

# 03-1667-cr

*To Be Argued By:*  
CALVIN B. KURIMAI

=====

## United States Court of Appeals

**FOR THE SECOND CIRCUIT**

**Docket No. 03-1667-cr**

UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

GORDON MILLER,  
also known as Shacara Miller,  
*Defendant-Appellant.*

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

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### **BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA**

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## **STATEMENT OF JURISDICTION**

The district court (Ellen B. Burns, J.) had subject matter jurisdiction over this federal criminal case 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 under 28 U.S.C. § 1291 and under 18 U.S.C. § 3742(a).

## **ISSUES PRESENTED FOR REVIEW**

- I. Whether the district court properly departed from criminal history category III to criminal history category IV after it noted, *inter alia*, that the defendant had a lengthy, and increasingly serious, criminal history not taken into account by the Sentencing Guidelines and that the defendant had additional criminal charges currently pending.
  
- II. Whether the defendant's Sixth Amendment rights were violated when the district court departed from criminal history category III to criminal history category IV.

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 03-1667-cr**

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UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

GORDON MILLER,  
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*Defendant-Appellant.*

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

---

## **BRIEF FOR THE UNITED STATES OF AMERICA**

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### **Preliminary Statement**

On October 22, 2003, the defendant-appellant, Gordon Miller, also known as Shacara Miller, was sentenced on one count of a three-count indictment charging a violation of 18 U.S.C. § 1341, use of the mail in furtherance of a scheme to defraud. The United States Probation office calculated the defendant's total offense level at 13 in criminal history category III, based upon four criminal history points for prior convictions, resulting in a guideline



imprisonment range of 18 to 24 months. At sentencing, however, the district court reviewed the defendant's significant criminal background and found, pursuant to U.S.S.G. § 4A1.3, that criminal history category III did not adequately represent the seriousness of the defendant's past conduct and the likelihood of recidivism. Accordingly, over the defendant's objection, the court departed to criminal history category IV with a guideline imprisonment range of 24 to 30 months, and sentenced the defendant to 30 months of imprisonment.

The defendant now contends that the district court failed to adequately articulate the reasons for its departure, and, further, that *Blakely v. Washington* prohibits an upward departure based upon facts not found by a jury. Because the district court properly explained its reasons for departure, and because *Blakely v. Washington* is not applicable, the judgment of the district court should be affirmed.

### **Statement of the Case**

On August 21, 2002, a federal grand jury in Connecticut returned a three-count indictment charging the defendant with use of the mail in furtherance of a scheme to defraud, in violation of 18 U.S.C. § 1341. *See* Government's Appendix ("GA") at 1.

The defendant pleaded not guilty on August 22, 2002 and was released on a \$50,000 non-surety bond.

On December 19, 2002, the defendant changed her plea to guilty. The court set sentencing for March 7, 2003, and the defendant's bond was continued.<sup>1</sup>

On February 13, 2003, the court granted the defendant's motion for a psychological evaluation and continued sentencing until the completion of the evaluation report.

On April 10, 2003, the court revoked the defendant's bond.

On October 22, 2003, the district court (Ellen B. Burns, J.) sentenced the defendant to imprisonment for 30 months to be followed by three years of supervised release. The court ordered restitution in the amount of \$112,292 and imposed a \$100 special assessment. The district court entered judgment on October 23, 2003, and the defendant filed a timely notice of appeal on October 31, 2003. The defendant is presently serving her sentence.

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<sup>1</sup> The defendant is in the process of gender transition from a male to a female, and has been alternatively referred to as both "he" and "she." The defendant is referred to as "he" in the presentence report, but as "she" in the sentencing memoranda, in the sentencing transcript, and in the defendant's brief. For consistency the Government will refer to Miller as "she."

## STATEMENT OF FACTS

### A. The Offense Conduct

From November 15, 1999 through January 27, 2000, Miller implemented a scheme to defraud retail merchants. She enlisted three of her acquaintances, Tyshawn Boykin, Ellesha Hamilton, and Jerry Gary, to participate in the scheme by purchasing merchandise with worthless checks. *See* Presentence Report (“PSR”) ¶¶ 6-7.

Miller, claiming to be an employee of New Haven Savings Bank (“NHSB”), ordered checks in the names Herman Patterson, Jamie Millenson and Darrius K. Melton from John H. Harland Corporation (“Harland”), a printing company. Miller gave Harland numbers that closely approximated valid NHSB checking account numbers, and directed Harland to send the checks to addresses in New Haven and North Haven, Connecticut. Harland shipped the checks from its plant in Enfield, Connecticut by Federal Express. *Id.* ¶ 9.

The defendant gave Boykin, Hamilton, and Gary false identification documents with which they were able to obtain Connecticut Department of Motor Vehicles (“DMV”) identification cards in the names Herman Patterson, Jamie Millenson, and Darius K. Melton, respectively, to be used as proof of their identities when passing the worthless checks. *Id.* ¶ 8. The defendant kept control of the checks, identified the merchandise to be purchased, and directed her confederates to make the appropriate purchases with the fraudulent checks. After

the purchases were made, the merchandise was given to the defendant who sold it, and returned a small amount of the proceeds to Boykin, Hamilton, and Gary. *Id.* ¶ 10; GA 3-4.

