

12-4160

To Be Argued By:
RICHARD J. SCHECHTER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-4160

—
UNITED STATES OF AMERICA,

Appellee,

-vs-

GREGORY VIOLA,

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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Table of Contents

Table of Authorities	iv
Statement of Jurisdiction	ix
Statement of Issues Presented for Review	x
Preliminary Statement	1
Statement of the Case	3
Statement of Facts and Proceedings Relevant to this Appeal	4
A. The offense conduct	4
B. Guilty plea hearing	9
C. Sentencing hearing	11
D. The written statement of reasons	23
Summary of Argument	25
Argument.....	26
I. The district court did not commit plain error in explaining the rationale for the defendant’s sentence or in deciding not to provide the parties with a written SOR for the sentence imposed	26
A. Relevant facts	26

B. Standard of review and governing law.....	26
1. Plain error review	26
2. Reasonableness review	28
3. Statement of reasons under section 3553(c)	29
C. Discussion	32
1. The defendant cannot show that the district court committed plain error at sentencing because the court did consid- er his downward departure arguments and adequately explained its reasons for refusing to depart and imposing a Guidelines sentence	32
2. The defendant’s sentence was within the applicable Guidelines range, and thus did not require a written statement of reasons	35
3. A written SOR was prepared and filed with the Bureau of Prisons and provided to the parties, thereby mooting this issue.....	36
II. The defendant cannot show that the district court committed plain error at sentencing because the court did consider his departure arguments and he can point to no record	

evidence that the court failed to consider his downward departure motions	38
A. Relevant facts	38
B. Governing law and standard of review	38
1. Plain error review	38
2. Downward departure motions.....	39
C. Discussion	41
Conclusion	46
Certification per Fed. R. App. P. 32(a)(7)(C)	
Addendum	

Table of Authorities

PURSUANT TO “BLUE BOOK” RULE 10.7, THE GOVERNMENT’S CITATION OF CASES DOES NOT INCLUDE “CERTIORARI DENIED” DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

Cases

<i>Gall v. United States</i> , 552 U.S. 38 (2007).....	28
<i>Rita v. United States</i> , 551 U.S. 338 (2007).....	29, 30, 32, 34
<i>United States v. Bonner</i> , 313 F.3d 110 (2d Cir. 2002) (per curiam).....	44
<i>United States v. Booker</i> , 543 U.S. 220 (2005).....	28
<i>United States v. Brown</i> , 98 F.3d 690 (2d Cir. 1996)	44
<i>United States v. Carter</i> , 489 F.3d 528 (2d Cir. 2007)	30
<i>United States v. Cotton</i> , 535 U.S. 625 (2002).....	27, 39
<i>United States v. Crosby</i> , 397 F.3d 103 (2d Cir. 2005)	28, 30

<i>United States v. Desena</i> , 260 F.3d 150 (2d Cir. 2001)	39
<i>United States v. Diaz</i> , 176 F.3d 52 (2d Cir. 1999)	41 43
<i>United States v. Ekhtator</i> , 17 F.3d 53 (2d Cir. 1994)	40
<i>United States v. Espinoza</i> , 514 F.3d 209 (2d Cir. 2008)	23, 30
<i>United States v. Fernandez</i> , 443 F.3d 19 (2d Cir. 2006)	28, 30, 43, 44
<i>United States v. Goldberg</i> , Case No. 3:10cr-192 (RNC).....	16
<i>United States v. Hall</i> , 499 F.3d 152 (2d Cir. 2007)	31
<i>United States v. Harris</i> , 38 F.3d 95 (2d Cir. 1994)	35
<i>United States v. James</i> , 280 F.3d 206 (2d Cir. 2002)	31, 35
<i>United States v. Jones</i> , 460 F.3d 191 (2d Cir. 2006)	34, 36
<i>United States v. Lewis</i> , 424 F.3d 239 (2d Cir. 2005)	30

<i>United States v. Margiotti</i> , 85 F.3d 100 (2d Cir. 1996) (per curiam).....	41
<i>United States v. Molina</i> , 356 F.3d 269 (2d Cir. 2004)	29
<i>United States v. Olano</i> , 507 U.S. 725 (1993).....	27, 39
<i>United States v. Prince</i> , 110 F.3d 921 (2d Cir. 1997)	30
<i>United States v. Rattoballi</i> , 452 F.3d 127 (2d Cir. 2006)	36
<i>United States v. Sero</i> , 520 F.3d 187 (2d Cir. 2008) (per curiam).....	40
<i>United States v. Silleg</i> , 311 F.3d 557 (2d Cir. 2002)	40
<i>United States v. Stinson</i> , 465 F.3d 113 (2d Cir. 2006) (per curiam).....	40, 43
<i>United States v. Valdez</i> , 426 F.3d 178 (2d Cir. 2005)	40

<i>United States v. Verkhoglyad</i> , 516 F.3d 122 (2d Cir. 2008)	31
<i>United States v. Villafuerte</i> , 502 F.3d 204 (2d Cir. 2007)	26, 27, 39, 41
<i>United States v. Watkins</i> , 667 F.3d 254 (2d Cir. 2012)	28
<i>United States v. Williams</i> , 399 F.3d 450 (2d Cir. 2005)	27, 39
<i>United States v. Zackson</i> , 6 F.3d 911 (2d Cir. 1993)	34

Statutes

18 U.S.C. § 1341	3
18 U.S.C. § 3231	ix
18 U.S.C. § 3553	<i>passim</i>
18 U.S.C. § 3742	ix
28 U.S.C. § 1291	ix

Rules

Fed. R. App. P. 4 ix

Fed. R. Crim. P. 52..... 27

Fed. R. Crim. P. 11..... 10, 42

Guidelines

U.S.S.G. § 2B1.1..... 9, 11

U.S.S.G. § 5H1.11 15

U.S.S.G. § 5K2.0..... 11

Statement of Jurisdiction

The district court (Vanessa L. Bryant, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on October 9, 2012. VA13.¹ On October 15, 2012, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). VA202. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

¹ The appendix filed by Gregory Viola will be referred to as “VA” with the page number. The government has filed a separate appendix, which will be referred to as “GA” with the page number.

Statement of Issues Presented for Review

1. Whether the district court plainly erred in failing to provide the parties with a written statement of reasons for imposing a Guidelines sentence of imprisonment where a written statement was not required, and the court did in fact prepare a written statement of reasons, which it provided to the Bureau of Prisons at the time of sentencing and to the parties after the defendant filed his appellate brief?

2. Whether the district court plainly erred by failing to recognize explicitly its authority to depart downward under the Sentencing Guidelines, or by failing to address explicitly each of the defendant's departure requests when imposing the sentence where the comments at the plea allocution and at the sentencing hearing demonstrated that the district court judge was aware of her authority to depart downward and had reviewed and considered defendant's written requests for various downward departures before imposing a Guidelines sentence?

