

12-4790

To Be Argued By:
JONATHAN S. FREIMANN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-4790

UNITED STATES OF AMERICA,

Appellee,

-vs-

ANTHONY PEARSON,

Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

DEIRDRE M. DALY
*Acting U.S. Attorney
District of Connecticut*

JONATHAN S. FREIMANN
Assistant United States Attorney
SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

Table of Contents

Table of Authorities	iii
Statement of Jurisdiction	vii
Statement of Issues Presented for Review	viii
Preliminary Statement.....	1
Statement of the Case	3
Statement of Facts and Proceedings Relevant to this Appeal	4
A. The offense conduct	4
B. The guilty plea.....	5
C. The psychological evaluation.....	6
D. The sentencing	8
Summary of Argument	15
Argument.....	16
I. The district court’s 64-month sentence was procedurally and substantively reasonable.....	16
A. Governing law and standard of review.....	16
1. Sentencing law generally.....	16

2. Standard of review	21
B. Discussion	23
1. The district court properly considered Pearson’s mental condition and personal history as potential mitigating factors	23
2. Pearson’s sentence was substantively reasonable	29
Conclusion	32
Certification per Fed. R. App. P. 32(a)(7)(C)	

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).....	17, 18, 19, 23
<i>Johnson v. United States</i> , 520 U.S. 461 (1997).....	22
<i>Puckett v. United States</i> , 556 U.S. 129 (2009).....	22
<i>Rita v. United States</i> , 551 U.S. 338 (2007).....	19
<i>United States v. Avello-Alvarez</i> , 430 F.3d 543 (2d Cir. 2005).....	18
<i>United States v. Bonilla</i> , 618 F.3d 102 (2d Cir. 2010).....	19, 26
<i>United States v. Booker</i> , 543 U.S. 220 (2005).....	17, 18
<i>United States v. Capanelli</i> , 479 F.3d 163 (2d Cir. 2007) (per curiam).....	26, 28

<i>United States v. Cavera</i> , 550 F.3d 180 (2d Cir. 2008) (en banc)	17, 18, 19, 23, 26
<i>United States v. Cossey</i> , 632 F.3d 82 (2d Cir. 2011) (per curiam)	21
<i>United States v. Cotton</i> , 535 U.S. 625 (2002).....	22
<i>United States v. Crosby</i> , 397 F.3d 103 (2d Cir. 2005)	18
<i>United States v. Dominguez Benitez</i> , 542 U.S. 74 (2004).....	22
<i>United States v. Dorvee</i> , 616 F.3d 174 (2d Cir. 2010).....	21
<i>United States v. Fernandez</i> , 443 F.3d 19 (2d Cir. 2006).....	18, 19, 20, 30, 31
<i>United States v. Jones</i> , 531 F.3d 163 (2d Cir. 2008)	21
<i>United States v. Juwa</i> , 508 F.3d 694 (2d Cir. 2007)	19

<i>United States v. Kane</i> , 452 F.3d 140 (2d Cir. 2006) (per curiam)	31
<i>United States v. Marcus</i> , 130 S. Ct. 2159 (2010).....	22
<i>United States v. Oehne</i> , 698 F.3d 119 (2d Cir. 2012) (per curiam)	23
<i>United States v. Olano</i> , 507 U.S. 725 (1993).....	22
<i>United States v. Rattoballi</i> , 452 F.3d 127 (2d Cir. 2006)	20
<i>United States v. Rigas</i> , 583 F.3d 108 (2d Cir. 2009)	20, 21, 30
<i>United States v. Wagner-Dano</i> , 679 F.3d 83 (2d Cir. 2012)	21, 22
<i>United States v. Walsh</i> , 194 F.3d 37 (2d Cir. 1999)	22, 28

Statutes

18 U.S.C. § 922.....	3
18 U.S.C. § 924.....	3
18 U.S.C. § 3231.....	vii

18 U.S.C. § 3553.....	<i>passim</i>
18 U.S.C. § 3742.....	vii
28 U.S.C. § 1291.....	vii

Rules

Fed. R. App. P. 4	vii
-------------------------	-----

Guidelines

U.S.S.G. § 2K2.1.....	8
U.S.S.G. § 3E1.1	8
U.S.S.G. § 5K2.0.....	8, 10
U.S.S.G. § 5K2.6.....	8

Statement of Jurisdiction

This is an appeal from a judgment entered on November 28, 2012, after the defendant, Anthony Pearson, was sentenced for one count of being a felon in possession of a firearm. Joint Appendix (“JA”) 5, JA65-66. The United States District Court for the District of Connecticut (Vanessa L. Bryant, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. On November 29, 2012, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), JA5, JA74, and 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**

