

09-2139-cr

To Be Argued By:
EDWARD CHANG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-2139-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

CHARLIE BLOUNT JR.,

Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Alvin W. Thompson, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on March 25, 2009. (Joint Appendix (“A”) 34). On March 30, 2009, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). (*Id.*). This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a).

Issues Presented for Review

1. Did the district court properly exercise its discretion in denying an adjustment for acceptance of responsibility, where the defendant had been arrested for selling heroin after pleading guilty to conspiracy to commit fraud in connection with access devices?

2. Was the 48-month, non-Guidelines sentence imposed by the district court reasonable, where the Guidelines recommended a sentence of 51 to 63 months?

United States Court of Appeals

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Appellee,

-vs-

CHARLIE BLOUNT JR.,

Defendant-Appellant.

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

On September 27, 2006, defendant Charlie Blount Jr. pled guilty to conspiracy to commit fraud in connection with access devices, based on his involvement in a “phishing” scheme. Specifically, the defendant and five co-conspirators sent fraudulent e-mail messages, purporting to originate from financial institutions and other companies, in order to trick victims into disclosing private personal and financial information. The defendant

and his co-conspirators then used the fraudulently obtained information to produce counterfeit debit cards, which they used to obtain money and goods to which they were not entitled.

On March 16, 2009, while on release pending sentencing, the defendant was arrested on state warrants based on allegations that he had made three sales of heroin to an undercover police officer. The Government filed a motion to deny the defendant credit for acceptance of responsibility.

On March 24, 2009, the defendant appeared for sentencing. During the proceedings, the defendant was advised by the district court (Alvin W. Thompson, J.) that he could contest the drug charges in state court if he wanted an opportunity to do so, “[b]ut otherwise” the district court would deny him credit for acceptance of responsibility. The defendant chose to proceed with sentencing.

Accordingly, the district court granted the Government’s motion and, without the adjustment for acceptance of responsibility, calculated a recommended Sentencing Guidelines range of 51 to 63 months of imprisonment. The district court imposed a non-Guidelines sentence, including a term of 48 months in prison.

On appeal, the defendant claims that the district court erred by denying him credit for acceptance of responsibility and by failing to explain its reasons for

doing so. The defendant is mistaken, because the reasons for the district court's decision are clear on the record and because the decision itself is unassailable: A defendant who sells heroin while awaiting sentencing has plainly not accepted responsibility for his criminal conduct.

The district court's judgment should be affirmed.

Statement of the Case

On September 20, 2006, a federal grand jury returned an indictment against the defendant and five co-defendants. (Joint Appendix ("A") at 37-56). The defendant was charged in Count One with conspiracy to commit fraud in connection with access devices, in violation of 18 U.S.C. § 1029(b)(2); in Count Two and Count Six with fraud in connection with access devices, in violation of 18 U.S.C. §§ 1029(a)(3) and (a)(4); and in Count Eight with aggravated identity theft, in violation of 18 U.S.C. § 1028A(a)(1). *See id.*

On September 27, 2006, the defendant pled guilty to Count One of the indictment. (*See A 9*). The remaining counts of the indictment were dismissed as to the defendant on the Government's motion. (*See A 34*).

On March 24, 2009, the district court (Alvin W. Thompson, J.) calculated a recommended Guidelines sentencing range of 51 to 63 months of imprisonment, with no adjustment for acceptance of responsibility. (*See A 68*). The district court then imposed a non-Guidelines

sentence, including a term of 48 months of imprisonment. (See A 96-98).

On March 30, 2009, the defendant filed a timely notice of appeal. (See A 99). The defendant is currently serving his sentence.

Statement of Facts

A. The offense conduct

From August 2004 through April 2006, the defendant and five co-conspirators defrauded customers of America Online (“AOL”) through a series of “phishing” schemes. See Pre-Sentence Report, dated Sept. 18, 2008 (“PSR”), ¶ 7.

