

06-5256-cr

To Be Argued By:
JOHN A. MARRELLA

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-5256-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

HERMAN JAMES,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Peter C. Dorsey, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. Judgment entered on November 13, 2006. (Appellant's Appendix ("AA") 25). The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on November 9, 2006. (AA 25). This Court has appellate jurisdiction over the challenge to the defendant's sentence pursuant to 18 U.S.C. § 3742(a).

**STATEMENT OF ISSUE
PRESENTED FOR REVIEW**

1. Whether the district court erred in declining to vacate its earlier findings of fact and Guidelines calculation following a remand under *United States v. Fagans*, 406 F.3d 138 (2d Cir. 2005), where the defendant failed to challenge these determinations in his earlier appeal, or to proffer any new facts or legal arguments on remand justifying such reconsideration.

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

On January 9, 2004, defendant-appellant Herman James pled guilty to Counts One, Two, and Three of the Second Superseding Indictment in this case. Counts One and Two charged him with counterfeiting, in violation of 18 U.S.C. § 472; Count Three charged him with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). On November 18, 2004, the district court (Peter C. Dorsey, J.) held a sentencing hearing, in the course of which the district court received

evidence and argument on two contested Guidelines issues: (i) whether the defendant should receive a two-level upward adjustment under U.S.S.G. § 3C1.1 for obstruction of justice; and (ii) whether the defendant should receive a three-level downward adjustment under U.S.S.G. § 3E1.1 for acceptance of responsibility. The district court's findings of fact, which were adverse to the defendant on both issues, resulted in a sentencing range of 63 to 78 months (Offense level 22, Criminal History Category IV). The district court sentenced the defendant principally to a term of imprisonment of 66 months. In light of the uncertainty regarding the applicability of the Sentencing Guidelines before the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the district court expressly stated that it would have imposed the same sentence if the Guidelines were not mandatory. Notwithstanding the judge's announcement, the defendant preserved his objection and filed a notice of appeal. On July 21, 2005, before any briefs were filed, the case was remanded by agreement of both parties. In remanding the case, this Court, citing *United States v. Fagans*, 406 F.3d 138 (2d Cir. 2005), instructed the district court to vacate the sentence and resentence the defendant in conformity with *Booker*.

On remand, Judge Dorsey vacated the defendant's original sentence, in accordance with the mandate. Judge Dorsey declined the defendant's request to disturb his original findings of fact relating to the two contested Guidelines issues. In this appeal the defendant claims that Judge Dorsey erred by declining to reconsider his original findings of fact and the resulting Guidelines calculation.

Statement of the Case

On November 21, 2002, a federal grand jury in the District of Connecticut returned a three-count Indictment against the defendant, charging him with counterfeiting, in violation of 18 U.S.C. § 472 (Counts One and Two) and possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) (Count Three). (AA 15).¹ On April 16, 2003, the grand jury returned a five-count Superseding Indictment against the defendant, charging him with two counts of witness tampering, in violation of 18 U.S.C. § 1512(b), in addition to the three original counterfeiting and gun charges. (AA 16). The grand jury returned a Second Superseding Indictment on November 20, 2003. (AA 1-4, 18). The Second Superseding Indictment did not allege any further offenses by the defendant, but rather included more details as to the offenses alleged in Counts Four and Five of the Superseding Indictment.

On January 9, 2004, in the midst of jury selection, the defendant pleaded guilty to Counts One, Two, and Three of the Second Superseding Indictment, pursuant to a written plea agreement. (AA 20-21).

On November 18, 2004, the district court sentenced the defendant principally to a term of imprisonment of 66

¹ References to the Appellant's Appendix are designated "AA ___". References to the Government's Appendix are designated "GA ___". References to the Government's Sealed Appendix are designated "GSA ___".

months, which was within the Guidelines range calculated by the district court and recommended by the Probation Office and the Government. (AA 22; GA 67). Judgment entered on November 19, 2004. (AA 22). On November 29, 2004, the defendant filed a timely notice of appeal. (AA 22).

On June 29, 2005, upon the defendant's motion and with the consent of the Government, this Court remanded the case for resentencing under *United States v. Fagans*, 406 F.3d 138 (2d Cir. 2005). (AA 26).

On November 6, 2006, the defendant appeared in the district court for resentencing, at which time the district court sentenced the defendant principally to a term of imprisonment of 63 months. (AA 5, 24). On November 9, 2006, the defendant filed a timely notice of appeal. (AA 8, 25).

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. The Offense Conduct

In May of 2002, the defendant, who was at that time a resident of New London, Connecticut, met Nicole Diaz. Shortly after they met, the defendant and Diaz began an intimate relationship and the defendant moved into Diaz's residence, a condominium in New London, Connecticut, where Diaz was then living. The defendant, who had no steady job, always had large amounts of cash on hand, which he used to pay for groceries, clothing, restaurants,

and numerous other household and consumer items. Shortly after the defendant moved in with her, Diaz realized that he possessed and routinely passed large amounts of counterfeit United States currency. Despite her initial misgivings about using counterfeit currency, Diaz herself began accepting counterfeit currency from the defendant and routinely used it to pay for various household and personal expenses. Diaz also came to realize that the defendant was involved in drug trafficking in and around New London. (GSA 3-4).

