06-0565-cr(L)

To Be Argued By:
FELICE M. DUFFY

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 06-0565-cr (L)
06-0737-cr (CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

JIMMY AUGUSTO RESTREPO, HECTOR BARRIENTOS,
Defendants-Appellants.

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

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BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Ellen Bree Burns, Senior U.S. District Judge) had subject matter jurisdiction under 18 U.S.C. § 3231. Following a resentencing hearing on remand held on January 9, 2006, a final amended judgment entered on February 2, 2006. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on January 12, 2006. This Court has appellate jurisdiction over the challenge to the defendant's sentence pursuant to 18 U.S.C. § 3742(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court constitutionally calculated the defendant's advisory Guidelines range using the preponderance standard of proof, where this Court has repeatedly held post-*Booker* that sentencing findings need not be made beyond a reasonable doubt.

2. Whether the district court reasonably considered the various factors set forth in 18 U.S.C. § 3553(a) in imposing a within-Guidelines sentence.

3. Whether the district court reasonably concluded that a within-Guidelines sentence created no unwarranted sentencing disparities with similarly situated defendants, either nationwide or in this multi-defendant case.

4. Whether the sentence imposed was not "greater than necessary," where the district court complied with the dictates of 18 U.S.C. § 3553(a).

5. Whether the district court plainly erred by declining to permit the defendant to address the court from the witness stand, and instead allowed him to introduce documentary evidence of his post-sentencing rehabilitation and to address the court from the podium pursuant to Fed. R. Crim. P. 32.

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Defendant-appellant Jimmy Augusto Restrepo ("Restrepo") ran a large-scale drug-trafficking organization that distributed large quantities of cocaine in the Greater Norwalk, Connecticut, area for approximately three years. Restrepo and numerous co-defendants entered guilty pleas before the district court (Ellen Bree Burns, Senior U.S.D.J.). The district court held five days of

contested sentencing hearings with respect to Restrepo and two other defendants.

At the conclusion of the hearings, the sentencing court determined that Restrepo was the leader, manager and organizer of a criminal organization that involved five or more persons and was otherwise extensive. The court conservatively estimated that Restrepo was responsible for not less than 15 but not more than 50 kilograms of cocaine, and that he had suborned perjury from a co-defendant at Restrepo's sentencing hearing. Because Restrepo did not personally testify falsely at the sentencing hearing, the court declined to increase his offense level for obstruction of justice, although it denied the defendant credit for acceptance of responsibility. As a result of those findings, the court sentenced Restrepo to a 293-month Guidelines term of imprisonment.

Restrepo appealed, and this Court summarily affirmed, the judgment of the district court. After the United States Supreme Court's decision in *Booker*, this Court remanded the case for further proceedings. After a *de novo* sentencing hearing, the sentencing court again sentenced Restrepo principally to 293 months of imprisonment and five years of supervised release. The present appeal followed.

On appeal, Restrepo raises a number of challenges to his sentence. Primarily, he claims: (1) the district court was required to apply a more stringent burden of proof than the preponderance standard to the sentencing factors when considered individually or together; (2) the court

miscalculated the Guidelines offense level and the resulting sentence was unreasonable; (3) the sentence of the district court was excessive and resulted in an unwarranted sentencing disparity among similarly situated defendants; (4) the sentence of the district court was excessive because it was greater than necessary to accomplish the goals of sentencing as provided by 18 U.S.C. § 3553(a)(2); and (5) the court committed procedural and structural error when it declined to allow Restrepo to testify under oath at sentencing.

For the reasons that follow, each of the defendant's claims on appeal should be rejected, and the judgment should be affirmed.

Statement of the Case

On January 5, 2001, a federal grand jury in the District of Connecticut returned a Second Superseding Indictment against numerous defendants alleged to be involved with drug trafficking activity in Norwalk, Connecticut, including, among others, the defendant-appellant Jimmy Augusto Restrepo. (A1039-1057.)[1] Count One charged Restrepo and others with unlawfully conspiring to

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[1] References are as follows:

Government Appendix . . . . . ("GA___.")

Government's Sealed Appendix . . . . . .("GSA___.")

Restrepo's Appendix . . . . . ("A ___.")

Restrepo's Special Appendix . . . . . .("SPA ___.")

distribute 50 grams or more of cocaine base or "crack" and five kilograms or more of cocaine, in violation of 21 U.S.C. § 846. Count Fifteen charged Restrepo and a co-defendant with possession with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A).

On March 28, 2001, Restrepo entered a guilty plea to Count One. Beginning in or about June 25, 2001, the district court conducted a five-day sentencing hearing concerning Restrepo and two co-defendants. A sentencing hearing was held on October 26, 2001, at which time the district court imposed a 293-month term of imprisonment, to be followed by a five-year term of supervised release. (A-214.) Judgment entered on October 26, 2001, A18, and on November 1, 2001, Restrepo filed a timely notice of appeal. (A218.)

On February 27, 2004, this Court summarily affirmed the judgment of the district court. *See United States v. Williams,* 90 Fed.Appx. 412, 413, 2004 WL 362934, *1 (2d Cir. 2004).

On January 24, 2005, the United States Supreme Court granted *certiorari* and remanded the case to this Court for further consideration in light of its decision in *United States v. Booker,* 543 U.S. 220 (2005). *See Restrepo v. United States,* 543 U.S. 1000 (2005).

On March 16, 2005, before *United States v. Fagans*, 406 F.3d 138 (2d Cir. 2005), was decided, this Court ordered a limited remand for resentencing in light of the

Supreme Court's decision in *Booker* and this Court's decision in *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005).

Prior to resentencing, the parties agreed that because Restrepo had preserved claims based on *Apprendi v. New Jersey*, 530 U.S. 466 (2000), at his original sentencing, Restrepo's resentencing was governed by this Court's decision in *United States v. Fagans*, 406 F.3d 138 (2d Cir. 2005), and a full resentencing was required.

On January 9, 2006, the district court presided over a full resentencing hearing. The sentencing court determined that a different sentence would not be appropriate, even under the now-advisory Guidelines, vacated the original sentence pursuant to *Fagans*, and resentenced the defendant to the same term of imprisonment and supervised release. (A1161, SPA 175.)

Judgment entered on January 9, 2006. (A21). On January 12, 2006, Restrepo filed a timely notice of appeal. (A1169). On February 2, 2006, the judgment was amended, A21, and on February 13, 2006, Restrepo filed another notice of appeal from the amended judgment. (A1170.) The minor amendment to the judgment is not an issue in the present appeal. Restrepo is presently serving his sentence.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. Overview of the Investigation

On May 25, 1999, a task force of the Federal Bureau of Investigation ("FBI") coordinated the arrests of thirty-seven defendants in Connecticut, New York, and New Jersey. The defendants were charged with conspiring to distribute substantial quantities of cocaine and cocaine base. The arrests were the culmination of a six-month wiretap investigation, one of the objectives of which was to target Rudolfo Segura, a multi-kilogram cocaine supplier operating in the areas of Norwalk and Bridgeport, Connecticut. (GSA 3-9.)

Wire interceptions initially focused on two significant crack cocaine suppliers, namely Willie Lopez and Carlos Davila. On a monthly basis, Lopez and Davila were supplying several kilograms of cocaine and crack cocaine to numerous street-level drug dealers in Norwalk, Connecticut. The wire interceptions recorded regular discussions between Lopez and Davila and their supplier, Rudolfo Segura. Segura, who eventually cooperated with the government, later acknowledged distributing more than 150 kilograms of cocaine in the mid to late 1990s. (A640, 697-698; GSA 3-9.)

In the Winter and Spring of 1999, the FBI task force obtained authorization for wire interceptions over telephones that Segura used to conduct his narcotics trafficking. The interceptions revealed that Segura had two primary supply lines for cocaine. First, Segura had a

supply line that involved three Colombian nationals, living in Queens, New York, namely Jimmy Augusto Restrepo, Hector Barrientos, and Norman Arango Ramirez. These three defendants worked together as partners. Restrepo, however, organized and managed the drug operation through which he distributed well in excess of 30 kilograms of cocaine from 1997 through 1999. Segura did not have direct access to Restrepo's drug business. Instead, for his transactions with Restrepo's organization, he used a middleman from Norwalk, Martin Torres. (A433-464.)

Second, Segura had a direct supply link to Carlos Bolanos Yusty, a Colombian national, who also lived in Queens and who operated his drug business with John Elejalde. Yusty dealt directly with Segura and sources of supply in Colombia. In January 1999, Rigoberto Yusty, Yusty's brother and partner in the drug business, was arrested when law enforcement authorities seized a 1,200 kilogram shipment of cocaine bound for the New York metropolitan area. (A554, 647-666.)

