05-6439-cr

To Be Argued By:
ERIC J. GLOVER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-6439-cr

UNITED STATES OF AMERICA,
Appellant,

-vs-

JOHN CANOVA,
Defendant-Appellee.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Alfred V. Covello, J.) had subject matter jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The district court entered judgment on November 16, 2005, and the government filed a timely notice of appeal on November 30, 2005. (A-311) This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(b). The government's appeal has been personally authorized by the Solicitor General of the United States.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the district court abused its discretion in departing downward on the basis that the $5 million guidelines loss conclusively found by this Court overstates the seriousness of the offense.

II. Whether the district court abused its discretion by departing on the basis of the "victim's own conduct."

III. Whether the district court abused its discretion in departing downward on the basis of the payment of restitution by the defendant's employer, which pled guilty and paid $5 million in restitution.

IV. Whether a sentence of no incarceration, and a nominal $1,000 fine, was unreasonable where the defendant helped his company overbill medicare by $5 million, and then tried to obstruct Medicare's efforts to recoup that $5 million.

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BRIEF FOR THE UNITED STATES OF AMERICA

PRELIMINARY STATEMENT

The defendant, John Canova, is the former Vice President of Operations at Raytel Cardiac Services, Inc. ("Raytel"). On September 25, 2002, Canova was convicted by a jury of one count of conspiring to defraud the United States and to obstruct a federal audit, two counts of making false statements to the government, and one count of obstructing a federal audit. The district court found that the defendant's conduct resulted in no guidelines loss and sentenced the defendant to a one-year

term of probation and a $1,000 fine. The government appealed the sentence, and this Court agreed that an intended loss of $5 million should have been factored into the guidelines calculation. *See United States v. Canova*, 412 F.3d 331 (2d Cir. 2005). This Court also affirmed the district court's grant of a downward departure for the defendant's public service and charitable works. *Id.*

On remand, the defendant's sentencing guidelines range was 46 to 57 months imprisonment. But the district court re-imposed its original sentence of a one-year term of probation and a $1,000 fine. The district court departed 15 levels, from 23 to 8, based on the public service/charitable works departure, and its conclusion that the loss overstated the seriousness of the offense, as well as the victim's (*i.e.*, Medicare's) own conduct and the fact that Raytel independently made restitution of $5 million. A sentence of probation and a nominal fine for a defendant involved in an offense that this Court found involved a $5 million intended loss is simply not reasonable, and this Court should vacate the district court's sentence and remand to the district court for resentencing.

STATEMENT OF THE CASE

On November 1, 2001, a federal grand jury in Connecticut returned a six-count indictment against the defendant charging him with conspiring to defraud the United States and to obstruct a federal audit in violation of 18 U.S.C. § 371 (count one), three counts of making false statements in violation of 18 U.S.C. § 1001 (counts two, three, and four), obstructing a federal audit in violation of 18 U.S.C. § 1516 (count five), and obstructing a criminal

investigation of a health care offense in violation of 18 U.S.C. § 1518 (count six). (A-012-035)[1]

On September 10, 2002, a jury trial commenced before United States District Judge Alfred V. Covello in Hartford, Connecticut, on counts one through five (count six was dismissed prior to trial). On September 25, 2002, the jury found the defendant guilty on counts one, two, three and five of the indictment, and found him not guilty on count four. (A-170-173) On March 17, 2003, the district court issued its ruling denying the defendant's motion for a new trial under Federal Rule of Criminal Procedure 33. (A-219-230)

On April 4, 2003, the district court sentenced the defendant to a one-year term of probation and a $1,000 fine. (A-280) The court ordered the defendant to pay a $100 special assessment on each of the four counts of conviction. (A-280) No restitution was ordered, as Raytel had already been ordered to pay $5 million in restitution. (PSR at ¶ 3, ¶ 85) The district court entered judgment on April 7, 2003. (A-036)

The government filed a timely notice of appeal of the sentence, and the defendant cross-appealed the district court's order denying his motion for a new trial.

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[1] References to parts of the record contained in the appendices are to pages of the Government's Appendix ("A"). *See* Fed. R. App. P. 28(e).

On June 21, 2005, this Court affirmed the defendant's conviction but vacated the district court's probationary sentence and remanded for resentencing. *See United States v. Canova*, 412 F.3d 331 (2d Cir. 2005). This Court concluded, among other things, that a $5 million intended loss should have been factored into the guidelines calculations, and that the district court acted within its discretion in granting a downward departure for charitable works and public service. *Id.* at 354-55, 359.

On November 10, 2005, the defendant was re-sentenced. On remand, the district court re-imposed its original sentence of a one-year term of probation and $1,000 fine. The district court entered judgment on November 16, 2005, and the government filed a timely notice of appeal on November 30, 2005.

STATEMENT OF FACTS

A. The Trial Evidence

Raytel provided transtelephonic pacemaker monitoring to patients nationally from three testing facilities, including one in Windsor, Connecticut. (A-155) Pacemaker monitoring consists of post-implant evaluation of implanted cardiac pacemakers to identify possible signs of pacemaker failure. (A-176) Monitoring reduces the number of sudden pacemaker failures requiring emergency replacement. (A-177) Patients use a portable transmitting device to detect and transmit an electrocardiograph signal of the heart over an ordinary telephone line to a receiving station, where the signal is decoded and transcribed into a

conventional electrocardiogram, also known as an "EKG" or "ECG" strip. (A-066) *See Canova*, 412 F.3d at 335-36.

Pacemaker monitoring is conducted in three phases. First, the technician conducting the monitoring takes an ECG strip of the pacemaker in the free-running or "demand mode." Next, the patient places a magnet on the pacemaker, and an ECG strip is taken of the pacemaker in the "magnetic mode." Finally, the magnet is removed, and another ECG strip is taken of the pacemaker. This final phase is known as the "demand after magnet" mode. (A-067-068) *See Canova*, 412 F.3d at 336. The third portion of the test is taken to ensure that the application of the magnet has not caused the patient to experience an irregular arrhythmia or other cardiac problem. (A-069-070)

Section 50-1 of the Medicare Coverage Manual requires each of these three phases to last at least 30 seconds, for a total of 90 seconds of monitoring. (A-063, 064, 176-77) This is known as the "30-30-30" requirement. (A-064) In order for Medicare to pay a claim for monitoring services, each of the three components had to be performed according to the prescribed 30-second time periods. (A-044-045, 048-049, 063, 064) *See Canova*, 412 F.3d at 336.

As Vice President of Operations, the defendant was well aware of Medicare's monitoring requirements and coverage policy. (A-156-158) The defendant set rigid numerical quotas for Raytel technicians designed to increase testing volume, and he knew that as a result

Raytel technicians were not conducting the monitoring for the length of time required by Medicare. (A-089-090, 093-095, 108-09).[2] *See Canova*, 412 F.3d at 337. Indeed, technicians would often monitor for about 10 seconds in the first two phases, and then skip the third phase altogether. (A-071, 077-880, 082-083, 108) Yet Raytel billed Medicare over $5 million per year for pacemaker monitoring services conducted at the Connecticut testing facility. (A-058-060) Statistical sampling of monitoring conducted in December 1999 and February 2000 showed that Raytel's *non*-compliance rate with Medicare's 30-30-30 requirement was between 65.3% and 78%. (A-128-33)

In the summer of 1999, Medicare, through United HealthCare (with whom Medicare had contracted to administer its program in Connecticut (A-039-40)) initiated an audit of Raytel concerning its compliance with the 90-second requirement after receiving an anonymous complaint. (A-046) *See Canova*, 412 F.3d at 338. If the audit had revealed fraud, Medicare could have suspended future payments and sought recoupment of overpayments. (A-056) *See Canova*, 412 F.3d at 354 (stating that the

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[2] As the district court stated in its post-trial ruling:

> Despite knowledge of Medicare's coverage policy and a company training program instructing technicians as to the proper method to conduct the test, the defendant, in an effort to increase the volume of tests and revenue, importuned technicians at Raytel to skip the third requirement and/or not take the minimum 30 seconds of ECG strip in each of the three portions of the test.

