07-1890-cr

To Be Argued By:
CHRISTOPHER M. MATTEI

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-1890-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

HECTOR SANTIAGO,
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

This is an appeal from a judgment entered April 27, 2007 (Stefan R. Underhill, J.) in which the district court issued a written ruling refusing to resentence the defendant in light of *United States v. Booker*, 543 U.S. 220 (2005) and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on May 7, 2007, and this Court has appellate jurisdiction over the defendant's challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

Statement of the Issue Presented

Did the district court abuse its discretion in refusing, on a *Crosby* remand, to lower its original 96-month sentence, which was 24 months below the sentence suggested by the original guideline range and was reasonable in light of the factors set forth at 18 U.S.C. § 3553(a)?

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Preliminary Statement

On the night of December 21, 2001, two police officers in Bridgeport, Connecticut, saw the defendant-appellant, Hector Santiago, standing in a dark alley behind an apartment building. When one of the officers approached him, the defendant ran up an exterior staircase. The officer saw the defendant toss away a loaded handgun. Because of the defendant's history of robbery and drug dealing offenses, he was charged in federal court with

unlawful possession of a firearm by a convicted felon, and the jury convicted him after trial.

At sentencing, the district court determined that the defendant faced a guideline range of 120-150 months based on an adjusted offense level of 26 and a Criminal History Category VI. The court departed downward horizontally to Criminal History Category IV based on its conclusion that Category VI substantially overstated the seriousness of the defendant's criminal past and imposed an incarceration term of 96 months. On remand from this Court under *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), the district court reimposed the same sentence.

In this appeal, the defendant argues that the district court's decision not to re-sentence him was unreasonable because the district court misapprehended its authority to depart from the Guidelines range based on the disparity between state and federal penalties. This claim has no merit. The district court fully understood its authority to impose a lower sentence based on the factors set forth in 18 U.S.C. § 3553(a), and its decision to reimpose its 96 month sentence, which was already the result of a 24 month departure, was reasonable.

Statement of the Case

On June 4, 2002, a federal grand jury in Connecticut returned a one-count indictment charging the defendant-appellant, Hector Santiago, with unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C.

§§ 922(g)(1) and 924(a)(2). A11-A12.[1] On October 1, 2002, a trial jury found the defendant guilty of the offense charged. A5 (docket entry). On March 3, 2003, the district court (Stefan R. Underhill, J.) sentenced the defendant to 96 months' imprisonment and three years' supervised release. A6 (docket entry).

On September 16, 2004, this Court affirmed the defendant's judgment of conviction by summary order. *See United States v. Hector Santiago*, 03-1148-cr. On September 20, 2005, the defendant filed a motion with this Court to recall the mandate and remand the case for re-sentencing in light of the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). The Government did not object to this motion. On October 3, 2005, this Court granted the motion and remanded the case to the district court. *See* A8 (docket entry).

On December 8, 2005, the district court issued a written decision indicating that it was imposing the same 96 month sentence and that another sentencing hearing was not necessary. A8 (docket entry). The defendant did not appeal that decision. On December 6, 2006, the defendant filed a motion to vacate, set aside or correct his sentence, under 28 U.S.C. § 2255, claiming that his counsel was ineffective for failing to file a notice of appeal as to the district court's decision following the *Crosby* remand. A9 (docket entry). The Government agreed with the defendant's argument and asked the district court to re-

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[1] The Joint Appendix will be referred to using "A" and the appropriate page number.

issue the judgment and thereby restore the defendant's appellate rights with respect to the sentencing decision. On April 24, 2007, the district court granted the defendant's motion and re-issued its decision declining to re-sentence the defendant. A9, A14-A17. On May 2, 2007, the defendant filed his Notice of Appeal. A18. The defendant has been incarcerated since his original arrest on December 21, 2001, and is currently serving his sentence.

Statement of Facts

A. Government's evidence at trial

On December 21, 2001, at approximately 9:00 p.m., police officers David Uliano and Sean Ronan of the Bridgeport Police Department were on routine patrol in the east end of the city. GA2-4.[2] Officer Uliano was driving, and Officer Ronan was in the front passenger seat. GA5. They were in a marked patrol car and dressed in full uniform. GA4. They had been working the 3:00 p.m. to 11:00 p.m. shift and were assigned to patrol a span of several city blocks on the east side of the city. GA3, GA31.

