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## Sidestepping Deference: How *United States v. Ressam* Encourages Overly Stringent Review of Sentencing Decisions

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## Sidestepping Deference: How *United States v. Ressam* Encourages Overly Stringent Review of Sentencing Decisions

### I. INTRODUCTION

In *United States v. Ressam*, the Ninth Circuit reviewed the sentence imposed on Ahmed Ressam, an Algerian national convicted in a terror plot to plant explosives at the Los Angeles International Airport (“LAX”) on New Year’s Eve 1999.<sup>1</sup> Reviewing district court-issued sentences requires appellate courts to give the sentencing decisions “substantial deference” without rendering appellate review an “empty exercise.”<sup>2</sup> Defining this balance, the Supreme Court in *Gall v. United States* directed appellate courts to examine all sentences—inside *and* outside the Federal Sentencing Guidelines (“Guidelines”) range—for both procedural error and substantive reasonableness, using the abuse-of-discretion standard.<sup>3</sup>

In *Ressam*, a three-judge panel, by a two-to-one majority, vacated Ressam’s below-Guidelines sentence because the majority determined that the sentencing judge committed procedural error.<sup>4</sup> This Note argues that the majority failed to apply the abuse-of-discretion standard with appropriate deference to the trial judge’s sentence.<sup>5</sup> The Ninth Circuit’s misapplication of the standard to review for procedural error more closely resembled a searching *de novo* review; consequently, the rigorous review to which the majority subjected the district court’s sentence led it to wrongly detect procedural error and vacate the sentence.<sup>6</sup> Further, this Note argues that the decision’s reasoning equips appellate courts with tools that could inappropriately encourage them to use an outcome-driven

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1. 593 F.3d 1095 (9th Cir. 2010).

2. *Koon v. United States*, 518 U.S. 81, 98 (1996).

3. 552 U.S. 38, 51 (2007). Black’s Law Dictionary defines “abuse of discretion” as “[a]n appellate court’s standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence.” BLACK’S LAW DICTIONARY 11 (9th ed. 2009).

4. *Ressam*, 593 F.3d at 1098, 1099.

5. *See Gall*, 552 U.S. at 56.

6. *See Ressam*, 593 F.3d at 1122–23, 1133–34.

analysis to encroach on traditional district court sentencing authority and vacate sentences with which the appellate courts disagree.<sup>7</sup>

## II. FACTS AND PROCEDURAL HISTORY

Ahmed Ressam, an Algerian national, traveled from France to Montreal in 1994 “using an illegally altered French passport.”<sup>8</sup> Although Canadian authorities intercepted him, “[a] moratorium on deportations from Canada to Algeria” permitted Ressam to remain in Canada.<sup>9</sup> In 1998 he traveled to Afghanistan under a fake name and underwent terrorist training in light weapons, explosives, sabotage, and urban warfare.<sup>10</sup> He returned to Canada in 1999 under directions to attack American interests before the end of the year; he chose to target LAX, one of the busiest American airports.<sup>11</sup>

In November 1999, Ressam traveled from Montreal to British Columbia, where he prepared explosives for the LAX bomb and hid them along with other explosive components in the wheel well of a rental car’s trunk.<sup>12</sup> He then entered the United States with the rental car via ferry from British Columbia to Port Angeles, Washington.<sup>13</sup> When customs inspectors searched the car upon his arrival in Port Angeles, Ressam fled and “attempted to carjack a vehicle” before the inspectors apprehended him and discovered the hidden explosives.<sup>14</sup>

After a jury convicted him on “nine counts relating to his attempt to carry out an act of terrorism transcending a national boundary,” Ressam agreed to cooperate with U.S. law enforcement officers investigating terror-related activities in exchange for a potential downward adjustment of his sentence.<sup>15</sup> Ressam provided information leading to a twenty-four-year prison sentence for Mokhtar Hauoari, one of Ressam’s co-conspirators,<sup>16</sup> and the

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7. *See id.* at 1134–35 (Fernandez, J., dissenting).

8. *Id.* at 1099 (majority opinion).

9. *Id.*

10. *Id.* at 1099–1100.

11. *Id.* at 1100–01.

12. *Id.*

13. *Id.* at 1101.

14. *Id.*

15. *Id.* at 1101–02; *see also* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2009).