The investigation revealed that Segura would regularly obtain cocaine from his two primary supply lines in quantities ranging from two to six kilograms. Segura would then sell the kilograms in powder form to other wholesale distributors, including Lopez, Davila, and Robert Vadas. Lopez and Davila, respectively, would convert the cocaine to cocaine base and supply other drug dealers operating on the streets of Norwalk. Vadas sold his narcotics out of his house in Trumbull, Connecticut to various other drug dealers. (A374-3791, 675; GSA 4.)

On May 25, 1999, the FBI task force coordinated the arrests of Restrepo, Barrientos, Torres, Yusty, Lopez, Vadas and numerous other individuals. Search warrants and consent searches were executed at various locations, as a result of which law enforcement officers seized cocaine, cocaine base, firearms, ammunition, bullet proof vests, scales, counterfeit detectors, drug ledgers, and tens of thousands of dollars in cash. (A143, 158-160.)

B. Segura's New York Sources of Supply

1. Restrepo, Barrientos and Torres

Jimmy Augusto Restrepo, a Colombian national, ran a large-scale drug trafficking organization operating principally in Queens, New York through which he distributed more than 30 kilograms of cocaine and approximately one kilogram of heroin during the period from 1997 until his arrest in May of 1999, as detailed below:

a. Restrepo's Cocaine Transactions in 1997

In the Summer of 1997, Martin Torres was introduced to Restrepo at a nightclub in Queens known as the Clara De Luna. Torres had previously established a relationship with other persons who were patrons of the nightclub. Through these individuals, Torres was purchasing kilogram quantities of cocaine. On the day he met Restrepo, Torres traveled to the Clara De Luna to make a payment of $25,000 to $30,000 in connection with a two-

kilogram drug deal. Restrepo took possession of the money, while the other persons associated with the drug deal explained to Restrepo why the payment was late. It thus became apparent to Torres that Restrepo was "the boss," and "the guy in charge of the drugs." (A435-439.)

Thereafter, in the Summer or Fall of 1997, Torres was unable to reach his drug contact at the Clara De Luna and consequently engaged in a series of transactions directly with Restrepo. Torres and Restrepo negotiated a five-kilogram transaction, which was consummated when Hector Barrientos delivered the drugs to Torres on Northern Boulevard in Queens. Torres returned to Connecticut and distributed the drugs to Rodolfo Segura. Within the next ten days, Torres paid Restrepo for the five kilograms of cocaine. (A439-443.)

The next drug deal in 1997 occurred when Torres contacted Barrientos, who explained that he would need to talk to Restrepo before they could engage in another transaction. Subsequently, Torres spoke with Restrepo and negotiated and completed a cocaine deal involving four or five kilograms. (A443.)

Yet another multi-kilogram transaction occurred in the Fall of 1997. The transaction occurred in a similar fashion, i.e., Restrepo authorized the deal and negotiated the price, after which he arranged for Barrientos to deliver three kilograms to Torres at a location in Queens. (A444.)

In short, in 1997 alone, Restrepo organized four cocaine transactions with Torres, involving a total of at

least 14 kilograms. Thereafter, in the late Fall of 1997, Torres lost contact with Restrepo until the Spring of 1998, when Restrepo returned to the United States from Colombia. (A433-444.)

b. Cocaine and Heroin Transactions in 1998

In late 1997, Restrepo returned to Colombia, where he had discussions with Norman Arrango Ramirez and Hector Barrientos about returning to the United States to do business. Ramirez observed that Restrepo maintained a fancy lifestyle – "he was financially well," and Ramirez assumed that Restrepo was involved in drug trafficking in the United States. Restrepo encouraged Ramirez to travel to the United States and indicated that he would find work for Ramirez in Queens. Restrepo "said he had a lot of money, and he needed someone to watch over his home." (A344-345.)

Ramirez arrived in the United States in March of 1998 and was greeted at the airport by Hector Barrientos. The two resided at an apartment in Queens and waited for Restrepo to arrive. Ramirez did not see any drugs or drug proceeds before the arrival of Restrepo. (A347-348.)

In late March 1998, Restrepo arrived in Queens. Within days, Ramirez observed drug proceeds and heroin at his residence. Restrepo instructed Ramirez to watch over the apartment, count money, and handle approximately 500 to 700 grams of heroin. Thereafter,

Restrepo obtained a second apartment on Wynn Street in Queens. (A348-350.)

After obtaining the Wynn Street apartment, Restrepo organized a transaction through which he purchased 30 kilograms of cocaine. Ramirez assisted Restrepo in obtaining the drugs, which were received in two duffel bags, each containing 15 kilograms. Restrepo instructed Ramirez to carry the bags into the Wynn Street apartment. At Restrepo's instruction, Ramirez removed the kilograms from the bags, one by one, and cut triangles into the packages. Restrepo then inspected the quality of the drugs. According to Ramirez, Restrepo checked the packages and "told Mr. Barrientos that the drugs was [sic] very nice." (A350-356.)

Following the purchase of the 30 kilograms of cocaine, Restrepo arranged to have them distributed to various kilogram quantity customers, including Martin Torres. Through a series of transactions in the Spring and Summer of 1998, Restrepo arranged for the distribution of approximately 11 kilograms of cocaine and 125 grams of heroin to Martin Torres; Torres would later return the heroin, because he and Segura could not sell it. In the course of these transactions, Restrepo negotiated prices, authorized and organized the delivery of the drugs to Torres through Ramirez and Barrientos, and oversaw the collection of the drug proceeds. (A356-362.)

As a result of the sale of the 30 kilograms of cocaine, large quantities of cash poured into the Wynn Street apartment. Restrepo, Barrientos and Ramirez counted the

money and stored the cash in duffel bags kept in a closet. Restrepo obtained and used an electronic counterfeit detecting device that was later seized in May of 1999. On one occasion, at Restrepo's instructions, Ramirez delivered a duffel bag to the individual who had supplied the 30 kilograms of cocaine. Ramirez estimated that the duffel bag contained $250,000. (A362-368.)

Restrepo arranged for various individuals to travel to Colombia, carrying Restrepo's drug proceeds with them. Ramirez and Barrientos first changed the cash received from their customers into denominations of $100. Restrepo placed the money into envelopes in increments of $10,000. Restrepo arranged for individuals to carry amounts ranging from $20,000 to $60,000 to Colombia. (A367-368.)

When Ramirez returned from the United States to Colombia in July of 1998, he carried $20,000 for Restrepo. For assisting in Restrepo's drug-trafficking network, Ramirez received several hundred dollars from Restrepo. In addition, Restrepo paid for Ramirez's room and board. Several weeks after Ramirez's departure, in the Fall of 1998, Restrepo returned to Colombia. (A367-370.)

In short, from March 1998 through August 1998, Restrepo organized the distribution of at least 30 kilograms of cocaine and 500 grams of heroin.

c. Cocaine and Heroin Transactions in 1999

In the Spring of 1999, Restrepo, Barrientos and Ramirez again took up the business of large-scale drug trafficking. First, Restrepo made the arrangements in February 1999, telling Ramirez that this time things would be better and that he would pay Ramirez more money. In March 1999, Ramirez traveled to Queens. When Barrientos arrived two days later, the two found an apartment on 78th Street and waited for Restrepo. (A369-372.)

When Restrepo arrived several weeks later, drugs and money began to flow through the 78th Street apartment. Specifically, 500 grams of heroin, six kilograms of cocaine, and at least two more kilograms of cocaine were stored at the apartment for further distribution. (A369-372; A990, 998-999.)

On April 20, 1999, acting at the instruction of Restrepo, Ramirez arranged to take delivery of six kilograms of cocaine from Mauricio Velencia. Ramirez brought the drugs into the 78th Street apartment, where he, Restrepo and Barrientos examined the narcotics. Later that day, Martin Torres arrived at the apartment and obtained all six kilograms of cocaine, before delivering them to Segura for further distribution in Connecticut. (A374-379.)

Wiretap conversations confirmed the consummation of the six-kilogram transaction. The conversations revealed

that after April 20, 1999, Barrientos and Ramirez regularly spoke with Martin Torres about obtaining payment for the drugs. The conversations further showed Restrepo's role as organizer and leader of the distribution network. For example, on April 28, 1999, Barrientos and Torres discussed the drug debt owed by Torres. Torres told Barrientos, "Tell him not to worry," referring to Restrepo. In another conversation, Torres and Segura discussed trying to re-negotiate the price of the six kilograms due to falling cocaine prices. Torres told Segura that "Jimmy is the one that authorizes it." In another similar conversation, Torres told Barrientos that he needed to speak with Restrepo in person about the drug debt because it was too difficult to explain on the telephone. (A988-990, 997.)

