07-2445-cr

To Be Argued By:
EDWARD T. KANG

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-2445-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

TERRENCE STEELE also known as
Tee-Fur, also known as T, also known as T-Fur,
Defendant-Appellant.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Ellen Bree Burns, Senior U.S.D.J.) had subject matter jurisdiction under 18 U.S.C. § 3231. Judgment entered on April 18, 2007. A11.[1] The defendant filed a timely notice of appeal pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure on April 5, 2007. *Id.* This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

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[1] Citations to the joint appendix are noted as "A ___." Citations to the Special Appendix are noted as "SPA ___." Citations to the Government's Appendix are noted as "GA ___."

STATEMENT OF THE ISSUES PRESENTED

I. Has the defendant met his heavy burden in establishing that he was denied his constitutional right to effective assistance of counsel at trial?

II. Did the district court abuse its discretion in allowing the government to elicit evidence of its cooperating witness's past cooperation with law enforcement officers to rebut defense counsel's repeated and vigorous attacks on the witness's credibility?

III. Was the district court's sentence of 324 months' imprisonment – which was at the low end of the defendant's applicable Guidelines range – procedurally and substantively reasonable?

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Preliminary Statement

On December 11, 2006, the defendant, a multi-convicted drug felon, was found guilty by a federal jury in New Haven of (1) having conspired to possess with the intent to distribute 50 grams or more of cocaine base and (2) having possessed with the intent to distribute and distributing 50 grams or more of cocaine base.

The district court sentenced the defendant to a 324-month term of imprisonment, followed by a ten-year term of supervised release. The defendant, who is represented on appeal by new counsel, raises three claims: (1) that he was denied effective assistance of counsel at trial; (2) that the district court abused its discretion by allowing the government on re-direct examination to elicit evidence of its cooperating witness' past cooperation with law enforcement after the witness' credibility was forcefully and repeatedly attacked by defendant's counsel on cross-examination; and (3) that the 324-month sentence of imprisonment imposed by the district court was unreasonable. For the reasons that follow, the defendant's challenges lack merit, and his conviction and sentence should stand.

Statement of the Case

On March 9, 2006, a federal grand jury in Connecticut returned a superseding indictment charging the defendant in Count One with conspiring to possess with intent to distribute 50 grams or more of cocaine base, in violation of Title 21, United States Code, Sections 846, 841(a)(1), and 841(b)(1)(A); in Count Two with possessing with intent to distribute and distributing 5 grams or more of cocaine base, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B); and in Count Three with possessing with intent to distribute and distributing 50 grams or more of cocaine base, in violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A). A6.

On November 14, 2006, the government filed with the district court an information pursuant to Title 21, United States Code, Section 851, establishing the fact of the defendant's prior conviction for a felony drug offense. A7. On November 21, 2006, the government filed a motion to dismiss Count Two of the superseding indictment as to the defendant. A7-8.

On December 6, 2006, a federal jury trial commenced as to the remaining two counts in the superseding indictment against the defendant. A9. On December 11, 2006, the jury returned a verdict of guilty as to both counts. *Id.*

On April 5, 2007, the district court sentenced the defendant to a term of 324 months of imprisonment, to be followed by a 10-year term of supervised release on both counts, with the sentences to run concurrently. A11. The district court entered judgment on April 18, 2007. *Id.*; SPA 1-3.

On April 5, 2007, the defendant filed a timely notice of appeal. A11, SPA4. The defendant is serving his sentence.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

I. The Investigation

In January of 2005, the Federal Bureau of Investigation ("FBI") began a narcotics investigation into one Christopher Goins. GA 56-59, 476. A cooperating witness began working with agents and attempted to arrange a controlled purchase from Goins in March 2005. *Id.* at 62-63, 214, 478. The witness placed a call to Goins' telephone, but a voicemail message directed callers to another number. *Id.* at 64. The telephone assigned that number was later determined to be used by the defendant. *Id.* at 63-65, 215.

On March 10, 2005, the cooperating witness made a controlled purchase of cocaine base during a meeting with the defendant that was monitored, recorded, and videotaped by law enforcement. *Id.* at 59, 60, 216-34, 478, 484-92. At the conclusion of that meeting, the cooperating witness gave to agents 2.25 ounces of cocaine base that he purchased from the defendant. *Id.* at 80-89, 226, 484.

