

# 13-399

*To Be Argued By:*  
JONATHAN S. FREIMANN

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**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 13-399**

UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

CHKAN HODGE, aka Shock Rock,  
*Defendant-Appellant.*

(For continuation of Caption, See Inside Cover)

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 (Ellen Bree Burns, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on January 18, 2013. Joint Appendix (“JA\_\_”) 7, JA42-44. On January 30, 2013, the defendant filed a timely notice of appeal, pursuant to Fed. R. App. P. 4(b), JA7, JA45, and this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

**Statement of Issue  
Presented for Review**

Whether the five-year term of supervised release imposed by the district court at resentencing was procedurally and substantively reasonable in light of the defendant's lengthy drug-related criminal history and need for help in transitioning from incarceration.

# United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 13-399

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UNITED STATES OF AMERICA,

*Appellee,*

-vs-

CHKAN HODGE,

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*Defendant-Appellant.*

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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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## **Preliminary Statement**

The defendant, Ch'khan Hodge,<sup>1</sup> pleaded guilty to one count of possession with intent to distribute 5 grams or more of cocaine base and was initially sentenced to 60 months' imprisonment and four years of supervised release. After

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<sup>1</sup> The docket identifies the defendant as "Chkan Hodge," but the defendant's first name is "Ch'khan."

the Supreme Court held that the new mandatory minimum threshold quantities in the Fair Sentencing Act of 2010 (“FSA”) should apply to defendants sentenced after its enactment, *see Dorsey v. United States*, 132 S. Ct. 2321 (2012), this Court remanded Hodge’s case for a *de novo* resentencing. A different district court judge then resentenced the defendant to 46 months’ imprisonment and five years’ supervised release. Having waived his right to appeal the incarceration portion of his sentence, the defendant challenges the district court’s imposition of a five-year term of supervised release as procedurally and substantively unreasonable.

On the record below, Hodge’s arguments should be rejected. The district court faithfully discharged its duty to explain its sentence in light of the statutory factors, the offense conduct and Hodge’s background and personal characteristics. Moreover, the defendant argued for the assistance of the probation office as he transitioned from incarceration to liberty. The sentence of five years’ supervised release was reasonable given the district court’s interest in reducing Hodge’s likelihood of recidivism. The district court’s judgment should be affirmed.

### **Statement of the Case**

On December 2, 2009, a federal grand jury returned an indictment charging the defendant and eight other individuals with narcotics re-

lated offenses. JA8-14. Specifically, the defendant was charged in Count One with conspiring to possess with intent to distribute five grams or more of cocaine base (“crack”), in violation of Title 21, United States Code, Sections 841(a)(1)(1), (b)(1)(B) and 846, and in Count Five with possession with intent to distribute five grams or more of cocaine base, in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(B). JA8-9, JA11.

On February 9, 2010, Hodge pleaded guilty to Count Five of the Indictment. JA3-4. The plea agreement contained an appeal waiver provision, in which the defendant waived his right to appeal or collaterally attack his sentence if it did not exceed 87 months of imprisonment, a 4-year term of supervised release, and a \$75,000 fine. Government Appendix (“GA\_\_”) 5.

On December 8, 2010, the Honorable United States District Court Judge Christopher F. Droney heard arguments regarding whether the threshold quantities in the FSA should be applied to the defendant. JA5, GA16-27. Judge Droney agreed with the government’s position at that time, ruling that the FSA was not applicable to the defendant’s case involving pre-FSA conduct, and, accordingly, that the defendant was subject to the five-year mandatory minimum. GA26-27. Judge Droney then sentenced the defendant to the mandatory minimum sen-

tence of 60 months' imprisonment, followed by 4 years of supervised release. GA42.

On December 14, 2010, judgment entered on Judge Droney's sentence. JA5. On December 21, 2010, the defendant filed a timely notice of appeal, JA5, docketed as No. 10-5189 in this Court.

On June 6, 2011, the defendant filed his brief, in which he argued that the threshold quantities in the FSA should have applied in his case. On October 12, 2011, the government concurred with the defendant's position and filed a motion for a remand to the district court for a full resentencing. On December 1, 2011, the government filed a motion to hold the appeal in abeyance, pending the Supreme Court's decision in *Dorsey v. United States*. After *Dorsey* was decided, the government filed a letter pursuant to Fed. R. App. P. 28(j) again requesting that the case be remanded for a full re-sentencing.

