

# 13-2391

*To Be Argued By:*  
ALINA P. REYNOLDS

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**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 13-2391**

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UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

THEODORE W. WELLS, JR.,  
*Defendant-Appellant.*

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

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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## **Statement of Jurisdiction**

The United States District Court for the District of Connecticut (Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The district court's order revoking the defendant's supervised release entered on June 7, 2013. Defendant's Appendix ("DA\_\_") 13, DA299. On June 18, 2013, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). DA13, DA301. This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a).



**Statement of Issue  
Presented for Review**

Whether the district court committed any procedural error in its consideration and weighing of the sentencing factors, and whether the court's 30-month sentence, which was 30 months below the applicable 5-year maximum sentence, was substantively reasonable in light of the factors set forth under 18 U.S.C. §§ 3553(a) and 3583(e)?

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

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## **Preliminary Statement**

In 2004, Theodore Wells, Jr., was sentenced to a 120-month term of imprisonment to be followed by 5 years' supervised release after he pleaded guilty to a kidnapping charge that involved illegal sexual activity with a minor. The defendant served his sentence of incarceration and was released from the custody of the Bureau of Prisons in February 2012, at which time he was required to report to a halfway house in

Connecticut to begin his supervised release term. Instead, the defendant fled, eluding law enforcement authorities for nearly nine months. In November 2012, the defendant was arrested in Virginia and returned to Connecticut on a violation of supervised release warrant.

Wells ultimately admitted that he had violated the conditions of his supervised release. The court sentenced Wells above the advisory Guidelines range to a non-Guidelines sentence of 30 months' incarceration, to be followed by 30 months' supervised release.

On appeal, Wells first claims that the district court made a variety of procedural errors and also argues that his sentence was substantively unreasonable because the district court failed to balance properly the § 3553(a) factors. For the reasons set forth below, the defendant's claims should be rejected, and the judgment should be affirmed.

### **Statement of the Case**

Wells pleaded guilty to one count of kidnaping, in violation of 18 U.S.C. § 1201(a)(1), and was sentenced on November 30, 2004 to a term of imprisonment of 120 months, to be followed by 60 months' supervised release. DA6, DA7. In February 2012, Wells was released from the custody of the Bureau of Prisons and absconded. DA150. On November 27, 2012, Wells was arrested in the Eastern District of Virginia on a

warrant for violation of supervised release, alleging that he had violated the conditions that he report to probation, that he report to a halfway house in Connecticut, that he refrain from using the internet without prior approval, and that he register as a sex offender. DA10, DA147-52. After several hearings where the defendant raised a variety of issues, including requests for new counsel, a request for medical attention, and release from custody, Wells admitted two violations of his federal supervised release, and was sentenced to 30 months' imprisonment, to be followed by 30 months' supervised release. DA13, DA294, DA299-300.

Wells is currently serving his sentence.<sup>1</sup>

#### **A. Wells' prior criminal conduct**

Wells has a history of crimes involving the sexual abuse of underage girls. In 1999, the defendant, who was then living in Florida, communicated over the internet and the phone with a 15-year old girl who lived in Illinois. Pre-Sentence Report ("PSR") ¶¶ 40-41. The defend-

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<sup>1</sup> Upon completion of the revocation proceedings in Connecticut, Wells was taken to the Eastern District of Virginia where he was charged in an indictment with one count of Failure to Register as a Sex Offender, in violation 18 U.S.C. § 2250(a). Wells pleaded guilty to that charge on October 21, 2013, and is currently scheduled to be sentenced on October 31, 2014. See *United States v. Wells*, Dkt. # 1:13-CR-249.

ant bought a bus ticket for the victim to help her run away from home.<sup>2</sup> PSR ¶¶ 40-41. Although the victim picked up the bus ticket, she decided to hitchhike to Orlando, Florida. PSR ¶ 41. The defendant met the victim in Orlando, and took her to his home in Fort Lauderdale. PSR ¶¶ 41-42. After the victim was reported missing, law enforcement officers found her at the defendant's house in Fort Lauderdale. PSR ¶¶ 40-42. The victim told the police that there had been no physical or sexual abuse, and she was retrieved by her parents. PSR ¶42.

Less than one month later, the defendant contacted the same victim again, through another young girl he had met on the internet. PSR ¶ 43. Through this intermediary, the defendant arranged to travel from Florida to meet the victim in Marion, Illinois. PSR ¶ 43. The defendant met the victim as planned, took her to a nearby motel, and, according to the victim, engaged in various sexual acts with the victim, including vaginal intercourse. PSR ¶ 44.

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<sup>2</sup> During the investigation of this offense, the FBI found another 15-year old girl who had communicated with the defendant during the same time period. PSR ¶ 46. Wells told this girl that he helped little girls run away and that he had helped one girl (the victim described above) run away twice. PSR ¶ 46. Wells offered to buy this girl plane tickets to come see him, and talking about marrying her and having children with her. PSR ¶ 46.

The following day, the defendant took the victim to a bus station and, in an effort to elude law enforcement, took a circuitous route back to Florida. PSR ¶ 45. The defendant and the victim were intercepted in Memphis, Tennessee where the defendant was arrested. PSR ¶ 45. In a post-arrest statement, the defendant admitted knowing that the victim was 15 years old and admitted having sex with the victim. PSR ¶¶ 44-46.

