07-1606-cr

To Be Argued By:
MICHAEL S. MCGARRY

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-1606-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

DIGBY M. FERRERA, also known as Casper Weiss, John R. Blot, also known as Victor Morgan, Shawn F. Haber, also known as Leo Schwartz, Leslie A. James, also known as Daryl McKinney,

Defendants,

SCOTT A. CIAPPETTA, also known as Steven Stiles, also known as Steven Markowitz,

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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KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

MICHAEL S. McGARRY
SANDRA S. GLOVER
Assistant United States Attorney

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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

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Statement of Jurisdiction

This is an appeal from a judgment entered April 16, 2007, in district court in the District of Connecticut (Janet C. Hall, J.) after the defendant pleaded guilty to one count of conspiracy and one count of securities fraud. The district court had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. On April 9, 2007, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). Government Supplemental Appendix ("GSA") 23, 30. This Court has appellate jurisdiction over the defendant's challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

Statement of Issue Presented for Review

Was the defendant's 100-month sentence, which was 20 months below the applicable Guideline range, reasonable in light of the uncontested Guideline range and the factors set forth in 18 U.S.C. § 3553(a) that were considered by the sentencing court?

United States Court of Appeals

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

-vs-

SCOTT A. CIAPPETTA, also known as Steven Stiles, also known as Steven Markowitz,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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Preliminary Statement

Scott Ciappetta, a manager and supervisor of a boiler room operation that defrauded over 250 victims of over $3.6 million, was sentenced to 100 months incarceration – 20 months below his Guidelines range. He now appeals his sentence, arguing it was unreasonable.

Ciappetta and his coconspirators, many of whom had Wall Street experience, used their experience, gained the trust of hundreds of victims and defrauded them. After pleading guilty to conspiracy and securities fraud, Ciappetta faced a statutory maximum of 120 months imprisonment which became his Guidelines range. The calculated Guidelines range was 121-151 months.

Ciappetta's initial sentencing hearing was continued for more than two months, so the court could review briefings and assure itself that there would be no unwarranted sentence disparities, an issue the court raised *sua sponte*. At the continuation of his sentencing, the court sentenced Ciappetta to 100 months. Dissatisfied with his sentence, Ciappetta filed this appeal claiming that his sentence was unreasonable. He first argues that the court erred in its application of the § 3553(a) factors, specifically the need to avoid unwarranted sentence disparities. He contends the court did not sufficiently explain, with factual support, its conclusion that there was no unwarranted sentencing disparity and that the court misunderstood the law. He next argues that the court did not adequately employ the balancing test of § 3553(a) and failed to give adequate weight to his personal characteristics.

The defendant's claims have no merit. The sentencing court properly considered all of the § 3553(a) factors, including § 3553(a)(6). This Court should not second guess the weight given to any particular factor or factors or the ultimate result of the district court's legally sound

determination. This Court should reject the defendant's claims and affirm the sentence.

Statement of the Case

On March 29, 2006, a grand jury returned a twenty-two count indictment charging Ciappetta with conspiracy to commit mail fraud and securities fraud in violation of 18 U.S.C. § 371, sixteen substantive counts of securities fraud in violation of 15 U.S.C. §§ 77q(a) and 77x, and five substantive counts of mail fraud in violation of 18 U.S.C. § 1341. GSA6 (docket entry).

On October 13, 2006, Ciappetta pleaded guilty to count one charging him with conspiracy in violation of 18 U.S.C. § 371, and count thirteen charging him with securities fraud in violation of 15 U.S.C. §§ 77q(a) and 77x. GSA17 (docket entry).

On January 22, 2007, the district court (Janet C. Hall, J.) held an initial sentencing hearing at which Ciappetta's Guidelines range was calculated and the district court preliminarily determined – without objection – that the Guidelines range was 120 months. GSA20, Defendant's Appendix ("DA") 65. Concerned about the length of Ciappetta's Guidelines range in comparison to the potential sentences of Ciappetta's co-defendants, the district court continued Ciappetta's sentencing until March 28, 2007, and requested briefing on the issue of relative culpability so the court could avoid unwarranted sentence disparities in accordance with 18 U.S.C.§ 3553(a)(6). DA85-86, DA90-DA95, GSA20-GSA23 (docket entries).

