06-2313-cr

To Be Argued By:
JAMES K. FILAN, JR.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-2313-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

SAMUEL COLON,
Defendant-Appellant.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Janet Bond Arterton, U.S. District Judge) had subject matter jurisdiction under 18 U.S.C. § 3231. Following a sentencing hearing held on July 9, 2003 (A 7), a final judgment entered on July 15, 2003. (A 7). The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on July 18, 2003. (A 7). On April 18, 2005, this Court remanded the matter to the district court for consideration of whether re-sentencing was required under *United States v. Crosby,* 397 F.3d 103 (2d Cir. 2005). On April 25, 2006, the district court denied re-sentencing without a hearing. (A 9). The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on May 5, 2006. This Court has appellate jurisdiction over the challenge to the defendant's sentence pursuant to 18 U.S.C. § 3742(a).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Whether the district court violated the Sixth Amendment by calculating the defendant's criminal history category by reference to judicial factfinding by a preponderance of the evidence, where the court determined on a *Crosby* remand hearing that it would have imposed the same sentence under an advisory guidelines regime.

2. Whether the district court reasonably considered the various factors set forth in 18 U.S.C. § 3553(a) in imposing a within-Guidelines sentence.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-2313-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

SAMUEL COLON,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

On June 18, 2002, a federal grand jury returned a three-count indictment charging the defendant, Samuel Colon, with various drug and gun charges. (A 10-12). On September 26, 2002, the defendant pleaded guilty to one drug conspiracy charge and one gun possession charge before U.S. District Judge Janet Bond Arterton. (A 5, 18). At the time of sentencing, the defendant expressly confirmed that he did not dispute the district court's

calculation of his criminal history category. (A 49). Instead, he sought a downward departure on numerous grounds, all of which were denied. (A 49-55). The district court sentenced the defendant on July 9, 2003, to an aggregate term of 121 months in prison. (A 7, 46).

On appeal, Colon raises two issues. First, he challenges the sentencing court's calculation of his criminal history category, claiming that the district court's calculation of his criminal history for purposes of determining his guidelines range violated his Sixth Amendment rights, because it was based in part on judicial factfinding. Second, he contends that the district court's original sentence and refusal to re-sentence him under *Crosby* is substantively unreasonable. For the reasons that follow, the defendant's claims should be rejected, and the judgment should be affirmed.

Statement of the Case

On May 28, 2002, Special Agent Jon Hosney of the Federal Bureau of Investigation ("FBI") appeared before United States Magistrate Judge Holly B. Fitzsimmons and executed an affidavit in support of a complaint charging the defendant with federal narcotics trafficking and firearms offenses. (A 3). The court at that time issued a warrant for the defendant's arrest. (A 3). On June 11, 2002, the warrant was executed and the defendant was presented before United States Magistrate Judge William I. Garfinkel who, with the consent of the United States, released the defendant on an order setting conditions of release. (A 4).

On June 18, 2002, a federal grand jury returned a three-count indictment charging the defendant with Conspiracy to Possess with Intent to Distribute and Distribution of Cocaine and Cocaine Base, in violation of 21 U.S.C. § 846 (Count One), Possession with Intent to Distribute Narcotics, in violation of 21 U.S.C. § 841(a)(1) (Count Two), and Possession of a Firearm by a Convicted Felon, in violation of 18 U.S.C. § 922(g) (Count Three). (A 10-12). The defendant was arraigned on the indictment on July 29, 2002, and was allowed to remain at liberty under the same conditions originally imposed by the court. (A 3-4).

On September 26, 2002, the defendant pleaded guilty to Counts One and Three of the indictment. (A 5, 13-18). The district court sentenced the defendant on July 9, 2003, to 121 months of imprisonment and four years of supervised release on Count One and 120 months of imprisonment and three years of supervised release on Count Two and ordered the sentences to run concurrently. (A 7, 88).

The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on July 18, 2003. (A 7). On April 18, 2005, this Court remanded the matter to the district court for consideration of a re-sentencing under *United States v. Crosby,* 397 F.3d 103 (2d Cir. 2005). (A 8). On April 25, 2006, the district court denied re-sentencing without a hearing. (A 9, 157-168).

