May 13, 2019

Clerk of the Court
Supreme Court of the United States
One First Street Northeast
Washington, D.C. 20543

Re: Shawn Sayer v. United States
United States Supreme Court No. ___
United States Court of Appeals for the First Circuit No. 17-2065

Dear Clerk:

Enclosed for filing please find one original and ten copies of Petitioner's Motion to Leave to Proceed In Forma Pauperis and attached Petition for a Writ of Certiorari, as well as Proof of Service.

Thank you for your attention to this matter.

Sincerely,

William S. Maddox, Esquire

cc: Solicitor General of the Untied States
Petitioner Shawn Sayer
Clerk, U.S. Court of Appeals for the First Circuit

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

_____

SHAWN SAYER

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

_____

On Petition for a Writ of Certiorari
to the Court of Appeals for the First Circuit

_____

PROOF OF SERVICE

_____

I, William S. Maddox, do swear or declare that on this date, May 13, 2019 as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to third-party commercial carrier for delivery within 3 calendar days.

The names and addresses if those served are as follows:

Noel Francisco, Esquire
Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, DC 20530-0001
(202) 514-2203

Mr. Shawn Sayer
Petitioner
Reg #70101-036
5 Grant Street
Portland, Maine 04101

WILLIAM S. MADDOX, Esquire
*Attorney of record for petitioner*
P.O. Box 1202
Rockland, Maine 04841
(207) 594-4020

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

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SHAWN SAYER

Petitioner

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UNITED STATES OF AMERICA

Respondent

_____

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

_____

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

_____

Pursuant to Supreme Court Rule 39, the petitioner, Shawn Sayer, moves to file the attached Petition For Writ of Certiorari to the United States Court of Appeals for the First Circuit without payment of costs and to proceed *in forma pauperis*, on the grounds that petitioner was represented in the United States Court of Appeals for the First Circuit by counsel appointed to the Criminal Justice Act, 18 U.S.C. § 3006a.

Respectfully Submitted,
SHAWN SAYER
Petitioner
*By her attorney of record*

_____

WILLIAM S. MADDOX, Esquire
P.O. Box 1202
Rockland, Maine 04841
(207) 594-4020

DATE: May 13, 2019

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE FIRST CIRCUIT

_____

WILLIAM S. MADDOX, Esquire
*Counsel of Record for Petitioner*
P.O. Box 1202
Rockland, Maine 04841
(207) 594-4020

May 13, 2019

## QUESTIONS PRESENTED

I. Whether the district court erred by imposing a sentence without adequate explanation pursuant to 18 U.S.C. § 3553( c), and the length of which sentence was greater than necessary pursuant to 18 U.S.C. § 3553(a). Whether the explanation given by the circuit court may have been adequate to impose an upward variant, but inadequate to impose the maximum possible sentence.

II. Whether the district court violated due process by imposing the maximum possible sentence where the court rested its decision on the blanket assertion that it accepted the probation officer's report in it's entirety, knowing the defense felt the report was factually inaccurate.

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[1] LIST OF PARTIES: All parties appear in the caption of the case on the cover page.

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(D.Me. Oct. 24, 2017)..... passim

NO.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2019

SHAWN SAYER

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

---

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

---

SHAWN SAYER respectfully petitions this Court for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the First Circuit dated February 22, 2019, affirming his sentence.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit in *United States v. Shawn Sayer*, No. 17-2065 (1st Cir. February 22, 2019)

appears at Appendix A to this petition (hereinafter cited "A-_"). The opinion of the United States District Court for the District of Maine in *United States v. Shawn Sayer*, No. 2:11-cr-0113 (JAW) (D.Me. October 24, 2017), consisting of the oral findings of the district court at the sentencing hearing, appears at Appendix B and is unpublished. A-20.

## JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The judgment of the Court of Appeals was entered on February 22, 2019. No petition for rehearing was filed in this case. This Petition is filed within ninety (90) days after entry of judgment. *See* Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court had jurisdiction pursuant to 18 U.S.C. § 3231 and the court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be...deprived of life, liberty, or property, without due process of law....

U.S. Const. amend. V.

18 U.S.C. 3553(a) provides in pertinent part:

> (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,
> (B) to afford adequate deterrence to criminal conduct;
> ( C) to protect the public from further crimes of the defendant;
> (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) ...
> (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 –
> .....
> (6) the need to avoid unwarranted sentencing 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).

## STATEMENT

Following a plea hearing in the United States District Court for the District of Maine, petitioner was convicted of violating conditions of release previously imposed December 4, 2012, upon his conviction to the following charge: one count of Cyberstalking in violation of 18 U.S.C. §§ 2261(A)(2), and 2261( b)(5), a Class C Felony. On October 24, 2017, Judge John D. Levy sentenced the petitioner to a term of 24 months, a full-revocation, followed by three years of supervised release.

1. On appeal, petitioner had argued to the court of appeals that imposition of the maximum possible sentence for violations of conditions of release which did not include new criminal conduct, and which otherwise fell considerably short of the most egregious ways by which the subject conditions could have been violated, constituted a sentence which was greater than necessary pursuant to 18 U.S.C. § 3553(a), and which required a more adequate explanation pursuant to 18 U.S.C. § 3553( c). The court of appeals answered petitioner's argument with the conclusory statement that "the district court considered all the factors it was required to."

II Before the Circuit court petitioner had also argued that his sentence was substantively flawed in that the sentencing court "did not leave room for harsher sentences for those with higher Criminal History Categories and more

serious violations." The court of appeals answered petitioner's argument with the conclusory statement that "it is evident from the hearing transcripts that the sentencing judge considered Sayer's criminal history and the nature of his violations to be serious enough to warrant the sentence imposed."

## REASONS FOR GRANTING THE WRIT

I. The court of appeals failed to entertain the contention that a continuum of transgression should result in a continuum of punishment pursuant to 18 U.S.C. § 3553(a).

II. The court of appeals failure to address petitioner's sentencing argument that imposition of the maximum possible sentence was greater than necessary to address a transgression which fell considerably short of the maximum possible manner with which these transgressions could have been committed pursuant to 18 U.S.C. § 3553(a).

III. Given a low-level of transgression and an abundance of mitigating factors, the court of appeals failed to give an adequate explanation for imposing the maximum possible sentence.

IV. The explanation given by the circuit court may have been adequate to impose an upward variant, but it was inadequate to impose the maximum possible

sentence.

V. This Court's intervention is warranted to correct the court of appeal's failure to address these important questions of federal constitutional law.

## A. A Continuum of Transgression Should Result in a Continuum of Punishment.

The United States Supreme Court has remarked on the court's authority to impose a continuum of punishment. Chief Justice Rehnquist in an unanimous opinion wrote that "[p]robation is 'one point...on a continuum of possible punishments ranging from solitary confinement in a maximum-security facility to a few hours of mandatory community service.'" United States v. Knights, 534 U.S. 112, 119, 122 S.Ct. 587, 151 L.Ed.2d 497, (70 U.S.L.W. 4029 (2001) *citing* Griffin v. Wisconsin, 483 U.S. 868, 874 (1987). Justice Thomas echoed this idea five years later when he wrote that "parolees are on a 'continuum' of state-imposed punishments,...and "[o]n this continuum, parolees have fewer expectations of privacy than probationers....[yet, of] the Court's continuum of possible punishments, parole is the stronger medicine." Samson v. California, 547 U.S. 843, 850, 126 S.Ct. 2193, 165 L.Ed2d (250 (2006)(citations omitted).

