

In the
United States Court of Appeals
For the Second Circuit

August Term, 2025

(Argued: March 18, 2026 Decided: August 24, 2026)

Docket No. 25-606

UNITED STATES OF AMERICA,

Appellee,

–v.–

STEFAN BAGLEY, JR.,

Defendant-Appellant,

TREMAYNE FERGUSON, AKA Tre, JEFFREY CHARLESTON, AKA J Dot, ESKAVAIL
GORDON, AKA Vail, CHASE DRALLE, AKA Chevy, JAMAINE ADKINS, JR., AKA G
Banger,

*Defendants.**

* The Clerk of Court is respectfully directed to amend the caption as reflected above.

Before: SULLIVAN, BIANCO, and ROBINSON, *Circuit Judges*.

Defendant-Appellant Stefan Bagley, Jr., appeals from a judgment of the United States District Court for the District of Connecticut (Williams, *Judge*) following his guilty plea to one count of firearm trafficking conspiracy in violation of 18 U.S.C. § 933(a)(3) and (b). The district court sentenced Bagley principally to seven years' (84 months') imprisonment, to be followed by three years of supervised release. This sentence was above the advisory range of 51 to 63 months' imprisonment under the United States Sentencing Guidelines.

On appeal, Bagley challenges both the procedural and substantive reasonableness of his sentence. He argues, among other things, that the court impermissibly imposed this substantial upward variance from the Guidelines range based on (1) his failure to assist law enforcement in recovering the trafficked firearms and (2) factors already incorporated into the Guidelines calculation without sufficient explanation as to why the Guidelines range did not sufficiently account for these factors.

We conclude that the district court varied upward from the Guidelines range based in substantial part on Bagley's failure to assist law enforcement in recovering the guns he sold—a procedural error that requires us to vacate Bagley's sentence. The court committed further procedural error in varying upward based on three factors already incorporated into the Guidelines range without specifically articulating why they bore greater-than-usual weight in this case, in violation of *United States v. Sindima*, 488 F.3d 81 (2d Cir. 2007), *superseded on other grounds, as recognized in United States v. Smith*, 949 F.3d 60, 64 (2d Cir. 2020). These errors were plain. We have no doubt that the sentencing judge would follow our guidance on remand, but we remand to a different judge for resentencing because under these circumstances our precedents call for reassignment to preserve the appearance of justice. *United States v. Sterkaj*, 138 F.4th 95, 103 (2d Cir. 2025).

Accordingly, we REMAND for reassignment to a different judge to vacate the sentence and resentence in accordance with this opinion.

Judge Sullivan dissents in a separate opinion.

CARLY LEVENSON, Assistant Federal Defender, *for*
Terence S. Ward, Federal Defender, District of
Connecticut, Hartford, CT, *for Defendant-Appellant*.

KENNETH L. GRESHAM (Conor M. Reardon, *on the*
brief), Assistant United States Attorneys, *for* David
X. Sullivan, United States Attorney, District of
Connecticut, New Haven, CT, *for Appellee*.

ROBINSON, *Circuit Judge*:

Defendant-Appellant Stefan Bagley, Jr., appeals from a judgment of the United States District Court for the District of Connecticut (Williams, *Judge*) following his guilty plea to one count of firearm trafficking conspiracy in violation of 18 U.S.C. § 933(a)(3) and (b). The district court sentenced Bagley principally to seven years' (84 months') imprisonment, to be followed by three years of supervised release. This sentence was above the advisory range of 51 to 63 months' imprisonment under the United States Sentencing Guidelines.

On appeal, Bagley challenges both the procedural and substantive reasonableness of his sentence. He argues, among other things, that the court impermissibly imposed this substantial upward variance from the Guidelines range based in substantial part on (1) his failure to assist law enforcement in recovering the trafficked firearms and (2) factors already incorporated into the

Guidelines calculation without sufficient explanation as to why the Guidelines range did not sufficiently account for these factors.

We conclude that the district court varied upward from the Guidelines range based on Bagley's failure to assist law enforcement in recovering the guns he sold—a procedural error that requires us to vacate Bagley's sentence. The court committed further procedural error by varying upward based on three factors already incorporated into the Guidelines range without specifically articulating why they bore greater-than-usual weight in this case, in violation of *United States v. Sindima*, 488 F.3d 81 (2d Cir. 2007), *superseded on other grounds as recognized in United States v. Smith*, 949 F.3d 60, 64 (2d Cir. 2020). These errors were plain.

Under our precedents, where the district court impermissibly increased a defendant's sentence based on failure to cooperate with law enforcement, we have remanded to a different judge for resentencing. *United States v. Stratton*, 820 F.2d 562, 565 (2d Cir. 1987); *United States v. Sterkaj*, 138 F.4th 95, 103 (2d Cir. 2025). That course is appropriate here, too. We are certain that the district court would have followed our guidance on resentencing, but our caselaw requires reassignment to preserve the appearance of justice.