On October 18, 2012, this Court vacated the defendant's sentence and remanded for *de novo* resentencing. JA25.

On January 18, 2013, the district court (Ellen Bree Burns, J.)<sup>2</sup> held a *de novo* sentencing hearing and sentenced the defendant to 46 months' imprisonment, five years' supervised release, and a \$100 special assessment. JA7, JA42.

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<sup>2</sup> While the defendant's appeal was pending, Judge Droney was elevated to the Second Circuit and the case was transferred to Judge Burns.

Judgment entered on January 18, 2013, JA7, and on January 30, 2013, the defendant filed a timely notice of appeal, JA7, JA45.

Hodge was released from custody on April 4, 2013, and began his term of supervised release the same day.

## **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 his guilty plea, his original sentencing or his resentencing. GA70-73, GA13-15, JA40-41.<sup>3</sup>

During a federal investigation into Stamford area drug trafficking organizations and their New York based sources, investigators learned that Carlos Marte Santos, also known as “Cesar” and “Shorty,” was the source of supply for several large scale cocaine dealers from the Stamford, Connecticut area. *See* PSR ¶¶ 6-14.

Hodge was one of Santos’s dealers and was arrested in connection with one transaction he completed with Santos. In a telephone call on November 17, 2009, Hodge told Santos, “Hey,

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<sup>3</sup> While the defendant did not dispute the actual facts, he did object to the inclusion of the conduct of his co-defendants in the PSR. GA13-15.

I'm on my way up there. Uh, fifteen.” PSR ¶ 15. Shortly after this call, Hodge drove up to and entered the building where Santos was known to operate his drug trafficking operation in the Bronx, New York. PSR ¶ 15. A woman waited in the car while Hodge was inside. PSR ¶ 15. Approximately five minutes later, Hodge came out of the building, returned to his car, and left. *See* PSR ¶ 15.

Law enforcement officers followed Hodge's car from New York to Stamford, Connecticut. PSR ¶ 15. Once Hodge was in Stamford, local police officers stopped the car for a motor vehicle violation. PSR ¶ 15. When the officers smelled marijuana in the car, they called in a K9 unit; the narcotics dog alerted to multiple areas of the car, indicating the presence of narcotics. PSR ¶ 15. The woman in the car admitted to the officers that Hodge had given her narcotics and told her to hide them in her pants. PSR ¶ 15. Eventually, 14 grams of crack cocaine was retrieved from the woman. PSR ¶ 15.

### **B. The guilty plea hearing**

On February 9, 2010, Hodge pleaded guilty in front of Judge Dronev to Count Five of the indictment, which charged him possession with intent to distribute 5 grams or more of cocaine base, in violation of Title 18, United States Code, Section 841(a)(1), 841(b)(1)(B). JA3-4, GA48-78. At the outset of the plea proceeding, the district

court placed Hodge under oath and questioned him to determine his competence to enter a guilty plea. GA51-54. The court then advised Hodge of the rights that he would be waiving by pleading guilty. GA55-58. Hodge stated that he understood his rights and that he was willing to waive those rights in order to enter a plea of guilty. GA58.

Next, the court directed the government to summarize the plea agreement in order to ensure that Hodge understood all of its terms. GA60-63. The government explained that, pursuant to the agreement, Hodge had agreed to plead guilty to Count Five of the indictment. GA60. The government further explained that, pursuant to the plea agreement, it would not seek a sentencing enhancement under Title 21, United States Code, Section 851, even though Hodge's prior convictions made him eligible for such an enhancement. GA60-61. The government explained the statutory penalties outlined in the plea agreement, specifically a mandatory minimum of 5 years' imprisonment and a maximum penalty of 40 years' imprisonment, and a term of supervised release of four years to life. GA60. The government also detailed the guideline stipulation set forth in the plea agreement. GA61-62. Pursuant to that stipulation, the parties agreed that Hodge's total offense level was a level 21 and that he fell within Criminal History Category V, resulting in a guideline range of 70

to 87 months' imprisonment and a term of supervised release of at least four years. GA61-62. Finally, the government explained that Hodge had waived his right to appeal or collaterally attack his sentence provided it did not exceed 87 months' imprisonment, a four-year term of supervised release and a \$75,000 fine. GA62. The court then canvassed Hodge on the terms of the appellate waiver; Hodge acknowledged that he understood and that he was willing to waive his right to appeal. GA63.