Wire interceptions further revealed that Restrepo was ready and willing to sell Torres additional quantities of cocaine, provided that Torres first paid for the six kilograms that he obtained on April 20, 1999. Torres told Segura, "I have to call them right away because I told Jimmy [Restrepo] there is more money right now.... Hopefully, they'll bring me something man. They say they have work [cocaine], but they have it on hold because that needs to be settled up." Subsequent conversations similarly indicated that Restrepo had several "girls," referring to kilograms of cocaine for sale. (A990, 998-999.)

Ultimately, Torres was unable to maintain a working relationship with Restrepo for two reasons. First, Torres could not pay off the drug debt; and second, Torres

angered Restrepo when he returned one of six kilograms, complaining to Barrientos and Ramirez that it was poor quality. As a result, Torres only purchased six kilograms of cocaine from Restrepo, notwithstanding the availability of additional kilogram quantities. (A379.)

In the Spring of 1999, at least two persons carried drug proceeds to Colombia for Restrepo. However, Restrepo became concerned about persons getting caught at the airport with large amounts of cash. Therefore, Restrepo instructed Ramirez and Barrientos to use a wire transfer service in Queens known as Pronto Envios (also used by Yusty and Elejalde). At Restrepo's instructions, Barrientos and Ramirez wired money to Colombia in $10,000 increments, broken down into four transfers of $2,500. Two or three times per week, Ramirez engaged in transfers of $10,000 each. Barrientos did the same. Restrepo kept track of his wire transfers in a notebook that listed in excess of 100 transactions, each involving a wire transfer of $2,500. (A379-390.)

On May 11, 1999, law enforcement officers in Queens conducted a motor vehicle stop involving Restrepo, Ramirez and Hector Londono. Restrepo was the driver, and the car was registered to Barrientos. Law enforcement officers seized $27,000 from a cake box in the trunk of the car. Restrepo was concerned about police involvement and directed Ramirez to take responsibility for a portion of the money. Moreover, after the police left the area, Restrepo found a pay phone, called Barrientos at the 78th Street apartment and instructed Barrientos to get rid of the

drugs, money and scales that were in the apartment. (A391-394; A558-560.)

On May 25, 1999, Restrepo, Barrientos and Ramirez were arrested at the 78th Street apartment. Pursuant to a consent search, law enforcement officers seized the counterfeit money detector, Restrepo's drug ledger concerning wire transfers, receipts for wire transfers from Pronto Envios, pagers, passports and address books. According to Ramirez, additional Pronto Envios receipts were hidden under a carpet in the apartment, but law enforcement officers did not find them. (A390; A563-564.)

C. The Indictment

On January 5, 2001, a federal grand jury in the District of Connecticut returned a Second Superseding Indictment in this case, *United States v. Rudolfo Segura, et al.*, 3:99CR85(EBB). (A1039-1057.) Count One of the Second Superseding Indictment charged Restrepo with conspiring to possess with intent to distribute fifty grams or more of cocaine base and five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 846 & 841(b)(1)(A). Count Fifteen charged Restrepo and a co-defendant with possession with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). The case was assigned to Senior United States District Judge Ellen Bree Burns.

D. The Guilty Plea

On March 28, 2001, Restrepo executed a plea agreement whereby he pleaded guilty to Count One of the Second Superseding Indictment. (A52.)

The plea agreement provided in pertinent part that Restrepo "agreed and conspired with at least one other person to possess with the intent to distribute five kilograms or more of cocaine," an "offense [that] carries a maximum penalty of life imprisonment." (A52-53.) Moreover, the Government agreed to recommend a three-level reduction under § 3E1.1 of the U.S. Sentencing Guidelines based on Restrepo's complete acceptance of responsibility. (A54-55.) The Government's recommendation was expressly "conditioned upon RESTREPO's full, complete, and truthful disclosure" to the Probation Office and the Government of the circumstances of the offense committed. *Id*. Although the parties agreed to disagree regarding the specific quantity of narcotics above five kilograms attributable to Restrepo, the plea agreement specifically noted the parties' understanding that a final narcotics "quantity determination [would] be made by the Court." (A54.)

Finally, the parties also agreed to disagree regarding the appropriateness of an upward adjustment for Restrepo's aggravating role in the offense. *Id*. During the change of plea, the Court advised Restrepo that "I would have to independently decide whether you are accepting responsibility, and if I determine not to grant you that reduction, you can't withdraw your guilty plea."

(A271.) During the change of plea, Restrepo allocuted to conspiring to possess with intent to distribute five or more kilograms of cocaine. (A264-265, 272, 283.)

E. The Government's Evidence at Sentencing

Commencing on June 25, 2001, the district court conducted a five-day sentencing hearing concerning three defendants in this case, including Restrepo. The hearing addressed the contested factual issues concerning drug quantities attributable to the defendants and their respective roles in the offense.

During the hearing, the government presented evidence tending to show that Restrepo, a Colombian national, ran a large-scale drug trafficking organization operating principally in Queens, New York, through which he distributed more than fifty kilograms of cocaine and approximately one kilogram of heroin during the period from 1997 until his arrest in May of 1999. The government presented the testimony of two law enforcement witnesses (FBI Special Agent Jon Hosney and Detective Lisa De Rienzo) and three cooperating co-defendants (Norman Arango Ramirez, Martin Torres, and Rodolfo Segura).

Through the testimony of the three cooperating co-defendants, the government proved that in 1997 alone, Restrepo organized four cocaine transactions with co-defendant Torres, involving a total of at least 14 kilograms. Moreover, from March 1998 through August

1998, Restrepo bought and organized the distribution of at least 30 kilograms of cocaine. In 1999, 500 grams of heroin, six kilograms of cocaine, and at least two more kilograms of cocaine were stored at an apartment for further distribution. (A373-374; A990, 998-999.) In the course of these transactions, Restrepo negotiated prices, authorized and organized the delivery of the drugs to Torres and others through Ramirez and Barrientos, and oversaw the collection of the drug proceeds. (A356-362, 446.)

Ramirez's testimony further proved Restrepo's role as organizer of the narcotics conspiracy. Specifically, Ramirez testified that Restrepo arranged for various individuals, including Ramirez himself, to travel to Colombia, carrying drug proceeds in amounts ranging from $20,000 to $60,000. (A367-368.) Additionally, Restrepo instructed Barrientos and Ramirez to wire money to Colombia in $10,000 increments two or three times per week through a business known as Pronto Envios. (A380-390.) For assisting in Restrepo's drug trafficking network, Restrepo paid Ramirez several hundred dollars and paid for Ramirez's room and board. (A367-369.)

The government supplemented this testimony with wiretap recordings confirming the consummation of multi-kilogram cocaine transactions. Recorded conversations further corroborated Restrepo's role as leader of the distribution network. In one such conversation, Torres and Segura discussed trying to re-negotiate the price of a six-kilogram transaction due to falling cocaine prices. Torres

stated to Segura that "Jimmy is the one that authorizes it." (A988-989.)

F. The Defense Case

The defense challenged the credibility of Ramirez, Torres, and Segura. Moreover, Restrepo offered the testimony of Samuel Valencia, owner of the nightclub Claro de Luna, where many of the narcotics transactions took place, and of Juan Diego Valencia, General Manager of the same nightclub. Samuel and Juan Diego Valencia both testified that they were unaware that Restrepo frequented their club for purposes of trafficking narcotics, and that they had never personally observed Restrepo engage in any narcotics or hand-to-hand money exchanges. Additionally, counsel for Restrepo called co-defendant Hector Barrientos to testify regarding the scope of Barrientos' dealings with Torres and Ramirez. Restrepo did not testify.

G. The Presentence Report

The Presentence Report ("PSR") prepared by the Probation Officer indicated that in light of all the evidence regarding Restrepo's role and the fact that he insisted that his role was limited to a single six-kilogram transaction, "it does not appear that he has clearly demonstrated acceptance of responsibility for the offense." (GSA 9.) The probation officer calculated Restrepo's total offense level as 38, starting from a base level of 34 for 15-50 kilograms of cocaine, *id.*, plus a four-level increase for a leadership role, with no reduction for acceptance of

responsibility. (GSA 10.) With no criminal convictions, resulting in a Criminal History Category I, the PSR's calculation resulted in a guidelines range of imprisonment of 235-293 months. (GSA 16.)