By means of this Petition, Shawn Sayer is asking the United States Supreme Court to correlate quantum of transgression with length of punishment. Before the

court of appeals, Shawn Sayer had argued that given the continuum of punishments meted out by a sentencing court, there should be a correlation between transgression and punishment in calibrating the decisional scales. Implicit in Sayer's argument then and now is the idea that violations of supervised release should be subject to a correlative degree of punishment just as probation violations, parole violations, or commissions of new crimes. He had argued that the continuum of seriousness of offense should be met with a correlative continuum of response pursuant to an extension of reasonableness inherent in 18 U.S.C. § 3553(a).

Specifically, appellant-petitioner had argued before the court of appeals that his sentence on a petition to revoke supervised release was both procedurally and substantively unreasonable because the sentencing court decision lacked adequate explanation and the length of the sentence was greater than necessary given the fact that the alleged violation was non-criminal and the defendant had accomplished many of the goals he and his probation officer had set out to accomplish. On a revocation of supervised release, the district court had imposed a twenty-four (24) month sentence on an advisory guideline range of five (5) to eleven (11) months.

Shawn Sayer had averred before the court of appeals that his sentence was

procedurally flawed in that the court neglected to adequately explain the rationale for its chosen sentence, and that his sentence was substantively flawed in that his sentence far exceeded that which was necessary pursuant to 18 U.S.C. § 3553(a).

**B. Procedural Reasonableness**

Before the circuit court, petitioner had cited United States v. Franquiz-Ortiz, in which the First Circuit had vacated a revocation sentence because the record in that case provided an insufficient basis for appellate review of the procedural and substantive reasonableness of the sentence. United States v. Franquiz-Ortiz, 607 F.3d 280, 282 (1st. Cir. 2010). The defendant, Franquiz-Ortiz, had admitted that he had committed a Grade B violation of his conditions of supervised release, which had resulted in an advisory guideline range of 4-10 months. Id. In imposing a full revocation of 24 months, despite a joint recommendation of the parties of 12 months, the sentencing judge stated

> *I am not prepared to give him...a guideline range sentence*.... This individual has been given opportunities. What he has done is not de minimus by any means, and I do not think that if I am not going to supervise him anymore, I am going to make him serve 24 months with no additional supervision.

Id. (emphasis added by First Circuit). The First Circuit wrote that this statement by the sentencing judge "does not reveal the court's rationale for imposing a non-guideline sentence twice as long" as the parties' joint recommendation. Id. The

First Circuit stated that the substantive reasonableness of the sentence was not immediately apparent because "by imposing the statutory maximum sentence, the court left no room for harsher sentences for those with higher criminal history categories and more serious violations." Id. For this reason, and because the sentencing court had not correlated the parties' recommendation of a twelve month sentence for the defendant's possession of a one pound package of marijuana with the court's statutory maximum sentence, the First Circuit vacated the sentence and remanded for resentencing. Id.

The First Circuit in Franquiz-Ortiz had cited United States v. Gallo, for it's determination that a sentencing court should calibrate relevant factors such as leaving "room for harsher sentences for those with higher criminal history categories and more serious violations." Id. *citing* United States v. Gallo, 20 F.3d 7, 14 (1st Cir. 1994). In Gallo, the First Circuit wrote

> In making discretionary judgments, a district court abuses its discretion when a relevant factor deserving of significant weight is overlooked, or when an improper factor is accorded significant weight, or when a court considers the appropriate mix of factors, but commits a palpable error of judgment in calibrating the decisional scales.

Id. at 14.

In the case sub judice, petitioner had posited that by stating that it was imposing the maximum sentence in order to "reflect the seriousness of the

offense...[and] to protect the public from further crimes by the defendant," the sentencing court committed the kind of analysis decried by the First Circuit in Gallo. Final Revocation Hearing Transcript at 33-34. The sentencing court twice stated that it's sentence was based on the revocation report, but failed to calibrate the results of two mental health evaluations conducted of defendant which were mentioned in the revocation report in contravention of these factors. Id. at 5,9. The first evaluation listed in the revocation report noted that the defendant "was identified as a Low/Moderate risk for recidivism per the Post-Conviction Risk Assessment (PCRA), with Dynamic Risk factors of 1) Social Networks; and 2) Education/Employment." Revocation Report at 5. The second evaluation mentioned by the probation officer was that in early 2017, three months or so before the filing of the petition, the defendant had undergone a mental health assessment which revealed that he "did not meet the criteria for diagnosis of a mental health disorder." Id. at 9.

The court of appeals responded to appellant-petitioner by writing:

> The district court's remarks at sentencing made clear that it considered the factors required by 18 U.S.C. § 3553(e), weighed them, and used its discretion to arrive at a reasoned, defensible decision. The court primarily stressed three factors in support of its variant sentence: (1) Sayer's criminal history and similarity of Sayer's conduct on supervised release to the conduct for which he had been convicted; (2) Sayer's unwillingness to accept responsibility; and (3) the need to protect the public from further crimes.

United States v. Sayer, No. 17-2065, (1st Cir. Feb. 22, 2019).

Petitioner posits that the explanation given by the circuit court may have been adequate to impose an upward variant, but it was inadequate to impose the maximum possible sentence. Petitioner states failure to correlate quantum of transgression with length of punishment makes the ultimate sentence too vague for appellate review.

**B1. Analysis ~ Procedural Reasonableness**

With respect to procedural reasonableness, the sentencing court ran afoul of procedural reasonableness by failing to adequately explain the chosen sentence in view of defendant's non-frivolous mitigating factors.

**B2. Adequacy of Explanation**

In United States v. Cirilo-Munoz, the First Circuit commented on the requirement of an adequate explanation by the district court in imposing a particular sentence. The First Circuit wrote

> Under 18 U.S.C. § 3553( c), the sentencing judge is required to state the reasons for imposing a particular sentence "in open court" at the time of sentencing....The district court's explanation of the sentence serves dual purposes. First, the explanation is an essential prerequisite to our appellate review of the sentence....The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decision-making

> authority....Second, such an explanation furthers the weighty goals of transparency and credibility for the justice system.

United States v. Cirilo-Munoz, 504 F.3d 106, 131-132, (1st Cir. 2007).

The First Circuit opinion in Cirilo-Munoz followed soon after the United States Supreme Court decided Rita in which the defendant had sought a lower than guidelines range sentence based upon "his physical condition, likely vulnerability in prison, and military experience." Rita v. United States, 551 U.S. 338, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007). In deciding the question whether the district court had properly analyzed relevant sentencing factors, Justice Breyer wrote

> [t]he sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decisionmaking authority....Where the defendant or prosecutor presents nonfrivolous reasons for imposing a different sentence, however, the judge will normally go further and explain why he has rejected those arguments.

Id. at 356-357.

In the present matter, petitioner Shawn Sayer had admitted to violations of supervised release which did not constitute new criminal conduct, and he had successfully completed numerous goals of supervision. Before the circuit court, petitioner had posited that his argument for a below maximum sentence was not based on frivolous reasoning, and that the district court did not explain adequately their reasons for rejecting this argument.

