

05-4976-cr

To Be Argued By:
KAREN L. PECK

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-4976-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

WANDA L. NURSE, also known as Wanda L. Wilson,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

Table of Authorities	iii
Statement of Jurisdiction	v
Statement of Issues Presented for Review	vi
Preliminary Statement	1
Statement of the Case	2
Statement of Facts	4
A. Nurse’s Background in the District Court	4
B. Nurse’s Violation of Conditions of Supervised Release	7
Summary of Argument	12
Argument	13
I. The Sentence Imposed by the District Court Should Be Affirmed Given the District Court’s Consideration of the Requisite Factors, the Explanation Provided, and the Reasonableness of the Sentence	13
A. Relevant Facts	13
B. Governing Law and Standard of Review	13
C. Discussion	15

II. Should This Court Require Further Articulation of the District Court’s Reasoning, a Limited Remand Is Appropriate	20
A. Relevant Facts	20
B. Governing Law and Standard of Review	20
C. Discussion	22
Conclusion	24
Addendum	

TABLE OF AUTHORITIES

CASES

PURSUANT TO “BLUE BOOK” RULE 10.7, THE GOVERNMENT’S CITATION OF CASES DOES NOT INCLUDE “CERTIORARI DENIED” DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

<i>United States v. Blount</i> , 291 F.3d 201 (2d Cir. 2002)	18
<i>United States v. Fernandez</i> , __ F.3d __, 2006 WL 851670 (2d Cir. Apr. 3, 2006)	16
<i>United States v. Fleming</i> , 397 F.3d 95 (2d Cir. 2005)	13, 14, 15
<i>United States v. Fuller</i> , 426 F.3d 556 (2d Cir. 2005)	15
<i>United States v. Jacobson</i> , 15 F.3d 19 (2d Cir. 1994)	4, 12, 20, 21, 23
<i>United States v. Jimenez-Beltre</i> , 404 F.3d 514 (1st Cir. 2006) (en banc)	16
<i>United States v. Lewis</i> , 424 F.3d 239 (2d Cir. 2005)	<i>passim</i>
<i>United States v. Molina</i> , 356 F.3d 269 (2d Cir. 2004)	15

<i>United States v. Nurse</i> , 205 F.3d 1326, 2000 WL 127515 (2d Cir. 2000) (unpub.)	3, 6
<i>United States v. Pelensky</i> , 129 F.3d 63 (2d Cir. 1997)	13, 15
<i>United States v. Santiago</i> , 384 F.3d 31 (2d Cir. 2004)	21
<i>United States v. Sweeney</i> , 90 F.3d 55 (2d Cir. 1996)	13
<i>United States v. Zackson</i> , 6 F.3d 911 (2d Cir. 1993)	21

STATUTES

18 U.S.C. § 3231	v
18 U.S.C. § 3553	<i>passim</i>
18 U.S.C. § 3583	<i>passim</i>
18 U.S.C. § 3742	v

GUIDELINES

U.S.S.G. § 7B1.1	16
U.S.S.G. § 7B1.4	16

STATEMENT OF JURISDICTION

The district court (Ellen Bree Burns, Senior U.S. District Judge) had jurisdiction over the federal supervised release violation pursuant to 18 U.S.C. §§ 3231 and 3583(e). This Court has jurisdiction under 18 U.S.C. §§ 3742(a)(1) and (3) over the defendant's claim that her sentence for her admitted violation of the conditions of her supervised release was imposed in violation of law.

**STATEMENT OF ISSUE
PRESENTED FOR REVIEW**

Whether, where the record reflects that the district court considered its substantial experience with the defendant, its full familiarity with her history and character, and in particular her extensive record of deceitfulness, the district court satisfied its obligation to provide a reason for the 24-month sentence it imposed for a violation of the conditions of supervised release?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-4976-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

WANDA L. NURSE, also known as Wanda L. Wilson,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR UNITED STATES OF AMERICA

Preliminary Statement

This is an appeal from a 24-month sentence imposed by the district court (Ellen Bree Burns, Senior U.S. District Judge) for the defendant's admitted violation of the conditions of her supervised release. The only claim before this Court is that the district court did not provide an adequate explanation for the sentence it imposed, which was above the 7-13 month advisory guideline range. Judge Burns had presided over three separate trials of the

defendant and had extensive knowledge of her long history of deceit, predatory criminal conduct, and breaches of the court's trust. At sentencing, Judge Burns explicitly referenced her long history with the defendant; her awareness of the defendant's utter deceitfulness; and her view that she had never encountered a defendant like Nurse.

