

12-3972

To Be Argued By:
HENRY K. KOPEL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-3972

—————
UNITED STATES OF AMERICA,
Appellee,

-vs-

TRAVAIL MCLEAN,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The United States District Court for the District of Connecticut (Alfred V. Covello, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on October 1, 2012. Joint Appendix (“JA”) 5. On September 18, 2012, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA 4, 72. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 3742(a).

Statement of Issues Presented for Review

- I. Whether the district court abused its procedural discretion by not giving more detailed reasons for imposing sentence at the bottom of the guidelines range where: (1) the court stated it had taken into account all reports, pleadings, statements, and statutory sentencing factors; and (2) the sentencing decision was relatively simple, in that: (a) the offense and relevant conduct of 15 false bomb threats was quite serious; (b) the defendant's probation request was based on his emotional/cognitive deficits and his alleged suitability for probation; but (c) before sentencing, the defendant had been non-complaint with his release conditions.

- II. Whether the district court abused its substantive discretion by imposing sentence at the bottom of the applicable guidelines range where: (1) the defendant made 15 false bomb threats; (2) each threat caused a costly and disruptive emergency police response; (3) several threats warned of imminent detonation and shootings of police and/or hostages; and (4) before sentencing, the defendant had been non-complaint with his several release conditions.

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Travail McLean pled guilty to making false bomb threats to the New Haven 911 call center, admitting to a total of 15 such threats. Many of the threats warned of imminent detonation, shooting of police, and/or hostages at risk. While on release pending sentencing, McLean repeatedly acquired and smoked marijuana, skipped drug treatment/counseling sessions arranged by the Probation Office, and refused to seek educational and employment opportunities referred by

the Probation Office, all in violation of his release conditions.

At sentencing, the government recommended a guidelines sentence, and McLean requested probation. The court, after stating it had taken into account all reports, pleadings, statements, and statutory sentencing factors, imposed an 18-month sentence, at the bottom of the guidelines range.

On appeal, McLean alleges both procedural error in the court's not having listed specific reasons for denying a non-guidelines sentence, and substantive error in the court's failing to impose a probationary sentence below the applicable guidelines range.

Particularly given the deferential, abuse-of-discretion standard of review, McLean's procedural and substantive claims of error should be denied. The court took into account all relevant facts and sentencing considerations; the sentencing decision was relatively simple; the offense and relevant conduct were serious; and McLean showed his unsuitability for probation by his non-compliance on pre-sentence release. Hence the decision to sentence McLean at the bottom of the guidelines range warrants affirmance.

Statement of the Case

On April 4, 2012, Travail McLean entered a plea of guilty to an information charging one count of maliciously conveying false information

(bomb threats), in violation of 18 U.S.C. § 844(e). JA 2, 6, 7-16. On September 18, 2012, the district court (Alfred V. Covello, J.) sentenced McLean to 18 months' imprisonment. JA 4, 73-74. Judgment was entered on October 1, 2012. JA 5. On September 18, 2012, McLean timely filed a notice of appeal. JA 4, 72. On that same date, McLean was remanded into custody to begin service of his sentence. JA 74.

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

A. The offense and relevant conduct

Over a nine-month period between September 2010 and June 2011, McLean separately telephoned 15 false bomb threats to the New Haven Police Department's 911 emergency call center. JA 15-16.

Many of the threats warned of imminent detonation, shooting of police, and/or hostages at risk. JA 15-16. The following six examples are illustrative:

September 23, 2010: "There's a bomb at 1620 Chapel . . . there's two . . . one in the house, and the other one's gonna blow in five minutes if you don't find it." JA 15.

November 24, 2010: "Bomb at 1620 Chapel, there's a hostage inside, you step in front, I'll blow it up." JA 15.

February 23, 2011: “There is a bomb on Premium Deli on Whalley . . . the men in the store are armed . . . they will shoot at police . . . let me repeat . . . they will shoot at police.” JA 15.

May 29, 2011: “There is a bomb at 1626 Chapel . . . there is hostages in the house with dynamite . . . and there’s another bomb buried in the back ditch.” JA 16.

June 18, 2011: “There’s a bomb at 1642 Chapel . . . there’s two . . . there’s a bomb in the big building on Ella Grasso and Chapel . . . we have hostages.” JA 16.

June 28, 2011: “There’s 10 bombs in a old folks home on Derby Street.” JA 16.