Accordingly, we **REMAND** for reassignment to a different judge to vacate the sentence and resentence in accordance with this opinion.

BACKGROUND¹

Bagley came to the attention of law enforcement in Bridgeport, Connecticut, when he arrived at a local hospital with a gunshot wound. Someone driving his car dropped him off. Later that same day, while Bagley remained hospitalized, an unknown passenger in Bagley's car shot someone else through the car window. The victim of that shooting ended up at the same Bridgeport hospital as Bagley.

When Bridgeport police searched Bagley's car, they found eleven empty firearm cases, several firearm receipts, and state transfer paperwork in the trunk. Upon investigating state firearms records, special agents from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) discovered that since acquiring his license to purchase firearms in Connecticut less than a year prior, Bagley had purchased about twenty guns. Two months after commencing their investigation, ATF officers observed Bagley buy another gun from a federally licensed firearms dealer and reviewed camera footage showing him stealing ammunition from the same dealer. As a result, they obtained a state arrest warrant.

The following month, when Bagley tried to purchase another gun, ATF officers arrested him on the active state warrant. A search of Bagley's home

¹ This account is drawn primarily from the Presentence Report and sentencing hearing transcript.

revealed a Dremel tool² with metal shavings, consistent with obliterating serial numbers on firearms to make them untraceable. On Bagley's cell phone, investigators discovered messages to customers in which Bagley discussed removing serial numbers, and they found photographs of firearms with serial numbers obliterated. Bagley's communications also indicated that he knew one of his customers was on state probation and thus prohibited from buying a gun. And Bagley's messages showed that he knew his conduct was illegal. For example, after the shootings referenced above, Bagley solicited members in a group chat to stage a robbery of his firearms, presumably to provide an explanation in case he was asked to produce the firearms he had purchased. And he wrote in a group chat that he would be "go in federal" if arrested.

After a grand jury returned a superseding indictment against Bagley and five co-defendants on twelve counts related to firearms trafficking, Bagley pled guilty to one count of firearm trafficking conspiracy in violation of 18 U.S.C. § 933(a)(3) and (b).

² "A Dremel tool is a hand held rotary power tool that employs small interchangeable tips spinning at high speeds allowing the user to sand, cut, polish, grind, etc. depending on which tip the user has selected." *Carty v. High Precision, Inc.*, 2015 WL 4098224, at *6 n.7 (Conn. Super. Ct., New Haven Dist., June 3, 2015).

In sentencing Bagley for firearms trafficking, the district court adopted the Probation Office's recommended advisory Guidelines range of 51–63 months. That calculation was based on a criminal history category of I and total offense level of 24. It reflected three upward adjustments to Bagley's base offense level of 14 as follows: (1) four levels pursuant to U.S.S.G. § 2K2.1(b)(1)(B) because his offense conduct involved between 8 and 24 firearms; (2) four levels under U.S.S.G. § 2K2.1(b)(4)(B)(i) for obliterating serial numbers on at least one gun; and (3) five levels pursuant to U.S.S.G. § 2K2.1(b)(5)(C) for selling firearms knowing or having reason to believe it would result in receipt of firearms by a person with a prior conviction for a crime of violence, controlled substance offense, or misdemeanor crime of domestic violence, who was under a criminal justice sentence at the time of the offense, or who intended to use or dispose of the firearms unlawfully.³ Those enhancements brought his Guidelines range from 15–21 months up to 70–87 months. A reduction of three levels for timely acceptance of responsibility brought his Guidelines range down to 51–63 months.

The government requested a sentence of 54 months, while Bagley asked for a significantly below-Guidelines sentence based on his youth (21 and 22 years old at the time of the offense conduct), chronic health condition, lack of criminal

³ This sentence calculation is based on the 2024 Sentencing Guidelines.

history, and strong record of compliance and rehabilitation on pretrial release. The court sentenced Bagley primarily to 84 months' imprisonment and 3 years' supervised release.

In explaining its sentence, the district court acknowledged that Bagley was fully compliant with his pretrial conditions of release and had presented compelling information about his upbringing. The court also said it took into account Bagley's steady and gainful employment, his age, and his medical condition.

On the other side of the ledger, the district court emphasized the seriousness of Bagley's offense, describing the kinds of harmful offenses Bagley's straw purchases could facilitate—including the shooting by someone in Bagley's own car while Bagley was hospitalized after he was shot. The court also underscored Bagley's expressed awareness that his conduct was illegal, and his effort to evade detection and prosecution by explaining away why he no longer had the firearms he had purchased. The court stressed that "to the extent that any of [the firearms] have been recovered, it's not through Mr. Bagley helping law enforcement recover them; it's because other crimes allegedly were committed and law enforcement in investigating those crimes recovered them." App'x 140. The court also stressed that Bagley's conduct "involved purposeful obliteration of serial numbers" and

pointed to Bagley’s knowledge that “the guns were being distributed to prohibited persons.” *Id.* at 141.

