08-0670-cr

To Be Argued By:
PATRICK F. CARUSO

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-0670-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

CLIFFORD CAPEHART,

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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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.

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STATEMENT OF JURISDICTION

The district court (Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on February 5, 2008. GA 8. On February 4, 2008, the defendant filed a timely notice of appeal. GA 9, A103. This Court has appellate jurisdiction over the defendant's challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW[1]

1. Whether the district court's failure to *sua sponte* declare unconstitutional the 120-month mandatory minimum sentence applicable to cocaine-base offenses under 21 U.S.C. § 841 was irrelevant and harmless, where that minimum had no impact on the defendant's sentence, which was 36 months above that minimum.

2. Whether the defendant affirmatively waived any challenge to the ten-year mandatory minimum in this case by signing a written plea agreement that unambiguously acknowledged the applicability of that penalty and repeatedly confirming in open court his understanding that he faced that penalty.

3. Alternatively, whether the district court plainly erred in failing to *sua sponte* declare the statutory minimum sentences unconstitutional, where this Court has consistently rejected Fifth Amendment challenges to those penalties?

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[1] Questions 2 and 3 are also presented in nearly identical terms in the unrelated appeal of *United States v. Samas*, No. 05-5213-cr, which was submitted to a NAC panel consisting of Chief Judge Jacobs and Judges Wesley and Hall on August 11, 2008.

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Preliminary Statement

This is a sentencing appeal. During an investigation conducted by the Drug Enforcement Administration ("DEA") in this case, Defendant Clifford Capehart purchased cocaine base ("crack") from a cooperating witness multiple times, and participated in multiple incriminating telephone calls that were intercepted pursuant to court-authorized wiretaps.

Capehart was originally indicted for conspiring to distribute 50 grams or more of cocaine base. This charge, because Capehart had been previously convicted of felony drug offenses, carried a mandatory minimum term of imprisonment of 20 years. Ultimately, however, Capehart was permitted to plead guilty to a one-count information charging him with conspiracy to distribute at least five grams, but less than 50 grams, of cocaine base. This offense of conviction carried a ten-year mandatory minimum term of imprisonment, after enhancement pursuant to 21 U.S.C. § 851 for Capehart's prior felony drug convictions.

The district court ultimately imposed a non-guidelines sentence of 156 months, which was 106 months below the advisory guidelines range, but 36 months above the mandatory minimum. The district court explained that, in its estimation, the sentence was necessary to protect the public and deter Capehart from committing future crimes.

Capehart raises but one claim on appeal. He argues for the first time that "the mandatory minimum sentence for crack cocaine based on a 100:1 cocaine powder to cocaine base ratio is arbitrary and capricious and without rational basis in violation of the due process and equal protection guarantees of the fifth amendment to the United States Constitution." Def. Br. at 11. This argument is irrelevant because he was sentenced above the mandatory minimum; it is waived because he conceded the applicability of the mandatory minimum in his plea; and it is squarely foreclosed by circuit precedent. Accordingly, this Court should affirm the sentence.

Statement of the Case

On April 19, 2006, a federal grand jury sitting in Connecticut returned an indictment against defendant Clifford Capehart and others charging them with conspiracy to possess with intent to distribute at least 50 grams of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 846. GA 3, GA 12-15.

On January 22, 2007, the defendant pleaded guilty to a one-count information charging him with conspiracy to possess with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) and 846. GA 5, A40, A104-111.

On March 8, 2007, the United States Probation Office disclosed it pre-sentence report ("PSR"). A54. The probation officer calculated the defendant's applicable guidelines range to be 262 to 327 months of imprisonment, with an eight-year term of supervised release and a fine range of $17,500 to $4,000,000. A52. The PSR identified no circumstances that would warrant a departure from the applicable guidelines range. A53. Absent objection, the district court adopted the PSR's guidelines calculations and the facts contained in the PSR that pertained to Capehart's offense conduct. A55, 60-61.

On January 25, 2008, the district court sentenced the defendant to 156 months of imprisonment, an eight-year term of supervised release, and a special assessment of $100. A94. Judgment entered on February 5, 2008. GA 8.

On February 4, 2008, the defendant filed a timely notice of appeal. GA 9, A103.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. Capehart's Offense Conduct

The district court, as noted, adopted the facts set forth in the PSR regarding the defendant's offense conduct, without objection from the parties. A60-62. These facts, in pertinent part, are as follows.

