

# 13-4835

*To Be Argued By:*  
ROBERT M. SPECTOR

---

---

**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 13-4835**

—  
UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

EDWARD N. ORTIZ,  
*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 .....	ii
Statement of Jurisdiction .....	v
Statement of Issue Presented for Review.....	vi
Preliminary Statement .....	1
Statement of the Case .....	3
A. The original sentencing hearing.....	4
B. The supervised release violation and related conviction.....	7
Summary of Argument .....	13
Argument.....	14
I. The district court applied the correct statutory penalties in imposing sentence. ....	14
A. Governing law and standard of review.....	14
B. Discussion.....	19
Conclusion .....	27
Addendum	

## 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>Apprendi v. New Jersey</i> , 530 U.S. 466 (2000) .....	21
<i>Johnson v. United States</i> , 529 U.S. 694 (2000) .....	23
<i>United States v. Almand</i> , 992 F.2d 316 (11th Cir. 1993) .....	21
<i>United States v. Fernandez</i> , 443 F.3d 19 (2d Cir. 2006).....	17
<i>United States v. Goffi</i> , 446 F.3d 319 (2d Cir. 2006).....	17
<i>United States v. Jones</i> , 460 F.3d 191 (2d Cir. 2006).....	17
<i>United States v. McNeil</i> , 415 F.3d 273 (2d Cir. 2005).....	17
<i>United States v. Pelensky</i> , 129 F.3d 63 (2d Cir. 1997).....	17

<i>United States v. Savage</i> , 542 F.3d 959 (2d Cir. 2008).....	7, 9, 10, 20
<i>United States v. Turlington</i> , 696 F.3d 425 (3rd Cir. 2012) .....	23, 24
<i>United States v. Warren</i> , 335 F.3d 76 (2d Cir. 2003).....	17, 21, 22, 23
<i>United States v. White</i> , 416 F.3d 1313 (11th Cir. 2005) (per curiam).....	20
<i>United States v. Wirth</i> , 250 F.3d 165 (2d Cir. 2001) (per curiam) .....	17

### Statutes

18 U.S.C. § 922.....	3, 25
18 U.S.C. § 924.....	<i>passim</i>
18 U.S.C. § 3231 .....	v
18 U.S.C. § 3553.....	12, 14, 16, 17
18 U.S.C. § 3559.....	15, 19
18 U.S.C. § 3583.....	<i>passim</i>
18 U.S.C. § 3742.....	v
28 U.S.C. § 1291.....	v
28 U.S.C. § 2255.....	21

## **Rules**

Fed. R. App. P. 4 .....	v
-------------------------	---

## **Guidelines**

U.S.S.G. § 4B1.2.....	18
U.S.S.G. § 5K1.1.....	1, 8
U.S.S.G. § 7B1.1.....	18
U.S.S.G. § 7B1.4.....	19

## **Statement of Jurisdiction**

This is an appeal from a judgment entered on December 18, 2013 by the district court (Alvin W. Thompson, J.) after the defendant was found to have violated the conditions of his supervised release term. Joint Appendix (“JA”)12, JA26-JA29. The district court had subject matter jurisdiction under 18 U.S.C. § 3231. On December 17, 2013, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA12, JA30. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

**Statement of Issue  
Presented for Review**

In a violation of supervised release proceeding, should the statutory maximum penalties for any term of imprisonment upon revocation be determined by reference to the law under which the defendant was convicted, or, if the law has changed, by reference to the law at the time of the revocation proceeding?

