

09-3542-cr(L)

To Be Argued By:
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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 09-3542-cr (L)
09-5159-cr (CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

LUKE JONES, also known as Mega, LANCE JONES,
LONNIE JONES, also known as LT, AARON HARRIS,
also known as Dog, also known as Toast, also known as

(For continuation of Caption, See Inside Cover)

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

BRIEF FOR THE UNITED STATES OF AMERICA

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Defendants.

LYLE JONES, also known as Speedy, KENNETH RICHARDSON, also known as Primo, also known as Tyree, also known as Rico,

Defendants-Appellants.

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Statement of Jurisdiction

This is an appeal from a judgment entered August 11, 2009 (Peter C. Dorsey, J.), in which the district court issued a written ruling refusing to re-sentence the defendant in light of *United States v. Booker*, 543 U.S. 220 (2005), and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). Appendix (“A”) 11, 116. The district court had subject matter jurisdiction over this criminal case under 18 U.S.C. § 3231. On August 19, 2009, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A 12, 116. This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a).

**Statement of Issue
Presented for Review**

Whether the district court's decision on a *Crosby* remand that it would not have imposed a different sentence under an advisory Guidelines regime was procedurally reasonable.

United States Court of Appeals

FOR THE SECOND CIRCUIT

**Docket Nos. 09-3542-cr (L)
09-5159-cr (CON)**

UNITED STATES OF AMERICA,
Appellee,

-vs-

LYLE JONES, also known as Speedy, KENNETH
RICHARDSON, also known as Primo, also known as
Tyree, also known as Rico,

Defendants-Appellants.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The defendant, Lyle Jones, Jr., was convicted at trial of racketeering and narcotics offenses. At sentencing, the district court determined that the defendant's guidelines range was life imprisonment, and sentenced the defendant to three concurrent terms of life imprisonment. On appeal, this Court affirmed the judgment of conviction. *United*

States v. Jones, 296 Fed. Appx. 179 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 747 (2008), 129 S. Ct. 1535 (2009), 129 S. Ct. 2012 (2009). On remand pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), the sentencing court issued a written decision concluding that it would not have imposed a different sentence under an advisory guidelines regime and thus denied the defendant's request for re-sentencing.

In this appeal, the defendant claims that the experienced district judge's decision not to lower his original life sentence was procedurally unreasonable. This claim has no merit. The district court fully complied with its sentencing obligations and the procedural requirements of *Crosby*. The district court understood its authority to treat the sentencing guidelines as advisory and impose a lower sentence, acknowledged that it had fully reviewed the record and considered the factors as they existed at the original sentencing, and expressly stated that it would not have imposed a materially different sentence under an advisory guidelines regime.

Statement of the Case

On April 24, 2003, a jury convicted the defendant-appellant Lyle Jones, Jr. of (1) conducting an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(c) (RICO); (2) conspiracy to conduct an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. § 1962(d) (RICO conspiracy); and (3) conspiracy to distribute and to possess with intent to distribute 1000 grams or more of heroin and 50 grams or

more of cocaine base, in violation of 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(A) (narcotics conspiracy). A 112; *see also Jones*, 296 Fed. Appx. at 181.

On September 3, 2003, the district court sentenced the defendant to three concurrent terms of life imprisonment. A 36, 113. The defendant appealed his convictions and sentence. A 113. On October 20, 2008, this Court affirmed the convictions, but ordered a limited remand pursuant to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), and this Court's decision in *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). *See Jones*, 296 Fed. Appx. at 184.

On April 13, 2009, the district court issued an order inviting briefing from the parties on the question of whether it would have imposed a non-trivially different sentence if the sentencing guidelines had been advisory. A 113. On August 11, 2009, after reviewing the parties' submissions, the district court (Peter C. Dorsey, J.) issued an order denying re-sentencing. A 11, 116.

On August 19, 2009, the defendant filed notice of appeal. A 12, 116. The defendant is currently serving his sentence.

**Statement of Facts and Proceedings
Relevant to this Appeal**

A. The original sentencing

On April 24, 2003, after a seven-week trial, a jury in Bridgeport, Connecticut convicted the defendant of violating 18 U.S.C. § 1962(c) (RICO); (2) 18 U.S.C. § 1962(d) (RICO conspiracy); and (3) 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(A) (narcotics conspiracy). A 112; *see also Jones*, 296 Fed. Appx. at 181.

