07-2659-cr

To Be Argued By:
CHRISTOPHER M. MATTEI

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-2659-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

EDDIE SMALLS,
Defendant-Appellant.

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

===

BRIEF FOR THE UNITED STATES OF AMERICA

===

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STATEMENT OF JURISDICTION

On March 30, 1998, Eddie Smalls, the defendant-appellant, pled guilty to a one-count indictment charging him with Possession with Intent to Distribute and Distribution of Cocaine Base, in violation of Title 21 of the United States Code, Section 841(a)(1). On October 12, 1999, the district court (Ellen B. Burns, Senior United States District Judge) sentenced the defendant to 72 months' incarceration, followed by a 5-year term of supervised release. The district court had subject matter jurisdiction pursuant to 18 U.S.C. § 3231.

On June 20, 2007, judgment entered in the District of Connecticut against the defendant after he was found to have violated two conditions of his supervised release. The district court imposed a sentence of 46 months' incarceration, and on June 19, 2007, the defendant filed a timely notice of appeal pursuant to Fed. R. App. 4(b). This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether, upon revocation of the defendant's supervised release, the district court plainly erred when it cited recent local gun violence before it imposed a sentence of incarceration at the bottom of the applicable Guidelines range to be served consecutively to the defendant's state sentence?

II. Whether the Guidelines sentence for a supervised release violation was substantively reasonable when the district court considered the conduct underlying the violation?

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Docket No. 07-2659-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

EDDIE SMALLS,

Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Defendant Eddie Smalls was initially sentenced in 1999 to a total of 72 months of incarceration, to be followed by 5 years of supervised release, for possession with intent to distribute cocaine base. The defendant began his supervised release in October 2003. He was arrested on January 19, 2007, and charged under Connecticut law with Criminal Possession of a Firearm,

Altering/Removing ID# of Firearm, Carrying a Pistol Without a Permit, and Possession of a Weapon in a Motor Vehicle. In March 2007, the defendant pled guilty to one or more of the firearms charges, and was sentenced to 8 years in prison.

At a supervised release revocation hearing held on June 13, 2007, the defendant admitted that he had violated two conditions of his supervised release. After hearing comments from the Government and defense counsel, the district court imposed a sentence of 46 months' incarceration – the low end of the Guidelines range – to be served consecutively to the defendant's state sentence, with no additional term of supervised release and without objection from either party. The defendant appeals this sentence, arguing for the first time on appeal that the district court erred by improperly considering recent, local gun violence and placing undue weight on the conduct underlying the defendant's violations.

The district court's sentence of 46 months' incarceration should be affirmed because the district court did not plainly err when it referred to recent, local gun violence or when it considered the conduct underlying the defendant's violation.

Statement of the Case

On November 12, 1997, a grand jury returned a one-count indictment against Eddie Smalls (the "defendant"), charging him with possession with intent to distribute and distribution of cocaine base, in violation of 21 U.S.C.

§ 841(a)(1). (Joint Appendix ("JA") 1; Government Appendix ("GA") 3). Thereafter, on October 12, 1999, having pled guilty to the offense charged in the indictment, the defendant was sentenced by the district court (Ellen B. Burns, Senior United States District Judge) to 72 months' incarceration followed by a 5-year term of supervised release. (JA 3; GA 7). The defendant's term of supervised release commenced in October 2003. (JA 3).

On January 19, 2007, the defendant was arrested by officers of the Bridgeport Police Department and charged with Criminal Possession of a Firearm, Altering/Removing ID# of Firearm, Carrying a Pistol Without a Permit, and Possession of a Weapon in a Motor Vehicle, all in violation of Connecticut law. (JA 3). On February 1, 2007, as a result of the defendant's arrest on multiple state charges, the United States Probation Office issued a Report of Violation of Supervised Release in which it charged the defendant with violating (1) the mandatory condition of supervised release prohibiting the defendant from committing another federal, state or local crime, and (2) the standard condition of supervised release prohibiting the defendant from associating with a convicted felon without permission from the probation officer. (JA 3-4).

In March 2007, the defendant pled guilty to one or more of the state firearms charges, and was sentenced to 8 years' incarceration. (JA 18-19).