As Officer Uliano was driving northbound on Hallet Street, he turned left onto Ogden Street and illuminated his passenger side "alley light," which is a car-mounted spotlight used to illuminate alleys on either side of the street. GA5-6, GA34-35. There were several apartment

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[2] The Government Appendix will be referred to using "GA" and the appropriate page number.

buildings near the intersection of Ogden and Hallet Streets, and it was routine for officers to check the alleys behind these buildings. GA5. Officer Uliano drove past the alley behind 729 Hallet Street, and he and Officer Ronan observed an individual standing in the alley behind the building. GA6, GA34-35. Officer Uliano stopped the patrol car and backed it up several feet so that it was even with the start of the alley. GA6.

Officer Ronan got out of the patrol car and used his flashlight to illuminate the individual. GA35. He was able to identify him as the defendant, Hector Santiago, someone whom he had known at the time. GA35-36. He called to the defendant, "Come here," but the defendant ignored him, turned around and walked, at a "fast pace," up an exterior staircase which led into the 729 Hallet Street building. GA36. As Officer Ronan walked up the staircase after him, Officer Uliano used his flashlight to search the alley for any apparent contraband. GA6-7, GA36. He found none. GA7.

Officer Ronan walked up the stairs and heard a door open and close on the third floor. GA37. He went to the third floor apartment door and knocked. GA37. After a short time, an unidentified female answered the door, and Officer Ronan saw the defendant standing behind her in the far side of the kitchen. GA37-38. He asked the defendant to come out of the apartment and talk to him, but the defendant refused. GA38. Officer Ronan contacted Officer Uliano, advised him that he was unable to talk with the defendant and told him he would meet him

back at their patrol car. GA38. The officers then resumed their normal patrol. GA39.

Approximately twenty minutes later, they arrived again at the intersection of Hallet and Ogden Streets. GA8-9, GA39. Once again, they turned left onto Ogden Street from Hallet Street, and Officer Uliano directed his passenger side alley light toward the alley behind 729 Hallet Street. GA8-9, GA39. They saw the defendant standing in the alley, this time with his back against the wall of the 729 Hallet Street building. GA9-10, GA39-40.

Officer Uliano was the first one out of the car. GA40. He directed his flashlight into the alley and caught a glimpse of the defendant's face as he walked toward the exterior staircase; like Officer Ronan, he too recognized the defendant from prior interactions. GA9-10. As Officer Uliano quickened his pace, so did the defendant. GA10. Officer Uliano testified that he was approaching the defendant to talk to him, to "find out why he is in the alleyway." GA10. He called out to the defendant, but the defendant ignored him and ran up the stairs. GA10-11. As the defendant got about half way up the first flight of stairs, Officer Uliano, who was between 10 to 15 feet behind him, observed him extend his right arm and throw away a handgun. GA11.

Q. And how – you say you saw him throw a handgun; how do you know it was a handgun?

A. I know a handgun. It had all the characteristics of a handgun. I wasn't that far away, not to

> question it was a handgun, and I had my light on him. I saw him throw the handgun.

GA11.

Officer Uliano immediately followed the defendant up the stairs and, as he did so, called on his radio that he was "in foot pursuit of a party who just threw a handgun, Ogden and Hallet." GA12. He also yelled to his partner, "Gun, Sean." GA13. The chase continued to the third floor, where the defendant banged loudly on an apartment door and was let in just before Officer Uliano could grab him. GA14. The apartment door "opened and the door was slammed in my face." GA14. He used his radio again to call for a supervisor and let everyone know that he "had a party . . . [who] had dumped a handgun on me and the party went into an apartment . . . ." GA14-15.

When the patrol car had pulled up to the alleyway the second time, Officer Ronan had decided to go to the corner of the building and watch toward the front, in case the defendant decided to go back through the building and out the front entrance. GA40-41. He had seen the defendant turn to flee from his partner, but had turned away before the defendant had run up the stairs and tossed the gun. GA41. At that point, he had heard Officer Uliano yell, "Sean, I need you back here, he threw a gun." GA41.

Officer Ronan turned and went back into the alley, toward the exterior staircase. GA41. Using his flashlight, he illuminated a gun on the ground at the bottom of the

stairs, to the right of the stairwell. GA42. He picked up the gun and ran up the stairs after his partner. GA42-43. He saw that the gun was cocked, with its hammer back. GA43-44. He did not take the time to uncock it or unload it, because he was pursuing Officer Uliano and the defendant. GA48.

