07-0956-cr

To Be Argued By:
ROBERT M. SPECTOR

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FOR THE SECOND CIRCUIT

Docket No. 07-0956-cr

United States Court of Appeals

UNITED STATES OF AMERICA,
Appellee,

-vs-

ALBERTO CASIANO also known as Tito,
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

This is an appeal from a judgment entered March 6, 2007 in the District of Connecticut (Mark R. Kravitz, J.) after the defendant pleaded guilty to possession with the intent to distribute cocaine. The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on March 9, 2007, and this Court has appellate jurisdiction over the defendant's challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

Statement of the Issue Presented

Was the defendant's 51-month sentence, which was 117 months below the applicable, post-departure, guideline range, reasonable in light of the guideline range and the factors set forth at 18 U.S.C. § 3553(a)?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-0956-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

ALBERTO CASIANO also known as Tito,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

On August 4, 2005, the FBI executed an arrest warrant for the defendant, Alberto Casiano, based on an Indictment charging him in one count with engaging in a conspiracy to distribute heroin. After his arrest, the FBI searched his residence and discovered two electronic digital scales, one plastic baggie containing three larger wrapped pieces and two smaller baggies of powder cocaine (with a total approximate weight of 11 grams), and one plastic baggie containing approximately 13 grams of marijuana. The

powder cocaine and one of the digital scales were located in the master bedroom dresser.

The defendant pleaded guilty to one count of possession with intent to distribute powder cocaine on October 3, 2006. At sentencing, the district court determined that the defendant was a career offender and faced a guideline incarceration range of 188-235 months. The court departed one criminal history level under U.S.S.G. § 4A1.3, reduced the incarceration range to 168-210 months, and then imposed a non-guideline sentence of 51 months.

In this appeal, the defendant claims that his sentence was unreasonable in light of the applicable guideline range and the factors set forth in 18 U.S.C. § 3553(a). This claim has no merit. The defendant, as a career offender, faced a guideline incarceration range of 188-235 months. Had it not been for his career offender status, he would have faced a guideline range of 15-21 months. Because the district court found that his criminal history category substantially overrepresented the seriousness of his criminal history, the court departed downward one category, resulting in a guidelines range of 168-210 months. In deciding to impose a non-guideline sentence of 51 months, the district court appropriately balanced its view that the career offender guidelines were simply too high to reflect the seriousness of the defendant's criminal history against its view that the defendant was a drug dealer who had not been deterred by his prior ordered two-year state sentence or the fact that he had been on state probation for a narcotics offense at the time of his federal offense.

Statement of the Case

On August 2, 2005, a federal grand jury sitting in New Haven returned an Indictment against the defendant and others charging him in one count with conspiring to possess with the intent to distribute and to distribute an unspecified quantity of heroin, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 846. JA2[1] (docket entry). On September 7, 2005, the grand jury returned a Superseding Indictment charging the defendant in Count One with conspiring to possess with the intent to distribute and to distribute an unspecified quantity of heroin, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C) and 846, and in Count Twelve with possession with the intent to distribute cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). JA3 (docket entry). The defendant persisted in his not guilty plea, along with five other defendants, and, on September 13, 2006, a federal grand jury sitting in Hartford returned a Second Superseding Indictment which charged him in Count One with engaging in a conspiracy to distribute heroin, in Count Three with engaging in a conspiracy to distribute cocaine, in Count Six with possession of cocaine with intent to distribute, and in Count Seven with engaging in a conspiracy to distribute marijuana. JA7 (docket entry), JA10-JA18.

On September 25, 2006, the Government filed a second offender notice based on the defendant's prior felony conviction for sale of narcotics. JA8 (docket entry). The

[1] The Joint Appendix will be cited as "JA" followed by the page number.

defendant changed his plea to guilty as to Count Six on October 3, 2006, the day of jury selection. JA8 (docket entry), JA27. On March 5, 2007, the district court (Mark R. Kravitz, J.) sentenced the defendant to 51 months' imprisonment and 6 years' supervised release. JA125-JA127. Judgment entered March 6, 2007. JA9 (docket entry).

