

12-4222

To Be Argued By:
RAHUL KALE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-4222

UNITED STATES OF AMERICA,
Appellee,

-vs-

GREGORY LYNCH,
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 (Robert N. Chatigny, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on October 18, 2012. Joint Appendix (“JA__”) 9, JA270. On October 18, 2012, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA9, JA273. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

**Statement of Issues
Presented for Review**

- I. Was the prosecution of the defendant conducted in violation of the Speedy Trial Act's requirement that a defendant be tried within 70 days of his indictment or arraignment:
 - A. When the defendant was arrested in New Jersey and subsequently indicted and arraigned in Connecticut, did the Speedy Trial Act clock start running with the date of the defendant's arraignment even though the defendant's transportation from New Jersey to Connecticut took longer than ten days?
 - B. When the defendant filed several pre-trial motions, did the pendency of those motions automatically exclude days from the Speedy Trial Act clock even though the defendant did not consent to the filing of all of the motions?
- II. Has the defendant shown that the district court plainly erred in treating the guidelines as mandatory where there is no record evidence suggesting that the court was unaware the guidelines were advisory?

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The defendant, Gregory Lynch, pleaded guilty to escape and was ultimately sentenced to 12 months' imprisonment. In this appeal, Lynch raises two issues. First, he claims that the district court should have granted his motion to dismiss the indictment for violation of the Speedy Trial Act. The court properly denied that motion, however, because Lynch pleaded guilty before expiration of the Speedy Trial Act's 70-

day indictment-to-trial “clock.” In particular, the Speedy Trial Act clock did not begin until Lynch was arraigned on his indictment in Connecticut. Moreover, after excluding days during which there were motions pending, less than 70 days elapsed before Lynch pleaded guilty. Accordingly, the district court properly denied Lynch’s Speedy Trial Act motion.

Second, Lynch argues, for the first time on appeal, that the court committed procedural error by assuming that the guidelines range provided the “correct” sentence. The record demonstrates, however, that the district court understood the law and properly treated the guidelines as advisory. For this reason, and for the reasons set forth below, the district court’s judgment should be affirmed.

Statement of the Case

On February 23, 2012, Lynch was arrested in New Jersey pursuant to an arrest warrant based upon a criminal complaint. Pre-Sentence Report (“PSR”) ¶ 5; JA13.

On March 13, 2012, a grand jury in Connecticut indicted Lynch on one count of escape, in violation of 18 U.S.C. § 751. JA2, JA14. Lynch was arraigned on that indictment on March 23, 2012. JA3.

On June 20, 2012, Lynch moved to dismiss the indictment for violation of the Speedy Trial

Act, JA4, JA32. On July 24, 2012, Judge Robert N. Chatigny orally denied Lynch's motion to dismiss. JA6, JA100-109.

On September 12, 2012, Lynch pleaded guilty to the indictment under Federal Rule of Criminal Procedure 11(a)(2), expressly reserving his right to appeal the denial of his Speedy Trial Act motion. JA7-8, JA151.

On October 16, 2012, the district court sentenced Lynch to 12 months' incarceration, and 3 years' supervised release. JA9, JA263, JA266. Judgment entered on October 18, 2012, JA9, JA270, and Lynch filed a timely notice of appeal that same day, JA9, JA273.

Lynch is currently serving his federal sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. The offense conduct

In 2009, the Honorable Peter C. Dorsey, Senior United States District Judge, sentenced Lynch to 46 months' imprisonment and 3 years' supervised release for his conviction on a charge of conspiracy to commit bank fraud, in violation of 18 U.S.C. § 371. PSR ¶ 7. The Bureau of Prisons designated Lynch to the United States Penitentiary Canaan, located in Waymart, Pennsylvania. PSR ¶ 7.

On December 7, 2011, Lynch applied for a furlough to a halfway house. PSR ¶ 8. On February 3, 2012, Lynch was granted a furlough to allow him to transfer to Watkinson House, a halfway house in Hartford, Connecticut. PSR ¶ 9. On that day, Lynch was dropped off at the Scranton Bus Terminal and given a ticket to Hartford. PSR ¶ 9. The bus was to arrive in Hartford at 7:00 p.m., and Lynch had until 8:00 p.m. to arrive at Watkinson House. PSR ¶ 9.

On the morning of February 4, 2012, Watkinson House notified the Bureau of Prisons and the United States Marshal Service that Lynch had not arrived. PSR ¶ 10. On February 23, 2012, after discovering that Lynch was near Camden, New Jersey, the United State Marshal Service arrested Lynch there on an arrest warrant issued pursuant to a criminal complaint. PSR ¶ 10; JA82.

B. The indictment, plea and sentencing

On March 13, 2012, a federal grand jury in Connecticut indicted Lynch for one count of escape, in violation of 18 U.S.C. § 751. JA2, JA14. After the court ruled on various motions (described in more detail below), including a motion to dismiss for violation of the Speedy Trial Act, on September 12, 2012, Lynch pleaded guilty to the indictment, preserving his right to appeal the denial of his Speedy Trial Act motion. JA7-8, JA151. After sentencing proceedings (described

in more detail below), the district court sentenced Lynch to 12 months' imprisonment. JA9, JA263.

Summary of Argument

I. The district court properly denied Lynch's motion to dismiss for violation of the Speedy Trial Act. *First*, as relevant to this case, the Speedy Trial Act "clock" requires that a defendant be tried within 70 days of his indictment or first appearance in the district where the charges are pending, whichever occurs later. By the plain language of this statute, that clock does not start to run until a defendant's first appearance in the district in which charges are pending against him. Accordingly, the district court properly found that any delay in transporting him from New Jersey to Connecticut prior to his first appearance in Connecticut did not impact the Speedy Trial Act clock.

Second, there is no need for this Court to decide whether the district court's "ends-of-justice" orders properly excluded time from the Speedy Trial Act clock because even without those orders, less than 70 days elapsed on the clock after the time for pending motions was automatically excluded. The fact that Lynch did not consent to the filing of some of those motions did not preclude those motions from automatically excluding time under the Speedy Trial Act. In any event, even if this Court were to review the va-

lidity of the district court’s orders granting continuances—at the request of Lynch’s counsel—under the “ends-of-justice” provision, those orders were fully proper. The court made appropriate findings in its written orders to support the continuances and the exclusion of time from the Speedy Trial Act clock. The fact that the court stated that the order was granted “subject to” the filing of a Speedy Trial Act waiver by Lynch did not invalidate its findings that the continuances were appropriate to serve the ends of justice.

II. The district court did not err, much less plainly err, when it properly calculated the guideline range, considered the range to be advisory and engaged in a detailed analysis of the other sentencing factors set forth at 18 U.S.C. § 3553(a). Lynch contends that the district court improperly gave too much weight to the guidelines, but this claim finds no basis in the record. This Court presumes that a sentencing court understands and follows governing law in the absence of record evidence to the contrary, and Lynch points to no evidence in the record here that the court did not understand that the guidelines were advisory.

Argument

I. The district court properly denied Lynch's motion to dismiss the indictment under the Speedy Trial Act.

A. Relevant facts

1. The motions to continue and withdraw

After Lynch's arrest in New Jersey on February 23, 2012, he appeared before a Magistrate Judge there and was ordered detained. PSR ¶ 5. At this initial appearance, Lynch demanded an identity hearing, and that hearing was scheduled for February 28, 2012. PSR ¶ 5. After the February 28 hearing, Lynch was ordered transferred to Connecticut. PSR ¶ 5; JA82. On March 8, 2012, Lynch arrived at the Wyatt Detention Center in Central Falls, Rhode Island. PSR ¶ 5.

