06-0203-cr

To Be Argued By:
MICHAEL E. RUNOWICZ

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-0203-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

MARVIN OGMAN,

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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STATEMENT OF JURISDICTION

The district court (Hall, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. Judgment entered on January 3, 2006. (Appendix ("A") 12; Government Appendix ("GA") 5). The defendant filed a timely notice of appeal on December 29, 2005 (A 11), which is treated as having been filed on January 3, 2006, pursuant to Fed. R. App. P. 4, and this Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the district court properly calculated the sentencing guidelines range by using both charges of conviction, instead of ignoring one charge as the defendant requested.

II. Whether the district court's denial of a downward departure is reviewable on appeal and whether that denial was proper in any event when the district court provided a reasonable explanation for its decision and the resulting sentence – 14 years below the low end of the guidelines range – was reasonable.

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Preliminary Statement

The defendant pleaded guilty to drug offenses charged in two separate indictments. One indictment charged him with conspiracy to possess cocaine with the intent to distribute it. (GA 17). The second indictment charged him with possessing with the intent to distribute more than 50 grams of cocaine base. (GA 18). At sentencing, the district court granted the government's motion for a downward departure based on the defendant's cooperation, and thus departed from a sentencing

guidelines range of 262 to 327 months to impose a sentence of 95 months' imprisonment.

Despite this substantial departure, the defendant appeals to challenge his sentence. Given the defendant's significant criminal history, the large quantity of narcotics involved, the significant downward departure in his sentence, and the district court's reasoned consideration of the defendant's sentencing arguments, his appeal should be denied.

Statement of the Case

On June 15, 2004, Marvin Ogman was indicted by a grand jury and charged in a single conspiracy to possess with intent to distribute more than 500 grams of cocaine and more than 50 grams of cocaine base in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A), (b)(1)(B), and 846. (A 3; GA 10). On February 16, 2005, a Second Superseding Indictment was returned charging the defendant with a single count of conspiracy to possess with the intent to distribute cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), and 846. (A 9, 19; GA 17). On the same date, February 16, 2005, a separate indictment was returned which charged the defendant with possession of 50 grams or more of a substance containing a detectable amount of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)(iii). (A 25; GA 3, 18). The defendant executed separate plea agreements and pleaded guilty to both indictments on May 4, 2005. (A 10, 13-18, 20-24; GA 4).

On December 29, 2005, the district court (Janet C. Hall, J.) sentenced the defendant principally to two concurrent terms of 95 months in prison. (A 11-12; GA 5). Judgment entered January 3, 2006, (A 12; GA 5), and the defendant filed a timely notice of appeal, (A 11, 140; GA 5).

The defendant is currently serving his sentence.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

Beginning in the summer of 2003, the government targeted a widespread network of cocaine traffickers of which defendant Marvin Ogman was a member. Based on evidence obtained from wiretaps and a cooperating witness, the government arrested and charged a total of fourteen people involved in this conspiracy with a variety of drug offenses including the distribution of both cocaine and cocaine base. (Presentence Report ("PSR") ¶ 3).[1] With respect to defendant Ogman, there were recorded conversations during which he had arranged two separate purchases of cocaine from a co-conspirator. (PSR ¶¶ 13-16). These two sales involved a total of approximately 140 grams of cocaine that the defendant intended to sell to lower level distributors and users. (PSR ¶ 17). On June 15, 2004, the defendant was indicted in case number 3:04CR60(JCH), along with thirteen other defendants, and was charged in a conspiracy to possess with the intent

[1] The district court adopted the facts in the PSR at sentencing with no objection from the parties. (A 104).

to distribute both cocaine and cocaine base. (A 3; GA 10).

On June 23, 2004, when law enforcement officers went to arrest the defendant on the warrant issued with the filing of the indictment, they found approximately 52 grams of cocaine base, or "crack," beneath a scale located on the defendant's night stand adjacent to the bed in which he had been sleeping. (PSR ¶¶ 21-22).

After the defendant's arrest, he engaged in several proffer sessions with the government, in the hope of entering into a cooperation agreement with the government and obtaining a motion under United States Sentencing Guideline (U.S.S.G.) § 5K1.1. During these sessions he provided the government various bits of information about his drug dealings. However, as this information proved to be largely corroborative in nature, the Assistant United States Attorney responsible for the prosecution of the case, in good faith, informed the defendant that his assistance to that point in time might not have risen to the level required for the filing of the desired 5K motion, which would then allow the sentencing judge to downwardly depart during sentencing. (A 90). During those sessions, the defendant had received no promises or assurances that such a motion would be filed.

