

13-2238

To Be Argued By:
ROBERT M. SPECTOR

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 13-2238

—
UNITED STATES OF AMERICA,
Appellee,

-vs-

LEROY PRESSLEY,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

DEIRDRE M. DALY
*United States Attorney
District of Connecticut*

ROBERT M. SPECTOR
Assistant United States Attorney
SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

Table of Contents

Table of Authorities	iii
Statement of Jurisdiction	vii
Statement of Issue Presented for Review.....	viii
Preliminary Statement	1
Statement of the Case	2
A. The offense conduct	2
B. The post-indictment conduct	7
C. The guilty plea.....	9
D. The sentencing	11
Summary of Argument	20
Argument.....	22
I. The district court’s 57-month guideline sen- tence was procedurally and substantively reasonable	22
A. Governing law and standard of review...	22
1. Reviewing a sentence for reasonableness	22

2. Reviewing a district court’s downward departure decision	26
3. Plain error review	27
B. Discussion	29
1. Procedural reasonableness	30
2. Substantive reasonableness	32
Conclusion	34
Certification per Fed. R. App. P. 32(a)(7)(C)	

Table of Authorities

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.

Cases

<i>Gall v. United States</i> , 552 U.S. 38 (2007)	23
<i>Norton v. Sam's Club</i> , 145 F.3d 114 (2d Cir. 1998)	30
<i>United States v. Booker</i> , 543 U.S. 220 (2005)	22
<i>United States v. Cavera</i> , 550 F.3d 180 (2d Cir. 2008) (en banc)	23, 24, 25
<i>United States v. Cotton</i> , 535 U.S. 625 (2002)	28
<i>United States v. Desena</i> , 260 F.3d 150 (2d Cir. 2001)	26
<i>United States v. Diaz</i> , 176 F.3d 52 (2d Cir. 1999)	27, 31
<i>United States v. Dorvee</i> , 616 F.3d 174 (2d Cir. 2010)	24

<i>United States v. Ekhator</i> , 17 F.3d 53 (2d Cir. 1994).....	26
<i>United States v. Fernandez</i> , 443 F.3d 19 (2d Cir. 2006).....	24, 25
<i>United States v. Fernandez</i> , 877 F.2d 1138 (2d Cir. 1989).....	13
<i>United States v. Jones</i> , 531 F.3d 163 (2d Cir. 2008).....	24
<i>United States v. Kane</i> , 452 F.3d 140 (2d Cir. 2006) (per curiam)	33
<i>United States v. Margiotti</i> , 85 F.3d 100 (2d Cir. 1996) (per curiam)	27
<i>United States v. Olano</i> , 507 U.S. 725 (1993)	28, 30
<i>United States v. Pressley</i> , 470 Fed. Appx. 37 (2d Cir. 2012)	9
<i>United States v. Rigas</i> , 490 F.3d 208 (2d Cir. 2007).....	23
<i>United States v. Rigas</i> , 583 F.3d 108 (2d Cir. 2009).....	24
<i>United States v. Savoca</i> , 596 F.3d 154 (2d Cir. 2010).....	24

<i>United States v. Sero</i> , 520 F.3d 187(2d Cir. 2008) (per curiam)	26
<i>United States v. Silleg</i> , 311 F.3d 557 (2d Cir. 2002).....	27
<i>United States v. Stinson</i> , 465 F.3d 113 (2d Cir. 2006) (per curiam).....	26, 32
<i>United States v. Valdez</i> , 426 F.3d 178 (2d Cir. 2005).....	26
<i>United States v. Villafuerte</i> , 502 F.3d 204 (2d Cir. 2007).....	27, 29
<i>United States v. Williams</i> , 399 F.3d 450 (2d Cir. 2005).....	28

Statutes

18 U.S.C. § 3231.....	vii
18 U.S.C. § 3553.....	22, 27,29, 33
18 U.S.C. § 3742.....	vii
18 U.S.C. § 922.....	7
21 U.S.C. § 841.....	7

Rules

Fed. R. App. P. 4	vii
Fed. R. Crim. P. 52.....	28

Guidelines

U.S.S.G. § 4A1.3.....	13, 15, 18
-----------------------	------------

Statement of Jurisdiction

The United States District Court for the District of Connecticut (Ellen Bree Burns, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on May 23, 2013. Government's Appendix ("GA")11. On June 3, 2013, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). GA11. This Court has appellate jurisdiction over the defendant's challenge to his sentence, pursuant to 18 U.S.C. § 3742(a).

**Statement of Issue
Presented for Review**

Whether the defendant's 57-month guideline sentence was procedurally and substantively reasonable given his lengthy criminal history, the nature of this firearms offense, and the fact that he committed numerous assaults in prison, including one during the pendency of this case?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 13-2238

UNITED STATES OF AMERICA,
Appellee,

-vs-

LEROY PRESSLEY,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The defendant, Leroy Pressley, a multi-convicted felon, was arrested after the Norwalk Police Department found a loaded handgun, almost \$600 in cash and over an ounce of crack cocaine in a car he had been driving. After the defendant pleaded guilty to a felon-in-possession charge, the district court sentenced him to 57 months in jail, which was the top of the applicable guideline range. The court found that a

guideline sentence was necessary based on the defendant's history of committing crimes while on supervision and engaging in violent acts, including shooting another individual and getting into numerous fights in prison, the most recent of which occurred while awaiting trial in this case.