On March 9, 2007, the defendant filed a timely notice of appeal. JA9 (docket entry), JA128. The defendant was ordered to surrender to the Bureau of Prisons on March 19, 2007, has been incarcerated in federal custody since that date, and is currently serving his sentence. JA9 (docket entry).

Statement of Facts

A. Factual Basis

Had this case gone to trial, the Government would have presented the following facts, which were set forth almost verbatim in the Government's February 27, 2007, sentencing memorandum (JA67-JA69) and the Pre-Sentence Report (sealed appendix):

In December, 2004, the FBI in Cleveland, Ohio began an investigation into a Drug Trafficking Organization ("DTO") operating in Cleveland, Ohio. This Title III investigation revealed that an individual named Gonzalo Sanchez was operating a large DTO that purchased kilogram quantities of cocaine and heroin for re-distribution to others. Pre-Sentence Report ("PSR") ¶ 11. Starting in approximately February, 2005, wire

interceptions over Sanchez's cellular telephone revealed that Carlos Roman, who resided at 191 Southridge Drive, Willimantic, Connecticut, began purchasing large quantities of narcotics from Sanchez. Sanchez and his associates would drive from Cleveland, Ohio, to Willimantic, Connecticut to deliver the narcotics and collect payment. Based on the interceptions over Sanchez's cellular telephones, the FBI in Connecticut, with court authorization, began intercepting communications over Roman's cellular telephone on April 3, 2005. PSR ¶ 13.

These interceptions revealed that Roman was a large scale distributor of heroin in Willimantic, Connecticut and the surrounding areas. PSR ¶ 14. They also revealed that he utilized an individual named Eduardo Casiano as an alternative source of supply, especially after Sanchez's federal arrest on May 26, 2005. The FBI, with court authorization, began intercepting Casiano's wire communications on May 6, 2005. Casiano was obtaining narcotics, including heroin, from various sources of supply, including co-defendants Hector David Espinosa, Jose Santiago Vera, Nazariel Gonzalez, and at least one unidentified source in New York City. PSR ¶ 15.

This defendant is Casiano's brother. Between May, 2005 and July, 2005, the defendant had numerous discussions with Eduardo about narcotics transactions. For example, on May 7, 2005, the defendant told his brother that he had a customer for "ten bars" and would charge him "$55 - $60" and "85" for the other (likely reference to heroin for $85 per gram). He told Eduardo that this customer had been unhappy with his heroin

source, and the defendant had offered to set him up with Eduardo. According to the defendant, the customer was complaining because he kept buying "dirt" and wanted better quality heroin. Later during that same conversation, the defendant told Eduardo that he was selling a lot of "eight balls" (common term referring to 3.5 grams of cocaine). He stated that he would sell the "eight balls" for $100 each, so that he made between $20 and $25 per eight ball. During a lengthy intercepted conversation between Eduardo and an associate in Florida on May 28, 2005, Eduardo stated that the defendant was "making good money" selling narcotics. PSR ¶¶ 16-17.

On June 1, 2005, the defendant and Eduardo were intercepted discussing "the stuff for the bread" (heroin). Eduardo advised that he had found "something real good," and that "everyone here liked it." On June 2, 2005, the defendant and Eduardo were intercepted discussing narcotics. Specifically, Eduardo asked the defendant, "Are you already finishing, or what? . . . How much you got left?" The defendant responded, "Like one and a little more. I have to weigh the other one. What happens is that I have to work because this guy has the balance, and I have to work for him." PSR ¶ 18.

On June 13, 2005, the defendant was intercepted telling Eduardo that he was "making bags because this is the last month of vacation." The defendant said that he was trying to make enough money to pay for the rent. The two then discussed a possible customer. The defendant stated that the customer "does not buy in big quantities," but in "10-15 gram" quantities. Eduardo responded, "[H]ey, don't say that." The defendant repeated, "Ten to fifteen" and

said that he had advised the customer that he would check (with Eduardo). At the end of the conversation, the defendant said that he had "two thousand dollars there." PSR ¶ 19.

