# 09-3308-cr

*To Be Argued By*:
CHRISTOPHER M. MATTEI

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# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 09-3308-cr**

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UNITED STATES OF AMERICA,
*Appellee,*

-vs-

JAMES NELSON,
*Defendant-Appellant.*

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

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## BRIEF FOR THE UNITED STATES OF AMERICA

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## Statement of Jurisdiction

This is an appeal from a judgment entered on July 14, 2009 in the District of Connecticut (Christopher F. Droney, J.) after the defendant pleaded guilty to possession with the intent to distribute five grams or more of a mixture and substance containing a detectable amount of cocaine base ("crack"). A 130.[1] The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on July 10, 2009, A 133, and this Court has appellate jurisdiction over the defendant's challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

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[1] The defendant's appendix will be cited as "A" followed by the page number.

## Statement of Issues
## Presented for Review

1. Whether the defendant's appeal should be dismissed because he knowingly and voluntarily waived his right to appeal any incarceration term that did not exceed 137 months, and he was sentenced to 110 months' incarceration.

2. Whether a sentence of 110 months' incarceration, which was the bottom of the applicable guideline range, was substantively reasonable in light of the sentencing factors set forth at 18 U.S.C. § 3553(a).

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 09-3308-cr**

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UNITED STATES OF AMERICA,
*Appellee,*

-vs-

JAMES NELSON,
*Defendant-Appellant.*

---

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

---

## BRIEF FOR THE UNITED STATES OF AMERICA

---

### Preliminary Statement

During March and April 2008, the defendant-appellant, James Nelson, twice sold re-distribution quantities of cocaine base to individuals who were working with law enforcement. On September 26, 2008, the defendant waived his right to be indicted and entered a guilty plea to a one-count Information charging him with possession with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841 (b)(1)(B). In pleading guilty, the defendant entered into a

written plea agreement, under which he agreed to waive his right to appeal any incarceration term which did not exceed 137 months. On July 7, 2009, the district court sentenced the defendant to 110 months' imprisonment and four years' supervised release.

On appeal, the defendant challenges the enforceability of the plea agreement's appeal waiver and also argues that his sentence was substantively unreasonable. As set forth below, the defendant has waived his right to appeal his sentence and, regardless of any waiver, the sentence itself was substantively reasonable. The judgment in this case, therefore, should be affirmed.

## Statement of the Case

On September 26, 2008, the defendant waived his right to be indicted and pleaded guilty to a one-count Information charging him with possession with intent to distribute five grams or more of a mixture and substance containing a detectable amount of cocaine base, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B). A 22, 57. The defendant entered his guilty plea pursuant to a written plea agreement. A 12-21. In that agreement, the defendant waived his right to appeal any sentence of incarceration that did not exceed 137 months. A 16.

On July 7, 2009, the district court (Christopher F. Droney, J.) sentenced the defendant to a term of 108 months' incarceration, followed by a term of four years' supervised release. A 124-125. The court entered

judgment on July 14, 2009. A 130-132. On July 10, 2009, the defendant filed his notice of appeal. A 133.

## Statement of Facts

### A. Factual basis

Had the case against the defendant gone to trial, the Government would have presented the following facts, which were set forth in the PSR[2] (sealed appendix):

On March 13, 2008, agents with the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") received information from a confidential informant ("CI") that the CI had arranged to purchase approximately one ounce of cocaine base ("crack") from an individual who was later identified as the defendant. PSR ¶ 8. ATF then equipped the CI with an audio/video recording device and provided the CI with $950 in ATF funds. PSR ¶ 8. The CI then proceeded, under surveillance, to the Farnum Court housing project in New Haven, Connecticut. PSR ¶ 8. The CI met the defendant within the housing complex, and followed him to a residence located at 184 Hamilton Street, Apartment 504. PSR ¶ 9. Upon entering that residence, the defendant provided the CI with 21.5 grams of crack in exchange for $950. PSR ¶¶ 9, 11.

On April 30, 2008, officers with the Connecticut State Police ("CSP") utilized a cooperating witness ("CW") to purchase an additional quantity of cocaine base from the

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[2] The Government will cite the PSR directly.

defendant. PSR ¶ 13. In connection with that transaction, CSP provided the CW with $900 in CSP purchase funds. PSR ¶ 13. The CW traveled to the vicinity of Wallace and Walnut Streets in New Haven where he met with the defendant. PSR ¶ 14. The defendant provided the CW with eight individually wrapped chunks of crack, which had a total approximate weight of 24 grams. PSR ¶ 14.