The defendant revealed to Diaz his methods for passing counterfeit currency. The defendant targeted certain establishments where he knew that the cashiers would be young and relatively inexperienced. For example, he would frequently dine at fast-food restaurants. He would use counterfeit ten-dollar and twenty-dollar bills to pay for relatively inexpensive items, a beverage, for example, and would pocket genuine currency as change. Before passing the counterfeit currency, the defendant would fold, roll, and crinkle the bills in order to enhance the appearance of authenticity. The defendant told Diaz that he used counterfeit currency to purchase illegal drugs. Because these drug purchases were generally furtive transactions in dimly lit areas, the recipients of the counterfeit currency would be less likely to notice that they had been bilked until it was too late. The defendant also used counterfeit (and sometimes genuine) currency to purchase counterfeit merchandise, including watches and clothing, which he then resold. (GSA 4).

One day towards the end of June 2002, Diaz went into the attic of her house and found approximately six two-

inch stacks of what she believed to be counterfeit currency. The stacks were partially concealed beneath insulation. The currency included ten-dollar bills, twenty-dollar bills, fifty-dollar bills, and hundred-dollar bills. The stacks were bound with red rubber bands and wrapped in clear plastic. Diaz also observed what she believed to be approximately 100 Ecstasy pills and a bag of what she believed to be powder cocaine, all of which was also partially concealed beneath insulation in the rafters or floorboards. Based on statements made by the defendant, Diaz concluded that this contraband belonged to him. (GSA 4)

Although the defendant himself passed large amounts of counterfeit currency, he also routinely used Diaz to purchase items for himself and for both of them using counterfeit currency that he had given to her. The defendant told Diaz that this practice was more likely to succeed because Diaz had a more innocent demeanor than he did and would thus be less likely to invite the suspicion of cashiers and merchants. The defendant also advised Diaz that she would not be severely punished if she were arrested because she had no criminal record, whereas the defendant would face more severe punishment if he were caught passing counterfeit currency because, as he explained to Diaz, he had a criminal record. (GSA 4).

The conduct that gave rise to Count One of the indictment occurred on July 16, 2002, which was the defendant's birthday. The defendant had decided to celebrate his birthday by obtaining a pair of Timberland boots for himself at Jammin, a store at the Crystal Mall in

Waterford, Connecticut, that sold hip-hop style clothing, footwear, and accessories. According to store employees, the defendant had previously come to this store and had been observed admiring certain articles of clothing, including Timberland boots. The defendant, accompanied by Diaz, entered the store and selected the boots, which he then instructed Diaz to purchase for him. Before entering the store, the defendant had given Diaz counterfeit United States currency to pay for the merchandise. The defendant knew that the currency was counterfeit at the time he gave it to Diaz. Diaz did, in fact, pay for the merchandise with 14 counterfeit ten-dollar bills. (GSA 5).

As Diaz and the defendant were leaving the store, just after Diaz had paid for the items with the counterfeit currency, the cashier and the proprietor of the store recognized the currency as counterfeit and demanded that Diaz return the merchandise, which she did. The proprietor gave her back the 14 counterfeit ten-dollar bills. Diaz and the defendant returned to their car, only to realize that Diaz had left the car keys in the store's changing room. The defendant directed Diaz to retrieve the keys. When Diaz returned to the store, she was met by officers of the Waterford Police Department, who had been summoned by the proprietor. The police arrested Diaz for forgery and larceny and seized from her person a total of 27 counterfeit ten-dollar bills. When questioned, Diaz falsely told the Waterford Police that she had received the counterfeit currency from a recent acquaintance known to her only as "Sean." (GSA 5).

Later in the investigation, the proprietor of Jammin and the two store employees identified the defendant in a

photospread as the person who accompanied Diaz to the store on July 16, 2002. They also recognized the defendant as having previously come to the store to check out the same Timberland boots that he had attempted to purchase on July 16, 2002. In fact, both employees remembered that approximately two weeks before the July 16 incident, the defendant had come into the store with an unidentified white male, who attempted to buy Timberland boots for the defendant using a credit card issued to a person with a female name. Sensing that this was a potentially fraudulent transaction, the cashier declined to complete the transaction. (GSA 5).

The incident at Jammin was actually the third occasion on July 16, 2002, on which Diaz had passed counterfeit currency that the defendant had given to her. Earlier that day, Diaz had gone to 5-Star Supermarket in New London and had passed four counterfeit ten-dollar bills to buy various groceries that she intended to use to prepare a special birthday dinner for the defendant. Although those counterfeit bills were accepted by the supermarket cashier, they were subsequently discovered (following deposit of the day's receipts) and turned over to the Secret Service. Similarly, Diaz and the defendant went to Timberland Retail in Westbrook on July 16, 2002, and bought a pair of Timberland boots for James using 10 counterfeit ten-dollar bills. These bills were accepted by the cashier, but were subsequently discovered among the day's receipts and turned over to the Secret Service. (GSA 5-6).

On August 8, 2002, the defendant and Diaz went to the Department of Motor Vehicles ("DMV") in Norwich,

Connecticut, so that the defendant could obtain a duplicate driver's license. Before the defendant entered the DMV, Diaz told him not to use counterfeit currency to pay the \$20 fee. Diaz knew that the defendant was carrying a large amount of genuine currency on him and was concerned that he had become too confident in his ability to pass counterfeit. The defendant disregarded Diaz's advice and tried to pay for the license using two counterfeit ten-dollar bills. When a clerk at the DMV noticed that the defendant had passed counterfeit currency, she notified her supervisor, who called the Connecticut State Police. The State Police arrived at the scene shortly thereafter and arrested James. At the time the defendant was arrested, Diaz was waiting for him in a car outside the DMV building. The defendant was charged with a state offense for his attempt to pass counterfeit currency and he was released on bond later that day. The defendant's attempt to pass counterfeit currency at the DMV gave rise to the counterfeiting offense charged in Count Two of the indictment, in violation of 18 U.S.C. § 472. (GSA 6).