The defendant gave Jerry Gary a second set of false identity documents with which Gary obtained another DMV identification card in the name Darrus Milton. PSR ¶ 8. The defendant then created what purported to be business checks drawn on a People's Bank account made payable to Darrus Milton, and directed Gary to cash the checks at a retail business and at a check cashing service, using the Connecticut DMV card as proof of his identity. *Id.* ¶ 11. Each time he cashed a check, Gary gave the proceeds to the defendant who then returned a small portion of the money to him. *Id.*

The total loss resulting from the defendant's scheme was \$112,292.00. Telecheck International, Inc. and Equifax, two companies that had approved the worthless checks when contacted by merchants accepting the checks, lost \$104,806 and \$3,500, respectively. People's Bank lost \$3,986. *Id.* ¶ 12.

Boykin, Hamilton, and Gary were indicted separately for violations of 18 U.S.C. § 1341 based upon their participation in the scheme. *Id.* ¶ 3. Each pleaded guilty and cooperated with the Government.

## **B. The Guilty Plea and Sentencing**

On August 21, 2002, a federal grand jury in New Haven, Connecticut returned a three-count indictment charging the defendant, Gordon Miller, also known as Shacara Miller, with three counts of mail fraud, in violation of 18 U.S.C. § 1341. *See* GA 1. The defendant pleaded guilty on December 19, 2002, and a presentence report was prepared by the Probation Office.

The Probation Office computed the defendant's Offense Level using the November 1, 1998 guidelines because of ex-post facto considerations. PSR ¶ 16. Under U.S.S.G. § 2F1.1(a), the defendant's base level was 6. An additional 6 levels were added because the amount of loss, \$112,292, was more than \$70,000 and less than \$120,000. U.S.S.G. § 2F1.1(b)(1)(G). The offense level also was increased by 2 for more than minimal planning pursuant to §§ 2F1.1(b)(2)(A) and 1B1.1, and by an additional 2 levels for the defendant's role as an "organizer, leader, manager, or supervisor in [a] criminal activity . . ." under § 3B1.1(c), for an adjusted offense level of 16. The adjusted offense level was reduced by 3 levels based upon the defendant's acceptance of responsibility, resulting in a total offense level of 13. *Id.* ¶¶ 17-25.

The Probation Office found that the defendant had accumulated eighteen criminal history points under U.S.S.G. § 4A1.1(c) based upon her prior convictions, however, under Application Note 3 to that section, only four points were counted, placing the defendant in criminal history category III. *Id.* ¶¶ 26-61, 63.

In fact, from 1983 when she was eighteen years old until her sentencing on October 22, 2003, the defendant had been convicted thirty-five times in state court for a variety of offenses including threatening a Connecticut Department of Children and Families social worker (May 7, 1996), assaulting a police officer with a motor vehicle (August 18, 2000), and fraud (March 24, 1994, May 4, 1994, and July 30, 2002). *Id.* ¶¶ 55, 56, 58, 60, 61. Moreover, the PSR reveals that the defendant embarked on the fraudulent check scheme at issue here less than one week after she was arrested for assaulting a police officer. *Id.* ¶¶ 6, 60. In addition, as of the sentencing date, charges against the defendant were pending in Manchester, Connecticut for credit card fraud and larceny, and in New York City for grand larceny, criminal possession of stolen property, and unauthorized use of a motor vehicle based upon a 1993 arrest for which the defendant had failed to appear. *Id.* ¶¶ 67-68.

Other suspected criminal conduct by the defendant not resulting in convictions involved purchasing tools with fraudulent checks, and purchasing automobile insurance policies using false bank accounts and false vehicle identification numbers, and then requesting and receiving refunds totaling \$84,380 from an insurance company. *Id.* ¶¶ 64-65.

The defendant urged the district court to depart downward based upon her extraordinary mental and emotional condition, and because of her extreme vulnerability in a prison setting due to her gender transition. JA 72-77. The district court denied the downward departure, believing it to be inappropriate, JA

67, but did depart laterally to criminal history category IV as had been urged by the Government over the defendant's objection, JA 61-63, 88-93.

In announcing its decision to depart, the court began by expressing its sympathy for the background from which the defendant had come. It noted, however, that that background, and the defendant's vulnerability as a prisoner, presumably had been taken into consideration in state court time and again as evidenced by the lenient sentences repeatedly imposed over the years. JA 61. The court then noted that the defendant had accumulated eighteen criminal history points, but that only four points could be counted under the guidelines. *Id.* In reviewing the defendant's convictions, the court observed that the criminal activity appeared to have escalated over the past twenty years, from criminal mischief to credit card fraud, forgery, robbery, assault on a police officer, larceny, and receiving stolen goods. JA 61-62. The court also took note of pending charges of credit card fraud and grand larceny, both of which were awaiting disposition. JA 62.