On appeal, the defendant summarily claims that the 57-month sentence was procedurally and substantively unreasonable. He appears to claim that the district court erred by not departing downward based on his difficult upbringing and his drug use at a young age. He also suggests, without explanation, that the district court's top-of-the-guideline sentence was overly harsh.

For the reasons that follow, these arguments have no merit, and this Court should affirm the district court's judgment.

Statement of the Case

A. The offense conduct

The following facts, which are undisputed, are set forth almost verbatim in the Pre-Sentence Report ("PSR") and the government's sentencing memorandum (GA28-GA31):

At approximately 7:30 p.m. on August 18, 2010, Norwalk Police Officer Mark Suda was driving in an unmarked police car on routine patrol of various known drug hot spots in and

around the Roodner Court Housing Complex. *See* PSR ¶ 8. Officer Suda was with four other police officers, all of whom were dressed in police raid gear. *See* PSR ¶ 8.

Roodner Court is a high crime area in South Norwalk where narcotics are often sold out in the open. *See* PSR ¶ 9. Recently, the police had made several arrests there for narcotics distribution and weapons possession, and there had been an increase in violent crime. *See* PSR ¶ 9. The residents of the housing complex had been complaining to the police about drug dealing and loitering in the complex. *See* PSR ¶ 9. The Norwalk Housing Authority owns the complex and has a no trespass policy that only allows access to residents and those visiting residents. *See* PSR ¶ 9.

While on patrol in the complex, Officer Suda saw a black Acura with tinted windows and black rims parked between Building 21 and a playground. *See* PSR ¶ 10. Officer Suda saw a man whom he knew as Calixto Figueroa working on the car's front headlight and saw the defendant sitting in the driver's seat. *See* PSR ¶ 10. The car was running, the driver's side window was down, and the hood open. *See* PSR ¶ 10. The defendant was the only person in the car. *See* PSR ¶ 10.

In the weeks prior to that night, other Norwalk police officers had received information from two credible and reliable informants that the defendant "had taken over the narcotics

trade in Roodner Court.” PSR ¶ 11. Both informants had seen the defendant selling crack to various customers late at night in the housing complex. *See* PSR ¶ 11.

When Officer Suda saw the defendant, he identified him to the other officers and said that he was not supposed to be in the complex. *See* PSR ¶ 12. The defendant had been arrested in the past for trespassing there and had been warned by Officer Suda himself only a few months earlier not to be in the complex. *See* PSR ¶ 12. Officer Suda also recognized the Acura, which he had seen the defendant drive previously, though it had been painted gray, not black. *See* PSR ¶ 12.

When the defendant saw the police, he turned off the engine, got out of the car, and stood next to it. *See* PSR ¶ 13. Officer Suda stopped, and all five officers walked up to the defendant’s car. Officer Suda walked up to the defendant and started talking with him. *See* PSR ¶ 13. He asked the defendant why he was in the complex, and the defendant replied that he was there visiting his cousin, Tanya Smeriglio, who owned the Acura. *See* PSR ¶ 13. Officer Suda asked the defendant where Smeriglio was, and he replied that she had gone to her house, pointing to the area of Building 19 or 20. *See* PSR ¶ 13. None of the officers approached Figueroa, and he walked away. *See* PSR ¶ 13.

At that point, Officer Suda conducted a patdown search of the defendant and found no weapons. *See* PSR ¶ 14. He asked for the defendant’s consent to search the car, but the defendant refused, telling the officers that the car belonged to his cousin and that they should ask her for consent. *See* PSR ¶ 14. Officer Suda called for a narcotics detection canine to come to the scene. *See* PSR ¶ 14. He also asked for additional marked units to be sent because there was a crowd gathering around them, and he was concerned for officer safety. *See* PSR ¶ 14.

The canine unit took about ten minutes to arrive. *See* PSR ¶ 15. During this time, the crowd grew larger and became more agitated. *See* PSR ¶ 15. The defendant also became agitated, cursed at Officer Suda, and asked him why he was “doing this.” PSR ¶ 15. Also, during this time, Smeriglio and Tammy Morales (another cousin of the defendant), arrived at the scene and were interviewed by the officers. *See* PSR ¶ 15. Smeriglio told the officers that she did not live in the complex, but Morales said that she lived in Building 21. *See* PSR ¶ 15.

When the canine unit—Officer David Peterson and Rainor, his trained, certified and accredited narcotics detection canine—arrived, Officer Peterson asked the defendant for consent to search the car. *See* PSR ¶ 16. When the defendant refused, Officer Peterson led Rainor around the outside of the car. Rainor alerted to the odor

of narcotics at the front passenger door area and the front license plate. *See* PSR ¶ 16. Officer Peterson then led Rainor inside the car, but Rainor did not make any additional positive alerts for narcotics. *See* PSR ¶ 16.