In the fall of 2003, the DEA began investigating a New Haven-based crack-distribution organization headed by Julius Moorning. A41. Moorning was aided by three lieutenants: Edward Hines, Michelle Groom, and Rodney Nelson. A41. The organization also included numerous street-level dealers. A41.

The DEA's investigation culminated with the installation of court-authorized wiretaps on cellular telephones utilized by Moorning and his co-conspirators. A41. Capehart participated in 19 pertinent intercepted calls with Hines and other co-conspirators. A41. The incriminating calls were intercepted on ten separate dates. A41.

The content of the intercepted calls, coupled with information from cooperating co-defendants, established that Capehart distributed at least 35 grams, but less than 50 grams, of crack during the course of the charged

conspiracy. A42. Capehart purchased redistribution quantities of crack, which he subsequently re-sold, from Moorning, Hines, Groom and Nelson. A30-32, A41-42. He participated in the charged conspiracy from December 2003 through March or April 2004. A42.

B. Capehart's Guilty Plea

The defendant eventually waived his right to indictment and pleaded guilty to a one-count substitute information charging him with conspiracy to possess with intent to distribute at least five grams, but less than 50 grams, of crack. A34e-34f. Before accepting Capehart's plea, the district court canvassed the defendant extensively on the rights he would be giving up by waiving indictment and pleading guilty. A9-11, A34b.

The district court confirmed that, under the terms of the plea agreement, the defendant was stipulating to a quantity attribution of at least 35 grams, but less than 50 grams, of crack. A31-32. The district court explained plainly that the crack conspiracy charge to which the defendant was pleading guilty carried a mandatory minimum term of imprisonment of ten years. A15, A26. Government counsel also explained that the crack conspiracy charge set out in the information carried a ten-year statutory minimum penalty. A28.

The district court found that the defendant was "fully competent and capable of entering an informed plea" and that he understood "the nature and consequences" of pleading guilty to the charged offense. A34f. Accordingly,

the district court accepted the plea and adjudged the defendant guilty. A35.

C. The Pre-Sentence Report

The United States Probation Office prepared a PSR in this case, the final version of which has been submitted to this Court by the Defendant as part of the Appendix. A38-55. The PSR concluded that the defendant had a base offense level of 30, deriving from the quantity stipulation – 35 to 50 grams of crack – contained in the plea agreement. A42-43. The PSR noted, however, that the defendant is a career offender. His adjusted offense level, therefore, was 37 pursuant to § 4B1.1(b)(A). A43. Taking into account a three-level reduction for acceptance of responsibility, Capehart's total offense level was 34. A43.

The PSR also noted that the defendant had 19 criminal history points stemming from eight prior convictions, which resulted in his designation as a criminal history category ("CHC") VI. A43-46. In other words, even had the defendant not qualified as a career offender, he would have been designated as a CHC VI. A46.

Capehart's prior convictions include a 1994 conviction for second-degree assault with a firearm; a 1998 conviction for first-degree robbery with a firearm; and, a 1999 conviction for possession of narcotics with intent to sell. A43-46. According to the PSR, the 1998 first-degree robbery conviction stemmed from an incident in which Capehart and two others abducted an individual, robbed him and planned to shoot him. A45. The robbery victim

escaped before the shooting took place and later identified Capehart as one of the perpetrators. *Id.*

The PSR reiterated that the defendant faced a mandatory minimum sentence of ten years in prison in connection with the crack conspiracy charge to which he pleaded guilty. A52. Neither party filed written objections to the PSR. A55.

D. Capehart's Sentencing

At a sentencing hearing on January 25, 2008, the district court confirmed that the defendant had reviewed the PSR and had been afforded an opportunity to discuss it with counsel. A60. The district court also confirmed that the parties had no objections to the PSR's guidelines calculations or to the facts contained in the PSR upon which the district court might rely in connection with the sentencing. A60-62. The district court adopted, absent objection, both the facts and the guidelines range of 262 to 327 months set forth in the PSR. A64.

The district court also plainly stated that it could not sentence the defendant below the applicable ten-year statutory minimum: "Obviously I have a mandatory minimum of 120 months. I can't give less than that . . . . I discussed it with Mr. Capehart when he changed his plea so I'm sure you discussed it." A73.

The defendant raised no objection to the mandatory minimum ten-year sentence he faced in connection with the crack-conspiracy charge to which he pleaded guilty.

