08-0222-cr(L)

To Be Argued By:
ROBERT M. SPECTOR

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United States Court of Appeals

FOR THE SECOND CIRCUIT

**Docket Nos. 08-0222-cr(L),
08-0366-cr(CON), 08-1146-cr(CON),
08-2470-cr(CON)**

UNITED STATES OF AMERICA,

Appellee,

-vs-

ANTWAN TANN, also known as Twan, LEANDA PERRY, also known as Monte, LUIS GONZALEZ, BENIGNO MALAVE,

Defendants-Appellants,

(For continuation of Caption, See Inside Cover)

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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Defendants,

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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

GUIDELINES

Statement of Jurisdiction

This is a consolidated appeal from judgments entered in the United States District Court for the District of Connecticut (Peter C. Dorsey, J.), which had subject matter jurisdiction over these criminal cases under 18 U.S.C. § 3231.

On January 15, 2008, the district court sentenced defendant-appellant Leanda Perry to 96 months' incarceration after he pleaded guilty to conspiracy to possess with the intent to distribute five grams or more of cocaine base. PJA22.[1] Judgment entered on January 15, 2008. PJA22. Perry filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on January 15, 2008. PJA23.

On February 29, 2008, the district court sentenced defendant-appellant Luis Gonzalez to 100 months' incarceration after he pleaded guilty to conspiracy to possess with the intent to distribute cocaine base. GJA117.[2] An amended judgment issued on March 6, 2008. GJA124. Gonzalez filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on March 7, 2008. GA2.

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[1] The Joint Appendix for Perry will be cited as "PJA" followed by the page number.

[2] The Joint Appendix for Gonzalez will be cited as "GJA" followed by the page number.

This Court has appellate jurisdiction over the defendants' challenges to their sentences pursuant to 18 U.S.C. § 3742(a).

Statement of the Issues Presented [3]

I. Was Perry's 96-month sentence, which was 34 months below the bottom of the applicable guideline range, reasonable?

II. Was Gonzalez's 100-month sentence, which was 51 months below the bottom of the applicable guideline range, reasonable?

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[3] The appeals involving co-defendants Antwan Tann (08-0222) and Benigno Malave (08-2470) were also consolidated with these two appeals. Tann's counsel filed an *Anders* brief on June 23, 2008, and the Government subsequently filed a motion for summary affirmance as to his appeal. As to Malave, on October 16, 2008, with the defendant's consent, the Government filed a motion to amend the judgment pursuant to Fed. R. Crim. P. 36 to remove the two conditions of supervised release that were challenged on appeal because those two conditions were not included in the oral judgment and were only included in the written judgment as a result of a clerical error. On October 17, 2008, the district court issued an amended judgment correcting the clerical error raised and removing the two challenged conditions of supervised release. GA39. As to Malave, the defendant has not raised any other issue on appeal, and it is anticipated that either he will withdraw his appeal, or the Government will move to dismiss the appeal as moot.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-0222-cr(L)
08-0366-cr(CON), 08-1146-cr(CON)

UNITED STATES OF AMERICA,

Appellee,

-vs-

LEANDA PERRY, also known as Monte, and LUIS GONZALEZ, also known as Oso,

Defendants-Appellants.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

From October 2005 through and July 2006, Milton Roman operated a powder and crack cocaine enterprise in Meriden, Connecticut and the surrounding area. He obtained large quantities of powder cocaine from various sources, including Eluid Rivera from Waterbury, much of which he converted to crack cocaine for resale to others.

Roman sold powder and crack cocaine in a variety of different quantities to numerous customers in and around Meriden. Leanda Perry was one of Roman's customers. He regularly purchased 3.5 gram and 7 gram quantities of powder and crack cocaine from Roman and redistributed the narcotics to others. From April 2006 through June 2006, he purchased between 50 and 150 grams of crack cocaine from Roman for redistribution to others.

A wiretap investigation in May 2006 also revealed that Wilfredo and William Abrahante, who are twin brothers, likewise ran a crack cocaine operation out of their residence at the second floor apartment at 138 Colony Street in Meriden, which serviced between ten and twenty customers on a daily basis.

Luis Gonzalez was a customer of both Roman and Wilfredo Abrahante. He purchased 1.75, 3.5 gram and 7 gram quantities of crack cocaine from Roman and Abrahante and redistributed the narcotics to others. From April 2006 through June 2006, he purchased between 5 and 20 grams of crack cocaine from Roman and Abrahante for redistribution to others.

Perry, Gonzalez, and thirty-three others were charged in a twenty-two-count indictment with a variety of narcotics offenses. Perry pleaded guilty to conspiring to distribute five grams or more of cocaine base on May 15, 2007. In the written plea agreement, the Government agreed not to file a second-offender notice pursuant to 21 U.S.C. § 851, which would have doubled the mandatory minimum sentence from 60 months to 120 months, and

Perry agreed not to seek a sentence below 84 months' incarceration. At sentencing, the district court departed downward under U.S.S.G. § 5K2.0 from the 130-162 month range to a term of 96 months.

Gonzalez was originally charged with conspiring to distribute five grams or more of cocaine base, but was permitted to plead guilty, on August 24, 2007, to the substitute charge of conspiracy to distribute an unspecified quantity of cocaine base. At sentencing, the district court imposed a non-guideline sentence of 100 months, which was 51 months below the bottom of the 151-188 month guideline range.

On appeal, Perry claims that the district court's sentence was unreasonable in light of the factors set forth at 18 U.S.C. § 3553(a). Specifically, he complains that, although the court agreed to depart downward, it ordered a sentence that was 12 months higher than the sentence that he requested. It appears that Perry's sole argument is that the district court did not adequately explain why the requested 84-month sentence was not sufficient to satisfy the goals of sentencing under § 3553(a). To the contrary, the district court properly considered the factors set forth in § 3553(a) in imposing the 96-month sentence. In particular, as the district court noted, Perry engaged in serious criminal conduct by distributing between 50 and 150 grams of cocaine base in a two-month period. Also, Perry had an extensive criminal history, which included prior drug trafficking arrests and one prior drug trafficking conviction.

As to Gonzalez, he does not challenge the district court's guideline calculation, but instead claims that the court's sentence was unreasonable because it did not adequately consider his request for a downward departure for overstatement of criminal history, under U.S.S.G. § 4A1.3. Gonzalez's sole argument is that the district court did not adequately explain why it chose to impose the 100-month sentence as a non-guideline sentence, rather than depart under U.S.S.G. § 4A1.3, which departure, under the plain language of that guideline section, would only have permitted a one-level horizontal departure to a guideline range of 140-175 months' incarceration.

Gonzalez's claim lacks merit. The district court's sentence was not procedurally unreasonable. The court properly calculated the guideline range, discussed the relevant factors under § 3553(a), which included Gonzalez's claim that his criminal history category was overstated, explained why these factors dictated a non-guideline sentence of 100 months, and further clarified that it would have ordered the same sentence under the Sentencing Guidelines.

Statement of the Case

On October 4, 2005, a federal grand jury sitting in Bridgeport returned a twenty-two count indictment against Perry, Gonzalez, and others charging each of them in one count with conspiring to possess with the intent to distribute and to distribute five grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B), and 846. PJA24-PJA36.

Perry changed his plea to guilty as to Count One on May 15, 2007. PJA14. On August 24, 2007, Gonzalez changed his plea to guilty as to Count One of a substitute information charging him with conspiring to possess with the intent to distribute and to distribute an unspecified quantity of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C) and 846. GA1.[4] On January 15, 2008, the district court (Peter C. Dorsey, J.) sentenced Perry to 96 months' imprisonment and 4 years' supervised release. PJA22. Judgment entered on January 15, 2008. PJA22. On February 29, 2008, the district court sentenced Gonzalez to 100 months' imprisonment and 5 years' supervised release, and ordered that the incarceration term be served concurrent to the defendant's state sentence. GJA110, GJA117. Judgment entered on February 29, 2008. GJA117. On March 6, 2008, the district court issued an amended judgment which clarified that the sentence originally imposed on Gonzalez was 120 months, but was reduced by a term of 20 months to give him credit for time served in state custody. GJA124.

