

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 August Term 2011

4 Argued: April 3, 2012 Decided: July 11, 2012

5 Docket No. 10-2210-cr

6 -----
7 UNITED STATES OF AMERICA,
8 Appellee,

9
10 V.

11
12 MICHAEL CASSESSE,
13 Defendant-Appellant.¹
14 -----

15 Before: NEWMAN, KATZMANN, and PARKER, Circuit Judges.

16 Appeal from the June 19, 2009, judgment of the United States
17 District Court for the Eastern District of New York (Sandra L. Townes,
18 District Judge), sentencing the Defendant for a racketeering
19 conviction and for violation of supervised release. The Defendant
20 contends that twelve months of imprisonment imposed for the supervised
21 release violation should have been subtracted from the lifetime term
22 of supervised release.

23 Affirmed.

24 Bradley W. Moore, New Haven, Conn.
25 (James I. Glasser, Wiggin and
26 Dana LLP, New Haven, Conn., on
27 the brief), for Defendant-
28 Appellant.
29
30

¹The Clerk is directed to change the official caption.

1 Amy Busa, Asst. U.S. Atty., New York,
2 N.Y. (Loretta E. Lynch, U.S.
3 Atty. for the Eastern District of
4 New York, Peter A. Norling, Asst.
5 U.S. Atty., New York, N.Y., on
6 the brief), for Appellee.
7

8 JON O. NEWMAN, Circuit Judge.

9 This appeal presents primarily the almost metaphysical issue of
10 how, if at all, a lifetime term of supervised release, imposed for a
11 supervised release violation, should be reduced by the number of
12 months of a prison term imposed for that violation, a subtraction we
13 are willing to assume is required by the literal terms of the
14 provisions governing supervised release. Defendant-Appellant Michael
15 Cassesse appeals from the June 19, 2009, judgment of the District
16 Court for the Eastern District of New York (Sandra L. Townes, District
17 Judge) revoking his lifetime term of supervised release and sentencing
18 him to a term of twelve months in prison followed by a renewed
19 lifetime term of supervised release. We affirm.

20 Background

21 In 1987, Cassesse was convicted of conspiracy to distribute
22 heroin and sentenced to five years' probation. In 1991, he was
23 convicted of possession with intent to distribute more than 500 grams
24 of heroin and sentenced to 87 months of imprisonment, a consecutive
25 term of 87 months for violating his probation, and a lifetime term of
26 supervised release, the maximum possible term of supervised release
27 under the statute. See 21 U.S.C. § 841(b)(1)(B) (1991). One of the
28 conditions of supervised release was that Cassesse refrain from new
29 criminal conduct.

1 In 2007, while Cassesse was out of prison but continuing to serve
2 his term of supervised release, he was indicted on several new
3 charges, including racketeering in violation of 18 U.S.C. § 1962.
4 Cassesse was subsequently charged with violating a condition of
5 supervised release by committing a new crime. Following his guilty
6 plea to the racketeering charge, the District Court sentenced Cassesse
7 for both the racketeering conviction and the supervised-release
8 violation.

9 Speaking with respect to the racketeering offense, Judge Townes
10 noted that she had considered all of the submitted documents, all of
11 the statements made by the defense, the United States Sentencing
12 Guidelines ("the Guidelines"), and the factors enumerated by 18 U.S.C.
13 § 3553(a), including the Defendant's history and characteristics, the
14 nature of the crime committed, and the need for specific and general
15 deterrence. Judge Townes noted that Cassesse's racketeering offense
16 was a violation of his term of supervised release:

17 He committed the crime to which he pled guilty [i.e.,
18 racketeering] while serving . . . a term of supervised
19 release. Mr. Cassesse's difficulties in life do not relieve
20 him of his responsibilities for [the consequences of]
21 continuing to commit crimes. [Yet] he does not seem
22 inclined to stop. . . . I truly don't think Mr. Cassesse
23 has fully accepted responsibility for his criminal conduct.
24 I believe he's just been caught.
25

26 The District Court imposed a sentence of 90 months of
27 imprisonment and three years of supervised release for the
28 racketeering crime.

