

06-2699-cr

To Be Argued By:
JAMES I. GLASSER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-2699-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

AZEEM RAHMAN,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Christopher F. Droney, J.) had subject matter jurisdiction over this criminal proceeding pursuant to 18 U.S.C. § 3231. Judgment entered on June 6, 2006. (JA 5).¹ The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on June 5, 2006. (JA 5, 89). This Court has appellate jurisdiction over the defendant's appeal of his sentence pursuant to 18 U.S.C. § 3742(a).

¹ The designation "JA _" refers to the Joint Appendix. The designation "SA__" refers to the Appendix containing the Presentence Investigation Report.

**STATEMENT OF ISSUES
PRESENTED FOR REVIEW**

1. Whether the district court did not rely excessively on the advisory Guidelines range and adequately considered other Section 3553(a) factors when it imposed sentence?

2. Whether the district court adequately stated its reasons for declining to impose a non-Guidelines sentence?

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-vs-

AZEEM RAHMAN,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Azeem Rahman is a multi-convicted felon who distributed significant quantities of crack cocaine to a confidential informant on two separate occasions. Six months later, Rahman was arrested and more than 377 grams of crack cocaine, more than 105 grams of cocaine hydrochloride, a quantity of marihuana, electronic scales, a .45 caliber firearm, ammunition, and over \$5,000 in

United States currency were seized incident to his arrest.

Despite Rahman's considerable criminal record, after protracted plea negotiations, the Government agreed not to file a prior felony information pursuant to 21 U.S.C. § 851 which would have subjected Rahman to a mandatory minimum twenty-year term of incarceration. Despite the favorable disposition of the charges against him, Rahman now complains that the district court's imposition of a sentence at the low end of the resulting guideline range was unreasonable. For the reasons that follow, Rahman's claims should be rejected, and the judgment should be affirmed.

Statement of the Case

In August 2004, a confidential informant advised law enforcement authorities in New Haven, Connecticut that an individual identified as Azeem Rahman ("Rahman") was selling significant quantities of crack cocaine. The confidential informant thereafter made two controlled purchases of crack cocaine from Rahman. Following the controlled purchases, on February 15, 2005, a federal arrest warrant was authorized and Rahman was taken into custody. (SA 3-4, 32).

On September 21, 2005, Rahman waived indictment and entered a plea of guilty to a one count information charging him with possession with intent to distribute more than fifty grams of cocaine base ("crack"), in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). (JA

6). Defendant's plea was entered pursuant to a written plea agreement with the Government. (SA 23-33).

On May 23, 2006, following a sentencing hearing, the court imposed a 151-month sentence – the low end of the correctly calculated guideline range – to be followed by a five-year term of supervised release. (JA 86). Judgment entered on June 6, 2006. (JA 5).

Following imposition of sentence, Rahman filed a timely notice of appeal. (JA 5, 89). Rahman is incarcerated.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. The Investigation

In August 2004, a confidential informant advised law enforcement authorities of a significant crack cocaine supplier in New Haven, Connecticut who was known to the informant as "AZ." The informant purchased ounce quantities of crack from AZ multiple times in the past and told authorities that AZ drove a green Lexus SC 400 with Connecticut license plate number 115-RMU. Connecticut Department of Motor Vehicle records disclosed that the Lexus automobile was registered to Azeem Rahman, 120 Grafton Street, New Haven, Connecticut. (JA 15, SA 3-4, 32).

Law enforcement authorities determined to attempt to make a controlled purchase of crack cocaine from Rahman

with the assistance of the informant. On August 3, 2004, the informant called Rahman and engaged in a consensually monitored and recorded telephone call in which Rahman agreed to distribute one ounce of crack cocaine in exchange for \$900. On that same date, at the appointed time and place, Rahman met with the informant and distributed an off-white, rock-like substance that was subsequently chemically analyzed and determined to be 25.7 grams of cocaine base (“crack”). The meeting was conducted under the observation of law enforcement officers and was both audio and video recorded. (JA 15, SA 3-4, 32).

