

10-2993

To Be Argued By:
DAVID E. NOVICK

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-2993

UNITED STATES OF AMERICA,

Appellee,

-vs-

TROY MOODY, KISASI GREEN,

Defendants.

TYLON MIMS,

Defendant-Appellant.

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

REDACTED BRIEF
FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

This is an appeal from a judgment entered in the United States District Court for the District of Connecticut (Janet B. Arterton, J.), which had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231.

On July 13, 2010, the district court sentenced the defendant-appellant to 20 months' incarceration after he pleaded guilty to two counts of bank fraud. Defendant's Appendix ("A") 5, 8, 106. Judgment entered on July 15, 2010. A8, 106. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on July 26, 2010. A8, 9, 109. This Court has appellate jurisdiction over this appeal of a criminal sentence pursuant to 18 U.S.C. § 3742(a).

**Statement of Issues
Presented for Review**

1. Did the defendant waive his right to be present at an in-court sidebar that was requested by his own counsel during his sentencing [REDACTED]

2. Did the district court fail to consider the defendant's argument for a downward departure based on vulnerability in prison, thereby rendering the sentence procedurally unreasonable?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-2993

UNITED STATES OF AMERICA,

Appellee,

-vs-

TYLON MIMS,

Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

In this appeal, a [REDACTED] defendant who was the [REDACTED], claims for the first time that he was improperly excluded from a sidebar conference held at his sentencing hearing, which was requested by his attorney in open court [REDACTED]

[REDACTED] The district court appropriately permitted the sidebar conference, the defendant waived any challenge to that conference, and in

any event, there was no prejudice or unfairness to the defendant by his absence.

The defendant also argues that the district court failed to consider his argument that, [REDACTED] a [REDACTED] downward departure was warranted based on his vulnerability in prison [REDACTED]

[REDACTED] The district court fully considered and rejected the defendant's argument [REDACTED]

[REDACTED] Moreover, the defendant did not preserve a challenge to the procedural reasonableness of the 20-month sentence, which was 31 months below the advisory Guidelines range, and he has not shown prejudice or unfairness as a result of the sentencing hearing. This Court should not disturb the district court's sound sentencing decision.

Statement of the Case

On April 14, 2009, a federal grand jury sitting in Hartford, Connecticut, returned a five-count indictment against three defendants charging this defendant in Count One with Conspiracy to Commit Bank Fraud, in violation of 18 U.S.C. §§ 371 and 1344, and in Counts Two and Three with Bank Fraud, in violation of 18 U.S.C. § 1344. A3, 10-19. On September 28, 2009, the defendant pleaded guilty to Counts Two and Three of the indictment. A5, 20-27.

On June 28, 2010, the defendant filed a sentencing memorandum, on June 30, 2010, he submitted a [REDACTED] supplemental sentencing memorandum, and on July 13, 2010, he submitted a [REDACTED] second supplemental sentencing memorandum. A8 (docket entries). [REDACTED]

[REDACTED] On July 13, 2010, the district court sentenced the defendant to 20 months' incarceration and 36 months' supervised release and ordered that this incarceration term be served consecutive to a previously imposed 46-month sentence for a violation of supervised release. A8, 78-79, 106-07. Judgment entered on July 15, 2010. A8, 106-07.

The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on July 26, 2010. A8-9, 109. In this appeal, the defendant challenges (1) his absence from a sidebar conference during the sentencing hearing and (2) the procedural reasonableness of the district court's sentence. The defendant is currently detained in federal custody serving his sentence on the supervised release violation.

**Statement of Facts and Proceedings
Relevant to this Appeal**

A. Factual basis

Had the case against the defendant gone to trial, the Government would have presented the following facts, which were set forth in the Pre-Sentence Report (sealed appendix) ("PSR"):

On April 6, 2007, the defendant was released from federal prison after serving a 110-month sentence for a narcotics felony. PSR ¶¶ 43, 74; *United States v. Mims*, 3:98CR241(CFD). After only three days, on April 9, the defendant joined the criminal scheme in this case by arranging for co-conspirator Patricia May (“May”) to register a business fraudulently with the City of Hartford. PSR ¶ 15. Shortly thereafter, on April 13, he also arranged for a second individual, Miosotis Garcia (“Garcia”), to register a similar fraudulent business with the City of Hartford. PSR ¶ 6.