In addition, the PSR detailed the nature and circumstances of the offense charged, the defendant's other criminal conduct, and his offender characteristics, including his personal and family data, marital status, physical condition, substance abuse, mental and emotional health, educational and vocational skills, and employment record. (GSA 3-15.) The PSR also stated that there were no identified factors warranting departure from the guidelines. (GSA 17.) The PSR provided that, although "it is expected that more information about the defendant will be revealed both before and during the sentencing hearing, . . . [b]ased upon what is presently known, it is believed that a sentence within the guideline range is entirely appropriate in this case." (GSA 18.)

H. Sentencing Memoranda

Following the evidentiary hearing, the Government and Restrepo filed memoranda in aid of sentencing, in which each party proposed certain drug quantity calculations based on evidence adduced at the hearing. (A72-173.) The Government proposed that the court attribute more than 50 but less than 150 kilograms of cocaine to Restrepo, which would result in a base offense level of 36 pursuant to U.S.S.G. § 2D1.1(c)(2), increase by four levels for Restrepo's leadership role in the offense pursuant to U.S.S.G. § 3B1.1(a), and provide no reduction for

acceptance of responsibility pursuant to U.S.S.G. § 3E1.1 due to Restrepo's dishonesty. This proposal would have resulted in a total offense level of 40, subjecting Restrepo to a sentencing range under the Guidelines of 292 to 365 months. (A130-168.)

I. The District Court's Imposition of Sentence

At Restrepo's initial sentencing on October 26, 2001, although the district court noted expressly that it was "clear in [its] own mind that at least 50 kilograms was involved," the court finally assigned Restrepo responsibility for 15 to 50 kilograms as "a conservative estimate."[2] (A212; SPA39.) The court further stated that any suggestion with regard to a lesser quantity was "absolutely absurd" and "almost an insult." (A210-211; SPA37-38.) Additionally, "out of an abundance of caution," the court declined to attribute any heroin

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[2] The court explained its hesitation to attribute more than 50 kilograms to Restrepo, which the Government had sought: "Now I agree with the government's position that there was more cocaine. There had to be more cocaine in view of the discussions that Mr. Restrepo had on the telephone. But I can't really quite quantify that. It would appear that there would be more than 50 kilograms." (A211; SPA38.) The court's extraordinary caution with respect to the attribution of drug quantity highlights the seriousness with which the court applied the preponderance standard of proof.

quantities to Restrepo for purposes of sentencing. (A212; SPA39.)

The district court increased the base offense level by four levels for Restrepo's role as leader and did not award a reduction for acceptance of responsibility. (A212-213; SPA39-40.) The court stated at sentencing that "there [was] no question in [her] mind but what the Government, through that hearing, ha[d] established: Mr. Restrepo was the leader." (A212; SPA39.) The court specifically found that Restrepo "clearly was the leader of Mr. Ramirez and Mr. Barrientos," as well as the leader of several other defendants engaged to carry drug proceeds back to Colombia. (A212-213; SPA39-40.) Based on that, the court found that Restrepo "more than qualifies for the four-level enhancement for a leadership role." (A213; SPA40.)

The court found the suggestion that Restrepo's sentence be reduced for acceptance of responsibility "mind-boggling" and "simply out of the question." (A213; SPA40.) The court was "troubled" by the similarity of testimony between Barrientos and Restrepo, and mentioned that it had previously given an obstruction-of-justice enhancement to Barrientos for his testimony, which the court believed to "be clearly perjurious," but declined to give such an enhancement to Restrepo because he did not testify. (A213; SPA40.)

The court then found that the resulting offense level of 38, at intersection with a Criminal History Category I, presented a sentencing range of 235 to 293 months.

(A213; SPA40.) The court brought up its "concern about the fact that there might have been more than 50 kilograms," which would place Restrepo in the next sentencing guideline range, which would begin at 292 months. (A214; SPA41.) With respect to that, the court stated "[a]nd if I were to have documented that position, I would have sentenced the Defendant to the bottom of that guideline range. And so the sentence falls within both categories." (A214; SPA41.) The court then imposed a 293-month sentence on Restrepo to be followed by a five-year period of supervised release. (A213-214; SPA40-41.)

J. The Initial Appeal

On November 1, 2001, Restrepo filed a timely notice of appeal. (A218.) On appeal, Restrepo challenged, among other things, the district court's use of a preponderance standard with regard to drug quantities, its imposition of a four-level role enhancement and its refusal to reduce the offense level for acceptance of responsibility.

On February 27, 2004, this Court summarily affirmed the district court's judgment with respect to Restrepo. *United States v. Williams,* 90 Fed.Appx. 412, 413, 2004 WL 362934, *1 (2d Cir. 2004). On January 24, 2005, the United States Supreme Court granted *certiorari* and remanded the case to this Court for further consideration in light of *United States v. Booker,* 543 U.S. 220 (2005). *Restrepo v. United States,* 543 U.S. 1000 (2005). On March 16, 2005, before *United States v. Fagans*, 406 F.3d 138 (2d Cir. 2005) was decided, this Court ordered a limited remand in this case in light of *Booker* and this

Court's decision in *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). (GA 1.) On September 27, 2005, the district court ordered simultaneous briefing from the parties on the question of whether it would have imposed a non-trivially different sentence in the case if the Sentencing Guidelines had been advisory. Restrepo and the government agreed that, because the defendant had preserved claims under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), at his original sentencing, a full resentencing was required by *United States v. Fagans*, 406 F.3d 138, 142 (2d Cir. 2005).

K. The Resentencing Hearing

On January 9, 2006, Judge Burns presided over the hearing for a full resentencing. At the resentencing hearing, Judge Burns determined that the same sentence would be appropriate even under the now-advisory Guidelines. She therefore vacated Restrepo's original judgment and imposed an sentence identical to his original sentence. (A1161; SPA175.) Restrepo now appeals the district court's resentencing determination on a number of grounds.

SUMMARY OF ARGUMENT

The district court's sentence of 293 months of incarceration was reasonable in light of all the factors set forth in 18 U.S.C. § 3553(a). The district court correctly calculated the Sentencing Guidelines, and properly accounted for all the relevant sentencing factors, such as drug quantity, leadership role and lack of acceptance of

responsibility using the preponderance standard of proof. As this Court has repeatedly held after *Booker*, neither the Due Process Clause nor the Sixth Amendment requires proof beyond a reasonable doubt when calculating a defendant's advisory guidelines sentencing range.

The district court properly considered the § 3553(a) factors and imposed a sentence that reflected the nature and circumstances of the offense, the need for specific and general deterrence, punishment and the protection of society from further crime, and that was not greater than necessary. In imposing a reasonable sentence, the district court reasonably found no unwarranted sentencing disparity among Restrepo and his co-defendants because his co-defendants were not similarly situated. Unlike his co-defendants, Restrepo was responsible for 15 to 50 kilograms of cocaine, received a leadership role enhancement, and was denied credit for acceptance of responsibility.

Moreover, the district court did not plainly err in its procedure for conducting a *Fagans* resentencing because it did reconsider the guideline range and § 3553(a) factors. The court complied with Fed. R. Crim. P. 32 and the Due Process Clause by providing Restrepo a full and fair opportunity to present his position at his resentencing hearing. Restrepo was permitted to introduce documentary evidence of his post-sentencing rehabilitation and to address the court without limitation from the podium. Restrepo offers no support for his novel argument that the district court erred in declining to allow him to provide this information from the witness stand.

ARGUMENT

I. The 293-Month Within-Guidelines Sentence Re-Imposed by the District Court on a Post-*Booker* Remand for Resentencing Was Reasonable

A. Governing Law and Standard of Review

The Sentencing Guidelines are no longer mandatory, but rather represent one factor a district court must consider in imposing a reasonable sentence in accordance with Section 3553(a). *See United States v. Booker*, 543 U.S. 220, 258 (2005); *see also United States v. Crosby*, 397 F.3d 103, 110-18 (2d Cir. 2005). Section 3553(a) provides that the sentencing "court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection," and then sets forth seven specific considerations:

> (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 [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).

In *Crosby*, this Court explained that, in light of *Booker*, district courts should now engage in a three-step sentencing procedure. First, the district court must

determine the applicable Guidelines range, and 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." *Crosby*, 397 F.3d at 112. Second, the district court should consider whether a departure from that Guidelines range is appropriate. *Id.* at 112. Third, the court must consider the Guidelines range, "along with all of the factors listed in section 3553(a)," and determine the sentence to impose. *Id.* at 112-13. The fact that the Sentencing Guidelines are no longer mandatory does not reduce them to "a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge." *Id.* at 113. A failure to consider the Guidelines range and to instead simply select a sentence without such consideration is error. *Id.* at 115.

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

Court will review sentences for their substantive reasonableness – that is, whether the length of the sentence is reasonable in light of the applicable Guidelines range and the other factors set forth in Section 3553(a). *Crosby*, 397 F.3d at 114.