Every threat caused a substantial emergency response by police and fire responders. JA 19-21; Pre-Sentence Report (“PSR”) ¶ 7. As explained by the government:

An average of more than nine police and fire responders rushed to each threat scene; multiple fire department vehicles were deployed at most threat incidents; and entire city blocks were shut down in response to some of the threats.

JA 19.

B. McLean’s guilty plea

On April 4, 2012, McLean waived his right to indictment and entered a plea of guilty to an information charging one count of maliciously con-

veying false information (bomb threats), in violation of 18 U.S.C. § 844(e). JA 2, 6, 7-16.

As part of the plea agreement and joint factual stipulation, McLean admitted making all 15 bomb threats. JA 15-16. Also, McLean agreed that a four-level upward adjustment under U.S.S.G. § 2A6.1(b)(4) was applicable, “because the threats caused a substantial disruption of government services.” JA 10.

C. McLean’s violations of pre-sentence release conditions

After McLean’s guilty plea, the court released McLean subject to an unsecured bond and certain release conditions, including that he not violate any laws, that he “actively seek employment/GED,” and that he participate in “[d]rug testing and treatment if required by Probation.” JA 2; Government’s Appendix (“GA”) 1, 4.

Over the next four months, McLean repeatedly violated all of the release conditions listed above. Between April and July 2012, McLean tested positive for PCP one time and positive for marijuana six times. GA 5-6. Over that same period, he skipped four scheduled drug treatment/counseling sessions, and left early from a fifth session after being instructed to remain on site for a supplemental therapy session. GA 5. Confronted by his clinician on July 23, McLean falsely insisted that he had not smoked marijuana “in a couple of months,” despite a positive drug test just five days earlier. GA 5.

McLean also ignored the Probation Office’s request and frequent reminders that he enroll in an adult education center’s GED program—even after the Probation Office arranged for McLean to obtain the necessary photo ID card—“while offering no plausible reason for his failure to do so.” GA 6-7. Later, McLean advised he did not wish to enroll in school, so the Probation Office instead “provided several employment leads/resources,” but McLean failed to obtain employment. GA 7.

On August 2, 2012, the assigned Probation Officer reported the several violations to the court and requested a bond review hearing. GA 5-7; JA 4. At the hearing on August 9, 2012, JA 4, the Magistrate Judge found that McLean “has violated his release order,” and modified his release status to home detention with electronic monitoring. JA 4, 26; GA 9, 11.

D. The sentencing

Sentencing proceeded on September 18, 2012. JA 4. There were no disputes over the sentencing guidelines calculations, JA 54, which were identical to the calculations set forth in the plea agreement, JA 10. The court adopted those guidelines calculations, resulting in a total offense level of 15 and a criminal history category I and thus an advisory sentencing guidelines range of 18 to 24 months. JA 10, 68.

The government argued for a sentence within the applicable 18 to 24 months advisory guide-

lines range, JA 17-24 (memorandum), JA 54-58 (sentencing hearing), relying primarily on the seriousness of the offense and relevant conduct. The government emphasized the large number of bomb threats (15), the fact that all threats targeted a densely populated urban area, including one that specifically identified a home for the elderly, and the heightened dangers emphasized in the threats. JA 19. Such dangers included imminent detonation (“one’s gonna blow in five minutes if you don’t find it”), threats on the lives of responding police officers (“There’s a bomb at Officer Hassett’s house”; “the men in the store are armed . . . they will shoot at police”), and hostages in danger of being murdered (“Bomb at 1620 Chapel, there’s a hostage inside, you step in front, I’ll blow it up”; “there are hostages in the house . . . people are armed with guns in the house with the hostages”; “there is hostages in the house with dynamite”; “there’s a bomb in the big building on Ella Grasso and Chapel...we have hostages”). JA 19; *see also* JA 15-16.

The government also emphasized the extensive emergency response by police and fire officials necessitated by each threat, and the significant disruptions this caused to several New Haven neighborhoods. JA 19-21 (memorandum), JA 55 (sentencing hearing). Among other things, the government pointed out that each bomb threat caused to be taken out of service for real emergencies, several police vehicles and fire trucks, and a significant number of police and fire de-

partment emergency responders—for several hours at a time. JA 21.