For these reasons, the court declined Bagley’s request to vary downward from the Guidelines range, and it instead concluded that the seriousness of the offense—including the societal danger that flows from straw purchasers making guns available to felons and other dangerous people—and Bagley’s primary and principal role in the offense warranted an upward variance.

The court subsequently summarized the basis for its above-Guidelines sentence in its written Statement of Reasons:

[A]n upward variance from the Guidelines [was] necessary in acknowledging the seriousness of the offense and Mr. Bagley’s principal role in it (through planning, over time). Mr. Bagley straw purchased 21 firearms which he then illegally distributed (sometimes after obliterating their serial[] numbers, and at least sometimes to people he knew were legally prohibited from possessing them[]). The only firearms since recovered have been due to law enforcement investigations of OTHER crimes (and NOT Defendant’s efforts), which shows the benefits to public safety in the sentence imposed, which also aimed to deter Mr. Bagley and others from future crime.

Statement of Reasons (SOR), Dist. Ct. Dkt. 268 at 4.

DISCUSSION

On appeal, Bagley challenges the procedural and substantive reasonableness of his significantly above-Guidelines sentence. He argues that the district court impermissibly varied upward from the Guidelines range based on

his decision not to assist law enforcement in recovering the trafficked guns, thus punishing him for his silence. He further contends that in varying upward the court relied on several factors that are baked into the Guidelines calculation without explaining why the Guidelines calculation didn't sufficiently account for those factors: the number of guns involved, Bagley's obliteration of serial numbers, and his knowing distribution of guns to people prohibited from possessing them. Bagley also submits that the court suggested that he was connected to the shooting from his car that occurred while he was hospitalized, which wasn't established by a preponderance of the evidence. Finally, he argues that his sentence is shockingly high in relation to local and national sentencing norms and given the strong mitigating factors of his age, difficult upbringing, chronic health condition, and perfect record of pre-trial compliance.

For the reasons set forth below, we conclude that the district court committed procedural error requiring vacatur of Bagley's sentence when it (1) varied upward based on the fact that Bagley didn't cooperate with law enforcement to recover guns he sold illegally, and (2) varied upward based on aggravating factors already incorporated into the Guidelines calculation without explaining why those factors bore greater-than-usual weight in Bagley's case.

We generally review “the procedural reasonableness of a sentence for abuse of discretion.” *United States v. Cooper*, 131 F.4th 127, 130 (2d Cir. 2025).⁴ Where, as here, procedural objections were not raised at sentencing, we review for plain error. *United States v. Cossey*, 632 F.3d 82, 86 (2d Cir. 2011). To satisfy the plain error standard, the defendant must show “(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected [the defendant’s] substantial rights, which in the ordinary case means it affected the outcome of the district court proceedings; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings.” *United States v. Marcus*, 560 U.S. 258, 262 (2010).

A sentence is procedurally unreasonable if the district court commits “significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.” *Gall v. United States*, 552 U.S. 38, 51

⁴ In quotations from caselaw, this opinion omits all internal quotation marks, footnotes, and citations, and accepts all alterations, unless otherwise noted.

(2007); *see also* 18 U.S.C. § 3553(c)(2) (requiring a written statement of specific reasons for imposing a sentence outside the Guidelines range).

The district court must support a major variance from the Guidelines range with “a more significant justification than a minor one.” *Gall*, 552 U.S. at 50; *see United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc). Here, the court imposed a sentence of 84 months—21 months higher than the top of the advisory Guidelines range and 30 months higher than the 54-month sentence the government sought. The average sentence for a defendant with an offense level of 24 and a criminal history category I, in the five years preceding Bagley’s sentencing, was 47 months. From 2021–2025, the average sentence for defendants in criminal history *category IV* with the same offense level was 75 months—lower than Bagley’s sentence here. “[T]he justification offered by the district court [must be] sufficient to support the magnitude” of this steep upward variance. *United States v. Singh*, 877 F.3d 107, 117 (2d Cir. 2017).

For the reasons set forth below, we conclude that the district court committed procedural error requiring vacatur of Bagley’s sentence when it (1) varied upward based on the fact that Bagley didn’t cooperate with law enforcement to recover guns he sold illegally, and (2) varied upward based on

aggravating factors already incorporated into the Guidelines calculation without explaining why those factors bore greater-than-usual weight in Bagley’s case.