# United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 13-4835

---

UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

EDWARD N. ORTIZ,  
*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 2003, the defendant, Edward Ortiz, pleaded guilty to being a previously convicted felon in possession of a firearm and, in doing so, admitted that he was an armed career criminal under 18 U.S.C. § 924(e), so that he faced a mandatory minimum incarceration term of fifteen years and a maximum term of life. Based on the government's filing of a motion under U.S.S.G. § 5K1.1, the district court imposed a sentence of ten years

in jail and five years of supervised release. Ortiz began his supervised release term on June 21, 2010, but after he participated in the burglary of a home in Colebrook, Connecticut on May 9, 2011, during which he stole, among other things, twelve firearms, Ortiz was charged with violating the terms of his supervised release and indicted for the same conduct. After Ortiz admitted to the violation and pleaded guilty to the separate federal firearms charges, the district court imposed the statutory maximum incarceration term of 60 months for the violation and ordered it to be served consecutive to the 72-month sentence ordered in the related, firearms case, *United States v. Edward Ortiz*, 3:12cr121(RNC).

On this appeal from the revocation sentence, Ortiz argues that the district court erred in finding that the statutory maximum incarceration term for the supervised release violation was five years, rather than the typical two-year term which applies to felon-in-possession cases prosecuted under 18 U.S.C. § 924(a)(2) (providing for a maximum ten-year incarceration term). Ortiz maintains that, under current caselaw, he is no longer an armed career criminal and, therefore, should no longer be subject to the higher statutory penalties provided for under 18 U.S.C. § 924(e).

His argument has no merit. As the district court properly concluded, regardless of any change in the law, the original count of convic-

tion was a Class A felony because it carried a maximum prison term of life. Under 18 U.S.C. § 3583(e), a Class A felony carries a maximum possible sentence of five years in jail for any subsequent violation of supervised release. The district court's judgment should be affirmed.

### **Statement of the Case**

On July 15, 2003, Ortiz was sentenced to 120 months' incarceration and five years' supervised release for his conviction of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924(e). JA9, JA23. He violated the conditions of his supervised release on May 9, 2011 by burglarizing a home and stealing 12 firearms, JA23, and was charged with that violation on August 3, 2011, JA10. After being indicted for federal firearms offenses for the same conduct, Ortiz pleaded guilty to the firearms offenses and admitted the separate supervised release violation. Government's Appendix ("GA")19, JA12.

On October 9, 2013, the district court (Robert N. Chatigny, J.) sentenced him to a total effective term of 72 months' incarceration and three years' supervised release on the new firearms charges, GA26, and, on December 9, 2013, the district court (Alvin W. Thompson, J.) sentenced him to a consecutive 60-month incarceration term on the supervised release violation, JA12, JA28.

Judgment on the supervised release violation entered on December 18, 2013, and Ortiz filed a timely notice of appeal on December 17, 2013. JA12. Ortiz is currently serving his sentence.

#### **A. The original sentencing hearing**

After pleading guilty to one count charging him with being a felon in possession of a firearm, Ortiz faced sentencing on July 15, 2003. JA32-JA33. In both the written plea agreement and at the start of the sentencing hearing, Ortiz acknowledged that he was an armed career criminal under 18 U.S.C. § 924(e) and, as such, faced enhanced penalties. JA15, JA34, JA39-JA40. Specifically, Ortiz acknowledged that he faced “a possible maximum sentence of life imprisonment[,] . . . a supervised release term of as much as five years[,] . . . a possible fine of as much as \$250,000[,] . . . [and] a mandatory special assessment of \$100.” JA38-JA39. In addition, the court informed him that, if he violated any condition of supervised release, he could be sentenced to “as much as five years” in prison. JA39.

Ortiz also faced a guideline incarceration range of 180-210 months, which was based on a total offense level of 30, a Criminal History Category VI, and the 15-year statutory mandatory minimum. JA39.

In imposing sentence, the district court granted the government’s substantial assistance

motion and imposed an incarceration term below both the guideline range and the statutory mandatory minimum. JA50-JA51. In particular, the court departed four levels, so that the new guideline range was 120-150 months, based on a total offense level of 26 and a Criminal History Category VI. JA51. With no objection from either side, the court characterized Ortiz's assistance as "below average" and adjusted its departure accordingly. JA46. It then imposed an incarceration term of 120 months and a supervised release term of 5 years. JA51-JA52. After reviewing the various mandatory and special conditions of supervised release, the court again advised Ortiz: "If you violate any of these conditions during your period of supervised release, the Court will be free to sentence you to additional time in prison of up to five years." JA54. Ortiz indicated that he understood these penalties. JA54.

