05-5300-cr(L)

To Be Argued By:
H. GORDON HALL

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United States Court of Appeals

FOR THE SECOND CIRCUIT

**Docket Nos. 05-5300-cr(L),
05-5753-cr(CON), 05-5829-cr(CON)
05-6597-cr(CON), 06-1049-cr(CON)**

UNITED STATES OF AMERICA,
Appellee-Cross-Appellant,

-vs-

AMOS TERRY, also known as Fame, TYRELL EVANS,
CRAIG MOYE, JAMES CALHOUN, ROBERT THOMAS,
Defendants-Appellants-Cross-Appellee.

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 criminal prosecution under 18 U.S.C. § 3231. Judgment entered on October 21, 2005. [Appendix ("A.") 18-19.] The defendant filed a timely notice of appeal on October 12, 2005, pursuant to Fed. R. App. P. 4(b). [A. 18, 181.] This Court has jurisdiction over the defendant's appeal of his sentence pursuant to 18 U.S.C. § 3742(a).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the district court act reasonably in imposing a sentence within the applicable Guidelines range, following its decision to depart downward based on overstatement of the defendant's criminal history and his extraordinary rehabilitation; its consideration of the factors set forth in 18 U.S.C. § 3553(a); and its compliance with the decisionmaking process outlined in *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005)?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 05-5300-cr(L), 05-5753-cr(CON), 05-5829-cr(CON) 05-6597-cr(CON), 06-1049-cr(CON) 06-1060-cr(CON)

UNITED STATES OF AMERICA,
Appellee-Cross-Appellant,

-vs-

AMOS TERRY, also known as Fame, TYRELL EVANS, CRAIG MOYE, JAMES CALHOUN, ROBERT THOMAS,[1]
Defendants-Appellants-Cross-Appellee.

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

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[1] With respect to the other consolidated defendants: Terry's Brief was due on May 11, 2006, but has yet to be filed. Calhoun withdrew his appeal on June 1, 2006. Moye's conviction was summarily affirmed on motion by defense counsel and cross-motion by the Government. The Government has also filed a cross-appeal in *Moye*, and will move to withdraw it. Thomas's brief is due presently, but as his appeal is from a jury verdict and sentencing, the Government files this brief separately, as it does not involve many of the issues present in *Thomas*.

Preliminary Statement

Tyrell Evans was indicted along with forty-nine co-defendants on April 27, 2004, and charged with conspiracy to possess with the intent to distribute at least fifty grams of cocaine base. Evans pleaded guilty to this charge on March 28, 2005, but refused to allocute to responsibility for at least fifty grams of cocaine base. The issue of drug quantity was reserved for a sentencing hearing. At sentencing, Evans stipulated that he was responsible for at least fifty grams of cocaine base, mooting the need for a hearing on this issue. The district court (Janet C. Hall, J.) correctly calculated that Evans was subject to an advisory Guidelines range of 168 to 210 months, based in part on Evans' classification as a career offender and a two-point adjustment for acceptance of responsibility. Finding that Evans' classification as a career offender overstated the seriousness of his criminal history and citing his post-offense rehabilitation, the sentencing court departed downward. After considering the remaining 18 U.S.C. § 3553(a) factors, the district court sentenced Evans to a sentence of 120 months of imprisonment, explaining that she arrived at that sentence through her departure authority and consistent with her view of what was a fair and just sentence.

Evans now appeals, challenging the district court's refusal to depart (or to depart further) within the Guidelines framework, or to impose an even lower non-Guidelines sentence, based on: (1) his request for a third point for acceptance of responsibility; (2) his disagreement with the 100:1 penalty ratio for crack and powder cocaine

offenses which is embodied in the statutes and guidelines governing drug conspiracies; and (3) his allegedly overstated criminal history. For the reasons set forth below, the sentence imposed by Judge Hall was reasonable, and the judgment should be affirmed.

Statement of the Case

On April 27, 2004, a federal grand jury in the District of Connecticut returned an Indictment charging Tyrell Evans in connection with a conspiracy to possess and distribute cocaine base ("crack"). Evans was named in Count One of the Indictment, which charged conspiracy to possess with intent to distribute and conspiracy to distribute fifty grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(iii), and 846. [Appendix ("A.") 24-25.] Evans was arrested on May 4, 2004, and initially was detained. [A. 4.] Subsequently, on September 16, 2004, Evans was released on bond. [A. 8, 36-39.]

On March 28, 2005, Evans pleaded guilty to Count One of the Indictment pursuant to a plea agreement, [A. 17.] but did not allocute to the fifty-gram quantity, reserving his right to challenge the Government's claim that he was responsible for more than fifty grams of cocaine base. After a Presentence Report was prepared by the United States Probation Office, a sentencing hearing was held before the district court (Janet C. Hall, J.) on October 6, 2005. [A. 67-177.] At this hearing, Evans chose not to object to the Probation Office's calculation that he was responsible for 50 grams or more of cocaine base. [A.

114.] The district court sentenced Evans principally to 120 months of incarceration. [A. 167.] Judgment entered on October 21, 2005. [A. 18-19.]

On October 10, 2005, Evans filed a timely notice of appeal. [A. 18, 181.] Evans was permitted to self-surrender on November 17, 2005, and he did so. He is currently serving his 120-month sentence at FCI Fort Dix, New Jersey.

STATEMENT OF FACTS

A. The Offense Conduct

On April 27, 2004, Evans and forty-nine others were indicted for conspiracy to possess with intent to distribute at least fifty grams of cocaine base in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(iii), and 846. [A. 24-25.] The conspiracy transpired over about four months, between January and April 2004. [A. 24.] During the course of the charged conspiracy, several key leaders "would obtain redistribution quantities of cocaine base and powder cocaine from an out-of-state source, transport the drugs to New Haven, and distribute them in redistribution or 'weight' quantities to individuals throughout the New Haven area," including Evans. (Presentence Report ("PSR") at 3.) In one instance, Evans was observed by agents involved in a purchase of drugs from Edward Hines, one of the conspiracy leaders. [A. 54.] The Government also intercepted more than a dozen conversations between Evans and chief conspirators over the course of two months. [A. 54.] Despite Evans'

characterization of his involvement in the conspiracy as "minimal" and "modest," [Def. Br. at 4], the Government had compelling evidence that Evans was responsible for a significant amount of crack cocaine. Indeed, one of the leaders of the conspiracy was prepared to testify that he had sold in excess of fifty grams of crack to Evans during the relevant time period. This evidence would have been presented had a hearing regarding the drug quantity been necessary. [A. 124-27.]

B. Evans' Prosecution and Guilty Plea

Following his indictment and arrest, Evans was denied bond. [A. 4.] Subsequently, following a hearing on September 16, 2004, Magistrate Judge Holly B. Fitzsimmons released Evans on a series of conditions and a $100,000 non-surety bond. [A. 36-39.] Evans' conditions of release required that he not commit any additional offenses; appear at all required proceedings; report to Probation as directed; maintain or seek employment; reside with a custodian; refrain from contact with his co-defendants; abide by a curfew; participate in electronic monitoring; contribute to the support of his son; refrain from drug use; and submit to drug testing and substance abuse therapy at the discretion of pre-trial services. [A. 36-38.] Evans complied with these conditions throughout his year-long period of release on bond. [A. 142.]

On March 28, 2005, Evans entered a guilty plea to Count One of the indictment, which charged him with conspiracy to possess with intent to distribute at least fifty grams of cocaine base. [A. 40.] Evans was not eligible for

"safety valve" treatment pursuant to 18 U.S.C. § 3553(f) and §§ 2D1.1(b)(6) and 5C1.2 of the Guidelines because he had more than one criminal history point. However, while Evans acknowledged his participation in the conspiracy, he refused to allocute to the quantity of at least fifty grams of cocaine base. [A. 46, 110-11.] Evans' plea was nonetheless accepted, and the quantity of crack attributable to him was reserved for the sentencing hearing. [A. 46, 112.]

