

12-165

To Be Argued By:
TRACY LEE DAYTON

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-165

—
UNITED STATES OF AMERICA,

Appellee,

-vs-

JOSEPH REYES, aka Fat Joe, aka RJ,
LAKESHA BOWLES, RALPH CORA, aka Petey,
aka Pito, RICHARD DANIELS, aka Wap, aka

(For continuation of Caption, See Inside Cover)

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

BRIEF FOR THE UNITED STATES OF AMERICA

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Defendants,

ERNEST WILLIAMSON,
aka Twin, aka Harlem,

Defendant-Appellant.

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Statement of Jurisdiction

The United States District Court for the District of Connecticut (Mark R. Kravitz, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on December 14, 2011. Appendix 7 (“A__”), A108-A110. On January 11, 2012, the district court docketed a *pro se* notice of appeal, dated December 30, 2011. A7, A111. Although this notice of appeal was untimely under Fed. R. App. P. 4(b), the time limits in that rule are not jurisdictional, *see United States v. Frias*, 521 F.3d 229, 231-34 (2d Cir. 2008), and for prudential reasons, the government waives any objection to the timeliness of Williamson’s notice of appeal. 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**

Whether the five-year term of supervised release imposed by the district court was substantively unreasonable in light of the defendant's extensive criminal history and demonstrated drug addiction.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-165

UNITED STATES OF AMERICA,

Appellee,

-vs-

ERNEST WILLIAMSON,

aka Twin, aka Harlem,

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, Ernest Williamson, pleaded guilty to one count of conspiracy to distribute and to possess with intent to distribute 28 grams or more of cocaine base, and was sentenced to 151 months' imprisonment and five years' supervised release. On appeal, Williamson challenges the district court's imposition of a five-

year term of supervised release as substantively unreasonable.

On the record below, the five-year supervised release term was reasonable. The district court faithfully discharged its duty to consider the statutory factors for imposing a term of supervised release and more than adequately explained its sentence in light of these factors, the offense conduct and Williamson's background and personal characteristics. Moreover, this run-of-the-mill, guidelines sentence of five years' supervised release was reasonable given the district court's interest in reducing Williamson's likelihood of recidivism. The district court's judgment should be affirmed.

Statement of the Case

On January 5, 2011, a federal grand jury returned a four-count indictment charging Williamson, and ten other individuals, in Count One with conspiracy to distribute and to possess with the intent to distribute over one kilogram of heroin and over 28 grams of cocaine base, in violation of Title 21, United States Code, Sections 841(a)(1) and 846. A3. The indictment also charged Williamson, and six other individuals, in Count Two with conspiracy to maintain a drug-involved premises within 1000 feet of a school and a housing facility, in violation of Title 21, United States Code, Sections 846 and 860. A3.

On February 1, 2011, the grand jury returned a superseding indictment that added substantive narcotics trafficking and firearm charges against several of Williamson's co-defendants. A4. The charges against Williamson remained the same. A10-A18.

On July 25, 2011, Williamson pleaded guilty to Count One of the superseding indictment. A5, A27.

On December 14, 2011, the district court (Mark R. Kravitz, J.) sentenced the defendant to 151 months' imprisonment, five years' supervised release and a \$100 special assessment. A7, A103. Williamson filed a notice of appeal dated December 30, 2011; it was docketed on January 11, 2012. A7, A111.

Williamson is currently serving the sentence imposed by the district court.

Statement of Facts and Proceedings Relevant to this Appeal

A. The offense conduct

The following description of the conduct underlying Williamson's conviction is drawn from the Pre-sentence Report ("PSR"), which the district court expressly adopted. A70. These facts are not disputed on appeal.

In January 2010, the Federal Bureau of Investigation Safe Streets Task Force ("Task Force") began an investigation of narcotics traf-

ficking in and around the Marina Village Housing Complex in Bridgeport, Connecticut. PSR ¶¶ 8-9. During the course of the investigation, the Task Force conducted several controlled purchases of narcotics from Williamson and his co-defendants, all of whom were selling crack cocaine and heroin from an abandoned house at 105/107 Johnson Street, directly across the street from Marina Village. PSR ¶¶ 9-12. For instance, on May 28, 2010, a cooperating witness, acting under the supervision and at the direction of the Task Force, went to 105/107 Johnson Street in order to make a controlled purchase of narcotics. PSR ¶¶ 14-15. Once inside the house, the cooperating witness gave Williamson \$160 in FBI pre-recorded funds. In return, Williamson and Joseph Reyes each gave the witness a bundle, or ten bags, of heroin. PSR ¶¶ 14-16.

