04-2936-cr

To Be Argued By:
PAUL A. MURPHY

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-2936-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

EVERETT CRAIG THOMPSON, also known as Teddy,
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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KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

PAUL A. MURPHY
Assistant United States Attorney
WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

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STATEMENT OF JURISDICTION

The district court (Alan H. Nevas, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether a sentence of 130 months of imprisonment was reasonable in light of all the sentencing factors in 18 U.S.C. § 3553(a).

2. Whether the district court correctly concluded that the defendant was a career offender because the offense conduct underlying his two prior felony drug convictions was separated by an intervening arrest.

3. Whether the district court correctly determined that the defendant was not entitled to a four-level, "minimal role" adjustment to his offense level because he was a career offender.

4. Whether the district court's refusal to grant the defendant a downward departure for over-representation of criminal history is unreviewable, or, in the alternative, whether the district court abused its discretion in denying the request for a departure.

5. Whether the quantity of drugs was immaterial to the defendant's sentencing given the district court's determination that the defendant was a career offender.

United States Court of Appeals

FOR THE SECOND CIRCUIT

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Appellee,

-vs-

EVERETT CRAIG THOMPSON, also known as Teddy,

Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This is a sentencing appeal. The defendant, Everett Craig Thompson, pled guilty to a one-count information charging him with conspiracy to possess with intent to distribute cocaine base, in violation of 21 U.S.C. §§ 846 & 841(a)(1). At sentencing, the district court concluded that the guideline range of 235 to 240 months of imprisonment recommended by the Probation Office, which resulted from the quantity of cocaine base attributable to the

conspiracy, was too high. In response, the Government adopted a conservative approach to drug quantity given the limited duration of the defendant's participation in the conspiracy, resulting in the application of the lower guideline range dictated by the career offender guideline. This approach had the effect of reducing the defendant's offense level by four levels, the very reduction he sought for his claimed minimal role in the offense. The district court then departed downwardly based on the defendant's family circumstances, resulting in a guideline range of 130 to 162 months of imprisonment, and sentenced the defendant to 130 months. The court adhered to that sentence after a *Crosby* remand.

On appeal, the defendant argues that (1) he should have received a four-level downward adjustment for his minimal role in the offense, (2) he was not properly categorized as a career offender, (3) he should have received a downward departure based on over-representation of his criminal history, and (4) he should not have had attributed to him the drug quantity on which he contends his sentence was based. Each of these arguments is meritless. This Court should affirm the district court's sentence.

Statement of the Case

On March 24, 2002, the defendant was arrested pursuant to a criminal complaint. Defendant's Appendix ("DA __") 5. On April 2, 2002, the defendant was indicted by a federal grand jury and charged with conspiracy to possess with intent to distribute and to distribute fifty grams or more of a mixture and substance

containing a detectable amount of cocaine base, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)(iii). On May 8, 2002, a grand jury returned a superseding indictment charging the defendant with the same conspiracy offense. DA 18. The case was assigned to the Honorable Alan H. Nevas, Senior United States District Judge for the United States District Court, District of Connecticut.

On January 7, 2003, the defendant pled guilty to a one-count information charging him with conspiracy to possess with intent to distribute cocaine base, in violation of 21 U.S.C. §§ 846 and 841(a)(1). On March 30, 2004, the district court sentenced the defendant principally to 130 months of imprisonment. Judgment entered on April 7, 2004. DA 12. On April 12, 2004, the defendant filed a timely notice of appeal. DA 12.

On June 8, 2005, this Court granted the defendant's motion, on consent of the Government, to remand this matter to the district court for it to determine whether to resentence the defendant in light of the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), and this Court's decision in *United States v. Crosby*, 397 F.3d 1003 (2d Cir. 2005). DA 15-16. On November 15, 2005, the district court decided that it would not resentence the defendant pursuant to *Crosby*. DA 98-101. On March 3, 2006, the defendant filed a motion with this Court to reinstate this appeal, *nunc pro tunc*. The Court granted the motion on March 10, 2006. The defendant is presently serving his sentence.

STATEMENT OF FACTS

A. The Offense Conduct

In the fall of 2001, the New Haven Organized Crime Drug Enforcement Task Force (the "Task Force") began investigating a crack cocaine distribution ring in New Haven, Connecticut, headed by Charles Henry Brewer III.[1] DA 31. Brewer obtained crack from a New York source almost every week in quantities ranging from about 125 to 250 grams. DA 31. Brewer's principal distributor in New Haven was an individual named Kevin Cunningham. DA 31. During the month of March 2002, the defendant, Everett Thompson, also distributed crack for the Brewer organization. DA 31. Thompson participated in the drug-trafficking efforts of the organization from on or about March 5, 2002, through on or about March 24, 2002, at which point he and other members of the organization were arrested. DA 29, 33-34.

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[1] The defendant's statement of facts in his brief is based on his own statements at the sentencing hearing. Defendant's Brief ("Def. Br.") 1-2. As the Government noted at the sentencing hearing, the defendant minimized his offense conduct at that hearing. DA 83-84. The Government's statement of the offense conduct in this brief is drawn from paragraphs of the Presentence Investigation Report which were not specifically objected to in the district court, as well as statements relating to the offense conduct made at the plea proceeding with which the defendant agreed.

The investigation revealed that, once Brewer's crack was delivered to New Haven from New York, Cunningham would arrange to have it made available to Brewer and their associates. Government's Supplemental Appendix ("GSA __") 21-22. The drugs would be stashed at different locations around New Haven. GSA 22. One of those locations was at Diamond Street in New Haven. GSA 22. The defendant was linked to this location through an intercepted call he made to an individual who lived at the Diamond Street location. GSA 23. The defendant inquired about a box that was there, and the Task Force later observed him going to the Diamond Street location. GSA 23.

The Brewer organization had a number of customers who purchased resale quantities of crack ranging in quantity from "eight balls" (an eighth of an ounce) up to full ounces. GSA 22. The investigation revealed that the defendant participated in supplying a co-conspirator named Travis Stevens with half-ounce or ounce quantities of crack. GSA 23.

The defendant also was intercepted on phone calls with an individual who was not charged in this case, but who was interested in buying a quantity of crack and talked to the defendant about obtaining it from him. GSA 23.

The defendant's other role was to drive Kevin Cunningham to the location of drug transactions. GSA 24. He also took several calls for Cunningham from prospective crack buyers and put Cunningham in contact with them so the deals could be consummated. GSA 24.