At the time Evans pleaded guilty, he understood that his offense might carry a mandatory minimum of ten years' imprisonment and a possible maximum of life imprisonment. [A. 41.] The Probation Office's Presentence Report ("PSR") calculated Evans' adjusted offense level to be 37 under U.S.S.G. § 4B1.1(b)(A). [PSR at 10.] This calculation included a base offense level of 32 pursuant to U.S.S.G. § 2D1.1(c)(4), based on an attribution of fifty grams of cocaine base, and a Criminal History Category of III. Based on Evans' classification as a career offender under U.S.S.G. § 4B1.1(a) due to prior convictions for a violent felony and a drug felony, and the maximum term of life imprisonment he faced as charged, the PSR recommended that his base offense level be enhanced to 37, and his Criminal History Category be enhanced to VI. After a two-level reduction for acceptance of responsibility,[2] the PSR calculated an offense level of 35, a Criminal History Category of VI,

[2] The Government declined to move for an additional one-level reduction pursuant to U.S.S.G. § 3E1.1(b). [A. 124.]

and a Guidelines range of 292 to 365 months of imprisonment. [PSR at 10, 19.]

C. Evans' Sentencing

In the interim between Evans' guilty plea and his sentencing, this Court decided *United States v. Gonzalez*, 420 F.3d 111 (2d Cir. 2005), which held that a defendant's guilty plea "could not support conviction on a § 841(b)(1)(A) conspiracy without an admission to the drug quantity element of such an aggravated offense. Gonzalez made no such admission and, in fact, disputed the statutory quantity. Thus his plea at best supports conviction on a lesser, unquantified drug charge, whose sentencing range is prescribed by § 841(b)(1)(C)." *Id.* at 115. Pursuant to *Gonzalez*, both the defendant and the Government agreed at the sentencing hearing that Evans did not face either a mandatory minimum of ten years' imprisonment or a maximum of life imprisonment. Instead, the parties agreed that Evans faced a maximum possible sentence of 20 years, and no mandatory minimum sentence pursuant to 21 U.S.C. § 841(b)(1)(C). [A. 72.]

Given this concession, Evans agreed to stipulate that he was responsible for more than fifty grams of crack. [A. 112-14.][3] Although the need for a contested hearing on

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[3] At the sentencing hearing, the parties and the court discussed the possibility that testimony offered by the Government might demonstrate that Evans was responsible for quantities of cocaine base that would trigger high offense levels (continued...)

the drug quantity issue was avoided, it is significant that this development occurred only at the sentencing at which the hearing was expected to occur. As such, Government resources that were expended in preparation for the expected hearing were effectively wasted. [A. 124, 127.]

Based on Evans' stipulation to a drug quantity of at least fifty grams of crack, the court calculated Evans' base offense level to be 32. [A. 130; *see also* U.S.S.G. § 2D1.1(c)(4).] This was also the offense level calculation based on Evans' status as a career offender, which was driven by the applicable 20-year maximum prison term.[4] [A. 130 to 131; *see also* U.S.S.G. § 4B1.1(b)(C).] The court reduced the offense level by two levels for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a), yielding an adjusted offense level of 30. *Id.*

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[3] (...continued)
that would trump those set by the career-offender guidelines. After allowing Evans an opportunity to confer with counsel, and canvassing him carefully, the court allowed Evans to waive his right to an evidentiary hearing, and instead to expressly state that he had no objection to the PSR's attribution to him of 50 grams or more of cocaine base. [A. 76-77.]

[4] The career offender guideline, § 4B1.1, sets different offense levels depending on the statutory maximum sentence for the offense of conviction. Because the court agreed with the parties that, in light of *Gonzalez*, Evans' plea subjected him to a maximum of 20 years rather than life in prison, Evans' offense level as a career offender was set at 32 according to § 4B1.1(b)(C), rather than 37 as had been calculated in the PSR according to § 4B1.1(b)(A).

Evans' criminal history resulted in a total of six points: four points for prior convictions, with an additional two points because Evans "committed the instant offense while under [a] criminal justice sentence . . . ." [A. 131.] This would have placed Evans in Criminal History Category III. Based on Evans' classification as a career offender, however, he was automatically placed in Criminal History Category VI. The relevant Guidelines range for an offense level of 30 and a Criminal History Category VI was 168 to 210 months. [A. 131.] Neither the Government nor defense counsel objected to this calculation. [A. 131-32.]

Evans argued for an additional one-point reduction in his offense level based on acceptance of responsibility. The Government declined to make a motion for this third point, without which the court could not grant the deduction. *See* U.S.S.G. § 3E1.1(b). Although the Government acknowledged, in Evan's plea agreement, that it had not ruled out the possibility of moving for a third point of reduction, at the time of the plea the parties had crossed out text in Evans' plea agreement relevant to the Government's intention to make the required motion. [A. 41,124.] Moreover, while the Government had envisioned that Evans "would come around" and decide to forego a hearing on the drug quantity "before the government was forced to put on witnesses," [A. 127.], Evans' stipulation to the drug quantity did not occur until the sentencing hearing, and after the investment of considerable Government resources. As the Government stated at the sentencing hearing, "Mr. Caruso and myself hav[e] spent well over 10, 15 hours preparing the witnesses. The witnesses will be shipped all over the state in order to be

prepared and be here this morning." [A. 127.] Evans' ultimate stipulation to a drug quantity of at least fifty grams did not conserve Government resources, and therefore the Government declined to move for the third-point reduction for acceptance of responsibility. On this basis, the court denied Evans' request for a third point, stating "I think I can only award two points under the guidelines as I read them." [A. 129.]

Evans advanced three grounds for departure. First, he argued that his classification as a career offender overstated the seriousness of his criminal history. [A. 132-34.] Evans acknowledged that his first offense for armed robbery was serious and countable. [A. 132.] However, Evans contended that his second countable offense – involvement in a marijuana conspiracy – was a "small one" not meriting the harsh treatment imposed on career offenders. [A. 133.] The Government objected to this account of Evans' second offense, emphasizing the seriousness with which Congress viewed an offense of this kind: "while is it just less than [an] ounce of marijuana or whatever, it is one of those convictions that Congress has said unequivocally would justify making this mandatory life." [A. 141.] The court chose to grant a departure on this ground, and departed one level horizontally to Criminal History Category V. [A. 145.] In so doing, the court stated, "the Court recognizes under the 2003 amendment, I am limited to a departure horizontally of one level." [A. 144-45.] Later, the court reiterated this point, saying, "I understand that I can only depart one level horizontally because of the criminal history. . . . I believe that I can

depart further if I choose to based upon the fact that there's a combination of another factor." [A. 147.]

Second, Evans argued that the court should depart on the basis that the 100-to-1 crack-to-powder-cocaine ratio embodied in U.S.S.G. § 2D1.1 is "unfair" and "creating disparities, something that the statute says shouldn't be occurring." [A. 134-35.] The Government objected to this departure, pointing out that the crack-to-powder ratio "plays off what Congress has done in setting the statutory penalties to 100 to one. . . . [T]hese mechanisms don't stand in a vacuum." [A. 137.] The court denied this basis for departure, stating, "I do not believe it is an appropriate basis for a departure." [A. 144.] The court explained:

> In taking that position or reaching that conclusion, the Court doesn't wish to suggest or agree that there should be such disparity but rather that it is one for Congress to decide and Congress has clearly said that it wants a disparity and certainly it could choose to punish someone more severely for using a gun instead of a knife or a knife instead of a gun. We punish people for dealing cocaine or crack cocaine but we don't for people who sell cigarettes. These are choices that the legislature gets to make. In my view, that certainly would not qualify as a downward departure under the guidelines because it is something that's taken into consideration by Congress and the commission and the commission wished to change it but Congress who has the ultimate authority chose not [t]o.

[A. 144.]

Third, Evans contended that his "family circumstances and personal situation" merited a downward departure. [A. 135.] The court denied a downward departure on these bases. With respect to family circumstances, the court noted that "every time a person is sent to prison who has a family, the family will suffer . . . . However what is required for this departure is an extraordinary family circumstances [sic] . . . and the Court doesn't find the record here will support such a finding." [A. 146; *see also* A. 147-48.]