On January 15, 2008, Perry filed a timely notice of appeal. PJA23. He has been incarcerated in federal custody since his initial arrest on October 6, 2006 and is currently serving his sentence.

On March 7, 2008, Gonzalez filed a timely notice of appeal. GA2. Gonzalez has been incarcerated in state custody serving an unrelated state sentence since July 28,

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[4] The Government's Appendix will be cited as "GA" followed by the page number.

2006. *See* Gonzalez Pre-Sentence Report ("GPSR") ¶¶ 2, 41. That state sentence expires on June 30, 2009. *See* GPSR ¶ 41. He has been serving his federal sentence since February 29, 2008.

Statement of Facts

A. Factual Basis

Had the case against Perry and Gonzalez gone to trial, the Government would have presented the following facts, which were set forth almost verbatim in the Government's January 14, 2008 and February 23, 2008 sentencing memoranda (PJA73-PJA84, GA3-GA15) and the Pre-Sentence Reports (sealed appendix):[5]

In October, 2005, the FBI began an investigation into a Drug Trafficking Organization ("DTO") operating in Meriden, Connecticut. Utilizing a cooperating witness ("CW-1"), the FBI engaged in several controlled purchases of multi-ounce quantities of cocaine base from a variety of different sources, including Harry Johnson, Raul Reyes, Miguel Acevedo and Milton Roman. As to Roman, the FBI engaged in controlled purchases of two ounces of crack cocaine on November 28, 2005, three

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[5] The district court adopted the facts set forth in the PSR for Perry. PJA108. As to Gonzalez, the district court did not specifically adopt the facts set forth in the PSR, but confirmed with both parties that the factual statements set forth there in were accurate and that the guideline calculation was correct. GJA57-GJA58, GJA70.

ounces of crack cocaine on December 6, 2005, two ounces of crack cocaine on January 4, 2006, four ounces of crack cocaine on April 14, 2006, and nine ounces of crack cocaine on May 17, 2006. *See* Perry Pre-Sentence Report ("PPSR") ¶ 8.

Through these controlled purchases, the FBI identified Roman as a primary source of supply for cocaine base in Meriden and decided to commence a wiretap investigation as to cellular telephones utilized by Roman. In April 2006, the FBI received authority from the district court to begin intercepting communications over two cellular telephones utilized by Roman. The wiretap investigation as to Roman concluded in June 2006, after approximately sixty days of interceptions. As a result of the wiretap, it was determined that Roman distributed cocaine and cocaine base to a customer base of approximately 35 individuals. During that period of time, the FBI identified co-defendant Eluid Rivera as a primary source of supply for Roman's DTO. Based on intercepted telephone calls, it is estimated that Roman distributed kilogram quantities of powder and crack cocaine on a monthly basis. *See* PPSR ¶¶ 9-10.

Also, during this period, the FBI identified another DTO being operated in Meriden by co-defendants Wilfredo and William Abrahante, a.k.a. "The Twins." The Abrahante brothers occasionally supplied Roman with smaller quantities of cocaine base when Roman was unable to obtain cocaine from his source of supply, and, on occasion, Roman supplied the Abrahantes with quantities of cocaine base. They operated their DTO out of their

residence in the second floor apartment of 138 South Colony Street, Meriden, Connecticut. They lived above co-defendant John Delorenzo, who resided in the first floor apartment and operated a crack house which serviced, on a daily basis, between ten and twenty customers. Some of these customers would come to 138 Colony Street and order quantities of cocaine base from Delorenzo, who would then obtain the cocaine base from the Abrahante brothers. *See* GPSR ¶ 9.

As to Perry, intercepted wire communications and physical surveillance reveal that he regularly purchased quantities of powder and crack cocaine from Roman for redistribution to others in the Meriden area. For example, on May 8 and May 9, 2006, Perry, who was known by the nickname "Monty," was intercepted in separate conversations arranging to meet with Roman to conduct a narcotics transaction. Also, on May 9, 2006, Perry was intercepted telling Roman that he was going to be calling him on that "soft" (powder cocaine) later in the day. In a separate conversation that day, Perry told Roman that he would need "one" of the "soft" later. On May 10, 2006, Perry was intercepted ordering "two" from Roman and telling him to make one of them a "Mr. Softy," which was a reference to powder cocaine. In a separate conversation on that date, Perry was intercepted ordering "two." He told Roman that he wanted to give him the "220" (dollars) that he owed him and advised that he had already given Roman "240." On May 11, 2006, Perry was intercepted ordering "one" from Roman. On May 12, 2006, Perry was intercepted telling Roman that he had a customer waiting for him. During a separate intercepted telephone call on

that date, Roman advised Perry that "the shit I had was fucked up, so I had to take it back, you heard. So I gotta wait til tomorrow." On May 15, 2006, Perry was intercepted ordering "one" from Roman. He told Roman that, if he could have a couple of hours, "I'd put 120 on what I owe you on that 220" (referring to dollar amounts). On May 16, 2006, Perry was intercepted asking Roman if he was "out and about," and Roman responded that he would be out tomorrow. On May 17, 2006, Perry was intercepted making arrangements with Roman to meet to conduct a narcotics transaction. On May 19, 2006, Perry was intercepted telling Roman that "my man come knocking on my door." In a separate conversation that day, Perry ordered "one" from Roman. In a later conversation that day, Perry told Roman to "make that double," referring to the quantity of cocaine that he wanted to purchase from Roman. On May 20, 2006, Perry was intercepted again asking Roman to "make that double." On May 21, 2006, Perry was intercepted ordering "one" from Roman. On May 23, 2006, Perry was intercepted ordering "one of them things." *See* PPSR ¶¶ 12-14.

On May 26, 2006, Perry was intercepted telling Roman that he had just gotten out of court and had taken the "blame for everything to get my cousin out." He told Roman that he was not worried and was fighting the case. Roman told him that he had just submitted a "dirty urine" to his parole officer. Perry bragged, "I never got a dirty urine, even though my shit was dirty all the time." Roman told him that he had been smoking PCP. *See* PPSR ¶ 14.

In several other intercepted conversations that day, Perry and Roman made arrangements to meet and for Perry to buy "one" from Roman. On May 30, 2006, Perry was intercepted ordering "one" from Roman. In a later conversation that day, Perry was intercepted asking for "one of the other" and confirming that the price was "one" (hundred dollars). In another conversation that day, Perry asked Roman for "one of the white girls" (reference to powder cocaine). On May 31, 2006, Perry was intercepted ordering "one of each" from Roman. *See* PPSR ¶ 14.