In an attempt to resolve the defendant's sole appellate claim efficiently, the Government moved for a limited remand to allow the district court to amplify its rationale for the sentence. The defendant opposed the Government's motion, and a motions panel of this Court denied it without prejudice to renewal before the merits panel. The Government submits that the record, as it stands, provides a sufficient basis for this Court to evaluate the reasonableness of the sentence. If this Court finds that further explanation is required, the Government renews its motion for limited remand so that the district court can provide such further explanation before this Court decides the defendant's claim.

Statement of the Case

On May 8, 1998, Defendant-Appellant Wanda L. Nurse was convicted after a jury trial in the District of Connecticut before the Honorable Ellen Bree Burns, Senior United States District Judge, of 16 counts of various types of fraud. (Presentence Report ("PSR") at ¶ 1) On August 26, 1998, Nurse was sentenced by Judge Burns principally to 72 months of imprisonment followed by five years of supervised release. (Appendix ("App.") at

A5-A6) The sentence included an upward departure from the applicable range under the United States Sentencing Guidelines. (App. at A22-A23, A35) This Court affirmed Nurse's conviction on appeal. *United States v. Nurse*, 205 F.3d 1326, 2000 WL 127515 (2d Cir. 2000) (unpub.). Nurse did not challenge her sentence.

On November 14, 2003, Nurse began her term of supervised release. (App. at A6) On August 8, 2005, the Probation Office in the District of Connecticut petitioned the district court for a warrant for Nurse's arrest based on a number of violations of the conditions of her supervised release. (App. at A1, A5, A10) She was arrested on that federal warrant on August 11, 2005, and brought before a United States Magistrate Judge for her initial revocation hearing on that same day. (App. at A1) The Magistrate Judge found probable cause to believe that a violation had occurred and ordered Nurse's detention until a full revocation hearing could be held before the district court.

On September 7, 2005, a final revocation hearing was held before Judge Burns. (App. at A1, A13-A57) Nurse conceded one of the violations that formed the basis for the warrant. (App. at A19) After hearing from Nurse's counsel (App. at A19-A22, A24-A41, A49-A52), from Nurse herself (App. at A42-A43), and from the Government (App. at A15-A19, A22-A23, A43-A49), Judge Burns sentenced Nurse to a term of imprisonment of 24 months with no additional period of supervised release. (App. at A53-A56) Judgment was entered on September 20, 2005. (App. at A1) Nurse filed a timely notice of appeal on September 12, 2005. (App. at A1)

On January 10, 2006, Nurse filed an appellant's brief, challenging the sentence solely on the ground that the district court failed to articulate adequately the reasons for the sentence imposed, which included an upward departure from the advisory guidelines range. In an effort to expedite the resolution of the only issue raised by Nurse on appeal, the Government moved for a limited remand to allow the district court to supplement the record pursuant to *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994). Nurse opposed the motion. A motions panel of this Court denied the Government's motion, suggesting that the Government was free to seek such a remand from the merits panel.

Statement of Facts

A. Nurse's Background in the District Court

From in or about 1993 to the present, Wanda Nurse has been under federal indictment and under the supervision of the United States District Court for the District of Connecticut (Honorable Ellen Bree Burns, S.U.S.D.J.). (PSR at ¶¶ 18-19) Her first federal case arose out of a massive telemarketing operation through which Nurse bilked hundreds of victims – primarily elderly – out of more than \$1 million. (PSR at ¶¶ 9-17) That case was the subject of two trials, both in front of Judge Burns. (PSR at ¶ 9)¹

¹ The telemarketing trials ended in a mistrial. The jury in the second trial informed the court that there
(continued...)

The second federal case was brought against Nurse in early 1997. (PSR at ¶ 5) In that case, Nurse originally was charged with 14 counts of fraud, including bank fraud, social security fraud, mail fraud, and frauds relating to a number of government assistance programs. (PSR at ¶¶ 5, 19-21, 24-33, 34-37, 42-58) Many of the crimes charged in the indictment occurred while Nurse was under federal supervision for the telemarketing case. (PSR at ¶ 8) After her 1997 arrest on the 14-count indictment, Nurse was released on bond. (PSR at ¶ 5) While on bond, Nurse committed additional crimes, and a superseding indictment was returned, adding two more counts of fraud to the original indictment. (PSR at ¶¶ 7, 27-33) Each and every federal violation charged against Nurse was a crime involving dishonesty and deceit.