When Officer Ronan arrived on the third floor landing, he saw Officer Uliano kicking at the apartment door and yelling, "Bridgeport Police. Open the door." GA43. Officer Uliano testified that he was concerned that the defendant might have another firearm on him and that he could pose a danger to those inside the apartment. GA15. Officer Ronan showed Officer Uliano the gun and pointed out that it "was cocked." GA15-16, GA43. He then placed it down on the floor of the landing, helped Officer Uliano with the door, and pulled out his own duty weapon to cover Officer Uliano as he entered the apartment through the breached door. GA15-16, GA44.

There were several individuals in the apartment who were yelling and screaming at the officers. GA17-20, GA45-46. Officer Ronan had not seen most of these individuals when he had been to the apartment door earlier that night. GA45-46. Officer Uliano entered the apartment with his gun drawn, grabbed the defendant by the arm, led him out to the landing and handcuffed him with the help of other officers who, by that time, had arrived as backup in response to the calls on the police radio. GA19-20.

At that point, Officer Ronan reholstered his own weapon and picked up the gun from the landing. GA47. He continued to handle it with great care because it was cocked, and he was concerned that it could discharge and jeopardize the safety of the other officers and the residents of the apartment, who were all standing on the landing. GA48. He took the gun down to his patrol car, uncocked it and removed its magazine. GA48-49. It was loaded with four hollow-point bullets, one of which was in the chamber. GA49.

As to the other two elements of the offense, the parties stipulated that, prior to December 21, 2001, the defendant had been convicted of a felony offense. In addition, the government's proof included testimony from Special Agent John Fretts of the Bureau of Alcohol, Tobacco, Firearms and Explosives that the gun at issue was a Llama .380 caliber handgun with serial number 570415. He further testified that it had been manufactured in Spain and imported into this country through Hackensack, New Jersey. GA59a-59b.

B. Sentencing proceeding

At sentencing on March 3, 2003, the district court determined that, under U.S.S.G. § 2K2.1(a)(2), the defendant's base offense level was 24. GA64. The district court then concluded that two levels should be added to the offense level because the defendant had possessed a stolen firearm. GA64. The district court also concluded that the defendant was in Criminal History VI as a result of accumulating fourteen criminal history

points, resulting in a Guidelines range of 120-150 months' incarceration, which was limited by the statutory maximum 120 months' incarceration under 18 U.S.C. § 924(a)(2). GA64.

Among other things, the defendant moved for a downward departure under U.S.S.G. § 4A1.3 (overstatement of criminal history). GA65-72. The Government objected to the motion, pointing out that the defendant would have accumulated far more than fourteen points had several prior state convictions counted under § 4A1.1. GA82-87. The court, however, agreed with the defendant and departed horizontally by two categories. GA94. In summary, the court ruled as follows:

> Under 4A1.3, I'm going to grant the motion for the following reasons. Mr. Santiago's criminal history is long but is not especially deep and in a couple of senses. First, the conduct for which he has been arrested and convicted in the past is not of the seriousness that one normally sees in a category six offender, specifically there is a robbery charge at the age of 16. It's unclear frankly whether there was any violence or threat of violence in that conviction but it was a very long time ago and it was appropriately not scored in the guideline calculation. . . . We have two controlled substance offenses at the age of 22. These were almost ten years ago. That is, the conduct was over ten years ago, the convictions were nearly ten years ago, and the quantities of drugs involved there were quite small by, again, by standards of the folks that we

> often see in a category six. . . . The only other term of incarceration was the six month period reflected for violation of probation in connection with the events surrounding the arrest that is at issue in the current offense. So what we have is in the period since 1988, by my calculation, prior to his current arrest, Mr. Santiago has spent a total of 17 months incarcerated and yet managed to earn 12 points for the conduct that led to that . . . . I don't totally discount Mr. Spector's argument that things could well have been different and that in some sense this criminal history may under-represent the seriousness, but I have to deal with the sentences that were handed out . . . . So I'm going to grant the motion for downward departure. When I make a horizontal departure, I'm supposed to stop at the first level that I think adequately reflects the seriousness of the past criminal history, and in this case, although an argument might be made that it should stop at five, I believe that a four most accurately represents the seriousness of Mr. Santiago's past criminal history.

GA91-95.