As this Court has held, "'reasonableness' is inherently a concept of flexible meaning, generally lacking precise boundaries." *Crosby*, 397 F.3d at 115. The "brevity or length of a sentence can exceed the bounds of 'reasonableness,'" although this Court has observed that it "anticipate[s] encountering such circumstances infrequently." *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005); *cf. United States v. Godding*, 405 F.3d 125, 127 (2d Cir. 2005) (per curiam) (noting, in connection with *Crosby* remand, "that the brevity of the term of imprisonment imposed . . . does not reflect the magnitude" of the crime).

An evaluation of whether the length of the sentence is reasonable will necessarily "focus . . . on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a)." *United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005); *see Booker*, 543 U.S. at 261 (holding that factors in § 3553(a) serve as guides for appellate courts in determining if a sentence is unreasonable). As the Eighth Circuit has observed, a sentence "may be unreasonable if [it] fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving

at a sentence that lies outside the limited range of choice dictated by the facts of the case." *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir.), *cert. denied*, 126 S. Ct. 276 (2005).

To fulfill its duty to consider the Guidelines, the district court will "normally require determination of the applicable Guidelines range." *Id.* at 1002. "An error in determining the applicable Guideline range . . . would be the type of procedural error that could render a sentence unreasonable under *Booker*." *United States v. Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005); *cf. United States v. Rubenstein*, 403 F.3d 93, 98-99 (2d Cir.) (declining to express opinion on whether an incorrectly calculated Guidelines sentence could nonetheless be reasonable), *cert. denied*, 126 S. Ct. 388 (2005). Although this Court has declined to adopt a formal presumption that a within-Guidelines sentence is reasonable, it has "recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006); *see also United States v. Rattoballi*, 452 F.3d 127, 133 (2d Cir. 2006) ("In calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.").

The Court has recognized that "[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to

review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge 'exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.'" *Fernandez*, 443 F.3d at 27 (citations omitted). In assessing the reasonableness of a particular sentence imposed,

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

United States v. Fairclough, 439 F.3d 76, 79-80 (2d Cir. 2006) (per curiam) (quoting *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005)) (alteration omitted), *cert. denied*, 126 S. Ct. 2915 (2006).

B. Discussion

1. The District Court Properly Calculated the Defendant's Guidelines Range Using the Preponderance Standard of Proof

Restrepo argues that the district court erred at sentencing by calculating his offense level using the preponderance standard of proof, rather than requiring the government to establish drug quantity, leadership role, and lack of acceptance of responsibility beyond a reasonable doubt.

As Restrepo himself acknowledges, however, this Court has repeatedly reaffirmed in the wake of *Booker* that a district court need only find sentencing factors proved by a preponderance of the evidence when calculating a defendant's advisory Guidelines range. *United States v. Florez*, 447 F.3d 145, 156 (2d Cir. 2006) (holding that defendant's argument that the judge could not find drug quantity by a preponderance "is foreclosed by our decision in *United States v. Garcia,* which holds that '[j]udicial authority to find facts relevant to sentencing by a preponderance of the evidence survives *Booker.'* 413 F.3d 201, 220 n.15 (2d Cir. 2005)."); *United States v. Vaughn*, 430 F.3d 518, 525 (2d Cir. 2005), *cert. denied*, *Lindo v. United States*, 126 S. Ct. 1665 (2006) ("We reiterate that, after *Booker,* district courts' authority to determine sentencing factors by a preponderance of the evidence endures and does not violate the Due Process Clause of the Fifth Amendment."); *United States v. Gonzalez,* 407 F.3d

118, 125 (2d Cir. 2005) (noting that district courts retain the authority post-*Booker* "to resolve disputed facts by a preponderance of the evidence when arriving at a Guidelines sentence").

Restrepo relies principally on language in two prior opinions of this Court which had suggested in *dicta* that, for sentencing purposes, a district court might in extreme circumstances consider applying a more demanding standard of proof. *See United States v. Shonubi*, 103 F.3d 1085, 1089 (2d Cir. 1997); *United States v. Gigante*, 94 F.3d 53, 56 (2d Cir. 1996). As Restrepo candidly acknowledges, however, this Court has subsequently recognized that statements to this effect in *Shonubi* were dicta, and in fact reversed a district court's decision to apply a higher standard in reliance on *Shonubi*. *United States v. Cordoba-Murgas*, 233 F.3d 704, 708 (2d Cir. 2000). In *Cordoba-Murgas*, this Court held that the preponderance standard must be applied when calculating an offense level based on defendant's commission of relevant conduct.

Although the Court in *Cordoba-Murgas* suggested that a district court retains discretion to downwardly depart in the event it has "substantial doubts whether the defendant [was] in fact responsible" for relevant conduct that forms the basis for an enhancement, there was no indication in the present case that Judge Burns harbored such "substantial doubts." Judge Burns' decision to impose a sentence at the high end of the applicable Guidelines range, and her refusal to impose a non-Guidelines sentence, reinforces the conclusion that she had no desire

to exercise the limited authority conferred by *Cordoba-Murgas*. Indeed, this Court held as much in Restrepo's initial appeal: It found no plain error because "the record does not indicate that the district court had substantial doubts about any of the findings relevant to this claim," *United States v. Williams,* 90 Fed.Appx. 412, 414, 2004 WL 362934, *1 (2d Cir. 2004), and Restrepo did not "ask the district court to downwardly depart based on the standard of proof," *id.* Because Restrepo made the same arguments, and Judge Burns made the same findings, during the resentencing hearing, Restrepo's claims must again fail.

2. The District Court Reasonably Considered the Various Factors Set Forth in 18 U.S.C. § 3553(a)

The district court's imposition of the 293-month sentence at Restrepo's resentencing was reasonable because it considered a properly calculated advisory guidelines range and properly considered the factors listed in 18 U.S.C. § 3553(a). Although district courts are still required to consider the applicable Guidelines sentencing range, the reasonableness inquiry ultimately "will 'focus primarily on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a).'" *United States v. Fairclough*, 439 F.3d 76, 80 (2d Cir. 2006) (quoting *United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005)). "As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about

such materials or misperception of their relevance, we will accept that the requisite consideration has occurred." *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005); *see also United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006) ("[W]e presume, in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the statutory factors."); *Crosby*, 397 F.3d at 113 (rejecting the need for "robotic incantations" by district judges to demonstrate that they have "considered" the Guidelines).

a. The District Court Properly Considered the Sentencing Guidelines

At the resentencing hearing, the district court discussed its original sentence of Restrepo, A1157; SPA171, and the five-day sentencing hearing, at which was addressed, "among other things, the quantity of the cocaine which should be attributed to this Defendant, whether or not he played a role in the offense, and whether or not he accepted responsibility for the actions in which he had been engaged," A1158; SPA172. The district court also reviewed its determination of the 15 to 50 kilogram quantity of cocaine that was attributable to Restrepo, and the evidence on which that determination was based, and stated that "[a]t the time I said, and continue to believe that that was a conservative estimate of how much should be attributable to the defendant." (A1158; SPA172.)

The district court also discussed the evidence supporting the role enhancement as a leader, A1158-1159;

SPA172-173, and the fact that, although it did not include an obstruction-of-justice enhancement in its sentencing of the Restrepo, "it's my belief that Mr. Restrepo suborned [Barrientos'] perjury." (A1160; SPA174.) The district court went on to state "[s]o, when I gave him – these sentences I did give, I had all of those things in front of me." (A1160; SPA174). The district court acknowledged that the "sentencing guidelines are not mandatory," A1161; SPA175, but were "a factor, along with all the other evidence that I've just enumerated, the Court has to take into consideration," A1162; SPA176, and concluded, "I believe, in this instance, it was a reasonable – indeed, it was a conservative but reasonable – assessment of Mr. Restrepo's involvement in this offense," A1162; SPA176. Based on that, the district court stated, "I do not believe that there is a basis under the law for me to change the sentence at this time." (A1162; SPA176.)

b. The District Court Properly Considered the § 3553(a) Factors

At resentencing, immediately after addressing the evidence supporting its guideline calculation, the district court specifically stated, "[o]f course, we also have the statutory considerations, which are set forth in 3553." (A1160; SPA174.) As discussed below in Section 3, the district court had already discussed the need to avoid unwarranted sentence disparities. 18 U.S.C. § 3553(a)(6). The district court next considered several other § 3553(a) factors as they each applied specifically to Restrepo. The district court considered the "nature of the circumstances of the offense," § 3553(a)(1), and stated "this was a major

drug conspiracy." (A1160; SPA174). As to the "the need for the sentence to reflect the seriousness of the offense and just punishment for it," § 3553(a)(2)(A), the district court reiterated, "I believe this was a major drug conspiracy. Mr. Restrepo was sending back to Colombia a great deal of money, obviously indicating it was a successful conspiracy." (A1160; SPA174.)