In response to this caution by the prosecutor, the defendant stated an intention to go to trial, rather than plead guilty. (A 91). The government accordingly began preparing for trial. In anticipation of trial, on February 16, 2005, the government sought and obtained a Second

Superseding Indictment which charged the defendant with engaging in a cocaine distribution conspiracy rather than the cocaine and cocaine base conspiracy in which he had originally been charged, a change which dramatically reduced his sentencing exposure if convicted.[2] (A 19). At the same time, the grand jury returned an additional indictment which charged the defendant with the possession of the cocaine base found next to his bed when he was arrested.[3] (A 25, 90-91; GA 3, 18).

Subsequent to the filing of these two indictments, the defendant's cooperation continued, and ultimately plea agreements as to each indictment were reached by the parties. On May 4, 2005, the defendant pleaded guilty to both the cocaine conspiracy indictment and to the cocaine base possession indictment. (A 10, 82; GA 4). While the government normally reserves its right to decide whether to file a 5K motion until sentencing, it took the unusual step in the written cooperation agreement of promising such a motion to the defendant. (A 42-43).

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[2] By eliminating the allegations of the defendant's involvement in the cocaine base conspiracy, the Second Superseding Indictment reduced a statutory maximum punishment from life imprisonment to 30 years and eliminated a statutory mandatory minimum sentence of ten years. *See* 21 U.S.C. §§ 841(b)(1)(A), (b)(1)(C).

[3] This indictment was assigned the case number 3:05CR36(RNC), and was assigned to Chief United States District Judge Robert N. Chatigny. However, on April 25, 2005, the case was transferred to District Judge Hall and was given the identification number of 3:05CR36(JCH). (GA 4).

At the defendant's sentencing on December 29, 2005, the defendant's initial offense level was calculated to be 32 as determined by the quantity of drugs involved in both cases to which he had pleaded guilty. (A 104). His offense level was then increased to level 37 under U.S.S.G.§ 4B1.1 because his previous felony convictions had made him a career offender. The district court then reduced this offense level by three levels for acceptance of responsibility, resulting in a total offense level of 34. (A 104-105). The district court then determined that the defendant's criminal history was category VI as he had acquired a total of 17 criminal history points.[4] (A 105). Accordingly, based on a total offense level of 34 and a criminal history category of VI, the district court calculated the defendant's guideline range to be 262 to 327 months of imprisonment. *Id*. The defendant did not object to the court's determinations. (A 105-106).

In determinating an appropriate sentence, Judge Hall denied two of the defendant's motions concerning the guideline calculations. First, the defendant, without citing any authority, proposed that the district court start the sentencing guideline calculation at level 34, the level dictated by his conviction on the cocaine conspiracy indictment, and essentially ignore the crack cocaine possession conviction for the purposes of calculating the sentencing guidelines. (A 93-96). The court rejected this

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[4] As a career offender, the defendant would automatically have been placed in criminal history category VI even if he had not reached that level on his own by virtue of his numerous previous convictions. U.S.S.G. § 4B1.1(b). *See also* PSR ¶ 47.

request. (A 127). The defendant also moved for a horizontal departure from his criminal history determination, claiming that it overstated his actual criminal past. (A 107). Judge Hall acknowledged her authority to depart on this ground, but in her discretion chose not to do so. (A 136). The district court did, however, grant the government's § 5K1.1 motion. (A 98).

Together, the defendant's criminal history and offense level had placed him in a guidelines range of 262 to 327 months. (PSR ¶ 75). The district court granted the government's § 5K1.1 motion, departing downward to sentence the defendant to 95 months in prison on each charge, to be served concurrently. (A 134; GA 7).

SUMMARY OF ARGUMENT

I. The district court properly calculated the defendant's sentencing guideline range. The district court followed the guidelines scheme and calculated the sentencing guidelines for all the offenses to which the defendant had pleaded guilty. In order to adopt the guideline range advocated by the defendant at sentencing, the district court would have had to alter the plea agreement and ignore one of the offenses to which the defendant had pleaded guilty, the cocaine base possession charge. The district court properly rejected this request. Because the defendant committed two crimes and chose to plead guilty to both charges, the district court reasonably considered both crimes, and properly calculated the guidelines as determined by the offenses of conviction.