The court further explained:

So, in effect, you do have a sentence of five years hanging over your head during the period that you're on supervised release. The consequences of a failure to comply with the conditions of supervised release are extremely serious and the Court would not hesitate to sentence you to additional time in prison if you violated the terms of your supervised release. . . .

One other thing I really ought to explain to you is that yours is a case where you had opportunities. You had a lengthy jail term. It didn't make a difference. You came out and you promptly committed another offense. Your situation is one where it just became too late. And with somebody who's younger or less mature, the Court might look at them differently in terms of how to interpret their criminal history. But with someone of your age and your number of offenses and the time you've been in jail, when you come out and you commit an offense right away, it tells the Court that you're someone who needs to be specifically deterred, and that means you get a longer sentence. And the reason I'm explaining this to you is that if you violate the conditions of your supervised release, that will be yet another message to the sentencing judge that you need to be specifically deterred and maybe that society needs to be protected from you. And that would suggest that the judge who imposes a sentence should give you the maximum upon the revocation of your supervised release.

JA54-JA55.

Ortiz did not attack his sentence through a direct appeal or a habeas petition. JA9-JA10.

## **B. The supervised release violation and related conviction**

Ortiz started serving his five-year supervised release term on June 21, 2010. JA20. On May 9, 2011, Ortiz and an accomplice committed a burglary at a home in Colebrook, Connecticut. JA23. They stole televisions, computers, jewelry and 12 different firearms. JA23. Ortiz then sold the contraband, including all of the firearms, for money and narcotics. JA23. On July 22, 2011, Ortiz was arrested by the New Britain police on unrelated state drug charges, and he was subsequently indicted in federal court on firearms charges related to the May 2011 burglary. JA23-JA24, GA15.

On October 9, 2013, after pleading guilty to the offenses of being a felon in possession of a firearm and conspiring to steal firearms, Ortiz was sentenced to a total effective term of 72 months in federal prison based on the new federal gun charges. GA26, JA24. In light of this Court's decision in *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008), his prior sale of narcotics conviction no longer counted as a serious drug offense, and he did not qualify as an armed career criminal. Pre-Sentence Report ("PSR") (2012) ¶ 4. After receiving several different guideline enhancements, including a four-level increase for firearms trafficking and a four-level increase for unlawful possession of 12 firearms, he faced a guideline range of 168-180 months, which capped at the 180-month statutory maxi-

imum sentence for the two offenses.<sup>1</sup> PSR (2012) ¶¶ 16-20, 58-59. He again received a significant departure based on his substantial assistance to the government and the court's granting of a § 5K1.1 motion. JA82.

In the supervised release violation report, the probation officer said that Ortiz's adjustment to supervision was "unsatisfactory" because he "failed to report as directed, failed to abstain from criminal conduct or participate in substance abuse or mental health treatment as directed." JA24. In particular, Ortiz failed to attend scheduled appointments at the Wheeler clinic for mental health and substance abuse evaluations. JA24. He also tested positive for use of controlled substances and "was repeatedly involved in illegal drug related criminal conduct." Though he briefly participated in vocational training, he failed to complete the training course and did not hold steady employment. JA24.

The district court held a supervised release violation hearing on December 9, 2013. JA59. At the start of the hearing, Ortiz, through counsel, admitted to all four violations set forth in the pe-

---

<sup>1</sup> The statutory maximum penalty for the felon-in-possession offense was ten years' incarceration, and the statutory maximum penalty for the conspiracy offense was five years' incarceration. PSR (2012) ¶ 58.

tion. A63. In particular, Ortiz admitted violating the following supervised release conditions: (1) “The defendant shall not commit another federal, state or local offense[]”; (2) “The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony, unless granted permission of the Probation Officer[]”; (3) “The defendant shall not use, possess or distribute illegal narcotics[]”; and (4) “The defendant shall notify the probation office at least 10 days prior to any change of residence or employment.” JA20. Because one of the violations involved the possession of a firearm, the district court concluded “that the nature of that violation at least mandates revocation of the defendant’s supervised release pursuant to Section 3583(g).” JA63.