On March 28, 2007, the sentencing court resumed the sentencing hearing and sentenced Ciappetta to 100 months' imprisonment, 20 months below the calculated Guidelines range. DA152, GSA23-24. Judgment entered April 16, 2007. DA13-15, GSA24. On April 9, 2007, the defendant filed a notice of appeal that is deemed timely pursuant to Federal Rule of Appellate Procedure 4(b)(2). GSA23. Ciappetta is currently serving his sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. The Offense Conduct

Had this case gone to trial, the Government would have presented the following facts, which were set forth in the Government's sentencing memoranda dated January 30, 2007, GSA31-75, and March 27, 2007, GSA76-96, and in the Pre-Sentence Report ("PSR") (sealed appendix):

In early 2001, Appellant Ciappetta met with two individuals (both of whom are named co-defendants) who recruited him to join a boiler-room fraud conspiracy. PSR ¶ 31. A number of the members of the conspiracy – including Ciappetta – had previously worked at investment firms, PSR ¶¶ 30, 31, 75, and some had even held securities licenses. PSR ¶¶ 30, 31. The conspiracy lasted from approximately January 2001 until approximately March 2004. PSR ¶ 15. The purpose of the conspiracy was for Ciappetta and his co-conspirators to enrich themselves by fraudulently obtaining money from investor-victims, through the sale of bogus securities. *Id*.

The securities they claimed to be selling were purportedly issued by a company called Cash Money Lending Corp. ("CMLC"). PSR ¶¶ 13, 15. In reality, CMLC was a wholly fictitious corporation that Ciappetta and his co-conspirators fraudulently represented to be an actual company in which the investors could purchase securities. PSR ¶ 13.

Ciappetta, who also used the names "Steven Stiles" and "Steven or David Markowitz," along with eight other co-conspirators, sold CMLC securities from an entity they called Blue Square Management Inc., ("Blue Square"). PSR ¶¶ 1, 3-5, 11, 15, 30, GSA34-35. Blue Square purported to be a venture capital firm in the business of selling securities and specializing in underwriting initial public offerings. PSR ¶ 11. In reality, however, Blue Square was a boiler-room operation. Blue Square was not registered with the Securities and Exchange Commission as an investment company, investment advisor, broker dealer, or in any other capacity, nor was Blue Square registered with the National Association of Securities Dealers in any capacity. PSR ¶ 11.

Defendant Ciappetta was part of the initial group that developed the sales pitch or "script" which they used when calling victims and potential victims and falsely representing to them that Blue Square was selling securities of CMLC. PSR ¶ 30. One of the other organizing roles Ciappetta played was recruiting individuals to act as cold callers and in turn supervising them. PSR ¶ 37. Ciappetta managed the daily activities of the cold callers and he paid them. *Id*.

Ciappetta and his co-conspirators obtained money from investors by making unsolicited telephone calls to them (i.e., "cold calling" them) and using the sales pitch that falsely and fraudulently representing to them the following: (1) that Blue Square was a New York City based venture capital firm that was offering them the opportunity to invest in a private ATM management company named CMLC; (2) that CMLC operated a lucrative business managing thousands of ATMs across the county; (3) that the initial public offering for CMLC would occur in the near future, and as such, the investors who purchased stock pre-IPO would make a significant profit; and (4) that investors could purchase CMLC stock for $7 to $10 per share, which was represented to be one-third to one-half the planned IPO or buy-out price. PSR ¶ 18. In fact, CMLC was a fictitious entity with no actual operations and there was no planned IPO. *Id.*

In order to lure and entice investors to send Blue Square money, the conspirators distributed promotional materials to prospective investors following the verbal solicitations. PSR ¶ 19. The materials expanded upon the solicitations and contained additional false and misleading representations. *Id*. To further create the appearance of legitimacy, members of the conspiracy would send the investors official looking documents after prospective investors expressed an interest in investing. PSR ¶ 20. These official looking documents contained additional false and misleading representations that tended to corroborate the misrepresentations made over the phone. PSR ¶ 20. After victims sent money to Blue Square, Ciappetta would follow-up and attempt to defraud them

again, fulfilling the role that the co-conspirators referred to as a "trader." DA146-47, PSR ¶¶ 30, 36. In this role, Ciappetta contacted all the victim-investors who had been previously contacted or "qualified," and attempted to solicit additional funds from them over and above what they had first "invested." DA146-47, PSR ¶¶ 30, 36. This was referred to by the co-conspirators as "trading." DA146-47.