Three days later, the cooperating witness was able to make a controlled purchase of cocaine base from Christopher Goins in a meeting that was monitored and recorded by law enforcement. *Id.* at 111-119, 234-48. In an effort to determine the connection between Goins and the defendant, agents instructed the cooperating witness to tell Goins that the quantity of cocaine base distributed by

the defendant on March 10 was three grams short of what the defendant had promised. *Id.* at 111, 238-39. The witness did as instructed, and Goins responded that he would "[f]ix the problem [and] make sure that everything was the correct weight." *Id.* at 242. The cooperating witness then bought two ounces of crack cocaine from Goins in exchange for $2,000. *Id.* at 240-47.

Laboratory analysis was conducted of the narcotics purchased from the defendant and from Goins. The tests confirmed that the drugs distributed by the defendant on March 10 was 57.7 grams of cocaine base, *id.* at 363, and that the drugs distributed by Christopher Goins was 52.7 grams of cocaine base. *Id.* at 371.

II. The Trial

At trial, the government presented evidence from two law enforcement agents who were involved in the investigation. Through these agents, evidence of the crack cocaine purchased from the defendant and from Goins was introduced, *id.* at 92, 116-17, as well as a videotape of the controlled purchase made from the defendant on March 10, 2005, *id.* at 484-92.

The cooperating witness testified at length about his dealings with the defendant and with Goins, including details of the telephone calls leading up to the controlled purchases and of the purchases themselves. The calls and the meetings were recorded, and the recordings were played for the jury. *Id.* at 215-247.

Moreover, a long-time friend of the defendant testified about the defendant and Goins having visited her apartment repeatedly, *id.* at 326-27, and about the defendant using her home to "cook up" powder cocaine into crack, *id.* at 333-36. She testified that she observed the defendant weighing and packaging crack cocaine, *id.*, and heard him engage in drug-related conversations over the telephone. *Id.* at 338-39.

The defendant chose not to present any evidence but relied on his attorney's vigorous cross-examination of the cooperating witness and other government witnesses. Defense counsel forcefully attacked the credibility of the cooperating witness, suggesting bias on his part because he faced pending charges at the time of the trial, *see, e.g.*, GA at 262, 265, 267-68, 277-78, 300-01; attacking his perception of relevant events, *see id.* at 287-88, 293; and attempting to show inconsistencies in his testimony, *see id.* at 268-70.

At the conclusion of trial, however, the jury convicted the defendant on both counts. A9.

III. The Sentencing

The Presentence Report ("PSR") calculated the defendant's guideline range to be a term of imprisonment of 360 months to life, based on his status as a career offender. *See* A343. The district court agreed with the calculation of the range but determined that a downward adjustment of the defendant's criminal history category was appropriate, leading to a range of 324 to 405 months

of imprisonment. A343. The defendant asserted that his sentence should be reduced due to his history of drug addiction and due to the fact that his prior convictions were for relatively low-level drug offenses. *See* A264-268, 272, 281-286, 297-300, 332-333, 336-340. The district court did not find the defendant's arguments compelling, noting that the defendant is "a recidivist . . . who continues to break the law." A336. Nevertheless, after adjusting his guideline range downwards, the court sentenced the defendant to the bottom of the range, 324 months of imprisonment. In consideration of the defendant's history of drug addiction, the district court recommended that he be considered for placement in the Bureau of Prisons' 500-hour drug program. A307-10, 348-49.

SUMMARY OF ARGUMENT

The defendant has failed to meet his heavy burden of showing that his trial counsel was constitutionally ineffective by conceding that the defendant had in fact distributed a narcotics substance during the March 10 transaction that had been videotaped and recorded by law enforcement. As an initial matter, this Court should adhere to its general practice of declining to resolve ineffective assistance claims on direct review, so that defendant's trial counsel may have an opportunity to explain the conduct at issue. Nevertheless, even if this Court were to consider the merits of that argument, the defendant's claim still fails because the defendant cannot demonstrate that the supposed ineffectiveness prejudiced him such that the result of the trial would have been

different but for trial counsel's alleged error. In this case, the record reflects that the jury was provided with overwhelming evidence that demonstrated that the defendant had in fact distributed narcotics on March 10.

The defendant also failed to show that the district court abused its discretion by allowing the government to present testimony on re-direct examination of the cooperating witness' past cooperation with law enforcement. The witness' credibility had been vigorously attacked by defense counsel on cross-examination, and the door was therefore opened for the government to attempt to rehabilitate the witness with evidence of his cooperation on other matters that had been successfully prosecuted.

Finally, the defendant's claim, that his sentence was procedurally unreasonable because the district court failed to consider the sentencing factors set forth in 18 U.S.C. § 3553(a), has no merit. The district judge stated explicitly the circumstances that led her to impose a sentence of 324 months of imprisonment, which was at the bottom of the guideline level a step below that set forth in the PSR.