Based on Rainor's positive alerts, Officer Suda entered the car and found approximately \$596 in small denominations in the center console. *See* PSR ¶ 17. He then opened the glove compartment and found a loaded Smith and Wesson .38 caliber revolver. *See* PSR ¶ 17. Based on this seizure, he ordered other officers to arrest the defendant, at which time the defendant was handcuffed and placed into a marked police car. *See* PSR ¶ 17.

At that point, because the crowd was becoming loud and angry and because there had been recent arrests in the complex during which the crowd turned on the police, Officer Suda had the Acura driven to the police station for a full search. *See* PSR ¶ 18. He also had the vehicle seized for asset forfeiture. *See* PSR ¶ 18. A full search conducted at the police station revealed the presence of approximately 28.5 grams of crack cocaine, packaging material, nine envelopes of heroin and mail addressed to the defendant in the trunk of the car. *See* PSR ¶ 18.

The next day, Smeriglio went to the Norwalk Police Department and asked to speak to the police officer who had interviewed her the previous day. *See* PSR ¶ 19. She told the officer, in a

signed, sworn statement, that she had no knowledge about the defendant's criminal activity and had no idea there were drugs and a firearm in her car. *See* PSR ¶ 19. She said that she had lent her car to the defendant's girlfriend and had asked her to get it registered. *See* PSR ¶ 19.

On September 9, 2010, federal authorities arrested the defendant. *See* PSR ¶ 20. After waiving his *Miranda* rights, the defendant admitted that the firearm in the car belonged to him, but refused to provide any information as to where he had gotten it. *See* PSR ¶ 20. He denied possessing the narcotics found in the trunk. *See* PSR ¶ 20.

B. The post-indictment conduct

On September 14, 2010, a federal grand jury returned an Indictment charging the defendant in Count One with unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); and in Count Two with possession with intent to distribute cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). GA3. On January 13, 2011, the grand jury returned a Superseding Indictment against the defendant which repeated the § 922(g)(1) charge in Count One and amended Count Two to charge the defendant with possession with intent to distribute 28 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). GA5, GA15-GA16.

On May 20, 2011, the district court (Ellen Bree Burns, J.) granted the defendant's motions to suppress the firearm and narcotics seized from his car on August 18, 2010 and dismissed the Superseding Indictment in its entirety. GA7. On that same date, the defendant was released from federal custody based on the district court's order. GA7; PSR ¶ 6.

Immediately upon release, the defendant returned to the Roodner Court housing complex and was seen by the police posing for pictures in front of one of the buildings there. PSR ¶ 6. Later that evening, he was a passenger in a vehicle in which the driver, a pistol permit holder, was stopped and found in possession of a handgun. PSR ¶ 6. During that traffic stop, the defendant recognized one of the officers as an officer who had been involved in the August 18, 2010 arrest and warned the officer that he "better run when he is in RC" (Roodner Court). PSR ¶ 6. And during these first few days of release, the defendant used PCP. PSR ¶¶ 6, 57.

On May 23, 2011, the government moved for reconsideration of that portion of the district court's order which dismissed the Superseding Indictment. GA7. The court vacated the dismissal of the Superseding Indictment that same day. GA7. The defendant voluntarily surrendered and was returned to federal custody. GA7. In addition, the government appealed the district court's decision suppressing the firearm and

narcotics seized from the defendant's vehicle. GA7.

On May 24, 2011 and June 29, 2011, the district court (Holly B. Fitzsimmons, J.) held detention hearings to address the defendant's repeated requests to be released on bond. GA8. The court ultimately denied these requests and ordered that the defendant be detained during the pendency of the government's appeal. GA8.

On October 12, 2011, the facility where the defendant was detained, Wyatt Detention Center, issued a "Code Blue" due to an inmate assault. PSR ¶ 5. The defendant and another inmate assaulted the victim by repeatedly punching and kicking him in the face. PSR ¶ 5. The victim's face was badly swollen, and he suffered lacerations on his face and head. PSR ¶ 5. He refused to press charges against his attackers and was soon moved from the facility. The defendant denied any involvement in the attack, but bragged that the victim had not "touched him" at all. PSR ¶ 5.

C. The guilty plea

On May 21, 2012, this Court issued a summary order which vacated the district court's decision on the motions to suppress and remanded the case for additional proceedings. *See United States v. Pressley*, 470 Fed. Appx. 37 (2d Cir. 2012).

On September 25, 2012, the defendant changed his plea to guilty as to Count One of the Superseding Indictment (the gun charge) and, in doing so, entered into a written plea agreement. GA9, GA17. In that agreement, the parties stipulated that the base offense level was 20 because the defendant had at least one prior conviction for a crime of violence or a controlled substance offense. GA20. The parties also agreed that a four-level enhancement was appropriate because the defendant possessed the charged firearm in connection with another felony offense. GA20. With a three-level reduction for acceptance of responsibility, the total offense level was 21. GA20.

The parties stipulated that the defendant fell into Criminal History Category II, but reserved their respective rights to support a different criminal history category at sentencing if the initial estimate was not accurate. GA20. Based on these calculations, the defendant fell into a guideline incarceration range of 41-51 months' imprisonment. GA20.