In considering the "element of deterrence, not only as it relates to the defendant in front of us, but general deterrence of society;" § 3553(a)(2)(B), the district court remarked, "We can't permit persons who have engaged in such egregious behavior to be the beneficiary of a light sentence, which would be interpreted by the public as being some concept, on the part of the Court, that this wasn't a very serious offense after all." (A1160; SPA174.)

Finally, the district court considered "the element of public protection," § 3553(a)(2)(C), and stated, "Mr. Seifert, it's your expectation that Mr. Restrepo will be returned to Colombia and, therefore, it would appear that he would not be a menace to the public of the United States. I don't know about his own country. Certainly not here, as long as he's no longer with us." (A1160-1161; SPA174-175.) The district court then concluded that "[h]aving taken all those factors into consideration, I have determined that I would not impose a nontrivially different sentence on Mr. Restrepo, and I adhere to the original sentence which was imposed." (A1161; SPA175.)

The district court reiterated that it had read both parties' resentencing briefs, and had given them

consideration, but adhered to the original sentence. (A1163; SPA177.) The district court then vacated the original sentence, and resentenced Restrepo to 293 months of imprisonment and a five-year term of supervised release – the same sentence it had originally imposed. (A1164-1165; SPA178-179.)

In addition to the reasoning above, the district court's resentence, like its original sentence, was consistent with the recommendation contained in the PSR, which also contained Restrepo's personal history and characteristics at the time of the original sentencing.[3] *See* 18 U.S.C. § 3553(a)(1); *Fernandez*, 443 F.3d at 29 (quoting *United States v. Jiménez-Beltre*, 440 F.3d 514, 519 (1st Cir. 2006) (en banc)) ("[A] court's reasoning can often be inferred by comparing what was argued by the parties or contained in the pre-sentence report with what the judge did.")).

The reasonableness of the sentence is reinforced by the markedly conservative approach taken by the district court in calculating Restrepo's advisory guidelines range. The court emphasized that although the evidence supported a finding that Restrepo was responsible for over 50 kilograms of cocaine, it nevertheless assigned him a lower offense level out of an abundance of caution. (A212; SPA39.) Moreover, the court opted not to consider the heroin that could have been attributed to Restrepo. (A212; SPA39.) Nor did the court enhance Restrepo's offense level for obstruction of justice, based on what it found to be his subornation of perjury by Barrientos at the

[3] There was no request to amend the original PSR.

evidentiary hearing, which the district court had concluded was "troubling." (A213; SPA40.)

Rather, the 293-month sentence was within the guideline range established for all defendants who engage in a massive drug conspiracy that involves between 15 and 50 kilograms of cocaine, who receive a four-level role enhancement as one of the two leading suppliers of cocaine to an organization that further distributes the drugs, and who do not receive any reduction for acceptance based on failing to admit to the quantity of cocaine attributable to them, as established by a five-day evidentiary hearing.

Thus, it is clear that the district court did not exceed the bounds of its discretion, and properly considered the sentencing guidelines and the § 3553(a) factors as required by *Fernandez*.

3. The District Court Reasonably Concluded That a Within-Guidelines Sentence Created No Unwarranted Sentencing Disparities with Similarly Situated Defendants

Restrepo argues that his sentence reflected an unwarranted sentencing disparity when compared to those co-defendants who were first-time drug conspirators who pleaded guilty in this case. Def. Brief at 27-29.

This Court has recently recognized that, while the language of 18 U.S.C. § 3553(a)(6) appears to allow

judges to consider disparities in sentences of co-defendants in the same case, it is an open question in this circuit whether such a disparity would support imposition of a non-Guidelines sentence. *Fernandez*, 443 F.3d at 32 n.9. The *Fernandez* court noted there is authority for the proposition that § 3553(a)(6) was intended to address *nationwide* disparities in sentencing, not disparities between or among co-defendants. *Id*. In *Fernandez*, this Court did not decide the issue, though, because the co-defendants were not similarly situated. *Id*.

The Court has also held that, even if a disparity between co-defendants were an appropriate argument for leniency, it would not necessarily require a lesser sentence, because § 3553(a)(6) is just one of several factors a sentencing court must consider in selecting the appropriate punishment. *Id*. at 30-31. When a sentencing court chooses to address co-defendant sentencing disparity, it "'is a matter firmly committed to the discretion of the sentencing judge and is beyond our [appellate] review, as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented.'" *United States v. Florez*, 447 F.3d 145, 157-58 (2d Cir. 2006) (quoting *Fernandez*, 443 F.3d at 32).

In *Florez*, based on the fact that the sentencing judge considered and addressed the sentencing disparity between Florez and his co-defendant, the Court noted that "Florez cannot complain that the district court committed procedural error in failing fully to consider § 3553(a)(6)." *Fernandez*, 443 F.3d at 27. The Court concluded that Florez's "reasonableness challenge reduces, at best, to a

complaint about the weight the district court afforded the disparity between his Guidelines range and his brother's sentence;" adding "[t]his is not a point on which we are inclined to second-guess a sentencing judge." *Id.*

Here, the district court explicitly addressed the sentencing-disparity issue at the resentencing hearing. The court stated, "We have a case with 34 defendants, codefendants, but each one of them had a different performance in the conspiracy. So, I think that when you talk about unwarranted disparity, you mean between persons who have similar situations, do you not?" (A1139; SPA153.) Restrepo's counsel agreed. (A1139; SPA153.) The district court also addressed Restrepo's argument regarding co-defendant Segura, stating that it believed "he was the first cooperating," A1139; SPA153, and in response to Restrepo's counsel's assertion that Segura was the kingpin, it stated "I do not believe that the evidence which was before this Court would support that allegation," A1158; SPA172.

Moreover, with respect to co-defendant Hector Barrientos, Restrepo was also not similarly situated. The quantity attributable to Barrientos was between 5 and 15 kilograms of cocaine, resulting in offense level 32, two levels lower than for Restrepo's quantity of between 15 and 50 kilograms. Like Restrepo, Barrientos did not receive a reduction for acceptance; but unlike Restrepo, he did not receive a four-level role enhancement for leadership. (Barrientos, unlike Restrepo, received a two-point increase for obstruction of justice for lying on the witness stand.) Like Restrepo, Barrientos was sentenced

within the guideline range that reflected his specific conduct. In Barrientos's case, that was level 34. For Restrepo, it was level 32. *Fernandez*, 443 F.3d at 32 (noting co-defendants are "not similarly situated for many reasons, not the least of which was that Elias, unlike his daughter, qualified under the Guidelines for a three-level reduction for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1 and a two-level 'safety valve' reduction pursuant to U.S.S.G. §§ 2D1.1(b)(7) and 5C1.2"). Further, as the district court found, the other first-time drug conspirators in this case who pleaded guilty are not similarly situated to Restrepo.[4]

Restrepo attempts to bolster his argument by asking this Court, "*[o]n the national scale, is there even one other federal inmate who pled guilty to a 6-kilogram non-violent drug conspiracy and as a first offender received 293 months?*" Def. Brief at 30. (Emphases in original.) That question, however, presumes an improper basis of comparison. Restrepo did not plead guilty to a 6-kilogram drug conspiracy. Restrepo pleaded guilty to conspiring to possess with intent to distribute 5 *or more* kilograms of cocaine. (A264-265, 272, and 283.) Moreover, the plea agreement set forth that the parties agreed to disagree regarding the specific quantity of narcotics above five kilograms attributable to Restrepo, and specifically noted

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[4] Should this Court wish to gain a more complete understanding of the circumstances affecting the sentences of co-defendants, the Government would make available the Presentence Reports of these other defendants for transmission to this Court *ex parte* under seal for this Court's review.

Restrepo's understanding that a final narcotics "quantity determination [would] be made by the Court." (A55.)

Here, the proper basis for comparison is to defendants who were leaders of a massive cocaine conspiracy, who refused to accept responsibility for their conduct. In that regard, Restrepo received a sentence that fell within the guideline range established for that conduct; a guideline range that was established to achieve the uniform and appropriate treatment of like crimes across the nation and similarly situated defendants. *Fernandez*, 443 F.3d at 27 ("this Court has recognized that "a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances"); *see also Rattoballi*, 452 F.3d at 133-34 (the Guidelines were established to avoid unwarranted sentencing disparities across the nation).