Upon inquiry of the court, Hodge acknowledged that the government had accurately summarized the terms of the plea agreement and that his decision to plead guilty was made freely and voluntarily. GA63-64. The court then filed the signed plea agreement. GA64.

After reviewing the signed plea agreement, the court advised Hodge that he was going to review the statutory penalties for the offense to which the defendant was pleading guilty. GA64. In particular, the court advised Hodge that Count Five carried a mandatory minimum penalty of five years' imprisonment, a maximum penalty of 40 years' imprisonment, a mandatory minimum term of supervised release of as much as life, and a fine. GA64-65. The court also explained the operation of the sentencing guidelines and advised Hodge that the parties' recommendation was not binding upon the court. GA66-68. Finally, the court advised Hodge that

he would have no right to withdraw his guilty plea should the court impose a sentence greater than the ranges set forth in the plea agreement. GA68.

Next, the court outlined the elements of the offense and the government explained the evidence that it would have presented had the case gone to trial. GA69-73. Hodge agreed that the government had accurately described the evidence against him. GA73. Hodge then entered a plea of guilty to Count Five of the indictment; the court accepted his plea. GA74-75.

### **C. The first sentencing hearing**

In preparation for sentencing, the Probation Office prepared a PSR. As explained below, the PSR identified numerous factors relevant to sentencing, including Hodge's criminal record, his family history, his education, his employment history and his extensive use and abuse of controlled substances. *See* PSR ¶¶ 36-63.

On December 8, 2010, Hodge appeared before Judge Droney for sentencing. JA5. The court spent a significant portion of this sentencing hearing on arguments regarding whether the threshold quantities in the FSA should be applied to the defendant. GA16-27. Ultimately, the court agreed with the government's position at that time, ruling that the FSA was not applicable to the defendant's case involving pre-FSA conduct, and, accordingly, that the defendant

was subject to the five-year mandatory minimum. GA27.

The court adopted the factual statements contained in the PSR, about which there were no objections. GA32. The court also noted that the Guidelines, as amended by the FSA, called for a recommended Guidelines range of 46 to 57 months' imprisonment, which became five years because of the statutory mandatory minimum. GA34. The court also found a Guidelines range of four to five years of supervised release. GA34.

The court then heard argument regarding the appropriate sentence. The government highlighted the defendant's three prior felony drug convictions and his return to selling narcotics just a year after being released from prison for selling drugs and while still on probation. GA35. Defense counsel noted Hodge's "tumultuous upbringing" and said,

I think Mr. Hodge has tremendous potential, but he's going to need some help when he is released, particularly with his drug addiction. So I would expect that the Court, and request that the court include among his conditions of supervised release, providing him with services that will help him with that. *I think that's going to be the key thing going forward.*

GA36-37 (emphasis added).

The court then discussed the factors guiding its sentencing decision, noting the defendant's prior criminal record and probation status, as well as his "particularly difficult childhood." GA41-42. The court then indicated it would have given a "materially different sentence" had the FSA applied to the defendant. The court then sentenced Hodge to serve a 60-month term of imprisonment followed by 4 years of supervised release. GA42. Finally, the court advised Hodge of his right to appeal explaining that he had 14 days within which to file an appeal. GA44. The court reminded Hodge that he had waived his right to appeal or collaterally attack his sentence as long as it did not exceed a 87-month term of imprisonment and a four-year term of supervised release. GA44.

#### **D. The appeal and remand**

Hodge appealed to challenge the district court's refusal to apply the FSA to his case. After *Dorsey*, the government moved to remand to the district court for resentencing. On October 18, 2012, this Court vacated Hodge's sentence and remanded for *de novo* sentencing. JA25.