The court then raised, *sua sponte*, a fourth basis for departure: extraordinary post-offense rehabilitation. [A. 142.] The court observed that Evans had been on release for more than a year, had remained drug-free, had been working regularly, and had otherwise been in total compliance. *Id.* The court determined that although Evans' rehabilitation was insufficiently extraordinary to independently warrant a departure, it was nevertheless "present to a substantial degree." [A. 148.] In combination with the overstatement of criminal history, this factor also formed the basis for a downward departure. *Id.*

Throughout the court's discussion of the Sentencing Guidelines, the court referred explicitly on several occasions to the advisory nature of the Guidelines to be considered in combination with the other factors identified in 18 U.S.C. § 3553(a). Before beginning its Guidelines calculation, the court observed, "[o]bviously the Court is mindful of the fact that I will be imposing sentence today

here after consideration of the factors set forth in the statute under § 3553(a). Of course, those factors include the sentencing guidelines . . . .” [A. 108.] Following calculation of the appropriate Guidelines range, the court inquired of defense counsel: “As to determining the guidelines as a factor, I want to know if you have objection to that.” [A. 132.] Defense counsel concurred in the court’s calculations. *Id.* In questioning the Government about Evans’ arguments for departures in the context of Guidelines, the court requested that the Government “[p]ut aside whether I exercise my discretion to depart. Let’s talk about whether the record would support a departure.” [A. 139.] Moreover, the Government took care to emphasize to the court its discretion in imposing a sentence: “[The Guidelines] are not mandatory. They are not binding on the Court but the Court is required to consider them carefully.” [A. 139.]

Following the court’s identification and discussion of the relevant Guidelines range and appropriate departures, the court fully considered the other factors identified in 18 U.S.C. § 3553(a). The court entertained arguments from both the Government and defense counsel, after which the court engaged in independent analysis of the § 3553(a) factors. “I also need to consider the nature and circumstances of this offense and the history and characteristics of the defendant. We have spoken about many of these and I will touch on some of them again. We need to talk about the need for the sentence.” [A. 163.] The court noted Evans’ positive behavior while out on bond, but stated clearly that hardships Evans faced while growing up could not excuse his unlawful behavior. [A.

166.] The court discussed at considerable length the need for a sentence not only to reflect the seriousness of the offense, but also to promote respect for the law, provide just punishment, and protect the public. [A. 160-66.] In particular, the court noted that Evans' prior jail sentences, including one for sixty-six months, had been insufficient to deter his subsequent unlawful behavior. [A. 160-61.] The court also noted that a purpose of just punishment is "to provide the defendant with needed educational and vocational care . . . ." [A. 165.] Finally, the court addressed "the need to avoid unwarranted sentencing disparities," being mindful of the role the Guidelines play in minimizing disparities in sentencing nationally while also considering the sentences imposed on other defendants in this case. [A. 166.]

Having considered all the factors outlined in § 3553(a), the court imposed a sentence of 120 months of incarceration, followed by a period of supervised release of three years, and a mandatory special assessment of $100. The court stated that it reached this sentence within the framework of the Guidelines,[5] and that it comported with the court's more general obligations under § 3553(a):

> I do want to say on the record that the sentence that I have imposed in my view is a departed guideline

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[5] Although the court did not expressly state how many levels it was departing vertically, it must have departed three levels (from 30 to 27) to reach a range (120-150 months) that, in conjunction with Criminal History Category V, permitted imposition of a 120-month sentence.

> sentence for the reasons I articulated in connection with the departure. However, it is also the sentence that I determined to be fair and just under [*United States v. Booker*, 543 U.S. 220 (2005)] or post-*Booker* under 3553(a).

[A. 169.]

Judgment entered on October 21, 2005. [A. 18-19.] On October 12, 2005, Evans filed a timely notice of appeal. [A. 18, 181.] He self-surrendered to begin serving his sentence on November 17, 2005. [A. 179.]

SUMMARY OF ARGUMENT

I. The district court correctly determined the applicable Guidelines range as required by *United States v. Booker*, 543 U.S. 220 (2005), and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). Although district courts have discretion post-*Booker* to impose non-Guidelines sentences following consideration of the § 3553(a) factors, a failure to correctly calculate the relevant Guidelines range in arriving at a sentence can be procedurally unreasonable. The district court in this case appropriately recognized the bounds of its discretion within the Guidelines regime, and found the 100-to-1 crack-to-powder ratio an inappropriate basis for departure within the Guidelines. The district court also complied with the Sentencing Guidelines in refusing to award a third-point reduction for acceptance of responsibility or more than a one-category criminal history reduction on the basis that Evans' classification as a career offender overstated his

criminal history. Because none of the district court's decisions not to depart, or not to depart more extensively, was based on an error of law, the court's determinations in those respects are not reviewable on appeal.

II. The district court imposed a reasonable sentence in light of § 3553(a) as required by *Booker* and *Crosby*. The district court appropriately declined to impose a non-Guideline sentence on the basis of the crack-to-powder ratio.

It was also well within the discretion of the district court to decline to impose a non-Guidelines sentence based on Evans' acceptance of responsibility, overstatement of his criminal history, and his rehabilitation and family circumstances. This Court has stated that the weight afforded to arguments made pursuant to the § 3553(a) factors is within the sound discretion of the district court and is beyond review. Moreover, there is evidence supporting the district court's decision in each instance, demonstrating that the court carefully considered each of these claims before imposing a sentence within the framework of the Guidelines.

Finally, the district court amply fulfilled its duty to consider each of the § 3553(a) factors in arriving at a reasonable sentence. Before sentencing Evans, the district court enumerated each of the § 3553(a) factors and its interaction with the facts of Evans' case. Moreover, this Court has emphasized that in absence of clear evidence suggesting otherwise, this Court presumes that the district court has "faithfully discharged" its "duty to consider" the

§ 3553(a) factors. In this vein, this Court has also stated that no "robotic incantations" are required to demonstrate consideration of the § 3553(a) factors. Thus, the sentence imposed by district court was reasonable both procedurally and substantively.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THE APPLICABLE GUIDELINES RANGE AS REQUIRED BY *BOOKER* AND *CROSBY*.

A. Relevant Facts

Based on Evans' offense conduct and criminal history, and accepting the PSR's unchallenged calculations as to drug quantity, the district court calculated Evans' base offense level under either the career-offender guidelines or the drug guidelines to be 32. [A. 130; *see also* U.S.S.G. § 2B1.1(c)(4), § 4B1.1(b)(C).] After awarding a two-point reduction for acceptance of responsibility, Evans' adjusted offense level was 30. Because Evans fell within Criminal History Category VI as a career offender, the district court initially calculated Evans' Guidelines range as 168-210 months. [A. 131.] Both the Government and defense counsel agreed that this calculation was correct. [A. 131-32.]

Following this undisputed calculation, Evans argued for an additional one-point reduction for acceptance of responsibility. The district court denied this motion, stating

"I think I can only award two points under the guidelines as I read them." [A. 129.] The district court also declined to depart based on the crack-to-powder ratio, stating, "I do not believe it is an appropriate basis for a departure." [A. 144.] The district court did depart one level horizontally to Criminal History Category V, [A. 145.], on the basis that Evans' classification as a career offender overstated the seriousness of his criminal history, but declined to depart further. In so doing, the court stated, "the Court recognizes under the 2003 amendment, I am limited to a departure horizontally of one level." [A. 144-45.] Later, the district court affirmed this point, noting, "I understand that I can only depart one level horizontally because of the criminal history. . . . I believe that I can depart further if I choose to based upon the fact that there's a combination of another factor." [A. 147.] The district court further departed vertically on the grounds that Evans' overstatement of criminal history, when combined with his extraordinary post-offense rehabilitation, presented mitigating factors that were present to a substantial degree. [A. 146-48.]

B. Governing Law and Standard of Review

1. Guidelines Calculations After *Booker* and *Crosby*

Although the Sentencing Guidelines no longer play a mandatory role in sentencing, they nevertheless continue to play a critical role in trying to achieve the "basic aim" that Congress tried to meet in enacting the Sentencing Reform Act, namely, "ensuring similar sentences for those

who have committed similar crimes in similar ways." *Booker*, 543 U.S. at 252. In furtherance of that goal, judges are required to "consider the Guidelines 'sentencing range established for . . . the applicable category of offense committed by the applicable category of defendants,' § 3553(a)(4), the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims, §§ 3553(a)(1), (3), (5)-(7) (main ed. and Supp. 2004)." *Id.* at 259-60; *see also id.* at 264 ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.").