The defendant directed Garcia to open a bank account in the name of the fraudulently registered business and to deposit a stolen check he provided to her. PSR ¶¶ 7, 8. The defendant then took Garcia to several different bank branches to withdraw the stolen funds from the fraudulent bank account. PSR ¶¶ 9-13. Between April 26 and May 10, the defendant took substantially the same steps with May, directing her to open a fraudulent bank account, deposit a stolen check, and withdraw the stolen funds. PSR ¶¶ 15-20.

B. Sentencing

[REDACTED]

[REDACTED] On that same day, the defendant was sentenced to 46 months’ imprisonment for a violation of the conditions of his supervised release in the 3:98CR241(CFD) case. A28. [REDACTED]

[REDACTED]

In anticipation of the defendant's sentencing hearing, the defendant submitted a sentencing memorandum on July 28, 2010, a supplemental sentencing memorandum on June 30, 2010, and a second supplemental sentencing memorandum on July 12, 2010. A8, 87-92. [REDACTED]

[REDACTED]

[REDACTED]



On July 13, 2010, the district court conducted a sentencing hearing. A30-86, 94-105. At outset of the hearing, the district court confirmed with the defendant that he had read the PSR, that he understood it, and that he no objection to its contents. A31-32. As a result, the court adopted the factual statements contained in the PSR. A33. It then calculated the defendant's advisory range under the Sentencing Guidelines. It found that the base offense level was seven for bank fraud, under U.S.S.G. § 2B1.1(a)(1), that twelve levels were added for a loss of greater than \$200,000, but less than \$400,000, that two levels were

added based on the defendant's aggravated role under § 3B1.1(c) and that three levels were subtracted for acceptance of responsibility, resulting in an adjusted offense level of 18. A33-34. The court also agreed with the defendant, and disagreed with the Government and Probation Office, in finding that the defendant was properly in Criminal History Category V, and not Category VI, as had been stated in the plea agreement and the Presentence Report. A22, 45; PSR ¶ 45. As a result, the defendant faced a guideline incarceration range of 51 to 63 months. A48.

Defense counsel advised the court that it had a further argument that "can be recognized as a reason to depart from the guidelines or a reason for a non-guideline sentence." A45-46. [REDACTED]

[REDACTED] Defense counsel responded, "I can certainly do what the Court is requesting. This morning is the first chance I've had to meet with Mr. Mims since the events that we're going to be discussing and there was an additional fact that he gave to me during our meeting [REDACTED] I'm happy to approach." A47. The court said, "Let's do that. I'll see you at sidebar to understand that." A47. [REDACTED]

[REDACTED]

At sidebar, defense counsel stated,

[REDACTED]

[REDACTED]

[REDACTED]

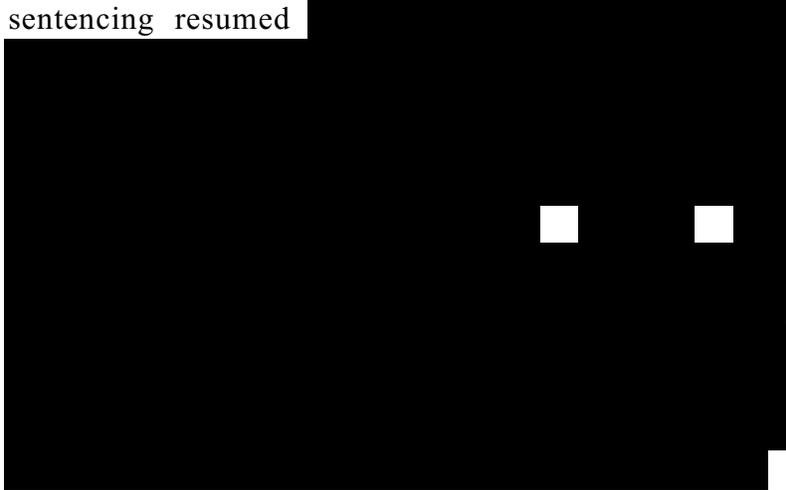
[REDACTED]