A phishing scheme is a scheme to obtain through fraud private personal and financial information, such as names, addresses, dates of birth, Social Security numbers, bank account numbers, credit or debit card numbers, and personal identification numbers (“PINs”). See PSR ¶ 8. In a typical phishing scheme, counterfeit e-mail messages are sent to thousands of potential victims, purporting to originate from banks or other companies that could plausibly be requesting financial information. See PSR ¶ 9.

One phishing scheme used by the defendant and his co-conspirators was particularly sophisticated. See PSR ¶ 13. As Internet users became increasingly wary of phishing schemes, they became less likely to respond to unsolicited

requests for financial information. *See id.* In the scheme used by the defendant and his co-conspirators, potential victims were sent a counterfeit electronic greeting card. *See id.* If the victim viewed the greeting card, he or she would not immediately be asked for financial information. *See id.* Instead, a program was downloaded onto the victim's computer, and the next time the victim attempted to access AOL, the victim would be directed to a counterfeit AOL Internet site and asked to provide updated financial information. *See id.* The scheme was effective because victims were only asked for financial information after having attempted, on their own, to access AOL. *See id.*

The defendant and his co-conspirators used the fraudulently obtained information to purchase goods on the Internet. *See* PSR ¶ 12. They also used the information to produce counterfeit debit cards using a magnetic stripe reader, known as an "MSR 206." *See id.* The counterfeit debit cards were used at ATM machines and retail establishments. *See* PSR ¶ 12. The defendant was involved in all significant aspects of the scheme: sending counterfeit e-mails, producing counterfeit debit cards, and using the counterfeit debit cards. *See* PSR ¶ 16.

The Government identified over 500 individuals who were victims of the phishing schemes. *See* PSR ¶ 17. Because the defendant and his co-conspirators deleted the information after it was used, many other victims of the schemes were never identified. *See id.*

B. The guilty plea and plea agreement

On September 27, 2006, the defendant pled guilty to Count One of the indictment pursuant to a written plea agreement. *See* PSR at 15-26.

In the plea agreement, the parties stipulated to the following offense characteristics: the loss from the offense exceeded \$120,000; the number of victims was 250 or more; and the offense included the possession and use of device-making equipment and the production and trafficking of an unauthorized access device. *See* PSR at 19.

The parties also agreed that, subject to certain conditions, the Government would recommend a three-level reduction in the defendant's Guidelines offense level if he "clearly demonstrate[d] acceptance of responsibility." *See id.* The conditions specified that the Government would *not* make such a recommendation if the defendant engaged in any acts that "(1) indicate that the defendant has not terminated or withdrawn from criminal conduct or associations . . . [or] (3) constitute a violation of any condition of release." *Id.* at 18.

Assuming that the defendant was entitled to the adjustment for acceptance of responsibility, the parties agreed to a recommended Guidelines sentencing range including a term of 37 to 46 months of imprisonment. *See* PSR at 19. The defendant agreed not to appeal or collaterally attack any sentence within or below that range. *See* PSR at 20.

Although the defendant had been providing assistance to law enforcement in connection with the investigation (*see* A 86), the parties never entered a written cooperation agreement.

C. The sentencing proceedings

On January 30, 2009, while the defendant was awaiting sentencing, the Government learned that the defendant was under investigation by the Connecticut Statewide Narcotics Task Force for selling heroin on three occasions to an undercover officer. *See* Sealed Motion, filed Feb. 3, 2009 [Dkt No. 237]. The Government filed an *ex parte* motion to adjourn the sentencing until March, to permit the investigation to be completed. *See id.*

The defendant was arrested on state warrants on March 16, 2009, whereupon the Government filed a motion to deny the defendant the adjustment for acceptance of responsibility. (*See* A 57-58). In the motion, the only basis suggested for denying the adjustment was that “the defendant’s heroin sales demonstrate that he has not withdrawn from criminal conduct” (A 58).