29 Judge Townes next turned to the violation of supervised release.
30 At this point the parties presented to the Court a plea agreement, in

1 which Cassesse apparently agreed to plead guilty to the supervised
2 release violation in exchange for the Government's recommendation that
3 any additional prison term for that violation be served concurrently
4 with the 90-month racketeering sentence. The parties agreed that the
5 relevant advisory range for the supervised release violation was six
6 to twelve months of imprisonment.

7 The District Court accepted Cassesse's guilty plea but rejected
8 the parties' recommendation of a concurrent term, imposing instead a
9 sentence of twelve months of imprisonment for the supervised release
10 violation to run consecutively to the 90 month term for the
11 racketeering conviction. Having revoked the previously imposed term
12 of lifetime supervised release for the narcotics violation, the
13 District Court then imposed a new lifetime term of supervised release.

14 Although Judge Townes provided no detailed explanation for the
15 sentence for the supervised release violation, she stated, "I have
16 reviewed everything." At the conclusion of the hearing, defense
17 counsel objected to the lifetime term of supervised release but did
18 not object either to the Court's failure to subtract the twelve month
19 term of imprisonment from it or to the brevity of the Court's
20 explanation of that term.

21 Discussion

22 A. Standard of Review

23 On appeal, sentences may be challenged for substantive and
24 procedural reasonableness. See United States v. Verkhoglyad, 516 F.3d
25 122, 127 (2d Cir. 2008). Cassesse argues on appeal that the lifetime

1 term of supervised release should somehow have been reduced by twelve
2 months, which is a substantive objection to the length of the
3 sentence. Although Cassesse did not specifically object in the
4 District Court to the lack of a twelve month reduction, we will assume
5 that his general objection to the length of the new lifetime term
6 comprehended this point. Because this claim presents a question of
7 statutory interpretation, we review the District Court's decision de
8 novo. See United States v. Aleynikov, 676 F.3d 71, 76 (2d Cir. 2012).

9 Cassesse also complains that the District Court inadequately
10 explained its reasons for the lifetime term, which is a procedural
11 objection, and in the absence of any objection in the District Court,
12 plain error review applies. See United States v. Villafuerte, 502 F.3d
13 204, 208, 211 (2d Cir. 2007) (holding that "rigorous" plain error
14 analysis applies to unpreserved claims of procedural sentencing error
15 under 18 U.S.C. § 3553(a) and (c)).²

16 B. Whether and How to Reduce the Lifetime Term of Supervised Release

17 Cassesse contends that the District Court erred when, after
18 revoking his previously imposed term of lifetime supervised release

²Although we have questioned the appropriateness of plain error review where a sentencing error allegedly increased a sentence, see United States v. Sofsky, 287 F.3d 122, 125-26 (2d Cir. 2002), we see no reason to weaken the plain error standard where a court has allegedly inadequately fulfilled a long-standing and uncomplicated procedural requirement of sentencing. See Villafuerte, 502 F.3d at 208, 211.

1 for his narcotics violation, it imposed both twelve months of
2 imprisonment and a new lifetime term of supervised release for the
3 supervised release violation. More specifically, he contends that the
4 District Court was required by statute to deduct the former from the
5 latter, limiting the supervised release term to something at least
6 twelve months less than the "lifetime" maximum authorized for the
7 narcotics violation for which his original term of supervised release
8 was imposed.

9 Sentencing for a violation of supervised release is governed by
10 18 U.S.C. § 3583. The parties agree that the relevant form of section
11 3583 is the one that was in force in 1991, at the time that Cassesse
12 was sentenced to his original lifetime term of supervised release. See
13 United States v. Smith, 354 F.3d 171, 172 (2d Cir. 2003). The version
14 of section 3583 in effect in 1991 provides in relevant part:

15 The court may . . . revoke a term of supervised release, and
16 require the person to serve in prison all or part of the
17 term of supervised release without credit for time
18 previously served on postrelease supervision, if it finds by
19 a preponderance of the evidence that the person violated a
20 condition of supervised release