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-vs-

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

From 2007 through 2011, the defendant, Gregory Viola, ran a multi-million dollar Ponzi scheme in which he defrauded more than 50 victims of approximately \$6.8 million. After several of these victims complained to state and federal authorities about the defendant's investment business, and the Federal Bureau of Investigation ("FBI") launched an investigation into his conduct, the defendant confessed his guilt to the

United States Attorney's Office ("USAO") in July 2011.

After pleading guilty to an information charging two counts of mail fraud, and subsequently agreeing to a guideline range of 97-121 months' incarceration, the defendant appeared for sentencing on October 4, 2012. There, the district court conducted a thorough analysis of the sentencing factors set forth in 18 U.S.C. § 3553(a), considered the Sentencing Guidelines to be advisory, and sentenced the defendant to a Guideline term of imprisonment of 100 months on each count, to be served concurrently, followed by three years of supervised release. The court imposed no fine, but ordered restitution in the amount of \$6,872,633.97.

On appeal, the Viola makes two arguments in attacking his sentence. *First*, he claims that the district court did not adequately explain the rationale for its sentence and failed to prepare a written statement of reasons. *Second*, he claims that the court failed to explicitly consider his requests for a downward departure from the Sentencing Guidelines.

As the defendant did not raise either of these arguments at the time of sentencing or thereafter, the two issues on appeal are subject to plain error review, and the district court committed no error, much less one that was obvious or affected the defendant's substantial rights. Before imposing the sentence, the district court clearly stated

that it had considered everything in the record, including the § 3553(a) factors. The defendant points to no evidence that the court misapprehended its sentencing authority in any way. Moreover, the court did explain the rationale for its sentence and did issue a written statement of reasons explaining its imposition of a Guidelines sentence. Thus, the defendant's claims should be rejected, and the judgment should be affirmed.

Statement of the Case

On July 8, 2011, after the FBI had already begun an investigation into the defendant's investment business, the defendant confessed to federal authorities that he had been running a lengthy, multi-million dollar Ponzi scheme. VA73, VA118-21. On August 11, 2011, the defendant was charged in a one-count mail fraud complaint. After he surrendered to authorities, he was released on a \$100,000 collateral bond and conditions of release. VA5.

On February 1, 2012, the defendant entered a guilty plea to an Information charging two counts of mail fraud in violation of 18 U.S.C. § 1341. VA7, GA1-5.

On October 4, 2012, the district court (Vanessa L. Bryant, J.) sentenced the defendant to concurrent terms of 100 months' imprisonment on each count. VA13, VA181. The district court also imposed a three-year term of supervised release, no fine, and restitution in the

amount of \$6,872,633.97. VA13, VA181-82. Judgment entered on October 9, 2012, and the defendant filed a timely notice of appeal on October 15, 2010. VA13, VA196, VA202.

The defendant surrendered to the Bureau of Prisons on December 3, 2012. VA197. He is currently serving his federal sentence.

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

A. The offense conduct

The following facts, which are essentially undisputed, are taken from the Pre-Sentence Report (“PSR”) and the government’s sentencing memorandum (GA128-68):

From 1989 to about 2006, the defendant, a resident of Orange, Connecticut, worked for various companies doing tax compliance. GA2. During much of that time, he also conducted an investment business in addition to preparing tax returns for profit. PSR ¶ 6, GA130. Although the defendant was not a licensed or registered investment adviser, he solicited and received funds from investors, some of whom were his tax clients. PSR ¶ 6, GA130. The defendant repeatedly represented to investors that he would invest their funds and help them generate a return on their investments. PSR ¶ 6, GA130. He found investors based on referrals from existing investors rather than through any form of advertising. PSR ¶ 6, GA130. In some cases, the defend-

ant represented to investors that he would provide a dividend or interest payment in addition to the possibility of appreciation on the investments. PSR ¶ 6, GA130.

Beginning as early as 2007 and continuing to in or about July 2011, the defendant engaged in a scheme to defraud his investors as he became unable to make the required dividend payments. PSR ¶ 7. In short, from 2007 through 2011, the defendant ran a Ponzi scheme by using new investor money both to pay redemptions to earlier investors and to provide dividends or interest payments to the investors. PSR ¶ 7. Thus, rather than invest the funds as he represented, the defendant used funds he received after 2007 to make payments to earlier investors. PSR ¶ 7. He also used investor funds to pay for his own personal expenses, including the mortgage on his personal residence. GA3.

To keep the Ponzi scheme going, the defendant repeatedly lied to his investors. PSR ¶ 3, GA130. For example, in an effort to solicit investors to provide funds to him, the defendant made false statements and misrepresentations regarding: (a) the returns generated by their investments; (b) the actual amounts investors had on account with the defendant; (c) the defendant's use of funds obtained from investors to make specified dividend payments to earlier investors; and (d) the fact that the defendant represented to investors that their funds were fully invested,

when he did not fully invest the investors' funds, but rather co-mingled the funds in his own personal bank accounts. GA130. On a few instances, he provided a prospective investor with information on Citigroup letterhead which led at least one investor to believe that the investment was going to Citigroup and was backed by Citigroup. PSR ¶ 8, GA130-31. Citigroup had nothing to do with the defendant's investment business. PSR ¶ 8, GA131.

To prevent his victims from becoming aware that he was using new investor funds to make returns to older investors, the defendant provided written statements to his investors by mail that falsely represented the value of their investments. PSR ¶ 9, GA131. The defendant also fraudulently created documents that falsely suggested investor funds were contained in specific ETrade accounts. PSR ¶ 9, GA131. He mailed these fraudulently created documents to his investors knowing that these documents falsely portrayed the value of the investments and falsely suggested that each investor's funds were segregated in separate ETrade accounts, which was not the case. PSR ¶ 9, GA131.

As explained by the victims, and as documented in victim impact statements and questionnaires filled out by victims, the defendant advised investors to provide him with funds, including the investors' retirement funds or proceeds from home equity loans, so that the de-

fendant could purportedly invest the funds for the investor. PSR ¶ 10, GA131. He would charge each investor for his services and send them each a bill that would be calculated as a percentage of the funds purportedly under his management. PSR ¶ 10, GA131. Given that he misrepresented the funds under management from at least 2007 forward, the percentage he requested from the investors for his fees was not accurate. PSR ¶ 10, GA131. In short, at the same time he was running a Ponzi scheme, he was charging his unsuspecting clients an inflated fee for services he was not providing. PSR ¶ 10, GA131.