#### **E. The resentencing hearing**

On remand, the Probation Office prepared an Addendum to the Presentence Report, which recalculated the statutory penalties and Guidelines range faced by the defendant. More specifi-

cally, the PSR Addendum noted that Hodge no longer faced any mandatory minimum penalty and faced a maximum of 20 years' imprisonment, and 3 years to life of supervised release. See PSR Addendum. The PSR as amended also recalculated Hodge's guidelines range as 46 to 57 months' imprisonment, based on a total offense level of 17 and a Criminal History Category of V. See PSR Addendum.

On January 18, 2013, Judge Burns held a *de novo* sentencing hearing. JA7. The court noted that it had considered the respective sentencing memoranda filed in the case. JA27. Later, the court confirmed that the defendant had read the PSR and had no additional objections to it. JA40-41.

During the resentencing hearing, the defense counsel sought a sentence of time served, arguing that

[Hodge] comes from a very rough childhood . . . It's rougher than most that I've seen. Not only were his parents abusive; the families that he went to live with after he was separated from his parents were also abusive . . . [Hodge] has his period of struggles . . . *I would put my trust on helping him transition into the probation office . . .* [Hodge has] discussed significant periods of depression, even contemplating suicide at times in his life. *So I note from the probation office, he could get the men-*

*tal health evaluation and the counseling that he needs, if he were to come out today.*

JA29-31 (emphasis added.)

The government then requested a guidelines sentence, noting that the defendant's crime was ongoing, that he had three prior drug-related felonies, and that "his history has shown every time he's out [of prison], he goes back to illegal drugs." JA35.

The court then sentenced the defendant to the bottom of the guidelines range for incarceration, 46 months. JA37. The court noted that there was "a relatively short period left to serve."<sup>4</sup>

The court then sentenced the defendant to five years of supervised release. The court explained its reasoning for increasing this part of the sentence:

I think that the gentleman needs the guidance of the probation office. I know he goes off the appropriate behavior every once in a while, and I think the probation office will be able to give him the kind of guidance and assistance to keep him on the right track . . . This is an opportunity

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<sup>4</sup> In fact, the defendant's resentencing took place on January 18, 2013, and he finished his term of incarceration on April 4, 2013.

for you to get on the right track, and I hope you do.

JA37-38.

When defense counsel reminded the district court that the previous district court judge had only sentenced Hodge to a four-year term of supervised release. JA39. The court responded,

He did, you're right, but I'm resentencing him . . . Yes, I am [increasing the length]. I think that your client needs guidance. I think he needs the help of the probation office, and always of course a probation officer can approach me and ask to terminate the period, as long as they feel that he has accomplished everything that's necessary under supervised release. But I really would like to have him have that guidance for that period of time. I think he needs it. . . . As I say, reviewing the whole situation, it seems to me that he would benefit from continued supervision by the probation department. I think it would help him get back into the appropriate conduct, if he had some guidance of the probation office. . . .

JA39. Later, the judge addressed Hodge about her hopes for his time on supervised release: "I think, sir, if you conform to the requirements of the supervised release, you're going to come out of this experience hopefully with no further con-

tact with the justice system, okay? I really do hope so. Good luck.” JA41.

### Summary of Argument

Hodge argues that the district court committed both procedural and substantive error in imposing the five-year term of supervised release.<sup>5</sup> He also argues that by imposing this term of supervised release the district court contradicted the purpose of the FSA and the law of the case. These claims lack merit. In requesting an immediate release from incarceration, Hodge emphasized his need to be supervised by probation to ensure he did not return to criminal activity. The district court considered the statutory factors and discussed on the record the defendant’s long criminal history involving drugs, his troubled past, and his need for help to avoid returning to criminal activity. Thus, the court gave an adequate explanation and justification for the five-year term of supervised release, and any procedural error was not plain and did not affect Hodge’s substantial rights.

The defendant’s incarceration sentence was reduced, pursuant to the FSA. The term of supervised release was not contrary to the FSA, but rather given in accordance with the purpose

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<sup>5</sup> Hodge waived his right to appeal the term of imprisonment and limits his appeal to a challenge to the length of the term of supervised release. *See* Def.’s Brief at 5.

of supervised release—to ease the defendant’s transition into the community and provide him with rehabilitation opportunities and supervision.

