07-1603-cr

To Be Argued By:
MICHAEL S. MCGARRY

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-1603-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

DMITRY KUPERMAN, also known as
James Kaufman, also known as Jimmy Kaufman,
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

MICHAEL S. McGARRY
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 April 16, 2007, and an amended judgment entered May 25, 2007, in district court in the District of Connecticut (Janet C. Hall, J.) after the defendant pleaded guilty to one count of conspiracy and one count of securities fraud. The district court had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. On April 3, 2007, the defendant filed a notice of appeal deemed timely pursuant to Fed. R. App. P. 4(b). Appendix ("A") 5 (docket entry). This Court has appellate jurisdiction over the defendant's challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

Statement of Issue Presented for Review

Was the defendant's 84-month sentence, which was 36 months below the applicable Guidelines range, reasonable in light of the Guidelines range, the factors set forth in 18 U.S.C. § 3553(a), and the defendant's cooperation, all of which were considered by the sentencing court?

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Preliminary Statement

Dmitry Kuperman, an organizer and leader of a boiler room operation that defrauded over 250 victims of over $3.6 million, was sentenced to 84 months incarceration – 36 months below his Guidelines range. He now appeals his sentence, arguing it was unreasonable.

Kuperman and his co-conspirators, many of whom had Wall Street experience, used their experience, gained the trust of hundreds of victims and defrauded them. After pleading guilty to conspiracy and securities fraud, Kuperman's calculated Guidelines range was 135-168 months. He faced a statutory maximum of 120 months' imprisonment, however, which became his Guidelines range.

Kuperman's sentencing hearing scheduled for January 29, 2007, was continued for two months, to March 29, 2007, so the court could inform itself as to the various roles played by the defendant and his codefendants and assure itself that there would be no unwarranted sentence disparities, an issue the court raised *sua sponte*. At Kuperman's sentencing, the court considered all the sentencing factors, granted the Government's motion made pursuant to U.S.S.G. § 5K1.1, and sentenced Kuperman to 84 months.

Dissatisfied with his sentence, Kuperman filed this appeal claiming that his sentence was unreasonable. He argues that the court erred in its application of the § 3553(a) factors, specifically arguing the court improperly weighed the nature and circumstances of the offense, the defendant's history and characteristics, and the need to avoid unwarranted sentencing disparity in combination with the Guidelines range. Kuperman also argues the § 5K1.1 departure was not extensive enough. He invites this Court to re-weigh the § 3553(a) factors and the extent of the departure and substitute its judgment for

that of the district court, and remand this case for resentencing.

The defendant's arguments have no merit. The sentencing court properly applied the Guidelines and properly considered all of the § 3553(a) factors. This Court should not second guess the weight given to any particular factor or factors or the ultimate result of the district court's legally sound determination. Nor should this Court review the extent of the § 5K1.1 departure. Accordingly, this Court should reject the defendant's claims and affirm the sentence.

Statement of the Case

On May 16, 2006, Kuperman waived indictment and entered a plea of guilty to a two-count information charging him with conspiracy to commit mail fraud, securities fraud and money laundering in violation of 18 U.S.C. § 371, and one substantive count of securities fraud in violation of 15 U.S.C. §§ 77q(a) and 77x. A3 (docket entry), A7-23.

On January 22, 2007, the district court (Janet C. Hall, J.) held an initial sentencing hearing for a co-defendant and determined that a telephone status conference was necessary in Kuperman's case and the related cases, so the court could clarify for itself factual issues. Accordingly, the court scheduled such a conference and continued Kuperman's sentencing. A4 (docket entry). The district court requested briefing on the issue of the relative culpability of Kuperman and his co-conspirators, so the

court could fully appreciate the roles in the offense and also avoid unwarranted sentence disparities in accordance with 18 U.S.C.§ 3553(a)(6). A4 (docket entries). The court continued Kuperman's sentencing hearing until March 29, 2007. A4 (docket entry).