The court found that under all those circumstances, criminal history category III did not address the severity of the defendant's criminal record, nor the fact that the defendant might very well engage in similar conduct in the future. *Id.* Therefore, the court concluded that under U.S.S.G. § 4A1.3, criminal history category III did not accurately reflect the seriousness of the defendant's past conduct and the likelihood that such conduct will continue in the future. JA 63. The court then departed to criminal history category IV with a sentencing range of 24 to 30 months, and imposed a sentence at the top of the range 30

months, basing its decision again on the severity of the defendant's past criminal behavior and the likelihood of recidivism. *Id.* In addition, the court placed the defendant on supervised release for three years, and ordered restitution in the amount of \$112,292. JA 63-65.

### **SUMMARY OF ARGUMENT**

I. The district court correctly departed from criminal history category III to criminal history category IV in sentencing the defendant. The defendant was convicted thirty-five times in Connecticut state court between 1983 and the date of her sentencing in this case. Because many of the convictions were entered more than ten years before the defendant's crime in this case, however, only eighteen convictions counted in computing her criminal history category. And under the Sentencing Guidelines, only four points could be counted in computing the defendant's criminal history category because none of the eighteen resulted in a sentence of at least sixty days. With this background, the district court correctly concluded that criminal history category III did not adequately account for the defendant's past criminal conduct or the likelihood for recidivism. In so concluding, the district court correctly considered charges pending against the defendant as well as prior lenient sentences the defendant had received.

In addition, the district court properly and adequately articulated its reasons for the departure from criminal history category III to criminal history category IV. It noted that the defendant had an extensive criminal history and that only a small portion of that history counted under



the Guidelines. Further, the court noted that the defendant's criminal behavior had escalated over the years but that, nevertheless, the defendant had served very little time on her convictions. The district court also noted that charges against the defendant were pending.

The district court specifically observed that criminal history category III did not accurately reflect the seriousness of the defendant's past conduct or the likelihood that she would commit other crimes in the future. Thus, the district court fulfilled its obligation under 18 U.S.C. § 3553(c)(2) to articulate the reasons for its departure from the applicable guideline range and to provide this Court with a sufficient record for review under 18 U.S.C. § 3742(e).

II. The defendant claims that under *Blakely v. Washington*, 124 S. Ct. 2531 (2004), her Sixth Amendment rights were violated because the district court enhanced her sentence under U.S.S.G. § 4A1.3 based on facts not found by a jury beyond a reasonable doubt.

Under *United States v. Mincey*, 380 F.3d 102 (2d Cir. 2004) (per curiam), however, *Blakely* does not apply to the federal sentencing guidelines. Thus the district court's decision to enhance the defendant's sentence based on her lengthy criminal history does not violate her Sixth Amendment rights.

## **ARGUMENT**

### **I. THE DISTRICT COURT CORRECTLY DEPARTED FROM CRIMINAL HISTORY CATEGORY III TO CRIMINAL HISTORY CATEGORY IV AND ADEQUATELY ARTICULATED ITS REASONS FOR THE DEPARTURE**

#### **A. Governing Law and Standard of Review**

Under the Sentencing Guidelines, a defendant's criminal history category is calculated pursuant to U.S.S.G. §§ 4A1.1 and 4A1.2. A horizontal departure to a higher criminal history category is authorized:

If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes . . . .

U.S.S.G. § 4A1.3.

U.S.S.G. § 4A1.3 sets forth five criteria which a court may consider in departing upward:

- (a) prior sentence(s) not used in computing the criminal history category (*e.g.*, sentences for foreign and tribal offenses);

- (b) prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions;
- (c) prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order;
- (d) whether the defendant was pending trial or sentencing on another charge at the time of the instant offense;
- (e) prior similar adult criminal conduct not resulting in a criminal conviction.

*Id.*

In applying these factors, this Court has emphasized that “[t]he ‘criminal conduct underlying *any* conviction that is not counted in the criminal history score’ may be considered by the district court in determining whether a departure is warranted.” *United States v. Franklyn*, 157 F.3d 90, 99 (2d Cir. 1998) (quoting § 4A1.2, Application Note 6) (emphasis added). *Id.* (upholding upward departure based on three outdated juvenile convictions that had not been counted in the defendant’s criminal history category).

Thus, for example, an outdated adult misdemeanor conviction can support an upward departure. *See United States v. Delmarle*, 99 F.3d 80, 85 (2d Cir. 1996). In *Delmarle*, the defendant pleaded guilty to shipping or transporting child pornography. His criminal history

category, as calculated under U.S.S.G. § 4A1.2, was I. That calculation, however, did not take into account an outdated misdemeanor conviction for unlawfully subjecting a fifteen year old to sexual contact or a foreign conviction for sexual misconduct with three young boys. This Court affirmed the district court's departure from criminal history category I to category III based upon its finding that category I significantly underrepresented the defendant's past criminal behavior and the likelihood that he would commit future similar crimes. *Id.* at 82, 84.