I. Failure to Assist Law Enforcement

This Court recently reaffirmed our longstanding rule that “increasing the severity of a sentence for a defendant’s failure to cooperate is an impermissible enhancement, warranting vacatur,” and that courts should not increase a sentence due to the defendant’s silence, regardless of the defendant’s motivations. *United States v. Sterkaj*, 138 F.4th 95, 99 (2d Cir. 2025). A defendant’s *cooperation* can be a *mitigating* factor showing “potential for rehabilitation.” *United States v. Bradford*, 645 F.2d 115, 117 (2d Cir. 1981). But *refusal* to cooperate cannot serve as the basis for “additional punishment to a defendant who by his silence has committed no additional offense.” *Id.*

We have thus drawn a distinction between “refusing to grant leniency” to a defendant who didn’t cooperate and “punishing a defendant for” remaining silent. *United States v. Stratton*, 820 F.2d 562, 564 (2d Cir. 1987). This distinction may be “somewhat illusory,” but “it is the only rule that recognizes the reality of the criminal justice system while protecting the integrity of that system.” *Id.* In addition to safeguarding defendants’ Fifth Amendment right against self-

incrimination, this rule protects those who remain silent based on fear of physical reprisal if they cooperate. *Id.*

Here, the court crossed that “fine line.” *Id.* As noted above, in its oral pronouncement of the sentence, the court explicitly referred to Bagley’s failure to help law enforcement recover the firearms he had sold, emphasizing that “to the extent that any of [the guns] have been recovered, it’s not through Mr. Bagley helping law enforcement recover them; it’s because other crimes allegedly were committed and law enforcement in investigating those crimes recovered them.” App’x 140. The court’s written statement of reasons for the upward variance—and its use of uppercase letters to emphasize its point—resolves any doubt as to whether the court increased Bagley’s sentence based in part on his failure to help recover the illegally sold weapons. The court wrote: “The only firearms since recovered have been due to law enforcement investigations of OTHER crimes (and NOT Defendant’s efforts).” SOR, Dist. Ct. Dkt. 268 at 4.

The court “was unquestionably permitted to hear evidence” that Bagley didn’t help police recover the guns and to consider how some of those guns he sold were used for criminal activity while others remained at large, posing a danger to the community. *Sterkaj*, 138 F.4th at 102. Those facts illustrate the gravity of the offense. And the court could well have declined to extend the

leniency to Bagley that it might have extended to someone in his circumstances who cooperated with police. *Cf. Bradford*, 645 F.2d at 118 (court didn't increase the defendant's sentence based on non-cooperation but rather concluded that circumstances didn't "warrant a reduction of the sentence below what [it] considered otherwise appropriate").

But the court was not permitted to impose additional punishment by varying upward based on Bagley's lack of cooperation. *Sterkaj*, 138 F.4th at 102 (vacating sentence where the court improperly "infer[red] a lack of remorse, warranting an upward variance, from the ambiguous silence of [the defendant's] unexplained lack of cooperation"); *see also Stratton*, 820 F.2d at 564 (vacating sentence where court "specifically stated that the sentences would run consecutively because of [defendant's] refusal to cooperate").

The court plainly erred by doing so. The legal conclusion that a sentencing court cannot increase a sentence due to a defendant's failure to help the police is not subject to reasonable dispute, and the import of the district court's oral explanation in concert with its statement of reasons is clear. *Marcus*, 560 U.S. at 262. Because we conclude the district court increased Bagley's sentence at least in part due to this impermissible factor, "the error affected [Bagley's] substantial

rights,” and thereby “seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Id.*

For these reasons, the sentence must be vacated.

II. Aggravating Factors Baked into Guidelines Calculation

The sentence was infected by a second set of errors. As Bagley correctly points out, in explaining its upward variance, both at sentencing and in its written statement of reasons, the district court emphasized Bagley’s purchase of 21 guns, removal of serial numbers, and knowing sales to individuals barred from possessing guns—all considerations built into the Guidelines calculation from which the court varied upward.

In particular, at sentencing the district court emphasized that Bagley’s crime “involved purposeful obliteration of serial numbers” and “acknowledgment the guns were being distributed to prohibited persons.” App’x 141. And in its statement of reasons explaining the upward variance, the court wrote, “Mr. Bagley straw purchased 21 firearms which he then illegally distributed (sometimes after obliterating their serial[] numbers, and at least sometimes to people he knew were legally prohibited from possessing them[]).” (SOR), Dist. Ct. Dkt. 268 at 4.

Each of these factors had already substantially increased Bagley’s Guidelines sentence range. The number of firearms increased the base offense

level by four pursuant to U.S.S.G. § 2K2.1(b)(1)(B); “[a]nother four levels were added” pursuant to U.S.S.G. § 2K2.1(b)(4)(B)(i) “because the firearms had obliterated serial numbers and a [D]remel tool was attributed” to Bagley; and the district court added another five levels pursuant to U.S.S.G. § 2K2.1(b)(5)(C) based on indications that Bagley “knew at least two of the firearms he transferred would go to people legally prohibited from possessing firearms.” App’x 103.

