07-0330-cr

To Be Argued By:
ROBERT M. SPECTOR

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-0330-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

MANUEL VILLARINI,
Defendant-Appellant.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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

ROBERT M. SPECTOR
Assistant United States Attorney
SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

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Statement of Jurisdiction

This is an appeal from a judgment entered in the District of Connecticut (Mark R. Kravitz, J.) on February 7, 2007 after the defendant pleaded guilty to engaging in a conspiracy to possess with the intent to distribute, and to distribute, one hundred grams or more of heroin. The district court had subject matter jurisdiction under 18 U.S.C. § 3231. On February 9, 2007, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). This Court has appellate jurisdiction over the defendant's challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

Statement of the Issue Presented

Was the defendant's sentence reasonable in light of the applicable sentencing guideline range and the factors set forth at 18 U.S.C. § 3553(a)?

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Preliminary Statement

From February 2005 through and including July 2005, Carlos Roman operated a heroin enterprise in Willimantic, Connecticut, during which time he obtained raw heroin from various sources, including Eduardo Casiano. Roman sold heroin in a variety of different quantities to numerous customers in and around Willimantic. The defendant, Manuel Villarini, was one of Roman's regular customers. He operated a heroin business in New London,

Connecticut and regularly purchased ten and twenty gram quantities of heroin from Roman and, on occasion, directly from Casiano. From April 2005 through July 2005, the defendant purchased in excess of one hundred grams of heroin for redistribution to others in New London.

The defendant and twenty-eight other individuals were charged in a fourteen-count superseding indictment with a variety of narcotics offenses. The defendant pleaded guilty to conspiring to distribute one hundred grams or more of heroin on May 12, 2006. At sentencing, the district court departed horizontally one criminal history category under U.S.S.G. § 4A1.3, reduced the incarceration range from 188-235 months to 168-210 months, and imposed a term of 168 months.

In this appeal, the defendant challenges his sentence on the ground that the district court improperly considered the defendant's extensive criminal history in refusing to impose a non-guidelines sentence. This claim has no merit. The district court properly considered the factors set forth in 18 U.S.C. § 3553(a) in imposing the 168-month sentence. In particular, as the district court noted, the defendant's extensive criminal history and arrest record demonstrated that, in addition to addressing the goal of general deterrence and imposing just punishment, the sentence had to deter specifically the defendant from engaging in narcotics trafficking in the future.

Statement of the Case

On September 7, 2005, a federal grand jury sitting in New Haven, Connecticut returned a fourteen-count superseding indictment against the defendant and others charging him in Count One with conspiring to possess with the intent to distribute and to distribute 100 grams or more of heroin, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846. JA1-JA4.[1] On May 12, 2006, the defendant changed his plea to guilty as to the charge in the superseding indictment. JA1-viii (docket entry). On February 5, 2007, the district court (Mark R. Kravitz, J.) sentenced the defendant to 168 months' imprisonment and 4 years' supervised release. JA13-JA15. Judgment entered February 7, 2007. JA1-x.

On February 9, 2007, the defendant filed a timely notice of appeal. JA86. The defendant was ordered to surrender to the United States Marshal on February 12, 2007, has been incarcerated in federal custody since that date, and is currently serving his sentence. JA14.

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

Statement of Facts

A. Factual Basis

Had this case gone to trial, the Government would have presented the following facts, which were set forth almost verbatim in the Government's January 30, 2007, sentencing memorandum and the Pre-Sentence Report (sealed appendix):

In December 2004, the FBI in Cleveland, Ohio began an investigation into a Drug Trafficking Organization ("DTO") operating in Cleveland, Ohio. This Title III investigation revealed that an individual named Gonzalo Sanchez was operating a large DTO that purchased kilogram quantities of cocaine and heroin for re-distribution to others. In particular, Sanchez was responsible for distributing cocaine and heroin in Cleveland, Ohio, and Willimantic, Connecticut. In Cleveland, Sanchez's brother-in-law, Melvin Ortega, helped Sanchez in the daily operation of his DTO by distributing cocaine and heroin and collecting the proceeds from such distribution. Wire interceptions also revealed that Juan Carlos Iniguez, who resided in Chicago, Illinois, was Sanchez's cocaine and heroin supplier, and that Iniguez was receiving at least a portion of his narcotics from suppliers in Mexico. On May 26, 2005, the FBI in Cleveland initiated the conclusion of its case by arresting Sanchez, Ortega, and their associates, and seizing several kilograms of heroin and cocaine. On that same date, the FBI in Chicago initiated the conclusion of its case by

arresting Iniguez and his associates. Pre-Sentence Report ("PSR") ¶ 11.

Starting in approximately February 2005, wire interceptions over Sanchez's cellular telephone revealed that Carlos Roman, who resided at 191 Southridge Drive, Willimantic, Connecticut, began purchasing large quantities of narcotics from Sanchez. Sanchez and his associates would drive from Cleveland, Ohio, to Willimantic, Connecticut to deliver the narcotics and collect payment. Based on the interceptions over Sanchez's cellular telephones, the FBI in Connecticut, with court authorization, began intercepting communications over Roman's cellular telephone on April 3, 2005. These interceptions continued over two different cellular telephones utilized by Roman, with periodic interruption, until June 19, 2005. PSR ¶ 13.