The various opinions in *Booker* each emphasized that the Guidelines carry out the express will of Congress that sentences be uniform across the country to the extent possible and be based on the offender's actual conduct and history. *See, e.g.*, *id.* at 253 (Breyer, J.) ("Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity."); *id.* at 250 ("Congress' basic statutory goal – a system that diminishes sentencing disparity – depends for its success upon judicial efforts to determine, and to base punishment upon, the *real conduct* that underlies the crime of conviction."); *id.* at 292 (Stevens, J., dissenting) ("The elimination of sentencing disparity, which Congress determined was chiefly the result of a discretionary sentencing regime, was unquestionably Congress' principal aim."); *id.* at 303-04 (Scalia, J., dissenting) ("[T]he primary objective of the Act was to reduce sentencing disparity.").

Although *Booker* holds that uniformity cannot be achieved through mandatory Guidelines, the goal of uniformity still weighs heavily in sentencing because reducing unjustified disparities was an important underlying purpose of federal sentencing reform. As this Court cautioned in *United States v. Crosby*, 397 F.3d 107, 113-14 (2d Cir. 2005):

> [I]t is important to bear in mind that *Booker/Fanfan* and section 3553(a) do more than render the Guidelines a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge . . . . On the contrary, the Supreme Court expects judges faithfully to discharge their statutory obligation to "consider" the Guidelines and all of the other factors listed in section 3553(a).

In *Crosby*, this Court explained that, in light of *Booker*, district courts should now engage in a three-step sentencing procedure. First, the court must determine the applicable Guidelines range, and in so doing, "the sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence." 397 F.3d at 112. Second, the court should consider whether a departure from that Guidelines range is appropriate. *Id.* Third, the court must consider the Guidelines range, "along with all of the factors listed in section 3553(a)," and determine the sentence to impose. *Id.* at 113.

2. Standard of Review

The Supreme Court in *Booker* held that the Courts of Appeals should review sentences for unreasonableness. *See Booker*, 543 U.S. at 261 (discussing the "practical standard of review already familiar to appellate courts: review for 'unreasonable[ness]'") (quoting 18 U.S.C. § 3742(e)). This Court has likened review for reasonableness post-*Booker* to review for abuse of discretion. *See Crosby*, 397 F.3d at 114; *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006), *pet'n for cert. filed*, 75 U.S.L.W. 3034 (June 30, 2006); *United States v. Florez*, 447 F.3d 145, 158 (2d Cir. 2006). This Court has further emphasized that, although appellate review of sentences "will not equate to a 'rubber stamp,'" *United States v. Rattoballi*, 452 F.3d 127, 132 (2d Cir. 2006) (quoting *United States v. Moreland*, 437 F.3d 424, 433 (4th Cir. 2006)), such review is to be deferential, *United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005), and the circuit expects to encounter unreasonable sentences "infrequently." *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005).

In *Crosby*, this Court explained that, post-*Booker*, it will review sentences for their substantive reasonableness, that is, whether the length of the sentence is reasonable in light of the applicable Guidelines range and the other factors set forth in 18 U.S.C. § 3553(a). *Crosby*, 397 F.3d at 114. In addition, this Court will assess procedural reasonableness: whether the sentencing court complied with *Booker* by (a) treating the Guidelines as advisory, (b) considering "the applicable Guidelines range (or arguably

applicable ranges)" based on the facts found by the court, and (c) considering "the other factors listed in Section 3553(a)." *Id.* at 115.

Under this rubric, pre-*Booker* rules for Guidelines calculation are still in force with respect to the first portion of this process. Thus, in reviewing the Guidelines range calculated by the district court, "[i]n the absence of an error of law or an erroneous belief on the part of the sentencing court that it had no power to depart, the district court's refusal to grant a downward departure and the extent of its departure are not appealable." *United States v. Tocco*, 135 F.3d 116, 131 (2d Cir. 1998); *see United States v. Valdez*, 426 F.3d 178, 184 (2d Cir. 2005) ("Although a refusal to downwardly depart is generally not appealable, review is available when a sentencing court misapprehended the scope of its authority to depart or the sentence was otherwise illegal.").

C. Discussion

Evans challenges the reasonableness of the district court's sentence. In so doing, he argues that he was entitled to additional downward departures within the Guidelines framework on the basis of his acceptance of responsibility, the crack-to-powder ratio, and overstatement of his criminal history based on his classification as a career offender. According to Evans, the district court erred in believing it did not have the discretion to depart (or depart further) on the basis of these factors, noting that its discretion was "limited." [A. 145; *see also* A. 129, 144.] On this basis, Evans argues that the

district court committed an error of law requiring reversal for procedural unreasonableness. Alternatively, with respect to the departure for overstatement of criminal history, Evans seems to suggest that the district court misperceived its authority when it stated, "I believe that I can depart further if I choose to based upon the fact that there's a combination of another factor." [A. 147.] None of these contentions is supported by case law or statute. Because the district court correctly calculated the Guidelines range, and therefore did not act unreasonably in dealing with Evans' motions for departure within the Guidelines regime, this Court should affirm.

1. Downward Departure and Acceptance of Responsibility

Evans' contention that he was entitled to a third point for acceptance of responsibility under U.S.S.G. § 3E1.1(b) is without merit. Evans was sentenced under the 2003 Guidelines because the activity to which Evans pleaded guilty occurred after the 2003 amendments to the Guidelines had been incorporated. Accordingly, it was beyond the discretion of the district court to *sua sponte* award a third point for acceptance of responsibility. The 2003 Guidelines did away with prior judicial discretion regarding the third point as well as departures based on extraordinary acceptance of responsibility. Instead, the 2003 Guidelines make an award of the third point contingent on the Government's motion. *See* U.S.S.G. § 3E1.1(b) (2003). Indeed, the Guidelines go to great length to stress that the third point deduction may only be awarded on the government's motion: "Because the

Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, *an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing*." *Id.* at cmt. n.6 (emphasis added).

This Court has not had occasion to state the obvious – that the Sentencing Guidelines mean what they say when they say that a government motion is required to award a third point for acceptance of responsibility. Other courts of appeals, however, have had and taken the opportunity to affirm this point. *See, e.g.*, *United States v. Smith*, 429 F.3d 620 (6th Cir. 2005) (collecting cases).

Moreover, the district court correctly refused to depart downward on the basis of extraordinary acceptance of responsibility. Not only was acceptance meriting further consideration not demonstrated, but such a departure would also have violated U.S.S.G. § 5K2.0(d)(2), which identifies acceptance of responsibility as a prohibited basis for departure. Because the district court's denial of a third point for acceptance of responsibility was not an error of law, its denial is unappealable. *See Tocco*, 135 F.3d at 131.

2. Downward Departure and the Crack-to-Powder Ratio

Likewise, Evans' contention that the district court had discretion to depart downward on the basis of the crack-to-powder ratio is without merit. Downward departure within the Guidelines on the basis of this ratio has been soundly

rejected by this Court. *See United States v. Haynes*, 985 F.2d 65, 70 (2d Cir. 1993) ("A downward departure may not be predicated on the fact that penalties for crack cocaine are more severe than those involving cocaine."). Such a departure has been similarly rejected by every other appellate court to have faced the issue. *See, e.g.*, *United States v. Booker*, 73 F.3d 706, 710 (7th Cir. 1996); *United States v. Alton*, 60 F.3d 1065, 1070-71 (3d Cir. 1995) (collecting cases); *United States v. Maxwell*, 25 F.3d 1389, 1400-01 (8th Cir. 1994); *United States v. Bynum*, 3 F.3d 769, 774-75 (4th Cir. 1993).

This settled law is not affected by *Booker* and *Crosby*, which still require district courts to determine the applicable Guidelines range before imposing a sentence. *See, e.g.*, *United States v. Crawford*, 407 F.3d 1174, 1178 (11th Cir. 2005) (stating that "*Booker* established a 'reasonableness' standard for final sentences imposed on a defendant" but "that *Booker* does not alter our review of the application of the Guidelines"). If a district court incorrectly assumes that it does not have discretion to depart when in reality it has such discretion (or vice versa), the sentence may be found unreasonable. However, in the instant case, this circumstance did not arise. The case law makes clear that district courts determining applicable Guidelines ranges are not permitted to depart on the basis of the crack-to-powder ratio. The district court recognized this lack of discretion, noting, "I do not believe it is an appropriate basis for departure." [A. 144.] Thus, the district court's refusal to grant Evans' motion to depart on this basis was not an error of law, and, as such, is unreviewable on appeal.

