APPEAL NUMBER 10-4280

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellee

V.

ANTHONY CLAY,
Appellant

BRIEF FOR APPELLANT

Appeal From Judgment In A Criminal Case Entered On
November 4, 2010, In The United States District Court For The
Eastern District Of Pennsylvania, At Criminal Number 09-cr-00419-1
By The Honorable Petrese B. Tucker

ROBERT EPSTEIN
Assistant Federal Defender

KEITH M. DONOGHUE
Research & Writing Attorney

DAVID L. McCOLGIN
Assistant Federal Defender
Supervising Appellate Attorney

LEIGH M. SKIPPER
Chief Federal Defender

Federal Community Defender Office
For the Eastern District of Pennsylvania
Suite 540 West - Curtis Center
601 Walnut Street
Philadelphia, PA 19106
(215) 928-1100

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case commenced with the prosecution of appellant, Anthony Clay, for alleged violations of the laws of the United States. District courts have original jurisdiction over such prosecutions pursuant to 18 U.S.C. § 3231. Following a trial, the district court, the Honorable Petrese B. Tucker presiding, imposed a sentence of 240 months' imprisonment to be followed by six years' supervised release, a $3,000.00 fine, and a $300.00 special assessment. (App. 4-6).[1]

This is an appeal of the district court's judgment entered on the criminal docket on November 4, 2010. (App. 12 at Docket Entry No. 34). This Court has jurisdiction under 28 U.S.C. § 1291, as an appeal from a final decision of a district court, and, more specifically, under 18 U.S.C. § 3742(a), as an appeal of a sentence imposed under the Sentencing Reform Act of 1984. A notice of appeal was timely filed on November 4, 2010. (App. 1-2; App. 12 at Docket Entry No. 35).

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[1] "App." followed by a number denotes the relevant page of the appendix to the brief. Volume I of the appendix is bound with this brief pursuant to Local Appellate Rule 32.2(c) (Mar. 8, 2010). Volume II is bound separately. Pursuant to Local Appellate Rule 30.3(c), the Presentence Investigation Report and Statement of Reasons for the sentence have been filed separately and under seal.

STATEMENT OF RELATED CASES AND PROCEEDINGS

A related case, *Commonwealth of Pennsylvania v. Anthony M. Clay*, Criminal No. 14575-2008, was commenced in the Court of Common Pleas of Philadelphia County on November 25, 2008. The prosecution was subsequently adopted by federal authorities and the state charges were *nolle-prossed* on June 25, 2009.

Counsel is aware of no other case or proceeding—completed, pending or about to be presented to this Court or any other court or agency, state or federal—that is in any way related to this appeal.

STATEMENT OF THE ISSUES

I.

Is the sentence substantively unreasonable because it is greater than necessary to achieve its stated purpose of deterring 24-year-old Anthony Clay from future criminal activity?

Preservation of Issue

Defense counsel argued for a sentence of less than 15 years' imprisonment because such a sentence would be sufficient, among other things, to deter Mr. Clay from future crimes. (App. 444-448, 456-458). The district court imposed a sentence of 20 years' imprisonment. (App. 463).

II.

Is the sentence procedurally unreasonable because the district court failed to consider the need to avoid unwarranted disparities between Mr. Clay's sentence and those imposed on defendants with similar or worse records convicted of crack offenses?

Preservation of Issue

Defense counsel stressed the need to avoid unwarranted disparities between Mr. Clay's sentence and those imposed on other defendants. (App. 446, 448). The district court's brief explanation of sentence does not indicate any reason the court could have had for regarding the sentence not to give rise to unwarranted disparities. (*See* App. 462-463).

III.

Is the six-year term of supervised release on Count One procedurally unreasonable because it was based on the mistaken premise that the statutory mandatory minimum had been enhanced by filing of an information pursuant to 21 U.S.C. § 851?

Preservation of Issue

The issue was not preserved by defense counsel. The absence of any charging instrument under 21 U.S.C. § 851 was brought to the court's attention by the government after the Presentence Investigation Report stated otherwise. (App. 431). The court identified the six-year term of supervised release it imposed on the first count as a mandatory-minimum sentence. (Statement of Reasons at II, III).

IV.

Is the sentence of 15 years' imprisonment and five years' supervised release for a violation of 18 U.S.C. § 922(g) above the statutory maximum and thus unlawful?

Preservation of Issue

The issue was not preserved.

STATEMENT OF THE CASE

On June 23, 2009, the United States filed a three-count indictment charging Anthony Clay in the first count with possessing cocaine base ("crack") with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C). (App. 14). The alleged offense involved 2.7 grams of crack. (App. 18). The second count charged Mr. Clay with possessing a firearm in furtherance of a drug trafficking offense, in violation of 18 U.S.C. § 924(c)(1). (App. 15). The third count charged him with possessing the firearm after having previously been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). (App. 16).

On June 14 2010, Mr. Clay proceeded to trial. (App. 11 at Docket Entry 27). On June 15, the jury found Mr. Clay guilty on the first two counts, and the court, pursuant to Mr. Clay's oral waiver of his right to a jury trial, found him guilty on the third count. (App. 11 at Docket Entry 28).

On October 29, 2010, the district court sentenced Mr. Clay to 240 months' imprisonment to be followed by six years' supervised release, a fine of $3,000.00, and a special assessment of $300.00. (App. 463). Judgment was entered on November 4, 2010. (App. 12 at Docket Entry No. 34). Mr. Clay filed a timely notice of appeal that day. (App. 1-2; App. 12 at Docket Entry 35).

STATEMENT OF THE FACTS

1. *Overview*

At the age of 24, Anthony Clay is serving 20 years in federal prison for 2.7 grams of crack cocaine and a gun. The district court's stated reason for this sentence was the need to deter Mr. Clay from future criminal activity. (App. 462-463). In determining what length of imprisonment was necessary to achieve that aim, the court's only point of reference was the career offender sentencing guideline. (App. 459, 463). Mr. Clay's status as a "career offender" rested solely on two prior state convictions for selling small amounts of crack cocaine on two occasions within 13 days of each other. (Presentence Investigation Report ("PSR") ¶¶ 25, 35-39). He was 20 years old at the time. The state court imposed sentences of less than two years on each, and Mr. Clay served less than nine months in jail all together. (PSR ¶¶ 35, 38).

Mr. Clay now challenges his 20-year sentence as both substantively and procedurally unreasonable. Separately, he challenges as procedurally unreasonable a six-year term of supervised release imposed on Count One. Finally, Mr. Clay challenges the sentence imposed on Count Three on the ground that it unlawfully exceeds the statutory maximum.

2. *Mr. Clay's record and the instant charges*

Several years after leaving a boarding school for troubled youth where he had been placed by Philadelphia's Department of Human Services, Mr. Clay was arrested on February 19, 2007, and March 4, 2007, for possessing crack cocaine with intent to distribute. (PSR ¶¶ 35-36, 38-39, 54; App. 447). Each time, Mr. Clay was found standing on the same block. (PSR ¶¶ 36, 39). The first offense involved 0.6 grams of crack; the second, 8.4 grams. (PSR ¶¶ 36, 39). Mr. Clay was prosecuted in the Philadelphia County Court of Common Pleas, and pled guilty to each charge on July 13, 2007. (PSR ¶¶ 35, 38). For the first offense, he received a sentence of not less than eight months nor more than 23 months' imprisonment, to be followed by a year of probation. (PSR ¶ 35). For the second, he received a sentence of a year of "intermediate punishment" to include six months' house arrest with outpatient treatment, 40 hours of community service, and two years' probation. (PSR ¶ 38). In all, Mr. Clay spent less than nine months in jail. (PSR ¶¶ 35, 38). He was then to be on probation until February 5, 2010. (PSR ¶ 37).