Hodge’s substantive reasonableness claim likewise fails. The facts set forth in the PSR reflect a serious offense, a lengthy criminal history involving illegal narcotics, an extensive substance abuse problem, and mental health concerns. These facts were more than sufficient to support the district court’s conclusion that the defendant required a five-year term of supervised release. Further, the resentencing was *de novo* and the district court was not bound by the previous court’s sentence.

## **Argument**

### **I. The district court’s sentence of five years of supervised release was procedurally and substantively reasonable.**

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

##### **1. Reviewing a sentence for reasonableness**

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 the history and characteristics of the defendant”; (2) the need for the sentence to serve various goals of the criminal justice sys-

tem, 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. *Id.* As to the length and conditions of supervised release, the sentencing court should consider the factors specified in §§ 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7). *See* 18 U.S.C. § 3583(c).

Following *United States v. Booker*, 543 U.S. 220 (2005), appellate courts are to review sentences for reasonableness, which amounts to review for “abuse of discretion.” *Gall v. United States*, 552 U.S. 38, 41 (2007); *United States v. Watkins*, 667 F.3d 254, 260 (2d Cir. 2012); *United States v. Cavera*, 550 F.3d 180, 187 (2d Cir. 2008) (en banc). This reasonableness review consists of two components: procedural and substantive review. *Cavera*, 550 F.3d at 189.

Substantive review is exceedingly deferential. The Second Circuit 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.'" *Id.* (quoting *United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007)). This review is conducted based on the totality of the circumstances. *Id.* at 190. Reviewing courts must look to the individual factors relied on by the sentencing court to determine whether these factors can "bear the weight assigned to [them]." *Id.* at 191. However, in making this determination, appellate courts must remain appropriately deferential to the institutional competence of trial courts in matters of sentencing. *Id.* In particular, as this Court has recognized, "[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.'" *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006) (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 deference is appropriate, however, only when a reviewing court determines that the sentencing court has complied with the procedural requirements of the Sentencing Reform Act. *Cavera*, 550 F.3d at 189-90. Sentencing courts commit procedural error if they fail to calculate the Guidelines range, erroneously calculate the Guidelines range, treat the Guidelines as mandatory, fail to consider the factors required by statute, rest their sentences on clearly erroneous findings of fact, or fail to adequately explain the sentences imposed. *Id.* at 190. These requirements, however, should not become “formulaic or ritualized burdens.” *Id.* 550 F.3d at 193. This Court thus presumes that a district court has “faithfully discharged [its] duty to consider the statutory factors” in the absence of evidence in the record to the contrary. *Fernandez*, 443 F.3d at 30; *see also United States v. Sanchez*, 517 F.3d 651, 665 (2d Cir. 2008) (“In general, we are entitled to assume that the sentencing judge understood all the available sentencing options, including whatever departure authority existed in the circumstances of the case.”). Moreover, the level of explanation required for a sentencing court’s conclusion depends on the context. A “brief statement of reasons” is sufficient where the parties have only advanced simple arguments, while a lengthier explanation may be required when the parties’ arguments are more complex. *Cavera*, 550 F.3d at 193. Finally, the reason-giving requirement is more pronounced

the more the sentencing court departs from the Guidelines or imposes unusual requirements. *Id.* This procedural review, however, must maintain the required level of deference to sentencing courts' decisions and is only intended to ensure that "the sentence resulted from the reasoned exercise of discretion." *Id.*

## 2. Plain error review

A defendant may—by inaction or omission—forfeit a legal claim, for example, by simply failing to lodge an objection at the appropriate time in the district court.<sup>6</sup> Where a defendant has forfeited a legal claim, this Court engages in "plain error" review pursuant to Fed. R. Crim. P. 52(b). Applying this standard, "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 proceedings.'" *United States v. Marcus*, 560 U.S. 258, 262 (2010) (quoting *Puckett v. United*

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<sup>6</sup> While the defendant did object to the length of the supervised release term—the substantive reasonableness of the sentence—he did not object to any alleged procedural errors. JA39.

*States*, 556 U.S. 129, 135 (2009)); *see also Johnson v. United States*, 520 U.S. 461, 467 (1997); *United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *United States v. Wagner-Dano*, 679 F.3d 83, 94 (2d Cir. 2012).