On June 13, 2007, the district court held a hearing to determine whether the defendant had violated the conditions of his supervised release. (JA 14). At that

hearing the defendant conceded that he had violated the conditions of release charged in the Report of Violation of Supervised Release. (JA 19-20). The defendant requested a Guidelines sentence to run concurrently with the term of incarceration already imposed in state court. (JA 23). After determining that the appropriate Guidelines range was 46-57 months' incarceration, the district court imposed a sentence of 46 months' incarceration to be served consecutively to the defendant's state sentence. (JA 27). Judgment entered June 20, 2007, and this appeal followed. (GA 9).

The defendant is currently serving his state sentence.

Statement of Facts

On November 12, 1997, a grand jury returned a one-count indictment against the defendant, charging him with possession with intent to distribute and distribution of cocaine base, in violation of 21 U.S.C. § 841(a)(1). (JA 1). Thereafter, on October 12, 1999, having pled guilty to the offense charged in the indictment, the defendant was sentenced to 72 months' incarceration followed by a five-year term of supervised release. (JA 3; GA 7). The defendant's term of supervised release commenced in October 2003. (JA 3).

On January 19, 2007, officers of the Bridgeport Police Department made a routine traffic stop of a vehicle in which the defendant was traveling with another individual, Arthur Preston. (JA 3-4). Mr. Preston is a felon and, at the time of the defendant's arrest, was under federal

supervision. (JA 4). The officers searched the vehicle and found a firearm. (JA 3). Following the search of the vehicle, the defendant was arrested and charged with Criminal Possession of a Firearm, Altering/Removing ID# of Firearm, Carrying a Pistol Without a Permit, and Possession of a Weapon in a Motor Vehicle. (*Id.*) On January 20, 2007, the defendant admitted in a sworn statement to officers of the Bridgeport Police Department that he had possessed the firearm. (*Id.*)

On February 1, 2007, as a result of the defendant's arrest on multiple state charges, the United States Probation Office issued a Report of Violation of Supervised Release in which it charged the defendant with violating (1) the mandatory condition of supervised release prohibiting the defendant from committing another federal, state or local crime, and (2) the standard condition of supervised release prohibiting the defendant from associating with a convicted felon without permission from the probation officer. (JA 3-4). On March 14, 2007, the defendant and his counsel appeared in district court for a Supervised Release Violation Hearing. (JA 7, 9). At that hearing, the defendant conceded that he had violated the standard condition of supervised release prohibiting him from associating with a convicted felon without permission from the probation officer. (JA 9). Based on the defendant's admission, the district court found that the defendant had violated a condition of his supervised release. (JA 11). The district court then continued the hearing in order to permit the state charges, which were then pending against the defendant, to be resolved. (*Id.*)

In March 2007, the defendant pled guilty to one or more of the state firearms charges, and was sentenced to 8 years' incarceration. (JA 18-19).

On June 13, 2007, the Violation of Supervised Release Hearing resumed. (JA 14). The defendant, accompanied by counsel, conceded a violation of the mandatory condition of supervised release prohibiting him from committing another federal, state or local crime. (JA 19-20). Based on the defendant's admission (and his admission from the March proceeding), the district court entered a finding that the defendant had violated both charged conditions of his supervised release. (*Id.*)

The defendant requested that the district court impose a sentence of incarceration within the applicable Guidelines range to run concurrently to the sentence imposed in state court. (JA 23). In support of this request, the defendant argued that, prior to his arrest, he had complied with all the conditions of his supervised release. (JA 20). The defendant also argued that a concurrent sentence was sufficient to satisfy several of the goals of a criminal sentence, under 18 U.S.C. § 3553(a), including the need to protect the public, the need for specific and general deterrence and the need for rehabilitation. (JA 21-23).

The Government did not recommend a particular sentence, but did describe the defendant's significant history of firearms offenses. (JA 23-24). The Government also observed that the United States had considered charging the defendant federally based on the

same conduct underlying the state charges, but declined to bring such charges after the defendant pled guilty in state court. (JA 24-26).