The interceptions between Roman and Perry continued through June 2006. For example, on June 1, 2006, Perry was intercepted again ordering "one of each" from Roman. On June 2, 2006, Perry was intercepted ordering "one of those Mr. Softies" (powder cocaine) and "one of the hard" (crack cocaine). On June 3, 2006, Perry was intercepted ordering "one of Mr. Softness" (powder cocaine). On June 7, 2006, Perry was intercepted ordering "one and one." On June 9, 2006, Perry was intercepted ordering "one and one." On June 10, 2006, Perry was intercepted ordering a "white girl" (powder cocaine) from Roman. On June 11, 2006, Perry was intercepted ordering a "white girl" (powder cocaine) from Roman. On June 12, 2006, Perry was intercepted ordering "two solids" (crack cocaine) from Roman. On June 13, 2006, Perry was intercepted telling Roman, "Sorry to bug you man, but I had a lot of people at this point, but it's my bad to be calling you so much." He ordered "one and one" from Roman. On June 14, 2006, Perry was intercepted ordering "two solid" (crack cocaine) from Roman. On June 17, 2006, Perry was intercepted ordering "the soft ones"

(powder cocaine). Later that day, he was intercepted complaining to Roman that his "clientele they be started calling me, asking how long . . . and they good people. . . ." On June 18, 2006, Perry was intercepted wishing Roman a happy Father's Day and asking him to bring "one and one." In another conversation that day, Roman told him that he only had the "hard" (crack cocaine), and Perry told him to bring it to him "for now." On June 19, 2006, Perry was intercepted ordering "one and one" from Roman. Like the day before, Roman told him that he had the "hard" (crack cocaine) on him, but was having trouble contacting "this other dude" for the powder cocaine. Perry responded that he would take the hard "right now." On June 21, 2006, Perry was intercepted ordering "one of the hard ones" (crack cocaine) and a "Mr. Softie" (powder cocaine). On June 23, 2006, Perry was intercepted ordering "the white girl" (powder cocaine) from Roman. *See* PPSR ¶ 15.

The investigation revealed that, each time Perry ordered "one" or "two" from Roman, he was referring to one or two eight-balls (3.5 grams) of powder cocaine or crack cocaine. When he referred to "the hard" or "the other," he was ordering crack cocaine, and when he referred to "the soft," "Mr. Softie," or "the white girl," he was referring to powder cocaine. Throughout the course of these wire interceptions, the investigating officers conducted physical surveillance of Roman and observed him meet with Perry on several occasions, including May 15, 2006, May 26, 2006, May 30, 2006, and June 14, 2006. Based on all of the intercepted conversations, the total quantity of cocaine and cocaine base attributable to Perry's

conduct was approximately equivalent to between 50 and 150 grams of cocaine base. *See* PPSR ¶¶ 16-17.

As to Gonzalez, intercepted wire communications reveal that, from April through June, 2006, he purchased quantities of crack cocaine from Roman and Wilfredo Abrahante for redistribution to others in the Meriden. For example, on May 1, 2006, he was intercepted making arrangements to meet with Roman, but they did not discuss a specific quantity of narcotics. Several other intercepted calls that same day reveal that Gonzalez and Roman were making arrangements to meet to engage in a drug transaction. At one point, Roman was intercepted telling him to "come by with my money and money for yourself." Gonzalez told Roman to send people to "the Bocce" (reference to a Meriden bar known as the Bocce Club), but Roman said, "I don't got it already on me. He got it." GPSR ¶ 11.

On May 4, 2006, Gonzalez was intercepted telling Roman, "I got that for you," and "I'm a need that and another one." Later that same date, Gonzalez was intercepted calling Roman, but co-defendant Cividanes answered the phone. Cividanes told him that Roman was not feeling good and that he was holding his phone. *See* GPSR ¶ 12.

On May 9, 2006, Gonzalez was intercepted ordering "half a baseball" from Roman and assuring him that he had "the cash." Roman told him that he needed a couple of minutes, and Gonzalez responded, "I'm going to pick up this dough from one of my custees (customers) and

then I can meet you wherever." Other intercepted calls that day revealed that the two did meet. *See* GPSR ¶ 12.

On May 12, 2006, Gonzalez was intercepted telling Roman to contact Cividanes because Gonzalez was waiting with customers. Specifically, Gonzalez stated, "Tell him to hurry up and get here, that there's like, . . . 6 people now, for that same thing he's bringing." GPSR ¶ 13.

On May 19, 2006, Gonzalez was intercepted ordering "half a baseball, powder" from Roman, but Roman refused to come and meet him because he was sleeping. Later that same day, Gonzalez was intercepted telling Roman that he had somebody who "needs some powder." Roman told him he was not around and could not meet him. *See* GPSR ¶ 13.

On May 26, 2006, Gonzalez was intercepted ordering "half a baseball . . . of that you know . . . hard." They agreed on a price of $70 and made arrangements to meet. Later that same day, Gonzalez was intercepted asking Roman when he was coming because he had a "homeboy" who "needs to know what time it is, cause I'm trying to hold him here." Roman said that he would get there when he could. *See* GPSR ¶ 13.

The interceptions involving Gonzalez continued in June 2006. For example, on June 6, 2006, Gonzalez was intercepted ordering a "baseball" (3.5 grams of cocaine) from co-defendant Wilfredo Abrahante. Abrahante asked if he wanted it "soft" (powder), and he responded that he

wanted it "hard" (crack cocaine). He told Abrahante that "Jessie" was "shut down," a reference to co-defendant Jessie Cividanes. *See* GPSR ¶ 14.

On June 7, 2006, Gonzalez was intercepted ordering something from Abrahante, who responded that he could not "get it right now . . . my man's not picking up his phone." He asked, "What about your brother?" referring to co-defendant William Abrahante. Wilfredo replied that his brother was sleeping and had to go to work the next day. *See* GPSR ¶ 14.

On June 10, 2006, Gonzalez was intercepted ordering "seven" from Roman, but Roman advised him that he did not have anything at that point. *See* GPSR ¶ 14.

The investigation revealed that, almost without exception, when Gonzalez engaged in a narcotics transaction with Roman or Abrahante, it was for the purchase of between half of an eight-ball of cocaine base (approximately 1.75 grams) and two eight-balls of cocaine base (approximately 7 grams). Based on all of the intercepted conversations, the total quantity of cocaine base attributable to Gonzalez's conduct was between 5 and 20 grams. *See* GPSR ¶ 15.

B. Guilty Pleas

1. Leanda Perry

Perry changed his plea to guilty as to Count One of the indictment on May 15, 2007. PJA14. In doing so, he

entered into a written plea agreement, in which the parties stipulated that the quantity of cocaine base involved in Perry's conduct was in excess of 50 grams, but not more than 150 grams. PJA16. The parties also agreed that, based on the information available to them, under U.S.S.G. § 4A1.1, Perry was in Criminal History Category VI. PJA17. Finally, the Government agreed to recommend a reduction for acceptance of responsibility. PJA16. According to the written plea agreement, under Chapter Two of the Sentencing Guidelines (in effect as of November 1, 2006), Perry faced a guideline range of 151-188 months, based on an adjusted offense level of 29 and a Criminal History Category VI. PJA17.

The plea agreement also contained the following provision in the Guideline Stipulation section:

> The defendant expressly reserves his right to seek a downward departure and his right to request a non-guideline sentence. In this case, the Government has agreed not to file a second offender notice under 21 U.S.C. § 851, which would have subjected the defendant to, among other things, a mandatory minimum term of incarceration of 120 months under 21 U.S.C. § 841(b)(1)(B). In consideration for this agreement, the defendant expressly agrees that, regardless of the applicable guideline range in this case, he will not seek a sentence below 84 months' incarceration. He will also not suggest that the Court, *sua sponte*, sentence the defendant to a term of incarceration below 84 months' incarceration. If

> the Court imposes a sentence below 84 months' incarceration, the Government will deem this plea agreement null and void. The Government will seek a sentence within the guideline range articulated in this written plea agreement.

PJA17. Perry and the Government also reserved their respective rights to appeal the court's sentence. PJA17.

2. Luis Gonzalez

Gonzalez changed his plea to guilty as to Count One of a substitute information on August 24, 2007. GA1. Specifically, Count One of the substitute information charged as follows:

> From in or about April, 2006 through in or about June, 2006, in the District of Connecticut, **LUIS GONZALEZ**, the defendant herein, and others known and unknown, knowingly and intentionally conspired together and with one another, to possess with intent to distribute, and to distribute, a mixture and substance containing a detectable amount of cocaine base, a Schedule II controlled substance, contrary to the provisions of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(C).
>
> All in violation of Title 21, United States Code, Section 846.

