07-2270-cr

To Be Argued By:
CALVIN B. KURIMAI

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-2270-cr

UNITED STATES OF AMERICA
Appellee,

-vs-

BRIAN PETERS,
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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Table of Contents

Table of Authorities

Cases

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.

Statutes

Rules

Guidelines

Statement of Jurisdiction

The district court (Droney, J.) had subject matter jurisdiction over this federal criminal case under 18 U.S.C. § 3231. On April 12, 1999, Defendant was sentenced to 96 months of imprisonment to be followed by three years of supervised release.

On May 11, 2007, the district court revoked Peters' supervised release pursuant to 18 U.S.C. § 3583(e)(3). On May 25, 2007, judgment was entered. On that same date, Defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a) and 28 U.S.C. § 1291.

Statement of Issue
Presented for Review

The district court sentenced Defendant to 18 months in prison, which was below the advisory ranges for supervised release violations that are Grade A (33-41 months) or Grade B (21-27 months), and below the statutory maximum of 24 months. Did the district court err by not specifically determining the grade of Defendant's violation, where it explicitly considered the two potentially applicable ranges?

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-vs-

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Defendant Brian Peters was initially sentenced in 1999 to a total of 96 months of incarceration, followed by three years of supervised release, for possession of marijuana and a 9 millimeter semiautomatic pistol with the serial number removed. Defendant began his supervised release on March 30, 2005. He was arrested less than a year later on March 7, 2006, for possession of a controlled substance with intent to sell.

At a supervised release revocation hearing held on May 11, 2007, Defendant admitted that he had violated a condition of his supervised release. During the hearing, the district court inquired about the relevant Guideline range and statutory maximum. After hearing comments from the government, defense counsel, Defendant, and reviewing exhibits, the district court imposed a sentence of 18 months of incarceration, followed by a year of supervised release, without objection from either party. Defendant appeals this sentence, arguing for the first time on appeal that the district court erred by failing to determine whether his violation of supervised release conditions constituted a Grade A or Grade B violation.

The district court did not plainly err in sentencing Defendant to 18 months in prison without deciding whether his violation fell under Grade A or Grade B, since the sentence was below the 24-month statutory maximum; and that sentence fell below the advisory guideline ranges applicable to either a Grade A (33-41 months) or a Grade B (21-27 months) violation.

Statement of the Case

On June 23, 1999, a federal grand jury in Connecticut returned a one-count indictment charging Defendant-Appellant Brian Peters with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g), Docket No. 3:99cr129(CFD).

On October 20, 1999, Defendant pleaded guilty to a two-count substitute information charging him with

violating 18 U.S.C. § 922(k) for possession of a firearm with the serial number removed and violating 21 U.S.C. § 844 for possession of a controlled substance. *See* Joint Appendix ("J.A.") at 11.

On April 12, 2000, the district court (Droney, J.) sentenced Defendant to imprisonment for 60 months on Count One and 36 months on Count Two, to be served consecutively. J.A. at 13.[1] The court further imposed a three-year term of supervised release on Count One and a two-year term on Count Two to run concurrently. J.A. at 13.

On March 30, 2005, Defendant began his term of supervised release. J.A. at 15.

On March 7, 2006, Defendant was arrested and charged with several state drug violations. J.A. at 15.

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[1] A violation of § 844 is, for a first offense of simple possession of a controlled substance, a misdemeanor. However, a conviction for such an offense after two or more prior convictions for drug offenses is punishable, in part, by imprisonment for not less than 90 days but not more than three years. Defendant had three prior state convictions for sale of narcotics, resulting in a sentence of three years of imprisonment on Count Two of the substitute information. Those prior convictions also qualified Defendant as an armed career criminal pursuant to 18 U.S.C. § 924(e).

On January 18, 2007, Defendant pleaded guilty in Connecticut Superior Court, under the *Alford* doctrine,[2] to possession with intent to sell narcotics. J.A. at 15.

On April 27, 2007, the Probation Office filed a Report of Violation of Supervised Release with the district court. J.A. at 16-19.

On May 11, 2007, the court conducted a hearing regarding the violation of supervised release, and Defendant admitted having violated a condition of his release, namely the requirement not to commit another criminal offense. J.A. at 37. The court found that Defendant had violated this condition, and sentenced him to 18 months of incarceration followed by a one-year term of supervised release. J.A. at 37, 45.

Judgment entered on May 25, 2007. J.A. at 7.

Defendant filed a notice of appeal on May 25, 2007. J.A. at 7.

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[2] Under *North Carolina v. Alford*, 400 U.S. 25 (1970), a trial court does not commit constitutional error in accepting a guilty plea from a defendant who, while maintaining his innocence, voluntarily pleads guilty in the face of strong evidence against him.