ARGUMENT

I. The defendant was not denied his constitutional right to effective assistance of counsel at trial

A. Governing law and standard of review

A defendant seeking to overturn a conviction on the ground of ineffective assistance of counsel bears "a heavy burden." *United States v. Gaskin*, 364 F.3d 438, 468 (2d Cir. 2004). He is required to demonstrate both: (1) that counsel's performance was so unreasonable under prevailing professional norms that "counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," and (2) that counsel's ineffectiveness prejudiced the defendant such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984)); accord *United States v. Campbell*, 300 F.3d 202, 214 (2d Cir. 2002); *United States v. Trzaska*, 111 F.3d 1019, 1029 (2d Cir. 1997). "Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable." *Strickland*, 466 U.S. at 467. "[T]he court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* at 690.

Moreover, the Supreme Court stressed that judicial scrutiny of an attorney's performance must be highly deferential and must avoid "the distorting effects of hindsight." *Strickland*, 466 U.S. at 689.

As to the first prong – whether counsel's performance was unreasonable – this Court has held that the defendant has the burden of showing that "his trial counsel's performance 'fell below an objective standard of reasonableness.'" *Johnson v. United States*, 313 F.3d 815, 817-18 (2d Cir. 2002) (quoting *Strickland*, 466 U.S. at 687-88 (1984)). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91.

As to the second prong, the Supreme Court has held that "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id.* "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id.*

"This Court is generally disinclined to resolve ineffective assistance claims on direct review." *Gaskin*, 364 F.3d at 467 (citation omitted); *see also United States v. Khedr*, 343 F.3d 96, 99-100 (2d Cir. 2003) ("this Court has expressed a baseline aversion to resolving ineffectiveness claims on direct review") (citation omitted). "Among the reasons for this preference is that the allegedly ineffective attorney should generally be given the opportunity to explain the conduct at issue." *Khedr*, 343 F.3d at 100 (citing *Spearman v. Edwards*, 154 F.3d 51, 52 (2d Cir. 1998)).

The Supreme Court has held that "in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective assistance" because the district court is "best suited to developing the facts necessary to determining the adequacy of representation during an entire trial." *Massaro v. United States*, 538 U.S. 500, 504, 505 (2003). "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. . . . inquiry into counsel's conversations with the defendant may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions." *Strickland*, 466 U.S. at 691 (citations omitted). Accordingly, the Supreme Court explained that few ineffectiveness claims "will be capable of resolution on direct appeal." *Massaro*, 538 U.S. at 508.

Nevertheless, direct appellate review is not foreclosed. This Court has held that "[w]hen faced with a claim for

ineffective assistance of counsel on direct appeal, we may: (1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent petition for writ of habeas corpus pursuant to 28 U.S.C. § 2255; (2) remand the claim to the district court for necessary factfinding; or (3) decide the claim on the record before us." *United States v. Morris*, 350 F.3d 32, 39 (2d Cir. 2003). "The last option is appropriate when the factual record is fully developed and resolution of the Sixth Amendment claim on direct appeal is 'beyond any doubt' or 'in the interest of justice.'" *Gaskin*, 364 F.3d at 468 (quoting *Khedr*, 343 F.3d at 100).

B. Discussion

The defendant's claim on appeal is that his trial attorney was constitutionally ineffective for conceding that the defendant had distributed a controlled substance but challenging the nature of the substance itself, specifically, whether it was cocaine base as charged in the superseding indictment. This Court should follow its "baseline aversion to resolving ineffectiveness claims on direct review," *Khedr*, 343 F.3d at 99-100, and decline to entertain the defendant's ineffective assistance of counsel claim. The defendant's trial counsel should be afforded the opportunity to explain the conduct at issue and to reveal his conversations with defendant about trial strategy, and the district court should be permitted to develop the facts necessary to determine the adequacy of trial counsel's representation during the trial. *See Khedr*, 343 F.3d at 100 (citing *Spearman*, 154 F.3d at 52); *Massaro*, 538 U.S. at 505.

The need to develop a more complete factual record regarding the genesis of defense counsel's strategy to challenge the nature of the narcotics distributed by the defendant is particularly appropriate in this case. There is strong reason to believe that the defendant himself was directly involved in this strategic decision. The record reflects that the defendant rejected a plea offer from the government that would have significantly reduced his sentencing exposure upon conviction. GA 24-25. The record also reflects that ten months prior to trial, the defendant was appointed a new attorney, Attorney Pattis, who ultimately represented the defendant at trial. A5. It is not unreasonable to conclude that the defendant requested Attorney Pattis to contest the nature of the narcotics substance at his trial. Indeed, at a hearing on December 5, 2006, Attorney Pattis informed the district judge that the defendant had requested that he seek a continuance of trial for the purpose of getting a chemist to test the narcotics at issue. GA 4. Moreover, at sentencing, the defendant made certain statements confirming that it was his decision to contest the nature of the narcotics substance: "And I feel that, you know, I had to take this situation to trial to prove a point that I really couldn't prove because the chemist that we wanted to call to testify was not able to testify." A280.