Turning to a discussion of the maximum penalties, the court heard argument from both counsel as to the appropriate maximum statutory penalties. JA64. Defense counsel maintained that, under *Savage*, Ortiz would no longer be considered an armed career criminal because the plea transcript for his 1992 Connecticut sale of narcotics conviction was not available and that conviction did not categorically qualify as a serious drug offense under 18 U.S.C. § 924(e). JA64-JA65. Indeed, counsel noted that in the related federal prosecution on the new firearms offense in which the district court ultimately imposed a 72-month sentence, the government had been

unable to establish that Ortiz was an armed career criminal. JA65. Defense counsel conceded that, in the original 2003 sentencing, no one had sought the plea transcript for the 1992 sale conviction because *Savage* had not yet been decided and that conviction still counted categorically as a serious drug offense. JA66. And the government pointed out that there is no way to know whether, back in 2003, the parties would have been able to get a transcript of the 1992 sale conviction to determine whether it qualified under the modified categorical approach. JA72.

At that point, the district court clarified defense counsel's position: "I should not treat him as if he was convicted of a Class A felony. I hear you saying I should make an adjustment for the fact that had *Savage* been in effect at the time, it would not have been a Class A felony." JA67-JA68. Defense counsel agreed. He argued, "If it were not a Class A felony, which the armed career criminal is, it would be a Class C felony. The most you could impose would be two years." JA68. Defense counsel also argued that the court should move Ortiz into a Criminal History Category V since that would have been his category had he not been considered to be an armed career criminal. JA68.

The government disagreed and argued that Ortiz was "sentenced under the correct law at the time[, and] [t]he guideline are very clear that we should not re-calculate[.]" JA72. "[T]he crim-

inal history category at the time of his conviction is what's supposed to take precedence right now." JA72.

The district court decided the issue as follows:

[T]he one thing that we should be clear on is that the defendant has raised an issue, and I think preserved it, with respect to the . . . class of the felony of which he was convicted[.] . . . And if that position were to prevail, the statutory maximum penalty at the time would have been ten years. And it would have been a Class C felony. I think everybody agrees on the facts there, and I'm not finding in favor of that argument, but the issue is preserved.

\* \* \*

So my analysis as to the maximum sentence and guideline range is as follows: The defendant's original offense was a Class A felony. Therefore, under Section 3583(e)(3), the maximum term of imprisonment that he may be required to serve, once his supervised release is revoked, is five years. In addition, since his violation of supervised release was a Grade A violation and he had a criminal history category of VI at the time that he was sentenced, the applicable policy statement under the Sentencing Guidelines suggest a term of imprisonment of 51 to 63 months. I note

that this policy statement has always been nonbinding.

JA73-74.

After considering the argument and comments of defense counsel, the district court delivered its sentence. JA83. First, it reviewed the relevant factors under 18 U.S.C. §§ 3583(e) and 3553, and referenced the material it had considered in preparing for sentencing, including the Pre-Sentence Reports from both the prior case and the new case, the sentencing memoranda, and the remarks in court. JA84-JA85. It determined that “what is of greatest concern is the need to deter you from committing crimes in the future and the need to protect the public from further crimes committed by you[.]” JA85. It was specifically concerned that “firearms get out of [Ortiz’s] hands and into the hands of others who are convicted felons and people who are not only convicted felons, but actively engaging in criminal activity.” JA85.