Similarly, on July 21, 2010, a cooperating witness, again acting under the supervision and at the direction of the Task Force, went to 105/107 Johnson Street to make a controlled purchase of narcotics. PSR ¶¶ 17-18. At the house, the witness gave Reyes \$80 in FBI pre-recorded funds. In exchange, Reyes gave the witness a bundle, or ten bags, of heroin. PSR ¶¶ 19-20. The witness then gave Williamson \$200 in FBI pre-recorded funds. In exchange, Williamson gave the witness 22 bags of crack cocaine. PSR ¶¶ 19-20.

In addition to the controlled purchases, the Task Force also intercepted communications occurring over five cellular telephones. PSR ¶ 10. Williamson was repeatedly heard on one of those telephones discussing the sale of heroin and cocaine base with Reyes. PSR ¶¶ 21-22. Moreover, the Task Force regularly saw Williamson at the 105/107 Johnson Street residence engaging in what appeared to be narcotics trafficking activity. PSR ¶ 21.

On January 5, 2011, the FBI arrested Williamson and ten other individuals. PSR, page 1.

B. The guilty plea hearing

On July 25, 2011, Williamson pleaded guilty to Count One of the superseding indictment, which charged him with conspiracy to distribute and to possess with intent to distribute 28 grams or more of cocaine base, in violation of Title 18, United States Code, Section 841(a)(1), 841(b)(1)(B) and 846. A27-A28, A32-A33. At the outset of the plea proceeding, the district court placed Williamson under oath and questioned him to determine his competence to enter a guilty plea. A28-A32. The court then advised Williamson of the rights that he would be waiving by pleading guilty. A33-A36. Williamson stated that he understood his rights and that he was willing to waive those rights in order to enter a plea of guilty. A36.

Next, the court directed the government to summarize the plea agreement in order to ensure that Williamson understood all of its terms. A38-A44. The government explained that, pursuant to the agreement, Williamson had agreed to plead guilty to Count One of the superseding indictment. A32-A33. The government further explained that, pursuant to the plea agreement, it would not seek a sentencing enhancement under Title 21, United States Code, Section 851, even though Williamson's prior convictions made him eligible for such an enhancement. A38. The government also outlined the guideline stipulation set forth in the plea agreement. A39-A41. Pursuant to that stipulation, the parties agreed that Williamson's total offense level was a level 29 and that he fell within Criminal History Category VI, resulting in a guideline range of 151 to 188 months' imprisonment. A39-A40. Finally, the government explained that Williamson had waived his right to appeal or collaterally attack his sentence provided it did not exceed 188 months' imprisonment, a four-year term of supervised release and a \$150,000 fine. A41-A42.

The court then canvassed Williamson on the terms of the appellate waiver. The court re-emphasized that, pursuant to the plea agreement, Williamson waived his right to appeal and collaterally attack his sentence as long as it did not exceed 188 months' imprisonment, a four-year term of supervised release and a \$150,000

fine. A42. The court explained that Williamson was giving up a very valuable right and inquired if he understood the nature of that right. A42. Williamson acknowledged that he understood and that he was willing to waive his right to appeal. A42, A48.

Upon inquiry of the court, Williamson acknowledged that the government had accurately summarized the terms of the plea agreement and that his decision to plead guilty was made freely and voluntarily. A44-A45. Williamson then signed the plea agreement. A45.

After reviewing the signed plea agreement, the court advised Williamson that he was going to review the statutory penalties for the offense to which the defendant was pleading guilty. A45. In particular, the court advised Williamson that Count One carried a mandatory minimum penalty of five years' imprisonment, a maximum penalty of 40 years' imprisonment, a mandatory minimum term of supervised release of at least four years and as much as life, and a fine. A45-A47. The court also explained the operation of the sentencing guidelines and advised Williamson that the parties' recommendation was not binding upon the court. A47-A49. Rather, the court explained that it would determine the appropriate sentence based upon a consideration of the PSR, the applicable guideline range and the statutory factors enumerated in § 3553(a). A47-A49. Finally, the court advised Williamson that

he would have no right to withdraw his guilty plea should the court impose a sentence greater than 188 months' imprisonment, four years' supervised release and a \$150,000 fine. A48-A49. Williamson acknowledged that he understood all that had been explained to him and that his decision to plead guilty was knowingly and voluntarily made. A44-A45, A49, A51.

