08-0052-cr

To Be Argued By:
STEPHEN B. REYNOLDS

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-0052-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

ANTHONY M. PERONE,

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 (Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. On December 20, 2007, the district court sentenced Perone to two consecutive terms of 60 months in prison. (JA 9; 314). On December 26, 2007, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). (JA 9; 418). Judgment entered on January 3, 2008. (JA 9). An Amended Judgment and a Second Amended Judgment entered on January 9 and January 16, 2008, respectively. (JA 9-10; 410-13; 414-17). 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

Whether the district court's ten-year sentence was substantively reasonable for a defendant who mailed threatening communications to a victim and her grandmother and was packed for travel to Connecticut and possessed a recently purchased assault rifle and hundreds of rounds of ammunition; and where a court-ordered psychological evaluation in aid of sentencing found that the defendant posed a high risk of dangerousness to the community and to the victim.

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Preliminary Statement

In May 2006, a 70-year-old grandmother and life-long resident of Connecticut received two letters that contained graphic threats to kill her young adult granddaughter. The letters, intended for the granddaughter, contained personal recollections and hand-drawn pictures depicting events from her third and fourth grade classes, the substance of which was intended to have her guess who had sent the

letters through a series of depicted clues.[1] The letters were written by the defendant, Anthony Perone, who had had only intermittent contact with the victim when they had attended third and fourth grade in Connecticut more than ten years earlier, and who had not seen the victim since.

In June 2006, law enforcement officers executed a search warrant at the defendant's home in Minnesota, where he lived with his parents. They seized hundreds of pages of additional writings that contained threats and plans to kill not only the victim, but also her family and certain of her former third and fourth grade classmates. These journals were maintained as a lid that covered a five-gallon bucket that was being used as a urinal in the defendant's bedroom. In that same room, officers also seized a recently purchased assault rifle with a scope; a backpack filled with hundreds of rounds of ammunition; a packed suitcase that contained a machete or sword with a recently sharpened blade; additional knives, flashlights and binding wire that were packed and ready to go; documents suggesting imminent travel to Connecticut; documents reflecting research on the defendant's intended targets and their locations; and various "to do lists" that

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[1] During the pendency of this case, the parties have made efforts to ensure that identifying information of the victim and her family was not publicly disclosed. Accordingly, this brief refers to the recipient of the letter as the "grandmother" and the intended target as "the victim," or the "granddaughter." Identifying information about the victim was redacted from the public versions of exhibits submitted below, and that practice has been followed in the Joint Appendix ("JA") as well.

discussed places to stay in Connecticut, additional items to add to his arsenal (e.g., hand grenades, homemade bombs, additional firearms), additional items to obtain or purchase (e.g., a mask and a glass cutter) and thoughts on completing his task (e.g., "break in at night"). Subsequent investigation determined that the first time Perone had ventured out, as an adult, into a retail establishment, unaccompanied by one of his parents, was to purchase the assault rifle. (JA 436).

Perone eventually pleaded guilty to two counts of mailing threatening communications, in violation of 18 U.S.C. § 876(c). (JA 3; 6; 12-13; 14-25). The government agreed to drop a third count, which reduced the defendant's sentencing exposure from fifteen to ten years. The parties agreed that Perone's advisory Guidelines range was 18-24 months, and each party reserved its right to advocate for a non-Guidelines sentence. At sentencing, the court (U.S. District Judge Janet C. Hall) considered a psychological evaluation that diagnosed Perone with a personality disorder and described the risk he posed to the community and to the victim as "high." After hearing testimony from two court-appointed psychologists, the case agent, the victim, and her grandmother, the district court sentenced Perone to 60 months in prison on each count, to run consecutively. (JA 9; 314). The court imposed this aggregate 120-month term as a non-Guidelines sentence.

On appeal, Perone claims that the district court abused its discretion and imposed a substantively unreasonable sentence because it based its sentence on: (1) evidence of

his intent to carry out his threats – a factor already addressed as a Guidelines adjustment; (2) purportedly unreliable predictions by the forensic psychologists of the long-term risk posed by Perone; and (3) the need to provide Perone with long-term treatment in a structured setting.

This Court should reject Perone's claims and affirm his sentence.

Statement of the Case

On June 6, 2006, following the execution of a search warrant at Perone's home in Minnesota earlier that day, a criminal complaint and arrest warrant issued in the District of Connecticut, charging Perone with mailing threatening communications in violation of 18 U.S.C. § 876(c). (JA 3).

On June 22, 2006, a federal grand jury in Connecticut returned an indictment charging Perone in Count One with interstate stalking in violation of 18 U.S.C. §§ 2261A(2) and 2261(b)(5), and in Counts Two and Three with mailing threatening communications in violation of 18 U.S.C. § 876(c). (JA 3; 12-13). The case was assigned to U.S. District Judge Janet C. Hall.

On March 16, 2007, Perone pleaded guilty to Counts Two and Three. (JA 6; 14-25).

On April 5, 2007, the district court ordered that a psychological evaluation be conducted by the Bureau of Prisons ("BOP") in aid of sentencing. (JA 7; 66-67).

On December 20, 2007, the court sentenced Perone primarily to 60 months on each count, to run consecutively. (JA 9; 314).

On December 26, 2007, the defendant filed a notice of appeal. (JA 9; 418).

Judgment entered on January 3, 2008. (JA 9). An Amended Judgment and a Second Amended Judgment entered on January 9 and January 16, 2008, respectively. (JA 9-10; 410-13; 414-17).

The defendant is presently serving his sentence.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. The Offense Conduct

On May 4, 2006, a 70-year-old grandmother and life-long resident of Connecticut received a threatening letter intended for her 20-year-old granddaughter. The letter had been sent to the grandmother's home address in Bridgeport, Connecticut, but listed no name in the address. The return address, which appeared to be in handwriting different from that of the address and the contents of the letter, indicated that the letter had been sent from "Anthony M. Perone" in Fairmont, Minnesota. The grandmother was deeply frightened by the enclosed letter, which was intended for her granddaughter, who had previously lived at that address. (JA 59-60; 136-38; 209-14; 239-42; 423).

The front side of the letter read:

> Dear [victim's name redacted] your as Beatiful
> as the sunset. ugly as the night.
> come with me and I'll treat you
> Right. If not prepare to fight.
> your Secret
> admireir.

(JA 137; 423).

The front page also contained a hand-drawn picture of a heart with a chunk taken out of it, and five drops of

blood coming from it, all colored in red with what appeared to be crayon or red pencil. The drawing bore the words "your heart" and "your blood." To the right of the heart appeared a drawing of an assault rifle colored in black and labeled with the words "The Gun your pain." Below the gun appeared the words "my Justice" with an arrow pointing up towards the weapon. Below the heart appeared a drawing of a single bill of U.S. currency, colored green, with the words "your money . . . I never had." The first page finished with the words "To [victim's name redacted] only." (JA 137; 423).

The back side of the letter contained a drawing of a tombstone bearing the words "[Victim's name redacted] RIP." The tombstone was surrounded by flowers and was labeled "your Tombstone where you Lye." In the middle of the page was a drawing of two hands, holding hands, and the words "your hand and mine will meet." The bottom of the page contained a drawing of a house, along with the words "your house will be destroyed." (JA 138; 423).

During initial interviews, the granddaughter could not recall anyone she knew by the name of Anthony Perone and she was unable to provide law enforcement officers with any thoughts about who might have sent the letter. (JA 213; 254-55; 424).

On May 16, 2006, the victim's grandmother received a second letter. The letter bore the same address and, as before, had no name identified for the recipient. As before, the return address on the envelope indicated that it

had been sent from an "Anthony M. Perone" in Fairmont, Minnesota. (JA 139; 424).

The second letter contained nine sequentially numbered pages that contained various pictures and words, again directed to the granddaughter, by name. In essence, the letter set forth a chronological series of rudimentary pictures depicting events purportedly from the victim and Anthony Perone's third and fourth grade classes that they had apparently attended together. In short, these pages contained clues intended to have the reader guess who had sent her the letter. (JA 139-49; 424).

For example, the third page contained a drawing labeled "auditorium" and "3rd grade." At the top was a box labeled "stage concert," under which appeared another box containing the words "seats filled with students" and "me sitting there." A drawing of a student in the seats was labeled "[victim's name redacted] . . . crying . . . Because of her favorite song." Below and to the left was a drawing of two people, one identified as the victim and the second as the "teacher," who was holding the victim's hand and was identified as "escorting" the victim out of the room. (JA 142).

