06-2343-cr

To Be Argued By:
JOHN A. MARRELLA

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-2343-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

MAURICE YOUMANS,
Defendant-Appellant.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Christopher F. Droney, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. Judgment entered on May 12, 2006. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on May 10, 2006. This Court has appellate jurisdiction over the challenge to the defendant's sentence pursuant to 18 U.S.C. § 3742(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in imposing a within-Guidelines sentence by not providing a detailed explanation for declining to impose a sentence below the Guidelines range.

2. Whether the district court's sentence at the low end of the Guidelines range was reasonable.

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Preliminary Statement

On June 14, 2005, defendant-appellant Maurice Youmans pled guilty to possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). The district court (Christopher F. Droney, J.) held a sentencing hearing on April 27, 2006. Although there was no dispute as to the applicable Sentencing Guidelines range, the defendant requested a sentence below that range, arguing that his particular characteristics warranted

either a downward departure or a non-Guidelines sentence. The district court considered the defendant's arguments and sentenced him principally to a term of imprisonment of 92 months, which was the low end of the applicable range of 92 to 115 months, and well below the statutory maximum sentence of 120 months.

On appeal, the defendant raises two related issues. First, he claims that the district court failed to explain adequately why it rejected his arguments for a downward departure or a non-Guidelines sentence. Second, he claims that the sentence imposed by the district court was not reasonable. For the reasons that follow, the defendant's claims should be rejected, and the judgment should be affirmed.

Statement of the Case

On May 3, 2005, a federal grand jury in the District of Connecticut returned an indictment against the defendant, charging him with possession of a firearm by a convicted felon (Count One) and possession of ammunition by a convicted felon (Count Two), in violation of 18 U.S.C. § 922(g)(1). The indictment also contained a forfeiture allegation. (JA 9-11).[1]

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[1] References are as follows:

Joint Appendix ("JA ___")

Sealed Appendix ("SA ___")

On June 14, 2005, the defendant entered a guilty plea to Count One of the indictment, pursuant to a written plea agreement. (JA 12-19).

On April 27, 2006, the district court imposed a 92-month term of imprisonment, to be followed by a three-year term of supervised release. (JA 62-63). Judgment entered on May 12, 2006. (JA 5). On May 10, 2006, the defendant filed a timely notice of appeal. (JA 65).

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

On January 9, 2005, members of the New Haven Police Department responded to 36 Oakridge Drive, Apartment 20, New Haven, Connecticut, on a report of a domestic dispute. The complainant, Marianne Jackson, told officers that at approximately 3:00 a.m. that day, she had been arguing with her daughter, Yvonne Wright, and Wright's live-in boyfriend, Maurice Youmans. According to Jackson, both Wright and Youmans had recently been released from prison and, having nowhere else to go, had come to live at Jackson's residence. Jackson told officers that Wright and Youmans had taken over her bedroom. Although Jackson still lived at the residence, Wright and Youmans would allow her to enter her bedroom only to retrieve clothing. (SA 4-5).

With Jackson's consent, the officers searched the apartment, including the bedroom where Wright and Youmans were staying. Officers searching the bedroom found and seized a Hi-Point nine-millimeter

semiautomatic pistol behind a dresser. The gun had an obliterated serial number and a round in the chamber. Youmans, who was present during the search, spontaneously stated that the gun belonged to him. Officers also found approximately 42 rounds of Winchester nine-millimeter ammunition. Youmans was arrested at that point. (SA 5).

In a subsequent interview at the New Haven Police Department, Youmans admitted that he had purchased the firearm for $400 and that he knew it had an obliterated serial number. He stated that he possessed the firearm for self-defense. Youmans was charged with Carrying a Pistol Without a Permit, Violation of a Protective Order, and Breach of Peace. (SA 5).

Before January 9, 2005, Youmans had been convicted of crimes punishable by imprisonment for a term exceeding one year. In addition, the Hi-Point nine-millimeter semiautomatic pistol possessed by Youmans on January 9, 2005, had previously been transported in or affected interstate commerce. (JA 19).