The defendant was sentenced on March 24, 2009. (*See* A 60-94). At the start of the proceedings, the defendant, through counsel, admitted that “it is within the Court’s discretion under the circumstances to deny an adjustment for acceptance of responsibility” (A 63). Nevertheless, the defendant argued that he should be given credit for acceptance, because: (1) there had been no finding of guilt with respect to the heroin charges, so he

was entitled to the presumption of innocence; (2) the defendant had been on release for three years and had been in compliance with the conditions of his release; and (3) the defendant had demonstrated acceptance of responsibility through his guilty plea, his cooperation with the Government, and his remorse. (*See* A 63-64). The defendant also argued that he understood the damage that he had caused the victims and that he wanted to repair that damage. (*See* A 64).

The Government responded that a finding of guilt was not necessary in order to decide whether the adjustment for acceptance of responsibility was warranted. (*See* A 65). The Government also argued that the defendant's heroin sales were more egregious than mere drug use, which had been held a sufficient basis for denying the adjustment in several cases cited by the Government in its motion. (*See* A 65; *see also* A 58).

The district court then inquired whether the defendant had a copy of the police report and a copy of the probation officer's report of violation. (*See* A 65-66). After ensuring that the defendant had been provided the factual basis for the allegations against him, the court observed: "This seems to me to be a case where the defendant does not merit credit for acceptance of responsibility." (A 66). Nevertheless, the court offered the defendant a chance to contest the state charges:

THE COURT: . . . If there's something going on in the state proceedings where you wanted an opportunity to have him be able to contest it and

say I was wrongfully charged, I would be willing to give him an opportunity to do that. But otherwise, I would grant the government's motion. As a matter of fact, I didn't need the motion. I would have not given him credit for acceptance without the motion.

Should we proceed?

MS. MURRAY: We can proceed, Your Honor.

(A 66). Accordingly, the district court granted the Government's motion to deny the defendant credit for acceptance of responsibility. (*See* A 67). The district court then computed a recommended Guidelines sentencing range that included a term of 51 to 63 months of imprisonment. (*See* A 68-71).

After hearing from both parties and the defendant's mother (*see* A 71-81), the district court imposed sentence. First, the court identified the factors that it was required to consider in imposing sentence. (*See* A 82-83). Second, the court explained how it balanced those factors in determining an appropriate sentence for the defendant. (*See* A 83-85). Finally, the court identified the "most significant factors" in its sentencing determination, which included the offense conduct itself, the impact of the crime on the victims, and the defendant's failure to take advantage of the opportunity for rehabilitation during his release pending sentencing. (*See* A 85). In particular, the court observed:

There are many defendants who want to have as much time out [before sentencing] as possible because it gives them an opportunity to show that they are not simply complying with the conditions of release, but they are going beyond all expectations and are doing an extraordinary job. So I considered the fact that the use you made of the time falls short.

(*Id.*). The court also found that the defendant deserved “some benefit” from his cooperation with law enforcement officials. (A 86).

After “balancing all of [those] factors,” the district court imposed a non-Guidelines sentence of 48 months in prison, 3 years of supervised release, restitution in the amount of \$33,714.30, and a \$100 special assessment. (*See* A 86-90; *see also* A 96-98). The court then advised the defendant of his right to appeal, and this appeal followed.

SUMMARY OF ARGUMENT

I. The district court did not commit plain error in denying the defendant credit for acceptance of responsibility. In particular, it is clear from the record that the district court’s decision was based on the fact that the defendant had sold heroin to an undercover officer on three occasions while on release pending sentencing. *See* Point I.C.1., *infra*. There was no other basis suggested for denying the adjustment, and the district court specifically offered to allow the defendant an opportunity to contest

responsibility for the heroin sales. “But otherwise,” the district court stated, it would deny the adjustment. Thus, the record clearly reveals the basis for the district court’s decision.

The decision itself also did not constitute plain error, because this Court’s precedents clearly establish that it is well within a district court’s discretion to deny an adjustment for acceptance of responsibility when a defendant continues to engage in criminal conduct. *See* Point I.C.2., *infra*.