Next, the court listed several important factors about Ortiz’s case. First, when he was first sentenced in 2003, Ortiz had already served twelve years in prison and eight years of probation. JA85. Second, because the court departed downward in the first sentencing, and Ortiz failed to take advantage of the opportunity, an upward departure might be appropriate on the supervised release violation. JA86. Third, prior to his theft of firearms in May 2013, Ortiz had

been arrested for selling crack cocaine, something he had been doing not “as a casual endeavor.” JA86. Finally, the court found it difficult to rely on Ortiz’s assurance that he would not re-offend because he had made similar statements in 2003 and those statements were directly contradicted by his subsequent criminal conduct. JA87.

As a result, the court imposed an incarceration term of 60 months and ordered that it be served consecutive to the 72-month incarceration term imposed on the underlying firearms convictions. JA87. It did not impose any additional supervised release time. JA87.

### **Summary of Argument**

The district court applied the correct statutory penalties here. There is no dispute that Ortiz was convicted of a Class A felony in 2003, *i.e.*, a felony which carried a maximum term of life in prison. During his original prosecution, the district court repeatedly advised him of the maximum penalties he would face, including the fact that he would face up to five years in jail on any future violation of supervised release. The fact that he may no longer be considered an armed career criminal is not relevant to the question of what statutory penalties should apply to a supervised release violation based on his original conviction. On that issue, the only relevant inquiry is what penalties applied at the time of his

original conviction. And there is no dispute that, at the time of his original conviction, he faced a statutory maximum term of life in prison. Nothing that has occurred since the entry of judgment in the original case has changed that fact. He never challenged his original conviction, nor did he question his status as an armed career criminal.

## **Argument**

### **I. The district court applied the correct statutory penalties in imposing sentence.**

#### **A. Governing law and standard of review**

“[I]n imposing a sentence to a term of imprisonment for a felony or a misdemeanor, [a sentencing court] may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment[.]” 18 U.S.C. § 3583(a). For a Class A or B felony, the term of supervised release ordered may not exceed five years. *See id.* § 3583(b).

A court “may, after considering the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7) . . . , revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute

for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release . . . .” 18 U.S.C. § 3583(e)(3). But a “defendant whose term is revoked . . . may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case.” *Id.*

Title 18, United States Code, Section 3559 sets out the various letter grades that apply to federal criminal offenses:

An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is—(1) life imprisonment, or if the maximum penalty is death, as a Class A felony; (2) twenty-five years or more, as a Class B felony; (3) less than twenty-five years but ten or more years, as a Class C felony; (4) less than ten years but five or more years, as a Class D

felony; (5) less than five years but more than one year, as a Class E felony . . . .

*Id.*

The statutory factors that sentencing courts must consider in determining whether to revoke a term of supervised release and impose a new prison sentence are as follows:

(1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the need for the sentence imposed – . . . (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; . . . (4) the kinds of sentence and the sentencing range established [in the Sentencing Guidelines]; (5) any pertinent policy statement [issued by the Sentencing Commission]; (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and (7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3553(a). Consideration of the guideline range requires a sentencing court to calculate the range and put the calculation on the

record. *See United States v. Fernandez*, 443 F.3d 19, 29 (2d Cir. 2006).

This Court has noted that a violation of supervised release is a serious matter. *See United States v. Warren*, 335 F.3d 76, 79 (2d Cir. 2003). A sentencing court has broad discretion to revoke an earlier grant of supervised release and impose imprisonment up to the statutory maximum, after due consideration to policy statements and the Sentencing Guidelines. *See United States v. Pelensky*, 129 F.3d 63, 69 (2d Cir. 1997); *United States v. Wirth*, 250 F.3d 165, 169 (2d Cir. 2001) (per curiam); *see also United States v. Jones*, 460 F.3d 191, 195 (2d Cir. 2006) (noting that post-*Booker* sentencing judges have an “enhanced scope” of discretion). A sentencing judge handling the revocation of supervised release must consider non-binding factors such as policy statements and the guideline range, but is not required to sentence within any advisory range. *See, e.g., United States v. Goffi*, 446 F.3d 319, 322-23 (2d Cir. 2006). Rather, the sentence need only be consistent with the general provisions of sentencing pursuant to 18 U.S.C. § 3553. *Id.* “The standard of review on the appeal of a sentence for violation of supervised release is . . . the same standard as for sentencing generally: whether the sentence imposed is reasonable.” *United States v. McNeil*, 415 F.3d 273, 277 (2d Cir. 2005).

