

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 - - - - -

4 August Term, 2005

5 (Argued: October 19, 2005 Decided: March 22, 2006)

6  
7 Docket No. 05-0458-cr

8  
9 \_\_\_\_\_  
10 UNITED STATES OF AMERICA,

11 Appellee,

12 - v. -

13 PAUL WILLIAMS,

14 Defendant-Appellant.  
15 \_\_\_\_\_

16 Before: KEARSE, MINER, and HALL, Circuit Judges.

17 Appeal from a judgment of the United States District Court  
18 for the Eastern District of New York, Allyne R. Ross, Judge,  
19 convicting defendant of violating terms of his supervised release  
20 and sentencing him to three years' imprisonment.

21 Affirmed.

22 ALPHONZO GRANT, Assistant United  
23 States Attorney, Brooklyn, New York  
24 (Roslynn R. Mausekopf, United States  
25 Attorney for the Eastern District of  
26 New York, Susan Corkery, Assistant  
27 United States Attorney, Brooklyn, New  
York, on the brief), for Appellee.

28 J. BRUCE MAFFEO, New York, New York,  
29 for Defendant-Appellant.

1 KEARSE, Circuit Judge:

2 Defendant Paul Williams appeals from a judgment of the  
3 United States District Court for the Eastern District of New York,  
4 Allyne R. Ross, Judge, revoking his supervised release and  
5 sentencing him to a three-year term of imprisonment. The district  
6 court found that Williams had violated the terms of his supervised  
7 release by committing crimes in violation of New York State  
8 ("State") law and federal law. On appeal, Williams contends (1)  
9 that the district court improperly based its findings on unreliable  
10 hearsay, and (2) that the sentence imposed was unreasonably long and  
11 was based on consideration of a statutorily prohibited sentencing  
12 factor. Finding no merit in his contentions, we affirm.

13 I. BACKGROUND

14 In 1996, following a plea of guilty, Williams  
15 was convicted of armed robbery of a mail carrier in violation of  
16 18 U.S.C. § 2114(a) and was sentenced to 78 months' imprisonment, to  
17 be followed by three years of supervised release. The conditions of  
18 release included the requirements that Williams abstain from drug  
19 use and attend a drug treatment program, that he not possess any  
20 firearms, and that he not commit any further federal or state  
21 crimes. Williams began serving his term of supervised release in  
22 June 2002.

1 A. The Charge of Supervised-Release Violation

2 On September 18, 2002, the United States Probation  
3 Department ("Probation" or "Probation Department") learned from the  
4 New York City Police Department ("NYPD") that Williams was a suspect  
5 in the September 17, 2002 shooting and robbery of one Samuel Donnell  
6 Ryan. Probation asked the district court to issue an emergency  
7 warrant for Williams's arrest for violation of the terms of his  
8 supervised release. It described the following information received  
9 from the NYPD:

10 On September 18, 2002, Detective Schmalenberger of  
11 the NYPD's 101 Precinct contacted the undersigned  
12 officer to advise that the releasee was a suspect in  
13 [a] case involving the Shooting & Robbery of a  
14 citizen. On September 17, 2002, NYPD Detectives  
15 interviewed the victim, Samuel Donnell [sic] Ryan  
16 (Ryan), in the emergency room of Jamaica Hospital.  
17 Ryan related that on the afternoon of September 17,  
18 2002, he went to pick up his cousin from school.  
19 Upon arriving at the destination, Ryan observed a  
20 group of individuals standing in front of a nearby  
21 apartment building. One of the individuals of the  
22 aforementioned party called Ryan over to the group  
23 of individuals. Ryan acquiesced and proceeded  
24 toward the groups [sic] direction. **Simultaneously,**  
25 **the releasee emerged from a nearby building carrying**  
26 **a 9 millimeter firearm and shot Ryan in the left**  
27 **leg.** After Ryan fell to the ground, the releasee  
28 robbed Ryan of his necklace, which was latched  
29 around Ryan's neck. Further probing of Mr. Ryan  
30 revealed that the aforementioned may have resulted  
31 from an apparent fight that Ryan had with releasee  
32 over an unknown female. We have provided a copy of  
33 the detective's investigation report for Your  
34 Honor's perusal. NYPD is in the process of  
35 ascertaining the releasee's whereabouts in order to  
36 arrest him.

37 In light of the aforementioned, coupled with  
38 the releasee's history of violence, history of

1 firearms possession and history of drug use, we deem  
2 him to be a serious threat to the community.  
3 Therefore, we respectfully recommend that Your Honor  
4 sign the attached Probation Form 12C, ordering the  
5 issuance of a warrant.

6 (Probation Department Request for a[n] Emergency Warrant, dated  
7 September 19, 2002 (emphasis in original).)

8 The Probation Department thereafter filed with the  
9 district court a formal Violation of Supervised Release Report dated  
10 September 28, 2002 ("Formal Violation Report" or "Formal Report").  
11 After repeating the above information from the NYPD as to the events  
12 of September 17, 2002, the Formal Report described the probation  
13 officer's ensuing contacts with Ryan:

14 On September 20, 2002, the undersigned officer  
15 interviewed Ryan at Jamaica Hospital. In response  
16 to our inquiries, Ryan confirmed the manner in which  
17 the above-noted incident happened, however, he  
18 denied ever identifying his assailant or engaging in  
19 confrontation with the offender prior to the  
20 occurrence of the above-noted incident. Ryan also  
21 provided the attached written statement (see  
22 Exhibit 2 [referring to his assailant only as  
23 "someone" or an "individual"]).