[REDACTED]

[REDACTED]



After the sidebar, which did not last long and only spanned ten pages of a sixty seven page transcript, the sentencing resumed



The district court then turned to defense counsel, who made sentencing arguments [redacted] A56-

70. The district court invited the defendant to speak, but he declined to do so, relying instead on a letter that had been submitted with his second supplemental memorandum (“defendant’s letter”). A70.¹ [REDACTED]

[REDACTED], the court took a recess to “take up some information that I’ve received on the matter we discussed at sidebar.” A75.

At the conclusion of the recess, the district court began to discuss its sentencing rationale. It [REDACTED] took note of several factors that weighed against the defendant, including the seriousness of the crime, his extensive criminal history, and the need to protect the public. A76-78. [REDACTED]

[REDACTED] the court also looked to the defendant’s personal situation, observing:

¹ This letter was originally appended to the defendant’s second supplemental memorandum, but was not included in the defendant’s appendix upon appeal. It has been included in the Government’s Appendix.

Looking at the history and characteristics of Mr. Mims does not paint a picture of someone who has made efforts to conduct his life within the confines of the law much at all, notwithstanding the fact that he has succeeded in his education, his educational undertakings, and my guess is [REDACTED] [REDACTED] that he is an intelligent person with capabilities and talents that have only been used for ill to date.

A77. The Court acknowledged that the defendant was “scarred” by his environment as a child, but noted that the defendant had the advantage of a mother and grandmother that many other similar defendants do not have. A77-78. Ultimately, in pronouncing sentence, the court assessed what is “necessary to deter further criminal conduct” and “to protect the public from further crime,” against the defendant’s personal history [REDACTED]. A78.

In consideration of these competing factors, the court sentenced the defendant to 20 months’ imprisonment on Counts Two and Three of the Indictment, to run concurrently with each other, but to run consecutively to his 46-month sentence on the supervised release violation. A78-79. The court also imposed a term of three years of supervised release and restitution in the amount of \$178,601.96. A79.

At the conclusion of the sentencing hearing, the district court asked, “[I]s there anything that I have not addressed or that I need to clarify?” A83. In response, defense counsel requested that the court clarify whether it was

imposing a guideline or non-guideline sentence. A83.
The court indicated that it was imposing a guideline
sentence [REDACTED]
[REDACTED]

[REDACTED]

Summary of Argument

The defendant asserts that (1) he was denied his right to be present at his sentencing insofar as he was not included in a sidebar that was requested by his counsel in open court [REDACTED] and (2) his sentence was procedurally unreasonable in that the district court allegedly failed to state how it resolved the defendant's application for a downward departure based on

vulnerability in prison. *See* Def.’s Br. at 8, 10-15. Both of the defendant’s arguments fail. The record reflects first that the defendant was present in court during sentencing, that he effectively waived his right to be present at sidebar, and that he was not prejudiced by his absence. Second, the record reflects that the district court considered the defendant’s departure application for vulnerability in prison and denied it. [REDACTED]

Argument

I. The defendant waived his right to be present at an in-court sidebar which was conducted during his sentencing hearing and requested in open court by his counsel [REDACTED].

A. Governing law and standard of review

A defendant may – by inaction or omission – forfeit a legal claim, for example, by simply failing to lodge an objection at the appropriate time in the district court. Where a defendant has forfeited a legal claim, this Court engages in “plain error” review pursuant to Fed. R. Crim. P. 52(b). Applying this standard, “an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an ‘error’; (2) the error is ‘clear or obvious, rather than subject to reasonable dispute’; (3) the error ‘affected the

appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 129 S. Ct. 1423, 1429 (2009)); see also *Johnson v. United States*, 520 U.S. 461, 467 (1997); *United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *United States v. Deandrade*, 600 F.3d 115, 119 (2d Cir.), *cert. denied*, 130 S. Ct. 2394 (2010).

