

# 13-1296

*To Be Argued By:*  
H. GORDON HALL

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**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 13-1296**

—  
UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

MICHAEL UNDERHILL,  
*Defendant-Appellant.*

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

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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## Statement of Jurisdiction

The United States District Court for the District of Connecticut (Eginton, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on April 5, 2013. *See* Appendix (“A”) 9. On April 8, 2013, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). *See id.* 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**

1. Whether the district court was required to conduct a Rule 11 colloquy before accepting the defendant's admissions that he violated the conditions of his supervised release?

2. Whether a consecutive, 48-month sentence for violating the conditions of his supervised release was substantively unreasonable, where the defendant engaged in narcotics trafficking while on supervised release, crashed into a residence while fleeing from the police, and continued narcotics trafficking while released on bail?

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FOR THE SECOND CIRCUIT

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ON APPEAL FROM THE UNITED STATES DISTRICT  
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**BRIEF FOR THE UNITED STATES OF AMERICA**

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## **Preliminary Statement**

On March 28, 2013, defendant Michael Underhill was sentenced to 60 months' imprisonment for conspiracy to possess cocaine base ("crack") with intent to distribute and to a consecutive 48 months' imprisonment for violating the conditions of a previously-imposed term of supervised release.

On appeal, Underhill challenges only the sentence for violating the conditions of his supervised release. Specifically, Underhill claims that the dis-

trict court failed to satisfy the requirements of Rule 11 before accepting his admissions on violating the conditions of supervised release and that the district court's sentence was substantively unreasonable.

Underhill's claims are without merit. First, this Court has squarely held that Rule 11 does not apply to violations of supervised release. Second, the sentence imposed was well within the district court's sound discretion in light of the facts that Underhill was engaged in drug dealing while on supervised release, that he crashed a car into a residence while fleeing the police, and that he continued his drug dealing even after he was granted bail in connection with his violations of supervised release.

The judgment of the district court should therefore be affirmed.

## **Statement of the Case**

### **The 1996 indictment**

The initial charge in the instant case was laid by way of an indictment, dated Dec. 10, 1996, charging the defendant with one count of possessing 50 grams or more of cocaine base. *See* A10. After pleading guilty, the defendant was sentenced to a term of 144 months of incarceration and 5 years of supervised release. *See* A4-5.

On October 19, 2007, after completing his term of incarceration, the defendant began serving his supervised release in the District of Massachusetts. *See* Government Appendix ("GA") 1.

## **The 2010 violations of supervised release**

Late in the evening of September 24, 2010, Bridgeport police responded to a call of shots fired. *See* GA7. One of the responding officers observed a vehicle at the side of the road, as well as an individual on foot near the vehicle. *See* GA7-8. When the individual noticed the marked police car, he entered the waiting vehicle, and the vehicle departed. *See* GA8. The officer followed behind. *See id.*

The vehicle circled the block and then departed the area in another direction. *See id.* The officer's suspicion was aroused, and he prepared to stop the vehicle. *See id.* When he illuminated the lights on his marked car, the vehicle sped up, leading the officer on a high-speed chase. *See id.* Several other marked police cars joined the chase, which ended as the vehicle being pursued crashed into a residence in nearby Fairfield. *See id.*

After the crash, the defendant and another individual exited the vehicle and fled on foot. *See id.* The defendant was chased by Bridgeport police officers, who saw the defendant discard several objects during the ensuing foot chase. *See id.*

After the defendant was subdued and taken into custody, police officers recovered the discarded objects. *See id.* Upon inspection, the officers determined that the objects were bags con-

taining heroin, cocaine, crack, marijuana, and Ecstasy, all pre-packaged for sale. *See id.* On the defendant's person, officers located over \$4,000 in the defendant's socks. *See id.*

Inside the vehicle, police officers found additional quantities of heroin and crack, all pre-packaged for sale. *See id.*

At the time of these events, the defendant was still on federal supervised release. *See* GA1. Accordingly, the defendant was charged with four violations of supervised release: violating Connecticut narcotics laws; failing to notify probation of his arrest; leaving Massachusetts, his district of supervision, without notifying probation; and changing his residence without notifying probation (collectively, the "2010 Violations"). *See* GA1-2.