Statement of Facts

On April 12, 2000, Defendant was sentenced to a total of eight years in prison and three years of supervised release following his guilty plea in federal court to a two-count substitute information charging him with possession of a 9 millimeter semiautomatic pistol with the serial number removed and possession of marijuana after two or more prior narcotic offenses. J.A. at 11, 13. Also, on that date, the indictment charging Defendant with violating 18 U.S.C. § 922(g) was dismissed. J.A. at 6.

Defendant began serving his supervised release on March 30, 2005. J.A. at 15. On March 7, 2006, Defendant was arrested and charged in Connecticut Superior Court with Sale of a Certain Illegal Drug, Drugs Near a School, and Possession of a Controlled Substance Within 1500 Feet of a School. J.A. at 17. On January 18, 2007, Defendant plead guilty under the *Alford* doctrine to a single count of possession with intent to sell narcotics. J.A. at 17. As part of his state-court plea, Defendant agreed to a sentence of eight years of incarceration, to be suspended after one year, and to be followed by three years of probation. J.A. at 17. That sentence was ultimately imposed on June 7, 2007.

On May 11, 2007, Defendant appeared in district court for a supervised release violation hearing. J.A. at 20. Defendant admitted that he had violated the conditions of his supervised release by being convicted of possessing narcotics with intent to sell. J.A. at 36. The district court

thus found that Defendant had violated his supervised release. J.A. at 37.

The district court inquired about the applicable statutory and Guideline ranges. The court understood that the maximum statutory sentence was twenty-four months. J.A. at 25. The court next asked the government for the applicable grade of violation under the Guidelines. The government, having moments before consulted the probation officer, responded "The Probation Office, your Honor, has recommended that this is a Grade A violation," and noted that this called for a Guideline range of 33 to 41 months. J.A. at 25. In its Report of Violation of Supervised Release, the Probation Office did not recommend whether the violation should be classified as Grade A or Grade B. Rather, the report stated the applicable range under both grades while noting the statutory maximum. J.A. at 17. However, the court next asked the government to clarify the range under a Grade B violation, which was 21 to 27 months. J.A. at 25. Thus, the court was aware of the applicable Guideline ranges under both relevant grades.

The court next solicited statements from the government regarding Defendant's sentence. The government highlighted Defendant's initial charge, under the dismissed indictment, for which he faced at least 15 years in prison. J.A. at 38. The government further noted Defendant's prior three convictions for the sale of narcotics, which was the same charge resulting in the supervised release violation. J.A. at 38. In light of Defendant's criminal history and the need for deterrence,

the government asked for a sentence in excess of one year. J.A. at 38.

Defense counsel also addressed the court, emphasizing Defendant's attempts at rehabilitation during his supervised release. J.A. 39. He emphasized Defendant's move from New Haven to West Hartford and explained Defendant's success at Gibbs College in a graphic arts training program. J.A. at 39. As evidence, the court was shown samples of Defendant's work. J.A. at 40. Finally, defense counsel asked the court to impose a sentence of incarceration of a year or less, so Defendant could continue his education and better manage his student loan debts. J.A. at 42. Counsel admitted, "I know it's a big request in view of Brian's past," but explained that if Defendant was not enrolled in school for more than one year, his loan debt would become payable, making it difficult for Defendant to obtain other educational loans. J.A. at 42.

The court finally heard from Defendant himself, who explained that he was attempting to work diligently and pay taxes. J.A. at 43. Defendant stated that he needed to continue working in order achieve success, although he recognized that "I have to pay for whatever was done." J.A. at 43.

After hearing from the parties, the court sentenced Defendant to eighteen months of incarceration, followed by one year of supervised release. J.A. at 45, 52. The court noted Defendant's "good progress" in moving, pursuing employment, and receiving education. J.A. at 45.

However, the court recognized the "many set backs and violations during his supervised release" and his "considerable prior criminal record." J.A. at 45. The court finally noted that "the conviction in this case was of substantial criminal offenses." J.A. at 45. The court issued its sentence "[b]ased on [the previous conditions described], my finding that Mr. Peters violated the condition of his supervised release, and with consideration to the factors set forth at 18 U.S.C. § 3583, as well as Chapter VII of the United States Sentencing Commission Guidelines manual, and statements made by the defendant, his counsel, and the Assistant United States Attorney." J.A. at 45-46.

After pronouncing sentence, the court asked both attorneys, "[D]o you know of any reason, other than the reasons you may have already stated, that [the] sentence should not be imposed as the Court has stated?" J.A. at 46. Both attorneys responded "no." *Id.* The court, while concluding the proceeding, accommodated Defendant's request for voluntary surrender after the receipt of his next paycheck, but declined to allow him to remain free on bond until the Bureau of Prisons designated the facility at which he would serve his sentence. J.A. at 47. The court said, "I'd rather have him go into custody. I was going to remand him today, but if he'd like to stay out to get that paycheck, I'm willing to accommodate that." *Id.* The court ultimately ended the proceeding by asking, "Is there anything else to take up concerning Mr. Peters this afternoon?" J.A. at 48-49. Both parties responded "no." J.A. at 49.