Upon receiving "investments" Ciappetta and his co-conspirators did not invest the money as represented, but instead diverted investors' funds for their own personal use and benefit. For example they converted a large amounts of the funds into cash that was distributed among members of the conspiracy. PSR ¶¶ 21, 26. Money received from investors was also used to pay for personal expenses such as real estate, meals at expensive restaurants, and expensive clothing. PSR ¶ 26. In addition, investor funds were diverted for the payment of Blue Square related expenses such as rent. PSR ¶ 26. While diverting the investor funds, the conspirators lulled investors into believing that their investment funds had been invested into the CMLC securities, as represented, and sought to prevent the discovery of the true use of their investment funds by issuing monthly account statements to investor-victims. PSR ¶ 21. The phoney monthly account statements purported to show the investors their account activity and balance at Blue Square, including apparent increases in the value of their CMLC investments. PSR ¶ 21.

Ciappetta and the other co-conspirators defrauded approximately 275 investor-victims out of "investments" of more than $3.6 million. DA142. After Blue Square was closed down, one of Ciappetta's co-conspirators established Westwood Holdings, which was a fraud identical to the fraud in Blue Square. PSR ¶ 33. Many of the cold callers and traders from Blue Square – including Ciappetta – went on to work at the Westwood Holdings scam. *Id.* Westwood Holdings remained in operation for approximately eight to nine months, and worked in the same way as Blue Square. The total amount of money lost by victims of the Westwood Holdings scheme was approximately $1.25 million. *Id.*

B. The Guilty Plea

On March 29, 2006, a grand jury returned a 22-count indictment charging Ciappetta and four co-defendants with conspiracy to commit mail fraud and securities fraud in violation of 18 U.S.C. § 371, five counts of mail fraud in violation of 18 U.S.C.§ 1341, and sixteen counts of securities fraud in violation of 15 U.S.C. §§ 77q(a) and 77x. Additionally, three other defendants were each charged by information with conspiracy and securities fraud for their conduct arising out of the same scheme. All eight defendants pleaded guilty.

On October 13, 2006, approximately four weeks before the scheduled start of trial, Defendant Ciappetta entered a guilty plea. DA1-12, GSA17. The Government and the defendant did not enter into a cooperation agreement, however, the defendant agreed to meet for a proffer

session with the understanding that the Government would consider the possibility of entering into a cooperation agreement. DA149, GSA85-86. The defendant did not provide any new information or aid in the prosecution of any other individuals and thus did not provide "substantial assistance" towards the prosecution of any other individual as contemplated by U.S.S.G. 5K1.1. Accordingly, the Government did not make such a motion on his behalf. GSA85-86. Nevertheless the Government made sure that at the time of sentencing the district court was aware of Ciappetta's willingness to offer some cooperation. *Id*.

C. The Sentencing Hearings and Briefings

On January 22, 2007, the sentencing court held an initial sentencing hearing at which Ciappetta's Guidelines range was calculated. DA65. The sentencing court determined – without objection – that the Guidelines range was 120 months. DA65. The court inquired of counsel as to whether or not there was any dispute over the probation officer's calculation of the Guidelines and counsel for both the Government and Ciappetta agreed that there was no dispute. DA71-72. Notwithstanding the agreed upon Guidelines range, and notwithstanding the fact that the probation office had concluded there were no grounds for a departure from the guidelines, PSR ¶ 89, the court raised *sua sponte* the issue of potential unwarranted disparate sentences for similarly situated defendants. DA48-57. The court expressed its concern that while, "in the abstract," a sentence of 121 months (the bottom of the calculated Guidelines) would be a "perfectly reasonable" sentence given the seriousness of the crime, the court was

nonetheless concerned about unwarranted disparate sentences. DA49. The sentencing court acknowledged that members of the same scheme or conspiracy could be less culpable than other members, but still sought to assure itself that the eight people who had pleaded guilty would receive fair and just sentences, without any unwarranted disparities. DA49-57.

At this initial hearing the sentencing court heard from Ciappetta's counsel regarding various § 3553(a) factors including among others, the defendant's status as a father and the adverse impact a period of incarceration would have on his family, his personal financial condition, his medical condition, and his personal history. DA63-65. The court considered the arguments raised and the need to avoid unwarranted sentence disparities, and then inquired of counsel: "Is the thrust of your argument under 3553(a) [that] what becomes the guideline sentence of 120 months [is] not a fair and just sentence, for the conduct that Mr. Ciappetta engaged in and was a part of for three years or that it is not fair and just in comparison to the sentences that will be imposed upon other people involved in the same scheme." DA65. Counsel responded: "[w]ell in some respects a little bit of both." *Id*.