On October 10, 2008, officers with the Philadelphia Police Department arrested Mr. Clay after approaching him down the street from where he had been in 2007. (PSR ¶ 8). This time federal authorities adopted the case. (PSR ¶ 44).

Mr. Clay was charged with three counts: possessing cocaine base with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C); possessing a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1); and possessing a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1). (App. 14-16). Shortly thereafter, the government advised the district court that Mr. Clay's sentencing range under the Sentencing Guidelines would be 198-217 months' imprisonment. (App. 19). In calculating that range, the government did not take Mr. Clay to be a "career offender" within the meaning of U.S.S.G. § 4B1.1.[2]

3. *The trial*

On June 14, 2010, Mr. Clay proceeded to trial on the crack and gun charges. (App. 11 at Docket Entry 27). The government's witnesses included two Philadelphia police officers, a firearms examiner, a federal agent who offered expert testimony regarding a firearm's point of origin, and a forensic chemist from the Philadelphia Police Department. There was testimony that Mr. Clay had run from an officer who approached him on suspicion that he was smoking marijuana.

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[2] As Mr. Clay was charged with an offense under 18 U.S.C. § 924(c), the lowest possible "career offender" sentencing range would have been 262-327 months. *See* U.S.S.G. § 4B1.1(c). The government's pretrial motion did not disclose how the 198-217 month range was calculated.

(App. 136-137). A chase ensued, during which Mr. Clay was said to have scaled several fences, entered an apartment within a housing project, and soon thereafter found nearby in a different apartment in possession of $305 in cash. (App. 138-139, 142-144, 147-148, 150).

There was testimony that in the course of the chase, Mr. Clay threw away 37 packets containing 2.783 grams of cocaine base, and placed a loaded handgun in a trash can, along with a baggie containing numerous empty packets resembling those in which crack cocaine was found. (App. 139-140, 144-145, 153, 192-193, 196, 265-268). There was no allegation or testimony that Mr. Clay had ever shot the gun or threatened anyone with it. The federal agent testified that the gun had been manufactured in Argentina. (App. 249).

The government also called a law enforcement agent associated with the Philadelphia Police Department and the Bureau of Alcohol, Tobacco, Firearms and Explosives, who was permitted to offer expert opinion testimony on the methods and operations of drug trafficking. (App. 277). The detective described 2.8 grams of crack cocaine as a quantity he would associate with a "lower level dealer." (App. 286). Such a dealer might realize about $120 in profit from the 37 packets of crack cocaine offered into evidence. (App. 287).

A jury convicted Mr. Clay of the first and second counts. (App. 417). The district court then heard from Mr. Clay concerning whether he wished to have the third count submitted to the jury. (App. 420-423). After apparently satisfying itself that Mr. Clay was validly waiving his right to a jury trial, the court found Mr. Clay guilty on the third count. (App. 425; App. 11 at Docket Entry 28).

4. *The career offender designation and sentence*

Following the verdict, a probation officer prepared a Presentence Investigation Report ("PSR"). The report disclosed that Mr. Clay had never previously been convicted of any violent offense. (PSR ¶¶ 30-39). It calculated a Category V criminal history pursuant to U.S.S.G. § 4A1 and Ch. 5, Pt. A. (PSR ¶ 40).[3] The PSR also, however, applied the "career offender" guideline at U.S.S.G. § 4B1.1. (PSR ¶ 25). The guideline applied solely on the basis of the

[3] Apart from the two convictions described above, Mr. Clay had been convicted in December 2005 of conspiracy and possession of crack cocaine, for which he had received one year of probation, and in December 2006 of forgery, involving the deposit of a counterfeit check into his own bank account, for which he had received 97 days (credit for time served) to 23 months, followed by 12 months of probation. The 2005 and 2006 sentences scored 4 points toward Mr. Clay's Criminal History Category. (PSR ¶¶ 30-34). Mr. Clay also scored 2 criminal history points due to his probationary status at the time of the offenses charged here, and 1 further point because he had been released from custody less than two years before these new offenses. (PSR ¶ 40). The drug offenses convictions from July 2007 added 4 more points, for a total of 11. (PSR ¶¶ 35, 38).

two drug convictions for offenses allegedly committed 13 days apart in February and March 2007, and for which Mr. Clay had spent less than nine months in jail. (PSR ¶ 25). By application of the career offender guideline, Mr. Clay's recommended Guidelines sentence became imprisonment for 360 months to life. (PSR ¶¶ 25 & n.1, 67).

The government contended that Mr. Clay's career-offender "status is well deserved." (App. 449). The prosecutor acknowledged the nature of Mr. Clay's previous drug convictions only in passing, stating that they involved selling crack cocaine on a single block. (App. 449). Notwithstanding the government's advocacy for application of the career offender guideline, it also submitted a memorandum calculating Mr. Clay's sentencing range absent the guideline's application. (App. 432-434). This was 152-175 months. (App. 434). Mr. Clay did not contest the government's calculation, which was the product of the sentencing guideline for firearms offenses at U.S.S.G. § 2K2.1.[4]

[4] Mr. Clay also accepts the 152-175 month calculation for purposes of this appeal. As discussed below, however, the firearms guideline's "double counting" of Mr. Clay's July 2007 convictions displaces the usual impact of a defendant's Criminal History Category, which is the measure the Sentencing Commission has calibrated to properly reflect a defendant's actual likelihood of recidivism. For this reason, a below-Guidelines sentence of significantly less than 152 months is warranted on a proper exercise of sentencing discretion pursuant to 18 U.S.C. § 3553(a).

At the sentencing hearing, the defense urged that the career offender sentencing range was much too high. (App. 444-448, 457-458). Counsel explained that "[i]t's just hard to fathom how 30 years is necessary to satisfy [the] purposes of sentencing … with respect to Mr. Clay." (App. 444). Two predicates that "happened 13 days apart when he was 20 years old," counsel pointed out, is "hardly a career." (App. 445). Noting that Mr. Clay is only 24 and had never before spent even two years in jail, counsel submitted that a 175-month sentence would be "severe punishment" sufficient to deter Mr. Clay from future criminal activity. (App. 445-47, 457-58). Under such a sentence, Mr. Clay would be in prison until his late 30's. (App. 447).

Counsel also recalled that the day before, the judge had given a 188-month sentence to a defendant with a history of violence "whose crimes had been spread out over time." (App. 446). "He was a true career offender." (App. 446). Mr. Clay "does not stand in the same stead as [that] individual," counsel submitted. (App. 448). He urged:

> It's just hard to fathom how [if] we are going to have some sort of sentencing scheme that tries to balance off the seriousness of people's crimes and the seriousness of their past and make sure that everybody is getting appropriate sentences as a result of that and not unduly disparate sentences, how this young man merits 30 years in jail. It does not seem to fit with what society needs in

> terms of punishment, in terms of promotion for the respect of law, in terms of deterrence.