The defendant was taken into federal custody, and on October 27, 2011, he made his initial appearance in connection with the alleged violations of supervised release. *See* A7. Although the government moved for pretrial detention, the defendant was released on conditions and a non-surety bond. *See, e.g.,* Consent Motion to Modify Conditions of Release, dated Nov. 16, 2011 [Record on Appeal Doc. No. 63] (noting that defendant had been placed under "house arrest").

### **The 2011 indictment and the 2012 superseding indictment**

On November 15, 2011, a federal grand jury returned an indictment based on the defendant's criminal conduct in September 2010, *i.e.*, the same criminal conduct that gave rise to the alleged violations of supervised release in the instant case. *See United States v. Michael T. Underhill*, No. 3:11 Cr. 218 (WWE) (indictment filed Nov. 15, 2011). Specifically, the defendant was charged with one count of conspiracy to possess, with intent to distribute, crack, heroin, cocaine, marijuana, and Ecstasy, in violation of 21 U.S.C. § 846, and one count each of possession, with intent to distribute, of 28 grams or more of crack and unspecified amounts of heroin, cocaine, marijuana, and Ecstasy. *See id.*

On August 2, 2012, while the defendant was on "house arrest" pending disposition of the new federal charges and the violations of supervised release, Drug Enforcement Administration agents executed a search warrant at his residence based on information from an informant that the defendant was selling drugs out of the house. *See GA9*. The agents seized heroin, crack, and Ecstasy from a container located in the garage. *See id.* On August 9, 2012, a federal grand jury returned a superseding indictment containing additional narcotics charges based on the seizure (the "2012 Indictment"). *See GA27-32*.

## **Disposition and sentencing**

On January 3, 2013, the defendant offered a guilty plea to Count One of the 2012 Indictment, which charged him with conspiracy to possess and distribute 28 grams or more of crack, in violation of 21 U.S.C. § 846. *See* GA7. With respect to that offense, the probation office calculated a recommended Guidelines sentencing range of 60 to 71 months' imprisonment, with a mandatory minimum of 60 months, based on a Guidelines offense level of 23 and a criminal history category of III. *See* GA23.

With respect to the 2010 Violations, the probation office calculated a recommended Guidelines sentencing range of 46 to 57 months, based on a finding of a Grade A violation and the defendant's original criminal history category of V. *See* GA3.

On March 28, 2013, the district court (Eginton, J.) disposed of the charges against the defendant in the 2012 Indictment and the 2010 Violations.

First, the district court accepted the defendant's guilty plea to Count One of the 2012 Indictment and, absent objection, adopted the factual findings and Guidelines calculations in the Presentence Report. *See* A38. The court then heard from both counsel and the defendant.

Counsel for the defendant, after acknowledging that the court was required to sentence the

defendant to 60 months' imprisonment on Count One of the 2012 Indictment, requested that the sentence for the 2010 Violations be imposed concurrently "for a total sentence of five years." A39-40. Defense counsel argued that, "particularly for a nonviolent offender," a lengthier sentence would be "counterproductive." A40. Defense counsel also highlighted the defendant's family support, observing that "two different federal judges reluctantly allowed him to be out of pre-trial detention for a period of time because of the impression that the family members made upon them." A42.

Counsel for the government responded that the defendant had engaged in "flagrant" criminal conduct while on supervised release, having already spent twelve years in prison for drug offenses. A43-44. Specifically, the defendant "was riding around in a car with another felon, apparently hitting off people with . . . all of these drugs. . . . [T]hey each had the little kit there with them in the car, of prepackaged amounts of heroin and cocaine and crack and marijuana and the Ecstasy." A44. Then, after he was arrested for violating his supervised release and released on bond, the defendant continued selling drugs from his home. *See* A46-47. Accordingly, government counsel argued that the court should impose a sentence above the mandatory minimum of 60 months, as well as a consecutive sentence for the 2010 Violations "because those rep-

resent an entirely separate breach that [the defendant] needs to be held accountable for.” A48.