The defendant was prosecuted for this offense in the Southern District of Florida and ultimately pleaded guilty to traveling with the intent to engage in illicit sexual conduct, in violation of 18 U.S.C. § 2423(b). He was sentenced to one year and one day in jail of which he served approximately 10 months. PSR ¶ 39. He was released from federal custody on that case in December 2000, and began serving a three-year term of supervised release. PSR ¶ 47. Despite a judicial finding that the defendant had violated the conditions of his supervised release, his supervised release was terminated early on December 31, 2002. PSR ¶ 47.

### **B. Wells' 2004 conviction**

On October 25, 2002, the defendant—a registered sex offender who was still under supervised release from his Florida conviction, PSR ¶¶ 10, 48, 49—met a young girl, Jane Doe, in an internet chat room. PSR ¶ 14. The defendant sent Doe his telephone number, and they spoke

on the telephone for approximately ten hours. PSR ¶ 14. During this conversation, Doe told Wells that she was 12 or 13 years old, and that she was taking medication. PSR ¶ 15. Wells told her he could help her leave home and that other girls he had helped had come to his house. PSR ¶ 15. Wells convinced Doe to come and stay at his house, arranged to meet her in Connecticut where she lived, and told her they would travel together to his home in New Jersey. PSR ¶¶ 16, 17.

The next day, Wells traveled to Connecticut and met Doe at a bus station in Bridgeport. PSR ¶ 16. He bought her a bus ticket using the name of his previous victim. PSR ¶ 17. He then transported her by bus and taxi to his home. PSR ¶ 17. They spent the night together and Wells sexually abused her. PSR ¶ 18. The next day, when Doe began to open a window, Wells stopped her, explaining that he was on probation for having sex with a minor, that he had spent ten months in jail, and that he was not supposed to have girls in his house. PSR ¶ 19. Doe began to cry and told Wells she wanted to go home. PSR ¶ 19. Wells told her that she would have to stay until Monday because there were no buses on Sunday. PSR ¶ 19.

Later, while Wells was showering, Doe called her boyfriend to ask for help. PSR ¶¶ 18, 19. The boyfriend put his mother on the phone and she told the girl she would come get her. PSR ¶ 20.

Wells became angry after Doe called her boyfriend, and made Doe engage in more sexual acts. PSR ¶ 20. Doe's boyfriend's mother picked up Doe at the Philadelphia bus station later that night. PSR ¶ 20.

Wells was identified through telephone records, and was arrested on May 13, 2003. PSR ¶ 23. When the police initially questioned him, he admitted that he traveled from New Jersey to Connecticut to meet the girl and transported her to New Jersey. PSR ¶ 23. He admitted that he touched her breasts and that she touched his penis, but he denied they engaged in "inappropriate sexual contact." PSR ¶ 23.

On May 13, 2003, Wells was arrested by federal agents in New Jersey and charged with enticement of a minor to travel across state lines to engage in illegal sexual activity. DA3. Ultimately, the charges against the defendant were resolved by way of a guilty plea to a one-count substitute information charging him with kidnaping. DA78, DA79. The written plea agreement included a calculation of the applicable guidelines range. The parties agreed that a cross-reference to U.S.S.G. § 2A3.2 applied because the offense conduct involved the criminal sexual abuse of a minor. DA82. A plea to the kidnaping charge avoided the § 4B1.5 enhancement for repeat sexual offenders that would have applied if he had been convicted of an enticement charge and thus carried a significantly lower



guideline range of 70-87 months. DA82. The resulting plea agreement between the parties specifically reserved the parties' right to argue for a departure from the sentencing guideline range. DA82.

Wells pleaded guilty to one count of kidnaping, in violation of 18 U.S.C. § 1201(a)(1), on August 25, 2004. DA6, DA79. The PSR prepared for sentencing calculated the defendant's sentencing guideline range to be 70-87 months' imprisonment to be followed by a 3-5 year term of supervised release. DA104, PSR ¶¶ 78, 80. The PSR also recommended that the district court consider an upward departure pursuant to U.S.S.G. § 5K2.21 to reflect the actual seriousness of the defendant's offense. PSR ¶ 87.

On December 2, 2004, following a sentencing hearing, the district court (Alan H. Nevas, J.) departed upward three levels from the calculated guidelines range based on U.S.S.G. § 5K2.21 (Dismissed and Uncharged Conduct) and § 4A1.3 (Inadequacy of Criminal History Category). DA142. The court sentenced Wells to 120 months' imprisonment, to be followed by 5 years' supervised release. DA142. Wells appealed, and after a remand prompted by *United States v. Booker*, 543 U.S. 220 (2005) and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), this Court affirmed his conviction and sentence. *See United States v. Wells*, No. 05-5810-cr, 2006 WL 2522007 (2d Cir. Aug. 30, 2006).

On November 26, 2007, Wells filed a petition under 28 U.S.C. § 2255, claiming that he received ineffective assistance of counsel in his criminal case. DA10. The district court (Janet B. Arterton, J.) rejected all of Wells' claims and denied his motion. *See Wells v. United States*, Ruling on Motion to Vacate, Set Aside, or Correct Sentence, Doc. #51, 3:07CV1740(JBA). Both the district court and this Court denied a certificate of appealability. *Id.* at p. 28; DA144.