Having heard from both the defendant and the Government, the district court calculated the applicable Guideline range to be 46-57 months. (JA 27). Neither the defendant, nor the Government objected to the district court's calculation. (*Id.*) Prior to imposing sentence, the district court made the following relevant comments:

> The firearms possession is a serious matter from the Court's point of view. In fact, I think I stated, this morning there were two more young men shot to death last night here in New Haven. Every day someone is shot in this state, and it is just appalling.
>
> I am disappointed that Mr. Smalls who began his supervised release service so well has unfortunately come into our court again on a serious, serious matter. And I do not think that it is appropriate to impose a concurrent sentence.
>
> I think some recognition has to [be] made that not only was the State law violated and potentially a federal law, but the terms of supervised release were violated. And there has to be an understanding among people who are on supervised release that violation of their conditions of release is going to incur sanctions from this Court.

> The question of course is what is necessary for the Court to impose to send that message, and at the same time take into consideration the fact that Mr. Smalls is already serving a significant State sentence.
>
> The Guideline range, as I understand it, is forty-six to fifty-seven months. I don't see any reason for a departure from the Guidelines or for a non-guideline sentence, but I do think the lower end of the Guideline range is appropriate. And therefore, I'm committing Mr. Smalls to the custody of the Bureau of Prisons for a period of forty-six months, consecutive to his current State sentence, and I am not imposing any supervised release thereafter.

(JA 26-27).

The court then asked whether there were "[a]ny comments from anybody." (JA 27). The Government responded, "None, your Honor." (*Id.*) Defense counsel responded, "No, your Honor." (*Id.*)

Summary of Argument

I. This Court should affirm the Guidelines sentence imposed by the district court because the district court's mention of recent, local gun violence did not constitute plain procedural error. The district court's comments were merely passing references to recent events, and in any event were properly considered by the district court as relevant to the court's concern with general deterrence.

Moreover, to the extent the defendant argues that the district court erred by considering policies or facts that were not unique to this case, that argument has been undermined by recent Supreme Court decisions. At a minimum, the district court's comments did not constitute "plain" error, did not affect the defendant's substantial rights, and did not undermine the fairness or integrity of the judicial proceeding.

II. The sentence imposed by the district court was substantively reasonable. The district court calculated the Guidelines range, considered the § 3553(a) factors, and imposed a Guidelines sentence. Although the defendant argues that the district court relied exclusively on one factor – the conduct underlying the supervised release violation – the record belies this claim. Under governing law, the district court properly considered this factor, and the weight afforded that factor in the sentencing process is a matter firmly committed to the discretion of the district judge.

ARGUMENT

I. The district court did not plainly err by imposing a guidelines sentence to be served consecutively to a term of incarceration imposed in state court.

At sentencing, the defendant failed to object, despite adequate opportunity, to the district court's sentence. The defendant now challenges the sentence imposed by the district court as procedurally and substantively unreasonable due to the district court's alleged reliance on

(1) the occurrence of recent, local gun violence, and (2) the seriousness of the state firearms offense underlying the defendant's violations. Having not objected at the sentencing hearing to the district court's alleged errors, the defendant must now show that the district court plainly erred in imposing a Guidelines sentence to be served consecutively to defendant's state sentence. The defendant cannot meet his burden because the record does not support a conclusion that the district court erred, much less plainly erred.

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 encourage "adequate deterrence," protect the public, generate respect for the law, and allow for "correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2)(B)-(D). In addition, the sentencing court should consider "the nature and circumstances of the offense and the history and characteristics of the defendant," the advisory Guidelines range and any pertinent policy statements, the "need to avoid unwarranted sentencing disparities" and the "need to provide restitution." *Id.* § 3553(a)(1), (4)-(7).

"A violation of supervised release is a serious matter." *United States v. Warren*, 335 F.3d 76, 79 (2d Cir. 2003).