On May 3, 2005, a federal grand jury in the District of Connecticut returned a two-count indictment in this case, *United States v. Maurice Youmans*, 3:05CR117 (CFD). (JA 9-11). Count One charged the defendant with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). (JA 9-10). Count Two charged the defendant with possession of ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). (JA 10). The indictment also contained a forfeiture allegation.

(JA 11). The case was assigned to United States District Judge Christopher F. Droney.

On June 14, 2005, the defendant entered a plea of guilty to Count One of the indictment, pursuant to a written plea agreement. (JA 12-19). The plea agreement included a Guidelines stipulation, in which the parties agreed that the defendant had a total offense level of 23 and was in Criminal History Category VI, resulting in a Guidelines sentencing range of 92-115 months. (JA 15). The defendant also agreed to forfeit any right, title, or interest in the firearm and ammunition. (JA 13). The Government agreed that it would move to dismiss Count Two following imposition of sentence. (JA 17).

On June 16, 2005, following the defendant's plea of guilty and in order to assist the district court in evaluating the defendant's mental and emotional condition, the district court ordered the defendant to undergo psychological and neurological testing, to be conducted by Madelon Baranoski, Ph.D. (JA 20-21). Pursuant to this order, Dr. Baranoski submitted her findings to the Probation Office by letter dated January 19, 2006. According to Dr. Baranoski's report, the defendant suffered from mental and emotional disorders as a result of childhood abuse and neglect. (SA 30-43).

On April 27, 2006, the district court held a sentencing hearing. As a preliminary matter, the district court adopted the factual statements of the Pre-Sentence Report, as to which there were no objections. (JA 36). The district court then calculated the defendant's Guidelines as

follows: a total offense level of 23 with a Criminal History Category VI, resulting in a Guidelines sentencing range of 92-115 months. (JA 37). Both parties agreed with this calculation, which was identical to the stipulation contained in the plea agreement. (JA 37-38).

The district court heard the parties' arguments regarding the defendant's request for a downward departure or, alternatively, a non-Guidelines sentence. The defendant's argument for a sentence below the applicable Guidelines range was based on Guidelines Section 5H1.3 (Mental and Emotional Conditions -- Policy Statement) and *United States v. Brady*, 417 F.3d 326, 334 (2d Cir. 2005). (JA 24, 42-46). In essence, the defendant argued that his history of childhood abuse and neglect had a catastrophic effect on his mental and emotional health, which manifested as post-traumatic stress disorder ("PTSD"), which in turn substantially contributed to the offense of conviction. (JA 44). The Government opposed the defendant's request for a sentence below the applicable Guidelines range. (JA 28, 38).

Before imposing sentence, the district court articulated the factors that it was required to consider under 18 U.S.C. § 3553(a), including the United States Sentencing Guidelines and policy statements and the need for the sentence imposed to serve the various purposes of a criminal sanction. (JA 52-53). The district court recognized its authority to impose a sentence within the Guidelines range or outside of the Guidelines range. (JA 53). Having considered all of those factors, the district court then explained how it reached an appropriate

sentence, taking into account the Pre-Sentence Report, the arguments of counsel, and the defendant's own statement to the court. The district court also expressly took into account the need for the sentence to serve the various purposes of a criminal sanction, including providing just punishment, avoiding unwarranted disparities among similarly situated defendants, protecting the public, specific deterrence, general deterrence, and rehabilitation. (JA 54-55).

Having acknowledged the various considerations that had guided the determination of an appropriate sentence, the district court turned to the principal question before it: whether to grant the defendant's request for a downward departure or, alternatively, a non-Guidelines sentence. The district court stated as follows:

> Now, as to departures from the guidelines, although I recognize I have the authority to depart from the sentencing range on the bases identified by Mr. Weinberger as well as other bases, I choose not to do so as the facts do not warrant a departure here. I've also determined that Mr. Youmans should be sentenced within the guidelines range that I have found. I also note for the record, however, I would give him the same sentence were I to impose a non-guideline sentence.