(App. 446). Mr. Clay "should be sentenced to something less than 180 months," counsel concluded. (App. 448).

Mr. Clay exercised his right of allocution, during which the court urged him, "Let's look forward." (App. 459). At a subsequent point, the court referred to the possibility of a 30-year sentence and stated, "Mr. Clay, I don't think you get it." (App. 460). Bringing Mr. Clay's allocution to a close, the court began its explanation of sentence by addressing him directly:

> Okay. Mr. Clay, as I said, I don't think that you really understand the seriousness of all of what is happening right here. I don't understand why you don't understand because I think you have the intelligence to understand, but your head is someplace else and perhaps the sentence that the court will impose will give you enough time to think about how you got in the predicament that you find yourself in today.

(App. 462).

At no point during sentencing did the district court acknowledge the need to avoid unwarranted disparities between similarly situated defendants. *See* 18 U.S.C. § 3553(a)(6). Instead, the court recited verbatim some of the sentencing factors it was required to consider under 18 U.S.C. § 3553(a): "your background, your history, … the seriousness of the offense and the need to protect the

community." (App. 462). Without elaboration of any kind, the court stated that the offense was "serious" and that there "is a need to protect the community." (App. 462).

The court then made clear that it would impose a sentence for the purpose of deterring Mr. Clay from future crimes:

> I do think that you are so mired in the criminal life that it is going to be difficult for you to understand anything else and I hope that the sentence that is imposed will give you an opportunity to think about again how you got where you are and how to get out of that situation.

(App. 463). "So," the judge concluded, "the court is going to impose a sentence of 240 months." (App. 463). This sentence reflected a recognition that the 30 years of imprisonment recommended by the career offender guideline "overstates the seriousness of your criminal history" and would be "far greater than necessary to punish you, to recognize the dangerousness and to protect the community[.]" (App. 463). A subsequently entered written judgment stated that the court was imposing concurrent 180-month sentences on the crack offense and the 18 U.S.C. § 922(g) offense, and a consecutive term of 60 months on the 18 U.S.C. § 924(c) offense. (App. 4; *see also* App. 464).[5]

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[5] Asked by the prosecutor whether the court was making a "departure," the court stated that "[t]echnically that's exactly what it is." (App. 465). The (continued...)

The court also imposed six years of supervised release on the crack offense. (App. 463; App. 5). In its Statement of Reasons, the court identified this term as a mandatory minimum. (Statement of Reasons at II, III). This determination reflected the PSR's determination, which rested on the erroneous premise that the government had filed a charging instrument under 21 U.S.C. § 851. (PSR ¶ 64; App. 431). Under the judgment, the six-year term is to run concurrently with separate supervised-release terms of five years on each of the second and third counts. (App. 5).

Mr. Clay filed a timely notice of appeal. (App. 1-2).

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[5](...continued)
Statement of Reasons refers to a departure pursuant to U.S.S.G. § 4A1.3. (Statement of Reasons at IV, V). The judge identified the pre-departure offense level as 34, Criminal History Category as VI, and sentencing range as 360-life. (Statement of Reasons at III).

SUMMARY OF ARGUMENT

I.

The sentence is substantively unreasonable because it is far greater than necessary to achieve the district court's stated aim of deterring Mr. Clay from future criminal activity. When specific deterrence is the reason for a sentence, the key measure to be considered is the defendant's likelihood of recidivism. Here, however, the sentence was the creature of the career offender guideline, which the Sentencing Commission itself has found to distort defendants' likelihood of recidivism. Mr. Clay's case exemplifies this distortion. He was designated a "career offender" solely because he had two prior state drug convictions for conduct spanning all of 13 days. He served, all together, less than nine months in jail—about 27 times less than the sentence imposed here.

Although the district court imposed a sentence below the career offender range, it did not go far enough down. The total punishment of 240 months remains more than five years above the very top of the sentencing range that would apply were it not for the career offender guideline. And from the court's perspective of specific deterrence, even this non-career offender range must be recognized to assign insupportable weight to Mr. Clay's prior drug convictions because it rests on the firearms guideline, which double-counts them. For these

reasons, the sentence is substantively unreasonable and the case must be remanded for resentencing.

II.

The sentence was procedurally unreasonable because the district court did not set forth enough to show it had considered the need to avoid unwarranted sentence disparities. The total punishment of 240 months includes a 180-month term of imprisonment for 2.7 grams of crack. This quantity is about 19 times less than the average quantity in federal crack prosecutions. Yet Mr. Clay's 180-month sentence is more than five years above the average for defendants sentenced pursuant to the crack guideline. The sentence is also significantly longer than those imposed on other crack defendants designated as career offenders. The district court did not explain whether or how this disparity could be warranted. Indeed, the judge did not even mention the disparity factor that is a mandatory consideration in every federal sentencing. Accordingly, the sentence must be reversed as procedurally unreasonable.

III.

The six-year term of supervised release on Count One must be vacated as procedurally unreasonable because the district court miscalculated the mandatory minimum sentence prescribed by statute. The error, which originated in a mistake by the probation officer, rested on the incorrect premise that the government had filed the special charging instrument required to raise the mandatory minimum term of supervised release under 21 U.S.C. § 841(b)(1)(C). Because no such filing was made, the mandatory minimum term of supervised release was three years. Yet the district court imposed what it took to be a mandatory minimum of six years.

IV.

The sentence of 15 years' imprisonment and five years' supervised release on the conviction under 18 U.S.C. § 922(g) is not authorized by law. The maximum sentence of imprisonment for such an offense is 10 years, and the maximum term of supervised release is three years.

ARGUMENT

I.

The sentence is substantively unreasonable because it is greater than necessary to achieve the district court's stated purpose of deterring Mr. Clay from future crimes.

Standard of Review

In assessing substantive reasonableness, this Court determines whether "no reasonable sentencing court would have imposed the same sentence on [the] particular defendant for the reasons the district court provided." *United States v. Merced*, 603 F.3d 203, 214 (3d Cir. 2010) (quoting *United States v. Tomko*, 562 F.3d 558, 568 (3d Cir. 2009) (*en banc*)). Although deferential, review for substantive reasonableness is "not an exercise in self-abnegation." *Id.* (quoting *Tomko*, 562 F.3d at 575).

This Court begins its review of sentences for procedural error, but it has made clear that "procedural problems may lead to substantive problems.… After all, if one cannot justify a result by the reasons given, that result is, by definition, not a substantively reasonable conclusion to the logical steps provided." *United States v. Levinson*, 543 F.3d 190, 195 (3d Cir. 2008). To achieve the greatest clarity of exposition, this brief begins with the sentence's substantive

unreasonableness, which helps illuminate the significance of the procedural error identified in Issue II.

Discussion

Though 20 years is a long time to spend in prison, the district court's explanation of sentence was very brief. The only aim discussed by the sentencing judge was that of deterring Mr. Clay from future criminal conduct. The court told Mr. Clay that his "head is someplace else" and that the sentence would give him "time" and "opportunity" to "think about …how you got where you are and how to get out of that situation." (App. 462, 463). "I do think you are so mired in the criminal life," the court admonished, "that it is going to be difficult for you to understand anything else." (App. 463).