In the written judgment of conviction, the district court explained why it was imposing a sentence of 18 months irrespective of the grade of the violation:

> This sentence was imposed below the advisory guidelines range for A or B violations (*see* U.S.S.G. § 7B1.1) because of his efforts in pursuing employment opportunities and moving from an environment which encouraged criminal activity.

J.A. at 51.

Summary of Argument

The district court did not plainly err when it sentenced Defendant without specifically determining the grade of violation under the Guidelines. The district court imposed an 18-month sentence, which was below the Guidelines ranges applicable to both Grade A and Grade B violations. Because the statutory maximum was 24 months, the Guidelines range for a Grade A violation, normally 33-41 months, became 24 months. Likewise, the Guidelines range for a Grade B violation, normally 21-27 months, was capped by the statutory maximum at 21-24 months. Given the district court's awareness of both potentially applicable ranges, together with its reasonable determination that a non-Guidelines sentence below both ranges was appropriate, there was no need for the district court to resolve any dispute over the grade of the violation. This Court stated, in *United States v. Crosby*, that a district court need not definitively choose which of two disputed

guidelines ranges is applicable, if the Court has decided to impose a non-Guidelines sentence regardless of which range applies. The court identified the applicable Guideline ranges, heard arguments from the government, Defendant and his counsel, and stated its specific reasons for the sentence. In its written judgment, the Court explained why it was selecting a sentence below either the Grade A or Grade B ranges. Because Judge Droney's sentencing decision was fully consistent with *Crosby*, there was no error, much less one that was "plain."

Moreover, Defendant has not satisfied his burden of demonstrating that any purported error affected his substantial rights – that is, he has not shown that his sentence would have been lower if Judge Droney had articulated whether Defendant's offense constituted a Grade A or Grade B violation. This Court has repeatedly stated its desire to give deference when reviewing a sentencing judge's "consideration" of the advisory policy statements under 18 U.S.C. § 3553. This deference is particularly merited when a district court is imposing a sentence upon revocation of supervised release. Judges are presumed to have considered all arguments and policies presented, including the Guidelines, unless the record clearly indicates otherwise. Here, the district court identified the potentially applicable Guidelines ranges, heard arguments from the government, Defendant, and his counsel, and stated its specific reasons for the sentence. No more is required.

Argument

I. The district court did not plainly err in sentencing Defendant without specifically defining the guideline grade of the violation.

A. Governing law and standard of review

Sentencing courts have the statutory authority, after "considering the factors set forth in [§§ 3553(a)(1), (a)(2)(B)-(D), and (a)(4)-(7)]. . . [to] revoke a term of supervised release" and impose a new prison sentence as "authorized by statute." 18 U.S.C. § 3583(e)(3). Any sentence imposed shall be "sufficient but not greater than necessary" to demonstrate the "seriousness of the crime," acknowledge the "history and characteristics of the defendant," encourage "adequate deterrence," protect the public, generate respect for the law, provide "just punishment," and allow for "correction treatment in the most effective manner." 18 U.S.C. § 3553(2)(A)-(D).

"[A] violation of supervised release is a serious matter." *United States v. Huerta,* 371 F.3d 88, 91 (2d Cir. 2004). A sentencing court has broad discretion to revoke an earlier grant of supervised release and impose imprisonment up to the statutory maximum, after due consideration to policy statements and the Guidelines. *See United States v. Pelensky*, 129 F.3d 63, 69 (2d Cir. 1997); *United States v. Wirth,* 250 F.3d 165, 169 (2d Cir. 2001); *United States v. Jones*, 460 F.3d 191,195 (2d Cir. 2006) (noting that post-*Booker* sentencing judges have an "enhanced scope" of discretion). A sentencing judge

handling the revocation of supervised release must consider non-binding factors such as policy statements and the Guidelines, but is not required to sentence within any advisory range. *Goffi,* 446 F.3d at 322-23. Rather, the sentence need only be consistent with the general provisions of sentencing pursuant to 18 U.S.C. § 3553. *Id.*

In *United States v. Booker*, the Supreme Court held that sentences are to be reviewed for reasonableness. 543 U.S. 220, 262-63 (2005). Reasonableness review is similar to review for abuse of discretion, in which the reviewing judge considers whether the decision can "be located within the range of permissible decisions, or is based on an error of law or clearly erroneous factual finding." *United States v. Sindima*, 488 F.3d 81, 85 (2d Cir. 2007) (internal quotation marks omitted). Reviewing judges should demonstrate restraint rather than micro-management over sentences. *Sindima,* 488 F.3d at 85; *Fleming*, 397 F.3d at 100. This approach has been adopted because reasonableness is flexible in meaning, "generally lacking precise boundaries." *United States v. Fairclough*, 439 F.3d 76, 79 (2d Cir.), *cert. denied*, 126 S. Ct. 2915 (2006).