II. The district court's decision to deny the defendant's motion for a horizontal departure from his criminal history category is not reviewable on appeal. The district court properly understood its authority to depart, but exercised its discretion and chose not to do so. Furthermore, the defendant's criminal history determination was a wholly appropriate categorization of his numerous past convictions, and the resulting sentence was substantively reasonable.

ARGUMENT

I. THE DISTRICT COURT PROPERLY CALCULATED THE DEFENDANT'S GUIDELINES RANGE BASED ON ALL COUNTS OF CONVICTION

A. Relevant Facts

The relevant facts are stated in the above Statement of Facts and Proceedings Relevant to this Appeal.

B. Governing Law and Standard of Review

This Court reviews a district court's interpretation of the sentencing guidelines *de novo*, and reviews the district court's findings of fact for clear error. *United States v. Rubenstein*, 403 F.3d 93, 99 (2d Cir.), *cert. denied*, 126 S. Ct. 388 (2005); *United States v. Fiore*, 381 F.3d 89, 92 (2d Cir. 2004). When a district court's application of the guidelines to the facts is reviewed, this Court takes an "either/or approach," under which the Court reviews "determinations that primarily involve issues of law" *de*

novo and reviews "determinations that primarily involve issues of fact" for clear error. *United States v. Vasquez*, 389 F.3d 65, 74 (2d Cir. 2004); *see also United States v. Selioutsky*, 409 F.3d 114, 119 (2d Cir. 2005) (court "review[s] issues of law *de novo*, issues of fact under the clearly erroneous standard, [and] mixed questions of law and fact either *de novo* or under the clearly erroneous standard depending on whether the question is predominantly legal or factual") (citations omitted).

When a defendant is convicted of multiple drug charges, the quantities of drugs are to be combined according to the Drug Equivalency Table set forth in § 2D1.1 of the guidelines. The guidelines specifically address the situation encountered here stating "[i]f the offense involved both a substantive drug offense and an attempt or conspiracy . . . , the total quantity involved shall be aggregated to determine the scale of the offense." U.S.S.G. § 2D1.1 note 12. *See, e.g., United States v. Patterson*, 947 F.2d 635, 636 (2d Cir. 1991).

However, the sentencing guidelines include special provisions for enhancing the sentences of "Career Offenders." A defendant qualifies as a career offender if (1) "[he] 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 for either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1(a). *See also United States v. Jones*, 415 F.3d 256, 260 (2d Cir. 2005).

For career offenders, the guidelines contain a table of offense levels to be used "if the offense level [in the table] is greater than the offense level otherwise applicable." § 4B1.1(b). The table sets offense levels based on the statutory maximum punishment for the offense of conviction, setting, for example, an offense level of 37 for offenses with a statutory maximum of life imprisonment and a level of 34 for offenses with a statutory maximum of 25 years or more. § 4B1.1(b). The career offender guidelines also provide that "[a] career offender's criminal history category in every case under this subsection shall be Category VI." § 4B1.1(b).

The decision whether or not to bring particular charges is left almost entirely to the prosecutor. *See United States v. Broderson*, 67 F.3d 452, 457 (2d Cir. 1995) ("Absent an allegation of prosecutorial misconduct, we must defer to the prosecutorial decisions as to whether to prosecute and what charges to file."). Further, during plea negotiations it is constitutionally permissible for a prosecutor to threaten to bring additional charges, and to follow through on those charges, in order to induce a guilty plea. *Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978).

This Court has rejected previous attempts by district courts to depart based on a prosecutor's charging discretion. In *United States v. Stanley*, 928 F.2d 575, 579-83 (2d Cir. 1991), the prosecutor brought additional charges after the defendant withdrew his guilty plea. After conviction on the original and the additional charges, the district court departed downward to ignore the increase in the sentencing guidelines that the

additional charges carried. This Court overturned the downward departure as inappropriate under the guidelines, recognizing that, so long as prosecutorial discretion does not discriminate against a class of individuals, decisions about whether or not to bring particular charges must be respected in sentencing. *Id*. at 582 ("[T]he fact that a charge was used in plea bargaining does not mean that the penalty mandated by statute does not apply.").