The defendant was sentenced to 64 months' imprisonment for his conviction on one count of being a felon in possession of a firearm, and on appeal claims that the sentence was procedurally and substantively unreasonable:

- A. Whether the sentencing court properly considered the defendant's request for leniency based on mental illness when it determined his mild condition did not mitigate his dangerous behavior?
- B. Whether the 64-month sentence was substantively unreasonable considering the defendant's violent criminal history and egregious conduct in possessing, firing and then discarding a still-loaded firearm?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-4790

UNITED STATES OF AMERICA,

Appellee,

-vs-

ANTHONY PEARSON,

Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Prior to December 30, 2011, the defendant, Anthony Pearson, had four felony convictions, including two for violent robberies and one for illegally possessing a firearm. That evening, Pearson attempted to purchase \$30 of marijuana. When the purported drug dealer took Pearson's money but refused to give him the marijuana or a refund, Pearson retrieved a loaded 9mm pistol, pointed it towards a nearby residential

building, and fired several shots. Other than pointing in the general direction of the residential area, Pearson did not look or aim where he was firing.

After firing his weapon, Pearson saw a marked police car and began running through residential backyards in the area. As he ran, he threw his loaded firearm into one of the backyards. Pearson did not know whose backyard he was in. Pearson then sought to avoid arrest by going into another apartment. Pearson also did not know the people who lived in that apartment, who confronted him and told him to leave.

For this conduct, Pearson pleaded guilty to a one-count indictment charging him with being a felon in possession of a firearm. Prior to being sentenced, the district court ordered that Pearson be examined by a mental health professional. The psychologist opined that Pearson suffered from a minor disorder, that he was able to appreciate the wrongful nature of his crimes, and that he was not significantly impaired due to his mental condition. At sentencing, the government moved for a 2-level upward departure based on the failure of the Sentencing Guidelines to otherwise adequately consider the aggravating factor of Pearson's discharging the weapon he possessed. The district court granted this motion and sentenced Pearson to the middle of the new guidelines range, 64 months' impris-

onment, followed by three years of supervised release.

Pearson now challenges his sentence as procedurally and substantively unreasonable. He claims that the district court improperly rejected his request for leniency based on his mental illness. He further argues that the 64-month sentence was simply too long.

As set forth below, the sentence imposed was reasonable. The court properly considered, and ultimately rejected, Pearson's request for leniency due to his mental illness. And the sentence was substantively reasonable as well. It reflected a careful balancing of the 18 U.S.C. § 3553(a) factors in light of the egregious nature of the offense conduct in this case and Pearson's prior criminal history. The district court's judgment should be affirmed.

Statement of the Case

On May 3, 2012, a federal grand jury returned a one-count indictment against the defendant, charging him with possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). JA2, JA7-8.

On June 28, 2012, the defendant pleaded guilty to the indictment. JA3. On November 19, 2012, the district court (Vanessa L. Bryant, J.) sentenced the defendant principally to 64 months of imprisonment. JA5, JA65. Judgment

entered November 28, 2012. JA5. On November 29, 2012, the defendant filed a timely notice of appeal. JA5, JA74. He is currently in federal custody serving the sentence imposed.

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

A. The offense conduct

The following facts are taken largely from the Pre-Sentence Report (“PSR”) and were not disputed by the defendant at the time of sentencing. JA38-40.

On December 30, 2011, Anthony Pearson attempted to purchase \$30 of marijuana from an individual near 503 Garden Street, a residential building, in Hartford, Connecticut. PSR ¶ 8. The purported drug dealer took Pearson’s money but refused to give him the marijuana or a refund. When Pearson complained, the purported drug dealer approached him. PSR ¶ 8. In response, Pearson pulled out a loaded 9mm pistol, pointed it toward 503 Garden Street, and fired five rounds towards the residence without looking or aiming at where he was firing. PSR ¶ 8. Pearson later explained his actions by saying he had been “caught up in the moment.” PSR ¶ 10.

After firing his weapon, Pearson saw a marked police car and began running through residential backyards in the area in an attempt to flee. PSR ¶ 9. As he ran, he threw his firearm,

which was still loaded with two rounds of ammunition, into one of the residential backyards. See PSR ¶ 9; JA 47-48. Pearson then went into an apartment. The residents of that apartment, whom Pearson did not know, confronted him and told him to leave. After police officers saw Pearson leaving the apartment, they arrested him. PSR ¶ 9.

The firearm possessed, fired and discarded by Pearson was manufactured in Brazil and imported through Florida. PSR ¶ 10. Prior to December 30, 2011, Pearson had been convicted of several felonies, including robbery and criminal possession of a weapon. PSR ¶ 7. After he was convicted of these felonies, Pearson never regained his right to possess a firearm or ammunition. PSR ¶ 7.