Finally, the government outlined the evidence that it would have presented had the case gone to trial. A51-A52. Williamson agreed that the government had accurately described the evidence against him and then entered a plea of guilty to Count One of the superseding indictment; the court accepted his plea. A53-A54.

C. The sentencing hearing

In preparation for sentencing, the Probation Office prepared a PSR. As explained below, the PSR identified numerous factors relevant to sentencing, including Williamson's criminal record, his family history, his education, his employment history and his extensive use and abuse of controlled substances. *See* PSR ¶¶ 36-68. The PSR calculated the guideline range to be 151 to 188 months' imprisonment, based upon a total offense level of 29 and Criminal History Category VI. PSR ¶ 72. The PSR's calculation was in accordance with the guideline range to which the parties stipulated in the plea agreement. A22.

On December 14, 2011, Williamson appeared before the district court for sentencing. A64. The court began the proceeding by considering the PSR. A65. Williamson raised certain disagreements with the factual findings contained in the PSR. The court noted that the Probation Office had addressed Williamson's objections in an addendum to the PSR. A66-A70. Absent further objection, the court adopted the factual findings contained within the PSR. A70.

The court explained the principles that governed its determination as to the appropriate sentence to impose in this case. A71. Such considerations included the guideline calculation as set forth in the PSR, Williamson's background and the goals of sentencing. A71-A72.

The court then heard extensive argument from Williamson and the government as to what sentence would be sufficient but not greater than necessary to achieve the goals of sentencing. A73-A90, A93-A99, A100-A102. Additionally, Williamson addressed the court, as did two other individuals on Williamson's behalf. A89-A92.

After hearing from all parties, the court explained the central factors guiding its sentencing decision. The court explained that pursuant to Title 18, United States Code, Section 3553, it was required to consider many factors in fashioning a sentence, including the guidelines, Williamson's personal history, such as his addiction and his efforts at rehabilitation, the circum-

stances of his offense, and the purposes of sentencing. A102. The court continued by explaining that the “primary purpose of sentencing” was to provide just punishment for the crime, to protect the public and to deter Williamson and others from engaging in such conduct. A102. On these points, the court emphasized Williamson’s efforts at rehabilitation, but also focused on the seriousness of the offense conduct. A102. In short, the court concluded that “in view of [Williamson’s] background and the danger to the community,” a sentence at the low end of the guideline range was appropriate. A103.

The court then sentenced Williamson to serve a 151-month term of imprisonment followed by 5 years of supervised release. A103. In addition to the standard and mandatory conditions of supervised release, the court ordered Williamson to participate in a substance abuse treatment program and in educational or vocational training as directed by the Probation Office. A104. The court also recommended that Williamson participate in the 500-hour program and urged him to take advantage of every program in the federal penitentiary. A105, A107. While the court declined to impose a fine, it did require Williamson to pay a \$100 special assessment. A103.

Finally, the court advised Williamson of his right to appeal explaining that he had 14 days within which to file an appeal. A105-A106. The court reminded Williamson that he had waived

his right to appeal or collaterally attack his sentence as long as it did not exceed a 188-month term of imprisonment and a four-year term of supervised release; the court noted that it had, in fact, imposed a five-year term of supervised release. A106. Neither Williamson nor his counsel objected to the sentence imposed by the court at any time during the hearing.

Summary of Argument

Williamson argues that the five-year term of supervised release imposed by the district court was substantively unreasonable.¹ Because Williamson did not object to the supervised release term below, this claim is reviewed for plain error. But there was no error, plain or otherwise, in the district court's decision to sentence Williamson to five years of supervised release. Williamson was sentenced to a guideline term of imprisonment and a guideline term of supervised release. The facts set forth in the PSR—and adopted by the district court—reflect that Williamson committed a serious offense, had a

¹ Williamson waived his right to appeal the term of imprisonment and does not dispute the enforceability of this waiver. *See* Def.'s Brief at 4-5. Further, although Williamson's notice of appeal was untimely, the government waives any challenge to the timeliness of his appeal. *See* Statement of Jurisdiction. Accordingly, this appeal is limited to a challenge to the length of the term of supervised release.

lengthy criminal history, including several probation violations, and an extensive substance abuse problem. These facts were more than sufficient to support the district court's conclusion that a guideline sentence of five years' supervised release was appropriate. The district court's judgment should be affirmed.