16. *Ressam*, 593 F.3d at 1102–03; *see also* United States v. Haouari, S4-00-cr-15, 2001 WL 1154714 (S.D.N.Y. Sept. 28, 2001).

capture and detention at Guantanamo Bay of Ahcene Zemiri, another of his collaborators.<sup>17</sup> His cooperation buttressed U.S. Attorney complaints against Abu Doha—“a major player in the arena of terrorist activity”—and Samir Ait Mohamed, another of Ressam’s accomplices.<sup>18</sup> Ressam also identified Zacarias Moussaoui, one of the 9/11 perpetrators, as a trainee at an Afghan terrorist camp and helped identify the “Shoe Bomber” Richard Reid’s bomb as “a complete device that needed to be disarmed for transport to a lab for analysis.”<sup>19</sup> However, Ressam ultimately recanted much of his testimony and refused to cooperate further.<sup>20</sup> This led to the dismissal of charges against Abu Doha and Samir Ait Mohamed.<sup>21</sup>

The district court sentenced Ressam in July 2005 to twenty-two years of imprisonment.<sup>22</sup> On appeal, the Ninth Circuit reversed the conviction on one count and vacated Ressam’s sentence,<sup>23</sup> after which the United States Supreme Court reversed the Ninth Circuit and remanded the case.<sup>24</sup> The appellate court again vacated the sentence and remanded the case, this time because the district court had not established the appropriate Guidelines range as required by a Ninth Circuit case decided during the appeals process of *Ressam*.<sup>25</sup> In December 2008, the district court resentenced Ressam to twenty-two years in prison followed by five years of supervised release. The Guideline minimum for Ressam’s offenses, however, is sixty-five years.<sup>26</sup> As justification for the departure from the Guidelines minimum, the judge cited Ressam’s cooperation and the personal risk it entailed, his confinement conditions, and his mental and physical health together with his life history and personal characteristics.<sup>27</sup>

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17. *Ressam*, 593 F.3d at 1108.

18. *Id.* at 1100, 1103.

19. *Id.* at 1103.

20. *Id.* at 1106, 1108–09.

21. *Id.* at 1111.

22. *Id.* at 1107.

23. *United States v. Ressam*, 474 F.3d 597, 599 (9th Cir. 2007), *rev’d*, 553 U.S. 272 (2008).

24. *United States v. Ressam*, 553 U.S. 272 (2008).

25. *United States v. Ressam*, 538 F.3d 1166, 1167 (9th Cir. 2008).

26. *Ressam*, 593 F.3d at 1112–14, 1124.

27. *Id.* at 1112–14.

## III. SIGNIFICANT LEGAL BACKGROUND

At issue in this case is whether Ressam's below-Guidelines sentence was procedurally erroneous. District courts must ensure that the sentences they impose meet certain requirements in order to pass appellate scrutiny.<sup>28</sup> Appellate courts review such sentences under the deferential abuse-of-discretion review standard,<sup>29</sup> dividing their assessment into two parts: review for procedural error and review for substantive reasonableness.<sup>30</sup> They approach each part differently.<sup>31</sup> This section will examine review for procedural error. Relevant distinctions between reviewing for procedural error and substantive reasonableness will be analyzed in Part V.B.

*A. Procedural Criteria for District Court Sentencing*

The Supreme Court in *Gall v. United States* delineated guidelines a district court should follow to reach a procedurally sound sentence: the court should (1) "correctly calculat[e] the appropriate Guidelines range," (2) "remain cognizant of [it] throughout the sentencing process," (3) avoid basing the sentence on clearly erroneous facts, and (4) sufficiently explain any variance from the Guidelines range<sup>32</sup> or reasons for rejecting the parties' nonfrivolous arguments in favor of a different sentence.<sup>33</sup> District courts must also consider the factors outlined in 18 U.S.C. § 3553(a).<sup>34</sup> These include the history and characteristics of the defendant, the seriousness of the offense, promoting respect for the law, providing just punishment, adequately deterring criminal conduct, protecting the public from the defendant, and providing the defendant with effective correctional treatment.<sup>35</sup> Although

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28. *Gall v. United States*, 552 U.S. 38, 49–51 (2007).

29. *Id.* at 51.

30. *United States v. Gardellini*, 545 F.3d 1089, 1094 n.6 (D.C. Cir. 2008).

31. *See id.* (reasoning that review for substantive reasonableness assesses the *weight* accorded to particular sentencing factors, while procedural soundness review inquires only as to whether such factors were *considered*); *see also, e.g., Gall*, 552 U.S. at 51 (distinguishing between the discrete, concrete criteria procedurally sound sentences must satisfy and the general requirement that substantively reasonable sentences must be justified by the "totality of the circumstances").

32. *Gall*, 552 U.S. at 49–51, 50 n.6.

33. *See Rita v. United States*, 551 U.S. 338, 357 (2007).

34. *Gall*, 552 U.S. at 51.

35. 18 U.S.C. § 3553(a)(1)–(2) (2006).

sentencing judges may exercise discretion in the “brevity or . . . conciseness” with which they address these criteria,<sup>36</sup> sentences outside the Guidelines range typically require “sufficiently compelling” justification.<sup>37</sup>

*B. Abuse-of-Discretion: The Proper Standard for Appellate Review of District Court Sentences*

Prior to 2003, appellate courts reviewed sentences both inside and outside the appropriate Guidelines range under an abuse-of-discretion standard as the Supreme Court stipulated in *Koon v. United States*.<sup>38</sup> Congress, however, overruled *Koon* in 2003<sup>39</sup> and mandated that appellate courts employ a *de novo* standard of review for outside-Guidelines sentences.<sup>40</sup> But in 2005, *United States v. Booker* rendered advisory the once-mandatory Guidelines, excised the *de novo* review requirement, and redirected appellate courts to the pre-2003 practice of reviewing outside-Guidelines sentences for “reasonableness” in light of the § 3553(a) factors.<sup>41</sup> *Gall* explained that it is “pellucidly clear” that “reasonableness” review equates with abuse-of-discretion review.<sup>42</sup>