On September 3, 2003, the defendant appeared for sentencing before the district court. A 14. At sentencing, the defendant objected to the Pre-Sentence Report's ("PSR") calculation of his offense level and criminal history score. Specifically, the defendant objected to a two-level enhancement for obstruction of justice, under U.S.S.G. § 3C1.1. However, the defendant acknowledged that even if the enhancement did not apply, the guideline range would still be life imprisonment. A 17-24. The district court elected not resolve that issue because the two-level enhancement did not affect the sentencing guidelines range. A 23-24. The defendant also objected to a two-level enhancement under U.S.S.G. § 3D1.4 for using a minor to commit a crime. A 24. Specifically, the defendant denied that one of the individuals who sold drugs on his behalf was 17 years old at the time of that activity. *Id.* Again, the district court chose not to resolve that issue because it was immaterial to the district court's calculation of the sentencing range. A 24-25.

With respect to his criminal history score, the defendant objected to the PSR's allocation of criminal history points based on a sentence imposed following his 1995 conviction in the State of New York for control of a dangerous substance with intent to sell. A 25. He also objected to the allocation of criminal history points due to the facts that he was on parole at the time of his offense, and that he committed the offense within two years of being released from prison. A 27-30. The district court overruled the objections after finding that (1) it would not consider the conduct underlying his 1995 drug conviction in selecting the defendant's sentence, and (2) he was, in fact, on parole at the time of his offense, which occurred less than two years after he was released from prison. A 26-30. The district court acknowledged, however, that even if those criminal history points were not included in the defendant's criminal history score, the sentencing guidelines range would still be life imprisonment. A 30-31.

After hearing from both parties, the district court imposed a guideline sentence of life imprisonment as to each count of conviction, and ordered its sentences to run concurrently. A 36.

B. The initial appeal

On appeal, the defendant challenged the sufficiency of the evidence underlying his convictions. *See Jones*, 296 Fed. Appx. at 181-83. He also claimed that the district court improperly calculated his offense level by utilizing an unreliable methodology to calculate the total amount of

narcotics involved in his offense. *Id.* at 183. This Court issued an unpublished opinion, affirming the convictions and declining to consider whether the district court improperly calculated the quantity of cocaine base and heroin involved in the defendant's offense, deeming that argument waived. *See Jones*, 296 Fed. Appx. at 183. Having considered the defendant's substantive arguments, this Court remanded the case, under *Crosby*, to allow the district court to consider whether it would have imposed a non-trivially different sentence if the sentencing guidelines had been advisory. *See id.* at 184.

C. The proceedings on remand

On April 13, 2009, the district court ordered the parties to file submissions on whether it should re-sentence the defendant. A 115. On June 2, 2009, the defendant filed a memorandum in support of re-sentencing, A 42-69, 116, and, on June 17, 2009, the government filed its memorandum in aid of post-*Crosby* proceedings on remand. A 70-85, 116.

In the defendant's submission, he presented several arguments in support of a non-guideline sentence. First, the defendant argued that he posed a low risk of recidivism because he would be middle aged at the expiration of the 20-year mandatory minimum penalty. A 50-52. Next, the defendant argued that the district court should impose a non-guideline sentence in order to avoid unwarranted sentencing disparities between the defendant and several of his co-conspirators who had been re-sentenced on *Crosby* remands. A 52-54. Third, he urged

the district court to impose a non-guideline sentence based on the disparate penalties applicable to cocaine base and powder cocaine offenses. A 63-64. Fourth, the defendant argued that the Court should consider his rehabilitation since the imposition of the original sentence. A 64-66. Fifth, the defendant argued that, for several reasons, his incarceration during a portion of the conspiracy, weighed in favor of a non-guideline sentence. A 55-61.

The defendant also urged the district court to recalculate his guidelines range. In doing so, the defendant repeated arguments that this Court deemed waived during the initial appeal, namely, that the district court improperly calculated the quantity of heroin and cocaine base by including drug quantities that were distributed during the course of the conspiracy, but while the defendant was incarcerated. A 55-58. Next, the defendant made a similar argument to one he made at his original sentencing. He argued that, under U.S.S.G. § 5G1.3, the conduct underlying his 1995 drug conviction should be considered relevant conduct to his racketeering and narcotics convictions. As a result, the defendant argued the district court should downwardly depart in order to credit him for his incarceration on that conviction. A 58-61. Finally, the defendant asked the district court to resolve in his favor the objections he previously raised at the original sentencing, *i.e.*, his challenge to the obstruction of justice enhancement; the use of a minor enhancement; and the allocation of three criminal history points to his 1995 drug conviction and sentence. A 61-63. The defendant did not argue, as he did at his original sentencing, that the district court improperly allocated three criminal history points

due to the fact that he was on parole and had recently been released from prison at the time of his offense.