B. The guilty plea

On June 28, 2012, pursuant to a plea agreement, Pearson pleaded guilty to the one-count indictment, charging him with being a felon in possession of a firearm. JA3; Government Appendix (“GA”) 1-10. In the plea agreement, the parties agreed that Pearson qualified for criminal history category V. GA5. The government agreed to recommend a full three-level reduction for acceptance of responsibility. GA3-5. The parties also stipulated that, with the reduction for acceptance of responsibility, Pearson’s total offense level was 17, resulting in a guidelines in-

carceration range of 46 to 57 months of imprisonment. GA5.

Pearson reserved his right to seek a departure or a non-Guidelines sentence, and the government reserved its right “to seek an upward departure or non-Guidelines sentence or otherwise advocate for a reasonable and appropriate sentence under 18 U.S.C. § 3553(a).” GA5. Moreover, the agreement stated that the district court was not bound at all by the parties’ agreement or their guideline calculations. GA3, GA5. The parties reserved their respective appellate rights in the plea agreement. GA6. Finally, the plea agreement also contained a stipulation of offense conduct in which Pearson admitted to shooting the firearm towards a residential building over a dispute about \$30 of marijuana and then discarding the firearm in a stranger’s backyard as he fled from the police and into another stranger’s home. *See* GA10.

C. The psychological evaluation

On July 19, 2012, the district court ordered a psychological study and report of Pearson to supplement the PSR. JA9-10. In its order, the district court explained that it wanted “more information than is otherwise available in order to determine the mental and emotional condition of the defendant for sentencing purposes” JA9. Accordingly, the district court ordered a doctor of psychology to conduct an examination and pre-

pare a report regarding Pearson's mental health. The order indicated that the report should include, among other things, the psychologist's conclusions as to whether Pearson "is suffering now or has suffered in the past from a mental or emotional disease or defect, and how any such disease or defect might have affected his offense conduct" JA10.

On September 20, 2012, the psychological evaluation was submitted and was later attached to the PSR. See PSR ¶ 45, pp. 36-44. The report indicated that Pearson reported hearing voices "here and there." See PSR, p. 38. The psychologist diagnosed Pearson with Mood Disorder NOS, mild, as well as substance dependence and paranoia (*i.e.*, cannabis induced psychotic disorder). PSR, pp. 42-43. The psychologist concluded, however, that Pearson was able to appreciate the wrongful nature of his offense and was not significantly impaired due to his mental disease at the time of his conduct. PSR, p. 43. The evaluator indicated that Pearson was able to conform his conduct to the requirements of the law, noting in particular Pearson's admission that he would not have shot the gun if there were witnesses or if he knew he would be arrested. PSR, p. 43.

D. The sentencing

In anticipation of Pearson's sentencing, the Probation Office prepared a PSR. Using the 2011 Guidelines Manual, the PSR recommended a base offense level of 20 under U.S.S.G. § 2K2.1(a) because of Pearson's previous conviction for Second Degree Robbery, and the subtraction of 3 levels for acceptance of responsibility (§ 3E1.1), for a total offense level of 17. PSR ¶¶ 14-21. Because Pearson fell into criminal history category V, PSR ¶ 29, the recommended guidelines range was 46 to 57 months of incarceration. PSR ¶ 56.

Prior to sentencing, the government filed a sentencing memorandum seeking an upward departure. JA17-35. More specifically, the government cited U.S.S.G. § 5K2.0(a)(1)(A), which explains that an upward departure is appropriate when "there exists an aggravating or mitigating circumstance . . . of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines. . . ." The memorandum also noted that U.S.S.G. § 5K2.6 indicates that the "discharge of a firearm might warrant a substantial sentence increase." JA22-23. The government argued that without an upward departure Pearson's guidelines would be the same as the range that would apply had he only possessed the illegal firearm. However, his possession of the firearm involved several aggravating activities that were not ade-

quately taken into consideration in formulating his guidelines: discharging the weapon towards a residence, disposing of the firearm by throwing it into a random residential yard, and attempting to hide in another stranger's home. JA23.

Pearson responded with his own sentencing memorandum. JA11-16. In it he conceded that, in a different guideline, the sentencing commission urges “a two-level differential between possession or brandishing of a firearm and discharging of the firearm in circumstances that risk but do not cause actual injury.” JA12. He also acknowledged the reasoning behind such an enhancement, namely that “it is clearly true that recklessly risking injury by discharging a firearm in the direction of a residential building is more serious than merely possessing a firearm . . .” JA13. Such a two-level upward departure in this case would result in a guidelines incarceration range of 57 to 71 months. JA13.