Determining what the defendant communicated to Attorney Pattis is essential, given that "what investigations are reasonable depends critically" on "information supplied by the defendant" or on "strategic choices made by the defendant." *Strickland*, 466 U.S. at 691.

Consequently, this Court should decline to review the defendant's ineffectiveness claim on this direct appeal.

Nevertheless, even if this Court were to consider the merits, the defendant's claim should still be rejected as he cannot satisfy the "prejudice" prong of *Strickland*. *See* 466 U.S. at 687, 694. While the defendant maintains that trial counsel's concession that the defendant did, in fact, sell a controlled substance "fell below prevailing professional standards," the record shows that evidence of the defendant's distribution was overwhelming. The jury heard the recorded telephone conversation between the defendant and the cooperating witness in which the defendant arranged to meet with the witness. The jury also heard a recording and saw a videotape of the meeting, during which the defendant was heard selling 2.25 ounces of narcotics to the cooperating witness. The jury heard from the cooperating witness himself who testified about purchasing cocaine base from the defendant and heard from two law enforcement officers who observed the meeting take place. Finally, the jury heard from the defendant's long-time friend who watched the defendant prepare cocaine base and heard him engage frequently in drug-related conversations over the telephone.

For all these reasons, the record reflects that the jury was given more than enough evidence to conclude that the defendant distributed a narcotics substance to the cooperating witness on March 10, 2005. Therefore, the defendant simply cannot meet his "heavy burden" of establishing that, but for trial counsel's concession that the defendant distributed a controlled substance, the result of

the proceeding would have been different. *Strickland*, 466 U.S. at 694.

II. The government did not improperly bolster the credibility of its cooperating witness

A. Governing law and standard of review

"'Bolstering' is the practice of offering evidence solely for the purpose of enhancing a witness's credibility before that credibility is attacked." *United States v. Lindemann*, 85 F.3d 1232, 1242 (7th Cir. 1996). "[A]bsent an attack on the veracity of a witness, no evidence to bolster his credibility is admissible." *United States v. Arroyo-Angulo*, 580 F.2d 1137, 1146 (2d Cir. 1978). "Such evidence is inadmissible because it 'has the potential for extending the length of trials enormously, . . . asks the jury to take the witness's testimony on faith, . . . and may . . . reduce the care with which jurors listen for inconsistencies and other signs of falsehood or inaccuracy." *Lindemann*, 85 F.3d at 1242 (quoting *United States v. LeFevour*, 798 F.2d 977, 983 (7th Cir. 1986)).

"Once a witness's credibility has been attacked, however, the non-attacking party is permitted to admit evidence to 'rehabilitate' the witness." *Lindemann*, 85 F.3d at 1242-43 (citation omitted); *see also United States v. Martinez*, 775 F.2d 31, 37 (2d Cir. 1985) ("it is well settled that a cross-examination attacking a witness's credibility and character will open the door to redirect examination rehabilitating the witness.") (citations omitted).

Acceptable methods of attacking the credibility of a witness's testimony include: (1) attacking the witness's general character for truthfulness; (2) showing that, prior to trial, the witness has made statements inconsistent with his testimony; (3) showing that the witness is biased; (4) showing that the witness has an impaired capacity to perceive, recall, or relate the event about which he is testifying; and (5) contradicting the substance of the witness's testimony. *Lindemann*, 85 F.3d at 1243 (citing Wright & Gold, *Federal Practice and Procedure*, § 6094 (1990)).

The Federal Rules of Evidence specifically address the bolstering and rehabilitation aspect of only two of the five aforementioned methods of attacking credibility: character for truthfulness and prior inconsistent statements. *Lindemann*, 85 F.3d at 1243; *see also* Fed. R. Evid. 608, 609, 613. "The admissibility of evidence regarding a witness's bias, diminished capacity, and contradictions in his testimony is not specifically addressed by the Rules, and thus admissibility is limited only by the relevance standard of Rule 402." *Lindemann*, 85 F.3d at 1243 (citing Wright & Gold, *Federal Practice and Procedure*, § 6092). "Evidence whose probative value might not be thought to outweigh its prejudicial effect if offered on direct examination may well be admitted during redirect examination 'for the purpose of rebutting the false impression which resulted from . . . cross examination.'" *Martinez*, 775 F.2d at 37 (citing *United States v. Finkelstein*, 526 F.2d 517, 527 (2d Cir. 1975)).