(JA55). Having concluded that a sentence within the Guidelines range was a reasonable and appropriate sentence, the district court next considered where to sentence the defendant within the range. The district court

identified various aggravating facts of the case as well as mitigating characteristics of the defendant, including his history of childhood abuse and neglect, his various mental and emotional disorders, including PTSD, and his aspirations to improve himself:

> Weighing all this, I will sentence him at the bottom of the guideline range, but I will note a couple of other things. First, it is a very sad situation for Mr. Youmans and I do believe that he can be successful with the appropriate treatment that he'll receive from the Bureau of Prisons. I'm going to make a strong recommendation to the Bureau of Prisons, and will follow-up with them to make sure they provide Mr. Youmans with intensive treatment for his emotional and psychiatric problems with pharmacological therapy as well as vocational training, so that when he completes his period of incarceration he will be able to return to society with those problems addressed more fully than they have been in the past.

(JA 56). With that explanation, the district court imposed a sentence of incarceration of 92 months, to be followed by three years of supervised release. (JA 56-57).

SUMMARY OF ARGUMENT

The district court adequately stated its reasons for imposing a Guidelines sentence of 92 months, to the extent required by 18 U.S.C. § 3553(c). The defendant's

proposed rule that a district court's refusal to impose a non-Guidelines sentence is *per se* unreasonable when not accompanied by a detailed rebuttal of the defendant's arguments is neither required nor justified by *United States v. Booker*, 543 U.S. 220 (2005), or *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). Furthermore, this proposal is inconsistent with this Court's post-*Booker* jurisprudence.

The district court's sentence of 92 months is reasonable in light of the defendant's serious criminal history, his pattern of recidivism, and his continuing danger to law enforcement personnel and the community. To the extent that he has suffered the consequences of an abusive childhood, the district court adequately accounted for this by sentencing him at the bottom of the 23-month Guidelines range.

ARGUMENT

I. THE DISTRICT COURT ADEQUATELY STATED ITS REASONS FOR IMPOSING A GUIDELINES SENTENCE OF 92 MONTHS.

A. Relevant Facts

The relevant facts are set forth above.

B. Governing Law and Standard of Review

The Sentencing Reform Act has three provisions regarding a sentencing court's obligation to articulate its reasons for a sentence. First, the court is required in all cases to state "the reasons for its imposition of a particular sentence." 18 U.S.C. § 3553(c). Second, if the sentence falls within a Guidelines range that exceeds 24 months, the judge must state "the reason for imposing a sentence at a particular point within the range." 18 U.S.C. § 3553(c)(1). Third, if the judge imposes a sentence outside an applicable Guidelines range, he must state "the specific reason for the imposition of a sentence different" from the sentence prescribed by the Guidelines. 18 U.S.C. § 3553(c)(2). The required statements, where applicable, must be made "at the time of sentencing" and "in open court." 18 U.S.C. § 3553(c). Furthermore, where a sentencing court is required to comply with the second and third provisions, its reasons must "also be stated with specificity in the written order of judgment and commitment." 18 U.S.C. § 3553(c)(2). This Court has "ruled that the Supreme Court's decision in *Booker* left Section 3553(c) 'unimpaired.'" *United States v. Jones*, 460 F.3d 191, 196 (2d Cir. 2006) (citing *United States v. Lewis*, 424 F.3d 239, 244 (2d Cir. 2005) and *Crosby*, 397 F.3d at 116).

C. Discussion

The defendant's primary argument on appeal is that the district court failed to make adequate findings on the record explaining its reasons for rejecting his arguments

for a sentence below the applicable Guidelines range, thereby depriving him of meaningful appellate review. This argument is undermined by the record in this case and by this Court's previous statements regarding the obligations of a sentencing court to explain its reasoning on the record.

1. The District Court Explained Its Reasoning.

Under Section 3553(c) of Title 18, a district court is required to "state in open court the reasons for its imposition of the particular sentence . . . ." In this case, the district court easily satisfied this requirement.