**B. Guilty plea**

On September 26, 2008, the defendant waived his right to be indicted and pleaded guilty to a one-count Information charging him with possession with intent to distribute five grams or more of a mixture and substance containing a detectable amount of cocaine base (crack"), in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). A 22-62. The defendant entered his plea pursuant to a written plea agreement. A 12-21. In the agreement, the parties entered into a factual stipulation in which the defendant acknowledged that "the total relevant quantity of narcotics attributable to [him] as a result of his conduct on March 13, 2008 and April 30, 2008 is at least 35 grams but less than 50 grams of cocaine base." A 21.

In addition, the parties entered into a sentencing guidelines stipulation. A 15. They agreed that the defendant appeared to be a career offender based on his "two prior felony convictions for crimes of violence" and faced a guideline incarceration range of 188-235 months. A 15. The defendant reserved the right to challenge his status as a career offender, under U.S.S.G. § 4B1.1(a). A 15.

The parties also agreed that, if the defendant was successful in challenging his career offender status, he would face a guideline incarceration range under § 2D1.1 of 110-137 months, based on the quantity of cocaine base involved in his offense, a reduction for acceptance of responsibility and the fact that he fell into Criminal History Category VI. A 15-16.

The defendant waived his right to appeal any incarceration term that did not exceed 137 months. Specifically, the appeal waiver provision provided as follows:

> The defendant acknowledges that under certain circumstances he is entitled to appeal his conviction and sentence. 18 U.S.C. § 3742. It is specifically agreed that, absent objection to his status as a career offender, the defendant will not appeal or collaterally attack in any proceeding, including but not limited to a motion under 28 U.S.C. § 2255 and/or § 2241, the conviction or sentence of imprisonment imposed by the Court if that sentence does not exceed 235 months' incarceration. In the event the defendant objects to his status as a career offender, he will not appeal or collaterally attack in any proceeding, including but not limited to a motion under 28 U.S.C. § 2255 and/or § 2241, the conviction or sentence of imprisonment imposed by the Court if that sentence does not exceed 137 months' incarceration. The defendant so agrees even if the Court reaches a sentencing range permitting such

> a sentence by a Guideline analysis different from that anticipated by the parties. The defendant expressly acknowledges that he is knowingly and intelligently waiving his appellate rights.

A 16.

During the plea colloquy, the district court conducted a thorough Rule 11 canvas. The court placed the defendant under oath, and confirmed the defendant understood that any false statements would be subject to the penalties for perjury and making a false statement. A 26. The court then confirmed that the defendant was of sound mind and fully aware of the nature of the plea proceeding. A 26-28. The court reviewed, *inter alia*, the defendant's trial rights, the nature the charge to which he was pleading, the maximum and mandatory minimum statutory penalties, and the sentencing guidelines. A 24-25, 32-33, 36-37, 47-53, 57. The district court also confirmed that there was a factual basis for the plea and determined that the defendant's plea was voluntary and did not result from force, threats, or promises (other than the promises in a plea agreement). A 39-40, 46-47, 54-57.

The Government reviewed the plea agreement and specifically discussed the appeal waiver provision, as follows:

> [T]he defendant has agreed to waive his right to appeal or collaterally attack his sentence under each of the two guideline stipulations presented there. If he is a career offender, he's agreed he will not

> appeal his sentence if it does not exceed 235 months. If he's not a career offender, he will not appeal his sentence so long as it does not exceed 137 months.

A 39. Defense counsel further explained the appeal waiver provision to the court, as follows:

> With respect to the waiver of right to appeal or collaterally attack the sentence, there are, consistent with the two potential guideline applications set forth in the agreement, two different possible waivers. . . . If we object to the career offender guideline status, the appeal waiver then is for any sentence that is 137 or more, over 137 months. In essence, that's something we would be able to appeal if we object.

A 43. The court then asked, "And if he does not object, then the appeals waiver would be effective for any sentence of imprisonment that would not exceed 235 months?" A 43. Defense counsel replied, "That's right." A 43.

