05-3830-cr

To Be Argued By:
ROBERT M. SPECTOR

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-3830-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

MICHAEL GREEN,
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 in the District of Connecticut (Mark R. Kravitz, J.) after the defendant pleaded guilty to being a previously convicted felon in knowing possession of a firearm. 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), 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

Did the district court properly exercise its discretion when it found that the defendant had sustained a prior felony conviction for a controlled substance offense, as defined by U.S.S.G. § 2K2.1(a)(4)(A)?

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PRELIMINARY STATEMENT

On March 8, 2004, law enforcement officers working with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") executed a state search warrant for the second floor apartment at 241 Alex Street based on two prior controlled purchases of narcotics from a 45-year-old, black, Jamaican male named "Mikey" who resided there. Upon entry, the officers discovered the defendant and his girlfriend inside the apartment. They asked the defendant if there were any guns or drugs there, and he directed them to a gun located in a bathroom closet. Bridgeport Police

Detective Santiago Llanos located a loaded Smith and Wesson, .357 Magnum revolver, Model 19-5 stuffed between the sheets on the third shelf of the bathroom closet. The firearm had been reported stolen out of New York in 1993 and had previously been shipped to a dealer in Valley Stream, New York on March 13, 1985. The defendant, who had sustained two narcotics felony convictions in New York in 1993 and 1996, waived his *Miranda* rights and provided a written statement in which he admitted owning and possessing the gun found in his residence.

The defendant was subsequently charged by indictment in federal court with one count of being a felon in possession of a firearm. He pleaded guilty to that charge, and, at sentencing, the district court imposed an incarceration term of 37 months.

In this appeal, the defendant challenges his sentence on the ground that the district court erroneously relied upon certain evidence in concluding that he had previously been convicted of a "controlled substance offense" as that term is defined by U.S.S.G. § 2K2.1(a)(4) (Nov. 2004). This claim has no merit. In concluding that the defendant had previously been convicted of a controlled substance offense, the district court properly considered the original charging document and a certificate of disposition, both of which revealed that the statute of conviction criminalized the possession with intent to distribute a narcotic substance.

STATEMENT OF THE CASE

On March 8, 2004, the defendant-appellant, Michael Green, was arrested at his residence in Bridgeport, Connecticut on state firearms and narcotics charges. Pre-

Sentence Report ("PSR"), ¶¶ 9, 15.[1] The state charges were dismissed after the defendant was arrested and presented on similar charges in federal court and detained in federal custody. PSR, ¶ 2. On July 7, 2005, a federal grand jury in Bridgeport, Connecticut returned a one-count indictment charging the defendant with possession of a firearm by a previously convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). JA8-JA9.[2] In addition, because the indictment was returned after the Supreme Court's decision in *Blakely v. Washington*, 542 U.S. 296 (2004), but before its decision in *United States v. Booker*, 543 U.S. 220 (2005), it alleged two "Factors To Be Considered For Sentencing." JA8. Specifically, the indictment charged that the defendant had possessed the charged firearm in connection with another felony offense, under U.S.S.G. § 2K2.1(b)(5), and that the defendant had possessed a stolen firearm, under U.S.S.G. § 2K2.1(b)(4). JA8-JA9. On February 2, 2005, the defendant changed his plea to guilty as to the charge in the indictment. JA4 (docket entry). On July 5, 2005, the district court (Mark R. Kravitz, J.) sentenced the defendant to 37 months' imprisonment and three years' supervised release. JA144-JA145.

On July 11, 2005, the defendant filed a timely notice of appeal. JA147. The defendant has been incarcerated in federal custody since his federal arrest on July 1, 2004, and is currently serving his sentence. PSR, ¶ 2.

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[1] The Government has filed the Pre-Sentence Report in a separate, sealed appendix, and citations to this document will reference the appropriate paragraph within the document itself.

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

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 May 11, 2005, sentencing memorandum (GA1-GA17)[3] and the PSR (sealed appendix):

On February 20, 2004, members of the ATF Task Force in Bridgeport met with a cooperating witness ("CW-1") to discuss the allegation that narcotics were being sold out of the second-floor apartment at 241 Alex Street in Bridgeport and to plan for a controlled purchase from that apartment. Members of the ATF Task Force searched CW-1 and provided him/her with ATF funds. CW-1 contacted the target, later identified as the defendant, via cell phone and made arrangements to meet him to purchase crack cocaine. CW-1 then drove to the target residence in an ATF vehicle equipped with monitoring and recording equipment. A black male known to CW-1 as "Mikey," and later identified as the defendant, exited 241 Alex Street and entered CW-1's vehicle. CW-1 then purchased two small plastic baggies of suspected crack cocaine from the defendant for $40. A field test confirmed that the substance in the baggies contained cocaine. After the transaction, CW-1 described Mikey as a black Jamaican male, approximately 5'5" to 5'6" tall, 145 pounds and 45 years old.

