Docket No. ____

IN THE SUPREME COURT OF THE UNITED STATES

SHAWN HILL,

Petitioner,

– against –

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

On Certiorari to the United States Court of Appeals
For the Second Circuit

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STATEMENT OF QUESTIONS PRESENTED

1. Was petitioner improperly denied credit for acceptance of responsibility based on an incident in a Hartford jail that appeared to be a mental health episode, a motion to withdraw his plea that did not actually contest his guilt, and a purely subjective belief that he lacked remorse?

2. Was petitioner's sentence substantively unreasonable in light of the totality of the circumstances?

3. Were certain conditions of supervised release imposed upon petitioner not reasonably related to the factors set forth in 18 U.S.C. § 3553(a)?

PARTIES TO THE PROCEEDING

The parties to the proceeding are the United States of America and petitioner Shawn Hill.

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United States v. Hill,
Docket Nos. 22-1536 (L), 22-1537 (Con), 22-1544 (Con)
2024 WL 831676 (2d Cir. 2020)

Decision: February 28, 2024

The decision of the Court of Appeals was an affirmance of the conviction and sentence imposed by the United States District Court for the District of Connecticut (Hon. Robert M. Chatigny, J.), entered July 18, 2022, arising from a consolidated plea and sentencing: (1) an order revoking his supervised release in D. Conn. Case No. 13-CR-46 and sentencing him to 21 months' imprisonment; (2) a judgment in D. Conn. Case No. 19-CR-180 adjudicating him guilty of conspiracy to distribute and possess with intent to distribute cocaine base and heroin and sentencing him to 57 months' imprisonment; and (3) a judgment in D. Conn. Case No. 20-CR-155 adjudicating him guilty of assault on a correction officer and sentencing him to 57 months' imprisonment. The 21-month sentence on the supervised release revocation was made consecutive to the 57-month sentences on the judgment, which in turn were made concurrent with each other, for an aggregate sentence of 78 months.

JURISDICTIONAL STATEMENT

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) in that this is a petition for *certiorari* from a final judgment of the United States Court of Appeals for the Second Circuit in a criminal case. The instant petition is timely because the Second Circuit's decision affirming Petitioner's conviction and sentence was issued on May 5, 2020, less than 90 days before the filing of this Petition. There have been no orders extending the time to petition for *certiorari* in the instant matter.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

18 U.S.C. § 3553(a)

(a) Factors To Be Considered in Imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—
(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
(B) to afford adequate deterrence to criminal conduct;
(C) to protect the public from further crimes of the defendant; and
(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—
(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—
(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28,

United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.[1]

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3583(d) (in pertinent part)

(d) Conditions of Supervised Release.—The court shall order, as an explicit condition of supervised release, that the defendant not commit another Federal, State, or local crime during the term of supervision, that the defendant make restitution in accordance with sections 3663 and 3663A, or any other statute authorizing a sentence of restitution, and that the defendant not unlawfully possess a controlled substance […] The court may order, as a further condition of supervised release, to the extent that such condition—

(1) is reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D);

(2) involves no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and

(3) is consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a);

U.S.S.G. § 3E1.1

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and upon motion of the government stating that the defendant has assisted authorities in the

investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by 1 additional level. The term "preparing for trial" means substantive preparations taken to present the government's case against the defendant to a jury (or judge, in the case of a bench trial) at trial. "Preparing for trial" is ordinarily indicated by actions taken close to trial, such as preparing witnesses for trial, in limine motions, proposed voir dire questions and jury instructions, and witness and exhibit lists. Preparations for pretrial proceedings (such as litigation related to a charging document, discovery motions, and suppression motions) ordinarily are not considered "preparing for trial" under this subsection. Post-conviction matters (such as sentencing objections, appeal waivers, and related issues) are not considered "preparing for trial."

STATEMENT OF FACTS

This petition arises from three appeals consolidated by order of the Second Circuit Court of Appeals, which in turn, arose from three District of Connecticut proceedings relating to petitioner Shawn Hill: an underlying firearm possession case from 2013, a charge of assault on a correction officer incurred while Hill was incarcerated on the firearm case, and a second drug case that originated when Hill was on supervised release. As will be discussed below, Hill entered into a single plea agreement resolving all three matters, resulting in a combined change-of-plea hearing and a combined sentencing.

A. Case No. 13-CR-46.

On February 19, 2013, a criminal complaint was lodged against Hill in the District of Connecticut alleging that he possessed a firearm as a convicted felon. (A77-81).[1] The complaint alleged that on December 12, 2012, during the execution of a search warrant at 83 Norton Street, 2nd Floor, New Haven, Connecticut, which was alleged to be "a location associated with Hill," police recovered a Sig Sauer P229 .40 caliber pistol that someone threw out a window. (A79-80). Upon entry into the apartment, Hill was present in the kitchen, and a nearby bedroom window "appeared to have a tear in the corner of the screen." (A80). Later, DNA swabs taken from the grip of the Sig Sauer were found to be consistent with Hill. (A81).

[1] Citations to "A" refer to the appendix filed in the Second Circuit, a copy of which will be provided to this Court upon request.

On March 5, 2013, a District of Connecticut grand jury indicted Hill on one count of unlawful possession of a firearm by a convicted felon. (A82-83).

After proceedings in the district court, Hill pled guilty to the sole count of the indictment and was sentenced to 72 months' imprisonment followed by three years of supervised release, with judgment being entered on March 17, 2016. (A84-86). Hill completed the imprisonment portion of this sentence on June 23, 2018; however, as set forth below, he remained in custody on another matter.

B. Case No. 20-CR-155.

On September 19, 2017, while Hill was incarcerated on the firearm case, a two-count indictment was lodged against him in the Middle District of Pennsylvania charging that he "did knowingly and intentionally forcibly assault, resist, oppose, impede, intimidate, and interfere with a Correctional Officer… employed by the United States Bureau of Prisons while he was engaged in the performance of his official duties" by means of "physical contact," and also that he possessed a contraband object, namely a "sharp weapon commonly known as a shank." (A110-11). This indictment was assigned docket number 17-CR-276 in the Middle District of Pennsylvania. (A112-20).

The gravamen of the charges was that during a random search, a "6-inch metal ice pick style weapon" was recovered from Hill's left sock, and that when prison staff attempted to handcuff Hill to take him to the SHU, he slipped his arm out of the restraints, pulled away, and "struck a Corrections Officer in the head with the hand

restraint which was attached to his other hand." (ECF Doc. 31 in M.D. Pa. Docket No. 17-CR-276 at 4). Left unsaid was whether Hill deliberately used the handcuff as a weapon or whether he struck the correction officer unintentionally during the act of pulling away or flailing. The officer's injuries were later agreed to be limited to "an abrasion and a small hematoma." (A131).