When the defendant failed to make redemptions to investors in early 2011, a number of them told him they would report him to the authorities. PSR ¶ 11, GA131. Indeed, in early 2011, the defendant did receive an inquiry from the Connecticut Department of Banking based on the fact that several victims had reported his conduct to that agency. PSR ¶ 11, GA131-32. In response to that inquiry, the defendant exercised his right not to speak with the state banking authority. PSR ¶ 11, GA132. He then sought to forestall the investors from learning that he was running a Ponzi scheme by advising them via a March 14, 2011 email that he was in the process of winding down the investment business and that it would take a few months to make final distributions to the investors. PSR ¶ 11, GA132.

The defendant also lied and told at least one investor that the reason he could not provide a redemption was that the Department of Banking had frozen his accounts, which it had not. GA132.

The FBI also had a criminal investigation of the defendant prior to July 8, 2011, the day he confessed his Ponzi scheme to the USAO. GA132. This investigation began when one victim contacted the FBI directly to report the defendant's conduct in failing to return investment funds. GA132. The Stamford police also received complaints from a number of investors on the morning of July 8, 2011, prior to when the defendant confessed his criminal conduct. GA132. And prior to July 8, 2011, a number of victims had advised the defendant that they intended to report him to the authorities when he failed to return their investments. GA132. Thus, there can be no doubt that, prior to July 8, 2011, the defendant knew that his victims were reporting his conduct to both federal and state authorities. GA132.

On July 8, 2011, after the FBI investigation had started and several victims had reported the defendant's fraudulent conduct, the defendant's counsel contacted the USAO. PSR ¶ 11, GA132. Later that day, his counsel brought him to the USAO, where he sat in a proffer interview and confessed to having defrauded his investors via a Ponzi scheme. PSR ¶ 11, GA132-33. According to

what he said during the proffer session, the defendant had become unable to pay his investors either the dividends he had promised them or the redemptions to investors who wanted a return on their principal. GA133. After the meeting, the FBI continued to receive additional complaints from some of the defendant's investors. GA133.

Shortly after the proffer session, the defendant formally surrendered to the authorities and was arrested on a mail fraud complaint. He appeared before United States Magistrate Judge William I. Garfinkel on August 11, 2011 and was released on a collateral bond and conditions of release. PSR ¶ 12.

B. Guilty plea hearing

On February 1, 2012, the defendant pleaded guilty to a two-count Information. VA79, GA1-5. In connection with his plea, the defendant entered into a written plea agreement. VA33 (plea transcript), VA17-30 (plea agreement). That plea agreement set forth two potential guideline incarceration ranges, depending on whether an upward adjustment was added under U.S.S.G. § 2B1.1(b)(18) "because the offense involved a violation of the securities law and at the time of the offense the defendant was an 'investment advisor[.]'" With the adjustment the range would be 97-121 months, and without the adjustment the range would be 78-97 months. VA22. The defendant agreed to waive his right to appeal or

collaterally attack any incarceration term that did not exceed 97 months. VA23.

In addition, the agreement provided that the court would “consider any applicable Sentencing Guidelines as well as other factors enumerated in 18 U.S.C. § 3553(a) to tailor an appropriate sentence in this case . . .” VA20. The plea agreement also contemplated that the defendant might request a “downward departure from the applicable Guideline Sentencing Range” and/or “a non-Guideline sentence.” VA22.

Before accepting his plea, the district court conducted a thorough Rule 11 canvas. VA35-79. In particular, the court engaged the defendant in the following colloquy regarding the operation of the Sentencing Guidelines:

THE COURT: Do you understand that in determining the appropriate sentence, the Court is obligated to calculate the United States Sentencing Guideline recommended sentencing range?

THE DEFENDANT: Yes.

THE COURT: And do you understand that the Court is also obligated to consider the recommended range and any departures, either upward or downward, under the Guidelines?

THE DEFENDANT: Yes.

THE COURT: Do you understand that the Court must also consider the other factors set forth in 18 United States Code, Section 3553?

THE DEFENDANT: Yes.

VA40-41.

C. Sentencing hearing

The PSR determined that the defendant's base offense level was 7 under U.S.S.G. § 2B1.1(a)(1). PSR ¶ 35. It then added 18 levels under § 2B1.1(b)(1)(J) because the loss from the defendant's crime exceeded \$2,500,000, but was not more than \$7,000,000. PSR ¶ 36. Four more levels were added under § 2B1.1(b)(2)(B), as the offense involved 50 or more victims. PSR ¶ 37. An additional four levels followed under § 2B1.1(b)(18)(A)(iii), because the defendant was a paid investment advisor and thus violated securities law at the time of the offense. PSR ¶ 38. Three levels were subtracted for acceptance of responsibility. PSR ¶ 43. With a resulting total offense level of 30 and no criminal history, the defendant's Guideline range was 97 to 121 months in prison. PSR ¶¶ 44-45, 84. There being no objection to the final version of the PSR, as modified by its two addenda, the district court adopted the facts stated therein as its findings of facts during the sentencing hearing. VA111.

In the defendant's sentencing memo, he advocated for a departure under U.S.S.G. § 5K2.0

based on 10 separate grounds:² (1) he voluntarily disclosed the offense to the USAO; (2) he cooperated with authorities in determining his victims and their respective losses; (3) he suffered from health problems; (4) he had purported diminished capacity at the time he committed the offense; (5) his age; (6) his risk of recidivism is low; (7) he made charitable and civic contributions; (8) his girlfriend would suffer collateral consequences and hardship; (9) a sentence in the Guideline range would create an unwarranted sentence disparity for similar offense conduct; and (10) he provided prior assistance to authorities on an unrelated criminal matter. GA30-46. In addition, after discussing the factors under 18 U.S.C. § 3553(a), he urged the district court to impose a non-Guidelines sentence. VA128-50.

The government's sentencing memorandum summarized the offense conduct, which involved the defendant's operation of a lengthy Ponzi scheme which caused more than 50 victims to lose their life savings of more than \$6 million. GA128-36. It emphasized the undisputed fact that the defendant defrauded many investors into providing him with funds to invest on their behalf in order to use the new investor money to pay redemptions, dividends, and interest payments to earlier investors. GA130. The defend-

² Although the defendant's appellate brief cites nine separate grounds for departure, his original sentencing memorandum listed ten grounds.

ant repeatedly lied to investors to keep the Ponzi scheme afloat by making false statements and misrepresentations regarding the returns generated by their investments and the actual amounts investors had on account with him. GA130. The government also highlighted how the defendant's criminal conduct, abuse of trust, and betrayal had devastated his numerous elderly and vulnerable victims. GA136-38.