The district specifically canvassed the defendant on the appeal waiver provision, as required by Rule 11:

> Court: First, I want to make sure you understand that appeals waiver section, Mr. Nelson. It's a little complicated. Mr. Thomas has just summarized it a but, but as I understand it, if you object to your status as a career offender, then you

may not appeal the sentence of incarceration by the Court that exceeds 137 months incarceration. Is that right, Mr. Thomas?

Mr. Thomas: Yes, your Honor.

Court: If you do not object to your status as a career offender, then you would not be able to appeal the sentence that the Court imposes that does not exceed 235 months incarceration. Do you understand that?

The defendant: Yes, I do.

Court: And it's both by way of direct appeal and habeas corpus petition. Those Sections 2255, 2241 that's in that paragraph, those are habeas corpus statutes. So your appeals waiver applies to both what's called a direct appeal of your conviction and sentence and then the habeas petitions as well. Do you understand that?

The defendant: Yes.

A 45-46.

**C. Sentencing Proceeding**

The PSR found that the applicable base offense level, under Chapter Two of the Sentencing Guidelines, was 28 because the defendant possessed with the intent to distribute at least 35 grams, but less than 50 grams, of

crack cocaine. PSR ¶ 22. The PSR subtracted three levels for acceptance of responsibility to arrive at a total offense level of 25. PSR ¶ 29. The PSR calculated that the defendant had accumulated 14 criminal history points and fell into Criminal History Category VI. PSR ¶ 39. At an offense level of 25 and a Criminal History Category VI, the defendant faced a guideline range of 110-137 months' imprisonment. PSR ¶ 76. The PSR described the offense conduct and reviewed the facts underlying each of his prior convictions. PSR ¶¶ 7-16, 30-38. The PSR also discussed the defendant's personal background, education, employment, substance abuse history, and mental and emotional health. PSR ¶¶ 42-74. The PSR did not identify any grounds for a departure or a non-guidelines sentence. PSR ¶ 85.

On June 24, 2009, the defendant filed his sentencing memorandum and argued for a non-guidelines sentence of five years' imprisonment. A 69. In support of his request, the defendant urged the district court to consider the unwarranted disparity between the penalties applicable to crack cocaine and powder cocaine offenses. A 63-69. The defendant also argued that he did not qualify as a career offender under U.S.S.G. § 4B1.1. A 62-63.

On the same date, the Government filed its sentencing memorandum. A 84. The Government conceded that the defendant did not qualify as a career offender and acknowledged that the then-existing disparity between penalties for cocaine base and cocaine offenses was unwarranted. A 85, 93. The Government argued, however, that the § 3553(a) factors, taken together,

militated in favor of a sentence at the top of the Chapter Two guideline range.

The sentencing hearing occurred on July 7, 2009. A 7. At the start of the hearing, the district court stated that it had reviewed the parties' memoranda, the PSR and its two addenda. A 97-98. The court then confirmed that the defendant had reviewed the PSR with his attorney and noted that the defendant had objected to certain paragraphs of the PSR. A 98. In particular, the defendant objected to the PSR's summaries of the circumstances underlying the defendant's prior convictions, which appeared at paragraphs 32, 33, 34, 36, 37 and 38 of the PSR. A 99. The Government argued that there was a sufficient factual basis to support the statements in the PSR regarding the defendant's prior first degree robbery and risk of injury convictions. A 100. The district court sustained the defendant's objection and did not consider the facts underlying any of those convictions. A 105. Other than those paragraphs, the district court adopted the PSR as its findings of fact and accepted the plea agreement as adequately reflecting the "seriousness of the actual offense behavior." A 107. Finally, the court reviewed the maximum and mandatory minimum statutory penalties and repeated the PSR's calculation of the guideline range of 110-137 months' incarceration. A 108.

The district court then entertained remarks from the Government, defense counsel and the defendant. A 109-120. The Government emphasized the seriousness of the offense conduct, pointing out that the defendant had sold crack cocaine in a public housing project and in close

proximity to a young child. A 110. Moreover, the defendant had engaged in the offense conduct in this case while on parole and after having accumulated a lifetime of serious narcotics, weapons-related, and violent felony convictions, including convictions for first degree robbery and risk of injury to a minor. A 110-111. As the Government argued, the defendant had a history of violating terms of court-ordered supervision and had not been deterred from engaging in criminal conduct by prior terms of state incarceration. A 111.