These charges remained pending at the time Hill completed his sentence, and although he moved for release in anticipation of such completion, the Middle District of Pennsylvania continued his detention by order dated June 21, 2018. (ECF Doc. 32 in M.D. Pa. Docket No. 17-CR-276). The Pennsylvania district court reconsidered that order on April 4, 2019 and set conditions of release, following which Hill was released from custody. (ECF Doc. 53 in M.D. Pa. Docket No. 17-CR-276). He was returned to the District of Connecticut for purposes of pretrial supervision. (ECF Doc. 77 in M.D. Pa. Docket No. 17-CR-276 at 2).

On September 10, 2020, pursuant to Hill's consent, this matter was transferred to the District of Connecticut for purposes of plea, and was assigned docket number 20-CR-155. (A107-09).

C. Case No. 19-CR-180.

On November 25, 2019, a Superseding Indictment was lodged in the District of Connecticut adding Hill to an existing drug conspiracy case. (A87-97). It was alleged that between "approximately November 2018 and on or about July 10, 2019" – a significant portion of which time had been in prison pursuant to the Middle

District of Pennsylvania indictment – Hill and several others conspired to distribute and to posses with intent to distribute cocaine, cocaine base, and heroin. (A88-90). Hill was charged only with the cocaine base and heroin branches of the conspiracy and was not alleged to have any knowledge of the quantities of cocaine trafficked (A89-90), and was also not charged in any of the substantive counts of the indictment (A90-94).

Hill had already been in custody on these drug charges since approximately September 27, 2019. (ECF Doc. 77 in M.D. Pa. Docket No. 17-CR-276 at 2).

On February 27, 2020, a Second Superseding Indictment was lodged in the same case, which again alleged that Hill was part of the cocaine base and heroin branches of the charged conspiracy and did not include Hill in any of the substantive counts. (A98-106).

D. The Consolidated Plea.

Hill, represented by counsel, entered into plea negotiations with respect to the three above matters, and on September 22, 2020, he entered into an agreement with the government resolving all three. (A121-31). In particular, he agreed to plead guilty to conspiracy to distribute and possess with intent to distribute cocaine base and heroin under Count 1 of the 19-CR-180 indictment and to plead guilty to assault on a correction officer under Count 1 of the 20-CR-155 indictment.(A121). Additionally, Hill acknowledged that he was on supervised release in the 13-CR-46 matter at the time he committed the drug offense charged in 19-CR-180 and admitted

that his conduct constituted a supervised release violation. (A126).

In an attached Stipulation of Offense Conduct, Hill agreed that the conduct underlying the 20-CR-155 charge was that while prison staff attempted to put hand restraints on Hill, Hill struck an officer "in the head with the hand restraint that was attached to his other hand," causing "an abrasion and a small hematoma to [the officer's] forehead." (A131). As to the 19-CR-180 indictment, the parties stipulated that between April 11 and July 10, 2019, Hill "agreed with other members of the conspiracy to obtain narcotics to sell" and that the amounts involved were less than 10 grams of heroin and less than 2.8 grams of cocaine base. (A131).

The parties stipulated that as to the 20-CR-155 matter, the base offense level under U.S.S.G. § 2A2.4(a) was 10, with a three-level enhancement for physical contact and a further two levels due to the victim sustaining bodily injury,[2] for a total offense level of 15. (A125). For the 19-CR-180 matter, the base offense level under U.S.S.G. § 2D1.1 was 12, given the small quantities of the drugs involved, and there were no enhancements, so the total offense level remained at 12. (A125). The two counts would be grouped, resulting in a combined offense level of 17 under the

[2] Bodily injury, for Sentencing Guideline purposes, is "any significant injury; e.g., an injury that is painful and obvious, or is of a type for which medical attention ordinarily would be sought." See U.S.S.G. § 1B1.1, cmt. 1(B). This may include superficial injuries such as a swollen and abraded lip resulting from a punch in the mouth, see United States v. Cerome, 277 Fed. App'x 85, 87 (2d Cir. 2008), or a slap in the face causing swelling and pain, see United States v. Greene, 964 F.2d 911, 911-12 (9th Cir. 1992). The Guidelines distinguish bodily injury from "serious bodily injury," which is injury requiring surgery, hospitalization or physical rehabilitation. See U.S.S.G. § 1B1.1, cmt. 1(M).

Sentencing Guideline grouping rules, which would then be reduced by three levels for acceptance of responsibility, giving a final offense level of 14. (A125). Given Hill's criminal history category of VI, this resulted in a recommended sentencing range of 37 to 46 months. (A125).

Hill further agreed not to appeal or collaterally attack his convictions, and also to not appeal or collaterally attack his sentence or sentences provided that such sentences "do not exceed *in total* 46 months of imprisonment." (A127) (emphasis added). The parties "agree[d] that any challenge to the defendant's sentence that is not foreclosed by this provision will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) this waiver. (A127).

On the same date, September 22, 2020, a consolidated change of plea hearing and supervised release hearing was held by video before U.S. Magistrate Judge Robert M. Spector of the District of Connecticut. (A132-86). At the conclusion of the allocution, Judge Spector accepted the pleas. (A181-82).

E. The Motion to Withdraw.

Following the entry of the guilty plea, the Probation Department prepared a presentence investigation report ("PSR") regarding the combined matters. The PSR deviated from the plea agreement in that it added a three-level enhancement to the 19-CR-180 drug offense because that offense was committed while Hill was on supervised release. Due to application of the grouping rules, however, this did not change the combined offense level, which remained at 17, subject to a three-level

reduction to 14 for acceptance of responsibility.

Subsequently, however, the Probation Department submitted an addendum to the PSR recommending that Hill be denied credit for acceptance of responsibility due to an incident occurring in January 2021. In particular, the addendum alleged that while incarcerated in the Hartford Correctional Center (a Connecticut state facility) awaiting sentence, at a time when he was on suicide watch and scheduled to be transferred to Behavioral Observation Status, Hill verbally shouted at and threatened a correction officer. Notably, Hill was on mental health status at the time, and although, at the time of the addendum, state charges against him were pending, those charges were ultimately dismissed in December 2021 by virtue of a nolle prosequi. (A235).

On May 27, 2021, after the addendum was issued, Hill moved to withdraw his guilty pleas. (A187-89). In a supporting memorandum containing one page of text, Hill argued that a "fair and just" reason for withdrawal existed in that "he felt coerced by the circumstances under which he pled guilty or was acting under duress because he felt that both his prior counsel and the AUSA were pressuring him to accept a global plea bargain or that it would get much worse for him." (A190-91). Hill additionally alleged "that the government did not even have evidence by a preponderance of the evidence standard to convict him on Count 1 of the superseding indictment," referring to the 19-CR-180 matter. (A191).

Hill did not elaborate on these arguments and – as the government pointed out

in its opposition papers (A203) – did not allege that he was innocent or even that the evidence would have been legally insufficient with respect to any of the matters other than 19-CR-180.

The district court denied this motion by minute entry order on April 24, 2021, finding that the allegations in Hill's motion did not meet the burden of demonstrating that an evidentiary hearing was warranted. (A56-57).