The standard is substantially deferential.<sup>43</sup> *Gall*, for instance, prohibits appellate courts from presuming that outside-Guidelines sentences are unreasonable<sup>44</sup> and precludes them from reversing a sentence because they “might reasonably have concluded that a different sentence was appropriate.”<sup>45</sup> Additionally, *Gall* rejects insufficiently deferential review practices such as “requir[ing] ‘extraordinary’ circumstances” to justify an outside-Guidelines

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36. *Rita*, 551 U.S. at 356.

37. *Gall*, 552 U.S. at 50; *see also* *United States v. Leyva-Ortiz*, 325 F. App’x 710, 715 (10th Cir. 2009) (noting that an outside-Guidelines sentence requires a “more specific” explanation than a within-Guidelines sentence, not necessarily a more “extensive” explanation).

38. *See* 518 U.S. 81, 98 (1996).

39. *Rita*, 551 U.S. at 361 (Stevens, J., concurring).

40. 18 U.S.C. § 3742(e), *invalidated by* *United States v. Booker*, 543 U.S. 220 (2005).

41. *Booker*, 543 U.S. at 259–61; *see also Gall*, 552 U.S. at 51 (“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.”).

42. *See Gall*, 552 U.S. at 46.

43. *See id.* at 47, 51.

44. *Id.*

45. *Id.* at 51.

sentence or employing “a rigid mathematical formula” to determine the necessary strength of justification for an outside-Guidelines sentence; these approaches “come too close to creating an impermissible presumption of unreasonableness” for such sentences.<sup>46</sup>

Abuse of discretion, moreover, is not a “monolithic standard.”<sup>47</sup> Its broad parameters encompass sub-standards used to assess particularized issues.<sup>48</sup> For instance, appellate courts may remain within the abuse-of-discretion rubric while examining questions of law *de novo*, mixed matters of law and fact for abuse of discretion, and purely factual issues for clear error.<sup>49</sup> In the context of sentencing review, questions of law include whether the district court correctly calculated the Guidelines range, mixed questions encompass the trial court’s application of the Guidelines to facts, and issues of straight fact involve the sentencing judge’s factual findings.<sup>50</sup>

The Supreme Court appears to require the abuse-of-discretion standard for examination of both procedural soundness and substantive reasonableness, though it is not clear on this point.<sup>51</sup> The Court stated in *Gall* that *all* sentences should be reviewed for abuse of discretion.<sup>52</sup> However, the Court then discussed appellate review for procedural error without mentioning any particular standard.<sup>53</sup> It went on to say that “appellate court[s] should *then* consider [the sentence’s] substantive reasonableness . . . under an abuse-of-discretion standard,”<sup>54</sup> intimating that the standard may apply only

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46. *Id.* at 47.

47. *United States v. Carrasco-de-Jesus*, 589 F.3d 22, 27 (1st Cir. 2009).

48. *See id.* (noting that review under abuse-of-discretion requires *de novo* review for “embedded questions of law” and clear-error review for embedded questions of fact); *see also* *Koon v. United States*, 518 U.S. 81, 100 (1996) (“The abuse-of-discretion standard includes [*de novo*] review to determine that the [district court’s] discretion was not guided by erroneous legal conclusions.”).

49. *See United States v. Grissom*, 525 F.3d 691, 696 (9th Cir. 2008).

50. *Id.*

51. *See United States v. Martin*, 520 F.3d 87, 92 (1st Cir. 2008) (citing *Gall*, 552 U.S. at 51) (indicating that once an appellate court finds a sentence procedurally sound, it reviews for substantive reasonableness “under the same abuse of discretion rubric”).

52. *See Gall*, 552 U.S. at 51.

53. *Id.*

54. *Id.* (emphasis added).

to substantive reasonableness review and not the initial procedural soundness inquiry.<sup>55</sup>

The Ninth Circuit indeed determined in *United States v. Grissom* that *Gall* did not require a change to the circuit's standard of review for sentencing decisions.<sup>56</sup> Because *Gall* did not explicitly mandate the abuse-of-discretion standard for review of procedural soundness, the *Grissom* Court reasoned, it left "untouched the preexisting standards of review for questions of procedural reasonableness."<sup>57</sup> Nevertheless, the Ninth Circuit's pre-*Gall* method of examining sentences for procedural reasonableness squared with the abuse-of-discretion standard that other circuits employ to review both procedural soundness and substantive reasonableness.<sup>58</sup> This method scrutinizes "the district court's interpretation of the . . . Guidelines *de novo*, [its] application of the . . . Guidelines to the facts . . . for abuse of discretion, and [its] factual findings for clear error."<sup>59</sup> Thus, *Grissom* declares that only review for substantive reasonableness is subject to the abuse-of-discretion standard, but the standard it delineates for procedural soundness review nominally squares with abuse-of-discretion review.<sup>60</sup>

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55. See *Grissom*, 525 F.3d at 696 n.2 (reading the holding of *Gall* as limited to substantive reasonableness and leaving intact the preexisting multi-level review standard for procedural error).