On February 26, 2004, members of the ATF Task Force again met with CW-1 to arrange a second controlled

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[3] The Government's Appendix will be cited as "GA" followed by the page number.

purchase from the Jamaican male involved in the February 20 sale. CW-1 again contacted "Mikey" on his cell phone and arranged to pick him up in the ATF vehicle in front of the Alex Street address. CW-1 was searched and given $40 to purchase the narcotics. When CW-1 arrived at the 241 Alex Street address, the defendant entered CW-1's vehicle, and CW-1 purchased two baggies of suspected crack cocaine in exchange for $40. A field test confirmed the presence of cocaine in the substances purchased.

On March 8, 2004, members of the ATF Task Force applied for and received a state search warrant for the second-floor apartment at 241 Alex Street based on CW-1's controlled purchases. At 2:05 p.m. that same day, officers executed the search and seizure warrant at the defendant's residence. They found the defendant and a woman later identified as Kay White, the defendant's girlfriend, inside the apartment. When the defendant was asked if he had any guns or drugs in the apartment, he directed the officers' attention to a gun inside the bathroom. Specifically, he told Bridgeport Police Detective Santiago Llanos that the gun was in the bathroom closet, hidden between the sheets.

Detective Llanos went to the bathroom and located a Smith and Wesson, .357 Magnum revolver, Model 19-5, bearing serial number AEF1253, which had been stuffed between the sheets on the third shelf of the closet. The gun was loaded with four rounds of .357 ammunition and two rounds of .38 special ammunition. An additional two rounds of ammunition were located on that same shelf in the bathroom closet, and a third round was found on the second shelf. A digital scale was found in the kitchen, above the door leading into the living room.

The seized firearm had been reported stolen out of Mineola, New York on April 4, 1993. A trace of the

firearm using its serial number revealed that it had been shipped to a dealer in Valley Stream, New York on March 13, 1985, and that the dealer had sold it on September 23, 1985, to an Ivan Camargo from Astoria, New York.

ATF Special Agent Kim McGrain found $600.00 in cash in a right top dresser drawer in one of the bedrooms. That same drawer contained a CT Identification card in the name of "Michael A. Green," a Sprint phone bill in the name of "Mikey Brown" at the 241 Alex Street address, and an "Ocean Freight Dock Receipt" in the name of Michael Green at this same address. A search incident to arrest of the defendant revealed a small knotted plastic baggie containing suspected crack cocaine and $40 in cash. The substance in the baggie field-tested positive for the presence of cocaine.

At approximately 4:30 p.m., the defendant was transported to the Bridgeport Police Department. Once there, he was interviewed by ATF Special Agent James Sullivan, who read him his *Miranda* rights and had him execute a written waiver of those rights. The defendant then provided a written statement in which he admitted owning and possessing the gun found in his residence. In the statement, he indicated that he was from Jamaica and came to the United States in 1984. He claimed that he "used to sell cocaine," but no longer did and only had cocaine for his own personal use. He then admitted that, approximately one year ago, he had bought a .357 handgun for $200 from "a guy in the neighborhood" and that he kept the gun in his closet "for protection."

Certified copies of conviction from New York confirmed the defendant's 1993 and 1996 felony narcotics convictions. In addition, a fingerprint comparison confirmed that the individual arrested by the Bridgeport

Police on March 8, 2004, was the same individual who had sustained these convictions.

B. Guilty Plea

On February 2, 2005, the defendant agreed to plead guilty to Count One of the Indictment, which charged him with knowing possession of a firearm by a previously convicted felon. JA4-JA5. The parties prepared a written plea agreement (GA18-GA24) which did not include a guideline stipulation, but did include the following offense conduct stipulation:

> On or about March 8, 2004, the defendant, Michael Green, knowingly possessed one Smith and Wesson, Model 19, .357 caliber revolver bearing serial number AEF1253. Prior to March 8, 2004, the defendant had been convicted of two felony offenses in the state of New York: a 1996 conviction for attempted criminal possession of a controlled substance in the third degree and a 1993 conviction for attempted criminal sale of a controlled substance in the third degree. Also prior to March 8, 2004, the subject firearm had been transported in or affected interstate commerce and had been reported as stolen.