### **C. The supervised release term and revocation hearings**

In late 2011, Wells was serving the remainder of his 120-month prison term. He was scheduled to be released and begin his term of supervised release on February 17, 2012. DA150. On December 14, 2011, the Probation Officer assigned to supervise Wells once he was released, informed him that he would begin reentry to society and his supervision at a halfway house in Hartford, Connecticut. The defendant agreed, and signed a waiver agreeing to this modification of his supervised release, and to serve the first 12 months of supervision at a Residential Re-entry Center (halfway house). Government Appendix ("GA") 1; *see also* DA145-47. On February 16, 2012, the defendant was to take a bus directly from the prison to Hartford, Connecticut to begin reentry into society at the halfway house there. DA145-47, DA150-52, DA256-57. Wells was given a bus voucher to purchase a

one-way ticket to Hartford. DA150. Instead, Wells used the voucher to purchase a one-way ticket to Boston, and failed to report to Probation or to the halfway house in Hartford. DA150.

On February 17, 2012, based upon a Petition for Warrant filed by the Probation Office alleging violations of supervised release based on Wells' failure to report to Probation, the court issued a warrant for Wells' arrest. DA10, DA152.

Law enforcement authorities began searching for Wells, but could not locate him. Wells was finally arrested approximately nine months later in Virginia when local law enforcement officers responded to a bicycle accident, and positively identified him at the hospital where he was treated for his injuries. GA7. He was placed under arrest on the outstanding warrant from Connecticut, and taken into custody. DA10, DA154-55. After an initial appearance in federal court in the Eastern District of Virginia, Wells was ordered detained and transported to Connecticut. DA155.

On January 9, 2013, the court (Janet C. Hall, J.) conducted an initial appearance on the revocation of supervised release petition. DA10, DA11, DA153. The court informed Wells of the charges in the revocation petition, and of his rights. DA11, DA156-57.

Wells next appeared in court on January 30, 2013, at which time he raised a complaint con-

cerning communication issues with defense counsel, but elected to continue to work with the attorney. DA11, DA162-68. Wells subsequently requested new counsel, and on March 5, 2013, new counsel was appointed. DA11, DA12, DA184-85.

On April 16, 2013, the court conducted another hearing, this time with newly appointed counsel. DA12, DA189. It was at this hearing that the defendant admitted two violations—that he failed to report to the Probation Officer as directed in February 2012 upon his release from prison, and that he traveled outside of Connecticut without prior permission from Probation. DA199-200.

As set forth in the Report of Violation, both violations admitted by the defendant are Grade C violations. GA8. Under U.S.S.G. § 7B1.4(a), and with a Criminal History Category III, the applicable revocation guideline imprisonment range was 5-11 months. GA8. Because both violations stem from a conviction for a Class A felony, the violations carried a maximum penalty of 5 years' imprisonment. GA8.

Based upon the defendant's admissions and the probation report, the court found that the violations had been established and proven, and found Wells guilty of those two violations. DA200. The court explained that the remaining two violations, including the failure to register as a sex offender that was the basis of a pending

charge in the Eastern District of Virginia, would remain pending until the final revocation hearing and the imposition of sentence. DA201.

**D. The final revocation hearing and the imposition of sentence**

On June 6, 2013, the court conducted a final revocation hearing. DA13.

At the outset, the court explained that it had reviewed all the memoranda prepared by the parties, as well as the letters and motions submitted to the court by the defendant himself. DA244-45, DA247. The court disposed of all pending motions, and confirmed that Wells was satisfied with his counsel and was prepared to go forward with sentencing. DA244-48. In addition, after receiving confirmation from counsel for the government, the court explained to the defendant that he was subject to a new indictment in the Eastern District of Virginia charging him with failure to register as a sex offender, and that a warrant would be lodged as a detainer. DA249-51.

The court identified the factors that it was required to consider in sentencing, as mandated by 18 U.S.C. § 3583(e). DA251-52. Defense counsel argued that the court could not consider the seriousness of the underlying offense when imposing sentence in this case. DA253-54. The court agreed, explaining that it would not consider the seriousness of the offense for the pur-

poses outlined in § 3553(a)(2)(A), but that it would carefully consider the “history and characteristics of the defendant.” DA253. Defense counsel replied, “That’s fair enough, your Honor.” DA253. Defense counsel argued for a sentence within the advisory guideline range of 5 to 11 months’ imprisonment, arguing principally that this sentence would be consistent with other sentences in similar cases. DA254-56.

The defendant then spoke—for nearly an hour, DA259-84—and repeatedly claimed that he had been treated unjustly in his criminal case and his § 2255 proceeding, and that he had no other alternative but to flee. DA260. He admitted that he had planned to flee before he was released from custody so that he would not have to participate in a sexual offender program on supervised release. DA272-73. He stated that his flight was “a no brainer,” and that “he had to do it.” DA274. In addition, the defendant urged the court not to impose a further term of supervised release because it “is a simple waste of time.” DA282.