STATEMENT OF FACTS

A. Overview of the Investigation

In February 2002, Statewide Narcotics Task Force ("SNTF") agents received information from a confidential informant concerning the purchase of crack cocaine from a person subsequently identified as the defendant. (PSR ¶ 5, A 20). In early March 2002, members of the SNTF met with the confidential informant to set up a controlled purchase of crack cocaine from the defendant. (PSR ¶ 6, A 20). The informant contacted the defendant via his cellular telephone and arranged for a meeting to make the purchase. *Id.* After the purchase, the informant told law enforcement that while in the defendant's car, the defendant produced a bag containing many bags of crack cocaine and removed the amount requested by the informant. *Id.*

Approximately one week later, a transaction was set up between the informant and the defendant for the purpose of making a controlled purchase of crack cocaine and marijuana from the defendant. (PSR ¶ 7, A 20-21). Like before, the informant contacted the defendant on his cellular telephone and arranged the meeting. *Id.* After the transaction was made, the informant turned over a number of bags containing crack cocaine. *Id.*

At about the same time in mid-March, members of the Bridgeport Police Department/Tactical Narcotics Team ("TNT") received information from a confidential source that the defendant was delivering narcotics in Bridgeport in a red Dodge Intrepid. (PSR ¶ 8, A 21). A police officer

observed the defendant in the Intrepid on Park Avenue in Bridgeport, conducting a drug transaction with another person. *Id.* Members of the TNT eventually stopped the defendant's car in Bridgeport. *Id.* The defendant got out of the car and dropped five bags of crack cocaine. *Id.* The defendant was charged by state authorities with two counts of Sale of Illegal Drugs and Possession of Narcotics. *Id.* He was released on bond. (PSR ¶¶ 8-9, A 21, 59).

During the weeks of April 13 and April 20, 2002, members of the SNTF met with the informant for the purpose of making a controlled purchase of crack cocaine and marijuana from the defendant. (PSR ¶¶ 910, A 21). As in previous transactions, the informant contacted the defendant on his cellular telephone and arranged for a meeting to make the drug transaction. *Id.* The CI met with the defendant on both occasions and completed the transaction. *Id.*

On April 24, 2002, a search and seizure warrant was obtained for the first floor apartment at 328 Garfield Avenue in Bridgeport, Connecticut, which was the defendant's residence. (PSR ¶ 11, A 21). Members of the SNTF executed the search warrant and seized 37 grams of crack cocaine and 207 grams of cocaine. *Id.* Also seized from a safe in the bedroom were three handguns: a loaded 9mm Taurus handgun, a .22 caliber Smith & Wesson handgun, and a .22 caliber Davis handgun. *Id.* On May 1, 2002, the defendant was arrested by state authorities and stated that earlier that day, he had purchased 250 grams of cocaine for $6,000 in cash in New York City. (PSR ¶ 12, A 21-22). The defendant admitted that he put the drugs he

purchased inside his apartment. *Id.* He also admitted that the three firearms found inside his apartment were his and that he had purchased them for $150. PSR ¶ 12, A 21-22).

The federal indictment of the defendant was based on these activities.

B. The Indictment

On June 18, 2002, a federal grand jury returned a three-count indictment charging the defendant with Conspiracy to Possess with Intent to Distribute and Distribution of Cocaine and Cocaine Base, in violation of 21 U.S.C. § 846 (Count One), Possession with Intent to Distribute Narcotics, in violation of 21 U.S.C. § 841(a)(1) (Count Two), and Possession of a Firearm by a Convicted Felon, in violation of 18 U.S.C. § 922(g) (Count Three). (A 10-12). The case was assigned to the Honorable Janet Bond Arterton, United States District Judge.

C. The Guilty Plea

On September 26, 2002, the defendant pleaded guilty to Counts One and Three of the indictment in the district court. (A 5, 13-18). The parties did not enter into a guidelines stipulation as part of the plea agreement. (A 13-18).

D. The District Court's Imposition of Sentence and the Initial Remand

At the time of sentencing, the defendant expressly confirmed that he did not dispute the district court's calculation of his criminal history category but instead sought a downward departure on numerous grounds. (A 49-55). Specifically, the defendant sought a departure on the ground of alleged substantial assistance to the government (A 55), his alleged voluntary disclosure of his offense (A 53-54), his alleged extraordinary physical impairment and the conditions the conditions of his pretrial confinement (A 49), all of which were denied by the district court. The district court sentenced the defendant on July 9, 2003 to 121 months of imprisonment and four years of supervised release on Count One and 120 months of imprisonment and three years of supervised release on Count Two and ordered the sentences to run concurrently. (A 7, 88). The defendant timely appealed that sentence. (A 7-8).