GA20. Although the defendant stipulated to the fact of his 1996 New York conviction for attempted criminal possession of a controlled substance, the stipulation itself did not specify under which subsection of the New York statute he had been convicted. GA20, JA49, JA100. Also in the plea agreement, the defendant and the Government reserved their respective rights to challenge the district court's sentence on appeal. GA21. Finally, with respect to the affect of the Supreme Court's decision in *United States v. Booker*, the parties agreed as follows:

> The defendant understands that the Court is required to consider any applicable Sentencing Guidelines as well as other factors enumerated in 18 U.S.C. § 3553(a) to tailor an appropriate sentence in this case. *See United States v. Booker*, 543 U.S. [220] (2005). The defendant expressly understands that the Sentencing Guideline determinations will be made by the Court, by a preponderance of the evidence, based upon input from the defendant, the Government, and the United States Probation Officer who prepares the presentence investigation report. The defendant further understands that he has no right to withdraw his guilty plea if his sentence or the Guideline application is other than he anticipated.

GA19-GA20.

C. Sentencing Proceeding

The district court applied the November 2004 Sentencing Guidelines Manual because the offense conduct occurred in March, 2004, and the defendant did not challenge that decision below or on appeal. The PSR was first disclosed to the parties on April 7, 2005. It calculated the defendant's base offense level as 20 under U.S.S.G. § 2K2.1(a)(4) based on its conclusion that the defendant had been previously convicted of a "controlled substance" offense. PSR ¶ 22. It then added two levels to the base offense level because the charged firearm had been previously reported stolen and four additional levels because the defendant had possessed the firearm in connection with another felony offense. PSR ¶¶ 23-24. After a three-level reduction for acceptance of responsibility, the PSR concluded that the defendant's adjusted offense level was 23, his Criminal History

Category was III, and his resulting incarceration range was 57-71 months. PSR ¶¶ 29, 67.

The district court conducted sentencing hearings on May 12, 2005, June 28, 2005 and July 5, 2005. JA18, JA65, JA108. At the start of the May 12, 2005, sentencing hearing, the court reviewed this Court's decision in *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), the fact that the sentencing guidelines were advisory, the various factors set forth in 18 U.S.C. § 3553(a), and the various considerations relevant to the decision whether to impose a guidelines or non-guidelines sentence. JA27-JA28.

As to the four-level enhancement for use of a firearm in connection with another felony offense, the Government supported the PSR's calculation by arguing that the defendant's conduct in selling drugs from the apartment while keeping a loaded firearm inside the apartment suggested that the firearm was possessed in connection with the distribution of narcotics. JA55. The district court disagreed. It found that the Government had not sustained its burden of proof by a preponderance of the evidence and that the four-level enhancement under U.S.S.G. § 2K2.1(b)(5) did not apply. JA56. Also, the district court denied the defendant's request for a downward departure based upon the argument that Criminal History Category III significantly overrepresented the seriousness of his criminal history. JA58.

As to the enhancement based upon the defendant's prior felony conviction for a controlled substance offense, the Government initially relied upon two exhibits to support the PSR's calculation: (1) a certificate of disposition for the defendant's 1996 felony conviction for attempted criminal possession of a controlled substance in the third degree; and (2) the applicable statutory provision under which the defendant was convicted. GA13-GA16.

The certificate of disposition was a one-page document which indicated that on October 2, 1996, the defendant, using the alias "Michael Wilson," was convicted of attempted criminal possession of a controlled substance in the third degree. JA10. The certificate also indicated that, on October 16, 1996, the defendant was sentenced to six months' incarceration and five years' probation for this conviction. JA10. Finally, the certificate specified that the count of conviction was for "attempted criminal possession of a controlled substance in the third degree," a violation of "PL 110-220.16 01 CF."[4] JA10. The Government argued that this last reference was to subsection one of the applicable statute of conviction, which prohibited the possession of a narcotic with the intent to distribute it. GA7 The Government explained that it had not been able to locate additional court records related to the 1996 conviction and was relying upon the certificate of disposition and the statute of conviction to establish, by a preponderance of the evidence, that the defendant's 1996 conviction had not been for a simple possession of narcotics offense, but for an offense which encompassed an element of narcotics distribution. JA38-JA40, JA43, JA46. The Government also submitted as an exhibit the defendant's NCIC criminal history sheet, which identified his 1996 New York conviction as a conviction under subsection one of section 220.16 and listed the same information for the conviction as the information contained in the certificate of disposition. JA43; Ex. 2 (defendant's criminal history sheet).

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[4] New York Penal Law § 220.16(1) provides, "A person is guilty of criminal possession of a controlled substance in the third degree when he knowingly and unlawfully possesses: 1. a narcotic drug with intent to sell it . . . ."

