06-3657-cr

To Be Argued By:
ANTHONY E. KAPLAN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-3657-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

COREY BROWN,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Ellen Bree Burns, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. Judgment entered July 28, 2006. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on August 3, 2006. This Court has appellate jurisdiction over the challenge to the defendant's sentence pursuant to 18 U.S.C. § 3742(a).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the district court's sentence of 180 months, which was 82 months below the bottom of the sentencing guidelines range, and 60 months below the statutory mandatory minimum, was reasonable.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-3657-cr

UNITED STATES OF AMERICA,
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-vs-

COREY BROWN,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

On February 7, 2005, Corey Brown pled guilty to possession with intent to distribute more than 50 grams of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(iii). (JAI 13).[1] The district court (Ellen Bree

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[1] References are as follows:
Joint Appendix Volume I ("JAI ___")

(continued...)

Burns, J.) held a sentencing hearing on July 25, 2006. Prior to sentencing, the government filed a motion for a downward departure (JAII 1-9), and the defendant also moved for a sentence below the guidelines range, arguing that his particular characteristics warranted a downward departure to and/or a non-guidelines sentence of ten years. (JAI 29-39). While denying the defendant's motion for a downward departure, the court granted the government's motion and sentenced Brown principally to a term of imprisonment of 180 months, which was 82 months below the low end and 147 below the top of the applicable range of 262 to 327 months, and 60 months below the statutory mandatory minimum of 240 months. (JAI 42-43).

On appeal, the defendant claims that the sentence imposed by the district court was unreasonable. For the reasons that follow, the defendant's claim should be rejected, and the judgment should be affirmed.

Statement of the Case

On May 27, 2004, a federal grand jury in the District of Connecticut returned an indictment against the defendant, charging him with two counts of possession with intent to distribute more than 50 grams of cocaine base (Count One and Count Two) in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(iii), and possession with intent to distribute more than 5 grams of cocaine base (Count Three), in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(iii). (JAI 11-12).

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[1] (...continued)
Joint Appendix Volume II ("JAII ___")

On February 7, 2005, the defendant entered a guilty plea to Count One of the indictment, pursuant to a written plea agreement. (JAI 13-19).

On July 25, 2006, the district court imposed a 180-month term of imprisonment, to be followed by a ten-year term of supervised release. (JAI 69-70). Judgment entered July 28, 2006. (JAI 42-43). On August 3, 2006, the defendant filed a timely notice of appeal. (JAI 10).

The defendant is incarcerated.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

On September 24, 2003, a confidential informant ("CI") acting under direction of the New Haven Safe Streets Task Force ("Task Force") placed a telephone call to the defendant. In that conversation the CI arranged to meet with the defendant in order to purchase one ounce of crack cocaine. While under law enforcement surveillance, the defendant met the CI on Ella Grasso Boulevard in New Haven and provided the CI 26.6 net grams of crack cocaine in exchange for $900. (JAII 14).

On September 26, 2003, the CI called the defendant and arranged to meet in the same area as before in order to carry out a second transaction. On this occasion, the defendant provided the CI two ounces of crack cocaine in exchange for $1,800. Laboratory analysis revealed 54.8 net grams of cocaine base. (JAII 15).

Following up on a call the day before, on September 30, 2003, the CI arranged to meet Brown to purchase an additional quantity of crack cocaine from the defendant. In a recorded conversation the defendant stated, "I got that for you kid." Thereafter, the defendant arrived at the agreed-upon location and gave the CI 114.1 grams of crack cocaine in exchange for $3,600. (JAII 15).

Two additional drug transactions took place on April 24, 2004, and April 26, 2004, in which the defendant provided the CI with 28 net grams of cocaine base. In total, the defendant distributed 223.5 net grams of cocaine base to the CI over the course of these five transactions. (JAII 15).

Prior to September 24, 2003, the defendant had been convicted of crimes punishable by imprisonment for a term exceeding one year. In 1994, he was convicted of importing cocaine and was sentenced to two years in jail. In 1997, the defendant was convicted of the sale of a controlled substance and received a five year suspended sentence and three years' probation. Finally, in 2000, the defendant was convicted of possession of narcotics. (JAII 17-19).

On May 27, 2004, a federal grand jury in the District of Connecticut returned a three count indictment charging Brown in Counts One and Two with possession with intent to distribute 50 grams or more of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(iii). (JAI 11). Count Three charged the defendant with possession with intent to distribute 5 grams or more of cocaine base in

violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B)(iii). (JAI 12).