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.*

## **B. Discussion**

This appeal comes to the Court on a largely undisputed record. The parties agreed to the PSR’s factual findings. GA80-73, GA13-15, JA40-41. Both parties recognized that the FSA’s application to the defendant reduced his incarceration exposure and that a period of incarceration below his initial sentence was appropriate. Indeed, in its argument at the *de novo* resentencing, it was the defendant who emphasized his need for supervision by the probation office once he was released from prison.

Against this backdrop, Hodge now asserts that the five-year term of supervised release imposed by the district court was both procedurally

and substantively unreasonable. *See* Def.’s Brief at 14. This argument lacks merit. The district court did not commit plain error in articulating the basis for its five-year term of supervised release, which reflected both the statutory factors set forth in § 3553(a) and the undisputed facts contained in the PSR. Moreover, the court did not abuse its discretion in determining that the defendant’s lengthy criminal record and history of drug abuse and mental health problems warranted a supervised release term of five years.

**1. The five-year term of supervised release imposed by the district court was procedurally reasonable.**

Nothing in the record indicates that the district court failed to consider the statutory factors or committed procedural error in imposing the five-year term of supervised release. To the contrary, the district court understood the post-FSA statutory and guidelines ranges, which were undisputed, as they applied to the defendant. At the outset of the *de novo* resentencing hearing, the defense counsel recounted the prior proceedings involving the FSA’s applicability to Hodge. JA27-28. The new statutory penalties and guidelines were outlined in the PSR, which the district court later referenced. PSR Addendum, JA40-41. Further, when sentencing the defendant to a prison term of 46 months, it noted that this was the “bottom of the guideline range.” JA37.

The court considered the arguments by counsel. In fact, in asking for a sentence of time served, the defendant focused the district court on the defendant's mental health struggles and troubled past. JA29-31. The defense counsel further emphasized that the defendant needed the probation office's assistance in making a transition from imprisonment, telling the court, "I would put my trust on helping him transition into the probation office . . . So I note from the probation office, he could get the mental health evaluation and the counseling that he needs, if he were to come out today." JA31. Similarly, the government, in asking for a guidelines sentence, noted that the defendant's history indicated that whenever he was released from prison, he quickly returned to illegal drugs, as he had done in this case. JA35.

This Court "presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged [his] duty to consider the statutory factors." *Fernandez*, 443 F.3d at 30; *see also Sanchez*, 517 F.3d at 665 ("In general, [this Court is] entitled to assume that the sentencing judge understood all the available sentencing options . . . ." (internal quotations omitted)). "No robotic incantations are required to prove the fact of consideration,' and we will not assume a failure of consideration simply because a district court fails to enumerate or discuss each [statutory] factor individual-

ly.” *United States v. Verkhoglyad*, 516 F.3d 122, 131 (2d Cir. 2008) (quoting *Fernandez*, 443 F.3d at 30). While this presumption most often arises in the context of the statutory factors a district court must consider in imposing a term of imprisonment, it also applies in the context of the statutory factors that a court must consider in setting a term of supervised release. See *United States v. Sero*, 520 F.3d 187, 192 (2d Cir. 2008) (per curiam).

There is nothing in the record to overcome the presumption that the district court faithfully considered the Section 3553(a) factors in imposing the five-year term of supervised release. The district court explained in significant detail the factors it considered in imposing the five-year term of supervised release, actually echoing many of the arguments put forth by the defendant:

I think that the gentleman needs the guidance of the probation office. I know he goes off the appropriate behavior every once in a while, and I think the probation office will be able to give him the kind of guidance and assistance to keep him on the right track . . .

\* \* \*

This is an opportunity for you to get on the right track, and I hope you do.

\* \* \*

I think that your client needs guidance. I think he needs the help of the probation office . . . I really would like to have him have that guidance for that period of time. I think he needs it.

\* \* \*

As I say, reviewing the whole situation, it seems to me that he would benefit from continued supervision by the probation department. I think it would help him get back into the appropriate conduct, if he had some guidance of the probation office.

\* \* \*

[Addressing the defendant:] I think, sir, if you conform to the requirements of the supervised release, you're going to come out of this experience hopefully with no further contact with the justice system, okay? I really do hope so. Good luck.