Defense counsel argued, as he had in his sentencing memorandum, that the disparity between the crack and powder cocaine penalties was unwarranted and did not reflect the § 3553(a) factors. A 113-114. He pointed out that the powder range for the same offense conduct would fall below the 60 month mandatory minimum sentence and, for this reason, requested a sentence of 60 months' incarceration. A 115. The defendant also addressed the court, discussed his family upbringing, his mother's addiction to crack cocaine, his own experiences with substance abuse, and his plans for the future. A 117-119.

After hearing these remarks, the district court reviewed the various factors it had to consider under 18 U.S.C. § 3553(a), including the advisory sentencing guideline range. A 120-121. It explained that, under § 3553(a), it was obligated to "impose a sentence sufficient, but not greater than necessary, to comply with the purposes of sentencing." A 122. Moreover, the court reviewed its obligation to "provide just punishment," and "part of the meaning of a just punishment is that it not be unduly

different from sentences received by defendants with similar records who have been convicted of similar conduct." A 122.

After reviewing the various purposes of sentencing, the court ruled that neither a downward departure, nor a non-guideline sentence was appropriate. A 123. Specifically, it stated, "I've also determined that Mr. Nelson should be sentenced within the guidelines range that I have found. However, I note for the record I would give him the same sentence were I to impose a non-guideline sentence." A 123. The court specifically recognized its "authority to not follow the applicable cocaine base quantity guidelines in the United States Sentencing Guidelines based on the United States Supreme Court decisions such as *Gall*, *Kimbrough* and *Rita*." A 123. The court concluded, "I've decided to not exercise my discretion to vary from th[e] guidelines after applying the factors of 18 U.S.C. § 3553(a) to Mr. Nelson." A 123.

In deciding where within the guideline range to sentence the defendant, the court found several facts to be significant. First, the defendant had engaged in two sales of considerable amounts of crack cocaine. A 123. Second, the defendant had a "very substantial and disturbing prior criminal record, including risk of injury, robbery in the first degree, drug and gun offenses." A 124. Third, the defendant had "already served considerable periods of incarceration in sate prison and was on state parole at the time of the two crack sales here." A 124. Finally, the defendant "had a very difficult childhood with no father and a mother who was addicted to drugs. [He]

was essentially on his own since age 15 and developed his own drug and alcohol problems at a very early age." A 124. The court then imposed a term of imprisonment of 110 months' imprisonment, which was the bottom of the guideline range, a supervised release term of four years and a $100 mandatory special assessment. A 124-125.

## Summary of Argument

The defendant's appeal is barred by the appellate waiver provision of his plea agreement, which he knowingly and voluntarily entered and which applies to any term of incarceration that does not exceed 137 months. Even if the appeal waiver is deemed to be unenforceable, however, the district's court's guideline incarceration sentence of 110 months was substantively reasonable in light of the § 3553(a) factors.

## Argument

### I. This appeal should be dismissed because the defendant knowingly and voluntarily waived his right to appeal any term of incarceration that did not exceed 137 months.

#### 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

A defendant's knowing and voluntary waiver of his right to appeal a conviction and sentence within an agreed upon guideline range is enforceable. *See United States v. Hernandez*, 242 F.3d 110, 113 (2d Cir.2001) (per curiam). "Waivers of appellate rights . . . are to be applied narrowly and construed strictly against the Government." *Id.* (internal quotation marks omitted). However, "[i]n no circumstance . . . may a defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement." *United States v. Salcido-Contreras*, 990 F.2d 51, 53 (2d Cir.1993) (per curiam).