On February 7, 2005, the government filed a second offender notice pursuant to 21 U.S.C. § 851. (JAI 20-21). Thereafter, the defendant entered a plea of guilty to Count One of the indictment, pursuant to a written plea agreement. (JAI 13-19). The plea agreement included a Guidelines stipulation, in which the parties agreed that, after taking account of the three level reduction under U.S.S.G. § 3E1.1 for acceptance of responsibility, the defendant had a total offense level of 34 and was in Criminal History Category VI as mandated by the Career Offender Guideline of U.S.S.G. § 4B1.1. This resulted in a Guidelines sentencing range of 262-327 months. (JAI 16). The plea agreement also included the recognition that the defendant was subject to a sentence enhancement as a Second Offender which increased the maximum penalty for the defendant's offense to life imprisonment, and created a mandatory minimum sentence of 20 years (240 months). (JAI 14).

On July 25, 2006, the district court sentenced the defendant. The court concluded that the defendant's applicable Guidelines range, as had been stipulated to between the parties, was 262-327 months. (JAI 68). The district court also acknowledged the existence of the twenty-year mandatory minimum associated with the defendant being a Second Offender. (*Id*.).

The defendant argued for a sentence below the applicable Guidelines range primarily based on two considerations. First, he argued that he should not be

classified as a Career Offender because one of the underlying convictions was originally charged as a misdemeanor rather than a felony, and the defendant only agreed to plead guilty to a felony in return for a suspended sentence. (JAI 48-51). He also argued that his Criminal History score over represented his true criminal conduct over the span of his life. (JAI 54-56).

The Government responded that the only basis for a downward departure was its motion, pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e), to the extent the court deemed appropriate given the defendant's assistance in the investigation and prosecution of other persons. (JAI 62-64).

Before imposing sentence, the court articulated the factors that it was required to consider under 18 U.S.C. § 3553(a), including the United States Sentencing Guidelines and policy statements, and the need for the sentence imposed to serve the various purposes of a criminal sanction. (JAI 68-69). The court recognized its authority to impose a sentence within or outside of the Guidelines range. (JAI 69). The district court also expressly took into account the need for the sentence to serve the various purposes of a criminal sanction, including providing just punishment, specific deterrence, general deterrence, and rehabilitation. (JAI 68-69, 72-73).

Having acknowledged the various considerations that had guided the determination of an appropriate sentence, the court turned to the question of whether to grant a downward departure. The court rejected Brown's contention that he was not a career offender and noted his

continuing involvement in drug distribution (JAI 67-68), but did believe that a reduction in the defendant's sentence was warranted:

> I do have the opportunity to go below the mandatory twenty-year minimum, and I think, under the circumstances, it's appropriate for me to do that. I do not, however, believe that I can go so far as ten years, as you've suggested, sir.

(JAI 69).

Having concluded that a sentence below the Guidelines range was a reasonable and appropriate sentence, the court next considered where to sentence the defendant below that range. The district court identified various aggravating facts of the case as well as mitigating characteristics of the defendant, including his cooperation with the government, and his aspirations to improve himself:

> I'm going to sentence the defendant in consideration of his cooperation with the government; in consideration of the seriousness of the offenses committed; in consideration of the necessity to deter, not only the defendant, but the general public, which will have knowledge of the sentence imposed here.

(JAI 69).

With that explanation, the district court imposed a sentence of incarceration of 180 months, to be followed by ten years of supervised release. (JAI 69-70).

SUMMARY OF ARGUMENT

The district court imposed a reasonable sentence on the defendant in light of the defendant's serious criminal history and his continuing pattern of recidivism. Indeed, the district court's sentence of 180 months was 82 months below the bottom of the 262-327 month Guidelines range, and 60 months below the statutory mandatory minimum. Further, in imposing that sentence, the court adequately stated on the record its reasons for imposing a below-Guidelines sentence of 180 months, to the extent required by 18 U.S.C. § 3553(c).

ARGUMENT

I. THE SENTENCE IMPOSED BY THE DISTRICT COURT WAS REASONABLE.

A. Relevant Facts

The relevant facts are set forth above.