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); *see also 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. *See, e.g., United States v. Goffi*, 446 F.3d 319, 322-23 (2d Cir. 2006). 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); *see also United States v. Fleming*, 397 F.3d 95, 99 (2d Cir. 2005) (sentences for supervised release violation revocation to be reviewed for reasonableness). Reasonableness review is a review for abuse of discretion, in which the reviewing court considers whether the decision can "be located within the range of permissible decisions, or is based either on an error of law or a clearly erroneous factual finding." *United States v. Sindima*, 488 F.3d 81, 85 (2d Cir. 2007) (internal quotation marks omitted). *See also Gall v. United States*, No. 06-7949, 2007 WL 4292116, *6 (U.S. Dec. 10, 2007) (explaining that reasonableness review is review for abuse of discretion). Reviewing courts 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. 2006) (per curiam) (quoting *United States v. Crosby*, 397 F.3d 103, 115 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 2915 (2006).

The Court has generally divided reasonableness review into procedural and substantive reasonableness. *United States v. Cavera*, 505 F.3d 216, 220 (2d Cir. 2007). For a sentence to be procedurally reasonable, the Court must review whether the sentencing court identified the Guidelines range based upon facts found by the court, treated the Guidelines as advisory, and considered the Guidelines along with the other § 3553(a) factors. *Id.* Substantive reasonableness "depends on whether the 'length of the sentence is reasonable in light of the factors outlined in 18 U.S.C. § 3553(a).'" *Id.* (quoting *United States v. Rattoballi*, 452 F.3d 127, 132 (2d Cir. 2006)).

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). And although the judge must state in open court the reasons behind the given sentence, 18 U.S.C. § 3553(c), robotic incantations of the § 3553(a) factors are not required, *see, e.g.*, *Goffi*, 446 F.3d at 321 (holding that "robotic incantations" are not required); *Crosby*, 397 F.3d at 113 (noting that consideration does not "impose[] any rigorous

requirement of specific articulation by the sentencing judge"). 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), *cert. denied*, 127 S. Ct. 192 (2006).

Indeed this Court presumes that a sentencing judge considers all arguments presented and all of the § 3553(a) factors, unless the record 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 30 ("[W]e 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."); *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."), *cert. denied*, 128 S. Ct. 332 (2007). This presumption is "especially forceful" when the judge emphasizes that all submissions have been heard and the § 3553 factors have been considered. *See Fernandez*, 443 F.3d at 29.

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; *United States v. Lewis*, 424 F.3d 239, 243-49 (2d Cir. 2005)(employing plain error analysis for review of sentence after revocation of supervised release where no objection raised); *Warren*, 335 F.3d at 78 (employing plain error analysis to review sentence imposed after supervised release where defendant failed to object to his 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. To be "plain," 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 the 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 . . . hav[ing] affected the outcome of the district court proceedings." *Olano*, 507 U.S. at 734. 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 467 (internal quotation marks and citations omitted).

The defendant urges this Court not to employ plain error review. Citing to cases from the Sixth Circuit, the defendant contends that plain error review is inappropriate because the district court did not offer the defendant a meaningful opportunity to object to its analysis. *See* Appellant's Brief at 7 n.8. In the Sixth Circuit, district judges have an affirmative duty after imposing sentence to inquire of counsel whether they have any objections "that have not previously been raised." *See United States v. Clark*, 469 F.3d 568, 570 (6th Cir. 2006), *cert. denied*, 128 S. Ct. 412 (2007). No such duty exists in the Second Circuit. Moreover, there is no authority in this Circuit that supports the defendant's position that the district court's solicitation of additional comments, and the defendant's affirmative refusal to object, amounts to a deprivation of the opportunity to object. (*See* JA 27).

This Court's recent decision in *United States v. Villafuerte*, 502 F.3d 204, 207-208 (2d Cir. 2007) squarely holds that "plain error" review applies to an unpreserved challenge to a sentencing court's "alleged failure to properly consider all of the § 3553(a) factors . . ." Here, the defendant's contention that the district court considered factors "outside the bounds of § 3553(a)," Appellant's Brief at 15, falls within the category of unpreserved sentencing errors covered by *Villafuerte*.

B. Discussion

1. The district court's passing reference to recent, local gun violence does not constitute error, much less plain error.

It is critical to note at the outset that the defendant has waived any challenge to the district court's imposition of a sentence within the applicable Guidelines range of 46-57 months' incarceration. Indeed, the defendant *requested* a Guidelines sentence at the Violation of Supervised Release Hearing. (JA 23) ("So we would respectfully ask that his sentence – that your Honor impose a sentence consistent with the Guidelines in this case and that the sentence runs concurrent."). Therefore, the only issue before this Court is whether the district court plainly erred by imposing a consecutive, rather than a concurrent, sentence. On this issue, the defendant fails to satisfy any of the four prongs of plain error analysis.