At an offense level of 26 and a Criminal History Category IV, the defendant faced a guideline range of 92-115 months' incarceration. GA95. The court sentenced the defendant to 96 months' incarceration, followed by three years' supervised release. GA95. In doing so, the Court advised the defendant,

> Mr. Santiago, I'm just going to leave you with the following thought. Under the sentencing guidelines, which govern all cases in federal court, . . . you were facing both a maximum and minimum of ten years in prison, and I realize that you think that eight years in prison is a long time and probably more than you think you deserve, but I think you need to recognize that you're here today because of the conduct that you've engaged in both with respect to this offense and with respect to past offenses, and that you have the opportunity to change your life while you're in prison . . . .

GA99.

C. *Crosby* remand

On March 5, 2003, the defendant filed a timely notice of appeal. A7. On September 16, 2004, this Court affirmed the defendant's judgment of conviction by summary order. A8. On September 20, 2005, the defendant filed a motion to recall the mandate and remand the case for resentencing in light of the Supreme Court's decision in *Booker*. A8. On October 3, 2005, this Court granted the motion and remanded the case to the district court for re-sentencing and, specifically, for a determination of whether it would have imposed a non-trivially different sentence had the sentencing guidelines been advisory at the time of the defendant's initial sentencing. A8-A9.

On remand, the defendant raised for the first time a "different departure" argument. GA103. Specifically, the defendant contended that the district court should impose a different sentence on remand because "Mr. Santiago was subject to far greater penalties under this federal prosecution than he would have faced had been [sic] prosecuted in state court."[3] GA103-104. The defendant did not cite any case law in support of this proposition, but provided the following rationale:

> [The defendant] may not have had a right to insist on state rather than federal prosecution, but there is no reasonable explanation for the gross disparity in sentencing decided by the somewhat arbitrary decisions to pursue a federal rather than state prosecution. Indeed, it is precisely such disparities that the Guidelines themselves were promulgated to address. It is ironic that in this case, the Guidelines, if strictly adhered to, would result in a

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[3] The defendant also contended that two prior convictions for possession and/or sale of narcotics should be considered as one conviction because they were part of "a single incident in his life." GA106. According to the defendant, this "single incident" rationale, supported a downward adjustment of his offense level from 24 to 20. The district court declined to re-sentence him on that basis. In this appeal, the defendant does not persist in the claim that the district court erred when it refused to re-calculate the defendant's offense level in accordance with his "single incident" theory.

> model of the very unfairness that they were designed to alleviate.

GA104.

On remand, the district court ruled that it would not have imposed a non-trivially different sentence had the guidelines been advisory at the time of the sentencing. The court reimposed the same 96 month sentence. In doing so, the court, in its Decision and Order dated December 8, 2005, squarely addressed the defendant's argument regarding the disparity between state and federal penalties. The court ruled as follows:

> Santiago is no doubt correct that he would have received a much more lenient sentence in Connecticut Superior Court. He was offered a three-year sentence, and the maximum sentence he could have received under state law was five years. Nevertheless, the disparity in sentences among the federal courts and the courts of the various states is not the disparity that the Sentencing Guidelines and 18 U.S.C. § 3553(a) sought to address. If the federal courts sought to reduce disparity in sentencing with the local state courts, then sentencing disparity within the federal system would be increased; federal courts in states with strict sentencing regimes would impose stiffer sentences than federal courts in states with more lenient regimes. Both the Sentencing Guidelines and section 3553(a) seek to reduce sentencing disparity among federal courts. Although Santiago

> received a harsher sentence in federal court than he would have in state court, that outcome results from the exercise of prosecutorial discretion, not from an unfairness in the way he was treated in the federal system. . . .
>
> Because I would not have sentenced Santiago to a non-trivially different sentence even under an advisory Sentencing Guidelines regime, I will not order re-sentencing of Santiago on remand.

A15-A16.

The defendant did not appeal the court's December 8, 2005 order. Instead, on December 6, 2006, the defendant filed a motion pursuant to 28 U.S.C. § 2255 claiming that his counsel had been ineffective for failing to file a Notice of Appeal as to the court's decision on the *Crosby* remand. A9. In its response, the Government indicated that, according to defense counsel, he had failed to notify timely the defendant of the court's decision, and, therefore, the § 2255 motion should be granted. The court agreed with the Government, granted the defendant's motion and, on April 24, 2007 reissued the same exact ruling on the *Crosby* remand, thereby restoring the defendant's appellate rights. A9. On May 2, 2007, the defendant filed his Notice of Appeal as to this decision. A18.

