *Id.* at 731-34.

³⁶ *Id.* at 732 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936) (alterations in original)).

³⁷ See *United States v. Mares*, 402 F.3d 511, 520-21 (5th Cir. 2005); *Booker*, 543 U.S. 220; *Rita v. United States*, 551 U.S. 338 (2007); *Gall v. United States*, 552 U.S. 38 (2007).

In *Jones v. United States*, a pre-Booker case, the Supreme Court defined the phrase "affects [a defendant's] substantial rights."³⁹ The Court reasoned that when "the effect of an alleged error is ... uncertain, a defendant cannot meet his burden of showing that the error actually affected his substantial rights."⁴⁰ Despite this pre-Booker definition, a split in the circuits developed regarding the appropriate standard of review in the context of a sentencing appeal.⁴¹ In general, the split centers on whether to apply a "traditional" or a "relaxed" standard of review.⁴² For example, in *United States v. Mares*, the Fifth [*1322] Circuit applied the traditional standard.⁴³ The court reasoned that in the context of a sentencing appeal, the phrase "affects a defendant's substantial rights" means an error affected the outcome of the district court's sentencing decision.⁴⁴ Conversely, in *United States v. Lewis*, the United States Court of Appeals for the Second Circuit applied the relaxed standard.⁴⁵ The court reasoned that although the phrase "affects a defendant's substantial rights" traditionally means affected the outcome of the district court decision, in the context of a sentencing appeal, a defendant's substantial rights include being informed of the basis for his sentence so that he is effectively able to argue it is unreasonable on appeal.⁴⁶

1. The Relaxed Standard of Review

The Second Circuit's opinion in *Lewis* is the leading post-Booker case in that circuit for the holding that a sentencing court's failure to provide explicit reasons for the specific sentence justifies relaxing the plain error standard of review.⁴⁷ Under the relaxed standard, a sentencing court's failure to give explicit reasons for a sentence affects a defendant's substantial rights and impacts the fairness, integrity, and public reputation of judicial proceedings.⁴⁸ In *Lewis*, the Second Circuit reasoned that in the context of sentencing, a defendant's substantial rights

³⁸ See *Mares*, 402 F.3d at 521; *United States v. Lewis*, 424 F.3d 239, 247 (2d Cir. 2005).

³⁹ 527 U.S. 373, 395 (1999).

⁴⁰ *Id.* at 394-95.

⁴¹ *United States v. Mondragon-Santiago*, 564 F.3d 357, 364 (5th Cir. 2009) ("We are aware that other circuits have relaxed [the plain error standard] in the sentencing context, but this circuit has not followed suit. To the contrary, we have applied our traditional standards when reviewing sentences." (footnote omitted)); see also Lindsay C. Harrison, *Appellate Discretion and Sentencing After Booker*, 62 U. Miami L. Rev. 1115, 1126-27 (2008) (arguing that in the context of reviewing "Booker pipeline" cases, appeals of pre-Booker sentencing decisions, there was a split between three competing views concerning the appropriate standard for plain error review: (1) the First, Fifth, Eighth, Tenth, and Eleventh Circuits in which almost nothing satisfies the strict plain error standard of review; (2) the Third, Fourth, and Sixth Circuits in which prejudice is presumed; and (3) the Second, Seventh, Ninth, and D.C. Circuits in which remand is appropriate for all unclear cases).

⁴² *Mares*, 402 F.3d at 521.

⁴³ *Id.* at 521-22.

⁴⁴ *Id.* at 521.

⁴⁵ 424 F.3d 239, 247 (2d Cir. 2005).

⁴⁶ *Id.*

⁴⁷ *Id.* at 248.