Roman utilized his cellular telephones to conduct his DTO in Connecticut. Wire interceptions between April 3, 2005 and June 19, 2005 revealed that Roman was a large scale distributor of heroin in Willimantic, Connecticut and the surrounding areas. Wire interceptions over both Sanchez's and Roman's cellular telephones also revealed that, from in or about February, 2005 through the date of Sanchez's arrest on May 26, 2005, Roman obtained large quantities of heroin from Sanchez and utilized his residence at 191 Southridge Drive, in Willimantic, Connecticut, and the residence of his cousin, Felix A. Roman, at 82 Boston Post Road, Apt. A4, North Windham, Connecticut, to package and store these narcotics. PSR ¶ 14.

Wire interceptions over Roman's cellular telephones also revealed that he utilized an individual named Eduardo Casiano as an alternative source of supply, especially after Sanchez's May 26, 2005 arrest. The FBI, with court authorization, began intercepting Casiano's wire communications on May 6, 2005. These interceptions continued over two different cellular telephones utilized by Casiano, with periodic interruption, until July 19, 2005. Intercepted telephone conversations revealed that Casiano was obtaining narcotics, including heroin, from various sources of supply, including co-defendants Hector David Espinosa, Jose Santiago Vera, Nazariel Gonzalez, and at least one unidentified source in New York City. PSR ¶ 15.

As to the defendant, from in or about April 2005 through and including July 2005, he purchased distribution quantities of heroin from Carlos Roman and, at times, Eduardo Casiano, and re-distributed the heroin to customers in New London. Specifically, on April 3, 2005, the defendant ordered "ten" (grams of heroin) from Roman. On April 4, 2005, the defendant talked about getting "twenty" (grams of heroin) from Roman and "stretching it" to increase his profit. The defendant also asked about "fifteen" or "twenty" and told Roman that he could move the narcotics easier if he had smaller quantities. On April 10, 2005, the defendant discussed getting "twenty" (grams of heroin) from someone else, and Roman agreed to store it for him. The defendant also said that he could get "100" of the other stuff. On April 18, 2005, Roman told the defendant that he had a guy "coming down with 100" (grams of heroin). On April 23, 2005,

Roman told the defendant that he had picked up "30" (grams of heroin) and made them. Roman asked the defendant to give him the "whole amount" and not just "1000" dollars. On April 25, 2005, the defendant talked with Roman about a price of "80" dollars per gram for heroin, which was a standard price that Roman charged per gram of heroin. PSR ¶ 16.

On May 7, 2005, the defendant talked with Casiano, over Casiano's recorded line. The defendant said that he was trying to find Roman, and Casiano responded that he had seen Roman yesterday. The defendant asked Casiano how much he was charging for heroin, and Casiano responded that he could give it to him for $85 per gram. First, the defendant stated that he wanted "ten" grams, and then he changed the quantity to "fourteen" grams. Casiano told him that fourteen grams would cost him "$1190." PSR ¶ 16.

On June 3, 2005, the defendant ordered "ten" (grams of heroin) from Roman, and then, later during that same recorded call, the defendant discussed the possibility of receiving "20 shirts" (grams of heroin) from Roman. Roman and the defendant also talked about the purchase of a quantity of cocaine, at "28" dollars per gram. On June 10, 2005, the defendant ordered "at least ten," and hopefully "twenty" from Roman, and Roman said that he would have to "call the kids" right now because he had already "let it go." On June 11, 2005, the defendant and Roman talked, and Roman confirmed that the defendant had taken "ten." On June 16, 2005, the defendant talked with Roman about ordering narcotics for a female named

"Lucy." The defendant asked for "five, ten, whatever," and Roman confirmed that he could get "ten." PSR ¶ 16.

In total, during the time period of the heroin conspiracy, the defendant was responsible for distributing between 100 and 400 grams of heroin. PSR ¶ 17. For reference, one bag, or one use, of heroin, typically weighs as little as .02 grams (although it could weigh more) and costs between $6 and $10. One "bundle" of heroin is typically comprised of ten bags, or .2 grams, and ten bundles (100 bags) would weigh approximately 2 grams. PSR ¶ 12.

B. Guilty Plea

The defendant changed his plea to guilty as to Count One on May 12, 2006. JA1-viii. In doing so, he entered into a written plea agreement, in which the parties stipulated that the quantity of heroin commensurate with the defendant's conduct was between 100 and 400 grams. The parties also agreed that, based on the information available to them, under U.S.S.G. § 4A1.1, the defendant was in Criminal History Category IV. Finally, the Government agreed to recommend a three-level reduction for acceptance of responsibility. According to the written plea agreement, under Chapter Two of the Sentencing Guidelines, the defendant faced a guideline range of 70-87 months, based on an adjusted offense level of 23 and a Criminal History Category IV.