F. The Consolidated Sentencing.

On June 9, 2022, Hill submitted a memorandum in aid of sentencing to the district court. (A210-22). Hill noted that he was born in New Haven, that he lived with his mother and siblings in public housing where he witnessed shootings, and that his father left the family and relocated to Virginia when he was a young boy. (A215). Later, his father was incarcerated for murder, and as an eight-year-old, Hill had to visit him in prison. (A215). When the father was still with the family, he physically abused both Hill's mother and Hill himself (A215), and his mother was a drug addict until she was finally able to become sober (A216).

In childhood, Hill spent most of his time on the street and at friends' houses, and was sometimes asked by his mother to help support the family. (A216). This formed the background to Hill entering into criminal conduct at the age of 17. (A214). Additionally, many of his friends themselves entered into criminal conduct, and his participation in the 19-CR-180 conspiracy was in part an attempt to reconnect with them. (A216-17).

Hill noted further that he had four children who he wished to help raise and that he would live in a supportive relationship with his sister Tanisha who would ensure his discipline. (A217). He had a history of drug use and suffered from diabetes, depression, and medical sequelae of Covid-19. (A218-19).

In conclusion, Hill submitted that in light of the above and in light of the factors mitigating the offense – including that the Pennsylvania incident might have been a "knee-jerk" reflex response that resulted in only minor injury, and that the 19-CR-180 case involved only a small amount of drugs, a total sentence of 50 months, amounting to the time he had spent in pretrial custody to date, was sufficient to satisfy the purposes of sentencing. (A219-20).

The government also filed a sentencing memorandum. (A223-245). At the outset, the government urged the district court that "Mr. Hill… appears all but certain to return to criminal conduct whenever he is released from whatever sentence the Court imposes on him," and that deterrence and incapacitation thus warranted "an upward departure or variance." (A223). The government characterized the offenses as "very serious" and Hill's criminal records as "unremitting," and essentially described Hill as a career criminal who had committed the 19-CR-180 conduct "within days of his pretrial release." (A237-41).

The government further urged that Hill not receive credit for acceptance of responsibility. (A229-30, 232-35). In support of this contention, the government cited Hill's motion to withdraw his guilty pleas, which it characterized as "frivolous."

(A232-33). The government also cited the Hartford incident in which Hill verbally shouted at and threatened a correction officer, contending that Hill was "manipulative" rather than actually out of his mind (A233-35), and argued that it was irrelevant that the Connecticut state charges arising from this incident were nolled in December 2021 (A235).

The government thus argued that Hill's total Guideline offense level should be 17 rather than 14 and that his advisory sentencing range should be 51 to 63 months. (A230). It argued further that in light of Hill's criminal record, the district court should depart upward to offense level 19, with a sentencing range of 63 to 78 months, and impose a sentence "at or near the top of that range." (A242).

On July 5, 2022, Hill appeared for sentencing before the Hon. Robert N. Chatigny of the District of Connecticut. (A246-321). Hill's counsel reiterated that he would live with his sister upon release, that she had secured a commitment from Milford Barrels, where he had once worked, to hire him back, and that her children, including one who was autistic, were eager to see him home. (A255-56). Although he had a prior criminal record, he now had a place to go, and could be managed on supervised release by such means as a mental health therapy condition. (A261-62).

Counsel further argued that Hill should not be deprived of acceptance of responsibility credit, because the alleged Hartford incident was not an assault, was not prosecuted, and was not related to the offenses at bar. (A256-57, 265).

As to the substantive offenses, Hill contended that the 20-CR-155 incident was

"more of a reflex response" that occurred in a prison where there was "a lot of pushing, shoving, yelling and screaming," and resulted in minor injuries. (A256-57). Hill noted further that the 19-CR-180 conduct grew out of his attempt to reconnect with his childhood friend Tommy Julius and involved a minimal amount of drugs. (A257-58).

In sum, Hill's counsel submitted that "everybody's past is the past," that there was no call to punish Hill more than was contemplated in the plea agreement, and that he would inevitably be released at some point when the considerations would be the same. (A263).

Hill himself spoke to the district court, acknowledging that when he was younger he was much more aggressive and committed crimes, and that he admitted that he had to pay for his mistakes. (A266). He stated that when he was released on April 4, 2019, he came home to his childhood friends, and was involved in a small amount of drugs, but was not caught on wiretaps having any drug-related conversations with other members of the conspiracy. (A267-68). He also gave further context to the Hartford incident cited by the government, stating that he was on suicide watch and not in his right mind, and that he essentially flipped out while being dragged through the hole in full point restraints, which the Connecticut authorities recognized when they decided to nolle the case. (A268-69).

Further, Hill noted that the prosecutor who negotiated the 2020 plea agreement was the same one who oversaw the original prosecution in 2013, and that

he therefore already knew about Hill's background and criminal record when he stipulated to a 37-to-46-month Guideline range. (A270).

In conclusion, Hill looked to the future, stating that he had found jobs when he was last at home, had another job waiting for him at Milford Barrels, and that his children were going through a lot of ups and downs and his sisters had brain surgery and a stroke. (A272-74). He stated it felt good to have a job and be a father, and he would be 39 next month and wanted to do better. (A275-77).

Counsel for the government reiterated that Hill had entered the 19-CR-180 drug conspiracy soon after coming home and cited a few ambiguous wiretapped conversations. (A278-80). He acknowledged, however, that Hill was not a leader in the organization. (A280).

In terms of acceptance of responsibility, the government argued that Hill's motion to withdraw his plea was inconsistent with an admission of guilt, and that the act of threatening a correction officer in Hartford was "not someone who has accepted responsibility." (A281-82). Upon questioning from the district judge as to whether Hill was in fact not in his right mind, the prosecutor answered only that "my thoughts are that the facts speak for themselves" and that the decision of the Connecticut authorities not to prosecute was not binding on the court. (A283). Upon further questioning from the district court, the prosecutor also acknowledged that he had no evidence to support the allegation that Hill was being manipulative or faking suicidal behavior. (A283-84).

The government then contended that the assault on the correction officer in Pennsylvania was forcible and that Hill "jumped [back] into the drug game" in New Haven rather than just connecting with old friends. (A285-86). Again, however, the prosecutor acknowledged that Hill "was a low-level seller, that's what he was, with his buddies." (A286).

Summing up, the government returned to Hill's criminal record and conduct while incarcerated and argued that the "hard cold record" was "unremitting and really unrepentant," justifying a sentence at or near the top of a 63-to-78-month range. (A293-95).

The district court then proceeded to impose sentence. The court began by stating that it would not credit Hill with acceptance of responsibility. (A298). It stated that, while awaiting sentencing for assaulting a correction officer, which it did not believe to be accidental conduct during resistance to the officer, Hill "engage[d] in this very disconcerting verbal assault on the lieutenant" in Hartford. (A300). Although the incident was "just verbal," the court described it as an "assault," and stated that there was a "sufficiently close relationship" between the Pennsylvania and Hartford conduct to require denial of acceptance of responsibility. (A301). The court added that it was "plausible" that Hill's mental health issues at Hartford were manipulative but that it didn't know. (A301).