Summary of Argument

The record amply demonstrates that the district court fulfilled its obligation to calculate the relevant guidelines range, consider that range and the relevant factors set forth in 18 U.S.C. § 3553(a), and impose a sentence that is sufficient but no greater than necessary to achieve the purposes of sentencing. The district court explained what led it to impose a guideline sentence of 96 months' incarceration after departing horizontally from Criminal History Category VI to IV. On remand, the district court reasonably concluded that it would not have imposed a non-trivially different sentence had the guidelines been advisory at the time of sentencing. There is no basis to find that the district judge exceeded the bounds of allowable discretion or violated the law in imposing the sentence it did.

Argument

I. The defendant's 96-month guideline sentence was reasonable.

The district court denied the defendant's request for re-sentencing on a *Crosby* remand, finding that even under an advisory guideline regime the original sentence "properly reflect[ed] all of the factors set forth in section 3553(a)." The defendant appeals that denial, claiming that the district court misapprehended its authority to depart further based on the disparity between state and federal penalties for the offense of conviction. This claim lacks merit. The court properly exercised its discretion under 18 U.S.C. § 3553(a), balancing a variety of factors, including the

defendant's criminal history, the seriousness of the offense, and the need for specific and general deterrence, to reach a sentence that was sufficient, but no greater than necessary to achieve the purposes of sentencing.

A. Governing law and standard of review

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the United States Sentencing Guidelines, as written, violate the Sixth Amendment principles articulated in *Blakely v. Washington*, 542 U.S. 296 (2004). *See Booker*, 543 U.S. at 243. The Court determined that a mandatory system in which a sentence is increased based on factual findings by a judge violates the right to trial by jury. *See id.* at 245. As a remedy, the Court severed and excised the statutory provision making the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), thus declaring the Guidelines "effectively advisory." *Booker*, 543 U.S. at 245.

After the Supreme Court's holding in *Booker* rendered the Sentencing Guidelines advisory rather than mandatory, a sentencing judge is required to: "(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence." *See United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir.), *cert. denied*, 127 S. Ct. 192 (2006); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005). The § 3553(a) factors include: (1) "the nature and circumstances of the offense and history and characteristics of the defendant"; (2) the

need for the sentence to serve various goals of the criminal justice system, including (a) "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment," (b) to accomplish specific and general deterrence, (c) to protect the public from 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 sentencing range set forth in the guidelines; (5) policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to victims. *See* 18 U.S.C. § 3553(a).

"[T]he excision of the mandatory aspect of the Guidelines does not mean that the Guidelines have been discarded." *Crosby*, 397 F.3d at 111. "[I]t would be a mistake to think that, after *Booker/Fanfan*, district judges may return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum." *Id.* at 113.

Consideration of the guidelines range requires a sentencing court to calculate the range and put the calculation on the record. *See Fernandez*, 443 F.3d at 29. The requirement that the district court consider the section 3553(a) factors, however, does not require the judge to precisely identify the factors on the record or address specific arguments about how the factors should be implemented. *Id.*; *Rita v. United States*, 127 S. Ct. 2456, 2468-69 (2007). There is no "rigorous requirement of

specific articulation by the sentencing judge." *Crosby*, 397 F.3d at 113. "As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, [this Court] will accept that the requisite consideration has occurred." *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005).

This Court reviews a sentence for reasonableness. *See Rita*, 127 S. Ct. at 2459; *Fernandez*, 443 F.3d at 26-27; *United States v. Castillo*, 460 F.3d 337, 354 (2d Cir. 2006). The reasonableness standard is deferential and focuses "primarily on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a)." *United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005). This Court does not substitute its judgment for that of the district court. "Rather, the standard is akin to review for abuse of discretion." *Fernandez*, 443 F.3d at 27.

Although this Court has declined to adopt a formal presumption that a within-guidelines sentence is reasonable, it has "recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Fernandez*, 443 F.3d at 27; *see also Rita*, 127 S. Ct. at 2462-65 (holding that courts of appeals may apply presumption of reasonableness to a sentence within the applicable Sentencing Guidelines range); *United States v. Rattoballi*, 452 F.3d 127, 133 (2d Cir. 2006) ("In

calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.").

Further, the Court has recognized that "[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge 'exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.'" *Fernandez*, 443 F.3d at 27 (citations omitted). In assessing the reasonableness of a particular sentence imposed:

> [a] reviewing court should exhibit restraint, not micromanagement. In addition to their familiarity with the record, including the presentence report, district judges have discussed sentencing with a probation officer and gained an impression of a defendant from the entirety of the proceedings, including the defendant's opportunity for sentencing allocution. The appellate court proceeds only with the record.