JA37-41. In short, the district court sentenced the defendant to a five-year term of supervised release primarily to deter him from returning to criminal activity, to protect the public from such recidivism, and to provide the defendant with the training, medical care and other correctional treatment he needs to transition from prison and discontinue his pattern of quickly returning to the drug trade. The district court's explanation demonstrates that it properly considered the Section 3553(a) requisite factors.

Finally, to the extent that the district court did err, this error was not plain, did not affect Hodge's substantial rights and did not seriously impact the integrity of the judicial proceedings. It is difficult to conceive how Hodge's substantial rights could have been impacted or how the integrity of the judicial proceedings could have been undermined given that the underlying purpose of the supervised release term was to ensure that Hodge receive substance abuse and mental health treatment, and thereby avoid the pattern of recidivism indicated by his criminal record.

The defendant also argues that the district court's imposition of a five-year term of supervised release contradicted the FSA's goal of reducing the penalties for crack cocaine sentences by changing the thresholds for mandatory minimum penalties and decreasing the associated guidelines ranges. However, the court recognized these goals by sentencing the defendant below the pre-FSA mandatory minimum 60 month sentence and actually sentencing Hodge to the bottom of the post-FSA guidelines range, 47 months of imprisonment.

The fact that the court did not also reduce his supervised release term is not inconsistent with the FSA. "Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarce-

ration.” *United States v. Johnson*, 529 U.S. 53, 59 (2000). *See also id.* (“[T]he primary goal [of supervised release] is to ease the defendant’s transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who has spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release.” (quoting S. Rep. No. 98-225, p. 124 (1983))). The district court’s comments during the resentencing hearing show that it imposed the defendant’s sentence in accordance with the goals of supervised release.

**2. The five-year term of supervised release imposed by the district court was substantively reasonable.**

Hodge asserts that the five-year term of supervised release was substantively unreasonable. *See* Def.’s Brief at 21-23. In substance, Hodge argues that because the first judge had sentenced him to a four-year term of supervised release, it was inappropriate for the second judge to increase that sentence at the *de novo* resentencing hearing. Def.’s Brief at 22-23. In fact, Hodge suggests that the *de novo* resentencing was arbitrary because it was different. Def.’s Brief at 23. These contentions fail for several reasons.

First, the factual findings contained in the PSR detailed a personal history which fully supported the imposition of a lengthy term of supervised release. More specifically, the PSR set forth the serious offense conduct in which the defendant was engaged, including the fact that Hodge instructed a female associate to hide the crack cocaine in her pants to avoid criminal detection at the time of his arrest, his lengthy criminal record, his troubled upbringing, his ongoing battle with drug addiction, and his serious mental health issues. PSR ¶¶ 15, 24, 36-54, 58-59.

Second, Hodge's criminal history fully supported the imposition of a lengthy supervised release term to lessen his likelihood of recidivism, an issue of obvious concern for the court. JA37, JA39-41. Hodge not only had three prior drug-related felonies, but also had been released from prison for selling drugs just over a year before returning to selling drugs in the instant offense. In fact, he was on probation for selling narcotics when he possessed the crack he intended to sell in this case. PSR ¶¶ 37, 38, 42. In other words, Hodge's criminal history suggested a propensity for recidivism; every time he was released from prison, he seemed to return to criminal activity involving drugs. Even his previous term of court supervision had failed to keep him from returning to sell drugs. PSR ¶ 42.

Further, in imposing a five-year term of supervised release, the court seemed to concur with the arguments put forth by the defendant when he requested to be immediately released from prison. Hodge's counsel had noted his mental health concerns and his period of struggles to stay within the law and stated, "I would put my trust on helping him transition into the probation office . . . So I note from the probation office, he could get the mental health evaluation and the counseling that he needs, if he were to come out today." JA29-31. So while the court did not find an incarceration term of time-served to be appropriate, it did agree with the defendant that the probation office's guidance and resources were essential to affording him the treatment he needed to keep from returning to criminal activity.