The serial numbers on the two counterfeit ten-dollar bills recovered from the defendant at the DMV in Norwich on August 8, 2002, match the serial numbers on some of the ten-dollar bills seized from Diaz when she was arrested at the Crystal Mall in Waterford on July 16, 2002. These serial numbers also matched serial numbers on some of the other counterfeit currency recovered on July 16, 2002, from establishments in New London and Westbrook, where Diaz admitted that she had passed counterfeit ten-dollar bills given to her by the defendant. (GSA 6).

On August 13, 2002, Diaz sold her residence in New London. As she and the defendant were moving their belongings out of the house, she observed the defendant to be in possession of two handguns, which she had not seen before. Diaz and James, along with one of the defendant's friends, Lacey Scott, then took up temporary residence in a suite at the Norwich Inn & Spa, a resort hotel in Norwich, Connecticut. (GSA 6).

While they were staying at the Norwich Inn & Spa, Diaz observed the defendant holding and handling the two guns that he had taken from her residence on August 13, 2002. On August 18, 2002, Diaz, the defendant, and Scott moved into another suite at the resort. A maid cleaning the suite that they had just vacated discovered several items that the trio had left behind, including a .32 caliber Arminius revolver, bearing serial number 100066. The maid also found a jacket and a VCR player. The maid informed the hotel manager, who immediately summoned the Norwich police. When the police arrived, they interviewed the defendant, who claimed ownership of the jacket and the VCR player, but denied knowing anything about the gun. The defendant falsely stated that the gun must have been left by the previous guest in that room. When told that the room had been thoroughly cleaned and checked before Diaz, the defendant, and Scott had moved in, the defendant falsely stated that the gun had probably been left there by one of several friends who had visited him in the room. (GSA 6-7).

Questioned separately by the police, Diaz falsely stated that she had no knowledge of the gun. Diaz also told

police, truthfully, that she and the defendant had not had any visitors since they arrived at the hotel. The defendant was arrested and charged with a state offense relating to his possession of the gun. (GSA 7). This incident gave rise to the firearms offense charged in Count Three of the indictment, charging the defendant with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1).

Before he possessed the firearm recovered at the hotel, the defendant had been convicted of the following felony offenses: Robbery in the Second Degree (Superior Court, State of Connecticut; 2001); Unlawful Possession of a Firearm by a Convicted Felon (United States District Court, Southern District of New York; 1995); and Criminal Possession of a Weapon in the Third Degree (Supreme Court, State of New York; 1991). (AA 2; GSA 7, 12-16).

After his release on bond on August 18, 2002, the defendant found out that Diaz had unwittingly given the police a statement that was inconsistent with his statement, which led to his arrest. As a result, he became enraged and beat her up. Diaz had always understood that she should cover for the defendant in encounters with law enforcement. (GSA 7).

On August 30, 2002, the defendant and Diaz went to the State's Attorney's Office at the state courthouse in Norwich, where they met with the Assistant State's Attorney in connection with the pending gun charge against the defendant. This is a routine practice in state

court, intended to allow a defendant an opportunity to persuade the prosecutor that the charges against him should be dismissed or, at the least, reduced. The State's case against the defendant was circumstantial and there were no fingerprints on the gun; in light of these circumstances, the defendant believed that he could persuade the Assistant State's Attorney to drop the charge. (GSA 7).

The Assistant State's Attorney first met privately with the defendant, while Diaz waited outside his office. The Assistant State's Attorney advised the defendant of his rights and then inquired as to the circumstances of the incident that led to his arrest. The defendant stated that the gun was not his, but did not say whose gun it was. The defendant told the Assistant State's Attorney that Diaz would also say that it was not his gun. When the Assistant State's Attorney stated that he wanted to talk to Diaz privately, the defendant indicated that he wanted to stay in the office while the Assistant State's Attorney interviewed Diaz. Despite the defendant's repeated request to be present while the Assistant State's Attorney interviewed Diaz, the Assistant State's Attorney told the defendant that he would only meet privately with Diaz and that the defendant should wait in the Main Lobby of the courthouse. (GSA 8).

The defendant did not wait in the Main Lobby, but in the vestibule of the State's Attorney's Office. The Assistant State's Attorney could see the defendant looking in the large plate glass window to his office, trying to observe Diaz. The defendant appeared agitated as he

watched and waited for Diaz. Diaz knew that the defendant was outside the office and appeared to be nervous as she gave a statement to the Assistant State's Attorney. Fearful that if she inculpated the defendant he would assault her again, Diaz falsely told the Assistant State's Attorney that the gun belonged to the defendant's friend, who was staying with them and whom she falsely identified as Parrish Raines. It was the defendant who induced Diaz to make this false exculpatory statement. In any event, the Assistant State's Attorney did not believe her and did not dismiss the gun charge based on her false exculpatory statement. (GSA 8).

Following this incident, the defendant became increasingly suspicious of Diaz and concerned that she would cooperate with law enforcement authorities in connection with the pending criminal charges against him. He was also concerned that investigators would make a connection (through common serial numbers) between the counterfeit currency recovered at the Crystal Mall from Diaz on July 16, 2002, and the counterfeit currency he had attempted to pass on at the DMV on August 8, 2002. He warned Diaz on various occasions not to cooperate with law enforcement. The defendant also became increasingly abusive toward Diaz in August and September of 2002, physically striking her on various occasions and threatening her on other occasions. (GSA 8).

In late September 2002, Diaz was contacted by Special Agents of the United States Secret Service, who were investigating the July 16, 2002, counterfeiting incident at Jammin, described above. Diaz revealed the defendant's

role in her own arrest on July 16, 2002, as well as the defendant's counterfeiting activity over the previous four months. She also disclosed that she had observed the defendant in possession of the gun that was recovered at the Norwich Inn & Spa on August 18, 2002. (GSA 8).