A75-76. To the contrary, defense counsel urged the district court to impose a "10 year sentence," suggesting that such a sentence would be sufficient because ten years "is a long period of time and Clifford [Capehart] will be a much different person 10 years from today than he is today and he will continue to mature and he's . . . realistic about where he is." A76.

The district court considered all the factors set forth in 18 U.S.C. § 3553(a). A59, A93. And it made clear that although it would "consider" the applicable guidelines range, it was "not bound" by the guidelines. A60.

The district court was particularly mindful of two factors set forth in § 3553: (1) the need to protect the public; and (2) the need to deter the defendant from the commission of future crimes. A66, A69, A71-73.

The district court focused its comments primarily on the need to protect the public: "among the factors I need to consider is the need to protect the public from future crimes by this defendant . . . ." A71. "That's a real concern of this court. I wouldn't want to face the person as to whom violence is [e]ffected by Mr. Capehart when he's released and they ask me why didn't you lock him up longer so I have to think about that given his criminal history." A72.

This concern derived principally from Capehart's 1998 first-degree robbery conviction: "The offense in '98 is obviously very troublesome." A80. Defense counsel's attempt to diminish the severity of the incident by

portraying it as one "motivated by drugs" and merely a drug deal that "went bad," were not well received by the district court. A85-86. "Do you think the victim cared why [Capehart] did what he did and the fact the [the victim] was looking at being murdered likely. It is a risk at least. I don't think it matters to the victim. It wouldn't matter." A86.

With regard to deterrence, the district court stated: "He's got a fairly lengthy and numerous criminal convictions, and it seems like he gets out and he's back in trouble again. It doesn't – things don't seem to have deterred him" A66. "My point is it [previous incarceration] didn't seem to deter him." A69.

Ultimately, the district court imposed a sentence of 156 months of imprisonment, an eight-year term of supervised release, and a $100 special assessment. The colloquy made clear that the sentence was a non-guidelines sentence: "Under *Booker*, I don't have to do it under the guideline analysis. . . . I have the guidelines and I'm not departing from them so then the question becomes what other factors enter into the analysis." A83-84. As indicated above, the sentence imposed by the district court reflected a variance of 106 months from the bottom of the applicable 262 to 327 month guidelines range.

This appeal followed.

A portion of the transcript of the sentencing hearing remains under seal. This sealed portion of the transcript, though not material to the issues raised on appeal, is

included in the Government's Sealed Appendix in an effort to provide the Court with a complete understanding of what transpired at the sentencing hearing.[2]

SUMMARY OF ARGUMENT

Because the district court sentenced the defendant to 36 months above the mandatory minimum sentence of 120 months, his constitutional challenge to that minimum is irrelevant, and any hypothetical error in that regard would be harmless beyond any doubt. In no way did the mandatory minimum factor into the guideline calculation, nor did the district court indicate that its sentence was influenced by the minimum.

Even if the minimum were relevant in this case, the defendant affirmatively waived any challenge to the ten-year mandatory minimum by signing a written plea agreement that unambiguously acknowledged the applicability of that penalty, and repeatedly confirming in open court his understanding that he faced that penalty. Such a waiver forecloses an appellate challenge to the statutory minimum sentence stemming from the crack conspiracy offense to which the defendant pleaded guilty.

Even assuming that the issue were relevant and had not been waived, the district court did not plainly err in failing, *sua sponte*, to declare unconstitutional the mandatory

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[2] The sealed portion of the transcript contains one transcription error: at GSA 2, line 17, the words "as part of the" should read "third-party."

minimum sentences applicable to cocaine-base offenses under 21 U.S.C. § 841. This Court has consistently rejected Fifth Amendment challenges to the differential penalties that Congress has selected for various drugs in § 841, and the Supreme Court's recent decision in *Kimbrough* neither overruled nor cast doubt on those precedents. Accordingly, there was no error at all. Certainly, given the absence of any precedent of the Supreme Court or this Court holding that these penalties are unconstitutional, the defendant cannot show that any hypothetical error is "plain" in the sense of "clear" or "obvious" at the time of appellate consideration.

ARGUMENT

I. The 156-month sentence imposed by the district court should be affirmed.

A. Governing law and standard of review

This Court ordinarily engages in *de novo* review of "challenges to the meaning and constitutionality of statutes . . . ." *United States v. Cullen*, 499 F.3d 157, 162 (2d Cir. 2007). A different standard, however, applies where a defendant has procedurally defaulted a claim of error before the district court.