A district court's evidentiary rulings are reviewed for abuse of discretion. *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001) (citing *United States v. Naiman*, 211 F.3d 40, 51 (2d Cir. 2000)).

Appellate courts have held that when the credibility of a government's cooperating witness is attacked on cross examination, a district court does not abuse its discretion in allowing the prosecutor, on redirect examination, to introduce evidence of the witness's cooperation in other cases for the purpose of rehabilitating the witness. *See Martinez*, 775 F.2d at 36-38 ("Against the background of these attacks by the defense on [the cooperator's] credibility, which included outright statements that [the cooperator] was lying in his charges against [the defendant] and suggestions that he had a long history of fabricating accusations, the trial court was within its bounds of discretion to admit the evidence that all of the MCC guards accused by [the cooperator] had pleaded guilty."); *Lindemann*, 85 F.3d at 1242-44 ("Here we concluded that the admission of evidence regarding [the cooperator's] cooperation in other cases was relevant. The evidence specifically rebutted the allegation that [the cooperator] was biased out of self-interest in [the defendant's] case"); *United States v. Lochmondy*, 890 F.2d 817, 821-22 (6th Cir. 1989) (affirming district court's admission of evidence of co-defendants' guilty pleas for purpose of rehabilitating cooperating witness's credibility).

B. Discussion

The district court did not abuse its discretion in allowing the government to rebut the defendant's attacks on the credibility of its cooperating witness by putting forth evidence on redirect examination of the witness' cooperation with law enforcement officers in other cases. GA 309-12.

At trial, defense counsel vigorously attacked the cooperator's credibility on cross-examination by several methods. First, he attempted to demonstrate bias by eliciting testimony that the witness was facing a 262-month term of incarceration that could be reduced only through cooperation with law enforcement officers and the government's filing of a 5K1.1 motion.

Q: You would like to spend as little time in prison as possible; fair enough?

A: Right.

Q: And you made that decision to cooperate with the Government very early on after your arrest in February 2005?

A: Right after the arrest.

*****

Q: When you started to think, one of the first thoughts you had, I need to help myself anyway I can?

A: Yes.

*****

Q: A 5K motion is something only the Government can file. I can't file one, your lawyer can't file one and the Judge can't say I'm going to grant one even if the Government says I'm not. It's only the government's decision, right?

A: Right.

Q: So, a lot is on the line for you in this trial.

GA at 262, 268, 277; *see also id.* at 265, 267, 278.

Second, defense counsel attacked the witness' ability to perceive, recall, or relate the events of March 10, when he purchased 57.7 grams of cocaine base from the defendant.

Q The Government asked you yesterday about the tape that it had and so forth, remember the disk? Did you listen to this; did you confirm it was your conversation, correct?

A: Yes.

*****

Q: So, they didn't get in the car is what you're telling the jury in open court, but when the tape is playing, they got in the car; is that it?

A: I just don't remember.

*****

Q: Trying as hard as you can to be truthful, that's all you can remember?

A: That's all I can remember.

Q: Do you suffer from memory loss, sir?

See id. at 287-88, 293.

Third, he attempted to discredit the cooperating witness by contradicting the substance of his testimony.

Q: And do you recall telling the jury that you tried crack cocaine?

A: No, I didn't try crack cocaine.

Q: So if they listen to your testimony when they're deliberating and hear you say that, that's a mistake the court reporter made?

See id. at 270; *see also id.* at 268-69.

In summation, defense counsel emphasized his attacks on the cooperating witness' credibility, arguing, for example, that the witness was "bargaining for his life," *id.* at 587, and that he "had an awful lot to lose," *id.* at 575; *see also id.* at 565-66.

These repeated attacks more than adequately opened the door for the government, on redirect examination and summation, to rehabilitate the cooperating witness' credibility by putting forth evidence of his cooperation in the context of other law enforcement investigations that led to successful prosecutions. *See Martinez*, 775 F.2d at 36-38; *Lindemann*, 85 F.3d at 1242-44; *Lochmondy*, 890 F.2d at 821-22.