(A-221)

government was "legally entitled to recoup from Raytel its full payment for any pacemaker tests not performed according to Medicare specifications"). Federal regulations provide that Medicare may suspend payments to providers if the carrier "possesses reliable information that an overpayment or fraud or willful misrepresentation exists or that the payments to be made may not be correct." 42 C.F.R. § 405.371(a)(1). The regulations further provide that the carrier may recoup payments if the carrier has determined that the provider has been overpaid. *See* 42 C.F.R. § 405.371(a)(2); *see also Canova*, 412 F.3d at 354 n.24. Indeed, one of the letters that Medicare sent to Raytel during the audit providing notice of overpayment of two claims for failure to comply with the 30-30-30 requirement – and to which the defendant responded with a false statement concerning Raytel's compliance (A-181) – states that "misrepresenting your services to Medicare is a fraudulent situation and that the Inspector General has the authority to exclude from coverage your services should you decide to continue to bill your services incorrectly to Medicare." (A-185) *See Canova*, 412 F.3d at 338.

The defendant was well versed in the financial perils of an audit and Medicare's right to recoup (A-161-62), *see Canova*, 412 F.3d at 354-55 ("[n]or does there appear to be any question that Canova was aware of this right [to recoup]"), and, in the course of the audit, he falsely stated to Medicare on multiple occasions that Raytel conducted monitoring for the entire 90-second period in accordance with Medicare's requirements. In a letter dated December 6, 1999, the defendant falsely advised Medicare that it was

Raytel's practice to monitor for three 30-second readings, *see Canova*, 412 F.3d at 338, and he falsely claimed that Raytel had an archive system and retained the full 90-second readings on its computer system for six months. (A-181) When an audit team decided to conduct an on-site review at Raytel to verify the defendant's representations, the defendant directed Raytel personnel to conduct monitoring during the review according to Medicare requirements, notwithstanding the fact that he knew this was not the practice at Raytel. (A-082-086, 094-095, 096-098, 111-12, 214) *See Canova*, 412 F.3d at 338-39.

After the on-site review, the defendant wrote a letter to Medicare on January 27, 1999, falsely stating once again that Raytel followed the 90-second requirement, and that Raytel would forward to Medicare "a complete printout of the entire 90-second recording obtained for each patient you asked to see." (A-190-91) *See Canova*, 412 F.3d at 339. The defendant subsequently directed Ronald Vincent, a supervisor at the Connecticut facility, to tell Medicare that due to problems with the archiving system, Raytel could not reproduce the entire 90-second recordings to Medicare. (A-054, 099-100, 216) Some of those recordings were capable of being reproduced, but the defendant knew that the monitoring on them was incomplete. The defendant never sent them to Medicare. (A-054, 115-20, 124, 162) The defendant also directed Vincent to alter test records in an attempt to support his representations to Medicare about Raytel's computer archiving. (A-101-06) Vincent then told another supervisor, Glenn Pelletier, to alter the records and send them to the defendant. (A-120-23) *See Canova*, 412 F.3d

at 339. If the defendant had not taken such steps to conceal Raytel's noncompliance with Medicare's requirements and coverage policy during the audit, Medicare could have expanded the audit and commenced recoupment of a massive overpayment through extrapolation. (A-056)

On June 23, 2000, after Medicare's audit was completed, the defendant was interviewed by federal agents. The defendant told the agents that Raytel was – and had been – in full compliance with Medicare's 30-30-30 regulation. (A-135-36) In fact, the defendant told the agents that he personally conducted an independent review of the testing sites and found that New York was in complete compliance with Medicare's 30-30-30 requirement. (A-135) The evidence at trial showed that New York's compliance rate with 30-30-30 appeared to be just above 25%. (A-217-18) The defendant told the agents that he had been advised by Glen Pelletier that there was "a possibility" that the third phase was not being conducted at the Connecticut facility. (A-136) However, the defendant told the agents that he had conducted his own review of the Connecticut facility, randomly selecting patients and dates of service and verifying whether the third phase had been conducted. Remarkably, the defendant told the agents that there were *no* instances at all in which the third phase was not performed. *Id. See Canova*, 412 F.3d at 340 n.7. The statistical evidence at trial showed a compliance rate in Connecticut of between 22% and 34.7%. (A-128-33) *See Canova*, 412 F.3d at 337.

B. The First Sentencing Hearing

The PSR calculated the defendant's total offense level to be 25, with a corresponding sentencing guidelines range of 57-71 months of imprisonment. (PSR at ¶ 77) The PSR calculated a base level offense of 6 under U.S.Sentencing Guidelones Manual § 2F1.1(a) (1998), with a 13-level increase for a loss of $5 million under § 2F1.1(b)(1)(N) and a 2-level increase for more than minimal planning under § 2F1.1(b)(2)(A). Based on the defendant's supervisory role in the offense – he was the vice president in charge of operations at Raytel and directed the other participants in the scheme – the PSR added 2 levels under U.S.S.G. § 3B1.1(c). (PSR at ¶¶ 42-51)

The district court held a sentencing hearing on April 4, 2003. The district court found no loss to have resulted from the offense, rejecting the government's argument that the actual and intended loss to Medicare was $5 million. The district court also declined to impose a perjury enhancement. The district court calculated the defendant's alternative guideline calculation for his obstruction conviction to be 14 (a base offense level of 12 under § 2J1.1 plus a 2-level increase for role in the offense). The court then departed downward by 6 levels based on public service and charitable works, resulting in an offense level of 8. (A-279) The district court sentenced the defendant to a one-year term of probation and a $1,000 fine, and ordered him to pay a $100 special assessment on each of the four counts of conviction. (A-036, 280)

C. The Government's First Appeal

The government appealed the sentence, and the defendant cross-appealed his conviction. On June 21, 2005, this Court affirmed the defendant's conviction but vacated the district court's probationary sentence and remanded for resentencing. *See United States v. Canova*, 412 F.3d 331, 359 (2d Cir. 2005).

This Court affirmed the defendant's conviction; rejected the government's claim that the district court erroneously failed to impose a perjury enhancement and that a civic/charitable works departure was unwarranted; but reversed the district court's finding that the applicable loss was zero. This Court agreed with the government that "[t]he record supports an intended loss of recoupment in an amount of $5 million, and such a loss should have been factored into the Guidelines considered by the district court in imposing sentence." *Id.* at 355. Accordingly, this Court vacated the sentence and remanded for re-sentencing. The Court noted in a footnote that it "express[ed] no view" on whether the district court, on remand, would be authorized to depart downward on the theory that the $5 million loss overstated the seriousness of the offense, *id.* at 351 n.21, and it likewise noted that on remand the district court could re-consider the extent of the charitable works departure, *id.* at 359 n.29.