The Court has generally divided reasonableness review into procedural and substantive reasonableness. For a sentence to be procedurally reasonable, the Court must review whether the sentencing court identified the Guidelines range based upon found facts, treated the Guidelines as advisory, and considered the other § 3553(a) factors. *United States v. Cavera*, No. 05-4591-cr(L), 2007 WL 1628799, *2 (2d Cir. June 6, 2007). Substantive

reasonableness is contingent upon the length of the sentence in light of the case's facts. *Id.* at *2.

This Court has upheld a sentence imposed upon revocation of supervised release when the judge considered the § 3553 policy statements, imposed a sentence below the statutory maximum, and the sentence was reasonable. *Pelensky*, 129 F.3d at 69. Similarly, this Court has concluded that when the judge gives the parties a chance to object, considers the Guidelines as advisory, recognizes the sentencing factors (such as the applicable guidelines range), and explains the reasons for a sentence, then a sentence imposed upon revocation of supervised release is reasonable. *See United States v. Avello-Alvarez*, 430 F.3d 543, 544 (2d Cir. 2005).

When imposing sentence, a court "shall consider" the factors listed in 18 U.S.C. § 3553(a), including the relevant Guidelines and policy statements issued by the Sentencing Commission. 18 U.S.C. § 3553(a)(4)(B). The judge must state in open court the reasons behind the given sentence. 18 U.S.C. § 3553(c)(2). In making the statement of reasons mandatory, Congress intended that the court "(1) inform the defendant of the reasons for his sentence, (2) permit meaningful appellate review, (3) enable the public to learn why the defendant received a particular sentence, and (4) guide probation officers and prison officials in developing a program to meet defendant's needs." *United States v. Molina,* 356 F.3d 269, 277 (2d Cir. 2004). Stating no reasons at all falls "plainly" short of fulfilling this statutory requirement. *Lewis*, 424 F.3d at 245 (internal citations omitted).

Even a brief statement will suffice, however, so long as it includes an adequate articulation of reasoning. For example, in *Rita v. United States,* 127 S. Ct. 2456, 2468-69 (2007), the district court imposed a sentence falling within the applicable Guidelines range and explained simply that this range was not "inappropriate." The Supreme Court held that although "the judge might have said more," what he did say was sufficient. "Where a matter is as conceptually simple as in the case at hand and the record makes clear that the sentencing judge considered the evidence and arguments, we do not believe the law requires the judge to write more extensively." *Id.* at 2469. *Rita* therefore confirms this Court's long line of cases declining to require "incant[ation] of specific language" mirroring the § 3553 factors. *United States v. Lewis*, 424 F.3d 239, 245 (2d Cir. 2005); *see also United States v. Goffi,* 446 F.3d 319, 321 (2d Cir. 2006) (requiring only a "statement of specific reasons" for a sentence, rather than a "robotic incantation"); *United States v. Pereira,* 465 F.3d 515, 523 (2d Cir. 2006) (noting that an "enumerat[ion]" of the consideration process is unnecessary); *United States v. Fleming*, 397 F.3d 95, 99 (2d Cir. 2005) ("no rigorous requirement of specific articulation"); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005) (noting that consideration does not "impose[] any rigorous requirement of specific articulation by the sentencing judge"); *United States v. Rattoballi*, 452 F.3d 127, 138 (2d Cir. 2005) (requiring only a "simple fact-specific statement" to depart from Guidelines). Furthermore, a judge need not address every "specific argument bearing on the implementation of those factors"

in order to execute the required consideration. *United States v. Fernandez,* 443 F.3d 19, 29 (2d Cir. 2006).

This Court further presumes that a sentencing judge considers all arguments presented, unless the record clearly suggests otherwise. *See United States v. Carter,* 489 F.3d 528, 540-41 (2d Cir. 2007), *pet'n for cert. filed,* No. 07-6441 (Sept. 06, 2007); *Fernandez*, 443 F.3d at 29-30. This presumption is particularly applicable when the judge emphasizes that all submissions have been heard and the § 3553 factors have been considered. *See United States v. Banks*, 464 F.3d 184, 190 (2d Cir. 2006) ("[T]here is no requirement that the court mention the required [§ 3553(a)] factors, much less explain how each factor affected the court's decision. In the absence of contrary indications, courts are generally presumed to know the laws that govern their decisions and to have followed them."), *pet'n for cert. filed*, No. 07-5969 (July 27, 2007); *Fernandez,* 443 F.3d at 29-30 ("We will not conclude that a district judge shirked her obligation to consider the § 3553(a) factors simply because she did not discuss each one individually or did not expressly parse or address every argument related to those factors that the defendant advanced.").

This Court has continued to distinguish between policy statements and sentencing guidelines, holding that "'a court's statements for its reasons for going beyond non-binding *policy statements* in imposing a sentence after revoking a defendant's supervised release term need not be as specific as has been required when courts departed from *guidelines* that were, before *Booker*, considered to be

mandatory.'" *United States v. Hargrove*, No. 06-4276-cr, 2007 WL 2324008, at *5 (2d Cir. Aug. 16, 2007) (quoting *Lewis*, 424 F.3d at 245) (holding that court need not give notice before *sua sponte* imposing sentence outside advisory guideline range in supervised release revocation cases).