⁴⁸ *Id.* ("[A sentencing] appeal - whether couched as dealing with 'structural error' or otherwise - [does not] fall[] within the category of the 'usual' case. The 'substantial rights' affected by a court's failure to comply with [the reasoning requirement] are of a somewhat different nature from those with which we typically deal.").

include a meaningful appellate review.⁴⁹ Three observations support this line of reasoning: (1) a sentencing court's failure to give explicit reasons for a sentence violates a defendant's right to a public trial; (2) a primary reason for the strict standards imposed under plain error review, judicial economy, is not implicated by a remand for resentencing to the same extent as in other contexts requiring a new trial; and (3) if a sentencing court's failure to give reasons does not violate a defendant's substantial rights, then there is, in effect, no requirement that sentencing courts give reasons because it is a plain error that will always be harmless.⁵⁰ Finally, the Second [*1323] Circuit reasoned that a failure to satisfy the reasoning requirement triggers the subsequent impact determination of plain error review because, beyond its impact on the defendant, it negatively impacts public trust in the judiciary.⁵¹

Subsequent Second Circuit cases have further refined the court's reasoning in *Lewis*. In *United States v. Nurse*, the Second Circuit observed that it had not yet settled whether to review an appeal of an outside Guidelines sentence under a traditional plain error standard or a more relaxed standard.⁵² In that case, the Second Circuit held the sentencing court's statement regarding the court's history and knowledge of the defendant satisfied the reasoning requirement.⁵³ The Second Circuit distinguished *Nurse* from *Lewis*, noting that the issue in *Lewis* was whether the absence of any reasons, as opposed to the adequacy of the reasons, for an outside Guidelines sentence required a more relaxed standard.⁵⁴

In general, the Second Circuit holds that a more relaxed standard is justified when there is no statement of reasons with which an appellate court can conduct a meaningful review.⁵⁵ In *Sicurella v. United States*, the Second Circuit remanded a below Guidelines sentence on three separate occasions.⁵⁶ The first and second remands were the result of the appellate court's determination that the district court provided insufficient reasoning.⁵⁷ The third and final remand was in response to the sentencing court's amended statement of reasons for imposing a new sentence: "I am mandated by the Court of Appeals to impose a new sentence."⁵⁸ The appellate court assigned the third and final remand to a new judge.⁵⁹

Conversely, the Second Circuit holds a more relaxed standard is not justified when a sentencing court's explicit reasons for imposing a sentence allow the appellate court to conclude the

⁴⁹ *Id.* at 247.

⁵⁰ *Id.* at 248-49.

⁵¹ *Id.* at 247 ("People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they have insufficient information to understand.").

⁵² 193 F. App'x 101, 103 (2d Cir. 2006).

⁵³ *Id.*

⁵⁴ *Id.* at 104; *Lewis*, 424 F.3d at 239.

⁵⁵ *Lewis*, 424 F.3d at 247.

⁵⁶ No. 05-6077-cr, 2006 U.S. App. LEXIS 13546, at 1-4 (2d Cir. May 23, 2006).

⁵⁷ *Id.* at 3 n.1.

⁵⁸ *Id.* (internal quotation marks omitted).

⁵⁹ *Id.*

sentencing court considered the parties' arguments and had a reasoned basis for [*1324] imposing a sentence.⁶⁰ In *United States v. Smalls*, the Second Circuit affirmed an outside Guidelines sentence in which the judge based the sentencing decision in part on the general need to deter gun crime.⁶¹ The appellate court employed a record review approach, in combination with the district court's explicit statements in the record, to determine whether the sentence was reasonable.⁶² The requirement that a sentencing court's reasons be explicit ensures that (1) the defendant is informed of the reasons for a sentence, (2) an appellate court can conduct a meaningful review, (3) the public can understand why a defendant received a particular sentence, and (4) other actors in the sentencing process have the information necessary to perform their functions.⁶³

The first three considerations for requiring a sentencing court to give explicit reasons for a sentence mirror the Second Circuit's observations in *Lewis* as to why the failure to give explicit reasons for a sentence affects both a defendant's substantial rights and the fairness, integrity, or public reputation of judicial proceedings.⁶⁴ Requiring an explicit statement of reasons does not imply that sentencing courts can only satisfy the reasoning requirement through "a rigid mathematical formula."⁶⁵ In *United States v. Molina*, a pre-Booker case, the Second Circuit held that a sentencing court may satisfy the reasoning requirement by adopting the reasoning and conclusions of a presentencing report (PSR), but the adoption must be explicit.⁶⁶ Later in *United States v. Carter*, a post-Booker case, the Second Circuit also required the sentencing court to adopt the reasoning and conclusion of the PSR explicitly for the court to satisfy the reasoning requirement.⁶⁷ In that case, the Second Circuit remanded a within Guidelines sentence because the combination of the district court's limited oral statements and the information in the PSR did not allow the appellate court to conduct a meaningful review.⁶⁸