The conspiracy came to an end when the Task Force learned through court-authorized electronic surveillance that a shipment of crack was to be transported to New Haven on March 24, 2002. DA 33. Physical surveillance showed Kevin Cunningham meeting on that date with an individual who was later identified as co-defendant Jose Luciano. DA 33. Luciano was seen getting out of a livery vehicle with New York license plates and having a brief conversation with Cunningham. DA 33. At this point, the Task Force arrested Luciano and found 250 grams of crack in the livery vehicle. DA 33. Cunningham fled the scene and engaged law enforcement in a high-speed chase, eventually abandoning his car and attempting to elude law enforcement by darting into a church where his co-defendant's father was presiding over Palm Sunday services. DA 34. Cunningham was apprehended after running up the center aisle of the church with a quantity of crack in his possession. DA 34.

B. The Presentence Investigation

The Presentence Investigation Report ("PSR") prepared by the U.S. Probation Office using the November 1, 2002, Sentencing Guidelines Manual, calculated the defendant's guideline imprisonment range to be 235 to 293 months. DA 51. Because the crime of conviction had a maximum term of 20 years, the actual range was 235 to 240 months. DA 94-95.

The base offense level was calculated to be 36, under U.S.S.G. § 2D1.1(c), based on a finding of up to 1.5

kilograms of crack being attributable to the defendant.[2] DA 34, 38, 55. The PSR noted that the defendant was a career offender under U.S.S.G. § 4B1.1, given that he was over 18 when he committed the instant offense, that the instant offense was a felony controlled substance offense, and that he had two prior felony controlled substance offenses. DA 38. Because the statutory maximum sentence was 20 years, the career offender guidelines called for an offense level 32. The PSR concluded that because the offense level calculated with reference to the quantity of drugs attributable to the conspiracy was higher than the career offender calculation, the higher offense level would apply, pursuant to U.S.S.G. § 4B1.1. DA 38. Accordingly, rather than start with an offense level 32, the PSR concluded that the appropriate offense level was 36, which was to be reduced by three levels for acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1, for a total offense level 33. DA 38-39.

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[2] The PSR noted in paragraph 27 that "a base offense level 34 [applies] for possession with intent to distribute at least 150 grams but less than 1.5 kilograms of cocaine base." DA 38. It then listed the offense level at 36. DA 38. These references to a level "34" and to "150 grams" appear to be errors, in light of the rest of the PSR. Paragraph 19, for instance, refers to the Government's conservative estimate of the quantity of drugs attributable to the conspiracy as being 1.5 kilograms, DA 34, and the Second Addendum to the PSR reflects that the U.S. Probation Office calculated the base offense level from a drug quantity of 500 grams to 1.5 kilograms, DA 55, which quantity results in a base offense level 36 under U.S.S.G. § 2D1.1(c). The defendant objected to the calculations in paragraphs 19 and 27 of the PSR. DA 55.

The PSR also found that the defendant had amassed a total of 22 criminal history points, DA 43-44, which would have placed him in criminal history category VI. U.S.S.G. Chapter 5, Part A (Sentencing Table). Moreover, because the defendant was a career offender, he automatically was placed in criminal history category VI. DA 44.

C. The Sentencing

At sentencing, the defendant argued for a downward departure on the ground that his criminal history over-represented the seriousness of his past criminal conduct. DA 60-64. As part of this argument, the defendant contended that four of his prior convictions – including the two felony narcotics convictions on which his career offender status was predicated – should be deemed related and therefore counted only as a single offense because, according to the defendant, they were not separated by intervening arrests. DA 61-62. The defendant also argued that he should receive a four-level reduction under U.S.S.G. § 3B1.2(a) for his supposed minimal role in the conspiracy. DA 64-67. The defendant also sought a downward departure based on his family background and circumstances. DA 70-73.

The district court refused to depart on the ground that the defendant's criminal history substantially over-represented the seriousness of his criminal past. In this regard, the court acknowledged that the guideline range of 235 to 240 months was driven largely by the defendant's criminal history category. DA 63. It added that "there isn't anything we can do about that. I mean, it is what it

is." DA 63. The district court went on to say that it could reduce the guideline range, "but I don't think you can do it with respect to the criminal history category." DA 64. The Court further remarked to the defendant that, "the bottom line, as they say, is that your record is what it is. You have a bad record." DA 86.

The district court also rejected the defendant's request for a role reduction, agreeing with the U.S. Probation Office that such a reduction does not apply to a career offender. DA 67.

The district court did express its concern that the guideline range of 235 to 240 months was excessive given the defendant's role in the offense. DA 63, 85-86. In this regard, the Government agreed to adopt a conservative approach to the issue of quantity, given the limited duration of the defendant's participation in the conspiracy. DA 68-69. Doing so had the result of lowering the offense level to that called for by the career offender guideline. DA 68-70. In this instance, the result was to reduce the defendant's offense level from 36 to 32 – a four-level reduction, which is what the defendant would have received for the minimal role reduction he sought. DA 68-70.

The district court then reduced the offense level three more points for the defendant's acceptance of responsibility. DA 70. It also granted the motion for a downward departure on the grounds of the defendant's

family circumstances.[3] DA 86. This brought the defendant down to a guideline range of 130 to 162 months, and the district court proceeded to sentence the defendant to 130 months. DA 86.

D. The *Crosby* Remand Proceeding

On remand, defense counsel argued that the defendant's sentence of 130 months should be further reduced now that the Sentencing Guidelines are advisory. He relied principally on his contention that the defendant had a limited role in the conspiracy, and also pointed to the defendant's psychological issues. DA 95, 97-98.

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[3] The defendant offers the curious suggestion in a footnote that a remand "might be necessary" to enable this Court "to discern exactly what bases on which the [district court] departed downward." Def. Br. 2, n.9. He then cites two cases where a remand was ordered because the district court failed to make clear whether it had applied an *enhancement* or to set forth adequately the reasons for such an enhancement. Def. Br. 2, n.9. *See United States v. Reed*, 49 F.3d 895, 901 (2d Cir. 1995); *United States v. Bradbury*, 189 F.3d 200, 204-05 (2d Cir. 1999). The defendant's argument is baseless. There is no reason for this Court to remand so the district court can explain why it *granted* a downward departure – particularly one which no party challenges on appeal. Moreover, the district court was perfectly clear that the basis for its two-point downward departure was the defendant's family circumstances. DA 85-86. Specifically, the court said, "I am gonna go down two more levels based on your bad family background, which takes us to a Level 27." DA 86.

The district court decided not to resentence the defendant. In doing so, it remarked on the defendant's "criminal record, which was – I think everyone can agree, was pretty extensive." DA 98. The district court also focused on the reduction in the guideline range that it had found at the sentencing, saying:

> [The Government] was more than reasonable and more than fair in this case, and [the Government] conceded and agreed that 235 to 240 months just wasn't called for in this case, so adjustments were made, I believe in quantity, and there was another adjustment, maybe it was quantity alone, to get the guideline range down, and then I departed downward another two levels for family reasons. . . .
>
> * * *
>
> So we got down to a range of 130 to 162 from 235 to 240, and then I sentenced him to the bottom of that range, which was 130 months.
>
> So he went from a bottom range of 235 to a bottom range of 130, and I then sentenced him to the bottom of that range at 130 months.