## C. Substantive Reasonableness

With respect to substantive reasonableness, petitioner had presented the circuit court with the following precedent from the First Circuit:

> When reviewing a challenge to the substantive reasonableness of a sentence, substantial deference is due to the sentencing court's discretion....Fidelity to this deferential standard requires that a challenge based on substantive reasonableness must comprise more than a thinly disguised attempt by the defendant to substitute his judgment for that of the sentencing court....In the last analysis, a challenge to the substantive reasonableness of a sentence turns on whether the sentencing court has offered a plausible rationale for the sentence and whether the sentence itself represents a defensible result.

Vargas-Garcia, supra at 166 (citations omitted).

Petitioner stated that he was not attempting to substitute his judgment for that of the sentencing court. Instead, he posited that where a sentencing court endeavors to base a sentence upon the defendant's criminal history and the underlying conviction, it was procedurally and substantively unreasonable to fail to take into consideration defendant's efforts while on supervised release, and the fact that this violation was not based on new criminal conduct, either felonious or otherwise, and the fact that the defendant posed a low/moderate risk of recidivism.

The sentencing court, by stating that it was going to rely on the revocation report for the basis of it's sentencing decision, and by failing to account for one evaluation showing defendant as a low/moderate risk for recidivism, and another

showing defendant as not meeting the criteria for a mental health diagnosis, the sentencing court failed to adequately calibrate the decisional scales. As in Franquiz-Ortiz, the sentencing court "by imposing the statutory maximum sentence,..left no room for harsher sentences for those with higher criminal history categories and more serious violations." Franquiz-Ortiz, supra at 282. These evaluations should have been accorded significant weight by the district court. They were not given any weight.

Petitioner had also cited precedent from the Second Circuit for the circuit court. In vacating a sentence of the district court and remanding for resentencing, the Second Circuit concurred with the approach the First Circuit had taken in Franquiz-Ortiz and Gallo. United States v. Aldeen, 792 F.3d 247 (2nd Cir. 2015). In Aldeen, the district court had sentenced Aldeen to eighteen months imprisonment and three years supervised release on defendant's second conviction for violating conditions. Id. at 249. The violation consisted of the defendant's having spoken "to a fellow member of...[his] treatment group in the subway following a treatment session." Id. at 255. The Second Circuit stated that "[b]ecause there was a major deviation from the Guidelines range in this case, the district court was obliged to provide a more substantial justification for its sentence." Id. at 254. Absent sufficient compelling reasons to support the

deviation from the guidelines, the Second Circuit concluded "that the district court committed procedural plain error by failing to adequately explain the reasoning for its sentence." Id. at 254, 253.

Envisioning a spectrum of possible sentences, and mindful of the need to leave "room for harsher sentences for those with higher criminal history categories and more serious violations," the district court should have assessed the following aggravating and mitigating circumstances:

Aggravating circumstances:

1) the defendant had demonstrated behavior similar to the behavior he demonstrated in the underlying offense thereby violating the Computer and Internet Monitoring Program (CIMP) condition of his release as follows: by downloading either 22 or 27 spoofing applications to his cell phone, allowing him to place outgoing phone calls under the guise of a different phone number; by downloading 20 nonapproved messaging applications to his cell phone; by using three nonapproved email accounts to contact his girlfriend; and by creating two false dating site profiles to resemble his girlfriend's profile.
2) on the underlying crime, defendant had been given a sentence representing the statutory maximum for that offense as well as an upward variance, which the court in this case described as "truly egregious.".
3) the defendant continued to violated the CIMP contract after the probation officer filed her petition.
4) the defendant had encouraged his grlfriend to contact his lawyer and provide him with exculpatory information.
5) the defendant's behavior demonstrated a violation of trust created between the defendant and the court when the court placed defendant on supervisory release.
6) the defendant had placed a tracking device on a mechanical device he had given his girlfriend.
7) the defendant's criminal history, both charged and uncharged, demonstrated a "chronic pattern of stalking behavior."
8) the defendant violated his bail after his initial appearance; And,

9) the court in this case concluded that supervised release had not worked.

Mitigating circumstances:

1) violation not based on new felonious criminal conduct;
2) violation not based on non-felonious criminal conduct;
3) at the beginning of his supervised release, defendant had met with his probation officer and set the following goals which the probation admitted the defendant had accomplished: secured employment, engaged in mental health treatment successfully completing 19 individual sessions, six group counseling sessions and domestic batterer's intervention counseling; saved money; re-established credit; purchased a truck; and put himself in a position to purchase his own home.
4) pursuant to mental health assessment, the probation officer reported that defendant "was identified as a Low/Moderate risk for recidivism per the Post-Conviction Risk Assessment (PCRA), with Dynamic Risk factors of 1) Social Networks; and 2) Education/Employment."
5) pursuant to mental health assessment conducted within three months of the probation officer's filing of the petition, the probation officer reported that the defendant had undergone a mental health assessment which revealed that he "did not meet the criteria for diagnosis of a mental health disorder."
6) the defendant exercised his right to allocution and apologized for his "impulsive behavior and compulsive reactions," and that he continued to need supervision in order to correct his "thinking errors." And,
7) The defendant and his girlfriend had an on again and off again relationship which demonstrated mixed messages to the defendant, yet continued.
8) The probation officer originally had recommended an 8 month term of imprisonment, before the defendant violated his bail.

By imposing the statutory maximum possible sentence on a criminal history category III defendant who has not committed a non-felonious crime, let alone a felony, the sentencing court left no room to sentence a defendant who possessed a higher criminal history category or who had committed a crime. By imposing the statutory maximum possible sentence on a defendant who scaled a low/moderate

risk for recidivism per the Post-Conviction Risk Assessment (PCRA), the sentencing court left no room to sentence a defendant who did possess an identifiable risk for recidivism. By imposing the statutory maximum possible sentence on a defendant who might appear to be on a trajectory of uncertain destination, left no room for a defendant who actually evinced that destination. The sentencing court appears to have conflated the objective facts of the violation with the aggravating factors in the underlying offense, and failed to account for obvious mitigating factors.

Petitioner contends that the circuit court did not fully address his argument that violations of conditions of supervised release should be sentenced in a manner where the maximum sentence is reserved for violations evincing maximum conduct. Defendant's attorney had objected at sentencing to the upward variance and had preserved "all of Mr. Sayer's appeal rights."

Petitioner had posited that the district court did not provide an adequate explanation for imposing a large variance and that references to the probation officer's report "in it's entirety" were too vague an explanation to justify a maximum variance. Petitioner cited United States v. Crespo-Rios, in which the First Circuit found that the district court failed to provide an adequate explanation for it's chosen sentence, treated the appeal as one of substantive reasonableness,

and employed the abuse of discretion standard on review. United States v. Crespo-Rios, 787 F.3d 34, 37 (1st Cir. 2015). In Crespo-Rios the district court had cited "the personal history and characteristics of the defendant as well as the potential for rehabilitation" and "the conclusion of the psychosexual report." Id. The district court also had stated that it had considered "all of the evidence that is really on record," and mentioned that the offense "was serious." Id. The First Circuit, however, stated that the district court did not explain how it factored that into its §3553(a) analysis, or explain its view "on the need for general deterrence or the potential for sentencing disparities." Id. Because the low end of the guideline range determined in the PSR was 70 months, and because the district court sentenced Crespo to 13 days, the First Circuit stated that "[t]he justification presented should be commensurate with the degree of the variance such that a major departure should be supported by a more significant justification than a minor one." Id. at 38 (citations omitted). The First Circuit stated that beyond the factors the district court did consider,

> [t]he district court did not explain how it had weighed the other factors laid out in § 3553(a), or why this particular sentence was appropriate in light of these factors. Critically, there is no explanation of how this sentence reflects the seriousness of the crimes committed, avoids sentencing disparities, promotes general deterrence, or promotes respect for the law.
>
> These factors cannot be left out of the sentencing calculus in cases like this.