[*1325] The fourth consideration for requiring a sentencing court's reasoning to be explicit, that other actors in the sentencing process have the information necessary to perform their functions, reflects the Court's intent to preserve the sentencing cycle after Booker. In *United States v. Verkhoglyad*, the Second Circuit upheld a within Guidelines sentence supported by a "more than adequate" oral statement of reasons.⁶⁹ However, the court remanded the case to

⁶⁰ *United States v. Smalls*, 291 F. App'x 397, 398 (2d Cir. 2008) (citing *Rita v. United States*, 551 U.S. 338, 356 (2007)).

⁶¹ *Id.*

⁶² *Id.* at 397-98.

⁶³ *United States v. Molina*, 356 F.3d 269, 277 (2d Cir. 2004).

⁶⁴ 424 F.3d 239, 247 (2d Cir. 2005); *Molina*, 356 F.3d at 277.

⁶⁵ *Gall v. United States*, 552 U.S. 38, 47 (2007) (rejecting the use of a rigid mathematical formula to determine the reasonableness of a sentence); *United States v. Nurse*, 193 F. App'x 101, 103 (2d Cir. 2006) ("We do not require 'robotic incantations' by district judges when they sentence defendants.").

⁶⁶ 356 F.3d at 277.

⁶⁷ 489 F.3d 528, 540 (2d Cir. 2007).

⁶⁸ *Id.*

⁶⁹ 516 F.3d 122, 127, 134, 136 (2d Cir. 2008).

the district court so it could include a written statement of reasons.⁷⁰ The court reasoned that because other actors in the sentencing cycle relied on the written record, it should require the district court to memorialize its reasons for sentencing.⁷¹

2. The Traditional Standard of Review

In contrast to the Second Circuit's decision in *Lewis*, other circuits espouse the view that the absence of an explicit statement of reasons does not affect either a defendant's substantial rights or the fairness, integrity, or public reputation of judicial proceedings.⁷² The Fifth Circuit subscribes to this view of plain error review in the context of sentencing appeals.⁷³ The circuits adopting this view reason that appellate courts must strictly adhere to the rule the Court set out in *Olano*.⁷⁴ Under this view, even when an appellate court concludes that it is uncertain whether a plain error affected the outcome of the sentencing court's decision, it must conclude that the error did not affect a defendant's substantial rights.⁷⁵ This view promotes judicial efficiency by limiting the number of sentencing remands and related appeals.⁷⁶

The United States Court of Appeals for the Tenth Circuit's opinion in *United States v. Mendoza* reflects the view that a strict plain error standard of review should apply in the context of sentencing appeals.⁷⁷ In *Mendoza*, the Tenth Circuit held that a sentencing court's failure to satisfy the reasoning requirement does not affect a party's [*1326] substantial rights.⁷⁸ In that case, the sentencing court imposed a sentence outside the Guidelines, giving general reasons for a sentencing departure.⁷⁹ The court reasoned that in the context of a sentencing appeal, a party can only show a plain error affected its substantial rights "by explaining how the outcome might have been different had the district court provided a procedurally adequate ... explanation for its choice of sentence."⁸⁰

Despite the court's decision in *Mendoza*, Tenth Circuit juris-prudence shows it has difficulty consistently applying a traditional standard of plain error review in the context of sentencing. In *United States v. Robertson*, the Tenth Circuit held that a sentencing court has an obligation to give a specific reason for a sentence outside the Guidelines.⁸¹ The court reasoned that a sentencing court's express adoption of the facts and reasoning of a PSR can fulfill the reasoning

⁷⁰ *Id.* at 127, 134.