Alternatively, the court stated that "even assuming that Mr. Hill was suicidal and his threats need to be viewed in that context," there remained the motion to

withdraw the guilty plea, which the court characterized as "done in bad faith." (A302). The court reviewed the timeline and stated that the motion to withdraw was made shortly after the Probation Department recommended that he be denied acceptance of responsibility credit due to the Hartford incident. (A303-04). The court stated that although a timely guilty plea ordinarily results in acceptance of responsibility, subsequent denial of accountability can overcome the plea. (A304-05). Further, while the court stated that there was a "need to be careful in making decisions of importance based on our perception of a person's state of mind with regard to remorse or contrition" and acknowledged that Hill had "admitted mistakes," it found that his personal statement at sentencing was devoid of "sorrow or regret." (A305-06).

The court then stated that it did not think an upward departure from 51 to 63 months was warranted, and that in light of the relevant sentencing factors including the harms of the drug trade, Hill's criminal record, the likelihood that his conduct would have continued but for his arrest, and the assault on the correction officer in Pennsylvania, 57-month concurrent sentences were justified on the 19-CR-180 and 20-CR-155 indictments. (A308-10). This was to be followed by three years of supervised release, with conditions that included *inter alia* the first six months to be spent in a halfway house and the next six months to be spent on a curfew with location monitoring. (A310-13).

On the supervised release violation, the court imposed a 21-month consecutive sentence, for a total of 78 months, which it viewed as justified by the speed with which

Hill returned to criminal conduct after his release. (A314-15).

Hill voiced his objection to the supervised release conditions at the time they were imposed and submitted that he was being treated "like a child" although he was 39. (A313).

G. Appeal to the Second Circuit.

Judgment was entered on July 18, 2022 in each matter reflecting the district court's sentence (A322-31) and Hill filed timely notices of appeal as to each of the judgments. (A332-34). His appeals were consolidated by order of the Second Circuit dated August 18, 2022.

In his briefs to the Second Circuit, Hill made three arguments: (1) that he was improperly denied acceptance-of-responsibility credit under the Sentencing Guidelines; (2) that his sentence was substantively unreasonable; and (3) that certain conditions of supervised release were not reasonably related to the 18 U.S.C. § 3553(a) factors.

By summary order dated February 28, 2024, the Second Circuit affirmed the judgments against Hill. (App. 1-8).[3] The court found that acceptance-of-responsibility credit was justified by the Hartford incident, significantly relying on a completely uncorroborated reference in the PSR to Hill "utilizing threats of self-harm for secondary gain with no intent." (App. 4). Alternatively, the court found that Hill's motion to withdraw his guilty plea and the district judge's "observations of Hill at

[3] Citations to "App." refer to the Appendix to this Petition.

sentencing" were sufficient reason to deny this credit. (App. 4).

The court then found that Hill's sentences were within the Guidelines and "not shockingly high in view of the factors cited by the district court," and were thus substantively reasonable. (App. 4-5).

Finally, the Second Circuit, while not deciding whether Hill's pro se remarks at sentencing preserved an objection to the supervised release conditions (App. 5-6),found that the halfway-house condition was warranted in light of "Hill's prior rapid return to criminal activity while on supervised release and his assault upon a correctional officer while serving a federal sentence" (App. 6-7) and that the curfew and location-monitoring condition was justified by "barriers to Hill's re-entry into society," and that neither condition was thus a greater-than-necessary deprivation of liberty. (App. 7-8).

REASONS FOR GRANTING THE WRIT

I. PETITIONER WAS IMPROPERLY DENIED CREDIT FOR ACCEPTANCE OF RESPONSIBILITY

Hill's first contention in this petition is that he was improperly denied credit for acceptance of responsibility. Hill acknowledges that defendants who plead guilty are not entitled to an acceptance-of-responsibility reduction as a matter of right. See U.S.S.G. § 3E1.1, Application Note 3. Moreover, Hill recognizes that district courts are granted wide discretion in assessing whether a defendant has accepted responsibility and that this Court's review of the denial of acceptance of responsibility

credit is for abuse of discretion. See United States v. Chu, 714 F.3d 742, 746 (2d Cir. 2013). Nevertheless, it is submitted that the specific grounds relied upon by the district court in this case – namely, the Hartford incident which occurred when Hill was not in his right mind, and a motion to withdraw the plea which was not inconsistent with Hill's admission of guilt and which was obviously intended to gain tactical leverage in response to an unfavorable probation report – did not constitute a failure to accept responsibility for the offenses of conviction. Therefore, this is one of the distinct cases in which the district court's determination that a defendant did not accept responsibility is "without foundation," see United States v. Harris, 13 F.3d 555, 557 (2d Cir. 1994), and reversal is required.

Turning first to the Hartford incident, it is certainly true that the courts view post-plea criminal conduct as a valid reason to deny acceptance-of-responsibility credit, see Chu, supra, but the government did not prove that the incident *was* criminal conduct. To reiterate: the incident admittedly occurred while Hill was being moved from suicide watch to behavioral monitoring – i.e., from one mental-health status to another – and was in four-point restraints. The video of the incident shows that Hill was raving, quite consistent with him not being in his right mind. Moreover, as discussed in the Statement of Facts, the government candidly acknowledged in response to questioning from the district court that it did not have any information apart from the video to suggest manipulation or malingering on

Hill's part, and it is undisputed that the Connecticut state authorities, who knew the incident best, dropped the charges against Hill within months.

Neither the district court's nor the Second Circuit's justifications for accepting this incident as criminal conduct pass muster. The district court's finding was apparently based on its belief that Hill's character made manipulative conduct "plausible." But even aside from the fact that Hill's personal history includes abuse during childhood and bona fide struggles with mental illness, "plausibility" is not enough to infer uncharged criminal conduct at sentencing; instead, the government has the burden to *prove* such conduct by a preponderance. See United States v. Rizzo, 349 F.3d 94, 98 (2d Cir. 2003) ("At sentencing, disputed factual allegations must be proven by the government by a preponderance of the evidence"). And here, the government and indeed the district court candidly conceded that there was no such proof. And likewise, the Second Circuit based its opinion regarding this incident on the very paragraph of the PSR which the government agreed there was no proof for. This was not a valid basis on which to deny the credit.

Moving on to the motion to withdraw the plea, it is settled that while such a motion may sometimes or even often be a ground for denying the adjustment, it is "not automatically disqualifying." See United States v. Hirsch, 239 F.3d 221, 226 (2d Cir. 2001). To the contrary, the sentencing court "must evaluate the reason for the attempt to withdraw the plea and assess the acceptance-of-responsibility question in that light," and so long as the reason for withdrawing the plea is "unrelated to a claim

of innocence," merely making the motion is not inconsistent with accepting responsibility. Id., quoting United States v. Negron, 967 F.2d 68, 73 (2d Cir. 1992).