Although appeal waivers are construed narrowly against the government, they are also interpreted according to basic principles of contract law. *See United States v. Stearns*, 479 F.3d 175, 179 (2d Cir. 2007). Where an

appellate waiver pertains to the incarceration component of the sentence, but is silent as to supervised release, a fine or any other component of the sentence, the waiver is enforceable as to the term of incarceration and unenforceable as to the other components of the sentence. *See United States v. Oladimeji*, 463 F.3d 152, 156-57 (2d Cir. 2006) (holding that, where appellate waiver covered a particular prison term, but was silent as to restitution, an appeal of the district court's restitution order was permissible); *United States v. Cunningham*, 292 F.3d 115, 117 (2d Cir. 2002) (holding that, where appellate waiver specified that defendant could not appeal a prison term of time served, but was silent as to supervised release, the defendant could challenge imposition of a two-year term of supervised release); *see also United States v. Cope*, 527 F.3d 944, 950-51 (9th Cir.), *cert. denied*, 129 S. Ct. 321 (2008) (allowing appeal of supervised release component of sentence because appellate waiver's supervised release provision was ambiguous).

**C. Discussion**

The defendant does not claim that he entered into his appellate waiver, his guilty plea or his written plea agreement unknowingly or involuntarily, and he acknowledges that his 110 month incarceration term falls underneath the 137-month cap in the written appellate waiver. Instead, he claims that the waiver does not preclude his appeal because it only applies to a "sentence" of 137 months' imprisonment or less, and his sentence, which includes a term of supervised release and a

mandatory special assessment, does not fall within that range. *See* Def.'s Brief at 8-9.

The construction advocated by the defendant misconstrues the plain language of the waiver, which precludes an appeal of any sentence that does not exceed 137 months' incarceration. A 16. This provision, read in accordance with basic contract principles, waives the defendant's right to appeal only the incarceration portion of a sentence and does not preclude appeal of the supervised release term, the fine, the special assessment or any other non-incarceration component of the sentence. *See Oladimeji*, 463 F.3d at 156-57; *Cunningham*, 292 F.3d at 117; *Cope*, 527 F.3d at 950-51. Because the defendant's appeal only challenges the length of his incarceration, it is barred by the appellate waiver.

Moreover, a review of the record leaves no doubt that the parties intended the appeal waiver to preclude an appeal to challenge a term of incarceration below 137 months' imprisonment, even if the total "sentence" included other terms. The written plea agreement specifically states that the defendant waives his right to appeal any sentence that does not exceed "137 months' incarceration." A 16. Both the prosecutor and defense counsel, in explaining this portion of the plea agreement, stated that the defendant was waiving his right to appeal any sentence that did not exceed 137 months. A 39, 43. In addition, the district court, in cavassing the defendant on the waiver, specifically referred to a "sentence of incarceration," making it clear that the waiver referred to the incarceration portion of the sentence. A 45-46.

If the plea agreement were interpreted, as the defendant suggests, to preclude an appeal for a sentence that only included a term of incarceration, it would never apply in this case because the sentence, by operation of law and as expressly acknowledged in the plea agreement, had to include two mandatory terms in addition to incarceration: a term of supervised release of at least 4 years, and a $100 special assessment. A 13. Because the parties understood that the sentence would necessarily include a term of supervised release and a special assessment, an appeal waiver that was ineffective if a sentence included those terms would have been pointless. As detailed above, the parties spent considerable time negotiating and drafting an extensive appellate waiver provision which contained two alternatives, depending on whether the court found that the defendant was a career offender. The district court reviewed this provision at length both with counsel and with the defendant, and its canvass on this provision made clear that the provision only applied to the incarceration portion of the defendant's sentence.

The fact that the defendant now suggests language for a more detailed appellate waiver, *see* Def.'s Brief at 9 n.3, does not mean that the language that the parties used was ineffective to bar this appeal. *Cf. Florida v. Powell*, 130 S. Ct.1195, 1205 (2010) (in upholding sufficiency of *Miranda* warnings, noting that "[a]lthough the warnings were not the *clearest possible* formulation of *Miranda*'s right-to-counsel advisement, they were sufficiently comprehensive and comprehensible when given a commonsense reading"). A commonsense and plain reading of the appellate waiver shows that the defendant

was agreeing to waive his right to appeal the incarceration portion of his sentence term, provided that term did not exceed 137 months, and was reserving his right to appeal all other aspects of his sentence. Because the defendant received the benefit of his bargain, he should not now be permitted to violate the terms of this bargain by appealing the merits of a sentence that he previously agreed he would not appeal. *See United States v. Pearson*, 570 F.3d 480, 485 (2d Cir. 2009) ("However, in no circumstances . . . may a defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement.") (internal citation omitted).