B. Governing Law and Standard of Review

The Sentencing Guidelines are no longer mandatory but, rather, represent one factor a district court must consider in imposing a reasonable sentence in accordance with Section 3553(a). *See United States v. Booker*, 543 U.S. 220, 258 (2005); *see also United States v. Crosby*, 397 F.3d 103, 100-18 (2d Cir. 2005). Section 3553(a) provides that the sentencing "court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection," and then sets forth seven specific considerations:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –
>
> > (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> >
> > (B) to afford adequate deterrence to criminal conduct;
> >
> > (C) to protect the public from further crimes of the defendant; and
> >
> > (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established [in the Sentencing Guidelines];

(5) any pertinent policy statement [issued by the Sentencing Commission];

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

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

In *Crosby*, this Court explained that, in light of *Booker*, district courts should now engage in a three-step sentencing procedure. First, the district court must determine the applicable Guidelines range, and in so doing, "the sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence." *Crosby*, 397 F.3d at 112. Second, the district court should consider whether a departure from that Guidelines range is appropriate. *Id.* Third, the court must consider the Guidelines range, "along with all of the factors listed in section 3553(a)," and determine the sentence to impose. *Id.* at 112-13. The fact that the Sentencing Guidelines are no longer mandatory does not reduce them to "a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge." *Id.* at

113. A failure to consider the Guidelines range and instead simply to select a sentence without such consideration is error. *Id.* at 115.

In *Booker*, the Supreme Court ruled that Courts of Appeals should review post-*Booker* sentences for reasonableness. *See Booker*, 543 U.S. at 261 (discussing the "practical standard of review already familiar to appellate courts: review for 'unreasonable[ness]'") (quoting 18 U.S.C. § 3742(e)(3) (1994)). In *Crosby*, this Court articulated two dimensions to this reasonableness review. First, the Court will assess procedural reasonableness – whether the sentencing court complied with *Booker* by (1) treating the Guidelines as advisory, (2) considering "the applicable Guidelines range (or arguably applicable ranges)" based on the facts found by the court, and (3) considering "the other factors listed in section 3553(a)." *Crosby*, 397 F.3d at 115. Second, the Court will review sentences for their substantive reasonableness – that is, whether the length of the sentence is reasonable in light of the applicable Guidelines range and the other factors set forth in § 3553(a). *Id.* at 114.

As this Court has held, "'reasonableness' is inherently a concept of flexible meaning, generally lacking precise boundaries." *Crosby*, 397 F.3d at 115. The "brevity or length of a sentence can exceed the bounds of 'reasonableness,'" although this Court has observed that it "anticipate[s] encountering such circumstances infrequently." *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005); *cf. United States v. Godding*, 405 F.3d 125, 127 (2d Cir. 2005) (per curiam) (noting, in connection with *Crosby* remand, "that the brevity of the term of

imprisonment imposed . . . does not reflect the magnitude" of the crime).

Although this Court has declined to adopt a formal presumption – rebuttable or otherwise – that a within-Guidelines sentence is reasonable, it has "recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir.), *cert. denied*, 127 S. Ct. 192 (2006); *see also United States v. Rattoballi*, 452 F.3d 127, 133 (2d Cir. 2006) ("In calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.").

As the Court has recently noted:

> Reasonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge exceeded the bounds of allowable discretion, committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.

United States v. Ministro-Tapia, 470 F.3d 137, 141 (2d Cir. 2006) (quoting *Fernandez*, 443 F.3d at 27). In

assessing the reasonableness of a particular sentence imposed,

> [a] reviewing court should exhibit restraint, not micromanagement. In addition to their familiarity with the record, including the presentence report, district judges have discussed sentencing with a probation officer and gained an impression of a defendant from the entirety of the proceedings, including the defendant's opportunity for sentencing allocution. The appellate court proceeds only with the record.

United States v. Fairclough, 439 F.3d 76, 79-80 (2d Cir.) (per curiam) (quoting *Fleming*, 397 F.3d at 100) (alteration omitted), *cert. denied*, 126 S. Ct. 2915 (2006).

While it is rare for a defendant to appeal a below-Guidelines sentence for reasonableness, this Court has held that the standard of review in those situations is the same as for the appeal of a within-Guidelines sentence. *United States v. Kane*, 452 F.3d 140 (2d Cir. 2006). In *Kane*, the defendant appealed for reasonableness the imposition of a sentence six months below the Guidelines range, and this Court stated that in order to determine whether the sentence was reasonable, it was required to consider "whether the sentencing judge exceeded the bounds of allowable discretion, committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact." *Id.* at 144-45 (quoting *Fernandez*, 443 F.3d at 27). The defendant must therefore, do more than merely rehash the same arguments made below because the court of appeals cannot overturn

the district court's sentence without a clear showing of unreasonableness. *Id*. at 145 ("[The defendant] merely renews the arguments he advanced below – his age, poor health, and history of good works – and asks us to substitute our judgment for that of the District Court, *which, of course, we cannot do*." (emphasis supplied)).[2]