On August 10, 2004, the informant placed another consensually monitored and recorded phone call to Rahman during which Rahman agreed to distribute two ounces of crack cocaine. Later that same day, Rahman distributed an off-white, rock-like substance to the informant in exchange for \$1800. The substance distributed by Rahman was chemically analyzed and determined to be 53.6 grams of cocaine base (“crack”). This transaction, like the first one, was consummated under the observation of law enforcement officers. (JA 15-16, SA 4, 32).

B. The Arrest and Search

Six months after Rahman completed the crack sales described above, a federal arrest warrant and criminal complaint were authorized. The arrest warrant was executed on February 15, 2005, at Rahman’s residence at 120 Grafton Street, New Haven. Rahman’s residence was

searched and the search netted more than 377 grams of crack cocaine, more than 105 grams of powder cocaine, a quantity of marihuana, electronic scales (used to weigh drugs), empty glassine envelopes (used to package drugs), a .45 caliber firearm, .45 caliber ammunition, cellular phones, jewelry, and more than \$5,000 in cash. (JA 16, SA 4, 32).

C. The Charge and Guilty Plea

On September 21, 2005, Rahman, waived indictment and pleaded guilty to a one-count information charging him with possession with intent to distribute 50 grams or more of cocaine base (“crack”), in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). (JA 6). The offense of conviction is punishable by a mandatory minimum ten-year term and a maximum of life. Pursuant to the plea resolution negotiated by the parties, the Government agreed not to file a prior felony enhancement pursuant to 21 U.S.C. § 851, which otherwise would have subjected the defendant to a mandatory minimum twenty-year term. (JA 17, 73). The plea agreement between the parties included a written stipulation in which Rahman and the Government agreed that Rahman’s offense conduct included the possession with intent to distribute more than 450 grams of cocaine base. (SA 32 (detailing sale of 25.7 grams and 53.6 grams of cocaine base, and seizure of 373.4 grams of cocaine base)).

D. The Presentence Investigation Report

The Probation Office prepared a Presentence Report (“PSR”) pursuant to Fed. R. Crim. P. 32(c). The PSR established a base offense level of 34 because more than 150 grams but less than 500 grams of cocaine base were attributed to Rahman. *See* U.S.S.G. § 2D1.1(c). (SA 5). Two levels were added pursuant to U.S.S.G. § 2D1.1(b)(1) because a firearm was possessed in connection with the offense of conviction. (SA 5). Three levels were subtracted pursuant to U.S.S.G. § 3E1.1 for acceptance of responsibility, resulting in a total adjusted offense level of 33. (SA 6). Despite a criminal record that included ten prior convictions, Rahman was found to qualify for criminal history category II. The intersection of offense level 33 and criminal history category II produced a sentencing guideline range of 151 to 188 months, and a five-year term of supervised release. (SA 18).

E. Sentencing

Rahman raised a single objection to the PSR: He objected to the two-level adjustment pursuant to U.S.S.G. § 2D1.1(b)(1) for possession of a firearm. In his sentencing memorandum, Rahman also asked the court to depart below the calculated guideline range based on the alleged over-representation of his criminal history score and based on his alleged public service and good works. Rahman also asked the court to consider the factors enumerated in Section 3553(a)(1) and to impose a non-guideline sentence of ten years, the statutory mandatory minimum. *See* 21 U.S.C. § 841(b)(1)(A). (JA 7-13).

The Government filed a Memorandum in Aid of Sentencing in which it supported the Probation Office's application of the two-level adjustment pursuant to U.S.S.G. § 2D1.1(b)(1), and opposed a departure below the properly calculated Guidelines range. (JA 14-25).

On May 23, 2006, the district court held a sentencing hearing. As a preliminary matter, the district court heard argument on the single objection to the PSR, and then made factual findings with respect to the disputed issue. (JA 37-50). The district court found that Rahman possessed a firearm in connection with the offense of conviction and that the two-level adjustment pursuant to U.S.S.G. § 2D1.1(b)(1) was appropriate. Rahman does not challenge this determination on appeal.