Nonetheless, Pearson sought a sentence at the low end of the guidelines without the upward departure based on “what is known about Mr. Pearson through the presentence report and the psychological evaluation.” JA15. In his sentencing memorandum, Pearson did not explicitly identify mitigating factors, other than to say “those other considerations” should offset the “aggravating circumstances” of his conduct. JA15.

Sentencing took place on November 19, 2012. JA5. At the start of the hearing, the court confirmed with Pearson that he had read the PSR and discussed it with his attorney. JA38. Pearson also stated that he had no corrections to the PSR. JA38. The court subsequently adopted the factual findings set forth in the PSR. JA40.

Government counsel addressed the court and suggested that a two-level upward departure was appropriate under U.S.S.G. § 5K2.0(a)(1)(A), which would result in a guidelines incarceration range of 57 to 71 months. JA41. The government requested a sentence at the top of that guidelines range. JA41. The government reviewed the lethal dangers created by Pearson's actions—firing a gun at a residential building without looking, throwing the still-loaded gun into a stranger's backyard, and fleeing into another stranger's home with police in tow—all triggered by a dispute over \$30 of marijuana. JA41-42.

The government also addressed Pearson's high likelihood of recidivism, citing his two prior violent robberies, his prior possession of a firearm, and his 29 disciplinary infractions while incarcerated. JA42-43. The government concluded by urging the court to sentence Pearson to 71 months' imprisonment to protect the public:

In short, he has not been deterred by . . . lengthy prison sentences. He's not been deterred by convictions for violence and

guns. He's not even been deterred while in prison.

He has shown a willingness to resort to lethal violence over \$30. He's shown apathy towards the well-being of others, coupled with the violence—the record of violence, and a failure to be deterred.

JA43.

Pearson's lawyer argued that the "maximum extent of any departure would be two levels," but urged the district court not to depart upward. JA44. And while he conceded that Pearson's actions were "reckless and problematic," defense counsel suggested Pearson's state of mind during the offense did not allow him to "pause and reflect on the risk that he was creating" JA45. Although defense counsel did not discuss why the psychological evaluation called for leniency, he referred to the treatment plan described therein and the need for continued counseling. JA45-46.

Pearson's mother spoke on his behalf, JA48-49, and then Pearson himself addressed the court, JA49-50. Pearson admitted that he was wrong, that he was "glad" no one got hurt, and that it was "time for change." JA50.

The district court began its remarks by discussing the nature and circumstances of the offense conduct. The district court noted that while the charge of being a felon in possession of

a firearm is always serious, this crime was particularly serious:

This crime was particularly serious in that it involved a piddling amount of money, \$30, and somehow or another the loss of \$30 was a sufficient motivation in your mind, to pull out a weapon

You say you did it out of fear but didn't just seek to stop the person that you say you were fearful of, you didn't even apparently shoot at the person, but instead shot at a residential property, a property out of which someone could have come to the window and looked out, someone could have opened the door and stepped out on the porch to see what was going on, a bystander could have been walking down the street past the house

* * *

It doesn't take a rocket scientist to realize that standing in [the] residential area with the gun, and firing it without regard to where those bullets are going, places everyone who is or may be present, in danger of mortal injury, loss of life, death, and for what, \$30?

JA51-53. The district court then pointed out that an inquisitive child could have come upon the firearm after Pearson threw it in a stranger's

backyard. JA53. The court also noted that Pearson brought the dangers inherent in a police pursuit into another stranger's home. JA53-54.

The district court then discussed Pearson's psychological evaluation. Given that Pearson's behavior was "so aberrant," the court stated that it came to "everyone's surprise" that the doctor concluded he only had a mild disorder. The court reminded Pearson that the report concluded that ultimately "you knew what you were doing, you knew it was wrong, and you had the ability to conform your conduct to the requirements of law, the last being the most important. You had the ability to conform your conduct to the requirements of law." JA55.

The district court then discussed Pearson's criminal history, noting that he took part in two "vicious assaults as . . . a member of a gang, a mob of thugs preying upon, beating up and robbing innocent people who were just trying to do an honest day's work and support their families. . . . as though they are inanimate objects, as though they don't feel the pain . . ." JA55-56. The district court contrasted Pearson's violent criminal history with his "very good upbringing," which included "a loving and caring stepfather, a supportive family, and hard working mother who set a good example." JA56. The district court then stated:

Your conduct is just inexplicable. There's just no justification for it, no explanation for it whatsoever. . . .

The offense is just beyond serious, and your history and characteristics do not in any way mitigate your conduct.

The Court has to impose a sentence that protects others, and I have to say that there have been few people that I had occasion to sentence, who I felt that the public needed to be protected from more than you, very few.

