JOHN M. WALKER, JR., Chief Judge, dissenting:

Because the majority relies on non-binding precedent that misapprehends 18 U.S.C. § 3742(f), the Sentencing Reform Act's vacatur provision, and thereby perpetuates the fallacy that vacatur is not required where a district court fails to comply with the requirement that it include in the judgment a written statement of reasons for the imposition of a sentence outside the applicable Guidelines range, I cannot join the decision of the court. I respectfully dissent.

The majority relies upon the reasoning of cases like United States v. Fuller, 426 F.3d 556 (2d Cir. 2005), to support the proposition that so long as a reviewing court can declare a sentence substantively reasonable, it is not under a duty to set aside that sentence where a district court fails to comply with the writing requirement codified at 18 U.S.C. § 3553(c)(2). The majority reaches this result by construing the statutory terms "too high" and "too low" – terms of art associated with certain subsections governing vacatur, 18 U.S.C. § 3742(f)(2)(A), (B) – to mean that a reviewing court must declare a sentence "unreasonably too high" or "unreasonably too low" before it is compelled to set aside that sentence for non-compliance with the writing requirement. The majority does this despite the fact that its interpretation of the vacatur provision is contrary to (1) the structure of the provision within the statutory scheme, (2) the congressional purpose underlying the writing requirement, (3) the

statutory history undergirding the provision, and (4) the Sentencing Commission's understanding of the provision.

The appropriate reading of § 3742(f) simply requires that a non-Guidelines sentence be above the recommended Guidelines range in order to be considered "too high" and below the recommended Guidelines range to be "too low." Thus, vacatur is required where (1) "the district court failed to provide the required statement of reasons in the order of judgment and commitment," (2) "the sentence is outside the applicable guidelines range," and (3) the appeal was taken by the defendant and the sentence is "too high" in that it is above the applicable Guidelines range or the appeal was taken by the government and the sentence is "too low" in that it is below the Guidelines range. 18 U.S.C. § 3742(f)(2)(A), (B); see also id. § 3553(c)(2).

As originally enacted, the Sentencing Reform Act of 1984 provided three separate criteria before a reviewing court was compelled to vacate a sentence: (1) the sentence had to fall "outside the range of the applicable sentencing guideline"; (2) it had to be "unreasonable"; and (3) it had to be "too high," in the event that the defendant appealed, or "too low," in the event that the government appealed. Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch.2, § 213(a), 98 Stat. 1987, 2012 (codified at 18 U.S.C. § 3742(e), later amended and recodified at 18 U.S.C. § 3742(f)). The structure and

purpose undergirding this provision yields two conclusions. First, the overarching structure of the vacatur provision treated as separate inquiries (a) whether a sentence was "unreasonable" and (b) whether it was "too high" or "too low." Id. Accordingly, this structure militates against any reading of the current statute that would conflate these inquiries. Second, the purpose behind linking the complaining party to the direction of the Guidelines deviation was a straightforward one: Congress sought to protect the complaining party from receiving a more adverse sentence following an appeal. In the absence of this protective scheme, a court of appeals would be able to set aside a sentence as unreasonably low even though it was the defendant, not the government, that chose to pursue an appeal from that sentence. When commenting on the intended effect of these provisions, the authors of the Senate Committee Report explained "that a sentence cannot be increased upon a section 3742[] appeal by the defendant." S. Rep. No. 98-225, at 155 (1983), reprinted in 1984 U.S.C.C.A.N. 3182, 3338. For the same reason, a sentence could not be decreased upon a section 3742 appeal by the government. See id. This is all that the "too high" and "too low" provisions were meant to accomplish; there is no hint from either the text or the legislative history that they were intended as substantive standards by which to evaluate the sentence.

From the subsequent statutory history of § 3742(f) it is likewise plain that when Congress amended the Sentencing Reform Act in 2003 to "require courts to give specific written reasons for any departure from the guidelines," H.R. Conf. Rep. No. 108-66, at 59 (2003), reprinted in 2003 U.S.C.C.A.N. 683, 694, it intended to enforce that requirement by providing a separate cause for vacatur where a district court fails to include the required written statement in the judgment.

Prior to its amendment in 2003, § 3742(f) already provided for vacatur where a court of appeals determined that a departure from the Guidelines range was unreasonable. See 18 U.S.C. § 3742(f)(2) (Supp. 2002) (requiring vacatur where "the sentence is outside the applicable guideline range and is unreasonable"). When Congress amended § 3742(f) in 2003 to provide for vacatur where a district court fails to issue a writing, it left intact the separate cause for vacatur where a departure was found to be unreasonable. See PROTECT Act of 2003, Pub. L. No. 108-21, § 401(c), 117 Stat. 650, 670 (codified at 18 U.S.C. § 3742(f)(2)) (requiring vacatur where a departure is to an "unreasonable degree"). Any reading that excuses non-compliance with the writing requirement where a reviewing court determines that a sentence is neither "unreasonably too low" nor "unreasonably too high" renders superfluous the inclusion of the separate cause for vacatur where the district court failed to abide by the writing requirement.