⁷¹ *Id.* at 134 n.9.

⁷² *United States v. Mares*, 402 F.3d 511, 521 (5th Cir. 2005); *United States v. Rodriguez*, 398 F.3d 1291, 1298 (11th Cir. 2005).

⁷³ *Mares*, 402 F.3d at 521.

⁷⁴ *Rodriguez*, 398 F.3d at 1298.

⁷⁵ *Id.* at 1301.

⁷⁶ *Mares*, 402 F.3d at 522.

⁷⁷ See 543 F.3d 1186, 1192 (10th Cir. 2008).

⁷⁸ *Id.* at 1195-97.

⁷⁹ *Id.* at 1192-94.

⁸⁰ *Id.* at 1194.

⁸¹ 568 F.3d 1203, 1209, 1215 (10th Cir. 2009).

requirement, but only if that adoption demonstrates the reasons for imposing a particular sentence, and does not merely restate why a particular sentence may be justified.⁸² However, the court did not remand the case because the defendant's council stated at the sentencing proceedings that he understood the reasons for the departure, so the court determined there was no prejudice to the defendant.⁸³

Similarly, in *United States v. Vigil* (2008), the Tenth Circuit affirmed an outside Guidelines sentence in which the judge gave an oral statement of reasons but did not include them in the written opinion.⁸⁴ The court observed that it had yet to address "whether remand would be appropriate in the absence of plain error when a party seeks only the remedy of an amended written order and judgment."⁸⁵ The court acknowledged that when a district court does not fulfill the reasoning requirement, it can prejudice other actors in the sentencing process that rely on the written record.⁸⁶ However, because the defendant failed to argue that remanding to the sentencing [*1327] court would have an impact on his individual interest, the court found no impairment to the defendant's substantial rights.⁸⁷

Conversely, in *United States v. Vigil* (2009), a case unrelated to that previously discussed, the Tenth Circuit affirmed a within Guidelines sentence in which the judge did not expressly satisfy the reasoning requirement.⁸⁸ The court stated that although the judge did not offer an express reason for the sentence, it could imply the judge's reasoning from her observation that "the court finds that the sentencing guidelines are advisory."⁸⁹ The Tenth Circuit reasoned further that "it would be an empty exercise - and a waste of judicial resources - to remand this case for no purpose other than to require the sentencing judge to state the obvious."⁹⁰ The court did not acknowledge its earlier unpublished opinion of the same name, which observed that it had yet to decide whether remand is appropriate in the absence of plain error to correct procedural defects.⁹¹ However, the court did point to and dismiss *United States v. Acevedo*, an unpublished Tenth Circuit opinion.⁹²

In *Acevedo*, the Tenth Circuit remanded a sentencing court's outside Guidelines sentence in which the judge did not satisfy the reasoning requirement.⁹³ In that case, the sentencing judge heard arguments by both the defendant and the government in favor of a within Guidelines

⁸² *Id.* at 1209, 1215 n.9.

⁸³ *Id.* at 1215.

⁸⁴ 301 F. App'x 788, 789 (10th Cir. 2008).

⁸⁵ *Id.* at 790.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ No. 08-2293, 2009 U.S. App. LEXIS 14385, at 11-12 (10th Cir. June 30, 2009).

⁸⁹ *Id.* at 11-12 n.7 (internal quotation marks omitted).

⁹⁰ *Id.* at 12.

⁹¹ *Vigil*, 301 F. App'x at 790.

⁹² *Vigil*, 2009 U.S. App. LEXIS 14385, at 14 (citing *United States v. Acevedo*, 219 F. App'x 828, 829 (10th Cir. 2007)).