C. Discussion

Brown claims on appeal that the district court's sentence of 180 months was substantively unreasonable in light of the factors set forth in Section 3553(a). In support of this argument, as he did below, the defendant points to his troubled childhood and the fact that he sold drugs in order to provide for his family, (JAI 52-54), the fact that he does not have a violent history, (JAI 59), and the evidence he presented to show that he is a good father and was able to comply with the terms of pretrial release, (JAI 53-54, 56-59). In addition, he argues, as he did below, that his criminal history score and career offender designation overstate the seriousness of his past criminal conduct. (JAI 54-56). For these reasons, Brown claims that the district court should have sentenced him to 120 months, not 180 months. (Brief at 7-9.)

Brown's argument, in effect, asks this Court to re-weigh the evidence before the district court at sentencing.

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[2] On November 3, 2006, the Supreme Court granted *certiorari* in companion cases to determine whether extraordinary circumstances must be present to justify deviation from the presumptive guideline range and whether a sentence within a correctly calculated guideline range is presumptively reasonable. *See Claiborne v. United States*, 127 S. Ct. 551 (2006) and *Rita v. United States*, 127 S. Ct. 551 (2006).

But as this Court has repeatedly emphasized, "[r]easonableness review does not entail the substitution of [the appellate court's] judgment for that of the sentencing judge." *Fernandez*, 443 F.3d at 27. When reviewing a sentence for reasonableness, the court "should exhibit restraint, not micromanagement." *Fleming*, 397 F.3d at 100. In sum, this Court simply "cannot" "substitute [its] judgment for that of the District Court." *Kane*, 452 F.3d at 145.

In any event, the district court's judgment was sound. In imposing sentence, the court had to weigh against Brown's claims of mitigation based on his personal history his criminal record and the facts of the offense of conviction. In this regard, over the course of a seven month period between September 24, 2003 and April 26, 2004, the defendant engaged in five drug transactions with the CI, resulting in the sale of 223.5 net grams of cocaine base. (JAII 14-15). The defendant had previously been convicted of several related offenses, including importation of cocaine, (JAII 17), sale of a controlled substance, (JAII 18), and possession of narcotics, (JAII 19). Indeed, as a result of these prior offenses the defendant was correctly classified as a Career Offender as defined in U.S.S.G. § 4B1.1(b), (JAI 16, JAII 19),[3] and as

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[3] Brown does not argue on appeal that the court committed legal error in classifying him as a career offender under the Sentencing Guidelines. Moreover, to the extent that Brown may be read to object to the district court's decision not to grant him a downward departure on his claimed basis, that claim would be foreclosed by this Court's precedent. *See United States v. Stinson*, 465 F.3d 113, 114 (2d Cir. 2006). It is clear from the record in this case that Judge Burns understood her authority to grant a downward departure but, (continued...)

a Second Offender as defined by 21 U.S.C. § 851, (JAI 20).

These facts weighed heavily with Judge Burns against the defendant in that they revealed a person who had

> been involved in one way or another with drugs for too long. And he has now got to come to the point where he has to acknowledge that, and understand that his history and the facts of this particular situation require a serious sentence.

(JAI 68). While it is true that a sentence should be no greater than necessary to accomplish the purposes of Section 3553(a)(2), a district court is not required to accept a defendant's estimate as to the lowest punishment necessary to accomplish these purposes.

The Government respectfully submits that a sentence of 180 months is not an unreasonable sentence for a career offender with a lengthy criminal record and a history of recidivism whose involvement in the instant case involved the sale of over 223 grams of cocaine base/crack cocaine. Indeed, the sentence imposed was not dramatically greater than the sentence of ten years suggested by defense counsel. (JAI 58).

Finally, Judge Burns did not treat the Guidelines as "presumptively reasonable" as Brown claims (Brief at 12),

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[3] (...continued)
nevertheless, chose not to exercise that authority on the grounds advanced by the defendant. *See* JA1 at 69, 73.

but, rather, as a factor "suggest[ing] the gravity of the offense that was committed." (JA1 at 68). The mere fact that the district judge referenced the Guidelines range and statutory mandatory minimum as a signal of the seriousness of the offense, (JAI 68), does not indicate, as the defendant suggests, that Judge Burns gave presumptive weight to the Guidelines or that she failed to consider adequately the other Section 3553(a) factors.