Under such a reading, we face the anomaly of only being required to vacate for non-compliance with the writing requirement where we must already vacate for unreasonableness. Moreover, in evaluating such a sentence for reasonableness, we would (paradoxically) lack the benefit of the district court's written statement explaining its reasons for selecting the sentence it chose to impose. Cf. United States v. Lewis, 424 F.3d 239, 246-47 (2d Cir. 2005) (holding that non-compliance with the writing requirement satisfied each of the three components of plain error analysis, including the requirement that the error affected the defendant's substantial rights because the lack of a written explanation frustrates appellate review).

Even if the structure, purpose, and history of the vacatur provision were inconclusive as to its meaning, we also have the benefit of the views of the Sentencing Commission – the expert agency charged with implementing the Sentencing Reform Act's mandates. The Sentencing Commission has interpreted § 3742(f) to require a reviewing court to "set aside the sentence and remand the case with specific instructions if it finds that the district court failed to provide the required statement of reasons in the judgment and commitment order." U.S. Sentencing Comm'n, Report to the Congress: Downward Departures From the Federal Sentencing Guidelines 9, 56-57 (2003).

The Fuller court, the majority, and other courts that have

interpreted these provisions have ignored the Sentencing Commission's understanding of, and the structure, purpose, and history undergirding, the vacatur provision; they have reasoned that "so long as 'we ultimately decide that a sentence is neither "too high" . . . nor "too low" . . . , we do not have any obligation to remand' in cases where the district court has failed to provide a separate written explanation for [a] departure[]" or a non-Guidelines deviation. Fuller, 426 F.3d at 566 (quoting dicta from United States v. Santiago, 384 F.3d 31, 36-37 (2d Cir. 2004) (per curiam)); accord United States v. Cooper, 394 F.3d 172, 176 (3d Cir. 2005); United States v. Daychild, 357 F.3d 1082, 1107-08 (9th Cir. 2004); United States v. Orchard, 332 F.3d 1133, 1141 n.7 (8th Cir. 2003). Based on this logic, Fuller held that where a departure is permissible, the overarching sentence cannot be "too high" or "too low." Fuller, 426 F.3d at 556-67. Today, the majority extends this flawed reading of the vacatur provision to provide that so long as a non-Guidelines deviation is reasonable, the overarching sentence cannot be "too high" or "too low" and, thus, vacatur is not required.

Although, as a panel, we lack the authority to overrule Fuller, we should not perpetuate its flawed reasoning by extending it to reach non-Guidelines sentences. Nothing in the terms "too low" or "too high" is tied to whether the sentence is substantively unreasonable.

These provisions were simply intended to provide a link between the nature of the deviation from the Guidelines and the right to appeal.

Jones's sentence satisfies each of the three criteria for vacatur: (1) "the district court failed to provide the required statement of reasons in the order of judgment and commitment," (2) "the sentence is outside the applicable guidelines range," and (3) the appeal was taken by the government and the sentence is "too low" in that it is below the applicable Guidelines range. 18 U.S.C. § 3742(f)(2)(B); see also id. § 3553(c)(2). As a result, we are required to "set aside the sentence and remand the case for further sentencing proceedings." Id. § 3742(f)(2)(B).

Because vacatur is already compelled by the lack of a writing, I would not reach the question of whether Jones's sentence is substantively reasonable – for at least two reasons. First, we should not rule on the substantive reasonableness of a sentence until we have had the benefit of the district court's "specific" written statement setting for its reasons for the imposition of a sentence "different from" the advisory Guidelines sentence. 18 U.S.C. § 3553(c)(2); cf. Lewis, 424 F.3d at 246-47. Second, the substantive reasonableness of the sentence is a close question that should only be decided if it is necessary to do so. I have difficulty accepting the fact that a district judge's "feelings" can support a fifty percent deviation from

the low-end of the recommended Guidelines range. Of course, as the majority recognizes, the rules that we establish run in both directions. My concerns would similarly exist in a case where a district judge's "feelings" resulted in a sentence fifty percent more than the high-end of the recommended Guidelines range. There is no reason to rule on the propriety of such unfettered discretion in imposing a non-Guidelines sentence when there remains the possibility that, on remand, the district court will articulate its reasoning in terms that more closely track the § 3553(a) factors – much like the district court did in United States v. Fairclough, 439 F.3d 76, 80 (2d Cir. 2006) (per curiam) (stating that the district court felt that "the Guidelines range was inadequate to address the 'nature and circumstances' of the offense"). Instead, by upholding this below-Guidelines sentence as reasonable, without first vacating to obtain adequate reasons in the written judgment, we invite a return to the days of wide-open discretion at the expense of both reduced sentencing disparity and fairness. This is an unhealthy trend because the government and defendants alike will come to view sentencing as an arbitrary exercise more informed by which district judge is assigned than by the factors outlined in § 3553(a), and the public, including its elected representatives, will find evidence to support the perception that, in sentencing, courts are more home to judicial

wilfulness than the law.

Because the court affirms this sentence as reasonable when the Sentencing Reform Act compels vacatur, I respectfully dissent.