DA 99-100.

In light of this substantial reduction, the district court concluded that there was no reason why it would resentence him under the advisory Guidelines. DA 100.

SUMMARY OF ARGUMENT

1. The district court's sentence of 130 months in prison was reasonable in light of all the factors set forth in 18 U.S.C. § 3553(a). It proceeded from a correct calculation of the Sentencing Guidelines, and accounted for all the relevant sentencing factors, such as the serious nature of this drug-trafficking conspiracy and the defendant's extensive criminal history. It reflected the need for deterrence, punishment and the protection of society from further crime, while balancing the defendant's difficult personal and family circumstances.

2. The district court did not err in concluding that the defendant was a career offender. He was over 18 years old when he committed the instant offense, a controlled substance offense, and he had two prior felony convictions for controlled substance offenses. Those prior felony drug offenses were not related for purposes of the Guidelines analysis because they were separated by an intervening arrest. That is, the defendant engaged in the conduct that resulted in the first conviction, was arrested for it, and then later committed the second controlled substance offense.

3. The defendant was not entitled to a further four-level reduction in his offense level for a minimal role. The district court effectively granted the defendant such a reduction when the Government agreed to take a conservative approach concerning the quantity of drugs attributable to the defendant based on the limited duration of his participation in the conspiracy. To the extent the defendant seeks a further four-level departure from the

offense level set by the career offender guideline, the Guidelines do not permit a role adjustment to reduce a career offender offense level.

4. The district court's decision not to grant a downward departure on grounds of over-representation of criminal history is an unreviewable exercise of the court's discretion. The district court is presumed to have understood its authority to depart, and the record reflects that it concluded that the defendant's criminal record did not substantially over-represent the seriousness of his criminal past.

5. The defendant was not sentenced based on a specific quantity of crack. Rather, his sentence was driven by the career offender guideline, which, in turn, was based on the statutory maximum sentence, not a specific drug quantity.

ARGUMENT

I. THE DEFENDANT'S SENTENCE WAS REASONABLE.

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the United States Sentencing Guidelines, as written, violate the Sixth Amendment principles articulated in *Blakely v. Washington*, 542 U.S. 296 (2004). As a remedy, the Court severed and excised the statutory provision making the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), thus declaring the Guidelines "effectively advisory." *Booker*, 543 U.S. at 245. This

ruling results in a system in which the sentencing court, while required to consider the Guidelines, may impose a sentence within the statutory maximum penalty for the offense of conviction.

Sentencing in the post-*Booker* regime now involves two analytic stages: first, a determination normally will have to be made of the applicable guideline range, including any departures; and then the court decides whether in light of the Guidelines and the other factors listed in 18 U.S.C. § 3553(a), there is any reason to impose a non-Guidelines sentence. *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005).

An appellate court reviews a sentence for "reasonableness." *Booker*, 543 U.S. at 261-62; *Crosby*, 397 F.3d at 110. The review for reasonableness "involves consideration not only of the sentence itself, but also of the procedure employed in arriving at the sentence." *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006); *Crosby*, 397 F.3d at 114; *United States v. Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005). "An error in determining the applicable Guideline range or the availability of departure authority would be the type of procedural error that could render a sentence unreasonable under *Booker*." *Selioutsky*, 409 F.3d at 118. This Court will remand where a miscalculation of the Guidelines is of sufficient magnitude to have the potential to "'appreciabl[y] influence' the ultimate sentence." *United States v. Canova*, 412 F.3d 331, 356 (2d Cir. 2005) (quoting *United States v. Rubenstein*, 403 F.3d 93, 98 (2d Cir.), *cert. denied*, 126 S. Ct. 388 (2005)).

Under the post-*Booker* regime, an appellate court reviews the sentencing court's interpretation of the Guidelines under a *de novo* standard and examines any factual findings for clear error. *See Rubenstein*, 403 F.3d 93, 99 (2d Cir. 2005); *Canova*, 412 F.3d at 351 ("We review the factual determinations underlying a district court's loss calculation at sentencing for clear error and its application of the Sentencing Guidelines *de novo*.").

This Court has summarized this post-*Booker* standard of review as follows:

> Reasonableness 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 (quoting *Crosby*, 397 F.3d at 114).

This Court has held that appellate review of the reasonableness of a sentence "should exhibit restraint, not micromanagement." *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005). "Although the brevity or length of a sentence can exceed the bounds of 'reasonableness,' [this Court] anticipate[s] encountering such circumstances

infrequently." *Id.*; *United States v. Fairclough*, 439 F.3d 76, 79-80 (2d Cir. 2006). And while this Court has declined to adopt a presumption that a sentence within the applicable guideline range is reasonable, and instead reviews the record as a whole in a specific case to determine reasonableness, it has found 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.

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).'" *Fairclough*, 439 F.3d at 80 (quoting *Canova*, 412 F.3d at 350). A sentencing court need not specifically identify the § 3553(a) standards for this Court to conclude that it adequately considered them. "As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception of their relevance, we will accept that the requisite consideration has occurred." *Fleming*, 397 F.3d at 100; *see Fernandez*, 443 F.3d at 30 ("[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."); *see also Crosby*, 397 F.3d at 113 (rejecting the need for "robotic incantations" by district judges to demonstrate that they have "considered" the Guidelines).

Here, the sentence of 130 months was the bottom of the guideline range that the district judge determined should apply after reducing the range calculated in the PSR from a minimum of 235 months. The 130-month sentence was eminently reasonable in light of the factors set out on 18 U.S.C. § 3553(a). For instance, it balanced the serious nature of this felony narcotics conviction involving a conspiracy to distribute substantial amounts of crack cocaine with the characteristics of the defendant, taking into account his extensive criminal history, his difficult family circumstances and the limited duration of his involvement in the charged conspiracy. The sentence further reflected the need to promote respect for the law, to render appropriate punishment, to deter other criminal conduct, and to protect society. And, as discussed below, it proceeded from a correct application of the Sentencing Guidelines coupled with a judicious exercise of the district court's discretion.

The defendant points to the fact that co-defendant Charles Brewer received a sentence of 12 months while Kevin Cunningham was sentenced to 120 months, suggesting that his sentence was unreasonable because he had a substantially lesser role than did either of these individuals. Def. Br. 3; DA 26-27.

This Court recently recognized in *Fernandez* that while the language of 18 U.S.C. § 3553(a)(6) appears to allow judges to consider disparities in sentences of co-defendants in the same case, it is an open question in this circuit whether such a disparity would support imposition of a non-Guidelines sentence. *Fernandez*, 443 F.3d at 32, n.9.