3. Downward Departure and Overstatement of Criminal History

Finally, the district court did not commit an error of law in concluding that it could depart only one level horizontally to Criminal History Category V on the basis that Evans' classification as a career offender overstated his criminal history. Under the 2003 Guidelines, downward departures for career offenders on the basis that such classification overstates criminal history "may not exceed one criminal history category." U.S.S.G. § 4A1.3(b)(3)(A). The district court granted this downward departure in accordance with its discretion, and the government does not challenge this departure.

Moreover, Evans is incorrect in implying that the district court erred by misperceiving the bounds of its authority when it stated,"I believe that I can depart further if I choose to based upon the fact that there's a combination of another factor." [A. 147.] In the first instance, this particular sentiment followed closely on the district court's affirmation of the scope of its discretion: "I understand that I can only depart one level horizontally because of the criminal history. . . ." [A. 147.] In addition, the district court's statement is correct – additional considerations could have warranted additional departures on independent grounds. Indeed, the district court chose to depart vertically based on a combination of factors, including the criminal history issue and the defendant's extraordinary post-offense rehabilitation. [A. 148.] Finally, even if the district court had misperceived its ability to depart and thought it had discretion to depart

further than it was in fact authorized, this would have been a mistake favorable to the defendant – and therefore undoubtedly harmless with respect to him. *See Crosby*, 397 F.3d at 114 (stating that procedural errors in sentencing that are not harmless may be found unreasonable); *see also Williams v. United States*, 503 U.S. 193, 203 (1992) ("[O]nce the court of appeals has decided that the district court misapplied the Guidelines, a remand is appropriate unless the reviewing court concludes, on the record as a whole, that the error was harmless, i.e., that the error did not affect the district court's selection of the sentence imposed."); *United States v. Scott*, 441 F.3d 1322, 1329 (11th Cir. 2006) (reaffirming *Williams* in post-*Booker* review of Guidelines calculations). Thus, far from a misperception of court discretion, the district court's statements are further evidence of its fluency in the requirements, scope, and limitations of Guidelines calculation.

Clearly, the district court correctly recognized the bounds of its discretion in departing on the basis that the career offender guideline overstated Evans' criminal history. Thus, it committed no error of law in declining to depart further on this basis. Because there was no error of law, the extent of the departure granted is not appealable. *See Valdez*, 426 F.3d at 184. The district court's Guidelines calculation was correct, and its sentence should be affirmed.

II. THE DISTRICT COURT IMPOSED A REASONABLE SENTENCE IN LIGHT OF THE § 3553(a) FACTORS AS REQUIRED BY *BOOKER* AND *CROSBY*

A. Relevant Facts

The district court on several occasions throughout the sentencing hearing referred explicitly to the advisory nature of the Sentencing Guidelines as one factor to be considered in combination with the other § 3553(a) factors. Before beginning its Guidelines calculation, the district court observed, "[o]bviously the Court is mindful of the fact that I will be imposing sentence today here after consideration of the factors set forth in the statute under § 3553(a). Of course, those factors include the sentencing guidelines . . . ." [A. 108.] Following calculation of the appropriate Guidelines range, the court inquired of defense counsel: "As to determining the guidelines as a factor, I want to know if you have objection to that." [A. 132.] In questioning the Government about Evans' arguments for departures in the context of Guidelines, the court requested that the Government "[p]ut aside whether I exercise my discretion to depart. Let's talk about whether the record would support a departure." [A. 139.] Moreover, the Government took care to emphasize to the court its discretion in imposing a sentence: "[The Guidelines] are not mandatory. They are not binding on the court but the court is required to consider them carefully." [A. 139.]

Moreover, the district court responded to Evans' requests for departures by considering them as requests for

departure within and variances from the Guidelines scheme. Evans contended that the court should depart from the Guidelines on the basis that the 100-to-1 crack-to-powder cocaine ratio is "unfair" and "creating disparities, something that the statute says shouldn't be occurring." [A. 134-35.] The court declined to impose a non-Guidelines sentence on this basis, explaining,

> the Court doesn't wish to suggest or agree that there should be such disparity but rather that it is one for Congress to decide and Congress has clearly said that it wants a disparity and certainly it could choose to punish someone more severely for using a gun instead of a knife or a knife instead of a gun. We punish people for dealing cocaine or crack cocaine but we don't for people who sell cigarettes. These are choices that the legislature gets to make. . . . I do not believe it is an appropriate basis for a departure.

[A. 144.] Later, the court recognized the role that the Guidelines play in minimizing disparities between similarly situated defendants. [A. 166.]

While granting Evans' request for departure on the basis that his classification as a career offender overstated the seriousness of his criminal history, and departing further based on this factor in combination with Evans' post-offense rehabilitation, the court declined to depart further or impose a non-Guidelines sentence on the basis of this factor in combination with Evans' "family circumstances and personal situation." [A. 135.] The court

noted that "every time a person is sent to prison who has a family, the family will suffer . . . . However what is required for this departure is an extraordinary family circumstances [sic] . . . and the Court doesn't find the record here will support such a finding." [A. 146.]

The district court also explicitly and fully considered each of the factors identified in 18 U.S.C. § 3553(a). At the outset of this analysis the court noted, "I also need to consider the nature and circumstances of this offense and the history and characteristics of the defendant. We have spoken about many of these and I will touch on some of them again. We need to talk about the need for the sentence." [A. 163.] The court noted Evans' positive behavior while out on bond, but stated clearly that hardships Evans faced while growing up could not excuse his unlawful behavior. [A. 166.] The court discussed at considerable length the need for a sentence not only to reflect the seriousness of the offense, but also to promote respect for the law, provide just punishment, and protect the public. [A. 160-66.] In particular, the court noted that Evans' prior jail sentences, including one for sixty-six months, had been insufficient to deter his subsequent unlawful behavior. [A. 160-61.] The court also identified that a purpose of just punishment is "to provide the defendant with needed educational and vocational care . . . ." [A. 165.] Finally, the court addressed "the need to avoid unwarranted sentencing disparities," mindful of the role the Guidelines play in minimizing disparities in sentencing nationally while also considering the sentences imposed on other defendants in this case. [A. 166.]

Only after this careful consideration of each § 3553(a) factor did the district court impose Evans' sentence. In doing so, the court made clear that the sentence it imposed was not only a result of its departure analysis within the Guidelines, but was "also the sentence that I determined to be fair and just under *Booker* or post-*Booker* under 3553(a)." [A. 169.]

B. Governing Law and Standard of Review

1. Consideration of the § 3553(a) Factors After *Booker* and *Crosby*

As noted above, while the Sentencing Guidelines no longer play a mandatory role in sentencing, they nevertheless continue to play a critical role in trying to achieve the "basic aim" that Congress tried to meet in enacting the Sentencing Reform Act, namely, "ensuring similar sentences for those who have committed similar crimes in similar ways." *Booker*, 543 U.S. at 252. Section 3553(a) provides that the sentencing "court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection," and then sets forth seven specific considerations which include consideration of the Guidelines:

> (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 and vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established [in the Sentencing Guidelines];
(5) any pertinent policy statement [issued by the Sentencing Commission];

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

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

18 U.S.C. § 3553(a).

Although the Guidelines are now advisory, they still provide "a benchmark or a point of reference or departure" when considering a particular sentence to impose. *United States* v. *Rubenstein*, 403 F.3d 93, 98-99 (2d Cir.), *cert. denied*, 126 S. Ct. 388 (2005); *see also Fernandez*, 443 F.3d at 28. More to the point, this and other Courts of Appeals have recognized that "the guidelines cannot be called just 'another factor' in the statutory list, 18 U.S.C. § 3553(a), because they are the only integration of the multiple factors and, with important exceptions, their calculations were based upon the actual sentences of many judges." *Rattoballi*, 452 F.3d at 133(quoting *United States v. Jiménez-Beltre*, 440 F.3d 514, 518 (1st Cir. 2006) (en banc), *pet'n for cert. filed,* No. 06-5727 (Aug. 4, 2006)); *see also United States v. Johnson*, 445 F.3d 339, 342 (4th Cir. 2006); *United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006), *pet'n for cert. filed*, No. 06-5618 (July 26, 2006); *United States v. Cooper*, 437 F.3d 324, 331 n.10 (3d Cir. 2006); *United States v. Mykytiuk*, 415 F.3d 606, 607 (7th Cir. 2005).