“Section 7B1.1(a) of the Guidelines recommends sentencing ranges for violations of supervised release based on alphabetical classifications.” *Id.* at 278. A “Grade A Violation” is defined, in relevant part, as “conduct constituting . . . a federal, state, or local offense punishable by a term of imprisonment exceeding one year that . . . is a crime of violence . . . .” U.S.S.G. § 7B1.1(a)(1). “Crime of violence” is defined under § 4B1.2. *See id.* § 7B1.1, comment (n.2). Under § 4B1.2, “[t]he term ‘crime of violence’ means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . is burglary of a dwelling . . . .” *Id.*, § 4B1.2(a)(2). “Where there is more than one violation of the conditions of supervision, or the violation includes conduct that constitutes more than one offense, the grade of the violation is determined by the violation having the most serious grade.” *Id.*, § 7B1.1(b).

Moreover, a violation of the mandatory condition of supervised release that a defendant not commit another federal, state, or local crime “may be charged whether or not the defendant has been the subject of a separate federal, state, or local prosecution for such conduct.” U.S.S.G. § 7B1.1, comment (n.1). “The grade of violation does not depend upon the conduct that is the subject of criminal charges or of which the defendant is convicted in a criminal proceeding.

Rather, the grade of the violation is to be based on the defendant's actual conduct." *Id.*

"The range of imprisonment applicable upon revocation is set forth" in a "Revocation Table" listed under U.S.S.G. § 7B1.4(a). *Id.* For a defendant whose original criminal history category was VI, the incarceration range for a Grade A violation is 51-63 months. *Id.* "Where the original sentence was the result of a downward departure . . . that resulted in a sentence below the guideline range applicable to the defendant's underlying conduct, an upward departure may be warranted." *Id.*, § 7B1.4, comment (n.4).

## **B. Discussion**

There is no dispute here that Ortiz's underlying conviction from his original case was a Class A felony. In that case, he was convicted of being a felon in possession of a firearm and was sentenced as an armed career criminal under 18 U.S.C. § 924(e) because he had at least three prior convictions for violent felonies/serious drug offenses. As an armed career criminal, he faced a possible maximum statutory prison term of life. 18 U.S.C. § 924(e). Under 18 U.S.C. § 3559, any crime which carries a maximum penalty of life in prison is a Class A felony. A subsequent revocation of supervised release ordered as part of the sentence for a Class A felony results in a maximum incarceration term of five years under 18 U.S.C. § 3583(e)(3).

Ortiz points out that he no longer qualifies as an armed career criminal because of a change in the law (*i.e.*, *Savage*) that occurred in the intervening years between his prior conviction and his latest arrest. The government does not dispute this fact, and, of course, in his new felon-in-possession case, he was not treated as an armed career criminal and the maximum statutory incarceration term he faced on both gun charges was fifteen years.

But Ortiz claims that, because he is no longer an armed career criminal, he should face a lower statutory penalty on his supervised release violation, even though that violation arose from a supervised release term imposed on a conviction for which he was indisputably sentenced as an armed career criminal. He cites no legal precedent to support his argument and merely casts the claim as one involving fundamental fairness. *See* Def.'s Br. at 10-11. According to Ortiz, because he would now face a maximum incarceration term of ten years on any felon-in-possession charge, making the gun conviction a Class C felony, he should only face a two-year maximum incarceration term on the supervised release violation. *See* Def.'s Br. at 9. There are several problems with this argument.

