

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.<sup>1</sup>  
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  
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<sup>1</sup>The 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)).<sup>2</sup>

#### 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

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<sup>2</sup>Although 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.<sup>3</sup>

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).

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<sup>3</sup>A 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).<sup>4</sup>

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<sup>4</sup>We 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.<sup>5</sup>

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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.

<sup>5</sup>Section 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

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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.