⁹³ 219 F. App'x at 829.

sentence, but at opposing ends of the range.⁹⁴ The court explicitly adopted the government's argument, in favor of a within Guidelines sentence, but went on to impose a sentence above the Guidelines range.⁹⁵ The Tenth Circuit, applying a traditional plain error standard of review, held that the sentencing court's failure to satisfy the reasoning requirement satisfied the first element, second element, and subsequent impact determination of plain error review.⁹⁶ The court reasoned that simply restating why a sentencing departure may be justified does not fulfill the reasoning requirement.⁹⁷ Further, the court found that this error affected the defendant's substantial rights [*1328] because the defendant was entitled to "informed appellate review of his sentence," which was impossible "without a sufficient explanation of the district court's reasoning."⁹⁸ Moreover, the court held that limiting the court's ability to conduct meaningful appellate review "seriously affected the fairness, integrity and public reputation of judicial proceedings."⁹⁹

III. The Court's Decision

In the noted case, the Fifth Circuit relied on a record review approach to divine the sentencing court's reasons for imposing an above Guidelines sentence.¹⁰⁰ The court reasoned that the record of the sentencing proceedings contained the requisite information for meaningful appellate review.¹⁰¹ The Fifth Circuit focused on four aspects of the proceedings: (1) the district court's decision to grant the MTR and subsequent imposition of the sentence recommended in the MTR, (2) the district court's finding that Whitelaw committed four of the five violations outlined in the MTR, (3) the absence of any impermissible sentencing factors in the government's argument for an above Guidelines sentence, and (4) the lack of any indication that on remand the district court would impose a more lenient sentence.¹⁰²

The Fifth Circuit quickly disposed of the first element of plain error review, holding that the district court's failure to state reasons for a sentence outside the Guidelines is plain error.¹⁰³ This quick decision relied on the Supreme Court's holding in *Rita*: when a sentencing court imposes a sentence outside the Guidelines, the judge must explain the deviation.¹⁰⁴ The Fifth Circuit interpreted this to require some explanation by the sentencing judge.¹⁰⁵

⁹⁴ *Id.* at 830.

⁹⁵ *Id.* at 830-31.

⁹⁶ *Id.* at 832-33.

⁹⁷ *Id.* at 832.

⁹⁸ *Id.* at 833.

⁹⁹ *Id.*

¹⁰⁰ *United States v. Whitelaw*, 580 F.3d 256, 264 (5th Cir. 2009).

¹⁰¹ *Id.*

¹⁰² *Id.* at 264-65.

¹⁰³ *Id.* at 260-62.

¹⁰⁴ *Id.* at 261; *Rita v. United States*, 551 U.S. 338, 357 (2007).

¹⁰⁵ *Whitelaw*, 580 F.3d at 261.

When analyzing the second element of plain error review, whether the error affected the defendant's substantial rights, the court noted that this case was the first application of plain error review to an above Guidelines sentence in the Fifth Circuit.¹⁰⁶ The court illustrated the Fifth Circuit's traditional application of plain error review, discussing prior Fifth Circuit cases applying this standard to appeals [*1329] from within Guidelines sentences.¹⁰⁷ In these cases, the Fifth Circuit relied on the Supreme Court's holding in *Olano* that the phrase "affected the defendant's substantial rights" means "the proponent of the error must demonstrate a probability "sufficient to undermine confidence in the [district court's decision]."¹⁰⁸ The court noted that Fifth Circuit precedent specifically rejects applying a relaxed plain error standard of review in the context of sentencing appeals.¹⁰⁹

The Fifth Circuit went on to concede that an above Guidelines sentence differed substantially enough from a within Guidelines sentence to require a reevaluation of "whether [its] traditional plain error standard is appropriately applied in this context."¹¹⁰ A brief discussion of the circuit split followed.¹¹¹ The court characterized the split as being between a relaxed standard of review, focused on the ability of the appellate court to conduct a meaningful review, versus a traditional standard of review, focused on whether a more detailed reasoning process by the sentencing court would result in a different sentence.¹¹²

Without any discussion of the merits of either view, the court dismissed the relaxed standard, reasoning that the record in the case was substantial enough to allow for meaningful appellate review.¹¹³ The court then outlined the reasons for *Whitelaw's* above Guidelines sentence contained in the record.¹¹⁴ This discussion detailed the government's reasoning section of the MTR.¹¹⁵ The court then held, "We have no trouble concluding that by granting the [MTR] and sentencing *Whitelaw* to the [sentence] recommended [in the MTR], the district court implicitly adopted the government's rationale for that sentence as set forth in the motion."¹¹⁶

The Fifth Circuit concluded by considering whether the error triggered the subsequent impact determination because it affected the fairness, integrity, or public reputation of judicial proceedings.¹¹⁷ In its [*1330] discussion of the circuit split, the court observed that those

¹⁰⁶ *Id.* at 262.