D. Resentencing

On remand, the government argued that given the Court of Appeals' determination of an intended loss of $5 million, the district court's sentence on remand must include a period of incarceration to be a "reasonable" sentence under *Booker v. United States*, 543 U.S. 220 (2005), and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). (A-244-45, 248)

The district court re-imposed its original sentence on the defendant of a one-year term of probation and $1,000 fine.[3] The district court agreed with the government that factoring a $5 million loss into the guidelines, as this Court said it must, resulted in a sentencing guidelines range on remand of 46 to 57 months imprisonment (total offense level 23), including a two-level enhancement for role in the offense. (A-309) The court, however, departed downward 15 levels, to a level 8 (0-6 months), the same level to which it departed at the initial sentencing, based on the defendant's public service and good works, as well as the court's view that the loss overstated the seriousness of the offense. (A-306-07) The district court also indicated that the fact that the defendant's former

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[3] The defendant's sentence was more lenient than that of a cooperating witness who pled guilty, who had a lesser role in the offense, and who testified for the government at the defendant's trial. The district court granted the government's motion for downward departure under U.S.S.G. § 5K1.1 for that cooperating witness, Ronald Vincent, and then sentenced him to a three-year term of probation. (PSR at ¶ 3)

employer, Raytel Corporation, paid restitution in the amount of $5 million was an appropriate basis for departure under *United States v. Broderson*, 67 F.3d 452, 458 (2d Cir. 1995), as was the "victim's own conduct," because the court believed there was evidence that Medicare could not tell what its own requirements meant. (A-308) (citing *United States v. Maldonado-Montalvo*, 356 F.3d 65, 71 (2d Cir. 2003)). More fully, the district court stated as follows:

> [T]he Court of Appeals disagreed with this Court that the government had failed to prove any loss and ordered the Court to reconsider the $5 million loss with its corresponding sentencing enhancement of 13 offense levels. The Court of Appeals also advised this Court that, quote, to the extent that this Court, i.e. me, previously determined that the defendant's public service and good works warranted a six-level departure, this Court, again meaning me, may of course reconsider that decision on remand in light of the higher guidelines range dictated by proper application of the loss enhancement.
>
> Without commenting further I would say that the Court was printing a road map for me in the event that I couldn't fully perceive what the Court of Appeals was saying.
>
> Now this afternoon, or in connection with this afternoon's proceedings the defendant now moves for a new downward departure on the grounds that

the monetary loss in this case overstates the seriousness of the offense. Because the previous departure for public service does not fully reflect the Court's sentencing objectives in light of the newly imposed loss enhancement, the Court agrees with the defendant and the motion for the downward departure is granted.

Now the Court notes that the presentence report at paragraph 87 indicates that the $5 million loss determination might be viewed to overstate the seriousness of the offense under the sentencing guidelines, Section 2F1.1, and that's Comment Note 11. And the Court agrees with the guideline note, and with the probation department's comment that the loss overstates the seriousness of the offense.

And, Attorney Glover, the Court agrees with you this disposition isn't solely about Mr. Canova, but it also involves the perception of the magnitude of this loss.

Now the finding that this is an overstatement is compelled by the fact that the $5 million loss calculation is based on the conclusion that the defendant here, Mr. Canova, is liable for the costs of any tests performed that lack the full three part Medicare test specification. And as Attorney Schechtman has pointed out here, it's not that these tests weren't performed. It's the question whether

a portion of the last test was not properly concluded.

In this case there was evidence that even Medicare could not tell in the language of its own policy that all three parts of the test were required. And the gentleman was here on the stand and testified and the victim's own conduct is a factor the Court may consider in deciding whether to depart on this type of ground and in that regard would refer you to *United States v. Maldonado* at 356 F.3d. 65, 71.

Further, as has also been drawn out here, the government was paid $5 million in full by the corporate defendant, and although payment of restitution is not ordinarily an appropriate case for departure, I conclude that it is here. And I'm referring you now to *United States v. Broderson*, 67 F.3d. 452, 458.

A finding that the loss overstates the seriousness of the offense coupled with the earlier determination that the higher guideline range calls for a more extended downward departure for the defendant's service to the country and community calls for a total downward departure of 15 offense levels, this based on the Court's calculation as suggested by the Court of Appeals.

A-306-09.

SUMMARY OF ARGUMENT

I. The district court abused its discretion in departing downward on the basis that the $5 million guidelines loss conclusively found by this Court overstates the seriousness of the offense. In departing, the district court addressed only the issue of *actual* loss, not *intended* loss. This Court, however, did not reach the issue of whether the actual loss was $5 million; rather, this Court found an intended loss of $5 million based on Canova's obstruction of the audit. And regardless of the district court's reasons, the $5 million intended loss does not overstate the seriousness of Canova's conduct. As this Court found, Canova sought to deprive the government of its lawful ability to recoup $5 million for the fraud that Canova initially committed upon it. Moreover, even if the district court did not abuse its discretion in granting a departure on this ground, the extent of the departure was not reasonable.

II. The district court abused its discretion by departing on the basis of the "victim's own conduct." The district court stated that "there was evidence that even Medicare could not tell in the language of its own policy that all three parts of the test were required." (A-308) Victim conduct of this type is not an appropriate basis for departure. In the case of non-violent offenses, § 5K2.10 provides that "an extended course of provocation and harassment might" warrant a departure for victim misconduct, but there was simply no such conduct here. Equally important, Canova was not confused about the requirements. To the contrary, Canova showed remarkable clarity about the 30-30-30 rule, as evidenced by his

repeated efforts over a lengthy period of time to deceive Medicare into believing that Raytel was in fact complying with that rule. The jury convicted him not only of fraud, but also of attempting to obstruct the Medicare audit. The district court's suggestion that there was somehow confusion in Canova's mind directly contradicts the jury's findings, which the district court cannot do.

III. The district court abused its discretion in departing downward on the basis of the payment of restitution by the defendant's employer, which pled guilty and paid $5 million in restitution. Restitution may be considered as evidence that the defendant has accepted responsibility for the crime and should not ordinarily be considered as a basis for downward departure. Payment by Canova's employer after it was prosecuted and pled guilty does not in any way mitigate Canova's responsibility or provide any evidence that Canova has personally taken responsibility for his actions. Indeed, Canova has continued to deny such responsibility, even on appeal of his conviction and at resentencing on remand. Moreover, allowing employer-paid restitution to serve as a basis for downward departure would create the potential for serious disparities in sentencing based on the deep pockets of a co-defendant. In white-collar cases, that will not infrequently depend on whether the defendant's employer is solvent, which would render a sentence based on fortuity rather than individual culpability.