24 During the evening of September 26, 2002, the  
25 undersigned officer received a telephone call from  
26 Ryan. At that time, Ryan advised that, contrary to  
27 his statements on September 20, 2002, he did  
28 identify the offender as his assailant during the  
29 above-noted incident. Ryan, however, maintained  
30 that a prior confrontation between he [sic] and the  
31 offender never happened. When asked why he failed  
32 to disclose this information during the previous  
33 interview, Ryan expressed that he felt vulnerable  
34 given his immobile state at Jamaica Hospital and  
35 feared that the offender would attempt to confront  
36 him at Jamaica Hospital if he (Ryan) provided any  
37 implicating information to law enforcement  
38 authorities.

1 (Formal Violation Report at 4-5 (emphases added).)

2 The Formal Report charged Williams principally with (1)  
3 robbery in the first degree in violation of state law, (2) assault  
4 in the second degree in violation of state law, and (3) possession  
5 of a firearm as a convicted felon, in violation of 18 U.S.C.  
6 § 922(g). It also charged him with violating two conditions of  
7 supervised release relating to the use of controlled substances.

8 The Formal Report noted that the charges resulting from  
9 the events of September 17, 2002, were the third set of criminal  
10 charges brought against Williams. On November 1, 1994, Williams and  
11 an accomplice, armed with semi-automatic weapons, had taken \$41,000  
12 worth of United States Treasury and income tax refund checks from a  
13 postal carrier at gun point; Williams also fired his gun, although  
14 no one was injured. (See id. at 2). In addition,

15 on April 20, 1995, [Williams] was arrested for  
16 attempted Robbery . . . . Subsequently, on  
17 September 12, 1995, he was convicted upon a plea of  
18 guilty to Attempted Robbery and sentenced to three  
19 years custody. Notably, during the commission of  
20 the Attempted Robbery offense, the defendant  
21 displayed a firearm and struck the complainant over  
22 the head with an unspecified instrument.

23 (Id.) The Formal Report recommended that, "[d]ue to the offender's  
24 dangerous, recidivist criminal behavior," the court, "upon a finding  
25 of violation of supervised release" revoke Williams's term of  
26 supervised release and impose a sentence near the maximum  
27 permissible term of imprisonment. (Id. at 9.)

1 B. The State Proceedings

2 Williams was not captured until December 22, 2002, when he  
3 was arrested on unrelated charges of criminal trespass and robbery  
4 and gave his name as "Ronald Richardson." NYPD Detective Jimmy  
5 Schmalenberger reinterviewed Ryan the next day. Ryan stated that  
6 his assailant on September 17, 2002, was Williams; he confirmed that  
7 he was acquainted with Williams, with whom he had grown up and who  
8 lived across the street from him. (See Police Complaint Follow Up  
9 Report dated December 24, 2002, at 1-2.) Detective Schmalenberger  
10 showed Ryan a picture of "Ronald Richardson"; Ryan identified the  
11 person in the photograph as Williams.

12 Detective Schmalenberger swore out a complaint against  
13 Williams, recounting, on information and belief, the September 17,  
14 2002 events as described by Ryan, in which Williams shot Ryan in the  
15 thigh and stole Ryan's necklace. Ryan signed a supporting  
16 affirmation, stating,

17 I, Samuel Donnell Ryan, have read the  
18 accusatory instrument filed in this action. The  
19 facts stated in that instrument to be on information  
20 furnished by me are true upon my personal knowledge.

21 (Ryan Affirmation dated December 23, 2002.) In January 2003, a  
22 State grand jury indicted Williams on nine counts. The indictment  
23 alleged, inter alia, that on or about September 17, 2002,

24 - Williams, "with intent to cause the death of a  
25 person, attempted to cause the death of Samuel  
26 Donnell Ryan" (Count 1);

27 - that Williams "forcibly stole certain property, to

1 wit: personal property from Samuel Donnell Ryan,  
2 and in the course of the commission of the crime or  
3 of immediate flight therefrom, the defendant caused  
4 serious physical injury to Samuel Donnell Ryan who  
5 was not a participant in the crime" (Count 2);

6 - that Williams "forcibly stole certain property, to  
7 wit: personal property from Samuel Donnell Ryan,  
8 and in the course of the commission of the crime or  
9 of immediate flight therefrom, the defendant was  
10 armed with a deadly weapon, to wit: a firearm"  
11 (Count 3);

12 - that Williams, "with intent to cause serious  
13 physical injury to a person, caused such injury to  
14 Samuel Donnell Ryan by means of a deadly weapon"  
15 (Count 4); and

16 - that, "under circumstances evincing a depraved  
17 indifference to human life," Williams "recklessly  
18 engaged in conduct which created a grave risk of  
19 death to another person in that the defendant did  
20 aim and discharge a loaded weapon at and in the  
21 direction of another person" (Count 8).