The plea agreement also stated that the defendant appeared to be a career offender under U.S.S.G. § 4B1.1

based on his 1991 conviction for sale of narcotics and his 1989 conviction for third degree robbery. The defendant expressly reserved his right to challenge any finding that he was a career offender, to move for a downward departure and to request a non-guideline sentence. Also, the defendant waived his right to appeal or collaterally attack any sentence of 151 months or less, regardless of how the court reached its sentence. During the plea proceeding, the parties recognized that the written plea agreement did not correctly calculate the guideline range under § 4B1.1. As a result, the parties redacted and removed the language from the plea agreement setting forth the potential guideline range under § 4B1.1.

C. Sentencing Proceeding

The PSR found that the defendant was a career offender as a result of a 1989 felony conviction for third degree robbery and a 1991 felony conviction for sale of narcotics. *See* PSR ¶ 28. As a result, after a three-level reduction for acceptance of responsibility, the defendant fell into a guideline range of 188-235 months, which was based on an adjusted offense level of 31 and a Criminal History Category VI. *See* PSR ¶¶ 29, 73. The defendant filed a sentencing memorandum asking for a departure for overstatement of criminal history under U.S.S.G. § 4A1.3 and a non-guideline sentence of 60 months. JA16, JA19-JA20. The Government opposed these requests and advocated for a sentence within the 188-235 month guideline range set forth in the PSR.

According to the PSR, as amended after sentencing, the defendant had twelve prior convictions for which he received no criminal history points and which were not counted towards any career offender calculation. Specifically, in 1980, the defendant was convicted of grand larceny in state court in New York and sentenced to time served. *See* PSR ¶ 32. In 1980, the defendant was also convicted of third degree grand larceny, possession of stolen property, and possession of burglary tools in state court in New York, and sentenced to concurrent terms of 15 days in prison. *See* PSR ¶ 33. In 1981, the defendant was convicted of attempted conspiracy to possess a controlled substance in state court in New York and ordered to pay a $50 fine. *See* PSR ¶ 34. In 1983, the defendant was convicted of possession of a controlled substance in the seventh degree in state court in New York and sentenced to three years of probation. *See* PSR ¶ 35. In 1983, the defendant was also convicted of petit larceny in state court in New York and sentenced to six months in prison. *See* PSR ¶ 36. In 1984, the defendant was convicted of possession of a controlled substance in the seventh degree in state court in New York and sentenced to a conditional discharge. *See* PSR ¶ 37. In 1987, the defendant was convicted of possession of a controlled substance in the seventh degree in state court in New York and sentenced to ten days in prison. *See* PSR ¶ 38. In 1988, the defendant was convicted of criminal trespass and possession of cocaine with intent to sell in state court in Connecticut, and sentenced to concurrent terms of six months' incarceration, execution suspended, and two years' probation. *See* PSR ¶ 39. In 1989, the defendant was convicted of third degree assault in state court in

Connecticut and sentenced to time served. *See* PSR ¶ 40. In 1989, the defendant was also convicted of resisting arrest in state court in Connecticut and sentenced to time served. *See* PSR ¶ 41. In 1989, the defendant was convicted of criminal trespass in state court in Connecticut and sentenced to time served. *See* PSR ¶ 43. On March 29, 1994, the defendant was convicted of interfering with the police and sentenced to a consecutive term of nine months' incarceration. *See* PSR ¶ 45. Because of the age of these prior convictions and the sentences imposed, none of them accumulated any criminal history points.

Due to the imposition of lengthier prison terms, however, some of the defendant's prior convictions accumulated criminal history points despite their age. For example, on July 19, 1989, the defendant was convicted of third degree robbery in state court in Connecticut and sentenced to three years' incarceration. He was not released from service of this sentence until July 19, 1992. *See* PSR ¶ 42. More specifically, the defendant was released on parole from his 1989 third degree robbery conviction on July 5, 1990. He was then returned to incarceration on September 21, 1990, after having been arrested for sale of narcotics. As a result, the defendant did not complete his sentence on the third degree robbery charge until July 19, 1992, at which time he was serving the sentence for his 1991 sale of narcotics conviction. *See* PSR ¶¶ 42, 44; JA47.

After his September 20, 1990 arrest for sale of narcotics, which occurred while on parole for the 1989 robbery conviction, the defendant was convicted of sale of

narcotics and sentenced to ten years' incarceration, execution suspended after three years, and three years' probation. *See* PSR ¶ 44. The defendant was arrested again on March 22, 1994, after having escaped from a community residence, where he had been serving a period of parole stemming from his 1991 sale of narcotics conviction. The defendant was not discharged as a result of both the sentence from the 1991 sale of narcotics conviction and the 1994 interfering with police conviction until October 19, 2005. *See* PSR ¶ 45. Finally, on October 6, 1998, the defendant was sentenced to a term of three years' incarceration, execution suspended, and three years' probation, based on a conviction for possession of narcotics. *See* PSR ¶ 46.