United States v. Fairclough, 439 F.3d 76, 79-80 (2d Cir.) (per curiam) (quoting *Fleming*, 397 F.3d at 100) (alteration omitted), *cert. denied*, 126 S. Ct. 2915 (2006).

While it is rare for a defendant to appeal a below-guidelines sentence for reasonableness, this Court has held that the standard of review in those situations is the same as for appeal of a within-guidelines sentence. *See United States v. Kane*, 452 F.3d 140 (2d Cir. 2006) (per curiam). In *Kane*, the defendant challenged the reasonableness of a sentence six months below the guidelines range, and this Court stated that in order to determine whether the sentence was reasonable, it was required to consider "whether the sentencing judge exceeded the bounds of allowable discretion, committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact." *Id.* at 144-45 (quoting *Fernandez*, 443 F.3d at 27). The defendant must therefore do more than merely rehash the same arguments made below because the court of appeals cannot overturn the district court's sentence without a clear showing of unreasonableness. *Id.* at 145 ("[The defendant] merely renews the arguments he advanced below – his age, poor health, and history of good works – and asks us to substitute our judgment for that of the District Court, which, of course, we cannot do.").

The Supreme Court has recently reaffirmed that appellate courts must review sentencing challenges under an abuse-of-discretion standard. *See Gall v. United States*, — S. Ct. —, 2007 WL 4292116, *7 (U.S. Dec. 10, 2007). In *Gall*, the Supreme Court held that a reviewing court must first satisfy itself that the sentencing court "committed no significant procedural error." *Id.* If there is no procedural error, the appellate court may then

"consider the substantive reasonablness of the sentence imposed under an abuse-of-discretion standard." *Id.*

B. Discussion

At the original sentencing hearing, the defendant asked the district court to depart under U.S.S.G. § 4A1.3, arguing that the defendant's Criminal History Category VI overstated the seriousness of his criminal past. GA65-72. The defendant did not request a specific sentence, but acknowledged that a term of incarceration would be imposed. GA71-72. Over the Government's objection, the district court departed horizontally from Criminal History Category VI to IV, which resulted in an adjusted guideline range of 92-115 months. GA91-95. The district court then imposed a sentence of 96 months' incarceration. GA95. On *Crosby* remand, the district court concluded that the 96 month sentence "properly reflect[ed] all of the factors set forth in section 3553(a)." A21. The district court based its imposition of a sentence 24 months below the applicable guideline range on several key factors.

First, the district court considered the defendant's criminal history and conducted a careful review of the defendant's prior convictions. With respect to two prior convictions for the sale of narcotics, the court noted that the conduct underlying those convictions was remote in time and the sales themselves involved relatively small amounts compared to other defendants within Criminal History Category Six. GA92. The court also observed that the defendant's criminal history was partially driven by the fact that the conduct underlying the instant offense

also constituted a violation of a condition of his probation. GA92-93. Finally, the court considered the fact that, although the defendant's criminal history involved several convictions, those convictions did not result in significant periods of incarceration. GA94. Based on these factors, the court concluded, over the Government's objection, that a Criminal History Category VI "significantly over-represents the seriousness of the criminal history," and departed horizontally to Criminal History Category IV GA93. Notwithstanding the Government's argument that several of the defendant's prior convictions had been omitted from his criminal history calculation, the district court concluded that Criminal History Category IV "most accurately represents the seriousness of Mr. Santiago's past criminal history." GA94-95.

Second, the district court considered the seriousness of the defendant's criminal conduct to fashion a sentence that constituted just punishment for the crime. GA90. The court indicated that a trial jury had convicted the defendant of a "serious offense." GA90. The court described the relevant conduct as follows:

> We have a gun here that had a bullet in the chamber and was cocked and ready to go, and that's a very serious situation. It's a situation that suggests that the gun is ready to be used, and not surprisingly, Congress has said that that's an offense that requires a significant punishment.

GA90.

Third, the district court properly considered the need for the sentence imposed to provide specific and general deterrence. In this regard, the court concluded that a sentence of 96 months' incarceration was sufficient to impress upon the defendant "the impact on [his] family of this conviction." GA90. Further, the district court's sentence was designed to compel the defendant to "recognize that any future conviction is simply going to be a higher guideline range and have a longer period of incarceration." GA90.