2. Standard of Review

As described above, the Supreme Court in *Booker* held that the Courts of Appeals should review sentences for reasonableness. *See Booker*, 543 U.S. at 261. In *Crosby*, this Court explained that, post-*Booker*, it will review sentences for both substantive reasonableness and procedural reasonableness. *Crosby*, 397 F.3d at 114-15.

An evaluation of substantive reasonableness will necessarily "focus . . . on the sentencing court's

compliance with its statutory obligations to consider the factors detailed in 18 U.S.C. § 3553(a)." *Canova*, 412 F.3d at 350. As the Fourth Circuit has observed, "[a] sentence may be substantively unreasonable if the court relies on an improper factor or rejects policies articulated by Congress or the Sentencing Commission." *United States v. Moreland*, 437 F.3d 424, 434 (4th Cir.), *cert. denied,* 126 S. Ct. 2054 (2006); *see also United States* v. *Haack*, 403 F.3d 997, 1004 (8th Cir.), *cert. denied*, 126 S. Ct. 276 (2005). Moreover, this Court has cautioned against imposing "a non-Guidelines sentence that rests primarily upon factors that are not unique or personal to a particular defendant, but instead reflects attributes common to all defendants." *Rattoballi*, 452 F.3d at 133.

An evaluation of the procedural reasonableness of a sentence focuses on whether the district court correctly calculated the applicable Guidelines range, as addressed above; recognized that range as advisory only; and considered the remaining § 3553(a) factors in determining whether to impose a non-Guidelines sentence. Under this rubric, the "weight to be afforded any given argument made pursuant to one of the § 3553(a) factors is a matter firmly committed to the discretion of the sentencing judge and is beyond our review, as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented." *Fernandez*, 443 F.3d at 32; *see also Jiménez-Beltre*, 440 F.3d at 419. Likewise, in evaluating whether a district court appropriately considered the § 3553(a) factors, this Court has stated that no "robotic incantations" are required. *Fernandez*, 443 F.3d at 29-30 (quoting *Crosby*, 397 F.3d at 113). This is

consistent with practices adopted in other circuits. *See id.* at 30-31 (collecting cases). In the absence of clear evidence in the record suggesting otherwise, this Court presumes that the district court has "faithfully discharged" its "duty to consider the statutory factors." *Id.* at 30.

C. Discussion

In addition to advancing arguments that the district court committed procedural errors in its Guidelines calculation, Evans also challenges the district court's imposition of a Guidelines-range sentence as both procedurally and substantively unreasonable. Specifically, because the district court found that the crack-to-powder ratio was not "an appropriate basis for departure," [A. 144] Evans argues that the sentence imposed was unreasonable in light of *Booker* and *Crosby*. He claims that the Guidelines' crack-to-powder ratio is antithetical to the factors enumerated in 18 U.S.C. § 3553(a) because it "creat[es] disparities, something that the statute [in § 3553(a)(6)] says shouldn't be occurring." [A. 134-35.] In this regard, he argues that the district court had not only the discretion to consider the crack-to-powder ratio in determining a fair sentence, but also an obligation to impose a non-Guidelines sentence on this basis. Thus, Evans claims that he is entitled to a sentence that diminishes or eliminates the 100-to-1 crack-to-powder ratio.

Evans also argues that the district court erred in not imposing a non-Guidelines sentence on the basis of his acceptance of responsibility, his rehabilitation and family

circumstances, and the fact that his Guidelines classification as a career offender overstated his criminal history. In particular, because the district court refused to award him the non-Guidelines equivalent of a third-point reduction for acceptance of responsibility or additional criminal history category reductions for overstatement of his criminal history, Evans claims the court imposed an unreasonably harsh sentence.

Finally, Evans argues that the district court acted unreasonably by failing to properly consider all of the § 3553(a) factors. Evans claims "the District Court's Guidelines analysis impermissibly overrode due consideration of the other § 3553(a) sentencing factors and thus resulted in an unreasonably harsh sentence for Mr. Evans." [Def. Br. at 46.] Evans thus challenges the district court's imposition of a sentence within the Guidelines framework on grounds that the court attributed too much weight to the Guidelines and not enough to the remaining § 3553(a) factors. In contrast, Evans contends that the court should have considered the Guidelines as "of no greater significance than the other considerations mandated by Congress in 18 U.S.C. § 3553(a) . . . ." [Def. Br. at 13-14.] Had the court done so, Evans argues, it would have imposed a lower, non-Guidelines sentence.

None of these contentions is supported by case law. Because the district court did not act unreasonably in considering each of the § 3553 (a) factors and imposing a Guidelines range sentence on that basis, this Court should affirm.

1. Sentencing in Accordance with the Crack-to-Powder Ratio Is Reasonable Under *Booker* and *Crosby*

In *Booker,* the Supreme Court made clear that the constitutional defect with the Guidelines was their previously mandatory nature, not their existence or structure — or, more to the point, the length of sentences prescribed by the Guidelines for any particular category of cases, such as crack cocaine cases. Indeed, *Booker* emphasized that "district courts, while not bound to the Guidelines, must consult those Guidelines and take them into account when sentencing." 543 U.S. at 264. Likewise, in *Crosby*, this Court interpreted *Booker* to require that district judges "faithfully" consider the Guidelines in sentencing. 397 F.3d at 114.

Under the approach that Evans suggests, however, the district court should have disregarded the Guidelines on the question of the severity of punishment in a crack cocaine case. Put differently, according to Evans, sentencing should be based not on a defendant's particular circumstances, but on a policy judgment about the correctness of the drug quantity tables in the Guidelines. *Booker* and *Crosby*, however, require sentencing judges to use the Guidelines and Section 3553(a) to fashion a sentence that will be based on the facts and circumstances of an individual case. *See Booker*, 543 U.S. 264 (noting that the requirement that sentencing courts "must consult [the] Guidelines and take them into account when sentencing" would "continue to move sentencing in

Congress's preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient *to individualize* sentences where necessary") (emphasis added). Contrary to Evans' assertions, nothing in *Booker* or *Crosby* empowers sentencing judges to categorically reject the Guidelines' drug quantity tables in favor a judge's own formula.

This Court recently rejected this same claim in *United States v. Castillo*, No. 05-3454-cr, 2006 WL 2374281 (2d Cir. Aug. 16, 2006). In *Castillo*, the district court imposed a non-Guidelines sentence "based solely on [its] generalized policy disagreement with the Guidelines" regarding the propriety of the 100:1 crack-to-powder ratio. *Id.* mem. op. at 42. In reversing the sentence and remanding, this Court stated unambiguously that

> we join the First, Fourth and Eleventh Circuits in holding that district courts may give non-Guidelines sentences only because of case-specific applications of the § 3553(a) factors, not based on policy disagreements with the disparity that the Guidelines for crack and powder create.

Id. at 43 (citing *United States v. Pho*, 433 F.3d 53, 64-65 (1st Cir. 2006); *United States v. Eura*, 440 F.3d 625, 633-34 (4th Cir. 2006); and *United States v. Williams*, No. 05-13205, 2006 WL 2039993, at *9 (11th Cir. July 21, 2006)).

Thus, the district court here acted reasonably in refusing to impose a non-Guidelines sentence based on

any policy disagreement it might have had with the crack-to-powder ratio.

2. The District Court's Decision Not To Impose a Non-Guidelines Sentence Based on Evans' Acceptance of Responsibility, Classification as a Career Offender, or Rehabilitation and Family Circumstances Was Reasonable

Evans is correct in noting that, in some instances, even where a reduction or departure is not available to a sentencing judge through a Guidelines calculation, it may be considered and effectively granted through the imposition of a non-Guidelines sentence. For instance, in *Fernandez*, the Government did not move for downward departure based on the defendant's cooperation. The defendant argued that she could still benefit from her limited cooperation, and this Court concluded that § 3553(a)(1), which requires that sentencing courts consider the "history and characteristics of the defendant," is a "sweeping provision" that "presumably includes the history of a defendant's cooperation and characteristics evidenced by cooperation, such as remorse or rehabilitation." *Fernandez*, 443 F.3d at 33.