On the one hand, a defendant may – by inaction or omission – forfeit a legal claim, for example, by simply failing to lodge an objection at the appropriate time in the district court. Where a defendant has forfeited a legal claim, this Court engages in "plain error" review pursuant

to Fed. R. Crim. P. 52(b). "For there to be 'plain error,' there must be (1) an error that (2) is 'plain' and (3) 'affect[s] substantial rights'; if these elements are satisfied, then the court may correct the error, but only if (4) the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Miller*, 263 F.3d 1, 4 (2d Cir. 2001) (quoting *Johnson v. United States*, 520 U.S. 461, 467 (1997)); *see also United States v. Cotton*, 535 U.S. 625, 631-32 (2002) (outlining "plain error" factors).

On the other hand, a defendant may do more than merely forfeit a claim of error. A defendant may – through his words, his conduct, or by operation of law – waive a claim, so that this Court will altogether decline to adjudicate that claim of error on appeal. *See United States v. Olano*, 507 U.S. 725, 733 (1993)*; United States v. Quinones*, 511 F.3d 289, 320-21 (2d Cir. 2007); *United States v. Wellington*, 417 F.3d 284, 289-90 (2d Cir. 2005); *United States v. Nelson*, 277 F.3d 164, 204 (2d Cir. 2002); *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995).

B. Discussion

1. Because the district court sentenced the defendant to 36 months above the 120-month mandatory minimum, his challenge to that minimum is irrelevant and any defect in that minimum would be harmless beyond any doubt.

The district court imposed a sentence in this case that exceeded the applicable mandatory minimum sentence by three years. As the record makes plain, the district court did so because it took seriously its obligation to impose a sentence that would protect the public from future crimes of the defendant, who is a career offender with a lengthy and violent criminal record. A43, A46, A66, A69, A71-73, A80, A85-86. Thus, the constitutionality of the mandatory minimum was irrelevant in this case, because the district court sentenced the defendant without regard to the mandatory minimum. *See United States v. McDonald*, 121 F.3d 7, 11 (1st Cir. 1997) (mandatory minimum penalty "had no relevance" where district court calculated sentence without reference to mandatory minimum and sentence exceeded mandatory minimum); *cf. United States v. Bell*, No. 06-3694, 2007 WL 2566003 at **2 (7th Cir. 2007) (unpub.) (retroactive application of repeal of mandatory minimum penalty was "irrelevant" where record showed that district court's sentence was driven by defendant's numerous prior convictions and not by mandatory minimum).

2. The defendant affirmatively waived any challenge to the ten-year mandatory minimum sentence in this case by signing a written plea agreement that unambiguously acknowledged the applicability of that penalty and repeatedly confirming in open court his understanding that he faced that penalty.

Even if the mandatory minimum were relevant in this case, the defendant waived any challenge to it. The Eighth Circuit has had occasion to hold that "a defendant who explicitly and voluntarily exposes himself to a specific sentence may not challenge that punishment on appeal." *United States v. Womack*, 985 F.2d 395, 400 (8th Cir. 1993) (internal quotation marks omitted). For example, in *United States v. Cook*, 447 F.3d 1127, 1128 (8th Cir. 2006), a defendant who had pled guilty to a violation of 21 U.S.C. § 841(b)(1)(A) challenged – for the first time on appeal – the applicability of the 20-year mandatory minimum penalty. The Eighth Circuit held that the defendant had waived his "right to contest his sentence on the basis of the § 841(b)(1)(A) enhancement" by freely entering into a plea agreement that called for that penalty. *Id.* ("At the time of the plea, Cook did not object to the prior crime but stated he understood the plea agreement and was entering his plea freely and voluntarily with the knowledge his mandatory minimum sentence would be twenty years."); *see also United States v. Nguyen*, 46 F.3d 781, 783 (8th Cir. 1995) (same); *United States v. Durham*, 963 F.2d 185, 187 (8th Cir. 1992) ("[Defendant] waived any objection to the twenty-five-year sentence by agreeing

that it was the minimum sentence mandated by the statutes, and by accepting the benefit of the plea agreement.").