21
22 18 U.S.C. § 3583(e)(3) (1991). The 1991 version is silent on the
23 question of whether a renewed term of supervised release may be
24 imposed in addition to a prison term as punishment for a supervised
25 release violation. Interpreting this version of the statute, the
26 Supreme Court in Johnson v. United States, 529 U.S. 694 (2000),
27 concluded that a court may "revoke the release term and require
28 service of a prison term equal to the maximum authorized length of a
29 term of supervised release." id. at 705. Moreover, the Court added,

1 because a term of supervised release "continues . . . after revocation
2 even when part of it is served in prison, . . . the balance of it []
3 remain[s] effective as a term of supervised release when the
4 incarceration is over[.]" Id. at 706. As we have noted, section
5 841(b)(1)(B) provided for the original term of supervised release and
6 authorized a maximum term of lifetime supervised release. In 1994,
7 before Johnson was decided, but after Cassesse was sentenced, Congress
8 amended the supervised release provisions to provide explicitly that
9 a renewed term of supervised release may be imposed for a supervised
10 release violation. See Violent Crime Control and Law Enforcement Act
11 of 1994, Pub. L. No. 103-322, § 110505, 108 Stat. 1796, 2017, codified
12 at 18 U.S.C. § 3583(h). The amending language not only authorized a
13 renewed term of supervised release not to exceed the maximum allowable
14 for the underlying violation, but also introduced the concept,
15 relevant to this appeal, of a reduction of the maximum allowable term
16 of supervised release by the length of time spent in prison for the
17 supervised release violation. The amendment added section 3583(h),
18 which provides:

19 When a term of supervised release is revoked and the
20 defendant is required to serve a term of imprisonment, the
21 court may include a requirement that the defendant be placed
22 on a term of supervised release after imprisonment. The
23 length of such a term shall not exceed the term of
24 supervised release authorized by statute for the offense
25 that resulted in the original term of supervised release,
26 less any term of imprisonment that was imposed upon
27 revocation of supervised release.
28

29 18 U.S.C. § 3583(h) (2012) (emphasis added).
30

1 Both parties agree, in effect, that once the Supreme Court ruled
2 in Johnson that a renewed term of supervised release may be imposed
3 for violations that occurred under the 1991 version of section
4 3583(e)(3), the imprisonment reduction concept of the later enacted
5 section 3583(h) should apply to such a renewed term. The Appellant
6 reasons as follows:

7 Under current law, "[t]he length of such a term of
8 supervised release shall not exceed the term of supervised
9 release authorized by statute for the offense that resulted
10 in the original term of supervised release, less any term of
11 imprisonment that was imposed upon revocation of supervised
12 release." 18 U.S.C. § 3583(h); see also USSG § 7B1.3(g)(2).
13 The law in effect when Mr. Cassesse committed his narcotics
14 offense is to the same effect, even though the underlying
15 statutory basis is different. As the Supreme Court stated,
16 under Section 3583(e):

17 [I]t is not a "term of imprisonment" that is to
18 be served, but all or part of "the term of
19 supervised release." But if "the term of
20 supervised release" is being served, in whole or
21 part, in prison, then something about the term of
22 supervised release survives the preceding order
23 of revocation.
24

25 Johnson, 529 U.S. at 705. Thus, if some "part" of the term
26 of supervised release is served in prison after a violation,
27 then the "part" of the term that remains after that prison
28 sentence is served is less than the whole, original release
29 term.
30

31 . . .

32
33 Thus, the pre-1994 Section 3583(e) and the current Section
34 3583(h) are in accord on this point. That is, any reimposed
35 supervised-release term must be reduced by the length of the
36 prison term the defendant serves for the violation.
37

38 Brief of Appellant at 14-16 (footnote omitted).
39

40 The Government reaches the same result by contending that
41 although "the pre-1994 version of § 3583(e) did not require
42 subtraction of the incarceratory sentence," it did require that "the

1 combined term of supervised release and incarceration did not exceed
2 the original term of supervised release." Brief for Appellee at 26.
3 Thus, for example, if the prior term of supervised release was ten
4 years and the period of incarceration for the violation was one year,
5 the only way the "combined term" could not exceed the original term is
6 if the one year term of imprisonment is subtracted from the prior ten
7 years of supervised release, yielding a maximum allowable renewed term
8 of nine years.