The facts of this case are analogous to those addressed in *Martinez*. That case involved a charge that the defendant attempted to commit murder within the special maritime and territorial jurisdiction of the United States. 775 F.2d at 33. At trial, a government cooperating witness, who was an inmate with the defendant, testified that the defendant had solicited his assistance in facilitating the murder of another inmate. *Id.* During cross-examination, defense counsel vigorously attacked the cooperating witness's credibility. *Id.* at 34. Defense counsel suggested that the cooperator was lying, that the cooperator had a long history of fabricating accusations to curry favor with prosecutors and prison officials in order to gain early release from prison, and further implied that the cooperator had made false accusations against prison guards. *Id.* at 34, 38. During redirect examination, the prosecutor elicited evidence that the prison guards against

whom the cooperator had made accusations in the past had pleaded guilty. *Id.* at 34. The prosecution also introduced into evidence two letters from the United States Attorney from the Southern District of New York, discussing the cooperator's participation in an investigation of corrupt prison guards. *Id.* One of the letters noted that "[a]ll seven of the guards with whom [the cooperator] dealt were arrested and indicted. All have pleaded guilty. . . ." *Id.*

As in this case, defendant Martinez argued that introduction of evidence of the cooperating witness's past cooperation violated his due process right to a fair trial. This Court rejected that argument, reasoning that Fed. R. Evid. 403 gives the trial court broad discretion in determining whether to admit relevant evidence and that the defendant's attack on the cooperating witness' credibility opened the door to the admission, on redirect examination, of evidence relating to the witness's past cooperation and guilty pleas resulting from that cooperation. *See id.* at 37 ("We find no such abuse of discretion here, for it is well settled that a cross-examination attacking a witness's credibility and character will open the door to redirect examination rehabilitating the witness.") (citations omitted). This Court thus concluded that "[a]gainst the background of these attacks by the defense on [the cooperator's] credibility . . ., the trial court was within the bounds of discretion to admit the evidence that all of the MCC guards accused by [the cooperator] had pleaded guilty." *Id.* at 38.[2]

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[2] In accord are cases from other circuits. *See, e.g.*, (continued...)

Accordingly, the government submits that this Court should find that the district court did not abuse its discretion in allowing the government to elicit evidence of the cooperating witness' past cooperation during redirect examination and to argue that evidence in its summation.[3] Defense counsel repeatedly and vigorously attacked the cooperator's credibility, employing a variety of

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[2] (...continued)
Lindemann, 85 F.3d at 1242-43 (holding that the district court properly permitted the introduction of evidence of a cooperation witness' cooperation in other cases to rebut the defendant's attacks on the witness' credibility); *Lochmondy*, 890 F.2d at 820 (finding that district court properly allowed evidence and argument about a cooperating witness' past cooperation in the face on a strong attack on the witness as someone who would do anything the government asked).

[3] The defendant misses the mark in arguing that the government improperly bolstered Cole's credibility because "at no time did defense counsel imply by his questioning that Cole should be discredited because he was attempting to frame the appellant." Def. Br. at 21. Accepting that argument would mean that evidence of past cooperation may be introduced to rehabilitate a witness only when defense counsel alleges that the witness was trying to frame the defendant. As discussed above, case law does not so narrowly limit the prosecutor's ability to introduce rehabilitation evidence. *See Martinez*, 775 F.2d at 37; *Lindemann*, 85 F.3d at 1242-43; *Lochmondy*, 890 F.2d at 821-22.

impeachment methods, thus opening the door to the fact of the witness' past cooperation for rehabilitation purposes.[4]

III. The district court's sentence was procedurally and substantively reasonable

A. Governing law and standard of review

The Sentencing Guidelines are no longer mandatory, but rather represent one factor a district court must consider in imposing a reasonable sentence in accordance with Section 3553(a). *See United States v. Booker,* 543 U.S. 220, 258 (2005); *see also United States v. Crosby*, 397 F.3d 103, 110-18 (2d Cir. 2005). Section 3553(a) provides that the sentencing "court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection," and then lists the specific considerations that guide a sentencing court's determination. Among the noted considerations are the history and characteristics of the defendant, *see* 18 U.S.C. § 3553(a)(1), the need to protect the public from further crimes of the defendant, *see* 18

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[4] The defendant is also incorrect in suggesting that the district court may have improperly admitted evidence of the cooperator's past cooperation pursuant to Fed. R. Evid. 608(b). Def. Br. at 21. The government did not seek to introduce, nor does the record reflect that the district court admitted, this evidence on Rule 608(b) grounds. Rather, the evidence was admitted pursuant to Rules 402 and 403, for the purpose of allowing the government to rebut the defendant's attacks on the credibility of its witness.

U.S.C. § 3553(a)(2)(c), and the need to provide the defendant with correctional treatment in an effective manner, *see* 18 U.S.C. § 3553(a)(2)(D).