C. Discussion

The district court properly calculated the defendant's initial advisory guidelines range given the charges to which he pleaded guilty. There is no dispute that the offense to which he pleaded guilty in the cocaine base indictment was punishable by a maximum term of imprisonment of life. (A 20, 58). There is also no dispute that the defendant was a "career offender" under U.S.S.G. § 4B1.1(a). (A 104-106). The district court properly determined that under § 4B1.1(b), as the statutory maximum penalty was life, the offense level was 37, and that the defendant's criminal history category was level VI. (A 104-105). After according the defendant a three level reduction for acceptance of responsibility, the district court concluded that the defendant's total offense level was 34 and his criminal history category was VI, which resulted in a guideline range of 262 to 327 months. (A 105).

In making this determination, the district court correctly and properly followed the application instructions contained in U.S.S.G. § 1B1.1, first by

determining "the offense guideline section from Chapter Two (offense conduct) *applicable to the offense of conviction*." U.S.S.G. § 1B1.1(a) (emphasis added); then determining the base offense level and any other specific offense characteristics under § 1B1.1(b), (A 104); and then finally determining the criminal history and applying any adjustments as called for under Part B of Chapter Four (defining career offenders). U.S.S.G. § 1B1.1(f). Therefore, by following the sentencing protocol of the guidelines, the district court committed no error in determining the advisory guidelines range.

Nonetheless, the defendant moved, without citing any authority, essentially for the district court to ignore his cocaine base offense and determine the guidelines based on the other offense to which he had pleaded guilty, the cocaine conspiracy charge, which had a lower statutory maximum and thus would have resulted in a lower offense level. (A 93-96). On hearing the defendant's argument, the district court expressed concern that the court was being asked to become a part of the plea negotiations, in violation of Fed. R. Crim P. 11(c). The district court told the defendant, "[i]f you are asking me to ignore the guideline calculation and take a different guideline calculation, the only way I can do that is by ignoring the plea agreement." (A 95). The district court ultimately declined to adopt the defendant's position, (A 127), and the defendant now challenges that decision.

The defendant ignores the issue raised by the trial judge. The Federal Rules of Criminal Procedure explicitly contemplate that a plea agreement may include promises not to bring particular charges. Fed. R. Crim. P.

11(c)(1)(A). They also expressly prohibit court participation in plea negotiations. Fed. R. Crim. P. 11(c)(1). The defendant's argument, as the district court recognized, essentially asked the court to re-write the plea agreement as though the government had agreed not to bring the cocaine base charges and to ignore the impact of his plea of guilty to that offense upon the calculation of the guidelines. This would be a violation of the Federal Rules.

Moreover, the prosecutor's decision to file the cocaine base charge was entirely permissible under *Bordenkircher*. Even if the charges had been brought after a threat by the prosecutor, which they were not, they would still have been constitutionally permissible. Here, the charges were brought entirely in good faith, as a result of the defendant's desire to go to trial. Consequently, the district court acted reasonably in respecting the prosecutor's good faith decision to bring the additional charges.

In significant respects, the present case is virtually indistinguishable from *Stanley*, 928 F.2d 575. In *Stanley*, the defendant had originally been charged with a drug offense carrying a mandatory minimum prison sentence penalty, but had been allowed to plead guilty to a drug offense that did not require the imposition of a mandatory minimum sentence. However, before sentencing, the defendant successfully moved to withdraw his guilty plea. The government subsequently obtained a superseding indictment not only reinstating the original drug offense with a mandatory minimum, but also adding a charge of possession of a firearm during a drug trafficking offense,

conviction upon which would require the imposition of a consecutive five year term of imprisonment. After trial, the defendant was convicted of both offenses. At the sentencing, the district court downwardly departed for a perceived sentencing disparity based on the prosecutor's plea bargaining decision. In reversing the departure, this Court noted that "the prosecutor's discretionary authority extends to choosing among statutes that impose different penalties, even if they are violated by the same conduct," 928 F.2d at 581, and "there is no impropriety in the government's exercise of its discretion . . . , so long as its selection is not 'based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Id*. (quoting *Bordenkircher*, 434 U.S. at 364).

Like the defendant in *Stanley*, the facts of this case involve plea negotiations which broke down, resulting in additional charges being brought. Thus, as in *Stanley*, a subsequent conviction on those additional charges (by a jury in *Stanley*, by guilty plea here) must be considered for sentencing purposes. In the absence of some allegation of prosecutorial misconduct, courts must defer to the prosecutor's discretion concerning which charges to bring. The defendant's argument – asking Judge Hall and this Court to ignore the cocaine base charges – would override this discretion. *Cf.* 928 F.2d at 583 ("We do not believe that substituting the judge's view . . . for that of the prosecutor constitutes a valid ground for departure from the guideline range."). In other words, the district court properly denied the defendant's request to ignore the cocaine base possession charge to which he had pleaded guilty.

