06-0518-cr

To Be Argued By:
JAMES K. FILAN, JR.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-0518-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

AMOS GOODWIN, aka JB, aka Junebug,
Defendant-Appellant.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

GUIDELINES

STATEMENT OF JURISDICTION

The district court (Underhill, Stefan R., U.S. District Judge) had subject matter jurisdiction under 18 U.S.C. § 3231. Following a sentencing hearing held on January 18, 2006, (A 8-9), a final judgment entered on January 19, 2006. (A 9). The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on January 30, 2006. (A 9). This Court has appellate jurisdiction over the challenge to the defendant's sentence pursuant to 18 U.S.C. § 3742(a).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

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

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Preliminary Statement

Defendant-appellant Amos Goodwin ran a large-scale drug-trafficking organization that distributed large quantities of crack cocaine in the Greater Norwalk, Connecticut, area for many years. Goodwin and two co-defendants entered guilty pleas before the district court (Stefan R. Underhill, U.S.D.J.). At the time of sentencing, the sentencing court determined that Goodwin was an organizer or leader of a criminal organization that involved

five or more persons and was otherwise extensive. The district court sentenced the defendant on January 18, 2006, to 188 months of imprisonment, five years of supervised release and forfeiture of approximately $100,000.

On appeal, Goodwin raises but one issue: whether the district court's sentence was reasonable. For the reasons that follow, the defendant's claim should be rejected, and the judgment should be affirmed.

Statement of the Case

On April 4, 2004, a federal grand jury in the District of Connecticut returned an Indictment against five defendants alleged to be involved with drug trafficking activity in Norwalk, Connecticut, including, among others, the defendant-appellant Amos Goodwin.[1] (A 11). Count One charged Goodwin and four others with unlawfully conspiring to 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 and 21 U.S.C. § 841(a)(1) and (b)(1)(A). (A 11-12). The indictment also contained a forfeiture allegation. (A 12).

On September 1, 2005, Goodwin entered a guilty plea to Count One and agreed to forfeit $106,948. (A 17).

On January 18, 2006, the district court imposed a 188-month term of imprisonment, to be followed by a five-year

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[1] References are as follows:

Appendix ("A ___.")

term of supervised release. (A 8-9, 89). Judgment entered on January 19, 2006. (A 9). On January 30, 2006, Goodwin filed a timely notice of appeal. (A 9).

STATEMENT OF FACTS

A. Overview of the Investigation

During 2001, a confidential informant advised federal law enforcement that Goodwin and his organization, which included Goodwin as well as Troy Salkie, Alfred Brown, Emmanuel Azolin, Kavan Weise, and others, ran a cocaine-base operation in Norwalk. (PSR ¶¶ 6-7).[2] Between January 25, 2001, and October 9, 2001, that confidential informant made ten controlled narcotics purchases at the direction of federal law enforcement from either Goodwin or Weise. (PSR ¶ 10). The controlled purchases ranged from $100 to $400 dollars worth of cocaine base. *Id.* On each controlled purchase, the confidential informant set up the transaction by contacting either Goodwin or Weise via their cellular telephone. *Id.* Thereafter, Goodwin or Weise would discuss with the confidential informant a particular time and location to meet to conduct the narcotics transactions. (PSR ¶ 10).

Further, beginning on or about June 13, 2002, Goodwin and his organization were the subject of a federal narcotics investigation. (PSR ¶ 14). Between June 2002 and February 2004, federal investigators, using a confidential informant, made 11 undercover purchases of

[2] The Presentence Report is being filed under seal as the Government's Appendix.

crack cocaine from members of the Goodwin organization. (PSR ¶ 14). These purchases resulted in the seizure of 118 grams of crack. *Id.*

During the time period set forth in the indictment, specifically, on July 27, 2001, Goodwin and Azolin were stopped at the I-10 border patrol checkpoint west of Las Cruces, New Mexico. (PSR ¶ 11). The vehicle was being driven by Azolin, and Goodwin was a passenger. *Id.* The vehicle was registered to Randolph Loiseau, 45 Glasser Street, Norwalk, Connecticut. *Id.* A search of the vehicle uncovered a "trapped," or hidden, compartment. *Id.* The hidden compartment contained $209,741.00 in United States currency, and a total of $7,616.00 was seized from the persons of Goodwin and Azolin. *Id.* All of the money was processed for forfeiture. *Id.* Neither Goodwin, Azolin, nor anyone else ever made a claim for the seized money. (PSR ¶ 11).