On March 13, 2012, a grand jury sitting in Connecticut indicted Lynch for one count of escape, in violation of 18 U.S.C. § 751. JA2, JA14. On March 23, 2012, Lynch was arraigned on that indictment before United States Magistrate Judge Donna F. Martinez in the District of Connecticut. JA3, JA52-55. At this initial appearance, jury selection was set for May 8, 2012. JA3.

On April 16, 2012, defense counsel moved to continue jury selection for thirty days. JA3, JA56. In the motion, counsel explained that she

could not begin trial as scheduled because she was scheduled to begin another trial on May 8, 2012, and because she was awaiting delivery of a transcript that Lynch had requested. JA56. Counsel also stated that she was sending a “waiver of speedy trial” to Lynch and that she would provide it to the court when she received it. JA56. On the same day, counsel wrote to Lynch explaining that she had another case that had been pending for over a year and that “more work must be done in order to prepare” Lynch’s case for trial. JA58. Counsel attached a Speedy Trial Act waiver to her letter to Lynch. JA59.

In a letter dated April 25, 2012, Lynch responded to counsel and stated that he did not wish to waive his speedy trial rights. JA60. Lynch suggested “an alternative solution” in which counsel solicited “a ‘reasonable’ plea agreement,” which would create “a ‘win-win’ for you, me and the Government and avoid[] the conflict created by May 8 trial date.” JA60.

In the interim, however, on April 19, 2012, in a written order, the district court granted the motion to postpone jury selection for thirty days “on the ground that more time is needed to obtain transcripts of prior proceedings.” JA20. The order granted the motion “subject to the filing of a properly executed waiver of the defendant’s rights under the Speedy Trial Act . . . which specifically waives the period of delay from May 8, 2012 through June 12, 2012.” JA20; *see also* JA3

(docket entry). The order also excluded the time between May 8 and June 12, 2012 from the Speedy Trial Act calculation under the “ends of justice” provision, 18 U.S.C. § 3161(h)(7). In particular, the court credited defense counsel’s representation that she needed additional transcripts to prepare for trial and thus found that “the ends of justice served by the requested continuance outweigh the interest of the public and the defendant in a speedy trial in that failure to grant the continuance would deny counsel reasonable time necessary for effective preparation, taking into account the exercise of due diligence.” JA21. Accordingly, the order concluded by excluding the time period between May 8, 2012 and June 12, 2012 under the Speedy Trial Act “subject to the filing of a waiver of the defendant’s rights as more fully described above.” JA21.

On May 22, 2012, defense counsel moved to withdraw as counsel. JA3, JA22. Counsel stated that “there has been an irretrievable breakdown in the relationship” between Lynch and counsel, and observed that Lynch “will pursue a claim” against counsel “for violation of his speedy trial rights.” JA22. On June 7, 2012, the Honorable Donna F. Martinez held a hearing on the motion to withdraw and, on June 12, 2012, granted the motion to withdraw, noting that substitute counsel had already entered an appearance. JA4.

Before the court granted counsel's motion to withdraw, on May 25, 2012, Lynch attempted to file a *pro se* motion to dismiss the indictment against him for violation of the Speedy Trial Act. JA4; *see* JA24-27. On June 12, 2012, the court returned the *pro se* submission because Lynch was represented by counsel. JA4, JA31.

On June 11, 2012, new counsel for Lynch moved to continue jury selection from June 12 to July 10, 2012. JA4, JA28-30. The district court granted that motion on June 15, 2012, but it was not entered on the docket until June 19, 2012. JA4. That order, like the court's earlier order, granted the continuance "subject to" the filing of a waiver of rights under the Speedy Trial Act, and excluded the time for the continuance under the ends-of-justice provision of the Speedy Trial Act. JA4.

2. The Speedy Trial Act motion

On June 20, 2012, Lynch, through new counsel, filed a motion to dismiss the indictment for violation of the Speedy Trial Act's rule requiring trial within 70 days of indictment or initial appearance. JA4, JA32-36. In a memorandum in support of his motion, Lynch observed that 117 days had elapsed between his arrest on February 23, 2012 and the date of the motion. JA70. Lynch conceded that certain time was excluded from the Speedy Trial Act calculation, including the time between his arrest and his March 13,

2012 indictment, but argued that the period from March 13, 2012 to June 12, 2012 was includable because the United States Marshals Service's transportation from New Jersey to Connecticut had exceeded ten days. JA71. Lynch argued that because of the transportation time in excess of ten days, Lynch "would have appeared in this District prior to the return of the Indictment," thereby making his indictment date the effective date for the Speedy Trial Act clock to start. JA71.

Lynch also argued that no other time period was excludable from the speedy trial calculus, including: (1) the period during which his prior counsel's motion to continue jury selection was pending; (2) the period set out in the district court's grant of continuance; and (3) the period during which prior counsel's motion to withdraw was pending. JA73. Specifically, Lynch argued that because prior counsel had sought a continuance without his being "informed of counsel's intention to file a continuance motion, to be consulted about it, and to raise an objection so that the matter can be resolved by the Court," counsel's motion to continue could not be excluded from the Speedy Trial clock. JA74-75. Lynch also observed that the district court had granted the continuance with the notation that Lynch execute "an explicit waiver covering the period of continuance." JA76. According to Lynch, because such a waiver was never filed, the order was not

effective to exclude time under the Speedy Trial Act. JA76. As relevant here, Lynch then asked for the remedy of dismissal with prejudice. JA76-78.

On June 21, 2012, the government filed a memorandum in opposition to Lynch's motion to dismiss. The government argued that the Speedy Trial Act clock started March 24, 2012, the day after the date of Lynch's first appearance before a judge in Connecticut, which in this case was Lynch's arraignment on the indictment. JA84. The government argued that counsel's motion to continue properly stopped the Speedy Trial Act, as did the court's order excluding time under the ends-of-justice provision. JA84-85.

On July 24, 2012, Judge Chatigny delivered an oral decision denying Lynch's Speedy Trial Act motion to dismiss the indictment. JA100. Judge Chatigny observed that Lynch made two "basic arguments." JA101. The court noted that Lynch first argued that "travel time in excess of ten days must be included" in any speedy trial calculation and then argued "that the speedy trial clock is not tolled by a motion for a continuance filed by defense counsel without the defendant's informed consent." JA101.

The court rejected Lynch's first argument because it was foreclosed by the statute. Reading from 18 U.S.C. § 3161(c), the court noted that the speedy trial clock commenced from the indictment's filing date or "from the date the de-

defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.” JA102. Noting that Lynch did not appear before a judicial officer in Connecticut until March 23, 2012, the district court found that the speedy trial 70-day period began to run on March 24, 2012. JA102-103.

The court similarly rejected Lynch’s second argument (that he was not bound by the continuance motion absent his consent), noting that if a “defendant is not bound by the representations of his lawyer” for purposes of the Speedy Trial Act, the courts would become “entangle[d]” in issues of informed consent. JA103. Furthermore, the court noted that the Speedy Trial Act itself permits a court to grant a continuance “at the request of the defendant or his counsel.” JA104 (quoting 18 U.S.C. § 3161(h)(7)). The district court recognized that it would be “good practice for counsel to consult with the defendant” about proposed continuance motions, but observed that such a practice was not “required by the Speedy Trial Act.” JA104-05. Finally, the court rejected Lynch’s argument that its order excluding time was ineffective because it was conditioned on the filing of a waiver by Lynch, which never occurred. According to the court, it “made a finding that a continuance was in the interest of justice and granted the motion excluding the period May 8 to June 12, and it was not my intention that this finding would depend on whether the

defendant filed a waiver. The finding was intended to be operative in accordance with the statute.” JA105.