On April 29, 1998, the jury trial began on the superseding indictment. On May 8, 1998, Nurse was convicted on all 16 counts. (PSR at ¶ 1) Before, during, and after the trial, Nurse engaged in numerous efforts to obstruct justice – defying grand jury subpoenas, influencing witnesses, fraudulently conveying assets, and filing a false affidavit with the district court. (PSR at ¶¶

¹ (...continued)
was an 11-to-1 deadlock, with the majority of jurors voting to convict Nurse of at least some of the charges. (PSR at ¶ 8) During trial preparation in that case, law enforcement agents discovered that Nurse had committed a number of other crimes, and she was charged with these violations in 1997. Nurse was convicted of all these crimes after a trial in 1998. (PSR at ¶ 8)

59-66) After the verdict and before sentencing, Nurse continued to engage in deceitful, criminal conduct, defrauding credit service providers and retailers. (Supplement to Government's Version of Offense Conduct, attached to PSR)

The Presentence Report recounted numerous instances of crimes of deceit by Nurse. Nurse's criminal history category was calculated as V, with nine convictions not counted in the calculation. (PSR ¶¶ 86-105) In all, according to the PSR, Nurse had approximately 20 convictions for crimes of deceit and two pending charges when she awaited sentencing in her federal case. (PSR at ¶ 139)

All of this information was available to the district court when it sentenced Nurse in August 1998 to a 72-month term of imprisonment followed by five years of supervised release. The district court departed upwardly from the range set forth in the applicable guidelines, based in part on the fact that Nurse's criminal history category of V under-represented the seriousness of her past conduct and the likelihood of recidivism in the future. (App. at A1-A4, A22-A23, A35) This Court ultimately affirmed Nurse's conviction on appeal; she did not challenge her sentence before this Court. *United States v. Nurse*, 205 F.3d 1326, 2000 WL 127515 (2d Cir. 2000) (unpub.).

B. Nurse's Violation of Conditions of Supervised Release

On August 8, 2005, the Probation Office petitioned the district court for a warrant for Nurse's arrest based on a number of violations of the conditions of her supervised release. First, the petition asserted that Nurse had been arrested by state law enforcement officials on multiple counts of larceny perpetrated against a 105-year-old woman who was in Nurse's care. (App. at A5-A7) According to information provided by the Manchester, Connecticut Police Department, Nurse obtained two checks from her victim under false pretenses and used them to obtain a \$300 gift certificate and a computer printer worth approximately \$400. (App. at A7)

The second violation was Nurse's failure to report the fact of her arrest to her supervising Probation Officer. (App. at A7) The third violation was Nurse's failure to pay restitution as required. (App. at A8) The Probation Report alerted the district court to allegations of other criminal behavior, separate and apart from the alleged larceny discussed above. (App. at A8-A9) The Report set forth the maximum sentence under statute that could be imposed under 18 U.S.C. § 3583(e)(3), that is, three years of imprisonment. (App. at A8)

Nurse was arrested for the supervised release violations and brought before a United States Magistrate Judge on August 11, 2005. (App. at A1) The Magistrate Judge found probable cause to believe that Nurse had violated the conditions of her supervised release, and he

ordered her detained until a final revocation hearing could be held. On September 7, 2005, Judge Burns presided over the revocation hearing. (App. at A1) The Probation Officer elected not to proceed on the third violation, Nurse's failure to pay restitution. (App. at A16) Government counsel alerted the district court that she was prepared to present evidence on the first two violations, the larcenies purportedly committed by Nurse against the elderly victim and Nurse's failure to report her arrest to the federal Probation Office. The Government noted that it had a witness present in the courtroom to testify and numerous items of documentary evidence to present. (App. at A15-A18). Government counsel also noted that she had been alerted by other police departments of additional criminal violations allegedly committed by Nurse but, because Nurse had not yet been arrested on those charges and had not seen the supporting affidavits relating to those other crimes, the Government did not intend to rely on them. (App. at A17-A19)

Nurse, through her counsel, admitted her failure to report her arrest to the Probation Office (App. at A19), and asked the court to proceed on that violation alone. (App. at A21) Defense counsel urged the court to forego consideration of the first violation alleged, the larcenies that were the subject of the state arrest. (App. at A21-A22) The Government reiterated that it was prepared to present evidence of the larcenies but noted that the district court had broad discretion to sentence Nurse up to the statutory maximum of three years of imprisonment, given Nurse's admission of her failure to alert the Probation Office to her state arrest. (App. at A22-A23)

Defense counsel addressed the court at length. He acknowledged the court's extensive history with Nurse, including presiding over three separate trials. (App. at A26-A27) Counsel admitted Nurse had a "terrible record," her efforts to obstruct justice, and the fact that there was a substantial basis for an upward departure based on Nurse's history. (App. at A34-A35) He urged the court, nevertheless, to sentence Nurse within the advisory range of 7 to 13 months, suggesting that the sentence she received in the underlying case was "significantly harsher" than sentences received by other people similarly situated (App. at A39), based on the fact that her convictions for bank fraud exposed her to a longer term of supervised release than she could have received had she been convicted only of other types of fraud violations with lower statutory maximum sentences. (App. at A32-A33) While arguing for a sentence within the advisory range, defense counsel conceded that the court had discretion to impose a higher sentence and suggested to the court, "if the court deems it appropriate to depart above the advisory [range], [the sanction] should in no case be greater than 24 months." (App. at A34)