In this case, the primary stated reason for making the motion was that Hill felt coerced and pressured by the circumstances surrounding the deal, which is not a denial of guilt. The motion did also contain a throwaway allegation that the government might not have *legally sufficient* evidence to prove Count 1 of the 19-CR-180 indictment, but this too is not a denial of guilt. See Bousley v. United States, 523 U.S. 614, 623 (1998) (distinguishing between legal sufficiency and actual innocence). Moreover, based on Hill's later comments about that indictment at the time of sentencing, the legal sufficiency remark appears to have been a reference to whether the government could prove that he was in charge of the conspiracy's phone (which he apparently believed, in error, to be a legal requirement for proving conspiracy) rather than a claim that he did not conspire to sell drugs at all. At no point in the single-page motion did Hill contradict any of the admissions he made during the plea colloquy. As such, the motion to withdraw was not a "claim of innocence," see Hirsch, supra.

Moreover, according to the very timeline cited by the district court, it is clear that the motion to withdraw was made shortly after the Probation Department recommended that Hill be denied acceptance of responsibility. It is thus circumstantially plain that the motive for filing the motion was not to assert innocence but to gain a bargaining chip in a situation that was developing much more

unfavorably than Hill anticipated at the time of sentencing – indeed, a situation in which he might reasonably feel that he had been rushed, coerced and/or misled – with which he might negotiate a reinstatement of the original deal. While perhaps tactical in nature, this was not a denial or repudiation of guilt, and litigation tactics in and of themselves are not an abdication of responsibility.

Ultimately, Hill pled guilty, admitted committing crimes, acknowledged that he had done wrong, presented a plan to do better in terms of living with his sister and obtaining a commitment to a job, and expressed an apology. Moreover, to the extent that the district court's "observations at sentencing" are relevant (App. 4), these appear to have been based on Hill's truthful statements regarding the extent and consequences of his conduct, such as that the correction officer he struck in Pennsylvania was not badly hurt and that the government didn't have his voice recorded on any wiretapped phone calls during the alleged drug conspiracy. Neither the government nor the Second Circuit pointed to any case authorizing the denial of acceptance of responsibility credit based on statements that, while perhaps emphasizing the mitigating factors in the case more than the government would like, are not actually false. Whatever the law may be about falsely "minimizing" criminal conduct, surely that does not apply when a defendant simply fails to maximize such conduct to the government's and/or district court's satisfaction, especially since criminal defendants have a right and even perhaps a duty to alert the court to any mitigating circumstances of which they are aware.

As such, Hill satisfied the factual predicate for accepting responsibility. And where the factual predicate for a Guideline adjustment is established, application of the adjustment is mandatory. See United States v. Friedman, 998 F.2d 53, 58 (2d Cir. 1993) (where court found factual predicate for obstruction-of-justice enhancement, it did not have discretion to decline to apply the enhancement); United States v. Jimenez, 68 F.3d 49, 51-52 (2d Cir. 1995) (managerial enhancement). The failure to credit Hill with acceptance of responsibility was error.

And that failure rendered the sentence unreasonable. It is by now well settled that reasonableness review of a sentence has two components: procedural and substantive. See United States v. Crosby, 397 F.3d 103, 114 (2d Cir. 2005); United States v. Rattoballi, 452 F.3d 127, 131-32 (2d Cir. 2006). Notably, although the Sentencing Guidelines are no longer mandatory, a sentence is procedurally unreasonable if the Guidelines are not properly calculated. Id. at 661; United States v. Cavera, 550 F.3d 180, 190 (2d Cir. 2010). That is precisely what happened here. Moreover, given that the district court did not state at any point that its sentence would have been the same regardless of the Guideline calculation – indeed, it is clear from the totality of the sentencing that the district judge's perception that Hill had not accepted responsibility was a key factor in determining the sentence – the error in imposing a procedurally unreasonable sentence cannot be dismissed as harmless. This Court should therefore find that Hill is entitled to credit for acceptance of responsibility and remand for resentencing with such credit in mind.

II. THE SENTENCE WAS SUBSTANTIVELY UNREASONABLE

Second, separate and apart from the erroneous Guideline calculation, the district court's sentence was substantively unreasonable. Hill acknowledges that he is not the most sympathetic of petitioners and that, in light of the two offenses to which he pled guilty and the fact that he committed one of them while on supervised release, a prison sentence was certainly warranted. But a sentence as harsh as 78 months was not. As will be discussed below, the district court focused too much on Hill's criminal history without considering the personal history that mitigated it; made unwarranted assumptions about both the Hartford incident and Hill's attitude and intentions; and did not give adequate consideration to either the relatively small harms of the offenses. The factors cited by the district court thus cannot bear the weight assigned to them, and the resulting sentence is excessive in light of United States v. Booker, 543 U.S. 220, 749-50 (2005), and its progeny.

Taking into account the specific circumstances of this case, a 78-month sentence exceeded the bounds of what was reasonable. To start with – and to step back and look at the forest rather than focusing on the trees – the actual offenses of conviction, the crimes for which the sentence was ostensibly being imposed, are not egregious. It is certainly not *trivial* to conspire to sell drugs or to resist a correction officer with physical contact. But at the same time, the government conceded that Hill was a low-level participant in the 19-CR-180 conspiracy, the quantity of drugs sold was at the lowest level specified in the Guidelines, and despite extensive

wiretaps, the government could only cite a few ambiguous conversations that may or may not have furthered the conspiracy in some small way. Likewise, as to 20-CR-155, it appears likely that Hill was resisting being handcuffed but that he pulled away and flailed indiscriminately rather than deliberately using the handcuffs as a weapon, and the officer's injuries were superficial – indeed, barely above the minimum to qualify as "bodily injury" at all, see United States v. Cerome, 277 Fed. App'x 85, 87 (2d Cir. 2008).

All this is not to trivialize Hill's conduct – as stated above, it is not trivial – but to place it in context and to evaluate its seriousness in the grand scheme of things. This is important because, as has been pointed out by an eminent former Chief Judge of the Second Circuit, "the offense of federal conviction [to] become just a peg on which to hang a comprehensive moral accounting." United States v. Broxmeyer, 699 F.3d 265, 298 (2d Cir. 2012) (Jacobs, J., dissenting); see also United States v. Robinson, 520 Fed. App'x 20, 22 (2d Cir. 2013) (quoting Broxmeyer). It is all very well to talk about Hill's criminal past, the district court's view of his attitudes toward authority, and the erratic conduct that occurred when he was not in his right mind, but at the end of the day, he was being sentenced for being an extremely-low-level drug conspirator and for barely injuring a correction officer during a prison scuffle. These incidents were not an escalation of Hill's previous criminal conduct of firearm possession that attracted a 72-month sentence; if anything, they were *less* serious than possessing a gun as a felon.