Restrepo fails to identify facts showing there was an *unwarranted* disparity between his sentence and those of his co-defendants. The district court sentenced Restrepo within a properly calculated guidelines range, based on his role as a leader, his failure to accept responsibility for his misconduct and a conservative estimate of the drug quantity attributable to him. Thus, there was no unwarranted disparity, either on a nationwide basis or among co-defendants. The fact that Restrepo received a sentence greater than his co-defendants does not make the district court's sentence unreasonable.

4. The Sentence Was Not "Greater Than Necessary"

Restrepo claims that his sentence was "greater than necessary," quoting 18 U.S.C. § 3553(a). Def. Brief at 31. 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." Section 3553(a)(2) provides that such purposes are:

> (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.

Restrepo does not appear to argue, and points to no evidence suggesting, that the district court did not consider the factors listed in § 3553(a)(2). Def. Brief at 32. Instead, Restrepo appears to limit his argument here to a challenge to the district court's failure to "explain why the 293 month sentence was not greater than necessary." *Id.* at 33; *see also id.* at 32.

This Court has held that there is no requirement that a sentencing judge assign any particular weight to any given argument made pursuant to one of the § 3553(a) factors, "as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented." *Fernandez*, 443 F.3d at 32 (citing *Jiménez-Beltre,* 440 F.3d at 519 ("Assuming a plausible explanation and a defensible overall result, sentencing is the responsibility of the district court.")). Such a determination is "a matter firmly committed to the discretion of the sentencing judge and is beyond our review." *Id.* Because, as demonstrated above, the district court's imposition of a sentence at Restrepo's resentencing was reasonable under all the circumstances, this argument adds nothing to the reasonableness analysis.

Further, under a reasonableness analysis, a sentencing judge is not required to identify at which exact point a sentence would become 'greater than necessary' or unreasonable, but only to consider the § 3553(a) factors in its sentencing decision and provide reasons for the sentence it imposes sufficient to permit this Court's review for reasonableness. This Court has recently

> emphasized that 'reasonableness' is inherently a concept of flexible meaning, generally lacking precise boundaries, that a reviewing court should exhibit restraint in assessing reasonableness, that we anticipate encountering . . . circumstances [warranting rejection of a sentence as unreasonable] infrequently, and that we would not fashion any *per se* rules as to the reasonableness of every sentence within an applicable guideline or the

> unreasonableness of every sentence outside an applicable guideline.

United States v. Jones, No. 05-2289-cr, 2006 WL 2167171, *3 (2d Cir. Aug. 2, 2006) (alterations in original) (internal citations and quotation marks omitted).

Even though the sentencing judge in *Jones* "gave no specific articulation as to why 15 months was the appropriate amount of punishment, *i.e.,* why the sentence was 15 months, rather than, say, 14 or 16 months," this Court nonetheless held the judge's oral explanation selecting a non-guideline sentence constituted "a sufficient statement of reasons for [the sentencing judge's] non-Guidelines sentence to permit our review for reasonableness." *Id.* at *3-*4. The Court expressly declined "to impose a requirement for such specific articulation of the exact number of months of an imposed sentence." *Id.* at *3. The Court explained that "[s]election of an appropriate amount of punishment inevitably involves some degree of subjectivity that often cannot be precisely explained . . . [and that] a sentencing judge has many available guideposts in ultimately selecting an amount of punishment." *Id.; see also Fernandez*, 443 F.3d at 29 ("Consideration of the § 3553(a) factors is not a cut-and-dried process of factfinding and calculation; instead, a district judge must contemplate the interplay among the many facts in the record and the statutory guideposts. That context calls for us to 'refrain[] from imposing any rigorous requirement of specific articulation by the sentencing judge.'") (quoting *Crosby*, 297 F.3d at 113); *Fairclough,* 439 F.3d at 80 ("We have stated . . . that '*per*

se rules would be inconsistent with the flexible approach courts have taken in implementing the standard of reasonableness in the sentencing contexts to which this standard applied prior to *Booker/Fanfan'* and we therefore 'decline[d] to fashion any *per se* rules as to the reasonableness of every sentence within an applicable guideline or the unreasonableness of every sentence outside an applicable guideline'") (quoting *Crosby*, 297 F.3d at 115).

The reasoning in *Jones* applies with equal force to Restrepo's argument that the district court should have explained why Restrepo's sentence was not greater than necessary. Although the district court was not required to specifically address the "greater than necessary argument," at his resentencing, the district court nevertheless implicitly did so. Restrepo set forth this argument in his resentencing brief, A1089, 1105-06, which the district court read. (A1157, SPA171). Restrepo also raised this argument at the resentencing hearing. (A1134-35, SPA 148-49.) Judge Burns**,** as noted above, considered each of the underlying purposes of § 3553(a)(2), A1160-61, SPA 174-75, thus implicitly finding that the sentence was not greater than necessary. *See Fernandez,* 443 F.3d at 29 ("we entertain a strong presumption that the sentencing judge has considered all arguments properly presented to her, unless the record clearly suggests otherwise. This presumption is especially forceful when, as was the case here, the sentencing judge makes abundantly clear that she has read the relevant submissions and that she has considered the § 3553(a) factors.").

As in *Jones*, the district court did not need to further identify at which exact point a sentence would become greater than necessary.[5] The resentencing record as it stands is sufficient to permit this Court to review the sentence it imposed for reasonableness.

5. The District Court Did Not Plainly Err by Allowing the Defendant to Address the Court Personally Regarding His Post-Sentencing Rehabilitation, Though Not from the Witness Stand

Restrepo asserts that the district court misconstrued its role at the resentencing hearing and committed procedural and structural error in the process. First, he asserts that the sentencing court failed to understand that it was dealing with a full *Fagans* resentencing, as opposed to a more limited resentencing pursuant to *Crosby,* in that it did not reconsider the guideline range or the § 3553(a) factors, thus presuming the sentence was reasonable. Def. Brief at 35. As set forth above, in Section 2, Restrepo is mistaken.

---

[5] Moreover, Restrepo did not object at the resentencing to a lack of explanation of why the sentence was not greater than necessary. In *Fernandez*, 443 F.3d at 30, this Court cited with approval *United States v. Ayers,* 428 F.3d 312, 315 (D.C.Cir. 2005), which explained "that when a defendant fails to object to the lack of an explanation on the record for the imposition of a sentence within the Guidelines range, the court begins its review with the presumption that the district court knew and applied the law correctly."

Next, Restrepo argues that because the sentencing court was faced with a full-blown resentencing hearing, he should have been allowed to testify – under oath and from the witness stand – about his post-sentencing rehabilitative efforts. He asserts: "Unfortunately, at the beginning of the hearing, when the defendant attempted to testify about his rehabilitation and good conduct for the past four years at Fort Dix, the Court would not let him testify." *Id.* at 34. Despite the fact that a court traditionally enjoys broad discretion in the conduct of sentencing proceedings, Restrepo further argues that it constitutes structural error for the district court to deny him the opportunity to testify under oath. He claims: "This constitutes reversible constitutional error. The defendant should have been allowed to present evidence about his conduct since 2001 *by testifying*." *Id.* at 35 (emphasis in the original). Thus, he is arguing that when this Court remands a case for resentencing and the district court proceeds according to *Fagans*, the well-established rules and practices for sentencing should be altered to require a district court to permit a defendant to address the court from the witness stand and under oath; and failure to do so requires reversal, notwithstanding the fact that the sentencing court fully complies with Fed. R. Crim. P. 32.

As an initial matter, the government disputes Restrepo's characterization of the proceedings below. The sentencing court did not refuse to allow him to testify. Instead, the following transpired:

> MR. SEIFERT: Thank you, Your Honor. And for the record, Conrad Ost Seifert, CJA

representing the Defendant, Jimmy Augusto Restrepo.

Your Honor, as a preliminary matter, may I inquire of the Court if my client would be allowed to take the witness stand to testify as regards to some of the courses he's taken at Fort Dix from, let's say, the end of 2001, roughly, through now. I have various diplomas.

THE COURT: Why would[n't] the diplomas be sufficient, sir? And besides which, I don't believe that his post-sentencing rehabilitation is an issue. But I will certainly say that you can have the exhibits marked.

* * *

MR. SEIFERT: It's similar to a normal sentencing hearing. At the hearing end, will the Defendant be allowed to briefly address the Court?

THE COURT: Certainly.

MR. SEIFERT: Okay. Thank you. . . .

(A1132; SPA146.) Thus, rather than precluding Restrepo from taking the witness stand at the sentencing hearing, the court suggested a reasonable alternative, that is, marking as exhibits the diplomas and certificates Restrepo had earned after his original sentencing hearing, and permitting him to address the court. The reasonableness of this

suggestion was readily apparent to counsel who did not object.