II. The district court’s sentence was substantively reasonable, in light of the offense conduct, the impact of the crime on the victims, and the defendant’s failure to rehabilitate while on release pending sentencing. *See* Point II.C., *infra*. Indeed, the district court actually imposed a below-Guidelines sentence, in light of the cooperation provided to the defendant to law enforcement authorities.

The judgment of the district court should be affirmed.

ARGUMENT

I. The district court did not commit plain error in denying the defendant credit for acceptance of responsibility, because he sold heroin to an undercover officer three times while on release pending sentencing

The district court denied the defendant a downward adjustment for acceptance of responsibility, because the defendant had been selling heroin while released pending sentencing. Although the defendant complains that the district court did not explain the basis for its decision and that the decision itself was in error, neither objection was preserved below.

In fact, the basis for the district court's decision is clear on the record, and the decision itself is unassailable. There was no error by the district court, much less plain error, and its judgment should be affirmed.

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

B. Governing law and standard of review

1. Review for procedural reasonableness

On appeal, a district court's sentencing decision is reviewed for reasonableness. *See United States v. Booker*, 543 U.S. 220, 260-62 (2005). In this context,

reasonableness has both procedural and substantive dimensions. *See United States v. Avello-Alvarez*, 430 F.3d 543, 545 (2d Cir. 2005) (citing *United States v. Crosby*, 397 F.3d 103, 114-15 (2d Cir. 2005)).

“A district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory.” *United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc) (citation omitted). A district court also commits procedural error “if it does not consider the § 3553(a) factors, or rests its sentence on a clearly erroneous finding of fact.” *Id.* Finally, a district court “errs if it fails adequately to explain its chosen sentence, and must include ‘an explanation for any deviation from the Guidelines range.’” *Id.* (quoting *Gall v. United States*, 552 U.S. 38, 51 (2007)).

When a defendant fails to preserve an objection to the procedural reasonableness of a sentence, the plain-error standard of review applies. *See United States v. Verkhoglyad*, 516 F.3d 122, 128 (2d Cir. 2008). To show plain error, a defendant must demonstrate “(1) error (2) that is plain and (3) affects substantial rights.” *United States v. Villafuerte*, 502 F.3d 204, 209 (2d Cir. 2007). Even then, the Court will exercise its discretion to correct the error “only if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings.” *Id.* (internal quotation marks omitted). Reversal for plain error should “be used sparingly, solely in those circumstances in which a miscarriage of justice would

otherwise result.” *Id.* (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)).

2. Acceptance of responsibility

Under the Sentencing Guidelines, a defendant who “clearly demonstrates acceptance of responsibility for his offense” is entitled to a two-level reduction in his offense level. U.S.S.G. § 3E1.1(a) (2008). A defendant whose offense level is 16 or greater before the two-level reduction may be entitled to an additional one-level reduction “by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently.” *Id.* § 3E1.1(b).

The commentary to Guidelines section 3E1.1 identifies a non-exhaustive list of “appropriate considerations” in determining whether an adjustment for acceptance of responsibility is appropriate, including a defendant’s “voluntary termination or withdrawal from criminal conduct or associations.” *Id.* § 3E1.1 cmt. n. 1(b).

If there are disputed issues, the district court must provide the parties with an adequate opportunity to be heard. *See United States v. Jeffers*, 329 F.3d 94, 101-02 (2d Cir. 2003). The court should then make any necessary factual findings “with sufficient clarity to permit appellate review” and “clearly state its resolution of any disputed factors predicated upon its findings.” *Id.* (internal quotation marks omitted).