After reviewing on the record all of the factors he was required to consider under Sections 3553, 3562, 3572, and 3583 of Title 18, Judge Droney stated that "while I have considered all those factors, I'll explain more particularly how I've reached a decision as to the appropriate sentence *in this case for Mr. Youmans*." (JA 54) (emphasis supplied). Judge Droney then described the rationale for his sentence by reference to certain specific factors: (1) just punishment; (2) unwarranted sentencing disparities; (3) public safety; (4) specific deterrence; (5) general deterrence; and (6) rehabilitation. (JA 54-55). It is clear from the context and from Judge Droney's specific reference to the defendant that this was not merely a general recitation of sentencing considerations, but an articulation of how he determined an appropriate sentence for *this* defendant.

A moment later, after announcing his decision not to depart downward or impose a non-Guidelines sentence, Judge Droney explained how he arrived at a sentence within the Guidelines range. Judge Droney began by summarizing specific aggravating facts of the case:

> Mr. Youmans possessed a loaded handgun with a chambered round only a short time after his release from state prison. That weapon also had an obliterated serial number. Mr. Youmans, unfortunately, also has a significant prior criminal record including narcotics sales, threatening, and larceny. As I mentioned, [he] has been incarcerated previously by the State of Connecticut.

(JA 55). Judge Droney then reviewed the mitigating facts, including the defendant's "considerable emotional [and] psychiatric problems" and his "very sad and destructive childhood." (JA 56). He concluded his explanation as follows: "Weighing all this, I will sentence him at the bottom of the guideline range." (JA 56). Read within this context, it is clear that Judge Droney's statement of aggravating facts is, in effect, the rationale for his imposition of a Guidelines sentence. The subsequent statement of mitigating facts serve to explain why he imposed the lowest possible sentence within the range.

Judge Droney's explanation for imposing a sentence of 92 months may have been brief, but it was neither casual nor ritualistic. In fact, his specific reference to the defendant's hardships and challenges as a basis for a sentence at the bottom of the Guidelines range reveals that

Judge Droney carefully considered and, in fact, credited the defendant's arguments, although not to the extent that the defendant requested.

2. District Courts Are Not Required To Articulate Reasons For Imposing A Sentence Within The Guidelines Range.

In alleging error in Judge Droney's supposed failure to explain adequately his reasons for declining to depart downward or impose a non-Guidelines sentence, the defendant is, in effect, asking this Court to impose a new post-*Booker* requirement on district judges: to articulate specific reasons *why* the court imposed a *Guidelines sentence*, as opposed to a below-Guidelines sentence. The defendant relies, in the first instance, on Section 3553(c)'s requirement that a district court state its reasons for imposing a particular sentence. However, this section does not require specificity, but rather contemplates a general statement of reasons. *Compare* 18 U.S.C. § 3553(c)(2) (requiring district court to state "with specificity" the reasons for imposing a non-Guidelines sentence). There is no authority in this circuit to support the defendant's proposed requirement that a district court articulate its reasons for imposing a Guidelines sentence.

As a preliminary matter, the defendant's proposed articulation requirement is inconsistent with this Court's rulings regarding downward departures. As set forth in Section II.B., *infra*, *Crosby* requires district judges to undertake a three-step process in determining an

appropriate sentence. The first step is to calculate the applicable Guidelines range while the second step is to consider whether a departure from that range is appropriate. *Crosby*, 397 F.3d at 112. This Court has held that even in the post-*Booker* sentencing regime, "a refusal to downwardly depart is generally not appealable," and an appeals court may review such a denial only "when a sentencing court misapprehended the scope of its authority to depart or the sentence was otherwise illegal." *United States v. Valdez*, 426 F.3d 178, 184 (2d Cir. 2005). It follows from this that a district judge need not articulate his reasons for declining to depart and imposing a Guidelines sentence. This holding could not survive if the Court were to adopt the defendant's proposal that a district judge's refusal to impose a non-Guidelines sentence is *per se* unreasonable, unless accompanied by a detailed rebuttal of the defendant's arguments.