The five factors listed in § 4A1.3 are not the only factors that may support an upward departure, however. In considering the adequacy of a defendant's criminal history category, "a sentencing court may consider information outside the five express factors of Section 4A1.3 as a basis for departure as long as the information is reliable." *United States v. Cox*, 299 F.3d 143, 147 (2d Cir. 2002) (court could base departure on a 1998 dismissed conviction). For example, this Court recognized that a propensity for future criminal behavior may be indicated by "uncharged criminal conduct . . ." and thus upheld an upward departure based in part on that ground. *United States v. Gayle*, 389 F.3d 406, 410 (2d Cir. 2004).

In addition, this Court has held that prior lenient sentences may support an upward departure in criminal history categories. *See id.* (upholding upward departure based in part on fact that Gayle had been beneficiary of light prison sentences and yet continued to "flout the laws of this country" (internal citations omitted)). The frequency of prior convictions, when viewed in conjunction with lenient sentences received for those

convictions, suggests a likelihood for recidivism that warrants an upward departure. *United States v. Diaz-Collado*, 981 F.2d 640, 644 (2d Cir. 1992) (departure from criminal history category IV to category V resulting in four-month sentence increase was reasonable).

The Sentencing Guidelines expressly encourage departures based on the “[i]nadequacy of a defendant’s criminal history category.” *Gayle*, 389 F.3d at 409. See *United States v. Broderon*, 67 F.3d 452, 458 (2d Cir. 1995) (quoting *United States v. Rivera*, 994 F.2d 942, 948-49 (1st Cir. 1993) (noting that courts distinguish between “encouraged” departures, where the guidelines list factors to be considered, “discouraged” departures, where the Guidelines have already incorporated the factors in question, and forbidden factors, where the factors in question cannot justify a departure).

When a district court departs under § 4A1.3, it must state “the specific reason for the imposition of a sentence different” from the applicable guideline range. 18 U.S.C. § 3553(c)(2). Thus, a district court must provide “*some explanation* of its reasoning” such as will enable an appellate court to assess whether the departure was justified. *United States v. Thorn*, 317 F.3d 107, 131 (2d Cir.) (emphasis added), *cert. denied*, 538 U.S. 1064 (2003).

Under 18 U.S.C. § 3742(e), this Court “review[s] *de novo* whether a departure is justified by the facts of the case . . . and review[s] a district court’s factual findings [in support of that departure] for clear error.” *United States*

*v. Santiago*, 384 F.3d 31, 35 (2d Cir. 2004) (internal quotations omitted).

## **B. Discussion**

### **1. The District Court Correctly Departed From Criminal History Category III to Criminal History Category IV**

The defendant in this case was convicted in Connecticut state court thirty-five times between 1983 and the date of sentencing for the instant offense, October 22, 2003. Pursuant to U.S.S.G. § 4A1.1, Application Note 3, only convictions occurring within ten years of the defendant's commencement of the instant offense, November 1999, could be counted in computing the defendant's criminal history category, resulting in eighteen criminal history points based upon that number of convictions. PSR ¶¶ 44-61. A mere four points, however, could be counted in calculating the defendant's criminal history category under § 4A1.1(c) because none of the eighteen convictions during that time period resulted in a sentence of imprisonment of at least sixty days.

The district court, therefore, correctly concluded that criminal history category III (based upon four to six criminal history points) was inadequate. JA 62. The court based that decision on "reliable information" set forth in the presentence report, specifically, the undisputed information on the defendant's convictions for criminal impersonation, credit card fraud, forgery, robbery, assault on a police officer, and receiving stolen goods. U.S.S.G. § 4A1.3; JA 62; PSR ¶¶ 44-61. In addition, although the

district court did not expressly rely on the defendant's "outdated" prior convictions, PSR ¶¶ 27-43, those numerous convictions also supported the upward departure to criminal history category IV. *See Delmarle*, 99 F.3d at 85.

The departure was further warranted because, as noted by the district court, criminal history category III did not adequately address the likelihood of future similar criminal conduct by the defendant. JA 62; U.S.S.G. § 4A1.3; *see Gayle*, 389 F.3d at 411; *Diaz-Collado*, 981 F.2d at 644. The defendant's propensity for future criminal conduct was supported by the uncharged criminal conduct documented in the PSR involving the defendant's fraudulent use of stolen checking account information to purchase power tools.<sup>2</sup> *See* PSR ¶ 64; *Gayle*, 389 F.3d at 411.

In addition, as noted by the district court, the departure was appropriate because the defendant had received lenient sentences in the past and her criminal conduct had escalated over the last twenty years. JA 61-62. After describing this escalation in criminal conduct, the district court also noted, in support of the upward departure, that the defendant currently had pending charges for credit card fraud and grand larceny. *See United States v. Sturgis*, 869 F.2d 54, 57 (2d Cir. 1989) (upholding departure based in part on pending felony convictions).

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<sup>2</sup> The PSR also documented additional uncharged criminal conduct involving an insurance fraud scheme. PSR ¶ 65. The defendant denies she was involved in this scheme. *See* JA 38.