JA56-57.

The district court then reviewed the other 18 U.S.C. § 3553(a) factors. JA57-58. The court adopted the guidelines calculation as set out in the PSR, which would result in an incarceration range of 46 to 57 months. JA58-59. However, the district court concurred that this guidelines range did not adequately consider the particularly aggravating nature of Pearson's conduct, including firing the weapon he possessed. JA59-60. The district court then held that because of the "depravity" of his conduct and "the risk that it placed [on] innocent bystanders in the community," a two-level enhancement was appropriate, resulting in a guidelines incarceration range of 57 to 71 months. JA59-60. The district court then sentenced Pearson to the middle of that range, 64 months' imprisonment. JA61.

Summary of Argument

The district court's sentence was procedurally and substantively reasonable.

A. The district court properly considered Pearson's alleged mitigating factor of mental illness, but determined that the seriousness of the offense conduct, Pearson's violent criminal record, and the need to protect the public demanded a sentence of no less than 64 months. The court discussed on the record the results of a psychological evaluation it had ordered, specifically noting that Pearson suffered only from a mild condition that did not impact his ability to conform his conduct to the requirements of the law nor prevent him from appreciating the wrongful nature of his conduct. Understandably, Pearson would have preferred the court to give his mental condition more weight, but the district court considered his arguments and came to a different conclusion. Nothing more was required. Similarly, the district court properly considered Pearson's criminal history and was not convinced that the "trajectory of his criminal career"—which culminated in the violent conduct leading to his arrest in this case—was a mitigating factor.

B. After weighing the various § 3553(a) factors, the court exercised proper discretion in granting an upward departure and imposing a 64-month sentence. This sentence was sufficient, but not greater than necessary, to reflect the

most important factors in this case: the serious nature of the offense conduct, and the need to deter others. In short, Pearson's actions, triggered by a trivial dispute, demonstrated a complete apathy towards the well-being of others and the value of human life. The fact that he would have preferred a shorter sentence does not make his sentence unreasonable.

Argument

I. The district court's 64-month sentence was procedurally and substantively reasonable.

Pearson maintains that his sentence should be vacated and that he should be resentenced. In particular, he claims that his sentence was procedurally unreasonable because his "diagnosed mental illness . . . should have been considered as a mitigating factor." *See* Def.'s Br. at 1. He also claims that his sentence was substantively unreasonable because "his personal trajectory is not one of increasing violence and disdain for others so much as mental and institutional drift." Def.'s Br. at 12. As set forth below, these arguments are without merit.

A. Governing law and standard of review

1. Sentencing law generally

Under 18 U.S.C. § 3553(a), in determining an incarceration term, a sentencing court should

consider: (1) “the nature and circumstances of the offense and history and characteristics of the defendant”; (2) the need for the sentence to serve various goals of the criminal justice system, including (a) “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment,” (b) to accomplish specific and general deterrence, (c) to protect the public from the defendant, and (d) “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”; (3) the kinds of sentences available; (4) the sentencing range set forth in the guidelines; (5) policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to victims. 18 U.S.C. § 3553(a).

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*, 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)). After giving

both parties an opportunity to be heard, the district court should then consider the sentencing guidelines, along with all of the factors under 18 U.S.C. § 3553(a). *See Gall*, 552 U.S. at 49-50. 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.” *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006).

Because the Guidelines are only advisory, district courts are “generally free to impose sentences outside the recommended range.” *Cavera*, 550 F.3d at 189. “When they do so, however, they ‘must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.’” *Id.* (quoting *Gall*, 552 U.S. at 50).

On appeal, a district court’s sentencing decision is reviewed for reasonableness. *See Booker*, 543 U.S. at 260-62. In this context, reasonableness has both procedural and substantive dimensions. *See United States v. Avello-Alvarez*, 430 F.3d 543, 545 (2d Cir. 2005) (citing *United States v. Crosby*, 397 F.3d 103, 114-15 (2d Cir. 2005)). For a sentence to be procedurally reasonable, the sentencing court must calculate the guideline range, treat the guideline range as advisory, and consider the range along with the other § 3553(a) factors. *See Cavera*, 550 F.3d at 190. Further, a court commits procedural error if it relies on “clearly erroneous facts,” *id.*; *see also*

United States v. Juwa, 508 F.3d 694, 700 (2d Cir. 2007) (noting that defendant has a “due process right to be sentenced based on accurate information”), or fails to adequately explain the reasons for its sentence, *Cavera*, 550 F.3d at 190. Nonetheless, a district court need not specifically respond to all arguments made by a defendant at sentencing. This Court has “never required a District Court to make specific responses to points argued by counsel in connection with sentencing.” *United States v. Bonilla*, 618 F.3d 102, 111 (2d Cir. 2010). “[T]he District Court must satisfy us only that it has considered the party’s arguments and has articulated a reasonable basis for exercising its decision-making authority.” *Id.* (citing *Cavera*, 550 F.3d at 193).