On July 1, 2005, the defendant was intercepted asking Eduardo for "a whole one." Eduardo said that he had not been planning to take that stuff out. The defendant said that he would bring the money and that he had sold it for $1000. The defendant told Eduardo that he was looking for "$200" and had given him "$600 for the other one." Eduardo told the defendant that he was making more money that he was. Eduardo told the defendant that he paid "six and one half" for it and had to pay the taxi "250" to bring it over here. On July 8, 2005, Eduardo was intercepted asking the defendant if he had money "from the horse" (referring to marijuana). The defendant said that he only had four left, but he still had ten there. The defendant said that he had "$1200 or $1300." PSR ¶¶ 20-21.

On August 2, 2005, an arrest warrant issued for the defendant based on the original Indictment, which charged him with one count of engaging in a conspiracy to distribute heroin. JA2. During the morning of August 4, 2005, the FBI arrested the defendant, at his place of employment, without incident. PSR ¶ 23. Later that day, the FBI searched the defendant's residence, pursuant to a written consent executed by the defendant's girlfriend, a co-occupant of the apartment. Among other things, the FBI seized two electronic digital scales, one plastic baggie containing three larger wrapped pieces and two smaller baggies of powder cocaine (with a total approximate

weight of 11 grams), and one plastic baggie containing approximately 13 grams of marijuana. The powder cocaine and one of the digital scales were located in the master bedroom dresser. PSR ¶ 23.

B. Guilty Plea

The defendant changed his plea to guilty as to Count Six of the Second Superseding Indictment on October 3, 2006. JA27. In doing so, he entered into a written plea agreement, in which the parties stipulated that the quantity of heroin, cocaine and marijuana that the defendant distributed was equivalent to between 2.5 kilograms and 5 kilograms of marijuana. JA21. The parties also agreed that, based on the information available to them, under U.S.S.G. § 4A1.1, the defendant was in Criminal History Category IV. JA22. Finally, the Government agreed to recommend a reduction for acceptance of responsibility. JA21. According to the written plea agreement, under Chapter Two of the Sentencing Guidelines, the defendant faced a guideline range of 15-21 months, based on an adjusted offense level of 10 and a Criminal History Category IV. JA22.

The plea agreement also stated that the defendant appeared to be a career offender under U.S.S.G. § 4B1.1 based on his 2001 Connecticut conviction for sale of narcotics and his 1998 Connecticut conviction for second degree assault. JA22. As a career offender, the defendant faced a guideline range of 188-235 months, based on an adjusted offense level of 31 and a Criminal History Category VI. JA22. The defendant expressly reserved his right to challenge any finding that he was a career offender

and to ask for a downward departure and a non-guideline sentence. JA22. The Government reserved its right to oppose these arguments. JA22. The defendant and the Government also reserved their respective rights to appeal the court's sentence. JA22.

C. Sentencing Proceeding

The PSR found that, under Chapter Two of the Sentencing Guidelines, the base offense level was 12 by virtue of the total quantity of narcotics attributable to the defendant's conduct. *See* PSR ¶ 27. The PSR also concluded that the defendant was a career offender under § 4B1.1 by virtue of his 2001 sale of narcotics convictions and his 1998 second degree assault conviction. *See* PSR ¶ 33. These were the only two felony convictions in the defendant's criminal history. At the time of the instant offense, the defendant was serving a period of state probation as a result of the 2001 sale of narcotics conviction. Without the career offender designation, the defendant would have been in Criminal History Category IV. The PSR subtracted three levels for acceptance of responsibility, and, as a result, like the written plea agreement, placed the defendant within an incarceration range of 188-235 months' incarceration. *See* PSR ¶¶ 34, 66.

The defendant filed a sentencing memorandum asking for a non-guideline sentence. JA54. He conceded that he was a career offender, but argued that the career offender guideline range was "inconsistent with the fundamental princip[le] set forth in 18 U.S.C. § 3553(a) that '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.'" JA55. The defendant relied on a number of factors, including his efforts at drug rehabilitation, his good behavior while on pretrial and presentencing release, and the huge disparity between the Chapter Two and career offender guideline ranges. JA56-JA58. On this last issue, the defendant argued that the facts underlying his two prior convictions undercut his designation as a career offender. JA58-JA59. Specifically, he pointed out that his 1998 second degree assault conviction related to an incident in which he fired an air-powered pellet gun as part of a prank, and his 2001 sale of narcotics "occurred at a time when he was in the throes of drug addiction." JA58-JA59.