The government acknowledged McLean’s early acceptance of responsibility and limited intellectual and emotional/social development, as “considerations [that] weigh in favor of a sentence in the low end of the applicable sentencing guidelines range.” JA 21 (memorandum). However, in response to McLean’s request for probation, the government pointed to McLean’s non-compliance with release conditions as evidence directly undercutting the claim that probation would be a sufficient and beneficial sentence. JA 22. The government argued that McLean’s conduct while on pre-sentencing release was “like a dry run for a probationary sentence,” and that McLean did not fare well in this dry run. JA 56-57 (hearing). The government also noted that McLean’s conduct on pre-sentencing release raised a serious concern “about whether Mr. McLean has fully come to appreciate the seriousness of what havoc he imposed upon the citizens of New Haven, their police, their fire departments, and the citizens of the neighborhoods.” JA 57.

McLean’s request for a non-guidelines sentence of probation relied in significant part on (1) a report and evaluation by Yale psychologist Melanie Scott (“Scott Report”), which documented McLean’s difficult youth and emotional/cognitive deficits, and (2) McLean’s young age

of 19. JA 27-32 (memorandum), JA 59-61, 64 (hearing).

The Scott Report poignantly described suspected abuse of McLean at an early age, McLean's lack of any close maternal relationship throughout his life, and the inability of his single-parent father, with whom McLean lived until this incarceration, to spend much time with McLean owing to a distant commute and very long workday. JA 37-38. The Scott Report also catalogued McLean's limited cognitive, intellectual, and social development. JA 38-43. Dr. Scott accordingly recommended that McLean obtain a GED, be given vocational/employment support, receive psychological therapy, and obtain guidance from a mentor. JA 45.

Regarding McLean's young age of 19, defense counsel relied on the briefing and decision in *Roper v. Simmons*, 543 U.S. 551 (2005) (barring capital punishment for crimes committed by persons under 18), to argue that McLean's judgment and decision-making skills were not yet fully developed. JA 31-32; *see also* JA 64 (hearing). Counsel also argued that McLean's youth and cognitive limitations rendered him vulnerable to potential abuse by other prisoners. JA 30-31 (sentencing memorandum).

Counsel further argued that, given McLean's status as a first-time offender, and his having allegedly "learned his lesson," JA 65-66, a proba-

tionary sentence would effectively foster McLean's rehabilitation. JA 33.

Finally, comparing the offense conduct to "crank calls," and "a bored child making pranks," counsel cited other District of Connecticut cases "that were at least somewhat similar" in which defendants received low sentences. JA 65-66 (hearing), JA 30, 33 (sentencing memorandum).

At the sentencing hearing, McLean's father promised to "stay on top of" his son and "make sure" that his son is "in compliance" with whatever the court ordered. JA 67. McLean himself also spoke, stating, "I want to say I'm sorry, I won't do it again." JA 67.

After hearing from all parties, the court summarized the sentencing guidelines calculations, reiterated the date and finding of guilt for the offense of conviction, and then stated as follows:

The record may reflect that the Court has considered the presentence report, the attachments thereto, the submissions of the parties, everything that was presented here today, as well as including the arguments of counsel, the motions and statements made by them, and the statements made by Mr. McLean, as well as all of the factors set forth in Title 18 U.S. Code Section 3553.

In light of all of these considerations the Court concludes that it is fair, just and

reasonable to order the gentleman committed to the custody of the Bureau of Prisons for a term of 18 months, the minimum range under our sentencing guidelines. This is to be followed by a period of supervised release of three years.

JA 68-69. The court also imposed the mandatory \$100 special assessment, no fine, and conditions of supervised release to include substance abuse treatment and mental health treatment. JA 69.

After asking the court for a prison location recommendation, which the court granted, McLean's counsel requested that the court address each of the "specific arguments" from McLean's sentencing memo, including each of "the 3553(a) sentencing factors," and the "psychological report indicating" McLean's "significant cognitive impairments" and "extremely low" intellectual functioning. JA 70. The court responded, "The court concludes that the record is adequate. We can adjourn." JA 70.

This appeal followed.

Summary of Argument

I. The district court's brief statement of reasons for imposing a guidelines sentence was not an abuse of its procedural discretion. The scope of the statutory requirement of 18 U.S.C. § 3553(c), that the judge state the reasons for imposing a particular sentence, varies according to the complexity or simplicity of the facts and

arguments. Absent contrary evidence, it is presumed that the sentencing judge considered all the statutory factors. A lengthy explanation is not needed where, as here, the case is of a fairly typical or simple kind. The judge made a clear record that he had considered all reports, pleadings, arguments, statements, and statutory sentencing factors. The offense and relevant conduct were far from complex, and the opposing arguments of counsel were quite straightforward. On this relatively simple record, further explanation could not have added much more clarity. Hence under the deferential abuse of discretion standard, the district court's brief remarks involve no procedural error.