As in *Cook*, the defendant here knowingly entered into a written plea agreement that called for a ten-year mandatory minimum penalty. A105. During the plea hearing, he acknowledged that he had read the plea agreement, discussed it with his attorney, and understood it. A34b-A34d. He also acknowledged that he faced a ten-year minimum sentence in connection with the crack-conspiracy offense to which he was pleading guilty. A15, A26. Having "explicitly and voluntarily expose[d] himself" to a ten-year minimum sentence, the defendant should not now be permitted to challenge the applicability of that mandatory minimum sentence. *Cook*, 447 F.3d at 1128.

The Eighth Circuit's approach is consistent with this Court's enforcement of plea agreements more generally. The Court has "noted the dangers of piecemeal non-enforcement of plea agreements," in the contexts of enforcing factual stipulations as well as appellate waivers. *United States v. Granik*, 386 F.3d 404, 412 (2d Cir. 2004). Both defendants and the Government benefit from the enforceability of plea agreements. "If defendants are not held to their factual stipulations, therefore, the government has no reason to make concessions in exchange for them." *Id.* at 412-13.

In this case, the defendant was permitted to plead to a substitute information charging a lesser offense than that

which was charged in the indictment, and which carried a ten-year mandatory minimum, as opposed to the 20-year mandatory minimum stemming from the charge contained in the indictment. A1-2. In addition, the Government did not file a two-time second-offender notice, which would have elevated the mandatory minimum sentence to life imprisonment, even on the lesser offense charged in the information. *See* 21 U.S.C. § 851.

To ignore the defendant's concession about the applicability of the mandatory minimum sentences would be to ignore the "mutuality of plea agreements." *Granik*, 386 F.3d at 412; *see also United States v. Brumer*, 528 F.3d 157, 159 (2d Cir. 2008) (per curiam) (holding that when defendant breaches plea agreement, government is entitled to choose between specific performance or being relieved of its obligations under agreement); *United States v. Bradbury,* 189 F.3d 200, 208 n.4 (2d Cir. 1999) (rejecting defendant's claim that his base offense level under the Guidelines should be calculated as if his conspiracy involved no drugs at all, where defendant had signed plea agreement acknowledging that conspiracy involved 378 pounds of marijuana); *United States v. Delgado*, 288 F.3d 49, 56-57 (1st Cir. 2002) (holding that defendant's concession in plea agreement that there was no basis for downward departure constituted waiver of this claim on appeal); *cf. United States v. Martinez*, 122 F.3d 421, 422-23 (7th Cir. 1997) (holding that factual stipulations in plea agreement are binding unless defendant validly withdraws from agreement).

Even if the defendant had not waived his right to challenge the mandatory minimum sentence in this case, his claim on that score would still fail on the merits. For the reasons that follow, the district court did not plainly err in failing, *sua sponte*, to declare the § 841 penalties unconstitutional.

3. Alternatively, the district court did not plainly err in failing to declare unconstitutional the mandatory minimum sentences applicable to cocaine-base offenses under 21 U.S.C. § 841, where this Court has consistently rejected Fifth Amendment challenges to those penalties.

This Court has repeatedly and authoritatively rejected claims that the statutory minimum penalties set forth in § 841(b) for cocaine-base offenses violate constitutional equal protection principles. And the defendant concedes that, in the sentencing context, rational-basis, equal protection analysis duplicates due process analysis. Def. Brief at 13 n.2.

The Court first turned away an equal-protection challenge to the crack/powder penalties in *United States v. Stevens*, 19 F.3d 93, 96-97 (2d Cir. 1994). In that case, the defendant pointed out that under the graduated schedule of penalties in the Guidelines for drug offenses, the penalties imposed for a given quantity of crack cocaine were the same as those imposed for a quantity of powder cocaine that was 100 times greater. This ratio, the Court observed, was "derived directly from" the schedule of mandatory

minimum penalties triggered by specified drug quantities in 21 U.S.C. § 841. Because "African-Americans constitute a higher proportion of crack offenders than powder cocaine offenders," the defendant contended that this penalty ladder violated "the equal protection component of the Fifth Amendment's Due Process Clause." 19 F.3d at 96.