Where, as here, the defendant fails to object to the alleged error, plain error is the appropriate standard of review. Fed R. Crim. P. 52(b). *See Johnson v. United States*, 520 U.S. 461, 468 (1997); *United States v. Olano*, 507 U.S. 725, 734 (1993). Under plain error review, before an appellate court may correct an error which was not raised before the district court, there must be (1) "error," (2) that is "plain," and (3) that "affect[s] substantial rights." *Id.* at 732. Only if all three conditions are met may an appellate court then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id*. As set forth below, the defendant has failed to satisfy any of the plain error standards.

First, the defendant has failed to demonstrate that the sentencing court committed any error. Rule 32 of the Federal Rules of Criminal Procedure, which governs sentencing hearings, requires simply that:

> Before imposing sentence, the court must:
>
> (i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;
>
> (ii) address the defendant personally in order to *permit the defendant to speak or present any information to mitigate the sentence*;

Id. (emphasis added.) Notably, the rule does not require the defendant to be sworn before addressing the court, nor does it require that he address the court from any particular location within the courtroom. *United States v. Anati*, 2006 WL 2075128, *1 (2d Cir. 2006) ("[b]efore imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant, and afford the defendant an opportunity to make a statement and to present any information in mitigation of punishment," and "to afford counsel for both sides an opportunity to comment on the probation officer's determination [in the presentence report] and on other matters relating to the appropriate sentence.") (internal citations and quotation marks omitted). Under Rule 32, the "procedure to be followed lies within the sound discretion of the sentencing judge." *United States v. Robin*, 545 F.2d 775, 779 (2d Cir. 1976); *see also United States v. Pugliese*, 805 F.2d 1117, 1123 (2d Cir. 1986) (same).

Here, the sentencing court complied with the provisions of Rule 32 when it permitted counsel to address the court, A1131-1140, 1144-1150; SPA 145-154,158-164; permitted the reading of letters from friends and family members, A1151-1156; SPA 165-170; and permitted the defendant to address the sentencing court without limitation, A1156-1157; SPA 170-171. In short, although the defendant did not address the sentencing court from the witness stand, he was permitted to address the court in compliance with Rule 32. There was no error.

Nor has the defendant satisfied the second prong of plain error analysis, that any error was plain, in the sense

of "clear or obvious." He cites no authority in support of his claim that the district court was obliged to hear the defendant from the witness stand instead of the podium or defense table. Neither Rule 32 nor any other statute or constitutional provision requires that the defendant be permitted to address the sentencing court from the witness stand. *See United States v. Maurer*, 226 F.3d 150, 151 (2d Cir. 2000) ("procedures used at sentencing are within the discretion of the district court so long as the defendant is given an adequate opportunity to present his position as to matters in dispute"; the Due Process Clause or the federal Sentencing Guidelines do not require "a full-blown evidentiary hearing") (internal citations and quotation marks omitted); *United States v. Slevin*, 106 F.3d 1086, 1091 (2d Cir. 1996) (same). Absent any clear, controlling precedent to the contrary, it cannot be said that any hypothetical error here was "plain." *Cf. United States v. Whab*, 355 F.3d 155, 158 (2d Cir.) (noting that "'[w]ithout a prior decision from this court or the Supreme Court mandating the jury instruction that [defendant], for the first time on appeal, says should have been given, we could not find any such error to be plain, if error it was'") (quoting *United States v. Weintraub*, 273 F.3d 139, 152 (2d Cir. 2001)), *cert. denied*, 541 U.S. 1004 (2004).

The defendant has likewise failed to satisfy the third prong of plain error analysis by proving that he suffered prejudice from the alleged error, in that "it affected the outcome of the district court proceedings." *United States v. McLean*, 287 F.3d 127, 135 (2d Cir. 2002) (internal citations and quotation marks omitted); *see also United States v. Vonn*, 535 U.S. 55, 57 (2002); *Olano*, 507 U.S. at

734-35; *United States v. Gore*, 154 F.3d 34, 47 (2d Cir. 1998). Other than his sweeping claim that, "[h]ad he testified, he represents that he could have shown that his educational and translating efforts were well beyond what all inmates do" (Def. Br. at 35), he does not share with this Court what evidence he would have elicited from the witness stand as opposed to the podium or defense table, or how the unspecified testimony would have made a difference. Restrepo in fact took the opportunity to speak about his post-sentencing rehabilitation when he was permitted without limitation to address the district court. At that time, Restrepo stated, "[a]lso during my time at Fort Dix, I helped other inmates improve and get on with their lives in helping them obtain their GED there at Fort Dix." (A1157; SPA171). Absent any showing that he was inhibited from providing relevant information to the sentencing court, Restrepo has failed to satisfy his burden of establishing prejudice.

Finally, Restrepo has not satisfied the fourth, discretionary prong of plain-error analysis, that "the forfeited error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." *Johnson*, 520 U.S. at 469-70. As set forth above, the sentencing court complied with Rule 32 and permitted the defendant to address the court in mitigation of sentencing. The solemnity and importance of the sentencing proceeding could not have been materially enhanced by the defendant's taking the witness stand, and the decision to hear Restrepo from counsel table certainly cannot be said to have undermined the integrity or reputation of the

proceedings. Nor does the defendant assert that the procedure followed by the court did so.

The sentencing hearing was conducted in compliance with Rule 32 and was otherwise fair. The defendant's belated claim of procedural error should be rejected on appeal.

CONCLUSION

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

Dated: August 14, 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 12,676 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

FELICE M. DUFFY
ASSISTANT U.S. ATTORNEY

ADDENDUM

Rule 32, Federal Rules of Criminal Procedure – Sentencing and Judgment

* * *

(i) Sentencing.

(1) In General. At sentencing, the court:

* * *

(4) Opportunity to Speak.

(A) By a Party. Before imposing sentence, the court must:

(i) provide the defendant's attorney an opportunity to speak on the defendant's behalf;

(ii) address the defendant personally in order to permit the defendant to speak or present any information to mitigate the sentence; and

(iii) provide an attorney for the government an opportunity to speak equivalent to that of the defendant's attorney.

* * *

Rule 52, Federal Rules of Criminal Procedure

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Title 18, United States Code, Section 3553

(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.

(b) Application of guidelines in imposing a sentence.--

(1) In general.--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing

guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.--

(A) Sentencing. – In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless –

(i) the court finds 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 should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) 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, taking account of any

amendments to such sentencing guidelines or policy statements by Congress;

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

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with

any amendments to such guidelines or policy statements by act of Congress.

(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.

United States Sentencing Guidelines

§3C1.1 Obstructing or Impeding the Administrative of Justice

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by **2** levels.

§3E1.1 Acceptance of Responsibility

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and

permitting the government and the court to allocate their resources efficiently, decrease the offense level by **1** additional level.

§ 5K2.19 Post-sentencing Rehabilitative Efforts (Policy Statement)

Post-sentencing rehabilitative efforts, even if exceptional, undertaken by a defendant after imposition of a term of imprisonment for the instant offense are not an appropriate basis for a downward departure when resentencing the defendant for that offense. (Such efforts may provide a basis for early termination of supervised release under 18 U.S.C. § 3583(e)(1).)

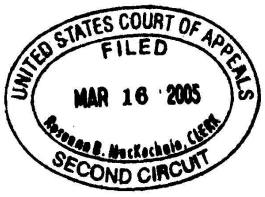
GOVERNMENT'S APPENDIX

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, at Foley Square, in the City of New York, on the 15th day of March, Two Thousand and Five,

Present:

Hon. Rosemary S. Pooler,
Hon. Sonia Sotomayor,
Hon. Richard C. Wesley,
Circuit Judges.



United States of America
Appellee,

v.

No. 01-1398

Jimmy Augusto Restrepo, Hector Barrientos, and Martin Torres,
Defendants-Appellants.

In light of the Supreme Court's decision in United States v. Booker, 125 S. Ct. 738 (2005), and this court's decision in United States v. Crosby, 397 F.3d 103 (2d Cir. 2005), this case is remanded to the district court for further proceedings in conformity with Crosby.

The disposition in the opinion or order previously issued in connection with this appeal is hereby made part of this order and is fully effective, except to the extent that it is inconsistent with the present remand in conformity with Crosby.

Any appeal taken from the district court following this remand and resentencing, if it occurs, can be initiated only by filing a new notice of appeal. See Fed. R. App. P. 3, 4(b).

A party will not waive or forfeit any appropriate argument on remand or on any appeal post-remand by not filing a petition for rehearing of this remand order.

FOR THE COURT:
Roseann B. MacKechnie, Clerk
By: Lucille Carr