Page five was labeled "swimming pool Gymnasium" and "4 grade." On the top half of the page was a rudimentary drawing of a swimming pool with a diving board, both of which were labeled accordingly. The victim was shown as being on the diving board. On the bottom half of the page was a box with a series of horizontal lines labeled "bleachers" and a drawing of a

person under which appeared the words "me sitting on the side Lines." (JA 144).

On page six Perone wrote: "Think everything over slowly and I'm sure you'll remember me. 9 years ago is a Long time so I understand you cant think clearly." (JA 145).

Page seven of the letter read:

> [Victim's name redacted] your favorite
> song from a child The Lion
> King soundtrack Elton John
> ((can you feel are Love Tonight))
>
> and your favorite christmas
> movie Jingle all the way
>
> You no who I am now?
> Ring any Bells?
>
> What about swimming.
> You Love swimming.
>
> Dont worry I'll see you soon
>
> your Secret
> admireir.
>
> P.S. I Love
> you

(JA 146).

Page eight included a drawing of an assault rifle with a muzzle blast and bullets coming out of it. Above the picture appeared the following message:

> WAR Games Begin
>
> [Victim's name] now comes a point in your
> Life where everything changes. for
> 20 years you Lived a rich Life
> with everything. money, family,
> Being popular. It's now gonna end.
> your gonna learn about suffering
> and having nothing. pain you
> will feel. fear, Being alive.
> prepare yourself. Because the war
> will not take place in the future.
> The Last Stand or fight will take
> place in the present time which
> is tonight.

Perone signed the page "Death Stalker." (JA 147; 424).

The last page contained pictures and words on both sides of the page. On the front page – which bore the title "DEATH STALKER" – appeared a drawing of a heart with a chunk taken out of it, nearly identical to the drawing of the heart in the first letter. Above and below the heart appeared the words "My heart . . . is Black Just Like Yours." (JA 148; 424-25).

On the bottom half of the page was a drawing of two people. One, with a hateful facial expression, was labeled

"me." The other person, whose head had been severed, was identified by the victim's name. In the hand of the person labeled "me" was a drawing of a girl's head labeled "your head." (JA 148; 425).

The back side of the page contained the following message:

> You made my Life a
> Living hell. a Long time
> ago. I Suffered from it.
> now your gonna feel that.
> no one can help you. I
> will never Stop
> until you are mine.
>
> Love
> Death
> Stalker
>
> PS NEVER Sleep sound
> Again. I'm comin for you.
> I'm Watchin your every
> move.

(JA 149; 425).

Subsequent investigation confirmed that the victim and Perone, did, in fact, attend elementary school together. The investigation also confirmed that the address in Minnesota that was identified as the return address for

Anthony Perone was, in fact, his current residence. (JA 36; 59-60; 95-97; 425).

On June 6, 2006 federal law enforcement officers executed a search warrant at Perone's home in Fairmont, Minnesota, where he lived alone with his parents. (JA 97; 214-15; 426). In Perone's bedroom, officers seized notebooks that contained hundreds of pages of additional bizarre writings with threats and plans to kill not only the victim, but also her family and certain of her former third and fourth grade classmates. (*See, e.g.*, JA 330-405; 426). These journals were found on top of a five-gallon bucket that was being used as a urinal in the defendant's bedroom. (JA 426; 435). The journals had to be bagged and sealed not only for evidentiary purposes, but also because the documents had taken on a pungent odor of urine. (JA 426).

Officers also seized what appeared to be additional draft mailings directed to the victim which were virtually identical to the mailings previously sent. These writings referred to additional grade school memories. (*See, e.g.*, JA 398-401; 426). The writings also contained additional menaces to the victim and others – and threatened a "killing spree." (JA 381).

On one such illustrative page, Perone wrote that he would "kill her entire relatives, family, parents, cousins, grandmother, down to her." On the same page, Perone wrote "[victim's name redacted] see what you did. Made me mad. [Classmate's name redacted] is dead just like you gonna be. I love you. See ya soon. Secret Admireir."

Under the words appeared a drawing of a gun with bullets discharging towards a female identified by the victim's name. (JA 398).

On another page, Perone wrote haphazardly, all over the page. In one section he instructed the victim, by name: "If you want the carnage to stop meet me at the Bridgeport Cemetary. Come alone. I'll be there. Your Secret Admireir. P.S. I love you." The page also contained a drawing of a female bearing the victim's name and the words "She would be mine" and "My girlfriend." On the same page, Perone wrote that the victim's "grandma lives alone. Wait until she leaves. Go through her house . . . into basement seller outside doors." On the same page Perone wrote the words: "killing spree." (JA 381).

On yet another illustrative page Perone repeatedly wrote the victim's name and the words: "follow her and wait . . . kill her first." (JA 392).

In his journals, the defendant not only repeatedly wrote the names of the victim, certain classmates and the "Blackham School" in Bridgeport, but he also repeatedly identified various types of assault weapons, automatic firearms, grenades and other weapons that he identified as additional items he wanted to obtain. (*See, e.g.*, JA 333-34; 348-49; 384-86; 391; 395; 397). The journals also contained references to potential lodging accommodations in Connecticut. (*See, e.g.*, JA 393). The journals also contained a draft letter to Savage Arms – the manufacturer of the weapon Perone had purchased – in which Perone identified himself as having purchased a "Savage Arms

Model 62164 Series Semi-Auto 22 LR Caliber Rifle." In the letter Perone asked "if you have any spare magazines you can send me." (JA 388).

Interspersed throughout his journals the defendant had also written what appeared to be several short screenplays or stories. (*See*, *e.g.*, JA 340-45; 426). One particularly graphic story was about a man being pursued by two strange women who were overtly sexual. (JA 340-45; 426). A second story starred a character who was aggressive and assaultive with law enforcement. (JA 355-57; 363; 426). A third story entitled "Blast from the Past" involved a high school student who was popular with other students and rebellious towards authority. (JA 358-59; 361; 364; 426).

Officers also recovered evidence that Perone was well on the path to acting out on his threats. The search recovered, for example, an assault rifle with a scope that Perone had recently purchased and which was consistent with the firearms Perone had drawn in his mailings. (*See* photo at JA 150; *see also* JA 426-27). Officers also recovered a backpack that was filled with hundreds of rounds of ammunition; a packed suitcase that contained a machete or sword with a recently sharpened blade; and additional knives, flashlights and binding wire that were packed and ready to go. (*See* photos at JA 151-54; *see also* JA 426-27).

Interviews with Perone and his parents revealed that Perone authored and addressed the letters and caused them to be mailed by his mother who, believing they were

simply innocuous letters intended for a friend in Connecticut, wrote Perone's name and return address on them on his behalf. (JA 427).

B. The Charges and The Plea

On June 6, 2006, following the execution of the search warrant, Perone was arrested by criminal complaint. On June 22, 2006, a federal grand jury in Connecticut returned an indictment charging Perone in Count One with interstate stalking in violation of 18 U.S.C. §§ 2261A(2) and 2261(b)(5), and in Counts Two and Three with mailing threatening communications in violation of 18 U.S.C. § 876. (JA 3; 12-13).

On March 16, 2007, Perone pleaded guilty to Counts Two and Three. (JA 6; 14-25). In the plea agreement, the parties agreed that the defendant's base offense level under U.S.S.G. § 2A6.1 was 12, and that six levels were added because the offense involved an intent to carry out the threats. *See* U.S.S.G. § 2A6.1(b)(1). With a three-level reduction under U.S.S.G. § 3E1.1 for acceptance of responsibility, the parties agreed that the total adjusted offense level was 15. The parties agreed that a total offense level of 15, with no criminal history, resulted in a range of 18 to 24 months of imprisonment. (JA 17).

Significantly, both parties reserved their rights "to seek a departure from the sentencing range . . . or to seek a non-Guidelines sentence." (JA 17). The government specifically reserved the right "to advocate in favor of consecutive sentences on each count" and "to seek an

upward departure or a non-Guidelines sentence up to the consecutive statutory maximum of ten (10) years imprisonment." (JA 17).

As part of his plea agreement, the defendant also agreed to the entry of a three-year, renewable protective order under 18 U.S.C. § 1514, which was to take effect upon the conclusion of any period of federal supervised release and the terms of which restrained him from contacting or harassing the victim. (JA 20-22; 26-57; 58-65; 321-27).

Finally, as part of the plea agreement, the government agreed that it would move to dismiss Count One of the Indictment, effectively lowering the defendant's total potential exposure from fifteen to ten years. (JA 22; 319; *see also* 18 U.S.C. §§ 2261(b)(5) and 876(c)).