After hearing from the defendant, *see* A52-54, the court sentenced the defendant on Count One of the 2012 Indictment to the mandatory minimum term of 60 months’ imprisonment, a term of 4 years’ supervised release, and a \$100 special assessment. A56-59.

The court then addressed the defendant with respect to each of the 2010 Violations. *See* A61-63. The court did not conduct a Rule 11 colloquy, and counsel for the defendant did not object or ask the court to do so. *Id.* Based on the defendant’s responses, the court found the defendant guilty of all four violations. *See* A63.

The court then heard, again, from both counsel and the defendant. Counsel for the defendant, after referring the court to his prior remarks, reiterated his argument that a lengthy, consecutive sentence would be “counterproductive.” A63-64.

Counsel for the government responded that the defendant’s arguments were directed more against lengthy drug sentencing, whereas the sentencing for the 2010 Violations had more to do with the defendant’s “flagrantly violating specific and very distinct court orders.” A65. “[W]hat we’re talking about here is a guy who just flagrantly disobeyed the orders of the court.

And that needs to have a consequence attached to it.” A66.

The district court agreed, stating: “I think you’re making a very valid point. . . . [I]t did fly in the face of two federal judges who took a chance on him.” A66. After giving the defendant an opportunity to speak again, *see* A66-67, the court terminated the defendant’s supervised release and sentenced him to a consecutive term of 48 months’ imprisonment. *See* A67.

The defendant filed this timely appeal, challenging only the sentence imposed on the 2010 Violations.

### **Summary of Argument**

First, the district court satisfied the requirements of Rule 32.1 of the Federal Rules of Criminal Procedure, which sets forth the procedures governing the revocation of supervised release. *See* Point I.C., *infra*. The defendant’s contention that the district court should have conducted a Rule 11 colloquy before accepting the defendant’s admissions is meritless, because as the defendant himself acknowledges, the Court has already held that Rule 11 does not apply to proceedings for the revocation of supervised release. *See id.*

Second, the sentence imposed by the district court was substantively reasonable. *See* Point II.C., *infra*. Not only was the sentence at the low

end of the recommended Guidelines sentencing range, but the defendant's conduct clearly warranted a significant sentence for violating the conditions of his supervised release. Specifically, the defendant engaged in narcotics trafficking while on supervised release, and he continued to do so even after he was charged with the violations of supervised release and placed on "house arrest." *See id.* The sentence imposed was neither "shockingly low" nor "unsupportable as a matter of law," so the judgment below should be affirmed. *See id.*

### **Argument**

#### **I. The requirements of Rule 11 do not apply to proceedings for the revocation of supervised release**

##### **A. Relevant facts**

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

##### **B. Governing law and standard of review**

Rule 32.1 of the Federal Rules of Criminal Procedure governs proceedings concerning alleged violations of supervised release. With respect to proceedings for the revocation of supervised release, the rule specifically provides that a defendant is entitled to written notice of the violation; disclosure of the government's evi-

dence against him or her; an opportunity to appear, present evidence, and confront adverse witnesses; representation by counsel; and an opportunity to be heard. *See* Fed. R. Crim. P. 32.1(b)(2).

Because the revocation of supervised release is the continuation of a criminal prosecution in which the defendant has already been convicted, the requirements of Rule 11 do not apply. *See United States v. Pelensky*, 129 F.3d 63, 67-68 (2d Cir. 1997). As the Court explained:

Unlike guilty pleas, admissions to violations of supervised release are not made in the course of a criminal trial and do not give rise to a different statutory offense or to an increase in punishment on the underlying conviction. The defendant is subject to the same maximum punishment of which she presumably was apprised before pleading guilty in the district court.

*Id.* at 68 (internal quotation marks omitted).

Because there was no objection below to the procedure followed by the district court when revoking the defendant's supervised release, a "plain error" standard of review applies. *See, e.g., United States v. Cassese*, 685 F.3d 186, 188 (2d Cir. 2012) (applying "rigorous" standard of plain-error review).

### C. Discussion

All of the requirements of Rule 32.1 were met in this case, and the defendant does not claim otherwise.