22 (People v. Ronald Richardson, AKA Paul Williams, Indictment Counts  
23 1, 2, 3, 4, and 8.)

24 On January 17, 2003, Detective Schmalenberger filed a  
25 report stating that Ryan had complained of receiving a threatening  
26 visit to his home by one Thyra Davis and her brother. Davis was  
27 Williams's girlfriend, and she offered Ryan money if he would not  
28 testify against Williams. When Ryan refused her offer, Davis said,  
29 "You will get yours if you testify, and we will have someone make a  
30 report so you get locked up so you can't testify." (Police  
31 Complaint Report of "TAMPERING W/WITNESS" dated January 17, 2003  
32 ("Witness Tampering Report").)

33 In July 2004, Williams reached a plea agreement with the

1 State and pleaded guilty to a misdemeanor charge of second-degree  
2 reckless endangerment. The Assistant District Attorney informed the  
3 State court that the State recommended a sentence of one year of  
4 imprisonment and that the remaining charges against Williams would  
5 be dropped. Williams's attorney stated

6 [t]hat is acceptable to my client. He has  
7 authorized me to withdraw his previously entered  
8 plea of not guilty, and enter a plea of guilty to  
9 the lesser included offense of Reckless Endangerment  
10 Second Degree as a class A misdemeanor . . . .

11 . . . .

12 THE COURT [addressing Williams]: Is it correct  
13 that you want to plead guilty to an A misdemeanor,  
14 Reckless Endangerment in the Second Degree?

15 THE DEFENDANT: Yes.

16 . . . .

17 THE COURT: By pleading guilty, you are  
18 admitting that on September 17, 2002 in Queens  
19 County, you recklessly engaged in conduct which  
20 created a substantial serious physical injury to  
21 another person.

22 Is that true?

23 THE DEFENDANT: Yes.

24 (State Court Plea Transcript, July 19, 2004 ("State Plea Tr."), at  
25 2, 4, 5.)

26 By the time he entered that plea of guilty, Williams had  
27 been in State custody for more than a year. He was shortly  
28 transferred to federal custody to face the charges of supervised-  
29 release violation.

1 C. The Proceedings in the District Court

2 Williams's release revocation hearing commenced on  
3 December 8, 2004. Ryan did not testify. The government stated that  
4 it had been unable to locate him, that it was still trying to find  
5 him and wanted to call him as a witness, but that he might be  
6 unwilling to testify. The government called as witnesses the police  
7 officers and probation officer who had interviewed Ryan, having them  
8 testify to Ryan's various out-of-court statements. Those witnesses  
9 described the accounts set out above, including the sequence of  
10 Ryan's identifications and refusals to identify Williams in 2002:

11 - September 17: at the scene of the crime, Ryan  
12 told the police that he did not know his assailant;

13 - September 17: at the hospital, Ryan told the  
14 police that he had been shot by Williams;

15 - September 20: at the hospital, Ryan confirmed to  
16 the probation officer the details of the shooting,  
17 but denied having identified Williams as his  
18 assailant; he also gave a handwritten statement that  
19 did not name Williams;

20 - September 26: Ryan told the probation officer  
21 that Williams was his assailant;

22 - December 23: following Williams's arrest, Ryan  
23 told Detective Schmalenberger that Williams was his  
24 assailant; Ryan identified Williams in a photograph  
25 and so indicated in writing on the photograph;

26 - December 23: after Detective Schmalenberger swore  
27 out a complaint against Williams following Ryan's  
28 identification of Williams's picture, Ryan signed a  
29 statement affirming that the information-and-belief  
30 allegations in the complaint were true based on  
31 Ryan's first-hand knowledge.

32 In addition, the government presented the January 17, 2003 NYPD

1 Witness Tampering Report, which stated that Ryan, in complaining of  
2 the threats received from Williams's girlfriend, again identified  
3 Williams as his assailant.

4 The district court adjourned the hearing until December  
5 21, giving the government a further opportunity to attempt to locate  
6 Ryan and persuade him to testify. At the resumption of the hearing,  
7 however, the government remained unable to produce Ryan.

8 Williams, in defense, submitted to the court a typewritten  
9 document headed "AFFIDAVIT," ostensibly signed by Ryan, which stated  
10 as follows:

11 On September 17, 2002 I was shot in the leg  
12 while picking up my nephew from P.S. 105. I had  
13 arrived at the school in my car and when I was  
14 getting out of my car a guy I do not know called my  
15 name.

16 I walked toward the guy who called my name and  
17 the guy took out a gun and shot me in the leg. I  
18 had never before seen the guy who shot me and I do  
19 not know his name.

20 Police Officers had asked me about a guy I know  
21 by the name of Paul Williams, who is also known as  
22 Ronald Richardson. Paul is not the guy who shot me  
23 in the leg.

24 I know that Paul was arrested and charged with  
25 shooting me, but I do not want to go to Court  
26 against Paul because he is not the guy who shot me.

27 I have not been forced or threatened in any way  
28 to sign this statement and I am doing it of my own  
29 free will.