C. The Pre-Sentence Investigation

The pre-sentence investigation conducted by the U.S. Probation Office determined that Perone lived an isolated life in his bedroom in Minnesota and was entirely dependent upon his parents for support and social interaction. (*See, e.g.*, JA 306-08; 432-36). As a child, Perone never engaged in social activities with others; often retreated to places of refuge to write in his journals; never made a social connection with any of his peers; and always sat alone. (JA 433-34). Eventually, his parents signed papers allowing him to withdraw from school approximately four months into the ninth grade. (JA 434). The defendant thereafter spent long periods of time alone

in his room, unsupervised, including one occasion in which he remained alone in his room for three days. (JA 434).

The investigation also determined that Perone actively avoided social interaction and was fully dependent upon his parents, who always accompanied him when he ventured into the outside world. (*See, e.g.*, JA 435). Indeed, Perone's mother once accompanied him to a job interview because he refused to go alone. (JA 441).

Significantly, the *first* time Perone overcame these fears and ventured out as an adult, unaccompanied by one of his parents, *was to purchase the assault rifle*. (JA 302; 307-08; 436).

The Pre-Sentence Report ("PSR") found that the defendant's Guidelines range was 18 to 24 months of imprisonment. (JA 431-32; 442-43). In the section entitled "Circumstances that may Warrant Departure or a Non-Guidelines Sentence," the PSR indicated that the court "may consider a[n] upward departure based upon extreme psychological injury incurred by the victim and her family." (JA 443; *see also* PSR "Victim Impact" section at JA 428-30).

The PSR raised a number of concerns in its conclusions:

> Mr. Perone is extremely introverted and has successfully isolated or insulated himself from the world until his involvement in this crime. Serious

underlying mental health problems are clearly manifesting themselves with his behavior displayed in the instant offense. He provided a social history that indicates he has been struggling with depression and loneliness for a long time.

. . . .

While the defendant was apprehended well before he was able to act on his threats to the victim, the guideline calculations may not properly reflect the potential danger the defendant poses to the victims and the community. Mr. Perone was very organized in his preparation to act on his threats to the victims and the community. His amassing of weapons and other tools indicate organized thinking and planning while he maintained a haze of disillusion in his relationship with the victim. His journals provide insight into a dark and lonely mind of a man that felt that he has had enough and it was time to avenge the pain and suffering he endured for so many years.

It appears Mr. Perone's childhood isolation was further fostered by his parents['] inability or unwillingness to provide their son proper psychological and psychiatric treatment at an early age. It is very clear to this officer that he continues to be a danger to himself and the targeted victims. He has demonstrated a social ineptitude in almost all situations in his life while in his fantasy writings he identifies with sexual

> prowess, rebellion, and physical intimidation as a masculine ideal. It appears to this officer that his participation in this offense empowered him in a way that nothing else in life has thus far. He was able to strike fear in his victims but continue his need for anonymity in the creation of the identity of the "Death Stalker." This is a frightening factor that must be considered by the Court when sentencing the defendant to a term of incarceration and post incarceration supervision. Mr. Perone's active and willing participation in mental health treatment may be the only way to reduce his potential for recidivism.

(JA 444-45).

D. The Court-Ordered Evaluation

On April 5, 2007, the district court ordered that an independent psychological evaluation be completed in aid of sentencing. (JA 7; 66-67). This evaluation was conducted by BOP psychologists. (JA 66-67; 200-01; 461-70).

Perone's evaluation was conducted over the course of four months by forensic staff at the Federal Correctional Institution in Fort Worth, Texas. As the district court remarked at sentencing, the results of the psychological evaluation were "quite striking." (JA 308).

Consistent with Perone's lack of social interaction highlighted in the PSR, the evaluators noted that Perone

kept to himself, did not socialize with other inmates and did not even establish a telephone account. (JA 465-66).

The report noted that Perone refused to cooperate with the evaluation process. "Throughout the evaluation, Mr. Perone appeared to be annoyed and disinterested. He did not make eye contact with th[e] examiner often, but when he did, he would sigh as though he was irritated and roll his eyes." (JA 465). Perone also failed to cooperate in several of the tests administered to determine his cognitive functioning. (JA 466).

According to the evaluators, Perone's personality functioning showed "a dependent, socially isolated individual who lacks the ability to interpret the social nuances of others. His functional difficulties appear to be compounded by parents who foster his dependence by enabling his childish and immature behavior and thus, increasing his propensity for social isolation from his peers." (JA 466).

Ultimately, the forensic psychologists diagnosed Perone with a "Personality Disorder, NOS [Not Otherwise Specified]," because Perone displayed "traits from more than one personality disorder without meeting the full criteria for any one in particular." (JA 468). First, Perone exhibited Antisocial Personality features

> by failing to conform to social norms with respect to lawful behaviors and displaying significant aggressive tendencies as evident in his journal entries and weapon collection. In addition, he has

> continued to display no remorse for his victim and does not appear to be willing to accept responsibility for the devastating emotional toll that his behavior has caused the victim and her family.

(JA 468). Second, Perone exhibited characteristics of Schizoid Personality Disorder:

> He has continually exhibited a pervasive pattern of emotional detachment toward others and from social relationships. He presents with a restricted affect and does not reciprocate gestures or facial expressions such as nods or smiles. Based on a review of his records, this pattern of detachment is pervasive and has been apparent since childhood. Since quitting school, his time has been spent almost exclusively in his room and his only social interaction for the last few years has been minimal time spent with his parents. His only interest appears to be weightlifting which he does in his room all by himself.

(JA 468). Third, Perone displayed dependent personality traits, allowing

> his parents, namely his mother, to assume the responsibility for major areas of his life. The most blatant example of this occurred when his mother placed a three [sic] gallon bucket in his room to use as a urinal so he would not fall down the stairs in the middle of the night. In addition,

> it was his mother that took complete responsibility for emptying and cleaning the urine bucket. He is completely supported financially by his parents who provide him with basic needs and other requests such as cigarettes. His mother reported the first time Mr. Perone ever entered an establishment and purchased something was when he purchased the rifle he described and drew in his writings. He may have been preoccupied with fears of abandonment as it was reported in his PSR that he told his mother he was depressed because he "feared being homeless if he lost his parents."

(JA 468).

The "Diagnosis" section of the BOP evaluation concluded:

> Mr. Perone's prognosis is guarded. The pervasive nature of his Personality Disorder may be difficult to address and does not typically respond well to treatment. His ability to address his criminal thinking and thus, facilitate his return to society, is negatively affected by his unwillingness to discuss the events that led to the instant offense and his seeming[] lack of insight into the effects that his behavior has on others.

(JA 467).

Finally, in response to the court's question "What danger does the defendant pose currently and in the future to the individual victim and the community?" (JA 66-67), the evaluation starkly concluded:

> Mr. Perone's relative risk of dangerousness to the community (particularly to the victim in this case) is high. His pervasive personality functioning is a factor for concern because he displays aggressive tendencies that are manifested in themes of violence, revenge and death. He displays an emotional coldness that allows him to detach from experiencing empathetic feelings toward others.
>
> Research has indicated the lack of a social support can also be a factor in the prediction of dangerousness. In this case, Mr. Perone has a limited desire for social contact and has no support system outside his family. His familial relationships appear to foster his dependence and exacerbate his social deficiencies creating a vicious cycle. As he has shown no progression toward becoming an independent, self-sufficient adult, his independence may be difficult to foster, which adds to his long term relative risk of dangerousness.
>
> Several situational factors are significant in looking at dangerousness in this case. Mr. Perone purchased a weapon, kept a backpack filled with hundreds of rounds of ammunition, found contact

> information for the victim, and made lodging inquiries in the town where the victim resides. All of these factors clearly indicate intent to harm and therefore, lend credence to the high relative risk of dangerousness if Mr. Perone were to be released into the community at this time.

(JA 469-70).

E. The Sentencing Proceeding

On December 20, 2007, following the submission of detailed sentencing memoranda by the parties (JA 68-154), the court held a sentencing hearing. (*See* Sentencing Tr. dated 12/20/2007, JA 155-329).

Consistent with its reservation of rights in the plea agreement, and in light of the results of the court-ordered psychological evaluation, the government urged the court to sentence the defendant to the statutory maximum of 60 months on each count, and to run the sentences consecutively. (JA 82-154). The government urged the court to do so whether pursuant to an upward departure under U.S.S.G. §§ 5K2.0, 5K2.3 or 5K2.8, or a combination of such departures, or, alternatively, as a non-Guidelines sentence. (JA 82-154).

At the sentencing hearing, the district court adopted the Guidelines calculation set forth in the PSR, which resulted in a Guidelines range of 18 to 24 months. (JA 166-68). Both parties agreed with the court's calculation. (JA 168).