To begin with, the defendant fails to establish that the district court committed any error at all. As the defendant acknowledged below, the district court's decision to run his sentence consecutively, rather than concurrently, was within the judge's discretion. (JA 21) ("We are respectfully requesting, your Honor, a sentence concurrent with the sentence that he's currently serving. Under the statutes, your Honor does have discretion to impose a concurrent sentence."); *see also* U.S.SG. § 7B1.3(f) ("Any term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be

served consecutively to any sentence of imprisonment that the defendant is serving . . . .").

The defendant nevertheless asserts that the Guidelines sentence was procedurally unreasonable because the district court improperly considered the occurrence of recent, local gun violence. According to the defendant, the district court's following remarks render his Guidelines sentence procedurally unreasonable:

> In fact, I think I stated, this morning there were two more young men shot to death last night here in New Haven. Every day someone is shot in this state, and it is just appalling.

(JA 26). *See* Appellant's Brief at 9.

The totality of the record, however, establishes that the district court's observation concerning recent gun violence was merely a passing reference to an unfortunate state of affairs in New Haven and the District of Connecticut. The defendant's attempt to infer a nexus between the district court's passing remark and its refusal to impose a concurrent sentence is unavailing. The sentencing judge did not make this remark as part of her explanation of the reasons for the sentence. (*See* JA 26). Rather, the comment appears to have been made in response to the Government's summary of the defendant's lengthy criminal history, which consisted of an assortment of firearms convictions. (*See* JA 23-24). The district court's concise explanation for its sentence contains no reference

to any unrelated instances of gun violence in New Haven or Connecticut. The district court stated simply:

> I think some recognition has to [be] made that not only was the State law violated and potentially a federal law, but the terms of supervised release were violated. And there has to be an understanding among people who are on supervised release that violation of their conditions of release is going to incur sanctions from this Court.
>
> The question of course is what is necessary for the Court to impose to send that message, and at the same time take into consideration the fact that Mr. Smalls is already serving a significant State sentence.

(JA 26).

But even if the court's comments reflected a consideration of recent gun violence, such consideration was not error. The district court's mention of the general level of gun violence was entirely consistent with its statutory obligation to "consider the need for the sentence imposed . . . to afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2)(B). Here, the district court made clear that its sentence was designed, in part, to instill an understanding in others "who are on supervised release that violation of their conditions of release is going to incur sanctions from this Court." (JA 26). Viewed in this light, the district court's comment, though fleeting, was entirely within the bounds of § 3553(a)(2)(B) because

it reflected the district court's assessment of the need for the sentence to provide general deterrence to those on supervised release from violating their supervised release, particularly by virtue of illegally possessing a firearm. *See Jones*, 460 F.3d at 195 ("[T]he judge is not prohibited from including in [his] consideration [of the § 3553(a) factors] the judge's own sense of what is a fair and just sentence under all the circumstances."). Furthermore, the district court's conclusion that a consecutive sentence was necessary to provide sufficient deterrence to those who might be tempted to violate their supervised release by illegally possessing a firearm is supported by the Guidelines. *See* U.S.S.G. § 7B1.3(f) ("Any term of imprisonment imposed upon the revocation of probation or supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving . . ."). Here, the district court's comment regarding recent, local gun violence, even if relevant to the sentence imposed, reflected proper consideration of the need for the sentence to provide general deterrence. The consecutive nature of the sentence, which was advised by the Guidelines, was simply not the result of any error.