The defendant raised several arguments in response. He challenged the accuracy of the certificate of disposition and claimed that a judgment of conviction or a transcript of the guilty plea proceeding would provide better information as to the specific offense to which the defendant had pleaded guilty. JA31. He challenged the Government's assumption "that 01" on the certificate of disposition "means subsection 1" of § 220.16, a statute which contains several subsections that refer simply to the possession, not the distribution, of narcotics. GA32. The defendant also claimed that, despite the information contained on the certificate of disposition, the statutory reference on the document could have been based on the charging document and not the offense to which the defendant pleaded guilty. JA32-JA33. The defendant claimed the Government should have to produce "a simple judgment of conviction" or "a copy of the plea proceeding." JA34. At the conclusion of the May 12, 2005, sentencing hearing, the defendant requested a continuance to attempt to locate additional court records related to the 1996 New York conviction. JA61-JA62.

At the start of the June 28, 2005, sentencing hearing, the Government indicated that it had made attempts to locate additional court documents relevant to the defendant's 1996 New York conviction and had located a copy of the entire court file. JA67. Although there was no transcript of the guilty plea proceeding in the file, it did contain various docket sheets and the indictment itself. JA67. At that point, the Government supplemented its previous submission with (1) the original certificate of disposition which contained a raised seal from the Clerk's Office; (2) proffered testimony from the case agent that the certificate of disposition was the court's official record of the judgment in the case; and (3) the indictment that served as the original charging document in the 1996 case. JA67-JA71; Exs. 3 (original certificate of disposition) and 4

(indictment). As to the indictment, the Government noted that it charged the defendant with possession of a controlled substance in the third degree in the second count, alleging that on or about November 29, 1987, "he knowingly and unlawfully possessed a narcotic drug, namely cocaine, with the intent to sell it"; no other count charged the defendant with an offense under that statute. JA12-JA15, JA71-JA73. The Government relied upon the indictment to corroborate the information in the certificate of disposition. JA73.

At that point in the proceeding, the defendant interjected a new claim related to the standard of proof at sentencing. JA75. Specifically, the defendant, relying upon *United States v. Gonzalez*, 407 F.3d 118 (2d Cir. 2005), argued that it was not clearly established in this Circuit that the preponderance of the evidence standard governed factual findings at sentencing.[5] JA74-JA76. The defendant objected to the Court's use of that standard and advocated use of the higher standard of proof beyond a reasonable doubt. JA76. The Government noted that the defendant had stipulated to the standard of proof in the plea agreement, but the defendant insisted that the referenced "acknowledgment" was not a stipulation at all and did not prevent him from advocating a higher standard. JA77-JA78. In the end, the Court found that the defendant had not waived the argument in the plea agreement, but rejected it on its merits and concluded,

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[5] The defendant has not pursued this claim on appeal, nor could he in light of this Court explicit statement in *Gonzalez* that, under *United States v. Booker*, 543 U.S. 220 (2005) and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), the preponderance of the evidence standard governs a district court's factual findings at sentencing. *See Gonzalez*, 407 F.3d at 125.

"I'm going to apply the preponderance of the evidence standard, but the burden is on the government." JA84-JA85.

In support of his underlying argument regarding the 1996 conviction, the defendant relied on the fact that the indictment differed from the certificate of disposition in that it did not charge any "attempt" offenses. JA86. He further asserted:

> We also know that it's possible, and common knowledge demonstrates, that people often plead down to something. It's very possible that he pled down from controlled substance in the first degree, which is Count One, to possession in the third degree, a lesser included in subsection 12 of the statute reflected in the certificate of judgment. . . . So something happened there and unfortunately, the certificate of judgment . . . only says he pled guilty to third degree possession which could either be subsection 1 as the government's arguing, it could be subsection 12 or something else that someone particular in New York law knows better than I do.

JA87. The defendant did not offer a plea transcript or other court document to contradict the certificate of disposition, but merely stated, "[W]e are resting on the fact that it's the government's burden." JA89.

In response to the defendant's argument that he had been convicted of an attempt crime which was not in the indictment, the Government asserted that there was no copy of a substitute charging document in the court file. JA92. The Government also pointed out that the certificate of disposition specifically referred to an

"indictment," not a substitute charging document. JA92.

As a result of the defendant's claim that the statutory citation on the certificate of disposition may not be a reference to the particular subsection under which the defendant was convicted, however, the court granted the Government a brief continuance to allow someone from the New York clerk's office to testify about the document. JA96. In making the request, the Government indicated that it would have had the witness ready to testify at the present hearing if it had understood the defendant's claim as one questioning the meaning of specific terms on the certificate of disposition: "I'm sort of reacting as we go to claims that, in my view, are being made as we go." JA100-JA101. In granting the continuance, the court observed, "[I]f we get to a point where . . . we've gotten the record as best we can, . . . I'll make the call based on the record as it is . . . , but it seems to me when things are so easily confirmable, why should we be guessing or playing a game of gotcha?" JA102.