The sentencing court was sufficiently concerned about a 120-month Guideline sentence in comparison to the potential sentences of Ciappetta's co-defendants, including a particular co-defendant who was facing a statutory maximum of 60 months, that the court continued the sentencing proceeding. The court stated:

I have decided that I'm not comfortable sentencing Mr. Ciappetta. For that I apologize to Mr. Ciappetta. Obviously I know you have come up to this point and you have done whatever you can do to prepare yourself for the judgment of the court. Obviously a lot of people in your family have come here to support you for which I know you are grateful but I'm struggling with what I might do in your case with what I know about the other defendants in your case, as well as in the [related] case[s]. I don't want to make any judgments as to your sentence and your case which in many respects, I need to make similar judgments as to other defendants without giving them an opportunity to be heard on the common issues. They are not necessarily common. There could be arguments made under the relevant conduct definition of the guidelines as to why the number of victims to be attributed to a defendant are different and dollar amounts are different but I need to have more confidence I guess that the judgments I make in this case with this defendant are not decisions that I will later wonder why I reached those decisions when faced with an argument made by another defendant in another case or another defendant in this case. I don't feel that I need to sentence all nine people at once, in effect, or on one day or in close proximity. . . . However, I do think that having Mr. Ferrera, Mr. Novosselov, Mr. Malyar and Mr. Kuperman together in proximity to Mr. Ciappetta would be helpful and in particular to hear and decide some of the arguments made by

> those counsel on issues like a misuse of trust, victim, number or victims and dollar loss. Just from a guideline calculation point of view, then to hear arguments under 3553A or I suppose under 5-K as to the appropriate sentences. And I think then . . . I will feel more confident in my ability to make a proper judgment about the sentence for Mr. Ciappetta as well as for the other defendants . . . .

DA73-75.

After adjourning the hearing, the court sought briefing on the issue of relative culpability, and on the issue of foreseeability of loss and number of victims with respect to various defendants including Ciappetta. The court also sought briefings on the various roles in the offense. DA86, DA90-95, GSA20-22 (docket entries). The Government filed an Omnibus Memorandum in Aid of Sentencing on January 30, 2007, GSA31-75, and a Supplemental Sentencing Memorandum on March 27, 2007, GSA76-96.

The Omnibus Memorandum provided facts regarding the conspirators' respective roles in the offense. GSA34-49. With respect to Ciappetta, the Omnibus Memorandum set forth facts, consistent with the PSR, that he recruited cold callers whom he supervised and whose pay he determined, and that he contacted all the victim-investors who had been "qualified" in an attempt to solicit additional funds from them. GSA34-35. The Omnibus Memorandum also set forth the Government's position that the number of victims and the amount of loss caused was

not identically foreseeable to each defendant – in essence they were not all identically situated or equally culpable. GSA53-59.

The Government's Supplemental Sentencing Memorandum, filed March 27, 2007, addressed various Guideline factors as well as the fact that Ciappetta attempted to cooperate with the Government. GSA79-86.

On March 28, 2008 the district court resumed Ciappetta's sentencing proceeding. DA97. At the start of the hearing, the court indicated that it was aware of its obligation to impose a sentence consistent with the factors set forth in 18 U.S.C. § 3553(a) and further indicated its intent to do so. DA98. The sentencing court then confirmed that the defendant had reviewed the PSR and that there were no objections to the factual statements set forth in the PSR. DA99. The sentencing court reviewed the Guideline calculations, calculated the defendant's Guidelines to be 121-151 months, and found that the Guideline range became 120 months, the statutory maximum. DA99-102. The court then confirmed that there were no objections to the court's calculated Guideline range of 120 months. DA102.

The court invited defense counsel to address the court and to address the factors that the court had to consider under 3553(a). *Id*. Before counsel made any arguments, the defendant and the defendant's family addressed the court. DA102-106. Counsel for the defendant then read from a number of letters that similarly addressed the history and characteristics of the defendant. DA106-108.

Counsel then argued for a downward departure based on the defendant's attempted cooperation, DA109-110, the fact that his profit from the scam was less than other co-conspirators, DA110-11, and the need to avoid disparate sentences for similarly situated defendants. DA111-12.

The court listened to counsel's presentation and considered the various arguments made. In response to the specific argument regarding the need to avoid unwarranted sentence disparities, the court found that Ciappetta and Mr. Ferrera (the co-conspirator facing a 60-month maximum sentence) were not similar because they did not engage in similar conduct. The court stated:

> I have to avoid unwarranted sentencing disparities among defendants with similar records which they both have and similar conduct so obviously that's why I have been trying to focus on everybody's relative conduct and . . . I . . . don't think that they are similar. I think that the sense I have of Mr. Ciappetta he was there day in and day out and that he was supervising cold callers and getting calls made and pitches made and that he then qualified or traded all clients. Those things can't be said about Mr. Ferrera . . . .