The defendant claims, however, with respect to his admission of the supervised release violations, that the district court failed to conduct a colloquy pursuant to Rule 11. In making this claim, the defendant acknowledges that the Court has held that such a colloquy is not required. *See* Brief of the Defendant-Appellant Michael Underhill (“Def. Br.”) at 11-12 (citing *Pelensky*). The defendant asks the Court to reconsider its holding in *Pelensky*, but he suggests no basis or reason for the Court to do so. *See United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004) (recognizing that Court is bound by decisions of prior panels until overruled by Court *en banc* or by Supreme Court).

In any event, *Pelensky* was properly decided. First, the express language of Rule 11 explicitly restricts its application to guilty pleas. *See Pelensky*, 361 F.3d at 67-68. Second, a Rule 11 colloquy is unnecessary because a supervised release violation is “not a separate criminal offense,” so the constitutional protections attendant to a criminal prosecution are not required. *Id.* at 68. Third, the Court observed that “a formal colloquy would be ill suited to the context of supervised release proceedings.” *Id.*

In contrast to the adversarial setting that characterizes the offering of a guilty plea, a revocation of supervised release proceeding features the involvement of the probation officer, who is responsible for representing the defendant's best interests to the greatest extent possible consistent with the welfare of the community. . . . To superimpose formalistic procedures such as a Rule 11 colloquy onto this context . . . is neither required by due process nor necessarily conducive to a more effective accomplishment of the goals of probation or supervised release.

*Id.* (citations and internal quotation marks omitted).

Finally, the defendant makes no claim that his admissions were actually made unknowingly or involuntarily. Indeed, in pleading guilty to Count One of the 2012 Indictment, the defendant had already admitted to the same criminal conduct underlying the 2010 Violations. In addition, before finding him guilty of the 2010 Violations, the district court directly addressed the defendant with respect to each of the alleged violations. *See* A62-63. Under the circumstances, the district court committed no error, much less plain error, in accepting the defendant's admissions of guilt on the 2010 Violations.

**II. The district court did not abuse its discretion in imposing a consecutive sentence of 48 months for the supervised release violations.**

**A. Relevant facts**

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

**B. Governing law and standard of review**

**1. Substantive reasonableness**

Upon finding that a defendant has violated the conditions of his supervised release, the district court may revoke the supervised release and require the defendant to serve a term of imprisonment. *See* 18 U.S.C. § 3583(e) (2012). The court is required to consider certain statutory factors set forth in 18 U.S.C. § 3553, including “policy statements issued by the Sentencing Commission . . . .” *Id.*; *see* 18 U.S.C. § 3553(a)(4)(B) (2012).

A term of imprisonment imposed for violating supervised release is reviewed for “reasonableness,” *United States v. Lewis*, 424 F.3d 239, 243 (2d Cir. 2005), including substantive reasonableness, *see United States v. Verkhoglyad*, 516 F.3d 122, 127 (2d Cir. 2008).

Substantive review is exceedingly deferential. This Court has stated it will “set aside a district

court’s *substantive* determination only in exceptional cases where the trial court’s decision cannot be located within the range of permissible decisions.” *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (*en banc*) (internal quotation marks omitted); *see also Verkhoglyad*, 516 F.3d at 134. In particular, sentences are substantively unreasonable if they are “shockingly high, shockingly low, or otherwise unsupportable as a matter of law.” *United States v. Leon*, 663 F.3d 552, 556 (2d Cir. 2011) (citing *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009)).

## **2. Imposing consecutive sentences**

Section 7B1.3 of the United States Sentencing Guidelines addresses the revocation of supervised release. The provision recommends that a term of imprisonment imposed upon the revocation of supervised release should be run consecutively to any other sentence being served by the defendant:

Any term of imprisonment imposed upon the revocation of . . . supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of . . . supervised release.

U.S.S.G. § 7B1.3(f) (2012).

Had the defendant been sentenced on the 2010 Violations before the 2012 Indictment, section 5G1.3 would have applied instead of section 7B1.3. Unsurprisingly, section 5G1.3 also would have recommended that the sentences be run consecutively. *See* U.S.S.G. § 5G1.3(c) & n. 3(C).