The *Fernandez* court noted there is authority for the proposition that 18 U.S.C. § 3553(a)(6) was intended to address *nationwide* disparities in sentencing, not disparities between or among co-defendants. *Id*. This Court did not decide the issue, though, because the co-defendants were not similarly situated. *Id*. The *Fernandez* court also held that, even if a disparity between co-defendants were an appropriate argument for leniency, it would not require a lesser sentence, as § 3553(a)(6) is just one of a number of factors a sentencing court must consider in reaching the appropriate punishment. *Id*. at 30-31. Where the sentencing court chooses to address a co-defendant sentencing disparity, it "'is a matter firmly committed to the discretion of the sentencing judge and is beyond our [appellate] review, as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented.'" *United States v. Florez*, No. 05-2385-cr, slip op. at 24 (2d Cir. May 3, 2006) (quoting *Fernandez*, 443 F.3d at 32).

Here, the defendant fails to identify facts showing that there was an *unwarranted* disparity among the co-defendants' respective sentences. Indeed, the defendant apparently has an incomplete and therefore inaccurate understanding of the circumstances underlying his co-defendants' sentences. For example, Charles Brewer's sentence resulted from factors that did not apply to this defendant.[4] Moreover, Kevin Cunningham had only three

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[4] To ensure that this Court has a complete understanding of the circumstances affecting the sentences of co-defendants (continued...)

criminal history points, unlike the defendant here. The defendant was the only one among the three adjudged a career offender. His extensive criminal history and career offender status were significant reasons why his circumstances were unlike those of his co-defendants. Indeed, the defendant's own brief recognizes this, noting that his "lengthy criminal history" is what "placed him even outside of the sentences accorded the conspirac[y's] leaders." Def. Br. 7.

In the end, the co-defendants were not similarly situated, and the fact that Cunningham and Brewer received lesser sentences does not in any way make the defendant's sentence unreasonable.

Indeed, at the time of sentencing, Cunningham had already been sentenced, and Brewer had been sentenced by the time of the *Crosby* remand in this matter. DA 26-27, 91. In the defendant's sentencing memorandum he wrote that "[i]t is believed that no other defendant has been

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[4] (...continued)
Brewer and Cunningham, the Government has filed a motion with the district court to supplement the record on appeal under seal with, among other documents, the Presentence Investigation Reports of these other defendants. These items are under seal in the district court and not available to this defendant. All of this information, of course, was available to Judge Nevas, who sentenced all three co-defendants. The Government has requested that they be transmitted to this Court *ex parte* under seal so this Court may review them should it wish to examine whether these co-defendants were similarly situated to the defendant.

sentenced to a term in excess of 10 years, including the leaders of the conspiracy." GSA 32. Moreover, in his memorandum in support of resentencing submitted prior to the *Crosby* remand hearing, the defendant urged the district court to re-examine his 130-month sentence, and asked the court "to compare his sentence with other, more culpable, members of the Brewer organization." GSA 35. Judge Nevas sentenced the defendant as well as co-defendants Brewer and Cunningham, and he can safely be presumed to have understood the bases for each person's specific sentence. He clearly was unmoved by the defendant's claim that his sentence represented an unwarranted disparity with his co-defendants. Such an exercise of the district court's discretion is unreviewable, given the reasonableness of the sentence when viewed through the prism of all the relevant sentencing factors. *See Florez*, No. 05-2385-cr, slip op. at 24 (2d Cir. May 3, 2006); *Fernandez*, 443 F.3d at 32.

As set forth in the succeeding sections of this brief, the sentence should be affirmed because there was no clear error of fact, misapplication of the Guidelines or abuse of the district court's discretion that infected the 130-month sentence.

II. THE DEFENDANT WAS PROPERLY CLASSIFIED AS A CAREER OFFENDER BECAUSE HIS FELONY DRUG OFFENSES WERE SEPARATED BY AN INTERVENING ARREST.

The PSR concluded – and the district court agreed – that the defendant was a career offender under U.S.S.G. § 4B1.1. On this appeal, the defendant contends that he is not a career offender because his prior felony drug convictions were "related." Def. Br. 5-7. The defendant's argument is flawed because his predicate drug offenses were separated by an intervening arrest.

A. Relevant Facts

The PSR reflected that the defendant had two prior felony convictions in Connecticut Superior Court for controlled substance offenses. The first resulted from his arrest on January 18, 1991, for sale of narcotics, a felony which he was convicted of on April 16, 1993, and for which he received a 12-year jail sentence, with five years to serve. DA 41. The defendant was arrested again on March 19, 1991, and charged with two counts of sale of narcotics, felonies of which he was found guilty on April 16, 1993. He received a 12-year jail sentence, with five years to serve, and a three-year jail sentence on these counts. DA 41-42.

B. Governing Law and Standard of Review

Section 4B1.1 of the Sentencing Guidelines defines a career offender as follows:

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

U.S.S.G. § 4B1.1(a).

The career offender guideline calculates an offense level based on the maximum penalty for the offense of conviction, and that offense level applies if the otherwise applicable level is less than that prescribed in the career offender table. *See* U.S.S.G. § 4B1.1(b). The guideline also automatically places a career offender in criminal history category VI. *Id*.

For the career offender guideline to apply, the sentences for the two prior felony convictions for controlled substance violations must be "counted separately under the provisions of § 4A1.1(a), (b), or (c)." U.S.S.G. § 4B1.2(c). Convictions are counted separately under the Guidelines if they are imposed in unrelated cases. U.S.S.G. § 4A1.2(a)(2).

"Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (*i.e.* the defendant is arrested for the first offense prior to committing the second offense)." U.S.S.G. § 4A1.2, comment (n.3). In *United States v. Boonphakdee*, 40 F.3d 538 (2d Cir. 1994), *overruled in unrelated part*, 420 F.3d 111 (2d Cir. 2005), this Court held that "whether an intervening arrest was present constitutes a *threshold* question that, if answered in the affirmative, precludes any further inquiry to determine whether the prior sentences were imposed in related cases." *Id*. at 544; *see also United States v. Rivers*, 50 F.3d 1126, 1128-29 (2d Cir. 1995).

C. Discussion

The defendant's contention that his controlled substance convictions are related simply misconstrues the nature of the phrase "intervening arrest." He appears to believe that there must be an arrest for some completely unconnected conduct to break the chain between two felony drug arrests in order for the drug arrests to be considered unrelated. Def. Br. 6. No such thing is required. The concept of an "intervening arrest" under the Guidelines simply refers to the fact that there was an arrest separating the two incidents underlying the charges. That is, "the defendant is arrested for the first offense prior to committing the second offense." U.S.S.G. § 4A1.2, comment (n.3).