Id. at 38. The First Circuit remanded the case "for resentencing with instructions for the district court to consider, and explain, all relevant sentencing factors for any sentence imposed," yet, stopped short of deciding whether the chosen sentence was in fact substantively unreasonable. Id. at 40-41, 38. The First Circuit stated that mere mention of sentencing factors, such as "the seriousness of the 'offense' once, in boilerplate fashion," constituted an inadequate explanation. Id. at 40.

Petitioner had argued that like Crespo-Rios, the sentencing court, by broadly incorporating the Revocation Report, brought into the calibration of sentencing factors, two key factors which were not discussed during the sentencing hearing, namely, that the probation officer reported that the defendant "was identified as a Low/Moderate risk for recidivism," and that shortly before the probation officer filed her petition, defendant had undergone a mental health assessment which revealed that the defendant "did not meet the criteria for diagnosis of a mental health disorder." Petitioner argued that these two omitted factors, as well as the omission of consideration that defendant had not committed a non-felonious crime, let alone a felony, might induce the analysis that appellant is merely raising an issue about the non-inclusion of serious sentencing factors which appellant contends should have been, but were not, addressed by the sentencing court.

Petitioner, however, made the additional argument, that these omitted

elements constituted essential elements of the sentencing calculus in this case, and their omission raised the argument that it was substantively unreasonable for the court to levy the maximum sentence possible on a defendant who presented with a quantum of transgression which placed him on the low end of the scale of egregious conduct. Petitioner contended that there must be uniformity at each level of the sentencing process, and, therefore, comparisons between sentences become inescapable. Petitioner avers that the circuit court did not address petitioner's argument in this regard, and, therefore, did not contend that the defendant sub judice committed transgressions at the upper end of a continuum of all possible ways that the supervision condition could have been violated. The circuit court opinion suggests that the fact that the sentencing court twice referenced the contents of the entire Revocation Report, and the fact that the sentencing court accepted both 1) the contention of the government and probation that the facts of the transgression under review approximated the facts of the original crime, and 2) the defendant received the maximum time on the original crime, that this obviates the need for analysis by the circuit court of petitioner's request to correlate transgression with punishment.

Yet, because the supervision condition in this case, and on these facts, could have been violated in a multitude of more egregious ways than it was violated, it

was substantively unreasonable for the sentencing court to sentence this defendant, and the essential elements of his transgression, to the maximum possible of all sentences.

As a final point, and buttressing a lack of significant consideration by the sentencing court of the entire set of circumstances with which defendant presented at sentencing, is the fact that when the sentencing court stated for the first time that the court was "going to adopt the report in its entirety as findings in support of the sentence that" the court was going to impose in this matter, it was before either the prosecution or the defendant had made their respective sentencing arguments. Final Revocation Hearing Transcript at 11. This fact makes it look like the sentencing court had already made up it's mind as to what it considered "the entire set of relevant circumstances," even if the possibility of a non-maximum sentence remained. If the court had not pre-determined "the entire set of circumstances" in this case, then the court would have, or should have, inquired further of both defendant and defense counsel when each of them stated that the report did not include exculpatory material. Id. at 9, 10-11. Tellingly, the defendant not only stated that the report failed to include exculpatory material, including text messages, but also that the report failed to include exculpatory material generated after the report was written. Id. at 10-11.

Because the probation officer neglected to put certain texts in her report, it might have appeared that the defendant foolishly engaged in behavior with M.G. in these texts which conceivably approximated defendant's prior bad behavior with Jane Doe. It is precisely for this reason that the defendant and his attorney both had informed the sentencing court that certain points, in the nature of exculpatory material, needed to be brought to the court's attention. This did not happen, in part because the court failed to follow-up on the request of both the defendant and his attorney. At most, the defendant's attorney asked the court to reconsider it's sentence, object to the upward variance and preserve "all of Mr. Sayer's appeal rights." Id. at 38-39.

In sum, because the district court imposed the highest possible sentence, more than twice the maximum of the applicable advisory guideline range, and because the district court neglected to account for important mitigating factors, and neglected to follow up with the defendant's and his attorney's statement that the Revocation Report failed to include exculpatory material, appellant states that the sentence imposed lacked an adequate explanation and was substantively unreasonable. Had the district court followed up with the defendant and his attorney, the court would have discovered the truth of defendant's relationship with M.G., and that the probation officer failed the court by providing an inaccurate

Revocation Report. The sentencing judge should have asked the defendant directly what he meant by his objections to the Revocation Report.

Had the sentencing court had it in mind to correlate quantum of transgression with degree of punishment, this defendant would have received less than the maximum possible sentence.

The questions presented warrant this Court's review.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted.

WILLIAM S. MADDOX, Esquire
*Counsel of Record for Petitioner*
1st Cir. #42694
P.O. Box 1202
Rockland, Maine 04841
(207) 594-4020

Dated: May 13, 2019

INDEX OF APPENDICES

Appendix A

# United States Court of Appeals
## For the First Circuit

No. 17-2065

UNITED STATES OF AMERICA,

Appellee,

v.

SHAWN SAYER,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. Jon D. Levy, U.S. District Judge]

Before

Howard, Chief Judge,
Torruella and Thompson, Circuit Judges.

William S. Maddox, on brief for appellant.
Renée M. Bunker, Assistant United States Attorney, Appellate Chief, and Halsey B. Frank, United States Attorney, on brief for appellee.

February 22, 2018

**TORRUELLA, Circuit Judge.** In 2012, appellant Shawn Sayer ("Sayer") pled guilty to one count of cyberstalking in violation of 18 U.S.C. §§ 2261A(2) and 2261(b)(5). He commenced his supervised release term in 2016, but it was revoked in 2017 because he violated some of his conditions. On appeal, Sayer contends that the district court's upwardly-variant sentence following revocation is procedurally and substantively unreasonable. Moreover, he challenges the district court's imposition of a supervised release term in addition to the statutory maximum term of imprisonment upon revocation.[1] After careful review, we affirm.

## I. Background

We briefly summarize the relevant facts and procedural course of this case.[2]

After Jane Doe[3] ended her relationship with Sayer in January 2006, Sayer stalked and harassed her for various years,

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[1] The maximum prison term that may be imposed following revocation is set forth at 18 U.S.C. § 3583(e)(3) and is based on the class of the original offense.

[2] We draw the uncontested facts underpinning Sayer's original sentence from this court's opinion affirming that sentence. See United States v. Sayer, 748 F.3d 425 (1st Cir. 2014). The facts regarding Sayer's conduct while on supervised release derive from the Probation Office's Revocation Report, which the district court adopted in its entirety with no objection from Sayer to the information therein.