With respect to substantive reasonableness, the Supreme Court has reaffirmed that the reasonableness standard requires review of sentencing challenges under an abuse-of-discretion standard. *See Gall*, 552 U.S. at 46. Although this Court has declined to adopt a formal presumption that a within-guidelines sentence is reasonable, it has “recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances.” *Fernandez*, 443 F.3d at 27; *see also Rita v. United States*, 551 U.S. 338, 347-51 (2007) (holding that courts of appeals may apply presumption of reasonableness to a sentence

within the applicable Sentencing Guidelines range); *United States v. Rattoballi*, 452 F.3d 127, 133 (2d Cir. 2006) (“In calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.”).

Further, this Court has recognized that “[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge ‘exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.’” *Fernandez*, 443 F.3d at 27 (citations omitted). A sentence is substantively unreasonable only in the “rare case” where the sentence would “damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law.” *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009). This Court has likened its substantive review to “the consideration of a motion for a new criminal jury trial, which should be granted only when the jury’s verdict was ‘manifestly unjust,’ and to the determination of intentional torts by state actors, which

should be found only if the alleged tort ‘shocks the conscience.’” *United States v. Dorvee*, 616 F.3d 174, 183 (2d Cir. 2010) (quoting *Rigas*, 583 F.3d at 122-23). On review, this Court will set aside only “those outlier sentences that reflect actual abuse of a district court’s considerable sentencing discretion.” *United States v. Jones*, 531 F.3d 163, 174 (2d Cir. 2008).

2. Standard of review

A district court’s legal application of the Guidelines is reviewed *de novo*, while the underlying factual findings are reviewed for clear error, acknowledging the lesser standard of proof at sentencing of preponderance of the evidence. *United States v. Cossey*, 632 F.3d 82, 86 (2d Cir. 2011) (per curiam).

When a defendant fails to object to an alleged sentencing error, this Court reviews for plain error. *See e.g.*, *United States v. Wagner-Dano*, 679 F.3d 83, 89, 90 (2d Cir. 2012). 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 reputation of judicial proceed-

ings.” *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 the defendant claiming it” *Wagner-Dano*, 679 F.3d at 94 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004)).

To “affect substantial rights,” an error must have been prejudicial and affected the outcome of the district court proceedings. *United States v. Olano*, 507 U.S. 725, 734 (1993). This language used in plain error review is the same as that used for harmless error review of preserved claims, with one important distinction: In plain error review, “[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.” *Id.*

This Court has made clear that “plain error” review “is a very stringent standard requiring a serious injustice or a conviction in a manner inconsistent with fairness and integrity of judicial proceedings.” *United States v. Walsh*, 194 F.3d 37, 53 (2d Cir. 1999) (internal quotation marks omitted).

B. Discussion

1. The district court properly considered Pearson's mental condition and personal history as potential mitigating factors.

Pearson does not claim that the district court failed to calculate or improperly calculated the guidelines range. *See Cavera*, 550 F.3d at 189; *United States v. Oehne*, 698 F.3d 119, 124 (2d Cir. 2012) (per curiam). Nor does he claim that the district court treated the guidelines as mandatory or failed to explain the reasons for its sentence. *See Gall*, 552 U.S. at 51; *Cavera*, 550 F.3d at 190; *Oehne*, 698 F.3d at 124.

Instead, Pearson argues that his sentence was procedurally unreasonable because the district court rejected the argument that his mental condition was a mitigating factor requiring a lesser sentence. *See* Def.'s Br. at 9. Because those "mental health issues must be seen as a mitigating factor," he argues that the district court unreasonably applied Section 3553(a) to the facts of this case. *See* Def.'s Br. at 9-12. Similarly, Pearson argues that the court failed to properly consider the "trajectory" of his criminal career, which he characterized as moving in an "increasingly mild" direction. Def.'s Br. at 11-12.

Pearson's arguments with respect to the court's consideration of his mental condition fail principally because they rely on a mis-reading of

the record. The district court did in fact consider the mitigating impact of Pearson's mental condition and concluded that it did not warrant a lower sentence in light of the aggravating nature of his conduct. The court outlined the aggravating aspects of Pearson's conduct: a dispute over just \$30 of marijuana led him to pull out a firearm; he quickly shot the firearm at a residential property without aiming or looking where he was shooting; he discarded the firearm—still loaded—in a stranger's backyard; and he fled from police into another stranger's home. JA51-53. The district court summarized the lethal risks created by Pearson's actions: putting "everyone who is or may be present, in danger of mortal injury, loss of life, death, and for what, \$30?" JA53.