¹⁰⁷ See *id.* at 262-63.

¹⁰⁸ *United States v. Mares*, 402 F.3d 511, 521 (5th Cir. 2005) (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004)); *United States v. Olano*, 507 U.S. 725, 734 (1993).

¹⁰⁹ *Whitelaw*, 580 F.3d at 262-63.

¹¹⁰ *Id.* at 263.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 264 n.1.

¹¹⁶ *Id.* at 264.

¹¹⁷ *Id.* at 263.

circuits applying a relaxed plain error standard hold that failure to give reasons for a sentence undermines public confidence in the judiciary.¹¹⁸ The court observed that those circuits conclude that a "statement of reasons indicates to the public that the sentencing judge has thoughtfully discharged his responsibilities and demonstrates that the judgment is not arbitrary."¹¹⁹ The Fifth Circuit determined that this concern was unwarranted, citing Vigil (2009) for support.¹²⁰ The Fifth Circuit reasoned that the record of the sentencing proceedings allowed for appellate review that was sufficient for the court to assess the reasonableness of Whitelaw's sentence.¹²¹ This review indicated (1) the implied reasoning of the sentencing court, (2) that the sentencing court did not consider any impermissible factors, and (3) on remand the court would not impose a more lenient sentence.¹²²

IV. Analysis

In the noted case, the Fifth Circuit's opinion reaches a correct conclusion by the wrong process. It is probable that Whitelaw's prior lenient sentence encouraged his recidivism.¹²³ It is also likely that the statutory maximum thirty-six-month sentence was more appropriate than the maximum Guideline sentence of ten months.¹²⁴ Recognizing this, the Fifth Circuit decided not to prolong the inevitable and affirmed Whitelaw's sentence.¹²⁵ However, as the Supreme Court observed in Booker, interest in fairness and reliability should always outweigh judicial economy concerns because "however convenient ... [new methods of trial] may appear at first ... delays, and little inconveniences in the forms of justice, are the price that all free nations must pay for their liberty in more substantial matters ... and that, though begun in trifles, the precedent may gradually increase and spread."¹²⁶ With this larger concern in mind, it is easy to understand why the Fifth Circuit's decision is correct and yet a dangerous precedent.

[*1331] The noted case proposes, contrary to Rita, that there is no specific reasoning requirement for Guideline departures.¹²⁷ According to the holding, a sentencing court can simply adopt a party's recommendation for an outside Guidelines sentence, implying that it also adopted the associated reasoning.¹²⁸ However, this holding is not supported by the facts of the noted case.¹²⁹ In the MTR, the government recommended the statutory maximum sentence of

¹¹⁸ Id.

¹¹⁹ Id.

¹²⁰ Id. at 264-65.

¹²¹ Id. at 265.

¹²² Id. at 264-65.

¹²³ See id. at 264 n.1.

¹²⁴ See id. at 259.

¹²⁵ See id. at 264-65.

¹²⁶ 543 U.S. 220, 244 (2005) (quoting 4 William Blackstone, Commentaries on the Laws of England 343-44 (1769) (alterations in original) (emphasis omitted)).

¹²⁷ 551 U.S. 338, 357 (2007); Whitelaw, 580 F.3d at 264-65.

¹²⁸ Whitelaw, 580 F.3d at 264-65.