II. The district court did not abuse its substantive discretion by imposing a guidelines sentence. On the facts of this case, the 18-month sentence falls squarely within the range of permissible decisions. Especially given the very serious nature of the defendant's conduct in this case, a sentence at the bottom of the applicable guidelines range is reasonable. Moreover, although McLean would have preferred a probationary sentence, the court properly denied that request in light of McLean's non-compliance with pre-sentence release conditions. Those facts were specifically presented and argued to the sentencing court. Accordingly, under the deferential abuse of discretion standard, the sentence imposed by the district court involved no substantive error.

Argument

I. The district court’s brief statement of reasons for denying a non-guidelines sentence of probation was not an abuse of procedural discretion.

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the ‘Statement of Facts’ above.

B. Governing law and standard of review

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court declared the United States Sentencing Guidelines “effectively advisory.” *Id.* at 245. After *Booker*, 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).

On appeal, a district court’s sentencing decision is reviewed for reasonableness. *See Booker*, 543 U.S. at 260-62. Reasonableness review is akin to a deferential review for abuse of discretion. *See Gall v. United States*, 552 U.S. 38, 46 (2007); *see also United States v. Watkins*, 667 F.3d 254, 260 (2d Cir. 2012) (“We are con-

strained to review sentences for reasonableness, and we do so under a deferential abuse-of-discretion standard.”) (quotation marks and citation omitted). Reasonableness review “encompasses two components: procedural review and substantive review.” *Watkins*, 667 F.3d at 260 (quotation marks and citation omitted).

Among the procedural sentencing errors recognized by the Courts of Appeals are failure to “consider the § 3553(a) factors,” and failure “adequately to explain its chosen sentence” *United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc) (citations omitted). With respect to this last requirement, under 18 U.S.C. § 3553(c), there is a procedural requirement that “[t]he court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence”

What constitutes a sufficient statement of reasons under 18 U.S.C. § 3553(c) was thoroughly addressed by the Supreme Court in *Rita v. United States*, 551 U.S. 338 (2007). As in the instant case, the decision reviewed in *Rita* involved the denial of a defense request for a below-guidelines sentence, and imposition of a sentence at the bottom of the applicable range. 551 U.S. at 344-45.

The defendant in *Rita* was convicted of perjury and other crimes, after having given false grand jury testimony in a firearms trafficking investigation. *Id.* at 341-342. His advisory sen-

tencing guidelines range was calculated at 33 to 41 months. *Id.* at 344.

The defense argued for a below-guidelines sentence based on the defendant's poor health, alleged vulnerability in prison, and record of military service. *Id.* at 344-45. The government argued for a sentence within the guidelines range, based on the seriousness of the offense conduct and defendant's status as "a former Government criminal justice employee." *Id.* at 345.

In denying the defense request for a below-guidelines sentence, the district court stated that it was:

unable to find that the [report's recommended] sentencing guideline range . . . is an inappropriate guideline range for that, and under 3553 . . . the public needs to be protected if it is true, and I must accept as true the jury verdict . . . So the Court finds that it is appropriate to enter . . . [a sentence of] a period of 33 months.

Id.

In the Supreme Court, defense counsel alleged that the district court had violated 18 U.S.C. § 3553(c) by failing to provide a sufficient statement of reasons for the sentence imposed. *Id.* at 356. The Supreme Court rejected this claim, holding that "*given the straightforward, conceptually simple arguments before the judge, the judge's statement of reasons here, though*

brief, was legally sufficient.” *Id.* (emphasis added).

The Court reasoned that “[t]he appropriateness of brevity or length, conciseness or detail . . . depends upon circumstances,” emphasizing that the sentencing judge must “set forth enough to satisfy the appellate court that he has considered the parties’ arguments and has a reasoned basis for exercising his own legal decisionmaking authority.” *Id.*

Accordingly, imposing a sentence within the advisory guidelines range

will not necessarily require lengthy explanation. Circumstances may well make clear that the judge rests his decision upon the [Sentencing] Commission’s own reasoning that the Guidelines sentence is a proper sentence (in terms of § 3553(a) and other congressional mandates) in the typical case, and that the judge has found that the case before him is typical.

Id. at 356-57.