Nurse was given the opportunity to address the court as well. She noted, ". . . I'm just who I am. . . . I've been this way all my life . . . [W]ho can change me from being this ugly monster?" (App. at A42-A43)

The Government urged the court to impose the statutory maximum sentence of three years. (App. at A18, A44-A47) Counsel noted the court's substantial base of knowledge concerning Nurse and Nurse's extensive

history of deceitful conduct and suggested that her history distinguished her from other defendants convicted of similar crimes. (App. at A43-A48) Government counsel contended that a departure was warranted because Nurse's criminal history score vastly under-represented the seriousness of her past conduct and that Nurse's track record conclusively demonstrated that she could not be trusted. The Government further argued that Nurse's probability of recidivism was 100% and urged the court to depart upward and incarcerate Nurse for as long as possible to protect the community from her predatory practices. (App. at A45-A48)

Defense counsel argued against the Government's position thereafter, suggesting that Nurse's criminal history was of lesser importance in the context of a supervised release violation, and urged the court to depart more moderately than the sentence advocated by the Government. (App. at A49-A52)

Prior to imposing sentence, the district court noted its history with Nurse and, given that history, that the court had learned that Nurse could not be trusted: ". . . I have learned that Ms. Nurse will say whatever she has to say in order to get the result that she seeks." (App. at A53) Directly thereafter, Judge Burns alluded to defense counsel's argument about sentencing Nurse in a way consistent with similarly situated defendants, stating, "Happily, I have never had another defendant quite like Ms. Nurse." (App. at A53) Explicitly stating that she was taking into account her knowledge of Nurse in deciding the appropriate sentence, Judge Burns sentenced Nurse to

a 24-month term of imprisonment without a further term of supervised release thereafter (App. at A53), consistent with defense counsel's suggestion that a sentence of that length was as high as the court should go. (App. at A34)

After imposition of the sentence, defense counsel did not object to the sentence, ask for a more detailed explanation of the reasons for the sentence, or suggest that the court had failed to articulate adequately its rationale for the departure above the advisory guidelines. (App. at A54-A56)

SUMMARY OF ARGUMENT

The record from the district court fully supports the sentence imposed and is sufficient for this Court to assess the reasonableness of the district court's action. Nurse, who had been before the district judge since 1993, had long demonstrated to the court her deceitfulness, incorrigible criminal nature, and predatory practices. The district court briefly but explicitly referenced its long history with the defendant; the defendant's penchant for utter deceitfulness; and the fact that the defendant was not similarly situated to any other defendant who had come before the court over the years. These factors led the judge to impose a sentence above the advisory range for a violation of supervised release. Nurse's counsel was aware of the basis for the court's sentence and was able, before sentence was imposed, to weigh in at length on its reasonableness. Accordingly, the district court satisfied its obligations under 18 U.S.C. §§ 3583(e) and 3553(a) and (c), and the sentence should be affirmed. In the alternative, if this Court believes that further articulation of the district court's reasoning would aid appellate review, it would be appropriate to order a limited remand for that purpose pursuant to *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994).

ARGUMENT

I. The Sentence Imposed by the District Court Should Be Affirmed Given the District Court's Consideration of the Requisite Factors, the Explanation Provided, and the Reasonableness of the Sentence

A. Relevant Facts

The relevant facts are set forth in the Statement of the Facts above.

B. Governing Law and Standard of Review

In the context of a violation of the terms of supervised release, the district court has “broad discretion to revoke its previous sentence and impose a term of imprisonment up to the statutory maximum.” *United States v. Pelensky*, 129 F.3d 63, 69 (2d Cir. 1997) (quoting *United States v. Sweeney*, 90 F.3d 55, 57 (2d Cir. 1996)). This Court will uphold the district court’s sentence if “(1) the district court considered the applicable policy statements; (2) the sentence is within the statutory maximum; and (3) the sentence is reasonable.” *Id.*; see also *United States v. Fleming*, 397 F.3d 95, 99 (2d Cir. 2005).