¹²⁹ See id.

thirty-six months.¹³⁰ The government based the reasons for this sentence on the allegations in the MTR that Whitelaw violated the conditions of his supervised release on several occasions.¹³¹ However, the sentencing court declined to rule on whether Whitelaw committed one of the violations.¹³² It is difficult to conclude that the sentencing court impliedly adopted the entire reasoning in the MTR because the court expressly declined to rule on one of the violations on which that reasoning was based.¹³³ While the violation on which the court declined to rule may be a "trifle," this is exactly what Blackstone's observation warns against.¹³⁴

Whitelaw's sentence is similar to the sentence in *Acevedo*, where the Tenth Circuit held that a sentencing court's adoption of the government's reasons for a sentence, but imposition of a greater sentence, affected the defendant's substantial rights because it foreclosed the possibility of meaningful appellate review.¹³⁵ In *Acevedo*, adoption of the government's reasoning did not, without more, justify imposing a greater sentence.¹³⁶ In *Whitelaw*, the sentencing court imposed the government's recommended sentence, but could not impliedly adopt the government's entire argument for that sentence.¹³⁷ Therefore, similar to the holding of *Acevedo*, the adoption of the government's recommended sentence did not imply that the court adopted the government's reasoning, less the violation on which the court declined to rule, and that this adoption expressly demonstrated the reasons for Whitelaw's sentence.¹³⁸

[*1332] While it is easy to dismiss this concern as trivial, the noted case itself contains proof that mere trifles can become more persuasive precedent.¹³⁹ The Fifth Circuit, relying on the Tenth Circuit's opinion in *Vigil* (2009), posits that an appellate court can apply a record review approach to divine a sentencing court's reasons for a sentence.¹⁴⁰ However, this contradicts the Tenth Circuit's holdings in both *Vigil* (2008) and *Acevedo*.¹⁴¹ In those cases, the Tenth Circuit acknowledged that a sentencing court's failure to satisfy the reasoning requirement with explicit reasons for a sentence can affect not only the defendant's substantial rights but also prejudice the sentencing cycle as a whole.¹⁴² All three Tenth Circuit cases are trifles, in that they have limited precedential value because they are unpublished.¹⁴³ However, *Vigil* (2009)

¹³⁰ *Id.* at 267.

¹³¹ *Id.* at 258-59.

¹³² *Id.* at 259.

¹³³ *Id.* at 259, 264-65.

¹³⁴ See *id.* at 259; 4 Blackstone, *supra* note 126, at 342-44.

¹³⁵ 219 F. App'x 828, 830-31 (10th Cir. 2007).

¹³⁶ *Id.* at 832.

¹³⁷ 580 F.3d at 259, 264-65.

¹³⁸ See *id.*; *Acevedo*, 219 F. App'x at 830-31.

¹³⁹ See *Whitelaw*, 580 F.3d at 264-65.

¹⁴⁰ *Id.*; *United States v. Vigil*, No. 08-2293, 2009 U.S. App. LEXIS 14385 (10th Cir. June 30, 2009).

¹⁴¹ *Vigil*, 2009 U.S. App. LEXIS 14385, at 14; *United States v. Vigil*, 301 F. App'x 788, 790 (10th Cir. 2008).

¹⁴² *Vigil*, 301 F. App'x at 790; *Acevedo*, 219 F. App'x at 832-33.

¹⁴³ *Vigil*, 2009 U.S. App. LEXIS 14385, at 1; *Vigil*, 301 F. App'x at 788; *Acevedo*, 219 F. App'x at 829.

and the noted case represent the beginning of a line of precedent suggesting that implied, as opposed to express, reasons satisfy the reasoning requirement, in contrast to other existing precedent.¹⁴⁴