In total, it appears that the defendant was arrested in New York and Connecticut approximately fifteen times prior to the instant arrest. In addition, over the course of his criminal career, the defendant repeatedly committed crimes while on court supervision. For example, in 1990, he was arrested for sale of narcotics while on parole from his robbery conviction. Again, in 1994, the defendant was arrested for escaping from a community release program while serving a parole term stemming from his 1991 sale of narcotics conviction. Also, between 1980 and 1989, the defendant was arrested multiple times having committed crimes either while on pretrial release, or while on parole or probation.

At the start of the sentencing hearing, the district court discussed the principles that would guide its sentencing decision. JA39. The court indicated that the sentencing

guidelines were no longer mandatory, that it must consider the guidelines, as well as the other factors set forth in 18 U.S.C. § 3553(a), and that it was required to determine the applicable guideline range and policy statements. JA39. The court then explained that it would decide, after consulting the sentencing guidelines and the other § 3553(a) factors, whether to impose a sentence under the guidelines or to impose a non-guidelines sentence. JA39.

At that point, the court calculated the guideline range. JA40-JA41. First, it granted the Government's motion for an additional one-level reduction for acceptance of responsibility and awarded the defendant a full three-level reduction for acceptance. JA40. Next, the court indicated that the base offense level would normally be 26 because the defendant had distributed between 100 and 400 grams of heroin. JA40. The offense level rose to 34, however, due to the defendant's career offender status. JA40. In addition, the court noted that, whereas the defendant would normally fall into Criminal History Category IV, having accumulated seven criminal history points, he fell into Criminal History Category VI as a result of being a career offender. JA40. Thus, at an adjusted offense level of 31 and a Criminal History Category VI, the defendant's guideline range was 188-235 months' incarceration. JA41.

After calculating the guideline range, the court invited the defendant to make downward departure arguments, advising him that any arguments he made would also be taken into consideration in determining if a non-guideline sentence was appropriate. JA42. In response, the

defendant indicated that his only guidelines-based departure argument was under U.S.S.G. § 4A1.3, for overrepresentation of criminal history. On that issue, the district court clarified that, under § 4A1.3, it was permitted only to depart one horizontal criminal history category from VI to V, resulting in a guideline range of 168-210 months. JA44-JA45. Before resolving the issue, the court clarified that the defendant was abandoning his argument that his 1989 third degree robbery conviction was too old to accumulate criminal history points and count toward his career offender designation. JA46-JA48. The parties all agreed that the defendant was released from incarceration on that conviction within fifteen years of his commission of the instant offense, so that the conviction counted under §§ 4A1.1 and 4B1.1. JA48-JA49.

In considering the § 4A1.3 argument, the court noted that the defendant, "in the ten-year period from 1995 to 2005, has one conviction for possession, . . . and that's it in ten years." JA49. The court went on to state, "And that in and of itself wouldn't be that remarkable if you didn't really know quite what he was doing but it looks like he was running a grocery store, he was a building manager, he was otherwise gainfully employed and so while you've got these, you know, he hits the trigger for these things that occurred before that time, it appears that he goes through essentially ten years, for all intents and purposes, with really no law enforcement contact." JA49-JA50.

In response, the Government indicated that the court had discretion on the issue and that it would not be "pushing too hard." JA50, JA53. Still, the Government

stated that, under the wording of § 4A1.3, the defendant did not appear to qualify for a departure. He had a number of arrests and convictions without a significant gap in time between them. JA53. More specifically, the Government focused on several of the defendant's New York convictions: "It's really the New York convictions that sort of, in my mind, change it because it shows what was going on from 1980 to 1988, and I think if you take a big step back from the defendant, you say, well, geez, you had a lot of problems in New York, you come to Connecticut with a chance to sort of start fresh and it doesn't happen, it just continues. Then when you look in 1991, when really the most significant sentence was imposed, you know, as a ten-year sentence suspended after three years, you would want that to be kind of the last contact with law enforcement . . . ." JA53-JA54.

In ruling on the issue, the court noted that it was a "close case." JA57. The court stated, "Mr. Villarini has a lot of convictions and he certainly qualifies as a career offender. What influences me, however, is that most of these are between 1980 and 1988 and that really during the ten years leading up to this conviction, he's got this one possession conviction for which he gets probation, and so the guidelines do recognize that his career offender status doesn't account for all the variations and seriousness. . . . And so I am going to grant Mr. Villarini's request for a one . . . horizontal category change from six to five under Section 4A1.3." JA57-JA58. This departure reduced the applicable guideline incarceration range to 168-210 months. JA58.

At that point, the defendant made a presentation in support of an argument for a non-guideline sentence. JA58. First, he presented the testimony of his sister, Nelthma Villarini. JA58. Next, he argued that his criminal history did not truly represent who he was as an individual. JA60. Specifically, defense counsel stated:

> I don't think that you can look at this man and forget about his family background as a child as well. I mean, there is a reason why we end up where we end up and certainly the painful situation with his father and his relationship with the rest of his children, his brothers and sisters and his late mother, all gets wrapped up into that.
>
> And I'm certain the Court has heard this before from other defense counsel but the reason why I believe a nonguidelines – this is most important in this situation is because technically, according to the convictions, he is where he is with respect to the guidelines but it's not necessarily where he as a person is, it's where he as a person who committed these acts but not him as a person.
>
> And this man I think, your Honor, deserves another chance. I don't believe he's going to get that chance if he is forced to do 168 or 100 months or whatever. I believe that what we are asking for in this matter essentially is a term of 60 months.