On July 5, 2005, the sentencing hearing concluded. At the start of the hearing, the Government provided the court with a written stipulation regarding the certificate of disposition. JA109-JA110. Specifically, the parties agreed that, if John Dorety of the Kings County Clerk's Office of the Supreme Court of New York were called as a witness, he would testify as to the following information, "which is not disputed":

> 1) The notation "PL 110-220.16 01" on the "Certificate of Disposition Indictment," which has been marked as Government's Exhibit 3 for purposes of the sentencing hearing, is a reference to subsection 1 of section 220.16 of the New York Penal Law; and

> 2) The "Certificate of Disposition Indictment" is a document prepared from information contained on a computer system maintained by the Clerk's Office. A clerk present in court the day of a proceeding prepares a calendar documenting the dispositions of all the cases that occur in the particular court that day. The calendar is then given to a data entry technician, who inputs the information into the computer system. The information can subsequently be accessed and printed out at any time upon request.

JA16; Ex. 5. The Government further noted that it had a copy of a form entitled "Sentence and Order of Commitment" for the conviction at issue, but that document did not specify a subsection for the statute of conviction. JA111; Ex. 5. The Government also marked as exhibits a court document with the arresting officer's list of charges against the defendant and the fingerprint card associated with the arrest. JA113; Exs. 6 and 7. The defendant replied, "It's still our position that [the certificate of disposition] is subject to error, is not made contemporaneous, and in light of *Shepard* just is not the type of document that the Supreme Court . . . contemplated courts using to determine prior convictions." JA114.

The district court ruled "that the government has shouldered its burden of proving by a preponderance of the evidence that Mr. Green's conviction in 1996 was one that would qualify for the base level of 20 under United States Sentencing [Guidelines] Section 2K2.1(a)(4)(A)." JA116. In so ruling, the court explicitly did not rely upon the defendant's criminal history sheet (exhibit 2), the arresting officer's list of charges (exhibit 7) or the fingerprint card (exhibit 8). JA116. Instead, the court relied upon the indictment and the certificate of disposition to conclude that the offense to which the defendant pleaded guilty was

under subsection 1 of section 220.16, which prohibits the knowing possession with the intent to distribute narcotics. JA116. The court distinguished the case law relied upon by the defendant by finding that "there's no transcript of the plea that would cast doubt on the certificate of disposition" and the defendant in this case was simply "speculating that an error might have occurred." JA117. As a result of this ruling, the defendant's incarceration guideline range was 37-46 months. JA118.

After considering argument from both counsel, the court imposed a sentence of 37 months' incarceration and three years' supervised release. The court took into account "the fact that [the defendant] appear[ed] to be nonviolent," the fact that he "had a serious drug problem," the fact that he "accepted responsibility in this case," the fact that "[g]uns, and stolen guns in particular . . . are a big, big problem for our communities," and, finally, "the need to provide general deterrence and to make sure that people who are felons and who are tempted to have a gun, and a stolen gun in particular, know that the law will deal seriously with that offense." JA136-JA137. The court found that "the guideline range is a reasonable one in this case." JA139. Specifically, the court stated, "[W]hile my heart goes out to you and your family, I don't find the kind of exceptional circumstances that would cause me to think that this is something where there is a warranted [sic] disparity based on the record." JA138.

SUMMARY OF ARGUMENT

The district court properly exercised its discretion in finding that the Government had established by a preponderance of the evidence that the defendant had previously been convicted of a "controlled substance offense" under U.S.S.G. § 2K2.1(a)(4)(A). The certificate of disposition and the original charging document for that

conviction established that the defendant had been convicted under a subsection which prohibited the possession with intent to sell a narcotic drug, and the court's reliance on these documents did not violate the principles set forth in *Shepard v. United States*, 544 U.S. 13, 125 S. Ct. 1254 (2005), and *Taylor v. United States*, 495 U.S. 575 (1990).

ARGUMENT

I. The District Court Properly Concluded That The Defendant Had Sustained A Prior Felony Conviction For A Controlled Substance Offense

The defendant does not dispute that, in 1996, he sustained a felony conviction in New York for attempted criminal possession of a controlled substance in the third degree. Def.'s Brief at 3. Rather, he claims that, at sentencing, the Government did not carry its burden of proving that an element of this conviction involved an intent to sell and thereby qualified as a "controlled substance offense" under U.S.S.G. § 2K2.1(a)(4)(A). Def.'s Brief at 3. Specifically, the defendant challenges the validity and significance of the certificate of disposition for the 1996 conviction, which was a document relied upon by the Government to support the sentencing enhancement. Def.'s Brief at 10. This argument has no merit. The district court in this case was entitled to rely on court records such as the charging document and the certificate of disposition to determine the nature of the prior conviction and conclude that the defendant had been convicted under a subsection of the New York Penal Law which prohibited the possession of a narcotic with the intent to sell it.