30 This document was neither dated nor sworn to. Williams's former  
31 attorney, who had prepared the document, testified that he had no

1 first-hand knowledge that the signature on it was Ryan's.

2 The district court thereafter issued a series of opinions,  
3 described below, in which it, inter alia, found that the government  
4 had proven by a preponderance of the evidence that on September 17,  
5 2002, Williams, in violation of his supervised release, shot Ryan;  
6 found that Ryan had been dissuaded from testifying as a result of  
7 intimidation by Williams; ordered the government to make another  
8 attempt to have Ryan testify; and accepted the government's report,  
9 following such an attempt, that Ryan reasonably feared for his own  
10 safety and that of his family.

11 In its first Opinion and Order, dated December 22, 2004  
12 ("Williams I"), the court observed that the various statements made  
13 by Ryan during the course of the investigation with respect to the  
14 identification of Williams had been inconsistent; but it found that  
15 each of Ryan's refusals to identify Williams was the result of  
16 feared reprisals and the receipt of threats:

17 The victim's unwillingness to identify his assailant  
18 at the scene of the crime, in a neighborhood that he  
19 frequented and potentially within earshot of those  
20 associated with Williams, is understandable. The  
21 court is not surprised that a victim in such  
22 circumstances, after being shot in broad daylight on  
23 a relatively busy street, would be reluctant to  
24 identify his assailant.

25 Williams I at 1. The court noted that after Ryan had identified  
26 Williams and Williams had been arrested and charged in Ryan's  
27 shooting, Ryan had contacted the police and  
28 complained that the defendant's girlfriend and her

1 brother had visited Ryan's residence. Ryan told  
2 Detective Schmalenberger that after he refused an  
3 offer of money not to testify, defendant's  
4 girlfriend said "You will get yours if you testify,  
5 and we will have someone make a report so you get  
6 locked up so you can't testify." . . . . Ryan has  
7 had little, if any, contact with law enforcement  
8 since complaining of the threat, demonstrating that  
9 the threat effectively dissuaded him from  
10 testifying.

11 Id. at 3 (emphasis added). The court found that the Ryan  
12 "AFFIDAVIT" submitted at the hearing by Williams was simply a  
13 product of Williams's intimidation of Ryan:

14 Ryan was apparently so convinced that the threat  
15 would come to fruition if he testified that he  
16 agreed to sign an affidavit prepared by then-defense  
17 counsel Jayson Russo. The affidavit apparently  
18 signed by Ryan, which is neither dated nor  
19 notarized, states that the defendant did not shoot  
20 him. The affidavit further states that Ryan does  
21 not want to testify against the defendant. Russo  
22 testified that Ryan signed the affidavit "long  
23 before" defendant plead to a misdemeanor in state  
24 court in July of 2004, and the evidence suggests  
25 that it was signed at some point after January 2003.  
26 The court thus finds, notwithstanding defense  
27 counsel's emphasis to the contrary, that the  
28 affidavit is no more than a confirmation by Ryan,  
29 after he had been threatened, that he did not wish  
30 to testify against defendant.

31 Id. (emphasis added). The court concluded that

32 Samuel Ryan's story is both compelling and credible.  
33 Its inconsistencies are explained by his fear of  
34 identifying and testifying against the defendant,  
35 fears that the court finds to be reasonable. . . .  
36 The evidence indicates that Ryan remained willing to  
37 identify Williams as his assailant until he had been  
38 threatened by defendant's girlfriend and her  
39 brother, at which point he no longer wanted anything  
40 to do with the prosecution of this case. The court  
41 finds that the victim's fear is reasonable in light  
42 of the daring nature of the mid-afternoon shooting

1 that occurred on a busy street. As noted above,  
2 that fear suggests that the affidavit prepared by  
3 Russo, then-counsel to defendant, and signed by Ryan  
4 was a final statement that Ryan would not testify in  
5 this case. The court thus finds Ryan's  
6 identification of Williams, based as it is on  
7 testimony from detectives and documentary evidence,  
8 to be credible and any inconsistencies in his  
9 statements to have been explained.

10 Id. at 3-4 (emphases added).

11 The court also found that Ryan's identification of  
12 Williams as his assailant was corroborated by Williams's guilty plea  
13 and his post-attack conduct that suggested a consciousness of guilt.  
14 Williams could not be found at any of the addresses he had given the  
15 Probation Department; he failed to appear for his required drug  
16 treatment; and when arrested he gave the police an alias rather than  
17 his real name. See id. at 4. The court added:

18 Even more significantly, on July 19, 2004, defendant  
19 plead guilty in state court to reckless endangerment  
20 in the second degree, a misdemeanor offense, arising  
21 out of the shooting of Samuel Ryan. When the judge  
22 asked whether defendant admitted that he had  
23 "recklessly engaged in conduct which created a  
24 substantial serious physical injury to another  
25 person," the defendant affirmed that he had. . . .  
26 While defense counsel rightly noted that the plea  
27 included time-served and would have resulted in the  
28 defendant's release as of that date but for the  
29 instant action, the allocution is not rendered  
30 meaningless by those circumstances. Acknowledging  
31 the circumstances of the allocution, the court finds  
32 that the defendant plead guilty to a crime arising  
33 from the September 17, 2002 shooting of Samuel Ryan  
34 and that the defendant's plea further corroborates  
35 the victim's statements.