On March 29, 2007, the sentencing court held the sentencing hearing and sentenced Kuperman to 84 months' imprisonment, 36 months below the statutory maximum which became the effective Guidelines range. A5, A43. Judgment entered April 16, 2007, and an amended judgment entered May 25, 2007. A5, A5-6. Special Appendix for Appellant ("SPA") 32-36. On April 3, 2007, the defendant filed a notice of appeal that is deemed timely pursuant to Federal Rule of Appellate Procedure 4(b)(2). A5. Kuperman is currently serving his sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. The offense conduct

Had this case gone to trial, the Government would have presented the following facts, which were set forth in the Government's sentencing memoranda dated January 30, 2007, Government's Supplemental Appendix ("GSA") 1-45, and March 28, 2007, GSA46-63, and in the Pre-Sentence Report ("PSR") (sealed appendix):

In early 2001, Appellant Kuperman met with two individuals (both of whom were named as co-defendants)

and discussed with them a scheme for enriching themselves by fraudulently obtaining money from "investors." PSR ¶ 13, 20-26. A number of the members of the conspiracy – including Kuperman – had previously worked at investment firms, PSR ¶¶ 35-36, 41, 90, and some – including Kuperman – had even held securities licenses, PSR ¶¶ 35-36, 41.

The conspiracy lasted from approximately January 2001 until approximately March 2004. PSR ¶ 20. The purpose of the conspiracy was for Kuperman and his co-conspirators to enrich themselves by fraudulently obtaining money from investor-victims, through the sale of bogus securities. *Id*. The securities they claimed to be selling were purportedly issued by a company called Cash Money Lending Corp ("CMLC"). PSR ¶¶ 18, 23. In reality, CMLC was a wholly fictitious corporation that Kuperman and his co-conspirators fraudulently represented to be an actual company in which the investors could purchase securities. PSR ¶ 18.

Kuperman, who also used the names "James Kaufman" and "Jimmy Kaufman," along with eight other co-conspirators, sold CMLC securities from an entity they called Blue Square Management Inc., ("Blue Square"). PSR ¶¶ 1, 3-4, 14, 16, 22-25; GSA4-6. Blue Square purported to be a venture capital firm in the business of selling securities and specializing in underwriting initial public offerings. PSR ¶ 16. In reality, however, Blue Square was a boiler-room operation. Blue Square was not registered with the Securities and Exchange Commission as an investment company, investment advisor, broker

dealer, or in any other capacity, nor was Blue Square registered with the National Association of Securities Dealers in any capacity. PSR ¶ 16.

Defendant Kuperman was part of the initial group that organized Blue Square and developed the sales-pitch or "script" used when calling victims and potential victims and falsely representing to them that Blue Square was selling securities of CMLC. PSR ¶ 35. One of the other organizing roles Kuperman played was recruiting individuals to act as cold callers. PSR ¶ 36. Kuperman also kept track of all the money coming in from "investors" and managed the daily activities of the cold callers, including keeping track of the amount of money each cold caller was due. PSR ¶ 35, 39.

Kuperman and his co-conspirators obtained money from investors by making unsolicited telephone calls to them (i.e., "cold calling" them) and using the sales pitch that falsely and fraudulently representing to them the following: (1) that Blue Square was a New York City based venture capital firm that was offering them the opportunity to invest in a private ATM management company named CMLC; (2) that CMLC operated a lucrative business managing thousands of ATMs across the county; (3) that the initial public offering for CMLC would occur in the near future, and as such, the investors who purchased stock pre-IPO would make a significant profit; and (4) that investors could purchase CMLC stock for $7 to $10 per share, which was represented to be one-third to one-half the planned IPO or buy-out price.

PSR ¶ 23. In fact, CMLC was a fictitious entity with no actual operations and there was no planned IPO. *Id.*

In order to lure and entice investors to send Blue Square money, the conspirators distributed promotional materials to prospective investors following the verbal solicitations. PSR ¶ 24. The materials expanded upon the solicitations and contained additional false and misleading representations. *Id*. To further create the appearance of legitimacy, members of the conspiracy would send the investors official looking documents after prospective investors expressed an interest in investing. PSR ¶ 25. These official looking documents contained additional false and misleading representations that tended to corroborate the misrepresentations made over the phone. PSR ¶ 25.

Upon receiving "investments," Kuperman and his co-conspirators did not invest the money as represented, but instead diverted investors' funds for their own personal use and benefit. PSR ¶ 31. For example they converted a large amount of the funds into cash that was distributed among members of the conspiracy. PSR ¶¶ 26, 29, 31. Money received from investors was also used to pay for personal expenses such as real estate, meals at expensive restaurants, and expensive clothing. PSR ¶ 31. In addition, investor funds were diverted for the payment of Blue Square related expenses and to pay the secretaries. PSR ¶ 31. While diverting the investor funds, the conspirators lulled investors into believing that their investment funds had been invested into the CMLC securities, as represented, and sought to prevent the

discovery of the true use of their investment funds by issuing monthly account statements to investor-victims. PSR ¶ 26. The phoney monthly account statements purported to show the investors their account activity and balance at Blue Square, including apparent increases in the value of their CMLC investments. PSR ¶ 26.