[3] As before, we refer to Sayer's victim as "Jane Doe" to preserve

causing her to seek a protective order against him in state court. United States v. Sayer, 748 F.3d 425, 428 (1st Cir. 2014). In the fall of 2008, Sayer started using the internet to induce random third parties to harass Jane Doe. Id. After several unknown, "'dangerous'-looking men" arrived at Doe's house in Maine in October 2008 "seeking 'sexual entertainment,'" she discovered an ad in the "casual encounters" section of Craigslist that showed pictures of her in lingerie, which Sayer had taken while they were dating. Id. The ad described a list of sexual acts she was supposedly willing to perform and provided her address. Id. Jane Doe had not posted the ad, nor authorized Sayer to do so. Id.

The unwanted visits from unknown men persisted until Jane Doe moved to her aunt's house in Louisiana and changed her name, seeking to avoid Sayer's harassment. The visits stopped until August 2009, when, once again, an unknown man showed up at her aunt's home in Louisiana, referring to Doe by her new name, claiming that he had met her over the internet, and seeking a sexual encounter. Id. Jane Doe later found: 1) videos of herself and Sayer engaged in sexual acts on various pornography websites detailing her name and current Louisiana address; (2) a fraudulent Facebook account including sexually explicit pictures of her; and

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her privacy. Sayer, 748 F.3d at 428 n.1. For the same reason, we will refer to Sayer's second victim as "M.G."

(3) a fake account on another social network, Myspace, which provided both her old and new names, her Louisiana address, and links to pornography sites hosting sex videos of her. Id. at 428-429. After police searched Sayer's home in June 2010, a forensic analysis of his computer showed that between June and November 2009, Sayer had created "numerous fake profiles" on Yahoo! Messenger using a variation of Jane Doe's name. Id. at 429. In many cases, "Sayer, posing as Jane Doe, chatted with men online and encouraged them to visit [her] at her home in Louisiana."[4] Id.

In 2012, Sayer pled guilty to cyberstalking.[5] The district court imposed a prison term of sixty months, the statutory maximum, to be followed by three years of supervised release.

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[4] Jane Doe was forced to return to Maine in November 2009, as the men that Sayer sent to the Louisiana residence scared her aunt and cousin, with whom she was staying. Id.

[5] The indictment encompassed conduct from "about July 2009, the exact date being unknown, until about November 2009," and alleged that the defendant:

> with the intent to injure, harass, and cause substantial emotional distress to a person in another state, namely, Louisiana, used facilities of interstate or foreign commerce, including electronic mail and internet websites, to engage in a course of conduct that caused substantial emotional distress to the victim and placed her in reasonable fear of death or serious bodily injury.

Sayer commenced his supervised release in February 2016. During the initial supervised release orientation, Sayer identified several goals, including finding full-time employment, saving money, and purchasing a truck. He worked in the school lunch program for the City of Portland while searching for carpentry-related employment.[6] In May 2016, Sayer secured employment with a construction company in the carpentry industry.

In June 2016, the Probation Office filed a petition to modify Sayer's supervised release conditions to add a requirement that he participate in a Computer and Internet Monitoring Program ("CIMP"), which involved partial or full restriction of his use of computers and the internet and required him to submit to unannounced searches of his computer, storage media, and electronic or internet-capable devices. Despite Sayer's opposition, the district court imposed the CIMP condition, explaining that it had inadvertently omitted it at the time of Sayer's original sentencing but that it was warranted considering the "nature and seriousness" of Sayer's underlying offense.

During his supervised release term, Sayer began a relationship with M.G. On October 25, 2016, Sayer called the

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[6] He secured this employment while serving the final part of his custodial sentence (pre-release) in the Pharos House Residential Reentry Center.

Probation Officer to inform that "things [had gone] sour" with M.G. While Sayer insisted that M.G. "never explicitly asked him to not contact her," he acknowledged that she had blocked communications with him on Facebook and ignored multiple text messages. The Probation Officer encouraged him to stop contacting M.G. During a meeting with Sayer days later, the Probation Officer brought up Sayer's communications with M.G., emphasizing that Sayer was "exhibiting at risk communication that reached an obsessive level." The Probation Officer informed Sayer that his internet access would be restricted for a while to allow the Probation Office to investigate the extent of his communication with M.G.

On November 18, 2016, M.G. denied any issues of harassment and said she and Sayer were "working things out." Hence, on November 29, 2016, the Probation Officer informed Sayer that he would restore his internet access, based on the results of the investigation. The Probation Officer later discovered that Sayer continued to use the internet during his period of restriction as the software installed by the Probation Office had failed to block his access. When confronted, Sayer said that although he had felt "shocked" when he was able to access the internet after being told he would not be able to, he just "went along with it."

In a meeting on January 4, 2017, Sayer and the Probation Officer once again discussed Sayer's communications with M.G., as she had recently requested he "leave her alone." Sayer insisted that his multiple messages were "his way of 'helping' her through periods of depression." He seemed "very bothered" by the breakdown of his relationship and expressed concern for an iPhone and iPad that he had let M.G. borrow and she had not returned. The Probation Officer suggested a mental health assessment, but Sayer said he was "not really that upset." During this meeting, the Probation Officer also discussed nude photos of M.G. in Sayer's cellphone, some in which M.G. was "not looking at the camera and it [was] unclear how aware she [was]." The Probation Officer instructed Sayer to inform M.G. that his cellphone was monitored and other people had access to her photos.

In mid-January 2017, the Probation Office discovered a GPS tracker application in Sayer's cellphone, which Sayer admitted to connecting to the iPad he had lent M.G.[7] The following month, Sayer scheduled a mental health assessment as instructed by the Probation Office, which he referred to as "ridiculous."

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[7] Sayer alleged that he installed the tracker because he wanted to know whether M.G. had mailed his iPad back. He provided evidence that it had been disabled. From the Revocation Report, it is unclear whether Sayer had previously disabled the tracker of his own volition, or whether he had only done so after prodding by the Probation Office.

In late February 2017, M.G. sought a no contact order regarding Sayer from the Ellsworth, Maine Police Department, and as a result Sayer was verbally instructed to cease all communications with her. On May 8, 2017, M.G. contacted the Probation Office to inform that Sayer had been obsessively contacting her via phone and email. She reported that he called from different numbers and was able to mask his phone number to appear as though another contact was calling. She also reported he emailed her from multiple accounts.

On May 23, 2017, the Probation Office filed a petition to revoke Sayer's supervised release, alleging that Sayer had violated the CIMP condition by opening and using a series of online accounts without prior permission from Probation. Sayer waived the preliminary revocation hearing, and the district court scheduled the final revocation hearing for October 24, 2017. On that day, Sayer waived the right to a hearing and admitted to committing the violations. Specifically, Sayer admitted to: (1) installing twenty-two "spoofing" applications on his phone, which enabled him to place outgoing phone calls under the guise of a different phone number, to call M.G.; (2) downloading twenty unapproved messenger applications; (3) opening 4 different email accounts, 3 of which were never reported to, nor approved by, the Probation Office, and were used to send multiple messages to M.G.;

and (4) creating two dating profiles appearing to resemble M.G., seeking to pose as a representation of her to find out if she was dating other men.

Sayer also accepted the Probation Officer's Revocation Report without any objection to its content, except for a complaint that it omitted some "mutual" communications between M.G. and him. Without any further objection from Sayer, the district court adopted the Revocation Report in its entirety as findings in support of the revocation sentence. While the Guidelines Sentencing Range was five to eleven months, the court ultimately varied upwards to impose a sentence of a twenty-four-month prison term and twelve months of supervised release.