The parties were not bound by this range. In particular, the agreement stated:

The defendant reserves his right to seek a departure or non-Guidelines sentence, including a sentence below the bottom of the Guidelines range as determined by the Court. The Government reserves its right to object to these requests and to

seek whatever sentence it deems appropriate. The Government reserves its right to seek an upward departure and/or a non-guideline sentence and specifically reserves its right to ask for a sentence above the top of the 41-51 month Guidelines range set forth in this stipulation.

GA20.

The defendant waived his right to appeal or collaterally attack any sentence that did not exceed 51 months' incarceration, and the government agreed to dismiss Count Two of the Superseding Indictment (the narcotics count) after sentencing. GA21, GA23.

D. The sentencing

The PSR found that the base offense level, under Chapter Two of the November 1, 2012 version of the Sentencing Guidelines, was 20 because the defendant committed the felon-in-possession offense after having sustained a felony conviction for a crime of violence or a controlled substance offense. *See* PSR ¶¶ 26-27. It then added four levels because the defendant used or possessed the charged firearm in connection with another felony offense, *i.e.* the possession with intent to distribute crack cocaine. *See* PSR ¶ 28. After a three-level reduction for acceptance of responsibility, the PSR determined that the total offense level was 21. *See* PSR ¶¶ 33-34.

As to the defendant's criminal record, the PSR disagreed with the parties and placed the defendant in Criminal History Category III because he had accumulated a total of four criminal history points from his 2004 conviction for second degree assault and his 2005 conviction for possession with intent to sell narcotics, and two criminal history points because he committed this offense while serving a term of probation stemming from the narcotics conviction.¹ See PSR ¶¶ 36-40. Although he had two separate convictions for criminal trespass, stemming from arrests in Roodner Court, neither received any criminal history points based on the sentences imposed in those cases. See PSR ¶¶ 38-39.

According to the PSR, based on a total offense level of 21 and a Criminal History Category III, the defendant faced a guideline incarceration range of 46-57 months. See PSR ¶ 67.

The defendant submitted a sentencing memorandum which did not dispute the findings of fact and guideline calculations set forth in the

¹ In drafting the plea agreement, the parties had not realized that the defendant was on state probation at the time of this offense because they believed his most recent three-year probationary term began in 2005. But this probationary term, which stemmed from his 2005 narcotics conviction, did not begin until he was released from prison for violating the terms of his 2004 probation, which was not until May 21, 2008. See PSR ¶ 37.

PSR. GA41-GA50. In particular, the defendant agreed with the PSR that, contrary to the plea agreement, he faced a guideline incarceration range of 46-57 months. GA41. Instead of challenging the PSR's calculations, the defendant simply asked the district court to give effect to the guideline range set forth in the plea agreement under *United States v. Fernandez*, 877 F.2d 1138, 1144 (2d Cir. 1989), and impose a sentence below this range of time served, which, at the time, amounted to approximately 33 months' incarceration. GA42, GA50. With the exception of three days in May 2011, the defendant had been in federal custody since September 9, 2010.

The government filed a sentencing memorandum seeking a sentence of 71 months' incarceration. GA25-GA40. It asked the district court to adopt the factual findings in the PSR, conclude that the guideline incarceration range was 46-57 months, depart upward one criminal history level under U.S.S.G. § 4A1.3, and impose a sentence at the top of the resulting 57-71 month guideline range. GA32. As the government argued, "[t]he defendant has a history of violent behavior which suggests strongly that he presents a high risk of recidivism and that this risk should figure prominently into the Court's sentencing decision." GA34.

In particular, the government pointed out that the defendant's 2004 assault conviction

arose from his use of “a firearm to shoot another person in the leg.” GA34. Moreover, while in both state and federal custody, the defendant was involved in numerous violent altercations. Specifically, he was involved in two separate incidents of fighting and two separate incidents of assault in state custody, *see* PSR ¶ 36, and a violent assault on an inmate in federal custody in October 2011, *see* PSR ¶ 5. And, after his state arrest in this case on August 18, 2010, but before his federal arrest on September 9, 2010, the defendant and two other individuals were arrested for assaulting a neighbor whom they suspected of burglarizing the defendant’s apartment. *See* PSR ¶ 42.

The government also pointed out that the defendant had “repeatedly committed crimes while on some form of court supervision.” GA35. He committed his 2005 narcotics offense while on probation for his 2004 assault conviction. GA35. He committed his 2009 trespass offenses, this offense and his September 2010 assault offense while on probation for his 2005 narcotic conviction. GA35. Finally, during the three-day period when he was mistakenly released in May 2011, he used PCP and returned to the very same housing complex where he had been arrested so many times in the past. GA35.

In sum, the government argued, “[s]ince 2004, including the time that the defendant has spent in prison, the defendant has engaged in

repeated violent and criminal conduct and has been virtually undeterred, even by this most recent federal case. The fact that he engaged in a violent assault on another inmate and then boasted that the victim had not ‘touched him,’ while awaiting what could very well have been a favorable disposition in this case shows that he still has very little respect for the law and for the safety of the community.” GA35-GA36.