Later during the time period set forth in the indictment, specifically, on February 21, 2003, individuals who identified themselves as Randolph Loiseau and Sabrina Lambert were stopped by the Utah Highway Patrol. (PSR ¶ 12). The vehicle was registered to a Tiana Taylor, 89 Suncrest Road, Norwalk, Connecticut. *Id.* A search of the vehicle uncovered an electronically controlled trapped compartment that contained $113,000.00 in U.S. currency. *Id.* The money was in multiple packages which were in vacuum-sealed plastic bags containing pepper. *Id.* In the bottom of the trapped compartments were 14 pine tree air fresheners. *Id.* Placing pepper and air fresheners with large amounts of money is a technique which narcotics

traffickers believe to be effective in shielding drugs and narcotics trafficking proceeds from detection by law enforcement canines trained to detect money and narcotics. (PSR ¶ 12). Just as in the other incident, no one made a claim to the seized money. *Id.*

The Goodwin organization operated their distribution network on a daily basis in a consistent manner. (PSR ¶¶ 9-10, 13-14). For instance, in the undercover purchases, the confidential informant would call a telephone utilized by the Goodwin organization during which the confidential informant would have a brief telephone conversation in which he would arrange a meeting for the purchase of a quantity of crack cocaine from members of the Goodwin organization. *Id.* The confidential informant would then meet a member of the Goodwin organization and purchase a quantity of crack cocaine. *Id.*

Based on the two cash seizures and the undercover purchases, beginning on or about June 26, 2003, the government applied for and obtained a series of orders authorizing the use of pen registers and trap and trace devices to determine who was calling members of the Goodwin organization. (PSR ¶¶ 15-17). Based on the pen register information, the Government applied for and received four Title III orders for Goodwin's telephones and the telephones of other members of the organization. *Id.* Based on the pen register information and the Title III intercepts, the government identified over 100 of these customers, approximately 15 of whom were prosecuted in related cases. *Id.*

B. The Indictment

On April 6, 2004, a federal grand jury in the District of Connecticut returned an Indictment in this case, *United States v. Amos Goodwin, et al.*, 3:04CR101 (SRU). (A 11). Count One of the Indictment charged Goodwin 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). (A 11). The Indictment also contained a forfeiture allegation. (A 12). The case was assigned to United States District Judge Stefan R. Underhill.

C. The Guilty Plea

On September 1, 2005, Goodwin pleaded guilty to Count One of the Indictment. (A 17). Although there was no written plea agreement, based only on sales to those customers who were prosecuted, in addition to the undercover purchases, the government and Goodwin agreed that he was responsible for 735 grams of crack cocaine. Goodwin also agreed to forfeit $106,748 as a result of his conduct. These agreements were memorialized in a letter. (A 34).

D. The District Court's Imposition of Sentence

At Goodwin's sentencing on September 1, 2005, the district court, with the parties' agreement, adopted the factual statements of the Pre-Sentence Report as the district court's findings of fact. (A 33). Further, the parties agreed on the basic Guidelines calculation, i.e., the amount of drugs for Guidelines purposes, a reduction of three levels for acceptance of responsibility, and the defendant's criminal history category. (A 57-58). The district court correctly noted that there were only two issues to decide. (A 34-35).