This is precisely the situation here. The defendant committed the conduct underlying his first felony drug conviction on or before January 18, 1991. DA 41. He

committed the actions that formed the basis for the second felony drug conviction on or about March 5, 1991. DA 41-42. Between those two criminal acts, he was arrested on January 18, 1991 for the conduct underlying the first charge. DA 41. Thus, the record makes clear that "the defendant [wa]s arrested for the first offense prior to committing the second offense." U.S.S.G. § 4A1.2, comment (n.3).[5]

Accordingly, the two offenses were separated by an intervening arrest and therefore are unrelated, qualifying the defendant as a career offender.

III. THE DEFENDANT WAS NOT ENTITLED TO A FURTHER DOWNWARD ADJUSTMENT FOR HIS ROLE IN THE OFFENSE BECAUSE HE WAS A CAREER OFFENDER.

The defendant argues that he was entitled to a four-level downward adjustment to his guideline range based on what he characterizes as his minimal role in the drug distribution conspiracy. Def. Br. 4-5.

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[5] The defendant also claims that the PSR reflects that requests were made for the New Haven Police Department reports, but none was received. Def. Br. 6. He also contends that the Government cannot meet what he claims is the Government's burden of proof that there were two prior drug sale convictions. Def. Br. 7. These assertions are directly contradicted by the PSR, which reflects information from the New Haven Police Department incident reports for the pertinent convictions. DA 41-42.

A. Relevant Facts

As noted above, based on the quantity of crack cocaine that was attributable to the conspiracy, the PSR calculated the defendant's base offense level under U.S.S.G. § 2D1.1 to be 36. DA 38. He was entitled to a three-level reduction for acceptance of responsibility – which he received – resulting in an adjusted offense level 33. DA 39. Were he also to have received a four-level minimal role adjustment under U.S.S.G. § 3B1.2, the defendant's adjusted offense level would have been 29 after accounting for all Chapter Three adjustments.

In contrast, the career offender guidelines provided for an offense level 32 because of the statutory maximum of 20 years in prison. DA 38. The defendant eventually was granted a three-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1, making the offense level 29. DA 68-69. The district court concluded that the defendant was not entitled to a role reduction because of the applicability of the career offender provisions. DA 67.

B. Governing Law and Standard of Review

Chapter Three of the Sentencing Guidelines contains adjustments to a base offense level calculated under Chapter Two. One such adjustment applies to defendants who are substantially less culpable than others involved in concerted criminal activity. Section 3B1.2(a) of the Sentencing Guidelines provides that "[i]f the defendant was a minimal participant in any criminal activity, decrease [the offense level] by 4 levels."

U.S.S.G. § 3B1.2(a). A "minimal role" adjustment "is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group." U.S.S.G. § 3B1.2, comment (n.4). "Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and the activities of others is indicative of a role as minimal participant." *Id*. The Sentencing Commission noted that the minimal role adjustment was intended to be applied "infrequently." *Id*. And, contrary to the defendant's suggestion in his brief, Def. Br. 5, a minimal role adjustment requires a court to compare a defendant's role not only to that of his co-defendant(s), but also to the role of "the average participant in such a crime." *United States v. Carpenter*, 252 F.3d 230, 235-36 (2d Cir. 2001).

The structure of the Guidelines establishes a sequencing regime whereby the court first determines a base offense level by looking to Chapter Two, then it moves to Chapter Three to determine whether any adjustments – such as those for role in the offense – should be applied. Then the court moves to Chapter Four to decide a defendant's criminal history category and whether the defendant qualifies as a career offender. *See* U.S.S.G. § 1B1.1; *United States v. Ventura*, 353 F.3d 84, 92 (1st Cir. 2003) (describing sequential structure of Guidelines application and citing cases).

Courts recognize that this structural arrangement of the Guidelines precludes a district court from applying a Chapter Three adjustment, such as an adjustment for role in the offense, to reduce the Chapter Four career offender

calculation. *See United States v. Perez*, 328 F.3d 96, 97-98 (2d Cir. 2003) (citing cases). Only the Chapter Three adjustment for acceptance of responsibility applies to reduce the career offender guideline, and that is because this specific adjustment is expressly incorporated into the language of the career offender guideline. U.S.S.G. § 4B1.1. This Court has been clear on these issues, holding as follows:

> [A]ll the circuit courts that have reached the question agree that "career offenders" cannot receive a "minor role" downward adjustment, to the extent that such an adjustment would result in an offense level that falls below the career-offender minimum established by U.S.S.G. § 4B1.1(b).

Id. at 97-98.

Thus, where the career offender guideline applies, the sentencing court first determines the offense level that would apply by virtue of the Chapter Two base offense level as adjusted by any applicable Chapter Three adjustments, then it compares that resulting offense level with the offense level set by the career offender provision. Where "the offense level for a career offender" derived from the table in section 4B1.1 "is greater than the offense level otherwise applicable," the career offender offense level applies. U.S.S.G. § 4B1.1(b).

C. Discussion

Here, the sentencing court concluded that it could not reduce the defendant's offense level of 36 with a minimal role adjustment because the career offender guideline applied. DA 67-68. Nevertheless, when the Government agreed to be conservative with respect to the issue of drug quantity, resulting in the career offender provision controlling, the defendant received the same result he would have had the Court granted a four-level role reduction. DA 68-69. This is because the offense level 36 that was based on the drug quantity attributable to the conspiracy dropped to the career offender offense level of 32. Recognizing that he had achieved the result he wanted, defense counsel (wisely) accepted the sentencing court's proposal without objection and moved on to his argument for a departure on family circumstances grounds (which the district court also granted). DA 69-70.

Level 32 was not only the very break the defendant requested, but it was the lowest his offense level could have gone (leaving aside credit for acceptance of responsibility and any departure) given his status as a career offender. This would be true even if his *base* offense level under U.S.S.G. § 2D1.1(c) had been lower than 36 due to a lesser drug quantity being attributed to him. Had that been the case, a four-level minimal role reduction would have made no difference because he still would have been subject to an offense level 32 under the career offender guideline. As noted, any offense level below the one set in the career offender guideline

automatically yields to the career offender level. U.S.S.G. § 4B1.1(b).

In the end, the defendant received the four-level reduction he was seeking. Even if the district court was wrong in the manner it reached that conclusion, such an error would be harmless as a matter of law because the result was exactly what the defendant sought. This Court will not vacate and remand a sentence where the purported error was harmless. *See United States v. Thorn*, 317 F.3d 107, 126 (2d Cir. 2003) ("'[W]e will vacate a sentence and remand for resentencing because of a misapplication of the Guidelines only if we determine that the error was not harmless.'") (quoting *United States v. Tropiano*, 50 F.3d 157, 162 (2d Cir. 1995)).