The district court (Ellen Bree Burns, J.) conducted the sentencing hearing on May 23, 2013. GA53. After confirming that the defendant had read the PSR and reviewed it with his attorney, GA54, the court, with no objection from either side, adopted the factual findings contained in the PSR and found that the guideline incarceration range for the offense was 46-57 months. GA55.

At that point, the government presented its argument that the court should depart upward horizontally to Criminal History Category IV because Criminal History Category III substantially unrepresented the defendant’s risk of recidivism, as contemplated by U.S.S.G. § 4A1.3. GA55. In support of that argument, the prosecutor played a video recording of the October 12, 2011 fight in which the defendant and an associate assaulted another inmate while the defendant was in federal custody awaiting the disposition of the interlocutory appeal in this case. GA55-GA56. The government also submitted

photographs taken of the two assailants and the victim after the assault. GA57. The victim's face was badly bruised and disfigured. GA57. As the government pointed out, "to see an assault at Wyatt like this while you have a federal case pending, while your case . . . has been dismissed, that . . . is an aggravating factor in the sense that [the defendant] has really won the case, . . . so he's hoping to go home. And when he makes a decision like this, it makes you question what kind of risk he presents once he gets out of jail." GA59.

In addition to this most recent fight, the government emphasized the defendant's prior assault and sale of narcotics convictions, his commission of offenses while on state probation and his other disciplinary tickets for fighting in prison. GA58. The government also emphasized that the defendant was arrested for an assault only a couple of weeks after his state arrest in this case and that he had smoked PCP and immediately returned to Roodner Court when he was mistakenly released from federal custody in this case. GA59-GA60.

In response, the defendant maintained that he had sustained his prior two felony convictions at the ages of 15 and 17, that these convictions were remote, that he should not still face consequences from these convictions and that the court should instead adopt the 41-51 month

guideline range that the parties had set out in the plea agreement. GA63.

The court denied the government's motion for an upward departure, stating as follows:

I can understand the government's argument for an increase in the criminal history category. However, the sentence which I expect to impose is one which would be within the guideline range of either of those categories, so I am declining to do that.

GA64.

At that point, the court entertained the parties' arguments as to the appropriate sentence, making clear that the 46-57 month guideline range was advisory and that the court was not "bound by the guidelines anyway[.]" GA64. The defendant maintained that he had matured while incarcerated in this case, that he valued his relationship with his young son above all, and that he would never again come before any court for criminal charges. GA67-GA68. He also pointed to the fact that his father had been murdered when he was young and that he himself had been using drugs since he was eleven years old. GA69.

Six different individuals addressed the court on the defendant's behalf, including his cousin, who discussed the defendant's relationship with his son and the fact that he had a strong support

network at home, GA71-GA72, his mother, who acknowledged the defendant's bad decisions and asked the court to give him a second chance and to return him to his family, GA74-GA75, and his sister, who talked about the defendant as a role model and an important influence in hers and her younger brother's lives, GA77. The defendant himself addressed the court and explained how important his young son was and about his plans for the future, which included starting a non-profit company in his neighborhood focused on changing the lives of his contemporaries and being a positive influence for others. GA81.

The government emphasized the seriousness of the offense conduct, in that the defendant, who had already been convicted of shooting someone, had possessed a loaded handgun. GA85-GA86. It also questioned the defendant's commitment to his son by pointing out that he had used PCP and immediately returned to Roodner Court during his three-day hiatus from federal prison in May 2011 and that he had viciously beaten another inmate in October 2011. GA86-GA87.

Given that the court refused to depart upward under § 4A1.3, the government asked for a sentence at the top of the 46-57 month range. In particular, the government argued:

When you look at [the defendant's] record since 2004, there has been a lot of times where he had a chance to get it

right. I understand everything that I've heard about bad choices.

The problem is where do we go from here? He's already served a sentence of three years in state prison because he violated probation. In this case, he violated probation again. In other words, he was on yet another term of probation.

He's asking this Court to impose a sentence of around three years, I think time served would probably end up being 32 or 33 months. And the problem with that is that one thing the Court has to worry about is incremental punishment. "How do I justify a sentence that's lower than some of your prior sentences? How do I justify imposing a sentence that isn't significantly enough higher that you understand this is the wake-up call, this should never happen again?"

GA88.

In explaining its sentence, the court told the defendant, "I read your letter, of course, and it's very articulate, very well done. Why are you in front of me then? You have the ability to do other things." GA90. The court said that it was "particularly troubled by the conduct that [the defendant] recently engaged in while [he was] being held." GA90. The court also cited the PSR's discussion of the numerous disciplinary tickets

the defendant had received in jail. GA90. The court said, “You don’t seem to be able to get it, sir, what your behavior should be, and I’m very troubled about that You ought to be able to do something better with your life.” GA90. The court then imposed sentence: “Your guideline range is 46-57 months, I have adopted it, and I’m going to commit you to the custody of the Bureau of Prisons for a period of 57 months.” GA90.

Summary of Argument

The district court’s 57-month guideline sentence was procedurally and substantively reasonable, and the defendant’s claim to the contrary, which is accompanied by little analysis or explanation, has no merit.