Fourth, the district court sought to impose a sentence that would permit the defendant to rehabilitate himself while incarcerated. In discussing this fourth purpose of a criminal sentence, the court commented:

> . . . you've had a long problem with alcohol and marijuana use, and it's not realistic to expect that you can stay out of trouble as long as you continue to have that problem. And you're going to have a chance to get some help and I hope that you will take advantage of every opportunity that you have so that when you come out, you won't have that addiction, you won't have that hanging on your back.

GA91.

In sum, the district court considered the goals of a criminal sentence along with the § 3553(a) factors, the Pre-Sentence Report, the defendant's sentencing memorandum, two letters submitted on the defendant's

behalf, the statements made by the defendant's family members and the defendant's statement, to arrive at a reasonable sentence of 96 months' incarceration.

On remand, the district court made clear that even under an advisory guidelines regime, the same factors that supported the original sentence applied with equal weight. A21. The court again articulated that its prior horizontal departure, though imposed when the guidelines were mandatory, resulted in a sentence that "properly reflects all of the factors set forth in section 3553(a)." A21. The court reiterated that its sentence remained appropriate in light of its prior consideration of the defendant's criminal history, the seriousness of his offense, and the significant need to deter both him and others like him from possession of firearms. A21. Therefore, the court's conclusion that it would not have sentenced Santiago to a non-trivially different sentence even under an advisory Guidelines regime was reasonable and did not constitute an abuse of discretion.

The defendant argues that the district court's refusal to re-sentence him constituted procedural error because the district court failed to apprehend its authority under § 3553(a)(6) to consider the disparity between state and federal penalties for the offense of conviction. *See* Appellant's Brief at 12. The district court, however, stated unequivocally in its ruling on remand that the original sentence "properly reflects all of the factors set forth in §3553(a)." A21. Moreover, the record reflects that the district court squarely addressed the issue of state/federal sentencing disparity and concluded that consideration of

such disparity would not result in a nontrivially different sentence. A15-A16. As the court explained, "[T]he disparity in sentences among the federal courts and the courts of the various states is not the disparity that the Sentencing Guidelines and 18 U.S.C. § 3553(a) sought to address. If the federal courts sought to reduce disparity in sentencing with the local state courts, then sentencing disparity within the federal system would be increased; federal courts in states with strict sentencing regimes would impose stiffer sentences than federal courts in states with more lenient regimes." A15-A16. Given this explanation as well as the court's statement that the original sentence "properly reflect[ed] all of the factors set forth in section 3553(a)," it is evident that the court considered the extent to which 18 U.S.C. § 3553(a)(6) applied in the defendant's case, and determined that such application, if any, did not materially affect the original sentence. Far from a misapprehension of its authority, the foregoing statement demonstrates the district court's reasoned conclusion that consideration of state/federal sentencing disparity would not have materially affected the defendant's sentence. *See United States v. Chabot*, 70 F.3d 259, 261 (2d Cir. 1995) (per curiam) ("[W]e normally do not infer that the sentencing court believed it had no authority to depart where it gave no indication that it had such a belief . . ."); *United States v. Brown*, 98 F.3d 690, 694 (2d Cir. 1996) ("We apply a presumption that district judges understand the much-discussed processes by which they may, in circumstances permitted by law, exercise discretion to depart from the sentence range prescribed by the Guidelines calculus."); *United States v. Zapata*, 135 F.3d 844, 848 (2d Cir. 1998) (affirming sentence where, in

the absence of clear law on the issue, the district court assumed that it had the power to depart on the basis of the defendant's consent to deportation, but declined to do so); *see also Fernandez*, 443 F.3d at 30 (stating that the Court "presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the statutory factors [under § 3553(a)]"); *United States v. Florez*, 447 F.3d 145, 157 (2d Cir.) (noting that the weight to be given any § 3553(a) factor is committed to the discretion of the sentencing court and beyond appellate review), *cert. denied*, 127 S. Ct. 600 (2006).