The district court then adopted the factual statements of the Presentence Report, as to which there were no objections. (JA 51). The district court then calculated Rahman's Guidelines as follows: a total offense level of 33 with a criminal history category II, resulting in a Guidelines sentencing range of 151-188 months. (JA 52-54). Both parties agreed with the court's calculation. (JA 53-54).

The district court heard the parties' arguments regarding Rahman's request for a downward departure or, alternatively, a non-Guidelines sentence. (JA 54-74). After considering the parties' submissions, hearing from the defendant, those who spoke on the defendant's behalf, and the argument of counsel, but before imposing

sentence, the district court articulated the factors influencing its sentencing determination as follows:

Before we begin, I'd like to state the factors that a district court must take into consideration in determining a particular sentence to be imposed under the Federal Sentencing Statute 18 which is U.S. Code Section 3553. Under that statute the factors are the following:

The nature and circumstances of the offense and the history and characteristics of the defendant;

The need for the sentence imposed to serve the various purposes of a criminal sentence, which I'll review in a moment;

The kinds of sentences available;

The kinds of sentence and sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth by the Sentencing Guidelines that apply to this sentencing;

Also, any pertinent policy statement in those guidelines; and

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

Lastly, the need to provide restitution to any victims.

Also, I must consider the United States Sentencing Guidelines and their policy statements in determining Mr. Rahman's sentence, however, I'm not bound by those guidelines. In other words, I may give him a sentence within a guideline range or outside of that range.

(JA 74-75).

The district court then expressly stated that it had considered all of the foregoing factors in reaching its sentencing determination. (JA 75). The court then complied with the punctilio of Section 3553(a) by explaining how each of the factors influenced its determination of an appropriate sentence for Rahman:

. . . I've also taken into account the need for this sentence to serve the various purposes of a criminal sanction.

First and foremost among the purposes of a criminal sentence is to provide just punishment. Part of the meaning of a just punishment is that it not be unduly different from sentences received by defendants with similar records who have been convicted of similar conduct. The Sentencing Guidelines reflect that purpose and I have given them due consideration. A criminal sentence also can protect the public by immobilizing an offender

and isolating him from society during the period of incarceration. Another function of a sentence is specific deterrence. Namely, to make sure that Mr. Rahman will not again commit a crime after he completes his sentence in this case. Another purpose is general deterrence. That is, to promote respect for the law and to warn others who might be tempted to act as he did that the community, represented by the law enforcement authorities and by the courts, treats these offense seriously and will punish others who behave as Mr. Rahman behaved. And finally, I have thought about the goal of rehabilitation for him.

(JA 76-77). The district court then considered the nature and circumstances of the offense and the history and characteristics of the defendant and determined not to depart below the applicable guideline range. More particularly, the court observed as follows:

Now, as to departures from the guidelines. Although I recognize that I have the discretion to depart from the range provided for by the Sentencing Guidelines, and I've considered the arguments offered by Mr. Rahman's counsel, I do not find that Mr. Rahman's record of public service rises to the level of extraordinary circumstances required for me to depart under United States Sentencing Guidelines 5H1.11. Similarly, having made a particularized consideration of the circumstances of Mr. Rahman's case, I do not find reliable information indicating that his criminal

history category of II does not adequately reflect the seriousness of his criminal history or his likelihood of recidivism as required for a downward departure, otherwise known as [a horizontal] departure, under United Sentencing Guidelines Section 4A1.3.

Therefore, I choose not to exercise my discretion and will not depart from the Sentencing Guidelines on either of the bases identified by the defendant, nor on any other basis, as the facts do not warrant a departure here.

I've also determined that Mr. Rahman should be sentenced within the guideline range that I have found. *However, I note for the record that I would give him the same sentence were I to impose a non-guideline sentence.*

Now, as to where within the guidelines range Mr. Rahman should be sentenced, the Court finds the following of particular significance:

This drug dealing by Mr. Rahman was not just one relapse into a distant period in his life. He made two sales of crack cocaine in August 2004 to a cooperating individual. The second sale was for \$1800 for 53 grams of crack cocaine, a considerable amount of that type of cocaine. Five months later his apartment was searched and turned up over 370 grams of crack cocaine, powder cocaine, and marijuana. He also had a handgun,

ammunition, scales, and over \$5,000 in cash. So it was a considerable amount of drug dealing for Mr. Rahman that he was engaged in over a long period of time involving resale amounts of crack cocaine. He also has a prior narcotics sale conviction for which he served time in state prison. Finally, he has an extensive record for state offenses prior to this case.