56. *Id.* at 696.

57. *Id.* at 696 n.2.

58. Compare *United States v. Cantrell*, 433 F.3d 1269, 1279 (9th Cir. 2006) (describing the abuse-of-discretion test applicable to procedural error review), with *United States v. Merced*, 603 F.3d 203, 214 (3d Cir. 2010) (citing *Gall*, 552 U.S. at 46) (noting that the abuse-of-discretion standard applies to each stage of the two-stage review process for procedural error and substantive reasonableness), *United States v. Shaw*, 560 F.3d 1230, 1237 (11th Cir. 2009) (same), *United States v. Carrasco-de-Jesus*, 589 F.3d 22, 27 (1st Cir. 2009) (noting that within the margins of the abuse-of-discretion standard questions of law receive *de novo* review and findings of fact receive clear-error review), and *United States v. Martin*, 520 F.3d 87, 92 (1st Cir. 2008) (indicating that review for substantive reasonableness occurs under "the same abuse of discretion rubric" as examination for procedural soundness).

59. *Cantrell*, 433 F.3d at 1279 (quoting *United States v. Kimbrew*, 406 F.3d 1149, 1151 (9th Cir. 2005)).

60. Compare *Grissom*, 525 F.3d at 696 ("Prior to *Gall*, we 'review[ed] the district court's interpretation of the Sentencing Guidelines *de novo*, the district court's application of the Sentencing Guidelines to the facts of a case for abuse of discretion, and the district court's factual findings for clear error.' We do not read *Gall* to change that practice." (quoting *Cantrell*, 433 F.3d at 1279)), with *Carrasco-de-Jesus*, 589 F.3d at 27 ("[A]buse of discretion is not a monolithic standard.").

## IV. THE COURT'S DECISION

The Ninth Circuit, reviewing for procedural soundness *sua sponte*, vacated Ressam's sentence based on the following errors in the sentencing process: failure to properly consider the Guidelines, and failure to adequately address the government's arguments regarding Ressam's history and characteristics, the value of his cooperation with prosecutors, and the need for a longer sentence to adequately protect the public.<sup>61</sup>

*A. Framework for Reviewing Procedural Soundness*

Although the government's challenge to Ressam's sentence expressly disclaimed allegations of procedural error, the majority held as a threshold matter that *Gall* requires *sua sponte* appellate review for procedural error, even when the parties do not assert it.<sup>62</sup> The court reasoned that review for substantive reasonableness without first having reviewed for procedural error would be "analytically problematic."<sup>63</sup> Further, it noted that a district court's failure to adequately explain an outside-Guidelines sentence in a "complex or complicated case" such as *Ressam*,<sup>64</sup> versus a "straight-forward" or "typical" case,<sup>65</sup> constitutes procedural error.<sup>66</sup> Relying on *Gall*, the majority then outlined a sufficient explanation for an outside-Guidelines sentence in a complex case, including properly calculating and minding the Guidelines range, considering the § 3553(a) factors, avoiding erroneous factual conclusions, and sufficiently explaining the sentence.<sup>67</sup>

*B. Procedural Error in the District Court's Sentencing Process*

Applying this framework, the majority noted four procedural errors in Ressam's sentence.<sup>68</sup> First, it held that the district court did

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61. United States v. Ressam, 593 F.3d 1095, 1115–16, 1122–23 (9th Cir. 2010).

62. *Id.* at 1115–16.

63. *Id.* at 1116 (arguing that for appellate courts to review substantive reasonableness, they must first see district courts' procedural steps).

64. *Id.* at 1117.

65. *Id.* at 1116–17 (quoting United States v. Carty, 520 F.3d 984, 993, 995 (9th Cir. 2008) (internal quotation marks omitted)).

66. *Id.* at 1117.

67. *Id.* at 1117–20.

68. *Id.* at 1122–23.

not use the Guidelines as a starting point in its sentencing process because the sentencing judge believed the government's pre-trial plea offer of a twenty-five-year sentence was a legally proper starting point for calculating the sentence.<sup>69</sup> The court further determined that the sentencing judge did not mind the Guidelines throughout the sentencing process because he did not sufficiently justify the outside-Guidelines sentence; aside from two "passing references" that generally acknowledged divergence from the Guidelines, the judge did not explicitly address the degree of variance or why it was justified.<sup>70</sup>