Kuperman and the other co-conspirators defrauded approximately 275 investor-victims out of "investments" of more than $3.6 million. PSR ¶ 46, A33, 75. After Blue Square was closed down, one of Kuperman's co-conspirators established Westwood Holdings, which was a fraud identical to the fraud in Blue Square. PSR ¶ 38. Many of the cold callers and traders from Blue Square – including Kuperman – went on to work at the Westwood Holdings scam. *Id.* Westwood Holdings remained in operation for approximately eight to nine months, and worked in the same way as Blue Square. The total amount of money lost by victims of the Westwood Holdings scheme was approximately $1.25 million. *Id.*

B. The guilty plea and cooperation

On May 16, 2006, Kuperman waived indictment and entered a plea of guilty to a two-count information charging him with conspiracy to commit mail fraud securities fraud, and money laundering in violation of 18 U.S.C. § 371, and one substantive count of securities fraud in violation of 15 U.S.C. §§ 77q(a) and 77x. A3 (docket entry). In a related case, a grand jury returned a 22-count indictment charging five defendants, effectively co-defendants of Kuperman, with conspiracy to commit mail

fraud and securities fraud in violation of 18 U.S.C. § 371, five counts of mail fraud in violation of 18 U.S.C.§ 1341, and sixteen counts of securities fraud in violation of 15 U.S.C. §§ 77q(a) and 77x. PSR ¶ 4. Additionally, two other defendants (Novosselov and Malyar) were each charged by information with conspiracy and securities fraud for their conduct arising out of the same scheme. PSR ¶ 3. All eight defendants pleaded guilty, Novosselov and Malyar did so before Kuperman and the remaining defendants did so after Kuperman.

In connection with the guilty plea, the Government and defendant Kuperman entered into a cooperation agreement pursuant to which Kuperman provided "substantial assistance" towards the prosecution of the other five above referenced indicted individuals. A45-50. Accordingly, as contemplated by U.S.S.G. 5K1.1, the Government made a motion for a downward departure pursuant to U.S.S.G. 5K1.1 on Kuperman's behalf. A5 (docket entry), 45-50. Thus, prior to and at the time of sentencing, the district court was well aware of the nature and extent of Kuperman's cooperation. *Id*.

C. The sentencing hearings and briefings

On January 22, 2007, the sentencing court held an initial sentencing hearing for one of Kuperman's co-defendant's (Ciappetta). After adjourning that hearing, the court scheduled a telephone conference in Kuperman's case and the related cases at which it sought briefing on the issues of role(s) in the offense, relative culpability, foreseeability of loss, and number of victims with respect

to various defendants including Kuperman. A4 (docket entries). In accordance with the sentencing court's instruction, the Government filed an Omnibus Memorandum in Aid of Sentencing on January 30, 2007, GSA1-45, and thereafter a Supplemental Sentencing Memorandum on March 28, 2007, GSA46-63.

The Omnibus Memorandum provided facts consistent with the PSR, regarding the conspirators' respective roles in the offense, GSA4-19, including that Kuperman recruited other members of the conspiracy including cold callers, assisted in developing the script that was used to defraud the victims, ran the day-to-day office operations, including collecting investor-victim checks and preparing them for deposit, and maintaining records of the victims' "investments." GSA4, 14-15. The Omnibus Memorandum also set forth the Government's position that the number of victims and the amount of loss caused was not identically foreseeable to each defendant – in essence they were not all identically situated or equally culpable. GSA20-28. The Omnibus Memorandum also set forth the Government's position on the respective roles of each of the defendants in the offense. GSA29-35.

The Government's Supplemental Sentencing Memorandum, filed March 28, 2007, responded to the various arguments raised by Kuperman in his sentencing memorandum, A81-92, including counsel's argument for a lenient sentence based on his purportedly difficult childhood, his financial situation, and other aspects of his personal history. GSA49-51. In these filings, the parties addressed the factors the sentencing court needed to

consider – and did consider – in determining the defendant's sentence, and provided the court arguments for and against the weight that the court should afford each such factor in meting out Kuperman's sentence. A81-92, GSA49-51.