A. Governing Law And Standard Of Review

A defendant convicted of being a previously convicted felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1), falls under U.S.S.G. § 2K2.1 for the purposes of the sentencing guidelines. Under that guideline section, a defendant who has previously been convicted of a crime of violence or a controlled substance offense starts at a base offense level of 20. *See* U.S.S.G. § 2K2.1(a)(4)(A). "Controlled substance offense" is defined by reference to U.S.S.G. § 4B1.2(b), under which it "means an offense under federal or state law, punishable by a term of imprisonment of more than one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." U.S.S.G. § 4B1.2(b).

In determining whether a prior conviction qualifies as a "controlled substance offense" under § 2K2.1(a)(4)(A), this Court takes a "categorical approach," looking only to the "fact of conviction" and "the statutory definition of the prior offense rather than to the underlying facts of a particular offense." *United States v. Jackson*, 301 F.3d 59, 61 (2d Cir. 2002). Thus, to qualify as a controlled substance offense, a prior conviction must have as an element, *inter alia*, the distribution of, or possession with the intent to distribute, a controlled substance. *See* U.S.S.G. § 4B1.2(b). To establish the "fact of conviction" and, in particular, the specific statute of conviction, the Government may rely upon court documents such as the indictment, the transcript of the plea proceeding, or the judgment of conviction, but may not rely upon documents such as a police report, which purport to set forth the facts underlying the conviction. *See Shepard*, 125 S. Ct. at 1261.

The Government bears the burden of proving by a preponderance of the evidence that a defendant has sustained a prior felony conviction for a controlled substance offense or a crime of violence. *See Gonzalez*, 407 F.3d at 125. A district court's findings of fact must be accepted on appeal unless clearly erroneous, and its legal conclusion are reviewed *de novo*. *See United States v. Fernandez*, 127 F.3d 277, 283 (2d Cir. 1997). "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985) (internal quotation marks omitted); *United States v. Williams*, 254 F.3d 44, 46 (2d Cir. 2001) (applying *Anderson* standard in sentencing guidelines context). Applications of sentencing guideline provisions which hinge on a district court's factual determinations are likewise reviewed for clear error. *See United States v. Brothers*, 316 F.3d 120, 123 (2d Cir. 2003). The interpretation of a sentencing guideline, however, is generally a question of law subject to *de novo* review. *See United States v. Vasquez*, 389 F.3d 65, 68 (2d Cir. 2004). In the end, a district court's decision involving primarily an issue of fact will be reviewed for clear error, and a district court's decision involving primarily an issue of law will be reviewed *de novo*. *See Vasquez*, 389 F.3d at 75-76.

B. Discussion

The district court properly found that the Government had satisfied its burden of proving that the defendant had previously been convicted of a controlled substance offense, as defined by U.S.S.G. § 4B1.2. Specifically, the Government submitted a charging document and a certificate of disposition which showed that, on October 16, 1996, the defendant sustained a conviction for

"attempted criminal possession of a controlled substance third degree" under § 220.16(1) of the New York Penal Law, which makes it unlawful to "knowingly and unlawfully possess[] . . . a narcotic drug with intent to sell it." Because the statute of conviction prohibits the distribution of a controlled substance, the conviction itself is a "controlled substance offense" under §§ 2K2.1(a)(4) and 4B1.2. *See* U.S.S.G. § 4B1.2 (defining "controlled substance offense" as "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits . . . the possession of a controlled substance . . . with intent to manufacture, import, export, distribute or dispense.").

Although the defendant relies on *Taylor* and *Shepard*, those cases simply stand for the proposition that, in the context of determining whether prior convictions qualify as crimes of violence for purposes of the Armed Career Criminal Act (18 U.S.C. § 924(e)), a district court may not look to the underlying facts of the qualifying convictions, as set forth in a police report or other document outside of the court record. Specifically, the Court in *Shepard* concluded: "We hold that enquiry under the ACCA to determine whether a plea of guilty to burglary defined by a nongeneric statute necessarily admitted elements of the generic offense is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or *to some comparable judicial record of this information*." *Shepard*, 125 S. Ct. at 1263 (emphasis added).