GA1. The charge in the substitute information did not involve the allegation of any specific quantity of narcotics, and, therefore, did not carry with it any mandatory minimum sentence. Despite Gonzalez's multiple prior felony drug convictions, the Government did not file a second offender notice, which would not have impacted any mandatory minimum penalty, since none existed, but would have increased the applicable career offender guideline range.

In pleading guilty, Gonzalez entered into a written plea agreement. The parties stipulated that the quantity of cocaine base commensurate with his conduct was between 5 and 20 grams. GA18. The parties also agreed that, based on the information available to them, under U.S.S.G. § 4A1.1, Gonzalez was in Criminal History Category VI. GA19. Finally, the Government agreed to recommend a three-level reduction for acceptance of responsibility. GA18. According to the written plea agreement, under Chapter Two of the Sentencing Guidelines, Gonzalez would have faced a guideline range of 92-115 months, based on an adjusted offense level of 23 and a Criminal History Category VI. GA19.

The parties also indicated that, under Chapter Four of the Sentencing Guidelines, Gonzalez appeared to be a career offender based on prior Connecticut convictions for sale of narcotics and robbery. GA19. As a career offender, Gonzalez faced a guideline range of 151-188 months, based on an adjusted offense level of 29 and a Criminal History Category VI. GA19. Gonzalez reserved his right to challenge the career offender designation, and

to move for a downward departure and non-guideline sentence if the Court concluded that he was a career offender. GA19. The Government reserved its right to oppose these requests. GA19. Both parties reserved their rights to appeal the sentence. GA19.

C. Sentencing Proceedings

1. Leanda Perry

The PSR applied the November 1, 2007 version of the Sentencing Guidelines, which included a two-level reduction in the applicable cocaine base guidelines. Based on a finding that Perry distributed between 50 and 150 grams of cocaine base, the PSR concluded that the base offense level was 30. *See* PPSR ¶ 20. The PSR also recommended a three-level reduction for acceptance of responsibility. *See* PPSR ¶ 26. As to criminal history, the PSR found that Perry had accumulated thirteen criminal history points and fell into Criminal History Category VI. *See* PPSR ¶¶ 29-38. As a result, Perry fell within a guideline incarceration range of 130-162 months. *See* PPSR ¶ 70.

Perry filed a sentencing memorandum asking for a sentence of 84 months. PJA54. Perry agreed with the guideline calculations set forth in the PSR, but claimed that a downward departure was warranted under U.S.S.G. § 5K2.0 due to his attempts to cooperate with the Government and his tragic family circumstances. PJA59-PJA65. In addition, Perry relied on these arguments to claim that a non-guideline sentence was appropriate based

on the factors articulated in 18 U.S.C. § 3553(a). PJA65-PJA70.

The Government filed a sentencing memorandum in which it recognized that the district court had "discretion to impose a sentence below the guideline range" for the reasons articulated by Perry, but claimed that a sentence within the guideline range was appropriate. PJA79. As the Government summarized, "The defendant was a mid-level crack and powder cocaine dealer in Meriden and Middletown who was responsible for purchasing and redistributing more cocaine than many defendants in this conspiracy. His attempts at cooperation did not substantially assist the prosecution of another individual, but did result in the Government's agreement not to file a second offender notice based on his 2004 sale of narcotics conviction." PJA79.

At the sentencing hearing, the district court confirmed that Perry had reviewed the PSR and that there were no objections to the factual statements set forth in the PSR. PJA108. The court then adopted the factual findings set forth in the PSR, applied the November 1, 2007 amended sentencing guidelines, and concluded that Perry faced a guideline incarceration range of 130-162 months, based on an adjusted offense level of 27 and a Criminal History Category VI. PJA108-PJA109.

Perry sought a downward departure, or, in the alternative, a non-guideline sentence, based on several factors. First and foremost, Perry argued that his attempts at cooperation, despite the fact that they did not qualify for

the filing of a Government motion for downward departure under U.S.S.G. § 5K1.1, warranted a reduction in his sentence. PJA114-PJA122. Perry did not make any claim that the Government acted in bad faith by not filing a § 5K1.1 motion or that the filing of such a motion was warranted. PJA120-PJA121. Instead, Perry argued that his attempts at cooperation, because they were timely and resulted in the provision of truthful information, should result in a significant sentence reduction. PJA117-PJA120. Specifically, in accordance with the plea agreement, Perry sought a sentence of 84 months' incarceration. PJA121.

In further support of this request, Perry relied on his tragic family circumstances. He argued, in summary, that he had a tragic upbringing, was raised by a single mother and had a father who never gave any financial or emotional support. PJA129-PJA131. As to his mother, she suffered from a crack cocaine addiction during Perry's childhood and, therefore, left him and his sisters home alone to fend for themselves. PJA130.

Finally, Perry relied on the disparity between the powder cocaine and the crack cocaine guidelines to argue that the guideline range in this case was too high. In making this argument, Perry relied on the Supreme Court's decision in *Kimbrough v. United States*, and argued that the guidelines were "much harsher than necessary" to accomplish the goals of sentencing set forth in 18 U.S.C. § 3553(a). PJA135-PJA139.

In response to Perry's argument regarding his cooperation, the Government clarified that, if the cooperation had been significant, it would have resulted in the filing of a § 5K1.1 motion. PJA122. The Government also pointed out that, as a result of Perry's attempt at cooperation, it refrained from filing a second offender notice, which would have subjected Perry to a ten-year mandatory minimum sentence. PJA123. In particular, the Government explained:

> Sitting in a couple proffer sessions is helpful, it's appreciated, and it is the reason why [the defendant is] able to argue for three years below what would otherwise be the mandatory minimum. . . . If it wasn't for the cooperation, I would have had no discretion, and would have filed that 851, because I would have had no choice, and so, we would be sitting here arguing . . . for the hundred and twenty months. So, that is a significant benefit, because it frees him up to argue for seven years, which is three years below that, and the Court to go all the way down to five. If it was as significant as described, I would have filed it. . . . I think it's just important to recognize the difference between coming and sitting in a proffer session, and getting what I consider to be a sort of a significant benefit, and actually substantially assisting.

PJA124. The Government explained that, even had it been able to use the defendant as a witness against Milton Roman, the lead target in the case, given how many other co-defendants had agreed to testify against Roman and the

fact that Roman had pleaded guilty, any substantial assistance motion would have been weak and would not have supported the defendant's request for an 84-month sentence. PJA125.

The Government also emphasized the seriousness of the offense conduct and claimed that, unlike many other co-defendants, the defendant was not a lower level participant in the drug conspiracy.

> He was on the phone almost every day, and the quantities that he was buying were higher than most of the defendants. He is in that middle level of defendants, and he's responsible for 50 to 150 grams, and if you were to add the powder into that, it would be closer to 200 grams total, of cocaine, which puts him at a higher level than most of defendants.

PJA143.

In addition, the Government emphasized the seriousness of the defendant's criminal record.

> If you look at the criminal record in this case, the thing that struck me is that Mr. Perry, up to the point of this case, was moving in the wrong direction. . . . Each arrest gets more serious, not less serious. . . . So, as opposed to taking the lessons that . . . state court has given him, and saying, you know, "This is not a good idea," he's become more involved. . . . So, I think regardless

> of what the sentence is, that's something the court is gonna have to account for under the 3553(a) factors, the concern that in terms of pointing him in the right direction, I don't think the state court has done that, and that's the simplest way to say it.

PJA144-PJA145. The Government pointed out that, in addition to his prior convictions, the defendant had three pending cases in state court at the time of the federal sentencing.[6] PJA145-PJA146. Finally, in terms of his family background, the Government indicated that, "despite all the things that were said, when he was in high school, he made a success of himself at a time when that didn't have to be the choice that he made. . . . The people that he lived with were interviewed by probation, gave a very glowing report of him, and so, we know that in that situation he did well, so that he does have the potential to do that again, which is not always the case . . . ." PJA146.