On March 29, 2007, the district court held Kuperman's sentencing proceeding. A26. At the start of the hearing, the court indicated that it was aware of its obligation to impose a sentence consistent with the factors set forth in 18 U.S.C. § 3553(a) and indicated its intent to do so. A27. The sentencing court then confirmed that the defendant had reviewed the PSR, A28, and that the only objections to the factual statements set forth in the PSR were with respect to the number of victims foreseeable to Kuperman and whether he abused a position of trust as set forth in paragraphs 59-61 of the PSR. A28-29. The sentencing court reviewed the PSR and the objections and made its findings as to number of victims and role in the offense applicable to Kuperman. A29-42. The court then calculated the defendant's Guidelines range to be 135-168 months, and found that the Guidelines range effectively became 120 months, the statutory maximum. A43. The court then confirmed that, other than the objections that had been over-ruled with respect to number of victims and abuse of trust, there were no other objections to the court's calculated Guidelines range of 120 months. A44-45.

The Government then made a motion pursuant to U.S.S.G. § 5K1.1 for a downward departure based on substantial assistance. A45-47. The court considered the motion and the factors set forth in U.S.S.G. 5K1.1 and

granted the motion. A47-50. In considering the factors set out in § 5K1.1, the court observed that Kuperman's cooperation "corroborated other testimony and therefore, it was useful to the government." A48. The court went on to state that Kuperman's cooperation "was confirmatory opposed to say Mr. Novesselov who [provided] 100 percent new information or close to 100 percent of [it] new information for the government and Mr. Malyar who had not 100 percent new. He [Malyar] brought new information. That Mr. Kuperman was of a confirmatory nature. . . ." A49. The court further observed "that Mr. Kuperman's recollection was not as good because if it had been better, they [the government] would have obtained more information. . . . If you don't remember, you don't remember. That goes to the sort of significance and usefulness of his cooperation. And so for all those reasons and I'm considering all of those matters, the court does grant the motion for downward departure made under 5K1.1 and brought on by the government and will consider it in determining sentence." A49-50. Just prior to announcing Kuperman's sentence, the court again addressed the fact of his cooperation and said: "[l]astly I don't mean to overlook this. It is perhaps – it is a very important factor in the court's determination of the sentence here today is Mr. Kuperman's cooperation." A71. The court explicitly found that while it weighed Kuperman's cooperation positively, it did not rate Kuperman's cooperation as valuable as that of Mr. Novosselov. A71-72.

After granting the substantial assistance motion, the court invited defense counsel to address the court and to address the factors that the court had to consider under § 3553(a). A51. At that point, counsel made various arguments, including arguments about the nature and circumstances of the offense, the deterrent value of sentences, the need for education and training, the defendant's personal background and history, his role as a husband and father, and his cooperation. A51-58. Counsel for the defendant had previously cited the court to excerpts from a number of letters – quoted at length in defendant's sentencing memorandum – that similarly addressed the history and characteristics of the defendant, including his life growing up as an immigrant to this country. A82-92. Counsel also made arguments about the need to avoid unwarranted sentencing disparities pursuant to § 3553(a)(6), A54-56, and the extent and timing of his cooperation, A52-53. The court listened to counsel's presentation including counsel's argument for a departure and considered the various arguments made. In response to the specific argument regarding the need to avoid unwarranted sentence disparities, the court engaged in an exchange with Kuperman's counsel and highlighted the fact that the level of Kuperman's culpability was underscored by the fact that he had recruited very successful cold callers. A56. After counsel completed his presentation, the defendant himself addressed the court. A59. The court listened to the defendant's remarks, and thanked the defendant for his remarks. A59.

After a brief recess, the court returned to the bench and indicated that it was the court's obligation "to impose a

fair and just sentence in this case after consideration of all of the factors we have spent some time discussing this afternoon." A63. The court then addressed the various factors. The court stated:

> First is the nature and circumstances of the offense that the defendant is before the court on. And that, of course, is a large scale fraud perpetrated on a large number of people. In his case 350 victims. In other words, he not only participated in the organization of Blue Square Management and its running day to day over a period of three and a half to four years. He then when it became possible that people were becoming suspicious . . . . Mr. Malyar decides to set up a second boiler room under the name of Westwood and Mr. Kuperman goes with him [Malyar] there as well and there defrauds approximately 75 victims out of approximately a million and a half dollars in addition to the Blue Square losses.