*First* and foremost, “a defendant may not challenge, for the first time on appeal from the revocation of supervised release, his sentence for the underlying offense.” *United States v. White*,

416 F.3d 1313, 1316 (11th Cir. 2005) (per curiam). Though Ortiz says he is not challenging his underlying sentence, he is certainly claiming that, based on caselaw decided after his sentence, he would no longer be subject to the same statutory penalties and, therefore, should face lower statutory penalties as a result of his supervised release violation. But “[a] sentence is presumed valid until vacated under [28 U.S.C. § 2255].” *Id.* (quoting *United States v. Almand*, 992 F.2d 316, 317-18 (11th Cir. 1993)). Here, Ortiz’s original sentence is presumed to be valid.

Indeed, this Court made the same point on facts directly analogous to the facts here in *United States v. Warren*, 335 F.3d 76 (2d Cir. 2003). In *Warren*, the defendant claimed that although his 1989 drug conviction was a Class B felony at the time of his conviction, after *Apprendi v. New Jersey*, 530 U.S. 466 (2000) it was clear that his conviction was really a Class C felony so that the maximum penalty for his post-*Apprendi* supervised release violation should have been two years, instead of three years. *Id.* at 77-78. This Court rejected the argument and held “that the validity of an underlying conviction or sentence may not be collaterally attacked in a supervised release revocation proceeding[.]” *Id.* at 78. As the Court explained:

The orderly administration of justice also calls for limiting revocation proceedings to the issue at hand—the fact or non-

fact, as the case may be, of a violation of supervised relief. The avenues of relief from error in the conviction or original sentence available to defendants have been dictated by Congress and the Constitution. They are both well-marked and well-traveled. Allowing claims of such error to be raised in proceedings designed to adjudicate a violation of supervised release would lead to endless confusion over the nature of the claims that could be made and in what circumstances such claims could be brought. In particular, courts would face confusion over whether to entertain arguments that are raised during a revocation proceeding in order to evade or trump the procedural and substantive limitations on other avenues for challenging the underlying conviction. This confusion would, therefore, sacrifice the orderly and efficient administration of justice for no particular gain in fairness.

*Id.* at 79. The Court continued to note that “[a] violation of supervised release is a serious matter, and prosecution of it should not be impeded by the threat of consuming judicial and prosecutorial resources in addressing a host of issues unrelated to the violation.” *Id.* In short, under *Warren*, the validity of the underlying sentence cannot be challenged in the supervised release hearing.

Here, as in *Warren*, Ortiz seeks to litigate the validity of his original conviction. He claims, as did the defendant in *Warren*, that although his conviction was one “class” of felony at the time of his conviction, by the time of his supervised release revocation proceeding, an intervening change in law had made clear that his conviction was really a lower class of felony. Accordingly, just as this Court rejected Warren’s attempt to litigate the validity of his original conviction, it should reject Ortiz’s attempt to litigate the validity of *his* original conviction.

*Second*, as the Third Circuit has explained, “[t]he length of a new term of imprisonment for violating supervised release . . . can only be answered by reference to the law under which the defendant was convicted.” *United States v. Turlington*, 696 F.3d 425, 427 (3rd Cir. 2012) (internal quotation marks and citations omitted). This is because the “imposition of a new sentence for violating the terms of one’s supervised release is part and parcel of the first offense for which the defendant was convicted.” *Id.* (citing *Johnson v. United States*, 529 U.S. 694, 700 (2000)). “[P]ostrevocation penalties relate to the original offense.” *Johnson*, 529 U.S. at 701. “Section 3583(e)(3) is . . . backward-looking; it focuses on the previous, underlying conviction.” *Turlington*, 696 F.3d at 428. “Thus, a district court must look to the underlying offense as it existed at the

time of his original sentencing when making decisions authorized by § 3583(e)(3).” *Id.*

The facts of *Turlington* are directly analogous to the facts here. In *Turlington*, the defendant argued that his original conviction for a Class A felony would be considered a Class B felony after the reductions enacted by the Fair Sentencing Act, and thus that he should face lower statutory penalties on the revocation. 696 F.3d at 427. The Third Circuit rejected that argument, however, concluding that the relevant statutory penalties were tied to “the law under which the defendant was convicted.” *Id.* Here, as in *Turlington*, the defendant’s conviction for a Class A felony would be a Class C felony by operation of an intervening change in the law, and thus he argues, as did *Turlington*, that he should face lower penalties for his revocation. But here, as in *Turlington*, this claim fails because the district court properly “look[ed] to the underlying offense as it existed at the time of his original sentencing when making decisions authorized by § 3583(e)(3).” *Id.* at 428.