In *Crosby*, this Court explained that not every dispute about Guideline calculations need always be resolved:

> Precise calculation of the applicable Guidelines range may not be necessary. . . . [S]ituations may arise where either of two Guidelines ranges, whether or not adjacent, is applicable, but the sentencing judge, having complied with § 3553(a) makes a decision to impose a non-Guidelines sentence, regardless of which of the two ranges applies. . . We recognized that additional situations may arise where the sentencing judge would not need to resolve every factual issue and calculate the precise Guidelines range, because the resolution of those issues might not affect a non-Guidelines sentence if the sentencing judge chooses to impose it.

Crosby, 397 F.3d at 112, 122 n.12.

When a defendant raises an argument for the first time on appeal, this Court can reverse only if there is (1) an error (2) that is plain (3) which affected the substantial rights of the defendant (4) and seriously affected the fairness, integrity, or public reputation of the judicial

proceedings. *See* Fed. R. Crim. P. 52(b); *United States v. Johnson*, 520 U.S. 461, 466-67 (1997); *United States v. Olano,* 507 U.S. 725, 732-36 (1993); *Carter*, 489 F.3d at 537; *Lewis,* 424 F.3d at 243 (employing plain error analysis for review of sentence after revocation of supervised release where no objection raised); *Molina*, 356 F.3d at 277 (using plain error standard when no objections raised to court's failure to follow the "open court" requirement under § 3553); *United States v. Warren*, 335 F.3d 76, 78 (2d Cir. 2003) (employing plain error analysis to review sentence imposed after supervised release where defendant failed to object to his new sentence during the revocation proceeding).

Error is "[d]eviation from a legal rule" that has not been waived. *Olano,* 507 U.S. at 732-33. That error must be "'clear' or, equivalently, obvious . . . under current law." *Id.* at 734 (internal citations omitted). An error is generally not "plain" under Rule 52(b) unless there is binding precedent of this Court or the Supreme Court, except "in the rare case" where it is "so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite defendant's failure to object." *United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004) (internal quotation marks and citations omitted). The error must have affected substantial rights, that is, "must have been prejudicial . . . having affected the outcome of the district court proceedings." *Id.* When those three conditions are met, an appellate court may exercise its discretion to correct the error "but only if the error seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings." *Johnson*, 520

U.S. at 466-67 (internal quotation marks and citations omitted).[3]

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[3] Citing *United States v. Sofsky*, 287 F.3d 122, 125 (2d Cir. 2002), and *United States v. Simmons,* 343 F.3d 72, 80 (2d Cir. 2003), the defense suggests that the plain error standard may be relaxed in certain circumstances when the claimed error arises in a sentencing context. Even if there is some vitality to the cited language in *Sofsky* and *Simmons*, those cases turned on the conjunction of *two* factors: (1) that the error have occurred at sentencing, and (2) that it involved the imposition of a condition of supervised release as to which the defendant had not received the requisite advance notice. *Sofsky*, 287 F.3d at 125-26 ("*Both* because the alleged error relates only to sentencing *and because Sofsky lacked prior notice*, we will entertain his challenge without insisting on strict compliance with the rigorous standards of Rule 52(b).") (emphasis added); *see also Simmons*, 343 F.3d at 80 ("Both [of the *Sofsky*] justifications are present in this case."). This Court has expressly held that plain error analysis must be applied "with Rule 52(b)'s full rigor" where the decision below did not "surprise" the appellant. *United States v. Gordon*, 291 F.3d 181, 191 (2d Cir. 2002).

In any event, this Court has just today held that "rigorous plain error analysis is appropriate" for unpreserved claims that a district court has failed "to properly consider all of the § 3553(a) factors." *United States v. Villafuerte*, No. 06-1292-cr, mem. op at 6-7 (2d Cir. Sept. 21, 2007). As pointed out in the text above, this Court has explicitly addressed the very question of whether a district court must settle definitively upon the applicable guideline range if decides to impose a non-Guidelines sentence. Accordingly, one "cannot view this class of issues as novel," and so no relaxed standard of review

(continued...)