A63.

The court went on to state that Kuperman was one of the organizers, he was at the early planning meetings, he provided start-up funds, created a website, recruited people, brought in cold callers and recruited staff people. A63-64. The court also weighed the fact that Kuperman was involved in the day-to-day operations, supervising cold callers, collecting money, and paying cold callers. A64. The court considered the fact that Kuperman also

participated in a meeting with an investor and furthered the scam by masquerading as a satisfied client. A64.

After considering the nature and circumstances of the offense, the court considered the history and characteristics of the defendant. A65. The court reflected upon the fact that the defendant has generally led a law-abiding life since immigrating from the Ukraine and becoming a United States citizen. A65. The court stated that "[b]y all accounts in the letters and materials that have been submitted to the court in which I looked at carefully yesterday, he's a very generous and caring individual who is a good family person." *Id.* The court observed the number of supporters in the courtroom and stated that the court found Kuperman to be, "by all accounts" a good person who had lived a good life, with the exception of his involvement in this lengthy and massive fraud. *Id*.

The court then considered the other factors set forth in § 3553(a)(2), including the need for the sentence to reflect the seriousness of the offense and to promote respect for the law. A66. The court observed that this offense was:

> an extremely serious offense [and one] that we as a society don't want to have happen very often. Therefore I think a penalty has to be imposed that promotes respect for the law. In that respect, to provide adequate deterrence and the deterrence works in two ways. One way is to deter others in the public who might think of opening a boiler room or working at a boiler room. It is this court's belief that in white collar crimes, in this one, also

> this particular one that someone who was thinking about that and saw the penalties imposed in the case they should be at a level that would provide deterrence to that person.

A66-67. The court went on to state that "[t]he other aspect of deterrence is to protect the public from further crimes by Mr. Kuperman." A67. The court then considered the need for the sentence to provide the defendant with needed education or vocational training or correctional treatment. A67. The court observed that this factor was raised earlier in the proceeding by Kuperman's counsel and indicated that it would be appropriate for the Bureau of Prisons to provide such training. A67-68.

The court then, consistent with § 3553(a)(4), addressed the kinds of sentences available, and the calculated – as well as the applicable – Guidelines range. A68. The court then considered the sentencing factor of avoiding unwarranted sentence disparities pursuant to § 3553(a)(6). A68 ("The court also has to avoid unwarranted sentencing disparities as [counsel for Kuperman] has alluded to that in his remarks."). The court went on to observe that it did not see any of the defendants as "the same," A69, and made the finding that viewed over the period of time that each one was involved and the degree of involvement during that respective time, equates to degrees of culpability, A69-70. The court further observed that in evaluating the need to avoid unwarranted disparate sentences, § 3553(a)(6) suggests that the sentencing court also consider defendants in other cases, not just between and among the defendants in a particular case and its

related cases. A70. Finally, the court again addressed the fact that the defendant cooperated with the Government and weighed his cooperation positively. A71.

After explaining its reasoning in detail, and considering and weighing all the factors, A72, including repeating the factors pertaining to the nature and circumstances of the offense and the need for deterrence, the court imposed a below-Guidelines term of 84 months' incarceration, followed by 3 years' supervised release, and imposed a restitution order of $3,602,425, A73-75.

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), including the nature and circumstances of the offense, the need for deterrence, the defendant's personal history and characteristics, and the need to avoid unwarranted sentencing disparities, and imposed a sentence that was sufficient but no greater than necessary to achieve the purposes of sentencing. The district court considered all of the relevant factors as well as Kuperman's cooperation, and explained what led it to impose a below-Guidelines sentence and why it chose to impose a sentence of 84 months' incarceration. There is no basis to find that the district court exceeded the bounds of allowable discretion or violated the law in imposing the sentence it did.