With these conclusions, and with the parties’ agreement that Lynch’s Speedy Trial Act motion stopped the clock, the court found that only 41 days had elapsed on the Speedy Trial Act clock: it began March 24, stopped April 16, resumed April 20, and stopped May 8. JA105.

Finally, the court noted that even if it had concluded that more than 70 days had already run, it would have dismissed the indictment without prejudice. JA105. The court explained that it found that Lynch was charged with a serious offense, that any violation of the Speedy Trial Act was relatively minor and not due to the government, and that re-prosecution would allow “for the just disposition of the case.” JA105-106.

3. Additional motions

On July 27, 2012, just three days after the district court denied Lynch’s motion to dismiss, Lynch filed a motion for “court trial.” JA6. Approximately two weeks later, on August 8, Lynch, through counsel filed a third motion to continue jury selection. JA6. The district court granted that motion on August 13, and the next day, entered an order excluding the time between July 27 and September 11, 2012 under the ends-of-justice provision of the Speedy Trial

Act. JA7. This order, unlike the court’s earlier ends-of-justice orders, was not conditional on the filing of a waiver of Speedy Trial Act rights by Lynch. *See* JA7.

B. Governing law and standard of review

1. The Speedy Trial Act

Under the Speedy Trial Act of 1974, trial must begin within 70 days from the later of the date an indictment is filed or the date on which the defendant first appears on the charges. In particular, 18 U.S.C. §3161(c)(1) provides in pertinent part:

In any case in which a plea of not guilty is entered, the trial of a defendant charged in an . . . indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the . . . indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. . . .

The Act provides, however, that certain periods of time may be excluded from this 70-day “clock.” Some periods of time are automatically excluded, including periods of delay resulting from the filing of pretrial motions, 18 U.S.C. § 3161(h)(1)(D), and periods of time (up to 30

days) during which a “proceeding concerning the defendant is under advisement by the court,” § 3161(h)(1)(H). In addition, “delay resulting from transportation of any defendant from another district” is excluded, “except that any time consumed in excess of ten days” for such transportation “shall be presumed to be unreasonable.” § 3161(h)(1)(F).

Finally, as relevant here, the district court may exclude time “resulting from a continuance granted . . . at the request of the defendant or his counsel . . . if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.” § 3161(h)(7)(A). To exclude time under this “ends-of-justice” provision, the district court must set forth, orally or in writing, its reasons for finding that the ends of justice are served by granting the continuance. *Id.*

The Speedy Trial Act also establishes a sanction for violation of its provisions: if a defendant is not brought to trial within the 70-day time limit, as extended by any days excluded from the clock, the “indictment shall be dismissed” 18 U.S.C. § 3162(a)(2). When an indictment is dismissed under this section, the dismissal may be “with or without prejudice” to refiling. *Id.* The Act specifically directs courts to consider several factors in deciding whether to dismiss with prejudice, including the “seriousness of the offense,”

the facts leading to the dismissal, and “the impact of a re prosecution on the administration of this chapter and on the administration of justice.” *Id.* In addition to these statutory factors, the Supreme Court has instructed courts also to consider prejudice to the defendant. *United States v. Taylor*, 487 U.S. 326, 332-34 (1988).

2. Standard of review

This Court “review[s] the district court’s findings of fact as they pertain to a speedy trial challenge for clear error and its legal conclusions *de novo*.” *United States v. Lucky*, 569 F.3d 101, 106 (2d. Cir. 2009) (quoting *United States v. Oberoi*, 547 F.3d 436, 443 (2d Cir. 2008)); *United States v. Gaskin*, 364 F.3d 438, 450 (2d Cir. 2004).

C. Discussion

Lynch makes two arguments about the Speedy Trial Act clock in this case: (1) the court should have included time that exceeded 10 days during which he was transported from New Jersey to Connecticut, before his indictment and appearance in Connecticut, and (2) the court’s order granting continuances under the ends-of-justice provision were ineffective. As set forth below, these arguments lack merit.

1. Transportation delays before the Speedy Trial Act clock starts do not count against the Speedy Trial Act calculation.

Under 18 U.S.C. § 3161(c)(1), the 70-day Speedy Trial Act clock begins on the later of two dates: (1) the date an indictment is filed and made public, or (2) “the date the defendant has appeared before a judicial officer of the court in which such charge is pending.” In this case, the indictment was filed March 13, 2012, but Lynch did not appear before a Magistrate Judge in Connecticut until March 23, 2012. Accordingly, the Speedy Trial Act clock began to run on March 24, the day after Lynch first appeared before a judge in the district where the indictment against him was pending. *See United States v. Pena*, 793 F.2d 486, 488 (2d Cir. 1986) (the day after the triggering event is the first to be counted for purposes of the statute).

Despite this straightforward reading of the statute, Lynch argues—without citation to legal authority—that the court should have counted 13 additional days against the Speedy Trial Act clock because the Act only allows 10 days for “transportation” delays and it took officials 23 days to transport him from New Jersey to Connecticut. This argument rests on a misreading of the statute.

When calculating the time in which a trial must begin (or the time in which an indictment

must be filed after an arrest), the Act automatically excludes time for transportation of a defendant from one district to another so long as the delay does not exceed 10 days. § 3161(h)(1)(F). But this time is only excluded *after* the clock has started running; by the plain terms of § 3161(c)(1), the clock does not start until after the defendant has been indicted or appeared before a judge.

To be sure, as Lynch notes, once the defendant has appeared in the district and the clock has started running, excessive transportation delay (*e.g.*, delays in excess of 10 days) count towards the Speedy Trial Act clock. Def. Br. at 20-21 (relying on *United States v. Tinklenberg*, 131 S. Ct. 2007 (2011) and other cases). And, of course, any excessive transportation delays would also count towards the speedy indictment provision of the Speedy Trial Act (§ 3161(b)). See *United States v. Hernandez*, 863 F.2d 239, 242 (2d Cir. 1988) (citing Second Circuit Guidelines which provided “[w]here no indictment or information is pending, the time between the defendant’s arrest in another district on a complaint from this district and his appearance (or arrival) in this district is excluded from the arrest-indictment or information interval. *Where there has been an unreasonable delay in the production of a defendant in custody, the period of delay found by the Court to be unreasonable shall not be excluded.*”) see also *United States v. Jerve*,

630 F. Supp. 695, 697 (S.D.N.Y. 1986) (transportation delay in excess of ten days counted for purposes of speedy indictment clock). Thus, here, for example, Lynch was arrested on February 23, and accordingly had to be indicted within 30 days under § 3161(b). Although 10 days of his transportation delay would not count towards this 30-day clock, the excessive transportation delay (13 days) would count under § 3161(h)(1)(F). In short, after the speedy indictment or speedy trial clock has begun, excessive transportation delays are counted against that clock.