Argument

I. The district court did not plainly err in sentencing Williamson to five years of supervised release.

A. Governing law and standard of review

1. Reviewing a sentence for reasonableness

Following *United States v. Booker*, 543 U.S. 220 (2005), a sentencing judge is required to “(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the calculated Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence.” *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005).

Under 18 U.S.C. § 3553(a), in determining an appropriate term of incarceration, a sentencing court should consider: (1) “the nature and circumstances of the offense and the 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 for the offense,” (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) policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to victims. As to the length and conditions of supervised release, the sentencing court should consider the factors specified in §§ 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7). *See* 18 U.S.C. § 3583(c).

On appeal, a district court’s sentencing decision is reviewed for reasonableness. *See Booker*, 543 U.S. at 260-62. Reasonableness review is a deferential “abuse of discretion” standard. *Gall v. United States*, 552 U.S. 38, 40 (2007); *United States v. Watkins*, 667 F.3d 254, 260 (2d Cir. 2012); *United States v. Cavera*, 550 F.3d 180, 187 (2008) (en banc). This reasonableness review consists of two components: procedural and substantive review. *Cavera*, 550 F.3d at 189.

“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,” including, “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, however. *See United States v. Bonilla*, 618 F.3d 102, 111 (2d Cir. 2010) (“[W]e never have required a District Court to make specific responses to points argued by counsel in connection with sentencing”), *cert. denied*, 131 S. Ct. 1698 (2011).

With respect to substantive reasonableness, this Court has recognized that “[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge ‘exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discre-

tion, or made a clearly erroneous finding of fact.” *Fernandez*, 443 F.3d at 27 (citations omitted). 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).

Although this Court has declined to adopt a formal presumption that a within-Guideline sentence is reasonable, it has “recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances.” *Fernandez*, 443 F.3d at 27; *see also Rita v. United States*, 551 U.S. 338, 347-51 (2007) (holding that courts of appeals may apply presumption of reasonableness to a sentence within the applicable Sentencing Guidelines range); *United States v. Rattoballi*, 452 F.3d 127, 133 (2d Cir. 2006) (“In calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.”).

2. Plain error review

As the Supreme Court recently reaffirmed, “[a] federal court of appeals normally will not

correct a legal error made in criminal trial court proceedings unless the defendant first brought the error to the trial court's attention." *Henderson v. United States*, __ S. Ct. __, 2013 WL 610203, *3 (Feb. 20, 2013). Federal Rule of Criminal Procedure 52(b), however, creates an exception to this general principle. *Id.* Under that Rule, "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*, 556 U.S. 129, 135 (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. Wagner-Dano*, 679 F.3d 83, 94 (2d Cir. 2012).

To "affect substantial rights," an error "must have been prejudicial: It must have affected the outcome of the district court proceedings." *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 distinc-

tion: 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).

B. Discussion

This appeal comes to the Court on a largely undisputed record. The parties agreed to the PSR’s factual findings with one exception related to Williamson’s possession of a firearm. A68. The government asserted that Williamson actually possessed a weapon; Williamson claimed that he only constructively possessed the weapon. A68-A69. However, even that disagreement was of no moment as, pursuant to the plea agreement, Williamson stipulated that his offense level should be increased by two points for possession of a firearm. A22, A40, A44, A68. For this reason, the sentencing court was not required to resolve any factual disputes and thus adopted the

factual findings as set out in the PSR. A70. The parties also agreed that the PSR correctly calculated Williamson's total offense level to be a level 29 and his Criminal History Category to be a level VI based upon his accumulation of 20 criminal history points. A72-A73; PSR ¶¶ 49, 72.

Against this backdrop, Williamson now asserts that the five-year term of supervised release imposed by the district court was substantively unreasonable. *See* Def.'s Brief at 24-26. This argument lacks merit. The district court did not abuse its discretion in determining that the seriousness of Williamson's offense, as well as his lengthy criminal record, history of recidivism and history of drug abuse, warranted a supervised release term at the top of the advisory guideline range.