And even moving outward from these offenses to a larger context, the district court's assessment of that context was one-sided. The district court cited, for instance, Hill's extensive record in the Connecticut state courts and his lack of steady employment prior to the 13-CR-46 matter, but did not pay heed to the fact that Hill had an abusive (and subsequently absent) father and a drug-addicted mother and/or that he spent much of his childhood left to fend for himself on the streets. This led to him depending for support – which he particularly needed due to his struggles with mental illness and depression – on other street people who led him into criminal conduct. And Hill's criminal record is precisely the kind that would be expected from a kid from the projects who was led into crime this way:[4] larcenies, drug crimes, failure to appear, a litany of misdemeanors and low-level felonies. Hill is sadly typical of a class of offender commonly seen in the federal courts, and while this certainly does not *excuse* his conduct, it *explains* it in a way that the district court seemed unwilling to credit.

Moreover, the district court did not take heed of the signs that Hill's present, at the time of sentencing, was different from his past. Unlike previous occasions when Hill had simply talked in general terms about going straight, this time he had a plan. He *had* found work during the period of his release, and his sister had

[4] Hill recognizes, of course, that not all kids from the projects are led into crime and that not all of those who *are* led, succumb. He is, again, not denying that he did wrong or that he should be punished, only that he spent his formative years in an environment far more conducive to such things than most.

obtained, on his behalf, a commitment from his boss at the barrel factory to hire him back. He had agreed to live with his sister, who was an upstanding citizen and who would supervise him and guide his re-entry into the community. He realized the value of fatherhood and, as his sister attested, had become a positive role model to his children and hers. In other words, at the age of 39, Hill was going through the same process as many offenders of similar age, and had reached a stage of maturity where recidivism become far less common. See, e.g., United States v. Sanchez, 2007 WL 60517, *4 (S.D.N.Y. 2007) (noting the steep decline in recidivism for offenders sentenced between the ages of 36 and 40).

The district court appeared to brush this off with comments regarding Hill's attitude and/or the Hartford incident. But as discussed in Point I, it is undisputed that the Hartford incident occurred when Hill was on suicide watch and was being moved into another mental health status in full restraints – in other words, it occurred when he was not at his right mind. Whether or not the district court found it "plausible" that Hill might have been malingering, the fact remains that both the court and the government admittedly had no *evidence* of that. Again, the fact that the Connecticut authorities – who presumably made the initial report to the Probation Department that led to the PSR amendment – declined to prosecute, while not binding on the district court, certainly suggested that the agency that knew the incident best regarded it as a manifestation of mental illness rather than a deliberate attempt to put the officer transporting Hill in fear. And also again, the district

court's subjective belief that Hill was insufficiently respectful or remorseful – which that very Court recognized was an unreliable measure – does not overcome Hill's showing of a concrete release plan and specific steps that he would take to live within the law.

Certainly, it was within the district court's rights to demand that Hill be supervised and to impose standard conditions of release such as employment, therapy, random searches and home checks, and such other measures as might be appropriate to ensure that Hill kept to his commitment. But a 78-month aggregate sentence for what at the end of the day were two relatively minor offenses, amounting to 32 months more than the maximum contemplated by the plea agreement, was not a fair substitute for such measures. This Court should therefore find that the sentence was substantively unreasonable and should reduce the sentence or alternatively remand for imposition of a shorter prison term.

III. CERTAIN CONDITIONS OF SUPERVISED RELEASE WERE NOT REASONABLY RELATED TO THE 18 U.S.C. § 3553(A) FACTORS

Finally, Hill submits that two of the conditions of supervised release imposed by the district court – namely, that the first six months of Hill's release be spent in a halfway house, and the second six months be spent on location monitoring with a curfew – were a greater deprivation of liberty than necessary to accomplish the rehabilitative purposes of such release.[5]

[5] Petitioner contends, as he did before the Second Circuit, that the personal objection he voiced at the time the conditions of release were pronounced – namely that the district court was

Pursuant to 18 U.S.C. § 3583(d), a district court may impose conditions of supervised release beyond the standard ones only where such conditions are "reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D); … involve[] no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D); and … [are] consistent with any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)." The sections of 18 U.S.C. § 3553(a) that are cross-referenced in this statute relate to the nature and circumstances of the offense and the history and characteristics of the defendant, and the factors of deterrence, protection of the public, and the defendant's need for education, training and/or treatment.

"Although the discretion thus conferred [to district courts] is broad, [this Court has] cautioned that [it] will carefully scrutinize unusual and severe conditions." United States v. Sofsky, 287 F.3d 122, 126 (2d Cir. 2002), quoting Untied States v. Doe, 79 F.3d 1309, 1319 (2d Cir. 1996); accord United States v. Bolin, 976 F.3d 202, 210 (2d Cir. 2020). Moreover, "[i]f the liberty interest at stake is fundamental, a deprivation of that liberty is reasonably necessary only if the deprivation is narrowly tailored to serve a compelling government interest." Bolin, 976 F.3d at 210, quoting United States v. Myers, 426 F.3d 117, 124 (2d Cir. 2005). Under these standards, the

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treating a grown man like a child – was, while perhaps inartfully worded, sufficient to preserve an issue of law concerning whether those conditions represented an excessive deprivation of liberty.

halfway-house and curfew/location monitoring conditions do not pass muster.

Starting with the six months in a halfway house, this is by any measure "unusual and severe." Typically, halfway-house confinement occurs at the end of a prison sentence, not the beginning of supervised release, see 18 U.S.C. § 3624(c), and thus, the district court's condition in this case amounted almost to an extension of Hill's prison term. Moreover, the restriction of liberty entailed in halfway-house confinement is as fundamental as it gets, precisely because halfway-house confinement *is* confinement. Although not under lock and key, Hill will have to stay in the halfway house at all times when not working or on approved activities such as religious or medical appointments, and will need to sign out and obtain permission every time he leaves the facility. He will also be subject to prison-style daily counts, prison discipline, and constant monitoring of his location. Hill thus submits that the halfway-house condition cannot stand unless it is narrowly tailored to serve a compelling government interest.

It is not. Assuming for the sake of argument that there is a compelling government interest in providing Hill with a structured, staged re-entry environment where he will be closely supervised, and further assuming *arguendo* that such supervision is indicated by his criminal record, *he will already have received that supervision by the time his supervised release begins*. Pursuant to 18 U.S.C. § 3624(c), as amended by the First Step Act, requires that the Director of the Bureau of Prisons "shall, to the extent practicable, *ensure* that a prisoner serving a term of

imprisonment spends a portion of the final months of that term (not to exceed 12 months), under conditions that will afford that prisoner a reasonable opportunity to adjust to and prepare for the reentry of that prisoner into the community," which "may include a community correctional facility" (emphasis added). Thus, halfway-house confinement *during the closing months of a defendant's prison term* is presumed and preferred, and in practice, the BOP does afford several months of halfway-house confinement to nearly every eligible inmate during the period leading up to release.