But the fact that excessive transportation delays are counted after the speedy indictment or speedy trial clock has started running does not require similar delays to count *before* the clock has started running. And indeed, courts have repeatedly held that the speedy trial clock does not start running until the defendant is arraigned in the district where the charges are pending, even when faced with delays in transporting a defendant into that district. *See, e.g. United States v. Wickham*, 30 F.3d 1252, 1254-55 (9th Cir. 1994) (holding that though the defendant was “indicted” on February 12, 1992, the defendant’s “relevant court appearance” for speedy trial purposes “occurred on April 21, 1992 when Wickham appeared in the Central District of California, the district in which the charge was pending,” thus rejecting the defendant’s ar-

gument that the excessive transportation delay from Texas to California should count towards the clock); *United States v. Thirion*, 813 F.2d 146, 153 (8th Cir. 1987) (although the defendant was arrested in Monaco on March 29, 1985, he did not appear before a judge until June 28, 1985, and it was that date that began the speedy trial act clock); *United States v. Montoya*, 827 F.2d 142, 152 (7th Cir. 1987) (“We believe that section 3161(c)(1)’s reference to ‘court’ refers to the specific charging district and not to any district in the federal system. This is true even if the defendant has appeared before a judge in another district to have the charges explained prior to arraignment in the charging district.”) (citations omitted); *United States v. O’Bryant*, 775 F.2d 1528, 1531 (11th Cir. 1985) (rejecting defendant’s argument that his initial appearance before a magistrate in a different district triggered the speedy trial clock because “[c]ase law and the legislative history of the Act also indicate that, where an indictment has been filed, the seventy day clock does not begin running until a defendant has appeared in the court where the charges are pending”); *United States v. Wilson*, 720 F.2d 608, 609 (9th Cir. 1983) (defendant’s initial appearance on information in Alaska where she was apprehended did not trigger speedy trial clock as “the 70-day time period did not begin running until Wilson first appeared before a judicial officer of the charging district, the Central District of California . . .”).

Here, there were no transportation delays after Lynch's initial appearance in Connecticut. Thus, transportation delay, if any, is irrelevant to Lynch's speedy trial claim. Under well-established case law, the Speedy Trial Act clock did not start to run until his arraignment in Connecticut on March 23, 2012.

2. After the Speedy Trial Act clock began to run, less than 70 countable days elapsed before Lynch pleaded guilty, even without excluding any days under an ends-of-justice continuance.

Lynch argues that the district court's orders excluding time for continuances under the ends-of-justice provision were ineffective because they were subject to a condition that was never fulfilled.¹ There is no need for this Court to decide this issue, however, because even without those orders, less than 70 countable days elapsed before Lynch pleaded guilty.

The Speedy Trial Act automatically excludes all time from the filing of a pre-trial motion "through the conclusion of the hearing on, or other prompt disposition, of the motion." 18

¹ Lynch focuses his attention on the court's April 19, 2012 order, but the government notes that the court's June 19 order also contained the same language excluding time "subject to" the filing of a Speedy Trial Act waiver by Lynch.

U.S.C. § 3161(h)(1)(D); *Tinklenberg*, 131 S. Ct. at 2012-16. In addition, the Act automatically excludes time—not to exceed 30 days—“during which any proceeding concerning the defendant is actually under advisement by the court.” 18 U.S.C. § 3161(h)(1)(H). As applied in this case, these provisions excluded all but 53 days between Lynch’s arraignment and the district court’s decision denying his Speedy Trial Act motion. The chart below summarizes the Speedy Trial Act calculations:

Dates	Description	Countable days
March 24 - April 15	Arraignment until filing of first motion	22
April 16- April 19	Filing of motion to continue through decision on motion	0
April 20-May 21	Disposition of motion to continue through filing of motion to withdraw	31
May 22-June 12	Filing of motion to withdraw through decision on motion	0

June 13- June 19	Filing of motion to continue through decision on motion	0
June 20-July 24	Filing of motion to dismiss through de- cision on motion	0

Moreover, although Lynch does not press the point, even after the court denied Lynch’s motion to dismiss, the additional countable days (when added to the 53 identified above) did not exceed 70 days. In particular, after only 2 days, on July 27, the Speedy Trial Act clock stopped with the filing of another motion (a motion for “court trial”) by Lynch. JA6. Before that motion was decided, Lynch filed a third motion to continue on August 8. JA6. The court decided that motion on August 13, and entered an order the next day excluding time from July 27 to September 11, 2012 under the ends-of-justice provision. JA7. Thus, when Lynch pleaded guilty on September 12, only 2 days had been added to the Speedy Trial Act clock after denial of his motion to dismiss. In total, then, only 55 countable days elapsed between Lynch’s arraignment in Connecticut and his guilty plea.

Lynch’s arguments to the contrary all fail. *First*, Lynch argues that the first motion to continue should not automatically exclude time because he was not consulted about the filing of

that motion and did not consent to its filing. Def. Br. at 29-32. Lynch’s consent was not required, however. Indeed, as Lynch acknowledges, there are no cases from this Court holding that a defense lawyer is required to consult with a client on scheduling matters. Def. Br. at 30. Instead, courts routinely hold that scheduling matters, like most tactical decisions, are generally and usually left to the discretion of defense counsel. *See generally New York v. Hill*, 528 U.S. 110, 115 (2000) (“Scheduling matters are plainly among those for which agreement by counsel generally controls. . . . [O]nly counsel is in a position to assess the benefit or detriment of the delay to the defendant’s case. Likewise, only counsel is in a position to assess whether the defense would even be prepared to proceed any earlier. Requiring express assent from the defendant himself for such routine and often repetitive scheduling determinations would consume time to no apparent purpose.”); *United States v. Gonzalez*, 553 U.S. 242, 249 (2008) (“Giving the attorney control of trial management matters is a practical necessity.”). Perhaps more importantly, the government, the court and the general public all rely on counsel’s public filings in conducting their own affairs. *See Vermont v. Brillon*, 129 S. Ct. 1283, 1290-91 (2009) (applying the Sixth Amendment) (“Because the attorney is the [defendant’s] agent when acting, or failing to act, in furtherance of the litigation, delay caused by the defendant’s counsel is also charged against the

defendant.” (quotation omitted)). Indeed, allowing a defendant to claim retrospectively that counsel’s decision was not his own and thereby prevent tolling of the Speedy Trial Act clock would only lead to gamesmanship or unnecessary litigation.

And to the extent Lynch argues that the Speedy Trial Act should dictate a different result, that argument is undermined by the Act itself. The Act specifically provides that a court may exclude time from the clock resulting from a “continuance granted . . . *at the request of the defendant or his counsel*” if the court finds that such a continuance serves the ends of justice. 18 U.S.C. § 3161(h)(7) (emphasis added). Had Congress intended to require a defendant’s consent to the filing of a motion for continuance, it could have so specified in the statute, but it did not do so. Instead, it expressly provided that a motion may be granted when requested by counsel. In short, Lynch’s consent to the motion to continue was not required, and accordingly the time during which that motion was under advisement was automatically excluded under the Act.

This conclusion is consistent with the uniform decisions of the Courts of Appeals that have considered the question. While it appears to be an issue of first impression in this Court,² the First,

² Although this Court has not issued a published decision on this issue, the government notes that in a

Third, Sixth, Eighth and Ninth Circuits have uniformly approved the exclusion of any delay stemming from a continuance granted at defense counsel's affirmative request without the knowledge or consent of the defendant. See *United States v. Herbst*, 666 F.3d 504, 510 (8th Cir. 2012) ("We agree with the Sixth Circuit that the plain language of section 3161(h)(7)(A) does not require a defendant's consent to the continuance 'if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.'") (quoting *United States v. Sobh*, 571 F.3d 600, 603-04 (6th Cir. 2009)); *United States v. Stewart*, 628 F.3d 246, 254 (6th Cir. 2010) (applying *Sobh* and finding no speedy trial violation where defendant sent letter indicating that he did not consent to his counsel's request for continuance of trial); *United States v. Daychild*, 357 F.3d 1082, 1094-95 (9th Cir. 2004) (rejecting argument that former counsel's motions to continue should not have stopped speedy trial clock because motion was made without defendant's knowledge or consent); *United States v. Fields*,

recent unpublished decision, it appeared to hold that a district court properly excluded time from the Speedy Trial Act calculation even though the defendant had objected to the extensions. See *United States v. Abdur-Rahman*, 2013 WL 562883, *4 (2d Cir. Feb. 15, 2013).