Finally, the defendant's criminal history warranted an upward departure to category IV because she committed the check fraud scheme at issue here less than one week after she was arrested for assaulting a police officer. *See* PSR ¶¶ 6, 60; U.S.S.G. § 4A1.3(d) (upward departure may be based on information that the defendant was pending trial or sentencing on another charge at the time of the offense).

The defendant speculates that “[s]ection 4A1.3 enhancements seem to have been designed for defendants with prior violent or otherwise very serious offenses” and contends that “[t]he vast majority of [the defendant’s] prior history consisted of minor or non-violent offenses.” App. Br. 12. The defendant, however, cites no authority for this limitation on § 4A1.3, and in any event, her significant criminal history hardly qualifies as “minor.” At least three of the defendant’s convictions were for felonies, including a conviction for robbery in the third degree, Conn. Gen. Stat. § 53a-136, for which the defendant received a one-year suspended sentence on September 5, 1995, and convictions for assault on a police officer and risk of injury, Conn. Gen Stat. § 53a-167(c) and § 53-21, respectively, which resulted in the imposition of concurrent five-year suspended sentences on August 18, 2000. Had the defendant received at least a thirteen month sentence on any one of those convictions, or at least sixty days on two of them, she would have received three or four additional criminal history points which would have placed her in criminal history category IV. U.S.S.G. § 4A1.1(a) and (b). The lenient sentences received by the defendant for those convictions alone support an upward



departure. *See Gayle*, 389 F.3d at 410; *Diaz-Collado*, 981 F.2d at 644.

Finally, the defendant argues that the departure was improper because the district court based the upward departure on a factor -- the defendant's mental and emotional condition -- that is traditionally a factor supporting *downward* departures. App. Br. 13. The district court did not depart upward based on the defendant's mental condition, however. The district court acknowledged the defendant's background and situation not as a basis for upward departure, but rather merely to suggest a possible reason for the state courts' previous lenient treatment of the defendant. JA 61. There was nothing improper in the district court's attempt to make sense of the consistently lenient sentences imposed by the state courts.

Considering the defendant's remarkable criminal background, the court correctly departed from criminal history category III to category IV, and the resulting six-month increase in the defendant's sentence was reasonable. *Diaz-Collado*, 981 F.2d at 644.

## **2. The District Court Adequately Articulated Reasons for the Departure**

Judge Burns began the sentencing by recognizing the defendant's unfortunate background and her "unfortunate situation through -- up to today, really." JA 61. She then noted the defendant's lengthy criminal record, and that she had served very little time, opining, with good reason, that courts were not quite certain what to do with a prisoner

like the defendant (who was undergoing gender transition from a male to a female). *Id.*

The court considered that the defendant had 18 criminal history points, only four of which could be counted under the guidelines, and stated that the defendant's criminal activity seemed to have "escalated over the period of the last 20 or so years," noting nineteen of the defendant's convictions. JA 61-62. The court noted that the defendant's convictions moved from criminal mischief to credit card fraud, forgery, robbery, assault on a police officer, larceny, and receiving stolen goods. Judge Burns also observed that there were charges pending against the defendant for credit card fraud, grand larceny, and the charge for which she was about to be sentenced, mail fraud. JA 62. Plainly, the convictions and pending charges reviewed by the court supported its observation of escalating criminal behavior by the defendant.

Judge Burns then stated "[u]nder those circumstances it seems to me that the criminal history category 3, which everyone agrees she falls into, does not address the severity of her criminal record, nor the fact that we can expect this Defendant may very well engage in conduct of this kind in the future." *Id.* Having clearly articulated the factors it had considered, the court stated "[a]ccordingly, it's my judgment that under Section 4[A]1.3, criminal history category 3 does not accurately reflect the seriousness of her past conduct and the likelihood that she will commit other crimes in the future." JA 63. Thereupon, the court departed upward to criminal history category 4, with a sentencing range of 24 to 30 months, and sentenced the defendant to the maximum term of

imprisonment, 30 months “because . . . of the severity of the past criminal conduct and what the Court believes is a likelihood of recidivism.” *Id.*

The district court’s statement on the record is far more than “some explanation of its reasoning,” *Thorn*, 317 F.3d at 131, by which this Court can determine “whether the departure was justified by the facts of the case,” *Gayle*, 389 F.3d at 408. It plainly set forth its rationale for concluding that criminal history category III underrepresented the seriousness of the defendant’s past criminal conduct and the likelihood of recidivism, warranting an upward departure to criminal history category IV.

The defendant, nonetheless, argues that the district court’s statement of reasons for the departure was inadequate, relying primarily on *United States v. Cervantes*, 878 F.2d 50 (2d Cir. 1989). That reliance is misplaced. In *Cervantes*, the defendant was convicted of importing cocaine. He had a prior criminal record beginning with a 1981 arrest for which he had forfeited his bond. *Id.* at 51-52. His criminal history also included arrests in Florida for obstruction of justice, resisting arrest, and passing a worthless check, an indictment in Florida for fraud, and an indictment in New York for conspiracy and attempted escape from the Metropolitan Correctional Center. *Id.* at 52.