## II. Discussion

"Appellate review of federal criminal sentences is characterized by a frank recognition of the substantial discretion vested in a sentencing court." United States v. Flores-Machicote, 706 F.3d 16, 20 (1st Cir 2013). We review sentencing decisions under the United States Sentencing Guidelines ("U.S.S.G.") for "reasonableness, regardless of whether they fall inside or outside the applicable [Guidelines Sentencing Range]." United States v. Turbides-Leonardo, 468 F.3d 34, 40 (1st Cir. 2006). Our "review process is bifurcated: we first determine whether the sentence imposed is procedurally reasonable and then determine whether it

is substantively reasonable." United States v. Clogston, 662 F.3d 588, 590 (1st Cir. 2011).

**A. Procedural Reasonableness of Sayer's Sentence**

We must ensure that the district court did not commit any "significant procedural error" to arrive at a sentence. Gall v. United States, 552 U.S. 38, 51 (2007). Examples of this include "failing to calculate (or improperly calculating) the [GSR], treating the Guidelines as mandatory, failing to consider the [18 U.S.C.] § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence-including an explanation for any deviation from the Guidelines range." Flores-Machicote, 706 F.3d at 20 (alterations in original) (quoting Gall, 552 U.S. at 51).

Preserved claims of sentencing error are generally reviewed for abuse of discretion. United States v. Márquez-García, 862 F.3d 143, 145 (1st Cir. 2017). However, when a defendant fails to contemporaneously object to the procedural reasonableness of a court's sentencing determination, we review for plain error. See United States v. Ruiz-Huertas, 792 F.3d 223, 226 (1st Cir. 2015). Under the plain error standard, "an appellant must show: '(1) that an error occurred (2) which was clear or obvious and which not only (3) affected the [appellant's] substantial rights, but also (4) seriously impaired the fairness,

integrity, or public reputation of judicial proceedings.'" Márquez-García, 862 F.3d at 145 (alterations in original)(quoting United States v. Duarte, 246 F.3d 56, 60 (1st Cir. 2001). Sayer did not raise his procedural reasonableness argument before the sentencing court, so we review for plain error.[8] See United States v. Duarte, 246 F.3d 56, 60 (1st Cir. 2001).

Sayer claims that the district court procedurally erred by failing to adequately explain the rationale for its chosen sentence. The revocation hearing transcript, however, refutes Sayer's argument. The district court's remarks at sentencing made clear that it considered the factors required by 18 U.S.C. § 3583(e), weighed them, and used its discretion to arrive at a reasoned, defensible decision. The court primarily stressed three factors in support of its variant sentence: (1) Sayer's criminal

[8] Sayer argues that he properly preserved all of his arguments on appeal. As the transcript of the revocation hearing reflects, Sayer's attorney stated: "I would like to object to the upward variance. I think that is necessary to preserve all of Mr. Sayer's appeal rights." This is insufficient. "A general objection to the procedural reasonableness of a sentence is not sufficient to preserve a specific challenge to any of the sentencing court's particularized findings. . . . [A]n objection must be sufficiently specific to call the district court's attention to the asserted error." United States v. Soto-Soto, 855 F.3d 445, 448 n.1 (1st Cir. 2017); see also United States v. Sosa-González, 900 F.3d 1, 4 (1st Cir. 2018) (finding "we object as to the sentence because we believe it is unreasonable" to be insufficient to preserve a procedural objection). In any event, even reviewed under the abuse of discretion standard, Sayer cannot meet his burden.

history and the similarity of Sayer's conduct on supervised release to the conduct for which he had been convicted; (2) Sayer's unwillingness to accept responsibility; and (3) the need to protect the public from further crimes.

First, the court expressed that Sayer's behavior while on supervised release "demonstrates that he has continued with the same sort of resistance to authority and compulsive thinking that resulted in his underlying cyberstalking conviction." It explained that although Sayer's conduct while on supervision did not "rise to the level" of the conduct for which he was originally convicted, "it certainly hearken[ed] toward it." Moreover, the court noted that Sayer had a Criminal History Category of III and emphasized that "more important than that number is the nature of his history," which is a:

> chronic pattern of stalking . . . and behavior involving violations of protective orders and bail orders which . . . [all] paint[] a picture . . . of a defendant who is absolutely resistant to court order, court supervision and respecting the rule of law as it pertains to . . . employing cell phones and the Internet to interfere with others.

As to Sayer's unwillingness to accept responsibility, the court emphasized that Sayer had described the Probation Officer's order that he receive a mental health assessment as "ridiculous" and that "today even I hear him blaming his relationship with M.G. for his problems . . . as opposed to

accepting full responsibility." Moreover, the court stressed the effect of Sayer's conduct on others and explained: "[t]o some degree the analogy to a drug addict is not appropriate. This is not a situation where he is using illegal substances to his own detriment only. This is a situation in which his behavior harms others." Thus, the court ultimately concluded that: "an upward variant sentence is essential, because I have before me a defendant who cannot control his behavior after all this history and for that reason poses what I regard to be a substantial risk of harm to the public."

This explanation was adequate, more than enough to defeat Sayer's procedural challenge under both the plain error and abuse of discretion standards. Sentencing courts need not recount every detail of their decisional processes; identification of the "main factors behind [the] decision" is enough. United States v. Vargas-García, 794 F.3d 162, 166 (1st Cir. 2015). And although Sayer contends that the court did not sufficiently explain why it rejected his arguments for a lower prison term, courts are not required to specifically explain why they rejected a particular defense argument in favor of a lower sentence. See id. at 167 (holding that while a "sentencing court may have a duty to explain why it chose a particular sentence, it has 'no corollary duty to

explain why it eschewed other suggested sentences'" (quoting United States v. Vega-Salgado, 769 F.3d 100, 104 (1st Cir. 2014))).

In any case, the court did explain that although it had considered Sayer's progress while on supervised release, it "pale[d] next to the continued absence of insight on his part as to the type of thinking and the type of behavior which is unlawful and is harmful, and it's harmful to other people, not just to him." Hence, the district court's explanation of its variant sentence was sufficient, and we discern no error, much less plain error.

**B. Substantive Reasonableness of Sayer's Sentence[9]**

"[I]f the sentence is procedurally sound, we then ask whether the sentence is substantively reasonable." United States v. Rossignol, 780 F.3d 475, 477 (1st Cir. 2015). A sentence is substantively reasonable so long as the sentencing court has provided a "plausible sentencing rationale" and reached a "defensible result." United States v. Martin, 520 F.3d 87, 96 (1st Cir. 2008). In assessing the substantive reasonableness of a sentence, this court should "take into account the totality of the circumstances, including the extent of any variance from the Guidelines [Sentencing] [R]ange." United States v. Contreras-Delgado, 913 F.3d 232, 243 (1st Cir. 2019) (quoting Gall, 552 U.S.

[9] Sayer claims this issue should be reviewed for abuse of discretion, and the government does not contest it.

at 51). "[T]he greater the variance, the more compelling the sentencing court's justification must be." United States v. Vázquez-Vázquez, 852 F.3d 62, 67 (1st Cir. 2017) (quoting United States v. Guzmán-Fernández, 824 F.3d 173, 178 (1st Cir. 2016)).