To the extent the defendant's argument is that he deserved a further four-point reduction for his role in the offense, taking him from the career offender level 32 down to a level 28, such an argument must fail. This Court has made abundantly clear that the career offender level may not be reduced based on a defendant's mitigating role in the offense. *See Perez*, 328 F.3d at 97-98. Accordingly, the defendant was not entitled to any further reduction in his guideline range for his role in the offense.

The defendant's citation to *United States v. Rogers*, 972 F.2d 489 (2d Cir. 1992), as supporting a downward departure from the career offender guideline is inapposite. Def. Br. 5. *Rogers* involved a downward departure from the career offender guideline for extraordinary acceptance

of responsibility. *See id*. at 492-95. No such issue was involved here.

Moreover, to the extent the defendant now claims he was entitled to a *departure* from the career offender guideline for his so-called "minimal role," such a contention is both unreviewable and unsupported by the record, for the reasons stated in Section V, *infra*.

IV. THE DISTRICT COURT'S DECISION NOT TO DEPART ON OVER-REPRESENTATION GROUNDS IS UNREVIEWABLE AND, IN ANY EVENT, WAS CORRECT.

The defendant next argues that the district court should have departed because his criminal history category over-represents the seriousness of his past criminal conduct. Def. Br. 7-8. He identifies no reason why this is so, nor could he.

A. Relevant Facts

The PSR reflected that the defendant had a substantial criminal history, having accumulated 22 criminal history points. DA 43-44. His criminal history included convictions stemming from arrests going back to October 27, 1986. A review of his prior convictions reflects the depth and breadth of his criminal history. The PSR shows 12 arrests between 1986 and 1998, all resulting in convictions. DA 39-43. His crimes ranged from forgery, to multiple counts of larceny, to sale of narcotics on two separate occasions, as well as possession of narcotics,

assault, use of a motor vehicle without permission, evading/injury to property and failure to appear. DA 39-43.

These convictions led to lengthy prison sentences which left the defendant incarcerated or on community release for much of the latter part of the 1980s through December 1995 – with a further probationary sentence imposed in 1998. DA 39-43. According to the PSR, the defendant was in prison from November 1986 through March 1987. DA 50. Three months after his release, he began serving another sentence, in June 1987, and was released from the sentence in June 1989. DA 50. The PSR also indicates that he was incarcerated from June 1989 until his release from parole on December 12, 1995, although for periods of that time he was in community confinement. DA 50. Indeed, the PSR reflects that, while in the halfway house, he worked at a job from which he was ultimately fired after being convicted of using a motor vehicle without the owner's permission. DA 50.

At sentencing, the district court took note of the fact that the defendant's criminal history drove the guideline range, adding that "there isn't anything we can do about that. I mean, it is what it is." DA 63. The district court went on to say that it could reduce the guideline range, "but I don't think you can do it with respect to the criminal history category." DA 64. Later in the proceeding, the court addressed the defendant's criminal history, saying:

> [T]he bottom line, as they say, is that your record is what it is. You have a bad record. I agree that

> there was a – there came a point in the '90s where you basically, or in terms of your arrests, it would appear that you finally got to a point in your life where you recognized that you just couldn't go on like this, in and out of jail all the time, and you tried to turn things around, but you came to New Haven, you got involved with these people, foolishly, and now you're here.

DA 86.

B. Governing Law and Standard of Review

The Sentencing Guidelines provide that a district court may depart downwardly if it determines that a defendant's "criminal history category significantly over-represents the seriousness of a defendant's criminal history or the likelihood that the defendant will commit further crimes." U.S.S.G. § 4A1.3. The November 1, 2002, Sentencing Guidelines Manual – which is applicable here – provided that "[i]n considering a departure under this provision, the [U.S. Sentencing] Commission intends that the court use, as a reference, the guidelines range for a defendant with a higher or lower criminal history category, as applicable." *Id*. To justify a downward departure, the defendant's criminal history score must "significantly" over-represent the seriousness of his history. *See Thorn*, 317 F.3d at 131 n.19.

In the context of a case where the career offender guideline applies, this Court has held that a district court has the authority to depart downwardly on over-

representation grounds on both the horizontal axis (the criminal history category) and the vertical axis (the offense level). *See United States v. Rivers*, 50 F.3d 1126, 1130 (2d Cir. 1995). As explained in *Rivers*, a departure on both the horizontal and vertical axes may be appropriate in the context of a career offender case because generally in such a case, "criminal history determines both the criminal history category and the offense level." *Id*.

In considering whether a departure on over-representation grounds is warranted, this court has noted that relevant factors to be considered might include the amount of drugs involved in the defendant's prior offenses, his role in the earlier offenses, "the sentences previously imposed, and the amount of time previously served compared to the sentencing range called for by placement in [criminal history category] VI." *United States v. Mishoe*, 241 F.3d 214, 219 (2d Cir. 2001). The *Mishoe* court added that "[o]bviously, a major reason for imposing an especially long sentence upon those who have committed prior offenses is to achieve a deterrent effect that the prior punishments failed to achieve." *Id*. at 220.

Prior to *Booker*, a district court's refusal to depart was unreviewable, subject to the limited exception "where 'the guidelines were misapplied, the court misapprehended its authority or imposed an illegal sentence.'" *United States v. Brown*, 98 F.3d 690, 692 (2d Cir. 1996) (quoting *United States v. Haynes*, 985 F.2d 65, 68 (2d Cir. 1993)); *see United States v. Clark*, 128 F.3d 122, 124 (2d Cir. 1997); *United States v. Martin*, 78 F.3d 808, 814-15 (2d Cir. 1996). This Court recently reiterated that "[a]lthough a

refusal to downwardly depart is generally not appealable, review is available when a sentencing court misapprehended the scope of its authority to depart or the sentence was otherwise illegal." *United States v. Valdez*, 426 F.3d 178, 184 (2d Cir. 2005) (rejecting claim that district court misconstrued departure grounds, and remanding under *Crosby*); *see United States v. D'Oliveira*, 402 F.3d 130, 133 (2d Cir. 2005) (declining to review district court refusal to depart where district court understood its authority to depart).

There is a "strong presumption that a district judge is aware of the assertedly relevant grounds for departure." *Brown*, 98 F.3d at 694. "This presumption is overcome only in the rare situation where the record provides a reviewing court with clear evidence of a substantial risk that the judge misapprehended the scope of his departure authority." *Id*. This Court has added:

> When a sentencing judge asserts that he has no authority to depart, or when he says he wishes he could impose a sentence outside the calculated Guidelines range but is constrained by the Guidelines from doing so, we do not infer that he is saying that the Guidelines never permit departure (for that is obviously untrue) but *that the facts of the case at hand do not provide any basis for lawful departure*.