36 Williams I at 4-5 (emphases added). The court found, in light of  
37 all the evidence, that the government had established by a

1 preponderance of the evidence that Williams shot Ryan and stole his  
2 necklace, in violation of the terms of Williams's supervised  
3 release.

4 In an Opinion and Order dated January 3, 2005  
5 ("Williams II"), issued as an addendum to Williams I, the district  
6 court noted that, under Fed. R. Crim. P. 32.1, Williams was  
7 "'entitled to . . . an opportunity to . . . question any adverse  
8 witness unless the court determines that the interest of justice  
9 does not require the witness to appear.'" Williams II at 2 (quoting  
10 Fed. R. Crim. P. 32.1(b)(2)(C)). The court found that the  
11 government had made good faith efforts to locate Ryan and persuade  
12 him to testify. See Williams II at 2. The court also observed that

13 Williams's history of violent conduct, as well as  
14 the threats that led Ryan to file a police complaint  
15 on January 17, 2003, made reprisal against Ryan a  
16 possibility. The court finds this reason adequate  
17 to explain Ryan's reticence to testify and the  
18 government's failure to call him.

19 Williams II at 3. The court also found that the testimony of the  
20 officers as to Ryan's identification of Williams was reliable for  
21 the reasons stated in Williams I, and was "particularly reliable in  
22 light of Williams's plea on July 19, 2004 in state court to a  
23 misdemeanor offense arising out of the shooting of Samuel Ryan."  
24 Williams II at 3. Thus, the court concluded that Williams's  
25 interest in confronting Ryan was outweighed by the government's  
26 grounds for not producing Ryan and the reliability of the evidence  
27 presented by the government.

1           Nonetheless, at a January 4, 2005 hearing, the court  
2 ordered the government to make another attempt to get Ryan to  
3 testify by serving him with a subpoena. Thereafter, in an Opinion  
4 and Order dated January 18, 2005 ("Williams III"), the court noted  
5 that the government had made the required attempt and that it for  
6 good reasons declined to ask the court to enforce the subpoena:

7           By letter dated January 14, 2005, the  
8 government indicated that it served Ryan with a  
9 subpoena on January 11, 2005. During a meeting with  
10 the government on January 12, 2005, however, Ryan  
11 explained that he had received numerous threats from  
12 associates of Williams discouraging him from  
13 testifying. According to the government, Ryan  
14 adamantly stated that he would not testify, out of  
15 concern for his safety and the safety of his family.  
16 Believing Ryan's fears to be genuine, the government  
17 has chosen not to call Ryan as a witness. The  
18 probation department has similarly indicated that it  
19 is reasonable that Ryan not appear as a witness.  
20 The department has detailed the threats received by  
21 Ryan in a memorandum to the court and stated that it  
22 believes his fears to be credible.

23           The court now finds that the government has  
24 made sufficient efforts to locate the complaining  
25 witness and to persuade him to testify, in order to  
26 provide for confrontation. . . . The court accepts  
27 the validity of the government's stated reasons for  
28 not calling the hearsay declarant. Williams'  
29 history of violent conduct, and the numerous threats  
30 directed by Williams's associates toward Ryan, make  
31 reprisal against Ryan a serious possibility if he  
32 were to testify.

33 Williams III at 1-2 (emphases added). Relying in addition on its  
34 analysis in Williams II that found the government's evidence to be  
35 reliable, the court concluded as follows:

36           Having balanced the defendant's right of  
37 confrontation wit[h] the government's grounds for

1 not allowing confrontation . . . and with the  
2 reliability of the evidence offered by the  
3 government, the court finds that the reasons for  
4 admitting the hearsay testimony outweigh Williams's  
5 right to confront the complaining witness.

6 Williams III at 2-3 (internal quotation marks omitted).

7 On January 19, 2005, the district court sentenced Williams  
8 to three years' imprisonment. In an Opinion and Order dated  
9 February 9, 2005 ("Williams IV"), the court noted this Court's  
10 decision in United States v. Fleming, 397 F.3d 95 (2d Cir. 2005), in  
11 the wake of the Supreme Court's invalidation of the United States  
12 Sentencing Guidelines, see United States v. Booker, 543 U.S. 220  
13 (2005), and explained its sentence "[i]n order to aid the Court of  
14 Appeals' review of this case," Williams IV at 2. The court stated  
15 as follows:

16 The court notes preliminar[il]y that Williams  
17 is a violent offender who has provided the court no  
18 indication that he has undergone any reform since he  
19 was first incarcerated on federal charges. Williams  
20 served three years in state incarceration beginning  
21 in 1995 after pleading guilty to attempted robbery.  
22 As related in the pre-sentencing report for the  
23 instant case, however, a New York City police report  
24 indicates that during the attempted robbery,  
25 Williams displayed a gun and struck his victim in  
26 the head with an unspecified instrument. He was  
27 nineteen years old at the time. Williams was  
28 originally convicted of federal charges in 1996 for  
29 the armed robbery of a postal worker, perpetrated  
30 with one other person. During the robbery, one of  
31 the men brandished a Tech Nine semi-automatic  
32 firearm. The other displayed a firearm while  
33 rifling through the letter carrier's mail bag. As  
34 the men fled, one discharged his firearm, but no one  
35 was injured. According to accomplice testimony, as  
36 reflected in Williams' pre-sentencing report, it was  
37 Williams who possessed the firearm that was