In the alternative, the defendant asked for a downward departure based on a variety of different grounds. JA60. Specifically, he argued that his imprisonment would have a large negative impact on his family. JA61. He also maintained that his criminal history category overstated the seriousness of his prior criminal convictions. JA61-JA63. Finally, he relied on his successful drug rehabilitation during the pendency of the case. JA64.

The Government filed a sentencing memorandum in which it took the position that the only argument by the defendant that could support the imposition of a non-guideline sentence or a downward departure was his claim that the career offender guidelines were too severe. JA72. On the one hand, the Government pointed out that the defendant was a drug dealer who distributed narcotics for profit in Waterbury while serving a period of state probation stemming from a prior narcotics distribution

conviction. JA73. On the other hand, the Government recognized that the 188-235 month range far exceeded the 15-21 month range that would have applied to the defendant had he not been a career offender. JA74. In the end, the Government deferred to the court's discretion as to whether a horizontal departure was appropriate under § 4A1.3 and as to whether a non-guideline sentence was warranted. JA74.

At the start of the sentencing hearing, the district court confirmed that the defendant had reviewed the PSR and that there were no objections to the factual statements set forth in the PSR. JA81-JA82. Next, the court reviewed the maximum statutory penalties. JA83-JA84. At that point, the court discussed the principles that would guide its sentencing decision. JA84-JA85. The court indicated that the sentencing guidelines were no longer mandatory, that it must consider the guidelines, as well as the other factors set forth in 18 U.S.C. § 3553(a), and that it was required to determine the applicable guideline range and policy statements. JA84. The court then explained that it would decide, after consulting the sentencing guidelines and the other § 3553(a) factors, whether to impose a sentence under the guidelines or to impose a non-guidelines sentence. JA84-JA85.

Next, the court calculated the guideline range. JA85. First, it found that, although the defendant's base offense level was 12 under Chapter Two by virtue of the quantity of cocaine and marijuana involved in his relevant conduct, the level increased to 34 because the defendant was a career offender. JA85. With a three-level departure for acceptance of responsibility, the defendant was at an

adjusted offense level of 31, a Criminal History Category VI and a guideline range of 188-235 months. JA86. The court also noted that, without the career offender status, the defendant would have been in Criminal History Category IV. JA86. Finally, the court pointed out the large difference between the 15-21 month guideline range applicable under Chapter Two and the 188-235 month range applicable under § 4B1.1. JA86.

Before entertaining sentencing arguments, the court indicated that, based on the sentencing memoranda, it would depart downward one criminal history category under § 4A1.3 for substantial overstatement of criminal history, so that the resulting sentencing guideline range was 168-210 months. JA88. Specifically, the court stated:

> I find that given that what puts him into the career offender status, which is the use of the pellet gun, career offender status substantially overrepresents the seriousness of his criminal history.
>
> So under 4A1.3(b)(1), and (b)(3), at least a one-category departure under the guidelines is appropriate, and I will depart.

JA88.

The court then indicated that it was going to impose a sentence below the guideline range and did not view itself as bound by the 168-210 month range. For that reason, the court advised defense counsel,

> I know, Mr. Jacobs, you have a number of other guidelines-based departures that you have in your memorandum. I can assure you, in view of the government's memorandum and my own view on this, I'm not going to feel bound to a guidelines sentence under this 168 to 210 because I just think that while technically he qualifies as a career offender, the nature of that offense is such, with the pellet gun, that it would not be appropriate in my judgment. . . .
>
> So that being the case, I'm going to be moving, probably going to be doing a nonguidelines sentence, and both of you should address that.

JA88-JA89. The court stated that defense counsel could address its guidelines-based departures, but indicated that it had already determined that, "strictly under the guidelines law," no departure was appropriate. JA89. It then invited defense counsel to make a presentation directed at identifying an appropriate sentence. JA89.

Defense counsel began by introducing all of the friends and family that were there to support the defendant. JA89-JA90. Next, he discussed a letter sent to the court by the defendant's employer and emphasized the positive things the employer said about the defendant. JA90-JA91. He told the court that he was asking for a sentence that was far closer to the guideline range that would have applied without the career offender enhancement. JA91.