The court did not otherwise relate the general sentencing considerations codified at 18 U.S.C. § 3553(a) to the particular circumstances of this case. Rather, the court merely recited certain statutory language embodying two such factors: "Clearly, this is a serious offense. Clearly, there is a need to protect the community." (App. 462). Such rote recitation does not constitute an explanation of sentence. *See United States v. Cooper*, 437 F.3d 324, 329 (3d Cir. 2006) ("[A] rote statement of the § 3553(a) factors should not suffice if at sentencing either the defendant or the prosecution properly raises a ground of recognized legal merit

(provided it has a factual basis) and the court fails to address it.") (internal quotation marks and citation omitted). Moreover, given the record here, the court's summary reference to the need to protect the public cannot be regarded as anything other than another way of saying the reason for the sentence was to deter Mr. Clay from future criminal activity.

In short, the stated reason for the sentence was the "traditional penological purpose[]" of "specific deterrence." *United States v. Manzella*, 475 F.3d 152, 158 (3d Cir. 2007) (internal quotation marks and citation omitted). That is, the conviction and sentence were "to dissuade the offender from committing crimes in the future." *Black's Law Dictionary* 206 (3d pocket ed. 2006) (distinguishing "special" deterrence from "general" deterrence, the latter of which aims "to discourage people from committing crimes"). *See also Tomko*, 562 F.3d at 568-69 (speaking of "general deterrence" by reference to "third party deterrence").

A. By focusing on the career offender sentencing range, the district court relied on an overstated measure of what sentence was necessary to deter Mr. Clay from future criminal activity.

A district court must impose a sentence that is "sufficient, but not greater than necessary" to comply with a range of statutorily specified considerations. 18 U.S.C. § 3553(a)(1). The fact that a sentence is below a defendant's Guidelines

range does not make it reasonable. *See United States v. Olhovsky*, 562 F.3d 530, 549-50 (3d Cir. 2009) (vacating as substantively and procedurally unreasonable a below-Guidelines sentence).

When a court's aim is the achievement of specific deterrence, a sentence can be reasonable only if it is informed by a sound measure of the defendant's likelihood of recidivism. *See* United States Sentencing Guidelines, Ch. 4, Pt. A, intro. comment. (stating that "likelihood of recidivism … must be considered" if sentence is to "protect the public from further crimes of the particular defendant"); United States Sentencing Commission, *Supplementary Report on the Initial Sentencing Guidelines and Policy Statements* 14 n.55 (June 18, 1987) ("To the extent that a sentencing system seeks to protect the public from future crimes by the defendant … the likelihood that the defendant would commit future crimes would be paramount."). In this connection, the pertinent guidelines are those codified at U.S.S.G. §§ 4A1.1 and 4A1.2, which assign criminal history points to yield a Criminal History Category. The Sentencing Commission has identified the Criminal History Category and its constituent criminal history points as sound predictors of a defendant's recidivism risk. *See* United States Sentencing Commission, *Measuring Recidivism: The Criminal History Computation of the Federal Sentencing Guidelines* 10-11 (May 2004).

In selecting a sentence here, however, the court looked not to the sentencing range associated with Mr. Clay's actual Criminal History Category, but to the much higher range yielded by the career offender guideline, which assigned Mr. Clay an artificial Category VI criminal history while also vastly elevating his offense level. *See* U.S.S.G. § 4B1.1(b).[6] It was the career offender range to which the court referred twice, (App. 459, 463); the career offender range within which the government urged the court to sentence, (*e.g.*, App. 430, 434, 439, 449-450); and the career offender range which the defense treated as technically applicable

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[6] Section 4B1.1(a) of the Sentencing Guidelines provides:

> A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence of a controlled substance offense.

Section 4B1.2(b) defines a "controlled substance offense" generically as:

> an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

but unreasonable, (App. 443-446, 458). The court did not refer at all to any other range, such as the one identified in the government's sentencing memorandum were Mr. Clay's actual Category V criminal history to control.

Unlike the Criminal History Category, the career offender range was a poor tool for achievement of the court's aim of specific deterrence. Mr. Clay was designated a "career offender" solely on the basis of two state drug convictions he sustained on July 13, 2007. The charged conduct fell within a 13-day period when Mr. Clay was 20 years old. He served, all together, less than nine months in jail. In this situation, the Second Circuit has laid its finger on the problem with applying the career offender guideline:

> [T]o achieve a deterrent effect that … prior punishments failed to achieve.… requires an appropriate relationship between the sentence for the current offense and the sentences, particularly the times served, for the prior offenses.… [I]f a defendant served no time or only a few months for the prior offenses, a sentence of even three or five years for the current offense might be expected to have the requisite deterrent effect.

United States v. Mishoe, 241 F.3d 214, 220 (2d Cir. 2001) (Newman, J.). The court of appeals went on to hold that even before *United States v. Booker*, 543 U.S. 220 (2005), a sentencing court could, in its "individualized consideration" of a defendant's criminal history, consider the relationship between the career

offender range and the previous sentences. *Id.* at 220. It concluded:

> In some circumstances, a large disparity in that relationship might indicate that the career offender sentence provides a deterrent effect so in excess of what is required in light of the prior sentences and especially the time served on those sentences as to [authorize a downward departure].

Id.

The chairman of the Sentencing Commission has seconded this analysis from the bench. *See United States v. Colon*, Crim. No. 06-121, 2007 WL 4246470 at *7 (D. Vt. Nov. 29, 2007) (Sessions, C.J.) (departing from career offender range in part because sentence in that range "would be approximately fourteen years longer than all of Colon's previous sentences combined, including probation violations"). Given the significance of the previous time actually served by a defendant, it is notable that whereas the calculation of the recidivism-predicting Criminal History Category looks to sentences *imposed* on prior offenses, the career offender guideline looks to the greatest punishment *authorized* by law. *Compare* U.S.S.G. §§ 4A1.1(a), (b) and 4A1.2(a)(1) *with* U.S.S.G. § 4B1.2(b); *see United States v. Fernandez*, 436 F. Supp. 2d 983, 990 n.7 (E.D. Wis. 2006).

It is not only the Second Circuit and the chairman of the Sentencing Commission who have recognized the career offender guideline's infirmity as

regards specific deterrence. Criticism has come straight from the United States Sentencing Commission itself. After a review of empirical data, the Commission concluded that the guideline distorts the actual likelihood of recidivism on the part of defendants who qualify on the basis of prior drug convictions. *See* United States Sentencing Commission, *Fifteen Years of Guidelines Sentencing* [hereinafter *Fifteen Years*] 134 (Nov. 2004).[7] In its 15-year review, the Commission found that "preliminary analysis of the recidivism rates of drug trafficking offenders sentenced under the career offender guideline based on prior drug convictions shows that their rates are much lower than other career offenders who are assigned to criminal history category VI." *Id.* Drug-trafficking career offenders were found to have a recidivism rate of 27 percent, *id.*—roughly comparable to that of defendants with Category II criminal histories. *See* Linda Drazga Maxfield, *Measuring Recidivism Under the Federal Sentencing Guidelines* [hereinafter *Measuring Recidivism*], 17 Fed. Sent'g Rep. 166, 167 & Ex.2 (Feb. 1, 2005) (report of Sentencing Commission's senior research associate identifying recidivism rate of 24.0 percent among Category II defendants and 34.2 percent among Category III defendants).