B. Discussion

1. The district court fulfilled its obligation to consider all the relevant § 3553 factors, including the Guidelines

The record more than adequately indicates that the sentencing judge considered the § 3553 factors, including the applicable statutory and Guideline ranges. First, the judge inquired as to the maximum period of incarceration that Defendant faced, which was 24 months. J.A. at 24. Second, the judge established the potentially applicable Guideline ranges by specifically questioning the parties about the ranges that would apply to either a Grade A or B violation. The court was advised that in Defendant's criminal history category of VI, a Grade A violation yielded an advisory range of 33 to 41 months of imprisonment. The court was aware that a Grade B violation prescribed imprisonment for 21 to 27 months. J.A. at 25. The sentencing judge thus appropriately established the relevant ranges, and therefore discharged his duty to consider the Guidelines. *Crosby,* 397 F.3d at 112-13; *Pereira,* 465 F.3d at 523-24. Further, the judge explicitly described the two arguably applicable ranges on the record, thereby triggering a presumption that he properly considered them. *See Fleming,* 397 F.3d at 100; *Carter,* 489 F.3d at 540-41.

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[3] (...continued)
should apply. *Id.* at 8.

Defendant asserts that the sentencing court failed to adequately determine the relevant Guidelines range because he failed to determine the grade violation of the offense. The court *did* consider the relevant ranges, though not with the narrow specificity Defendant requests. For the purposes of Defendant's case, the Guidelines involved consideration of both Grade A *and* B ranges. *Crosby,* 397 F.3d at 113. In the present case, the judge imposed a non-Guideline sentence below the ranges for both grades in question, therefore not requiring a specific finding regarding the grade of violation. Pursuant to U.S.S.G. § 7B1.4(b)(1), the statutory maximum of 24 months effectively capped Defendant's Guidelines imprisonment ranges – yielding, for a Grade A violation, a range of 24 months, and for a Grade B violation, 21 to 24 months. Defendant received only 18 months. The written judgment makes plain that Judge Droney considered both violation grades, but sentenced Defendant below both in recognition of Defendant's efforts at rehabilitation. J.A. at 51.

Judge Droney's decision was entirely consistent with this Court's explanation that where a judge "makes a decision to impose a non-Guidelines sentence, regardless of which of . . . two ranges applies," the Court need not proceed to "[p]recise calculation of the applicable guidelines range." *Crosby,* 397 F.3d at 113. In the pre-*Booker* era, this Court followed a similar rule, permitting district courts to avoid resolving disputed issues to determine which of two Guidelines ranges applied if the district court decided to make a permissible departure regardless of which range was applicable. *See, e.g.,*

United States v. Borrego, 388 F.3d 66, 68-70 (2d Cir. 2004); *cf. United States v. Bermingham*, 855 F.2d 925, 930-32 (2d Cir. 1988) (holding that court need not choose between two overlapping ranges if court imposes sentence within overlap and states that sentence would have been same regardless of which range applied).

Defendant cites *United States v. McNeil*, 415 F.3d 273 (2d Cir. 2005), in support of his contention that the sentencing court relied on a legally incorrect interpretation of the Guidelines by failing to define the grade of violation. Defendant is correct that this Court requires sentencing judges to follow a "legally correct interpretation of the Guidelines." *McNeil*, 415 F.3d at 277. However, *McNeil* does *not* hold that judges must specifically define the grade of violation when imposing a non-Guidelines sentence. Rather, in *McNeil*, the defendant argued that the calculation of the relevant range was incorrect because the court classified his crime as a Grade A felony when it should have been Grade B. *Id.* at 278. The court "expressly relied on the inappropriate range" when imposing the sentence, thus prompting this Court to find a reversible error. *Id.* at 279. In the present case, however, the district court did not rely on a legally incorrect range – he considered two potentially applicable ranges and decided to give the defendant the benefit of a lower sentence than either of them.[4]

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[4] For the same reason, Defendant's reliance on *United States v. Savarese*, 404 F.3d 651 (2d Cir. 2005), is misplaced. In that case, the sentencing court misinterpreted the law (continued...)

The court also fulfilled its obligation to state the reasons for imposing the sentence. In explaining the sentence, the court stated that "Mr. Peters has made some good progress . . . . Unfortunately, he [has] also had many set backs and violations . . . including domestic violence and selling drugs again." J.A. at 44. Further, the court explicitly referenced Defendant's "prior criminal record" and noted that "the conviction in this case was of substantial criminal offenses." *Id.* The court was aware of Defendant's prior narcotic offenses, and that Defendant violated his supervised release by committing the same crime that previously had qualified him as an armed career criminal. J.A. at 38. Even defense counsel noted that a sentence of incarceration of less than a year was "a big request in view of Brian's past." J.A. at 42.

The record indicates that the sentencing court explicitly balanced all relevant factors before imposing an 18 month sentence. *See Rita,* 127 S. Ct. at 2469 (affirming in part because record showed that district judge listened to defendant's arguments). The court heard from all parties, and even accepted examples of Defendant's artwork. J.A. at 40. Upon hearing all arguments, the judge noted, "Mr.

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[4] (...continued)
regarding conspiracy, and thus incorrectly calculated the defendant's guideline range. *Id.* at 655. In the present case, the sentencing court did not make any incorrect Guideline calculations, but rather opted for a non-Guideline sentence that was lower than either of the potentially applicable ranges suggested by the policy statements in the Guidelines Manual.