There is no doubt, however, that there is a good side to Mr. Rahman. He is a man of considerable intelligence and other gifts. He performed well for four years as a case manager at the AIDS Interfaith Network and worked well in a halfway house and the Job Corps Center. It is very sad that he lost his career through his injuries from the robbery. He also comes from a good family and has worked hard to be an educated man. Finally, he cares deeply for his daughter and has been very supportive of his family in their times of need.

Weighing all this, I'll sentence Mr. Rahman to the bottom of the guidelines range.

(JA 77-79) (emphasis supplied).

With that explanation, the district court imposed a sentence of incarceration of 151 months – the bottom of the applicable Guidelines range – to be followed by five years of supervised release. (JA 56-57).

SUMMARY OF ARGUMENT

The district court adequately considered all of the factors enumerated in 18 U.S.C. § 3553(a)(1) and, contrary to Rahman's claim, did not unduly rely on the advisory sentencing Guidelines range when it imposed sentence.

Neither the Supreme Court nor this Court requires the district court to specifically address each and every one of a defendant's claims and to justify a determination to reject the imposition of a non-Guidelines sentence.

The district court's sentence of 151 months is reasonable in light of the seriousness of Rahman's offense, his serious criminal record, and his pattern of recidivism.

ARGUMENT

I. THE DISTRICT COURT PROPERLY CONSIDERED THE FACTORS LISTED IN SECTION 3553(a).

Rahman claims that the district court relied too heavily on the advisory Guidelines range and did not properly consider his arguments for a below-guideline range sentence. Rahman's claim is frivolous.

A. Relevant Facts

The relevant facts are set forth above.

B. 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 instead simply to 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). *Id.* at 114.²

² On November 3, 2006, the Supreme Court granted *certiorari* in companion cases to determine whether extraordinary circumstances must be present to justify deviation from the presumptive guideline range and whether a sentence within a correctly calculated guideline range is presumptively reasonable. *See Claiborne v. United States*, 127 S. Ct. 551 (2006) and *Rita v. United States*, 127 S. Ct. 551 (2006).

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).

The Court has explained what is meant by “consideration” of the statutory factors in order for the sentence ultimately imposed to be “reasonable.” This Court has “steadfastly refused to require judges to explain or enumerate how such consideration was conducted.” *United States v. Pereira*, 465 F.3d 515, 523 (2d Cir. 2006). Rather, this Court presumes “in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged [his] duty to consider the statutory factors . . . and will not conclude that a district judge

shirked [his] obligation to consider the § 3553(a) factors simply because [he] did not discuss each one individually or did not expressly parse or address every argument relating to those factors that the defendant advanced.” *Id.* (quoting *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir.), *cert. denied*, 127 S. Ct. 192 (2006)).

To fulfill its duty to consider the Guidelines, the district court will “normally require determination of the applicable Guidelines range.” *Crosby*, 397 F.3d at 113. “An error in determining the applicable Guideline range . . . would be the type of procedural error that could render a sentence unreasonable under *Booker*.” *United States v. Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005); *cf. 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.” *Fernandez*, 443 F.3d at 27; *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.) (per curiam) (quoting *Fleming*, 397 F.3d at 100) (alteration omitted), *cert. denied*, 126 S. Ct. 2915 (2006).

C. Discussion

Rahman ignores the district court’s careful consideration of *both* the advisory guideline range and the Section 3553(a) factors and claims the court placed undue reliance on the advisory guideline range when it imposed

sentence. In support of his argument, Rahman claims that the district court did not adequately consider his “history and characteristics” and the “nature and circumstances” surrounding the offense. Rahman Br. at 8. The record discloses, however, that the district court carefully considered both.