Brown, 98 F.3d at 693 (emphasis in original); *see United States v. Walker*, 191 F.3d 326, 338-39 (2d Cir. 1999) (sentencing court stated "the guidelines do not permit a

departure" based on family circumstances; court of appeals "understand[s] the district court to have meant that no departure would be permitted under the specific circumstances of this case").[6]

C. Discussion

Here, the defendant identified no reason why his criminal history over-represented the seriousness of his prior criminal acts. Nor could he. His past record is abysmal. Even a quick review of his prior convictions shows multiple prior felony convictions leading to lengthy prison sentences. His criminal record is broad and deep, with convictions for an array of offenses ranging from larceny, to narcotics possession and distribution, to assault and failure to appear. Many of these crimes were committed on multiple occasions. Moreover, it is highly significant that the defendant spent substantial stretches of time in jail without it having a deterrent effect on his criminal behavior.

He accrued 22 criminal history points, well above the minimum 13 points that qualify a person for criminal

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[6] This Court has tended to be more cautious in circumstances unlike the present ones where the ground for departure was just recently recognized, or where a district judge's decision may have turned on an "obscure point of law or where the judge's sentencing remarks create ambiguity as to whether the judge correctly understood an available option." *Rivers*, 50 F.3d at 1132; *see United States v. Rivera*, 192 F.3d 81, 85-86 (2d Cir. 1999).

history category VI. Indeed, a number of his convictions from the 1980s were not even counted in the 22-point tally because of when they occurred. DA 39-40. So his criminal history score could more accurately be described as under-representative of his criminal past.

This was not a situation like that in *Rivers*, where the defendant's career offender status resulted in an increase in both his criminal history category and offense level. *Rivers*, 50 F.3d at 1127-28. The career offender guidelines certainly did not raise the defendant into a higher criminal history category – he already was a category VI. Moreover, because of the conservative approach taken regarding drug quantity, which otherwise may have led to an offense level of 36, the career offender guideline may actually have benefitted the defendant on the issue of his offense level, and was unlikely to have placed him in any worse position vis-a-vis his offense level.

In addition, there is no indication that Judge Nevas misconstrued his authority to depart. He made several comments, when referring to the defendant's criminal history, that "there isn't anything we can do about that. I mean, it is what it is." The district court also said that it could reduce the guideline range, "but I don't think you can do it with respect to the criminal history category." DA 64.

These comments need to be viewed in the context of the defendant's remarkable criminal history. They do not indicate that the experienced district judge misunderstood his ability to depart. Instead, they show that the judge

understood what a dismal criminal record the defendant had and that it would be incorrect to conclude that the defendant's criminal history substantially over-represented the seriousness of his criminal past, because it did not. As this Court noted in *Brown*, such comments are correctly construed not as showing that the district court misapprehended its departure authority, but rather that *"the facts of the case at hand do not provide any basis for lawful departure*." *Brown*, 98 F.3d at 693 (emphasis in original); *see Walker*, 191 F.3d at 338-39.

The defendant cites *United States v. Tropiano*, 50 F.3d 157 (2d Cir. 1995), and contends that the district court here "should have evaluated what category accurately reflects the seriousness of his record." Def. Br. 8. In *Tropiano*, however, this Court faulted the district court for upwardly departing on under-representation grounds by applying a vertical upward departure rather than proceeding sequentially through each successively higher criminal history category and explaining why that category did not adequately address the under-representation concern. *Id*. at 162. *Tropiano* did not involve a situation like this one where the sentencing court refused to depart on over- (or under-) representation grounds. Moreover, such a step-by-step review plainly was not called for here, as there is no criminal history category other than VI that would better reflect the seriousness of the defendant's criminal record. As the district court's comments made clear, there was no ignoring the defendant's eye-opening criminal record. In the words of the district court, "it is what it is," DA 64, and it was "bad." DA 86.

Accordingly, the Court should not review the district court's refusal to grant a downward departure on over-representation grounds. Alternatively, the district court did not abuse its discretion in denying the departure motion. The record demonstrates that the defendant's criminal history did not over-represent the seriousness of his criminal past, and a lengthy sentence was necessary to deter his criminal behavior, which prior lengthy prison terms had failed to do.

V. THE DEFENDANT'S GUIDELINES WERE NOT BASED ON ANY QUANTITY OF DRUGS, BUT RATHER WERE DERIVED FROM THE CAREER OFFENDER TABLE.

The defendant's final argument is that he should not have been held liable for the quantity of crack on which he supposedly was sentenced. Def. Br. 8-9. Specifically, he takes the offense level 32 and, through some misplaced reverse-engineering, concludes that he was sentenced based on the quantity of crack applicable to that level in the drug quantity table in U.S.S.G. § 2D1.1(c). Def. Br. 9. This argument can be quickly dispatched.

As noted, the defendant's guideline range was derived from the career offender provisions in U.S.S.G. § 4B1.1. The table in that section is calculated based on the statutory maximum penalty that the crime of conviction carries. The maximum term of imprisonment for the crime of conviction here is not driven by any specific drug quantity. *See* 21 U.S.C. §§ 841(a)(1) and 846.

Accordingly, the defendant's career offender offense level was not affected by any specific drug quantity.

Indeed, the career offender level controlled here precisely because the Government, at sentencing, agreed to take a conservative approach with respect to drug quantity against the defendant. Quantity thus became irrelevant. The practical result was for the defendant's offense level to be reduced four levels from that calculated by the Probation Office based on drug quantity.

Because the defendant's sentence was not in any way derived from a specific drug quantity, *United States v. Lara*, 47 F.3d 60 (2d Cir. 1995), holding that in the particular circumstances a departure was warranted as to some defendants based on drug quantity, is inapposite. The defendant's argument that he is entitled to a downward departure because the quantity of drugs attributable to him overstated the seriousness of the offense must fail. Def. Br. 9.

Moreover, even if drug quantity had guided his sentence, the departure argument asserted here would be unreviewable. In his sentencing memorandum, the defendant suggested an argument for an offense level 18 based on an alleged quantity of between 1 and 2 grams of cocaine base. GSA 32. Leaving aside whether there is any factual basis for this contention, Judge Nevas clearly did not grant such a request, and, as previously noted, the refusal to depart is unreviewable by this Court. *See Valdez*, 426 F.3d at 184.