IV. A sentence of no incarceration, and a nominal $1,000 fine, was unreasonable where the defendant helped his company overbill Medicare by $5 million, and then

tried to obstruct Medicare's efforts to recoup that $5 million. The district court did not impose a non-guidelines sentence, but rather imposed its sentence based on departure analysis. Although this Court suggested that the district court on remand could reconsider the extent of the 6-level good-works departure in light of the higher guidelines sentence dictated by the fraud loss, it did not suggest what the boundaries might be for such a departure. The reasons given here by the district court do not justify the magnitude of its departure. The departure was not one-half or even two-thirds of the bottom of the defendant's sentencing guidelines range. It was a probationary sentence where the guidelines range was 46 to 57 months imprisonment. The sentence is also unreasonable under a reasonableness inquiry pursuant to *Booker*, *Crosby* and 18 U.S.C. § 3553(a). The offense was a serious one, and a sentence of probation and a nominal fine is not just punishment and does not promote respect for the law – it undercuts it and provides no deterrence to those who would commit fraud upon the government.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DEPARTING DOWNWARD ON THE BASIS THAT THE $5 MILLION GUIDELINES LOSS CONCLUSIVELY FOUND BY THIS COURT OVERSTATES THE SERIOUSNESS OF THE OFFENSE.

A. Relevant Facts

In *Canova*, this Court addressed both the actual and intended loss to the government stemming from Canova's conduct. As to actual loss, this Court noted that "the very essence of Canova's fraud scheme was to conceal from the government the fact that Raytel was *not* performing pacemaker tests according to Medicare specifications in order to induce payments that would otherwise not have been made." *Canova*, 412 F.3d at 353. This Court, however, did not reach the issue of actual loss because it "conclude[d] that the government's right to recoup monies paid Raytel for testing not conforming to specifications provides a satisfactory alternative for calculating 'intended loss.'" *Id.* at 354. In other words, although Canova's "first fraud" involved "Raytel's procurement of millions of dollars in Medicare funds through false representations that it was testing pacemakers in accordance with government specifications," Canova "also engaged in a second fraud, which was not fully consummated as a result of government detection." *Id.*

Canova's "second fraud" caused a calculable intended loss, as this Court determined that the intent of Canova's obstructive conduct during the course of a government audit was to deprive the government of the ability to recoup money for the fraudulent billing of non-conforming tests. "Pursuant to this fraud, Canova made further false representations to Medicare agents to obstruct an audit of Raytel, thereby preventing the government from recovering monies paid to Raytel pursuant to the testing fraud." *Id.* This Court therefore held that the intended loss stemming from that conduct was $5 million. *See id.* at 355 (noting that under the government's "conservative approach . . . at least 50 percent of Raytel's tests did not conform to Medicare specifications, resulting in a loss of $5 million").

On remand, the district court accordingly fixed the defendant's sentencing guidelines total offense level at 23, resulting in a guidelines range of 46 to 57 months. This calculation included a 13-level increase because the loss was more than $2.5 million but not more than $5 million under § 2F1.1(b)(1)(N) (Nov. 1, 1998 edition). It also included a 2-level increase for Canova's role in the offense as a leader under § 3B1.1(c). (A-309)

In granting a departure on the ground that the loss overstates the seriousness of the offense, the district court stated that "the finding that this is an overstatement is compelled by the fact that the $5 million loss calculation is based on the conclusion that the defendant here . . . is liable for the costs of any tests performed that lack the full three part Medicare test specification." (A-308) The

Court reasoned that "it's not that these tests weren't performed. It's the question whether a portion of the last test was not properly concluded." *Id.* The district court did not address the issue of whether the *intended,* as opposed to the *actual*, loss overstated the seriousness of the offense, which was the basis on which this Court found the guidelines loss to be $5 million in *Canova*, 412 F.3d at 355.

B. Governing Law and Standard of Review

Application Note 11 in the Commentary for U.S.S.G § 2F1.1 provides that "[i]n a few instances, the loss determined under subsection (b)(1) may overstate the seriousness of the offense." The Commentary provides as an example a situation "where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it." *Id.* "In such cases, a downward departure may be warranted." *Id.* Thus, "this departure typically applies in cases where there *is no meaningful chance* that the attempted crime would have succeeded to the extent indicated by the stated loss." *United States v. Crawford*, 407 F.3d 1174, 1182 (11th Cir. 2005) (emphasis added); *see also United States v. LeRose*, 219 F.3d 335, 339 (4th Cir. 2000) (concluding that departure was abuse of discretion where, among other things, the defendant's conduct bore "no resemblance to the example given in the guideline").

In *Canova*, 412 F.3d at 351 n.21, this Court stated that "the Commission expressly authorizes courts to depart from the Sentencing Guidelines when monetary loss either

overstates or understates the seriousness of the particular fraudulent conduct." This Court made clear, however, that it "express[ed] no view as to whether any such departure might be appropriate" on remand in this case. *Id.*

This Court should review the district court's decision to depart downward under the deferential "abuse of discretion" standard of review adopted in *Koon v. United States*, 518 U.S. 81, 96-100 (1996). *See also United States v. Gaines*, 295 F.3d 293, 303 (2d Cir. 2002). In the "Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today of 2003," or the PROTECT Act, Congress changed the applicable standard of review for reviewing departures from the sentencing guidelines by amending 18 U.S.C. § 3742(e)(3)(A) and (B), which governed appellate review of a district court's threshold decision to depart from the presumptive sentencing guidelines range in all cases. The PROTECT Act added the following sentence to 18 U.S.C. § 3742(e): "With respect to determinations under subsection 3(A) or 3(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts." However, in *Booker v. United States*, 543 U.S. 220, 258-59 (2005), the Supreme Court severed and excised these provisions from § 3742(e). *See also United States v. Fernandez*, No. 05-1596-CR, 2006 WL 851670, at *5 (2d Cir. Apr. 3, 2006) (discussing *Booker*'s impact on § 3742(e)).

Accordingly, after *Booker*, the standard of review for downward departures is abuse of discretion. *See United States v. Brady*, 417 F.3d 326, 332 (2d Cir. 2005) (stating

that after *Booker* "[w]e . . . continue to review a district court's exercise of departure authority, and we do so by inquiring 'whether the [d]istrict [c]ourt abused (or exceeded) its discretion'") (quoting *United States v. Selioutsky*, 409 F.3d 114, 119 (2d Cir. 2005)). "'A district court 'abuses' or 'exceeds' the discretion accorded to it when (1) its decision rests on an error of law (such as application of the wrong legal principle) or a clearly erroneous factual finding, or (2) its decision–though not necessarily the product of a legal error or a clearly erroneous factual finding–cannot be located within the range of permissible decisions.'" *Brady*, 417 F.3d at 332-33 (quoting *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 169 (2d Cir. 2001), *cited with approval in Crosby*, 397 F.3d 103, 114 2d Cir. 2005)).

This Court reviews the extent of a departure for reasonableness. *See United States v. Dos Reis*, 369 F.3d 143, 151 (2d Cir. 2004); *United States v. Leung*, 360 F.3d 62, 73 (2d Cir. 2004); *cf. Fernandez*, 2006 WL 851670, at *6 (stating that the "[reasonableness] standard is akin to review for abuse of discretion"); *Crosby*, 397 F.3d at 114 (comparing reasonableness review for abuse of discretion). Under *Williams v. United States*, 503 U.S. 193 (1992), this Court considers "'the amount and extent of the departure in light of the grounds for departing"' and examines' "the factors to be considered in imposing a sentence under the Guidelines, as well as the district court's stated reasons for the imposition of the particular sentence.'" *Dos Reis*, 369 F.3d at 151-52 (quoting *Williams*, 503 U.S. at 203-04). "The key question is whether the 'reasons given by the district court . . . are sufficient to justify the magnitude of

the departure.'" *United States v. Campbell*, 967 F.2d 20, 26 (2d Cir. 1992) (quoting *Williams*, 503 U.S. at 204).