*Third*, a plain reading of 18 U.S.C. § 3583, which is the statute governing supervised release violations, shows the flaw in Ortiz’s reasoning. Under § 3583(e), a district court, upon revocation, may “require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release with-

out credit for time previously served on postrelease supervision[.]” *Id.* The statute explicitly sets the maximum jail term as the “term of supervised release authorized by statute for the offense[.]” *Id.* Here, the maximum term of supervised release authorized for Ortiz’s underlying offense was five years, and he received that sentence. He never challenged that sentence in any appeal or collateral proceeding. He does not challenge it now. Since § 3583(e) explicitly ties the maximum incarceration term for a supervised release violation to the maximum authorized supervised release term for the original offense, there is no statutory authority to support recalculating the maximum penalties years after the original judgment becomes final.

*Finally*, despite Ortiz’s arguments here, which occur in the context of him being arrested and prosecuted for a new federal firearms offense, he has never challenged the classification of his original firearms offense. For that offense, he was treated as an armed career criminal and sentenced for the commission of a Class A felony. In fact, though he received a downward departure on his incarceration term, his five-year supervised release term could not have been authorized had he been sentenced under the typical penalty provision for a § 922(g)(1) offense (18 U.S.C. § 924(a)(2)), which is a Class C felony and authorized a maximum supervised release term of only three years. Regardless of whether inter-

vening caselaw has made it impossible to establish at present that he is an armed career criminal, the government established this fact back in 2003.

Though Ortiz couches his argument as one relying on an intervening change in the law, the same failed argument could have been made based on a change in the facts. For example, had the government lost the ability to establish the fact of any of Ortiz's prior convictions due simply to their age, it would certainly not change the classification of the underlying firearms offense at the time of the conviction.

To the extent that Ortiz relies on the concept of fundamental fairness (and, presumably, due process), the factual record here belies his claim. As discussed above, during the guilty plea and the sentencing for the 2003 case, the district court repeatedly advised him of the consequences of violating the conditions of his supervised release term. The court told him several times that he faced a maximum term of five years in prison on any violation. That same warning was in his plea agreement. He certainly understood, when he burglarized the home in May 2011 and stole 12 firearms, that he could return to prison for as long as five years for his crime. Accordingly, there is no violation of fundamental fairness to require him to serve that term.

**Conclusion**

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

Dated: July 29, 2014

Respectfully submitted,

DEIRDRE M. DALY  
UNITED STATES ATTORNEY  
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, reading "Robert M. Spector". The signature is written in a cursive style with a large, sweeping "R" and "S".

ROBERT M. SPECTOR  
ASSISTANT U.S. ATTORNEY

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

## **Addendum**

**18 U.S.C. § 3559. Sentencing classification of offenses**

(a) Classification.--An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is--

(1) life imprisonment, or if the maximum penalty is death, as a Class A felony;

(2) twenty-five years or more, as a Class B felony;

(3) less than twenty-five years but ten or more years, as a Class C felony;

(4) less than ten years but five or more years, as a Class D felony;

(5) less than five years but more than one year, as a Class E felony;

(6) one year or less but more than six months, as a Class A misdemeanor;

(7) six months or less but more than thirty days, as a Class B misdemeanor;

(8) thirty days or less but more than five days, as a Class C misdemeanor; or

(9) five days or less, or if no imprisonment is authorized, as an infraction.

\* \* \*

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

\* \* \*

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

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

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

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized

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

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

\* \* \*