First, Rahman alleges that his “history and characteristics” demonstrated that he rehabilitated himself after his incarceration in the late 1980s and that he attempted to help others with drug problems by working at various outreach programs. Rahman Br. at 8. As the Government pointed out in its sentencing memorandum, however, while “defendant was working at the Interfaith Network he was responsible for peddling substantial quantities of crack in the New Haven area.” (JA 23). The Government also pointed out that despite defendant’s claimed employment at various outreach programs, his record reflects that Rahman never paid taxes on his alleged income. (JA 23).

The district court was well aware that Rahman claimed that he was rehabilitated after his arrest in the late 1980s and thereafter helped others with drug addiction issues. The court was also well aware, however, that despite defendant’s claim, his record reflected that: he was arrested and convicted of possession of a weapon in a motor vehicle in 1993; he was arrested by state police in Virginia and charged with possession with intent to distribute marijuana and ultimately convicted of possession of marijuana; and he was convicted of another marijuana offense in Maryland in 2002. (SA 7-9).

The district court properly expressed skepticism for defendant's claim that his crack distribution that formed the basis of his conviction was aberrational when it observed that defendant sold significant quantities of crack to the confidential informant on two separate occasions, and then six months later, when his home was searched, there were over 370 grams of crack, other drugs, a firearm, packaging material and a significant sum of United States currency present. (JA 78).

Based on the foregoing, the district court most certainly considered the defendant's history and characteristics and properly concluded that they warranted neither a downward departure from the Guidelines range nor a non-guideline sentence. The district court's determination was not clearly erroneous.

Similarly, Judge Droney's comments also reflect that the court considered the "nature and circumstances" of the offense. In addition to the quantity of crack cocaine involved, the court also noted that the offense involved a handgun, ammunition, and drug paraphernalia. The court further observed that Rahman had previously been convicted of a narcotics sales offense and "has an extensive record for state offense prior to this case." (JA 78).

Notwithstanding the seriousness of the offense, Judge Droney also considered Rahman's intelligence, his efforts to educate himself, his employment history, and his family ties. Specifically, Judge Droney considered these as

mitigating factors that justified a sentence at the bottom of a range that spanned 37 months.

Finally, contrary to the defendant's arguments on appeal, there is no evidence that Judge Droney considered the Guidelines to be presumptively reasonable. The mere fact, as the defendant suggests, that the district judge sentenced him within the Guidelines range does not mean that the district judge gave presumptive weight to the Guidelines or that he failed to consider adequately the other Section 3553(a) factors. Indeed, the record reflects Judge Droney's careful consideration of the Section 3553(a) factors, as applied to *this defendant*.

Accordingly, Judge Droney is entitled to the presumption articulated by this Court that “[a]s long as the judge is aware of both the statutory requirements and the sentencing range . . . and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, we will accept that the requisite consideration has occurred.” *Fernandez*, 443 F.3d at 29-30 (quoting *Fleming*, 397 F.3d at 100) (emphasis supplied in *Fernandez*). *Cf. Pereira*, 465 F.3d at 523 (“[A] sentencing judge’s decision not to discuss explicitly the sentencing factors or not to review them in the exact language of the statute does not, without more, overcome the presumption that she took them all properly into account.”).

The resulting sentence of 151 months – the bottom of the Guidelines range – is a reasonable sentence for a multiple-convicted felon with a serious history of narcotics

offenses, and whose conviction arose from the distribution of and possession with intent to distribute significant quantities of crack cocaine. (SA 4-10). In light of the defendant's history of recidivism, the seriousness of the offense, including the fact that a firearm was involved, the Government respectfully submits that a sentence of 151 months is a reasonable sentence.

II. THE DISTRICT COURT PROPERLY STATED ITS REASONS FOR IMPOSING A SENTENCE OF 151 MONTHS.

Rahman claims that the district court failed to adequately explain its reasons for rejecting his arguments for a sentence below the applicable Guidelines range or, alternatively, for a non-Guidelines sentence, thereby depriving him of meaningful appellate review. Rahman Br. at 9-10. Even a cursory review of the record of the sentencing proceeding below belies Rahman's claim.