Although the defendant does not claim any deficiency in the district court's Rule 11 colloquy, it appears from the transcript that, in reviewing the appeal waiver with the defendant and his counsel, the district misquoted the plea agreement and mistakenly asked defense counsel if the defendant was waiving his right to appeal any sentence that "exceeds 137 months' incarceration." A 45. Defense counsel agreed with this statement despite the fact that, moments earlier, he had explained that the defendant was waiving his right to appeal any sentence that did not exceed 137 months. A 45. The defendant has not pointed to this portion of the plea canvass in support of a claim that the appeal waiver is unenforceable; however, this Court must still analyze the Rule 11 canvass to make a finding that the defendant knowingly waived his right to appeal.

In the Government's view, despite this error by the district court, the defendant's waiver of his appeal rights was still knowing and voluntary. The written plea agreement itself, which the defendant acknowledged "fully and accurately reflect[ed] [his] understanding of the agreement that [he] entered into with the Government," A 46, specifically states that the defendant is waiving his right to appeal a sentence that does not exceed 137 months' incarceration. A 16. During the Rule 11 plea canvass, the Government summarized the appeal waiver and specifically stated that the defendant was waiving his right to appeal a sentence that did not exceed 137 months' incarceration. A 39. Defense counsel also summarized the provision to the district court and explained that the defendant was waiving his right to appeal any sentence that did not exceed 137 months' incarceration. A 43. In addition, the defendant expressed absolutely no confusion in his answers to the district court during its colloquy about the appeal waiver. Finally, it is hard to conceive that the defendant could have been confused because, had the appeal waiver been construed to apply to any sentence that exceeded 137 months' incarceration, the waiver would have been counter to the express language of the written plea agreement and the defendant's own interests in pursuing an appeal for any sentence that exceeded the Chapter Two guideline range. As this Court held in *United States v. Roitman*, 245 F.3d 124, 126 (2d Cir. 2001),

> Although ambiguities in plea agreements are to be resolved against the Government, . . . the agreement here was clear that appellate rights were

> waived if the sentence was "within or below" the anticipated range. The District Court's inadvertent omission of the words "or below" cannot vitiate the waiver, since it would be absurd to think that a defendant willing to waive an appeal if sentenced within the range of 12 to 18 months was not also willing to waive an appeal if sentenced to a lesser term. . . . Although a judge's remark at sentencing might assist interpretation of an ambiguous appellate waiver, . . . it does not affect a waiver that is clear and fully enforceable when entered.

*Id.*

## II. The district court properly considered the § 3553(a) sentencing factors and imposed a substantively reasonable sentence.

### 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

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the United States Sentencing Guidelines, as written, violate the Sixth Amendment principles articulated in *Blakely v. Washington*, 542 U.S. 296 (2004). *See Booker*, 543 U.S. at 243. The Court determined that a mandatory system in which a sentence is increased based on factual findings by a judge violates the

right to trial by jury. *See id.* at 245. As a remedy, the Court severed and excised the statutory provision making the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), thus declaring the Guidelines "effectively advisory." *Booker*, 543 U.S. at 245.

After the Supreme Court's holding in *Booker* rendered the Sentencing Guidelines advisory rather than mandatory, a sentencing judge is required to: "(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence." *See United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005). "[T]he excision of the mandatory aspect of the Guidelines does not mean that the Guidelines have been discarded." *Crosby*, 397 F.3d at 111. "[I]t would be a mistake to think that, after *Booker/Fanfan*, district judges may return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum." *Id.* at 113-14.

Consideration of the guidelines range requires a sentencing court to calculate the range and put the calculation on the record. *See Fernandez*, 443 F.3d at 29. The requirement that the district court consider the section 3553(a) factors, however, does not require the judge to precisely identify the factors on the record or address specific arguments about how the factors should be implemented. *Id.*; *Rita v. United States*, 551 U.S. 338, 356-

59 (2007) (affirming a brief statement of reasons by a district judge who refused downward departure; judge noted that the sentencing range was "not inappropriate"). There is no "rigorous requirement of specific articulation by the sentencing judge." *Crosby*, 397 F.3d at 113. "As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, [this Court] will accept that the requisite consideration has occurred." *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005).