The court then proceeded to hear the testimony of five witnesses called by the government: the two forensic psychologists who had participated in the court-ordered evaluation, the case agent, the victim grandmother, and the victim granddaughter. (JA 170-264).

1. The Testimony of the Court-Appointed Evaluators

Dr. Leslie Powers, a forensic psychologist for the Federal Bureau of Prisons, was Perone's primary evaluator. (JA 172).

Dr. Powers testified that personality disorders are "pervasive over time and they are difficult to treat." (JA 178). Dr. Powers explained that, because a personality disorder is "part of the person's character" (JA 179), "[t]here really is no medication that's been proven to be extremely effective with personality disorder and therapy had not been proven by studies to be particularly effective." *Id*.

With respect to Perone's high risk of dangerousness to the community and the victim, Dr. Powers explained:

> While we cannot predict with absolute certainty whether someone is going to be dangerous in the future or not, there's some characteristics that a defendant can display that can be predictive of future violence. Mr. Perone certainly met the characteristics of some of the things we look at. . . . [H]e [w]as aggressive all through his

> journal writing, in his letters to the victim, aggressive things of violence, revenge and death. It appears he had a plan for violence [and what] is probably the most disturbing, the fact that he purchased a weapon or obtained weapons and ammunition. He was able to find contact information for the victim and even went as far as inquir[ing] about hotels in the victim's area, [which] shows that he had a plan of intent. Also that he has no social support outside of his family is an indicator that he is very dependent with no signs of being able to care for himself. That's concerning with regard to future dangerousness.

(JA 179-80).

Dr. Powers also noted that the victim had not had any sort of relationship with Perone – ever – and even according to Perone, he had not had a relationship of any sort with the victim since the fourth grade. (JA 180). Dr. Powers concluded that Perone had therefore "been thinking about this for a long time" and that another evaluation was imperative after any period of incarceration "because there [was] no indication [given how] long he's harbored this already, that anything is going to change during a period of incarceration." (JA 181).

According to Dr. Powers, the ten-year gap between Perone's last known interaction with the victim and his conduct was "very unusual." Dr. Powers testified that she had "never had a case like this and the word that comes to mind is disturbing. It is a long time to harbor resentment

especially when the victim has really no knowledge of Mr. Perone or no memory of him at all." (JA 181).

Dr. Daniel Kim, a supervisory forensic psychologist for the Federal Bureau of Prisons with more than nine years of experience and personal participation in 400 to 500 evaluations, supervised the evaluation of Perone. (JA 204). Dr. Kim concurred in the conclusions of the forensic report, explaining that "there was enough data as well as dynamic factors regarding the dangerousness question that we felt there was a moderate to high risk of dangerousness . . . as far as potentially acting out on the potential victim here." (JA 204-05).

2. The Testimony of the Case Agent

The Court heard testimony from the case agent, Postal Inspector Tom Lambert who, among other things, interacted with the victim, her grandmother and her family; and participated in the search of Perone's home in Minnesota.

Inspector Lambert testified about the impact of the letters on the victim and her grandmother that he observed. (JA 211-13). Agent Lambert also testified about the execution of the search warrant at Perone's home, including the living conditions (JA 214-16) and the various items seized. (JA 216-21; 230-31). Inspector Lambert produced the assault rifle and scope; the hundreds of rounds of ammunition; the machete; the additional knives, wire, and flashlights, and Perone's packed suitcase. (JA 216-21; 230-31). He also reviewed some

highlights from Perone's journals, including additional threats directed at the victim, her family and her former classmates; Perone's repeated references to weapons and other materials he wanted to obtain; and Perone's references to going on a killing spree. (JA 222-29).

Inspector Lambert testified that in his twenty years as a Postal Inspector, this was "by far the worst" threatening communications case he had ever seen, in light of "all these writings, the weapons, the actual weapons, the fact that it appeared in my opinion . . . that this was going to happen." (JA 229-30).

3. The Testimony of the Victims

The court then heard the testimony of the now 72-year-old grandmother regarding the impact of Perone's threatening letters. (JA 237-50).

In describing how the incident had changed her, the grandmother testified that she had become more nervous and apprehensive of others; she had lost significant amounts of sleep; and the incident was "always in the back of my head." (JA 246-47).

The grandmother testified that, due to her fear, she made permanent changes in her daily life, including curbing her activities outdoors; having caller ID installed on her phone; having a "peep hole" installed in the door to her house; and having deadbolts installed on her doors. (JA 241; 244). Indeed, the grandmother testified that she became so fearful as a result of the letters that she began

sleeping on a couch on the first floor of her house, rather than in her bedroom on the second floor. (JA 241).

The grandmother – while testifying about seeing the drawing in the second letter where the defendant "was holding my granddaughter's head" – broke down on the stand. (JA 243-44). The grandmother testified about a recurring nightmare where she comes home, opens the door, walks a few steps into the kitchen and sees the defendant "sitting at my table and my granddaughter's head on my kitchen table." (JA 247).

The grandmother testified that she would never be the same again and that she was "convinced" that "he's never going to be through with us and we'll never be able to put this behind us . . . . Believe me he's going to come after us again. . . . It is not fun living in fear." (JA 248; *see also* the Victim Impact section of the PSR at JA 428-29).

By agreement and following a full canvas of the defendant, the victim then testified with the defendant absent from the courtroom. (JA 158-59; 160-62; 250-51).[2]

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[2] This was because although the victim wished to address the court, it was her understanding that the defendant did not know what she currently looked like and she was fearful of testifying in a manner that would expose her to the defendant. (*See, e.g.*, PSR ¶31 at JA 429-30; 158-59; 160-62; 250-51; *see also* JA 262 "I don't want him to see what I look like.").

The now 20-year-old victim testified that she learned about the first letter when she received a rare call from her grandmother at work. The victim testified that she "knew there was a problem" because her grandmother "told [her] that [she] had to come to her house right away." The victim testified that she "freaked out" because she "didn't know what was wrong," until her grandmother "told [her] that somebody wants to kill [her]." (JA 254). The victim testified that she was "crying hysterical[ly]" and after reading the letter, she "was a mess." (JA 254).

The victim testified that the name Anthony Perone "didn't ring a bell at all," even after learning that they had attended third and fourth grade together. (JA 255). The victim testified that, upon seeing, in the second letter, specific recollections from ten years before, including her favorite movie, her favorite song, who her friends were, and where she sat, she "was scared because this person remember[ed] everything that happened in third and fourth grade dealing with me and I ha[d] no clue whatsoever who he [wa]s." (JA 257).

The victim testified that, as a result of the letters, she made significant changes in her daily life:

> I had to quit my job. I couldn't work anymore because it was being in danger of our employees and myself. . . . I wasn't barely leaving my house as much as possible. If I did, it was my father I had to call and tell him I was okay. My mother, my grandmother. I had to go down the chain of who to call to make sure I was okay. When I

> would get home, I would have my mom come downstairs and unlock the front door and watch me from my car to the door. I would look in my back seat before I got in my car. My grandma gave me pepper spray to carry with me. It was like living with somebody following your shadow.

(JA 257-58).

The victim testified that, even after the defendant's arrest, she continued to be scared because, she believed, Perone was "not coming with a letter next time. I'm sure of it. Nobody who wants something this bad that stirs up since third and fourth grade is going to stop now. I don't believe it." (JA 258). The victim testified that she lost sleep, she "limit[s] who I talk to. Who I hang out with," and that she has significantly curtailed her use of the internet as a result of the defendant's conduct. (JA 260-61). Towards the end of her direct testimony, the victim broke down while testifying that she remains fearful of what Perone may do to her in the future and that she will never be the same again. (JA 262).

4. The Court's Findings and Sentence

After hearing from both counsel on the appropriate sentence to be imposed (JA 272-97), the court proceeded to make its findings.[3]

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[3] The defendant declined the opportunity to address the court at sentencing. (JA 296-97).

Although the court thought it "possible there's a sufficient basis here to make a finding under 5K2.3 especially," and that "the stronger grounds for departure, if one were to be granted . . . would be the combination under 5K2.0," the district court expressly declined to upwardly depart, opting instead "to impose a non-guideline sentence after considering all the factors" of 18 U.S.C. § 3553(a). (JA 297-99).

Beginning with the nature and circumstances of the offense, the court found Perone's conduct to be "very threatening, terrorizing" with respect to "[t]he sorts of things that he wrote and drew that he graphically depicts." (JA 300). While thoroughly reviewing the contents of each letter (JA 300-02), the court noted that "all of this was meant to be anonymous by Mr. Perone . . . suggest[ing] his intention was to have it go on for quite a bit longer . . . ." (JA 300). The district court was also troubled by the passage of time since elementary school and the lack of any significant interaction between Perone and the victim:

> I can think of very close friends of mine that I have known since the third grade and with whom I remain in touch. I couldn't possibly know what their favorite song was or other things that were set forth here. So I don't think this is something that Mr. Perone sat down in 2006, but instead reflects, if not a violent fixation on the victim, it's certainly a fixation upon her for a very long time.