C. Discussion

The district court abused its discretion in departing downward on the basis that the loss overstated the seriousness of the offense.

On remand, the district court addressed only the issue of whether a $5 million *actual* loss overstates the seriousness of the offense. (A-308) But this Court did not reach the issue of whether the actual loss was $5 million. Rather, this Court reached only the issue of *intended* loss, and it found an intended loss of $5 million based on Canova's obstruction of the audit, which prevented the government's recovery of that amount. Notwithstanding the fact that the government and the defendant's sentencing memoranda both addressed this Court's decision in that regard, the district court did not address the issue in making its decision to depart downward from the sentencing guidelines range. The district court's decision to depart on this ground is not supported by the reasons it provided. *Cf. Fernandez*, 2006 WL 851670, at *6 (stating that "while we review a sentence for reasonableness that review involves consideration not only of the sentence itself, but also of the procedure employed in arriving at the sentence") (citation omitted).

In any event, even if the district court had addressed intended loss, the loss found by this Court does not overstate the seriousness of Canova's obstruction. This is

simply not a case where there was "no meaningful chance" of Canova's obstruction succeeding in defrauding Medicare out of its right to recover $5 million that it was fraudulently induced to pay Raytel. *See Crawford*, 407 F.3d at 1182. Medicare was entitled to recover the full value of the tests that were not performed in accordance with their guidelines, regardless of how much of the test was actually performed, and made quite clear its intent to do so. *See Canova*, 412 F.3d at 354-55.

Moreover, as this Court recognized, there is no question that "Canova was aware of this right." *Id.* at 355. Canova's own testimony during the trial established that he was well aware of Medicare's right to recover full payment for all the shorted tests. He knew that the financial consequences of a failed audit would be devastating to the company, and he therefore obstructed Medicare's audit to prevent it. As Canova testified:

> As I previously stated, the original claim rejections were for the 13 months prior to the date of the claim rejection, and my concern . . . was if Medicare required any tests that was a full disclosure greater than six months old, Raytel could not provide that information. I processed in Connecticut about 15, 20,000 tests a month. *That's a large bullet to take as a financial hit.*

(A-161-62 (emphasis added)) In *Canova*, this Court quoted Canova's testimony on this very point, and concluded that "Canova's trial testimony made plain that he understood what was at stake." *Canova*, 412 F.3d at

355. In short, Canova knew full well, and indeed intended, the consequences of his obstruction – to deprive the government of its ability and its right to recoup $5 million for the fraud that was initially committed upon it. A guidelines loss of $5 million does not overstate the seriousness of the offense because the entire point of Canova's offense was to prevent Medicare from obtaining the $5 million to which it was entitled.

Alternatively, even if the district court did not abuse its discretion in granting a departure on this ground, the extent of the departure must be reasonable. The reasons given by the district court for the departure concerned actual loss, not intended loss, and as such the reasons did not relate to the $5 million intended loss found by this Court. *See Campbell*, 967 F.2d at 26 (stating that "[t]he key question is whether the 'reasons given by the district court . . . are sufficient to justify the magnitude of the departure'") (quoting *Williams*, 503 U.S. at 204). In any event, even if the district court had provided reasons for the departure relating to the $5 million intended loss, the extent of the departure was unreasonable. In *United States v. Arutunoff*, 1 F.3d 1112, 1120 (10th Cir. 1993), the Court held that a departure of 10 levels from an offense level of 20 was unreasonable because it reduced the loss caused by defendant to 2 levels or a loss range of $5,000 to $10,000. The original loss was calculated at $1,500,000, *id.* at 1119, of which defendant benefitted $110,000. *Id.* at 1120. Here, a departure to a level that results in no incarceration would be unreasonable given the intended loss amount found by this Court, and given the seriousness of Canova's conduct in committing not one fraud but two, the second

perpetrated upon the first, in an attempt to defraud Medicare first of what it paid for and second of its right to get its money back.

II. THE DISTRICT COURT ABUSED ITS DISCRETION BY DEPARTING ON THE BASIS OF THE "VICTIM'S OWN CONDUCT."

A. Relevant Facts

At the sentencing hearing on remand, the district court stated the following in connection with the reasons it was departing downward from the applicable sentencing guidelines range:

> In this case there was evidence that even Medicare could not tell in the language of its own policy that all three parts of the test were required. And the gentleman was here on the stand and testified and the victim's own conduct is a factor the Court may consider in deciding whether to depart on this type of ground and in that regard would refer you to *United States v. Maldonado* at 356 F.3d. 65, 71.

(A-308) The district court was referring to testimony given by a Raytel employee named Steven Boecklin, who stated that he had called Medicare to inquire into what was required for third part of the test, the "demand-after-magnet" phase. (A-091B-091C) Boecklin testified that he called directory assistance and said that he "needed to speak to someone that is in Medicare." *Id.* He did not know the name or position of the person or persons he

called. *Id.* Boecklin testified that the persons with whom he spoke at Medicare stated that they did not know what the third part of the test meant. (A-091D-091E) *See Canova*, 412 F.3d at 338 ("Boecklin stated that when he attempted to confirm this interpretation with Medicare, the persons with whom he spoke could not answer his questions.").

B. Governing Law and Standard of Review

U.S.S.G. § 5K2.10, "Victim's Conduct," provides that "[i]f the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guidelines range to reflect the nature and circumstances of the offense." The factors enumerated in § 5K2.10 are geared toward crimes involving violence. In fact, § 5K2.10 states that "this provision usually would not be relevant in the context of non-violent offenses." However, "[t]here may . . . be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense." *Id.* By way of example, § 5K2.10 cites "an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation." *Id.*

This Court reviews a district court's decision to depart for abuse of discretion and the extent of the departure for reasonableness. *See* Section I.B, *supra*.

C. Discussion

The district court improperly departed based on the claim that Medicare's requirements regarding the transtelephonic pacemaker testing were confusing. Victim conduct of this type is not an appropriate basis for departure. *See United States v. Godding*, 405 F.3d 125, 126-127 (2d Cir. 2005) (per curiam). Victim conduct should generally only be considered in relation to violent crimes in which the victim's behavior provoked the defendant's offense behavior. U.S.S.G. § 5K2.10.

In *Godding*, 405 F.3d at 127, this Court found that a bank's failure to detect and prevent embezzlement by the defendant, its employee, could not be considered as a basis for downward departure. According to the Court, the bank's failure to detect and prevent the embezzlement did nothing to lessen the defendant's responsibility. *Id.* In the present case, the district court relied primarily on trial testimony relating to a telephone inquiry made by a Raytel employee to an unknown Medicare employee where the Medicare representative was unfamiliar with Medicare's policy regarding transtelephonic pacemaker testing and was unable to answer the inquiry. Confusion by an unidentified Medicare employee is hardly the sort of provocation or wrongdoing that justifies a downward departure. *See id.*; *see also United States v. LeRose*, 219 F.3d 335, 340 (2d Cir. 2000) (vacating departure based on supposed bank misconduct in bank fraud case, and stating that "we have emphasized that not only must the victim's conduct be provocative, but 'the victim must actually have done something wrong'") (quoting *United States v. Morin*,

80 F.3d 124, 128 (4th Cir. 1996)). In the case of non-violent offenses, § 5K2.10 provides that "an extended course of provocation and harassment might" warrant a departure for victim misconduct. "Provocation necessarily involves deliberate conduct that stirs a defendant to action," *LeRose*, 219 F.3d at 340, and there is simply no such conduct at issue here.