In *Crosby*, this Court explained that, in light of *Booker*, district courts should now engage in a three-step sentencing procedure. First, the district court must determine the applicable Guidelines range and is entitled to engage in fact-finding as necessary to do the requisite guidelines calculations. *See* 397 F.3d at 112. Second, the district court should consider whether a departure from that Guidelines range is appropriate. *Id.* Third, the court must consider the Guidelines range, "along with all of the factors listed in section 3553(a)," and determine the sentence to impose. *Id.* at 112-13. A failure to consider the Guidelines range and instead simply to select a sentence without such consideration is error. *Id.* at 115.

This Court has recently held that "[t]he recommended guideline range '*should* serve as a benchmark or a point of reference or departure' for a sentencing court." *United States v. Capanelli*, 479 F.3d 163, 165 (2d Cir. 2007) (per curiam) (quoting *United States v. Fernandez*, 443 F.3d 19, 28 (2d Cir.), *cert. denied*, 127 S. Ct. 192 (2006), in turn quoting *United States v. Rubinstein*, 403 F.3d 93, 98-99 (2d Cir.), *cert. denied*, 126 S. Ct. 388 (2005)) (emphasis added in *Capanelli*). "While 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.'" *Capanelli*, 479 F.3d at 165 (quoting *Fernandez*, 443 F.3d at 32). "A sentencing judge's decision to place

special weight on the recommended Guideline range will often be appropriate, because the Sentencing Guidelines reflect the 'considered judgment of the Sentencing Commission,' . . . 'are the only integration of the multiple [§ 3553(a)] factors and, with important exceptions, . . . were based upon the actual sentences of many judges,' . . . ." *Capanelli*, 479 F.3d at 165 (quoting *United States v. Rattoballi*, 452 F.3d 127, 133 (2d Cir. 2006), and *United States v. Jimenez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc)).

In *Booker*, the Supreme Court ruled that Courts of Appeals should review post-*Booker* sentences for reasonableness. *See Booker*, 543 U.S. at 261 (discussing the "practical standard of review already familiar to appellate courts: review for 'unreasonable[ness]'") (quoting 18 U.S.C. § 3742(e)(3) (1994)). In *Crosby*, this Court articulated two dimensions to this reasonableness review. First, the Court will assess procedural reasonableness – whether the sentencing court complied with *Booker* by (1) treating the Guidelines as advisory, (2) considering "the applicable Guidelines range (or arguably applicable ranges)" based on the facts found by the court, and (3) considering "the other factors listed in section 3553(a)." *Crosby*, 397 F.3d at 115. Second, the Court will review sentences for their substantive reasonableness – that is, whether the length of the sentence is reasonable in light of the applicable Guidelines range and the other factors set forth in § 3553(a). *Id.* at 114.

An evaluation of whether the length of the sentence is reasonable will necessarily "focus . . . on the sentencing

court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a)." *United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005); *see Booker*, 543 U.S. at 261 (holding that factors in § 3553(a) serve as guides for appellate courts in determining if a sentence is unreasonable).

The Court has explained what is meant by "consideration" of the statutory factors in order for the sentence ultimately imposed to be "reasonable." This Court presumes "in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged [his] duty to consider the statutory factors . . . and will not conclude that a district judge shirked [his] obligation to consider the § 3553(a) factors simply because [he] did not discuss each one individually or did not expressly parse or address every argument relating to those factors that the defendant advanced." *United States v. Pereira*, 465 F.3d 515, 523 (2d Cir. 2006) (quoting *Fernandez,* 443 F.3d at 30).

To fulfill its duty to consider the Guidelines, the district court will "normally require determination of the applicable Guidelines range." *Crosby*, 397 F.3d at 113. "An error in determining the applicable Guideline range . . . would be the type of procedural error that could render a sentence unreasonable under *Booker*." *United States v. Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005); *cf. Rubenstein*, 403 F.3d at 98-99 (declining to express opinion on whether an incorrectly calculated Guidelines sentence could nonetheless be reasonable).

The Supreme Court has held that an appellate court may afford a presumption of reasonableness to a sentence imposed within the Sentencing Guidelines range. *See Rita v. United States*, 127 S. Ct. 2456, 2462-68 (2007); *see also Fernandez*, 443 F.3d at 27 ("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."); *Rattoballi*, 452 F.3d at 133 ("In calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.").

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

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

> including the defendant's opportunity for sentencing allocution. The appellate court proceeds only with the record.

United States v. Fairclough, 439 F.3d 76, 79-80 (2d Cir.) (per curiam) (quoting *Fleming*, 397 F.3d at 100) (alteration omitted), *cert. denied*, 126 S. Ct. 2915 (2006); *see also United States v. Kane*, 452 F.3d 140, 145 (2d Cir. 2006) (per curiam) ("[The defendant] merely renews he 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*.") (emphasis added).