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[7] The Sentencing Commission's Fifteen Year report is available at: http://www.ussc.gov/Research/Research_Projects/Miscellaneous/15_Year_Study/index.cfm.

In fact, the distortion owing to the career offender guideline means the Category VI designation is, as a categorical matter, "a *less* perfect measure of recidivism risk than it would be without the inclusion of offenders qualifying only because of prior drug offenses." *Fifteen Years* at 134 (emphasis in original); *see also Measuring Recidivism* at 169. Unlike the differences between Categories I through V, the "difference in predictive accuracy between CHC V and CHC VI is not statistically significant." *Measuring Recidivism* at 168. When the analysis is adjusted so that Category VI includes only defendants who qualify solely as a function of their criminal history points, "the statistical tests show that all categories are significantly different from one another, including categories V and VI." *Id.* at 169.

A fundamental problem with the career offender guideline is that it is incapable of registering any distinction between different drug offenses. The guideline treats the cross-country distribution of enough cocaine to flood all of Southwest Philadelphia with crack as if this were exactly the same thing as Mr. Clay standing on a street corner in 21°-weather to sell 0.6 grams of it.[8] *See United States v. Pruitt*, 502 F.3d 1154, 1167 (10th Cir. 2007) (McConnell, J., concurring)

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[8] See the weather history archive for February 19, 2007, available at http://www.wunderground.com/history/.

(criticizing career offender guideline because "it does not matter, for sentencing purposes, whether [the defendant's] prior drug felonies were large-scale or petty, violent or nonviolent"); *United States v. Moreland*, 568 F. Supp. 2d 674, 686 (S.D. W. Va. 2008) ("Any offense that falls within [the § 4B1.1] definition *must* be counted as a predicate offense, regardless of the amount of drugs involved, the actual punishment imposed, or the length of time between the prior and present offenses.") (emphasis in original); *Fernandez*, 436 F. Supp. 2d at 990 n.7 ("[A] defendant who served 20 years on a prior drug case is treated the same as one who received a sentence of probation.").

Here, the guideline's infirm treatment of prior drug convictions leaps off the pages of Mr. Clay's Presentence Investigation Report. Mr. Clay's status as a "career offender" owes exclusively to two prior drug convictions for offenses allegedly committed when he was 20 years of age. The offenses were a mere 13 days apart. One of the convictions was for 0.6 grams of crack; the other, for 8.4 grams—amounts that would together "rattle around in a matchbox." *Moreland*, 568 F. Supp. 2d at 687. In neither of the offenses did Mr. Clay play any sort of leadership role. In neither was there any indication that he collected any sort of real profit. In neither had the presiding state judge seen fit to impose a sentence of even one-tenth the length of imprisonment Mr. Clay is now serving. And in both,

taken together, Mr. Clay spent about 27 times less time in jail than the period of imprisonment imposed by the present sentence.

In sum, the particulars of this case exemplify the Sentencing Commission's empirical finding that the career offender guideline fails to identify a sentence bearing any proportion to the actual likelihood of recidivism. In sending Mr. Clay to prison for 20 years, the district court selected a sentence that was clearly longer than necessary to deter a 24-year-old man who had been held in jail for less than nine months for his earlier small-scale crack offenses.

B. The sentence, while below the career offender range, remains far greater than necessary to achieve the district court's deterrent aim.

The district judge sentenced below the career offender range, but not far enough below it to accord with the court's stated aim of specific deterrence. No reasonable sentencing judge could regard Mr. Clay to be so "mired in the criminal life," (App. 463), that it was necessary to send him to federal prison for the next two decades if he was to be set straight.

Significantly, the court did not go far enough below the career offender range to come anywhere near the "pre-career offender" sentencing range of 152-175 months pursuant to the firearms guideline at U.S.S.G. § 2K2.1. (*See* App. 434). Yet the firearms guideline itself also grossly exaggerates the recidivism risk

associated with the 2007 drug convictions by "double-counting" them. *See* U.S.S.G. § 2K2.1(a)(2). That is, rather than have drug convictions simply make their proper contribution to the defendant's Criminal History Category—here, moving Mr. Clay from the bottom of Category IV to the middle of Category V, (PSR ¶¶ 35, 38, 40)—the firearms guideline also vastly elevates the *offense level* on the basis of such convictions. *Compare* § 2K2.1(a)(2) with 2K2.1(a)(6). That yields a sentencing range once again higher than what obtains were the Guidelines' proper measure of recidivism risk, the Criminal History Category, allowed to operate without being pushed aside by countervailing treatment of a defendant's criminal history.

Here, the firearms guideline's double-counting provision elevated Mr. Clay's base offense level by 10, raising it from 14 to 24. U.S.S.G. §§ 2K2.1(a)(2), (a)(6). In tandem with the Category V criminal history, this yielded a range of 92-115 months. A consecutive term of 60 months is added for the 18 U.S.C. § 924(c) offense, yielding the final range of 152-175 months.

If Mr. Clay's drug convictions had factored into the calculation strictly by operation of the Category V criminal history designation they supported—*i.e.*, had the base offense level not also been elevated—the drug guideline at U.S.S.G.

§ 2D1.1 would have controlled.[9] Under that guideline, the offense level would have been 18. *See* U.S.S.G. § 2D1.1(c)(11) (2009). The final sentencing range would then have been 51-63 months on Counts One and Three, with a consecutive 60-month term on Count Two, for a total of 111-123 months.

Thus, even the range under the firearms guideline was between 37 percent[10] and 42 percent[11] above the range identified when the Criminal History Category measure of recidivism risk is given undistorted effect. Accordingly, the firearms guideline, like the career offender guideline, is an unsound measure for

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[9] The drug guideline would replace the firearms guideline pursuant to the "grouping" of the convictions under 21 U.S.C. § 841 and 18 U.S.C. § 922. *See* U.S.S.G. § 3D1.2(c) or (d). (PSR ¶ 16; App. 432). Regardless of whether subsection (c) or (d) of § 3D1.2 supplies the correct rule, the sentencing range would then be calculated by using the Chapter 2 guideline which produces the "highest offense level." *See* U.S.S.G. § 3D1.3(a) & comment. n.2 (providing rule if subsection (c) controls); *id.* § 3D1.3(b) & comment. n.3 (providing same rule here if subsection (d) controls). Were the firearms guideline not to double-count Mr. Clay's prior drug convictions, the offense level under that guideline would be 14. *See* U.S.S.G. § 2K2.1(a)(6). Under the drug guideline in effect as of Mr. Clay's October 29, 2010, sentencing, the base offense level was 18. *See* U.S.S.G. § 2D1.1(c)(11). Thus, but for the firearms guideline's "double counting" provision, the drug guideline would have controlled.

[10] The difference between a low-end 111-month sentence under the drug guideline range and a low-end 152-month sentence pursuant to the firearms guideline's double-counting provision.