To "affect substantial rights," an error must have been prejudicial and affected the outcome of the district court proceedings. See *United States v. Olano*, 507 U.S. 725, 734 (1993). This language used in plain error review is the same as that used for harmless error review of preserved claims, with one important distinction: In plain error review, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.*

This Court has made clear that "plain error" review "is a very stringent standard requiring a serious injustice or a conviction in a manner inconsistent with fairness and integrity of judicial proceedings." *United States v. Walsh*, 194 F.3d 37, 53 (2d Cir. 1999) (internal quotation marks omitted). Indeed, "[t]he error must be so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *United States v. Plitman*, 194 F.3d 59, 63 (2d Cir. 1999) (internal quotation marks omitted).

A defendant may do more than merely forfeit a claim of error. A defendant may – through his words, his conduct, or by operation of law – waive a claim, so that this Court will altogether decline to adjudicate that claim of error on appeal. *See Olano*, 507 U.S. at 733; *United States v. Polouizzi*, 564 F.3d 142, 153 (2d Cir. 2009); *United States v. Hertular*, 562 F.3d 433, 444 (2d Cir. 2009); *United States v. Quinones*, 511 F.3d 289, 320-21 (2d Cir. 2007); *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995). “Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right.” *Olano*, 507 U.S. at 733 (internal quotation marks omitted). “The law is well established that if, ‘as a tactical matter,’ a party raises no objection to a purported error, such inaction ‘constitutes a true “waiver” which will negate even plain error review.’” *Quinones*, 511 F.3d at 321 (quoting *Yu-Leung*, 51 F.3d at 1122) (footnote omitted).

Normally, a defendant has both a constitutional and statutory right to be present at all stages of a prosecution, including the sentencing hearing. *See Fed. R. Crim. P.* 43(a); *United States v. Agard*, 77 F.3d 22, 24 (2d Cir. 1996) (holding defendant’s presence at sentencing hearing required by both the Sixth Amendment and the Due Process Clause); *United States v. Alessandrello*, 637 F.2d 131, 138 (3d Cir. 1980) (stating that Congress, in Rule 43, “explicitly intended to codify existing law concerning a defendant’s constitutional and common law rights to be present throughout trial.”). “[D]espite its constitutional and statutory underpinnings, the right to be present may be

waived by the defendant.” *Polizzi v. United States*, 926 F.2d 1311, 1319 (2d Cir. 1991). Indeed, Rule 43 was amended in 1995 to provide explicitly that a defendant in a noncapital case waives the right to be present at his sentencing if he is “voluntarily absent.” *See* Fed. R. Crim. P. 43(c)(1)(B); C. Wright, *Federal Practice and Procedure (Criminal)* § 723, at 38-39 (3d ed. 2004).

A defendant’s waiver of his right to be present at any stage of proceedings, including sentencing, must be knowing and voluntary. *See Polizzi*, 926 F.2d at 1319; Fed. R. Crim. P. 43(c)(1)(B). Such a waiver may be made by counsel when in the presence of the defendant; a court is not obligated to personally canvas the defendant regarding his options. *See Polizzi*, 926 F.3d at 1323. “The district court need not get an express ‘on the record’ waiver from the defendant for every . . . conference which a defendant may have a right to attend.” *United States v. McCoy*, 8 F.3d 495, 497 (7th Cir. 1993). “A defendant knowing of such a discussion must assert whatever right he may have under Rule 43 to be present.” *Id.* (citing *United States v. Gagnon*, 470 U.S. 522, 528 (1985)). “A defendant may not assert a Rule 43 right for the first time on appeal.” *Id.*; *see also Gagnon*, 470 U.S. at 528-29 (holding that defendant waived his right to be present at an *in camera* discussion with a trial juror).