Equally important, Canova was not confused about the requirements. There is no evidence that Boecklin ever communicated the results of his communications with unknown persons at Medicare to Canova, much less that it confused Canova about the testing requirements. Quite to the contrary, Canova showed remarkable clarity about the 30-30-30 rule, as evidenced by his repeated efforts over a lengthy period of time to deceive Medicare into believing that Raytel was in fact complying with that rule. He was convicted by the jury of attempting to defraud Medicare by failing to fulfill the terms of Raytel's contract. He knew that Raytel was not in compliance and sought to cover up the fraud. The jury convicted him, not only of fraud, but also of attempting to obstruct the Medicare audit that was designed to recoup the fraudulently obtained funds. This Court affirmed the conviction. *Canova*, 412 F.3d at 348-50. There is no question that Canova knew what Medicare required and that he repeatedly and fraudulently reassured Medicare that Raytel was in compliance.

Indeed, the district court's suggestion that there was somehow confusion in Canova's mind directly contradicts the jury's findings that Canova specifically intended to defraud Medicare and sought to obstruct the Medicare

audit, as well as the district court's own findings in denying Canova's motion for a new trial.[4] The district court cannot now contradict the jury's findings by providing a downward departure based on the victim's conduct. *See United States v. Reed*, 264 F.3d 640, 648 (6th Cir. 2001) (holding that a district court, when sentencing a defendant under the guidelines, cannot rely on a finding that directly conflicts with the jury's verdict).

Finally, the district court's reliance upon *United States v. Maldonado-Montalvo*, 356 F.3d 65, 71 (1st Cir. 2003), as a basis for departing downward was misplaced. (A-308) *Maldonado-Montalvo* recognizes the general rule that "[a] victim's conduct may warrant a departure where the victim significantly contributed to an increase in the amount of loss." *Id.* at 71. However, the First Circuit rejected the district court's decision to depart downward on the basis that the victim's employees acquiesced in the fraudulent conduct because there was no evidence of it in the record, much less that it significantly contributed to an increase in the amount of loss. *Id.* Here, likewise, there is no evidence that Canova knew of Boecklin's communications with Medicare, much less that those communications caused Canova any confusion, constituted any wrongdoing by Medicare, or contributed to the amount

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[4] "Despite knowledge of Medicare's coverage policy . . . the defendant, in an effort to increase the volume of tests and revenue, importuned technicians at Raytel to skip the third requirement and/or not take the minimum 30 seconds of ECG strip in each of the three portions of the test." (A-221) *See Canova*, 412 F.3d at 349.

of money that Canova fraudulently endeavored to prevent Medicare from recouping.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN DEPARTING DOWNWARD ON THE BASIS OF THE PAYMENT OF RESTITUTION BY THE DEFENDANT'S EMPLOYER, WHICH PLED GUILTY AND PAID $5 MILLION IN RESTITUTION.

A. Relevant Facts

As this Court noted in *Canova*, 412 F.3d at 355, Canova's corporate employer and co-defendant, Raytel, pled guilty and agreed to make restitution in the amount of $5 million as part of the plea agreement in its criminal case. *See also* PSR at ¶ 3, ¶ 85. At resentencing on remand here, the district court stated the following with respect to that restitution:

> Further, as has also been drawn out here, the government was paid $5 million in full by the corporate defendant, and although payment of restitution is not ordinarily an appropriate case for departure, I conclude that it is here. And I'm referring you now to *United States v. Broderson*, 67 F.3d 452, 458.

(A-308-309)

B. Governing Law and Standard of Review

Because the Guidelines provide for consideration of restitution in determining the sentence, restitution is a discouraged basis for departure and should only be considered when it would remove the case from the "heartland" of the crime. *See United States v. Broderson*, 67 F.3d 452, 458 (2d Cir. 1995); *United States v. Merritt*, 988 F.2d 1298, 1309 (2d Cir. 1993). The Guidelines have provisions for considering restitution in determining the amount of loss, *see* U.S.S.G. § 2B1.1, cmt. n.3(E)(I) (2005), and as evidence that the defendant has accepted responsibility for the crime, *see* U.S.S.G. § 3E1.1, cmt. n.1(c) (1998). *See United States v. LeRose*, 96 F.3d 335, 341 (4th Cir. 2000) ("restitution, although taken into account in the guideline permitting a reduction for acceptance of responsibility can provide a basis for a departure when present to such an exceptional degree that it cannot be characterized as typical or 'usual'") (citation omitted) (quoting *United States v. Hairston*, 96 F.3d 102, 108 (4th Cir. 1996)).

This Court reviews a district court's decision to depart for abuse of discretion and the extent of the departure for reasonableness. *See* Section I.B, *supra*.

C. Discussion

The district court erroneously relied on *Broderson*, 67 F.3d at 458, for the proposition that full payment of restitution by the defendant's employer, Raytel, supported a downward departure in this case. (A-308-309) Raytel

was a co-defendant who paid restitution only after it was prosecuted – a typical situation that is well within the heartland of fraud cases.

According to the Guidelines, restitution by "the defendant or other persons acting jointly with the defendant" should be considered in determining the amount of loss, such that it will be credited against loss if the restitution was made "before the offense was detected." U.S.S.G. § 2B1.1, cmt. n.3(E)(i) (2005). In this case, restitution was made by co-defendant Raytel only after prosecution had commenced and therefore cannot be credited against the loss.

Restitution may also be considered as evidence that the defendant has accepted responsibility for the crime and should not ordinarily be considered as a basis for downward departure. "[T]he Sentencing Commission adequately considered restitution as a mitigating circumstance when it formulated the Sentencing Guidelines." *United States v. Arjoon*, 964 F.2d 167, 171 (2d Cir. 1992). Payment by Raytel does not in any way mitigate Canova's responsibility or provide any evidence that Canova has personally taken responsibility for his actions. Indeed, Canova has continued to deny such responsibility, even on appeal of his conviction and at resentencing on remand.

The one case in the Second Circuit in which restitution by a third party was used as a basis for downward departure supports the conclusion that a departure on this basis was inappropriate in this case. In *Broderson*, 67 F.3d

at 459, this Court found that a downward departure was appropriate because the case, involving disclosure requirements when negotiating with the federal government, was outside the heartland of fraud crimes. Broderson did not inform NASA that he had obtained a lower interest rate on a lease than had been stated originally. *Broderson*, 67 F.3d at 455. The failure to disclose violated the Truth in Negotiations Act (10 U.S.C. § 2306a) and Federal Acquisition Regulations (48 C.F.R. §§ 15.801-15.804). *Broderson*, 67 F.3d at 455. As the court noted, transparency of this sort during negotiations is not usually required, and the failure to disclose the interest rate was a statutorily created fraud, specific to certain types of contract negotiations with the government. *Id.* Further, Broderson did not initially intend to deceive the government. *Id.* at 459. Because the government received more in contractual and civil damages than the amount it overpaid, the court concluded that the government suffered no loss. *Id.* The downward departure was supported only because the court concluded that the "confluence of circumstances was not taken into account by the Guidelines, *see* U.S.S.G. § 5K2.0, and that the loss calculation . . . overstated the seriousness of Broderson's offense." *Broderson*, 67 F.3d at 459; *see also United States v. Hairston*, 96 F.3d 102, 108-09 (4th Cir. 1996) (reversing downward departure where embezzler did not make restitution "until after she had been criminally indicted, in order to settle her civil liability, and in the hope of receiving a reduced sentence").