Some courts of appeals have required district judges to explain why they imposed a Guidelines sentence in cases where the defendant's argument for a lower sentence has substantial factual and legal strength. *See, e.g., United States v. Cunningham*, 429 F.3d 673 (7th Cir. 2005); *United States v. Vonner*, 452 F.3d 560 (6th Cir. 2006); *United States v. Sanchez-Juarez*, 446 F.3d 1109, 1116-1118 (10th Cir. 2006). Nothing in *Booker* requires a general rule to that effect. In any event, those courts also recognize a sentencing court's prerogative to let pass weaker arguments without discussion. *See Cunningham*, 429 F.3d at 678-79; *see also Sanchez-Juarez*, 446 F.3d at 1116-17. And a judge's failure to discuss a point explicitly does not mean he has not considered it; the

record as a whole may reveal otherwise.[2] *See United States v. Jimenez-Beltre*, 440 F.3d 514, 519 (1st Cir. 2006) ("A court's reasoning can often be inferred by comparing what was argued by the parties or contained in the pre-sentence report with what the judge did."), *pet'n for cert filed*, No.06-5727 (Aug. 4, 2006). Accordingly, when a judge complies with Section 3553(c)'s requirement to state "the reasons for its imposition of the particular sentence" within the Guidelines, the judge need not generally provide a further explanation of the Section 3553(a) factors to establish that they have been considered.

Consistent with this principle, this Court has expressed its disinclination to fashion new requirements for judges, beyond what is required by Section 3553 and *Booker*. For example, in *United States v. Fernandez,* 443 F.3d 19, 27 (2d Cir. 2006), *cert. denied*, 75 U.S.L.W. 3143 (October

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[2] Nothing in *Cunningham* indicates that the appellate court may not review the record as a whole to determine whether the district court adequately considered the required factors. Indeed, in *Cunningham*, the Seventh Circuit's concern arose because its review of the record indicated that the defendant had presented uncontested evidence of his severe psychiatric illness, and the government had made only a vague and unsupported assertion of the defendant's failure to cooperate. 429 F.3d at 677-78. On that record, without an explanation from the sentencing judge of his reasons for rejecting the defendant's arguments and adopting the government's, the court concluded that it could not have "confidence in the judge's considered attention to the factors." *Id.* at 679.

2, 2006), the Court considered the question of whether and to what extent a district court is required to articulate its consideration of the Section 3553(a) factors. There, the Court declined to impose on district judges a requirement to "*precisely identify* either the factors set forth in § 3553(a) or specific arguments bearing on the implementation of those factors in order to comply with [the] duty to consider all the § 3553(a) factors along with the applicable Guidelines range." *Id.* at 29 (emphasis in original). Rather, the Court established a "strong presumption that the sentencing judge has considered all arguments properly presented to her, unless the record clearly suggests otherwise." *Id.* Likewise, in *Crosby* itself, the Court "refrained from imposing any rigorous requirement of specific articulation by the sentencing judge." 397 F.3d at 113.

Similarly, in *United States v. Jones*, 460 F.3d at 195, this Court declined to impose on district judges an articulation requirement beyond the requirements of Section 3553(c). In *Jones*, the Government claimed that the district judge erred by failing to explain why he selected a particular non-Guidelines sentence (*i.e.*, "why the sentence was 15 months rather than, say, 14 or 16 months"). Rejecting this argument, the Court "decline[d] to impose a requirement for such specific articulation of the exact number of months of an imposed [non-Guidelines] sentence." *Id*. The Court further stated as follows:

> Selection of an appropriate amount of punishment inevitably involves some degree of subjectivity that

> often cannot be precisely explained. In light of the reasons of the sort identified by [the district judge], a sentencing judge has many available guideposts in ultimately selecting an amount of punishment. The judge undoubtedly is familiar with the maximum penalty authorized by Congress and the proportion of that maximum that a particular sentence reflects. The judge is also aware of both the calculated Guidelines range and the sentences typically imposed in the district for misconduct of comparable seriousness.