At sentencing, the district court told the defendant and the Government that it would sentence Cervantes on the importation charge within the guidelines. *Id.* The district court then stated, as the sole basis for its departure, the

following: “This is a pretty bad record. A man has jumped bail, went to Florida; quite apart from what is happening in the Southern District, which I will just pass over. I think an upward departure is warranted.” The court sentenced Cervantes, departing from a guideline range of 33-41 months, to 60 months’ imprisonment. *Id.*

This Court found Cervantes’ sentencing deficient for several reasons. It found that the district court failed “even to attempt a minimal version of the detailed [analytical] process prescribed by § 4A1.3” thereby rendering Cervantes’ sentence unlawful. *Id.* at 54. Further, the district court failed to even mention § 4A1.3 as authority for the departure, leading this Court to question whether it had even considered that section. This Court thus was left with an “inability to discern reasons for such a significant deviation” from Cervantes’ guideline range. *Id.* at 54-55. Finally, this Court was concerned that the district court had failed to provide sufficient notice to Cervantes that it intended to depart from the guidelines and thus that Cervantes might not have had sufficient opportunity to contest the departure. *Id.* at 55-56.

The many deficiencies found by this Court in the Cervantes sentencing stand in stark contrast to the sentencing in the instant case. In this case, Judge Burns plainly identified U.S.S.G. § 4A1.3 as authority for departing from the defendant’s guideline range. The court reviewed the defendant’s criminal background, and specifically found that criminal history category III underrepresented the severity of the defendant’s past criminal conduct and the likelihood of recidivism. *See supra* at 8. After reviewing the defendant’s extensive

criminal history, the court upwardly departed only one level, leading to only a six month increase in the defendant's sentence. Finally, there is no suggestion here that the defendant lacked the opportunity to contest the upward departure. The Government specifically requested the upward departure in its Sentencing Memorandum, filed one month prior to sentencing. *See* JA 88. In sum, the sentencing in this case had none of the flaws present in the *Cervantes* case.

The other cases cited by the defendant are similarly unhelpful to her. *United States v. Thorn*, for example, involved a downward departure, where the district court simply stated that “Thorn’s criminal history was ‘overrepresented’ and was ‘better represented by Criminal History Category I.’” 317 F.3d at 129 (quoting district court). The district court made *no* findings to support this conclusion, however, and thus this Court remanded the case to the district court. *Id.* at 131. Here, by contrast, Judge Burns made findings that more than fully support her conclusion, and accordingly, *Thorn* provides no guidance to this case.

And in two cases relied on by the defendant, this Court remanded for resentencing because the district courts had departed upward based on criminal history and likelihood of recidivism, but without expressly relying on -- or following the then-required procedures for -- § 4A1.3 departures.<sup>3</sup> In both cases, instead of departing under

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<sup>3</sup> The step by step approach to departing under § 4A1.3 which this Court found lacking is no longer required “as long  
(continued...) ”

§ 4A1.3, the district courts purported to depart *vertically* under § 5K2.0. This Court held that a court may not avoid the requirements of § 4A1.3 in this manner. *See United States v. Deutsch*, 987 F.2d 878 (2d Cir. 1993) (remanding because district court stated that it was departing vertically under § 5K2.0, but then departed based on past criminal behavior and likelihood for recidivism, which are factors to be considered under § 4A1.3, without following the procedures required for a § 4A1.3 departure); *United States v. Tropicano*, 50 F.3d 157, 162-63 (2d Cir. 1995) (seven-level departure under § 5K2.0 based on recidivism vacated and remanded for consideration of departure under § 4A1.3). Here, there is no question that the district court departed under § 4A1.3 and that it followed all appropriate procedures for doing so. *Deutsch* and *Tropicano* do not help the defendant.

In this case, the district court’s analysis of the facts warranting an upward departure, and its explanation for departing upward, are much like the district court’s analysis and explanation in *United States v. Ashley*, 141 F.3d 63, 67-68 (2d Cir. 1998). In *Ashley*, the district court noted that the defendant had accumulated eighteen convictions between 1984 and 1989, and then he had been incarcerated for five years. The court noted also that as soon as he was released, “he was arrested again two or three times.” *Id.* at 67. The court then stated that it had considered the nature of prior offenses, and, “[w]hile many of them are for less serious things, such as stealing tokens

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<sup>3</sup> (...continued)  
as the reasons for such a departure are fully explained.” *United States v. Simmons*, 343 F.3d 72, 78 (2d Cir. 2003).

and petty larceny, one of the prior convictions was for attempted robbery during which a victim was hit in the head with a radio,” and “[a]nother conviction was for assault with intent to cause serious physical injury.” *Id.* at 67-68. The court then pointed to occasions that the defendant had resisted arrest or assaulted the arresting officer, on one of these occasions attempting to take the arresting officer’s gun. *Id.* at 68. It also noted that eight convictions were for narcotics offenses.