It was in the context of these lethal risks that the district court then turned to consideration of Pearson's mental condition. In ordering the psychological evaluation, the district court seemed to expect him to have a significant condition because his behavior was "so aberrant." But to "everyone's surprise," the psychologist diagnosed him only with a mild condition of Mood Disorder, NOS, and paranoia. JA55, PSR, pp. 42-43. The district court then emphasized that the doctor's report concluded that Pearson was able to appreciate the wrongful nature of his offense, was not significantly impaired due to his mental condition at the time, and was able to conform his

conduct to the requirements of the law. JA55. In short, the district court, on the record, did in fact consider the impact of Pearson's mental condition and its effect on his sentence.

Pearson contends, nonetheless, that the court erred by failing to give his mental condition sufficient mitigating weight, resting his argument almost exclusively on a subsequent statement by the district court. In particular, Pearson points to the district court's statement as follows: "The offense is just beyond serious, and your history and characteristics do not in any way mitigate your conduct." JA56. According to Pearson, this "blanket rejection" of his argument amounted to a refusal to consider the mitigating effect of his mental illness. *See* Def.'s Br. at 9.

The fact that the court rejected his argument, however, does not mean that the court erred by failing to consider it or unreasonably applied the § 3553(a) factors. Rather, the district court's statement, in proper context, demonstrates that it did balance different factors and found the mitigation argument lacking. After discussing the psychological evaluation, the district court examined the other aspects of Pearson's history and characteristics. The district court noted that he had a "very good upbringing" with family support and positive influences. JA55-56. In this context, the district court returned to Pearson's demonstration of total apathy to the well-being of other people through his offense conduct. The

court called that conduct “just inexplicable” and noted that Pearson’s history and characteristics provided no reason to lower his sentence in light of the offense and need to protect the public. In fact, the district court emphasized that it had sentenced few defendants that posed such a risk to the public. JA56-57. These judgments were fully within the district court’s discretion.

Of course, a district court need not specifically respond to all arguments made by a defendant at sentencing. This Court has “never required a District Court to make specific responses to points argued by counsel in connection with sentencing.” *Bonilla*, 618 F.3d at 111. “The District Court must satisfy us only that it has considered the party’s arguments and has articulated a reasonable basis for exercising its decision-making authority.” *Id.* (citing *Cavera*). Here, the district court did just that.

In short, the fact that Pearson believes the court should have given more weight to this mitigating factor does not make his sentence unreasonable. See *United States v. Capanelli*, 479 F.3d 163, 165 (2d Cir. 2007) (per curiam) (“While a district court must consider each § 3553(a) factor in imposing a sentence, the weight given to any single factor is a matter firmly committed to the discretion of the sentencing judge and is beyond [appellate] review.”) (internal quotations and citations omitted). Here, the district court considered and responded specifically to defense coun-

sel's arguments for leniency and rejected them. There was no procedural error.

Similarly, the district court considered Pearson's argument regarding the "trajectory" of his criminal career. *See* Def. Br. at 11. Pearson insists that the district court should have focused more on his criminal record from April 20, 2010 until December 29, 2011, when he was not incarcerated and convicted only of two non-violent misdemeanors.¹ *See* Def. Br. at 12; *see also* PSR ¶¶ 27-28. However, the district court properly considered Pearson's criminal record as a whole and did not find it mitigating. At his sentencing hearing, the district court discussed Pearson's prior robbery and escape convictions:

And then your criminal history, Criminal History Category V. Two vicious assaults as a gang—a member of a gang, a mob of thugs preying upon, beating up and robbing innocent people who were just trying to do an honest day's work and support their families . . . as though they are inanimate objects, as though they don't feel the pain, as though their families don't need them to get up the next day and go to work to earn a living . . . and then to go into a

¹ It is worth noting that Pearson was on parole when he committed both non-violent crimes. *See* PSR ¶¶ 26-28.

halfway house and decide, “I’m not gonna follow the rules and I’m just leaving.”

JA55-56.

Despite a brief period in Pearson’s criminal history where he committed non-violent crimes, the “trajectory” of his criminal career began with brutal violence and culminated with shooting a firearm at a residence and putting more lives at risk as he fled. The district court considered his entire criminal record and its trajectory. The court’s rejection of the notion that his criminal record required leniency was within its discretion and not procedural error. *See Capanelli*, 479 F. 3d at 165.