His strongest argument was based on the defendant's drug addiction. JA91. He explained that the defendant

had gone through some false starts in trying to deal with his substance abuse problem, but that his latest period of sobriety, achieved during his pretrial and presentencing release, showed that he was serious about his drug rehabilitation. JA92. Defense counsel stated, "I think that I can represent to the Court sincerely from having dealt with Mr. Casiano over the last year-and-a-half and having seen what he's done in his life over the course of that time that he has finally met that challenge and decided, at this point, that he is going to stay clean[.]" JA93.

He also relied on the defendant's employment record. Specifically, he stated that the defendant has always been a good worker, a responsible worker, and a committed worker, who was worried about training someone else to take over for him during his period of incarceration. JA94.

Finally, defense counsel emphasized the defendant's role as a good father and provider:

> He supports his family. He supports every one of those children, and spends a great deal of time with all of them. . . . Now it's clear that he won't be around for a period of time and that the kids will be without him, which is clearly unfortunate, but for purposes of the nonguidelines sentence, I think it's important for the Court to take note of the importance of family to him and also the importance of him, Mr. Casiano, to his family.

JA94-JA95.

The court inquired of the defendant if he was asking for the court to ignore the career offender guidelines and instead sentence him to an incarceration period within the Chapter Two range of 15-21 months. JA95. The defendant acknowledged that a request for a term within that range was not realistic. JA95. Instead, he requested a sentence that was somewhere between the 15-21 month range and the 188-235 range, but far closer to the 15-21 month range than "the other end of the spectrum." JA95-JA96. At that point, the court clarified that the defendant had been convicted of sale of narcotics in 2001, sentenced to a five year term of incarceration, which was suspended after two years, and ordered to serve a probationary term which included drug treatment as a condition. JA96.

The defendant also challenged the Government's evidence that he was distributing narcotics. In response, the Government indicated that the intercepted telephone calls involving the defendant were very specific and showed that he was a drug dealer, especially when considered along with the powder cocaine that was seized from his residence on the date of his arrest. JA98. The court asked defense counsel if he took issue with the paragraphs in the PSR which indicated that the defendant was distributing narcotics:

> So why wouldn't that satisfy a preponderance of the evidence standard to show that Mr. Casiano was substantially involved in distributing drugs? Now, there may be a good reason for it from his point of view, that is to say to support his habit, but I don't think there's any question but that there was fairly substantial involvement.

JA99. In response, defense counsel stated, "You are right. Put into that context, I don't have a beef with it and clearly in the context of the PSR, it's appropriate for the Court to consider those facts." JA99-JA100.

At the conclusion of the defendant's presentation, the Government indicated that it was deferring to the court on the issue of what would constitute a reasonable and appropriate sentence. JA102. In doing so, the Government pointed out that one aggravating factor in the case was the fact that the defendant had now twice violated terms of state probation, first by being arrested and convicted of sale of narcotics while serving a period of probation stemming from his second degree assault conviction, and second by being arrested and convicted in this case while serving a period of probation stemming from his 2001 sale of narcotics conviction. The Government also compared the defendant's case to that of co-defendant Carlos Pacheco, who was convicted of distributing between 20 and 40 grams of heroin and who, despite his status as a career offender, received a 92-month nonguideline sentence. JA103. Whereas Mr. Pacheco had a low IQ, poor employment history, a significant psychiatric history, and a very poor family history, this defendant was employed, was intelligent and did not present the same mitigating factors as Mr. Pacheco. JA103. In response, the court reminded the Government that this defendant's Chapter Two guideline range was about half of what Mr. Pacheco's guideline range was because this defendant was convicted of a distribution offense involving powder cocaine, whereas Mr. Pacheco was convicted of a distribution offense involving heroin. JA104. Finally, the Government noted that "the

employment history is a positive thing for him, but I think it cuts both ways because he can make a living, you know, legitimately, he doesn't need to be doing this." JA104.

The court asked the Government to compare the defendant's role in this offense to various co-defendants who had already been sentenced. JA105. The Government explained which defendants were suppliers and which ones were street-level drug dealers. JA105. In doing so, it characterized the defendant as having "a small drug business in Waterbury. . . doing it on his own." JA106. In the end, the Government's main concern was the fact that the defendant had previously been sentenced to 24 months for sale of narcotics, and that this sentence did not deter him from continuing to engage in narcotics activity. JA106.