A. Relevant Facts

The relevant facts are set forth above.

B. Governing Law and Standard of Review

The Sentencing Reform Act has three provisions regarding a sentencing court's obligation to articulate its reasons for a sentence. First, the court is required in all cases to state "the reasons for its imposition of a particular sentence." 18 U.S.C. § 3553(c). Second, if the sentence falls within a Guidelines range that exceeds 24 months, the

judge must state “the reason for imposing a sentence at a particular point within the range.” 18 U.S.C. § 3553(c)(1). Third, if the judge imposes a sentence outside an applicable Guidelines range, he must state “the specific reason for the imposition of a sentence different” from the sentence prescribed by the Guidelines. 18 U.S.C. § 3553(c)(2).

The required statements, where applicable, must be made “at the time of sentencing” and “in open court.” 18 U.S.C. § 3553(c). Furthermore, where a sentencing court is required to comply with the second and third provisions, its reasons must “also be stated with specificity in the written order of judgment and commitment.” 18 U.S.C. § 3553(c)(2). This Court has “ruled that the Supreme Court’s decision in *Booker* left Section 3553(c) ‘unimpaired.’” *United States v. Jones*, 460 F.3d 191, 196 (2d Cir. 2006) (citing *United States v. Lewis*, 424 F.3d 239, 244 (2d Cir. 2005), and *Crosby*, 397 F.3d at 116).

C. Discussion

1. The District Court Explained Its Reasoning

Under Section 3553(c) of Title 18, a district court is required to “state in open court the reasons for its imposition of the particular sentence” In this case, the district court easily satisfied this requirement.

After reviewing on the record all of the factors he was required to consider under Sections 3553, 3562, 3572, and

3583 of Title 18, Judge Droney stated that “while I have taken into account all those factors, I’ll explain more particularly how I’ve reached a decision as to *the appropriate sentence for Mr. Rahman in this case.*” (JA 75) (emphasis supplied). Judge Droney then described the rationale for his sentence by reference to certain specific factors: (1) just punishment; (2) unwarranted sentencing disparities; (3) public safety; (4) specific deterrence; (5) general deterrence; and (6) rehabilitation. (JA 76-77). It is clear from the context and from Judge Droney’s specific reference to the defendant that this was not merely a general recitation of sentencing considerations, but an articulation of how he determined an appropriate sentence for *this* defendant.

The district court specifically considered Rahman’s request for a sentence below the applicable Guidelines range or, alternatively, a non-guideline sentence. The district court expressly recognized that it had the authority to impose a sentence below the calculated range but declined to do so because it found that Rahman’s record of alleged public service did not merit such consideration. (“I do not find that Mr. Rahman’s record of public service rises to the level of extraordinary circumstances.”). Similarly, the court found no reliable information indicating that Rahman’s criminal history category overstated the seriousness of his criminal past or the likelihood of recidivism. (“I do not find reliable information indicating that his criminal history category of II does not adequately reflect the seriousness of his criminal history or the likelihood of recidivism”) (JA 76-78.)

The district court then determined that there were no facts presented by the defendant, or otherwise, that warranted a departure from the Guidelines range. (JA 77). Then, contrary to Rahman's contention, the district court expressly considered whether a non-Guidelines sentence was appropriate under the facts of this case and concluded: "*I note for the record that I would give him the same sentence were I to impose a non-guideline sentence.*" (JA 77) (emphasis supplied).

The court then carefully put on the record the facts that informed its ultimate sentencing determination:

[T]he court finds the following of particular significance:

This drug dealing by Mr. Rahman was not just one relapse into a distant period of his life. He made two sales of crack cocaine in August 2004 to a cooperating individual. The second sale was for \$1800 for 53 grams of crack cocaine, a considerable amount of that type of cocaine. Five months later his apartment was searched and turned up over 370 grams of crack cocaine, powder cocaine, and marijuana. He also had a handgun, ammunition, scales, and over \$5,000 in cash. So it was a considerable amount of drug dealing for Mr. Rahman that he was engaged in over a long period of time involving resale amounts of crack cocaine. He also has a prior narcotics sales conviction for which he served time in state prison. Finally, he

has an extensive record for state offenses prior to this case.