Pursuant to 18 U.S.C. § 3583(e), the district judge, when determining the appropriate sentence for a supervised release violation, must consider most of the factors set forth in 18 U.S.C. § 3553(a), including, for

example, the nature and circumstances of the offense and the history and characteristics of the defendant, 18 U.S.C. § 3553(a)(1), the need to protect the public from further crimes by the defendant, 18 U.S.C. § 3553(a)(2)(C), and the applicable guidelines or policy statements issued by the Sentencing Commission, 18 U.S.C. § 3553 (a)(4) & (a)(5). *See* 18 U.S.C. § 3583(e). The district court is required, under 18 U.S.C. § 3553(c)(2), to state its reasons for imposition of the particular sentence, and, in the case of a supervised release violation, if the sentence is outside the range set forth in the policy statements, the court must give the specific reason for imposing such a sentence.

In reviewing sentences for supervised release violations, this Court takes a deferential approach. *Fleming*, 397 F.3d at 99. The requirement that the district court “consider” the factors set forth by statute is not a rigorous one. *Id.* “As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, we will accept that the requisite consideration has occurred.” *Id.* at 100; *see also United States v. Lewis*, 424 F.3d 239, 245 (2d Cir. 2005).

Moreover, given the district court’s broad sentencing discretion in cases of supervised release violations and the advisory nature of the policy statements issued by the Sentencing Commission, this Court has held that the district court’s reasons need not be stated as specifically as required during the sentencing on the original case. *Lewis*,

424 F.3d at 245. No “explicit, detailed” findings are required, *Pelensky*, 129 F.3d at 69, and no “specific articulation” is mandated, *Fleming*, 397 F.3d at 99. Rather, the district court’s statements should give the defendant a basis to argue whether the sentence imposed is reasonable. *See United States v. Fuller*, 426 F.3d 556, 565 (2d Cir. 2005).

Where, as here, the defendant failed to object to the district court’s articulation of reasons, this Court may review the claim for plain error. *See Lewis*, 424 F.3d at 243 (noting that the issue of whether traditional plain error review or some less stringent standard is employed in the sentencing context where the defendant failed to object is not yet settled); *United States v. Molina*, 356 F.3d 269, 277 (2d Cir. 2004) (employing plain error standard when reviewing defendant’s § 3553(c) claim).

C. Discussion

The record in this case makes a number of things clear. First, Judge Burns, with her years of experience with Nurse in particular and on the bench in general, was uniquely suited to determine the appropriate sentence here. The district court had extensive knowledge of Nurse from presiding over three lengthy trials and from her exposure to voluminous information bearing on Nurse’s character, her deceitfulness, her tendency to victimize those most vulnerable, her history, and the overwhelming likelihood – indeed, the certainty – that Nurse would commit further crimes. The court explicitly referenced its long history with Nurse when it imposed sentence. (App. at A52-53)

Second, the record demonstrates that defense counsel was exceedingly well-versed in both the history of the case and the district court's familiarity with Nurse, and was able to and did in fact take every opportunity to advance Nurse's position concerning the appropriate sentence. Indeed, the sentence the court ultimately imposed was at the upper end of the range proposed by defense counsel as reasonable if the court were to upwardly depart. (App. at A34 – "[T]he sanction here . . . should . . . be [no] greater than 24 months.") Thus, there is no question that Nurse's counsel had sufficient indication of the bases for the sentence to argue about its reasonableness prior to the imposition of that sentence on Nurse.

Third, the record shows that the district court was made aware of and considered the requisite factors. The court was informed of the applicable range set forth in the policy statements at U.S.S.G. §§ 7B1.1 and 7B1.4. (App. at A24-A25) The court was aware of the statutory maximum of three years of imprisonment. (App. at A22) The court was keenly aware of Nurse's history and characteristics, the nature of her offenses, and the need to protect the public from her. (*See, e.g.*, App. at A18, A34-A35, A43-A47, A52-A53, PSR and Supplement to Government's Version of Offense) *See United States v. Fernandez*, __ F.3d __, 2006 WL 851670 (2d Cir. Apr. 3, 2006) (finding that there is no requirement that a sentencing judge specifically articulate consideration of factors; court's reasoning can be inferred from what was argued by counsel) (citing *United States v. Jimenez-Beltre*, 404 F.3d 514, 519-19 (1st Cir. Mar. 9, 2006) (en banc)).