On April 18, 2005, this Court remanded the matter to the district court for a determination whether re-sentencing was required under *United States v. Crosby,* 397 F.3d 103 (2d Cir. 2005). (A 8). The defendant, now represented by new counsel, submitted a lengthy written submission in support of his request for resentencing. (A133-56).

E. The District Court's Decision on Remand

On April 25, 2006, the district court denied re-sentencing without a hearing but in a written ruling. (A 9,

157-168). In its ruling, the district court held that it would not have imposed a different sentence had the defendant been sentenced in light of the Supreme Court's ruling in *United States v. Booker*, 543 U.S. 220 (2005) (A 157).

The district court first reviewed the defendant's offense, including the fact that it involved both drugs and handguns. (A 159-60). It then reviewed the bases upon which the defendant originally moved for a downward departure. (A 161-66). It then considered the sentencing guidelines (A 160), and the sentencing factors under 18 U.S.C. § 3553(a) (A 166-68).

The district court also reviewed the defendant's attempted assistance to the Government concerning an uncharged murder. (A 162). As the district court correctly noted, the Government already possessed that information. *Id.* The district court also noted that the defendant, despite his claims otherwise, declined to assist in the Government's investigation and that there was no cooperation agreement entered into between the parties. *Id.* Thus, the district court concluded that there was no basis to conclude that the Government had somehow withheld a substantial assistance motion in bad faith. *Id.*

The district court then spent considerable time reviewing and comparing the defendant's medical condition with the other factors found in § 3553(a). (A 162-66). Finally, the court rejected the defendant's claim that *Shepard v. United States*, 544 U.S. 13 (2005), prohibited the court from enhancing his sentence based on facts concerning his prior convictions. (A 166-67). The

court noted that Colon had accepted the PSR's calculation of his criminal history at his original sentencing, and in any event the court had calculated the defendant's criminal history based solely on the fact and type of convictions, together with the dates of his convictions – all facts that appeared on the face of the relevant criminal judgments, and which Colon himself had admitted by agreeing to the PSR. (A 166-67).

After a thorough analysis, including an examination of the defendant's long history of violence and drug dealing and the seriousness of the defendant's conduct, the district court found that it would not have imposed a materially different sentence had the sentence been imposed under *Booker*. (A 157). Accordingly, the court declined to re-sentence the defendant.

SUMMARY OF ARGUMENT

1. The district court on remand properly determined that the defendant was not entitled to a jury finding on the fact of his prior conviction. First, the defendant waived any challenge to his criminal history category by affirmatively stating to the district court that it was not in dispute. Second, even if the issue had been preserved, there could be no Sixth Amendment violation. When the guidelines are properly treated as advisory, as they were in the *Crosby* remand in this case, the Sixth Amendment permits calculation of the guidelines by reference to judicial factfinding by a preponderance of the evidence. Third, even if advisory guidelines calculations could hypothetically implicate the Sixth Amendment, criminal

history computations fall within the recidivism exception carved out by the Supreme Court in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). As this Court has recognized, the Supreme Court has repeatedly declined to overrule *Almendarez-Torres*, and thus it remains binding precedent. *See United States v. Estrada*, 428 F.3d 387, 391 (2d Cir. 2005), *cert. denied*, 126 S.Ct. 1451 (2006).

2. The 121-month sentence imposed by the district court was reasonable. The district court properly determined that the defendant was not entitled to either a downward departure or a non-guidelines sentence even upon considering the totality of the guidelines and the sentencing factors of 18 U.S.C. § 3553(a). The district court methodically and thoroughly balanced the § 3553 factors and determined that it would not have imposed a different sentence were the guidelines advisory at the time of the defendant's original sentencing. The court imposed a sentence that reflected the nature and circumstances of the offense, the need for specific and general deterrence, punishment and the protection of society from further crime, and that was not greater than necessary. Accordingly, the judgment should be affirmed.