Therefore, by the time Hill's supervised release begins, he will *already* have experienced a staged reintroduction to society, he will have *already* received assistance securing work, he will *already* have conducted months of intensely counseled, supervised and monitored community activities. Neither the district court nor the Second Circuit explained why Hill might need six *more* months in a halfway house beyond those customarily afforded to him by the BOP; indeed, neither court addressed at all the fact that Hill would already have been in a halfway house for months by the time the condition came into play. Nor, given that Hill had commitments to a home with his sister and a job with Milford Barrel, was such a condition necessary to assist him in obtaining these things. Thus, this condition cannot be said to be narrowly tailored to serve a compelling government interest. Indeed, the fact that Hill would already have received months of halfway-house supervision before being released renders this condition a greater-than-necessary

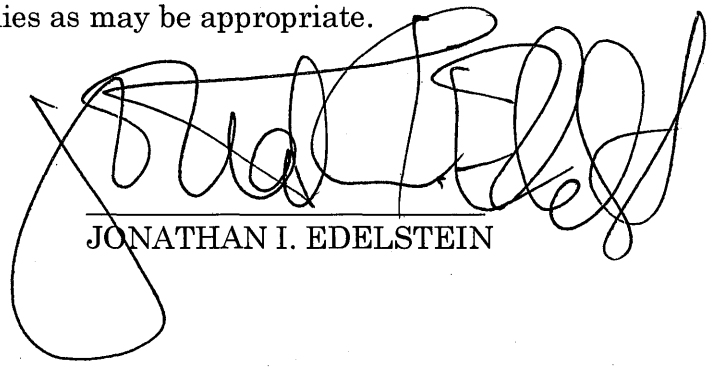
deprivation of liberty even if this Court were to find that the liberty interests at issue are *not* fundamental enough for the "narrowly tailored" standard to apply.

The curfew/location monitoring condition is also excessive. Other than a generalized reference to Hill having problems accepting authority and having had difficulty with re-entry in the past, the district judge did not explain why a curfew was necessary – for instance, there was no indication that the offenses of conviction occurred at night. Moreover, to the extent that the purpose of a curfew may have been to preclude Hill from congregating with the childhood friends with whom he had committed crimes, that was already covered by another condition of release (which Hill does *not* challenge) which prohibited him from associating with felons. And likewise, the district court did not explain why location monitoring, as opposed to less intrusive alternatives such as random home checks and searches, monitoring of Hill's telephones and electronic devices, and/or therapy, was necessary to keep Hill on the straight and narrow. Since a condition of supervised release is excessive if the same underlying purpose can be accomplished by "more focused restriction[s]" and forms of monitoring, see Sofsky, 287 F.3d at 126-27 (listing alternative, less restrictive measures that could ensure the defendant's compliance with terms of release), this renders the curfew/location monitoring restriction a greater-than-necessary deprivation of liberty. This Court should therefore amend the judgment by striking the two challenged conditions.

CONCLUSION

WHEREFORE, in light of the foregoing, this Court should grant certiorari on all issues raised in this Petition and, upon review, should vacate the judgment against petitioner and remand for such remedies as may be appropriate.

Dated: New York, NY
May 24, 2024



JONATHAN I. EDELSTEIN

22-1536-cr (L)
United States v. Hill

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 28th day of February, two thousand twenty-four.

Present:

DEBRA ANN LIVINGSTON,
Chief Judge,
JOHN M. WALKER,
SUSAN L. CARNEY,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v.

22-1536 (L),
22-1537 (Con),
22-1544 (Con)

SHAWN HILL,

Defendant-Appellant.

For Defendant-Appellant: JONATHAN I. EDELSTEIN, Edelstein & Grossman, New York, NY.

For Appellee: TARA E. LEVENS (Sandra S. Glover, *on the brief*), Assistant United States Attorneys, *for* Vanessa Roberts Avery, United States Attorney for the District of Connecticut.

Appeal from a judgment of the United States District Court for the District of Connecticut (Chatigny, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is **AFFIRMED**.

Defendant-Appellant Shawn Hill appeals from three judgments entered on July 18, 2022, in connection with his consolidated plea and sentencing in the United States District Court for the District of Connecticut (Chatigny, *J.*). On September 22, 2020, Hill pleaded guilty both to assault on a correctional officer—which occurred while he was incarcerated on a federal firearm charge in Pennsylvania—in violation of 18 U.S.C. § 111(a), and conspiracy to distribute, and to possess with intent to distribute, cocaine base and heroin, in violation of 21 U.S.C. §§ 864, 841(a)(1), and 841(b)(1)(C). The latter offense occurred in Connecticut while Hill was on supervised release in connection with the firearm case. At the consolidated sentencing, the district court sentenced Hill to 57 months' imprisonment on each of the assault and narcotics conspiracy offenses, to run concurrently, and to be followed by concurrent three-year terms of supervised release. Hill was also sentenced to 21 months' imprisonment for the violation of supervised release, to run consecutively to the other terms of imprisonment. On appeal, Hill raises three challenges to his sentences. In addressing these challenges, we assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal, which we discuss here only as necessary to explain our decision to **AFFIRM**.

* * *

This Court reviews sentences for procedural and substantive reasonableness under "a particularly deferential form of abuse-of-discretion review." *United States v. Broxmeyer*, 699 F.3d 265, 278 (2d Cir. 2012) (citation omitted). We find procedural error where, *inter alia*, the district

court "makes a mistake in its Guidelines calculation," "does not consider the [18 U.S.C.] § 3553(a) factors," or "fails adequately to explain its chosen sentence." *United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc). We will vacate a sentence as substantively unreasonable "only in exceptional cases where the trial court's decision 'cannot be located within the range of permissible decisions.'" *Id.* at 189 (quoting *United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007)).

I. Acceptance of Responsibility

Hill first argues that the district court committed procedural error by denying him a three-level downward adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1. We disagree. "A defendant who enters a guilty plea is not entitled to an adjustment [for acceptance of responsibility] as a matter of right." *Id.* Commentary, App. Note 3. Evidence of acceptance of responsibility "may be outweighed by conduct of the defendant that is inconsistent with such acceptance . . . ." *Id.* Here, the district court provided three reasons for denying credit: that following his guilty plea and while incarcerated, Hill threatened to kill a correctional officer; that Hill thereafter attempted to withdraw his guilty plea; and that Hill at sentencing offered "no evidence of acceptance of responsibility in the sense of contrition or remorse." A305. "The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility," *United States v. Ortiz*, 218 F.3d 107, 109 (2d Cir. 2000) (quoting U.S.S.G. § 3E1.1, Commentary, App. Note 5), and the court's determination "should not be disturbed unless it is 'without foundation.'" *United States v. Harris*, 13 F.3d 555, 557 (2d Cir. 1994) (quoting *United States v. Irabor*, 894 F.2d 554, 557 (2d Cir. 1990)). The district court's determination here has ample foundation.