39 F.3d 439, 443 (3d Cir. 1994) (describing the defendant’s argument for a speedy trial dismissal as “disturbing[,] because he would have [the court] order the dismissal of his indictment based on continuances that his own attorney sought”) (Alito, J.); *United States v. Gates*, ___ F.3d___, 2013 WL 765121, *5 (1st Cir. Mar. 1, 2013) (“[A] defendant’s lawyer may seek a continuance and the concomitant exclusion of time for [Speedy Trial Act] purposes without first securing the defendant’s personal consent.”); see also *Parisi v. United States*, 529 F.3d 134, 140 (2d Cir. 2008) (“The ends-of-justice determination is, therefore, entrusted to the court, not the parties”); *United States v. Lewis*, 39 Fed. Appx. 337, 339-40 (7th Cir. 2002) (rejecting argument that a motion to continue was ineffective to exclude time because the record did not reflect that the defendant had agreed to it); *United States v. Bryant*, 1998 WL 39393, at *3-4 (4th Cir. Feb. 2, 1998) (holding, where the defendant “did *not* agree to the continuance[,] only his defense counsel agreed to it,” that to include the otherwise tolled time period would “be permitting [a] sort of sandbagging, *i.e.*, permitting a defendant to use the services of his counsel when it suited him, but disavowing his counsel’s advice when that advice did not suit the defendant’s purposes”) (emphasis in original).

Second, Lynch argues that his first lawyer’s motion to withdraw should not count to exclude

days because it was “occasioned in large part by the breakdown in the attorney client relationship that resulted from counsel’s failure to seek her client’s input before filing her Motion to Continue . . .” Def. Br. at 31-32. Lynch’s half-hearted argument lacks merit. After all, 18 U.S.C. § 3161(h)(1)(D) excludes the period during which a motion is pending regardless of the source of the motion. *See United States v. Hood*, 469 F.3d 7, 10 (1st Cir. 2006) (holding period during which prior counsel filed motion to withdraw was excludable because “the pendency of a pre-trial motion is excludable regardless of its type or its actual effect on the trial.”); *Daychild*, 357 F.3d at 1095 (excluding time during which a defense counsel’s motion to withdraw was pending because “the language of the statutory exclusion for delay [due to motions]. . . is unqualified as to the type of motion”).

Third, Lynch seeks to include the three days between the hearing on the appointment of new counsel and new counsel’s June 11, 2012 motion to continue. Def. Br. at 32. Lynch asks this Court to ignore that the ruling on prior counsel’s motion to withdraw took place three days later. In so arguing, Lynch again ignores the plain language of the Speedy Trial Act, which excludes “delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.” 18 U.S.C. § 3161(h)(1)(D).

Indeed, the First Circuit has previously rejected a similar argument. The defendant in *Hood* argued that the motion to withdraw did not delay the proceedings because his new attorney “had already begun participating in the trial before [prior counsel] offered her motion to withdraw.” 469 F.3d at 10. Finding that the motion to withdraw was not “part of a Government attempt to frustrate the operation of the Speedy Trial Act,” the *Hood* Court ruled that the entire period during which the motion to withdraw was pending was excludable.

Nor was Judge Martinez at fault for waiting three days before granting the motion to withdraw. The appointment of new counsel does not end a prior counsel’s potential involvement. Prior counsel must transfer information to new counsel and, perhaps more significantly, be available to represent the defendant’s interests in case new counsel and the defendant learn, for example, they have a legal conflict. Thus, it is hardly prejudicial to Lynch that prior counsel’s motion to withdraw remained pending for three days until new counsel was ready to represent him.

3. The court's orders excluding time under the ends-of-justice provision were effective to exclude time under the Speedy Trial Act.

Although, as described above, it is unnecessary to reach this issue, the district court's ends-of-justice orders validly excluded time under the Speedy Trial Act. Lynch argues that the court's ends-of-justice orders were ineffective because they were conditioned on the filing of a Speedy Trial Act waiver and that condition was never fulfilled. Def. Br. at 24-29. A defendant's waiver, however, is irrelevant to the granting of a continuance under the ends-of-justice provision. See *Zedner v. United States*, 547 U.S. 489, 500-503 (2006). Here, the court considered the relevant factors under the Speedy Trial Act, and explained on the record why the continuance met the statutory standard. Furthermore, the district court explained that it had granted the continuance with no "intention that [the ends of justice] finding would depend on whether the defendant filed a waiver. The finding was intended to be operative in accordance with the statute." JA105. Accordingly, because the district court complied with the Act, the absence of a waiver of Speedy Trial Act rights by Lynch is legally irrelevant.

The Sixth Circuit considered a similar claim in *US v. Stewart*. In that case, the defendant argued that the court's ends-of-justice continuance

was ineffective because “he never provided his written consent, which was required by the district court’s Pretrial Order and was specifically ordered when the court granted the motion.” 628 F.3d at 254. The Court rejected this claim, noting that consent is not a requirement under the statute. *Id.* Moreover, the Court noted that the Act permits a district court to grant a continuance on its own motion when the interests of justice support a delay. *Id.* In other words, the Court stated, “even though [the defendant] did not provide his consent, the district court acted within its wide range of discretion in deciding to grant the motion for a continuance that was filed by [his] attorney.” *Id.*

Here, just as in *Stewart*, the district court properly exercised its discretion to grant counsel’s motion to continue and exclude time under the ends-of-justice provision. Lynch’s failure to waive his rights in this context is irrelevant.

In any event, to the extent (as Lynch argues) that his waiver was a condition for the granting of the continuance, when that condition remained unfulfilled, the court’s order resolving the motion for continuance was not yet final. In other words, if the district court was expecting additional information in support of the motion for continuance (*e.g.*, the filing of a waiver), the motion remained pending until that waiver was filed. *See Henderson v. United States*, 476 U.S. 321, 332 (1986) (where trial court asked for fur-

ther information before rendering decision, which was not submitted for nearly nine months, entire period was excludable from speedy trial calculation); *United States v. Bufalino*, 683 F.2d 639 (2d Cir. 1982) (where the government filed a motion for jury sequestration on March 27 and the defendant did not respond to the motion until September 30 at a pretrial conference, entire time excludable because “Bufalino, when faced with a government motion, had a duty to do more than stand by without taking a position and then reap the benefit of inaction by having the indictment dismissed on speedy trial grounds”). Accordingly, under this theory, and in the absence of any waiver from Lynch, the entire period from the filing of the motion should be excluded from the Speedy Trial Act clock calculation.

4. The remedy for a violation of the Speedy Trial Act is to remand for further consideration by the district court.

Even if this Court were to find that Lynch’s Speedy Trial Act rights were violated, this Court should remand to allow the district court to decide whether to dismiss with or without prejudice. *See United States v. Larson*, 627 F.3d 1198, 1207 (10th Cir. 2010) (noting that it is general practice of the court to remand to district court to assess whether dismissal should be with or without prejudice). Lynch agrees that this reme-

dy is normally the appropriate remedy. Def. Br. at 32. He argues, however, that this Court should deviate from this practice and remand with instructions to the district court to dismiss with prejudice. Def. Br. at 33.