(JA 300-02).

With respect to both the "nature and circumstances of the offense" and the "history and characteristics of the defendant" (JA 302), the court noted:

> . . . . Mr. Perone is someone who reported never to have made a purchase on his own in his life. While he's writing to the victim threatening her, drawing pictures of a rifle, he goes out and purchases that rifle. He has a packed suitcase. . . . [T]his is a man that otherwise . . . there's no evidence he's ever traveled anywhere in his life other than to move from Bridgeport to Minnesota with his family, and yet he's got a suitcase with some clothes and with a sharpened machete, that's part of his writings, in the suitcase. Along with in the room other items, additional knives, binding wire, flashlights, he's got documents showing that he's investigated locations of his victim. He's got to do lists what he has to do to arrange for and accomplish his plan. He's written plans about how to do it. He's made lists of what he still needs – glass cutters, grenade, mask, he's written about all of the family and the victim. He's specifically talked about the grandmother's house that she lives alone. That he has a plan. That's also, I think, part of the nature and circumstances of the offense.

(JA 302-03).

In considering the nature and circumstances of the offense, the court also noted the impact on the

grandmother and the victim. (JA 303-06). The court found that the grandmother testified "very convincingly" and "obviously lives in fear." (JA 303). The court remarked:

> She's constantly checking her surroundings. She's not at ease. She's suffering from nightmares. She's changed her life-style. She's not going out as she used to because of her fear. She's apprehensive of people who are in her vicinity as to whether they are part of something that this defendant is part of. She was absolutely convinced I believe that the defendant intended to act on his plan. And that I think has worked a significant psychological injury to her. She's also in physical senses changed her life. She's installed caller I.D. Installed a peep hole, changing her locks, made them dead bolts, sleeps on the first floor.

(JA 303-04). The court went on to make similar findings regarding the victim granddaughter:

> . . . . [C]learly her life has been altered. She has modified her behavior in a very obvious and measurable way. She quit her job. She didn't leave her house. Or she left it less than she did. She . . . despite being 20 is in constant contact with her family who are wanting to be certain that she's safe . . . . What struck me was the idea when she returns home she calls so that her mother can watch for her so she can enter the

> house safely. She's lost sleep. She's modified her social life. She clearly is more guarded about her social interactions. . . . I think this case has its roots in the life of a man who has serious emotional and psychological problems and has likely had them for a very long time. [He] [h]as lived a very isolated life without any type of what the rest of us might call a healthy environment either psychologically or physically. . . . The victim testified that all of this was extremely frightening to her and that she felt she would never be the same and I credit her testimony . . . .

(JA 304-06).

With respect to the "history and characteristics of the defendant" (JA 306) the court stated:

> the defendant is an individual who really has had no apparent social interaction in his life, and I think suffers – as I have said, crediting the psychologist's report and opinion – very seriously from mental illness. From the record before me, it would appear that the defendant has no friendship relationships; that he is alone and feels alone. That his life since he stopped going to school appears to have been centered in a room on [the] second floor of his parents' house from which it doesn't appear that he's left very often. And the only evidence of a time when he's ever spoken to his mother about a female was to ask for his grade school picture . . . .

. . . . I have little difficulty on this record concluding that the psychologist is right. This is a fixation or a preoccupation[,] [w]hatever it is called, of Mr. Perone for a very long time. . . . Mr. Perone I believe is an isolated individual with really no support. Suffers from depression, his life is a disorganized life. Obviously the evidence here is overwhelming. Obviously Mr. Perone confessed to the writings. That the defendant did as much planning as he did also persuades this court that he did intend to act on his plans.

. . . . if this were a person who lived a fairly normal life, had a job, had some friends, [but] for one reason or another became fixated on someone . . . sat down and wrote a journal and that was found, it would be quite a different situation and I think I would be more likely to conclude it was not something he intended to act on. In this case, however, we have a person who . . . hasn't been in society and yet overcomes his sense of isolation and his life-style in order to purchase – to be able to go out and purchase a rifle, the very rifle he uses in the writings he sent to his victims, the suitcase, the list of things to do, the information about travel, places to stay, notes about the grandmother's house, about what he would do, how he would do it, what he needed by way of further equipment, and the two letters being sent, to me suggests that he did intend to, if he could, act out on this. . . . The psychological evaluation I found quite striking. . . . The conclusion that Mr.

> Perone faces a high risk of dangerousness to the community and particularly to the victim is also very weighty evidence for the Court's consideration here. His displaying aggressive tendencies[,] themes of violence, revenge and death and emotional coldness, a lack of social support, all of this . . . I think rightly supports the psychologist's conclusion about the risk here.

(JA 306-09).

With respect to providing adequate deterrence and protection of the public from further crimes of the defendant, the court commented:

> In this instance to me, protection of the public and in particular the victim is a very important factor. . . .
>
> As far as the consideration of deterring the defendant, I really have to struggle with that factor. I'm very troubled by the psychologist's report of his not engaging the psychologist, [and] testimony about people who are suffering from the types of mental and emotional disturbance that the defendant is suffering from are difficult to reach and for treatment to succeed with. And so given that I think in large measure this crime was committed because of the defendant's mental illness, it is very difficult for me to say that a sentence of a certain period of time will deter the defendant. I think the defendant will only be

> deterred when and if he's able to come to [grips] with his mental illness.

(JA 310-11).

Finally, in addressing the need for the sentence "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner," 18 U.S.C. § 3553(a)(1)(D), the court considered

> the comments of counsel as well as the testimony and the report of the psychologist. While I think it is fair to say the psychologist was not terribly optimistic about efficaciousness of psychological treatment, I don't think there's much dispute this nature of treatment needed for Mr. Perone given his illness is one that's going to be very long term and any success will be gradual and that a structured environment – that he would benefit from a structured environment. Obviously prison is not the only structured environment but it is a structured environment, and it is a place in which psychological treatment can take place.

(JA 311).

After reviewing the kinds of sentences available and the sentencing range established in the guidelines, any pertinent policy statements, the need to avoid unwarranted sentencing disparities and the question of restitution (JA 311-12), the court imposed a sentence principally of 60

months each on Counts Two and Three, and ordered that the sentences be served consecutively. (JA 313-14).

SUMMARY OF ARGUMENT

The defendant's sentence was substantively reasonable. The record amply demonstrates that the district court judge considered and thoroughly addressed all of the § 3553(a) factors before imposing its ten-year sentence.

Perone mailed deeply disturbing and threatening communications to a female in Connecticut that he barely knew in third and fourth grade more than 10 years earlier. A search of Perone's residence recovered a recently purchased assault rifle and scope; a backpack filled with hundreds of rounds of ammunition; a packed suitcase that contained a machete; knives, flashlights and binding wire; and documents suggesting imminent travel to Connecticut and research on his anticipated targets. In addition, a court-ordered psychological evaluation found that Perone's risk of dangerousness to the community was high. On these facts, it cannot be said that the district court abused its discretion in imposing a ten-year sentence.

Moreover, the defendant's challenges are without merit. First, that a particular factor – such as evidence of the defendant's intent to carry out his threats – was also a Guidelines adjustment does not preclude the district court from considering that factor in imposing a non-Guidelines sentence under § 3553(a). Second, the defendant's claims that a factor was already addressed as a Guidelines adjustment and that predictions of future risk are

inherently unreliable were specifically raised and rejected by the district court. It is well settled that this Court will not substitute its own judgment for that of the sentencing court when ascribing particular weight to any given factor.

Finally, the district court did not impose its sentence for the improper purpose of providing the defendant with mental health treatment in the structured setting of prison. The district court based its sentence on proper § 3553(a) factors – including the nature and circumstances of the offense; the history and characteristics of the defendant; the seriousness of the offense; and the need to protect the public – and the court merely noted, in reference to Perone's need for psychological treatment "that he would benefit from a structured environment." A district court is not prohibited from noting that mental health benefits may flow from an otherwise valid imprisonment based on appropriate § 3553(a) factors.

ARGUMENT

I. The Defendant's Sentence Was Substantively Reasonable

A. Governing Law and Standard of Review

In light of the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), 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).