DA117.

The court then heard additional argument from Ciappetta's counsel, DA125-27, and from Government counsel as to the nature and circumstances of the offense, DA136-42. Ciappeta's counsel argued for a departure,

DA125-27, while Government counsel opposed any departure. DA141-42.

After hearing the arguments, the court articulated the factors it considered and its reasoning behind the sentence it was prepared to impose:

> [I]t is my responsibility to impose sentence here today upon Mr. Ciappetta. I have to do so after considering the various factors that Congress identified . . . .
>
> . . . The first identified need to reflect the seriousness of the offense and to promote respect for the law and appropriate just punishment for the offense and the offense here is a serious one. Fraud is always serious. And . . . the two offenses on which Mr. Ciappetta stands convicted are very serious because of their scope and extent of harm and the period of time over which they operated. And so the sentence needs to reflect that seriousness of offense.
>
> Another need for the sentence is to provide adequate deterrence to future criminal conduct and

> to protect the public from further crimes by this particular defendant.

DA144-45.

The court went on to state that it had a certain degree of confidence that a sentence in the white collar area, as this crime is, can serve as a general deterrent to the public, such that the next person presented with the decision to engage in similar conduct will be deterred. DA145. The court then considered the need to protect the public from future crimes of the defendant and to provide educational or vocational training, consistent with 3553(a)(2)(B) and (C) yet the court did not give these factors significant weight. DA146.

The court then addressed at length the nature and seriousness of the offense. The court first addressed and weighed Ciappetta's particular conduct, role, and involvement. DA146-47. The court weighed the fact that he was there "pretty much from the beginning," that he was recruited early on, and that he worked for Blue Square over the entire period. DA146. He helped develop the pitch, recruited cold callers, managed the daily activities of the cold callers, and contacted all qualified investors to try to "trade" them. DA146-47. Moreover, the court noted that it was the sense of people who worked in the office that Ciappetta was devoting his efforts to this scheme full time. DA147. When Blue Square shut down, Ciappetta went over to the Westwood scheme and worked there as well. DA146.

As to the nature and seriousness of the offense conduct in its totality, the court stated the following:

> And this, of course, is what is so very tragic in this case and that is hundreds of investors, many of them . . . [s]ome clearly are elderly. Others are post-retirement age. Many of them are not people of means. . . . [T]here's 350 of those people who have been defrauded. It is not merely the loss of the money that I find to be the affect of the victims here. . . . I think it would affect [the victim's] self-worth, the sort of idea that you [the victims] were able to be duped. You were able to be victimized. . . . People feeling stupid, people being embarrassed and owned up to their spouses and the impact of the loss of this money, had the inability to buy medicines, to get cancer treatments, to put their children through college after they save for many years. Each one of those victims is a tragedy. And the amount of money totally is enormous. Over five million dollars. Is a lot of money. A lot of harm.

DA147-48.

After considering the nature and circumstances of the offense, the court considered the history and characteristics of the defendant. DA148. The court reflected upon the defendant's family support and upon his role as a father, a brother and a son. DA148-49. The court noted also that the defendant had attempted to cooperate with the

Government, even if his cooperation did not rise to the level of warranting a departure. DA149-50.

The court then considered the sentencing factor of avoiding unwarranted sentence disparities pursuant to 3553(a)(6). DA150-51. The court stated: "Lastly I haven't mentioned the unwarranted sentencing disparities among defendants with similar records and similar conduct and, of course, the guidelines are the first place to begin in an attempt to avoid unwarranted sentencing disparities." DA150. The court reasoned that there were two co-defendants who were not identically situated and found Ciappetta to be more culpable. DA151 ("It is my finding that Mr. Ciappetta is more culpable.").

However, the court also concluded that the statutory maximum sentence that each defendant was potentially facing was also a factor to be considered in this case and continued as follows:

> However, I don't think that the relative culpability is appropriately reflected and this is without regard to cooperation. . . . I think there is a disparity if you took their relative culpability and look at the two [potential maximum] sentences. In other words, the 60 months for Mr. Ferrera and the 120 months for Mr. Ciappetta. And so to the extent that the sentence needs to avoid an unwarranted sentencing disparity, the court is going to be mindful of its views in that respect. And again I

have gone over in some detail already so I don't want to repeat it all. . . .