Counsel for the government argued the defendant had proven that he was impossible to supervise and asked the court to impose a sentence of 5 years’ imprisonment. DA286-88.

After hearing from both counsel and the defendant, the court imposed sentence. The court began by addressing the defendant, explaining that it had listened to all of the defendant’s com-

plaints about his conviction and the ruling denying his § 2255 motion, but that its only job was to sentence the defendant for the violations of supervised release under the factors set forth at 18 U.S.C. § 3583. DA290. The court found that the defendant was a person who tries to “control the circumstances” by deciding “when and what will happen” to him, and who was willing to comply with court orders only if he gets his way. DA291. The court explained that this attitude was inconsistent with the criminal justice system. DA291. As the court noted, when the defendant was originally sentenced, the court had imposed a term of supervised release, and the court opined that “in this instance, I can’t think of another offense of conviction in which supervised release could be more important.” DA291.

The court explained that it had considered the advisory guideline range of 5 to 11 months, but that it “was also mindful of application note 3 to 7B1.4,” which noted that an upward departure may be warranted for a “Grade C violation, associated with a higher risk of new felonious conduct.” DA292.

The court considered the defendant’s history and characteristics, and concluded that these factors showed “a very high risk of new felonious conduct”:

My view is that he is at high risk to commit new felonious conduct because I look at his criminal history, which is only a

three, that reflects a conviction for sexual offense involving a minor, he's incarcerated, released and less than two years after that release, while on supervised release, he commits another sexual offense involving a minor.

DA292.

The court emphasized that the defendant's supervised release violations were so "egregious" because he is a convicted sexual offender, and because he had failed entirely to submit to supervision. DA293. The court explained that it had considered the cases the defendant had relied on in requesting a sentence within the advisory guidelines range, but that it considered Wells' conduct more serious than the defendants' conduct in the cases. In those other cases, according to the court, the defendants had absconded after having been supervised for a period of time. DA293. The court emphasized that a guidelines sentence was not appropriate for Wells:

In this case, in the face of the direct instructions to come to Connecticut and to report immediately, Mr. Wells said no. He did not submit for one moment to supervision. He fled because he wanted to live his life unexamined by the authorities. I think that given his criminal history and his complet[e] failure to submit to the supervised release, it is an egregious situation



and that the guidelines as suggested for this grade C violation do not adequately reflect the extreme betrayal of the court's trust, in particular, in Judge Nevas's sentence.

DA293. The court explained that it had also considered the need to avoid unwarranted sentencing disparities, and the need to provide deterrence. DA293-94.

The court then sentenced the defendant to a period of incarceration of 30 months, to be followed by a period of supervised release of 30 months. DA294. In concluding its remarks, the court stated that a non-guidelines sentence was appropriate "for all the reasons I have articulated," DA294, and added that "[g]iven the nature and circumstance of your offense, the egregious way in which it was committed, your history and characteristics, in particular, have driven me to the conclusion that I have just made." DA294.

### **Summary of Argument**

The district court's imposition of a 30-month sentence of imprisonment, which was half of the statutory maximum sentence, to be followed by 30 months' supervised release, was procedurally and substantively reasonable.

The defendant's challenges to the procedural reasonableness of the sentence all fail. *First*, the court did not create a "blanket" rule for all cases,

but rather engaged in an individualized sentencing determination focused on the facts of this case. *Second*, the court did not misstate the record when it characterized the defendant’s offense of conviction as a sex offense. The court understood that the defendant had been convicted of kidnapping, but also recognized that the conduct underlying that kidnapping—as expressly admitted by the defendant—included the criminal sexual abuse of a minor. *Third*, the court properly applied the Sentencing Commission’s policy statements when it concluded that an upward departure was warranted given the heightened risk of additional felonious conduct. In applying this policy statement, the court properly considered the defendant’s conduct and his criminal history to conclude that the defendant posed a risk of “new felonious conduct.” *Fourth*, the court properly and repeatedly explained why this case was not covered by the guidelines policy statements and thus warranted an above-guidelines sentence. *Fifth*, there is no basis in the record for concluding that the court relied on factors it should not have considered under 18 U.S.C. § 3583(e). *Sixth*, the court did not ignore the fact that there was no evidence that Wells committed any crimes (beyond the failure to register as a sex offender) during his period of “release.” The court clearly understood that there was no evidence of criminal conduct, but also properly noted that it had no way to verify whether there was *in fact* no criminal conduct because the de-

defendant refused to submit to supervision. *Finally*, the court did not err by noting that the defendant had failed to register as a sex offender as it selected a sentence in this case. Even though the defendant did not plead guilty to a violation based on that conduct, the court was still permitted to consider that fact as it considered the history and characteristics of the defendant.

Furthermore, the sentence was substantively reasonable. The defendant is a convicted sexual offender who absconded the day he was released from jail after serving a 10-year term of imprisonment for a kidnapping charge. He failed to report to probation or submit to supervision, and was a fugitive for nearly ten months. His conduct, coupled with his prior criminal record of sexual offenses against minors, was egregious and warranted a 30-month sentence. He demonstrated a high risk of future felonious conduct, and a track record of avoiding supervision. In light of its careful consideration of the relevant sentencing factors, the district court properly concluded the defendant should be sentenced above the advisory guidelines range. This Court should not substitute its judgment for that of the district court, which carefully reviewed the record, and properly considered and weighed the relevant § 3553(a) sentencing factors before imposing sentence.