ARGUMENT

I. The District Court Did Not Violate the Sixth Amendment by Calculating the Defendant's Criminal History Category

A. Governing Law and Standard of Review

In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court interpreted the Sixth Amendment right to a trial by jury (as incorporated by the Fourteenth Amendment's Due Process Clause) to hold that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490. The "statutory maximum" under *Apprendi* is "the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Blakely v. Washington*, 542 U.S. 296, 303 (2004). In other words, as the Court recently reaffirmed, "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *United States v. Booker*, 543 U.S. 220, 244 (2005).

Apprendi carves out an express "recidivism" exception: facts pertaining to a defendant's prior convictions may be used to enhance the defendant's sentence even though those facts were not admitted by the defendant or proved

to a jury. 530 U.S. at 489. This exception derives from the Supreme Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). This Court has repeatedly held (consistent with the Supreme Court's own statements) that *Almendarez-Torres* survives *Apprendi*. *See United States v. Santiago*, 268 F.3d 151, 155 (2d Cir. 2001) (rejecting claim that predicate facts supporting sentencing enhancement under 18 U.S.C. § 924(e) must be considered elements of the offense and must be charged in the indictment and found by a jury beyond a reasonable doubt). *See also, e.g., United States v. Martino*, 294 F.3d 346, 349 (2d Cir. 2002) (rejecting claim that prior convictions must be alleged in indictment to implicate mandatory minimum term under 21 U.S.C. § 841); *United States v. Anglin*, 284 F.3d 407, 409 (2d Cir. 2002) (holding that fact of prior conviction is sentencing factor subject to judicial factfinding for purposes of 18 U.S.C. § 924(c)).

B. Discussion

Relying on a concurring opinion in *Shepard v. United States*, 544 U.S. 13 (2005), in which Justice Thomas questioned the continued viability of *Almendarez-Torres,* the defendant argues that the district court improperly found the "fact" of the defendant's prior convictions and that those convictions (and their associated facts, such as the date and type of convictions) either had to be found by a jury beyond a reasonable doubt or admitted by the defendant. This argument fails for three reasons.

First, and most fundamentally, the defendant cannot get around the fact that on page 4 of the sentencing transcript

(A 49), his attorney stated that he did not dispute the criminal history calculation – thereby effectively admitting the relevant facts. The district court expressly reviewed the guidelines calculations, and asked the parties to confirm that, *inter alia*, "the criminal history category of four is also not disputed. Am I correct so far?" Defense counsel immediately responded, "Yes, your Honor." (A 49). As the district court properly found during the *Crosby* remand, the defendant thereby admitted the facts contained in the PSR pertaining to his convictions (including the date and type of convictions) – all of which resulted in the district court's not being called upon "to find any disputed facts underlying the state court convictions, only the fact of the convictions." (A 167).

The defendant's attempt on appeal (represented by new counsel) to explain away his concession in a footnote at the end of his argument – questioning whether it was part of trial counsel's overall sentencing strategy or whether there was some other motive, Def. Br. 16 n.3 – misses the point. Whatever may have been trial counsel's motivation, the fact remains that he specifically confirmed that the defendant fell into Criminal History Category IV. (A 49). In the face of such an express, unequivocal statement in the sentencing record, any subsequent challenge to that finding must be deemed affirmatively waived. *See United States v. Yu-Leung*, 51 F.3d 1116, 1121-22 (2d Cir. 1995) (comparing waiver to forfeiture).

Second, even if this issue had been preserved, the defendant's merits argument misses the central fact that after *Booker* rendered the guidelines advisory, the Sixth

Amendment is no longer implicated when a defendant's guidelines range is calculated by reference to judicial factfinding by a preponderance of the evidence. *See United States v. Gonzalez*, 407 F.3d 118, 125 (2d Cir. 2005) (stating that after *United States v. Booker*, 543 U.S. 220 (2005), and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), preponderance of the evidence standard governs district court's factual findings at sentencing). The defendant here is not claiming that the statutory range of imprisonment he faced was somehow increased by virtue of a past conviction. Instead, he contests only the Criminal History Category into which the district court placed him. In the wake of the district court's reconsideration of his sentence during the *Crosby* remand, that Criminal History Category ultimately served only one purpose – to inform the district court's determination of which advisory guidelines range to consider pursuant to 18 U.S.C. § 3553(a)(4). Because, after *Booker* and in light of the *Crosby* remand, this determination ultimately had no effect on the maximum to which the defendant was lawfully exposed, any potential Sixth Amendment claims drop completely out of the picture.[1]

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[1] The defendant cites *United States v. Fagans*, 406 F.3d 138, 140 (2d Cir. 2005), for the proposition that there is uncertainty surrounding the scope of the prior-conviction exception to the Sixth Amendment. That *dictum*, however well considered, is beside the point in the present case. The reason the Court had occasion to even consider the question of criminal history computation in *Fagans* was to determine whether a pre-*Booker* sentencing, which had occurred under the mandatory Guidelines regime, had to be remanded to the

(continued...)