As part of her informal cooperation with the Secret Service, Diaz agreed to ask the defendant for counterfeit currency, which she would then turn over to the Secret Service. When Diaz did ask for counterfeit currency from the defendant on November 4, 2002, he became suspicious of her motives. He had previously warned her not to cooperate with law enforcement authorities in connection with the gun possession and counterfeiting charges, and had previously threatened her with physical violence if she did cooperate. (GSA 9).

In the early morning hours of November 4, 2002, the defendant expressly told Diaz, "If I find out you snitched on me, I will f___king kill you." The defendant left Diaz with a jacket and indicated that he wanted to meet with her later that day. (GSA 9). This incident gave rise to Count Four of the indictment, charging the defendant with obstruction of justice, in violation of 18 U.S.C. § 1512(b)(3).

When Diaz did not meet with him, the defendant became enraged. Sensing that Diaz could not be relied upon to cover for his criminal offenses, he left a series of five menacing messages on Diaz's voice mail, in which he threatened her and her parents with physical harm if she did not return his jacket. Although the messages were

ostensibly about a borrowed jacket, Diaz believed that the defendant was frustrated that he was losing control of Diaz and was attempting to intimidate her. (GSA 9).

Based in large part on information provided by Diaz, the Secret Service obtained a criminal complaint and arrest warrant for the defendant on October 30, 2002. The complaint was supported by a sworn affidavit, which included significant inculpatory information that had been provided by Diaz. The affidavit, which was filed under seal, identified Diaz only as "CW-1." (GSA 9).

Following his arrest on the federal arrest warrant on November 14, 2002, the defendant was lodged at the Wyatt Detention Facility in Central Falls, Rhode Island. His cellmate, identified herein as Inmate #1, had been arrested by the FBI in June of 2002 for aiding and abetting a bank robbery. Over the course of the next four weeks, the defendant and Inmate #1 developed a rapport, and talked at length about their respective criminal cases. (GSA 9).

On November 21, 2002, a federal grand jury returned a three-count indictment against the defendant, charging him with counterfeiting (two counts) and illegal gun possession. Following his arraignment on December 4, 2002, the defendant had an opportunity to review the arrest warrant affidavit, which had been unsealed at that proceeding and disclosed for the first time to James and his attorney. The defendant correctly discerned that "CW-1" was in fact Diaz, and that she had provided the Secret Service with the information to establish probable cause to

arrest him for the three federal offenses charged in the indictment. The affidavit also suggested that the Government's case rested in large part on the testimony of Diaz. (GSA 9).

The defendant concluded that if he could get Diaz to change or recant her testimony, his legal problems would be solved because the Government would be unable to prove its case. The defendant told Inmate #1 that Diaz was the only person who could incriminate him on the counterfeiting and gun charges. Shortly after December 4, 2002, the defendant offered Inmate #1 \$2,000 to arrange for somebody outside the facility to intimidate or assault Diaz or, in the event she could not be located, assault Diaz's eight-year-old son by breaking his arm. According to Inmate #1, the defendant told him "Just assault her and tell her, 'This is from James. Stop cooperating with the feds or next time you'll be killed.' Or, 'Next time your son will be in danger.'" The defendant continued to advise Inmate #1, stating "You don't have to kill her, just intimidate her not to testify. Tell her not to involve me in 'work' she got caught doing." (GSA 10). This conduct gave rise to Count Five of the superseding indictment, charging the defendant with obstruction of justice, in violation of 18 U.S.C. § 1512(b)(1).

The defendant accurately described Diaz's physical appearance to Inmate #1, who had never seen her before, and told Inmate #1 where Diaz and her son could be found. In the course of their discussions from December 4 to December 14, 2002, Inmate #1 told the defendant that he would try to make the necessary arrangements for an

associate outside the Wyatt Detention Facility to confront Diaz. Inmate #1 went so far as to ask a relative then residing in New York to go to New London for the purpose of confronting Diaz. (GSA 10).

Although Inmate #1 was at first amenable to the plan, insofar as it involved verbal intimidation of Diaz, he had a change of heart, occasioned, at least in part, by his reluctance to participate in a conspiracy to commit a violent physical assault on Diaz and, especially, her eight-year-old son. Inmate #1 was also concerned that another inmate (to be identified herein as Inmate #2) who had been solicited by the defendant to arrange the assault on Diaz or her son, would disclose the scheme to law enforcement authorities, thereby implicating Inmate #1 in a conspiracy to obstruct justice. (GSA 10).

The defendant's solicitation of Inmate #1 and Inmate #2 to assault Diaz or her son were not his only attempts to obstruct justice in this case. According to Inmate #1, the defendant also tried to induce him and at least one other prisoner, Inmate #2, to harass and intimidate the Secret Service agent assigned to the case. The defendant suggested to Inmate #1 and Inmate #2 various ways of carrying out this assignment, including: making harassing and threatening anonymous telephone calls to the agent; putting a bullet in the agent's mailbox; and pouring blood on the windshield of the agent's vehicle. Of course, the latter two methods of intimidation would require the assistance of associates outside of Wyatt. According to Inmate #2, the defendant offered Inmate #2 \$300 to make a harassing and threatening telephone call. Inmate #1 did

not take up James on the offer. It is not known whether Inmate #2 attempted to call the agent; in any event, the agent did not receive any such telephone call. (GSA 10-11).