At that point, the court indicated that it would take a break, but was considering a range of possible sentences that were in excess of the top of the Chapter Two range (21 months) and less than Mr. Pacheco's 92 month sentence. JA107-JA108. When the court reconvened, it explained to the defendant the process that it went through in deciding the appropriate sentence. JA110. The court advised the defendant that it listened to everything that was said by both sides at sentencing. JA110. It read the PSR, the Government's sentencing memorandum, and the defendant's sentencing memorandum. JA110. It considered the nature and circumstances of the offense. JA111. It took into account the history, background and characteristics of the defendant, including his family commitment and work history, as well as his criminal history. JA111. In addition, the court considered "the

need for the sentence to be sufficient but no greater than necessary to achieve the various purposes of a criminal sentence." JA111. It considered the "kinds of sentences that are available and the kinds of sentences that are recommended by the guidelines." JA111. Finally, the court considered the various purposes of sentencing and the need to "avoid unwarranted disparities among defendants with similar records who have been found guilty of the same conduct." JA111-JA112. The court specifically reviewed the purposes of a criminal sentence, namely, to provide just punishment, to protect the public, to provide specific and general deterrence, and to provide a defendant with any needed educational, vocational or medical care. JA112-JA113.

In reaching a decision as to this defendant, the court indicated, "I guess first and foremost, this Court views drugs as extremely serious. Drugs don't just affect the addicted person; drugs destroy families, and they destroy whole communities . . . ." The court explained, "I take drug crimes very seriously because of their impact, there are victims, it's not a victimless crime, . . . there are numerous victims, both family members and the community, and so I take drugs seriously." JA113. The court observed, "And all indications are that while you may well have been distributing drugs for your own habit, you know, there was a fair amount involved here and so I take this crime, this is a serious crime." JA113-JA114.

The court also stated, "[Y]ou are not like some defendants who come before me who haven't had a chance to turn their lives around. You have spent two years in prison, you took part in drug treatment programs, you

were I gather clean for a while, but yet committed this crime while on probation from your prior offense. . . . [A]nd so the Court is concerned about deterrence here, specific deterrence, concerned about protecting the public because of drugs, concerned about just punishment." JA114.

On the other hand, the court pointed out that the defendant had performed well while on pretrial release and had maintained steady employment. JA114-JA115. In response to the Government's point that the defendant could have made money without resorting to dealing drugs, the court stated, "I am accepting the proposition that you were dealing drugs because of your addiction and it wasn't a volitional choice on your part. But you have your work ethic and your skills to fall back on and to rely on, and that's to your credit." JA114-JA115. "By all accounts, you are a loving father to your children and loving partner to your partner, and that, too, is to your credit except for the fact that you've let down those people with this turn of events, and I know that . . . you will work hard to make sure that that doesn't happen . . . again because you hurt them as well . . . ." JA115.

The court reiterated that it would impose a non-guidelines sentence because 168 months' incarceration was too harsh. JA115. Still, the court wanted to account for the seriousness of this offense and the fact that the defendant had been in prison two years in 2000 and did not "get the message." JA115. The fact that the defendant committed this crime while on probation suggested that a sentence within the 15-21 Chapter Two range was too low. JA115.

The court also referenced co-defendant Carlos Pacheco's case. Pacheco was also a career offender who had been sentenced to a non-guideline sentence of 92 months, well below the 151-188 month career offender guideline range applicable in his case. According to the court, Pacheco's Chapter Two range was far higher (30-37 months) than this defendant's, and Pacheco's qualifying career offender convictions both involved the distribution of narcotics. JA116. As the court concluded, "At the bottom, it's a judgment call on my part as to what I feel is sufficient but no greater than necessary to achieve these various purposes of a criminal sentence that I have just outlined." JA116. At that point, the court imposed a non-guideline incarceration term of 51 months' incarceration, followed by 6 years' supervised release. JA116.