This Court reviews a sentence for reasonableness. *See Rita v. United States*, 127 S. Ct. 2456, 2459 (2007); *Fernandez*, 443 F.3d at 26-27. The Court has generally divided reasonableness review into procedural and substantive reasonableness. For a sentence to be procedurally reasonable, the Court must review whether the sentencing court identified the Guidelines range based upon found facts, treated the Guidelines as advisory, and considered the other § 3553(a) factors. *United States v. Rattoballi*, 452 F.3d 127, 131-32 (2d Cir. 2006). Substantive reasonableness is contingent upon the length of the sentence in light of the case's facts and the factors outlined in § 3553(a). *Id*. at 132.

This Court has recognized that "[r]easonableness review does not entail the substitution of [its own] judgment for that of the sentencing judge." *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).

The standard of review for a non-Guidelines sentence 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). 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.

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." . . . . "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).

B. Discussion

The defendant's ten-year sentence was substantively reasonable. As set forth above, the district court exhaustively discussed all of the § 3553(a) factors, including: the nature and circumstances of the offense (JA 300-06); the history and characteristics of the defendant (JA 302-03; 306-09); the need for the sentence imposed to reflect the seriousness of the offense (JA 309); the need to afford adequate deterrence and to protect the public from further crimes of the defendant (JA 310-11); the need for the sentence to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (JA 311); and the kinds of sentences available, the sentencing range established in the Guidelines, and the need to avoid unwarranted sentencing disparities (JA 311-12). In short, the record shows that the district court was aware of the statutory requirements, understood the need to consider all of the relevant factors, and after giving them due consideration, determined that a ten-year sentence was appropriate and reflected the proper balance of all of the § 3553(a) factors.

As the Supreme Court and this Court have repeatedly emphasized, the district court's judgment about the appropriate sentence in a criminal case is entitled to deference and should only be disturbed if it is an abuse of discretion. *Gall*, 128 S. Ct. at 594; *Fernandez*, 443 F.3d at 27. Here, there is no basis to find that the district court abused or exceeded the bounds of allowable discretion or violated the law in determining its sentence.

The Sentencing Commission has explicitly recognized that offenses covered by U.S.S.G. § 2A6.1 "may include a particularly wide range of conduct and that it is not possible to include all of the potentially relevant circumstances in the offense level." U.S.S.G. § 2A6.1. Accordingly, Application Note 3 to Section 2A6.1 expressly authorizes the district courts to consider deviating from the Guidelines range in cases involving particularly serious conduct. *See* Application Note 3 to U.S.S.G. § 2A6.1. Moreover, the district court's sentence fell squarely within this Court's case law upholding variances from the applicable Guideline range in threatening communications cases. *See, e.g.*, *United States v. Pergola*, 930 F.2d 216, 218-20 (2d Cir. 1991) (affirming upward departure from a range of 15 to 21 months on two counts of mailing threatening communications to statutory maximum of 60 months and noting that the district court "could have sent [the defendant] to prison for 10 years instead of five by requiring the sentences to run consecutively"); *see also United States v. Morrison*, 153 F.3d 34, 52-54 (2d Cir. 1998) (affirming 14-level upward departure from approximately 60 months to 300 months for threatening communications on grounds of extreme

conduct by the defendant and extreme psychological injury to victims). On this record, it cannot be said that the district court abused its discretion in imposing a ten-year sentence. *Fernandez*, 443 F.3d at 27.

Perone argues, however, that the district court abused its discretion and imposed a substantively unreasonable sentence because it based its sentence on: (1) evidence of the defendant's intent to carry out his threats – a factor already addressed as a Guidelines adjustment; (2) unreliable predictions by the forensic psychologists of the long-term risk posed by the defendant; and (3) the need to provide the defendant with long-term treatment in a structured setting.

The district's court's sentence, however, was not so narrowly cabined to those three considerations. Rather, as set forth above, the district court thoroughly and extensively addressed all of the § 3553(a) factors and appropriately determined that under the unique and troubling circumstances of this case, a ten-year sentence reflected the proper balance of those factors. (JA 300-14). That the basis for the district court's sentence reflected the totality of the circumstances and a consideration of all the § 3553(a) factors, is further reflected in the district court's statement of reasons set forth in the judgment. (JA 414); *see Gall*, 128 S. Ct. at 597 (application of the abuse-of-discretion standard in determining the substantive reasonableness of a district court's sentence requires consideration of "the totality of the circumstances, including that extent of any variance from the Guidelines range. . . . [The appellate court] 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."); *see also United States v. Regalado*, 518 F.3d 143, 147 (2d Cir. 2008) (per curiam).

In addition, the district court's reliance on evidence of the defendant's intent to carry out his threats – a factor already addressed by U.S.S.G. § 2A6.1 as a Guidelines adjustment – is of no moment. That a particular factor has been incorporated into or addressed by the Guidelines does not prohibit the district court from considering that factor when imposing a non-Guidelines sentence under § 3553(a). *See, e.g., United States v. Jones*, 460 F.3d 191, 194 (2d Cir. 2006) ("the Guidelines limitations on the use of factors to permit departures are no more binding on the sentencing judges than the calculated Guidelines ranges themselves"); *see also United States v. Kimbrough*, 128 S. Ct. 558 (2007) (district court is free to determine that the weight attributed by the Guidelines to a particular factor does not result in an appropriate sentence under § 3553).

The defendant's claim that the psychologists' predictions of long-term risk were too unreliable is similarly unavailing. First, although both psychologists readily acknowledged that there is some inherent uncertainty in making a long-range prediction of future dangerousness, these caveats, elicited during cross-examination, bore simply on the weight that the psychologists gave the assessment of future risk and, in turn, to the weight the judge could reasonably put on that

assessment. The record is clear, however, that neither psychologist deviated from their assessment of the risk presented by Perone. (*See, e.g.*, JA 178 (issues identified by defense would "absolutely not" change psychologist's opinions regarding susceptibility to treatment or risk of dangerousness in the future); 179-80 ("[w]hile we cannot predict with absolute certainty whether someone is going to be dangerous in the future or not, there's some characteristics a defendant can display that can be predictive of future violence. Mr. Perone certainly met the characteristics of some of the things we look at."); (JA 204-06). The record is also clear that the court considered those caveats – indeed, the judge expressly inquired about them. (JA 194-97) (questioning by the court regarding conclusions and studies regarding the reliability of predictions of future dangerousness)).

Second, the fact that assessments of future dangerousness are not readily quantified or neatly measured does not render them unreliable. Rather, it simply means that the psychologists were applying their expertise to a somewhat more difficult area.

Third, a sentencing court is required to make determinations about future dangerousness and recidivism all the time, often in the absence of express testimony from forensic psychologists bearing directly on the issue. *See* 18 U.S.C. § 3553(a). In *Jones*, 460 F.3d 191, for example, this Court affirmed a non-Guidelines sentence where the district court expressed "the sense" that the defendant was capable of doing better and a positive "gut feeling" about the defendant's future. Here, the district court had the

benefit of expert testimony from two court-appointed forensic psychologists regarding Perone's future risk; it expressly considered evidence of the reliability of such predictions; and it concluded that a ten-year sentence reflected the proper balance of the § 3553(a) factors.

Moreover, the defendant's claims – (1) that evidence of the defendant's intent to carry out his threats was already addressed as a Guidelines adjustment; and (2) that predictions of future risk are inherently unreliable – were specifically raised before and rejected by the district court. (*See, e.g.*, Def.'s Sentencing Memo at 11; JA 78 ("The indications of efforts to follow through on the threats cannot be a basis for departure, as the Sentencing Commission already considered that factor in providing a six-level enhancement "[i]f the offense involved any conduct evidencing an intent to carry out such threat[.]"); and Def.'s Sentencing Memo at 13; JA 80 (arguing that predictions of possible future dangerousness are an unreliable basis for increasing a term of imprisonment for past criminal conduct)). In that regard, the defendant essentially asks this Court to reweigh the § 3553(a) factors and second-guess the district judge's decision on how best to balance those factors to fashion an appropriate sentence. But it is well settled that this Court will not substitute its own judgment for that of the sentencing 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).

Perone's final claim – that the district court improperly imposed its ten-year sentence for the purpose of providing the defendant with long-term treatment in the structured setting of a prison – is also without merit.

Perone correctly argues that 18 U.S.C. § 3582(a) and 28 U.S.C. § 994(k) prohibit a district court from sentencing a defendant to a term of imprisonment (or deciding how long that term will be), for the purpose of rehabilitating the defendant or providing the defendant with needed medical care or treatment. Def.'s Brief at 19-20 (citing 18 U.S.C. § 3582(a); 28 U.S.C. § 994(k) and *United States v. Anderson*, 15 F.3d 278, 280 (2d Cir. 1994)). In support of his claim that the district court did so here, however, Perone relies on the following three sentences uttered by the court while discussing the need for its sentence "to provide the defendant with needed educational or vocational treatment in the most effective manner," (JA 311), which the court made during its otherwise extensive review of all of the § 3553(a) factors:

> Based on the comments of counsel as well as the testimony and the report of the psychologist. While I think it is fair to say the psychologist was

> not terribly optimistic about efficaciousness of psychological treatment, I don't think there's much dispute this nature of treatment needed for Mr. Perone given his illness is one that's going to be very long term and any success will be gradual and that a structured environment – that he would benefit from a structured environment. Obviously prison is not the only structured environment but it is a structured environment, and it is a place in which psychological treatment can take place.