B. The First Sentencing

In connection with the defendant's sentencing, the Probation Office prepared a Presentence Report ("PSR"), which included certain recommendations regarding the application of the Sentencing Guidelines to this case. The base offense level for Counts One and Two, which were grouped, was Level 9 under Sentencing Guidelines Section 2B5.1. (GSA 11). This was in accord with the Guidelines calculation contained in the plea agreement. The base offense level for Count Three was Level 20, under Section 2K2.1(a)(4)(A). (GSA 11-12). Because the offense level for the group comprising Counts One and Two was more than eight levels less serious than the offense level for Count Three, there was no increase for the combined offense level. See U.S.S.G. § 3D1.4(c).

The Probation Office recommended a two-level upward adjustment for obstruction of justice, pursuant to Section 3C1.1 of the Guidelines. (GSA 12). The Government concurred with this recommendation. The Probation Office also recommended that the district court withhold the three-level downward adjustment for acceptance of responsibility because James falsely denied and frivolously contested relevant conduct. (GSA 12, 28; GA 49-50). The Government agreed with the Probation

Office and did not recommend to the district court a downward adjustment for acceptance of responsibility.

To assist the district court in its fact-finding, the Government prepared a detailed sentencing memorandum, including documentary exhibits and consensual recordings, summarizing a lengthy criminal investigation. (AA 22). Also, on October 29, 2004, the Government filed an unopposed motion and supporting memorandum seeking permission to submit to the district court, under seal, the grand jury transcripts of two witnesses in order to assist the district court in making findings of fact regarding the proposed obstruction of justice adjustment. (GSA 25-30). The district court granted this motion on October 29, 2004, and received the transcripts of the two witnesses. (GSA 31). These transcripts had been disclosed to the defendant approximately one year earlier in the course of pre-trial discovery. (GSA 25-26). The two witnesses would have been the Government's principal witnesses at trial.

On November 18, 2004, the district court held a sentencing hearing. There were two contested issues at this hearing: (1) whether the defendant should receive a two-level upward adjustment under U.S.S.G. § 3C1.1 for obstruction of justice; and (2) whether the defendant should receive a three-level downward adjustment under U.S.S.G. § 3E1.1 for acceptance of responsibility. With respect to the obstruction of justice issue, the Government's written submission, including exhibits, identified six discrete acts of obstruction. (GA 5-6, 23). In addition, the Government offered the testimony of

Special Agent Stuart Collier, who testified regarding a specific instance of witness tampering on the part of the defendant. (GA 24-30). Defense counsel had an opportunity to cross-examine Agent Collier. (GA 31). Although the defendant contested the facts proffered by the Government and summarized in the PSR on this issue, he conceded that those facts were sufficient to support an adjustment for obstruction of justice. (GA 19, 23, 81). The defendant offered no evidence on this issue. The district court found that the defendant had engaged in acts that constituted obstruction of justice and, accordingly, applied the adjustment for obstruction of justice. (GA 34).

The district court next turned to the issue of acceptance of responsibility. (GA 34-50). During his interview with the United States Probation Officer assigned to the case, the defendant denied his role in producing or procuring large amounts of counterfeit currency, minimized his criminal activity, and falsely inculpated Diaz by claiming it was she who provided him with the counterfeit currency, not the other way around. (GSA 42-43). The district court noted that this was inconsistent with acceptance of responsibility and declined to reduce the defendant's offense level under Section 3E1.1. (GA 50).

Having decided the two contested Guidelines issues, the district court announced that it would adopt the Guideline calculation recommended in the PSR, *viz.*, Level 22. (GA 51; GSA 11-12). The defendant had an opportunity to address the district court before sentence was imposed. (GA 51-57). He conceded that he was not completely honest with the Probation Officer. (GA 51).

The district court sentenced the defendant to a term of imprisonment of 66 months on Counts One, Two, and Three, to run concurrently. This sentence was within the range recommended by the Probation Office, *viz.*, 63 to 78 months. (GA 67). After announcing this sentence, Judge Dorsey stated that he would have imposed the same sentence if the Guidelines were not mandatory. (GA 67-68). At the conclusion of the proceedings, the district court dismissed Counts Four and Five of the Second Superseding Indictment, upon motion of the Government. (GA 69).

C. The Remand and Resentencing

The defendant filed a timely notice of appeal on November 29, 2004. (AA 22). He filed no briefs in support of his appeal. On or about March 29, 2005, the defendant filed a motion with this Court seeking a remand for resentencing in accordance with the principles set forth in *United States v. Crosby*. (GA 72-73). On June 29, 2005, this Court granted the defendant's motion, and, citing *Booker* and *Fagans*, "remanded to the district court with instructions to vacate the sentence and resentence the defendant-appellant in conformity with *Booker*." (AA 26). The mandate issued on July 21, 2005. (AA 26).

On September 7, 2006, the defendant appeared before the district court for resentencing. The district court vacated the sentence (AA 75) and expressed its inclination simply to reimpose the sentence of 66 months. (AA 60-62). The defendant expressed the view that a *Fagans* remand required the district court to vacate not only its

sentence, but also its findings of fact on any contested issues and its Guidelines calculation as well. The district court agreed to continue the resentencing so as to allow the defendant to submit a motion for reconsideration, wherein the defendant would have an opportunity to articulate his reasons for seeking this relief. On or about September 26, 2006, and before the final sentencing hearing, he filed a two-sentence Motion for Reconsideration, in which he asked the district court to “reconsider the issues raised and the facts presented relating to departure issues on his behalf at the previous sentencing.” (GA 75).² The defendant proffered no facts or arguments in this motion.