After hearing from the parties, as well as the defendant himself, the district court set forth its analysis in reaching its sentencing determination. "The starting point in the case is the agreed guideline calculation of a hundred and

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[6] The district court asked the parties about the status of the pending state cases. After being informed that the federal sentence would be ordered first, since the defendant had been in federal custody since the time of his arrest in this case, the court stated, "What I think I will do is just simply act independently, . . . and then I think I would put on the record that I would have no objection to a concurrent sentence [in state court]." PJA156.

thirty to a hundred and sixty-two months." PJA167. The court felt this range was "a little stiff," but pointed out that the defendant "had several state convictions involving drugs, and in each instance, he has been provided with the opportunity, through periods of supervision, periods of conditional discharges, to respond to the insistence of the community, that he answer for his conduct, particularly with respect to drugs, and yet, here he is. He's still here. He's still at it . . . ." PJA167. The court also recognized that the fact that the state court had not dealt with the prior convictions with lengthy prison terms may have "deluded Mr. Perry into believing that he could go about the business of drug involvement . . . with impunity . . . ." PJA167. The court described his criminal conduct as "significant" and noted that "all of the sales that he arranged . . . would be a substantial factor in the destruction of other people's lives, whether it's simply a matter of a failure to meet family responsibilities, or society's requirements, or employment." PJA168.

On the other hand, the court was troubled by the defendant's poor upbringing. "You can't expect somebody to adhere to a societal obligation to remain free from drugs if you're sopping them up yourself, and in consequence, I am convinced that Mr. Perry did not get the kind of parental guidance and support that he was entitled to, and he should have been provided with." PJA169. On this subject, the court noted that, during his high school years, another family had cared for the defendant, and he had prospered. PJA169-PJA170. In the court's view, this opportunity "diminishe[d] the failure of his actual parents, and . . . demonstrate[d] the potential that Mr. Perry has, if

he only would adhere to the expectations of the community and stay away from drugs . . . ." PJA170. The court also noted that the defendant's siblings have "been able to stabilize their lives," despite the poor upbringing. PJA170. Lastly, as to this subject, the court noted that, when the defendant returned to his family in Connecticut after high school, he chose to involve himself in the drug trade despite having opportunities to avoid it. PJA170.

As to his argument regarding cooperation, the court found that, although the defendant had received a certain amount of credit already, since the Government did not file a second offender notice, "that's somewhat academic, since his sentencing guidelines, at the lowest level, exceed the mandatory minimum that might be imposed" if the notice had been filed. PJA171. The court further stated,

> [A]lthough I am not entitled to treat his case, by virtue of a 5K1.1 motion, I think under 5K2.0, there is enough cooperation to suggest that one aspect of cooperation; that is, . . . a reflection of a willingness on the part of Mr. Perry, to comport his life with the society's expectations, and the holding of others to the responsibility for their conduct, as well as exposing himself, I think he's entitled to credit . . . .

PJA172-PJA173.

The court concluded that the defendant "has a substantially significant potential to make something positive of his life." PJA171. "He's only 28 years old.

He's obviously intelligent and articulate." PJA171-PJA172. The court explained that the defendant "could do more for himself educationally" and could "be weaned from the drug atmosphere, and the effects of addiction." PJA172.

The court departed downward under the guidelines and imposed a sentence of 96 months' incarceration and four years' supervised release. PJA173-PJA174. The court characterized this as a "partial acquiescence" of defense counsel's arguments, but concluded that a departure all the way down to 84 months' incarceration was not warranted. PJA173. As the court stated, "I find that 96 months is a reasonable reflection of the factors that are contained in 3553(a)" and the sentencing guideline range. PJA173. In addition, the court explained, "I do that as a guideline authorized departure, but I would note for the record that that's the same sentence that I would have [im]posed as a non-guideline sentence, again, taking into consideration the guidelines, and the obligation of the court to accommodate the factors in 3553(a)." PJA173. Finally, the court specifically noted that it had taken into consideration the factors set forth in *Kimbrough*. PJA173-PJA174.

2. Luis Gonzalez

The PSR applied the November 1, 2007 version of the Sentencing Guidelines, but did not include the requisite two-level reduction in the applicable cocaine base guidelines. *See* GPSR ¶¶ 18-19. As a result, based on a finding that Gonzalez distributed between 5 and 20 grams

of cocaine base, the PSR concluded that the base offense level was 26. *See* GPSR ¶ 19. The two-level reduction under the amended crack guidelines would not have inured to Gonzalez's benefit because the PSR correctly concluded that he was a career offender based on a 1993 conviction for sale of narcotics and a 1993 conviction for third degree robbery. *See* GPSR ¶ 25. Gonzalez had a third qualifying conviction in 2006 for second degree robbery. *See* GPSR ¶ 41. Thus, his base offense level was 32, which went down to 29 based on a three-level reduction for acceptance of responsibility. *See* GPSR ¶¶ 25-27.

As to criminal history, the PSR found that Gonzalez had accumulated twenty-two criminal history points and fell into Criminal History Category VI. *See* GPSR ¶¶ 29-41. Gonzalez also would have fallen into Criminal History Category VI based on his career offender status. As a result, he fell within a guideline incarceration range of 151-188 months. *See* GPSR ¶ 80.

Gonzalez filed a sentencing memorandum in which he agreed with the guideline calculations set forth in the PSR, but asked for a downward departure for overstatement of criminal history under U.S.S.G. § 4A1.3, and for a non-guideline sentence under 18 U.S.C. § 3553(a). GA29, GA33. In addition, Gonzalez argued that, "[b]ased on his person and criminal history, including his 5½ years of sobriety, as well as the circumstances of this offense, and Mr. Gonzalez's good work performance and rehabilitative efforts while in prison . . . ." GA33. He also encouraged the court to apply the 77-96 month guideline range that would have applied under the Chapter Two guidelines,

factoring in the two-level reduction for the November 1, 2007 crack cocaine amendments. GA33. Finally, Gonzalez asked the court to give him credit for the 17 months he had already spent in state custody serving an unrelated state sentence, and requested that the federal sentence be ordered to be served concurrent to the state sentence. GA36.

The Government filed a sentencing memorandum in which it argued that the court should impose a sentence within the 151-188 month guideline range. GA8. As to the § 4A1.3 argument, the Government pointed out that, since Gonzalez's release from incarceration on his 1993 convictions for sale of narcotics and robbery, he had been arrested eleven more times, not including his arrest in this case. GA10. Although most of his arrests were for relatively minor crimes, his most recent arrest on November 14, 2005 was for second degree robbery and third degree assault, and he was released on bond on this assault/robbery case when he committed the offense conduct in this case. *See* GPSR ¶ 41. Gonzalez was currently serving a sentence of five years' incarceration, execution suspended after three years, and two years' probation as a result of that case.

The Government also addressed the issues of whether to depart downward to give Gonzalez credit for time served in state custody and whether to order the federal sentence to be served concurrent to the remaining portion of the state sentence. GA13. On the issue of credit, the Government indicated that, as long as the court imposed a sentence within the 151-188 month guideline range, it did

not object to the district court reducing the sentence to give Gonzalez credit for the 17 months that he had spent in jail since the return of the Indictment in this case. GA13. If Gonzalez was sentenced below the guideline range, however, the Government stated that it would object to him receiving any credit for time served on the unrelated state sentence. GA13. In particular, the Government noted that Gonzalez's state conviction was for a violent felony that was completely unrelated to this case, and that he committed the offense conduct in this case while released on bond in the state case. GA13-GA14. On the issue of whether to order the federal sentence to be served concurrent to the state sentence, the Government deferred to the court's discretion. GA13.