First, the parties disagreed as to whether Goodwin deserved a three-level or a four-level enhancement for role in the offense. (A 35). The defendant agreed that he was at least a manager or supervisor but claimed that he was not an organizer or leader. A 36-37. Second, the defendant claimed that he was entitled to either a downward departure or, in the alternative, a non-Guidelines sentence. (A 58-59). After hearing argument from the parties, the district court enhanced the defendant's sentence by only three levels for his role in the offense but did not grant the defendant's motion for a downward departure. The court found that the resulting offense level of 36, at intersection with a Criminal History Category I, presented a sentencing range of 188 to 235 months, and imposed a sentence of 188 months. (A 89).

SUMMARY OF ARGUMENT

The district court's sentence of 188 months of incarceration was reasonable in light of all the factors set forth in 18 U.S.C. § 3553(a). The defendant does not dispute that the district court correctly calculated the Sentencing Guidelines, including issues such as drug quantity, role in the offense and acceptance of responsibility. The only question is whether the court reasonably imposed a sentence at the low end of a properly calculated advisory Guidelines range. Here, the record demonstrates that the district court properly considered the § 3553(a) factors. The court 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. Accordingly, the judgment should be affirmed.

ARGUMENT

I. THE 188-MONTH WITHIN-GUIDELINES SENTENCE IMPOSED BY THE DISTRICT COURT 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.

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.* 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)). In *Crosby*, this Court articulated two dimensions to this reasonableness review. First, the Court will assess procedural reasonableness – whether the sentencing court complied with *Booker* by (1) treating the Guidelines as advisory, (2) considering "the applicable Guidelines range (or arguably applicable ranges)" based on the facts found by the court, and (3) considering "the other factors listed in section 3553(a)." *Crosby*, 397 F.3d at 115. Second, the Court will review sentences for their substantive reasonableness – that is, whether the length of the sentence is reasonable in light of the applicable Guidelines range and the other factors set forth in § 3553(a). *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), *pet'n for cert. filed,* 75 U.S.L.W. 3034 (June 30, 2006) (No. 06-21); *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 Reasonably Considered the Various Factors Set Forth in 18 U.S.C. § 3553(a)

The district court's imposition of the 188-month sentence at Goodwin's sentencing was reasonable because it considered an accurately calculated advisory Guidelines range and properly considered the factors listed in 18 U.S.C. § 3553(a).[3] 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.), *cert. denied*, 126 S. Ct. 2915 (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

[3] Indeed, the parties agreed on all Guidelines issues except the enhancement for role in the offense and whether a non-Guidelines sentence was appropriate. (A 34).

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).

2. The Record Demonstrates That the District Court Carefully Considered the § 3553(a) Factors

At sentencing, defense counsel laid out in great detail the many factors the district court had to consider in imposing sentence, specifically referencing "the factors in 3553(a)" (A 73), "the circumstances of this offense" (A 73), "the characteristics of the defendant" (A 74), "deterrence" (A 75), and recidivism ("whether this individual basically would commit crimes in the future") (A 76). The district court considered all of these factors.

Immediately after hearing from the defendant, defense counsel, the defendant's wife and mother, and the government, the district court explained in detail everything it was considering. It stated:

THE COURT: The statute requires, as your lawyer pointed out, that I consider everything I know about you in deciding how to sentence you. The nature of your offense is quite serious. Your character and background, purposes of sentencing, we talked about punishment, we heard something from counsel about deterrence. There's also the need to rehabilitate, to hope for rehabilitation and I have to be try to meet all of these purposes, some of which say punish you more harshly, some of which say punish you less harshly. I have to consider the sentencing guidelines. They are no longer mandatory. They are no longer – I'm no longer required to sentence you under the guidelines but they remain a very important source of guidance for judges. They are what Congress wants judges to do and they help insure that people who do the same type of activity are sentenced in the same way, so that someone standing in my courtroom won't receive a very different sentence from someone standing in some other state of some other part of the state.