1 discharged. After serving time in prison following  
2 his conviction for this robbery, while on supervised  
3 release in 2002, Williams brazenly shot a man in  
4 broad daylight, wounding him. As is apparent from  
5 this brief recitation of his criminal history,  
6 Williams has already compiled, at a tender age, a  
7 weighty history of violent acts perpetrated with  
8 apparent disregard for the consequences either for  
9 himself or his victims.

10 In light of the defendant's background and the  
11 nature of his offense, the court determined that the  
12 most severe sentence that could be imposed, three  
13 years' incarceration, was warranted as punishment  
14 for violating his supervised release. While this  
15 sentence reflects the seriousness of the offense  
16 and, the court hopes, will provide some deterrence  
17 from further criminal conduct by the defendant, the  
18 court was most concerned with protecting the public  
19 from further crimes of the defendant when it imposed  
20 the three year sentence. The court considered the  
21 guidelines range in reaching its sentencing  
22 decision. Having committed a Class B felony and as  
23 a defendant in Criminal History Category II,  
24 Williams' guidelines range was 15-21 months. The  
25 court considered imposing a sentence[] within this  
26 range but concluded that such a sentence would  
27 insufficiently reflect the seriousness of  
28 defendant's crime and sought greater protection of  
29 the public from further crimes by the defendant.  
30 The court also could have sentenced defendant to a  
31 lesser term of imprisonment to be followed by  
32 another period of supervised release. While the  
33 court considered imposing such a sentence, it  
34 decided, given defendant's track record, that  
35 supervised release would do little to deter  
36 defendant from committing further crimes, perhaps of  
37 a violent nature. The court thus found it  
38 appropriate to give defendant the maximum sentence  
39 of three years' imprisonment.

40 Williams IV at 2-3 (emphases added).

1 II. DISCUSSION

2 On appeal, Williams contends that the district court (1)  
3 improperly admitted and credited the hearsay evidence identifying  
4 him as Ryan's assailant, and (2) improperly based his sentence on  
5 consideration of a statutorily prohibited factor. Neither  
6 contention has merit.

7 A. The Admission of Ryan's Hearsay Identifications of Williams

8 Although the Confrontation Clause of the Sixth Amendment  
9 does not apply to supervised-release revocation hearings, see United  
10 States v. Aspinall, 389 F.3d 332, 342-43 (2d Cir. 2004) ("Aspinall")  
11 (discussing Crawford v. Washington, 541 U.S. 36 (2004)), the Federal  
12 Rules of Criminal Procedure provide that in such a hearing the judge  
13 must give the defendant "an opportunity . . . to question any  
14 adverse witness, unless the judge determines that the interest of  
15 justice does not require the witness to appear." Fed. R. Crim. P.  
16 32.1(b)(2)(c) (2002). This requirement reflects the principle  
17 stated in Morrissey v. Brewer, 408 U.S. 471 (1972), that the  
18 "minimum requirements of due process" in a parole revocation hearing  
19 include the right of the defendant to "confront and cross-examine  
20 adverse witnesses (unless the hearing officer specifically finds  
21 good cause for not allowing confrontation)," id. at 489; see also  
22 Gagnon v. Scarpelli, 411 U.S. 778 (1973) (extending Morrissey to

1 probation revocation hearings).

2 In such a hearing, neither the Due Process Clause nor Rule  
3 32.1 obliges the district court to perform a good-cause analysis  
4 with respect to a "proffered out-of-court statement [that] is  
5 admissible under an established exception to the hearsay rule."  
6 Aspinall, 389 F.3d at 344; see United States v. Jones, 299 F.3d 103,  
7 113 (2d Cir. 2002) ("firmly rooted" hearsay exception); see also  
8 Gagnon, 411 U.S. at 782 n.5. On the other hand, if the statement  
9 does not fall under such an exception, Rule 32.1 requires the court  
10 to determine whether good cause exists to deny the defendant the  
11 opportunity to confront the adverse witness. In making that  
12 determination, the court must balance, on the one hand, the  
13 defendant's interest in confronting the declarant, against, on the  
14 other hand, the government's reasons for not producing the witness  
15 and the reliability of the proffered hearsay. See, e.g., United  
16 States v. Chin, 224 F.3d 121, 124 (2d Cir. 2000); Aspinall, 389 F.3d  
17 at 343-45.