Furthermore, the government discussed why the § 3553 factors supported a multi-year prison sentence and why it opposed each of the defendant's downward departure arguments. GA143-66. *First*, as to his request for a departure for reporting his criminal conduct to the USAO, the government suggested the court could consider these actions as a possible mitigating factor, but argued that he did not qualify for a departure because, prior to July 8, 2011, victims had warned him that they would report him to the authorities, and then proceeded to do so. GA153-55. Furthermore, prior to his confession, he was already under investigation by the FBI and had already declined to speak to the Connecticut Department of Banking when it contacted him regarding some of these complaints. GA153-55.

Second, the government explained that, while the defendant was not entitled to a departure for his decision to identify his victims and their losses because this would have been done "whether or not [the defendant] participated in

that process[,]" the court should consider this factor in fashioning the appropriate sentence. GA155. But, as the government pointed out, "[A]ll the hours [the defendant] spent working on the matter in the last eighteen months since July 2011 did not produce a single dollar of restitution or any plan of restitution[,]" despite the fact that he owns two homes and sold neither to help pay back his victims. GA155

Third, in addressing the defendant's health problems as a basis for departure, the government pointed out that the critical question was not whether defendant has medical problems, but rather, whether his medical problems could be treated in prison, which, in this instance, they could. GA156-58.

Fourth, the government argued that the defendant's purported diminished capacity did not warrant a departure for two reasons. GA158-59. First, any suggestion that his medical ailments led to some loss of neurocognitive functioning that might somehow have contributed to his criminal conduct was pure guesswork. GA159-59. Second, the suggestion that he suffered from any mental impairment when he spent four years running a complex Ponzi scheme in which he avoided detection while keeping numerous investors at bay was hard to take seriously. GA158-59.

Fifth, the government reasoned that no departure was warranted due to the defendant's

age, as he was only 60 years old and was able to commit the crime when he was 55 to 59 years old. GA159-60. Since many of his victims were much older than he was, he was not too old to serve the prison time warranted by his serious criminal conduct. GA159-60.

Sixth, in rejecting the defendant's request for a departure due to his low chance of recidivism, the government emphasized that, although he would not be in a position to commit this massive crime again, an appropriate sentence must be imposed for the crime that he already committed to send a message to similarly situated potential offenders and serve the purpose of general deterrence. GA160.

Seventh, in addressing the defendant's charitable acts toward his church and alma mater as a basis for departure, the government explained that departures for civic or charitable works under U.S.S.G. § 5H1.11 were generally disfavored. GA160-63. The government also noted that, as the defendant took investor funds and commingled those funds in his personal accounts, the fact that he donated some of that money to a church was not an act that should be rewarded. GA160-63..

Eighth, the government objected to a departure based on the negative effect that the defendant's imprisonment would have on his girlfriend, as all custodial terms of imprisonment impose a hardship on family responsibilities,

and the defendant was not a special exception. GA164-65.

Ninth, in addressing the defendant's request for a departure to avoid a sentencing disparity, the government rejected the defendant's attempts to analogize his case to the one in *United States v. Goldberg*, Case No. 3:10cr-192 (RNC). GA165-66. Principally, the government stressed that when the defendant in *Goldberg* had reported and confessed his criminal conduct to federal authorities, there had not been a federal investigation of any kind. GA165-66. In the case at hand, however, the defendant did not report his offense to authorities until after a federal investigation was already underway. GA165-66. And, in the *Goldberg* case, the court imposed a non-Guideline sentence of ten years in jail, twenty months longer than the sentence imposed here. GA165-66. In short, the court's sentence was not disparate in relation to the *Goldberg* sentence.

Tenth, the government opposed the defendant's departure request for his alleged prior assistance to federal authorities in an unrelated criminal matter, because such a departure required a motion to be made by the government, which it had declined to do. GA166.

Ultimately, the government recommended a sentence of at least 84 months in prison. GA128.

At sentencing on October 4, 2012, the government referenced many of the arguments from its sentencing memorandum, pointing out that it would not repeat everything written in the memorandum given that “Your Honor has thoroughly read that and considered all of those arguments.” VA112. The government touched upon the § 3553(a) factors that would contribute to a “just and fair sentence” for the defendant, namely the seriousness of the crime, the number of victims, the aggregate loss of the victims, the length of time over which the defendant committed the crime, and the elderly and vulnerable nature of the victims who were defrauded. VA112-18. The government also stressed the need for general deterrence and the need to promote respect for the law, especially in light of the increase in white collar crimes in recent years. VA115-18.

As to the defendant’s request for a downward departure for allegedly reporting his criminal conduct to authorities, the government again stressed that the defendant was not entitled to a departure on this basis since the FBI was already investigating his conduct at the time that the defendant confessed his crime to the USAO. VA118-19. It did, however, ask the court to consider the defendant’s cooperation with authorities in identifying his victims and their losses as a mitigating factor when setting the sentence:

THE COURT: So the Government is recommending a downward departure of 13 months on the basis of Mr. Viola's disclosure of the facts and circumstances surrounding his offense?

MR. SCHECHTER: If Your Honor wants to look at it as a downward departure, perhaps, but I think the way we phrased it

—

THE COURT: Or a non-Guideline sentence.

MR. SCHECHTER: Yes, I think it's more or less a non-Guideline sentence.

VA121-24.

The government also highlighted its argument against a downward departure for the defendant due to mental impairment, citing difficulty "understanding how someone could be so mentally impaired, yet have the ability to run a complex fraud scheme in which 50 people lost 6 million dollars." VA126.

Defense counsel reiterated the points articulated in his sentencing memorandum and made a point to request that "Your Honor review the many factors that have been addressed in the sentencing memo, factors that, under the law, can be considered by the Court, and that, under the law, have been found to justify a non-Guideline sentence." VA129. Defense counsel

then took the time to stress four of the defendant's downward departure requests contained in the memorandum: the defendant's cooperation with federal authorities in identifying his victims and their respective losses, his alleged mental and physical health problems, his charitable and civic contributions, and the effect that his imprisonment would have on his girlfriend. VA129-50. At the end of his colloquy, defense counsel again stated, "I will not address all these issues specifically because, as I've noted, Your Honor, they are set forth in our memo, but I wish to highlight and emphasize the fact that there are, in fact, many individual characteristics of Mr. Viola which would qualify him for a non-Guideline sentence." VA144.

The defendant then personally made a brief statement to the Court in which he laid out his specific health problems over his lifetime. VA151-53.

Afterward, many of the defendant's victims made emotional statements of their own to the court, detailing the horrific impact that the defendant's criminal actions had on their lives. VA153-72. For example, victims explained that the defendant had spent their funds on travel and jewelry, that the money he stole was supposed to be used by the victims for their health needs in their old age, that he had gained the victims' trust and deceived them, that the victims have lost their life savings and retirement

money, and that one of the victims had to apply for Medicaid to pay for nursing home care. VA153-72; GA136-39 (summarizing victim impact statements).