A district court’s decision to deny an adjustment for acceptance of responsibility is reviewed for clear error and will be reversed only for an abuse of discretion. *See id.* at 101. “The sentencing judge is in a unique position to evaluate a defendant’s acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.” U.S.S.G. § 3E1.1 cmt. n. 5. Accordingly, this Court will not disturb a district court’s “factual determination regarding whether a defendant has accepted responsibility unless it is ‘without foundation.’” *United States v. Guzman*, 282 F.3d 177, 184 (2d Cir. 2002) (quoting *United States v. Austin*, 17 F.3d 27, 30 (2d Cir. 1994)). Where the record sufficiently explains the rationale for the district court’s decision and “no extraordinary circumstance . . . counsel[s] a different result,” the district court’s decision should be upheld. *Jeffers*, 329 F.3d at 102.

C. Discussion

1. The record is sufficient to permit meaningful appellate review

The defendant’s argument—that the district court failed to provide a rationale for denying him credit for acceptance of responsibility—was not raised below. (*See* A 62-66). Accordingly, the plain-error standard of review applies.

In fact, there was no error, much less plain error. Even a cursory examination of the record reveals the basis for the district court’s decision to deny the defendant an

adjustment for acceptance of responsibility. On March 19, 2009, the Government filed a motion asking the district court to deny the adjustment. (*See* A 57). The only basis in the Government’s motion for denying the adjustment was that “the defendant’s heroin sales demonstrate that he has not withdrawn from criminal conduct” (*See* A 57-58).

Likewise, at the sentencing hearing on March 24, 2009, both the defendant and the Government addressed the issue of acceptance of responsibility solely with reference to the defendant’s heroin sales. The defendant, through counsel, admitted that he had been arrested but argued that he was still entitled to a presumption of innocence. (*See* A 63). The defendant also attributed the heroin sales to his drug addiction, and he argued that he had been clean for several years while attempting to address his drug problem. (*See* A 63-64).

The Government responded that a finding of guilt beyond a reasonable doubt as to the heroin sales was not necessary for purposes of the sentencing hearing and that mere drug use—much less drug *sales*—had been held by this Court and others to be a sufficient basis for denying credit for acceptance of responsibility. (*See* A 65).

After allowing the parties an opportunity to be heard, the district court asked whether the defendant had been provided with a copy of the police report and the probation officer’s report of violation. (*See* A 65-66). With respect to the probation officer’s report, the district court inquired:

THE COURT: The report states that he allegedly sold narcotics to an undercover police officer on three occasions?

MS. MURRAY: This is my understanding, Your Honor, yes.

(A 66). The district court continued:

THE COURT: And my reaction to that report was to approve a recommendation that the defendant's bond be revoked and a warrant be issued.

MS. MURRAY: Yes, Your Honor.

(*Id.*). In other words, the defendant did not deny making the heroin sales, nor did the defendant claim that the district court erred in revoking his bond. (*See id.*).

The district court then offered the defendant a final opportunity to contest responsibility for the heroin sales:

THE COURT: . . . If there's something going on in the state proceedings where you wanted an opportunity to have him be able to contest it and say I was wrongfully charged, I would be willing to give him an opportunity to do that. *But otherwise, I would grant the government's motion. As a matter of fact, I didn't need the motion. I would have not given him credit for acceptance without the motion.*

Should we proceed?

MS. MURRAY: We can proceed, Your Honor.

(A 66 (emphasis added)).

From the record, it is obvious that the district court denied the defendant an adjustment for acceptance of responsibility because of the heroin sales. Had the defendant wanted to contest liability for the heroin sales, the district court offered to allow him an opportunity to do so “[b]ut otherwise” determined to grant the Government’s motion. (A 66). The district court’s statement—that it would grant the Government’s motion unless the defendant wanted to dispute the heroin sales—makes clear that the defendant’s heroin sales were the basis for the district court’s decision.

Moreover, there was absolutely no other basis in the record, other than the heroin sales, for denying the defendant an adjustment for acceptance of responsibility. That was the only basis suggested by the Government in its motion, and that was the only issue argued by the parties at sentencing. Under those circumstances, where there is only a “single issue presented to the district court, the basis of the court’s ruling is plain.” *United States v. Gambino*, 106 F.3d 1105, 1111 (2d Cir. 1997) (rejecting claim that district court’s findings with respect to safety-valve eligibility were inadequate where sole issue was defendant’s credibility).