Third, even if advisory guideline calculations could still hypothetically implicate the Sixth Amendment, this Court has repeatedly rejected the defendant's argument that criminal history calculations implicate that constitutional guarantee, both before and after *Shepard*. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court declined to overrule the "prior conviction" exception set out in *Almendarez-Torres*, noting that the defendant did not contest the validity of *Almendarez-Torres* and that "we need not revisit it for purposes of our decision today to treat the case as a narrow exception to the general rule." In *United States v. Santiago*, 268 F.3d 151 (2d Cir. 2001), this Court weighed in on the post-*Apprendi* validity of the "prior conviction" exception and concluded that "*Almendarez-Torres* remains good law." *See also United States v. Anglin*, 284 F.3d 407, 409 (2d Cir. 2002) (stating that "this Court has repeatedly held that *Almendarez-Torres* survives *Apprendi*"). Accordingly, this Court has demonstrated time and again that notwithstanding any "tension between the spirit of *Booker* . . . and the Supreme Court's decision in *Almendarez-Torres*, the 'prior conviction' exception nonetheless remains the law." *United States v. Estrada*, 428 F.3d 387, 391 (2d Cir. 2005), *cert. denied*, 126 S.Ct. 1451 (2006).

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[1] (...continued)
district court. The defendant in this case has already crossed that bridge. Here, this Court has already remanded the case pursuant to *Crosby*, and Judge Arterton has already had an opportunity to determine (with the benefit of comprehensive briefing from defense counsel) whether or not to resentence.

II. The 121-Month Within-Guidelines Sentence Imposed by the District Court Was Reasonable

A. Governing Law

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

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and

> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established [in the Sentencing Guidelines];
>
> (5) any pertinent policy statement [issued by the Sentencing Commission];
>
> (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
>
> (7) the need to provide restitution to any victims of the offense.

In *Crosby*, this Court explained that, in light of *Booker*, district courts should now engage in a three-step sentencing procedure. First, the district court must determine the applicable Guidelines range, and in so doing, "the sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence." *Crosby*, 397 F.3d at 112. Second, the district court should consider whether a departure from that

Guidelines range is appropriate. *Id.* Third, the court must consider the Guidelines range, "along with all of the factors listed in section 3553(a)," and determine the sentence to impose. *Id.* at 112-13. The fact that the Sentencing Guidelines are no longer mandatory does not reduce them to "a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge." *Id.* at 113. A failure to consider the Guidelines range and instead simply to select a sentence without such consideration is error. *Id.* at 115.

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

As this Court has held, "'reasonableness' is inherently a concept of flexible meaning, generally lacking precise

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

An evaluation of whether the length of the sentence is reasonable will necessarily "focus . . . on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a)." *United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005); *see Booker*, 543 U.S. at 261 (holding that factors in § 3553(a) serve as guides for appellate courts in determining if a sentence is unreasonable). As the Eighth Circuit has observed, a sentence "may be unreasonable if [it] fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice dictated by the facts of the case." *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir.), *cert. denied*, 126 S. Ct. 276 (2005).

To fulfill its duty to consider the Guidelines, the district court will "normally require determination of the applicable Guidelines range." *Id.* at 1002. "An error in

determining the applicable Guideline range . . . would be the type of procedural error that could render a sentence unreasonable under *Booker*." *United States v. Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005); *cf. United States v. Rubenstein*, 403 F.3d 93, 98-99 (2d Cir.) (declining to express opinion on whether an incorrectly calculated Guidelines sentence could nonetheless be reasonable), *cert. denied*, 126 S. Ct. 388 (2005).

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." *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir.), *cert. denied,* 127 S. Ct. 192 (2006); *see also 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.").