The defendant appeared again for resentencing on November 6, 2006, at which time he renewed his argument that the *Fagans* remand required the district court to vacate its original sentence and all factual findings that supported that sentence, including a Guidelines calculation. The district court vacated the sentence (GA 85), but declined to revisit its original Guidelines calculation. The district court noted, and the defendant agreed, that the only issue preserved by the defendant in his appeal was the *Booker* issue regarding the mandatory application of the Guidelines. (GA 83-84). Specifically, the district court stated that the scope of the remand was limited to “the *Booker* question, *i.e.*, the mandatory application of the guidelines, [and] there is nothing further that was returned to this Court to deal with, and so

² At the final sentencing hearing on November 6, 2006, the defendant acknowledged that there were no departure issues. (GA 78-80).

therefore, this Court is really not, under the law, entitled to go beyond the extent of the remand.” (GA 92).

Having vacated the Guidelines sentence, the district court expressly acknowledged its obligation to consider the factors set forth in 18 U.S.C. § 3553(a). (GA 98). With respect to the Guidelines calculation, the district court adopted its previous findings and determined that the applicable guidelines range was 63 to 78 months (Level 22, Criminal History Category IV). (GA 98). After the defendant addressed the court (GA 99-100), Judge Dorsey explained the factors that he considered in fashioning an appropriate sentence. (GA 101-104). Judge Dorsey expressly referenced the Section 3553(a) factors as he announced a sentence of 63 months on each count of conviction, to run concurrently. (GA 133-135). In arriving at this sentence, Judge Dorsey credited the defendant for an improved attitude after his original sentencing. (GA 133-134).

SUMMARY OF ARGUMENT

The district court fully complied with this Court’s mandate by vacating the defendant’s sentence, which had been imposed before the Supreme Court decided *Booker*, and resentencing the defendant under the principles articulated by the Supreme Court in *Booker* and by this Court in *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), and *United States v. Fagans*, 406 F.3d 138 (2d Cir. 2005). Nothing in those decisions requires a district court on remand to vacate its findings of fact and Guidelines calculations. In any event, under the law of the case

doctrine, the district court's decision not to relitigate factual issues that had already been decided was wholly appropriate because the defendant proffered no new facts or legal arguments in support of his motion for reconsideration, and thus he provided no basis for the district court to reopen those issues. For the same reasons, the defendant's failure to proffer any evidence that would have provided the district court with a basis for revisiting its factual findings, and his continued failure to do so in this appeal, illustrates the lack of any prejudice to him as a result of the district court's ruling.

ARGUMENT

I. THE DISTRICT COURT FULLY COMPLIED WITH THIS COURT'S REMAND PURSUANT TO FAGANS.

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 United States v. Booker*, 543 U.S. 220, 258 (2005); *see also United States v. Crosby*, 397 F.3d 103, 110-18 (2d Cir. 2005). 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 114.³

To fulfill its duty to consider the Guidelines, the district court will “normally require determination of the applicable Guidelines range.” *Crosby*, 397 F.3d at 113. “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.)

³ On November 3, 2006, the Supreme Court granted *certiorari* in companion cases to determine whether extraordinary circumstances must be present to justify deviation from the advisory guideline range and whether a sentence within a correctly calculated guideline range is presumptively reasonable. *See Claiborne v. United States*, 127 S. Ct. 551 (2006), and *Rita v. United States*, 127 S. Ct. 551 (2006).

(declining to express opinion on whether an incorrectly calculated Guidelines sentence could nonetheless be reasonable), *cert. denied*, 126 S. Ct. 388 (2005).

Where a defendant preserved his objection to the compulsory use of the Guidelines in the wake of *Blakely v. Washington*, 542 U.S. 296 (2004), this Court has held that the proper procedure is to “remand [the case] to the District Court with instructions to vacate the sentence and resentence in conformity with *Booker* and this opinion.” *Fagans*, 406 F.3d 142. In other words, a *Fagans* remand requires a district court to resentence a defendant under the post-*Booker* sentencing regime, in which the Guidelines are merely advisory.

This Court will “review a district court’s factual findings made in the course of imposing a sentence under the Guidelines for clear error and the application of the Guidelines to those findings for abuse of discretion, unless the application presents a purely legal question, in which case [the Court will] employ a *de novo* standard of review.” *United States v. Ravelo*, 370 F.3d 266, 269 (2d Cir. 2004).

C. Discussion

1. The District Court Complied With the Instructions in the Mandate.

This Court's mandate of July 21, 2005, required the district court to vacate its original sentence and resentence the defendant "in conformity with *Booker*." (AA 26). That portion of the mandate requiring resentencing under *Booker* essentially required the district court to (1) calculate the Guidelines; (2) apply the Guidelines in an advisory manner and not as compulsory; and (3) "consider the factors specified in 18 U.S.C. § 3553(a) . . . before deciding whether to impose a Guidelines sentence or a non-Guidelines sentence." *Fagans*, 406 F.3d at 141 (citing *Crosby*, 397 F.3d at 110-12). The district court complied with the mandate.

The district court clearly announced its understanding of the mandate: to resentence without mandatory application of the Guidelines, and considering the various other factors set forth in Section 3553(a). (GA 58). This approach is completely consistent with this Court's holdings in *Crosby* and *Fagans*. Nothing in those two decisions requires a district court to revisit contested factual issues as to which the district court had already made findings of fact and as to which the appellate court remained silent.