I have considered these factors. They don't result in any mathematical calculation as to a fair and just sentence in your case. There is no mathematical way to evaluate how you ought to be sentenced. I've got to weight the good and the bad, and what makes your case especially difficult is both the good and the bad are relatively apparent, and the result in that case is a sentence that you're going to think is too harsh and the government is

likely to think is too lenient and I can only hope is the fair one.

(A 87-88)

The district court also considered the fact that Goodwin turned in approximately ½ kilogram of crack cocaine on the day he pleaded guilty. Recognizing the valiant efforts of defense counsel, the district court stated that circumstance "does tend to cut both ways." (A 88). The district court noted that "[i]t's unusual that someone would turn it in but the fact that you had it in effect under your control suggests, if anything, that your involvement here was as serious as the government has suggested it was." (A 88).

The district court also stated that it was tempted to go below the Guidelines, but ultimately declined to do so. It said that it wouldn't do that, "in part because you received the benefit of the doubt to a certain extent in my guideline calculation. There was a very close call made between the level three and the level four and that, that decision was worth at the minimum 22 months in terms of guideline adjustment, difference in guideline range, and I gave you the benefit of the doubt there and I believe that that is sufficient enough, compensates for the factors that otherwise would cause me to consider a non-guideline sentence in your case." (A 89).

Reviewing the district court's thorough analysis of the 3553(a) factors, it is clear that the district court did not

exceed the bounds of its discretion, and properly considered the § 3553(a) factors as required by *Fernandez*.

3. Each of the Factors Put Forth by the Defendant in Support of a Non-Guidelines Sentence Was Considered by the District Court, and the Court Reasonably Concluded That They Did Not Warrant a Non-Guidelines Sentence.

The defendant raises a number of claims concerning the district court's determinations under 18 U.S.C. § 3553(a) and argues that the district court improperly refused to impose a non-Guidelines sentence. In each instance, however, it is clear that the district court expressly considered the factor at issue. That is enough to satisfy the court's obligation under § 3553(a). 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 *United States v. Jiménez-Beltre*, 440 F.3d 514, 519 (1st Cir. 2006) ("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.*

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, at *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 that the judge's oral explanation 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).

Moreover, even if the district court's weighting of the various factors were subject to review, it is clear that its assessment was thoroughly reasonable. Each claim will be addressed in turn.

First, the defendant claims that unlike the usual narcotics offender, the defendant is "unique." Def. Br. at 12. He claims that he is an educated person, that he has no

criminal history and that this is his first offense. *Id.* at 13. These characteristics, however, do not lead to the conclusion that the district court's sentence was unreasonable.

As an initial matter, the fact that the defendant is educated really means that he should not have turned to a life of drug peddling, but rather should have used his education for the greater good. Instead, he squandered it and is only now realizing the price he must pay for ruining so many other peoples' lives. The district court recognized and considered that as well. It stated as follows:

> THE COURT: You're an educated man. Most of the drug dealers that I see and I have to sentence have never graduated high school, much less gone to college. That encourages me in the sense that you have some opportunity ahead of you. On the other hand, it concerns me because you had greater opportunities than many did and you still chose to sell drugs rather than work legitimately for a living.

(A 86). Thus, the district court properly considered the defendant's personal characteristics. Instead of using the defendant's characteristics as a basis for a non-Guidelines sentence, however, the district court saw the other side of the story and simply held that the defendant, because of his education, squandered chances many others never had, and should not be rewarded for those actions. Here, even though under the Guidelines a defendant's education ordinarily is not relevant, this Court in *Jones*, 2006 WL

2167171, *2, held that a sentencing court could consider a defendant's education. It stated that

> [w]ith the entire Guidelines scheme rendered advisory by the Supreme Court's decision in *Booker*, the Guidelines limitations on the use of factors to permit departures are no more binding on sentencing judges than the calculated Guidelines ranges themselves. Of course, a sentencing judge's obligation to "consider" the Guidelines, *see* 18 U.S.C. § 3553(a)(4), along with the other relevant factors listed in section 3553(a), *see United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005), includes the obligation to consider the Commission's relevant policy statements as well as the calculated Guidelines range. But "consideration" does not mean mandatory adherence.