After determining that the Guideline range was 97-121 months' incarceration, as the parties had agreed in their sentencing memoranda, the court turned to the imposition of sentence. VA180 As the court explained, "[t]he United States Sentencing Guideline recommended sentence is neither mandatory nor is it presumed to be reasonable, and the [c]ourt is admonished to take into consideration, all of the 3553 factors in determining the appropriate sentence to impose." VA180.

The court specifically elaborated on several of the applicable § 3553 factors. VA175-79. For instance, in reviewing the nature and circumstances of the offense, the court called this "a horrific offense in which Mr. Viola breached a solemn trust to people who counted upon him: elderly people, frail people, vulnerable people, young and old, people who trusted him with their live savings, people who trusted him with their retirement funds, people who, at his direction, incurred debt so that they would have money to invest with him because he assured them that he would be successful in increasing their assets." VA175-76. The court explained that "from 2007 to 2011, Mr. Viola perpetrated a Ponzi scheme in which he stole nearly \$7 million

dollars, at least approximately \$7 million dollars of the money entrusted to him by people who trusted him.” VA176.

The court also expressly rejected the defendant’s attempt to minimize his criminal conduct by his suggestion that he suffered from a medical condition. As the court explained, “[h]e stole this money, not because of any health condition. . . . Certainly, Mr. Viola’s ability to continue to garner the trust of his victims, to continue to live his lavish lifestyle, to continue to create the false account statements for his victims, attest to the fact that Mr. Viola’s mind is firmly intact.” VA176.

The court further contemplated “the need for the sentence to protect the public from further crimes which the [d]efendant might commit,” VA176, as well as the need for the sentence to be an adequate deterrent for the defendant and others engaging in similar criminal conduct. VA175-76. As the court explained, “[t]here are many crimes that are crimes of passion and compulsion for which general deterrence is inapplicable, is ineffective, but certainly general deterrence and the promotion of respect for the law and the protection of the public can be achieved in a circumstance such as this where individuals intentionally perpetrate a sophisticated scheme to defraud others.” VA177.

The court also considered the degree of remorse exhibited by the defendant by noting that

“the comments he made to his victims, all attest to his lack of insight, his lack of appreciation and understanding of the gravity of his conduct.” VA177-78. As the court explained, “[w]hen afforded an opportunity to speak, he used a fraction of his time to apologize to his victims, and then proceeded to regale those present with his concerns, his concerns about his life, his misfortune.” VA178

The court further assured the defendant that the “Bureau of Prisons is more than capable of addressing your medical needs and providing you with the medication that you need, as well as treatment.” VA179.

“Taking into consideration, all of the 3553 factors and the facts of this case,” the court concluded that the defendant should be sentenced to 100 months in prison on each of the two counts, to be served concurrently, as well as three years of supervised release, restitution in the amount of \$6,872,633.97, and a \$100 special assessment on each count. VA181-82. The court permitted the defendant to self-surrender to the Bureau of Prisons. VA192.

Significantly, the defendant never asked for a clarification of the court’s sentence or for a more detailed explanation of its reasons for refusing to depart downward or vary from the Guideline range.

This appeal followed.

D. The written statement of reasons

After the defendant filed his appellate brief, the government requested that the district court release to the parties the statement of reasons (“SOR”) form, which had been provided to the Bureau of Prisons. GA169; *see United States v. Espinoza*, 514 F.3d 209, 212 n.5 (2d Cir. 2008) (while the Administrative Office of the United States Courts encourages courts not to file the Statement of Reasons in the public case file, “it is important that the judgment and Statement of Reasons Form be made available promptly to defense counsel, government attorneys . . . and if a term of imprisonment is imposed, the Federal Bureau of Prisons . . .”). The court granted the motion and provided the SOR to the government and the defendant’s appellate counsel. GA172.³ Appellate counsel was given an opportunity to amend defendant’s brief after the SOR had been released but did not do so.

The written SOR explains the court’s specific reasons for imposing the 100 month sentence. For instance, a section entitled “Additional Facts Justifying the Sentence in this Case” reads:

The Sentencing Guidelines are neither mandatory [n]or presumptively reasonable and the sentencing factors outlined in 18 U.S.C. 3553 warrant a sentence of 100 months on Count 1 to run concurrent with

³ The Statement of Reasons Form has been furnished to this Court in a sealed appendix.

the 100-month sentence imposed on Count 2. Considering the nature and circumstances of the ponzi [sic] scheme lasting several years and the history and characteristics of this defendant, the Court finds that the defendant was not motivated by any mental deficiencies but, rather his own personal greed and continued lack of insight. A lengthy sentence is necessary to promote this defendant's respect for the law, to provide just punishment and to protect the public from his criminal actions. The sentence imposed must also deter others from engaging in similar financial crimes. Therefore, a sentence of 100 months and 3 years supervised release is sufficient but not greater than necessary considering all of the sentencing factors in this case.

Government's Sealed Appendix ("GSA")4.

Summary of Argument

The district court's sentence should be affirmed.

1. The district court did not err, much less plainly err, in the manner in which the court explained the rationale for the sentence. Nor did the court err in not providing the parties with a written SOR for the sentence imposed as a written SOR was not required pursuant to 3553(c)(1) because the court imposed a Guidelines sentence. Notwithstanding these facts, this issue is now moot since both parties to this appeal have been provided with the SOR that was originally filed by the district court for use by the Bureau of Prisons. Finally, the written SOR, coupled with the court's oral pronouncement of sentence, is more than adequate to demonstrate the court's rationale for the sentence.

2. The district court did not err, much less plainly err, at sentencing because the defendant can point to no record evidence that the court failed to consider his downward departure requests. In the absence of any evidence—much less clear evidence—that the sentencing court misapprehended its sentencing options or authority, this Court has not required the district court to address and reject each and every sentencing argument.

Argument

I. The district court did not commit plain error in explaining the rationale for the defendant’s sentence or in deciding not to provide the parties with a written SOR for the sentence imposed.

A. Relevant facts

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

B. Standard of review and governing law

1. Plain error review

To the extent that the defendant did not raise a perceived sentencing error below, this Court applies a plain error standard of review. *United States v. Villafuerte*, 502 F.3d 204, 207 (2d Cir. 2007). This Court has applied the plain error standard of review to unpreserved claims that the district court failed to adequately consider the § 3553(a) factors or explain its reasoning for imposing a particular sentence. *Id.* at 207-212. Requiring that such claims be raised before the sentencing judge “alerts the district court to a potential problem at the trial level and facilitates its remediation at little cost to the parties, avoiding the unnecessary expenditure of judicial time and energy in appeal and remand.” *Id.* at 208. Moreover, “[r]equiring the [sentencing] error to be preserved by an objection creates incen-

tives for the parties to help the district court meet its obligations to the public and the parties.” *Id.* at 211.