Further, if the district court did commit an error by rejecting Pearson’s arguments for leniency, it did not amount to plain error. The district court considered Pearson’s sentencing memorandum. JA38. It then held a sentencing hearing in which the court heard arguments from Pearson’s counsel, Pearson’s mother, and Pearson himself. JA44-50. It discussed his mental health and criminal record. JA 55-56. The district court then sentenced a man with a brutally violent past who committed more potentially-lethal violence to 64 months’ imprisonment. JA61. The court’s rejection of Pearson’s arguments for a lower sentence did not cause “a serious injustice or a conviction in a manner inconsistent with fairness and integrity of judicial proceedings.” *See Walsh*, 194 F. 3d at 53 (inter-

nal quotation marks omitted). As such, there was no plain error.

2. Pearson’s sentence was substantively reasonable.

Pearson also claims that his sentence was substantively unreasonable. This argument, too, is without merit.

Pearson’s sentence appropriately reflected his extreme recklessness and total disregard for the safety of others. As the district court stated, throughout his entire offense conduct Pearson put “everyone who is or may be present, in danger of mortal injury, loss of life, death.” JA53. Furthermore, the district court appropriately considered the other 18 U.S.C. § 3553(a) factors, emphasizing the need to protect the public from the danger’s posed by Pearson. JA57-58. In addition, as discussed above, the court considered Pearson’s mitigating factors, balancing those factors—along with all of the others—to impose an appropriate sentence.

Pearson complains, nonetheless, that his “personal trajectory is not one of increasing violence and disdain for others so much as a mental institutional drift.” Def.’s Br. at 12. This argument is belied by the record. Pearson’s “personal trajectory” shows repeated violence and dangerous behavior. Pearson began his adult criminal career with two robberies during which he and others violently assaulted the victims. *See* PSR

¶¶ 23-24. Less than 10 months after being released from prison for those convictions, Pearson was arrested and later convicted for illegal possession of a pistol. *See* PSR ¶ 25. He followed that up with a conviction for escape. *See* PSR ¶ 26. Further, his dangerous behavior did not cease when incarcerated; he accumulated 29 disciplinary tickets while in prison, including tickets for interfering with safety/security, fighting, and threats. *See* PSR ¶ 28. In fact, the district court’s description of how Pearson treated the victims from his early offense—as “inanimate objects, as though they don’t feel the pain”—can just as easily apply to the members of the community he put at risk through his conduct in this case. *See* JA56. In short, Pearson’s “personal trajectory” has been consistently violent.

Accordingly, in light of Pearson’s violent “personal trajectory” and the serious offense conduct at issue in this case, the district court reasonably concluded that a sentence of 64 months’ imprisonment was necessary to serve the purposes of punishment here. JA56-58. As a sentence squarely within the Guidelines range ultimately calculated by the court (and not disputed by Pearson), that judgment did not “exceed[] the bounds of allowable discretion.” *Fernandez*, 443 F.3d at 27 (citations omitted). Nor was it the “rare case” of a sentence so “shockingly high” that it would “damage the administration of justice.” *Rigas*, 583 F.3d at 123.

As this Court has repeatedly explained, “[r]easonableness review does not entail the substitute of [the appellate court’s] judgment for that of the sentencing judge.” *Fernandez*, 443 F.3d at 27; *see also United States v. Kane*, 452 F.3d 140, 145 (2d Cir. 2006) (per curiam) (“[The defendant] merely renews the arguments he advanced below . . . and asks us to substitute our judgment for that of the District Court, which, of course, we cannot do.”). In any event, Pearson identifies no basis for overturning the district court’s judgment. The 64-month sentence was reasonable given Pearson’s history of violence and weapons possession, as well as the actions he took on December 30, 2011 to put many lives in danger. The record demonstrates that the district court fully understood its authority to depart or vary from the guidelines and its obligation to consider and apply the § 3553(a) factors. Given all of the circumstances of Pearson’s conduct and especially the extreme dangers he posed to the public through his actions, the sentence here was reasonable.

Conclusion

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

Dated: July 11, 2013

Respectfully submitted,

DEIRDRE DALY
ACTING U.S. ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, appearing to read "Jonathan S. Freimann". The signature is fluid and cursive, with a large initial "J" and "S".

JONATHAN S. FREIMANN
ASSISTANT U.S. ATTORNEY

SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

**Federal Rule of Appellate Procedure
32(a)(7)(C) Certification**

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 6,740 words, exclusive of the Table of Contents, Table of Authorities, and this Certification.

A handwritten signature in black ink, appearing to read "Jonathan S. Freimann". The signature is fluid and cursive, with a large initial "J" and "S".

JONATHAN S. FREIMANN
ASSISTANT U.S. ATTORNEY