The district court thus had the discretion to impose a non-Guidelines sentence based on case-specific considerations involving a defendant's acceptance of responsibility, overstatement of his criminal history, or his rehabilitation and family circumstances. Indeed, the

district court recognized this discretion, referring to its discretion to deviate from the Guidelines on several occasions. [*See* A. 108, 132, 139.] In discussing § 3553(a)(1), the district court referred to its earlier discussion under the Guidelines, implying that considerations affecting Guidelines calculation could also affect non-Guidelines sentencing decisions. [A. 163.] In particular, the court explicitly recognized Evans' rehabilitation as "a history or circumstance of the defendant. That's in the very positive column for him." [A. 162.]

Having appropriately perceived its discretion to impose a non-Guidelines sentence on these bases, the district court's decision not to do so was well within the bounds of reasonableness. Departures for acceptance of responsibility are designed to reward those who "assist[] authorities in a manner that avoids preparing for trial." U.S.S.G. § 3E1.1(b) cmt. n.6. Evans pled guilty to the charges against him, thus earning a two-point reduction in Guidelines calculation, but he refused to allocute to the charged drug quantity. Instead, this issue was reserved for resolution at the sentencing hearing. Although Evans eventually agreed to stipulate to drug quantity (or, more precisely, to waive any objection to the PSR's calculation of drug quantity), obviating the need for a hearing and presentation of witnesses on this issue, this stipulation did not occur until the sentencing hearing – after the investment of considerable Government resources. As the Government informed the district court at the sentencing hearing, "Mr. Caruso and myself hav[e] spent well over 10, 15 hours preparing the witnesses. The witnesses will

be shipped all over the state in order to be prepared and be here this morning." [A. 127.] Evans' ultimate stipulation to a drug quantity of at least fifty grams did not conserve Government resources, and therefore it was reasonable not only for the Government to decline to move for the third-point reduction for acceptance of responsibility, but also for the district court to refuse to grant a non-Guidelines equivalent.

Likewise, the district court acted reasonably in not sentencing outside the Guidelines based on overstatement of Evans' criminal history, because that factor was adequately factored into the Guidelines framework in the court's departure analysis. The district court appropriately recognized the seriousness of Evans' prior and current offenses, characterizing Evans' first conviction as "obviously an extremely serious offense," [A. 140], and noting with respect to the second and current offenses that "drug offenses are extremely serious offenses not only because they violate the law and show a lack of respect for the law [but also] because they destroy our communities." [A. 164.] Moreover, the district court observed Evans' prior prison sentence of more than five years had not sufficiently deterred Evans from continued illegal activities. [A. 161.] The district court's decision not to impose a non-Guidelines sentence based on overstatement of Evans' criminal history was thus supported by consideration of not only the Guidelines, but also the remaining § 3553(a) factors including the need "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; . . .

[and] to afford adequate deterrence to criminal conduct." 18 U.S.C. § 3553(a)(2).

Moreover, in considering Evans' rehabilitation and family and personal circumstances, the district court reasonably recognized that these factors could be evaluated as " history and characteristics of the defendant" under § 3553(a)(1). However, in making this evaluation, the court correctly noted that "[s]ociety or Congress won't tolerate" a difficult childhood or background "as an excuse for committing criminal behavior." [A. 166.] During its Guidelines analysis, the district court noted that not only were these factors not present in extraordinary fashion, but that adverse family circumstances were not even present to a "substantial degree." [A. 148.] Moreover, the court appropriately recognized that Evans' family circumstances were not an individualized basis for departure within the Guidelines or sentencing without them: "[E]very time a person is sent to prison who has a family, the family will suffer . . . ." [A. 146.] Declining to impose a non-Guidelines sentence on this basis accords with this Court's explication that "we will view as inherently suspect a non-Guidelines sentence that rests primarily on factors that are not unique or personal to a particular defendant, but instead reflects attributes common to all defendants." *Rattoballi*, 452 F.3d at 133. Thus, once again, the district court's decision not to impose a non-Guidelines sentence on this basis was reasonable – particularly because the court had already granted a departure in part based on Evans' rehabilitation – and its decision should be affirmed.

Not only is there sufficient reason to support the district court's decision not to sentence outside the Guidelines on any of these bases, but such decisions are also granted broad deference on review. This Court has observed that the "weight to be afforded any given argument made pursuant to one of the § 3553(a) factors is a matter firmly committed to the discretion of the sentencing judge and is beyond our review, as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented." *Fernandez*, 443 F.3d at 32; *see also Jiménez-Beltre*, 440 F.3d at 519. A reviewing court is to defer to the weights and measures assigned to various arguments and bases for departure within and from the Guidelines because the sentencing court is the best-informed decisionmaker about the particular circumstances at issue. Thus, the district court's decision not to impose a non-Guidelines sentence on the basis of Evans' acceptance of responsibility, overstatement of his criminal history, or his rehabilitation and family circumstances is beyond review.

3. The District Court Explicitly Considered Each of the § 3553(a) Factors in Arriving at Its Sentence

In addition to considering the interaction between the § 3553(a) factors and Evans' specific claims for departure, the district court also engaged in an overarching analysis of the § 3553(a) factors. In evaluating whether a district court appropriately considered the § 3553(a) factors, this Court has stated that no "robotic incantations" are required. *Fernandez*, 443 F.3d at 29-30 (quoting *Crosby*,

397 F.3d at 113). This is consistent with practices adopted in other circuits. *See id.* at 30-31 (collecting cases). In the absence of clear evidence in the record suggesting otherwise, this Court presumes that the district court has "faithfully discharged" its "duty to consider the statutory factors." *Id.* at 30. Moreover, as noted above, the "weight to be afforded any given argument made pursuant to one of the § 3553(a) factors is a matter firmly committed to the discretion of the sentencing judge and is beyond our review, as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented." *Fernandez*, 443 F.3d at 32; *see also Jiménez-Beltre*, 440 F.3d at 519.

In this case, the record makes clear that the district court amply fulfilled its duty to consider each of the § 3553(a) factors. Having already correctly calculated and considered the applicable Guidelines range and relevant departures within the Guidelines regime, as specified in § 3553(a)(4) & (5), the Court recognized the nature and seriousness of the offense, identified in § 3553(a)(1), terming Evans' crime an "extremely serious" one. [A. 164.] In considering Evans' "history and characteristics," also identified in § 3553(a)(1), the court noted Evans' positive behavior while out on bond, but stated clearly that hardships Evans faced while growing up could not excuse his unlawful behavior. [A. 166.] The court discussed at considerable length the need for a sentence not only to reflect the seriousness of the offense, but also to promote respect for the law, provide just punishment, deter future law breaking, and protect the public. [A. 160-66; *see also* § 3553(a)(2)(A)-(C).] In the same vein, the court identified

a purpose of punishment as "provid[ing] the defendant with needed educational and vocational care . . . ." [A. 165; *see also* § 3553(a)(2)(D).] The court addressed "the need to avoid unwarranted sentencing disparities," being mindful of the role the Guidelines play in minimizing disparities in sentencing nationally while also considering the sentences imposed on other defendants in this case. [A. 166; *see also* § 3553(a)(6).] Finally, the Court also explicitly stated that the Guidelines-range sentence it imposed was "also the sentence that I determined to be fair and just under *Booker* or post *Booker* under 3553(a)." [A. 169.]

Having considered each of the § 3553(a) factors, the district court's decision to impose a Guidelines range sentence was reasonable, and its decision should therefore be affirmed.

CONCLUSION

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

Dated: August 22, 2006

Respectfully submitted,

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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 10,929 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. § 3553 (in pertinent part)

(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.

U.S.S.G. § 4A1.3. (Nov. 1, 2003

Departures Based on Inadequacy of Criminal History Category (Policy Statement))

. . . .

(b) Downward Departures.--

(1) Standard for Downward Departure.--If reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.

(2) Prohibitions.--

(A) Criminal History Category I.--A departure below the lower limit of the applicable guideline range for Criminal History Category I is prohibited.

(B) Armed Career Criminal and Repeat and Dangerous Sex Offender.--A downward departure under this subsection is prohibited for (i) an armed career criminal within the meaning of §4B1.4 (Armed Career Criminal); and (ii) a repeat and dangerous sex offender against minors within the meaning of §4B1.5 (Repeat and Dangerous Sex Offender Against Minors).

(3) Limitations.--

(A) Limitation on Extent of Downward Departure for Career Offender.--The extent of a downward departure under this subsection for a career offender within the meaning of §4B1.1 (Career Offender) may not exceed one criminal history category.