The district court did not misapprehended its authority to impose a lower sentence. The defendant simply disagrees with the district court's conclusion that the existence of a state/federal sentencing disparity did not support the imposition of a lower sentence on remand. *See Fernandez*, 443 F.3d at 34 ("We will not second guess the weight (or lack thereof) that the judge accorded to a given factor or specific argument made pursuant to that factor."). Moreover, the district court's rationale for not imposing a lower sentence due to the state/federal sentencing disparity is consistent with this Court's frequent observations concerning departures based on disparate state and federal penalties. *See United States v. Cavera*, 505 F.3d 216, 221 (2d Cir. 2007) (rejecting district court's demographics-based enhancement and stating ". . . Congress enacted the Guidelines, bringing nationwide uniformity to federal criminal sentences. [T]he Guidelines aim to eliminate disparities in sentences meted out by the different district courts to defendants who commit similar offenses");

United States v. Johnson, — F.3d —, No. 05-3811-cr, 2007 WL 2935882, at *2 (2d Cir. Oct. 10, 2007) (affirming district court's refusal to adopt approach that "would have decreased sentencing disparities between [the defendant] and any similarly situated state defendant but increased sentencing disparities between [the defendant] and any similarly-situated federal defendant prosecuted in different states");*United States v. Haynes*, 985 F.2d 65, 70 (2d Cir. 1993) ("Allowing departure because a defendant might have been subjected to different penalties had he been prosecuted in state court would make federal sentences dependent on the law of the state in which the sentencing was located . . . [and] would surely undermine Congress' stated goal of uniformity in sentencing").

Despite the district court's conclusion that the existence of a state/federal sentencing disparity would not have resulted in a materially different sentence, the defendant relies on *Johnson*, — F.3d —, 2007 WL 2935882, at * 2, to maintain that sentencing courts are "permitted" to consider such disparities. *See* Appellant's Brief at 12. This Court in *Johnson* clearly indicated that in all, but the most exceptional cases, consideration of that disparity will render the sentence unreasonable. *See id.* ("requiring district courts to reduce a defendant's sentence whenever he 'might have been subjected to different penalties had he been prosecuted in state court would make federal sentence dependent on the law of the state in which the sentencing court was located, resulting in federal sentencing that would vary from state to state.'") (quoting *Haynes*, 985 F.2d at 70); *see also United States v. Clark*, 434 F.3d 684, 687 (4th Cir.) ("Though in the vast

majority of cases the creation of disparities among federal defendants that results from the consideration of state sentencing practices will similarly render the sentence unreasonable in light of section 3553(a)(6), the consideration of state sentencing practices is not necessarily impermissible per se."), *cert. denied*, 126 S. Ct. 2054 (2006); *United States v. Wurzinger*, 467 F.3d 649, 654 (7th Cir. 2006) ("Because penalties very from state to state, sentence reductions to approach state penalties similarly vary with the state in which the federal sentencing court sits, unjustifiably creating disparities among federal convicts."), *cert. denied*, 127 S. Ct. 3066 (2007); *United States v. Branson*, 463 F.3d 1110, 1112-13 (10th Cir. 2006) ("Adjusting federal sentences to conform to those imposed by the states where the offenses occurred would not serve the purposes of § 3553(a)(6), but, rather, would create disparities within the federal system, which is what § 3553(a)(6) is designed to encourage.").

This case does not present the "exceptional circumstance" referred to in *Johnson*. The maximum state penalty for the offense of conviction is five years' incarceration. The district court imposed a Guidelines sentence of 96 months' incarceration based on a violation of a federal statute that operates independently of state law. Therefore, this case falls well outside any narrow exception to the general rule adopted by this Court in *Johnson*, i.e., that consideration of federal/state sentencing disparities is, as a general matter, contrary to the "primary purpose" of § 3553(a)(6). *See Johnson*, — F.3d —, 2007 WL 2935882, at *2; *Haynes*, 985 F.2d at 69 ("To adopt

this rationale for departure would surely undermine Congress' state goal of uniformity in sentencing").

In the end, the district court exercised sound judgment in re-imposing its original sentence, which fell 24 months below the applicable guideline range. The court complied with all applicable procedural requirements on *Crosby* remand, and the record here amply demonstrates that the district court considered all of the § 3553 factors, as well as the arguments raised by the defendant in support of re-sentencing. In so holding, the court set forth particular and individualized reasons why it would have sentenced the defendant to the same sentence it previously did. A16-A17. Accordingly, the district court's decision not to re-sentence the defendant should be upheld.

Conclusion

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

Dated: December 26, 2007

Respectfully submitted,

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

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,256 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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Addendum

18 U.S.C. § 3553 - Imposition of a sentence

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

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

(2) the need for the sentence imposed--

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

(B) to afford adequate deterrence to criminal conduct;

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

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

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for--

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines--

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

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

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