DA151.

After explaining its reasoning in detail, the court imposed a below-Guideline term of 100 months' incarceration, followed by 3 years' supervised release, and imposed a restitution order of $3,602,425. DA152.

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), including § 3553(a)(6), and impose a sentence that was sufficient but no greater than necessary to achieve the purposes of sentencing. The district court considered all of the relevant factors, considered Ciappetta's personal circumstances, and explained what led it to impose a below-Guideline sentence and why it chose to impose a sentence of 100 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 100 month below-Guideline sentence was reasonable.

The defendant claims that the 100-month sentence imposed by the district court was unreasonable. He

appears to believe that his sentence was too high, and reasons that his sentence should have been more in line with that of a co-defendant who cooperated with the Government and who the district court found to be not as culpable. The court was specifically mindful of the need to avoid unwarranted sentencing disparities and cited this factor as one reason for imposing a below-Guideline sentence. Although the defendant is unhappy with the extent of the variance in this case, his arguments for a reduced sentence or alternatively a remand are wholly without merit.

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." *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), (attached as addendum).

"[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 has recognized that "[r]easonableness review does not entail the substitution of [its own]

judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion." *Fernandez*, 443 F.3d at 27. As the Supreme Court recently instructed the "explanation of 'reasonableness' review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions." *Gall v. United States*, 128 S. Ct. 586, 594 (2007) (citing *Booker*, 543 U.S. at 260-62). *See also Rita*, 127 S. Ct. at 2465 ("appellate 'reasonableness' review merely asks whether the trial court abused its discretion").

Under this deferential standard, in determining "whether a sentence is reasonable, [the Court] 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 (quoting *Crosby*, 397 F.3d at 114). Furthermore, 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, the standard of review in such situations is the same as for an appeal of a within-Guidelines sentence. *See Gall*, 128 S. Ct. at 596 ("[T]he abuse-of-discretion standard of review applies to appellate review of all sentencing decisions – whether inside or outside the Guideline range."); *United States v. Kane*, 452 F.3d 140 (2d Cir. 2006) (per curiam). In *Kane*, for instance, 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.").

As the Supreme Court recently articulated in *Gall*, the sentencing court "must make an individualized assessment

based on the facts presented. If [the court] decides that an outside-Guidelines sentence is warranted, [the court] must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall*, 128 S. Ct. at 597.

The *Gall* Court further stated:

> [I]f the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.
>
> Practical considerations also underlie this legal principle. "The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record." Brief for Federal Public and Community Defenders et al. as *Amici Curiae* 16. "The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court." *Rita*, [127 S. Ct. at 2469]. Moreover, "[d]istrict

> courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines sentences than appellate courts do." *Koon v. United States*, 518 U.S. 81, 98 (1996).

Id. at 597-98 (footnote omitted).

This Court has recently held that "plain error analysis in full rigor applies to unpreserved claims that a district court failed to comply with § 3553(c)." *United States v. Villafuerte*, 502 F.3d 204, 211 (2d Cir. 2007). "Section 3553(c)'s long-standing requirements present no novel or complex issues meriting greater consideration for its violation: A defense counsel can quickly decide whether he is dissatisfied with the district court's explanation and promptly object." *Id.* (citing *United States v. Keppler*, 2 F.3d 21, 24 (2d Cir. 1993), and *United States v. Romero*, 491 F.3d 1173, 1179 (10th Cir. 2007)).

B. Discussion

In this case, the district court conducted two sentencing hearings and received and reviewed voluminous briefings. Through this process, the defendant requested a non-Guidelines sentence, and the court granted that request when it sentenced him to 100 months' incarceration, a sentence 20 months below the statutory maximum sentence.

The defendant now argues on appeal that his sentence was unreasonable. He argues that the sentencing court

failed to explain how he engaged in more culpable conduct than a co-defendant and further asserts that the court misapplied the law in its determinations of relative culpability. Ciappetta also argues that the district court gave undue weight to the factor of general deterrence and insufficient weight to the defendant's personal characteristics. These arguments are wholly without merit.