(JA 78).

Judge Droney then reviewed the mitigating facts, including Rahman’s “considerable intelligence,” his work at the Interfaith Network, the fact that he comes from a good family, that he had worked hard to achieve an education, and his devotion to his family. (JA 79). He concluded his explanation as follows: “Weighing all this, I’ll sentence Mr. Rahman to the bottom of the guideline range.” (JA 79).

Read within this context, it is clear that Judge Droney’s statement of aggravating facts is, in effect, the rationale for his imposition of a Guidelines sentence. The subsequent statement of mitigating facts serve to explain why he imposed the lowest possible sentence within the range.

Judge Droney’s explanation for imposing a sentence of 151 months was neither casual nor ritualistic. His careful recitation of both aggravating and mitigating facts reveals that Judge Droney carefully considered all the 3553(a) factors in arriving at a just sentence. The court’s recitation of facts, including those that moved the court to impose a sentence at the very bottom of the Guidelines range, demonstrates that the court considered the defendant’s arguments for a departure and a non-Guidelines sentence, even though he did not reach the conclusion that the defendant may have wished.

2. District Courts Are Not Required To Articulate Reasons for Imposing a Sentence Within the Guidelines Range.

In alleging error in Judge Droney's supposed failure to explain adequately his reasons for declining to depart downward or impose a non-Guidelines sentence, the defendant is, in effect, asking this Court to impose a new post-*Booker* requirement on district judges: to articulate specific reasons why the court imposed a Guidelines sentence, as opposed to a below-Guidelines sentence. The defendant relies, in the first instance, on Section 3553(c)'s requirement that a district court state its reasons for imposing a particular sentence. However, this section does not require specificity, but rather contemplates a general statement of reasons. *Compare* 18 U.S.C. § 3553(c)(2) (requiring district court to state "with specificity" the reasons for imposing a non-Guidelines sentence). There is no authority in this circuit to support the defendant's proposed requirement that a district court articulate its specific reasons for imposing a Guidelines sentence.

As a preliminary matter, the defendant's proposed articulation requirement is inconsistent with this Court's rulings regarding downward departures. *Crosby* requires district judges to undertake a three-step process in determining an appropriate sentence. The first step is to calculate the applicable Guidelines range while the second step is to consider whether a departure from that range is appropriate. *Crosby*, 397 F.3d at 112. This Court has held

that even in the post-*Booker* sentencing regime, “a refusal to downwardly depart is generally not appealable,” and an appeals court may review such a denial only “when a sentencing court misapprehended the scope of its authority to depart or the sentence was otherwise illegal.” *United States v. Valdez*, 426 F.3d 178, 184 (2d Cir. 2005); *United States v. Stinson*, 465 F.3d 113, 114 (2d Cir. 2006) (per curiam) (refusal to depart from the guideline range is not appealable). It follows from this that a district judge need not articulate his reasons for declining to depart and imposing a Guidelines sentence. This holding could not survive if the Court were to adopt the defendant’s proposal that a district judge’s refusal to impose a non-Guidelines sentence is *per se* unreasonable, unless accompanied by a detailed rebuttal of the defendant’s arguments.

Consistent with this principle, this Court has expressed its disinclination to fashion new requirements for judges, beyond what is required by Section 3553 and *Booker*. For example, in *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir.), *cert. denied*, 127 S. Ct. 192 (2006), the Court considered the question of whether and to what extent a district court is required to articulate its consideration of the Section 3553(a) factors. There, the Court declined to impose on district judges a requirement to “*precisely identify* either the factors set forth in § 3553(a) or specific arguments bearing on the implementation of factors in order to comply with [the] duty to consider all the § 3553(a) factors along with the applicable Guidelines range.” *Id.* at 29 (emphasis in original). Rather, the Court established a “strong presumption that the sentencing judge has considered all arguments properly presented to

her, unless the record clearly suggests otherwise.” *Id.* This Court recently reaffirmed that “absent record proof showing otherwise, we assume the district court’s awareness of and compliance with this statutory sentencing obligation.” *United States v. Ministro-Tapia*, 2006 WL 3411410, at *4 (2d Cir. Nov. 28, 2006).