On this record, the court found that criminal history category VI did not “reflect the seriousness of Mr. Ashley’s past criminal conduct or the likelihood that he will break the law again,” *id.*, and upwardly departed four levels in Category VI, which, with adjustments, yielded a guideline range of 84 to 105 months. This Court affirmed the district court’s § 4A1.3 upward departure, noting approvingly that the district court had considered both the number and nature of the defendant’s prior offenses and the high likelihood of future recidivism given the defendant’s past record of recidivism. *Id.* at 70.

Similar to the district court’s analysis in *Ashley*, in the instant case, Judge Burns looked to the high number of the defendant’s convictions and to the nature of those convictions, ultimately concluding that the defendant’s criminal behavior seemed to have “escalated [in severity] over the period of the last 20 or so years.” JA 61-62. Judge Burns concluded, as did the district court in *Ashley*, that pursuant to § 4A1.3, criminal history category III did “not accurately reflect the seriousness of [the defendant’s] past conduct and the likelihood that she [would] commit other crimes in the future.” JA 63; *Ashley*, 141 F.3d at 68.

Also, as in *Ashley*, Judge Burns' conclusion was "well supported by . . . [the defendant's] record." *Ashley*, 141 F.3d at 70.

The defendant, nevertheless, complains dismissively that, at sentencing, Judge Burns "merely rattled off the names of the prior offenses . . .," saying "nothing about the nature of the prior incidents . . . about the facts underlying those incidents . . . [or] about the context of those incidents in relation to the present charges." App. Br. 10. There was nothing about the defendant's prior convictions, however, that would require extended discussion. And in any event, Judge Burns *did* discuss the nature of the incidents when she noted that the defendant's criminal conduct had escalated over the years.

More fundamentally, the defendant cites no authority for the proposition that the court was required to discuss the *facts* or *contexts* underlying the defendant's prior convictions. Indeed, this Court rejected a similar argument in *United States v. Simmons*, 343 F.3d 72 (2d Cir. 2003). In that case, the defendant argued that the district court improperly departed upward based on his previous foreign convictions for assault and extortion because the court had no reliable information about those convictions beyond the name of the offense. This Court rejected that argument, noting that while background information for those convictions was not available "the nature of those offenses was not obscure." *Id.* at 79.

As in *Simmons*, there is nothing "obscure" about the defendant's prior convictions that would require additional discussion or consideration. She has prior convictions for



crimes such as fraud, larceny, robbery, and assault. The precise facts underlying those convictions are not important; the important point for the district court is that these convictions added up to a remarkably long criminal record and demonstrated a high likelihood of recidivism.

Finally, the defendant argues that “[t]he court also did not rely upon any of the five enumerated factors in § 4A1.3.” App. Br. 10-11. The defendant is mistaken. The court specifically considered factor (a) under § 4A1.3 (prior sentences not used in computing the criminal history), when it took into account the defendant’s convictions during the ten years prior to the commencement of the instant offense which were not counted in calculating her criminal history category. JA 61-62. In addition, although the court did not expressly identify this factor, it could have noted that the defendant’s history warranted upward departure because she committed the instant offense while awaiting trial or sentencing on another charge. § 4A1.3(d); *see* PSR ¶¶ 6, 60. Finally, as described more completely above, *see supra* at 15-17, the district court properly considered factors in addition to the five listed in § 4A1.3, as permitted by this Court in *Cox*, 299 F.3d at 147.

Based upon the foregoing, Judge Burns specifically found that criminal history category III did not accurately reflect the seriousness of the defendant’s past conduct and the likelihood of recidivism, and horizontally departed to criminal history category IV. The district court fulfilled its obligation under 18 U.S.C. § 3553(c)(2) to articulate the reasons for its departure from the defendant’s applicable

guideline range, and to provide this Court with a sufficient record for review under 18 U.S.C. § 3742(e).

## **II. THE DISTRICT COURT'S SENTENCE DID NOT VIOLATE THE DEFENDANT'S SIXTH AMENDMENT RIGHTS**

The defendant claims that the district court's sentence violated her rights under the Sixth Amendment because it was based on facts not found by the jury beyond a reasonable doubt. Specifically, she relies upon the Supreme Court's recent decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), and argues that the district court incorrectly enhanced her sentence under U.S.S.G. § 4A1.3 based upon facts not proven to a jury beyond a reasonable doubt. App. Br. 14.

This Court's recent decision in *United States v. Mincey*, 380 F.3d 102 (2d Cir. 2004) (per curiam), is directly on point. In *Mincey*, this Court decided that it would not apply *Blakely* to the federal sentencing guidelines, so that enhancements and departures provided for under the guidelines need not be proven to a jury beyond a reasonable doubt. Specifically, the Court stated:

We therefore reject appellants' arguments that, in this Circuit, the Sixth Amendment now requires every enhancement factor that increases a Guidelines range to be pleaded and proved to a jury beyond a reasonable doubt. Unless and until the Supreme Court rules otherwise, the law in this Circuit remains as stated in *Garcia, Thomas*, and our other related case law. We conclude that the

district court did not err in sentencing defendants in accordance with the Guidelines as previously interpreted by this Court.

In so holding, we expect that, until the Supreme Court rules otherwise, the courts of this Circuit will continue fully to apply the Guidelines.