Because the defendant had not alleged that either Congress or the Sentencing Commission acted with discriminatory intent, the Court asked "whether the challenged sentencing scheme has a rational basis, that is, whether it is rationally related to a legitimate governmental purpose." *Id.* Congress had precisely such a "valid reason for mandating harsher penalties for crack as opposed to powder cocaine: the greater accessibility and addictiveness of crack." *Id.* at 97 (citing *United States v. Haynes*, 985 F.2d 65, 70 (2d Cir. 1993) (holding that disparate impact of crack penalties on African-Americans did not justify downward departure)). In reaching this conclusion, this Court joined every other circuit to have ruled on the issue. *Id.* The Court has subsequently re-affirmed this holding, *see, e.g., United States v. Then*, 56 F.3d 464, 464 (2d Cir. 1995), and expanded it to reject claims of intentional racial discrimination, *United States v. Moore*, 54 F.3d 92, 96-99 (2d Cir. 1995).

Recent developments have not undermined the foregoing precedents of this circuit, which could be

revisited only by this Court sitting *en banc*.[3] Even in the wake of *Booker* and *Kimbrough*, this Court has continued to adhere to *Stevens*. Thus, in *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008) (per curiam), this Court relied expressly on *Stevens* to turn away an identical constitutional challenge to the Guidelines-based crack:powder ratio. *Id.* at 149 n.3 ("In addition, Regalado's (unpreserved) due process challenge to the 100-to-1 powder to crack cocaine ratio underlying his sentence is without merit as we have repeatedly rejected similar constitutional challenges. *See, e.g., United States v. Stevens*, 19 F.3d 93, 97 (2d Cir. 1994).").

The Court has also expressed skepticism that *Kimbrough* undermined the holding of *Stevens* with respect to the mandatory minimum sentences established by § 841. Thus, in *United States v. Lee*, 523 F.3d 104, 106 (2d Cir. 2008), a defendant argued that her sentence of 120 months – which was at the mandatory minimum applicable to her crack-cocaine offense – was unconstitutional because of the "adverse racial impact" of the crack:powder ratio. *Id.* The Court ultimately dismissed the appeal

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[3] Although Judge Calabresi speculated, in his *Then* concurrence, that the "constitutional status" of the crack:powder ratio might change over time, 56 F.3d at 467-68, only an *en banc* court is authorized to overrule binding circuit precedent such as *Stevens.* In any event, as Judge Calabresi pointed out, "[t]oo many issues of line drawing make [it] hazardous" "for courts to step in and say that what was rational in the past has been made irrational by the passage of time, change of circumstances, or the availability of new knowledge." *Id.* at 468.

because the defendant's claim was covered by a valid appeal waiver in the plea agreement. *Id.* But before doing so, the Court noted that it had previously rejected an "equal-protection challenge to the powder cocaine-crack cocaine disparity embodied in an Act of Congress." *Id.* Commenting on the defendant's argument that the Supreme Court's decision in *Kimbrough* had changed the "legal landscape" since *Stevens*, the Court observed that "[i]t is not apparent to us that the principles set forth in *Kimbrough* have any application to mandatory minimum sentences imposed by statute." 523 F.3d at 106.

This Court was correct when it suggested that nothing in *Kimbrough* has any application to statutory minimum sentences. For one thing, *Kimbrough* is simply the latest in a series of cases holding, in light of the Sixth Amendment, that the statutory *maximum* sentence to which a defendant may be lawfully exposed is dictated by facts found by a jury beyond a reasonable doubt or admitted by the defendant himself. *See, e.g., United States v. Booker*, 543 U.S. 220, 231 (2005). These Sixth Amendment principles do not apply to statutory *minimum* sentences, like the ones at issue here. *Harris v. United States*, 536 U.S. 545, 560-68 (2002).

Second, *Kimbrough* nowhere suggested that the 100:1 powder:crack ratio was irrational. It merely reviewed some of the conflicting data on the relative harmfulness of powder and crack cocaine by way of background, 128 S. Ct. at 566-69, and held that § 3553(a) gives sentencing judges the discretion to decide for themselves whether to adhere to the ratio selected by the Sentencing Commission,

128 S. Ct. at 574-75. In no way did the *Kimbrough* Court undertake to evaluate the competing evidence regarding the societal harms caused by different drugs, or to determine any equivalences between specified quantities of heroin, marijuana, powder cocaine, crack cocaine, or any other drugs.[4] The Court likewise offered no opinion about the rationality or desirability of the crack:powder ratios that the Sentencing Commission had recently adopted in the amended drug quantity table of U.S.S.G. § 2D1.1, which now range from 1:25 to 1:80. 128 S. Ct. at 573. The fact that there is an ongoing debate that involves the political branches and the Sentencing Commission about the proper equivalencies among different drugs hardly demonstrates the "irrationality" of the ratios that Congress chose when it enacted § 841. It would be highly unusual, to say the least, for an appellate court to make such a dramatic pronouncement without the slightest factual record having been developed below.