At the start of the sentencing hearing, Gonzalez himself addressed the district court and explained that he found the PSR to be "a little lacking." GJA55. The court indicated that he would have an opportunity to make any corrections or additions that he felt were appropriate. GJA55. At that point, defense counsel indicated to the court that there were no disputed factual issues in the PSR and that the guideline calculations, including the characterization of Gonzalez as a career offender, were correct. GJA57. The court asked Gonzalez directly whether he had read the PSR and whether there was anything in it that was not correct. GJA57. Gonzalez indicated that he had read the PSR and that everything contained in it was correct. GJA57. When asked whether anything should be added to the PSR, Gonzalez indicated that, although nothing "necessarily" had to be added, he

felt that the PSR "didn't really cover who I am." GJA58. In particular, he explained,

> I mean, on black and white, boy, I look horrible, but I don't think black and white is – there's a lot of gray in between black and white. . . . I thought it was going to be more thorough. So I found it to be a little bit lacking, you know, even though my family did take the time to address issues, and write letters, and stuff like that, which I greatly appreciate . . . .

GJA58-GJA59.

In response, the court recognized the limitations of any PSR, as "a piece of paper," but assured Gonzalez:

> I operate on the basis that I'm dealing with human beings. Every human being is different, and while the underlying circumstances of somebody's conduct and behavior over the years doesn't excuse them from conduct that violates the law, nonetheless, it is still of significance, I think, in the decision as to what to do about a case, to remember that everybody is a human being, and there is some good in almost every human being.

GJA60-GJA61.

At that point, Gonzalez continued to address the court himself and explain the progress he had made while being incarcerated and the positive steps that he had taken to

improve his outlook and his chances for success in the future. GJA62-GJA64. In response, the court explained that it was often the case that a defendant, at sentencing, appeared to be a very different person from the individual who committed the crime charged. GJA64. Still, the court explained that it was necessary to impose a punishment that reflected the seriousness of the offense. GJA65. Specifically, the court stated:

> But on the other hand, the question of giving you the opportunity, with the structuring that I'm going to build into a sentence, in any event, to try to help you accomplish the things that you're talking about, making something more positive, constructive, satisfying not only to you, but in the fulfillment of your responsibilities to those who depend upon you, is the problem of trying to figure what amount of jail time accomplishes that, hopefully, but without overkill in the form of discouraging the kind of change in attitude, the kind of change in direction that is important, as far as you're concerned, if your life is to have any significant, constructive and positive meaning, not only to you, but to those who depend upon you, to the community at large. . . .
>
> So, what you have said is a reflection of a different approach than the presentence report has somewhat suggested by virtue of the recitation of the criminal behavior, but on the other hand, there is in the various sections in the report, a number of recitations that give me a sense of who you are,

> what you've been like, how you come to be in this situation you are in, and that is something that tempers the appropriateness of a period of incarceration that would otherwise be required, or at least suggested, by the guidelines and by the statute that recites what is supposed to accomplished . . . .
>
> So, you're right in a way, that the presentence report probably is not as fully successful in humanizing your life, but I want you to know it does, to a significant degree, tell me a lot more about you than just simply the paper recitation.

GJA65-GJA67. The court went on to explain that, although Gonzalez was not going to "walk out that door" due to the serious nature of the offense conduct, the sentence would provide a "structure" to allow Gonzalez to address his drug addiction and his mental health issues, both of which had been discussed in the PSR. GJA68-GJA69.

At that point, defense counsel presented his sentencing arguments. He talked about Gonzalez's personal characteristics and, in particular, his intelligence and his potential for success. GJA72-GJA73. He discussed the strides that Gonzalez had made since being incarcerated, including the various vocational programs in which he had participated. GJA74. He suggested that the court consider imposing a lesser period of incarceration and a greater period of supervised release. GJA75. He argued that his criminal history category was overstated under § 4A1.3,

and made similar arguments in support of a non-guideline sentence. GJA76-JA77. Finally, defense counsel asked the court to reduce the sentence by 16 or 17 months to give Gonzalez credit for time served on the unrelated state sentence, and to order the federal sentence to be served concurrent to the state sentence. GJA78. At the conclusion of defense counsel's remarks, Gonzalez's sister, brother-in-law, and fifteen-year-old son addressed the court. GJA82-GJA89. Gonzalez also addressed the court himself. GJA90-GJA95.

The Government, in its comments, discussed the conspiracy in which Gonzalez had participated. It explained that the cocaine and cocaine base conspiracy in Meriden involved 40 indicted defendants, 35 of whom were pending before this district court. GJA95. It further explained that the lead target, Milton Roman, had pleaded guilty and faced a sentence of no less than 240 months' incarceration. GJA96. As to Roman, who had intended to go to trial, but pleaded guilty just before trial, four different co-defendants, all of whom were career offenders, had agreed to testify against him and, in doing so, had put themselves and their families at great risk. GJA96. As to this defendant, who had not agreed to cooperate, the Government had already afforded him significant benefits in permitting him to plead guilty to a lesser charge, not filing a second offender notice, and not objecting to him receiving credit and a concurrent sentence with respect to his unrelated state sentence. GJA96-GJA97. On this last issue, the Government pointed out,

> The defendant was arrested for robbing somebody, and he was sentenced in state court for that crime, as well as a possession of narcotics that has nothing to do with this case. So, whatever happens here today, that conviction is essentially gone because the time that he's served on that conviction will likely get credited towards this, and that's not a position I take lightly, and not one that I will usually take. I'm usually fervently opposed to that, because what it means is what happened in state court really didn't happen. In other words, the conviction is on his record, but everyday that he serves in state custody will get usurped and put into [this] sentence . . . .

GJA97.

The Government acknowledged that Gonzalez may have engaged in his criminal conduct to feed a drug addiction, but pointed out that he had two prior robbery convictions on his record: "When you combine a drug addiction with violent behavior, that is where the Meriden community, and any other community, has a right to say, 'No.'" GJA99. The Government pointed out that Gonzalez's most recent conviction involved the robbery of a drug dealer: "The reason robbing a drug dealer is significant is because the drug deals often occur in public places, and so, if the robbery is violent at all, somebody else can get hurt." GJA100. In the Government's view, Gonzalez faced such a lengthy potential incarceration term because of his thirteen arrests and four felony convictions, the most recent of which was for second degree robbery.

GJA101. Finally, the Government pointed out to the court that, although Gonzalez could participate in the 500 hour drug treatment program, he was likely not eligible for any sentencing reduction as a result of his prior robbery convictions, so that the court should not assume he would be able to reduce his sentence through successful completion of the program. GJA102.

At that point, the court explained that, in imposing sentence, it was going to consider the seriousness of the offense, the sentencing guideline range, and the fact that Gonzalez had already benefitted significantly as a result of being permitted to plead guilty to a reduced charge without the filing of a second offender notice. GJA105. The court specifically found that the PSR's calculation of the 151-188 month guideline incarceration range was accurate, and reviewed the relevant factors set forth under 18 U.S.C. § 3553(a). GJA106-GJA107.

As to these factors, the court made several observations. First, the court stated that "the rehabilitation that the defendant has engaged in of his own volition [is] . . . to a degree . . . an offset to the negative impact on the community of the criminal conduct that's involved." GJA107. Second, "recidivism on Mr. Gonzalez's part is less likely than his offense level and career offender status would suggest." GJA107. Third, Gonzalez "obviously has a mental health factor that's involved in his life, which is correlated to his drug addiction and, therefore, is not totally an excuse for, or explanation that would justify ignoring the seriousness of the criminal conduct involved." GJA107-GJA108. Fourth, Gonzalez had a "fair

employment record." GJA108. Fifth, Gonzalez's criminal history could be explained, in part, by his drug use. GJA108. The most recent robbery conviction, however, was "inconsistent with his motivation expressed here to change the way he lives his life." GJA108. The court did recognize that Gonzalez's motivation to "guide his life in a different direction" was credible. GJA108.