There is no basis for such an extraordinary remedy here. Indeed, while a violation of the Speedy Trial Act is not subject to harmless error review, *Zedner*, 547 U.S. at 507-08, dismissal with prejudice is a “severe sanction” that is intended to “give[] the prosecution a powerful incentive to be careful about compliance.” *Id.* at 499. Accordingly, that sanction should be used sparingly.

To that end, it is worth noting that the district court has already concluded that if it were to dismiss the indictment due to a Speedy Trial Act violation, it would dismiss without prejudice. JA105-106. This was a sound conclusion. The bulk of the delay below resulted from Lynch’s own interactions with his lawyers. None of the claimed speedy trial delay, save the thirteen days of claimed transport delay prior to his initial appearance in Connecticut, was attributable to the government. In fact, Lynch’s speedy trial claim appears to be a disguised ineffective assistance of counsel claim, which would be better pursued through a petition under 28 U.S.C. § 2255. *See Daychild*, 357 F.3d at 1095 (observing that in claiming that his counsel filed a continuance motion without his “knowledge or con-

sent” and after the defendant had advised the court that it wanted a speedy trial, the defendant “may be alleging ineffective assistance of counsel, albeit not explicitly, [which] we do not ordinarily consider on direct review”; *United States v. Brown*, 623 F.3d 104, 112 (2d Cir. 2010) (“[C]ollateral review typically provides a far better opportunity for an evaluation of an ineffective-assistance claim than direct review”). Moreover, as the district court noted, any violation of the Speedy Trial Act was minimal and thus Lynch was hardly prejudiced. On this record, at a minimum, the district court should be permitted to decide whether to dismiss with or without prejudice.

II. Lynch cannot show that the district court committed plain error at sentencing because he can point to no record evidence that the court treated the guidelines as mandatory.

A. Relevant facts

After Lynch pleaded guilty, the Probation Office prepared a PSR for sentencing. The PSR calculated a sentencing range of 12-18 months' imprisonment. PSR ¶¶ 14-31, 74.

On October 9, 2012, the government filed its memorandum in aid of sentencing. JA152. Analyzing several of the factors contained in 18 U.S.C. § 3553(a), the government asked for a "significant sentence" above the guidelines range, and argued that Lynch "planned and successfully carried out a scheme to circumvent a sentence imposed on him" JA152, JA155, JA158. Noting that Lynch had a pre-paid cellphone as soon as he escaped, the government argued that the "meticulously planned conduct" was more serious than simply walking away from a halfway house. JA155. Addressing Lynch's history and characteristics, the government noted the violence in Lynch's earlier criminal history and his movement to white-collar crime once he entered his forties. JA156. The government further argued that the public's respect for the law would be promoted with a lengthy prison sentence. JA156. Turning to deterrence, the government

urged the court to impose a lengthy sentence so that other prisoners would be deterred from following in Lynch's footsteps and also so that Lynch would "understand that there are consequences other than full service of his prior sentence to his conduct." JA157.

On October 10, 2012, Lynch filed a memorandum in aid of sentencing, seeking a sentence of time served. JA160-72. In his memorandum, Lynch alleged that he had failed to report to the halfway house because he "was told that when he got to the halfway house, there were people who were prepared to do him harm." JA160. Turning to the guidelines, Lynch argued that the district court should effectively ignore this Court's decision in *United States v. Aska*, 314 F.3d 75 (2d Cir. 2002), find that the escape guidelines as reflected in U.S.S.G. § 2P1.1 resulted in "double counting," and accordingly reduce Lynch's guidelines to 8-14 months' imprisonment. JA164-66. At bottom, Lynch argued that further punishment was unwarranted and that the goals of sentencing had already been met. JA173. Accordingly, he argued that a sentence of time served was "sufficient, but not greater than necessary" in this case. JA173.

On October 16, 2012, Lynch appeared for sentencing. JA191. At that hearing, the district court addressed Lynch's objections to the PSR, omitted all language to which Lynch objected,

and then adopted the remaining factual findings in the PSR. JA191-213.

The court calculated a final offense level of 7 as follows: Under U.S.S.G. § 2P1.1(a)(1), Lynch's base offense level was 13, which was reduced by four levels because Lynch left non-secure custody, and subtracted a further two levels under U.S.S.G. § 3E1.1(a) based on Lynch's acceptance of responsibility. JA213. The district court adopted the PSR's conclusion that Lynch had accumulated 10 criminal history points, placing him in Criminal History Category V, which resulted in an "advisory" guideline incarceration range of 12-18 months. JA214-15.

With these preliminary points resolved, the court invited defense counsel to speak about the appropriate sentence for Lynch. JA215. Counsel again asked the district court to ignore this Court's holding in *Aska*, arguing that it resulted in double-counting. JA215-21. The district court responded that it was "conscious" that the "double counting" challenged by counsel moved Lynch's criminal history from category IV to category V. JA221-22. Further, the court stated, "I recognize I have the authority to impose a non-Guideline sentence that is sufficient but not harsher than necessary taking into account all that happened here, including the nature of the offense." JA222.

Counsel next took issue with the government's characterization of the offense conduct in

this case, and offered his own explanation of events. According to counsel, Lynch had not engaged in “meticulous planning” of the escape but rather had simply “made a decision not to appear at the halfway house.” JA225-26. Further, counsel argued that Lynch did this on his own: he had no assistance, but rather went by himself to a Best Buy in New Jersey to buy a cell phone. JA226. And although Lynch chose “not to appear,” he did not try to leave the country or avoid detection. JA229. Counsel argued that Lynch’s actions were driven by the fact that Lynch had been incarcerated in a “bad place . . . where people get hurt, where people get killed, where assaults happen.” JA231, JA237. And after this bad experience, he felt he was going to be assaulted at the halfway house. JA233. Counsel concluded by urging the court not to sentence Lynch “on his prior record” but “on the basis of what he did here,” and accordingly asked for a sentence of time served. JA241-44. After defense counsel finished, Lynch spoke on his own behalf. JA244-46.

After Lynch, the government argued that Lynch has not been able to follow “the confines of the law for most of his life.” JA247. The government observed that the guidelines are “very low for what he did” and that getting a furlough to the halfway house “got him out of the penitentiary,” and allowed him privileges of which “[h]e chose not to take advantage.” JA248. The gov-

ernment noted that considering the § 3553(a) factors for sentencing, including the nature and circumstances of the offense, the history and characteristics of the defendant, and the need to impose a sentence that promotes respect for the law and general and specific deterrence, Lynch's guidelines were quite low. JA249-250. Emphasizing Lynch's "long and serious criminal history" and his "violent tendencies for most of his adult life," the government asked the court to depart upward to a criminal history category VI. JA250-51.

In fashioning an appropriate sentence, the court turned first to Lynch's criminal history and likelihood of recidivism. JA254. In declining the government's motion for an upward departure based on the insufficiency of Lynch's criminal history score, the district court noted that it had to put aside information that had been deleted from the PSR and therefore declined to apply the upward departure JA254-55.

The district court next discussed the circumstances of the offense and Lynch's proffered reason for refusing to report to Watkinson House, noting that Lynch had a prior conviction for fraud and that there was no support for his explanation beyond Lynch's own word. JA256. The court explained further that it was not aware of any "history of violence at Watkinson House." JA256. Accordingly, the court declined to credit Lynch's version of the offense conduct. JA256-57.

On the other hand, the court also rejected the government's argument that Lynch's escape was well planned. JA257.