In short, *Kimbrough* has not overruled, much less undermined, this Court's consistent holdings in *Stevens*,

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[4] For example, although the Court noted in passing the Sentencing Commission's conclusion that "crack is associated with 'significantly less trafficking-related violence . . . than previously assumed,'" 128 S. Ct. at 568, the Court did not review the Commission's recent statistic showing that crack offenders are twice as likely as powder offenders to have a weapon involved in their offense. U.S. SENTENCING COMMISSION, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 106 (Table 39, Weapon Involvement of Drug Offenders for Each Drug Type, Fiscal Year 2007) (29.8% of crack offenders v. 14.4% of powder offenders).

Then, *Moore*, and *Regalado* that the schedule of penalties in § 841 does not violate equal protection principles. "[A] prior decision of a panel of this court binds all subsequent panels 'absent a change in law by higher authority or by way of an in banc proceeding' . . . ." *Mendez v. Mukasey*, 525 F.3d 216, 221 (2d Cir. 2008) (quoting *United States v. Snow*, 462 F.3d 55, 65 n.11 (2d Cir. 2006) (quoting, in turn, *United States v. King*, 276 F.3d 109, 112 (2d Cir. 2002)), *cert. denied*, 127 S. Ct. 1022 (2007)); *see also Union of Needletrades, Indus. & Textile Employees v. INS*, 336 F.3d 200, 210 (2d Cir. 2003) (recognizing authority to revisit prior panel's decision only if "there has been an intervening Supreme Court decision that casts doubt on our controlling precedent," such as a decision that overrules a different, but similar, circuit precedent). These precedents therefore dictate that the defendant's challenge to the constitutionality of the mandatory minimum be rejected on the merits.

In any event, the defendant certainly cannot demonstrate that any error was "plain," in the sense of being clear or obvious at the time of appellate consideration. *Olano*, 507 U.S. at 734. The Government is aware of no cases, and the defense has cited none, holding that a district court "plainly erred" in failing to *sua sponte* ignore an undisturbed line of binding precedents from this Court, where the only claim on appeal is that a recent Supreme Court decision has made that line of cases ripe for reconsideration. *See United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004) (noting that "[w]ithout a prior decision from this court or the Supreme Court mandating the jury instruction that [defendant], for the first time on

appeal, says should have been given, we could not find any such error to be plain, if error it was") (quoting *United States v. Weintraub*, 273 F.3d 139, 152 (2d Cir. 2001)).

CONCLUSION

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

Dated: October 14, 2008

Respectfully submitted,

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ADDENDUM

18 U.S.C. § 3551. Authorized sentences

(a) In general.--Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute, including sections 13 and 1153 of this title, other than an Act of Congress applicable exclusively in the District of Columbia or the Uniform Code of Military Justice, shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.

(b) Individuals.--An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to--

(1) a term of probation as authorized by subchapter B;

(2) a fine as authorized by subchapter C; or

(3) a term of imprisonment as authorized by subchapter D. A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

(c) Organizations.--An organization found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to--

(1) a term of probation as authorized by subchapter B; or

(2) a fine as authorized by subchapter C.

A sentence to pay a fine may be imposed in addition to a sentence to probation. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

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.

* * *

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases.--Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this Subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine,

ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of

any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance

shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance

containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or

more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall

be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the

absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

* * *

21 U.S.C. § 846

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

* * *

21 U.S.C. § 851. Proceedings to establish prior convictions

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that

any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if

sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

Fed. R. Crim. P. Rule 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Capehart

Docket Number: 08-0670-cr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 10/14/2008) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: October 14, 2008

CERTIFICATE OF SERVICE

08-0670-cr US v. Capehart

I hereby certify that two copies of this Brief for the United States of America were sent by Regular First Class Mail delivery to:

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I also certify that the original and nine copies were also shipped via hand delivery to:

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on this 14th day of October 2008.

Notary Public:

Sworn to me this

October 14, 2008

NADIA R. OSWALD HAMID
Notary Public, State of New York
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Qualified in Kings County
Commission Expires November 10, 2011

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