(B) Limitation on Applicability of §5c1.2 in Event of Downward Departure to Category I.--A defendant whose criminal history category is Category I after receipt of a downward departure under this subsection does not meet the criterion of subsection (a)(1) of §5C1.2 (Limitation on Applicability of Statutory Maximum Sentences in Certain Cases) if, before receipt of the downward departure, the defendant had more than one criminal history point under §4A1.1 (Criminal History Category).

U.S.S.G. § 4B1.1. Career Offender (Nov. 1, 2003)

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

(b) Except as provided in subsection (c), if the offense level for a career offender from the table in this subsection is greater than the offense level otherwise applicable, the offense level from the table in this subsection shall apply. A career offender's criminal history category in every case under this subsection shall be Category VI.

Offense Statutory Maximum	Offense Level [FN*]
(A) Life	37
(B) 25 years or more	34
(C) 20 years or more, but less than 25 years	32
(D) 15 years or more, but less than 20 years	29
(E) 10 years or more, but less than 15 years	24
(F) 5 years or more, but less than 10 years	17
(G) More than 1 year, but less than 5 years	12.

FN*1. If an adjustment from §3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.
(c) If the defendant is convicted of 18 U.S.C. § 924(c) or

§ 929(a), and the defendant is determined to be a career offender under subsection (a), the applicable guideline range shall be determined as follows:

(1) If the only count of conviction is 18 U.S.C. § 924(c) or § 929(a), the applicable guideline range shall be determined using the table in subsection (c)(3).

(2) In the case of multiple counts of conviction in which at least one of the counts is a conviction other than a conviction for 18 U.S.C. § 924(c) or § 929(a), the guideline range shall be the greater of--

(A) the guideline range that results by adding the mandatory minimum consecutive penalty required by the 18 U.S.C. § 924(c) or § 929(a) count(s) to the minimum and the maximum of the otherwise applicable guideline range determined for the count(s) of conviction other than the 18 U.S.C. § 924(c) or § 929(a) count(s); and

(B) the guideline range determined using the table in subsection (c)(3).

(3) Career Offender Table for 18 U.S.C. § 924(c) or § 929(a) Offenders

§3E1.1 Reduction	Guideline Range for the 18 U.S.C. § 924(c) or § 929(a) Count(s)
No reduction	360-life

2-level reduction	292-365
3-level reduction	262-327.

§5K2.0. Grounds for Departure (Policy Statement)

(A) Upward Departures in General and Downward Departures in Criminal Cases Other than Child Crimes and Sexual Offenses.--

(1) In General.--The sentencing court may depart from the applicable guideline range if--

(A) in the case of offenses other than child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. § 3553(b)(1), that there exists an aggravating or mitigating circumstance; or

(B) in the case of child crimes and sexual offenses, the court finds, pursuant to 18 U.S.C. § 3553(b)(2)(A)(i), that there exists an aggravating circumstance,

of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that, in order to advance the objectives set forth in 18 U.S.C. § 3553(a)(2), should result in a sentence different from that described.

(2) Departures Based on Circumstances of a Kind Not Adequately Taken into Consideration.--

(A) Identified Circumstances.--This subpart (Chapter Five, Part K, Subpart 2 (Other Grounds for Departure)) identifies some of the circumstances that the Commission may have not adequately taken into consideration in determining the applicable guideline range (e.g., as a specific offense characteristic or other adjustment). If any such circumstance is present in the case and has not adequately been taken into consideration in determining the applicable guideline range, a departure consistent with 18 U.S.C. § 3553(b) and the provisions of this subpart may be warranted.

(B) Unidentified Circumstances.--A departure may be warranted in the exceptional case in which there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence.

(3) Departures Based on Circumstances Present to a Degree Not Adequately Taken into Consideration.--A departure may be warranted in an exceptional case, even though the circumstance that forms the basis for the departure is taken into consideration in determining the guideline range, if the court determines that such circumstance is present in the offense to a degree substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense.

(4) Departures Based on Not Ordinarily Relevant Offender Characteristics and Other Circumstances.--An offender characteristic or other circumstance identified in Chapter Five, Part H (Offender

Characteristics) or elsewhere in the guidelines as not ordinarily relevant in determining whether a departure is warranted may be relevant to this determination only if such offender characteristic or other circumstance is present to an exceptional degree.

(b) Downward Departures in Child Crimes and Sexual Offenses.--Under 18 U.S.C. § 3553(b)(2)(A)(ii), the sentencing court may impose a sentence below the range established by the applicable guidelines only if the court finds that there exists a mitigating circumstance of a kind, or to a degree, that--

(1) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, United States Code, taking account of any amendments to such sentencing guidelines or policy statements by act of Congress;

(2) has not adequately been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(3) should result in a sentence different from that described.

The grounds enumerated in this Part K of Chapter Five are the sole grounds that have been affirmatively and specifically identified as a permissible ground of downward departure in these sentencing guidelines and policy statements. Thus, notwithstanding any other reference to authority to depart downward elsewhere in this Sentencing Manual, a ground of downward

departure has not been affirmatively and specifically identified as a permissible ground of downward departure within the meaning of section 3553(b)(2) unless it is expressly enumerated in this Part K as a ground upon which a downward departure may be granted.

(c) Limitation on Departures Based on Multiple Circumstances.--The court may depart from the applicable guideline range based on a combination of two or more offender characteristics or other circumstances, none of which independently is sufficient to provide a basis for departure, only if--

(1) such offender characteristics or other circumstances, taken together, make the case an exceptional one; and

(2) each such offender characteristic or other circumstance is--

(A) present to a substantial degree; and

(B) identified in the guidelines as a permissible ground for departure, even if such offender characteristic or other circumstance is not ordinarily relevant to a determination of whether a departure is warranted.

(d) Prohibited Departures.--Notwithstanding subsections (a) and (b) of this policy statement, or any other provision in the guidelines, the court may not depart from the applicable guideline range based on any of the following circumstances:

(1) Any circumstance specifically prohibited as a ground for departure in § §5H1.10 (Race, Sex, National Origin, Creed, Religion, and Socio-Economic Status), 5H1.12 (Lack of Guidance as a Youth and Similar Circumstances), the third and last sentences of 5H1.4 (Physical Condition, Including Drug or Alcohol Dependence or Abuse; Gambling Addiction), the last sentence of 5K2.12 (Coercion and Duress), and 5K2.19 (Post-Sentencing Rehabilitative Efforts).

(2) The defendant's acceptance of responsibility for the offense, which may be taken into account only under §3E1.1 (Acceptance of Responsibility).

(3) The defendant's aggravating or mitigating role in the offense, which may be taken into account only under §3B1.1 (Aggravating Role) or §3B1.2 (Mitigating Role), respectively.

(4) The defendant's decision, in and of itself, to plead guilty to the offense or to enter a plea agreement with respect to the offense (i.e., a departure may not be based merely on the fact that the defendant decided to plead guilty or to enter into a plea agreement, but a departure may be based on justifiable, non-prohibited reasons as part of a sentence that is recommended, or agreed to, in the plea agreement and accepted by the court. See §6B1.2 (Standards for Acceptance of Plea Agreement).

(5) The defendant's fulfillment of restitution obligations only to the extent required by law including the guidelines (i.e., a departure may not be based on

unexceptional efforts to remedy the harm caused by the offense).

(6) Any other circumstance specifically prohibited as a ground for departure in the guidelines.

(e) Requirement of Specific Written Reasons for Departure.--If the court departs from the applicable guideline range, it shall state, pursuant to 18 U.S.C. § 3553(c), its specific reasons for departure in open court at the time of sentencing and, with limited exception in the case of statements received in camera, shall state those reasons with specificity in the written judgment and commitment order.

b) Downward Departures.--

(1) Standard for Downward Departure.--If reliable information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted.

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(B) Limitation on Applicability of §5C1.2 in Event of Downward Departure to Category i.--A defendant whose criminal history category is Category I after receipt of a downward departure under this subsection does not meet the criterion of subsection (a)(1) of §5C1.2 (Limitation on Applicability of Statutory Maximum Sentences in Certain Cases) if, before receipt of the downward departure, the defendant had more than one criminal history point under §4A1.1 (Criminal History Category).