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

To “affect substantial rights,” an error must have been prejudicial and affected the outcome of the district court proceedings. *Olano*, 507 U.S. at 734. This language used in plain error review is the same as that used for harmless error review of preserved claims, with one important distinction: In plain error review, it is the defendant rather than the government who bears the burden of persuasion with respect to prejudice. *Id.*

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

2. Reasonableness 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 constrained 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).

3. Statement of reasons under section 3553(c)

Once the district court makes its determination as to the sentence, it must “state in open court the reasons for its imposition of the particular sentence” 18 U.S.C. § 3553(c). This requirement is intended “(1) to inform the defendant of the reasons for his sentence, (2) to permit meaningful appellate review, (3) to enable the public to learn why defendant received a particular sentence, and (4) to guide probation officers and prison officials in developing a program to meet defendant's needs.” *United States v. Molina*, 356 F.3d 269, 277 (2d Cir. 2004). “By articulating reasons, even if brief, the sentencing judge not only assures reviewing courts (and the public) that the sentencing process is a reasoned process but also helps that process evolve.” *Rita v. United States*, 551 U.S. 338, 357 (2007).

The Supreme Court has emphasized that a district court’s statement of reasons need not be exhaustive, particularized, or uniform: “The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends on circumstances. Sometimes a judicial opinion responds to every argument; sometimes it does not The law leaves much, in this respect, to the judge's own professional judgment.” *Rita*, 551 U.S. at 356. To satisfy his or her burden under Section 3553(c), “[t]he sentencing judge should 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.*

This Court's own pre-*Rita* expression of a sentencing judge's § 3553(a) obligation was strikingly similar: it merely required a sufficient basis for the defendant and court of appeals "to determine why the district court did what it did." *United States v. Carter*, 489 F.3d 528, 540 (2d Cir. 2007) (citing *United States v. Lewis*, 424 F.3d 239, 247 n.5 (2d Cir. 2005)); accord *United States v. Espinoza*, 514 F.3d 209 (2d Cir. 2008). As with Section 3553(a)'s analogous requirement that sentencing judges "shall consider" the applicable Guidelines range, this Court has never "require[d] robotic incantations by district judges," *United States v. Crosby*, 397 F.3d at 113 (internal quotation marks omitted); see also *Fernandez*, 443 F.3d at 30.

In limited circumstances, the district court may be required to state its reasons for the particular sentence with greater specificity. First, 18 U.S.C. § 3553(c)(1) provides that, for sentences within a Guidelines range which spans more than 24 months from the bottom of the range to the top of the range, the sentencing court must provide "the reason for imposing a sentence at a particular point within the range." 18 U.S.C. § 3553(c)(1); see also *United States v. Prince*, 110 F.3d 921, 926 (2d Cir. 1997). Therefore, where the span of the applicable Guidelines range is

equal to or less than 24 months, the district court's discretionary decision as to which sentence to impose within that range is generally not subject to appellate review and need not be explained in a written statement of reasons. *United States v. James*, 280 F.3d 206, 208 (2d Cir. 2002).

Second, pursuant to 18 U.S.C. § 3553(c)(2), if the imposed sentence is outside the applicable Guidelines range, the judge must state “the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment.” 18 U.S.C. § 3553(c)(2). In addition to better assisting the appellate court in its review, this Court has found that “a written statement of reasons is beneficial because the Bureau of Prisons consults the written judgment of conviction, which may contain information relevant to a defendant's service of sentence.” *United States v. Verkhoglyad*, 516 F.3d 122, 133-34 (2d Cir. 2008) (quoting *United States v. Hall*, 499 F.3d 152, 154-155 (2d Cir. 2007)).

C. Discussion

1. The judge adequately explained the reasons for the sentence in open court, and the defendant's applicable Guidelines range did not require a more specific explanation since the range did not exceed 24 months

The defendant argues that his sentence was imposed in violation of law, and therefore appealable, because the sentencing court failed to meet its general obligation to state in open court the reasons for the imposition of the particular sentence. *See* Def.'s Br. at 9. Section 3553(c)(1), however, requires that the judge must state "the reasons for imposing a sentence at a particular point within the range" only if the sentence is within an applicable Guideline range that exceeds 24 months. *See* 18 U.S.C. § 3553(c)(1). Since the district court provided on the record in open court a sufficient statement of reasons for its Guidelines sentence to satisfy the reasonableness review standard, and since the defendant's Guidelines range did not exceed 24 months, the statutory demands of 3553(c) were adequately met here.

In analyzing the court's remarks made at sentencing in light of the Supreme Court's holding in *Rita*, it is clear that "the judge's statement of reasons here . . . was legally sufficient." 551 U.S. at 356. At the sentencing hearing on Octo-

ber 4, 2012, the court heard arguments from defense counsel, the defendant, government counsel and numerous victims. VA105-94. The court then explained why it was imposing a sentence near the bottom of the applicable Guidelines range. VA175-81.

First, the court stated that it understood the Guidelines were advisory. VA175. Next, the court stated that it had considered all of the factors under § 3553(a). VA175. The court specifically discussed the nature and circumstances of the crime and concluded that “[i]t was a horrific offense in which Mr. Viola breached a solemn trust . . .” VA175. The court also specifically discussed the history and characteristics of the defendant, citing his use of the victims’ money to fund his lavish lifestyle, and rejected the argument that his conduct was a consequence of any mental impairment. *See* VA176-78. The court noted the need for the sentence to protect the public from further crimes, to punish the defendant, to promote respect for the law, and to deter others from engaging in the same criminal conduct. VA176-77. It concluded: “[t]aking into consideration, all of the 3553 factors and the facts of this case, the [c]ourt sentences you . . . to a period of incarceration of 100 months.” VA181.

The oral reasons provided by the court are more than “enough to satisfy the appellate court that [the district court] has considered the parties’ arguments and has a reasoned basis for ex-

exercising his own legal decision.” *Rita*, 551 U.S. at 356. The defendant’s argument that the district court did not provide “a statement of reasons . . . as required by 18 U.S.C. § 3553(c)” and thus “this Court, nor the defendant cannot know its basis for the sentence imposed,” Def.’s Br. 14, completely inverts the inquiry. This Court has made clear that there is no requirement that sentencing judges specifically identify the § 3553(a) factors they consider in imposing a sentence, nor that they explain why a non-Guideline sentence would not be sufficient. *Cf. United States v. Jones*, 460 F.3d 191, 195 (2d Cir. 2006) (“We decline to impose a requirement for such specific articulation of the exact number of months of an imposed sentence.”)