Argument

I. The defendant's 84 month below-Guidelines sentence was reasonable.

The defendant claims that the 84-month sentence imposed by the district court was unreasonable. He appears to believe that his sentence was simply too high, and cites among his reasons his difficult childhood, his "generosity and spirit," and his cooperation. He argues that his sentence should have been more in line with that of a co-defendant (Novesselov) who cooperated with the Government before he did, and whose cooperation the district court found to have been of a substantively more valuable nature because Novosselov cooperated first and provided "new" information to the Government. The court was specifically mindful of all of the relevant sentencing factors including the need to avoid unwarranted sentencing disparities and fully considered the extent and nature of defendant's cooperation. In fact, the court specifically cited his cooperation as a very important factor in the decision to impose a below-Guidelines sentence. Although the defendant is unhappy with the extent of the departure in this case, his arguments for a reduced sentence or alternatively a remand are wholly without merit.

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." *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), (attached as addendum).

"[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. 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 has recognized that "[r]easonableness review does not entail the substitution of [its own] judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion." *Fernandez*, 443 F.3d at 27. As the Supreme Court recently instructed, the "explanation of 'reasonableness' review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions." *Gall v. United States*, 128 S. Ct. 586, 594 (2007) (citing *Booker*, 543 U.S. at 260-62). *See also Rita*, 127 S. Ct. at 2465 ("appellate 'reasonableness' review merely asks whether the trial court abused its discretion").

Under this deferential standard, in determining "whether a sentence is reasonable, [the Court] 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 (quoting *Crosby*, 397 F.3d at 114). Furthermore, 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).

While it is rare for a defendant to appeal a below-Guidelines sentence for reasonableness, the standard of review in such situations is the same as for an appeal of a within-Guidelines sentence. *See Gall*, 128 S. Ct. at 596 ("[T]he abuse-of-discretion standard of review applies to appellate review of all sentencing decisions – whether inside or outside the Guideline range."); *United States v. Kane*, 452 F.3d 140 (2d Cir. 2006) (per curiam). In *Kane*, for instance, the defendant challenged the reasonableness of a sentence six months below the Guidelines range, and this Court stated that in order to determine whether the sentence was reasonable, it was required 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." *Id.* at 144-45 (quoting *Fernandez*, 443 F.3d at 27). The defendant must therefore do more than merely rehash the same arguments made below because the court of appeals cannot overturn the district court's sentence without a clear showing of unreasonableness. *Id.* at 145 ("[The defendant] merely renews the arguments he advanced below – his age, poor health, and history of good works – and asks us to substitute our judgment for that of the District Court, which, of course, we cannot do.").

As the Supreme Court recently articulated in *Gall*, the sentencing court "must make an individualized assessment based on the facts presented. If [the court] decides that an outside-Guidelines sentence is warranted, [the court] must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall*, 128 S. Ct. at 597.

The *Gall* Court further stated:

> [I]f the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.

> Practical considerations also underlie this legal principle. "The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record." Brief for Federal Public and Community Defenders et al. as *Amici Curiae* 16. "The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before him than the Commission or the appeals court." *Rita*, [127 S. Ct. at 2469]. Moreover, "[d]istrict courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines sentences than appellate courts do." *Koon v. United States*, 518 U.S. 81, 98 (1996).

Id. at 597-98 (footnote omitted).

Finally, as this Court has held, 18 U.S.C. § 3742(a), which sets forth the possible bases for a defendant's appeal of his sentence "does not generally confer jurisdiction on courts of appeals to review a district court's refusal to grant a downward departure or the extent of any downward departure that is granted." *United States v. Hargrett*, 156 F.3d 447, 450 (2d Cir. 1998) (emphasis added); *see also United States v. Stinson*, 465 F.3d 113, 114 (2d Cir. 2006) (per curiam) (refusal to downwardly depart from guideline range is generally not appealable).

Similarly, this Court has held repeatedly held that "[a] defendant cannot generally appeal the extent of a departure made pursuant to U.S.S.G. § 5K1.1." *United States v. Lucas*, 17 F.3d 596, 599 (2d Cir. 1994); *accord United States v. Gonzalez*, 192 F.3d 350, 353 (2d Cir. 1999) (per curiam); *United States v. Ming He*, 94 F.3d 782, 787 (2d Cir. 1996). This Court only reviews the denial of a downward departure "when a sentencing court misapprehended the scope of its authority to depart or the sentence was otherwise illegal." *United States v. Valdez*, 426 F.3d 178, 184 (2d Cir. 2005). Thus, "[i]n the absence of 'clear evidence of a substantial risk that the judge misapprehended the scope of his departure authority,' [this Court] presume[s] that a sentenc[ing] judge understood the scope of his authority." *Stinson*, 465 F.3d at 114 (quoting *United States v. Gonzalez*, 281 F.3d 38, 42 (2d Cir. 2002)).