The second error concerned the district court's valuation of Ressam's assistance to prosecutors.<sup>71</sup> The majority concluded that, contrary to the Guidelines, the sentencing judge gave no weight to the government's evaluation of Ressam's assistance, instead relying wholly on Ressam's own assessment.<sup>72</sup> The government argued that Ressam cooperated only when faced with a life sentence, provided information already available in classified form, undermined his own assistance by recanting much of it, and terminated his cooperation prematurely.<sup>73</sup> Because the district court inadequately explained why it rejected the government's arguments, the majority held that it could not determine whether the judge abused his discretion.<sup>74</sup>

Third, the majority held to be "clearly erroneous" the district court's factual finding that Ressam's life and personal characteristics supported a favorable sentence.<sup>75</sup> The majority determined that the record showed that "Ressam has lead [sic] a life of crime dedicated to terrorist causes," and that the district court failed to address this and square it with its finding that Ressam's "true character is manifest in his decision to cooperate."<sup>76</sup>

The fourth error was the district court's failure to discuss the § 3553(a) factor requiring sentences to protect the public from the

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69. *Id.* at 1123.

70. *Id.* at 1123–25.

71. *Id.* at 1122–23.

72. *Id.* at 1126.

73. *Id.* at 1126–27.

74. *Id.* at 1125, 1128.

75. *Id.* at 1128.

76. *Id.*

defendant, which omission the majority found “particularly troubling [in this case] given the nature of Ressam’s crimes.”<sup>77</sup>

### C. Dissent

Judge Fernandez contended in dissent that the district court’s “sentence was neither procedurally erroneous nor substantively unreasonable.”<sup>78</sup> He suggested that the majority failed to accord sufficient deference to the district court’s sentence and, by doing so, improperly entered “territory . . . forbidden to [appellate courts],” swapping the sentencing judge’s decision with the majority’s own.<sup>79</sup> Because neither party had alleged procedural error, Judge Fernandez intimated that the court should have reviewed the sentence only for substantive reasonableness, and that even that should have been done “with a great deal of humility.”<sup>80</sup> Even if review for procedural soundness had been appropriate, he noted that the district court “touched all of the procedural bases” and therefore committed no procedural error.<sup>81</sup>

## V. ANALYSIS

The Ninth Circuit panel majority erroneously vacated Ahmed Ressam’s twenty-two-year prison sentence<sup>82</sup> by failing to review the procedural soundness of the sentence under the abuse-of-discretion standard.<sup>83</sup> Although the *Ressam* majority purported to review for abuse of discretion,<sup>84</sup> the court misapplied the standard by failing to proceed with the deference that the standard requires. This permitted the majority to ferret procedural error from the district court’s sentencing decision. Under a properly applied abuse-of-discretion standard, the sentencing process satisfied all procedural requirements.<sup>85</sup>

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77. *Id.* at 1129.

78. *Id.* at 1135 (Fernandez, J., dissenting).

79. *See id.*

80. *See id.* at 1134–35, 1134 n.1.

81. *Id.* at 1134.

82. *Id.* at 1099 (majority opinion).

83. *See id.* at 1122 (citing *United States v. Grissom*, 525 F.3d 691, 696 & n.2 (9th Cir. 2008)).

84. *Id.*

85. *See id.* at 1134 (Fernandez, J., dissenting).

*A. Ninth Circuit Sidesteps the Deferential Abuse-of-Discretion Standard*

The Ninth Circuit cited its decision in *United States v. Grissom* to establish the standard it employed in *Ressam* to examine procedural soundness.<sup>86</sup> Maintaining that *Gall* explicitly designated the abuse-of-discretion standard only for review of substantive reasonableness, the *Grissom* court suggested that procedural soundness review called for a standard different from the abuse-of-discretion standard used in review of substantive reasonableness.<sup>87</sup> Nevertheless, each element of the standard corresponds with the abuse-of-discretion standard when appropriately conceived as a tiered standard of review depending on the question under consideration.

The Ninth Circuit's standard mandates *de novo* review of the district court's interpretation of the Guidelines and clear-error review for factual findings.<sup>88</sup> Similarly, the Supreme Court has indicated that appellate abuse-of-discretion review may include *de novo* review to examine district courts' legal conclusions.<sup>89</sup> The First Circuit agreed, observing that *de novo* review of questions of law, such as interpretations of the Guidelines, fall under the abuse-of-discretion standard.<sup>90</sup> Further, it noted that clear-error review for factual findings is in harmony with abuse-of-discretion review.<sup>91</sup> Regarding mixed questions of law and fact, such as district courts' application of the Guidelines to facts, the Ninth Circuit acknowledged that the abuse-of-discretion standard applies.<sup>92</sup> Thus the standard the *Ressam* majority pulled from *Grissom* and professed to employ for procedural soundness review equates with the deferential abuse-of-discretion standard.<sup>93</sup>

But by misapplying the abuse-of-discretion standard in its review for procedural error,<sup>94</sup> the majority sidestepped the substantial deference the standard requires for appellate sentence review.<sup>95</sup> As a

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86. *Id.* at 1121–22 (majority opinion) (citing *Grissom*, 525 F.3d at 696 & n.2).

87. *Grissom*, 525 F.3d at 696 & n.2.