As the court continued its consideration, it took into account Lynch's argument that he would not have been housed at USP Canaan if his prior PSR had not included references which were deleted from the current PSR. JA257-58. The court also acknowledged counsel's concern about the double counting under the guidelines. JA258. The court examined Lynch's personal history, including his work history, marriage history, and his unpaid child support obligation exceeding \$80,000. JA259-60.

The court then queried whether Lynch's offense could be distinguished in any manner "from other walkaways in other cases that are relevant to sentencing, whether there are mitigating facts or aggravating facts that would call for a sentence above or below the advisory Guideline range." JA260. The district court stated that it did not "see any." JA260. The court next inquired of itself "whether there are aspects to your history and characteristics that warrant a sentence above or below the range." JA260-61. Again, the court answered that it did not see any, "especially once the report is corrected, as we have taken pains to correct it." JA261.

Next, the court noted that the question before it was "what sentence is sufficient to serve the purposes of a criminal sentence taking account

of all these matters?” JA261. In answering this question, the court noted that it had to:

impose a sentence that adequately reflects the seriousness of the offense, that imposes just punishment, that provides adequate deterrence against criminal conduct by you and other people and thereby protects society, and I need to take into account the Guideline range, the need to avoid unwarranted disparity in sentencing, and the need to provide you with appropriate support and assistance going forward.

JA261.

The court indicated that it had read the cases defense counsel had cited and had found them “clearly distinguishable,” one because the defendant in that case was a “chronic alcoholic” with “mitigating factors” and the other because the parties had “agreed that a sentence at the bottom of the range was appropriate.” JA261-62. The court further indicated that it understood why the government had argued for an upward departure. JA262.

With regard to general deterrence, the court observed that it was “important” to send the message that failing to report after being granted a furlough would result in “a significant penalty.” JA262. And with regard to specific deterrence, the court addressed Lynch to explain that

it was “important for you to understand that given your record, . . . [y]ou’ve reached the point of zero tolerance. You can’t ask the Court to give you the benefit of the doubt and treat you with leniency. Your record is too serious.” JA262.

On providing support to Lynch, the court observed that Lynch would be on supervised release and that Lynch should comply with his conditions. JA262. The court urged Lynch to use his period of supervised release to “be proactive in a positive way.” JA263.

On this record, the court sentenced Lynch to 12 months’ imprisonment. JA263. The court noted that the sentence was at the bottom of the “advisory Guideline” range with a criminal history category V, and at the midpoint of the range with a criminal history category IV—the range that would have applied without the “double counting.” JA263.

Defense counsel asked the court to impose a sentence of a year and a day. JA263. The court indicated that it had “thought about it” but stated that it believed that “a sentence of 12 months is necessary.” JA263. Upon further questioning, the court reiterated again that it had considered—and rejected—giving Lynch a sentence of a year and a day:

I have thought about whether the sentence should be a year and a day, which would give Mr. Lynch an opportunity to earn

good time credit and reduce his sentence in effect to ten months, and I concluded no, ten months is not sufficient to reflect the seriousness of the offense and to provide adequate[] deterrence. It simply isn't.

If there were a record that supported a finding of mitigating factors, it would be different, but we've talked about that too. On this record, I don't see the basis for a reliable finding that would mitigate the seriousness of the offense.

JA265. The court also imposed a supervised release term of three years to run concurrently with the three-year term imposed in Lynch's fraud case. JA266.

B. Governing law and standard of review

1. Sentencing law generally

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the United States Sentencing Guidelines, as written, violate the Sixth Amendment principles articulated in *Blakely v. Washington*, 542 U.S. 296 (2004). *See Booker*, 543 U.S. at 243. The Court determined that a mandatory system in which a sentence is increased based on factual findings by a judge violates the right to trial by jury. *See id.* at 244. As a remedy, the Court severed and excised the statutory provision making the Guidelines man-

datory, 18 U.S.C. § 3553(b)(1), thus declaring the Guidelines “effectively advisory.” *Booker*, 543 U.S. at 245.

After *Booker*, at sentencing, a district court must begin by calculating the applicable Guidelines range. See *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc). “The Guidelines provide the ‘starting point and the initial benchmark’ for sentencing, and district courts must ‘remain cognizant of them throughout the sentencing process.’” *Id.* (internal citations omitted) (quoting *Gall v. United States*, 552 U.S. 38, 49, 50 & n.6 (2007)). Consideration of the guideline range requires a sentencing court to calculate the range and put the calculation on the record. See *United States v. Fernandez*, 443 F.3d 19, 29 (2d Cir. 2006).

After giving both parties an opportunity to be heard, the district court should then consider all of the factors under 18 U.S.C. § 3553(a). The requirement that the district court consider the section 3553(a) factors, however, does not require the judge to precisely identify the factors on the record or address specific arguments about how the factors should be implemented. See *Rita v. United States*, 551 U.S. 338, 356-59 (2007) (affirming sentence despite district judge’s brief statement of reasons in refusing downward departure that the guideline range was “not inappropriate”). There is no “rigorous requirement of specific articulation by the sen-

tencing judge.” *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005). And although the judge must state in open court the reasons behind the given sentence, 18 U.S.C. § 3553(c), “robotic incantations” are not required. *Id.*; see also *United States v. Goffi*, 446 F.3d 319, 321 (2d Cir. 2006).

This Court “presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the [§ 3553(a)] factors.” *Fernandez*, 443 F.3d at 30. “As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, [this Court] will accept that the requisite consideration has occurred.” *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005). Furthermore, a judge need not address every “specific argument[] bearing on the implementation of those factors” in order to execute the required consideration. See *Fernandez*, 443 F.3d at 29.

On appeal, a district court’s sentencing decision is reviewed for reasonableness. See *Booker*, 543 U.S. at 260-62. Although reasonableness has both procedural and substantive dimensions, see *Cavera*, 550 F.3d at 189-90, in this appeal, Lynch raises only a procedural challenge to his sentence.

As relevant here, “[a] district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory.” *Id.* at 190 (citations omitted). A district court also commits procedural error “if it does not consider the § 3553(a) factors, or rests its sentence on a clearly erroneous finding of fact.” *Id.* Finally, a district court “errs if it fails adequately to explain its chosen sentence, and must include ‘an explanation for any deviation from the Guidelines range.’” *Id.* (quoting *Gall*, 552 U.S. at 51).

Although the court commits error if it treats the Guidelines as mandatory, a “sentencing judge’s decision to place special weight on the recommended guideline[s] range will often be appropriate, because the Sentencing Guidelines reflect the considered judgment of the Sentencing Commission, are the only integration of the multiple [§ 3553(a)] factors and, with important exceptions, . . . were based upon the actual sentences of many judges.” *United States v. Capanelli*, 479 F.3d 163, 165 (2d Cir. 2007) (per curiam) (internal citations and quotations omitted). For the same reason, “although [this Court does] not presume that a within-Guidelines sentence is substantively reasonable,” see *United States v. Wagner-Dano*, 679 F.3d 83, 95 (2d Cir. 2012) “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.” *United States v. Friedberg*, 558 F.3d 131, 137 (2d Cir. 2009) (quotations omitted).

2. Standard of review

“A sentencing court’s legal application of the Guidelines is reviewed *de novo*, while the court’s underlying factual findings with respect to sentencing . . . are reviewed for clear error.” *United States v. Cossey*, 632 F.3d 82, 86 (2d Cir. 2011) (per curiam).

When, as here, a defendant fails to object to an alleged procedural sentencing error and that sentencing issue is “not particularly novel or complex,” this Court reviews for plain error. *United States v. Villafuerte*, 502 F.3d 204, 208 (2d Cir. 2007); *United States v. Verkhoglyad*, 516 F.3d 122, 128 (2d Cir. 2008); *Wagner-Dano*, 679 F.3d at 89.