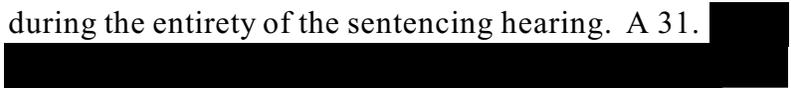
A lawyer may also waive his client’s right to be present at a particular sentencing proceeding in certain circumstances. *See United States v. Doe*, 964 F.2d 157 (2d Cir. 1992). [REDACTED]



Moreover, the Court held that the defendant was not prejudiced, because the matters discussed in chambers were stated ultimately either in filings or in open court, and because he did not contend that he would have added anything to the discussion. *Id.*

B. Discussion

Here, the defendant and his counsel effectively waived the defendant’s right to be present during the sidebar, and therefore he cannot raise the issue before this Court. It is clear and uncontested that the defendant was in court during the entirety of the sentencing hearing. A 31.



He was also present in court when defense counsel agreed to a sidebar conference



Despite being present and hearing his attorney request a discussion with the district

judge that would not occur in open court, the defendant never asked to be present during the sidebar conference. Therefore, he waived any claim of statutory or constitutional error.

Whereas in *Doe* the Court approved a chambers conference with only an inference that the defendant was aware of the request, here defense counsel made clear both what he wished to discuss as well as his justification for seeking closure in open court and in front of the defendant. A45-46. Counsel stated that he wished to raise an argument that he “addressed in the memo that [he] filed just recently with the Court based on some recent events.” A45-46.



Should the Court decide that the defendant did not waive this claim, it should reject it under a plain error analysis.

[REDACTED]

Second, even if the defendant's absence from the sidebar was error, there was no prejudice or unfairness to the defendant. The defendant does not allege that he would have added anything to the district court's discussion

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

II. The district court amply considered and rejected the defendant’s motion for downward departure on the basis of vulnerability in prison, and thus the sentence was procedurally reasonable.

A. Governing law and standard of review

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the United States Sentencing Guidelines, as written, violate the Sixth Amendment principles articulated in *Blakely v. Washington*, 542 U.S. 296 (2004). *See Booker*, 543 U.S. at 243. The Court determined that a mandatory system in which a sentence is increased based on factual findings by a judge violates the right to trial by jury. *See id.* at 245. As a remedy, the Court severed and excised the statutory provision making the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), thus declaring the Guidelines “effectively advisory.” *Booker*, 543 U.S. at 245.

After *Booker*, at sentencing, a district court must begin by calculating the applicable Guidelines range. *See United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc), *cert. denied*, 129 S. Ct. 2735 (2009). “The Guidelines provide the ‘starting point and the initial benchmark’ for sentencing, and district courts must ‘remain cognizant of them throughout the sentencing process.’” *Id.* (internal citations omitted) (quoting *Gall v. United States*, 552 U.S. 38, 49, 50 & n.6 (2007)). After giving both parties an opportunity to be heard, the district court should then consider all of the factors under 18 U.S.C. § 3553(a). *See Gall*, 552 U.S. at 49-50. This Court

“presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the [§ 3553(a)] factors.” *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006).

Because the Guidelines are only advisory, district courts are “generally free to impose sentences outside the recommended range.” *Cavera*, 550 F.3d at 189. “When they do so, however, they ‘must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.’” *Id.* (quoting *Gall*, 552 U.S. at 50).

On appeal, a district court’s sentencing decision is reviewed for reasonableness. *See Booker*, 543 U.S. at 260-62. In this context, reasonableness has both procedural and substantive dimensions. *See United States v. Avello-Alvarez*, 430 F.3d 543, 545 (2d Cir. 2005) (citing *United States v. Crosby*, 397 F.3d 103, 114-15 (2d Cir. 2005)). “A district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory.” *Cavera*, 550 F.3d at 190 (citations omitted). A district court also commits procedural error “if it does not consider the § 3553(a) factors, or rests its sentence on a clearly erroneous finding of fact.” *Id.* Finally, a district court “errs if it fails adequately to explain its chosen sentence, and must include ‘an explanation for any deviation from the Guidelines range.’” *Id.* (quoting *Gall*, 552 U.S. at 51). A district court need not specifically

respond to all arguments made by a defendant at sentencing. *See United States v. Bonilla*, 618 F.3d 102, 111 (2d Cir. 2010) (“we never have required a District Court to make specific responses to points argued by counsel in connection with sentencing”).