On appeal, the defendant raises two additional arguments. He first argues that the charges would not have been brought had the Assistant U.S. Attorney not commented that the defendant *might* not be eligible for a 5K motion. His second argument asserts that because of the "unusual nature" of this case, the judge should have ignored the second crime the defendant committed when calculating the guidelines. These arguments are meritless.

The defendant's first argument ignores two crucial facts. Initially, under *United States v. Lovasco*, 431 U.S. 783 (1977) the government was free to bring the cocaine base charges at any point within the statute of limitations, subject to speedy trial requirements. The defendant does not, and cannot, argue that the charges were improperly filed. The government was under no obligation to ignore the defendant's other criminal conduct. That the government chose to bring the charges after the defendant expressed a desire to go to trial does not change the fact that the defendant committed the offense and pleaded guilty to it as part of his plea agreement.

The defendant's argument also ignores the fact that the government at no point promised that the charges would not be brought. To claim that the charges were brought "on the basis of factor [sic] out of the Appellant's control," Brief for Appellant at 15, disregards the fact that the possession of the narcotics was completely within the defendant's control. The claim that his guidelines range was increased "for reasons thoroughly unrelated to [his] level of cooperation," *id.*, is irrelevant, given that the increase was for reasons thoroughly related to his own criminal conduct. In other words, although the

government ultimately promised to file a 5K motion, it never promised to ignore the full scope of his criminal conduct and it never promised not to bring additional charges.

The defendant's second argument is that the "unusual nature" of this case should also have led the district court to ignore the cocaine base conviction and determine the guidelines based on his plea of guilty to only the cocaine conspiracy indictment. The only aspect of this case that is unusual, however, is that the government committed to the filing of a 5K motion within the cooperation agreement instead of making such a determination prior to the sentencing of the defendant. *See* A 42-43 (district court commenting on unusual nature of cooperation agreement). In all other respects, the sentence in the case was determined like any other case. The district court determined the guidelines based on the offenses of conviction, properly determined that the defendant was a career offender, considered the defendant's requests for departure or imposition of a non-guidelines sentence, and considered the fact the government had kept its promise and had filed a substantial assistance motion for the defendant before imposing a sentence well below the suggested guideline range. This case was not unusual in any manner.

The other aspects of this case cited by the defendant as "exceptional" were already taken into account in the district court's sentencing determination. The fact that the defendant continued to cooperate throughout the time prior to the plea agreement as well as the probation officer's opinion of the defendant were factors in the

district court's decision to depart so substantially downward. (A 88-98, 132-34).

With no finding – much less an allegation – that the government violated a promise to the defendant, or improperly acted in violation of the plea agreement, or incorrectly brought the second indictment, there are no grounds on which the district court could have relied to completely set aside and ignore the defendant's conviction on the cocaine base indictment during sentencing. Therefore, the district court properly calculated the defendant's guidelines based on the highest offense level of conviction. Neither the fact that the government chose not to bring the indictment immediately, nor the fact that the eventual plea and cooperation agreements were unusually favorable to the defendant in that he had been promised the filing of a 5K motion on his behalf, are relevant to the fact that the defendant possessed and intended to distribute cocaine base. He knowingly pleaded guilty to this crime and was sentenced accordingly.

Nor can a review of the defendant's sentence for reasonableness provide grounds for re-sentencing. The eventual sentence imposed was far below both the calculated guidelines range and the range called for in the defendant's motion. In fact, his actual sentence was fully half of the defendant's suggested guidelines range and only one third of the calculated range. To claim that such a substantial downward departure resulted in an unreasonable sentence would require significantly more persuasive facts than those presented by the defendant in this case.

II. THE DENIAL OF THE DEFENDANT'S MOTION FOR A DOWNWARD DEPARTURE IS NOT REVIEWABLE ON APPEAL AND WAS PROPER IN ANY EVENT

A. Relevant Facts

The relevant facts are stated in the above Statement of Facts and Proceedings Relevant to this Appeal.