88. *Id.* at 696.

89. *Koon v. United States*, 518 U.S. 81, 100 (1996).

90. *United States v. Carrasco-de-Jesus*, 589 F.3d 22, 27 (1st Cir. 2009).

91. *Id.*

92. *Grissom*, 525 F.3d at 696.

93. *See United States v. Ressam*, 593 F.3d 1095, 1121–22 (9th Cir. 2010).

94. *See id.* at 1122.

95. *See, e.g.*, Lindsay C. Harrison, *Appellate Discretion and Sentencing After Booker*, 62

result, the court overturned Ressam's sentence even though it was not "illogical, implausible, or without support in inferences that may be drawn from facts."<sup>96</sup>

Deference for district courts' sentencing decisions is rooted in Supreme Court directives and district courts' practical advantages in sentencing. For its part, the Supreme Court has in recent decisions enhanced district courts' sentencing discretion.<sup>97</sup> It has also recognized district courts' "institutional advantage" in making sentencing decisions, due to their consistent exposure to Guidelines cases.<sup>98</sup>

Additionally, district courts have traditionally been given wide latitude in the sentencing sphere. This deference is rooted in what one professor termed the "you are there" principle: trial judges are present to observe interpersonal dynamics between lawyers, witnesses, and juries.<sup>99</sup> Appellate courts, on the other hand, do not see defendants, victims, or victims' families testify at trial; nor are appellate judges typically experienced at sentencing.<sup>100</sup> Conversely, district courts' "ring-side perspective on the sentencing hearing and [their] experience over time in sentencing" grant them "comparative advantages" in sentencing over appellate courts.<sup>101</sup>

When trial judges' decisions are based on critical facts or circumstances "that the record imperfectly conveys," as is typically the case in sentencing decisions, appellate courts should defer to

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U. MIAMI L. REV. 1115, 1157 (2008) (arguing that district courts possess "special expertise" in respect to sentencing decisions).

96. See *Ressam*, 593 F.3d at 1122 (quoting *United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (internal quotation marks omitted)).

97. See *United States v. Vonner*, 516 F.3d 382, 392 (6th Cir. 2008) ("*Booker* empowered district courts, not appellate courts and not the Sentencing Commission. Talk of presumptions, plain error and procedural and substantive rules of review means nothing if it does not account for the central reality that *Booker* breathes life into the authority of district court judges to engage in individualized sentencing within reason in applying the § 3553(a) factors to the criminal defendants that come before them."). *Vonner* pointed to four recent Supreme Court decisions that significantly bolstered the discretion of the district court judge in sentencing: *Kimbrough v. United States*, 552 U.S. 85 (2007); *Gall v. United States*, 552 U.S. 38 (2007); *Rita v. United States*, 551 U.S. 338 (2007); *United States v. Booker*, 543 U.S. 220 (2005).

98. *Koon v. United States*, 518 U.S. 81, 98 (1996).

99. Maurice Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 183 (1978).

100. *United States v. Poynter*, 495 F.3d 349, 351 (6th Cir. 2007).

101. *Id.* at 351-52.

district courts' conclusions.<sup>102</sup> In light of these traditional policies and standards, the standard the *Ressam* majority actually used to examine *Ressam*'s sentence for procedural error failed to accord the district court the deference it should have received under a properly applied abuse-of-discretion standard.

*B. Inadequately Deferential Review Standard Yields Errant Findings of Procedural Error*

Illustrating the stringency of its review standard, the *Ressam* majority was able to review for procedural soundness only because it incorrectly held that appellate courts have a “duty” to review for procedural error sua sponte, even when neither party raises the issue on appeal.<sup>103</sup> This holding is inconsistent with Ninth Circuit precedent<sup>104</sup> and is based on an errant reading of *Gall*, which interpreted the Supreme Court's directive to “first” review for procedural error as a requirement to *always* do so.<sup>105</sup> The Ninth Circuit in *Ressam* thus erred by ruling, contrary to its own prior practice, that appellate courts *must* review for procedural error whether or not it is alleged.

The misapplied review standard also resulted in errant findings of procedural error in the district court's sentencing process. The majority wrongly concluded that the sentencing judge “failed to use the Guidelines as a starting point” in the sentencing process and did not “remain cognizant” of [the Guidelines] throughout the process.”<sup>106</sup> Because the sentencing judge merely calculated the

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102. Rosenberg, *supra* note 99, at 183 (contending that trial judges' rulings deserve “substantial” respect “whenever [they are] based on facts or circumstances that are critical to decision and that the record imperfectly conveys”).

103. See *United States v. Ressam*, 593 F.3d 1095, 1115–16 (9th Cir. 2010).

104. See *United States v. Paul*, 561 F.3d 970, 974 n.2 (9th Cir. 2009) (reviewing only for substantive reasonableness because “no one contends that the original sentence was procedurally invalid”); *United States v. Edwards*, 595 F.3d 1004, 1014 (9th Cir. 2009) (addressing procedural soundness with one sentence because “neither party challeng[ed] the [sentence's] procedural soundness”); *United States v. Whitehead*, 532 F.3d 991, 993 (9th Cir. 2008) (avoiding the issue of procedural soundness where neither party alleged procedural error).