Moreover, in the case of an argument for a downward departure by a defendant, it is the defendant who bears the burden to prove by a preponderance of the evidence that a downward departure is appropriate. *See United States v. Valdez*, 426 F.3d 178, 184 (2d Cir. 2005). Typically, “a sentencing court’s refusal to grant a departure is not appealable unless the court committed an error of law or was unaware of its power to depart.” *United States v. Fernandez*, 127 F.3d 277, 282 (2d. Cir. 1997).

When, as here, a defendant fails to preserve an objection to the procedural reasonableness of a sentence, this Court reviews for plain error. *See United States v. Verkhoglyad*, 516 F.3d 122, 128 (2d Cir. 2008); *United States v. Villafuerte*, 502 F.3d 204, 208 (2d Cir. 2007). To show plain error, a defendant must demonstrate “(1) error (2) that is plain and (3) affects substantial rights.” *Villafuerte*, 502 F.3d at 209. Even then, the Court will exercise its discretion to correct the error “only if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.” *Id.* (internal quotation marks omitted). Reversal for plain error should “be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.” *Villafuerte*, 502 F.3d at 209 (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)).

B. Discussion

The defendant's sole claim as to procedural reasonableness is that the sentencing record is "bereft of *any* indication of the resolution" to his argument for a [REDACTED] departure because of vulnerability in prison. *See* Def.'s Br. at 13-14. This claim is belied by the record itself. In fact, the district court directly addressed and resolved each of the defendant's sentencing arguments, including his argument for a departure because of vulnerability in prison. The record shows clearly that the defendant developed his departure argument extensively in writing and orally, and that the district court considered and rejected it.

[REDACTED]



[REDACTED]

[REDACTED]

Although the court had not, at that point, specifically addressed vulnerability as a separate departure, it indicated that it had considered both sides' arguments, A76, and moreover it was under no obligation to respond specifically to the defendant's departure argument at all. *See Bonilla*, 618 F.3d at 111.

The district court then took the extra step of asking the parties whether any clarification was needed. A83. The defendant specifically asked the court to address whether

it was imposing a Guidelines sentence and whether it had denied the defendant's departure motion based on vulnerability. A83-84. [REDACTED]

[REDACTED] Thus, at the point, the district court did exactly what the defendant claims on appeal it had failed to do; it directly addressed and rejected the defendant's separate request for a departure based on vulnerability in prison.

[REDACTED]

Finally, after the district court clearly explained the rationale for its sentencing and then explicitly denied the downward departure motion, the defendant did not raise

any further challenge to the procedure by the district court. A84-85. Thus, the defendant's challenge to the procedural reasonableness of the sentence is unpreserved. *See Verkhoglyad*, 516 F.3d at 128. [REDACTED]

Conclusion

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: May 11, 2011

Respectfully submitted,

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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.

* * *

(c) Statement of reasons for imposing a sentence.
The court, at the time of sentencing, shall state in open

court the reasons for its imposition of the particular sentence, and, if the sentence --

- (1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or
- (2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the

Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

Federal Rule of Criminal Procedure 43. Defendant's Presence

(a) When Required.

Unless this rule, Rule 5, or Rule 10 provides otherwise, the defendant must be present at:

- (1) the initial appearance, the initial arraignment, and the plea;
- (2) every trial stage, including jury impanelment and the return of the verdict; and
- (3) sentencing.

(b) When Not Required.

A defendant need not be present under any of the following circumstances:

- (1) **Organizational Defendant.**
The defendant is an organization represented by counsel who is present.
- (2) **Misdemeanor Offense.**
The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur in the defendant's absence.

- (3) Conference or Hearing on a Legal Question.
The proceeding involves only a conference or hearing on a question of law.
- (4) Sentence Correction.
The proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).

(c) Waiving Continued Presence.

- (1) In General.
A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:
 - (A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;
 - (B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or

(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

(2) Waiver's Effect.
If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.