Together, the number of guns involved, Bagley’s obliteration of serial numbers, and his sales to individuals prohibited from possessing firearms increased Bagley’s offense level by 13 levels and increased the applicable Guidelines range from 8–14 months to 51–63 months (accounting for the three-level decrease to reflect his acceptance of responsibility). That’s more than four years of additional time at the upper end of the Guidelines range due to these three factors on which the district court *also* relied to explain its decision to sentence Bagley *above* the Guidelines range.

When the court relies on factors already incorporated into the Guidelines calculation to impose an upward variance, as it did here, it “must articulate specifically the reasons that this particular defendant’s situation is different from the ordinary situation covered by the Guidelines calculation.” *United States v. Sindima*, 488 F.3d 81, 87 (2d Cir. 2007), *superseded on other grounds as recognized in*

United States v. Smith, 949 F.3d 60, 64 (2d Cir. 2020). Here, the court neither acknowledged that the above factors were baked into the Guidelines calculation nor explained why they bore greater-than-usual weight in this case.

Especially given the magnitude of the upward variance imposed here, the failure to “articulate specifically” why these factors were not adequately accounted for in Bagley’s Guidelines calculation constituted procedural error. *Id.*; *see Gall*, 552 U.S. at 50.⁵

That error was plain. The Presentence Report made clear that the Guidelines calculation incorporated the three upward adjustments, and given the court’s explicit emphasis on those factors, the error affected Bagley’s substantial rights and the fairness of the proceedings. *See United States v. Rosa*, 957 F.3d 113, 118–21 (2d Cir. 2020) (court plainly erred in failing to provide adequate explanation of sentence imposed); *see also United States v. Dralle*, 175 F.4th 374, 391 (2d Cir. 2026) (sentencing court’s plain error in relying on improper considerations “affected the defendant’s substantial rights and seriously affected the fairness, integrity, or public reputation of judicial proceedings” where there was a

⁵ Bagley frames this as a challenge to the substantive reasonableness of the sentence. Because the *Sindima* inquiry turns on the adequacy of the court’s explanation, we view this primarily as a procedural challenge under *Gall*, 552 U.S. at 51. Whether the district court’s reasons bear the weight assigned them would be a substantive reasonableness challenge. *Cavera*, 550 F.3d at 191.

“reasonable probability, based on the district court’s reasoning, that its improper consideration . . . contributed to the upward variance”).

The government argues that the district court based the sentence on other aggravating factors not baked into the Guidelines calculation, including Bagley’s primary role in the offense and his suggestion to co-defendants that they stage a fake robbery to explain why he no longer had the guns he purchased. Because we can’t tell what portion of the upward variance is attributable to factors baked into the Guidelines calculation as opposed to other aggravating considerations, the sentence could not stand without further explanation even absent the court’s error in punishing Bagley for his failure to cooperate.

For both of the above reasons, we conclude that the district court committed procedural error requiring vacatur of his sentence.⁶

CONCLUSION

Under our precedents, where, as here, the district court impermissibly increased a defendant’s sentence based on the defendant’s failure to cooperate with law enforcement, we have remanded to a different judge for resentencing. *See Sterkaj*, 138 F.4th at 103; *Stratton*, 820 F.2d at 565. “If reassigning the case to a

⁶ Because we remand for resentencing, we need not address Bagley’s remaining challenges to his sentence.

different judge was the appropriate course of action” in *Stratton* and *Sterkaj* based on the same kind of error, it is “the correct outcome here, too.” *Sterkaj*, 138 F.4th at 103. In so concluding, we emphasize that our disposition does not reflect any lack of confidence in the sentencing judge’s ability to appropriately resentence Bagley. As in *Sterkaj*, we “are certain that the District Court’s resentencing would have comported with our order. But we cannot ignore the appearance-of-justice concerns before us here.” *Id.*

For these reasons, we **REMAND** for reassignment to a different judge and direct the court to vacate the sentence and resentence in accordance with this opinion.

RICHARD J. SULLIVAN, *Circuit Judge*, dissenting:

The majority vacates Stefan Bagley's eighty-four-month sentence for procedural unreasonableness. Holding that the district court abused its discretion by varying upward from Bagley's Guidelines range based on (i) "Bagley's failure to assist law enforcement in recovering the guns he sold" and (ii) "three factors already incorporated into the Guidelines range," Maj. Op. at 4, the majority misconstrues the record and affords the district court scant deference on plain-error review. Because the district court did not plainly err in sentencing Bagley above the advisory Sentencing Guidelines, I would affirm.