The defendant argues, nevertheless, that there was error in the district court's imposition of a consecutive sentence because the district court impermissibly considered "gun-related violence," i.e., community-specific information, rather than the unique nature and circumstances of the defendant's case. *See* Appellant's Brief at 9-12. In support of this argument, the defendant relies on a line of this Court's cases directing district

courts to tailor sentences to the specific facts of the cases before them and to avoid sentencing based on policy disagreements with the Guidelines. *See, e.g.*, *United States v. Trupin*, 475 F.3d 71, 76 (2d Cir. 2007) ("We have rejected general policy disagreements such as these on two occasions. . . . In the federal sentencing scheme, judges have a limited but important role: tailor a sentence based on defendant-specific considerations. The failure to do so renders a sentence unreasonable."), *petn. for cert. filed*, No. 06-12034 (June 22, 2007); *Cavera*, 505 F.3d at 219 (vacating an above-Guidelines sentence because the district court's departure was based on policy determinations and not the individual facts of the case); *Rattoballi*, 452 F.3d at 133 (noting that Court "will view as inherently suspect a non-Guidelines sentence that rests primarily upon factors that are not unique or personal to a particular defendant, but instead reflects attributes common to all defendants").

The cases relied upon by the defendant are inappposite. In those cases, the district courts made policy determinations unrelated to the particular defendant in order to justify *non-Guidelines* sentences. *See Cavera*, 505 F.3d at 219 (noting that Court is considering "when and u under what circumstances a district court may impose a non-Guidelines sentence"); *Trupin*, 475 F.3d at 72 (Court is reviewing a non-Guidelines sentence); *Rattoballi*, 452 F.3d at 128 (same). The concern expressed by this Court was with the district courts' decisions to sentence based on facts inconsistent with the policies embodied in the Guidelines or § 3553(a). *See, e.g., Trupin*, 475 F.3d at 76; *Cavera*, 505 F.3d at 223. Here, by

contrast, pursuant to the defendant's request, the district court imposed a *Guidelines* sentence. Thus, by definition, the sentence imposed was not based on a policy determination contrary to the policies embodied by the Guidelines or § 3553(a). *See Rita v. United States*, 127 S. Ct. 2456, 2463 (2007) (sentencing judge and Sentencing Commission (through Guidelines) are both "carrying out the same basic § 3553(a) objectives"); *id.* at 2464-65 ("[I]t is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives."); *Rattoballi*, 452 F.3d at 133 ("[T]he Guidelines cannot be called just 'another factor' in the statutory list, 18 U.S.C. § 3553(a), because they are the only integration of the multiple factors . . .") (citation omitted).

In any event, to the extent the defendant reads this Court's cases to prohibit a district court from relying on policy disagreements with the Guidelines or on factors beyond those specific to the particular case, that reading of the governing law – and potentially this Court's cases – has been undermined by the Supreme Court's recent decisions. In *Kimbrough v. United States*, No. 06-6330, 2007 WL 4292040 (U.S. Dec. 10, 2007), the Supreme Court considered whether a district court may consider the disparity in the sentencing guidelines governing crack cocaine and powder cocaine when selecting an appropriate sentence. In holding that this disparity is properly considered at sentencing (i.e., that a district court may rely on a policy disagreement with the Guidelines), the Court noted that "as a general matter, 'courts may vary [from Guidelines ranges] based solely on policy considerations,

including disagreements with the Guidelines." *Kimbrough*, 2007 WL 4292040, *10 (quoting Government's Brief). *See also Rita*, 127 S. Ct. at 2465 (noting that district court may consider an argument that "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations"); *id.* at 2468 (parties may "contest[] the Guidelines sentence generally under § 3553(a)" or "argue[] that the Guidelines reflect an unsound judgment"). Thus, to the extent the defendant relies on this Court's cases to establish a categorical bar on a district court's consideration of facts or policies not specifically tied to the case before it, that reading does not survive *Kimbrough* and *Rita*. In other words, under *Kimbrough* and *Rita*, there was no error here.

Moreover, the district court's consideration of local gun violence, if any, did not constitute plain error because such consideration was fully consistent with the district court's statutory obligation under 18 U.S.C. § 3553(a)(2) and with the Supreme Court's decisions in *Kimbrough* and *Rita*. At a minimum, in the context of a Guidelines sentence, such consideration, if any, is not plainly improper under governing law. *See Whab*, 355 F.3d at 158 (holding that this Court "typically will not find [plain error] where the operative legal question is unsettled, including where there is no binding precedent from the Supreme Court or this Court") (internal quotations omitted).