Summary of Argument

The record amply demonstrates that the district court fulfilled its obligation to calculate the relevant guidelines range, consider that range and the relevant factors set forth in 18 U.S.C. § 3553(a), and impose a sentence that is sufficient but no greater than necessary to achieve the purposes of sentencing. The district court explained what led it to impose a non-guideline sentence and why it chose to impose a sentence of 51 months' incarceration. There is no basis to find that the district judge exceeded the bounds of allowable discretion or violated the law in imposing the sentence it did.

Argument

I. The defendant's 51 month non-guideline sentence was reasonable.

The defendant claims that the 51-month sentence imposed by the district court was unreasonable. It is difficult to understand where the defendant finds fault with the district court's analysis. It appears that the defendant simply thinks that the sentence, despite being 117 months below the post-departure guideline range, was too high. This claim lacks merit. Here, the defendant did not attempt to cooperate or qualify for a § 5K1.1 motion; however, the Government afforded the court a substantial amount of flexibility by deferring to its discretion as to whether to impose a non-guideline sentence. The court properly exercised its discretion in balancing a variety of factors, including the defendant's work history, family responsibilities, efforts at drug rehabilitation, criminal history and underlying criminal conduct, to reach a sentence that was sufficient, but no greater than necessary to satisfy 18 U.S.C. § 3553(a).

A. Governing law and standard of review

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the United States Sentencing Guidelines, as written, violate the Sixth Amendment principles articulated in *Blakely v. Washington*, 542 U.S. 296 (2004). *See Booker*, 543 U.S. at 243. The Court determined that a mandatory system in which a sentence is increased based on factual findings by a judge violates the right to trial by jury. *See id.* at 245. As a remedy, the

Court severed and excised the statutory provision making the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), thus declaring the Guidelines "effectively advisory." *Booker*, 543 U.S. at 245.

After the Supreme Court's holding in *Booker* rendered the Sentencing Guidelines advisory rather than mandatory, a sentencing judge is required to: "(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence." *See United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir.), *cert. denied*, 127 S. Ct. 192 (2006); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005). The § 3553(a) factors include: (1) "the nature and circumstances of the offense and history and characteristics of the defendant"; (2) the need for the sentence to serve various goals of the criminal justice system, including (a) "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment," (b) to accomplish specific and general deterrence, (c) to protect the public from 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 sentencing range set forth in the guidelines; (5) policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to victims. *See* 18 U.S.C. § 3553(a).

"[T]he excision of the mandatory aspect of the Guidelines does not mean that the Guidelines have been

discarded." *Crosby*, 397 F.3d at 111. "[I]t would be a mistake to think that, after *Booker/Fanfan*, district judges may return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum." *Id.* at 113.

Consideration of the guidelines range requires a sentencing court to calculate the range and put the calculation on the record. *See Fernandez*, 443 F.3d at 29. The requirement that the district court consider the section 3553(a) factors, however, does not require the judge to precisely identify the factors on the record or address specific arguments about how the factors should be implemented. *Id.*; *Rita v. United States*, 127 S. Ct. 2456, 2468-69 (2007) (affirming a brief statement of reasons by a district judge who refused downward departure; judge noted that the sentencing range was "not inappropriate"). There is no "rigorous requirement of specific articulation by the sentencing judge." *Crosby*, 397 F.3d at 113. "As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, [this Court] will accept that the requisite consideration has occurred." *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005).

This Court reviews a sentence for reasonableness. *See Rita*, 127 S. Ct. at 2459; *Fernandez*, 443 F.3d at 26-27; *United States v. Castillo*, 460 F.3d 337, 354 (2d Cir. 2006). The reasonableness standard is deferential and focuses "primarily on the sentencing court's compliance

with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a)." *United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005). This Court does not substitute its judgment for that of the district court. "Rather, the standard is akin to review for abuse of discretion." *Fernandez*, 443 F.3d at 27.

Although this Court has declined to adopt a formal presumption 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." *Fernandez*, 443 F.3d at 27; *see also Rita*, 127 S. Ct. at 2462-65 (holding that courts of appeals may apply presumption of reasonableness to a sentence within the applicable Sentencing Guidelines range); *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.").

Further, the Court has recognized that "[r]easonableness 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.'" *Fernandez*, 443 F.3d at 27 (citations omitted). 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 appeal of a within-guidelines sentence. *See United States v. Kane*, 452 F.3d 140 (2d Cir. 2006) (per curiam). In *Kane*, the defendant challenged the reasonableness 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.").