We review a district court's sentencing decisions under "a deferential abuse-of-discretion standard." *United States v. Vargas*, 961 F.3d 566, 570 (2d Cir. 2020) (internal quotation marks omitted). As relevant here, "[a] district court errs procedurally when it fails to calculate (or improperly calculates) the Sentencing Guidelines range, treats the Sentencing Guidelines as mandatory, fails to consider the [section] 3553(a) factors, selects a sentence based on clearly erroneous facts, or fails adequately to explain the chosen sentence." *United States v. Alvarado*, 720 F.3d 153, 157 (2d Cir. 2013) (internal quotation marks omitted).

Furthermore, because Bagley did not object in the district court, we review only for plain error. *See United States v. Williams*, 998 F.3d 538, 540 (2d Cir. 2021). “To establish plain error, a defendant must demonstrate: (1) error, (2) that is plain, and (3) that affects substantial rights.” *United States v. Bleau*, 930 F.3d 35, 39 (2d Cir. 2019) (internal quotation marks omitted). “If all three conditions are met, we will then exercise our discretion to rectify this forfeited error only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.” *Id.* (internal quotation marks omitted); *see* Fed. R. Crim. P. 52(b). And to be “plain,” an error must be “clear” under “binding precedent from the Supreme Court or this Court,” or “so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant’s failure to object.” *United States v. Esteras*, 102 F.4th 98, 108 (2d Cir. 2024) (internal quotation marks omitted). Put simply, this standard is “very stringent.” *United States v. Ramirez*, 973 F.2d 102, 105 (2d Cir. 1992).

I. Bagley’s Sentence Was Procedurally Reasonable.

The majority vacates Bagley’s sentence on two procedural grounds. Neither is persuasive.

A. The District Court Did Not Plainly Err by Varying Upward Based on Bagley's Failure to Assist Law Enforcement.

The majority first concludes that the district court plainly erred because it “varied upward based on the fact that Bagley didn’t cooperate with law enforcement to recover guns he sold illegally.” Maj. Op. at 12. Both the majority and Bagley point to several statements made by the district court at sentencing and in its Statement of Reasons as evidence that it impermissibly punished Bagley for failing to cooperate. *See, e.g., id.* at 14 (referencing the district court’s comment that police subsequently located several firearms “not through Mr. Bagley helping law enforcement recover them; it’s because other crimes allegedly were committed and law enforcement in investigating those crimes recovered them” (quoting App’x at 140)); Sealed Docs. at 110 (Statement of Reasons accompanying judgment of conviction: “The only firearms since recovered have been due to law enforcement investigations of OTHER crimes (and NOT Defendant’s efforts), which shows the benefits to public safety in the sentence imposed, which also aimed to deter Mr. Bagley and others from future crime.”). For the majority, these statements indicate that the “district court increased Bagley’s sentence at least in part due to” his failure to assist law enforcement. Maj. Op. at 15. I disagree.

We have long recognized “that *increasing* the severity of a sentence for a defendant’s failure to cooperate is an impermissible enhancement, warranting vacatur.” *United States v. Sterkaj*, 138 F.4th 95, 99 (2d Cir. 2025) (emphasis added, alterations adopted, and internal quotation marks omitted). But the district court’s statements, read in context, do not establish that it sentenced Bagley to a longer period of incarceration for his “failure to cooperate.” *Id.* (internal quotation marks omitted); see *United States v. Banks*, 464 F.3d 184, 190 (2d Cir. 2006) (explaining that “courts are generally presumed to know the laws that govern their decisions and to have followed them”). Instead, the court merely clarified that, while some of the firearms sold by Bagley were ultimately recovered – lessening (albeit only partially) the seriousness of his crime – they were not recovered due to Bagley’s assistance, which might otherwise have warranted a *downward* departure or variance from the applicable Guidelines range. App’x at 125. As the majority acknowledges, a well-settled line exists between “‘refusing to grant leniency’ to a defendant who didn’t cooperate and ‘punishing a defendant for’” not assisting law enforcement. Maj. Op. at 13 (quoting *United States v. Stratton*, 820 F.2d 562, 564 (2d Cir. 1987)); cf. *United States v. Whitten*, 610 F.3d 168, 195 (2d Cir. 2010) (distinguishing “between increasing the severity of a sentence” and “refusing to

grant leniency” in the guilty-plea context (emphasis and internal quotation marks omitted)).