Finally, the record demonstrates that both Nurse and the Government understood the basis for the district court's sentence. Prior to sentence being imposed, Government counsel urged the court to consider Nurse's lengthy history of crimes and conduct involving deceit (App. at A45), her repeated violations of the district court's trust (given her multiple violations of conditions of bond, her efforts to obstruct justice, and her violations of the terms of her supervised release) (App. at A 48), and that the likelihood of Nurse preying on other members of the public was 100%. (App. at A18, A45-48) Government counsel characterized Nurse as "an incorrigible criminal" (App. at A46) and one of the most "cagey" defendants counsel had ever prosecuted (App. at A48), and urged the court to incarcerate her for as long as possible to protect the public. (App. at A18, A46) When giving the reasons for the sentence, the district court's comments mirrored those made by Government counsel. The court noted that its "long history" with Nurse led to a belief that she was completely deceitful. (App. at A52-53) The court also explained, directly thereafter, that Nurse was unique – no other defendant was similarly situated to her. Moreover, the court was clearly speaking in the pejorative sense when it commented that "[h]appily," the court had "never had another defendant quite like Ms. Nurse." (App. at A53) Given the context in which this comment was made – so soon after the court had referenced the defendant's record of duplicity – it is apparent that the court believed the defendant's deceitfulness was of an exceptional quality, distinguishing her from other similarly situated defendants. Given these considerations, the court imposed a sentence above the advisory range but below the statutory

maximum. *Cf. United States v. Blount*, 291 F.3d 201, 218-219 (2d Cir. 2002) (district court's agreement with statements of counsel at sentencing hearing provided sufficient basis to uphold enhancement for obstruction).

While the district court certainly could have been more detailed about the reasons for the sentence, in the context of this case and given the record as a whole, the Government submits that the district court satisfied its obligation to state the reasons for the sentence it imposed. The Government further submits that the record amply demonstrates that the sentence was reasonable.

The principal case relied upon by Nurse in urging this Court to vacate the sentence and remand for re-sentencing is *United States v. Lewis*, 424 F.3d 239. In that case, this Court vacated a sentence imposed for a violation of conditions of supervised release because the district court failed to provide any reason at all for imposing a sentence significantly above, not only the advisory range, but also the recommendation of the Probation Office and defense counsel, with the Government having made no recommendation whatsoever. *Id.* at 242.

There are important differences between *Lewis* and the case currently before this Court, however, and the Government submits that these differences lead to a different result here. In *Lewis*, the district court had no prior experience with the defendant. The defendant had been tried in South Carolina, had been sentenced by a judge there to a term of imprisonment and supervised release, had served her sentence, and her case was later

transferred to New York for supervision. The district judge handling the violation hearing had not presided over the defendant's trial, *id.* at 241, and did not appear to have anything close to the extensive history with the defendant that Judge Burns has had with Nurse.

Second, unlike in this case, the opinion in *Lewis* suggests that no one involved – defense counsel, the Government, or the Probation Office – had any idea of the basis for the court's substantial upward departure, and defense counsel was therefore unable to address the reasonableness of the departure at the time the sentence was imposed. The Probation Officer recommended a sentence within the 3-to-9-month range, and defense counsel asked for a 3-month sentence. *Id.* At 242. The Government made no recommendation. Likely, given that the defendant's underlying case was prosecuted elsewhere, Government counsel had little background on the defendant that would bear on the sentence.

In contrast, the record in this case demonstrates that Nurse's counsel was fully cognizant of the basis for the court's upward departure at the time of the revocation hearing. He engaged in a lengthy discussion before the court about Nurse's history and her record of deceitful conduct, acknowledging the grounds for a departure and explicitly suggesting that a sentence of up to 24 months, the sentence that was in fact given, would be reasonable if the court chose to upwardly depart. Nurse's counsel responded substantively to the arguments made by the Government in support of a sentence significantly higher than the one the court imposed. Further, while Judge

Burns did not provide a lengthy rationale for the sentence, she did provide a reason – her lengthy history with Nurse had led her to believe that Nurse was utterly deceitful and therefore significantly different than any other defendant she had sentenced during her substantial judicial tenure. Given the record as a whole, the Government submits that these facts distinguish this case from *Lewis* and that the result in that case does not and should not control the result here.

II. Should This Court Require Further Articulation of the District Court’s Reasoning, a Limited Remand Is Appropriate

A. Relevant Facts

The relevant facts are set forth in the Statement of the Case and the Statement of the Facts above.

B. Governing Law and Standard of Review

This Court has, on a number of occasions, ordered a limited remand to allow for supplementation of the record before review of the merits of an appellate claim. In *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994), a defendant challenged his sentence based on a purported disparity between his sentence and that of his co-conspirators. This Court entered an order, requesting that the district judge supplement the record regarding the reasons for the sentence imposed, because the record at the initial sentencing proceeding did not provide a valid basis

for the sentence. *Id.* at 20. On limited remand, the district court clarified the reasons for the sentence previously imposed, and this Court – resuming jurisdiction over the case – affirmed. *Id.* at 23.