## Argument

### **I. The district court’s sentence was procedurally and substantively reasonable.**

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

##### **1. Sentencing factors for revocation of supervised release**

Under 18 U.S.C. § 3583(e) a court may revoke a term of supervised release and order a defendant to serve a term of imprisonment “after considering 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).”

Thus, in a sentencing for a violation of supervised release, the relevant § 3553(a) factors include: “the nature and circumstances of the offense and the history and characteristics of the defendant”; the need for the sentenced imposed “to afford adequate deterrence to criminal conduct,” “to protect the public from further crimes of the defendant,” and “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”; the applicable guidelines and policy statements from the Sentencing Commission; the need to avoid unwarranted sentencing disparities; and the need to provide restitution to victims. *See* 18 U.S.C. § 3553(a).

Under the policy statements set forth at U.S.S.G., Chap. 7, Pt. A.3(b), a court’s sentence for a violation of supervised release should be focused primarily on the defendant’s “breach of trust,” although the nature of the conduct can be “considered in measuring the extent of the breach of trust.” Chap. 7, Pt. A.3(b). In other words, according to the Sentencing Commission’s policy statement, the “imposition of an appropriate punishment for any new criminal conduct would not be the primary goal of a revocation sentence.” Chap. 7, Pt. A.3(b).

## 2. Standard of review

A sentence imposed for violation of supervised release is reviewed for “reasonableness.” *United States v. McNeil*, 415 F.3d 273, 277 (2d Cir. 2005) (“The standard of review on the appeal of a sentence for violation of supervised release is now the same standard as for sentencing generally: whether the sentence imposed is reasonable.”); *United States v. Fleming*, 397 F.3d 95, 98 (2d Cir. 2005).

Reasonableness review is akin to a deferential “abuse of discretion” standard. *Gall v. United States*, 552 U.S. 38, 46 (2007); *United States v. Watkins*, 667 F.3d 254, 260 (2d Cir. 2012); *United States v. Cavera*, 550 F.3d 180, 187 (2d Cir. 2008) (en banc). This reasonableness review consists of two components: procedural and substantive review. *Cavera*, 550 F.3d at 189.

“A district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory.” *Cavera*, 550 F.3d at 190 (citations omitted). A district court also commits procedural error “if it does not consider the § 3553(a) factors, or rests its sentence on a clearly erroneous finding of fact.” *Id.* Finally, it is error if the district court “fails adequately to explain its chosen sentence,” including, “an explanation for any deviation from the Guidelines range.” *Id.* (quoting *Gall*, 552 U.S. at 51).

When imposing a sentence for a violation of supervised release, a district court is required to consider the factors listed in 18 U.S.C. § 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7). *See* 18 U.S.C. § 3583(e). In reviewing a court’s compliance with this procedural requirement, this Court will “take a deferential approach and refrain from imposing any rigorous requirement of specific articulation by the sentencing judge.” *Fleming*, 397 F.3d at 99. This Court has also recognized that a sentencing court’s explanation for a sentence on a revocation of supervised release that is above the sentence recommended in the Guidelines’ non-binding policy statements need not be as detailed as its explanation for an upward departure in sentencing after conviction. *See United*

*States v. Verkhoglyad*, 516 F.3d 122, 133 (2d Cir. 2008); *United States v. Pelensky*, 129 F.3d 63, 69 (2d Cir. 1997).

When a defendant challenges a sentence as substantively unreasonable, he “bears a heavy burden” because the Court’s review of “a sentence for substantive reasonableness is particularly deferential.” *United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2786 (2013). The Second Circuit will set aside a sentence on substantive grounds “only in exceptional cases where the trial court’s decision cannot be located within the range of permissible decisions.” *Cavera*, 550 F.3d at 189 (internal quotation marks omitted).

Where warranted by the circumstances and supported by the record, a sentence substantially above a policy statement’s recommended range will be affirmed. *See, e.g., Verkhoglyad*, 516 F.3d at 134; *Fleming*, 397 F.3d at 100. With respect to substantive reasonableness, this Court has recognized that “[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge.” *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006). A sentence is substantively unreasonable only in the “rare case” where the sentence would “damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a

matter of law.” *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009).

### 3. Plain error review

When a defendant fails to object to an alleged error in the sentencing process, this Court reviews that alleged error under Federal Rule of Criminal Procedure 52(b). *See Verkhoglyad*, 516 F.3d at 128; *United States v. Villafuerte*, 502 F.3d 204, 208 (2d Cir. 2007). Under that Rule, “an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an ‘error’; (2) the error is ‘clear or obvious, rather than subject to reasonable dispute’; (3) the error ‘affected the appellant’s substantial rights, which in the ordinary case means’ it ‘affected the outcome of the district court proceedings’; and (4) ‘the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *United States v. Marcus*, 560 U.S. 258, 262 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)); *see also Johnson v. United States*, 520 U.S. 461, 467 (1997); *United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *United States v. Wagner-Dano*, 679 F.3d 83, 94 (2d Cir. 2012).