The defendant inexplicably claims that “the record provides no indicia of the district court’s reasoning,” Brief for Defendant-Appellant Charles Blount, Jr (“Def. Br.”) at 7, and that the reasons behind the district court’s decision “remain a mystery,” *id.* at 8. As argued above, the defendant’s claim is meritless. The defendant entirely ignores the significance of the district court’s offer to allow the defendant an opportunity to contest the charges related to the heroin sales “[b]ut otherwise” deciding to deny credit for acceptance of responsibility. The defendant also ignores the fact that the heroin sales were the sole focus of the parties’ arguments and that there was no other basis available to the district court for denying the defendant credit for acceptance of responsibility. The record, in short, makes very clear that the defendant’s heroin sales provided the basis for the district court’s decision.

The defendant also claims, mistakenly, that “a complex calculation taking multiple factors into consideration” is required before deciding whether to grant an adjustment for acceptance of responsibility. *See id.* at 10. While some cases may require a closer consideration, it is by no means true that a complex calculation is required in all.

In particular, this Court has repeatedly held that a defendant who engages in criminal conduct after pleading guilty may properly be denied credit for acceptance of responsibility. *See, e.g., United States v. Ortiz*, 218 F.3d 107, 109 (2d Cir. 2000) (*per curiam*); *United States v. Fernandez*, 127 F.3d 277, 285 (2d Cir. 1997); *United States v. Olvera*, 954 F.2d 788, 793 (2d Cir. 1992); *cf.*

Puckett v. United States, 129 S. Ct. 1423, 1433 (2009) (observing that adjustment for acceptance of responsibility would have been “ludicrous” where defendant did not cease criminal conduct). Indeed, “[t]he only conclusion to be drawn from such post-plea conduct is that it is inconsistent with a full and ungrudging acceptance of responsibility.” *Guzman*, 282 F.3d at 185. Given the precedents of this Court, it was not necessary for the district court to engage in any elaborate analysis before concluding that the defendant’s heroin sales provided an adequate foundation on which to deny an adjustment for acceptance of responsibility.

In sum, the record sufficiently explains the rationale for the district court’s decision and provides an adequate basis for meaningful appellate review.

2. The district court properly denied an adjustment for acceptance of responsibility

The defendant also argues that the district court decision denying him credit for acceptance of responsibility was in error. Not only did the defendant fail to raise this argument below, he specifically conceded that “it [was] within the Court’s discretion under the circumstances to deny an adjustment” (A 83). Accordingly, the plain-error standard of review applies.

In fact, there was no error, much less plain error, in denying the adjustment for acceptance of responsibility. As argued earlier, this Court has repeatedly held that a defendant who engages in criminal conduct after pleading

guilty may properly be denied the adjustment. *See, e.g., Ortiz*, 218 F.3d at 109; *Fernandez*, 127 F.3d at 285; *Olvera*, 954 F.2d at 793; *see also Puckett*, 129 S. Ct. at 1433.

In this case, where the defendant made three sales of heroin to an undercover officer (*see* A 66), the district court was entitled to conclude that the defendant had not voluntarily withdrawn from criminal conduct and had not adequately accepted responsibility with respect to the conduct underlying the offense of conviction. At a minimum, it was not plain error for the district court to make such a finding, and that finding was not “without foundation.” Therefore, the district court’s decision to deny credit for acceptance of responsibility should be upheld.

The defendant’s arguments to the contrary are misguided in several respects. First, the defendant continues to claim that he was merely arrested for the heroin sales, not convicted, and therefore entitled to the presumption of innocence. *See* Def. Br. at 10. Obviously, the district court could not, and did not, sentence the defendant on any pending state criminal charges relating to the heroin sales. But it was entirely proper for the district court to consider the defendant’s heroin sales themselves—after giving the defendant multiple opportunities to contest culpability with respect to those sales—in deciding whether to grant an adjustment for acceptance of responsibility with respect to the offense of conviction.