Here, the court did consider the defendant's education and factored it into its sentencing determination.

Further, the fact that the defendant has no criminal history has already been considered in calculating his sentencing range. It placed him in criminal history category I, so he has already received the benefit of his lack of criminal history. In seeking additional leniency for a characteristic that he shares with most others in criminal history I, the defendant is essentially asking the court to give him more favorable treatment than other similarly situated offenders. That would run counter to Congress's goal of avoiding "unwarranted sentence disparities among

defendants *with similar records* who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6) (emphasis added). *Cf. United States v. Sherpa*, 265 F.3d 144, 149 (2d Cir. 2001) ("The lower limit of the range for Criminal History Category I is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the Guidelines range for Criminal History Category I on the basis of the adequacy of criminal history cannot be appropriate.").

Moreover, even though the defendant has no criminal history, he clearly was selling drugs since the early 1990s. (A 78). What is odd about the defendant's argument is that, on the one hand, he states that he is a "first time offender" (A 67), and on the other hand he states "that if I would have got arrested a long time ago I wouldn't be here today." (A 67). The defendant's wife made the same argument when she spoke at the defendant's sentencing. In one breath she states that Goodwin "has never committed a crime or was ever incarcerated." (A 60). Shortly thereafter, she states that "the judicial system on the state level has failed us. Amos should have been arrested a long time ago. And if he was, we wouldn't be here today and his lesson would have already been learned and his past would already been put behind him." *Id.* Both the defendant's and his wife's statements demonstrate that the defendant was selling drugs for a long time, he just hadn't been caught.

The district court properly recognized and considered that the defendant was a long-time drug seller who had not

been caught and that fact figured in the district court's sentencing. The district court stated that:

> THE COURT: This is your first offense and that's of significance to me. It's a little surprising that you could sell drugs as long as you did and not face charges before now, and I'm not going to draw any inferences about whether it's because you're smart, you're lucky or because the state system broke down or whatever. It doesn't really matter why, but you're here as a first time offender and that's significant in that you haven't had a chance to taste jail and decide whether that's what you want for the rest of your life or what.

(A 85-86).

The defendant next claims that his stable, loving marriage makes his case unique. What the defendant fails to mention is what the government placed on the record at the time of sentencing. At that time the government stated as follows:

> Now, his wife clearly supports him and she may very well be the best thing in his life, but it shouldn't be lost on the court, we have many reports that Nyokee Goodwin was present during the time that many transactions were actually carried out. She knew that he was selling drugs. The money had to be coming from someplace. She wasn't working. And when she was working, she was making not enough money to buy two homes

> and two time-shares. While she supports him, she also turned a blind eye and that blind eye allowed Mr. Goodwin to continue doing what he was doing.

(A 78). Thus, while the defendant may have a supportive and loving wife, her complicity no doubt allowed the defendant to continue selling drugs, and she benefitted from his activities. For the defendant to now seek a reward for having that kind of relationship would turn proper sentencing considerations on their head.

It would be equally improper to consider his supportive family as a basis for concluding that his potential for rehabilitation is more exceptional than that of any other defendant. As noted above, these are the same people who were, at the least, complicit in his activities and, at worst, potentially co-conspirators. Family support is not, under the facts of this case, a reasonable basis for a non-Guidelines sentence.

The defendant next claims that he should have received a non-Guidelines sentence because his activities did not result in violence and that no weapons or guns were used in connection with his activities. As an initial matter, the Sentencing Guidelines call for an enhancement if a dangerous weapon was used, *see* U.S.S.G. § 2D1.1(b)(1) (Use of a dangerous weapon), so the fact that no dangerous weapons, firearms or violence was used has already been factored into his advisory Guidelines range. The defendant's argument that he deserves even *less* time than called for by such a Guidelines range amounts to a claim that he should be sentenced more leniently those

nonviolent drug offenders who have been found guilty of "similar conduct." Again, that claim would run directly counter to 18 U.S.C. § 3553(a)(6).