The Court observed that where either party “presents nonfrivolous reasons for imposing a [non-guidelines] sentence . . . the judge will normally go further and explain why he has rejected those arguments,” but cautioned that “[s]ometimes the circumstances will call for [only] a brief explanation” *Id.* at 357.

In applying these standards, the Court found the sentencing judge's statements "brief but legally sufficient." *Id.* at 358. The Court explained:

The record makes clear that the sentencing judge listened to each argument . . . then simply found [the defendant's] circumstances insufficient to warrant a sentence lower than the Guidelines range He said that this range was not "inappropriate."

Id. The Court "acknowledge[d] that the judge might have said more," *id.*, but concluded,

Where a matter is as conceptually simple as in the case at hand and the record makes clear that the sentencing judge considered the evidence and arguments, we do not believe the law requires the judge to write more extensively.

Id. (emphasis added). *See also Fernandez*, 443 F.3d at 30 ("[W]e will not conclude that a district judge shirked her obligation to consider the § 3553(a) factors simply because she did not discuss each one individually . . .").

Several Courts of Appeals have applied *Rita* in rejecting procedural error claims, where sentencing judges made brief statements in denying below-guidelines sentence requests. *See United States v. Gomez-Herrera*, 523 F.3d 554, 564-65 (5th Cir. 2008) (no procedural error where district court "stated that it was persuaded by the arguments at the hearing and in the sentencing

memos that he should not depart downward from the Guidelines range”); *United States v. Sigala*, 521 F.3d 849, 850-52 (8th Cir. 2008) (no procedural error where court “stated that it was using the guidelines as advisory, and that after ‘considering the factors under 18 U.S.C. 3553,’ the court determined that a sentence of 24 months was ‘a reasonable and appropriate sentence”); *United States v. Carty*, 520 F.3d 984, 990, 995-96 (9th Cir. 2008) (en banc) (no procedural error where, after hearing from seven of defendant’s family members, the judge “recognized that [defendant] had strong family support and that the matter was ‘a familial tragedy of enormous proportion,” but imposed 235 month sentence and “gave no explicit reasons” for denying non-guideline sentence); *United States v. Madden*, 515 F.3d 601, 611-612 (6th Cir. 2008) (no procedural error where court “fail[ed] to mention [defendant]’s argument for a reduced sentence based on her alleged ‘aberrant behavior,” holding that “[e]ven where, as here, the defendant presents an arguably nonfrivolous reason for imposing a sentence below the Guidelines range, the judge is not always required to address the specific argument”). *Cf. Fernandez*, 443 F.3d 19 (pre-*Rita* case, finding no procedural error where court failed to address disparate sentence argument in defendant’s sentencing memo, stating there is “no . . . requirement that [the] judge *precisely identify* either the factors set forth in § 3553(a) or specific arguments bearing

on the implementation of those factors . . . to comply with her duty to consider all the § 3553(a) factors”).

Other Courts of Appeals have similarly applied *Rita*, albeit on plain error review. *See, e.g., United States v. Jones*, 563 F.3d 725, 729 (8th Cir. 2009); *United States v. Cereceres-Zavala*, 499 F.3d 1211, 1216-18 (10th Cir. 2007). *See also United States v. Villafuerte*, 502 F.3d 204, 210-12 (2d Cir. 2007).

This Court “*presume[s]*, in the absence of record evidence suggesting otherwise that a sentencing judge has faithfully discharged her duty to consider the statutory factors.” *Fernandez*, 443 F.3d at 30 (emphasis added). In calibrating the level of scrutiny invited by these standards, the Court of Appeals observed,

Sentencing is a responsibility heavy enough without our adding formulaic or ritualized burdens. And, a brief statement of reasons will generally suffice *where the parties have addressed only “straightforward, conceptually simple arguments” to the sentencing judge.*

Cavera, 550 F.3d at 193 (emphasis added).

C. Discussion

In this case, the sentencing judge’s statements satisfied the requirements of 18 U.S.C. § 3553(c) as interpreted by *Rita* and its progeny. First, after hearing arguments from counsel and

statements by McLean’s father and McLean, the court explicitly stated that it had taken into account the presentence report and its attachments, all written pleadings, all arguments and statements at sentencing, and all factors listed in 18 U.S.C. § 3553. JA 68-69. The court then said, “[i]n light of all of these considerations the Court concludes that it is fair, just and reasonable to order the gentleman committed to the custody of the Bureau of Prisons for a term of 18 months, the minimum range under our sentencing guidelines.” JA 69.