Indeed, it would even have been permissible for the district court to consider ostensibly innocent conduct, conduct for which the defendant was never arrested or charged, if such conduct was pertinent to the defendant's acceptance of responsibility. *See Guzman*, 282 F.3d at 184-85 (holding that district court properly denied adjustment for acceptance of responsibility with respect to document fraud defendant who was observed on several occasions in vicinity of Motor Vehicles Department, notwithstanding defendant's claim that his presence there was innocent). *A fortiori*, it was not error for the district court to consider the defendant's arrest for selling heroin, a criminal offense as to which the Government had proffered a factual basis and which the defendant chose not to contest.

Second, the defendant points out that his post-plea arrest created no *per se* bar to an adjustment for acceptance of responsibility. *See* Def. Br. at 10. But even assuming that the district court could have granted the defendant such an adjustment, it does not follow that the district court erred in declining to do so. To the contrary, several decisions of this Court hold that the district court acted well within its discretion in denying the adjustment for acceptance of responsibility.

Third, the defendant argues that the district court was required to consider his "history and characteristics" in fashioning a sentence, citing 18 U.S.C. § 3553(a). *See* Def. Br. at 10-11. But section 3553(a) governs the district court's ultimate sentencing decision, rather than its decision as to whether an adjustment for acceptance of

responsibility is appropriate under § 3E1.1 of the Sentencing Guidelines. The defendant cites no authority for importing the § 3553(a) factors into § 3E1.1 of the Sentencing Guidelines, and the Government is not aware of any.

Finally, the defendant complains that the district court did not give adequate weight to his “three years of compliance with pretrial release and law-abiding behavior and efforts at rehabilitation.” Def. Br. at 11. While such considerations may have been pertinent, it was not plain error for the district court to conclude that the defendant’s efforts at rehabilitation and compliance with conditions of pretrial release were outweighed by his decision to sell heroin. The defendant sold heroin, not once, but *three times* to an undercover officer. Under the circumstances, the district court’s decision to deny credit for acceptance of responsibility was not “without foundation” and should be upheld.

II. The 48-month, non-Guidelines sentence imposed by the district court was substantively reasonable, where the Guidelines recommended a sentence of 51 to 63 months in prison

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the “Statement of Facts” above.

B. Governing law and standard of review

At sentencing, a district court must begin by calculating the applicable Guidelines range. *See Cavera*, 550 F.3d at 189. “The Guidelines provide the ‘starting point and the initial benchmark’ for sentencing, and district courts must ‘remain cognizant of them throughout the sentencing process.’” *Id.* (citations omitted) (quoting *Gall*, 552 U.S. at 49 (2007)).

After giving both parties an opportunity to be heard, the district court should then consider all of the factors under 18 U.S.C. § 3553(a). *See Gall*, 552 U.S. at 49-50. Because the Guidelines are only advisory, district courts are “generally free to impose sentences outside the recommended range.” *Cavera*, 550 F.3d at 189. “When they do so, however, they ‘must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.’” *Id.* (quoting *Gall*, 552 U.S. at 50).

If the district court committed no procedural error, this Court reviews the sentence for substantive reasonableness under an abuse-of-discretion standard. *See Gall*, 552 U.S. at 51. At this stage, the Court “may consider whether a factor relied on by a sentencing court can bear the weight assigned to it.” *Cavera*, 550 F.3d at 191. But the Court “will not substitute [its] own judgment for the district court’s . . .”; rather, a district court’s sentence may be set aside “only in exceptional cases where [its] decision cannot be located within the range of permissible decisions.” *Id.* at 189 (internal quotation marks omitted);

see also Verkhoglyad, 516 F.3d at 134 (“Our review of sentences for reasonableness thus exhibits restraint, not micromanagement.” (internal quotation marks omitted)).

A sentence is substantively unreasonable only in the “rare case” where the sentence would “damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law.” *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009).

While the Court does not presume that a Guidelines sentence is reasonable, “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. 2006).