1. The five-year term of supervised release imposed by the district court was procedurally reasonable.

Nothing in the record indicates that the district court failed to consider the statutory factors or committed procedural error in imposing the five-year term of supervised release. To the contrary, prior to entertaining argument from the parties, the court explicitly—and correctly—described the procedural requirements that would govern its determination of a sentence. A71. First, the court explained that the guidelines were neither mandatory nor binding. A71.

Rather, the court stated that it was required to determine Williamson's applicable guideline range and to use that as a starting point without presuming that range to be reasonable. A71. Second, the court explained that it would consider the applicable guideline range in conjunction with the statutory factors set forth in Section 3553(a) in order to determine whether to impose a guidelines or a non-guidelines sentence. A72. Third, the court explained that in making the "individualized assessment of the appropriate sentence for [Williamson]", the court would rely upon "the facts presented and the factors set forth in Section 3553(a)." A72.

A review of the sentencing proceeding demonstrates that the court faithfully followed the procedural requirements of sentencing as outlined in Section 3553(a). First, the court calculated Williamson's applicable guideline range. A72-A73. In doing so, the court recognized the disparity in the cocaine-to-crack cocaine ratio and its effect on the guideline calculation. A74. Nonetheless, the court specifically declined to utilize a 1-to-1 ratio citing Williamson's "[e]ight felonies since 1995" and inquiring of Williamson's counsel why it should "dip down under the guidelines for someone who has a recidivist background?" A74.

Williamson's counsel responded to this inquiry, and in the course of so doing, presented the court with facts pertaining to Williamson's

background and personal characteristics, including his family circumstances, his substance abuse issues, his efforts at rehabilitation and his criminal history. A74-A89. The court recognized the significance of Williamson's acknowledgment that he had a substance abuse problem and inquired if Williamson wanted to participate in the 500-hour program. A84-A85. The court also acknowledged the hardship that incarceration would have on Williamson's family and expressed his appreciation for the letters from Williamson's family, remarking that the court was "never going to know Mr. Williamson" as well as they did. A74. Finally, the court expressed his concern about Williamson's extensive and recidivist criminal history. A74, A82. In all, these comments by the court reflect the court's consideration of Williamson's personal characteristics in the sentencing equation.

After hearing from Williamson's lawyer, the court heard from two other individuals who spoke on behalf of Williamson. A81-A90. In addition, the court heard from Williamson himself. A91-A92. Williamson emphasized that he had a substance abuse problem and that he had changed his ways going forward. A92. Finally, the court heard from the prosecutor, who emphasized Williamson's recidivist past and the seriousness of his offense conduct. A93-A99.

Prior to the imposition of sentence, the court reiterated that, "[u]nder 18 United States Code,

Section 3553(a), I have to consider the guidelines, but also your background and circumstances; your recognition that you're an addict, and that will be with you for the rest of your life; your support group; and the purposes of sentencing." A102. The court explained that the sentence to be imposed must provide just punishment for the crime, protect the public and deter Williamson and others from engaging in similar criminal conduct. A102. The court noted that the determination of sentence was a "difficult choice" due to Williamson's obvious desire to turn his life around and to be with his children. A102. However, due to the seriousness of Williamson's criminal conduct and his lengthy criminal history, the court declined to depart from the guidelines. Instead, the court imposed a 151-month term of imprisonment, which was at the low end of the guidelines, and a five-year term of supervised release, which was at the upper end of the guidelines. A103. The court encouraged Williamson to take advantage of the 500-hour program and "of every program in the federal penitentiary." A107.

This Court "presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged [his] duty to consider the statutory factors." *Fernandez*, 443 F.3d at 30. "No robotic incantations are required to prove the fact of consideration,' and we will not assume a failure of consideration simply

because a district court fails to enumerate or discuss each [statutory] factor individually.” *United States v. Verkhoglyad*, 516 F.3d 122, 131 (2d Cir. 2008) (quoting *Fernandez*, 443 F.3d at 30). While this presumption most often arises in the context of the statutory factors a district court must consider in imposing a term of imprisonment, it also applies in the context of the statutory factors that a court must consider in setting a term of supervised release. *See United States v. Sero*, 520 F.3d 187, 192 (2d Cir. 2008) (per curiam).