9 The intriguing question is whether and how the prison term
10 reduction concept applies to a renewed lifetime term of supervised
11 release. The Government elides this question by converting the
12 subtraction concept into an addition concept. It observes that
13 although Cassesse's one year term in prison plus the renewed lifetime
14 term of supervised release "may equal the original lifetime term of
15 supervised release, they do not exceed it." Id.

16 Cassesse advances the subtraction concept and insists that his
17 one year of imprisonment must somehow be subtracted from his lifetime
18 term of supervised release. He suggests three techniques. First, he
19 contends that the lifetime term should be abandoned in favor of a
20 fixed term of years from which the one year term of imprisonment would
21 be subtracted. See Brief for Appellant at 21. Second, he suggests
22 that the lifetime term of supervised release should be converted to
23 the corresponding offense level 43 in the Sentencing Table of the
24 Sentencing Guidelines from which some appropriate reduction should be
25 made, after which the reduced offense level would presumably be
26 converted back into a term of years. Cf. United States v. Nelson, 491

1 F.3d 344, 349 (7th Cir. 2007) (affirming conversion of mandatory life
2 sentence to offense level 43 and then reducing that level by 40
3 percent to reflect substantial assistance). Third, he suggests that
4 one year could be subtracted from his life expectancy at the time of
5 sentencing.³

6 Intriguing as are the question and some possible answers to it,
7 we conclude that the more appropriate course is simply to recognize
8 that this is one of those rare situations where Congress did not
9 expect the literal terms of its handiwork to be applied to a lifetime
10 term of supervised release, even if we assume that the subtraction
11 concept of section 3583(h) should be applied to a fixed term of
12 supervised release imposed under the pre-1994 version of section
13 3583(e)(3). Cf. Holy Trinity Church v. United States, 143 U.S. 457,
14 472 (1892) (statute prohibiting prepayment of transportation of alien
15 into United States to perform service of any kind held inapplicable to
16 church's contract to bring resident of England to render service as
17 rector and pastor, even though contract was "within the letter" of
18 statute).

³A variant of Cassesse's third suggestion was offered by the Seventh Circuit, in the context of a reduction for substantial assistance from a mandatory life sentence. That Court suggested making the substantial assistance reduction from 470 months, the average life expectancy of federal defendants at the time of sentencing, as determined by the United States Census Bureau. See Nelson, 491 F.3d at 349-50.

1 First, it is highly unlikely that Congress expected the
2 subtraction concept to be applied to a lifetime of supervised release.
3 Second, even if a sentencing judge were to feel obliged to make a
4 subtraction in some fashion, the judge could easily circumvent such a
5 requirement by selecting a supervised release term of many years, 99
6 for example, and then imposing a term of "only" 98 years. Third, use
7 of the defendant's life expectancy would introduce a variable bearing
8 little, if any, relation to penological purposes for defendants who
9 outlive their life expectancy and would introduce reverse age
10 discrimination. We conclude that the unadjusted lifetime term of
11 supervised release was not unlawful. See United States v. Rausch, 638
12 F.3d 1296, 1303 (10th Cir. 2011) ("Because it is impossible to predict
13 the precise length of any individual's life, a [supervised release]
14 sentence of 'life less two years [imprisonment]' has only
15 conceptual-not practical-meaning."). But see United States v. Shorty,
16 159 F.3d 312, 316 (7th Cir. 1998) ("[T]he maximum amount of supervised
17 release possible would have been life minus the amount of imprisonment
18 imposed during the sentencing for revocation"; no method of
19 subtraction suggested).⁴

⁴We note that in a recent summary order, United States v. McNaught, 396 F. App'x 772 (2d Cir. 2010), our Court appeared to endorse Cassesse's argument. See id. at 774 (stating that section 3583(h) "required the district court to subtract Appellant's term of 30 months' imprisonment from the maximum lifetime term of supervised release"). That statement, made without considering whether or how

1 C. Explanation of Sentence

2 Cassesse contends that the District Court committed procedural
3 error during the sentencing for his supervised release violation by
4 failing to consider the statutory factors required by 18 U.S.C.
5 § 3583(e) and by failing to explain the reasons for the sentence as
6 required by 18 U.S.C. § 3553(c). The statutory requirements are set
7 out in the margin.⁵

such a subtraction should be made, was dictum; the holding was that a
five-year term of supervised release was lawful. Moreover, the
summary order in McNaught was non-precedential. See 2d Cir. I.O.P.
32.1.1.