JA60-JA61.

In response, the Government noted two aggravating factors. First, the quantity of heroin involved in the defendant's offense was substantially more than was involved in the conduct of most of the co-defendants. In making this point, the Government referred to Carlos Pacheco, who was a career offender sentenced to a non-guideline term of 92 months, but who only distributed between twenty and forty grams of heroin. JA63-JA64. Second, the Government pointed out that the defendant had a more troubling criminal history than most of the other co-defendants who were career offenders, many of whom qualified as career offenders based only on two qualifying convictions. JA65. In the end, according to the Government, the defendant did not present the same mitigating factors as some of the other co-defendants. He "has the support of family, has an employment history, he can work, he knows how to make money the correct way, the lawful way, he has skills, and so it makes it harder for him, it makes it harder for him to get the benefit of Mr. Pacheco's sentence, which I think reflected that he had a lot of things going against him from the start." JA66.

In response, the defendant recognized that "the amount of drugs in this situation is the driving force, and would be the driving force even under a nonguidelines sentence, but I believe that at this man's core, he's deserving of something better than what the guideline provide because I believe that the impact of a sentence of the kind that the defense is contemplating is going to be substantial for him, it's going to get the message across to him that he has to improve as a person, he has to improve more as a person, and I believe that giving him some glimmer of hope or

recognition that he has improved as a person, . . . and that it means something to his government." JA68.

At that point, the court explained to the defendant the process that it goes through in deciding the appropriate sentence. JA68. The court advised that it listened to the comments of the defendant, his sister, and the Government. JA68. It read the PSR, the Government's sentencing memorandum, and the defendant's sentencing memorandum. JA68. It considered the nature and circumstances of the offense and the history and characteristics of the defendant, including his family history. JA69. It considered the "need for the sentence to be sufficient but no greater than necessary to achieve the various purposes of a criminal sentence." JA69. It considered the various kinds of sentences available, as well as the need to avoid "disparities in sentences among defendants who have engaged in similar conduct and have roughly similar backgrounds." JA69. Next, the court reviewed the purposes of a criminal sentence, namely, to provide just punishment, to protect the public, to provide specific and general deterrence, and to provide a defendant with any needed educational, vocational or medical care. JA69-JA70.

In reaching a decision as to this defendant, the court indicated, "[A] number of things strike me." JA70. "First, I take drugs very seriously. Drugs aren't a victimless crime. Drugs destroy communities, and Willimantic certainly suffered from this drug conspiracy. Drugs also destroy families and family members, and we see this in

this case as well. . . . And 100 to 400 grams of heroin is a significant amount." JA70.

Second, the court stated:

> [Y]ou have had many, many, many opportunities to get a wake-up call from the judicial system, the justice system, of the need to stick to a life free of crime. To have 15 convictions between the age of 18 and 41 is really rather remarkable.
>
> And if all those convictions were really between age 18 and age 25, then one could say you had really put that all behind you, but it doesn't seem to be that way. They keep coming at 26, 28, 30, 32, 35, 36 and 41.
>
> And so each time that you had the opportunity to say enough is enough, this will never happen again, and you didn't really take that opportunity, and so I think in your case, specific deterrence, to really bring home to you [that] you cannot do this ever again, is an important factor for the Court, as well as general deterrence and protecting the public and providing just punishment, which is to say a punishment which is commensurate with what other individuals similarly situated have received.

JA71.

As to the defendant's argument, the court stated, "I understand Mr. McIntosh's point about your background

and your growing up, and I am sympathetic to that, but this offense occurs really when you are 41. That's at a time when most people who have put crime behind them . . . , they're sufficiently mature and reflective to know not to get involved with crime." JA71-JA72. The court indicated that the defendant's "risk of recidivism appears to be pretty high" and decided, based on all of its stated reasons, that a guideline sentence was the "appropriate sentence in this case . . . ." JA72. Thus, the court imposed a sentence of 168 months' incarceration and 4 years' supervised release. JA72.

Summary of Argument

The record amply demonstrates that the district court fulfilled its obligation to calculate the relevant guidelines range, consider that range and the relevant factors set forth in 18 U.S.C. § 3553(a), and impose a sentence that is sufficient but no greater than necessary to achieve the purposes of sentencing. The district court explained what led it to impose a sentence at the bottom of the applicable range and why it denied the defendant's request for a non-guideline sentence. There is no basis to find that the district judge exceeded the bounds of allowable discretion or violated the law in imposing the sentence it did.

Furthermore, the district court was well within its discretion to consider all of the defendant's prior convictions, including those convictions that did not accumulate criminal history points, when choosing an appropriate sentence in light of the § 3553(a) factors.