18 In the balancing process, the defendant's interest in  
19 confronting the declarant is entitled to little, if any, weight  
20 where the declarant's absence is the result of intimidation by the  
21 defendant: Where a defendant has procured the declarant's  
22 unavailability "by chicanery, . . . by threats, . . . or by actual  
23 violence or murder," the defendant is deemed to have "waived his  
24 sixth amendment rights and, a fortiori, his hearsay objection" to

1 the admission of the declarant's statements. United States v.  
2 Mastrangelo, 693 F.2d 269, 272-73 (2d Cir. 1982), cert. denied, 467  
3 U.S. 1204 (1984); see also United States v. Miller, 116 F.3d 641,  
4 667-68 (2d Cir. 1997), cert. denied, 524 U.S. 905 (1998); United  
5 States v. Thai, 29 F.3d 785, 814 (2d Cir.), cert. denied, 513 U.S.  
6 977 (1994); United States v. Aguiar, 975 F.2d 45, 47 (2d Cir. 1992);  
7 United States v. Potamitis, 739 F.2d 784, 788-89 (2d Cir.), cert.  
8 denied, 469 U.S. 918 (1984). The Mastrangelo principle allows the  
9 court--even at trial--to admit unsworn statements of a witness,  
10 whose planned testimony was withheld in response to the defendant's  
11 intimidation, in the form of hearsay evidence from a law enforcement  
12 officer as to the witness's prior statements. See, e.g., United  
13 States v. Aguiar, 975 F.2d at 47; see also Aspinall, 389 F.3d at 344  
14 (in supervised-release revocation proceedings, "the normal  
15 evidentiary constrictions" applicable to trials are "relaxed").

16 The Mastrangelo principle is essentially codified in Fed.  
17 R. Evid. 804(b) (6), which provides that evidence of an out-of-court  
18 statement by an unavailable declarant is "not excluded by the  
19 hearsay rule" when "offered against a party that has engaged or  
20 acquiesced in wrongdoing that was intended to, and did, procure the  
21 unavailability of the declarant as a witness." Fed. R. Evid.  
22 804(b) (6). This exception to the hearsay rule was added to Rule  
23 804(b) in 1997

24 to provide that a party forfeits the right to object  
25 on hearsay grounds to the admission of a declarant's

1 prior statement when the party's deliberate  
2 wrongdoing or acquiescence therein procured the  
3 unavailability of the declarant as a witness. This  
4 recognizes the need for a prophylactic rule to deal  
5 with abhorrent behavior "which strikes at the heart  
6 of the system of justice itself." United States v.  
7 Mastrangelo, 693 F.2d [at] 273. . . . The  
8 wrongdoing need not consist of a criminal act.

9 Fed. R. Evid. 804 Advisory Committee Note (1997). While we do not  
10 characterize this exception as a long established or firmly rooted  
11 exception that eliminates the requirement for a Rule 32.1 balancing  
12 analysis, its recognition that a defendant's wrongful conduct  
13 causing the witness's absence "strikes at the heart of the system of  
14 justice" at the very least illustrates that in the balancing  
15 process, such a defendant's interest in examining the declarant is  
16 eviscerated.

17 We review the court's balancing of the Rule 32.1 factors  
18 for abuse of discretion. See, e.g., United States v. Jones, 299  
19 F.3d at 112. Abuse of discretion encompasses clearly erroneous  
20 findings of fact and misapplications of the law.

21 In the present case, we see no abuse of discretion in the  
22 court's balancing of the relevant factors. In evaluating the  
23 reliability of the government's evidence of Ryan's identifications  
24 of Williams, the court considered the full range of statements made  
25 by Ryan to the police officers and the probation officer, the  
26 circumstances under which the conflicting statements were made, and  
27 Ryan's explanations that he had declined to identify Williams at the  
28 scene of the shooting and while he was immobilized in the hospital

1 because he feared reprisal. In assessing both the reasonableness of  
2 Ryan's explanations for his inconsistent statements and the  
3 reasonableness of the government's decision not to insist that Ryan  
4 testify, the court considered Ryan's statements that he had received  
5 numerous threats from Williams's associates, had felt compelled to  
6 change his residence and work schedule several times in an effort to  
7 avoid receiving further threats, and feared for his own safety and  
8 that of his family. The court found these statements and Ryan's  
9 explanations credible in light of, inter alia, the facts that Ryan  
10 made a formal complaint to the police that he had been threatened by  
11 Williams's girlfriend not to testify against Williams, and that Ryan  
12 had apparently been willing to testify against Williams in the State  
13 proceeding until he received that threat. The court found that  
14 Ryan's fears--and the government's decision not to seek to compel  
15 his testimony--were reasonable in light of Williams's well-  
16 documented history of violence.

17 The court permissibly found that Ryan's well-founded fear  
18 of retribution from Williams and his associates explained why on two  
19 occasions Ryan had refused to accuse Williams to the authorities,  
20 and found that the statements that instead identified Williams as  
21 Ryan's assailant were reliable. The court found confirmation for  
22 Ryan's identification of Williams in, inter alia, Williams's conduct  
23 in absconding and using an alias after the shooting, and in the fact  
24 that Williams pleaded guilty in State court to recklessly inflicting

1 "substantial serious physical injury to another person" (State Plea  
2 Tr. at 5) in satisfaction of the indictment that charged him with  
3 many offenses expressly related to the shooting and robbing of Ryan  
4 on September 17, 2002.