Here, the district court did not violate the dictates of *Taylor* and *Shepard*. It did not rely upon the underlying police report, the PSR, or any other source to ascertain the facts underlying the defendant's 1996 New York conviction. Indeed, the district court specifically refused

to rely upon the defendant's criminal history sheet, the fingerprint card for the underlying arrest, or the court document setting forth the arresting officer's charges. JA116. Instead, the district court did exactly what the Supreme Court in *Shepard* contemplated; it relied on the charging document and the certificate of disposition, both of which are "judicial record[s]" that simply set forth the statute of conviction – a statute which prohibits possession with the intent to distribute narcotics. It was uncontested based upon the parties' stipulation that the certificate of disposition is created by the New York courts, from records maintained by the New York courts, based on the observations by court employees of official New York court proceedings.

The defendant does not challenge the fact of his 1996 conviction; he simply argues that the evidence proffered by the Government did not establish by a preponderance of the evidence which subsection of § 220.16 applied to the prior conviction. Although the defendant concedes, as he must, that the certificate of disposition does specify the subsection, he challenges the accuracy of this document.

In doing so, he relies primarily on the Third Circuit's decision in *United States v. Hernandez*, 218 F.3d 272 (2000). In that case, the district court refused to consider the plea transcript for two underlying New York convictions despite the fact that the transcript conflicted with the certificate of disposition on the key issue of whether the convictions themselves involved simple possession of narcotics, or distribution of narcotics. *See Hernandez*, 218 F.3d at 278. The Court of Appeals reversed the district court, based on its refusal to account for the conflicting evidence presented by the defendant. *See id.* at 279 ("Accordingly, we hold that when deciding whether a prior conviction based on a guilty plea in the state court qualifies as a predicate offense for a sentence

enhancement under the federal sentencing guidelines, *and the accuracy of a Certificate of Disposition for that conviction is seriously called into question*, the federal sentencing judge may, and under the circumstances here must, look to the plea colloquy in the state court to resolve the accuracy of the Certificate of Disposition") (emphasis added). Here, as the district court noted, no such conflicting evidence was presented. The defendant simply speculated that, because the certificate of disposition in *Hernandez* was of questionable validity, the certificate of disposition in this case was likewise unworthy of reliance. Such speculation is not sufficient to counteract the Government's evidence. The certificate of disposition in this case, as corroborated by the charging document itself, established that the defendant was convicted under the subsection of the statute which prohibits the possession with the intent to distribute narcotics.

Most recently, in *United States v. King*, 325 F.3d 110 (2d Cir. 2003), this Court specifically addressed an identical attack on a New York certificate of disposition for a conviction for attempted third degree criminal possession of a controlled substance. Specifically, the district court had relied both on the fact that the charging document and the certificate of disposition had indicated that the conviction fell under subsection one of the statute, which prohibited not simple narcotics possession, but possession with the intent to distribute. *See id.* at 114-115. The defendant in *King*, like the defendant here, claimed that, since he had pleaded guilty to the reduced charge of "attempted criminal possession of a controlled substance in the third degree, his "plea was ambiguous and may have related to some subsection of § 220.16 other than subsection (1)." *Id.* at 114. This Court concluded:

> [T]here is nothing in the record to support this suggestion. Only count one of the indictment

> charged King with cocaine possession in the third degree, and that count alleged that he violated § 220.16(1). Although two additional counts charged King with cocaine possession, those counts charged possession only in lesser degrees. In light of the facts that the certificate of King's conviction shows his plea of guilty to attempted possession in the third degree, that only one count of the indictment charged King with possession in the third degree, and that count cited subsection (1) of § 220.16, we conclude that King's conviction was properly interpreted as one for attempt to violate 220.16(1).

Id. at 114-115.

The defendant also relies upon *United States v. Gutierrez-Ramirez*, 405 F.3d 352 (5th Cir.), *cert. denied*, 126 S. Ct. 217 (2005), and *United States v. Navidad-Marcos*, 367 F.3d 903 (9th Cir.2004), to support his argument that the district court should not have relied upon the certificate of disposition. In both cases, the courts questioned a district court's reliance upon a California state document entitled an "abstract of judgment." The defendant likens the New York certificate of disposition in this case to the California abstract of judgment and argues, without a factual basis and as a general matter, that it is not the type of information that is worthy of reliance, as contemplated by the Supreme Court in *Taylor* and *Shepard*.

The defendant's reliance on *Gutierrez-Ramirez* and *Navidad-Marcos* is misplaced. First, in both cases, the abstract of judgment at issue listed a statutory section that criminalized *both* the simple possession of narcotics and the distribution of narcotics. Indeed, in *Gutierrez-Ramirez*, the original charging document likewise

contained some language from the statute of conviction which did not qualify the charge as one involving "drug trafficking." *See Gutierrez-Ramirez*, 405 F.3d at 359. The key problem in both cases was that each sentencing court relied, not on the portion of the abstract of judgment listing the statute of conviction, but on the portion which purported to summarize the offense as one involving the transportation or sale of narcotics. *See Gutierrez-Ramirez*, 405 F.3d at 357-58; *Navidad-Marcos*, 367 F.3d at 908-909. Here, the specific statutory section listed on the certificate of disposition criminalized *only* the possession with the intent to distribute narcotics, and the district court relied on the document for that fact alone.