Similarly, in *United States v. Santiago*, 384 F.3d 31 (2d Cir. 2004), this Court issued a limited remand to the district court to set forth in writing its reasons for granting an upward departure. *Id.* at 37. The panel retained jurisdiction to hear the defendant’s challenge to the departure once the district court had supplemented the record. *Id.*; *see also United States v. Zackson*, 6 F.3d 911, 924 (2d Cir. 1993) (remanding case to district court for a statement of reasons in compliance with § 3553(c)(1), with panel retaining jurisdiction).

The procedure set forth in *Jacobson* is as follows: This Court directs that the mandate issue, and the mandate states the conditions that will restore jurisdiction to the appellate court without the need for a new notice of appeal. Jurisdiction would be restored when either party informs the Court by letter that the record has been supplemented or at the expiration of a specified period of time, whichever occurs first. Once the stated condition has been satisfied, appellate jurisdiction would be restored automatically, and this Court could then review the district court’s stated reasons, as supplemented, for the sentence previously imposed. 15 F.3d at 22. If the defendant wishes to submit additional briefing addressing the record as supplemented, she could be permitted to do so.

C. Discussion

The Government submits that the record made by the district court is sufficient to satisfy the court's obligation under 18 U.S.C. § 3553(c) but acknowledges that it is a close question in light of *United States v. Lewis*, 424 F.3d 239, 245 (2d Cir. 2005). Because Nurse's only claim on appeal is the district court's purported failure to adequately articulate the reasons for the sentence, and in an effort to expedite resolution of this claim, the Government moved for a limited remand, seeking an order from this Court that the district court supplement the record concerning the reasons for the sentence. Nurse would not have been prejudiced by the limited remand – such action would have directly responded to her claim, and she would have been given the opportunity to file a supplemental brief prior to this Court's decision on the merits. Despite this fact, and despite her failure to object to the district court's explanation at the time of sentencing, Nurse opposed the remand motion.

This Court denied the Government's motion, suggesting that the Government renew the motion before the merits panel should it see fit to do so. As noted above, the Government submits, based on a careful review of the record, that the district court satisfied its obligation to articulate its reason for the sentence imposed. If this Court were to disagree, however, the Government asks for a limited remand to allow the district court to shed further light on its rationale through supplementation of the record. A limited remand is particularly appropriate where, as here, the current record clearly supports the

sentence imposed and demonstrates its reasonableness, and where the defendant does not challenge the length of her sentence.

The Government acknowledges that in *Lewis*, where this Court found that the district court had provided an inadequate statement of reasons in support of an above-range sentence upon a finding of a supervised release violation, it simply vacated the sentence and remanded for further proceedings. 424 F.3d at 249. There is no indication in *Lewis*, however, that the parties argued or the Court considered the appropriateness of a limited remand, as in *Jacobson*. Because this Court in *Lewis* did not address the question of remedy, the Government respectfully submits that a limited remand remains available in the case at bar.

CONCLUSION

For each of the foregoing reasons, the sentence imposed for the defendant's violation of the conditions of her supervised release should be affirmed.

Dated: April 26, 2006

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, appearing to read "Karen Peck". The signature is fluid and cursive, with the first name "Karen" written in a larger, more prominent script than the last name "Peck".

KAREN L. PECK
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

Addendum

18 U.S.C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.--

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(I) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

.....

18 U.S.C. § 3583. Inclusion of a term of supervised release after imprisonment

(e) Modification of conditions or revocation.--The court may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)--

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release

without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

.....

18 U.S.C. § 3742. Review of a sentence

(a) Appeal by a defendant.--A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence--

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

.....

U.S.S.G. § 7B1.1. Classification of Violations (Policy Statement)

(a) There are three grades of probation and supervised release violations:

(1) Grade A Violations--conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (I) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years;

(2) Grade B Violations--conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year;

(3) Grade C Violations--conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of supervision.

(b) Where there is more than one violation of the conditions of supervision, or the violation includes conduct that constitutes more than one offense, the grade of the violation is determined by the violation having the most serious grade.

COMMENTARY

Application Notes:

1. Under 18 U.S.C. §§ 3563(a)(1) and 3583(d), a mandatory condition of probation and supervised release is that the defendant not commit another federal, state, or local crime. A violation of this condition may be charged whether or not the defendant has been the subject of a separate federal, state, or local prosecution for such conduct. The grade of violation does not depend upon the conduct that is the subject of criminal charges or of which the defendant is convicted in a criminal proceeding. Rather, the grade of the violation is to be based on the defendant's actual conduct.>

2. "Crime of violence" is defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1). See § 4B1.2(a) and Application Note 1 of the Commentary to § 4B1.2.

3. "Controlled substance offense" is defined in § 4B1.2 (Definitions of Terms Used in Section 4B1.1). See § 4B1.2(b) and Application Note 1 of the Commentary to § 4B1.2.