For all of these reasons, the court decided to impose a term of incarceration of 120 months, as a non-guideline sentence. GJA109. The court found that the guideline range was greater than necessary to accomplish the purposes of sentencing. GJA108. The court also found, in the alternative, that the same factors which motivated the imposition of a non-guideline sentence could have supported an identical departure under the guidelines. GJA109. In addition, the court indicated that the sentence would be ordered to be served concurrent with the previously ordered state sentence, and that Gonzalez would receive credit for the time already served in state custody. GJA110-GJA111.

At that point, the Government suggested that, rather than recommend to the Bureau of Prisons that Gonzalez receive credit for time served in state custody, the court simply reduce the 120 month sentence by the number of months that he had been incarcerated in state custody. GJA111. The Government was concerned that the Bureau of Prisons would not credit Gonzalez for time served in state custody because he had already received credit for that time toward the unrelated state sentence. GJA111. The court agreed that the Bureau of Prisons was likely to

ignore its recommendation regarding credit and, at the Government's urging, reduced the incarceration term to 100 months to give Gonzalez credit for time served in state custody. GJA113. Contrary to the parties' suggestion that Gonzalez should receive credit for time served since the return of the indictment in October 2006, the court gave him credit for time served since his entry into state custody in July 2006. GJA113. Finally, the court noted that the length of its sentence was motivated, in part, by the fact that Gonzalez would likely not qualify for a reduction in sentence if he were to complete successfully the 500-hour drug treatment program. GJA114.

Summary of Argument

As to each defendant, 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. For Perry, the district court explained what led it to impose a guideline sentence and why it chose to impose a sentence of 96 months' incarceration, and for Gonzalez, the district court explained what led it to impose a non-guideline sentence and why it chose to impose a sentence of 100 months' incarceration. There is no basis to find that the district judge exceeded the bounds of allowable discretion, misunderstood its discretion to depart under the Sentencing Guidelines or violated the law in imposing the sentences it did.

Argument

I. Perry's 96-month guideline sentence was reasonable.

Perry claims that the 96-month sentence imposed by the district court was unreasonable. It is difficult to understand where Perry finds fault with the district court's analysis. It appears that he simply thinks that his sentence should have been 84 months, and is upset that the district court imposed a sentence slightly higher than the one he requested. He claims that the district court's sentence "was unreasonable in light of his history and characteristics as well as the substantial mitigating factors and sentencing arguments Perry presented at sentencing." Def.'s Brief at 6. This argument lacks merit. The district court properly balanced the factors set forth in 18 U.S.C. § 3553(a) in imposing a sentence far below the advisory guideline range.

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) (affirming a brief statement of reasons by a district judge who refused downward departure; judge noted that the sentencing range was "not inappropriate"). 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.

The Supreme Court has recently reaffirmed that appellate courts must review sentencing challenges under an abuse-of-discretion standard. *See Gall v. United States*, 128 S. Ct. 586, 597 (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 reasonableness of the sentence imposed under an abuse-of-discretion standard." *Id.*

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.").

B. Discussion

Perry asked the district court to impose a sentence of 84 months based on several factors. He relied upon his attempts at cooperation, his tragic family circumstances, and the disparity between the powder cocaine and crack cocaine sentencing guidelines. On appeal, Perry claims that the district court failed to analyze the 96-month sentence that was imposed based on the parsimony clause of § 3553(a). He argues that 96 months' incarceration was greater than necessary to satisfy the goals of sentencing.

He then repeats the same arguments that he made before the district court and argues that the district court failed to give adequate consideration to those arguments. In the end, Perry's sole argument in this appeal seems to be that, in departing downward from the 130-162 month guideline range, the district court imposed a term of incarceration that was only slightly higher than the term of incarceration that he requested.

This argument lacks merit. The district court imposed a sentence that was 34 months below the bottom of the guideline range, and did so based on the three arguments raised by Perry. In particular, the district court acknowledged that Perry had a difficult upbringing, gave Perry some credit for his attempts at cooperation, and noted that there was a significant disparity between the sentencing guidelines in this case and the guidelines that would have applied had Perry been convicted of selling powder cocaine. The court balanced these factors, however, against the other factors set forth under § 3553(a). In particular, the court noted that Perry had a long criminal record and had engaged in very serious offense conduct, so that the sentence of incarceration had to reflect the seriousness of his crime.

In considering the guideline range, the court noted that, although it seemed "a little stiff," there were several factors which suggested that the range was reasonable. First, the court explained that Perry had "several state convictions involving drugs" and had been given repeated opportunities through the imposition of suspended sentences to stop violating the law. PJA167. Second, the

court stated that Perry had a "very significant amount of drug involvement during the period of time covered by the charge here." PJA167-PJA168. The court was "significantly troubled by the drug participation itself, because all of the sales that he arranged . . . would be a substantial factor in the destruction of other people's lives . . . ." PJA168. In addition, although the court gave Perry a reduction for his tragic family upbringing, it found that this argument was not strong. The court pointed out that Perry was raised by a loving and supportive family in North Carolina during his high school years, that his sisters grew up in the same household and did not resort to crime, and that one of his sisters offered him help and support when he returned to Connecticut after high school. PJA170.

Perry relies on the Sixth Circuit's decision in *United States v. Vonner*, 452 F.3d 560 (6th Cir. 2006), to suggest that the district court here failed to provide an adequate explanation for the imposition of the 96-month sentence. *See* Perry's Brief at 9. In *Vonner*, a panel of the Sixth Circuit faulted the district court for failing to give a thorough explanation as to why it rejected the defendant's request for a non-guideline sentence and chose instead to impose a sentence in the middle of the advisory guideline range. *See Vonner*, 452 F.3d at 568. Applying *Vonner* to this case, Perry claims that the district court failed to explain why its sentence was not greater than necessary to satisfy the purposes of sentencing set forth in § 3553(a). Perry's Brief at 11.

First, the panel's decision in *Vonner* was subsequently vacated. After an *en banc* rehearing, the Sixth Circuit upheld the district court's sentence. *See United States v. Vonner*, 516 F.3d 382, 384 (6th Cir. 2008). It concluded that, since the defendant had failed to request a more specific explanation from the district court as to its refusal to impose a sentence below the guideline range, plain error review applied. *See id.* at 386. It also found that, although the district court's failure to address specifically all of the defendant's sentencing arguments could be considered error, such error was not "plain" because the defendant's "arguments were conceptually straightforward, and . . . [n]othing in the 'record,' or the 'context' of the hearing, suggests that the court did not 'listen' to, 'consider' and understand every argument Vonner made." *Id.* at 388. The court concluded:

> If there is a pattern that emerges from *Rita*, *Gall* and *Kimbrough*, it is that the district court judges were vindicated in all three cases, and a court of appeals was affirmed just once – and that of course was when it deferred to the on-the-scene judgment of the district court. Our affirmance in today's case respects the central lesson from these decisions – that district courts have considerable discretion in this area and thus deserve the benefit of the doubt when we review their sentences and the reasons given for them.

Vonner, 516 F.3d at 392.

Second, contrary to the claim raised on appeal, the record here amply demonstrates that the district court considered all of the § 3553(a) factors, as well as the arguments raised by Perry in support of a more lenient sentence. PJA167-PJA174. The court calculated the guidelines range and considered the range and the other factors set forth in 18 U.S.C. § 3553(a). PJA173. It provided a thoughtful and thorough analysis of Perry's case in light of the factors set forth under § 3553(a) and the arguments that he raised. PJA167-PJA173. In sum, the sentencing record shows that the district court was aware of the statutory requirements and the applicable guidelines range, that the court understood the relevance of these matters, and that the court gave them due consideration when sentencing Perry to 96 months in prison, rather than the 84-month term that he requested. *See United States v. Jones*, 460 F.3d 191, 195 (2d Cir. 2006) (refusing to impose requirement that district court specifically explain reasons for imposing sentence of a particular length because "[s]election of an appropriate amount of punishment inevitably involves some degree of subjectivity that often cannot be precisely explained"); *see also United States v. Ministro-Tapia*, 470 F.3d 137 (2d Cir. 2006) (presuming that sentence at low end of guideline range satisfies the parsimony clause); *Fernandez*, 443 F.3d at 27 ("Reasonableness review does not entail the substitution of [the appellate court's] judgment for that of the sentencing judge"). Accordingly, Perry's sentence should be upheld.