This Court reviews a sentence for reasonableness. *See Rita*, 551 U.S. at 341; *Fernandez*, 443 F.3d at 26-27. The reasonableness standard is deferential and focuses "primarily on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a)." *United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005), *cert denied*, 129 S. Ct. 2735 (2009). The Supreme Court has reaffirmed that the reasonableness standard requires of sentencing challenges under an abuse-of-discretion standard. *See Gall v. United States*, 552 U.S. 38, 46 (2007). Although this Court has declined to adopt a formal presumption that a within-guidelines sentence is reasonable, it has "recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Fernandez*, 443 F.3d at 27; *see also Rita*, 551 U.S. at 347-51 (holding that courts of appeals may apply presumption of reasonableness to a sentence within the applicable

Sentencing Guidelines range); *United States v. Rattoballi*, 452 F.3d 127, 133 (2d Cir. 2006) ("In calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.").

Further, the Court has recognized that "[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge 'exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.'" *Fernandez*, 443 F.3d at 27 (citations omitted). 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), *cert. denied*, 131 S. Ct. 140 (2010).

**C. Discussion**

The defendant claims that the district court's imposition of 110 months' imprisonment was substantively unreasonable because it was greater than necessary to achieve the goals of a criminal sentence. In particular, the defendant argues that the district court failed to properly consider the unwarranted disparity

between the penalties applicable to cocaine base and cocaine offenses, as well as the defendant's difficult upbringing and history of substance abuse. In essence, the defendant advances the same arguments on appeal that he raised in support of his request for a non-guideline sentence before the district court.

The record establishes that the district court fully complied with its sentencing obligations and imposed a reasonable sentence in light of the § 3553(a) factors. First, the court considered the nature and circumstances of the offense. A 120, 123-24. In doing so, the court commented that the defendant's offense was particularly serious because it involved "considerable . . . resale" quantities of cocaine base. A 123. Further, the court was aware that the defendant conducted his drug dealing within a public housing complex, an aggravating feature of the defendant's offense. PSR ¶¶ 8, 13.

Next, the court considered the defendant's history and characteristics and gave particular emphasis to the defendant's criminal history, commenting that, "Mr. Nelson also has a very substantial and disturbing prior criminal record, including risk of injury, robbery in the first degree, drug and gun offenses." A 124. Indeed, the defendant's federal offense capped an eleven-year period during which he had been convicted of eight felonies. PSR ¶¶ 32-38. In assessing the risk of recidivism posed by the defendant, the court noted that "[h]e has already served considerable periods of incarceration in state prison and was on state parole at the time of the two crack sales here." A 124.

Further, in imposing a sentence at the bottom of the guideline range, the court confirmed that its sentence was designed, in part, to provide the defendant with effective rehabilitative treatment, noting that the defendant "developed his own drug and alcohol problems at a very early age. The Bureau of Prisons needs to help him address these problems permanently if he is to return to society as a productive member of our society." A 124.

Given the seriousness of the defendant's offense, his lengthy and troubling criminal record, the fact that significant terms of imprisonment had not previously deterred him and the other sentencing factors, it was substantively reasonable for the district court to sentence the defendant to 110 months of imprisonment, which represented the bottom of the applicable guideline range.

The district court recognized its authority to depart or impose a non-guideline sentence based on the cocaine base/cocaine disparity, but decided not to do so based on its consideration of the § 3553(a) factors, including the seriousness of the offense conduct and the defendant's extensive criminal record. The court also gave due consideration to the defendant's history and characteristics, including his difficult upbringing and history of substance abuse, but decided that these factors did not warrant a sentence below the guideline range. The defendant now re-argues these same bases for a lower sentence to this Court, having failed to convince the district court of their merit. His claim of substantive unreasonableness fails, however, because the record demonstrates that the primary considerations which led the

court to impose a sentence at the bottom of the guideline range (the seriousness of the offense conduct and the defendant's extensive criminal record) were valid.

## Conclusion

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

Dated: January 14, 2011

Respectfully submitted,

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# ADDENDUM

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

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

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;
(2) the need for the sentence imposed--

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

(B) to afford adequate deterrence to criminal conduct;

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

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

(3) the kinds of sentences available;

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

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

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

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

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

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy

statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

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

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

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