4. A "firearm or destructive device of a type described in 26 U.S.C. § 5845(a)" includes a shotgun, or a weapon made from a shotgun, with a barrel or barrels of less than 18 inches in length; a weapon made from a shotgun or rifle with an overall length of less than 26 inches; a rifle, or a weapon made from a rifle, with a barrel or barrels of less than 16 inches in length; a machine gun; a muffler or

silencer for a firearm; a destructive device; and certain large bore weapons.

5. Where the defendant is under supervision in connection with a felony conviction, or has a prior felony conviction, possession of a firearm (other than a firearm of a type described in 26 U.S.C. § 5845(a)) will generally constitute a Grade B violation, because 18 U.S.C. § 922(g) prohibits a convicted felon from possessing a firearm. The term "generally" is used in the preceding sentence, however, because there are certain limited exceptions to the applicability of 18 U.S.C. § 922(g). *See, e.g.*, 18 U.S.C. § 925(c).

U.S.S.G. § 7B1.4. Term of Imprisonment (Policy Statement)

(a) The range of imprisonment applicable upon revocation is set forth in the following table:

Revocation Table
(in months of imprisonment)
Criminal History Category [FN*]

Grade of Violation	I	II	III	IV	V	VI
Grade C	3-9	4-10	5-11	6-12	7-13	8-14
Grade B	4-10	6-12	8-14	12-18	18-24	21-27
Grade A	(1) Except as provided in subdivision (2) below: 12-18 15-21 18-24 24-30 30-37 33-41					
	(2) Where the defendant was on probation or supervised release as a result of a sentence for a Class A felony: 24-30 27-33 30-37 37-46 46-57 51-63.					

[FN*] The criminal history category is the category applicable at the time the defendant originally was sentenced to a term of supervision.

(b) *Provided, that--*

(1) Where the statutorily authorized maximum term of imprisonment that is imposable upon revocation is less than the minimum of the applicable range, the statutorily authorized maximum term shall be substituted for the applicable range; and

(2) Where the minimum term of imprisonment required by statute, if any, is greater than the maximum of the applicable range, the minimum term of imprisonment required by statute shall be substituted for the applicable range.(3) In any other case, the sentence upon revocation may be imposed at any point within the applicable range, provided that the sentence-- (A) is not greater than the maximum term of imprisonment authorized by statute; and (B) is not less than any minimum term of imprisonment required by statute.

COMMENTARY

Application Notes:

1. The criminal history category to be used in determining the applicable range of imprisonment in the Revocation Table is the category determined at the time the defendant originally was sentenced to the term of supervision. The criminal history category is not to be recalculated because the ranges set forth in the Revocation Table have been designed to take into account that the defendant violated supervision. In the rare case in which no criminal history

category was determined when the defendant originally was sentenced to the term of supervision being revoked, the court shall determine the criminal history category that would have been applicable at the time the defendant originally was sentenced to the term of supervision. (See the criminal history provisions of §§ 4A1.1-4B1.4.)

2. Departure from the applicable range of imprisonment in the Revocation Table may be warranted when the court departed from the applicable range for reasons set forth in § 4A1.3 (Adequacy of Criminal History Category) in originally imposing the sentence that resulted in supervision. Additionally, an upward departure may be warranted when a defendant, subsequent to the federal sentence resulting in supervision, has been sentenced for an offense that is not the basis of the violation proceeding.

3. In the case of a Grade C violation that is associated with a high risk of new felonious conduct (e.g., a defendant, under supervision for conviction of criminal sexual abuse, violates the condition that he not associate with children by loitering near a schoolyard), an upward departure may be warranted.

4. Where the original sentence was the result of a downward departure (e.g., as a reward for substantial assistance), or a charge reduction that resulted in a sentence below the guideline range applicable to the defendant's underlying conduct, an upward departure may be warranted.

5. Upon a finding that a defendant violated a condition of probation or supervised release by being in possession of a controlled substance or firearm or by refusing to comply with a condition requiring drug testing, the court is required to revoke probation or supervised release and impose a sentence that includes a term of imprisonment. 18 U.S.C. §§ 3565(b), 3583(g).

6. In the case of a defendant who fails a drug test, the court shall consider whether the availability of appropriate substance abuse programs, or a defendant's current or past participation in such programs, warrants an exception from the requirement of mandatory revocation and imprisonment under 18 U.S.C. §§ 3565(b) and 3583(g). 18 U.S.C. §§ 3563(a), 3583(d).

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Nurse

Docket Number: 05-4976-cr

I, Natasha R. Monell, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 4/26/2006) and found to be VIRUS FREE.

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Record Press, Inc.

Dated: April 26, 2006