Peters has made some good progress during supervised release." J.A. at 44. The written judgment confirms that the judge took this progress into consideration: "This sentence was imposed below the advisory Guidelines range for A or B violations because of his efforts in pursuing employment opportunities and moving from an environment which encouraged criminal activity." J.A. at 51. The sentencing judge balanced all of the relevant factors as required by § 3553. *Fernandez,* 443 F.3d at 29.

Because the sentencing court correctly identified the complete and relevant Guidelines range, treated the Guidelines as advisory, and considered the Guidelines with the other § 3553(a) factors, the sentence is procedurally reasonable. *See Sindima*, 488 F.3d at 84 n.8.

2. The district court correctly exercised its sentencing discretion by imposing a term of incarceration

Defendant asserts that the sentencing court needed to establish the applicable violation grade because a Grade B determination would allow him to serve part of his sentence from home. However, the record indicates the sentencing judge's intention that Defendant be incarcerated. A sentencing court may employ its discretion in creating a sentence that adequately punishes the particular defendant before the court. *Jones,* 460 F.3d at 195. The judge specifically noted Defendant's prior convictions and his "set backs" during supervised release. Given Defendant's recidivism, the court justifiably imposed incarceration. *See Sindima*, 488 F.3d at 87

(allowing recognition of similarities between supervised release violation and prior convictions); *United States v. Anderson*, 15 F.3d 278, 282 (2d Cir. 1994) (allowing consideration of Defendant's correctional needs); *Pelensky*, 129 F.3d at 70 (allowing violation of supervised release sentence to reflect defendant's disregard of court orders).

Further, the sentencing court is entitled to the presumption that it considered the issue regarding Defendant's educational loans while crafting a sentence. Defendant's counsel raised the issue during the sentencing hearing. As this Court has made clear, a sentencing judge is presumed to have considered all arguments presented absent a clear indication otherwise. *Carter*, 489 F.3d at 540-41. Simply because the sentencing judge did not explicitly mention the loans when imposing the sentence does not imply that the issue went unconsidered. *See Rita*, 127 S. Ct. at 2456; *Fernandez,* 443 F.3d at 29-30 (noting that reviewing Court will not assume a sentencing judge ignored an argument raised by defendant in the absence of specific evidence to the contrary). Rather, the sentencing court seemed to understand Defendant's financial situation by allowing him to remain at liberty until he received his next paycheck. J.A. at 47. The court granted liberty, despite stating its preference "to remand him today, " particularly "given the sentence he's facing here and in the Superior Court that the time has come for him to be remanded." *Id.* The statement further indicates the sentencing court's desire that Defendant be imprisoned.

Conclusion

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

Dated: September 21, 2007

Respectfully submitted,

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Addendum

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

(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--

A. **(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. [FN1]

(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.

(b) Application of guidelines in imposing a sentence.--

(1) In general.--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that 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 that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.--

(A) Sentencing.--In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless--

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has

committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the

reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission,, [FN3] and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

(d) Presentence procedure for an order of notice.--Prior to imposing an order of notice pursuant to section 3555, the court shall give notice to the defendant and the Government that it is considering imposing such an order. Upon motion of the defendant or the Government, or on its own motion, the court shall--

(1) permit the defendant and the Government to submit affidavits and written memoranda addressing matters relevant to the imposition of such an order;

(2) afford counsel an opportunity in open court to address orally the appropriateness of the imposition of such an order; and

(3) include in its statement of reasons pursuant to subsection (c) specific reasons underlying its determinations regarding the nature of such an order.

Upon motion of the defendant or the Government, or on its own motion, the court may in its discretion employ any additional procedures that it concludes will not unduly complicate or prolong the sentencing process.

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases.-- Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or

406 of the Controlled Substances Act 21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act 21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of

conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

18 U.S.C. § 3583. Inclusion of a term of supervised release after imprisonment

(a) In general.--The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment, except that the court shall include as a part of the sentence a requirement that the defendant be placed on a term of supervised release if such a term is required by statute or if the defendant has been convicted for the first time of a domestic violence crime as defined in section 3561(b).

(b) Authorized terms of supervised release.--Except as otherwise provided, the authorized terms of supervised release are--

(1) for a Class A or Class B felony, not more than five years;

(2) for a Class C or Class D felony, not more than three years; and

(3) for a Class E felony, or for a misdemeanor (other than a petty offense), not more than one year.

(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 confirmation 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)(1) through (b)(10) and (b)(12) through (b)(20), and any other condition it considers to be appropriate. 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.

(e) Modification of conditions or revocation.--The court may, after considering the factors set forth insection 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)--

(1) terminate a term of supervised release and discharge the defendant released at any time after the expiration of

one year of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice;

(2) extend a term of supervised release if less than the maximum authorized term was previously imposed, and may modify, reduce, or enlarge the conditions of supervised release, at any time prior to the expiration or termination of the term of supervised release, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the terms and conditions of post-release supervision;

(3) revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on postrelease supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in

prison if such offense is a class C or D felony, or more than one year in any other case; or

(4) order the defendant to remain at his place of residence during nonworking hours and, if the court so directs, to have compliance monitored by telephone or electronic signaling devices, except that an order under this paragraph may be imposed only as an alternative to incarceration.