B. Discussion

In this case, the district court conducted a detailed sentencing proceeding after it had received and reviewed voluminous briefings. *See* A81-93, GSA1-63. Through the process, the defendant requested a non-Guidelines sentence, and the court granted that request when it sentenced him to 84 months' incarceration. His ultimate sentence was 36 months below the statutory maximum and his effective Guidelines range.

The defendant now argues on appeal that his sentence was unreasonable. He argues that the sentencing court misapplied the § 3553(a) factors, giving undue weight to the nature and circumstances of the offense and the need

for general and specific deterrence, while according insufficient weight to the defendant's personal characteristics and the need to avoid unwarranted sentencing disparities. These arguments are wholly without merit.

1. The court properly considered all the relevant factors, heard arguments, and imposed a reasonable sentence.

Consistent with law and consistent with the teachings of this Court, the district court properly determined and imposed Kuperman's sentence. The sentencing court calculated the relevant Guidelines range, considered the Guidelines range, along with the other § 3553(a) factors, and imposed a reasonable sentence. *See Fernandez*, 443 F.3d at 26; *Crosby*, 397 F.3d at 113. Accordingly, this Court should not substitute its own judgment for that of the district court's. "Reasonableness review does not entail the substitution of [the appellate court's] judgment for that of the sentencing judge." *Fernandez*, 443 F.3d at 27.

The record here amply demonstrates that the district court properly calculated the Guidelines range, A40-43, and noted that it was obliged to consider the range and the other factors set forth in § 3553(a). A63-73. The court considered all of the § 3553(a) factors (including the need to avoid unwarranted sentence disparities), and then considered the arguments raised by counsel, the defendant himself, A59, his friends and family members in their letters to the court, A65, all made in support of a more

lenient sentence. *See, e.g.*, A51-59. The court then engaged in a thoughtful and thorough analysis of the defendant's case in light of the seriousness of the offense and the harm caused, A66, as well as other sentences that were to be imposed on Kuperman's co-defendants. A70-71. The record amply reflects that the court considered the issue of unwarranted sentence disparities and took pains to assure that there would be no such disparities. A68-70. Prior to imposing sentence, the court made specific findings as to the role played by Kuperman as well as the level of his culpability in comparison with that of his co-defendants. A29-33, A37-42, A55-56, A68-70. The court then considered the defendant individually and the arguments raised for a below-Guidelines sentence and heard from the defendant himself. A51-59. The record reflects that the court was listening to the arguments made, commented on what counsel was saying, and thanked the defendant for his own remarks. A55, 56, 59. Finally, the sentencing transcript demonstrates that the district court fully explained the reasons for its sentence including the granting of the Government's § 5K1.1 motion and the relative value it ascribed to his cooperation. *See* A63-74.

In short, the record shows that the district court was aware of the statutory requirements, understood the need to consider all the relevant factors and, after giving them due consideration, sentenced the defendant to 84 months in prison.

2. The defendant's arguments are without merit.

a. This Court should not second guess the weight given to any particular factor by the sentencing court.

In advancing his arguments, Kuperman contends that the district court gave undue weight to the nature and circumstances of the offense and the need for general and specific deterrence while giving insufficient weight to the defendant's personal characteristics and the need to avoid unwarranted sentencing disparities. Kuperman does not argue that the court failed to consider the relevant sentencing factors, or that the court did not understand its obligation to do so. Instead, he simply questions the relative weight given to the factors of deterrence (general and specific), the nature and circumstances of the offense, and his personal history and characteristics. In other words, Kuperman invites this Court to reweigh those factors on appeal and rehashes arguments already advanced in the district court. This Court should reject the invitation to substitute its judgment for that of the district court.

It is well settled that this Court will not substitute its own judgment for that of the district court. *Kane*, 452 F.3d at 145 ("[The defendant] merely renews the arguments he advanced below . . . and asks us to substitute our judgment for that of the District Court, which, of course, we cannot do."). *Accord Fairclough*, 439 F.3d at 79-80 (a reviewing court "'should exhibit restraint, not

micromanagement'") (quoting *Fleming*, 397 F.3d at 100). As this Court reiterated in *United States v. Capanelli*, 479 F.3d 163, 165 (2d Cir. 2007) (per curiam), "[w]hile a district court must consider each § 3553(a) factor in imposing a sentence, the weight given to any single factor 'is a matter firmly committed to the discretion of the sentencing judge and is beyond our review.'" (quoting *Fernandez*, 443 F.3d at 32). Accordingly, this argument should be rejected.