Argument

I. The defendant's 168-month guideline sentence was reasonable.

The defendant claims that his 168-month sentence violated his due process and Eighth Amendment rights. Specifically, he claims that the district court improperly relied upon twelve prior criminal convictions that had accumulated no criminal history points under the Sentencing Guidelines because they were too old. *See* Def.'s Brief at 8. The defendant argues, "The District Court's reliance upon the previous convictions for which the Sentencing Commission gave no value to refuse to sentence on a non-guideline basis because the district court believed that the suspect convictions had value to inform him of Mr. Villarini's character for sentencing purposes is to be misinformed on a constitutional magnitude." *Id.* The defendant also argues that the district court gave significant weight to an "improper or irrelevant sentencing factor." *Id.* at 9. In addition, the defendant seems to rely on the allegation that the district court was incorrect in its assertion that the defendant had previously been convicted of offenses at ages 26, 28, 30, 32, 35, 36 and 41. *See id.* at 5, 9.

The defendant's argument has no merit. The district court, after having departed horizontally from Criminal History Category VI to V under § 4A1.3, refused the defendant's request for a non-guideline sentence based on its view that a sentence within the guideline range would satisfy the goals of 18 U.S.C. § 3553(a). In referring to the

defendant's prior criminal history, the district court appropriately observed that he was a recidivist who was likely to offend again and needed to be deterred specifically from doing so. Section 3553(a) advises a district court to consider, among other things, the "history and characteristics of the defendant." 18 U.S.C. § 3553(a). It would have been impossible to determine the extent to which the sentence had to serve the purpose of specific deterrence without considering the defendant's entire criminal history, including every arrest and conviction discussed in the PSR.

A. Governing law and standard of review

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the United States Sentencing Guidelines, as written, violate the Sixth Amendment principles articulated in *Blakely v. Washington*, 542 U.S. 296 (2004). *See Booker*, 543 U.S. at 243. The Court determined that a mandatory system in which a sentence is increased based on factual findings by a judge violates the right to trial by jury. *See id.* at 245. As a remedy, the Court severed and excised the statutory provision making the guidelines mandatory, 18 U.S.C. § 3553(b)(1), thus declaring the guidelines "effectively advisory." *Booker*, 543 U.S. at 245.

After the Supreme Court's holding in *Booker* rendered the Sentencing Guidelines advisory rather than mandatory, a sentencing judge is required to: "(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the

Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence." *See United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir.), *cert. denied*, 127 S. Ct. 192 (2006); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005). The § 3553(a) factors include: (1) "the nature and circumstances of the offense and history and characteristics of the defendant"; (2) the need for the sentence to serve various goals of the criminal justice system, including (a) "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment," (b) to accomplish specific and general deterrence, (c) to protect the public from the defendant, and (d) "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner"; (3) the kinds of sentences available; (4) the sentencing range set forth in the guidelines; (5) policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to victims. *See* 18 U.S.C. § 3553(a).

"[T]he excision of the mandatory aspect of the Guidelines does not mean that the Guidelines have been discarded." *Crosby*, 397 F.3d at 111. "[I]t would be a mistake to think that, after *Booker/Fanfan*, district judges may return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum." *Id.* at 113.

Consideration of the guidelines range requires a sentencing court to calculate the range and put the

calculation on the record. *See Fernandez*, 443 F.3d at 29. The requirement that the district court consider the Section 3553(a) factors, however, does not require the judge to precisely identify the factors on the record or address specific arguments about how the factors should be implemented. *Id.*; *Rita v. United States*, 127 S. Ct. 2456, 2468-69 (2007) (affirming a brief statement of reasons by a district judge who refused downward departure; judge noted that the sentencing range was "not inappropriate"). There is no "rigorous requirement of specific articulation by the sentencing judge." *Crosby*, 397 F.3d at 113. "As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, [this Court] will accept that the requisite consideration has occurred. *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005).

This Court reviews a sentence for reasonableness. *See Rita*, 127 S. Ct. at 2459; *Fernandez*, 443 F.3d at 26-27; *United States v. Castillo*, 460 F.3d 337, 354 (2d Cir. 2006). The reasonableness standard is deferential and focuses "primarily on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a)." *United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005). This Court does not substitute its judgment for that of the district court. "Rather, the standard is akin to review for abuse of discretion." *Fernandez*, 443 F.3d at 27.

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 Rita*, 127 S. Ct. at 2462-65 (holding that courts of appeals may apply presumption of reasonableness to a sentence within the applicable Sentencing Guidelines range); *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.").

Further, 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).

Absent the sentencing court having committed an error of law or being unaware of its power to depart, the court's refusal to give the defendant a downward departure is not reviewable on appeal. *See United States v. Stinson*, 465 F.3d 113, 114 (2d Cir. 2006) (per curiam).