The incident in which Hill threatened the corrections officer, the graphic facts of which he does not contest, was both sufficiently related to his prior physical assault on an officer and serious in nature so as to be incompatible with a sincere acceptance of responsibility. *See United States*

v. Chu, 714 F.3d 742, 744 (2d Cir. 2013). Hill claims that this incident occurred while he was on suicide watch and not "in his right mind." App't Br. at 14. The Presentence Report ("PSR") notes, however, that mental health staff determined that Hill "was utilizing threats of self-harm for secondary gain with no intent" during this episode. PSR Add. 2. And in any event, the district court made clear that even assuming the truth of Hill's claim, the record was otherwise sufficient to demonstrate that Hill did not fully accept responsibility. We agree. In particular, an attempt to withdraw a guilty plea "is a well-established ground for denying the [acceptance of responsibility] adjustment," *United States v. Hirsch*, 239 F.3d 221, 226 (2d Cir. 2001) (internal citation omitted), and the district court did not err in determining that Hill's conduct in this regard "outweigh[ed] the evidence of acceptance of responsibility provided by the timely guilty plea," A304. The district court also relied on its observations of Hill at sentencing, noting that Hill failed to express "sorrow or regret," offer "[a]ny apology," or express "[a]ny concern for the guard[s]" whom he harmed or the victims of drug trafficking. A306. Based on the reasoned analysis of the district court, we conclude that it did not abuse its discretion in denying credit for acceptance of responsibility when calculating the Guidelines range.

II. Substantive Unreasonableness

Hill next argues that his 78-month combined sentence is substantively unreasonable in light of, *inter alia*, his history, the nature of his offenses, and his plans for life upon release. We again disagree. The district court properly considered the § 3553(a) factors—including the nature of the offense, characteristics of the defendant, need for the sentence imposed, and available sentences. Hill's 57-month concurrent sentences as to the assault and narcotics conspiracy offenses fell squarely in the middle of his Guidelines range of 51–63 months, while the 21-month sentence imposed by the court for Hill's supervised release violation fell below the applicable maximum of

two years.[1] Although this Court has declined to adopt a presumption that a within-Guidelines sentence is reasonable, we have stated that "[i]n the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *United States v. Bryant*, 976 F.3d 165, 181 (2d Cir. 2020) (quoting *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006)). Such is the case here. Hill's sentences are not "shockingly high" in view of the factors cited by the district court, *Rigas*, 583 F.3d at 123; rather, they are squarely "located within the range of permissible decisions," *Cavera*, 550 F.3d at 189.

III. Supervised Release Conditions

Finally, Hill challenges two special conditions of supervised release: one that requires him to serve the first six months of supervised release at a halfway house and another that subjects him to a curfew with location monitoring for the following six months. This Court reviews conditions of supervised release under a deferential abuse of discretion standard. *United States v. Johnson*, 446 F.3d 272, 277 (2d Cir. 2006). When a defendant does not contemporaneously object to the special conditions, we conduct only plain error review. *United States v. Green*, 618 F.3d 120, 122 (2d Cir. 2010) (per curiam). At sentencing, Hill's counsel did not object to the two conditions at issue; accordingly, the Government argues that the plain error standard applies. However, Hill exclaimed to the court after it announced the special conditions: "You do understand I'm a 39 year old man and you are trying to treat me like a child." A313. In any event, we need

[1] The court noted that it imposed the sentence for the supervised release violation consecutively in accordance with the policy of the Sentencing Commission, explaining, "I see no reason to depart from that policy." A315.

not determine whether Hill's remarks preserved his objection, because under either an abuse of discretion or plain error standard, Hill's arguments fail.[2]

A sentencing court may impose special conditions of supervised release that are "reasonably related" to the § 3553(a) factors, "involve[] no greater deprivation of liberty than is reasonably necessary" to implement the statutory purposes of sentencing, and are consistent with the Sentencing Commission's policy statements. 18 U.S.C. § 3583(d); *see also* U.S.S.G. § 5D1.3(b); *United States v. Myers*, 426 F.3d 117, 123–24 (2d Cir. 2005). "[S]entencing courts have 'broad discretion to tailor conditions of supervised release to the goals and purposes outlined in § 5D1.3(b).'" *United States v. Amer,* 110 F.3d 873, 883 (2d Cir. 1997) (quoting *United States v. Abrar*, 58 F.3d 43, 46–47 (2d Cir. 1995)).

Hill first argues that spending six months in a halfway house constitutes an "unusual and severe" condition that effectively extends his sentence and constitutes a greater-than-necessary deprivation of liberty. We disagree. Both the Guidelines and our precedent support the imposition of halfway house residency as a special condition when appropriate under 18 U.S.C. § 3583(d). *See* U.S.S.G. § 5D1.3(e)(1); *see also id.* § 5F1.1 ("Community confinement may be imposed as a condition of probation of supervised release."); *United States v. Murdock*, 735 F.3d 106, 112–13 (2d Cir. 2013) (holding that a halfway house condition was "plainly reasonable" given the defendant's criminal history, including previous violations of supervised release conditions).

[2] Notably, Hill did not have notice of the special conditions prior to sentencing. We have repeatedly affirmed that when a defendant does not receive prior notice of a special condition imposed at sentencing, we may "entertain [a defendant's] challenge without insisting on strict compliance with the rigorous standards of Rule 52(b)." *United States v. Sofsky*, 287 F.3d 122, 125–26 (2d Cir. 2002); *Green*, 618 F.3d at 122. The Government argues that this relaxed plain error standard is inconsistent with the Supreme Court's recent decision in *Greer v. United States*, 593 U.S. 503, 512 (2021). We need not address this issue either, however, since Hill's arguments fail under both versions of the plain error standard.

Here, the district court provided sound reasons for the condition imposed, including Hill's prior rapid return to criminal activity while on supervised release and his assault upon a correctional officer while serving a federal sentence. The district court assessed that in light of Hill's "very high" risk of recidivism, this condition "give[s] [Hill] whatever chance [he] ha[s] of turning over a new leaf and starting what [he] ha[s] referred to as a new chapter." A316–17. We do not disturb this conclusion.

Hill next argues that the curfew and location-monitoring condition is excessive, asserting that the district court did not explain the reason for its imposition or consider more tailored alternatives. For much the same reasons as above, these arguments, too, are unavailing. The Sentencing Commission policy states:

> A condition imposing a curfew may be imposed if the court concludes that restricting the defendant to his place of residence during evening and nighttime hours is necessary to provide just punishment for the offense, to protect the public from crimes that the defendant might commit during those hours, or to assist in the rehabilitation of the defendant. Electronic monitoring may be used as a means of surveillance to ensure compliance with a curfew order.

U.S.S.G. § 5B1.3(e)(5).

The district court reasonably concluded that the curfew and monitoring would be appropriate here as part of the conditions imposed to serve "the interests of Mr. Hill, his loved ones[,] and the public." A311. In considering these conditions, the court recognized barriers to Hill's re-entry into society, including that Hill has sold drugs since childhood and was childhood friends with co-conspirators in the narcotics conspiracy he joined soon after his release. The district court expressed its assessment that Hill "needs to be off the street and at home when he is not engaged in legitimate activity, whether it is working, attending treatment, engaged in programming

or for other reasons." A313. The court did not effect a greater-than-necessary deprivation of liberty in imposing this special condition.

* * *

We have considered Hill's remaining arguments and conclude they lack merit. We therefore **AFFIRM** the district court's judgment.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court