Id. Thus, the Court recognized that district judges cannot and should not be required to articulate the precise blend of objective and subjective factors that produce a particular sentence. Most recently, in *United States v. Pereira*, No. 05-5969-cr (2d Cir. October 13, 2006), the Court refused to require sentencing courts "expressly to mention or explain [their] consideration of each § 3553(a) factor." *Id.* mem. op. at 15. The Court explained that "a sentencing judge's decision not to discuss explicitly the sentencing factors or not to review them in the exact language of the statute does not, without more, overcome the presumption that she took them all properly into account." *Id.*

While it is true in this case that defense counsel spent much more time advancing his arguments for a sentence below the Guidelines range than Judge Droney spent in explaining why he rejected those arguments, this fact hardly constitutes evidence that Judge Droney neglected his duty to weigh those arguments carefully against the

statutory factors. As this Court held in *Fernandez*, "we will not conclude that a district judge shirked her obligation to consider the § 3553(a) factors simply because she did not discuss each one individually or did not expressly parse or address every argument relating to those factors that the defendant advanced." 443 F.3d at 30. Indeed, in *Pereira*, this Court affirmed a sentence *above* the applicable Guidelines range, even though the district judge's oral explanation for that sentence was "cursory." No. 05-5969-cr, mem. op. at 18. If an admittedly cursory explanation is sufficient under Section 3553(c)(2) for a sentence 11 months above the Guidelines range, then, *a fortiori*, such an explanation would also be sufficient under Section 3553(c) for a sentence within the Guidelines range.

3. Conclusion

In fashioning an appropriate sentence, district judges are required to consider numerous factors and to state the reasons for imposing a particular sentence. Judge Droney fulfilled those obligations. His remarks at sentencing reflect careful consideration of the Section 3553(a) factors and the unique characteristics of this defendant, including both aggravating and mitigating circumstances. He ultimately imposed a Guidelines sentence, albeit at the bottom of the 23-month range. Judge Droney explained the rationale for his sentence and, although he did not refute each of the defendant's arguments for a sentence below the Guidelines range, his comments were more than sufficient to allow review of this sentence for reasonableness.

There are already numerous safeguards and requirements in place to ensure procedural reasonableness in sentencing, all of which Judge Droney followed. This Court should reject the defendant's invitation to impose yet another obligation on sentencing judges in this circuit.

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

A. Relevant Facts

The relevant facts are set forth above.

B. Governing Law and Standard of Review

The Sentencing Guidelines are no longer mandatory, but rather represent one factor a district court must consider in imposing a reasonable sentence in accordance with Section 3553(a). *See Booker*, 543 U.S. at 258; *see also Crosby*, 397 F.3d at 110-18. Section 3553(a) provides that the sentencing "court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection," and then sets forth seven specific considerations:

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed --

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

(B) to afford adequate deterrence to criminal conduct;

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

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

(3) the kinds of sentences available;

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

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

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

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

In *Crosby*, this Court explained that, in light of *Booker*, district courts should now engage in a three-step sentencing procedure. First, the district court must determine the applicable Guidelines range, and in so doing, "the sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence." *Crosby*, 397 F.3d at 112. Second, the district court should consider whether a departure from that Guidelines range is appropriate. *Id.* Third, the court must consider the Guidelines range, "along with all of the factors listed in section 3553(a)," and determine the sentence to impose. *Id.* at 112-13. The fact that the Sentencing Guidelines are no longer mandatory does not reduce them to "a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge." *Id.* at 113. A failure to consider the Guidelines range and instead simply to select a sentence without such consideration is error. *Id.* at 115.

In *Booker*, the Supreme Court ruled that Courts of Appeals should review post-*Booker* sentences for reasonableness. *See Booker*, 543 U.S. at 261 (discussing the "practical standard of review already familiar to appellate courts: review for 'unreasonable[ness]'") (quoting 18 U.S.C. § 3742(e)(3) (1994)). In *Crosby*, this Court articulated two dimensions to this reasonableness review. First, the Court will assess procedural reasonableness -- whether the sentencing court complied with *Booker* by (1) treating the Guidelines as advisory, (2) considering "the applicable Guidelines range (or

arguably applicable ranges)" based on the facts found by the court, and (3) considering "the other factors listed in section 3553(a)." *Crosby*, 397 F.3d at 115. Second, the Court will review sentences for their substantive reasonableness -- that is, whether the length of the sentence is reasonable in light of the applicable Guidelines range and the other factors set forth in § 3553(a). *Id.* at 114.