1. The court properly considered all the relevant factors, heard arguments, and imposed a reasonable sentence.

Consistent with law and consistent with the teachings of this Court, the district court properly determined and imposed Ciappetta's sentence. The sentencing court calculated the relevant Guidelines range, considered the Guidelines range, along with the other § 3553(a) factors, and imposed a reasonable sentence. *See Fernandez*, 443 F.3d at 26; *Crosby*, 397 F.3d at 113. Accordingly, this Court should not substitute its own judgment for that of the district court's. "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 properly calculated the Guidelines range, DA101-102, and noted that it was obliged to consider the range and the other factors set forth in 18 U.S.C. § 3553(a). DA144-152. The court considered all of the § 3553(a) factors (including the need to avoid unwarranted sentence disparities), and then considered the arguments raised by the defendant himself, his family members, and counsel in

support of a more lenient sentence. *See, e.g.*, DA63-DA65, DA102-17, DA125-27. The court then engaged in a thoughtful and thorough analysis of the defendant's case in light of other sentences that were to be imposed on co-defendants. DA150-52. The record amply reflects that the court raised *sua sponte* the issue of unwarranted sentence disparities and took pains to assure that there would be no such disparities. The court made specific findings as to the relative levels of culpability between Ciappetta and his co-defendants prior to imposing sentence. DA49, DA74, DA117-118, DA150-52. The court then considered the defendant individually and the arguments raised for a below-Guidelines sentence. DA117-18, DA144-52. Finally, the sentencing transcript demonstrates that the district court fully explained the reasons for its sentence. *See* DA144-52.

In short, the record shows that the district court was aware of the statutory requirements, understood the need to consider all the relevant factors and after giving them due consideration, sentenced the defendant to 100 months in prison.

2. The defendant's arguments are without merit.

a. The sentencing court's explanation of its reasons for imposing a below-Guidelines sentence was more than sufficient.

In Point I of his brief, the defendant appears to argue that there is an unwarranted sentence disparity, but then seeks to couch his argument in terms of the sentencing court's failure to explain how Ciappetta engaged in more culpable conduct than one of his co-defendants.

Because Ciappetta never objected to the district court's statement of reasons below, this claim is reviewed for plain error. *See Villafuerte*, 502 F.3d at 211. Here, the district court's lengthy and thoughtful explanation for the sentence it imposed fully complied with its obligations under § 3553(c). Thus, there was no error, much less plain error.

As set forth in detail above, the sentencing court more than adequately explained its conclusions. The court stated on the record why it found Ciappetta to be more culpable and that because of this greater culpability he should receive a greater sentence. *See* DA117-18, DA150-52. However, even after finding Ciappetta to be more culpable, the court saw fit to mitigate any potential disparity by imposing a non-Guidelines sentence more than 15 percent below the Guidelines range. *See* DA117, DA146-47, DA150-52.

Nonetheless Ciappetta claims the record is not sufficiently detailed to explain his greater culpability. As this Court has held, however, "no 'robotic incantations' are required to prove the fact of consideration." *Fernandez*, 443 F.3d at 30 (quoting *Crosby*, 397 F.3d at 113 (internal quotation marks omitted)). Said another way, this Court has "declined to articulate precise standards for assessing whether a district court's explanation of its reason for imposing a non-Guidelines sentence is sufficient. But, in the course of imposing a sentence, the district court's statement of reasons must at least explain – in enough detail to allow a reviewing court, the defendant, his or her counsel, and members of the public to understand – why the considerations used as justifications for the sentence are sufficiently compelling or present to the degree necessary to support the sentence imposed." *United States v. Sindima,* 488 F.3d 81, 86 (2d Cir. 2007) (internal quotations and citations omitted).

Clearly, the facts and discussion on the record here explain in more than enough detail why the justifications are compelling and support the sentence imposed. Here, after finding that Ciappetta and Ferrera were not the same, *i.e.,* that Ciappetta was more culpable, the court explained in detail how it viewed the two differently. DA117-18, DA151-52. Nonetheless concerned about disparate treatment, the court departed downward to bring the sentences closer together, thus benefitting the defendant. *See* DA151 ("And so to the extent that the sentence needs to avoid an unwarranted sentencing disparity, the court is going to be mindful of its views in that respect.").

None of the cases cited by defendant support his assertion that the district court in this case failed to provide sufficient reasons on the record. In *United States v. Wills*, 476 F.3d 103, 109-11 (2d Cir. 2007), a case cited by the defendant, this Court reversed the district court where the lower court provided no assessment of how the defendant was similarly situated to his co-defendants and why that would matter in light of the differences between them. In that case, the court only pointed to facts showing that defendant Wills was not convicted of conduct similar to that of his co-defendants and was not similarly situated, yet the court departed downward significantly. *Id*. at 110. Here, the record reflects the district court's assessments of both how the co-defendants were similar and how they differed. Moreover, the sentencing court in Ciappetta's case fully developed its reasoning.

