

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.

1 **At a stated Term of the United States Court of Appeals for the Second Circuit, held**
2 **at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New**
3 **York on the 9th day of February, two thousand eighteen.**

4
5 Present: ROBERT A. KATZMANN,
6 *Chief Judge,*
7 ROSEMARY S. POOLER,
8 CHRISTOPHER F. DRONEY,
9 *Circuit Judges.*

10 _____
11
12 UNITED STATES OF AMERICA,
13
14 *Appellee,*

15
16 v.

No. 17-328

17
18 ROBERT KALABA, AKA Bobby,
19
20 *Defendant-Appellant,*
21
22 VICTOR KALABA, KAHER ABDULNABI,
23 ABDELRAHMAN M. TAYYEB, AKA Abdel R. Tayeb,
24 PATRICK CARTER,
25
26 *Defendants.*
27 _____
28
29
30

1 For Appellee: Daniel B. Tehrani and Daniel C. Richenthal for
2 Geoffrey S. Berman, Interim United States
3 Attorney for the Southern District of New
4 York, New York, NY
5
6 For Defendant-Appellant: Jane Fisher-Byrialsen, Fisher & Byrialsen
7 PLLC, New York, NY
8
9

10 Appeal from a judgment of the United States District Court for the Southern District of
11 New York (*Preska, J.*).

12 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND**
13 **DECREED** that the judgment of said district court is **VACATED** and the case is **REMANDED**
14 for resentencing consistent with this order.

15 Defendant Robert Kalaba appeals from a judgment of the Southern District of New York
16 (*Preska, J.*), entered January 26, 2017, revoking Kalaba’s term of supervised release and
17 sentencing him to 24 months’ imprisonment. We assume the parties’ familiarity with the
18 underlying facts, the procedural history of the case, and the issues on appeal.

19 In 2006, Kalaba pled guilty to two counts related to credit card theft, and was sentenced
20 to 70 months’ imprisonment, to be followed by three years of supervised release. He was
21 released in October 2011. Two years later, while on supervised release, Kalaba was arrested and
22 indicted for multiple narcotics offenses related to the unlawful distribution of controlled
23 substances in a conspiracy spanning from November 2011 to October 2013. In 2015, Kalaba pled
24 guilty to one of the narcotics counts and was convicted at trial of the remaining counts. He was
25 sentenced to 84 months’ imprisonment, well below the statutory maximum of 540 months’
26 imprisonment and the 240 months recommended by the Probation Office.

1 On November 6, 2013, while Kalaba was awaiting trial for the narcotics offenses, the
2 Probation Office submitted a violation of supervised release report, specifying four violations of
3 supervised release. The first two specifications pertained to two counts in the narcotics
4 indictment, and were established by Kalaba’s conviction. Kalaba admitted to the third and fourth
5 specifications, which were for failing to notify the Probation Office of a change of residence and
6 employment, as well as traveling to New Jersey without permission, The Probation Office
7 calculated a Sentencing Guidelines range of 15-21 months, and recommended a 21-month
8 sentence. The statutory maximum was 24 months. On January 25, 2017, following his sentencing
9 for the narcotics offenses, Kalaba was sentenced to 24 months’ imprisonment on the supervised
10 release violations, to run consecutive to the term of imprisonment for the narcotics offenses. No
11 written statement of reasons was attached to the judgment.

12 On appeal, Kalaba challenges the reasonableness of his sentence for the supervised
13 release violation. “Reasonableness review requires an examination of the length of the sentence
14 (substantive reasonableness) as well as the procedure employed in arriving at the sentence
15 (procedural reasonableness).” *United States v. Johnson*, 567 F.3d 40, 51 (2d Cir. 2009). Kalaba’s
16 first argument, which is that the district court erred by failing to adequately explain—orally and
17 in writing—why it imposed a sentence that exceeded the guideline range, addresses procedural
18 reasonableness. Because Kalaba did not raise a contemporaneous objection to the district court’s
19 explanation, this challenge is reviewed for plain error. *United States v. Aldeen*, 792 F.3d 247,
20 253 (2d Cir. 2015). Under the plain error standard, a defendant “must establish (1) error (2) that
21 is plain and (3) affects substantial rights.” *United States v. Villafuerte*, 502 F.3d 204, 209 (2d Cir.
22 2007). Should the “error meet[] these initial requirements, we then must consider whether to
23 exercise our discretion to correct it, which is appropriate only if the error seriously affected the

1 ‘fairness, integrity, or public reputation of the judicial proceedings.’” *Id.* (quoting *United States*
2 *v. Doe*, 297 F.3d 76, 82 (2002)).

3 Sentencing law requires that “[t]he court must ‘state in open court the reasons for its
4 imposition of [a] particular sentence.’” *Aldeen*, 792 F.3d at 251 (quoting 18 U.S.C. § 3553(c)).

5 When the sentence is outside the Guidelines range, the district court must state “the specific
6 reason for the imposition of a sentence different from” the advisory Guidelines range. 18 U.S.C.
7 § 3553(c)(2). Further, the district court must provide its rationale both “in open court as well as
8 in writing—‘with specificity in a statement of reasons form’ that is part of the judgment.”