No departure from the career offender guideline would have been justified in any event. The defendant clearly participated in the serious drug-trafficking conspiracy at the center of this case, and while he was involved for only about three weeks when he and other co-conspirators were arrested, there is no basis for concluding that his participation was so extraordinarily minimal as to qualify as a mitigating circumstance not adequately taken into consideration by the Sentencing Commission. He was connected to a stash house, drove the group's chief distributor around to conduct drug transactions, and facilitated drug sales transactions. GSA 21-24. This case is unlike cases such as *United States v. Restrepo*, 936 F.2d 661 (2d Cir. 1991), where a downward departure was granted because the defendants' offense level was "extraordinarily magnified" by the amount of cash involved in the money laundering crime in comparison to the defendants' role in the offense, which included simply loading boxes. *Id*. at 667-68. Here, unlike *Restrepo*, the defendant's participation was more involved, as noted above, and the offense level ultimately was driven by the defendant's status as a career offender, rather than by the quantity of drugs attributable to him.

In the end, the district court recognized the defendant's lesser role in the offense of conviction, and accounted for it by reducing his offense level from 36 to 32. No further departure based on the defendant's role in the conspiracy was either requested or warranted.[7]

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[7] The defendant's brief refers to "U.S.S.G. 2D1.1, (continued...)

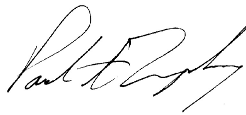
CONCLUSION

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

Dated: May 10, 2006

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



PAUL A. MURPHY
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

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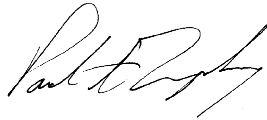
[7] (...continued)
comment, n.14," as a potential basis for a departure, adding though that "he would need a base offense level greater than 36." Def. Br. 9. Not only is this departure ground not included in the Guidelines Manual applicable to the defendant's case, but, even if it were, the defendant could not have benefitted from it for several reasons. First, his base offense level was not high enough. Second, he had two prior felony controlled substance convictions. Each of these grounds independently would have precluded this departure ground from being applied to the instant case. *See* U.S.S.G. § 2D1.1, comment (n.14) (2000).

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 9,769 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



PAUL A. MURPHY
ASSISTANT U.S. ATTORNEY

Addendum

U.S.S.G. § 1B1.1. APPLICATION INSTRUCTIONS

(a) Determine, pursuant to § 1B1.2 (Applicable Guidelines), the offense guideline section from Chapter Two (Offense Conduct) applicable to the offense of conviction. See § 1B1.2.

(b) Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular guideline in Chapter Two in the order listed.

(c) Apply the adjustments as appropriate related to victim, role, and obstruction of justice from Parts A, B, and C of Chapter Three.

(d) If there are multiple counts of conviction, repeat steps (a) through (c) for each count. Apply Part D of Chapter Three to group the various counts and adjust the offense level accordingly.

(e) Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.

(f) Determine the defendant's criminal history category as specified in Part A of Chapter Four. Determine from Part B of Chapter Four any other applicable adjustments.

(g) Determine the guideline range in Part A of Chapter Five that corresponds to the offense level and criminal history category determined above.

(h) For the particular guideline range, determine from Parts B through G of Chapter Five the sentencing requirements and options related to probation, imprisonment, supervision conditions, fines, and restitution.

(i) Refer to Parts H and K of Chapter Five, Specific Offender Characteristics and Departures, and to any other policy statements or commentary in the guidelines that might warrant consideration in imposing sentence.

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U.S.S.G. § 3B1.2. MITIGATING ROLE

Based on the defendant's role in the offense, decrease the offense level as follows:

(a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.

(b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.

Commentary

Application Notes:

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3. Applicability of Adjustment.--

(A) Substantially Less Culpable than Average Participant.--This section provides a range of adjustments for a defendant who plays a part in committing the offense that makes him substantially less culpable than the average participant.

A defendant who is accountable under § 1B1.3 (Relevant Conduct) only for the conduct in which the defendant personally was involved and who performs a limited function in concerted criminal activity is not precluded from consideration for an adjustment under this guideline. For example, a defendant who is convicted of a drug trafficking offense, whose role in that offense was limited

to transporting or storing drugs and who is accountable under § 1B1.3 only for the quantity of drugs the defendant personally transported or stored is not precluded from consideration for an adjustment under this guideline.

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(C) Fact-Based Determination.--The determination whether to apply subsection (a) or subsection (b), or an intermediate adjustment, involves a determination that is heavily dependent upon the facts of the particular case. As with any other factual issue, the court, in weighing the totality of the circumstances, is not required to find, based solely on the defendant's bare assertion, that such a role adjustment is warranted.

4. Minimal Participant.--Subsection (a) applies to a defendant described in Application Note 3(A) who plays a minimal role in concerted activity. It is intended to cover defendants who are plainly among the least culpable of those involved in the conduct of a group. Under this provision, the defendant's lack of knowledge or understanding of the scope and structure of the enterprise and of the activities of others is indicative of a role as minimal participant. It is intended that the downward adjustment for a minimal participant will be used infrequently.

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U.S.S.G. § 4B1.1. CAREER OFFENDER

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

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

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

*If an adjustment from § 3E1.1 (Acceptance of Responsibility) applies, decrease the offense level by the number of levels corresponding to that adjustment.

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U.S.S.G. § 4B1.2. DEFINITIONS OF TERMS USED IN SECTION 4B1.1

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(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of § 4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

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U.S.S.G. § 4A1.2. DEFINITIONS AND INSTRUCTIONS FOR COMPUTING CRIMINAL HISTORY

(a) Prior Sentence Defined

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(2) Prior sentences imposed in unrelated cases are to be counted separately. Prior sentences imposed in related cases are to be treated as one sentence for purposes of § 4A1.1(a), (b), and (c). Use the longest sentence of imprisonment if concurrent sentences were imposed and the aggregate sentence of imprisonment imposed in the case of consecutive sentences.

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Commentary

Application Notes:

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3. Related Cases. Prior sentences are not considered related if they were for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). Otherwise, prior sentences are considered related if they resulted from offenses that (A) occurred on the same occasion, (B) were part of a single common scheme or plan, or (C) were consolidated for trial or sentencing. The court should be aware that there may be instances in which this definition is

overly broad and will result in a criminal history score that underrepresents the seriousness of the defendant's criminal history and the danger that he presents to the public. For example, if a defendant was convicted of a number of serious non-violent offenses committed on different occasions, and the resulting sentences were treated as related because the cases were consolidated for sentencing, the assignment of a single set of points may not adequately reflect the seriousness of the defendant's criminal history or the frequency with which he has committed crimes. In such circumstances, an upward departure may be warranted. Note that the above example refers to serious non-violent offenses. Where prior related sentences result from convictions of crimes of violence, § 4A1.1(f) will apply.

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ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Thompson

Docket Number: 04-2936-cr

I, Natasha R. Monell, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 5/10/2006) and found to be VIRUS FREE.

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Natasha R. Monell, Esq.
Staff Counsel
Record Press, Inc.

Dated: May 10, 2006