There can be no dispute that the district court properly calculated the guideline range, considered the various arguments for a sentence above and below that range and adequately explained its reasons for imposing a sentence within that range. Indeed, the defendant specifically agreed to the guideline range in the PSR and never suggested that the court’s explanation for refusing to depart and imposing a sentence at the top of the range was incomplete or insufficient.

Moreover, as the government pointed out at sentencing, the defendant, who was on state probation at the time, engaged in very serious offense conduct by possessing a loaded handgun

and over an ounce of crack cocaine. The defendant had already sustained two serious felony convictions for shooting someone and for selling narcotics, and he had already served as much as three years in state prison. He had repeatedly engaged in criminal conduct while under court supervision and had received numerous disciplinary tickets for fighting while in jail, the most recent of which was for a violent assault he committed in federal custody for this case. Indeed, despite his claim at sentencing that he had changed, there were at least three very recent examples of his utter disregard for the law, all of which occurred *after* his arrest in this case and revealed his high risk of recidivism: (1) he was involved in the assault on a neighbor within weeks of being arrested in this case; (2) when he was mistakenly released from federal prison for a weekend in May 2011, he immediately used PCP and returned to the housing complex where he had trespassed so many times before and where he had possessed the loaded handgun charged in this case; and (3) while waiting for the results of the government's interlocutory appeal in this case, he violently assaulted another inmate and lied about it when questioned. In weighing these and other aggravating factors, the district court properly rejected the defendant's pleas for leniency and determined that a sentence at the top of the guideline range was minimally necessary to reflect the seriousness of

the offense and deter the defendant from engaging in criminal conduct in the future.

Argument

I. The district court’s 57-month guideline sentence was procedurally and substantively reasonable.

A. Governing law and standard of review

1. Reviewing a sentence for reasonableness

Under 18 U.S.C. § 3553(a), in determining an incarceration term, a sentencing court should consider: (1) “the nature and circumstances of the offense and history and characteristics of the defendant”; (2) the need for the sentence to serve various goals of the criminal justice system, including (a) “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment,” (b) to accomplish specific and general deterrence, (c) to protect the public from 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 sentencing range set forth in the guidelines; (5) any policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentenc-

ing disparities; and (7) the need to provide restitution to victims. *Id.*

Following *United States v. Booker*, 543 U.S. 220 (2005), appellate courts are to review sentences for reasonableness, which amounts to review for “abuse of discretion.” *Gall v. United States*, 552 U.S. 38, 41 (2007); *United States v. Cavera*, 550 F.3d 180, 187 (2d Cir. 2008) (en banc). This reasonableness review consists of two components: procedural and substantive review. *Cavera*, 550 F.3d at 189.

Substantive review is exceedingly deferential. This Court has stated it will “set aside a district court’s *substantive* determination only in exceptional cases where the trial court’s decision ‘cannot be located within the range of permissible decisions.’” *Id.* (quoting *United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007)). This review is conducted based on the totality of the circumstances. *Id.* at 190. Reviewing courts must look to the individual factors relied on by the sentencing court to determine whether these factors can “bear the weight assigned to [them].” *Id.* at 191. However, in making this determination, appellate courts must remain appropriately deferential to the institutional competence of trial courts in matters of sentencing. *Id.* Finally, this Court neither presumes that a sentence within the Guidelines range is reasonable nor that a sentence outside this range is unreasonable, but may take the degree of variance from the Guide-

lines into account when assessing substantive reasonableness. *Id.* at 190. This system is intended to achieve the Supreme Court’s insistence on “individualized” sentencing, *see Gall*, 552 U.S. at 50; *Cavera*, 550 F.3d at 191, while also ensuring that sentences remain “within the range of permissible decisions,” *Cavera*, 550 F.3d at 191.

This Court has recognized that “[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge.” *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006); *see also United States v. Savoca*, 596 F.3d 154, 160 (2d Cir. 2010). A sentence is substantively unreasonable only in the “rare case” where the sentence would “damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law.” *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009). This Court recently likened its substantive review to “the consideration of a motion for a new criminal jury trial, which should be granted only when the jury’s verdict was ‘manifestly unjust,’ and to the determination of intentional torts by state actors, which should be found only if the alleged tort ‘shocks the conscience.’” *United States v. Dorvee*, 616 F.3d 174, 183 (2d Cir. 2010) (quoting *Rigas*, 583 F.3d at 122-23). On review, this Court will set aside only “those outlier sentences that reflect actual abuse

of a district court's considerable sentencing discretion." *United States v. Jones*, 531 F.3d 163, 174 (2d Cir. 2008).