To “affect substantial rights,” an error “must have been prejudicial: It must have affected the outcome of the district court proceedings.” *United States v. Olano*, 507 U.S. 725, 734 (1993). This language used in plain error review is the



same as that used for harmless error review of preserved claims, with one important distinction: In plain error review, “[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.” *Id.*

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

## **B. Discussion**

Wells’ arguments fall into two categories. First, he claims that the district court committed a series of procedural errors in the sentencing process. Most of these arguments are raised for the first time on appeal, and most of them rest on a cramped reading of the sentencing record. A careful review of the entire record demonstrates that the court faithfully executed its sentencing obligations.<sup>3</sup> Second, Wells argues that the dis-

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<sup>3</sup> In a related procedural point, Wells argues that the district court erred by failing to specify in writing its reasons for imposing a non-guidelines sentence. See 18 U.S.C. § 3553(c)(2). The government acknowledges that the district court did not do this and that a limited remand is warranted to permit the court to fulfill this requirement. See, e.g., *United States v. Lewis*, 424 F.3d 238, 245 (2d Cir. 2005) (explaining

district court's imposition of a 30-month prison term was substantively unreasonable because the district court failed to properly weigh the sentencing factors under 18 U.S.C. § 3553(a). This argument rests on a request that this Court substitute its judgment for that of the district court. This Court should reject the defendant's request and affirm the sentence.

**1. The district court fully complied with its sentencing obligations and properly considered all of the relevant factors.**

The sentencing record in this case demonstrates that the district court meticulously complied with all of the procedural requirements of sentencing. The court was fully aware of the relevant sentencing factors and carefully considered those factors in reaching its decision. The court considered, and responded to, the arguments of the parties. And finally, the court thoroughly explained the reasons for its sentence. *See* DA251-54, DA290-94; *see also* Statement of the Case, *supra*, Part D.

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that the requirement for a written statement of reasons applies to sentences imposed for violations of supervised release); *United States v. Sindima*, 488 F.3d 81, 88 (2d Cir. 2007) (“The court should also record its reasons for the sentence [for violation of probation] in its written judgment pursuant to 18 U.S.C. § 3553(c).”).

Wells argues, nonetheless, that the court committed a host of procedural errors at sentencing. Most of his arguments are raised for the first time on appeal, and so are reviewed for plain error.

*First*, Wells points to the court’s statement that it could not “think of another offense of conviction in which supervised release could be more important,” *see* DA291, as evidence that the court adopted a “blanket” rule that “all sex offenders who commit the Class C violation of failing to report to a probation officer and leave the district without the probation officer’s permission, should be sentenced significantly above the guidelines.” Defendant’s Br. at 34. According to Wells, this “blanket” approach was improper because the court did not “articulate the specific reasons why Wells’ situation is different from that of any other defendant covered by the guidelines.” Defendant’s Br. at 34.

This argument—reviewed for plain error—rests on a selective reading of the record. Even a cursory reading of the transcript reveals that the court did not adopt a blanket approach or an absolute rule for handling any particular type of cases. To be sure, the court expressed its view that supervised release is especially important for sex offenders, but that view is hardly unique or shocking. Indeed, as the court noted, Congress shares the view that supervision is important for sex offenders. DA291. More significantly,

though, the court's comment about the importance of supervised release was not made in the context of establishing a blanket rule for all sex offenders. The comment was made, rather, in the context of the court's explanation for why the defendant's violation here was such an egregious breach of trust. DA291. And it was prefaced by a reference to the defendant's own statements about his conduct and his motivations, thus defeating any suggestion that the court was establishing any blanket rules. DA291. In short, there was no error, and certainly no error that would meet the rigorous standard for plain error review.

*Second*, in a related point, Wells argues that the court erred by characterizing Wells' offense as a sex offense when he was only convicted of kidnapping. Defendant's Br. at 34. This argument ignores the conduct admitted by the defendant, as well as the specific terms of the plea agreement. Though the defendant pleaded guilty to kidnapping, his offense involved the enticement of a minor to go with him from Connecticut to New Jersey where he engaged in sexual acts with the minor. See PSR ¶¶ 10-23. Moreover, in the written plea agreement, the defendant agreed that, in light of his conduct, the kidnapping guideline required a cross-reference to the criminal sexual abuse of a minor guideline, U.S.S.G. § 2A3.2. DA82. In the face of this record, there can be no dispute that the defendant's

underlying conviction in this case involved the sexual abuse of a minor. Thus, the court did not err in characterizing the kidnapping conviction as a sex offense, regardless of the final offense of conviction.

*Third*, Wells argues that the court misapplied the Sentencing Commission's policy statements when it found that an upward departure from those policy statements was warranted. According to Wells, the court improperly applied Application Note 3 to U.S.S.G. § 7B1.4, when it concluded that his criminal history warranted an upward departure from the guidelines because that policy statement only allows a departure based on the *conduct* that lead to the violation. Defendant's Br. at 34-35. Again, this argument (raised for the first time on appeal) rests on a mis-reading of the record and the policy statement. To be sure, when the district court stated that an upward departure was warranted, it referred to the defendant's criminal history in passing, but the thrust of its explanation was its focus on the defendant's conduct: his failure to subject himself to supervision. DA292. As the court explained, it was "the nature and circumstances of the violation here [that] is egregious." DA293.