In *Sindima*, 488 F.3d 81, another case cited by defendant, this Court remanded the case because the sentence was more than three times the top of the Guidelines range and yet the court did not provide sufficient reasoning on the record for such a deviation. That case is simply inapposite. Here the sentence was below the Guidelines range and the reasons on the record were more than sufficient to allow a reviewing court, the defendant, his counsel, or any member of the public to understand the justifications for the sentence. Furthermore, as described above, those explanations and justifications were more than sufficiently compelling for the below-Guidelines sentence imposed.

b. The sentencing court did not misapply the law in its determinations of relative culpability.

The second prong of the defendant's argument in Point I is the assertion that the sentencing court misapplied the law in its determinations of relative culpability. He argues, without authority or support from case law, that the sentencing court engaged in a misapplication of law by relying upon a co-defendant's drug use as a factor for determining relative levels of culpability. He goes on to argue that the court relied on this factor to justify "more prison time for defendant Ciappetta." Brief at 23. This argument is without merit.

First, the court neither misapplied the law nor relied on the conduct of a co-defendant to justify more time for the defendant. To the contrary, the record amply demonstrates the court sought to impose fair and appropriate sentences on each of the defendants and look at each of them individually. *See, e.g.*, DA50 ("I'm left with the eight people who have pled and trying to figure out fair and just sentences."). In doing so, the court sought to determine what conduct was attributable to each defendant. *See generally United States v. Jackson*, 335 F.3d 170, 181 (2d Cir. 2003). The court sought extensive briefing on the matter. *See* GSA31-96. After careful review, *see* DA112-13, DA117) the court found defendant Ciappetta to be more culpable. DA117, DA151 ("It is my finding that Mr. Ciappetta is more culpable.").

The fact that a co-defendant was less involved at points in time of the conspiracy (*e.g.*, was not there every day and was not managing co-conspirators) is irrelevant to the determination that Ciappetta was in fact there everyday and was managing co-conspirators. Moreover, no matter the reason or reasons for a co-defendant being less involved at times during the life of a conspiracy, be it a drug problem, family responsibilities, or simple lack of interest, it is irrelevant to the sentence of Ciappetta. It simply does not change the fact that Ciappetta was involved day in and day out. DA117.

Ciappetta appears to be arguing that his co-defendant should have received a greater period of incarceration, and that his co-conspirator received an unjust benefit by virtue of the fact that he used drugs and as a result took on a lesser role in the scheme. The particular sentencing factors of Ciappetta's co-defendants are irrelevant to him, except as they relate to § 3553(a)(6) and in this regard he certainly cannot claim any error or even any prejudice as he benefitted somewhat from their lower sentences.

c. This Court should not second guess the weight given to any particular factor by the sentencing court.

In his final argument, Ciappetta argues that the court gave undue weight to the factor of general deterrence and inadequate weight to Ciappetta's personal characteristics. Ciappetta does not argue that the court failed to consider any of the factors, or did not understand its obligation to do so. He simply questions the relative weight given to

deterrence, the nature and circumstances of the offense, and his personal history and characteristics, and invites this Court to reweigh those factors on appeal. This Court should reject the invitation.

It is well settled that this Court can not and will not substitute its own judgment for that of the district court. *Kane*, 452 F.3d at 145 ("[The defendant] merely renews the arguments he advanced below . . . and asks us to substitute our judgment for that of the District Court, which, of course, we cannot do."). *Accord Fairclough*, 439 F.3d at 79-80 (a reviewing court "'should exhibit restraint, not micromanagement'") (quoting *Fleming*, 397 F.3d at 100). As this Court reiterated in *United States v. Capanelli*, 479 F.3d 163, 165 (2d Cir. 2007) (per curiam), "[w]hile a district court must consider each § 3553(a) factor in imposing a sentence, the weight given to any single factor 'is a matter firmly committed to the discretion of the sentencing judge and is beyond our review.'" (quoting *Fernandez*, 443 F.3d at 32). Accordingly, this argument should be rejected.

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 100 months in prison. Accordingly, that sentence should be upheld.

Conclusion

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

Dated: January 7, 2008

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

MICHAEL S. McGARRY
ASSISTANT U.S. ATTORNEY

Sandra S. Glover
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,932 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

MICHAEL S. MCGARRY
ASSISTANT U.S. ATTORNEY

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.

* * *

(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.