This deference is appropriate, however, only when a reviewing court determines that the sentencing court has complied with the procedural requirements of the Sentencing Reform Act. *Cavera*, 550 F.3d at 189-90. A sentencing court commits procedural error if it fails to calculate the Guidelines range, erroneously calculates the Guidelines range, treats the Guidelines as mandatory, fails to consider the factors required by statute, rests its sentence on clearly erroneous findings of fact, or fails to adequately explain the sentence imposed. *Id.* at 190. These requirements, however, should not become "formulaic or ritualized burdens." *Id.* at 193. This Court thus presumes that a district court has "faithfully discharged [its] duty to consider the statutory factors" in the absence of evidence in the record to the contrary. *Fernandez*, 443 F.3d at 30. Moreover, the level of explanation required for a sentencing court's conclusion depends on the context. A "brief statement of reasons" is sufficient where the parties have only advanced simple arguments, while a lengthier explanation may be required when the parties' arguments are more complex. *Cavera*, 550 F.3d at 193. Finally, the reason-giving requirement is more pronounced the more the sentencing court departs from the Guidelines or imposes unusual

requirements. *Id.* This procedural review, however, must maintain the required level of deference to sentencing courts' decisions and is only intended to ensure that "the sentence resulted from the reasoned exercise of discretion." *Id.*

2. Reviewing a district court's downward departure decision

With respect to the consideration of departure grounds as a basis for procedural error, this Court has explained that "a refusal to downwardly depart is generally not appealable." *United States v. Stinson*, 465 F.3d 113, 114 (2d Cir. 2006) (per curiam) (quotation marks and citation omitted); *see also United States v. Valdez*, 426 F.3d 178, 184 (2d Cir. 2005); *United States v. Ekhator*, 17 F.3d 53, 55 (2d Cir. 1994); *United States v. Desena*, 260 F.3d 150, 159 (2d Cir. 2001).

A narrow exception to this general rule exists "when a sentencing court misapprehended the scope of its authority to depart or the sentence was otherwise illegal." *Stinson*, 465 F.3d at 114 (quotation marks and citation omitted). Absent "clear evidence of a substantial risk that the judge misapprehended the scope of his departure authority," however, this Court presumes that the judge understood the scope of his authority. *Id.* (quotation marks and citation omitted); *see also United States v. Sero*, 520 F.3d 187, 192 (2d Cir. 2008) (per curiam) (noting that the "pre-

sumption that a district court understands its authority to depart may be overcome only” in a “rare situation”) (quotation marks and citation omitted). Such a substantial risk may arise “where the available ground for departure was not obvious and the sentencing judge’s remarks made it unclear whether he was aware of his options.” *United States v. Silleg*, 311 F.3d 557, 561 (2d Cir. 2002) (quotation marks and citation omitted).

In addressing motions for downward departures, this Court “does not require that district judges by robotic incantations state ‘for the record’ or otherwise that they are aware of this or that arguable authority to depart but that they have consciously elected not to exercise it.” *United States v. Diaz*, 176 F.3d 52, 122 (2d Cir. 1999) (quotation marks and citation omitted); *see also United States v. Margiotti*, 85 F.3d 100, 103 (2d Cir. 1996) (per curiam) (“Sentencing is rigid and mechanistic enough as it is without the creation of rules that treat judges as automatons.”).

3. Plain error review

To the extent that the defendant did not raise a perceived sentencing error below, this Court applies a plain error standard of review. *United States v. Villafuerte*, 502 F.3d 204, 207 (2d Cir. 2007). This Court has applied the plain error standard of review to unpreserved claims that the district court failed to adequately consider

the § 3553(a) factors or explain its reasoning for imposing a particular sentence. *Id.* at 207-212. Requiring that such claims be raised before the sentencing judge “alerts the district court to a potential problem at the trial level and facilitates its remediation at little cost to the parties, avoiding the unnecessary expenditure of judicial time and energy in appeal and remand.” *Id.* at 208. Moreover, “[r]equiring the [sentencing] error to be preserved by an objection creates incentives for the parties to help the district court meet its obligations to the public and the parties.” *Id.* at 211.

Pursuant to Fed. R. Crim. P. 52(b), plain error review permits this Court to grant relief only where (1) there is error, (2) the error is plain, (3) the error affects substantial rights, and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Williams*, 399 F.3d 450, 454 (2d Cir. 2005) (citing *United States v. Cotton*, 535 U.S. 625, 631-32 (2002), and *United States v. Olano*, 507 U.S. 725, 731-32 (1993)).

To “affect substantial rights,” an error must have been prejudicial and affected the outcome of the district court proceedings. *Olano*, 507 U.S. at 734. 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, it is the defendant rather than the government who bears

the burden of persuasion with respect to prejudice. *Id.*

This Court has cautioned that reversal under the plain error standard of review should “be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.” *Villafuerte*, 502 F.3d at 209 (internal quotation marks omitted).

B. Discussion

The defendant’s eight-page brief appears to take issue with the district court’s guideline calculation, but not with its explanation of the sentence. As to the guideline calculation, he offers no reason or explanation as to why it was incorrect. Instead, he simply argues that the sentence was “unwarranted, unreasonable and excessive.” Def.’s Br. at 6. He argues that a sentence at the top of the guideline range was excessive and did not give proper consideration to his downward departure arguments. *See* Def.’s Br. at 7. In short, he appears to argue that the district court’s sentence was substantively unreasonable, though he suggests, in referencing an “improper” guideline calculation, that there was some procedural error as well. These arguments have no merit.