(JA 311).

Viewed in the context of the entire sentencing hearing, the district court imposed the ten-year term for proper reasons under § 3553(a) and merely observed that Perone might benefit from the mental health treatment he could receive while serving the court's term of imprisonment based on other § 3553(a) factors.

Section 3582(a) provides that the sentencing court, "in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation." 18 U.S.C. § 3582(a). Similarly, 28 U.S.C. § 994(k) provides:

> The [Sentencing] Commission shall insure that the guidelines reflect the inappropriateness of

> imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

28 U.S.C. § 994(k).[4]

18 U.S.C. § 3553(a)(2)(D), however, instructs the district court to consider the need for the sentence "to provide the defendant with needed . . . medical care or other correctional treatment in the most effective manner." Although this section appears, at first blush, to conflict with 18 U.S.C. § 3582(a) and 28 U.S.C. § 994(k), this Court has explained that rather than prohibiting rehabilitation as a goal of *sentencing*, 18 U.S.C. § 3582(a) and 28 U.S.C. § 994(k) "stand[] for the significantly

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[4] Like Section 3582(a), 28 U.S.C. § 994(k) was enacted as part of the Sentencing Reform Act. *See* Pub.L. No. 98-473, Tit. II, ch. II, § 994(k). "Unlike § 3582(a), though, § 994(k) is a directive to the U.S. Sentencing Commission, not to sentencing courts." *United States v. Manzella*, 475 F.3d 152, 158 n.2 (3d Cir. 2007). Accordingly, some courts have found that section 994(k) applies only "to the Sentencing Commission in formulating the advisory Guidelines and has no direct application" to a sentencing appeal. *See*, *e.g.*, *United States v. Watson*, 482 F.3d 269, 274 (3d Cir. 2007). "Still, given the sections' common origin and remarkably similar wording," *Manzella*, 475 F.3d at 158 n.2, this Court and others have found analyses of section 994(k) to be instructive to its understanding of section 3582(a). *See Anderson*, 15 F.3d at 280-81; *see also Manzella*, 475 F.3d at 158 n.2 (collecting cases).

different proposition that rehabilitation is not an appropriate goal for *imprisonment*." *United States v. Maier*, 975 F.2d 944, 946 (2d Cir. 1992) (emphasis in original). In other words, 18 U.S.C. § 3553(a) "permit[s] courts to take 'medical care' and 'correctional treatment' into consideration in determining the particular *sentence* to impose," but 18 U.S.C. § 3582(a) provides that "*imprisonment* is not an appropriate means of promoting correction and rehabilitation." *Anderson*, 15 F.3d at 281 (first emphasis added); *see also Manzella*, 475 F.3d at 158.

In *Maier*, this Court explained that "Congress wanted to be sure that no defendant was locked up in order to put him in a place where it was hoped that rehabilitation would occur." *Maier*, 975 F.2d at 946. Instead, "[i]ncarceration would have to be justified by such traditional penological purposes as incapacitation, general deterrence, specific deterrence, and retribution." *Id.*

The Courts of Appeals have therefore remanded cases for re-sentencing where the district court clearly imposed or lengthened a term of imprisonment *solely* for rehabilitative or correctional treatment. *See, e.g.*, *Manzella*, 475 F.3d at 161 (vacating and remanding for re-sentencing defendant's 30-month sentence imposed solely to make the defendant eligible for the Bureau of Prison's 500-hour drug treatment program; "There can be no conclusion but that the Court set the length of Manzella's prison term solely for rehabilitative reasons."); *see also United States v. Tsosie*, 376 F.3d 1210, 1215 (10th Cir. 2004) (section 3582(a) "clarifie[s] that it is inappropriate to impose a sentence to a *term of imprisonment* solely for

rehabilitative purposes or correctional treatment.")*; United States v. Harris*, 990 F.2d 594, 595 (11th Cir. 1993) (vacating and remanding for re-sentencing defendant's sentence imposed consecutively, rather than concurrently, to state sentence for the "main" purpose of ensuring "that the defendant have enough time . . . to undergo drug treatment in a federal institution.").

Conversely, the Courts of Appeals have affirmed sentences where, as here, a district court's sentence of imprisonment is firmly grounded in such section 3553(a) factors as the nature and circumstances of the offense; the history and characteristics of the defendant; the seriousness of the offense; and the need to afford adequate deterrence and to protect the public from further crimes of the defendant, notwithstanding the district court's having also noted that mental health, drug treatment or medical benefits might flow from the otherwise valid imprisonment.

For example, in *United States v. Watson*, 482 F.3d 269 (3d Cir. 2007), the Third Circuit rejected the defendant's claim that the district court had inappropriately imposed his sentence, in part, to further medical treatment and rehabilitative goals, in contravention of 18 U.S.C. § 3582(a) and 28 U.S.C. § 994(k). The Court found that the sentencing court had "merely observed that Watson may benefit from the medical care he receives while serving an otherwise valid and proper term of imprisonment that [wa]s based on all of the other . . . § 3553(a) factors." *Id.* at 275. The Third Circuit explained:

> What a court can not do is to impose or lengthen a term of *imprisonment* for the purpose of providing correction and rehabilitation. As in all appeals, the burden is on the appellant to demonstrate that the District Court imposed a prison term or lengthened the term of imprisonment because of such considerations. The mere fact that a court may take into account or mention correction or rehabilitation along with other factors in arriving at or explaining its *sentence* is not enough, by itself, to meet this burden. Unlike the situation in *Manzella*, where the Court's improper motivation was clear from statements of the Court, there is no such showing in this case. In fact, the Court's express statements indicate exactly the opposite.

Id. at 275 (footnote omitted).

Similarly, in *United States v. Limon*, 2008 WL 904662 (10th Cir. 2008) (summary order), the Tenth Circuit rejected a claim that the district court's 279-month sentence was substantively unreasonable in light of 18 U.S.C. § 3582(a) and 28 U.S.C. § 994(k), even though the district court had stated, while considering other § 3553(a) factors, that the only place the defendant could realistically obtain necessary mental health treatment was in prison. *Id.* at *5.[5]

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[5] Rule 32.1 of the Federal Rules of Appellate Procedure permits the citation of unpublished opinions issued on or after (continued...)

In *Limon*, although the sentencing court had "thoroughly discussed the various sentencing factors under 18 U.S.C. § 3553(a)." *id*. at *4 (listing factors), the court also mentioned "the fact that the only way [the defendant] can receive and is amenable to the mental health treatment he needs is under supervision while incarcerated." *Id*. The judge added: "And I further am concerned when I consider what [the defendant] needs that it is only in a prison setting that his mental health can be appropriately dealt with." *Id*. at *5.

The defendant, relying on 18 U.S.C. § 3582(a) and 28 U.S.C. § 994(k), argued that his sentence was substantively unreasonable "because the district court impermissibly relied on his need for mental health treatment or rehabilitation to impose a variance." *Id*. at *5. In rejecting the claim, the Tenth Circuit reviewed the various decisions by the Courts of Appeals holding that 18 U.S.C. § 3582(a) and 28 U.S.C. § 994(k) prohibit a sentencing court from imposing or lengthening a term of imprisonment "*solely* for rehabilitative purposes." *Id*. at *9 (citing *Tsosie*, 376 F.3d at 1215; *Manzella*, 475 F.3d at 161; and *Harris*, 990 F.2d at 595-97). The Tenth Circuit found that

> the district court did not base its upward variance *solely* on [the defendant]'s need for such treatment. Instead . . . it considered his need for

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[5] (...continued)
January 1, 2007. *See* Fed. R. App. P. 32.1; *see also* 2d Cir. R. 32.1; 10th Cir. R. 32.1.

> such treatment in conjunction with his danger to the community based on the escalation of his criminal activities which became more numerous and violent, resulting in extraordinarily serious offenses. These are enumerated factors under § 3553(a) which the district court must consider, and which, in this case, the district court explained were connected, in part, with [the defendant]'s prior neglect in seeking mental health treatment and taking prescribed medication and acts of medicating himself with drugs and alcohol.