*See also Gayle*, 389 F.3d at 411.

The Supreme Court will address the issue squarely when it decides the appeals in *United States v. Booker*, 04-104, and *United States v. Fanfan*, 04-105, argued in October 2004. This Court, therefore, in accordance with its August 6, 2004 memorandum, should withhold the mandate in this case until after the Supreme Court's decision in the *Booker/Fanfan* cases and, depending on the outcome of those cases, permit either party to file supplemental petitions for rehearing in this case with appropriate briefing at that time.

## CONCLUSION

Therefore, for all the reasons set forth above, the judgment of the district court should be affirmed.

Dated: January 10, 2005

Respectfully submitted,

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## **GOVERNMENT'S APPENDIX**

**ADDENDUM OF STATUTES  
AND GUIDELINES**

## 1998 Federal Sentencing Guidelines

### §4A1.1. Criminal History Category

The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

(a) Add **3** points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add **2** points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add **1** point for each prior sentence not counted in (a) or (b), up to a total of **4** points for this item.

(d) Add **2** points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add **2** points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a sentence. If **2** points are added for item (d), add only **1** point for this item.

(f) Add **1** point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was considered related to another sentence resulting from a conviction of a crime of violence, up to a total of **3** points for this item. *Provided*, that this item does not apply where

the sentences are considered related because the offenses occurred on the same occasion.

**§4A1.3. Adequacy of Criminal History Category (Policy Statement)**

If reliable information indicates that the criminal history category does not adequately reflect the seriousness of the defendant's past criminal conduct or the likelihood that the defendant will commit other crimes, the court may consider imposing a sentence departing from the otherwise applicable guideline range. Such information may include, but is not limited to, information concerning:

- (a) prior sentence(s) not used in computing the criminal history category (*e.g.*, sentences for foreign and tribal offenses);
- (b) prior sentence(s) of substantially more than one year imposed as a result of independent crimes committed on different occasions;
- (c) prior similar misconduct established by a civil adjudication or by a failure to comply with an administrative order;
- (d) whether the defendant was pending trial or sentencing on another charge at the time of the instant offense;
- (e) prior similar adult criminal conduct not resulting in a criminal conviction.

A departure under this provision is warranted when the criminal history category significantly under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit further crimes. Examples might include the case of a defendant who (1) had several previous foreign sentences for serious



offenses, (2) had received a prior consolidated sentence of ten years for a series of serious assaults, (3) had a similar instance of large scale fraudulent misconduct established by an adjudication in a Securities and Exchange Commission enforcement proceeding, (4) committed the instant offense while on bail or pretrial release for another serious offense, or (5) for appropriate reasons, such as cooperation in the prosecution of other defendants, had previously received an extremely lenient sentence for a serious offense. The court may, after a review of all the relevant information, conclude that the defendant's criminal history was significantly more serious than that of most defendants in the same criminal history category, and therefore consider an upward departure from the guidelines. However, a prior arrest record itself shall not be considered under §4A1.3.

There may be cases where the court concludes that a defendant's criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes. An example might include the case of a defendant with two minor misdemeanor convictions close to ten years prior to the instant offense and no other evidence of prior criminal behavior in the intervening period. The court may conclude that the defendant's criminal history was significantly less serious than that of most defendants in the same criminal history category (Category II), and therefore consider a downward departure from the guidelines.

In considering a departure under this provision, the Commission intends that the court use, as a reference, the guideline range for a defendant with a higher or lower criminal history category, as applicable. For example, if the court concludes that the defendant's criminal history

category of III significantly under-represents the seriousness of the defendant's criminal history, and that the seriousness of the defendant's criminal history most closely resembles that of most defendants with Criminal History Category IV, the court should look to the guideline range specified for a defendant with Criminal History Category IV to guide its departure. The Commission contemplates that there may, on occasion, be a case of an egregious, serious criminal record in which even the guideline range for Criminal History Category VI is not adequate to reflect the seriousness of the defendant's criminal history. In such a case, a departure above the guideline range for a defendant with Criminal History Category VI may be warranted. In determining whether an upward departure from Criminal History Category VI is warranted, the court should consider that the nature of the prior offenses rather than simply their number is often more indicative of the seriousness of the defendant's criminal record. For example, a defendant with five prior sentences for very large-scale fraud offenses may have 15 criminal history points, within the range of points typical for Criminal History Category VI, yet have a substantially more serious criminal history overall because of the nature of the prior offenses. On the other hand, a defendant with nine prior 60-day jail sentences for offenses such as petty larceny, prostitution, or possession of gambling slips has a higher number of criminal history points (18 points) than the typical Criminal History Category VI defendant, but not necessarily a more serious criminal history overall. Where the court determines that the extent and nature of the defendant's criminal history, taken together, are sufficient to warrant an upward departure from Criminal History Category VI, the court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Criminal History

Category VI until it finds a guideline range appropriate to the case.

However, this provision is not symmetrical. The lower limit of the range for Criminal History Category I is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the guideline range for Criminal History Category I on the basis of the adequacy of criminal history cannot be appropriate.