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 *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005)) (alteration omitted), *cert. denied*, 126 S. Ct. 2915 (2006).[2]

B. Discussion

The defendant's second claim on appeal is a substantive reasonableness argument. According to the defendant, the district court's sentence of 121 months was unreasonable, and he is entitled to a non-guidelines sentence. To the contrary, the district court, both at the

[2] The Supreme Court has recently granted certiorari in two cases involving the contours of reasonableness review. *See Claiborne v. United States*, ___ U.S. ___, 2006 WL 2187967 and *Rita v. United States*, ___ U.S. ___, 2006 WL 2307774 (Nov. 3, 2006).

original sentencing and in its lengthy written ruling after remand, engaged in an extremely thorough analysis of the pertinent factors under the guidelines and § 3553(a) (A 157-168).

The defendant claims that there are numerous circumstances and characteristics involving the defendant that warrant a "non-guidelines" sentence and that the district court should have considered anew the arguments he made for downward departures now that the Court is not bound by mandatory guideline considerations. The defendant's argument misinterprets sentencing in the post-*Booker* regime.

Sentencing in the post-*Booker* regime, as explained in *Crosby*, now involves two analytic stages: first, a determination of the applicable guidelines range (including any departures); and second, a determination of whether in light of the Guidelines and the other factors listed in § 3553(a), there is any reason to impose a non-guidelines sentence. *Crosby*, 397 F.3d at 113. Thus, while a court may ultimately decide not to impose a Guidelines sentence, it must first determine the appropriate Guidelines range. *Id*.

At the original sentencing, the district court properly determined the appropriate guidelines range for the defendant: Total Offense Level at 29 and Criminal History Category at IV, which placed him in a guidelines range of 121 to 151 months (A 49).

As part of step one of the post-*Booker* regime, the departure issues must still be calculated and a sentencing court is not free simply to disregard them. Rather, they must be considered in reaching the appropriate Guideline range. Only then can the sentencing court make a determination of whether in light of the Guidelines, departure claims and the other factors listed in § 3553(a), there is any reason to impose a non-Guidelines sentence. *Crosby*, 397 F.3d at 113.

The district court correctly determined that the defendant was not entitled to a downward departure for any of the reasons raised at sentencing. These were: (1) that he rendered substantial assistance to the United States and is therefore entitled to a departure pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e) (A 73, 87); (2) that he voluntarily disclosed his participation in two previous murders and is therefore entitled to a downward departure pursuant to U.S.S.G. § 5K2.16 (A 73); (3) that he has an extraordinary physical impairment that qualifies for a downward departure pursuant to U.S.S.G. § 5H1.4 (A 49); and (4) that the conditions of his pretrial confinement represent "an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described" pursuant to U.S.S.G. § 5K2.0 and 18 U.S.C. § 3553(b) (A 49).

Indeed, the district court carefully considered and rejected the departure claims at the time of sentencing. Furthermore, even though the defendant's prior counsel

had conceded that the defendant was not legally entitled to two departures, the Court wisely and correctly determined that the defendant would not have received those departures even if he had not made the concession. The departure issues were fully and fairly litigated at the time of the original sentencing – including those that were conceded. The defendant apparently recognizes that he cannot challenge the district court's discretionary decision not to depart downward under Chapter 5 of the Guidelines Manual,[3] because he frames his claims exclusively under the rubric of seeking a non-guidelines sentence.

The second portion of the post-*Booker* regime requires consideration of the other factors of 18 U.S.C. § 3553(a). As this Court has recognized, the reasonableness inquiry ultimately "will 'focus 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. Fairclough*, 439 F.3d 76, 80 (2d Cir.) (quoting *United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005)), *cert. denied*, 126 S. Ct. 2915 (2006). "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

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[3] *United States v. Stinson*, 465 F.3d 113, 114 (2d Cir. 2006) (per curiam) (re-affirming pre-*Booker* rule that denial of downward departure is generally unreviewable on appeal, absent indication that court misapprehended its authority); *United States v. Valdez*, 426 F.3d 178, 184 (2d Cir. 2005) (same).

about such materials or misperception of their relevance, we will accept that the requisite consideration has occurred." *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005); *see also Fernandez*, 443 F.3d at 30 ("[W]e presume, in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the statutory factors."); *Crosby*, 397 F.3d at 113 (rejecting the need for "robotic incantations" by district judges to demonstrate that they have "considered" the Guidelines).