By itself, that statement satisfies the critical requirement of *Rita*, viz., that the sentencing judge “set forth enough to satisfy the appellate court that he has considered the parties’ arguments and has a reasoned basis for exercising his own legal decisionmaking authority.” *Rita*, 551 U.S. at 356. There is nothing in the record to disturb the “presum[ption] . . . that [the] sentencing judge has faithfully discharged h[is] duty to consider the statutory factors.” *Fernandez*, 443 F.3d at 30.

The court’s choice to impose a sentence at the bottom of the advisory guidelines range despite the government’s arguments about the seriousness of the threats and their consequences further indicates that the court also weighed McLean’s contrary arguments in the balance.

Second, the facts and arguments presented at sentencing were relatively “straightforward

[and] conceptually simple,” rendering only a “brief statement of reasons” necessary. *Cavera*, 550 F.3d at 193; *see also Rita*, 551 U.S. at 358.

The offense and relevant conduct was far from complex: a series of very similar, telephonic bomb threats to the same victim-municipality. The government presented two basic arguments in favor of a guideline sentence and against probation: the seriousness of the offense and relevant conduct (violent threats, and major disruptive impacts); and McLean’s repeated non-compliance with pre-sentence release conditions, presaging a low likelihood of probationary success. Defense counsel also presented a straightforward set of arguments: a psychological report documenting McLean’s difficult youth and emotional/cognitive deficits; McLean’s young age of 19 (hence immature/less culpable; and vulnerable in prison); and a brief reference to the allegedly “prank”-like nature of the offense, and McLean’s lack of a criminal history.

The parties’ framing of the sentencing alternatives was also conceptually simple: a binary choice between a guidelines sentence, and supervised probation.

In sum, the issues presented at sentencing were relatively basic and lacking in complexity. Unlike many sentencings, there was no dispute about McLean’s intent for the court to calibrate; no co-defendants and relative offense role culpabilities to sort out; no sophisticated transactions

needing to be traced and explained; and no spreadsheets of data to analyze and present. On the contrary, this sentencing falls squarely within the Court's description in *Cavera*, wherein "the parties have addressed only 'straightforward, conceptually simple [sentencing] arguments,'" necessitating only a "brief statement of reasons." 550 F.3d at 193.

Third and finally, the relative simplicity of both the sentencing issues and the contrasting sentence requests render the case one in which the facts and circumstances themselves make clear that the judge was able to "rest[] his decision upon the [Sentencing] Commission's own reasoning," having "found that the case before him is typical." *Rita*, 551 U.S. at 356-57.

In essence, the record shows that the court was presented with two clear alternatives: (1) treating McLean as a young and contrite first offender who would likely benefit from a non-guidelines, non-custodial sentence; or (2) inferring from the offense/relevant conduct and from McLean's post-plea non-compliance with release conditions that he needed a more typical, deterrent sentence to serve as a "wake up call." It is evident from the sentence that the court found the latter alternative more persuasive. An elaborate explanation could have done little to make this more clear, because in this relatively uncomplicated case, the record already made quite clear the competing sentence options and the respective reasons for each.

McLean cites and describes *United States v. Cunningham*, 429 F.3d 673 (7th Cir. 2005) as “a case with nearly identical facts as this one.” Brief for McLean at 20. *Cunningham* found procedural error in the trial judge’s denying a departure request without addressing the defendant’s extensive, diminished capacity evidence. But the *Cunningham* facts are only superficially similar to those on review here. A careful reading of those facts reveals that the sentencing arguments in *Cunningham* were far less “straightforward [and] conceptually simple,” *Cavera*, 550 F.3d at 193. In contrast to the instant case, the *Cunningham* facts invited a much more contestable argument over the defendant’s level of culpability; drew upon much stronger mitigation evidence from the defendant’s characteristics and history; and involved a less obvious and more ambiguous basis for the government’s argument against a non-guidelines sentence. 429 F.3d at 676-79. Under *Rita* and its progeny, the *Cunningham* sentencing warranted a fuller statement of reasons than the instant case.¹

¹ McLean also cites *United States v. Garcia-Oliveros*, 639 F.3d 380, 382, 381 (7th Cir. 2011) (per curiam) (Brief for McLean at 21-22), in which the Court of Appeals found—and the government conceded—the trial court’s procedural error at sentencing. But unlike the present matter, it appears that the court in *Garcia-Oliveros* did not even make a summary reference to what it had considered: the Court of Appeals referred to “the sentencing judge’s *complete silence*”

II. The 18-month sentence—a sentence at the bottom of the applicable guidelines range—was substantively reasonable.

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the ‘Statement of Facts’ above.