9 *Aldeen*, 792 F.3d at 251-52 (quoting 18 U.S.C. § 3553(c)(2)). “[T]he district court’s statement of
10 reasons must at least explain—in enough detail to allow a reviewing court, the defendant, his or

11 her counsel, and members of the public to understand—why the considerations used as
12 justifications for the sentence are sufficiently compelling or present to the degree necessary to

13 support the sentence imposed.” *United States v. Sindima*, 488 F.3d 81, 86 (2d Cir. 2007) (internal
14 quotation marks and citation omitted). Further, “[w]hen a factor is already included in the

15 calculation of the Guidelines sentencing range, a judge who wishes to rely on that same factor to
16 impose a sentence above or below the range must articulate specifically the reasons that this

17 particular defendant’s situation is different from the ordinary situation covered by the Guidelines
18 calculation.” *Id.* at 87 (quoting *United States v. Zapete–Garcia*, 447 F.3d 57, 60 (1st Cir. 2006))

19 (brackets omitted).

20 These requirements similarly “apply . . . to sentences for violations of supervised
21 release.” *Aldeen*, 792 F.3d at 252. However, we have noted that “we . . . require less rigorous

22 specificity where, as here, a court sentences a defendant for violation of supervised release.” *Id.*
23 at 253; *see also United States v. Hargrove*, 497 F.3d 256, 260-61 (2d Cir. 2007) (“We have

1 drawn a sharp divide between initial sentencing and the revocation of supervised release with
2 respect to the protections and safeguards available to the individual.”).

3 Here, the district court did not meet its procedural obligations in imposing an above-
4 Guidelines sentence. At the sentencing hearing, the district court noted that the “the major factor
5 in this sentencing is to provide some respect for the law,” and elaborated that Kalaba “was on
6 supervised release from this Court when he engaged in this monumental drug distribution
7 conspiracy.” App’x at 124-25. However, the district court made no mention of the fact that it was
8 imposing an above-Guidelines sentence, and did not provide a specific reason for doing so. Nor
9 did the district court provide a written statement of reasons for imposing an above-Guidelines
10 sentence. As a result, the district court did not fulfill its obligations under 18 U.S.C. § 3553(c)(2).

11 While the district court may impose an above-Guidelines sentence based on the factors it
12 discussed at the sentencing hearing—namely, the breach of the court’s trust while on supervised
13 release, and the severity of the criminal activity—the Guidelines were designed to take these
14 factors into account. *See Sindima*, 488 F.3d at 87. Accordingly, to meet its procedural obligations
15 in imposing an above-Guidelines sentence, the district court must “articulate specifically the
16 reasons that this particular defendant’s situation is different from the ordinary situation covered
17 by the Guidelines calculation.” *Id.* (quoting *Zapete-Garcia*, 447 F.3d at 60) (brackets omitted).

18 We have held that “a major departure [from the Guidelines range] should be supported by
19 a more significant justification than a minor one,” and the district court here sentenced Kalaba to
20 three months above the high end of the Guidelines recommendation. *United States v. Stewart*,
21 590 F.3d 93, 168 (2d Cir. 2009) (quoting *Gall v. United States*, 552 U.S. 38, 50 (2007)).
22 Nonetheless, the departure obligated the district court to state its rationale for departing from the
23 Guidelines with specificity.

1 Finally, Kalaba’s sentencing is distinguishable from *United States v. Verkhoglyad*, where
2 we found that the district court sufficiently articulated its reasons for imposing an above-
3 Guidelines sentence in open court, but neglected to complete its “ministerial duty to memorialize
4 its stated reasons for sentencing.” 516 F.3d 122, 134 (2d Cir. 2008). There, unlike here, the
5 district court, at the sentencing hearing, had been “quite specific in explaining the reasons for its
6 sentence,” expanding on the defendant’s specific circumstances and prior sentencing proceedings
7 before the district court. *Id.* at 133.

8 Having concluded that there was an error, we must next consider whether the error was
9 plain. In this instance, not providing a more complete explanation was plain error. As discussed
10 above, the district court did not sufficiently specify why an above-Guidelines sentence was
11 necessary, given that the reasons it provided are all contemplated by the Guidelines. *See United*
12 *States v. Lewis*, 424 F.3d 239, 245 (2d Cir. 2005) (explaining that “[s]tating no reasons at all
13 plainly falls short of the requirement to state reasons that is set forth in § 3553(c), no matter what
14 the required level of specificity may be” for supervised release sentencing) (internal quotation
15 marks omitted).

16 The next inquiry is whether substantial rights were affected by the absence of an adequate
17 oral or written explanation. An oral and written statement of reasons is required under § 3553(c)
18 because, “[b]y informing the defendant of the basis for the sentence, he or she may well become
19 better able effectively to pursue an appeal asserting that the sentence is unreasonable. By
20 similarly informing the Court of Appeals as to the reasons for the sentence, we may well become
21 better able to hear and determine the appeal effectively.” *Id.* at 247. As we have explained, these
22 interests implicate substantial rights. *See id.* (failure to adequately explain the reasons for a
23 sentence is “clearly . . . substantial”) (internal quotation marks omitted).