In any event, the policy statement itself does not preclude a court from considering the defendant's criminal history—in conjunction with the defendant's conduct—when deciding whether

to depart from the guideline. Indeed, the example given in the Application Note highlights both the conduct (*i.e.*, defendant loiters near a schoolyard) and the defendant's criminal history (*i.e.*, the defendant was on supervision for a conviction for criminal sexual abuse). Here, just as in the Application Note, the court considered both the defendant's criminal history and his conduct when concluding that there was a "high risk of new felonious conduct." Accordingly, because the defendant has not shown that the court plainly erred in applying the policy statement as it did, the defendant's argument fails.

In a related argument, Wells argues that the upward departure also violated the Commission's directive that a defendant's criminal history is to be considered only "to a limited degree." Defendant's Br. at 36. As set forth above, though, the court did not rely solely on the defendant's criminal history, and the Commission's non-binding guidance, in any event, does not *preclude* a court from considering the defendant's criminal history. Thus, when reviewed for plain error, the court complied with the guidance that the defendant's criminal history should be considered to a limited degree.

*Fourth*, Wells argues that the court erred in considering his criminal history when granting an upward departure because his criminal history was already factored into his guidelines calculation. In this context, Wells contends that the

court failed to specify why this case was different from the ordinary case that should be covered by the guidelines. Defendant's Br. at 35-36. As with Wells' other arguments, this claim rests on a selective reading of the record. Throughout the sentencing proceeding the district court referenced Wells' conduct, and his history and characteristics, and carefully explained that it was Wells' complete failure to submit to supervision and his decision to flee, that separated his case from other Grade C violators. The court explained that it was because Wells "did not submit for one moment to supervision" that it considered his violation more egregious than the typical case. DA293. The court further explained that in the case of a convicted sexual offender, like Wells, who reoffended just two years after being released on his first sexual offense conviction—"[i]t is all the reason why he should be supervised." DA292-293. In addition, the court tied its decision to Wells' comments at sentencing, in which he declared that he had made a deliberate choice to flout the court's authority and would continue to do so, as reflecting a deep-seated and egregious breach of trust. DA290-91. Thus, the court's explanation for its decision adequately and appropriately explained why the guidelines were inadequate in this case.

Wells' reliance on *United States v. Sindima* is misplaced in light of this record. The district court in *Sindima* imposed a significantly above-

guidelines sentence without identifying any factors beyond the defendant's conduct that warranted such a sentence. 488 F.3d 81, 86-87 (2d Cir. 2007). Further, the district court in that case was more focused on punishing the conduct underlying the violation than on punishing the breach of trust. *Id.* Here, by contrast, as explained above, the district court identified aspects of the defendant's history and conduct that made his violation an "egregious" violation of trust. Thus, the court did not rely solely on factors already considered by the guidelines but took pains to explain why the guidelines were inadequate on the facts of this case. In sum, given the district court's detailed explanation of its sentence, it cannot be said that the district court erred, let alone plainly erred, in concluding that Wells' case was different than the typical case covered by the guidelines and thus that a departure from the advisory guideline range was warranted.

*Fifth*, Wells claims that the court erred by considering the "retribution" sentencing factors in contravention of 18 U.S.C. § 3583(e), which specifically precludes a court from considering the need for a sentence "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." 18 U.S.C. §§ 3583(e), 3553(a)(2)(A). *See* Defendant's Br. at 37-38. In support of this argument, the defendant points to the court's con-



sideration of the “egregious” nature of the violation here as evidence that the court violated § 3583(e).

The court did not violate § 3583(e) at sentencing. Indeed, the court expressly agreed with defense counsel that it could not consider the factors outlined in § 3553(a)(2)(A) for sentencing on a violation of supervised release. *See* DA253. And the court complied with this statutory directive. The mere fact that the court referred to the nature of the defendant’s conduct does not mean that it considered that conduct for a prohibited purpose. Consistent with the statute, the court considered the defendant’s conduct when evaluating the significance of the breach of trust evidenced by that conduct, and it considered the nature of the defendant’s conduct for purposes of understanding the history and characteristics of the defendant—both fully proper considerations under § 3583(e). Thus, because the court was authorized to consider the nature of the defendant’s conduct for proper purposes, the defendant cannot show that the court considered it for improper purposes just by pointing to the court’s consideration of his conduct. There was no error here.

*Sixth*, Wells contends that the court erred by “ignoring that there was absolutely no evidence that Wells had committed any offenses during the approximately ten months he was released, with the exception of the failure to register.” De-

fendant's Br. at 36. The transcript reflects, however, that the court was fully aware of the state of the record on this issue. The court acknowledged that there was no evidence that the defendant had committed any offenses during his nine-month "release," but also noted—with complete accuracy—that there was no way to verify whether Wells had *in fact* committed any other offenses because Wells was not under supervision during this period. DA292. This position is imminently reasonable. Wells committed his original offense while on supervision from his first conviction, and he announced in open court that he would not comply with the terms of supervised release. Given this record, the court properly and fairly noted that there was no way to verify that Wells had not committed any crimes after he was released from prison. The court did not "imagine" that Wells had committed other offenses, *see* Defendant's Br. at 36; the court merely noted that it had no way to know whether he had committed other offenses. The court committed no error, and certainly no plain error warranting reversal.