Similarly, in *United States v. Jones*, 460 F.3d at 195, this Court declined to impose on district judges an articulation requirement beyond the requirements of Section 3553(c). In *Jones*, the Government claimed that the district judge erred by failing to explain why he selected a particular non-Guidelines sentence (*i.e.*, “why the sentence was 15 months rather than, say, 14 or 16 months”). Rejecting this argument, the Court “decline[d] to impose a requirement for such specific articulation of the exact number of months of an imposed [non-Guidelines] sentence.” *Id.* The Court further stated as follows:

Selection of an appropriate amount of punishment inevitably involves some degree of subjectivity that often cannot be precisely explained. In light of the reasons of the sort identified by [the district judge], a sentencing judge has many available guideposts in ultimately selecting an amount of punishment. The judge undoubtedly is familiar with the maximum penalty authorized by Congress and the proportion of that maximum that a particular sentence reflects. The judge is also aware of both the calculated Guidelines range and the sentences

typically imposed in the district for misconduct of comparable seriousness.

Id. Thus, the Court recognized that district judges cannot and should not be required to articulate the precise blend of objective and subjective factors that produce a particular sentence. Most recently, in *Pereira*, the Court refused to require sentencing courts “expressly to mention or explain [their] consideration of each § 3553(a) factor.” 465 F.3d at 523. The Court explained that “a sentencing judge’s decision not to discuss explicitly the sentencing factors or not to review them in the exact language of the statute does not, without more, overcome the presumption that she took them all properly into account.” *Id.*

In this case, the district court expressly considered the Section 3553(a)(1) factors and articulated with precision those facts that influenced its ultimate sentencing determination. Moreover, the court stated that it would have reached the same conclusion whether it imposed a Guidelines or non-Guidelines sentence. The fact that the district court rejected Rahman’s request for the mandatory minimum sentence required by statute does not ineluctably mean that the court did not properly consider his arguments. Indeed, the record here is clearly to the contrary. As this Court recently observed in *Pereira*, “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 indicated misunderstanding about such materials or misperception about their relevance, we will accept that the requisite

consideration has occurred.” *Id.* at 523 (quoting *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005)).

3. Conclusion

In fashioning an appropriate sentence, district judges are required to consider numerous factors and to state the reasons for imposing a particular sentence. Judge Droney fulfilled those obligations. His remarks at sentencing reflect careful consideration of the Section 3553(a) factors and the unique characteristics of this defendant, including both aggravating and mitigating circumstances. He ultimately imposed a Guidelines sentence, albeit at the bottom of the range. Judge Droney explained the rationale for rejecting Rahman’s request for a departure from the properly calculated guideline range and indicated that he would have imposed the same sentence if he had imposed a non-Guidelines sentence. The district court’s comments were more than sufficient to allow review of this sentence for reasonableness.

CONCLUSION

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

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

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,057 words exclusive of the Table of Contents, Table of Authorities this Certification, and the Addendum of Statutes and Rules.

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JAMES I. GLASSER
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ADDENDUM

§ 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence.

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider --

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed --
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;

- (4)** the kinds of sentence and the sentencing range established for --
 - (A)** the applicable category of offense committed by the applicable category of defendant as set forth in the Guidelines --
 - (i)** issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such Guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (ii)** that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or
 - (B)** in the case of a violation of probation, or supervised release, the applicable Guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such Guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission

into amendments issued under section 994(p) of title 28);

- (5) any pertinent policy statement—
 - (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
 - (B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

* * *

(c) Statement of reasons for imposing a sentence.
The court, at the time of sentencing, shall state in open

court the reasons for its imposition of the particular sentence, and, if the sentence --

- (1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or
- (2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the

Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.