As this Court has held, "'reasonableness' is inherently a concept of flexible meaning, generally lacking precise boundaries." *Crosby*, 397 F.3d at 115. The "brevity or length of a sentence can exceed the bounds of 'reasonableness,'" although this Court has observed that it "anticipate[s] encountering such circumstances infrequently." *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005); *cf. United States v. Godding*, 405 F.3d 125, 127 (2d Cir. 2005) (per curiam) (noting, in connection with *Crosby* remand, "that the brevity of the term of imprisonment imposed . . . does not reflect the magnitude" of the crime).

An evaluation of whether the length of the sentence is reasonable will necessarily "focus . . . on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a)." *United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005); *see Booker*, 543 U.S. at 261 (holding that factors in § 3553(a) serve as guides for appellate courts in determining if a sentence is unreasonable). As the Eighth Circuit has observed, a sentence "may be unreasonable if [it] fails to consider a relevant factor that should have received significant

weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case." *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir.), *cert. denied*, 126 S. Ct. 276 (2005).

To fulfill its duty to consider the Guidelines, the district court will "normally require determination of the applicable Guidelines range." *Id.* at 1002. "An error in determining the applicable Guideline range . . . would be the type of procedural error that could render a sentence unreasonable under *Booker*." *United States v. Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005); *cf. United States v. Rubenstein*, 403 F.3d 93, 98-99 (2d Cir.) (declining to express opinion on whether an incorrectly calculated Guidelines sentence could nonetheless be reasonable), *cert. denied*, 126 S. Ct. 388 (2005).

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

The Court has recognized that "[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge 'exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.'" *Fernandez*, 443 F.3d at 27 (citations omitted). In assessing the reasonableness of a particular sentence imposed,

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

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

C. Discussion

The defendant's second claim on appeal is a substantive reasonableness argument. According to the defendant, the district court's sentence of 92 months was unduly harsh and, in any event, was greater than necessary to accomplish the purposes of Section 3553(a). In support of this argument, the defendant has documented his abusive childhood and its tragic consequences for him as an adult.

While the Government does not dispute the defendant's factual assertions regarding his personal history, there is another side to his character that cannot be ignored, as evidenced by his criminal record and the facts of the offense of conviction. To summarize: less than four months after his release from state prison, the defendant moved in to his girlfriend's mother's residence in New Haven; the defendant and his girlfriend then displaced the girlfriend's mother from her own bedroom. In this bedroom, the defendant kept a loaded handgun with a round in the chamber. (SA 4-5). The defendant had previously been convicted of several offenses, including sale of narcotics (twice), carrying a dangerous weapon, larceny, and threatening. (SA 7-10). The defendant has a history of alcohol and drug abuse and had contemplated suicide by provoking a police officer into shooting him. (JA 46). These facts weigh heavily against the defendant, particularly to the extent that they indicate that he may pose a danger to law enforcement personnel and to the community. Indeed, in explaining his sentence, Judge Droney stated that "[a] criminal sentence also can protect

the public by immobilizing an offender and isolating him from society, thus, absolutely protecting society from him during the period of incarceration." (JA 54).

The need for a sentence to protect society is further emphasized by a review of the defendant's criminal history. He has been arrested eight times in less than 10 years and he has committed almost all of his criminal offenses, including his federal conviction, while on probation or shortly after being released from a previous term of incarceration. (SA 7-10). These facts weigh heavily against the defendant in that they reveal a person unwilling or unable to conform his behavior to the norms of society. Judge Droney appears to have considered these facts when, in explaining his sentence, he stated that the sentence would protect society from the defendant during the period of incarceration. (JA 54). While it is true that a sentence should be no greater than necessary to accomplish the purposes of Section 3553(a), a district court is not required to accept at face value a defendant's estimate as to the lowest punishment necessary to accomplish these purposes.