[11] The difference between a high-end 123-month sentence under the drug guideline and a high-end 175-month sentence pursuant to the firearms guideline's double-counting provision.

determining the length of imprisonment sufficient to achieve the district court's aim here of specific deterrence.

Despite all this, Mr. Clay's 240-month sentence was *still* five years above the *high end* of the 152-175 month sentencing range yielded by the firearms guideline's overstated measure. The 240-month sentence is also more than ten times longer than any sentence previously imposed upon Mr. Clay. And it is about 27 times longer than any period of time he has previously been in jail. It is unreasonable to believe that such an exponential increase is no "greater than necessary" to achieve the specific deterrence that was the court's stated reason for sentence. The sentence must accordingly be vacated as substantively unreasonable.

II.

The sentence is procedurally unreasonable because the district court failed to consider the need to avoid unwarranted disparities between Mr. Clay's sentence and those imposed on defendants with similar or worse records convicted of crack offenses.

Standard of Review

The Court reviews the procedural reasonableness of the sentence under an abuse of discretion standard. *Gall v. United States*, 552 U.S. 38, 46 (2007); *United States v. Tomko*, 562 F.3d 558, 568 (3d Cir. 2009) (*en banc*).

Discussion

To be procedurally reasonable, the district court must: (1) calculate the correct Guidelines range; (2) rule on departure motions; and (3) exercise its discretion by considering the relevant 18 U.S.C. § 3553(a) factors. *United States v. Gunter*, 462 F.3d 237, 247 (3d Cir. 2006). To comply with step three, the district court must give "meaningful consideration" to the § 3553(a) factors. *United States v. Sevilla*, 541 F.3d 226, 232 (3d Cir. 2008) (quoting *United States v. Cooper*, 437 F.3d 324, 329 (3d Cir. 2006)). After arriving at its proposed sentence, the district court "must adequately explain the chosen sentence to allow for meaningful appellate review." *Gall*, 552 U.S. at 50.

Among the requisite considerations in any federal sentencing is "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6). When the sentence "implicates concerns over sentencing disparities," then "that concern warrants explicit consideration." *United States v. Negroni*, —F.3d—, 2011 WL 1125854 at *8 (3d Cir. Mar. 29, 2011). In *Negroni*, the district court explicitly "stated it had considered" the disparity factor. *Id.* Nonetheless, in light of the "clear disparity" which the sentence "seemed to create," *id.*, the court vacated the sentence due to the absence of fuller explanation.

While the sentence in *Negroni* represented a sizable downward variance from 70-87 months' imprisonment to 60 months' probation, there is also a profound disparity between Mr. Clay's sentence and those imposed for crack offenses committed by defendants with similar, or worse, records. (*Infra* Part A). Neither Mr. Clay's status as a career offender nor his conviction of gun counts show this disparity to be warranted. (*Infra* Part B).

Despite the manifest signs of disparity, the district court did not even mention the need to avoid unwarranted disparities, much less "adequately explain the chosen sentence to allow for meaningful appellate review." *Gall*, 552 U.S. at 50. This was procedural error requiring that the sentence be vacated.

A. The drug sentencing guideline, the relevant statistics, and the reported cases show significant disparity between Mr. Clay's sentence and those imposed on similarly situated defendants convicted of crack offenses.

At trial, the government's expert described the charged conduct as that of a "lower level dealer." (App. 286). The offense, of course, involved only 2.783 grams of crack. The court imposed a 180-month sentence on this count (with the total punishment of 240 months' imprisonment comprising an additional, consecutive term of 60 months under 18 U.S.C. § 924(c).).

The drug guideline at U.S.S.G. § 2D1.1 is not nearly so harsh. Under that guideline, as in effect at the time of Mr. Clay's October 29, 2010, sentencing, a Category V defendant's Guidelines range did not reach as high as 180 months' imprisonment unless he trafficked in between 50 and 150 grams of crack. *See* U.S.S.G. § 2D1.1(c)(5) (2009) (assigning offense level of 30, which yields sentencing range of 151-188 months at Criminal History Category V).[12] Conversely, a Category V defendant sentenced under § 2D1.1 for possession with intent to distribute 2.783 grams of crack had a Guidelines range of 51-63 months.

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[12] Following a revision to the guideline that became effective three days after Mr. Clay's sentencing, it takes about one-quarter kilogram of crack for a Category V defendant's sentencing range to reach as high as 180 months. *See* U.S.S.G. § 2D1.1(c)(5) (2010) (assigning offense level of 30 to offenses involving at least 196 grams but less than 280 grams of crack).

See U.S.S.G. § 2D1.1(c)(11) (2009).[13]

Disparity is also evident from a statistical perspective. Mr. Clay's 180-month sentence on Count One is almost five and a half years longer than the average length of imprisonment for crack offenses sentenced under U.S.S.G. § 2D1.1. *See* United States Sentencing Commission, *Sourcebook of Federal Sentencing Statistics* fig. J (2009) (average sentence of 114.8 months).[14] Yet the median quantity in all crack cases is 51 grams—more than 19 times the quantity possessed by Mr. Clay. *See* United States Sentencing Commission, *Report to Congress: Cocaine and Federal Sentencing Policy* 108 tbl. 5-2 (May 2007).[15]

The reported cases also reveal numerous instances in which sentences of far less than 180 months have been imposed on "defendants with similar"—or worse—"records who have been found guilty of similar offenses." 18 U.S.C.

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[13] Following a revision to the guideline that became effective three days after Mr. Clay's sentencing, a Category V defendant convicted of a 2.783-gram crack offense has a sentencing range of 33-41 months—more than four times less than the sentence here. *See* U.S.S.G. § 2D1.1(c)(13).

[14] The Sentencing Commission's data analysis is available at: http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2009/figj.pdf.

[15] The Sentencing Commission's 2007 report on cocaine sentencing policy is available at: http://www.ussc.gov/Legislative_and_Public_Affairs/Congressional_Testimony_and_Reports/Drug_Topics/200705_RtC_Cocaine_Sentencing_Policy.pdf.

§ 3553(a)(6). *See United States v. Williams*, 435 F.3d 1350 (11th Cir. 2006) (affirming 90-month sentence for distribution of five grams of crack by career offender previously convicted of cocaine trafficking and carrying a concealed firearm); *United States v. Bowser*, 941 F.2d 1019, 1025 (10th Cir. 1991) (affirming 96-month sentence for distribution of 9.3 grams of crack by career offender previously convicted of robbing two convenience store at gunpoint within two-month period); *United States v. Senior*, 935 F.2d 149 (8th Cir. 1991) (affirming 120-month sentence for possession with intent to distribute 10.774 grams of crack by career offender who had previously served three years for robbing three Pizza Hut restaurants and, later in life, 18 months for distribution of Dilaudid and possession of another controlled substance); *United States v. Moreland*, 568 F. Supp. 2d 674, 687 (S.D. W. Va. 2008) (120-month sentence for trafficking in 7.85 grams of crack by career offender previously convicted of distributing small amount of marijuana to prison inmate and, four years later, trafficking in less than 50 grams of crack after having been arrested in possession of 6.92 grams); *see also United States v. Ware*, Crim. No. 08-32, 2008 WL 4682663 (E.D. Wis. Oct. 21, 2008) (108-month sentence for trade of 2.1 grams of crack for gun, and distribution in total of 4.3 grams of crack, by career offender previously convicted of burglary, battery, and numerous other offenses).