Canova's behavior does not fall outside the heartland of fraud crimes. Canova participated in a scheme to charge

the government for services that were not performed and to obstruct a Medicare audit designed to recoup the funds to which Medicare was contractually entitled. Canova did not violate *sui generis* disclosure requirements – he simply charged Medicare for services which he knew were not being rendered, and then lied and manufactured false evidence when Medicare became suspicious. This is garden-variety fraud. Moreover, as argued above, $5 million does not overstate the loss in this case because Canova not only defrauded Medicare but also obstructed the audit, knowing that Medicare was trying to recoup a massive amount of money from Raytel. In short, there is no special confluence of circumstances that would make Raytel's payment of restitution an appropriate basis for downward departure.

Further, allowing employer-paid restitution to serve as a basis for downward departure would create the potential for serious disparities in sentencing based on the deep pockets of a co-defendant (and frequently in white collar cases, that might depend on whether the defendant's employer is solvent). Defendants who, by happenstance, worked for companies able to pay restitution would generally receive lighter sentences than those who worked for companies unable to pay restitution. This would create a system in which sentences are based not on individual culpability, but rather on fortuity. Canova should not benefit because Raytel made restitution after prosecution had commenced.

IV. A SENTENCE OF NO INCARCERATION, AND A NOMINAL $1,000 FINE, WAS UNREASONABLE WHERE THE DEFENDANT HELPED HIS COMPANY OVERBILL MEDICARE BY $5 MILLION, AND THEN TRIED TO OBSTRUCT MEDICARE'S EFFORTS TO RECOUP THAT $5 MILLION

A. Governing Law and Standard of Review

1. Reasonableness of the Extent of the Departure

This Court reviews the extent of a departure for reasonableness. *See* Part I.A, *supra*.

2. Reasonableness under *Booker*

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

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established [in the Sentencing Guidelines];

(5) any pertinent policy statement [issued by the Sentencing Commission];

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

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

18 U.S.C. § 3553(a).

In *United States v. Crosby*, this Court explained that, in light of *Booker*, district courts should now engage in a three-step sentencing procedure. First, the district court must determine the applicable Guidelines range, and in so doing, "the sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence." *Crosby*, 397 F.3d at 112. Second, the district court should consider whether a departure from that Guidelines range is appropriate. *Id.* at 112. Third, the court must consider the Guidelines range, "along with all of the factors listed in section 3553(a)," and determine the sentence to impose. *Id.* at 112-13. The fact that the Sentencing Guidelines are no longer mandatory does not reduce them to "a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge." *Id.* at 113. A failure to consider the Guidelines range and to instead simply select a sentence without such consideration is error. *Id.* at 115.

In *Booker*, the Supreme Court ruled that Courts of Appeals should review post-*Booker* sentences for reasonableness. *See Booker*, 543 U.S. at 261 (discussing the "practical standard of review already familiar to appellate courts: review for 'unreasonable[ness]'") (quoting 18 U.S.C. § 3742(e)(3) (1994 ed.)). In *Crosby*, this Court articulated two dimensions to this reasonableness review. First, the Court will assess procedural reasonableness – whether the sentencing court complied with *Booker* by (1) treating the Guidelines as advisory, (2) considering "the applicable Guidelines range (or arguably applicable ranges)" based on the facts found by the court, and (3) considering "the other factors listed in section 3553(a)." *Crosby*, 397 F.3d at 115. Second, the Court will review sentences for their substantive reasonableness – that is, whether the length of the sentence is reasonable in light of the applicable Guidelines range and the other factors set forth in Section 3553(a). *Crosby*, 397 F.3d at 114.

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

An evaluation of whether the length of the sentence is reasonable will necessarily "focus . . . on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a)." *Canova*, 412 F.3d at 350; *see Booker*, 543 U.S. at 261 (holding that factors in § 3553(a) have, and will, serve as guides for appellate courts in determining if a sentence is unreasonable). As the Eighth Circuit has observed, a sentence "may be unreasonable if [it] fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case." *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir.), *cert. denied*, 126 S. Ct. 276 (2005).

To fulfill its duty to consider the Guidelines, the district court will "normally require determination of the applicable Guidelines range." *Id.* at 1002. "An error in determining the applicable Guideline range . . . would be the type of procedural error that could render a sentence unreasonable under *Booker*." *United States v. Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005); *cf. United States v. Rubenstein*, 403 F.3d 93, 98-99 (2d Cir. 2005) (declining to express opinion on whether an incorrectly calculated Guidelines sentence could nonetheless be reasonable).

In assessing the reasonableness of a sentence, this Court reviews the district court's findings of fact in connection with that sentence for clear error. *United*

States v. Garcia, 413 F.3d 201, 221-22 (2d Cir. 2005) (clear error standard of review still applicable after Booker to challenges to findings of fact at sentencing); *Selioutsky*, 409 F.3d at 119 (same).

B. Discussion

Here, the brevity and nominal financial impact of the district court's sentence – probation and a $1,000 fine – was unreasonable in light of the applicable Guidelines range and the other factors set forth in Section 3553(a). *Crosby*, 397 F.3d at 114. Canova's sentencing guidelines range as calculated by the government and determined by the district court was 46 to 57 months of imprisonment, with a fine range of $10,000 to $100,000. Although this Court's opinion in this case noted that, on remand, the district court might impose a non-Guidelines sentence, *Canova*, 412 F.3d at 359 n.29,[5] it offered no opinion as to whether the same sentence – that is, probation plus a nominal fine – would be "reasonable." Although this Court suggested that the district court could reconsider the extent of the 6-level good-works departure in light of the higher guidelines sentence dictated by the $5 million loss, *id.*, it did not suggest what the boundaries might be for such a departure.

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[5] On remand, the district court declined to impose a non-guidelines sentence. (A-305) (stating that because "the sentencing guidelines have achieved a different status in the three years that have passed, it probably makes sense to keep this one or the approach to this case in the context of the sentencing guidelines").

This Court stated in *Canova* that 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)." *Canova*, 412 F.3d at 350; *see Booker*, 543 U.S. at 261 (holding that factors in § 3553(a) have, and will, serve as guides for appellate courts in determining if a sentence is unreasonable). Here, the factors detailed in § 3553(a) clearly show the sentence imposed to be unreasonable. The nature of the offense has been discussed in detail above, but suffice it to say that the offense was a serious one: the defendant defrauded Medicare by billing for services that his company did not render, and then obstructed a Medicare audit designed to recover $5 million of those fraudulent billings. A sentence of probation and a nominal fine is not just punishment, and it does not promote respect for the law – it undercuts it. Nor does the district court's sentence afford adequate deterrence to criminal conduct, particularly health care fraud committed upon the government. *See United States v. Thurston*, 358 F.3d 51, 81 (1st Cir. 2004) (vacating 3-month sentence for $5 million fraud and stating that "[h]ealth care fraud is a serious crime and the federal interest in combating it is powerful"), *cert. granted and judgment vacated in light of Booker v. United States*, 543 U.S. 1097 (2005); *United States v. Khan*, 53 F.3d 507, 518 (2d Cir. 1995) (affirming upward departure where loss exceeded $1 million and stating that health care fraud compromises the integrity of our national health care system, and "the public's confidence in government" is undermined as a result).