There is nothing in the record to overcome the presumption that the district court faithfully considered the Section 3553(a) factors in imposing the five-year term of supervised release. In fact, the district court’s imposition of special conditions of supervised release serves as additional evidence that it properly considered the requisite factors. If a district court chooses to set any special conditions of supervised release, it is required by § 3583(d)(1) to consider the factors enumerated in §§ 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D). In other words, the factors a court must consider in setting special conditions of supervised release are the same factors as those it must consider in setting the length of supervised release. Here, the court, absent comment or objection, ordered special conditions of supervised release that were clearly intended to address

Williamson's need for substance abuse treatment and vocational training. A104.

Further, the requirement that a district court state its reasons for imposing a particular sentence applies to the sentence as a whole, not to every individual component of the sentence. *See Sero*, 520 F.3d at 192 (rejecting defendant's attack on supervised release term as "seemingly automatic" by presuming, in the absence of contrary evidence, that the sentencing judge faithfully considered the § 3553(a) factors and "clearly articulated its consideration of the § 3553(a) factors"). Because the court explained the reasons guiding its determination of Williamson's sentence, it adequately articulated its basis for the supervised release term and did not commit procedural error. *See id.* Additionally, by explicitly adopting the factual findings contained in the PSR, which included information about Williamson's offense conduct, criminal history, educational background, substance abuse and employment history, the district court provided ample justification for both the length of the supervised release term and the specific conditions of supervised release.

Finally, to the extent that the district court did err, this error was not plain, did not affect Williamson's substantial rights and did not seriously impact the integrity of the judicial proceedings. As stated above, the district court twice referred to the required statutory factors during

the sentencing hearing. Thus, any error was not “plain.” In addition, it is difficult to conceive how Williamson’s substantial rights could have been impacted or how the integrity of the judicial proceedings could have been undermined given that the underlying purpose of the supervised release term, as represented by the special conditions, was to ensure that Williamson receive substance abuse treatment and vocational training, and thereby avoid the pattern of recidivism indicated by his criminal record.

2. The five-year term of supervised release imposed by the district court was substantively reasonable.

Williamson asserts that the five-year term of supervised release was substantively unreasonable. *See* Def.’s Brief at 24-26. In substance, Williamson argues that he was sentenced to a lengthy term of imprisonment and thus, on balance, he should have received a shorter term of supervised release. Def.’s Brief at 26. Williamson continues to argue that there “is no basis to suggest that [he] could get through four years of supervised release only to violate the law during a fifth year.” Def.’s Brief at 25-26. These contentions fail for several reasons.

First, the factual findings contained in the PSR detail a personal history which fully supported the imposition of a supervised release

term at the top of the guideline range. More specifically, the PSR set forth the serious offense conduct in which the defendant was engaged, including the fact that Williamson was a prolific narcotics trafficker who, in conjunction with several gang members, sold crack cocaine and heroin from an abandoned residence directly across the street from the Marina Village Housing Complex. PSR ¶¶ 9-22.

Second, Williamson's lengthy criminal history fully supported the imposition of a supervised release term at the top of the guideline range in order to lessen his likelihood of recidivism, an issue of obvious concern for the court. A74, A82. Williamson had 20 criminal history points and eight prior felony convictions:

- On April 7, 1995, Williamson was arrested for illegal possession of an assault weapon and no pistol permit. On February 29, 1996, he was convicted and sentenced to serve three years' imprisonment, execution suspended after one year, and three years' probation. PSR ¶ 37.
- On September 18, 1998, while on probation, Williamson was arrested for forgery 2nd degree. PSR ¶ 38. On November 6, 1998, while on pretrial release, the defendant was arrested for sale of narcotics. PSR ¶ 39. On May 28, 1999, Williamson was convicted of both

offenses and sentenced to concurrent terms of imprisonment. PSR ¶¶ 38-39. For the forgery conviction, he was sentenced to serve 18 months' imprisonment. PSR ¶ 38. For the sale of narcotics conviction, he was sentenced to serve eight years' imprisonment, execution suspended after 18 months, and three years' probation. PSR ¶ 39.