The district court's sentence should not be vacated because even if the district court's passing consideration of recent, local gun violence constituted obvious error in

derogation of binding precedent in this Circuit, such consideration did not affect the defendant's substantial rights. *See Olano*, 507 U.S. at 734 ("[T]he error must have been prejudicial: It must have affected the outcome of the district court proceedings."). Here, the district court sentenced the defendant to 46 months' incarceration, the bottom of the agreed-upon Guidelines range. Indeed, the defendant requested a Guidelines sentence. (JA 23). In sentencing the defendant to a consecutive term of imprisonment, the court's primary concern was fashioning a sentence that balanced the need to provide general deterrence to others on supervised release while taking into the account the defendant's lengthy state sentence. (*See* JA 26-27) ("And there has to be an understanding among people who are on supervised release that violation of their conditions of release is going to incur sanctions from this Court. The question of course is what is necessary for the Court to impose to send that message, and at the same time take into consideration the fact that Mr. Smalls is already serving a significant State sentence."). There is no indication that the district court arrived at its sentence as a result its consideration of the general level of gun violence in Connecticut. Because the record does not reflect that the district court's consideration of gun violence in Connecticut, if any, affected the ultimate sentence imposed, the district court did not plainly err.

Finally, even if the district court erred in a manner that affected the defendant's substantial rights, this Court need not correct the error because the error did not "seriously affect[] the fairness, integrity, or public reputation of [the]

judicial proceedings." *Johnson*, 520 U.S. at 467 (internal citations and quotation marks omitted). By imposing a sentence of incarceration at the bottom of the applicable Guidelines range to be served consecutively to the defendant's state sentence (as recommended by the Guidelines), the district court acted in a manner consistent with the Guidelines. Where a district court's careful consideration of the defendant's arguments, the Guidelines range and policy statements, and the § 3553(a) factors yields a sentence at the bottom of the Guidelines range – and a decision to run that sentence consecutively as recommended by the Guidelines – that result cannot be understood to have seriously affected the fairness, integrity or public reputation of that judicial proceeding. *See Villafuerte*, 502 F.3d at 209 (noting Supreme Court's admonition that "reversal for plain error should 'be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result'") (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)).

2. The district court properly considered the § 3553(a) factors, and the resulting sentence was reasonable.

The district court's Guidelines sentence of 46 months' incarceration to be served consecutively to the defendant's state sentence was substantively reasonable. *See Rita*, 127 S. Ct. at 2464-65 ("[I]t is fair to assume that the Guidelines, insofar as practicable, reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.").

The record more than adequately indicates that the sentencing judge properly considered the § 3553 factors in arriving at its sentence. First, the judge was aware that in the defendant's criminal history category of V, a Grade A violation yielded an advisory Guidelines range of 46-57 months. (JA 4, 27). Second, the judge properly identified the nature of the defendant's violations, i.e., associating with a known felon and commission of a state crime. (JA 19). Third, even though neither party argued for a departure or a non-Guidelines sentence, the judge considered whether any such issues existed. (JA 27). Fourth, the judge considered and rejected the defendant's arguments for a concurrent sentence. (JA 26) ("I do not think that it is appropriate to impose a concurrent sentence."). Fifth, the district judge's imposition of a consecutive sentence reflected her careful consideration of the defendant's state sentence and the need to generally deter those on supervised release from violating conditions of their supervised release:

> And there has to be an understanding among people who are on supervised release that violation of their conditions of release is going to incur sanctions from this Court.
>
> The question of course is what is necessary for the Court to impose to send that message, and at the same time take into consideration the fact that Mr. Smalls is already serving a significant State sentence.

(JA 26-27). Finally, because sentencing courts "are generally presumed to know the laws that govern their decisions," *Banks*, 464 F.3d at 190, the district judge is presumed to have considered, as she was required to, U.S.S.G. § 7B1.3(f), which advises that "[a]ny term of imprisonment imposed upon the revocation of . . . supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the defendant is serving . . . ." Thus, the district court properly considered the Guidelines and the § 3553(a) factors in imposing a consecutive sentence.