Moreover, the district court specifically considered the fact that there were no weapons or violence, and that is enough to satisfy the requirement that the court "consider" that factor as part of the "nature and circumstances of the offense." 18 U.S.C. § 3553(a)(1). The district noted that "[t]here is also some good or at least some relatively good things on your side. I'm very happy that you did not resort to violence or the use of firearms which I think makes a drug offense much more serious. You yourself mentioned that your life in effect was spared by your arrest because you had a chance of being killed, and that's true. When people are selling drugs, the drug dealers or drug buyers or even innocent people have a chance to be killed when drug dealers are using weapons, and I'm encouraged that you didn't do that." (A 85). Thus, the district court and the Guidelines have both clearly considered the lack of violence and weapons and determined that, in this case, the defendant should, and did, receive credit for that and no further adjustment in the form of a non-Guidelines sentence is warranted.

Next, the defendant claims that his act of turning in approximately 600 grams of crack cocaine at the time of his plea is grounds for a non-Guidelines sentence. As the district court noted, however, the act "does tend to cut both ways." (A 88). The district court stated that "[i]t's unusual that someone would turn it in but the fact that you had it in effect under your control suggests, if anything,

that your involvement here was as serious as the government has suggested it was." (A 88). The district court's statements demonstrate that satisfied its duty under § 3553(a)(1) by considering this factor. *Fernandez*, 44 F.3d at 29. This Court has repeatedly stated that it will not review the weight ascribed to a particular factor, where the overall sentence is reasonable. *Id.* at 32. Here, the district court reasonably concluded that the defendant's actions were not a proper basis for a downward departure or non-Guidelines sentence.

The defendant next claims that the disparity between crack cocaine Guidelines and power cocaine Guidelines is a ground for a non-Guidelines sentence and relies on *United States v. Fisher*, 2005 WL 2542916 (S.D.N.Y. Oct. 11, 2005). This argument is unavailing for two reasons. First, the district court specifically discussed the disparity of treatment of offenses involving crack cocaine in the sentencing Guidelines. Thus, the transcript indicates that the district court considered that and gave the defendant some form of non-quantified credit for this disparity. (A 86). Second, assuming the district court did in fact give the defendant some credit for this disparity, the district court's decision to do so was improper. This Court, just last month and since the time the defendant filed his brief, in *United States v. Castillo*, No, 05-3454-cr, 2006 WL 2374281 (2d Cir. Aug. 16, 2006), expressly rejected the reasoning of *Fisher* held that "[n]othing in Booker specifically authorizes district judges to rewrite different Guidelines with which they generally disagree, which is effectively what district judges do when they calculate a sentence with a 20:1 or 10:1 ratio instead of the 100:1 ratio

in the drug sentencing table." *Id.* at *15. Thus, even though the defendant obtained the benefit of the district court's disagreement with the differing treatment between crack cocaine and other drugs under the Guidelines, that benefit we now know was not properly conferred.

The defendant's reliance upon *Fisher* to support his argument for sentence disparities, protection of the public, and the need for deterrence and other factors considered under 3553(a), is misplaced. It is clear from *Fisher* that the district court's entire sentencing decision was driven by the crack cocaine vs. powder cocaine disparity. Indeed, the district court begins its memorandum of decision by stating that "[i]n the eleven years that I have served as a district court judge, I have been troubled by the exceedingly harsh sentences imposed on those who deal in crack cocaine." 2005 WL 2542916, at *1. Thereafter, every sentencing factor is considered through the prism of this disparity, which, as *Castillo* now teaches us, is not a proper consideration. Accordingly, the defendant's reliance on *Fisher*, while understandable, is misplaced.

CONCLUSION

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

Dated: September 8, 2006

Respectfully submitted,

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ADDENDUM

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.