Sayer's violation while on supervised release was a Grade C violation.[10] Because Sayer had a Criminal History Category of III, the Guidelines Sentencing Range of imprisonment was five to eleven months. By imposing an imprisonment term of twenty-four months on revocation, the district court varied upwards by thirteen months. Sayer argues that his sentence is longer than necessary, and therefore substantially unreasonable because the court: (1) "failed to calibrate the decisional scales" by not accounting for "obvious mitigating factors"; and (2) left no room for harsher sentences for those with higher Criminal History Categories and more serious violations.

Sayer's arguments are without merit. To begin with, the district court clearly stated that it considered the sentencing factors set forth in 18 U.S.C. § 3553(a), including "Sayer's

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[10] The Sentencing Commission's policy statement divides conduct that violates conditions of supervision into three categories: Grade A, B, and C violations. U.S.S.G. § 7B1.1(a). There are two types of Grade C violations: "(A) a federal, state, or local offense punishable by a term of imprisonment of one year or less; or (B) a violation of any other condition of supervision." U.S.S.G. § 7B1.1(a)(3)(emphasis added).

personal history and characteristics" and "the need for the sentence imposed to . . . avoid unwanted sentencing disparities." See United States v. Santiago-Rivera, 744 F.3d 229, 233 (1st Cir. 2014) (noting that a judge's statement that he has considered all of the § 3553(a) factors is entitled to significant weight). Moreover, the court adopted the Revocation Report, which mentioned the mitigating factors that Sayer refers to, as findings of fact in support of the sentence that it would impose. Finally, the district court even expressly mentioned the "progress" that Sayer achieved while on supervised release, but ultimately concluded that it "pale[d]" compared to his harmful thinking and behavior. Hence, it is evident that the district court considered all the factors it was required to.

In essence, then, Sayer's challenge is directed at the sentencing judge's weighing of the factors that affect sentencing. He understands that the district judge should have given certain mitigating factors greater significance. However, although the district court must consider a "myriad of relevant factors," the weighing of those factors is "within the court's informed discretion." Clogston, 662 F.3d at 593. Moreover, the reasons cited by the district court and described above, including Sayer's extensive criminal history and the seriousness of his offenses, his proclivity upon release towards the type of conduct for which

he had been convicted, his unwillingness to accept responsibility, and the need to protect the public from further crimes, constitute a "plausible rationale" for a "defensible" sentence. See Martin, 520 F.3d at 91, 98. And while Sayer argues that the sentence imposed did not leave room for harsher sentences for those with higher Criminal History Categories and more serious violations, it is evident from the hearing transcript that the sentencing judge considered Sayer's criminal history and the nature of his violations to be serious enough to warrant the sentence imposed. See Clogston, 662 F.3d at 592 ("There is no one reasonable sentence in any given case but, rather, a universe of reasonable sentencing outcomes."). Thus, considering the totality of the circumstances, we find the district court's sentence to be substantively reasonable and not an abuse of discretion. [11]

**C. Sayer's Additional Term of Supervised Release upon Revocation**

Finally, Sayer argues for the first time on appeal that the district court erred by imposing a term of supervised release in addition to the statutory maximum term of imprisonment upon revocation. He contends that because the court sentenced him to

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[11] We have reviewed the cases Sayer cited in his briefs and in a post-argument letter submitted pursuant to Federal Rule of Appellate Procedure 28(j), but they fail to persuade us to the contrary. They are either distinguishable, lacking a record from which the appellate court could have deciphered a sentencing rationale, or inapposite.

the statutory maximum imprisonment term on revocation, it could not also impose an additional term of supervised release. He bases this argument on the Probation Officer's erroneous paraphrasing of U.S.S.G. § 7B1.3(g)(2) in the Revocation Report[12] and several cited cases that imposed a statutory maximum sentence on revocation but no additional term of supervised release.

The plain text of 18 U.S.C. § 3583(h) and U.S.S.G. § 7B1.3(g)(2) negates Sayer's position. Section 3583(h) establishes that:

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

(Emphasis added). U.S.S.G. § 7B1.3(g)(2) basically mirrors the statute. Here, Sayer does not dispute that the maximum supervised release term authorized for his original cyberstalking offense is

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[12] On page 5 of the Revocation Report, the Probation Officer erroneously appears to suggest that supervised release can be imposed upon revocation only if the term of imprisonment imposed is "less" than the maximum term of imprisonment imposable upon revocation. Nevertheless, the Probation Officer correctly stated the calculation on the Revocation Report's page 4 when he explained that "the term of supervised release that can be imposed upon revocation is 36 months, less any imprisonment imposed for this revocation."

thirty-six months. According to Section 3583(h), the district court could impose a second supervised release term as long as it did not exceed the term of supervised release authorized for the underlying conviction (i.e., thirty-six months), less the term of imprisonment that was imposed upon revocation (i.e., twenty-four months). As thirty-six minus twenty-four equals twelve, simple arithmetic reveals that the new twelve-month supervised release term does not exceed the maximum allowed upon revocation.

Finally, the fact that some district courts exercise their discretion to impose only the maximum statutory imprisonment term upon revocation, without a new supervised release term,[13] does not affect the district court's authority here to impose the twelve-month supervised release term upon revocation. Thus, Sayer has not been able to show any error in the district court's imposition of his supervised release term on revocation.

## III. Conclusion

For the reasons expounded above, Sayer's revocation sentence is affirmed.

**Affirmed**.

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[13] See United States v. Márquez-García, 862 F.3d 143, 145 (1st Cir. 2017), United States v. Alejandro-Rosado, 878 F.3d 435, 438 (1st Cir. 2017), United States v. Soto-Soto, 855 F.3d 445, 448 (1st Cir. 2017).

THE COURT: I find that Mr. Sayer has both knowingly and voluntarily waived his right to a hearing in this matter and that there's a sufficient factual basis for the revocation. You may be seated at this time.

Have both the Government and the defendant received the revocation report in this case?

MR. WOLFF: Yes, Your Honor.

MR. ANDREWS: Yes, Your Honor.

THE COURT: Mr. Andrews, have you had the opportunity to review the report with Mr. Sayer?

MR. ANDREWS: I have, Your Honor.

THE COURT: And you're satisfied that he understands it?

MR. ANDREWS: I am, Your Honor.

THE COURT: Mr. Andrews, is there any objections or challenges to the report?

MR. ANDREWS: Your Honor, I mean, there is -- the sense that there is no challenge that we agree that much of the information in there is factually reported, but we would challenge it in the sense that some information that is helpful to Mr. Sayer is not included in that report; in particular, that some of the contact between Mr. Sayer and M.G. after the February date in the report was not something that he

did on his own, but that was mutual contact and that that was fine with the person whom we refer to as M.G.

THE COURT: All right, so that I understand, then, although there's additional information that he would prefer be in the report, with respect to what is in the report you're not stating any specific objection; is that correct?

MR. ANDREWS: That is correct.

THE COURT: Thank you.

Mr. Sayer, would you stand, please? Did you receive the report?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And have you read it?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Do you feel that you understand it?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And have you had sufficient time to discuss it with Mr. Andrews?

THE DEFENDANT: Yes, Your Honor.

THE COURT: Mr. Sayer, is there anything contained in the report that's in the report that you disagree with?

THE DEFENDANT: Just what Mr. Andrews has stated, that there is communications between M.G. and I

that are not recorded there after the date of February.

THE COURT: All right. Thank you, you may be seated.