A review of both Second and Tenth Circuit jurisprudence demonstrates that appellate courts consistently hold that sentencing courts satisfy the reasoning requirement by explicitly offering some reason for a sentence.¹⁴⁵ This line of precedent transcends the split the Fifth Circuit identified in the noted case and finds direct support in *Gall and Rita*.¹⁴⁶ The Fifth Circuit's focus on the circuit split caused it to overlook the more pertinent issue in the noted case of whether a sentencing court satisfies the reasoning [*1333] requirement by impliedly adopting a party's reasoning. Both the Second and Tenth Circuits have precedent holding that only when adoption expressly demonstrates the reasons for imposing a particular sentence, as opposed merely to implying why a particular sentence may be justified, is the reasoning requirement satisfied.¹⁴⁷ Moreover, the facts of the noted case show that the reasoning in the MTR does not demonstrate the reason the sentencing court imposed the particular sentence, but rather only why the statutory maximum may have been justified.¹⁴⁸ While on the facts of the noted case this distinction may ultimately be moot, as precedent, the Fifth Circuit's holding risks obliterating the reasoning requirement by making the absence of an explicit statement of reasons a plain error that never affects a defendant's substantial rights and is therefore always harmless.¹⁴⁹

Aside from merely prejudicing Alan Whitelaw, this emerging line of contradictory precedent has the potential to impact the entire sentencing cycle negatively.¹⁵⁰ The Commission "monitors when courts depart from the Guidelines and ... analyzes their stated reasons ... so ... the Commission, over time, will be able to refine the Guidelines to specify more precisely when departures should and should not be permitted."¹⁵¹ In the noted case, the sentencing court imposed the government-recommended sentence, which was more than three times the maximum sentence under the Guidelines.¹⁵² Even assuming that Whitelaw's sentence is justified, the lack of any explicit reasoning for the sentence deprives the Commission of the chance to analyze the departure and revise the Guidelines accordingly.¹⁵³ The Fifth Circuit's

¹⁴⁴ See *Whitelaw*, 580 F.3d at 265-67; *Vigil*, 2009 U.S. App. LEXIS 14385, at 9.

¹⁴⁵ See, e.g., *United States v. Robertson*, 568 F.3d 1203, 1209, 1215 (10th Cir. 2009) (stating that district court judges must disclose their reasons for sentencing departures); *United States v. Nurse*, 193 F. App'x 101, 104 (2d Cir. 2006) (finding the district court's reasoning sufficient when based on the court's own familiarity with past behavior).

¹⁴⁶ *Gall v. United States*, 552 U.S. 38, 45 (2007); *Rita v. United States*, 551 U.S. 338, 357 (2007).

¹⁴⁷ *Robertson*, 568 F.3d at 1209, 1215 n.9; *United States v. Carter*, 489 F.3d 528, 540 (2d Cir. 2007).

¹⁴⁸ See *Whitelaw*, 580 F.3d at 259, 264 n.1.

¹⁴⁹ *United States v. Lewis*, 424 F.3d 239, 248-49 (2d Cir. 2005) (arguing that if a failure to satisfy the reasoning requirement does not affect a defendant's substantial rights there is, in effect, no reasoning requirement because it is a plain error that will always be harmless).

¹⁵⁰ See *Gall*, 552 U.S. at 45; *United States v. Booker*, 543 U.S. 220, 264 (2005).

¹⁵¹ U.S. Sentencing Guidelines Manual ch. 1, pt. A, at 7 (2009).

¹⁵² *Whitelaw*, 580 F.3d at 261.

¹⁵³ See *Rita v. United States*, 551 U.S. 338, 358 (2007).

conclusion that a sentencing court can impliedly adopt a party's reasoning by adopting that party's recommended sentence disrupts the sentencing cycle envisioned by the Act and maintained by the Supreme Court.¹⁵⁴ It allows sentencing judges to abdicate their duty to make a reasoned determination that a particular sentence is appropriate.¹⁵⁵ Ultimately, if appellate courts do not act as gatekeepers and remand these "unreasoned" sentences, the Commission will base its Guideline revisions on the reasoning of parties, who "have entirely different goals, different reasons for choosing a certain sentence, [*1334] which have never been approved as legitimate reasons to allocate punishment either by Congress or the Commission."¹⁵⁶

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¹⁵⁴ Gall, 552 U.S. at 45; Rita, 551 U.S. at 356; Booker, 543 U.S. at 264.

¹⁵⁵ Gall, 552 U.S. at 45.

¹⁵⁶ Nancy J. King, Reasonableness Review After Booker, 43 Hous. L. Rev. 325, 337 (2006).