Nor can the brevity of the sentence be justified under departure analysis. This Court reviews the extent of a departure for reasonableness. *See United States v. Dos Reis*, 369 F.3d 143, 151 (2d Cir. 2004); *see also Williams v. United States*, 503 U.S. 193, 203-04 (1992). A reviewing court is to examine, among other things, "the factors to be considered in imposing a sentence under the Guidelines, as well as the district court's stated reasons for the imposition of the particular sentence.'" *Williams*, 503 U.S. at 203-04. "The determinative question is whether the 'reasons given by the district court . . . are sufficient to justify the magnitude of the departure." *Dos Reis*, 369 F.3d at 152 (quoting *Williams*, 503 U.S. at 204); *see also United States v. Campbell*, 967 F.2d 20, 26 (2d Cir. 1992) (same).

The reasons given by the district court here do not justify the magnitude of the departure. Indeed, it is the government's position that none of the reasons the district gave for departing, save the defendant's civic and charitable good works, justified a departure at all. But even assuming *dubitante* that one of them did, the magnitude of the departure provided cannot be justified by the reasons that the district court provided, and indeed cannot be justified at all. Although this Court clearly provided the district court with the authority to depart downward based on the defendant's public service and good works, *see Canova*, 412 F.3d at 359 & n.29, and left open the possibility of a greater departure (beyond the original 6 levels) on remand, *id.* at 359 & n.29 that authority does not insulate the district court's ultimate sentence for review under either *Booker*'s reasonableness

standard or reasonable of the extent of the departure under *Williams*. *Cf. United States v. Moreland*, 437 F.3d 424, 433 (4th Cir. 2006) ("'reasonableness' is not code-word for 'rubber stamp'"). And a sentence of probation is simply not reasonable for a defendant who attempted through false statements and other obstructive conduct to deprive the Medicare program of its right to recoup $5 million for fraudulent testing. *See United States v. Godding*, 405 F.3d 125, 127 (2d Cir. 2005) (per curiam) (post-*Booker* case vacating sentence of one-day term of imprisonment, remanding, and noting concern "that the brevity of the term of imprisonment imposed . . . does not reflect the magnitude of the theft of nearly $366,000 over a five-year period"); *see also United States v. McMannus*, 436 F.3d 871, 874 (8th Cir. 2006) ("[T]he farther the district court varies from the . . . guidelines range, the more compelling the justification . . . must be."); *Moreland*, 437 F.3d at 434 (same).

The district court's sentence was not one that varied from the bottom of the defendant's sentencing guidelines range by one-half or two-thirds. *See United States v. Claiborne*, 439 F.3d 479, 481 (8th Cir. 2006) (vacating 15-month sentence because "the sixty percent reduction . . . was an extraordinary variance that is not supported by comparably extraordinary circumstances"); *Moreland*, 437 F.3d at 436-37 (vacating sentence of 120 months as unreasonable where bottom of the guidelines range was 360 months); *McMannus*, 436 F.3d at 875 (holding that two sentences, one a "54 percent variance" and the other a "58 percent variance," were "outside the range of reasonableness"); *cf. United States v. Williams*, 435 F.3d

1350, 1355 (11th Cir. 2006) (per curiam) (affirming as reasonable 90-month sentence where bottom of guidelines range was 188 months).[6] It was a probationary sentence where the guidelines range was 46 to 57 months of imprisonment. *Cf.* U.S.S.G. § 5C1.1 (f) ("If the applicable guideline range is in Zone D of the Sentencing Table, the minimum term shall be satisfied by a sentence of imprisonment."). If that is not an unreasonable sentence given the offense for which the defendant was convicted, "it is difficult to imagine any meaningful limit on the discretion of the district court." *Moreland*, 437 F.3d at 437.

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[6] A table of appellate decisions on reasonableness review (up to March 13, 2006) can be found at page 30 of the *United States Sentencing Commission's Final Report on the Impact of United States v. Booker on Federal Sentencing*, which can be accessed on the Web at *www.ussc.gov/booker_report/Booker_Report.pdf*.

CONCLUSION

For the foregoing reasons, the Court should vacate the district court's judgment and sentence, and remand the case for resentencing.

Dated: April 10, 2006

Respectfully submitted,

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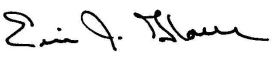

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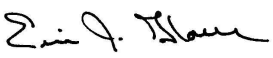
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

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 11,134 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



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ADDENDUM

U.S.S.G. § 2F.1.1 (1998). Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

. . . .

Application Note:
11. In cases in which the loss determined under subsection (b)(1) does not fully capture the harmfulness and seriousness of the conduct, an upward departure may be warranted. Examples may include the following:

(a) a primary objective of the fraud was non-monetary; or the fraud caused or risked reasonably foreseeable, substantial non-monetary harm;

(b) false statements were made for the purpose of facilitating some other crime;

(c) the offense caused reasonably foreseeable, physical or psychological harm or severe emotional trauma;

(d) the offense endangered national security or military readiness;

(e) the offense caused a loss of confidence in an important institution;

(f) the offense involved the knowing endangerment of the solvency of one or more victims.

In a few instances, the loss determined under subsection (b)(1) may overstate the seriousness of the offense. This may occur, for example, where a defendant attempted to negotiate an instrument that was so obviously fraudulent that no one would seriously consider honoring it. In such cases, a downward departure may be warranted.

. . . .

U.S.S.G. § 5K2.10 (1998). Victim's Conduct (Policy Statement)

If the victim's wrongful conduct contributed significantly to provoking the offense behavior, the court may reduce the sentence below the guideline range to reflect the nature and circumstances of the offense. In deciding the extent of a sentence reduction, the court should consider:

(a) the size and strength of the victim, or other relevant physical characteristics, in comparison with those of the defendant;

(b) the persistence of the victim's conduct and any efforts by the defendant to prevent confrontation;

(c) the danger reasonably perceived by the defendant, including the victim's reputation for violence;

(d) the danger actually presented to the defendant by the victim; and

(e) any other relevant conduct by the victim that

substantially contributed to the danger presented. Victim misconduct ordinarily would not be sufficient to warrant application of this provision in the context of offenses under Chapter Two, Part A.3 (Criminal Sexual Abuse). In addition, this provision usually would not be relevant in the context of non-violent offenses. There may, however, be unusual circumstances in which substantial victim misconduct would warrant a reduced penalty in the case of a non-violent offense. For example, an extended course of provocation and harassment might lead a defendant to steal or destroy property in retaliation.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Canova

Docket Number: 05-6439-cr

I, Natasha R. Monell, hereby certify that the Appellant'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 4/10/2006) and found to be VIRUS FREE.

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Dated: April 10, 2006