Here, the district court properly toed that line. Its limited observation at sentencing that “many” of the firearms Bagley sold “ha[d] not been recovered” simply “explain[ed] in very real terms the seriousness of [Bagley’s] crime and the need to show other[s] . . . that [it] will be taken seriously.” App’x at 125. Such a remark was neither wrong as a matter of law nor erroneous as a matter of fact. It also distinguishes this case from *Stratton*, where we vacated and remanded for resentencing after the district court “*specifically stated* that the sentences would run consecutively because of [defendant’s] refusal to cooperate.” 820 F.2d at 564 (emphasis added); *see also DiGiovanni v. United States*, 596 F.2d 74, 75 (2d Cir. 1979) (vacating sentence where district court told defendant he could “make an application to the [c]ourt for a reduction of sentence” if he “chang[ed] his mind . . . about the desirability of helping the [g]overnment do something about this drug scene,” “but not otherwise”). The district judge did no such thing here. As a result, because the court did not “clear[ly] or obvious[ly]” err by observing that Bagley played no part in the government’s recovery of some of the illegal firearms that he

sold, I see no basis to disturb Bagley's sentence on this ground. *United States v. Villafuerte*, 502 F.3d 204, 209 (2d Cir. 2007).

B. The District Court Did Not Plainly Err by Varying Upward Based on Factors Already Included in Bagley's Guidelines Calculation.

The majority next holds that that the district court plainly erred because it “varied upward based on aggravating factors already incorporated into [Bagley's] Guidelines calculation without explaining why those factors bore greater-than-usual weight in Bagley's case.” Maj. Op. at 10. In particular, the majority highlights that the district court added (i) four levels pursuant to U.S.S.G. § 2K2.1(b)(1)(B) because Bagley's offense conduct involved between eight and twenty-four firearms; (ii) four levels pursuant to U.S.S.G. § 2K2.1(b)(4)(B)(i) “because the firearms had obliterated serial numbers and a [D]remel tool was attributed” to Bagley; and (iii) an additional five levels pursuant to U.S.S.G. § 2K2.1(b)(5)(C) because Bagley “knew at least two of the firearms he transferred would go to people legally prohibited from possessing firearms.” *Id.* at 17 (quoting App'x at 103). Pointing to these enhancements, the majority asserts that because it “can't tell what portion of the upward variance is attributable to factors baked into the Guidelines calculation,” the district court plainly erred in explaining its chosen sentence. *Id.* at 19. Once again, I disagree.

The record shows that the district court relied on several aggravating factors not baked into Bagley’s Guidelines calculation. At the sentencing hearing, for example, the court highlighted that Bagley (i) “continue[d] in [his] criminal activity” “over and over again” even after being shot, which showed a lack of appreciation both for the seriousness of his offense and its ramifications, App’x at 111, 120; (ii) persisted “even [after] acknowledging that his actions were criminal” by joking to his co-conspirators that he would be “goin’ federal” if caught; *id.* at 120; PSR ¶ 23; and (iii) “allegedly plann[ed] a staged robbery” to dupe authorities and cover his tracks, App’x at 122, 141. After reiterating these aggravating facts, the district court carefully explained why they justified an above-Guidelines sentence under the 18 U.S.C. § 3553(a) factors. *See, e.g., id.* at 141 (“[T]he [c]ourt sees good reason to vary upward based on the seriousness of the offense and Mr. Bagley’s primary and principal role in committing this act.”).

To be sure, the Statement of Reasons referenced factors that contributed to Bagley’s Guidelines calculation, including the fact that “Bagley straw purchased firearms which he illegally distributed, sometimes after obliterating their serial numbers.” Bagley Br. at 28 (quoting Sealed Docs. at 110). But “[a]n offense involving a firearm with an obliterated serial number . . . is serious indeed,” *United*

States v. Bert, 814 F.3d 70, 89 (2d Cir. 2016) (Jacobs, J., concurring in part), and we have never held that a district court’s mere mention of factors contributing to a defendant’s Guidelines range is categorically prohibited, particularly where, as here, the court repeatedly underscored *other* factors that led it to impose an above-Guidelines sentence. *See, e.g.*, Sealed Docs. at 110 (identifying “additional” non-Guidelines facts such as Bagley’s “principal role” in the crime and its “planning[] over time” as a basis for its sentence); App’x at 137–42.

That is especially true given that we are reviewing Bagley’s challenge for plain error. As discussed above, to be “plain,” an error must be “clear” under binding precedent or “*so egregious and obvious* as to make the trial judge and prosecutor derelict in permitting it.” *Esteras*, 102 F.4th at 108 (emphasis added and internal quotation marks omitted). Plain-error review is therefore an “exacting” standard, *United States v. Mendonca*, 88 F.4th 144, 152 (2d Cir. 2023), reserved “solely for those circumstances in which a miscarriage of justice would otherwise result,” *United States v. Fletcher*, 134 F.4th 708, 712 (2d Cir. 2025) (internal quotation marks omitted). It is *not*, in other words, applicable in cases where a panel majority “can’t tell” with mathematical certainty the precise reasons for the district court’s sentencing decision. *Cf. Banks*, 464 F.3d at 190 (“[T]here is no requirement that the

court mention the required factors, much less explain how each factor affected the court's decision."); *United States v. Cavera*, 550 F.3d 180, 193 (2d Cir. 2008) (en banc) (explaining that "[s]entencing is a responsibility heavy enough without our adding formulaic or ritualized burdens"). "If this is plain error, no error isn't." *United States v. Cruz*, 554 F.3d 840, 853 (9th Cir. 2009) (Kozinski, C.J., dissenting).