II. Gonzalez's 100-month guideline sentence was reasonable.

Gonzalez claims that the 100-month sentence imposed by the district court was unreasonable. Specifically, he claims that the district court committed "procedural error" by allegedly failing to consider his request for a downward departure based on claimed overstatement of criminal history under U.S.S.G. § 4A1.3. Def.'s Brief at 3. Gonzalez seems to claim that the court erred by not considering his motion for downward departure under § 4A1.3. Def.'s Brief at 6-7.

This argument lacks merit. The district court did consider the § 4A1.3 argument and determined it was more appropriately addressed in the context of a non-guideline sentence, especially in light of the several other mitigating factors raised by Gonzalez that did not fall neatly within a recognized departure ground. Moreover, Gonzalez fails to acknowledge in this appeal that the plain language of § 4A1.3 would only have permitted a one-level horizontal departure for him in light of his career offender status, resulting in a guideline range of 140-175 months, which still far exceeds the sentence imposed here. *See* U.S.S.G. § 4A1.3(b)(3)(A). As the record demonstrates, the district court properly considered all of Gonzalez's sentencing arguments and appropriately balanced all of the factors set forth in 18 U.S.C. § 3553(a) in imposing a sentence far below the advisory guideline range.

A. Governing law and standard of review

The relevant legal principles and standard of review are set forth above in Section IA.

B. Discussion

Gonzalez asks for a remand to provide the district court with an opportunity to rule on his request for a downward departure for overstatement of criminal history under § 4A1.3. A remand is not warranted because the record establishes that the district court gave ample consideration to this departure argument and that this ground was one of the factors which motivated the court to issue a sentence well below the guideline range.

As discussed above, both parties addressed the potential § 4A1.3 departure in their written sentencing memoranda. In particular, the Government pointed out that any such departure under § 4A1.3 was limited. "The extent of a downward departure under this subsection for a career offender within the meaning of § 4B1.1 (Career Offender) may not exceed one criminal history category." U.S.S.G. § 4A1.3(b)(3)(A). Thus, according to the Government, a § 4A1.3 departure would only lower the guideline range from 151-188 months to 140-175 months. On the issue of whether the defendant should receive a departure under § 4A1.3, the Government explained:

> The convictions which qualify this defendant for career offender treatment are relatively old. The arrests giving rise to the convictions occurred in

> 1993, and the defendant's total effective sentence as to these convictions was only eighteen months' incarceration. Based on these facts alone, it would appear that the defendant should qualify for a departure. Since his release from incarceration from these two felony convictions, however, the defendant has been arrested eleven more times, not including his arrest in this case. Although most of the offenses he committed were relatively minor, his most recent arrest on November 14, 2005 was for second degree robbery and third degree assault. In fact, he was released on bond on this assault/robbery case when he committed the offense conduct in this case.

GA10-GA11. The Government took the position that Gonzalez did not qualify for a departure under § 4A1.3. GA10.

At sentencing, during his lengthy comments, Gonzalez only made passing reference to his § 4A1.3 argument, and did so in the context of a broader sentencing argument aimed at convincing the court that the sentencing guideline range did not account for his personal characteristics and was higher than necessary to accomplish the purposes of sentencing set forth in 18 U.S.C. § 3553(a). GJA76.

In resolving the issue, the sentencing court relied, as it should have, on the § 3553(a) factors. GJA106-GJA107. In the context of a discussion of those factors, the court made findings as to whether Gonzalez's criminal history category was overstated. The court stated, "I do think that

contrary to what the record would otherwise suggest, that recidivism on Mr. Gonzalez's part is less likely than his offense level and career offender status would suggest." GJA107. On the other hand, and contrary to Gonzalez's argument, the court concluded that his recent robbery conviction was "inconsistent with [the] motivation expressed here, to change the way he lives his life." GJA108. In addition, the court noted that Gonzalez's long criminal history was characterized by "substantial gaps, with relapses in drug use being a substantial factor" in his commission of additional crimes. GJA108. Thus, a fair reading of the sentencing transcript shows that some portion of the 51-month reduction below the guideline range was due to the court's consideration of the § 4A1.3 argument.

Moreover, although the court imposed the 100-month term as a non-guideline sentence, it explained that it would have done the same thing as a departure under the guidelines. GJA109.[7] Given that the only downward departure argument raised by Gonzalez was an argument under § 4A1.3, it can be inferred from the court's comments that some portion of the sentence reduction was motivated by its view that, at least to some degree,

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[7] Although the defendant suggests that, had the district court explicitly rejected his § 4A1.3 argument, he would have been able to challenge that ruling on appeal, he is incorrect. *See United States v. Stinson*, 465 F.3d 113, 114 (2d Cir. 2006) (per curiam) (noting that, even in post-*Booker* era, the denial of a motion for downward departure is unreviewable on appeal); *United States v. Valdez*, 426 F.3d 178, 184 (2d Cir. 2005).

Gonzalez's criminal history category and career offender status overstated the seriousness of his prior record. *See United States v. Sanchez*, 517 F.3d 651, 665 (2d Cir. 2008) (stating that the Court is "entitled to assume that the sentencing judge understood all the available sentencing options, including whatever departure authority existed in the circumstances of the case" and that remand is not appropriate "if the record indicated clearly that the district court would have imposed the same sentence had it had an accurate understanding of its authority" to depart).

"Procedural reasonableness requires [this Court] to examine whether the district court properly (a) identified the Guidelines range supported by the facts found by the court, (b) treated the Guidelines as advisory, and (c) considered the Guidelines together with the other factors outlined in 18 U.S.C. § 3553(a)." *United States v. Richardson*, 521 F.3d 149, 156 (2d Cir. 2008) (internal quotation marks omitted). "This Court's ability to uphold a sentence as reasonable will be informed by the district court's statement of reasons (or lack thereof) for the sentence that it elects to impose." *Id.* (internal quotation marks omitted). Still, this Court has "declined to encroach upon the province of district courts by dictating a precise mode or manner in which they must explain the sentences they impose." *United States v. Sindima*, 488 F.3d 81, 85 (2d Cir. 2007). The Court does not "require district courts to engage in the utterance of 'robotic incantations' when imposing sentences in order to assure us that they have weighed in an appropriate manner the various section 3553(a) factors." *Id.*

Here, the district court articulated very specifically what factors under § 3553(a) impacted its sentencing decision. It properly calculated the guideline range, reviewed the § 3553(a) factors that were relevant to its decision and explained in detail why a non-guideline sentence of 100 months was appropriate. Moreover, the court explained that it would have reached the same decision had it decided to depart within the guidelines, rather than issue a non-guideline sentence. In the end, the court provided a thoughtful and thorough analysis of Gonzalez's case in light of the factors set forth under § 3553(a) and the arguments that he raised. The record shows that the district court was aware of the statutory requirements and the applicable guidelines range, that the court understood the relevance of these matters, and that the court gave them due consideration when sentencing Gonzalez to 100 months in prison. Accordingly, that sentence should be upheld.

Conclusion

For the foregoing reasons, this Court should affirm both the judgment of the district court as to Perry and the judgment of the district court as to Gonzalez.

Dated: October 24, 2008

Respectfully submitted,

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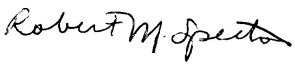

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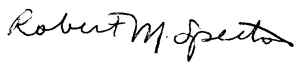
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

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 13,303 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



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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.