In sum, the benchmarks embodied in the drug guideline at § 2D1.1, the average sentences identified in the Sentencing Commission's published statistical reports, and the illustrations provided in the reported cases present a grave specter of disparity with regard to Mr. Clay's 15-year sentence on the crack count. Given the "clear disparity" which the sentence "seem[s] to create," *Negroni*, 2011 WL 1125854 at *8 & n.11, it was incumbent on the district court to "adequately explain the chosen sentence to allow for meaningful appellate review" of whether the court complied with 18 U.S.C. § 3553(a)(6). *Gall*, 552 U.S. at 50. The district court did not adequately explain whether or how the disparity could be warranted. Indeed, she did not even state that she had given the matter any consideration. Accordingly, the sentence is procedurally unreasonable.

B. Neither Mr. Clay's career offender status nor the other counts of conviction show the disparity to be warranted.

Mr. Clay's status as a career offender does not justify the disparity between his sentence and those imposed in other crack cases involving defendants with similar, or worse, criminal histories. All of the significantly shorter crack sentences reviewed above were imposed in cases where the defendant were career offenders. Nor is this pattern coincidence. Of all crack defendants qualifying as career offenders, nearly 25 percent received sentences below the career offender

range on their own motion, and another 33.4 percent received below-range sentences with government sponsorship. *See* United States Sentencing Commission, *Final Report on the Impact of United States v. Booker on Federal Sentencing* 139 tbl. 27 (March 2006). Thus, the fact that Mr. Clay received a sentence below the career offender range does not show that he won such unusual dispensation as to justify the disparity between his sentence and those received by other career offenders sentenced for crack offenses. Still less does the below range sentence eliminate the even larger disparity between Mr. Clay's sentence and those imposed under U.S.S.G. § 2D1.1.

Mr. Clay's conviction of a § 924(c) offense also fails to account for the disparity. The 60-month sentence imposed on this count is the same sentence imposed in almost every case. *See Harris v. United States*, 536 U.S. 545, 578 (2002) (Thomas, J., concurring) (citing United States Sentencing Commission, 2001 Datafile, USSCFY01, Table 1). There was nothing aggravated, much less extraordinarily aggravated, about the gun-related conduct of which Mr. Clay was convicted. Accordingly, a consecutive sentence of anything more than 60 months would have itself given rise to unwarranted disparity. By no means, then, can Mr. Clay's conviction of a § 924(c) offense account for the disparity in the separate 180-month sentence imposed on the crack count.

Finally, Mr. Clay's conviction of a § 922(g) offense does not account for the disparity. The district court never once spoke of the § 922(g) conviction at the sentencing hearing. Clearly, the court viewed the 60-month sentence imposed on the § 924(c) count as sufficient to address the gun-related conduct of which Mr. Clay was convicted. Given this record, the § 922(g) offense can hardly be regarded as material to the court's selection of sentence.

In sum, no ready explanation accounts for the disparity between Mr. Clay's sentence and the sentences imposed on defendants with similar or worse records for similar or worse crack offenses. If the district court viewed this disparity as warranted, its obligation was to set forth enough of an explanation to permit this Court to review the sentence for compliance with 18 U.S.C. § 3553(a)(6). By saying nothing at all, the district court abused its discretion. Accordingly, the sentence must be vacated as procedurally unreasonable.

III.

The sentence of six years' supervised release on Count One was procedurally unreasonable because the court erroneously concluded this was the mandatory minimum on the mistaken premise that a charging instrument had been filed under 21 U.S.C. § 851.

Standard of Review

As stated above at the outset of Issue II, this Court reviews sentences for procedural reasonableness under an abuse of discretion standard. *Tomko*, 562 F.3d at 568. A "district court will be held to have abused its discretion if its decision was based on a clearly erroneous factual conclusion or an erroneous legal conclusion." *United States v. Wise*, 515 F.3d 207, 217 (3d Cir. 2008).

Here, the government correctly advised the district court that the mandatory-minimum term of supervised release on the first count was three years, (App. 432), but the court identified the mandatory minimum sentence as six years, (Statement of Reasons at II, III). Because the government brought the matter to the court's attention, the issue was preserved and an abuse of discretion should be found.

To the extent the government's submission did not preserve the issue, review is for plain error. To show plain error, a party must demonstrate that (1)

there was error; (2) the error was clear or obvious; and (3) the error affected substantial rights—after which, the Court will exercise its discretion to correct the error provided it seriously affects the fairness, integrity or public reputation of judicial proceedings. *See, e.g.*, *United States v. Brown*, 595 F.3d 498, 519-20 (3d Cir. 2010).

A. The district court erred in identifying a mandatory-minimum term of six years' supervised release.

For more than 40 years, Section 851 of Title 21 of the United States Code has provided:

> No person … shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.

21 U.S.C. § 851(a)(1); *see* Pub. L. No. 91-513 § 704(a), 84 Stat. 1236 (Oct. 27, 1970). The provision applies to any person "convicted of an offense under this part," *i.e.*, Part D of Chapter 13, Title 21 of the United States Code, which includes the provisions under which Mr. Clay was convicted on the first count, 21 U.S.C. § 841(a)(1) and (b)(1)(C). Defendants "for whom the Government did not file a notice under § 851(a)(1) … are therefore ineligible for the penalty

enhancement." *United States v. LaBonte*, 520 U.S. 751, 759 (1997). Here, it is undisputed that the government did not file any § 851 information. (App. 431).

Under 18 U.S.C. § 841(b)(1)(C), the mandatory minimum period of supervised release increases from three years to six years if the defendant commits the offense "after a prior conviction for a felony drug offense has become final." The enhancement is within the scope of § 851's coverage of "increased punishment" because "[s]upervised release is punishment; it is a deprivation of some portion of one's liberty imposed as a punitive measure for a bad act." *United States v. Dozier*, 119 F.3d 239, 242 (3d Cir. 1997), *abrogated on other ground*, *Johnson v. United States*, 529 U.S. 694, 702-03, 713 (2000); *United States v. Powell*, 269 F.3d 175, 181 (3d Cir. 2001).

Although the government never filed a § 851 charging instrument in this case, the Presentence Investigation Report erroneously stated that it had. (PSR ¶ 64). Accordingly, with respect to Count One, the PSR stated that "a term of six years supervised release is required if a sentence of imprisonment is imposed, pursuant to 21 U.S.C. § 841(b)(1)(C)." (PSR ¶ 70). The government subsequently alerted the court of this error, advising that no § 851 information had been filed, and that the mandatory minimum term of supervised release was three years. (App. 431-432).

At the sentencing hearing, the district court imposed a six-year term of supervised release. (App. 463). The judgment stated that this term was imposed on Count One. (App. 5). The court thereafter prepared a Statement of Reasons in which it checked a box stating that "Mandatory minimum sentence imposed," and went on to identify the Guidelines range for supervised release as "6 to __ years." (Statement of Reasons at II, III).