The Court has not yet decided whether the plain-error standard applies when a defendant fails to preserve an objection to the substantive reasonableness of a sentence. *See Verkhoglyad*, 516 F.3d at 134; *cf. Puckett v. United States*, 129 S. Ct. 1423, 1429 (2009) (observing that Supreme Court has “repeatedly cautioned” against creating exceptions to plain-error standard).

C. The sentence imposed was substantively reasonable

On the issue of substantive reasonableness, the defendant claims that the sentence imposed was “greater than necessary” to comply with 18 U.S.C. § 3553. Def.

Br. at 12. The defendant did not preserve this claim below, and on appeal, the only basis asserted for the claim is that the district court erred in denying him an adjustment for acceptance of responsibility. *See id.*

Because the district court's decision was not erroneous, *see* Point I.C.2., *supra*, the only issue for this Court to consider is the defendant's generic complaint that the sentence was excessive.

In fact, the sentence imposed by the district court was entirely reasonable. The defendant and his co-conspirators used a sophisticated phishing scheme to trick hundreds of victims into disclosing private personal and financial information. *See* PSR ¶ 13 & 19. The defendant was involved in all significant aspects of the scheme, from "spamming" counterfeit e-mail messages to creating and using counterfeit debit cards. *See* PSR ¶ 16. Even after pleading guilty to the phishing scheme, the defendant engaged in new unlawful conduct: selling heroin. (*See* A 66). Based on the defendant's conduct and his lack of any criminal history, the defendant's recommended Guidelines sentencing range was correctly determined to include a term of 51 to 63 months of imprisonment.

In sentencing the defendant, the district court identified the "most significant factors" in its sentencing determination, which included the offense conduct itself, the impact of the crime on the victims, and the defendant's failure to take advantage of the opportunity for rehabilitation during his release pending sentencing. (*See* A 82-85). Taking into consideration the defendant's

cooperation with law enforcement authorities, the district court imposed a below-Guidelines sentence of 48 months of imprisonment. (*See* A 86). The factors identified by the district court easily “bear the weight” of the sentence imposed. *See Rigas*, 583 F.3d at 122 (internal quotation marks omitted).

Moreover, the imposition of a sentence *below* the recommended Guidelines range is very strong evidence that the sentence was not unreasonably long, given the institutional capacity of the United States Sentencing Commission “to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise.” *Kimbrough v. United States*, 552 U.S. 85, 109 (2007) (internal quotation marks omitted); *see also Rigas*, 583 F.3d at 121-24 (affirming below-Guidelines sentence); *United States v. Giovanelli*, 464 F.3d 346, 354-55 (2d Cir. 2006) (per curiam) (same); *United States v. Kane*, 452 F.3d 140, 144-45 (2d Cir. 2006) (per curiam) (same). The Commission’s recommended sentencing range ordinarily “will reflect[s] a rough approximation of sentences that might achieve § 3553(a)’s objectives.” *Kimbrough*, 552 U.S. at 109 (internal quotation marks omitted).

Finally, of course, the defendant should not be asking this Court merely to substitute its own judgment for that of the district court. *See Cavera*, 550 F.3d at 189; *Kane*, 452 F.3d at 144-45; *see also Kimbrough*, 552 U.S. at 109 (recognizing particular institutional competence of sentencing judge). The only question is whether the district court’s sentence was “within the range of

permissible decisions”; because it was, the district court’s judgment should be affirmed.

CONCLUSION

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

Dated: January 7, 2010

Respectfully submitted,

NORA R. DANNEHY
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A handwritten signature in cursive script, appearing to read "Edward Chang".

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Assistant United States Attorney (of counsel)

ADDENDUM

§ 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.

* * *

(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.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Blount

Docket Number: 09-2139-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 1/8/2010) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: January 8, 2010

CERTIFICATE OF SERVICE

09-2139-cr USA v. Blount

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

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Notary Public:

Sworn to me this

January 8, 2010

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