At the final sentencing hearing on November 6, 2006, the district court noted, and the defendant agreed, that the only issue preserved by the defendant in his appeal was the

Booker issue regarding the mandatory application of the Guidelines. (GA 83-84). The district court correctly stated that “when a case is remanded, it is to be considered solely to the extent of the remand, and not otherwise, and in the absence . . . of any suggestion of anything other than the *Booker* question, *i.e.*, the mandatory application of the Guidelines, there is nothing further that was returned to this Court to deal with.” (GA 92). Accordingly, Judge Dorsey declined the defendant’s repeated requests to relitigate his findings of fact relating to obstruction of justice and acceptance of responsibility. *Cf. United States v. Pineiro*, 470 F.3d 200, 206 (5th Cir. 2006) (“By recalculating Pineiro’s guideline range, the district court exceeded the scope of our mandate. Under the limits of our mandate in *Pineiro II*, the district court was only to resentence Pineiro under an advisory guideline regime, not recalculate his total offense level; that had never been addressed or vacated on appeal.”).

It should be noted that Judge Dorsey properly followed the mandate by considering new facts that arose after the original sentencing (*i.e.* the defendant’s improved attitude). Under *Fagans*, a district court must sentence a defendant as he stands before the court at that moment, whereas *Crosby* freezes time at the moment of the original sentencing and precludes a court from considering later-arising facts when deciding whether to re-sentence. Thus, to the extent the defendant proffered new evidence, the district court properly agreed to consider it.

In imposing a final sentence after remand, Judge Dorsey articulated the factors that he considered (GA 101-

104) and expressly acknowledged that he had considered the Section 3553(a) factors (GA 129-130, 133).

2. The Defendant Did Not Preserve Any Claim of Error Relating to the District Court's Guidelines Calculation.

At the initial sentencing hearing on November 18, 2004, the defendant contested the factual basis for the obstruction adjustment, but offered *no evidence* in support of his position on this issue. Regarding the district court's denial of a three-level downward adjustment for acceptance of responsibility, the defendant *admitted* that he had been dishonest in his interview with the Probation Officer. (GA 52-53). In his original appeal, he did not claim error as to either of these issues, but merely sought - and received - a remand based on *Booker*. Thus, the defendant has not preserved a claim of error relating to the district court's calculation of the Guidelines and has not argued in this appeal that the district court erred in calculating his Guidelines. Indeed, the defendant conceded at his original sentencing that the facts recited in the PSR were sufficient to support an adjustment for obstruction of justice. (GA 19, 23). The defendant's present appeal rests solely on the proposition that the district court erred by not allowing him to revisit contested factual issues as to which he had, in the first instance, either offered no evidence or admitted. In support of this proposition, the defendant cites "the spirit of *Fagans*." *See* Def.'s Brf. at 6.

This Court's decision in *Fagans* was concerned largely with preserved claims of error relating to the calculation of the Guidelines in a firearms prosecution. After affirming the district court's Guidelines determinations, the *Fagans* court remanded the case for resentencing on the defendant's principal claim of error - the compulsory application of the Guidelines. *Fagans*, 406 F.3d at 142. The *Fagans* court did *not* remand for reconsideration of any findings of fact, and there is no suggestion in the text of the opinion that the remand in any way invited the parties or the district court to engage in an open-ended review of the district court's previous Guidelines determinations, which, in any event, had been affirmed by the Court.

In the present case, by contrast, the defendant preserved no claims of error, aside from his objection to the compulsory application of the Guidelines. Based on that claim, this Court remanded for resentencing and Judge Dorsey appropriately limited the resentencing to this issue - that is, a reassessment of the appropriate sentence in light of all the Section 3553(a) factors, including the advisory Guidelines. It should be noted that at his resentencing, the defendant offered *no evidence* and *no argument* relating to the Section 3553(a) factors, aside from his own brief and largely incoherent statement. (GA 99-100, 105). Nevertheless, Judge Dorsey did, in fact, reduce the defendant's sentence by three months, clearly illustrating that he understood his authority to impose a lower sentence on remand. The fact that the final sentence - 63 months - was at the bottom of the Guidelines range does not suggest that Judge Dorsey believed he was constrained

by the Guidelines to impose a sentence within the range. Indeed, Judge Dorsey clearly stated his understanding that he was *not* bound by the Guidelines. (GA 133).

In support of his argument that “the spirit of *Fagans*” requires the district court on remand to revisit all findings of fact upon which its Guidelines calculation was based, the defendant cites *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006), wherein this Court remanded a case pursuant to *Fagans* so that the district court could consider certain Guidelines calculations. *See* Def.’s Brf. at 7. However, the Court’s remand in that case was premised on the fact that the defendant had “raised numerous arguments as to the district court’s calculation of his Guidelines sentence.” *Id.* at 350. In other words, the defendant had preserved and made claims of error relating to the district court’s Guidelines calculation. In the present case, the defendant has made no such claims. In his initial appeal, he did not file a brief. Instead, after the Supreme Court issued its decision in *Booker*, he filed a motion for remand in which he expressly referenced the *Booker* issue, *and nothing else*. (GA 73). Accordingly, the mandate could encompass nothing more than the issue of the mandatory application of the Guidelines, and a reconsideration of an appropriate sentence in light of all the Section 3553(a) factors. Nothing in *Gotti* requires, or even suggests, that a district must revisit all contested factual findings in a *Fagans* remand *where there has been no claim of error as to those findings*.

3. Conclusion

The Court's mandate in this case required the district court to do nothing more than vacate the defendant's sentence and resentence him under an advisory Guidelines regime. The district court fully complied with this mandate by considering all the Section 3553(a) factors in light of the facts that existed at the time of the resentencing. Neither *Fagans* nor *Crosby* nor *Booker* can support the proposition that the district court on remand should have revisited Guidelines calculations or factual findings as to which the remand was silent, and as to which the defendant has never proffered any contrary evidence.