*Finally*, Wells argues that the court improperly considered the fact that he had failed to register as a sex offender when selecting a sentence above the guidelines range. Defendant's Br. at 37. According to the defendant, this was improper because he did not admit this violation and was facing prosecution for that offense in Virgin-

ia. As a preliminary matter, the defendant cites no authority for the proposition that the court could not consider all of the facts about him—including that he failed to register as a sex offender—when selecting an appropriate sentence. It is black-letter law that a court may consider all facts and circumstances about a defendant and his conduct, even if a defendant was acquitted of charges related to that conduct. *See United States v. Martinez*, 525 F.3d 211, 215 (2d Cir. 2008) (per curiam); *United States v. Vaughn*, 430 F.3d 518, 527 (2d Cir. 2005). In any event, the defendant’s failure to register as a sex offender—as required by law and his supervised release terms—was certainly a fact about his history and circumstances that was a relevant consideration for sentencing. It demonstrated, as did his conduct more generally, that he was unwilling to comply with the terms of court orders that he did not like. At a minimum, the court did not commit plain error in considering this fact in its sentencing calculus.

In sum, given the court’s careful consideration of all of the appropriate sentencing factors, as well as the advisory guideline range, the sentence was procedurally reasonable. *See Fleming*, 397 F.3d at 100.

## **2. The defendant's sentence was substantively reasonable.**

Given the defendant's egregious breach of trust, his history and characteristics, and the high risk of future felonious conduct, the 30-month, above guidelines sentence was substantively reasonable.

In arguing to the contrary, the defendant argues, as he did below, that his violation of supervised release was not serious enough to warrant a variance from the guidelines, and points to other defendants convicted of Grade C violations who received lower sentences, often within the applicable guideline range. *See* Defendant's Br. at 40-54. The district court considered this argument, however, and rejected it, concluding principally that Wells was not similarly situated to the defendants in the cases he cited. As the district court explained, it had reviewed the cases cited by the defendant and concluded that Wells' situation was very different because he had absconded before ever reporting to probation and submitting to supervision:

I do think the nature and circumstances of the violation here is egregious. I understand that Mr. Wells has cited me to a number of cases where the guidelines sentences are imposed even when people absconded, but I believe that all the ones that I remember, maybe one exception, in-

volved people who had submitted to supervision then left.

DA293. *See also* DA253-56 (discussing cases with defense counsel and explaining that court considered those cases distinguishable because, unlike the defendants in those cases, Wells never subjected himself to supervision at all).

The defendant argues, nonetheless, that the court improperly weighed the seriousness of his violation by equating his conduct in this case to the conduct of a defendant convicted of far more serious violations. While the defendant may not agree with the degree to which the court considered the seriousness of his conduct, especially as compared to the conduct of other defendants, it was not improper for the district court here to conclude that a defendant who absconds and entirely fails to submit to supervision has committed an “egregious” violation that warrants greater punishment than the 5 to 11 month range suggested by the guidelines. Indeed, this Court has made it clear that a district court must be given considerable deference in its choice of sentence, and in the weight it gives each of the sentencing factors it considers when determining a sentence. *See Verkhoglyad*, 516 F.3d at 131 (“[T]he weight to be afforded any § 3553(a) factor ‘is a matter firmly committed to the discretion of the sentencing judge and is beyond our review, as long as the sentence ultimately imposed is

reasonable.” (quoting *Fernandez*, 443 F.3d at 32)).

And here, after considering the defendant’s argument about sentencing disparities, the district court concluded that other sentencing factors warranted a significant sentence. In particular, the court noted that the defendant’s conduct was an egregious violation of trust, and that his history and conduct together reflected an unwillingness to comply with court orders and a risk of future felonious conduct. DA290-93. This risk was highlighted by the defendant’s own comments at sentencing, during which he told the court that he would not comply with terms of supervised release. *See* DA290-93 (discussing the defendant’s comments at sentencing). In addition, the court noted that a significant sentence was required to promote deterrence. DA294. Taken together, the court properly concluded that an above-guidelines sentence was warranted in this case.

In sum, the defendant showed a complete disregard of the court’s orders by absconding and never submitting to supervision, and demonstrated no remorse for having done so. He admitted to the court that he never had any intention of submitting to supervision. DA273. On this record, the sentence imposed was neither “shockingly high . . . [n]or otherwise unsupportable as a matter of law,” *Rigas*, 583 F.3d at 123, and ac-

cordingly, it cannot be said that it was substantively unreasonable.

**Conclusion**

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

Dated: October 24, 2014

Respectfully submitted,

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A handwritten signature in black ink that reads "Alina Reynolds". The signature is written in a cursive, flowing style.

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

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,265 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

A handwritten signature in black ink that reads "Alina Reynolds". The signature is written in a cursive, flowing style.

ALINA P. REYNOLDS  
ASSISTANT U.S. ATTORNEY



## **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 offenses;

(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 (re-

ardless 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.

(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)**

(e) Modification of conditions or revocation. –

The court may, after considering 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) –

(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 provision 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 terms 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.