B. Discussion

At sentencing, the defendant faced a guideline range of 188-235 months' incarceration. PSR ¶ 73. Although he had gone approximately seven years since his last conviction, the defendant had a lengthy criminal history which included a 1989 felony conviction for third degree robbery, PSR ¶ 42, and a 1991 felony conviction for sale of narcotics, PSR ¶ 44. In total, since 1980, the defendant had been convicted of fifteen separate offenses, twelve of which were too old to accumulate criminal history points. PSR ¶¶ 32-46. From 1980 through 1988 alone, the defendant was convicted of numerous serious narcotics and larceny offenses in New York. PSR ¶¶ 32-39.

In ruling on the defendant's request for a downward departure under § 4A1.3, the court noted that it was a close call and that it was difficult to conclude that Criminal History Category VI substantially overstated the seriousness of the defendant's criminal history. JA57. Still, based on the defendant's most recent period of good behavior and the fact that he had not been convicted of another offense in seven years, the court decided to depart horizontally one criminal history category. JA57-JA58.

The reservations that the court had when considering whether to depart downward resurfaced when the court considered the defendant's request for a non-guideline sentence. The court was specifically concerned with the defendant's status as a repeat offender. As the court stated, despite having been given many opportunities to stop violating the law, the defendant repeatedly engaged in criminal conduct. JA71. For this reason, the court determined that specific deterrence was an important goal in sentencing this defendant. The court was concerned that a sentence below the guideline range would not effectively convince the defendant that, upon release from incarceration in this case, he should stop selling drugs. JA71-JA72.

The district court was well within its authority to consider all of the defendant's past criminal conduct in reaching this conclusion. "The sentencing court is well within its discretion and, indeed, is required to carefully consider the facts contained in the PSR when evaluating the § 3553(a) sentencing factors, including 'the history and characteristics of the defendant,' and the need for a

sentence to 'afford adequate deterrence to criminal conduct,' and 'to protect the public from further crimes of the defendant.'" *United States v. Mateo*, 471 F.3d 1162, 1167 (10th Cir. 2006) (quoting 18 U.S.C. §§ 3553(a)(1), (a)(2)(B) and (a)(2)(C)), *cert. denied*, 127 S. Ct. 2890 (2007). "No limitation should be placed on the information concerning the background, character, and conduct of a person . . . for the purpose of imposing an appropriate sentence." *Id.* (internal quotation marks omitted).

Furthermore, the Sentencing Guidelines themselves explicitly permit a district court to consider criminal convictions which do not accumulate criminal history points in deciding whether to depart horizontally upward to a higher criminal history category. *See* U.S.S.G. § 4A1.3. In the post-*Booker* world, either in the context of an upward departure or a non-guideline sentence above the guideline range, a district court can still consider prior convictions which do not accumulate criminal history points. *See United States v. Zeigler*, 463 F.3d 814, 818 (8th Cir. 2006) (upholding 24 month sentence as reasonable for defendant in Criminal History Category I and guideline range of 0-6 months, where district court noted that lying was a "way of life" for the defendant, as evidenced by numerous fraud convictions from 1978-1984). Indeed, district courts have even been permitted to consider uncontested facts in the PSR relating to "prior arrests" in determining "the adequacy of the advisory Guidelines sentencing range in fulfilling the relevant sentencing objectives described in § 3553(a)(2)." *Mateo* 471 F.3d at 1167-68; *see also United States v. Zapete-*

Garcia, 447 F.3d 57, 61 (1st Cir. 2006) (stating that "series of past arrests might legitimately suggest a pattern of unlawful behavior even in the absence of any convictions").

Here, the defendant claims that the sentencing court, by misstating facts about his prior convictions or relying on prior convictions that were too old to accumulate criminal history points, violated his Eighth Amendment right to be free from punishment that is "unduly harsh" and his due process right to be sentenced based on materially accurate information. Def.'s Brief at 8-9. He also argues that the district court "gave improper weight" to the twelve prior convictions that did not accumulate criminal history points. Def.'s Brief at 9.

As to this last point, it is exclusively the district court's function to determine what weight, if any, to give to the defendant's prior criminal convictions. *See Fernandez*, 443 F.3d at 32 ("The weight to be afforded any given argument made pursuant to one of the § 3553(a) factors is a matter firmly committed to the discretion of the sentencing judge and is beyond our review, as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented.").

As to the due process claim, the district court did not sentence the defendant based on material misinformation. The defendant claims that the district court was incorrect when it stated during its sentencing decision: "To have 15 convictions between the age of 18 and 41 is really rather remarkable. And if all of those convictions were really

between age 18 and age 25, then one could say you had really put that all behind you, but it doesn't seem to be that way. They keep coming at 26, 28, 30, 32, 35, 36 and 41." JA71. Specifically, the defendant claims that he was not previously convicted at age 30, 35 or 41. Def.'s Brief at 5.