B. Governing law and standard of review

The substantive validity of a sentence is reviewed for “reasonableness.” *Booker*, 543 U.S. at 261-62. *See also Watkins*, 667 F.3d at 260 (same). Reviewing a sentence’s substantive reasonableness, *i.e.*, reviewing whether the sentence is sufficient to meet the purposes of 18 U.S.C. § 3553(a), is a highly deferential exercise. In particular, this Court has said:

[W]e will not substitute our own judgment for the district court’s on the question of what is sufficient to meet the § 3553(a) considerations in any particular case We will instead 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.”*

in assigning error. 639 F.3d at 382 (emphasis added).

Cavera, 550 F.3d at 189 (quoting *United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007)) (second emphasis added). Moreover, substantive review “take[s] into account the totality of the circumstances, giving due deference to the sentencing judge’s exercise of discretion, and bearing in mind the institutional advantages of district courts.” *Id.* at 190.

Although permitted by the Supreme Court in *Rita*, 551 U.S. at 347-51, this Court has not adopted a presumption of reasonableness for sentences falling within the advisory guidelines range. *Cavera*, 550 F.3d at 190. However, 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 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.”).

Consequently, the trial court’s sentencing discretion will be limited only in the most exceptional cases by substantive reasonableness review, which this Court has compared to the “manifest-injustice [and] shocks-the-conscience” benchmarks. *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009). As this Court explained:

In sum, these standards provide a backstop for those few cases that, although procedurally correct, would nonetheless damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law.

Id.

C. Discussion

On the facts presented to the district court, McLean’s 18-month sentence falls well within the “the range of permissible decisions,” *Cavera*, 550 F.3d at 189 (quotation omitted).

First, a sentence at the bottom of the 18 to 24 month guidelines range appears especially reasonable in light of the very serious nature of the offense conduct. As discussed above, all 15 of the bomb threats were highly graphic, warning of imminent detonation, shooting of police, and/or hostages at risk of impending death. Every threat necessitated a substantial emergency response, involving an average of more than nine police officers and fire fighters plus several police and fire department vehicles—all of which were, because of McLean’s conduct, rendered unavailable for *real* emergencies for hours at a time.

Indeed, the low-end guidelines sentence appears especially appropriate in view of the large number of bomb threats. Fifteen threats meas-

urably exceeds the typical conduct that appears to have been envisioned by the drafters of the applicable guideline, U.S.S.G. § 2A6.1, which in sub-section (b)(2) distinguishes only between conduct involving one or two threats, and conduct involving “more than two threats.”

McLean’s various rhetorical efforts to mitigate the seriousness of the conduct are unsuccessful. First, he compares the offense conduct to crank calls, as if they were nothing more than bothersome phone calls, devoid of any causal connection to fire trucks and police cars rushing through crowded urban streets, and entire city blocks being shut down for hours at a time. Second, he asserts that “none of the calls were to a specific individual,” but rather “to the New Haven 911 dispatcher,” Brief for McLean at 16, as if that somehow reduced the anxiety and disruption imposed by the threats. But the anxiety and disruption would have been quite similar, whether the threat calls went to 911 or directly to the targeted locations: loud sirens approaching, streets closed off, emergency responders in protective gear streaming into each location, and occupants having to clear out in a panicked rush. Third, McLean cites the lack of evidence of other possible crimes, such as actual explosives or provable plans to harm other persons. But those are *non sequiturs*, showing only that McLean did not commit *other* crimes; they do not mitigate the crime for which he was sentenced.

McLean suggests that the Probation Office also supported a sentence below the applicable guidelines range, by quoting language from the PSR that the “Court might wish to ‘consider whether a sentence within the guideline range [was] more than necessary to meet the purposes of sentencing detailed at 18 U.S.C. § 3553(a).” Brief for McLean at 25 (quoting from PSR ¶ 56).

The selective quotation omits to mention the Probation Office’s own caveat in the preceding paragraph, that “[c]ircumstances and factors noted in this section should *not* be constructed as a recommendation by the U.S. Probation Office.” PSR ¶ 55 (emphasis added). Nowhere does the PSR recommend or imply that the court should impose a non-custodial sentence. On the contrary, the PSR makes clear that the Probation Office anticipated a term of incarceration as part of the sentence. *See* PSR ¶ 58 (stating that McLean’s limitations will “pose challenges during his period of supervised release,” which assumes an incarcerative sentence that necessarily precedes such release period); PSR ¶ 59 (expressing “hope[]” that McLean will “make every effort to live a pro-social life *when he is released from custody*” (emphasis added)).