(f) Written statement of conditions.--The court shall direct that the probation officer provide the defendant with a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required.

(g) Mandatory revocation for possession of controlled substance or firearm or for refusal to comply with drug testing.--If the defendant--

(1) possesses a controlled substance in violation of the condition set forth in subsection (d);

(2) possesses a firearm, as such term is defined in section 921 of this title, in violation of Federal law, or otherwise violates a condition of supervised release prohibiting the defendant from possessing a firearm;

(3) refuses to comply with drug testing imposed as a condition of supervised release; or

(4) as a part of drug testing, tests positive for illegal controlled substances more than 3 times over the course of 1 year;

the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment not to exceed the maximum term of imprisonment authorized under subsection (e)(3).

(h) Supervised release following revocation.--When a term of supervised release is revoked and the defendant is required to serve a term of imprisonment, the court may include a requirement that the defendant be placed on a term of supervised release after imprisonment. The length of such a term of supervised release shall not exceed the term of supervised release authorized by statute for the offense that resulted in the original term of supervised release, less any term of imprisonment that was imposed upon revocation of supervised release.

(i) Delayed revocation.--The power of the court to revoke a term of supervised release for violation of a condition of supervised release, and to order the defendant to serve a term of imprisonment and, subject to the limitations in subsection (h), a further term of supervised release, extends beyond the expiration of the term of supervised release for any period reasonably necessary for the adjudication of matters arising before its expiration if, before its expiration, a warrant or summons has been issued on the basis of an allegation of such a violation.

(j) Supervised release terms for terrorism predicates.--Notwithstanding subsection (b), the authorized term of supervised release for any offense listed insection 2332b(g)(5)(B) is any term of years or life.

(k) Notwithstanding subsection (b), the authorized term of supervised release for any offense under section 1201 involving a minor victim, and for any offense under section 1591, 2241, 2242, 2243, 2244, 2245, 2250, 2251, 2251A, 2252,2252A, 2260, 2421, 2422, 2423, or 2425, is any term of years not less than 5, or life. If a defendant required to register under the Sex Offender Registration and Notification Act commits any criminal offense under chapter 109A, 110, or 117, or section 1201 or 1591, for which imprisonment for a term longer than 1 year can be imposed, the court shall revoke the term of supervised release and require the defendant to serve a term of imprisonment under subsection (e)(3) without regard to the exception contained therein. Such term shall be not less than 5 years.

Rule 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

U.S.S.G. § 7B1.1. Classification of Violations (Policy Statement)

(a) There are three grades of probation and supervised release violations:

(1) Grade A Violations--conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment exceeding one year that (i) is a crime of violence, (ii) is a controlled substance offense, or (iii) involves possession of a firearm or destructive device of a type described in 26 U.S.C. § 5845(a); or (B) any other federal, state, or local offense punishable by a term of imprisonment exceeding twenty years;

(2) Grade B Violations--conduct constituting any other federal, state, or local offense punishable by a term of imprisonment exceeding one year;

(3) Grade C Violations--conduct constituting (A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of supervision.

(b) Where there is more than one violation of the conditions of supervision, or the violation includes conduct that constitutes more than one offense, the grade of the violation is determined by the violation having the most serious grade.

U.S.S.G. § 7B1.4. Term of Imprisonment (Policy Statement)

(a) The range of imprisonment applicable upon revocation is set forth in the following table:

Revocation Table
(in months of imprisonment)
Criminal History Category
Grade of
Violation I II III IV V VI

Grade C 3-9 4-10 5-11 6-12 7-13 8-14

Grade B 4-10 6-12 8-14 12-18 18-24 21-27

Grade A (1) Except as provided in subdivision (2) below: 12-18 15-21 18-24 24-30 30-37 33-41

(2) Where the defendant was on probation or supervised release as a result of a sentence for a Class A felony: 24-30 27-33 30-37 37-46 46-57 51-63.
[FN*]The criminal history category is the category applicable at the time the
defendant originally was sentenced to a term of supervision.

(b) Provided, that--

(1) Where the statutorily authorized maximum term of imprisonment that is imposable upon revocation is less than the minimum of the applicable range, the statutorily authorized maximum term shall be substituted for the applicable range; and

(2) Where the minimum term of imprisonment required by statute, if any, is greater than the maximum of the applicable range, the minimum term of imprisonment required by statute shall be substituted for the applicable range.

(3) In any other case, the sentence upon revocation may be imposed at any point within the applicable range, provided that the sentence--

(A) is not greater than the maximum term of imprisonment authorized by statute; and

(B) is not less than any minimum term of imprisonment required by statute.