Furthermore, this Court should reject the defendant’s argument that a more specific statement of reasons was required by § 3553(c)(1). As support for his claim, the defendant cites to *United States v. Zackson*, 6 F.3d 911, 923-24 (2d Cir. 1993), concluding that “pursuant to [*Zackson*], the sentence must be vacated for the failure to state the reasons for the sentence.” Def.’s Br. 11. The defendant in *Zackson*, however, had a calculated Guideline range of 121 to 151 months’ imprisonment based on his offense level and criminal history, a range that spanned 30 months. *Id.* at 917. Thus, in *Zackson*, this Court remanded the case so that the district court could provide a written statement of reasons

pursuant to § 3553(c)(1), noting that, if the sentence range “*exceeds* twenty-four months, as here, the reasons for choosing a particular point within the applicable range must be stated.” *Id.* at 923 (emphasis added). Indeed, the Second Circuit has consistently held that “[t]he specificity of subsection 3553(c)(1) . . . clearly implies that no further explanation is required for the selection of a sentence at a particular point *within a range of 24 months or less.*” *James*, 280 F.3d at 208-09 (emphasis added).

Here, the uncontested Guidelines range was 97 to 121 months’ imprisonment, yielding a range of precisely 24 months. VA180. As the range did not exceed 24 months, the district court was under no obligation to “articulate its reasons” for selecting a particular sentence within that range, and the court’s “exercise of discretion is . . . unreviewable.” *United States v. Harris*, 38 F.3d 95, 97 (2d Cir. 1994).

2. The defendant’s sentence was within the applicable Guidelines range, and thus did not require a written statement of reasons

Defendant contends that “[t]he fact that § 3553(c) imposes obligations on the district court . . . to make a written statement is plain.” Def.’s Br. 11. Because the district court imposed a sentence *within* the Guidelines range, however, the district court was not required to state its reasons for the sentence in the written judg-

ment. *See* 18 U.S.C. § 3553(c)(2). Thus, the defendant’s contention that the district court procedurally erred in failing to state its reasons in a statement of reasons form is clearly without merit.

The defendant cites to *United States v. Rattoballi*, 452 F.3d 127, 138 (2d Cir. 2006), as the basis for his assertion that the district court had a duty to file a written SOR. He fails to note, however, that *Rattoballi* also states, “Section 3553(c) distinguishes between the obligations for a sentence within and without the advisory Guidelines range.” *Id.* It is only when a sentence is outside of the applicable guidelines range that a district court must provide reasons “with specificity in a statement of reasons form.” 18 U.S.C. §3553(c)(2); *see also Jones*, 460 F.3d at 197.

Here, the sentence imposed upon the defendant was 100 months which was within the applicable Guidelines range of 97-121 months. VA180-81. Therefore, a written SOR was not required. Accordingly, Section 3553(c)(2) does not compel the sentence to be vacated or the case to be remanded. *See Jones*, 460 F.3d at 197.

3. A written SOR was prepared and filed with the Bureau of Prisons and provided to the parties, thereby mooting this issue

The defendant claims that “a written statement of reasons is also required to assist the Bu-

reau of Prisons and the Sentencing Commission.” Def.’s Br. 13. Notwithstanding the fact that a written SOR was not required in this case because the sentence imposed was within the applicable Guidelines range, the district court prepared and filed a written SOR on October 5, 2012 to be used by the Bureau of Prisons. *See* GSA1-5. As the defendant does not argue that the sentence itself was unreasonable, but only that the court “erred in not providing a written statement of reasons for the sentence imposed,” the revelation that a written SOR was in fact filed on the day after his sentencing sufficiently moots this issue.

On June 4, 2013, following the defendant’s filing of his appellate brief, the government requested the district court release to the parties and this Court the written SOR provided to the Bureau of Prisons. GA169. The court granted the order on June 10, 2013. GA172. The written SOR, which is quoted above, provides further explanation of the court’s specific reasons for imposing the 100 month sentence. GSA1-5.

The defendant is simply mistaken when he claims that “[h]ad the district court adopted the findings of the PSR that would have been adequate, but the record in this case does not show the court referring to the PSR.” VA9-10. Indeed, the SOR, which tracks what actually occurred at sentencing, explicitly notes that “the court adopts the presentence investigation report

without change.” GSA1; *see also* VA111 (court notes that it is adopting the presentence investigation report).

Ultimately, putting aside the fact that a written SOR was not required and that the district court’s oral explanation of its sentence was more than adequate for appellate review, the defendant’s argument here is simply factually wrong since the district court did file written SOR on October 5, 2012 and subsequently released it to the parties.

II. The defendant cannot show that the district court committed plain error at sentencing because the court did consider his downward departure arguments and adequately explained its reasons for refusing to depart and imposing a Guidelines sentence.

A. Relevant facts

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

B. Governing law and standard of review

1. Plain error review

As stated above, to the extent that the defendant did not raise a perceived sentencing error below, this Court applies a plain error stand-

ard of review. *Villafuerte*, 502 F.3d at 207. This Court has applied the plain error standard of review to unpreserved claims that the district court failed to adequately consider the § 3553(a) factors or explain its reasoning for imposing a particular sentence. *Id.* at 207-212. Requiring that such claims be raised before the sentencing judge “alerts the district court to a potential problem at the trial level and facilitates its remediation at little cost to the parties, avoiding the unnecessary expenditure of judicial time and energy in appeal and remand.” *Id.* at 208. Moreover, “[r]equiring the [sentencing] error to be preserved by an objection creates incentives for the parties to help the district court meet its obligations to the public and the parties.” *Id.* at 211.

Again, to prevail under this standard of review, a defendant must establish that (1) there is error, (2) the error is plain, (3) the error affects substantial rights, and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See Williams*, 399 F.3d at 454 (citing *Cotton*, 535 U.S. at 631-32 and *Olano*, 507 U.S. at 731-32).

2. Downward departure motions

With respect to the consideration of departure grounds as a basis for procedural error, this Court has explained that “a refusal to downwardly depart is generally not appealable.”

United States v. Stinson, 465 F.3d 113, 114 (2d Cir. 2006) (per curiam) (quotation marks and citation omitted); see also *United States v. Valdez*, 426 F.3d 178, 184 (2d Cir. 2005); *United States v. Ekhtator*, 17 F.3d 53, 55 (2d Cir. 1994); *United States v. Desena*, 260 F.3d 150, 159 (2d Cir. 2001).

A narrow exception to this general rule exists “when a sentencing court misapprehended the scope of its authority to depart or the sentence was otherwise illegal.” *Stinson*, 465 F.3d at 114 (quotation marks and citation omitted). Absent “clear evidence of a substantial risk that the judge misapprehended the scope of his departure authority,” however, this Court presumes that the judge understood the scope of his authority. *Id.*; see also *United States v. Sero*, 520 F.3d 187, 193 (2d Cir. 2008) (per curiam) (noting that the “presumption that a district court understands its authority to depart may be overcome only” in a “rare situation”) (quotation marks and citation omitted). Such a substantial risk may arise “where the available ground for departure was not obvious and the sentencing judge’s remarks made it unclear whether he was aware of his options.” *United States v. Silleg*, 311 F.3d 557, 561 (2d Cir. 2002) (quotation marks and citation omitted).