Further, the reasonableness of denying McLean’s request for a probationary sentence becomes especially apparent when viewed against the undisputed record of his repeated non-compliance with pre-sentence release conditions. As discussed above, while on pre-

sentencing release, McLean repeatedly tested positive for drugs, repeatedly refused to enroll in a GED course despite guidance and several promptings by the Probation Office, and after suggesting to Probation that he would prefer employment to GED classes, he appears to have done nothing to follow up on the multiple employment opportunities referred by the Probation Office.

If one were seeking an empirical assessment of a defendant's fitness for probation, one could hardly design a better experiment than what actually happened in this case. Among other things, McLean's conduct while on release starkly undermined his argument that "probation would have most effectively fostered Mr. McLean's rehabilitation," Brief for McLean at 29.

Most important, those facts concerning McLean's flagrant non-compliance were presented to the sentencing court and specifically argued by the government—in both its sentencing memorandum and at the sentencing hearing—as reasons to deny McLean's request for probation.

Accordingly, the court's 18 months sentence at the bottom of the applicable guidelines range cannot conceivably be deemed "shockingly high . . . or otherwise unsupportable as a matter of law," *Rigas*, 583 F.3d at 123. Especially under the deferential, abuse of discretion standard of review, and in light of the facts and arguments

presented, the district court's decision to reject McLean's arguments for probation appears manifestly reasonable.

Despite the abundance of facts to support an incarcerative sentence, McLean further argued that probation was needed to “avoid unwarranted disparities,” citing and describing lower sentences imposed in three Connecticut federal cases. Brief for McLean at 10-11. Even if this very small sampling were representative—which is by no means evident—the cited cases' descriptions are both too dissimilar and insufficiently specific to provide baselines for the instant case. The first probation case cited, *United States v. Juan Rivera, Jr.*, No. 3:10cr108(EBB), involved only one, not 15, threat incidents, and the facts bearing on the defendant's fitness or non-fitness for probation are not described. The second probation case cited, *United States v. Joseph Faryniarz*, No. 3:01cr253(AVC), was a conviction for the lesser charge of false statement, albeit “in connection with a bomb hoax,” *id.*: in other words, one as opposed to 15 hoaxes, and no conviction for that conduct; and again, lacking facts about fitness or non-fitness for probation. The third cited case, *United States v. Amir Omerovic*, No. 3:02cr56(AHN), resulted in a 10 month sentence for mailing anthrax hoax letters filled with powder—clearly not a probationary sentence, and again, with no mention of defendant's particular characteristics.

In any event, one could undoubtedly find quasi-analogous cases involving *higher* sentences, without necessarily shedding light on the reasonableness of the particular sentence imposed in this case. See e.g., *United States v. Simmons*, 649 F.3d 301, 301-303 (5th Cir.) (per curiam) (10-year sentence for 13 telephonic bomb threats made against army depot, as part of larger stalking/harassment pattern towards ex-girlfriend), *cert. denied*, 132 S. Ct. 857 (2011); *United States v. Wilfong*, 551 F.3d 1182, 1182-83 (10th Cir. 2008) (48-month sentence for single bomb threat made against Air Force base).

In sum, the district court fully considered all of the § 3553(a) factors and imposed a sentence that reflected a careful balancing of those factors. On this record, the Court should decline McLean's invitation to substitute its judgment for that of the district court on the proper weight to be given the sentencing factors.

Conclusion

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

Dated: January 28, 2013.

Respectfully submitted,

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UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in cursive script that reads "Henry K. Koebel". The signature is written in black ink and is positioned above the printed name and title of the signatory.

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**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 6,610 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

A handwritten signature in cursive script that reads "Henry K. Koebel".

HENRY K. KOPEL
ASSISTANT U.S. ATTORNEY

Addendum

18 U.S.C. § 3553

(a) Factors to be considered in imposing a sentence.--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider--

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments

made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

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

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

...

(c) Statement of reasons for imposing a sentence.--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason

for the imposition of a sentence different from that described, which reasons must also be stated with specificity in a statement of reasons form issued under section 994(w)(1)(B) of title 28, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

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