⁵Section 3583(e) cross-references several subsections of section
3553(a). These are:

- (1) the nature and circumstances of the offense and the
history and characteristics of the defendant;
- (2) the need for the sentence imposed--
. . . .
 - (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;

. . .

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

. . .

(B) in the case of a violation of . . . supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28 . . . ;

(5) any pertinent policy statement . . . issued by the Sentencing Commission . . . that . . . 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. § 3553(a).

Section 3553(c) provides:

The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence.

1 The District Court's failure to explicitly consider the section
2 3553(a) factors does not rise to the level of plain error. "As long
3 as the judge is aware of both the statutory requirements and the
4 sentencing range or ranges that are arguably applicable, and nothing
5 in the record indicates misunderstanding about such materials or
6 misperception about their relevance, we will accept that the requisite
7 consideration [required by 18 U.S.C. § 3583(e)] has occurred." United
8 States v. Fleming, 397 F.3d 95, 100 (2d Cir. 2005). Here, there is
9 every reason to believe that Judge Townes knew she had to consider,
10 and did consider, the relevant statutory factors. She thoroughly
11 considered nearly identical factors during her discussion of the
12 racketeering conviction that resulted from the same criminal acts.
13 During that discussion, moreover, she commented on Cassesse's
14 supervised release violation and how that violation affected her
15 overall assessment of the Defendant as an unremorseful repeat
16 offender. Then, after turning specifically to the supervised release
17 violation itself, in lieu of a detailed explanation she stated
18 generally, "I have reviewed everything." Finally, the record shows
19 that Judge Townes was aware of the appropriate policy statements and
20 the relevant advisory terms of imprisonment.

21 The explanation requirement of section 3553(c) is also
22 sufficiently satisfied to preclude a finding of plain error. Section
23 3553(c) requires no specific formulas or incantations; rather, the
24 length and detail required of a district court's explanation varies
25 according to the circumstances. See Villafuerte, 502 F.3d at 210.
26 Where, as here, the sentence concerns a violation of supervised

1 release and the ultimate sentence is within the recommended range ,
2 compliance with the statutory requirements can be minimal. See
3 Verkhoglyad, 516 F.3d at 132-33 (“[A] court’s statement of its reasons
4 for going beyond non-binding policy statements in imposing a sentence
5 . . . need not be as specific as has been required when courts
6 departed from guidelines” (emphases original)); Villafuerte,
7 502 F.3d at 210 (“When the district court imposes a Guidelines
8 sentence, it may not need to offer a lengthy explanation”).
9 Furthermore, section 3553(c) has likely been satisfied when a court’s
10 statements meet the goals “of (1) informing the defendant of the
11 reasons for his sentence, (2) permitting meaningful appellate review,
12 (3) enabling the public to learn why the defendant received a
13 particular sentence, and (4) guiding probation officers and prison
14 officials in developing a program to meet the defendant’s needs.” Id.

15 The District Court adequately fulfilled its duties under the
16 statute, and the error, if any, was not plain. First, Judge Townes
17 briefly described some reasons for her supervised release violation
18 sentence, stating that she would not reduce the sentence for
19 Cassesse’s cooperation because she had already given him credit for
20 that in her racketeering sentence and noting that Cassesse differed
21 from his co-defendants because he was the only one with a violation of
22 supervised release. Second, and more importantly, Judge Townes’s
23 intertwined analysis of the supervised release violation and the
24 racketeering crime clearly provided a sufficient explanation of the
25 sentence she ultimately imposed for the violation.