In addressing motions for downward departures, this Court “does not require that district judges by robotic incantations state ‘for the rec-

ord' or otherwise that they are aware of this or that arguable authority to depart but that they have consciously elected not to exercise it." *United States v. Diaz*, 176 F.3d 52, 122 (2d Cir. 1999) (quotation marks and citation omitted); *see also United States v. Margiotti*, 85 F.3d 100, 103 (2d Cir. 1996) (per curiam) ("Sentencing is rigid and mechanistic enough as it is without the creation of rules that treat judges as automatons.").

C. Discussion

The defendant argues that the district court failed to consider all of his downward departure requests, since it did not explicitly recognize its authority to depart downward or address each of the nine departure requests during the sentencing hearing. Def.'s Br. at 14-20. The defendant did not make these claims below and thus, they are subject to plain error review. *Villafuerte*, 502 F.3d at 207. Under this stringent standard of review, the defendant's claim fails as there is no evidence that the district court misinterpreted its authority to depart from the applicable Guidelines range.

The departure requests that the defendant points to now were thoroughly briefed by each party and considered by the district court. While only some were explicitly discussed at the sentencing hearing, both parties noted on the record the district court's practice of reviewing the parties' submissions. VA131, VA112, VA124. Furthermore, contrary to the defendant's position

that “the record . . . does not show the court referring to the PSR,” Def.’s Br. at 10, the sentencing transcript reflects that the court reviewed the PSR with the defendant, and, when there were no objections, adopted the facts of the PSR as its own factual findings. VA111. Thereafter, the district court listened as the government argued that none of the defendant’s departure arguments had merit, VA124, and as the defense argued that the defendant deserved a non-Guideline sentence. VA129. The district court also considered information contained in victim’s letters and oral presentations before handing down its sentence. VA112, VA158, VA170.

In addition, at the plea hearing, the district court made clear to the defendant that it understood its ability to depart from the applicable Guidelines range. VA40-41. During the Rule 11 canvas, the court specifically asked, “[D]o you understand that the Court is also obligated to consider the recommended range and any departures, either upward or downward, under the Guidelines?” VA41. The defendant then responded “Yes.” VA41. While this exchange did not occur at the actual sentencing, it certainly contradicts the defendant’s assertion that the court misapprehended its authority to consider any departure requests.

The defendant’s argument is essentially that the district court could have and should have said more at sentencing to explain its sentence

with regard to the defendant's individual departure requests. This Court, however, has consistently held that, in the absence of clear record evidence of a substantial risk that the sentencing judge misapprehended her authority to depart or impose a non-Guideline sentence, *Stinson*, 465 F.3d at 114, a sentence is presumed to be procedurally reasonable. *Fernandez*, 443 F.3d at 30. As discussed above, there is no requirement that a sentencing court explicitly recognize its power to depart, or address and reject every departure or variance argument. *Diaz*, 176 F.3d at 122.

Here, the record reveals no reason to disturb this presumption. Before imposing sentence, the district court provided a host of explanations for its decision. VA175-81. First, the court explicitly addressed the § 3553(a) factors, discussing the nature and circumstances of the offense, the need for the sentence to protect the public from further crimes which the defendant might commit, the need to promote respect for the law, and the need to deter others from engaging in criminal conduct. VA176-77. Moreover, in its oral pronouncement of reasons for the sentence, the court specifically discussed some of the defendant's departure requests, commenting on his arguments for leniency based on his health and so-called diminished capacity. VA176 ("He stole this money, not because of any health condition. The psychologist report filed by the [d]efendant[] is replete with qualifications. There is no opinion

that Mr. Viola’s conduct was a consequence of any impairment. . . . Mr. Viola’s mind is firmly intact.”). While the court did not expressly refer to the defendant’s arguments regarding his age or the need to avoid a sentencing disparity for similar offense conduct, this is not surprising and does not indicate a failure to consider those arguments, especially given the fact that the defendant did not refer to them at all at the sentencing hearing. *See Fernandez*, 443 F.3d at 29 (“When an argument is not raised during a sentencing proceeding, the failure of the sentencing judge to address that argument explicitly on the record does *not*, without more, demonstrate a failure of consideration by the judge. Rather, we entertain a strong presumption that the sentencing judge has considered all arguments properly presented to her, unless the record clearly suggests otherwise.”) (emphasis in original).

Overall, the defendant cites to no evidence—much less “clear evidence”—that the district court misapprehended its power to depart. At bottom, there is “no basis in the record to conclude that the district court was not fully aware of the extent of its discretion to depart downward from the Sentencing Guidelines.” *United States v. Bonner*, 313 F.3d 110, 112 (2d Cir. 2002) (per curiam); *see also United States v. Brown*, 98 F.3d 690, 694 (2d Cir. 1996) (noting “*strong* presumption that a district judge is

aware of the assertedly relevant grounds for departure”) (emphasis added).

Ultimately, the defendant has not attempted to carry his “plain error” burden and cannot do so. For the reasons discussed above, the district court did not commit any error whatsoever, let alone error that was plain, in sentencing the defendant. Moreover, the defendant cannot demonstrate that he suffered any prejudice as a result of the purported errors he has identified. In particular, he cannot show that he would have received a more lenient sentence if the district court had provided a more detailed statement of reasons for the sentence that it imposed. Finally, the defendant, who received a sentence that was very near the bottom of the Guideline range, cannot show that the purported errors he has identified seriously affected the fairness, integrity, or public reputation of the judicial proceedings, or that his sentence must be overturned in order to prevent a miscarriage of justice. Indeed, the defendant himself must recognize the reasonableness of the court’s 100 month sentence for a four-year Ponzi scheme involving almost \$7 million in losses as he agreed to waive his right to appeal any incarceration term of 97 months or less. VA23. For these reasons as well, the defendant’s claims are entirely without merit and should be rejected.

Conclusion

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

Dated: August 29, 2013

Respectfully submitted,

DEIRDRE M. DALY
ACTING UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, reading "Richard J. Schechter". The signature is written in a cursive style with a large initial "R" and a long, sweeping underline.

RICHARD J. SCHECHTER
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Law Student Intern (on the brief)

**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 9,771 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

A handwritten signature in cursive script that reads "Richard J. Schechter". The signature is written in black ink and is centered on the page.

**RICHARD J. SCHECHTER
ASSISTANT U.S. ATTORNEY**

Addendum

18 U.S.C. § 3553. Imposition of a sentence

* * *

(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.

* * *