The sentencing record shows that the district court was aware of the statutory requirements and the applicable Guidelines range, and aware of the defendant's cooperation. The record further demonstrates that the court understood the relevance of these matters and gave them due consideration when sentencing the defendant to 84 months in prison.

On the specific factor of the need to avoid unwarranted sentencing disparities set forth in § 3553(a)(6), the defendant argues that the court erred in giving him a lengthier term of incarceration than co-defendant Novosselov. This argument necessarily fails on two fronts. First, as described above, this Court does not substitute its own judgment for that of the sentencing court. Second, even if this Court were to re-evaluate the district court's judgment, the sentencing court clearly articulated on the record its reasoning, namely that it viewed Novosselov's cooperation as more valuable than that of Kuperman. Accordingly, while the defendant disagrees with the district court's assessments, the district court's judgment was not an abuse of discretion.

b. The sentencing court did not misapply the law in its granting of a departure pursuant to U.S.S.G. § 5K1.1 and thus this Court should not second-guess the extent of the departure.

As the final part of his argument that the 84-month below Guidelines sentence was unreasonable, Kuperman endeavors to argue that the downward departure the district court granted should have been greater. While couching it as a § 3553(a)(6) argument, it is really nothing more than a complaint that the § 5K1.1 departure was not as great as he wanted or expected.

Kuperman first acknowledges that a district court's departure pursuant to U.S.S.G. § 5K1.1 is not something this Court reviews, but then invites this Court to do exactly that. This Court should – consistent with well established precedent – decline this invitation. The limited circumstances in which this Court would review a departure made pursuant to U.S.S.G. § 5K1.1 are when there has been a violation of law or there is some "'clear evidence of a substantial risk that the judge misapprehended'" her authority to depart. *Stinson*, 465 F.3d at 114 (quoting *Gonzalez*, 281 F.3d at 42); *Valdez*, 426 F.3d at 184. Neither situation applies here, nor are such arguments even advanced. Thus, this Court should not revisit the extent of the departure. *See Hargrett*, 156 F.3d at 450; *Lucas*, 17 F.3d at 599 ("[a] defendant cannot generally appeal the extent of a departure made pursuant to U.S.S.G. § 5K1.1"); *accord Gonzalez*, 192 F.3d at 353.

But even if this Court were to review the extent of the departure, the record here fully supports the district court's judgment. The district court considered Kuperman's cooperation and explained on the record the reasons for the departure it granted. A47-50, A71-72. Furthermore, the court expressly described the reasons for the departure granted Kuperman in comparison to that granted Novosselov. A71-72. Specifically, the court concluded that Kuperman's cooperation was not as valuable as Novosselov's because Novosselev had agreed to cooperate first and had provided new information to the Government while Kuperman's information was more confirmatory in nature. A72. Thus, the court provided sound and rational reasons – reasons grounded in an effort to avoid unwarranted sentencing disparities between codefendants – to support the extent of the departure it granted Kuperman. Those reasons were more than sufficient to support the sentence imposed. *See United States v. Sindima*, 488 F.3d 81, 86 (2d Cir. 2007) ("[T]he district court's statement of reasons must at least explain – in enough detail to allow a reviewing court, the defendant, his or her counsel, and members of the public to understand, . . . – why the considerations used as justifications for the sentence are sufficiently compelling [ ]or present to the degree necessary to support the sentence imposed.") (internal citations and quotations omitted).

In sum, the sentencing record shows that the district court was aware of its obligations, the statutory requirements and the applicable Guidelines range, and that the court understood these matters, gave them due

consideration and imposed a lawful sentence of 84 months in prison. Accordingly, the sentence should be upheld.

Conclusion

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

Dated: January 30, 2008

Respectfully submitted,

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

MICHAEL S. McGARRY
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 7,474 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

MICHAEL S. MCGARRY
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.

* * *

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

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

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

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

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

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

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Kuperman

Docket Number: 07-1603-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 1/30/2008) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: January 30, 2008