Id. at *10. The Tenth Circuit concluded that the district court had provided sufficient reasoning to support the upward variance. *Id*.

The record in Perone's case likewise demonstrates that the district court thoroughly considered and exhaustively discussed all of the § 3553(a) factors, including: the nature and circumstances of the offense (JA 300-06); the history and characteristics of the defendant (JA 302-03; 306-09); the need for the sentence imposed to reflect the seriousness of the offense (JA 309); and the need to afford adequate deterrence and to protect the public from further crimes of the defendant (JA 310-11). It merely noted, in reference to Perone's need for psychological treatment, "that he would benefit from a structured environment." (JA 311). *Cf., e.g., Watson*, 482 F.3d at 275 (the district court "merely observed that Watson may benefit from the medical care he receives while serving an otherwise valid and proper term of imprisonment that [wa]s based on all of

the other § 3553(a) factors."). The provisions relied upon by the defendant do not prohibit a court from sentencing a defendant to imprisonment for proper reasons such as the seriousness of the offense and the need to protect the public, while also noting that mental health benefits may flow from the otherwise valid imprisonment. *See, e.g.*, *Limon*, 2008 WL 904662 at *9-10.

That the district court imposed its ten-year sentence not for purposes of rehabilitation, but rather for other, proper purposes under § 3553(a), is also demonstrated by the statement of reasons in the district court's judgment. There, the district court highlighted Perone's having mailed two disturbing and threatening letters to someone he had barely known 10 years earlier in grade school; and the fact that the defendant was arrested with weapons, ammunition, and travel plans to come to Connecticut. Moreover, after noting that it had considered "all of the 3553(a) factors," the court expressly stated:

> Two of the factors in particular, the need to protect the public and the nature of the offense, led the court to impose a non-guidelines sentence. With regard to the former factor, the court found that the defendant intended to follow through on his threats, and the court found that the defendant suffered from mental illness with a poor prognosis of improvement and a high risk of danger to others. With regard to the latter factor, the impact on the victims was significant, resulting in significant emotional distress and significant modifications in life behavior.

(JA 414). The record as a whole makes clear that the district court's sentence was not based on Perone's need for psychological treatment, but was rather "justified by such traditional penological purposes as incapacitation, general deterrence, specific deterrence, and retribution." *Maier*, 975 F.2d at 946.

A ten-year sentence – for a defendant who mailed threatening communications to a victim and her grandmother; who was packed for travel to Connecticut with a recently purchased assault rifle, hundreds of rounds of ammunition; a machete; knives, and binding wire; and who underwent a court-ordered psychological evaluation that found him to pose a high risk of dangerousness to the community – is reasonable and should not be disturbed. *Cf. Pergola*, 930 F.2d at 220 (affirming upward departure from a range of 15 to 21 months on two counts of mailing threatening communications to statutory maximum of 60 months). Accordingly, the Court should reject Perone's claims and affirm his sentence. *Gall*, 128 S. Ct. at 594; *Fernandez*, 443 F.3d at 27.

CONCLUSION

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

Dated: April 30, 2008

Respectfully submitted,

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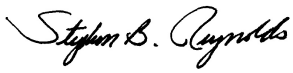

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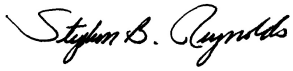
Certification per Fed. R. App. P. 32(a)(7)(C)

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 13,588 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



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ADDENDUM

18 U.S.C. § 876. Mailing Threatening Communications

(a) Whoever knowingly deposits in any post office or authorized depository for mail matter, to be sent or delivered by the Postal Service or knowingly causes to be delivered by the Postal Service according to the direction thereon, any communication, with or without a name or designating mark subscribed thereto, addressed to any other person, and containing any demand or request for ransom or reward for the release of any kidnapped person, shall be fined under this title or imprisoned not more than twenty years, or both.

(b) Whoever, with intent to extort from any person any money or other thing of value, so deposits, or causes to be delivered, as aforesaid, any communication containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined under this title or imprisoned not more than twenty years, or both.

(c) Whoever knowingly so deposits or causes to be delivered as aforesaid, any communication with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to kidnap any person or any threat to injure the person of the addressee or of another, shall be fined under this title or imprisoned not more than five years, or both. If such a communication is addressed to a United States judge, a Federal law enforcement officer, or an official who is covered by section 1114, the individual shall be fined under this title, imprisoned not more than 10 years, or both.

(d) Whoever, with intent to extort from any person any money or other thing of value, knowingly so deposits or causes to be delivered, as aforesaid, any communication, with or without a name or designating mark subscribed thereto, addressed to any other person and containing any threat to injure the property or reputation of the addressee or of another, or the reputation of a deceased person, or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both. If such a communication is addressed to a United States judge, a Federal law enforcement officer, or an official who is covered by section 1114, the individual shall be fined under this title, imprisoned not more than 10 years, or both.

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.

18 U.S.C. § 3582. Imposition of a Sentence of Imprisonment

(a) Factors to be considered in imposing a term of imprisonment. – The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation. In determining whether to make a recommendation concerning the type of prison facility appropriate for the defendant, the court shall

consider any pertinent policy statements issued by the Sentencing Commission pursuant to 28 U.S.C. 994(a)(2).

28 U.S.C. § 994. Duties of the Commission

(k) The Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care, or other correctional treatment.

U.S.S.G. § 2A6.1. Threatening or Harassing Communications; Hoaxes

(a) Base Offense Level

(1) 12; or

(2) 6, if the defendant is convicted of an offense under 47 U.S.C. § 223(a)(1) (C), (D), or (E) that did not involve a threat to injure a person or property.

(b) Specific Offense Characteristics

(1) If the offense involved any conduct evidencing an intent to carry out such threat, increase by 6 levels.

(2) If the offense involved more than two threats, increase by 2 levels.

(3) If the offense involved the violation of a court protection order, increase by 2 levels.

(4) If the offense resulted in (A) substantial disruption of public, governmental, or business functions or services; or (B) a substantial expenditure of funds to clean up, decontaminate, or otherwise respond to the offense, increase by 4 levels.

(5) If (A) subsection (a)(2) and subdivisions (1), (2), (3), and (4) do not apply, and (B) the offense involved a single instance evidencing little or no deliberation, decrease by 4 levels.

(c) Cross Reference.

(1) If the offense involved any conduct evidencing an intent to carry out a threat to use a weapon of mass destruction, as defined in 18 U.S.C.

2332a(c)(2)(B), (C), and (D), apply § 2M6.1 (Weapons of Mass Destruction), if the resulting offense level is greater than that determined under this guideline.

Commentary

Statutory Provisions: 18 U.S.C. §§ 32(c), 35(b), 871, 876, 877, 878(a), 879, 1038, 1992(a)(9), (a)(10), 2291(a)(8), 2291(e), 2292, 2332b(a)(2); 47 U.S.C. § 223(a)(1)(C)-(E); 49 U.S.C. 46507. *For additional statutory provision(s), see Appendix A (Statutory Index).*

Application Notes:

1. *Scope of Conduct to Be Considered. – In determining whether subsections (b)(1), (b)(2), and (b)(3) apply, the court shall consider conduct that occurred prior to or during the offense; however, conduct that occurred prior to the offense must be substantially and directly connected to the offense, under the facts of the case taken as a whole. For example, if the defendant engaged in several acts of mailing threatening letters to the same victim over a period of years (including acts that occurred prior to the offense), then for purposes of determining whether subsections (b)(1), (b)(2), and (b)(3) apply, the court shall consider only those*

prior acts of threatening the victim that have a substantial and direct connection to the offense.

2. *Grouping. – For purposes of Chapter Three, Part D (Multiple Counts), multiple counts involving making a threatening or harassing communication to the same victim are grouped together under § 3D1.2 (Groups of Closely Related Counts). Multiple counts involving different victims are not to be grouped under § 3D1.2.*

3. *Departure Provisions. –*

(A) *In General. – The Commission recognizes that offenses covered by this guideline may include a particularly wide range of conduct and that it is not possible to include all of the potentially relevant circumstances in the offense level. Factors not incorporated in the guideline may be considered by the court in determining whether a departure from the guidelines is warranted. See Chapter Five, Part K (Departures).*

(B) *Multiple Threats or Victims. – If the offense involved substantially more than two threatening communications to the same victim or a prolonged period of making harassing communications to the same victim, or if the*

offense involved multiple victims, an upward departure may be warranted.

Background: These statutes cover a wide range of conduct, the seriousness of which depends upon the defendant's intent and the likelihood that the defendant would carry out the threat. The specific offense characteristics are intended to distinguish such cases.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Perone

Docket Number: 08-0052-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 4/30/2008) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: April 30, 2008