Under plain error review, “an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an ‘error’; (2) the error is ‘clear or obvious, rather than subject to reasonable dispute’; (3) the error ‘affected the appellant’s substantial rights, which in the ordinary case means’ it ‘affected the outcome of the district court proceedings’; and (4) ‘the error seriously affect[s] the fairness, integrity or public reputa-

tion of judicial proceedings.” *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)); see also *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *Wagner-Dano*, 679 F.3d at 94. “[T]he burden of establishing entitlement to relief for plain error is on Lynch claiming it” *Wagner-Dano*, 679 F.3d at 94 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004)).

C. Discussion

The district court complied with all of its procedural obligations at sentencing. The court resolved factual disputes in the PSR, and then calculated a final guidelines range. JA191-215. After hearing remarks from counsel for the government, counsel for Lynch and Lynch himself, the court first considered the government’s motion for an upward departure under U.S.S.G. § 4A1.3. JA254-55. The district court rejected the motion, although it noted that it “undertand[s] why the government takes that position.” JA255, JA262.

The district court then commenced its analysis of the 3553(a) factors. The court considered the circumstances of the offense conduct, and Lynch’s personal characteristics. JA254-56. With this background, the court considered whether there were any facts about the offense conduct or

Lynch’s personal characteristics “that would call for a sentence above or below the advisory Guideline range.” JA260; *see also* JA260-61. On both issues, the court concluded that there was nothing that would call for a sentence outside the advisory range. JA260-61.

The court also considered the purposes of sentencing, and identified the § 3553(a) factors that guided its analysis. JA261. On specific factors, the court noted, for example, that as a matter of general deterrence, it was “important” to send the message that failing to report after being granted a furlough would result in “a significant penalty,” and that as a matter of specific deterrence, Lynch had reached a “point of zero tolerance” with regard to being treated with “leniency.” JA262. And finally, the court urged Lynch to take advantage of services available to him on supervised release. JA262-63.

On this thorough record, the court then sentenced Lynch to 12 months’ imprisonment. JA263. In short, the district court conducted a thorough and proper § 3553(a) analysis, resulting in a reasonable sentence.

Notwithstanding the district court’s rigorous analysis of the § 3553(a) factors, Lynch argues that the district court erred by “giving presumptive weight to the Guidelines range” Def. Br. at 41. As a preliminary matter, the mere fact that the district court imposed a guidelines sentence is insufficient to establish that the court treated

the guidelines as mandatory. Indeed, consideration of the guideline range is an appropriate starting point for district judges at sentencing, because, as this Court has recognized, the guidelines reflect a studied integration of the § 3553(a) factors. *See Capanelli*, 479 F.3d at 165. Moreover, this Court has noted 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.” *Friedberg*, 558 F.3d at 137 (quotations omitted).

In any event, Lynch’s claim fails on the merits. In support of his argument, Lynch points to nothing more than the fact that, at sentencing, the district court queried “whether there are mitigating facts or aggravating facts that would call for a sentence above or below the advisory Guideline range” and whether anything in Lynch’s “history and characteristics warrant a sentence above or below the range[.]” Def. Br. at 41. But the trial court’s initial consideration of the guideline range is hardly error. *See Gall*, 552 U.S. at 50 n.6 (“[D]istrict courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process.”). Nor is a sentencing court required to express “specific verbal formulations . . . to demonstrate the adequate discharge of the duty to ‘consider’ matters relevant to sentencing.” *Fleming*, 397 F.3d at 100. Indeed, this Court

“presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged [his] duty to consider the [§ 3553(a)] factors.” *Fernandez*, 443 F.3d at 30; *see also United States v. Banks*, 464 F.3d 184, 190 (2d Cir. 2006) (“In the absence of contrary indications, courts are generally presumed to know the laws that govern their decisions and to have followed them.”).

On the record here, there is no evidence that the court failed to understand that the guidelines were advisory. Indeed, to the contrary, there is ample evidence in the record that the district court clearly understood that the guidelines were advisory. First, the district court repeatedly and explicitly described the guidelines as “advisory.” JA215, JA260. Second, Judge Chatigny succinctly stated that “I recognize I have the authority to impose a non-Guidelines sentence that is sufficient but not harsher than necessary taking into account all that happened here, including the nature of the offense conduct.” JA222. Third, the district court demonstrated an understanding of proper sentencing procedure by carefully reviewing all of the § 3553(a) factors, an unnecessary exercise if the district court had considered the guidelines to be mandatory. JA256-63.

Finally, to the extent that the district court did err, Lynch has not met his burden of showing that the error was plain, that it affected his

substantial rights and that it seriously impacted the integrity of the judicial proceedings. As stated above, the district court was fully aware of the “advisory” nature of the guidelines, recognized its authority to impose a “non-Guidelines sentence,” and described and analyzed the sentencing factors. Thus, any error was not “plain.” In addition, it is difficult to conceive how Lynch’s substantial rights could have been impacted or how the integrity of the judicial proceedings could have been undermined given that the district court imposed a 12-month term of imprisonment based, in part, on Lynch’s history of violence, and his inability to function lawfully in society.

In sum, under the law of this Circuit and the record in this case, Lynch cannot show that the district court erroneously treated the guidelines as mandatory or that any such error affected his sentence.

Conclusion

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

Dated: March 8, 2013

Respectfully submitted,

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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 11,554 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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RAHUL KALE
ASSISTANT U.S. ATTORNEY

Addendum

18 U.S.C. § 3161. Time limits and exclusions

* * *

(c)(1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate [United States magistrate judge] on a complaint, the trial shall commence within seventy days from the date of such consent.

* * *

(h) The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to—

(A) delay resulting from any proceeding, including any examinations, to determine the mental competency or physical capacity of the defendant;

(B) delay resulting from trial with respect to other charges against the defendant;

(C) delay resulting from any interlocutory appeal;

(D) delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion;

(E) delay resulting from any proceeding relating to the transfer of a case or the removal of any defendant from another district under the Federal Rules of Criminal Procedure;

(F) delay resulting from transportation of any defendant from another district, or to and from places of examination or hospitalization, except that any time consumed in excess of ten days from the date an order of removal or an order directing such transportation, and the defendant's arrival at the destination shall be presumed to be unreasonable;

(G) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the Government; and

(H) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

* * *

(7)(A) Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

(B) The factors, among others, which a judge shall consider in determining whether to grant a continuance under subparagraph (A) of this paragraph in any case are as follows:

(i) Whether the failure to grant such a continuance in the proceeding would be likely to

make a continuation of such proceeding impossible, or result in a miscarriage of justice.

(ii) Whether the case is so unusual or so complex, due to the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law, that it is unreasonable to expect adequate preparation for pretrial proceedings or for the trial itself within the time limits established by this section.

(iii) Whether, in a case in which arrest precedes indictment, delay in the filing of the indictment is caused because the arrest occurs at a time such that it is unreasonable to expect return and filing of the indictment within the period specified in section 3161(b) or because the facts upon which the grand jury must base its determination are unusual or complex.

(iv) Whether the failure to grant such a continuance in a case which, taken as a whole, is not so unusual or so complex as to fall within clause (ii), would deny the defendant reasonable time to obtain counsel, would unreasonably deny the defendant or the Government continuity of counsel, or would deny counsel for the defendant or the attorney for the Government the reasonable time necessary for effective preparation, taking into account the exercise of due diligence.

* * *