B. Discussion

The defendant asked the district court to impose a non-guideline sentence based on a number of factors, including the large disparity between the career offender guideline range and the Chapter Two guideline range. The Government deferred to the court on the issue of whether a sentence below the guideline range was appropriate. The court departed one horizontal level under § 4A1.3 and then imposed a non-guideline sentence that was 137 months below the original guideline range. The defendant now argues on appeal that his sentence was unreasonable. His arguments amount to a claim that his sentence was too high. He seems to focus on the fact that the 51-month sentence was more than twice the maximum guideline sentence of 21 months that would have applied had the defendant not been designated as a career offender. Indeed, the defendant's sole argument in this appeal seems to be based on the disparity between his sentence and the guideline range that would have applied had the defendant not been a career offender.

The defendant's argument, however, ignores the obvious and undisputed fact that, regardless of how his prior convictions are characterized, he is a career offender based on a 1998 conviction for second degree assault and

a 2001 conviction for sale of narcotics. PSR ¶ 33. Thus, the starting point for any reasonableness analysis is not the guideline range that would have applied under Chapter Two of the Sentencing Guidelines, but the 168-210 month post-departure guideline range that applied to the defendant by virtue of his career offender status.

Moreover, in considering the reasonableness of the 51-month sentence, there are three key factors which impacted the district court's decision. First, the defendant had already been sentenced to 24 months' incarceration for committing the very same offense that brought him before the court in this case. PSR ¶ 37. Thus, in calculating an appropriate sentence here, the court had to impose an incarceration term that was high enough to deter specifically the defendant from dealing drugs in the future. JA115.

Second, when the defendant engaged in the criminal conduct in this case, he was serving a period of probation stemming from his state narcotics distribution conviction. PSR ¶¶ 37-38; JA115. Therefore, contrary to the defendant's argument that a six-year term of supervised release allowed the court to impose a lower incarceration term, *see* Def.'s Brief at 12, court supervision has not dissuaded the defendant from re-offending. Indeed, the defendant has now twice violated terms of probation, having committed the 2001 sale of narcotics offense while on probation for the second degree assault offense. *See* PSR ¶¶ 36-37.

Third, in deciding to impose a sentence below the career offender range, the court did not think it appropriate

to disregard completely that range and sentence the defendant within the 15-21 month range applicable under Chapter Two. JA107-JA108. Had the court done that, it would have failed to account for the fact that the defendant, by virtue of his career offender status, was not at all similarly situated to other defendants who distributed the same quantity of narcotics, but were not career offenders. Indeed, the defendant himself acknowledged at sentencing that he was not seeking a sentence within the 15-21 month range, but one that was somewhere between the 15-21 month range and the 168-210 month range, and that was far closer to the 15-21 month range. JA95-JA96.

In the end, the district court exercised sound judgment in deciding how far to go below the applicable, post-departure, 168-210 month guideline range. "Reasonableness review does not entail the substitution of [the appellate court's] judgment for that of the sentencing judge." *Fernandez*, 443 F.3d at 27. The record here amply demonstrates that the district court considered all of the § 3553 factors, as well as the arguments raised by the defendant in support of a more lenient sentence. *See, e.g.*, JA110-JA116. The court calculated the guidelines range and noted that it was obliged to consider the range and the other factors set forth in 18 U.S.C. § 3553(a). JA84-86, JA88. It provided a thoughtful and thorough analysis of the defendant's case in light of other sentences that had been imposed on co-defendants and addressed the defendant's arguments for a non-guidelines sentence. JA103-JA107, JA114-JA116. In sum, the sentencing record shows that the district court was aware of the statutory requirements and the applicable guidelines range, that the court understood the relevance of these matters,

and that the court gave them due consideration when sentencing the defendant to 51 months in prison. Accordingly, that sentence should be upheld.

Conclusion

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

Dated: October 29, 2007

Respectfully submitted,

KEVIN J. O'CONNOR
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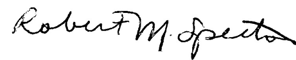
DISTRICT OF CONNECTICUT



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Addendum

18 U.S.C. § 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.