Because the district court did not impermissibly "rel[y] on factors already incorporated into the Guidelines calculation to impose an upward variance," Maj. Op. at 17, I do not agree that there was plain error here.

II. Bagley's Sentence Was Substantively Reasonable.

While the majority does not reach the issue of whether Bagley's sentence was substantively unreasonable, it certainly suggests as much. *See id.* at 12 (comparing "the average sentence for defendants in criminal history category IV with the same offense level" and Bagley's above-Guidelines sentence (emphasis omitted)); *id.* at 3 (remarking that Bagley's "sentence was above the advisory range"); *id.* at 17 (emphasizing the district court's "decision to sentence Bagley *above* the Guidelines range"). I see no reason to conclude, or even suggest, that Bagley's sentence was substantively reasonable.

A sentence is substantively unreasonable only if it is "shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *United States v.*

Rigas, 583 F.3d 108, 123 (2d Cir. 2009). To establish that a sentence is substantively unreasonable, defendants “bear[] a heavy burden because our review of a sentence for substantive reasonableness is particularly deferential.” *United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012). Importantly, “a sentence outside the Guidelines carries no presumption of unreasonableness.” *Irizarry v. United States*, 553 U.S. 708, 714 (2008). And disparities between a defendant’s sentence “and the purported national [mean] and median sentences that he points to” can be justified by “the context that renders [the defendant’s] crimes particularly worthy of opprobrium.” *United States v. Sampson*, 898 F.3d 287, 314 (2d Cir. 2018). The district court, relying on detailed factual and contextual findings, concluded as much here.

The district court carefully walked through the subsequent crimes that were committed with the guns Bagley trafficked – including a burglary with a firearm, a shooting “in a domestic violence crime,” and a shooting committed by “someone who illegally possesse[d] a gun,” App’x at 138 – to highlight the seriousness of the offense, *see* 18 U.S.C. § 3553(a)(2)(A). The court explained that “the community still might feel the impact of [Bagley’s] crime, by those guns that still remain out there to this day.” App’x at 142. The sentencing judge also assigned greater

weight to Bagley’s role as a “straw purchaser” whose identity was concealed by the obliteration of the firearms’ serial numbers – a fact that Bagley well understood. And the court further recognized that “people who unlawfully shoot other people in the community, gang members, [and] robbers” “might have a difficult time obtaining firearms if not for a straw purchaser like Mr. Bagley.” *Id.* at 141. In keeping with its statutory obligation to “consider the nature and circumstances of the offense,” 18 U.S.C. § 3553(a)(1), the district court properly weighed the “lengthy period of time” during which Bagley illegally sold guns, the degree of planning involved, and his clear-eyed knowledge that he was selling guns to felons. *See* App’x at 139, 142.

Even a cursory review of our caselaw shows that we have routinely affirmed above-Guidelines sentences in similar circumstances. *See, e.g., United States v. Davis*, 82 F.4th 190, 203 (2d Cir. 2023) (affirming forty-eight-month felon-in-possession sentence where Guidelines recommended fifteen to twenty-one months and finding the 129% variance not “shockingly high”); *United States v. Feaster*, 833 F. App’x 494, 495–96 (2d Cir. 2020) (affirming sixty-month felon-in-possession sentence where Guidelines recommended twenty-seven to thirty-three months); *United States v. Baptist*, 847 F. App’x 61, 67 (2d Cir. 2021), *as amended* (Mar.

31, 2021) (affirming sixty-month felon-in-possession sentence where Guidelines recommended thirty to thirty-seven months); *United States v. Gordon*, No. 24-2758, 2026 WL 876962, at *2 (2d Cir. Mar. 31, 2026) (affirming forty-eight month felon-in-possession sentence where Guidelines recommended twenty-four to thirty months). Because Bagley’s sentence was neither “shockingly high” nor “otherwise unsupportable as a matter of law,” there is no basis for concluding – or even hinting – that it was substantively unreasonable. *Rigas*, 583 F.3d at 123.

* * *

At bottom, the majority overreads the record, manufactures plain error, disregards the district court’s sentencing discretion, and ultimately vacates Bagley’s sentence because of its apparent discomfort with an above-Guidelines sentence. Given that the Guidelines are merely advisory and that we are reviewing only for plain error, I see no reason to question the procedural and substantive reasonableness of Bagley’s eighty-four-month term of imprisonment. Accordingly, I respectfully dissent.