THE DEFENDANT: Thank you.

THE COURT: Does the Government have any objection to the revocation report?

MR. WOLFF: No, Your Honor.

THE COURT: I have also reviewed the report. I am going to adopt the report in its entirety as findings in support of the sentence that I impose in this matter. I want to summarize for the record now the applicable provisions from the sentencing commission guidelines as is reflected beginning on Page 4 of the report itself.

The violation that Mr. Sayer has admitted to in this case is a Grade C violation. His criminal history category is III, and under the guidelines this results in a range of imprisonment of 5 to 11 months. He is, of course, also subject under the guidelines to the imposition of an additional period of supervised release as long as a period of 36 months less any period of imprisonment that might be imposed.

Counsel, is there any objection to the summary of the guidelines that apply here that I've just provided?

MR. WOLFF: No, Your Honor.

the directions given to me and staying in an unhealthy relationship.

I'm asking for a chance, Your Honor. I'm not a lost cause. I'm not all bad. There is good in me. Thank you.

THE COURT: Thank you, Mr. Sayer. You can be seated. Anything else, Mr. Andrews?

MR. ANDREWS: No, Your Honor.

THE COURT: The recommendation in this case includes the recommendation that the Court adopt the three newly adopted mandatory standard conditions of supervised release which were effective in the district in November of 2016 along with the previously imposed conditions. And before I can finally determine the sentence in this case, I need to obtain a copy of those three new conditions so that they can be read to Mr. Sayer.

So I'm going to recess. That will also give me the opportunity to reflect on the arguments that I've received. And, Ms. Phillips, if you could -- if you could provide me a copy of those three conditions, I'd appreciate it, before I return to the bench. Counsel, we'll be in recess for approximately 15 minutes.

(A recess was taken from 10:44 a.m. to 11:03 a.m.)

THE COURT: In arriving at a sentence in this

case, I of course have considered the sentencing guidelines, which I've already addressed on the record. In addition, I've considered the other factors that govern sentences in federal courts set forth in 18 USC Section 3553(a). These include the nature and circumstances of the offense; Mr. Sayer's personal history and characteristics; the need for the sentence imposed to reflect the seriousness of the offense, promote respect for the law, and provide just punishment; to protect the public from further crimes where that's needed; to provide the defendant, Mr. Sayer, with any needed educational or vocational training, medical care, or other correctional treatment in the most effective way; and to avoid unwarranted sentencing disparities.

Mr. Sayer has admitted to the violation in this case. His underlying conviction that results in him being on supervised release is for cyberstalking. He was sentenced in 2012. At that time he was sentenced by Judge Hornby to the statutory maximum sentence permitted by law, which was an upward variance. And he commenced supervised release once he finished his prison term.

Now, I've already indicated that I am adopting the revocation report in its entirety as findings of fact

in support of the sentence that I impose in this case. And for that reason I'm not going to reiterate all of the specific conduct which gives rise to the violation here.

What is clear from reading the report and from Mr. Sayer's experience once he was on supervised release really is two things that stand out to me. The first is that he did demonstrate the capacity to work, to become self-supporting, and to earn the trust of in his case an employer, which put him on a path toward perhaps stability.

However, also, of course, his experience while on supervised release demonstrates that he has continued with the same sort of resistance to authority and compulsive thinking that resulted in his underlying cyberstalking conviction.

The conduct that he committed while on supervised release, the violations that he committed, were certainly not as serious in degree as the conduct that resulted in his underlying conviction for cyberstalking. I want to also -- I think it's important to note that the cyberstalking conviction in this case, the conduct was truly egregious. This was not -- this was a very serious case of cyberstalking, so serious as to justify the actual statutory maximum

sentence permitted by law. And I don't lose sight of that. This is a defendant who committed an extreme serious violation of the law. And one can't read the First Circuit, for example, First Circuit Court of Appeals' description of the offense conduct and not be left just really sort of -- almost in shock. It was just terrible, the cyberstalking that took place.

This conduct doesn't rise to the level of the seriousness of that conduct. But it certainly hearkens toward it. It's similar to it. It's of the same vein. It demonstrates Mr. Sayer remains, continues to be, highly resistant to change. To some degree today even I hear him blaming his relationship with M.G. for his problems today as opposed to accepting full responsibility and full acknowledgment for the pattern of conduct that results in the -- that results in him being here today for these violations.

And so the progress that he did demonstrate while on supervised release really pales next to the continued absence of insight on his part as to the type of thinking and the type of behavior which is unlawful and is harmful, and it's harmful to other people, not just to him. To some degree the analogy to a drug addict is not appropriate. This is not a situation where he is using illegal substances to his own

detriment only. This is a situation in which his behavior harms others.

As recently as February of 2017 Mr. Sayer described his scheduled mental health assessment that probation had arranged as, quote, ridiculous. And there is perhaps no stronger evidence nor could there be stronger evidence of his inability to control his behavior than the fact that after being admitted to bail for these very -- for this very violation he continued to violate. All this in the face of what has been a -- I think a substantial effort by probation to afford him the services that one would need to deal with the problem that he has, all of that of course detailed in the report.

And so the offense conduct is quite serious and the sentence should reflect that. The guidelines, as I've already indicated in this case, call for a range of imprisonment of 5 to 11 months. And taking into consideration the offense conduct, it seems to me that my analysis begins at the top of that scale, the top of that range, which would be 11 months.

But Mr. Sayer's history also is of extreme importance. He's a Criminal History Category III, and more important than that number is the nature of his history. The nature of his history is a chronic

pattern of stalking behavior and behavior involving violations of protective orders and bail orders which, when one looks at his six convictions and the eight, nine -- eight or nine, plus or minus, charges for which he did not receive convictions but was charged, all paints a pattern -- paints a picture of a defendant who is absolutely resistant to court order, court supervision, and respecting the rule of law as it pertains to contacting others and employing cell phones and the Internet to interfere with others.

And so here we are after the completion of the maximum jail term possible for the underlying conviction, after the passage of the time that he's been on supervised release, and I have before me a defendant who seems to be essentially in the same place he was -- as he was back in January of 2007 at the time he was convicted of stalking in the York County Superior Court and given a 364-day jail sentence that was suspended.

Taking into consideration both the offense conduct as well as his personal history and characteristics and the other sentencing factors, I've concluded that the purpose of the sentence that I impose for these violations must be to reflect the seriousness of the offense, of the violations -- I've already indicated

that -- but also to protect the public from further crimes by the defendant.

Furthermore, I conclude that supervised release has not worked to date, Mr. Sayer has not gotten it, and that a lengthy period of incarceration is needed so that perhaps he will get it so that when he comes out he will better appreciate that the law will not tolerate his compulsion and that he will face the most serious consequences if he continues with this.

So ultimately I have concluded that a variant sentence -- an upward variant sentence is essential, because I have before me a defendant who cannot control his behavior after all this history and for that reason poses what I regard to be a substantial risk of harm to the public. So, Mr. Sayer, I would ask that you stand at this time.

I have concluded that a just and fair sentence which is sufficient but not greater than that necessary to achieve the purposes as I've identified them is as follows: I'm ordering you committed to the custody of the U.S. Bureau of Prisons for a term of 24 months, and I am ordering that you begin service of that sentence immediately. Furthermore, I am going to order that upon your release that you be on a period of supervised release for a period of 12 months.