Second, unlike California's abstract of judgment, there are no cases attacking the general reliability of the New York certificates of disposition, and these documents do indeed constitute "other judicial record" of information related to a prior conviction, as discussed in *Shepard*. The certificate of disposition in this case did not allow the court to rely upon anything other than the statutory elements of the conviction in determining whether it was for a controlled substance. Specifically, by relying upon the certificate of disposition, rather than a police report or PSR, the district court was not be able to consider the underlying facts of the conviction to categorize its nature. Although the *Hernandez* court criticized the district court's reliance on a New York certificate of disposition, in that case, it did so because the district court refused to consider another judicial record – a transcript of the plea colloquy – which contradicted the document and suggested that the defendant had pleaded guilty to a simple possession of narcotics offense.

Third, in relying upon *Gutierrez-Ramirez* and *Navidad-Marcos*, the defendant fails to cite *United States v. Velasco-Medina*, 305 F.3d 839 (9th Cir. 2002), *cert.*

denied, 540 U.S. 1210 (2004), which is discussed in both *Gutierrez-Ramirez* and *Navidad-Marcos*. In *Velasco-Medina*, a different panel of the Ninth Circuit held that a district court *properly* relied upon an abstract of judgment in determining the nature of a prior burglary conviction, when it did so in conjunction with the original charging document. *See Velasco-Medina*, 305 F.3d at 852-853. That is exactly what the district court did here; it did not consider the certificate of disposition alone, but in conjunction with the original charging document, and, thereby properly determined that the defendant had been convicted of an offense which involved the distribution of narcotics.

CONCLUSION

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

Dated: January 19, 2006

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
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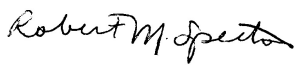

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ADDENDUM

Statutory Provisions

New York Penal Law § 220.16 - Criminal Possession of a Controlled Substance in the Third Degree

A person is guilty of criminal possession of a controlled substance in the third degree when he knowingly and unlawfully possesses:

1. a narcotic drug with intent to sell it; or

2. a stimulant, hallucinogen, hallucinogenic substance, or lysergic acid diethylamide, with intent to sell it and has previously been convicted of an offense defined in article two hundred twenty or the attempt or conspiracy to commit any such offense; or

3. a stimulant with intent to sell it and said stimulant weighs one gram or more; or

4. lysergic acid diethylamide with intent to sell it and said lysergic acid diethylamide weighs one milligram or more; or

5. a hallucinogen with intent to sell it and said hallucinogen weighs twenty-five milligrams or more; or

6. a hallucinogenic substance with intent to sell it and said hallucinogenic substance weighs one gram or more; or

7. one or more preparations, compounds, mixtures or substances containing methamphetamine, its salts, isomers or salts of isomers with intent to sell it and said preparations, compounds, mixtures or substances are of an aggregate weight of one-eighth ounce or more; or

8. a stimulant and said stimulant weighs five grams or more; or
9. lysergic acid diethylamide and said lysergic acid diethylamide weighs five milligrams or more; or

10. a hallucinogen and said hallucinogen weighs one hundred twenty-five milligrams or more; or

11. a hallucinogenic substance and said hallucinogenic substance weighs five grams or more; or

12. one or more preparations, compounds, mixtures or substances containing a narcotic drug and said preparations, compounds, mixtures or substances are of an aggregate weight of one-half ounce or more; or

13. phencyclidine and said phencyclidine weighs one thousand two hundred fifty milligrams or more.

Criminal possession of a controlled substance in the third degree is a class B felony.

Sentencing Guideline Provisions

§ 4B1.2. Definitions of Terms Used in Section 4B1.1

. . .

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by a term of imprisonment of more than one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

. . .

§ 2K2.1. Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition

(a) Base Offense Level (Apply the Greatest):

. . .

(4) 20, if--

(A) the defendant committed any part of the instant offense subsequent to sustaining one felony conviction of either a crime of violence or a controlled substance offense; or

(B) the offense involved a firearm described in 26 U.S.C. § 5845(a) or 18 U.S.C. § 921(a)(30); and the defendant (i) was a prohibited person at the time the defendant committed the instant offense; or (ii) is convicted under 18 U.S.C. 922(d);

. . .