Indeed, the record reflects Judge Burns' careful consideration of the Section 3553(a) factors, as applied to *this defendant*. Judge Burns noted the seriousness of the offense and the need for the sentence to provide just punishment (JAI 68, 69), § 3553(a)(2)(A). She also noted that the sentence she imposed was designed to provide both specific and general deterrence (JAI 69), §§ 3553(a)(2)(B), (C). In addition, Judge Burns considered the history and characteristics of the defendant, expressly citing the defendant's "very unfortunate childhood," (JAI 66), the fact that he sold drugs in order to "raise money to support his family," (JAI 67), his desire to be a good father, (JAI 67), and his "cooperation with the government," (JAI 69), § 3553(a)(1). Just because the only reason Judge Burns found compelling enough to warrant a departure below the applicable Guidelines range was his cooperation with the Government, does not point to the conclusion that it was the only factor Judge Burns considered in imposing her sentence or, even if she did, that that was inappropriate in this case.[4]

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[4] In the written judgment, Judge Burns did not include the specific reasons for why she imposed a sentence outside the (continued...)

On this record, Judge Burns is entitled to the presumption that she fully and properly considered all relevant factors at sentencing. The record reflects that Judge Burns understood the applicable statutory requirements, the relevant guidelines range, and her authority to depart from the guidelines range and the statutory mandatory minimum, (JAI 67-69). Accordingly, Judge Burns is entitled to the presumption articulated by this Court that "'*[a]s long as the judge is aware of both the statutory requirements and the sentencing range . . . and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, we will accept that the requisite consideration has occurred.*'" *Fernandez*, 443 F.3d at 29-30 (quoting *Fleming*, 397 F.3d at 100) (emphasis supplied in *Fernandez*).

Brown suggests that Judge Burns erred by failing to explicitly address his arguments for a lower sentence (Brief at 10), but this suggestion is misplaced. A review of the record reveals that Judge Burns carefully and thoughtfully considered his arguments for a 120-month sentence. *See, e.g.*, JAI 66 (addressing defendant's

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[4] (...continued)
applicable Guidelines range as required by 18 U.S.C. § 3553(c)(2). (JAI 42-43). In *United States v. Jones*, 460 F.3d 191, 197 (2d Cir. 2006), and *United States v. Goffi*, 446 F.3d 319, 321-22 (2d Cir. 2006), this Court held that when a sentence is reasonable, it will affirm the judgment of the district court and simply remand for amendment of the judgment to comply with Section 3553(c)(2).

childhood); *id.* at 67 (addressing defendant's expressed desire to be a good father); *id.* at 67-68 (rejecting defendant's argument that he should not be classified as a career offender); *id.* at 68 (addressing defendant's lengthy criminal history). In any event, this Court has expressly declined to require district courts to address each argument made by the defendant. *See Fernandez*, 443 F.3d at 29-30 (holding that Court presumes district court considered § 3553(a) factors, and stating that "we will not conclude that a district judge shirked her obligation to consider the § 3553(a) factors simply because she did not discuss each one individually or did not expressly parse or address every argument relating to those factors that the defendant advanced"). The fact that Judge Burns did not expressly recite that she considered the "3553(a) factors" does not change the fact that, as described above, she considered those factors. *See United States.v. Pereira*, 465 F.3d 515, 523 (2d Cir. 2006) ("[A] sentencing judge's decision not to discuss explicitly the sentencing factors or not to review them in the exact language of the statute does not, without more, overcome the presumption that she took them all properly into account.").

The resulting sentence of 180 months – twelve years below the top of the Guidelines range, seven years below the bottom of the Guidelines range, and five years below the otherwise applicable statutory mandatory minimum sentence – is a reasonable sentence for a multiple-convicted felon with a long history of both the sale and trafficking of narcotics. In light of the defendant's history of recidivism and the seriousness of the offense of conviction, the Government respectfully submits that the sentence should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: January 5, 2007

Respectfully submitted,

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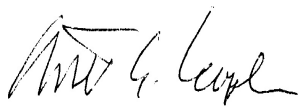

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ADDENDUM

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider --

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

(2) the need for the sentence imposed --

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for --

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines --

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation, or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement–

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

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

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

* * *

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence --

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing

a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

ANTI-VIRUS CERTIFICATION

Case Name: United States v. Brown

Docket Number: 06-3657-cr

I, Natasha R. Monell, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 1/5/2007) and found to be VIRUS FREE.

Natasha R. Monell, Esq.
Staff Counsel
Record Press, Inc.

Dated: January 5, 2007