Because no § 851 information was filed, however, the mandatory minimum was three years. The Guidelines range is also three years. *See* 18 U.S.C. § 3559 (identifying as Class C felony any offense for which maximum authorized term of imprisonment is less than 25 years but ten or more years); 21 U.S.C. § 841(b)(1)(C) (authorizing maximum term of imprisonment of 20 years absent § 851 filing); U.S.S.G. § 5D1.2(a)(2) (prescribing two-to-three year term of supervised release for Class C felonies); *id.* § 5D1.2(c) (providing that term of supervised release shall not be less than any statutory minimum).

It is well-settled that a district court's erroneous calculation of the advisory Guidelines range constitutes "significant procedural error." *Gall*, 522 U.S. at 51. It is obviously far more significant procedural error for the court also to mistake a statutory mandatory minimum that is an absolute constraint on its exercise of sentencing discretion. By relying on an incorrect factual premise—that

a § 851 information was filed—to reach an erroneous legal conclusion—that the mandatory minimum on Count One was six years—the district court committed procedural error that amounted to an abuse of discretion. *See Wise*, 515 F.3d at 217.

B. The error was plain and warrants remand.

Here, the error should be deemed preserved because the government alerted the court that no § 851 information had been filed and that the mandatory minimum was three years. (App. 431-432). In any event, the record shows plain error warranting correction on appeal.

The error is clear in light of the express language of 21 U.S.C. § 851 and 40 years of practice under that statute. It became all the more obvious when the government alerted the court to the mistake in the probation officer's PSR.

The error affected Mr. Clay's substantial rights in that it "affected the outcome of the district court proceedings." *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (internal quotation marks and citations omitted). The district court's Statement of Reasons shows that its intent was to impose the mandatory minimum term of supervised release. The court's error therefore affected its decision as to what term of supervised release would be imposed, and accordingly

the outcome of proceedings. *See United States v. Hutchinson*, 573 F.3d 1011, 1031 (10th Cir. 2009) (reversing sentence based on district court's erroneous calculation of mandatory minimum prison term under § 841(b)(1)(C), when district court had "seemed to indicate that it would have imposed a much lower sentence" absent error).

Finally, remanding for correction of the error is warranted here. The miscalculation of the mandatory minimum doubles the length of time for which Mr. Clay will be "subject to various terms and conditions which restrict his freedom and which make him vulnerable to further punishment should he violate them." *Powell*, 269 F.3d at 181. This result has come about because the probation officer made an inexplicable mistake and the court relied on it even after being alerted of the error. The error thus affected the fairness, integrity, and public integrity of judicial proceedings. *Compare United States v. Syme*, 276 F.3d 131, 158 (3d Cir. 2002) (noticing and correcting plain error when district court, despite erroneous Guidelines calculation, selected sentence within correct, overlapping range).

For the reasons stated, plain error should be noticed and the matter remanded for resentencing.

IV.

The sentence of 15 years' imprisonment and five years' supervised release for a violation of 18 U.S.C. § 922(g) is above the statutory maximum and thus unlawful.

Standard of Review

This Court exercises plenary review over challenges to a sentence's legality. *United States v. Murray*, 144 F.3d 270, 275 n.6 (3d Cir. 1998).

Discussion

Mr. Clay was convicted in a bench trial[16] of possession of a firearm after having been convicted of a felony, in violation of 18 U.S.C. § 922(g). The maximum term of imprisonment for this offense is ten years. 18 U.S.C. § 924(a)(2). The offense is thus a Class C felony, *see* 18 U.S.C. § 3559(a)(3), making the maximum term of supervised release three years, *see* 18 U.S.C. § 3583(b)(2).

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[16] The record does not show Mr. Clay to have personally waived in writing his right to a jury trial, as required by Rule 23(a)(1) of the Federal Rules of Criminal Procedure. However, courts have held that such error does not require reversal when an on-the-record colloquy, and/or other circumstances ascertainable from the record, show the waiver to have been voluntary, knowing and intelligent. *See, e.g.*, *United States v. Leja*, 448 F.3d 86, 93 (1st Cir. 2006); *United States v. Saadya*, 750 F.2d 1419, 1420 (9th Cir. 1985); *cf. United States v. Lilly*, 536 F.3d 190, 192, 197 (3d Cir. 2008). The court conducted an on-the-record colloquy here. (App. 420-23).

Here, however, the written judgment provides for a sentence of 15 years' imprisonment and five years' supervised release on the § 922(g) count. (App. 4-5). Although this issue was not preserved, the sentence is illegal and should be noticed and corrected as plain error. *See United States v. Gunter*, 527 F.3d 282, 288 (3d Cir. 2008), *vacated on other ground*, 129 S. Ct. 2051 (2009) (endorsing government's concession that sentence in excess of statutory maximum under 18 U.S.C. §§ 922(g) and 924(a)(2) was plain error); *see also United States v. Ferguson*, 369 F.3d 847, 849 n.4 (5th Cir. 2004) ("[B]ecause a sentence which exceeds the statutory maximum is an illegal sentence and therefore constitutes plain error, our review of the issue presented in this appeal will be de novo.") (internal quotation marks and citation omitted).

CONCLUSION

For the reasons stated in the foregoing, the sentence should be vacated and the matter remanded for resentencing.

Respectfully submitted,

/s/ Robert Epstein

ROBERT EPSTEIN
Assistant Federal Defender

KEITH M. DONOGHUE
Research and Writing Attorney

DAVID L. McCOLGIN
Assistant Federal Defender
Supervising Appellate Attorney

LEIGH M. SKIPPER
Chief Federal Defender

CERTIFICATE OF BAR MEMBERSHIP

It is hereby certified that Robert Epstein is a member of the bar of the Court of Appeals for the Third Circuit.

/s/ Robert Epstein
ROBERT EPSTEIN

DATE: 4/8/11

CERTIFICATION

I, Robert Epstein, Assistant Federal Defender, Federal Community Defender Office for the Eastern District of Pennsylvania, hereby certify that the electronic version of the attached brief sent by e-mail to the Court was automatically scanned by Symantec AntiVirus Corporate Edition, version 8.00, and found to contain no known viruses. I further certify that the text in the electronic copy of the brief is identical to the text in the paper copies of the brief filed with the Court.

/s/ Robert Epstein
ROBERT EPSTEIN

DATE: 4/8/11

CERTIFICATE OF COMPLIANCE

I, Robert Epstein, Assistant Federal Defender, Federal Community Defender Office for the Eastern District of Pennsylvania, hereby certify that appellant's brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,145 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect X4 word count software in font size 14, type style Times New Roman.

/s/ Robert Epstein
ROBERT EPSTEIN

Attorney for Anthony Clay

Dated: 4/8/11

CERTIFICATE OF SERVICE

I, Robert Epstein, Assistant Federal Defender, Federal Community Defender Office for the Eastern District of Pennsylvania, hereby certify that I have filed this same day, both in electronic and paper form, the Brief for Appellant and served two (2) copies of the Brief and one (1) copy of the Appendix upon Assistant United States Attorney Richard Kornylak, by first class U.S. mail to his office located at Suite 1250, 615 Chestnut Street, Philadelphia, Pennsylvania 19106.

/s/ Robert Epstein
ROBERT EPSTEIN

DATE: 4/8/11