The defendant argues, nevertheless, that the sentence was substantively unreasonable because the district court placed undue weight on the conduct that gave rise to the violation of supervised release, i.e., the state firearms offense. *See* Appellant's Brief at 14-15. In support of his argument, the defendant points to the district court's statement that it viewed the firearms possession as "a serious, serious matter" and to its reference to recent local gun violence. (JA 26). The totality of the record simply does not support the defendant's assertion that the district court "exceeded the bounds of allowable discretion." *See United States v. Kane*, 452 F.3d 140, 144-45 (2d Cir. 2006) (quoting *Fernandez*, 443 F.3d at 27).

It is important to note that the defendant does not claim that the district court lacked authority to consider the conduct underlying the violation. *See* Appellant's Brief at 14 n.12. And indeed this concession is supported by governing law. Specifically, this Court has held that "under the pertinent statutory provisions, the court a

sentencing a defendant for violation of supervised release may properly consider the seriousness of his offense." *See United States v. Williams*, 443 F.3d 35, 48 (2d Cir. 2006); *see also* 18 U.S.C. § 3553(a)(1) (directing courts to consider "the nature and circumstances of the offense").

Rather, the defendant appears to argue that the district judge's comments indicate that she gave undue weight to the conduct underlying the defendant's state offense. *See* Appellant's Brief at 14. In other words, the defendant asks this Court to reweigh the § 3553(a) factors on appeal and substitute its judgment for that of the district court, a task this Court "cannot do." *Kane*, 452 F.3d at 145. *See also Fernandez*, 443 F.3d at 34 ("[W]e will not second guess the weight (or lack thereof) that the judge accorded to a given factor or specific argument made pursuant to that factor."); *id.* at 35 ("the weight to be afforded any given argument made pursuant to one of the § 3553(a) factors is beyond our review, as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented"); *United States v. Florez*, 447 F.3d 145, 157-58 (2d Cir.) (noting that the weight to be given any § 3553(a) factor is committed to the discretion of the sentencing court and is beyond appellate review), *cert. denied*, 127 S. Ct. 600 (2006).

In any event, the record does not support the defendant's argument that the district court gave *undue* weight to the defendant's underlying firearms offense. That the defendant's conviction of unlawful possession of a firearm while on supervised release was viewed by the district court as "a serious matter," is neither surprising,

nor unreasonable. (JA 26). But a review of the record demonstrates that the district court also focused on other factors – such as the need for general deterrence – in selecting an appropriate sentence. (*See* JA 26) ("I think some recognition has to [be] made that not only was the State law violated and potentially a federal law, but the terms of supervised release were violated. And there has to be an understanding among people who are on supervised release that violation of their conditions of release is going to incur sanctions from this Court."). Thus, the defendant's statement that the district court "predicated its consecutive sentence almost exclusively on the underlying firearms offense," Appellant's Brief at 14, is simply not supported by the record. The district court's incisive comments concerning the gravity of the supervised release violation, the need to deter others from violating supervised release, and the existence of a significant state sentence, demonstrate that the district court properly considered the § 3553(a) factors and did not abused its discretion. (JA 26-27). *See Gall*, 2007 WL 4292116, **11-12 (affirming principle that a reviewing court must evaluate the district court's § 3553(a) analysis under abuse of discretion standard).

Moreover, to the extent the district court considered the defendant's firearms offense, that consideration was fully consistent with policy statements addressing the sentencing of supervised release violations and with governing law. *See* 18 U.S.C. § 3553(a)(5) (requiring consideration of Sentencing Commission policy statements; U.S.S.G. Ch. 7, Part A ¶ 3(b) ("[A]t revocation the court should sanction primarily the defendant's breach

of trust, *while taking into account, to a limited degree, the seriousness of the underlying violation* and the criminal history of the violator") (emphasis added); *Williams*, 443 F.3d at 48.

In sum, the district court properly considered the defendant's firearms offense – as one of several § 3553(a) factors – in selecting a reasonable sentence.

CONCLUSION

For the foregoing reasons, this Court should affirm the sentence of the district court in all respects.

Dated: December 13, 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--

(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.

18 U.S.C. § 3583(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.

U.S.S.G. § 7B1.3. Revocation of Probation or Supervised Release (Policy Statement)

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