- On August 24, 2000, while still on transitional supervision, Williamson was arrested for possession of narcotics. On September 28, 2000, Williamson was convicted and sentenced to serve 15 months' imprisonment. PSR ¶ 40. On August 27, 2001, Williamson was released to supervised parole. Williamson's parole ended on February 26, 2002, at which time his three-year term of probation, imposed to follow to the 1999 convictions detailed above, began to run. PSR ¶ 40.
- On October 17, 2002, while on probation, Williamson was arrested for operating a vehicle while under suspension. He was convicted on March 25, 2003 and ordered to pay a \$250 fine. PSR ¶ 41.
- On June 11, 2003, while on probation, Williamson was arrested for possession of marijuana and criminal possession of

a weapon. PSR ¶ 42. While on pretrial release, Williamson was arrested for operating a vehicle while under suspension. PSR ¶ 43. On September 18, 2003, Williamson was convicted of operating a vehicle under suspension and ordered to pay a \$200 fine and \$125 in fees. PSR ¶ 43. Thereafter, on September 23, 2003, Williamson was convicted of possession of marijuana and criminal possession of a weapon and sentenced to serve eight years' imprisonment, execution suspended after two years, and three years' probation. The sentence was imposed to run concurrently to a two-year term of imprisonment imposed for his probation violation. PSR ¶ 42.

- On September 5, 2005, while on transitional supervision, Williamson was arrested for threatening 2nd degree. On October 18, 2006, he was convicted and sentenced to one year imprisonment, execution suspended, and two years' conditional discharge. PSR ¶ 44.
- On November 8, 2005, while on probation, Williamson was arrested for operating a vehicle under suspension. On January 17, 2006, he was convicted and sentenced to one year imprisonment, execution suspended, and two years' probation. PSR ¶ 45.

- On January 31, 2006, only two weeks after having been placed on probation, Williamson was again arrested for operating a vehicle under suspension. On January 29, 2007, he was convicted and sentenced to serve 90 days' imprisonment, execution suspended, and one year probation. PSR ¶ 46.
- On March 30, 2007, while on probation, Williamson was arrested for sale of narcotics. He was convicted on January 9, 2008, and sentenced to serve 10 years' imprisonment, execution suspended after four years, and five years' probation. PSR ¶ 47. His conviction in this case violated his probation in the above two cases. PSR ¶¶ 45-47.
- On February 18, 2010, Williamson was released to supervised parole. PSR ¶ 47. Three months later, he sold heroin to a cooperating witness at 105/107 Johnson Street. PSR ¶ 14. At the time of Williamson's arrest on the present case, he was still on parole. PSR ¶ 49.

As set forth above, Williamson has a lengthy and unabated criminal history and an obvious propensity for recidivism. Williamson's repeated probation violations demonstrate a lack of respect for the law and the authority of the court. Moreover, Williamson's offenses, which include possession of an assault weapon in 1995, crimi-

nal possession of a weapon in 2003 and numerous narcotics trafficking offenses in 1998, 2000, 2003, 2007 and 2011, show a disturbing trend toward escalating criminal activity.

Following his myriad convictions, Williamson has been placed under the supervision of probation or parole on at least eight separate occasions. The periods of supervision have ranged from one year in 2006, to two years in 2005, to three years in 1995, 1998 and 2003, to five years in 2007. With one exception, Williamson has never successfully completed a term of supervision. On this record, it cannot reasonably be concluded that the court's decision to sentence Williamson to a five-year term of supervised release was not "located within the range of permissible decisions." *Cavera*, 550 F.3d at 189.

In sum, the district court properly considered the statutory factors and selected a term of supervised release squarely within the guidelines range. In light of Williamson's offense conduct and significant criminal history—including a demonstrated inability to comply with terms of probation or supervised release—the term of supervised release was not "shockingly high" so as to warrant reversal. *See Rigas*, 583 F.3d at 123.

Conclusion

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

Dated: February 26, 2013

Respectfully submitted,

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UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, appearing to read "Tracy Lee Dayton", written over a light gray rectangular background.

TRACY LEE DAYTON
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Addendum

18 U.S.C. 3553(a)

(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.¹

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

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

18 U.S.C. § 3583(c)-(d)

(c) Factors to be considered in including a term of supervised release.--The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider 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).

(d) Conditions of supervised release.--The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by

the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test con-

firmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition--

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall be imposed only for a

violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.