II. UNDER THE LAW OF THE CASE DOCTRINE, THE DISTRICT COURT APPROPRIATELY DECLINED TO REVISIT THE CONTESTED FACTUAL FINDINGS UPON WHICH IT BASED ITS GUIDELINES CALCULATION.

A. Relevant Facts

The relevant facts are set forth above.

B. Governing Law

The law of the case doctrine has "two branches." *United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002). "The first requires a trial court to follow an appellate court's previous ruling on an issue in the same case. This is the so-called 'mandate rule.'" *Id.* (citation

omitted). “The mandate rule ‘compels compliance on remand with the dictates of the superior court and foreclose relitigation of issues expressly or impliedly decided by the appellate court.’” *United States v. Bryce*, 287 F.3d 249, 253 (2d Cir. 2002) (quoting *United States v. Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (quoting, in turn, *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993))) (emphasis deleted).

“The second and more flexible branch is implicated when a court reconsiders its own ruling on an issue in the absence of an intervening ruling on the issue by a higher court. It holds ‘that when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case,’ unless ‘cogent’ and ‘compelling’ reasons militate otherwise.” *Quintieri*, 306 F.3d at 1225 (quoting *United States v. Uccio*, 940 F.2d 753, 757 (2d Cir. 1991), and *United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000)) (citations omitted) (emphasis added). “The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” *Tenzer*, 213 F.3d at 39 (citations and internal quotation marks omitted). “[T]his branch of the doctrine, while it informs the court’s discretion, ‘does not limit the tribunal’s power.’” *United States v. Uccio*, 940 F.2d 753, 758 (2d Cir. 1991) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). A court may therefore revisit an earlier, unreviewed, decision of its own so long as it has a valid reason for doing so, and provides the opposing party “sufficient notice and an opportunity to be heard.” *Uccio*, 940 F.2d at 759 (finding

that district court's realization that it had relied on faulty legal interpretation of a sentencing guideline was valid reason for revisiting earlier ruling).⁴

C. Discussion

1. The Law of the Case Doctrine Effectuates a Preference For Finality of Judgments.

The reason why further reconsideration by the district court would have been inappropriate in this case, the Government submits, lies with the concept of finality, which is the core concept animating the law of the case doctrine. As this Court has explained:

Very high among the interests in our jurisprudential system is that of finality of judgments. It has become almost a commonplace to say that litigation must end somewhere, and we reiterate our firm belief that courts should not encourage the reopening of final judgments or casually permit the relitigation of litigated issues out of a friendliness to claims of unfortunate failures to put in one's best case.

⁴ This Court has had occasion to discuss the standard of review applicable after a district court declines to resentence after a *Crosby* remand, *see United States v. Williams*, 475 F.3d 468, 474-76 (2d Cir. 2007), but has not yet applied the law of the case doctrine to a post-*Crosby* resentencing or its equivalent, a *Fagans* resentencing, *id.* at 476 n.4.

United States v. Cirami, 563 F.2d 26, 33 (2d Cir. 1977). The *Cirami* court went on to find that the systemic interest in finality in the case at hand was outweighed by one party's presentation of compelling, newly available evidence - a traditional exception to the mandate rule. The point here is that a given issue should not be litigated before a trial court, yet still remain open to relitigation following a final judgment. Once the district court made a definitive judgment about the obstruction and acceptance of responsibility issues - as framed by a given set of legal rules and a given set of facts - those issues should be foreclosed from further litigation. To do otherwise would invite open-ended relitigation on remand of any issue that involves a factual component - that is, any issue which is reviewable for clear error, and which therefore might hypothetically admit of more than one possible permissible conclusion in the first instance.

2. The Defendant Has Not Offered Any Reason to Relitigate the Contested Factual Issues.

On remand to the district court, the defendant did not offer any new evidence relating to the contested factual issues that would warrant disturbing the district court's findings as to those issues. Prior to the final sentencing hearing, he filed a two-sentence Motion for Reconsideration, in which he asked the district court to "reconsider the issues raised and the facts presented relating to departure issues on his behalf at the previous sentencing." (GA 75). The defendant's presentation to the district court at his resentencing consisted principally

of his request to relitigate the district court's factual findings relating to obstruction of justice. However, the defendant proffered no evidence to support an alternative factual finding. In this appeal, he claims that the district court denied him "the opportunity to present evidence on his own behalf regarding his sentencing calculation." *See* Def.'s Brf. at 8. Later, he claims that he "was not given the opportunity to testify, as counsel indicated was a possibility if he were given the opportunity." *See* Def.'s Brf. at 10.

In fact, the defendant had the opportunity to present evidence on his own behalf at the original sentencing on November 18, 2004. He offered nothing and did not testify. Following the remand, the defendant offered nothing to support his claim that the district court should vacate its previous factual findings regarding the contested Guidelines issues. In light of this complete failure to present the district court with any evidence that would weigh against its previous factual findings, Judge Dorsey's decision not to disturb his original findings of fact was consistent with the purposes served by the law of the case doctrine.

3. Conclusion

The district court's factual findings regarding obstruction of justice and acceptance of responsibility were the law of the case and the defendant never offered the court any reason to disturb these findings.

CONCLUSION

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

Dated: March 21, 2007

Respectfully submitted,

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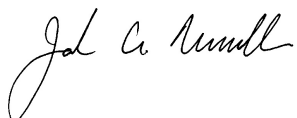
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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9,374 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

A handwritten signature in cursive script, reading "John A. Marrella".

JOHN A. MARRELLA
ASSISTANT U.S. ATTORNEY

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. James

Docket Number: 06-5256-cr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 3/21/2007) and found to be VIRUS FREE.

Louis Bracco
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Dated: March 21, 2007