Reviewing the district court's thorough analysis of the § 3553(a) factors, it is clear that the district court did not exceed the bounds of its discretion, and properly considered those factors as required by *Fernandez*. Because the defendant is essentially challenging nothing more than the particular weight that the district court ascribed to the various factors at issue, his challenge is to a "matter firmly committed to the discretion of the sentencing judge and is beyond our review." *Fernandez*, 443 F.3d at 32.

Even if this Court were to re-examine the particular weight that the district court assigned to the various factors at play here, it should conclude that the sentence imposed by the district court was reasonable.

Focusing on the only § 3553 factor cited by the defendant, the district court reasonably assessed the nature and circumstances of the offense and the history and characteristics of the defendant. Here, we have a drug dealing defendant against whom was attributed only 37

grams of cocaine base and 207 grams of cocaine. (PSR ¶ 14, A 22, 159-160). As the PSR notes, however, "[t]his is a conservative estimate based on the amount of drugs that were seized during the search of Mr. Colon's apartment on May 1, 2002." (PSR ¶ 14, A 22, 164). This represents but one day of the defendant's involvement in the drug conspiracy. (PSR ¶ 14, A 22, 164). Also seized at the time of his arrest were three handguns – seized from a person who already had a manslaughter conviction (A 77,78, 159-160). He had shot and killed another person (A 77-78, 164-165), which of course underscores the history and characteristics of the defendant. Under this first factor, the district court certainly acted reasonably in concluding that, under § 3553, "Colon's history and characteristics weigh in favor of a substantial sentence of incarceration." (A 165).

Also considered under this factor, and relied upon heavily by the defendant, are his medical issues. (A 85-87). Yet the district court considered those issues at length, having reviewed the extensive medical records provided by defense counsel and considered all of these issues notwithstanding that the defendant withdrew his motion for a downward departure on those grounds. *Id.* Again, the district court expressly evaluated the defendant's medical issues in its *Crosby* remand ruling, and determined that it "would not impose a different sentence, based on defendant's health or any other factor, if it were to resentence." (A 166; *see also* A 162-63 (outlining defendant's medical issues); A 165 (acknowledging that "other than defendant's medical problems," Colon's history and characteristics militate in

favor of substantial prison term). Having fully and fairly considered the defendant's medical problems, but determined that other considerations tipped the scales in favor of a 121-month sentence, the district court's decision is "beyond [this Court's] review." *Fernandez*, 443 F.3d at 32.

It bears note that the district court expressly discussed additional § 3553(a) factors as well, including some that the defendant does not discuss on appeal. For example, the district court observed that its sentence was appropriate to serve the need under § 3553(a)(2) for the sentence imposed to reflect the seriousness of the offense (A 164), to promote respect for the law (A 165), and to provide just punishment for the offense, *id.*; to afford adequate deterrence to criminal conduct (A 164); to protect the public from further crimes of the defendant (A 165); and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner (A 158 n.1). This defendant was convicted of two crimes, drug trafficking and possession of deadly weapons. A sentence of ten years reflects exactly how serious the offenses are, promotes respect for the law, and provides just punishment. Drug trafficking is a scourge, and the violence associated with this defendant's drug trafficking places his conduct on a particularly blameworthy level. This is not a situation in which a defendant was, for instance, simply selling drugs to support an addiction. He was part of a major conspiracy over an extended period of time. He had killed for the organization in the past. And he possessed deadly weapons after killing someone.

Knowing this, the district court reasonably declined to impose a non-guideline sentence. (A 164-65).

Finally, under subsection (6), there is the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct. As the district court properly observed, the defendant has pointed to no similarly situated defendants whom he claims received more favorable treatment. (A 166). Indeed, the defendant arguably received somewhat more lenient treatment than he could have faced, given that the district court adopted the PSR's conservative view of the drug quantities for which he was responsible. (PSR ¶ 14, A 22). By sentencing the defendant within his advisory guidelines, the district court properly minimized any unwarranted disparities among offenders who were similarly situated to the defendant.

CONCLUSION

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

Dated: December 11, 2006

Respectfully submitted,
KEVIN J. O'CONNOR

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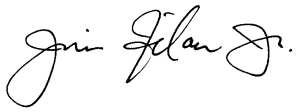

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ADDENDUM

Title 18, United States Code, Section 3553

(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.

(b) Application of guidelines in imposing a sentence.--

(1) In general.--Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.--

(A) Sentencing. – In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless –

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that--

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.--The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence--

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.