B. Discussion

The defendant argues that the district court's sentence of 324 months' imprisonment was procedurally unreasonable because "the district judge gave no consideration to the sentencing factors contained in 18 U.S.C. § 3553(a)." Def. Br. at 24. Specifically, the defendant argues that the district court failed to address: (1) the fact that he was a relatively low-level drug dealer whose prior convictions were for low-level drug offenses; and (2) the defendant's long-term addiction to drugs. Def. Br. at 26-27.

The district court's sentence was not procedurally unreasonable. The record reflects that the district court did precisely as directed by this Court's *Crosby* decision. The district judge determined the applicable Guideline range. A343. The court then considered whether a

departure was appropriate and decided that it was. *Id.* Finally, taking into account the Guidelines and the other statutory factors, the district court imposed a sentence at the bottom of the now lower range, given the departure. *Id.*

As for consideration of the statutory factors, the court expressly considered the defendant's assertion that he was a low-level drug dealer, deserving of a lesser sentence than that called for by the Guidelines. While agreeing that the defendant would not be sentenced as a career offender, the court considered his history and characteristics, noting that the defendant is a "recidivist . . . who continues to break the law," and has "no employment history." A336, 341-342. The record demonstrates that the district court considered the need to avoid unwarranted disparities in the sentences of other defendants charged with similar crimes. A342-43; *see* 18 U.S.C. § 3553(a)(6). The district court also considered the kinds of sentences available, as well as the need for the sentence to provide the defendant with treatment for drug addiction. A346-50; *see* 18 U.S.C. §§ 3553(a)(2)(D), (a)(3). Indeed, contrary to the defendant's claim on appeal, the record makes plain that the district court took the defendant's history of drug addiction into account directly as the judge expressly recommended placement in the 500-hour drug treatment program within the Bureau of Prisons. A307-310, 348-349.

Based upon this record, there is no support for the defendant's assertion that the "the district judge gave no consideration to the sentencing factors contained in 18

U.S.C. § 3553(a)." Def. Br. at 24; *see also Pereira*, 465 F.3d at 523 ("steadfastly refus[ing] to require judges to explain or enumerate how such consideration [of the statutory factors] was conducted.").

The district judge is entitled to the presumption that she fully and properly considered all relevant factors at sentencing. Nothing in the record demonstrates that the experienced district judge failed to understand the applicable statutory requirements of Section 3553(a), the relevant Guidelines range, or her authority to depart from the Guidelines range. Indeed, Judge Burns exercised her authority and adjusted the defendant's criminal history category by one level, which reduced his Guidelines range from a range of 360 months-life to a range of 324-405 months' imprisonment. A343. Accordingly, Judge Burns is entitled to the presumption articulated by this Court that "'[a]s long as the judge is aware of both the statutory requirements and the sentencing range . . . and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, we will accept that the requisite consideration has occurred.'" *Fernandez*, 443 F.3d at 29-30 (quoting *Fleming*, 397 F.3d at 100) (emphasis omitted).

Moreover, the district court's sentence was substantively reasonable. The defendant was found guilty by a jury for having conspired to distribute 50 grams or more of cocaine base and having distributed 50 grams or more of cocaine base. Owing to the government's filing of a second offender notice, pursuant to 21 U.S.C. § 851, the defendant faced a mandatory minimum term of

imprisonment of 20 years. Moreover, the district court found that the relevant quantity of cocaine base attributable to the defendant in furtherance of the offenses for which he was convicted was 110.4 grams of cocaine base – more than twice the statutory threshold quantity of 50 grams. A258. The record thus reflects that the defendant was involved in the distribution of a significant quantity of cocaine base.

The record also reflects that the defendant has an abysmal criminal history. Time and again, for over fifteen years, the defendant has repeatedly engaged in criminal activity, including a weapons offense, several felony narcotics crimes, repeated convictions for interference or threatening, and convictions for crimes of deceit. Every time the defendant was released from jail under some type of supervision, he violated the conditions of his release and was re-incarcerated. *See* PSR at 4-6. After reviewing this history, the district court noted "[Y]our client is not at liberty for very long before he does something else illegal." A336.

Based upon this lengthy criminal history, as well as the gravity of the offenses for which the defendant was found guilty after a jury trial, the government respectfully submits that the district court's sentence of 324 months' imprisonment is substantively reasonable.

Conclusion

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

Dated: March 17, 2008

Respectfully submitted,

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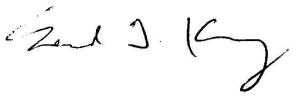

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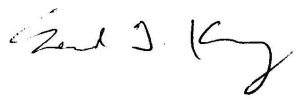
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,342 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



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