Finally, the defendant's claim that the district court should have been bound by the prior district court's sentence regarding supervised release is also meritless. There is no dispute that when this Court remanded this case for a resentencing, it specified that the resentencing would be *de novo*. JA25. When a mandate calls for a *de novo* resentencing, it allows the "parties to reargue issues previously waived or abandoned." *United States v. Malki*, 718 F. 3d 178, 182 (2d Cir. 2013). At the defendant's *de novo* resentencing, the district court had an obligation to independently consider the § 3553(a) factors in de-

termining the proper sentence. Here, after lowering Hodge's incarceration term, the district court determined that he needed additional support from the probation office to transition from prison and end his cycle of recidivism. As such, the court properly exercised its discretion at the *de novo* resentencing.

In sum, the district court properly considered the statutory factors in selecting a term of supervised release. In light of Hodge's offense conduct, significant criminal history, risk of recidivism, and need for treatment for mental health and drug addiction issues, the term of supervised release was not "shockingly high" so as to warrant reversal. *See Rigas*, 583 F.3d at 123.

## Conclusion

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

Dated: November 25, 2013

Respectfully submitted,

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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".

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

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 6,363 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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## **Addendum**

**18 U.S.C. 3553(a)**

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

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

**(2)** the need for the sentence imposed--

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

**(B)** to afford adequate deterrence to criminal conduct;

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

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

**(3)** the kinds of sentences available;

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

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

**(i)** issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United

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

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

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

**(5)** any pertinent policy statement--

**(A)** issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

**(B)** that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.<sup>1</sup>

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

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

#### **18 U.S.C. § 3583(c)-(d)**

**(c) Factors to be considered in including a term of supervised release.**--The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7).

**(d) Conditions of supervised release.**--The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision and that the defendant not unlawfully possess a controlled substance. The court shall order as an explicit condition of supervised release for a defendant convicted for the first time of a domestic violence crime as defined in section 3561(b) that the defendant attend a public, private, or private nonprofit offender rehabilitation program that has been approved by

the court, in consultation with a State Coalition Against Domestic Violence or other appropriate experts, if an approved program is readily available within a 50-mile radius of the legal residence of the defendant. The court shall order, as an explicit condition of supervised release for a person required to register under the Sex Offender Registration and Notification Act, that the person comply with the requirements of that Act. The court shall order, as an explicit condition of supervised release, that the defendant cooperate in the collection of a DNA sample from the defendant, if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000. The court shall also order, as an explicit condition of supervised release, that the defendant refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release on supervised release and at least 2 periodic drug tests thereafter (as determined by the court) for use of a controlled substance. The condition stated in the preceding sentence may be ameliorated or suspended by the court as provided in section 3563(a)(4). The results of a drug test administered in accordance with the preceding subsection shall be subject to confirmation only if the results are positive, the defendant is subject to possible imprisonment for such failure, and either the defendant denies the accuracy of such test or there is some other reason to question the results of the test. A drug test con-

firmation shall be a urine drug test confirmed using gas chromatography/mass spectrometry techniques or such test as the Director of the Administrative Office of the United States Courts after consultation with the Secretary of Health and Human Services may determine to be of equivalent accuracy. The court shall consider whether the availability of appropriate substance abuse treatment programs, or an individual's current or past participation in such programs, warrants an exception in accordance with United States Sentencing Commission guidelines from the rule of section 3583(g) when considering any action against a defendant who fails a drug test. The court may order, as a further condition of supervised release, to the extent that such condition--

**(1)** is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

**(2)** involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

**(3)** is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

any condition set forth as a discretionary condition of probation in section 3563(b) and any other condition it considers to be appropriate, provided, however that a condition set forth in subsection 3563(b)(10) shall be imposed only for a

violation of a condition of supervised release in accordance with section 3583(e)(2) and only when facilities are available. If an alien defendant is subject to deportation, the court may provide, as a condition of supervised release, that he be deported and remain outside the United States, and may order that he be delivered to a duly authorized immigration official for such deportation. The court may order, as an explicit condition of supervised release for a person who is a felon and required to register under the Sex Offender Registration and Notification Act, that the person submit his person, and any property, house, residence, vehicle, papers, computer, other electronic communications or data storage devices or media, and effects to search at any time, with or without a warrant, by any law enforcement or probation officer with reasonable suspicion concerning a violation of a condition of supervised release or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.