Notwithstanding the seriousness of the offense and the danger to the community posed by the defendant, Judge Droney expressly accounted for the defendant's "considerable emotional [and] psychiatric problems" and his "very sad and destructive childhood with an abusive and addictive mother, no father around, and continued neglect." (JA 56). Specifically, Judge Droney sentenced the defendant to the bottom of the 23-month range. The final sentence of 92 months is approximately three-

quarters of the maximum sentence authorized by statute. The Government respectfully submits that this is not an unreasonable sentence for an armed offender with a lengthy criminal record and a history of emotional instability, who has seriously considered provoking an armed confrontation with police officers in order to effectuate a suicide. Nor is this sentence dramatically greater than the sentence of five years suggested by defense counsel. (JA 43).

The defendant suggests that his sentence is unreasonable because he would have received a shorter sentence in the state system. He notes that if he had pled guilty to this offense in state court, he would have received a sentence of four years, and would have been eligible for release after serving only two years. By contrast, he will have to serve at least six years and eight months in federal prison. Def. Br. at 18. There is no basis for assuming, however, that the proffered state court sentence was the appropriate disposition of the defendant's case or that it should be a benchmark for measuring the reasonableness of his federal sentence. Specifically, there is no reason to believe that the proffered state sentence would have served the goals set forth in Section 3553(a), such as reducing unwarranted disparities in sentencing or ensuring that the defendant receive appropriate treatment for his mental illness. In any event, with full knowledge that his prospective federal sentence could exceed his state sentence, the defendant rejected the State's four-year offer precisely so that he could get into the federal system and into the mental health treatment facilities available there. (JA 22, 46, 47, 50). Having rejected the State's four-year

offer in order to gain the benefits available in the Bureau of Prisons, the defendant should not be allowed to challenge his Guidelines sentence in federal court on the grounds that it is significantly longer than the state court sentence that he rejected.

Finally, contrary to the defendant's arguments on appeal, there is no evidence that Judge Droney considered the Guidelines to be presumptively reasonable. The mere fact, as the defendant suggests, that the district judge sentenced him within the Guidelines range does not mean that the district judge gave presumptive weight to the Guidelines or that he failed to consider adequately the other Section 3553(a) factors. Indeed, the record reflects Judge Droney's careful consideration of the Section 3553(a) factors, as applied to *this defendant*. Accordingly, Judge Droney is entitled to the presumption articulated by this Court that "'*[a]s long as the judge is aware of both the statutory requirements and the sentencing range . . . and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, we will accept that the requisite consideration has occurred.*'" *Fernandez*, 443 F.3d at 29-30 (quoting *Fleming*, 397 F.3d at 100) (emphasis supplied in *Fernandez*). *Cf. Pereira*, No. 05-5969-cr, mem. op. at 15 ("[A] sentencing judge's decision not to discuss explicitly the sentencing factors or not to review them in the exact language of the statute does not, without more, overcome the presumption that she took them all properly into account.").

The resulting sentence of 92 months -- almost two years below the top of the Guidelines range -- is a reasonable sentence for a multiple-convicted felon with a history of physical violence, sale of narcotics, and drug abuse, and whose conviction arose from his illegal possession of a loaded firearm. (SA 4-10). In light of the defendant's history of recidivism, the seriousness of the offense of conviction, and the continuing danger that he poses to law enforcement personnel and the community, the Government respectfully submits that a sentence of 92 months is a reasonable sentence.

CONCLUSION

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

Dated: October 18, 2006

Respectfully submitted,

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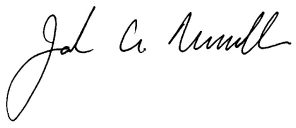

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ADDENDUM

§ 3553. Imposition of a sentence

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

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

(2) the need for the sentence imposed --

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

(B) to afford adequate deterrence to criminal conduct;

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

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

(3) the kinds of sentences available;

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

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

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

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

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

amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement–

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

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

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

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

* * *

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open

court the reasons for its imposition of the particular sentence, and, if the sentence --

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

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

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

Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.