5 After requiring the government to make an additional  
6 effort to get Ryan to testify at Williams's hearing, and after  
7 hearing all of the evidence and the government's report as to Ryan's  
8 receipt of threats by associates of Williams, the court gave little  
9 weight to the defendant's interest in examining Ryan, finding that  
10 Ryan's adamant refusal to testify was the product of Williams's  
11 intimidation. The evidence discussed above supports the court's  
12 factual finding.

13 In sum, we see no abuse of discretion in the district  
14 court's balancing of the Rule 32.1 factors and in its consequent  
15 admission of the hearsay testimony as to Ryan's identification of  
16 Williams as his assailant. The record thus amply supports the  
17 judgment revoking Williams's supervised release on the grounds that  
18 Williams committed assault and robbery in violation of State law and  
19 possessed a firearm in violation of 18 U.S.C. § 922(g).

20 B. The Court's Consideration of an Allegedly Impermissible Factor

21 Williams also argues that the sentence imposed on him was  
22 unreasonable because the court considered a factor that Williams  
23 contends was impermissible: the seriousness of his offense. His

1 argument is based on the fact that 18 U.S.C. § 3583, which governs  
2 supervised release, lists certain subsections of 18 U.S.C. § 3553(a)  
3 that the court is expressly required to consider in determining  
4 punishment for a violation of supervised release, but does not list  
5 subsection (a)(2)(A). As subsection (a)(2)(A) of § 3553 provides  
6 that the court is to consider the need for the sentence imposed "to  
7 reflect the seriousness of the offense, to promote respect for the  
8 law, and to provide just punishment for the offense," and is not  
9 mentioned in § 3583(e), Williams contends that "the 'seriousness of  
10 the offense' factor set forth in Section 3553(a)(2)(A)" was  
11 "specifically excluded from consideration" and is "inapplicable to  
12 the district court's inquiry upon a revocation of supervised  
13 release." (Williams brief on appeal at 23.) We disagree.

14 Subsection (e) of § 3583, which governs, inter alia,  
15 revocation of supervised release, provides that

16 [t]he court may, after considering the factors set  
17 forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C),  
18 (a)(2)(D), (a)(4), (a)(5), (a)(6), and (a)(7)--

19 . . . .

20 (3) revoke a term of supervised release,  
21 and require the defendant to serve in prison  
22 all or part of the term of supervised release  
23 authorized by statute for the offense that  
24 resulted in such term of supervised release  
25 without credit for time previously served on  
26 postrelease supervision, if the court . . .  
27 finds by a preponderance of the evidence that  
28 the defendant violated a condition of  
29 supervised release . . . .

30 18 U.S.C. § 3583(e)(3). Section 3583 does not state that any

1 particular factor cannot be considered, and we interpret § 3583(e)  
2 simply as requiring consideration of the enumerated subsections of  
3 § 3553(a), without forbidding consideration of other pertinent  
4 factors.

5 Further, § 3583(e) cannot reasonably be interpreted to  
6 exclude consideration of the seriousness of the releasee's  
7 violation, given the other factors that must be considered.  
8 Sections 3553(a)(1), (a)(2)(B), and (a)(2)(C), which are among the  
9 sections the court is expressly required to consider, provide that

10 [t]he court in determining the particular sentence  
11 to be imposed, shall consider--

12 (1) the nature and circumstances of the  
13 offense and the history and characteristics of  
14 the defendant; [and]

15 (2) the need for the sentence imposed--

16 . . . .

17 (B) to afford adequate  
18 deterrence to criminal conduct; [and]

19 (C) to protect the public from  
20 further crimes of the defendant . . . .

21 18 U.S.C. § 3553(a). It may be possible for the court, in  
22 considering these factors and the other factors adverted to in  
23 § 3583(e), to avoid considering a need to promote respect for the  
24 law and a need to provide just punishment for the offense, which,  
25 along with the seriousness of the offense, are the factors set out  
26 in § 3553(a)(2)(A). But we cannot see how, in order to impose a  
27 sentence that will provide "adequate deterrence," *id.* § (a)(2)(B),

1 and protection of the public from "further crimes of the defendant,"  
2 id. § (a) (2) (C), in light of "the nature and circumstances of the  
3 offense," id. § (a) (1), the court could possibly ignore the  
4 seriousness of the offense.

5 Thus, we conclude that under the pertinent statutory  
6 provisions, the court in sentencing a defendant for violation of  
7 supervised release may properly consider the seriousness of his  
8 offense. If further confirmation of that conclusion is required, we  
9 find it in the legislative history of § 3553(a) (1), which indicates  
10 that, by the "nature" of the offense, Congress meant, inter alia,  
11 "the amount of harm done by the offense, whether a weapon was  
12 carried or used, . . . and whether there were any particular  
13 aggravating or mitigating circumstances surrounding the offense."  
14 S. Rep. No. 98-225, at 75 (1984), reprinted in 1984 U.S.C.C.A.N.  
15 3182, 3258.

#### 16 CONCLUSION

17 We have considered all of Williams's arguments on this  
18 appeal and have found them to be without merit. The three-year  
19 sentence of imprisonment imposed on Williams is reasonable in light  
20 of the factors discussed by the district court in Williams IV. The  
21 judgment is affirmed.