Section 5G1.3(c) invests the district court with broad discretion in determining whether to run a sentence consecutively to, or concurrently with, an existing sentence. *See United States v. Rodriguez*, 715 F.3d 451, 451-52 (2d Cir. 2013) (*per curiam*). Under that guideline, courts should follow “the basic principle that a consecutive sentence should be imposed to the extent that it will result in a reasonable incremental penalty.” *Id.* at 452 (quoting *United States v. McCormick*, 58 F.3d 874, 878 (2d Cir. 1995)).

“A district court’s sentencing decisions under § 5G1.3 will not be overturned absent an abuse of discretion.” *Id.* at 452. Neither the Guidelines nor the commentary thereto require the district court to make specific findings with respect to section 3553(a) factors to support the imposition of a consecutive sentence under section 5G1.3. *See United States v. Brennan*, 395 F.3d 59, 69-70 (2d Cir. 2005); *see also United States v. Johnson*, 640 F.3d 195, 208-09 (6th Cir. 2011) (“There is no requirement that the district court state a ‘specific reason’ for a consecutive sentence” under section 7B1.3).

### C. Discussion

The sentence imposed by the district court was neither shockingly high nor unsupported by the law. To the contrary, the 48-month sentence was at the low end of the recommended Guidelines sentencing range of 46 to 57 months' imprisonment.

Moreover, the district court's sentence was reasonable under all the circumstances of this case. The defendant, on supervised release after serving a twelve-year sentence for narcotics offenses, was arrested for selling a panoply of drugs and leading the police on a high-speed chase from Bridgeport into Fairfield that ended when the defendant crashed into a house. *See* GA8. As a result of this criminal conduct, the defendant was brought twice before the district court: once, to answer for the violations of his supervised release, and again, after he was indicted. On both occasions, the defendant was released on bond, subject to strict conditions amounting to "house arrest."

Even under house arrest, however, the defendant continued selling narcotics, including heroin, crack, and Ecstasy. *See* GA9. As the district court observed before imposing sentence, the defendant's conduct "did fly in the face of two federal judges who took a chance on him." A66.

On appeal, the defendant asks this Court to second-guess the judgment of the district court,

arguing that the consecutive, 48-month sentence was substantively unreasonable in light of the nature of the underlying offense, the defendant's acceptance of responsibility and expression of remorse, his positive work history and strong family support, and his belief that a lengthy sentence will only increase the likelihood of recidivism. *See* Def. Br. at 12-13. The Court should not do so.

The court below sentenced the defendant for the underlying crimes and for the supervised release violations at the same proceeding. Because of this, the court heard, and could carefully consider, all of the arguments now being repeated on appeal as to the appropriate sentence to be imposed. The judgment of the court below deserves deference, derived from its "distinct institutional advantages" at sentencing, including the opportunity to "interact directly with the defendant . . . thereby gaining insights not always conveyed by a cold record." *United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2786 (2013).

The criminal conduct admitted by the defendant amounted to serious violations of federal narcotics laws, as well as to flagrant violations of the conditions of the defendant's supervised release. Accordingly, the district court's decision to impose a consecutive, 48-month sentence on those violations did not result in a "shockingly high" sentence, but rather in an appropriate in-

cremental punishment that fell at the low end of the recommended Guidelines sentencing range.

**Conclusion**

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

Dated: December 30, 2013

Respectfully submitted,

DEIRDRE M. DALY  
UNITED STATES ATTORNEY  
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, appearing to read "H. Gordon Hall". The signature is written in a cursive, flowing style with a large initial "H" and a long, sweeping underline.

H. GORDON HALL  
ASSISTANT U.S. ATTORNEY

Edward Chang  
Assistant United States Attorney (of counsel)

## **Addendum**

**Fed. R. Crim. P. 32.1(b)(2)**

**Revocation Hearing.** Unless waived by the person, the court must hold the revocation hearing within a reasonable time in the district having jurisdiction. The person is entitled to:

(A) written notice of the alleged violation;

(B) disclosure of the evidence against the person;

(C) an opportunity to appear, present evidence, and question any adverse witness unless the court determines that the interest of justice does not require the witness to appear;

(D) notice of the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; and

(E) an opportunity to make a statement and present any information in mitigation.

**U.S.S.G. § 7B1.3(f).**

Any term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of probation or supervised release.