B. Governing Law and Standard of Review

In *United States v. Booker*, 543 U.S. 220, 259-65 (2005), the Supreme Court held that although a district court must consider the sentencing guidelines along with the other factors listed in 18 U.S.C. § 3553(a), they are no longer mandatory. *See also United States v. Crosby*, 397 F.3d 103, 110-12 (2d Cir. 2005). This Court has further held that in the post-*Booker* sentencing regime, "a refusal to downwardly depart is generally not appealable," and an appeals court may review such a denial only "when a sentencing court misapprehended the scope of its authority to depart or the sentence was otherwise illegal." *United States v. Valdez*, 426 F.3d 178, 184 (2d Cir. 2005); *see also United States v. Stinson,* 465 F.3d 113, 114 (2d Cir. 2006) (per curiam) (refusal to downwardly depart from the guideline range is generally not appealable); *United States v. Hargrett*, 156 F.3d 447, 450 (2d Cir. 1998) (court lacks jurisdiction "to review a district court's refusal to grant a downward departure or the extent of any downward departure that is granted"). "In the absence of 'clear evidence of a substantial risk that the judge misapprehended the scope of his departure authority,'

[this Court] presume[s] that a sentenc[ing] judge understood the scope of his authority." *Stinson*, 465 F.3d at 114 (quoting *United States v. Gonzalez*, 281 F.3d 38, 42 (2d Cir. 2002)).

In *United States v. Mishoe*, 241 F. 3d 214 (2d Cir. 2001), this Court held that when calculating a criminal history category "a reduction would be permissible if the sentencing judge determines, *in the exercise of [the District Court's] discretion* after individualized consideration of the factors relevant to [the defendant's] case, that CHC VI overstates the seriousness of his criminal record." 241 F. 3d at 215 (emphasis added).

C. Discussion

The district court's denial of the defendant's motion for a downward departure is unreviewable. Nothing in the record suggests that his sentence was illegal or that the district court misunderstood its authority to grant a departure.

Here, the district court explicitly acknowledged its authority to depart under *Mishoe*. (A 136). Moreover, the defendant also explicitly acknowledged during the sentencing that the district court had correctly applied the sentencing guidelines in determining both the total offense level and the criminal history category. (A 104, 106). Thus, there is no basis for arguing that the sentence was illegal.

In any event, even if this Court were to review the district court's denial of the downward departure, that

denial was fully proper. The district court correctly pointed out that the defendant's criminal history was so extensive that "even if I ignore a number of those [crimes] and not count them, the defendant still ends up in a criminal history category six and still has the qualifying convictions for career offender." (A 136). Furthermore, the charges for which the defendant was being sentenced represented his third and fourth narcotics convictions. He had previously been subject to a 30 month prison sentence for possession of narcotics, (PSR ¶ 34), and to a six year sentence for sale of narcotics, (PSR ¶ 43), which had been insufficient to deter him from again engaging in drug distribution behavior. He also had several convictions for resisting arrest, and a second degree assault conviction stemming from the shooting of his then-girlfriend. *See* PSR ¶¶ 42-46. Categorizing the defendant as a "career offender" based on his ten prior convictions is wholly appropriate and in no way unreasonable.

Moreover, there is no basis for arguing that his criminal history category overstated the likelihood that he would offend again. The defendant's eight previous sentences to either prison or jail (four of which were suspended) prior to these convictions suggest that the risk of recidivism is extremely high. Indeed, it took only four months after the defendant had been released after serving two years of a six year sentence on the shooting case before he was again arrested. (A 114). This fact alone shows that it was not only reasonable, but also correct, for the district court to conclude that the defendant's criminal history category neither overstated the severity of his record nor the likelihood of recidivism.

Finally, it cannot be claimed that the imposed sentence of 95 months – some 167 months or 14 years below the minimum 262 months of the guideline range and fully one-half of the 188 month minimum of the range the defendant had advocated at sentencing – was unreasonable. In reaching that sentence, Judge Hall gave thoughtful consideration to all of the sentencing factors detailed in 18 U.S.C. § 3553(a) including, *inter alia*, the nature of the crime, the characteristics of the defendant, and the need for the sentence to provide just punishment, adequate deterrence, protect the public and provide the defendant with needed educational and vocational training. (A 128-34). Nothing more was required.

Accordingly, the defendant's appeal of the denial of his horizontal departure motion should be denied.

CONCLUSION

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

Dated: August 1, 2007

Respectfully submitted,

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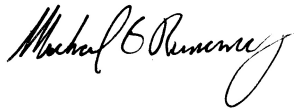

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ADDENDUM

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.