The defendant is correct. He did not sustain any convictions at ages 30, 35 or 41. He did, however, sustain three separate convictions at age 26, two separate convictions at age 27, one conviction at age 28, one conviction at age 31, and one conviction at age 36. *See* PSR ¶¶ 39-46. In addition, he committed the instant offense at ages 42 and 43. *See* PSR ¶ 16. Moreover, the district court was correct that the defendant sustained 15 separate convictions between the ages of 18 and 41. *See* PSR ¶¶ 32-46. Thus, although the district court did not accurately recount the defendant's ages at the times he committed the prior offenses, it did accurately refer to the total number of convictions by the defendant. Also, the district court referred to seven convictions that the defendant sustained between ages 26 and 41, when, in fact, he sustained eight convictions between ages 26 and 36 and began committing this offense at age 42. In the end, regardless of the accuracy of this single statement during the sentencing hearing, the district court's overriding concern rings true and is supported by the information contained in the PSR: namely, that the defendant is a recidivist who continues to commit offenses despite repeated contact with the criminal justice system. At a minimum, the district court's minor – and immaterial – misstatements about the defendant's precise ages at the

time of his prior convictions do not render his sentence one based on "misinformation of constitutional magnitude." *See United States v. Tucker*, 404 U.S. 443, 447 (1972).

And although the defendant suggests that the district court violated his due process rights by relying on his old prior convictions, this argument is meritless. The defendant does not contest the accuracy of his criminal record as recounted in the PSR, but merely contests the district court's reliance on that record in setting his sentence. But as described above, the district court was well within its discretion to consider all facts about the defendant – including all facts regarding his prior criminal history – when selecting an appropriate sentence.

Finally, as to the defendant's Eighth Amendment claim, "the Eighth Amendment forbids only extreme sentences that are grossly disproportionate to the crime." *United States v. Snype*, 441 F.3d 119, 152 (2d Cir.) (internal quotation marks omitted), *cert. denied*, 127 S. Ct. 285 (2006). "'[O]utside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.'" *Id.* (quoting *Ewing v. California*, 538 U.S. 11, 21 (2003)). "The only such case in recent memory is *Solem v. Helm,* in which the Supreme Court vacated a life sentence without parole for a defendant convicted of passing a bad check for $100." *Id.*

Here, the defendant was sentenced to 168 months' imprisonment based on his status as a career offender and

his conviction for having conspired to possess with the intent to distribute 100 grams or more of heroin. Despite facing a possible statutory maximum sentence of life in prison and a guideline incarceration range of as high as 188-235 months, the court departed horizontally one criminal history category and sentenced the defendant to the bottom of the resulting guideline range. Such treatment under the sentencing guidelines cannot be categorized as overly harsh or "grossly disproportionate" to the crime. *See Ewing*, 538 U.S. 11 (rejecting Eighth Amendment challenge to sentence imposed under state three-strikes law, where crime of conviction was theft of $1200 worth of golf clubs from pro shop, following convictions for theft, burglary, possession of drug paraphernalia, robbery, trespassing, and firearm possession); *Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding life sentence for possession of 672 grams of cocaine).

In the end, the record here amply demonstrates that the district court considered all of the § 3553 factors, as well as the arguments raised by the defendant in support of a more lenient sentence. JA68-JA72. The court calculated the guidelines range and noted that it was obliged to consider the range and the other factors set forth in 18 U.S.C. § 3553(a). JA39-41. It provided a thoughtful and thorough analysis of the defendant's case in light of the § 3553(a) factors the specific facts that guided its analysis, including the seriousness of the offense, the need for a sentence to specifically deter the defendant, and the defendant's personal history and characteristics. JA70-JA72. Although the court was able to lower the applicable

guideline range slightly, from 188-235 months to 168-210 months, JA57-JA58, it could not find that the lower range provided for a sentence that was too high or was contrary to the § 3553(a) factors, JA71-JA72. In other words, the court made clear that it had considered the statutory factors that shape the determination of the sentence, and that it had concluded that a sentence within the guideline range was appropriate while a sentence below the range was not. The defendant offers no reason to believe that the guidelines sentence in this case falls outside the "broad range of sentences that would be reasonable in the particular circumstances." *Fernandez*, 443 F.3d at 27.

The court demonstrated its fulfillment of its statutory obligations and its compliance with the dictates of *Crosby*. The sentencing record shows that the district court was aware of the statutory requirements and the applicable guidelines range, that the court understood the relevance of these matters, and that the court gave them due consideration when sentencing Villarini within his guidelines range to 168 months in prison. Accordingly, that sentence should be upheld.

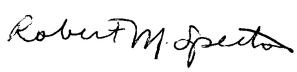
Conclusion

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

Dated: October 31, 2007

Respectfully submitted,

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

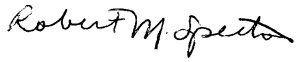


ROBERT M. SPECTOR
ASSISTANT U.S. ATTORNEY

SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

Certification Per Fed. R. App. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,159 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



ROBERT M. SPECTOR
ASSISTANT U.S. ATTORNEY

Addendum

18 U.S.C. § 3553 - Imposition of a sentence

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

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

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

(B) to afford adequate deterrence to criminal conduct;

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

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

(3) the kinds of sentences available;

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

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

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

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

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

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy

statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

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

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

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