The district court engaged in a proper sentencing procedure, correctly calculated the guideline range, applied the factors articulated in § 3553(a), considered the defendant’s various

arguments for leniency and reached a reasoned view that a guideline-sentence was appropriate. This view was supported by the undisputed findings of fact in the PSR, which depicted a defendant with an extensive record, a violent past, a history of committing crimes while on probation and a propensity to assault other inmates, *i.e.*, a defendant who presented a high risk of re-offending.

1. Procedural reasonableness

The district court did not commit any procedural error and certainly not one that constituted “plain error.” First, although the defendant suggests that the court improperly calculated the guideline range, Def.’s Br. at 6-8, he has waived any argument to that effect by agreeing at sentencing that the PSR correctly calculated the range, GA41-GA42, GA55, *see Olano*, 507 U.S. at 733, and by failing to articulate on appeal *how* the range was calculated incorrectly, *see Norton v. Sam’s Club*, 145 F.3d 114, 117 (2d Cir. 1998) (holding that issues not sufficiently argued in a brief are deemed waived).

In any event, as the defendant acknowledged at sentencing, the district court properly calculated his guidelines range based on factors agreed upon in the plea agreement and set forth, with no dispute, in the PSR. GA55, GA63. The defendant’s base offense level of 20 was due to his prior assault conviction. He received a four-

level enhancement for possessing the firearm in connection with the crack cocaine he also possessed. His Criminal History Category was based on the points he received for his prior assault and sale of narcotics convictions and the fact that he committed this offense while serving a term of state probation. Thus, it is undisputed that the guideline incarceration range was properly determined to be 46-57 months. GA54-GA55.

Second, the district court sufficiently explained its sentencing decision. It denied the government's request for an upward departure for understatement of criminal history and explicitly stated it would consider those same factors in deciding where within the range to impose sentence. GA64. It rejected the defendant's request for leniency and, in particular, his claim that he had rehabilitated himself since being incarcerated in this case, by pointing to his repeated prison assaults. GA90. The court was troubled by the number of disciplinary tickets the defendant had received while incarcerated and was particularly upset that he would violently assault another inmate while awaiting disposition of this case. GA90.

Finally, although the court did not explicitly refer to the defendant's leniency arguments as "downward departure" arguments, such a reference is not required, *Diaz*, 176 F.3d at 122, especially here where the defendant himself did not

articulate his claim as one requesting a downward departure. A review of both his sentencing memorandum, GA41-GA50, and his sentencing comments, GA65-GA69, shows that the defendant made general arguments for leniency and for a below-guideline sentence of time served. GA44-GA48, GA83-GA84. In fact, the only specific request for a downward departure he made was to ask the court to depart to the guideline range set forth in the plea agreement under *Fernandez*, GA49, and, here, he does not challenge the district court's rejection of that argument. Since the defendant never explicitly asked for a downward departure on the grounds he raises on appeal, there could not have been any error by the district court in refusing to grant one. Moreover, it is well-settled that, where, as here, there is no evidence that the district court misapprehended its authority to depart downward, the refusal to depart is unreviewable on appeal. *Stinson*, 465 F.3d at 114.

2. Substantive reasonableness

The district court's sentencing decision was not unreasonable, nor did it constitute an abuse of discretion. As noted above, the defendant engaged in very serious offense conduct here by possessing a loaded handgun and over an ounce of crack in a public housing project where he was not allowed to be. He had previously sustained a felony conviction for selling drugs and a separate felony conviction for shooting another individual.

He had repeatedly committed crimes while on probation or pretrial supervision and committed this offense while on probation. When given a chance to prove himself during his brief respite from federal prison in May 2011, he made the poor decisions to use PCP and trespass in the very same housing project where he was arrested in this case. And, as the district court emphasized in imposing the 57-month sentence, GA90, the defendant had repeatedly received disciplinary tickets for violently assaulting other inmates in jail, the most recent of which was captured on video and played for the court at sentencing. In light of these factors, the district court's decision to impose a sentence at the top of the guideline range was reasonable and reflected a proper balancing of the § 3553(a) factors.

The defendant's brief has pointed to nothing to suggest that this decision constituted an abuse of discretion. His arguments simply repeat the same points he made before the district court. It is well-settled that this Court does not substitute its own judgment for that of the district court when reviewing the substantive reasonableness of a sentence. *See United States v. Kane*, 452 F.3d 140, 145 (2d Cir. 2006) (per curiam). Thus, the district court's guideline sentence should be affirmed.

Conclusion

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

Dated: January 7, 2014

Respectfully submitted,

DEIRDRE M. DALY
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in black ink that reads "Robert M. Spector". The signature is written in a cursive style with a large, sweeping initial "R".

ROBERT M. SPECTOR
ASSISTANT U.S. ATTORNEY

Sandra S. Glover
Assistant United States Attorney (of counsel)

**Federal Rule of Appellate Procedure
32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,353 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

A handwritten signature in black ink that reads "Robert M. Spector". The signature is written in a cursive style with a prominent initial "R" and a long, sweeping underline.

ROBERT M. SPECTOR
ASSISTANT U.S. ATTORNEY