105. See *Ressam*, 593 F.3d at 1115–16; see also *Gall v. United States*, 552 U.S. 38, 51 (2007) (“[The appellate court] must first ensure that the district court committed no significant procedural error . . . . Assuming that the district court's sentencing decision is procedurally sound, the appellate court should then consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.”).

106. *Ressam*, 593 F.3d at 1122 (quoting *Gall*, 552 U.S. at 50 n.6).

Guidelines range at the outset of the sentencing hearing and referenced it only twice more “in passing,” the majority held that he “did not appear to give *any weight whatsoever* to the Guidelines range.”<sup>107</sup>

Yet the judge’s treatment of the Guidelines fulfilled the legal requirements of the sentencing process.<sup>108</sup> He calculated the Guidelines range, which neither party claimed he did incorrectly.<sup>109</sup> He used the range as a starting point and initial benchmark and remained cognizant of it during the sentencing process, as reflected by his proper calculation of the range at the outset and his two references to the Guidelines during the hearing. In fact, he expressly acknowledged that “the sentence I am imposing reflects a significant downward deviation from the advisory guideline range,” which he found to be justified by the § 3553(a) factors.<sup>110</sup> In the absence of guidance for how a trial judge “remain[s] cognizant” of the Guidelines range, the *Ressam* district court’s initial Guidelines calculation and final recognition of deviation should be sufficient to infer that the judge “remained cognizant” of the Guidelines range throughout the sentencing process. To hold otherwise would compel judges to render opinions riddled with unnecessary references to the Guidelines range.<sup>111</sup> The district court thus “touched all of the procedural bases” relating to the Guidelines range.<sup>112</sup>

Further, the district court considered each § 3553(a) factor and adequately articulated its reasoning for departing from the Guidelines range.<sup>113</sup> Although sentencing judges must explain outside-Guidelines sentences sufficiently to allow “meaningful appellate review,”<sup>114</sup> they need only provide enough explanation to show that they “considered the parties’ arguments” and have a

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107. *Id.* at 1123 (emphasis added).

108. *Id.* at 1134 (Fernandez, J., dissenting).

109. *Id.*

110. *See id.* at 1114, 1123 (majority opinion) (citation omitted).

111. *Cf. Rita v. United States*, 551 U.S. 338, 356 (2007) (“The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances.”); *United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008) (“The district court need not tick off each of the § 3553(a) factors to show that it has considered them.”).

112. *See Ressam*, 593 F.3d at 1134 (Fernandez, J., dissenting).

113. *Id.*

114. *Carty*, 520 F.3d at 992.

reasonable basis for the sentence.<sup>115</sup> Here, the district court's explanation demonstrated that it contemplated the parties' contentions<sup>116</sup> and adequately revealed the reasoning behind the reduced sentence; it cited as support Ressam's cooperation leading to terrorist convictions, his confinement conditions, his life and characteristics, and the need to encourage other captured terrorists to cooperate.<sup>117</sup>

The majority also cited the sentencing judge's failure to address the government's nonfrivolous arguments regarding the value of Ressam's cooperation with law enforcement, the impact of his recantation, and the need for a longer sentence to protect the public as procedural error.<sup>118</sup> It noted that "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."<sup>119</sup> But the sentencing judge explained why he rejected the government's arguments, recognizing that, although Ressam's recantation "resulted in the dismissal of two pending prosecutions and the retraction of certain of his statements against two other terrorist suspects," his "cooperation, while it lasted, provided the United States government and [other] governments . . . extensive intelligence that proved to be invaluable in the fight against international terrorism."<sup>120</sup> Further, although the judge "did not specifically discuss the need to protect the public, [he] did note that [he] had to consider this factor, and we have nothing to indicate that [he] did not do so."<sup>121</sup>

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115. *Rita*, 551 U.S. at 356.

116. *Ressam*, 593 F.3d at 1112–14 (majority opinion) ("[T]he seriousness and heinousness of the act of terrorism Mr. Ressam was carrying out at the time of his arrest cannot be understated. . . . Mr. Ressam's extensive and valuable cooperation . . . ended unwisely and prematurely . . . . The Court recognizes that Mr. Ressam's later decision to end his cooperation resulted in the dismissal of two pending prosecutions and the retraction of certain of his statements against two other terrorist suspects. . . . I believe that the sentence I am imposing today will serve as a deterrent . . . . Moreover, I have considered the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." (citation omitted)).

117. *See id.*

118. *Id.* at 1122–23.

119. *Carty*, 520 F.3d at 992–93 (citing *Rita*, 551 U.S. at 356).

120. *Ressam*, 593 F.3d at 1113.

121. *Id.* at 1134 (Fernandez, J., dissenting).

While the district court thus satisfied all the procedural criteria, the majority attempted to buttress its finding of error by departing from the test for procedural error. The majority took issue with the relative weight the district court gave to several of the sentencing considerations.<sup>122</sup> But the *weight* a district court gives to specific procedural requirements should not be considered during review for the sentence's procedural soundness. Rather, the weighing of procedural criteria should be examined during review for substantive reasonableness; examination for procedural error analyzes only whether a district court *considered* the requirements.<sup>123</sup> Even then, one commentator has argued that appellate courts cross the "threshold of necessary deference" when they question how a district court weighed the § 3553(a) factors.<sup>124</sup> The commentator further suggests that appellate courts should only reverse a sentence for substantive unreasonableness if it is "irrational or arbitrary," inconsistent with the district court's explanation thereof, "based on impermissible factors," or issued without the district court having considered relevant § 3553(a) factors.<sup>125</sup> Thus, under its own precedent, the Ninth Circuit should reverse only sentences that are illogical, illegal, or insupportable by inferences drawn from the facts.<sup>126</sup>

Here, the sentence was logical, legal, and factually supported. The district court intended the below-Guidelines sentence to encourage other captured terrorists to emulate Ressam's cooperation, which helped convict dangerous terrorism conspirators.<sup>127</sup> The court also considered that Ressam's harsh confinement circumstances may have worn on his health and

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122. *Id.* at 1122–23, 1128–29 (majority opinion) (contesting the weight given the Guidelines range, the government's evaluation of Ressam's cooperation and his life and characteristics, and the § 3553(a) condition that sentences adequately protect the public).

123. *United States v. Gardellini*, 545 F.3d 1089, 1094 n.6 (D.C. Cir. 2008) (citing *Gall v. United States*, 552 U.S. 38, 52–55, 59 (2007)).

124. *Harrison*, *supra* note 95, at 1156.

125. *Id.* at 1154–56.

126. *See United States v. Hinkson*, 585 F.3d 1247, 1251 (9th Cir. 2009) (outlining the Ninth Circuit's two-part "abuse of discretion" test, which first considers whether the district court identified the correct legal standard for the issue in question, and then decides whether the district court's findings of fact and applications thereof to correct legal standards were "illogical, implausible, or without support in inferences that may be drawn from facts in the record").

127. *Ressam*, 593 F.3d at 1112–13.

contributed to his decision to terminate his assistance.<sup>128</sup> Further, the government itself originally suggested a comparable sentence in light of Ressam's prospective assistance.<sup>129</sup> Thus, considering the substantial deference appellate courts must give district courts' sentencing decisions,<sup>130</sup> Ressam's sentence was suitable based on the totality of the circumstances.

#### VI. CONCLUSION: RAMIFICATIONS OF *RESSAM*

The Ninth Circuit's misapplication of the deferential abuse-of-discretion standard to procedural soundness review in *Ressam* not only led to errant findings of procedural error,<sup>131</sup> but also appears to encourage and equip appellate courts to reverse sentences with which they disagree. For instance, *Ressam* invites appellate courts to examine sentences more closely than even the appellant wishes by *requiring* review for procedural error whether or not the parties allege it.<sup>132</sup> District courts' assurances that they considered each § 3553(a) factor are insufficient to avoid procedural error under *Ressam*, even though district courts are ostensibly not required to "tick off" each factor as they consider it.<sup>133</sup> The court also removed a key distinction between procedural and substantive review when it reviewed for procedural soundness by examining the weight the district court gave to the § 3553(a) factors.<sup>134</sup>

These less deferential means of sentence review undercut *Gall's* maxim that reviewing courts may not reverse merely because they would have chosen a different sentence.<sup>135</sup> Moreover, they run counter to traditional notions of the deference due a trial judge and the Supreme Court's recent theme of enhancing that deference in the context of sentencing review.<sup>136</sup> In sum, the majority's refusal to

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128. *See id.* at 1106, 1113. The government argued that the district court erred in crediting Ressam's psychiatrist's assessment that Ressam's confinement conditions negatively affected his mental health, which prevented him from remembering details and ultimately led to his ceasing cooperation. *Id.*

129. *Id.* at 1106–07 (noting that the United States Attorney offered Ressam a pre-trial plea offer of twenty-five years in prison).

130. *See Koon v. United States*, 518 U.S. 81, 98 (1996).

131. *See Ressam*, 593 F.3d at 1099.

132. *Id.* at 1115–16.

133. *United States v. Carty*, 520 F.3d 984, 992 (9th Cir. 2008).

134. *See supra* notes 122–26 and accompanying text.

135. *See Gall v. United States*, 552 U.S. 38, 51 (2007).

136. *See supra* notes 95–102 and accompanying text.

apply the abuse-of-discretion standard to procedural soundness review enabled the court to find nonexistent procedural error and erroneously vacate Ressay's sentence. This decision is inconsistent with the appellate deference owed to district courts' sentencing decisions and thereby wrongly encourages appeals courts to engage in outcome-based analysis to defeat sentences with which they disagree.

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