In its memorandum in aid of post-*Crosby* proceedings on remand, the government urged the district court not to re-sentence the defendant because there was no compelling reason to do so. A 72. The government presented the district court with the PSR's calculation of the defendant's offense level, and reiterated the bases for the obstruction of justice enhancement, the use of a minor enhancement and the allocation of three criminal history points to the defendant's 1995 drug conviction and sentence. A 74-77. The government also alerted the district court to the fact that any post-sentence rehabilitation was irrelevant to the consideration of whether the district court would have imposed a different sentence under an advisory guideline regime because those circumstances did not exist at the time of the original sentence. A 72 n. 2. The government also noted that the cocaine base/powder disparity was irrelevant because the amount of heroin involved in the defendant's offense alone resulted in a base offense level of 38. A 79 n. 3. Finally, the government argued that the sentencing factors set forth at 18 U.S.C. § 3553(a) supported the district court's original sentence. A 82-84.

On August 11, 2009, the district court issued a written order denying the defendant's request for re-sentencing. A 11. The order provided, in relevant part, as follows:

Though the sentencing guidelines are now required to be considered and are not mandatory as

at the time of the original sentencing, upon full review of the record of this case and the pending motion, the factors in the record as rated at the original sentencing remain to be considered now and after consideration there is no basis found from [sic] imposing any different sentence even though the guidelines are now only advisory. Accordingly the sentence originally imposed will not be reduced.

A 11. This appeal followed.

Summary of Argument

The district court's order denying re-sentencing was procedurally reasonable. The district court acknowledged that the sentencing guidelines were advisory, reviewed the entire record, considered the factors as they existed at the original sentencing, including the guidelines range, and concluded that it would not have imposed a non-trivially different sentence under an advisory guidelines regime.

The defendant contends that the district court erred by failing to resolve his objections to the guidelines calculation, but these arguments are foreclosed by the law of the case doctrine because he did not raise them to this Court in his first appeal. The defendant's remaining arguments – that the district court failed to conduct a proper assessment of various sentencing factors – are not supported by the record.

Argument

I. The district court’s refusal to re-sentence the defendant on a post-*Crosby* remand was procedurally reasonable.

A. Governing law and standard of review

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the United States Sentencing Guidelines, as written, violate the Sixth Amendment principles articulated in *Blakely v. Washington*, 542 U.S. 296 (2004). As a remedy, the Court severed and excised the statutory provision making the guidelines mandatory, 18 U.S.C. § 3553(b)(1), declaring the guidelines “effectively advisory.” This results in a system in which this Court, while required to consider the guidelines, may impose a sentence within the statutory maximum penalty for the offense of conviction. Such a sentence will be subject to appellate review for “reasonableness.”

This Court summarized the impact of *Booker* as follows:

First, the Guidelines are no longer mandatory. Second, the sentencing judge must consider the Guidelines and all of the other facts listed in Section 3553(a). Third, consideration of the Guidelines will normally require determination of the applicable Guidelines range, or at least identification of the arguably applicable ranges, and consideration of applicable policy statements.

Fourth, the sentencing judge should decide, after considering the Guidelines and all other factors set forth in Section 3553(a), whether (i) to impose the sentence that would have been imposed under the Guidelines, i.e., a sentence within the applicable Guidelines range, or within permissible departure authority, or (ii) to impose a non-Guideline sentence. Fifth, the sentencing judge is entitled to find all the facts appropriate for determining either a guideline sentence or a non-guideline sentence.

United States v. Crosby, 397 F.3d 103, 113 (2d Cir. 2005). This Court also stated that a district court must be mindful that *Booker* and section 3553(a) “do more than render the Guidelines a body of casual advice, to be consulted or overlooked at the whim of the sentencing judge.” *Id.* Both the Supreme Court and this Court expect “sentencing judges faithfully to discharge their statutory obligation to ‘consider’ the guidelines and all of the other factors listed in Section 3553(a), . . . and that the resulting sentences will continue to substantially reduce unwarranted disparities while now achieving somewhat more individualized justice.” *Id.* at 113-14.

In *Crosby*, this Court determined that it would remand most pending appeals involving challenges to sentences imposed prior to *Booker* “not for the purpose of a required resentencing, but only for the more limited purpose of permitting the sentencing judge to determine whether to resentence, . . . and if so, to resentence.” *Crosby*, 397 F. 3d at 117. Such a remand would enable this Court to complete the necessary plain error review by “permit[ting]

the district court to determine whether it would have imposed a nontrivially different sentence . . . if it had known that the Guidelines are merely advisory.” *United States v. Carr*, 557 F.3d 93, 98-99 (2d Cir.), *cert. denied*, 130 S. Ct. 169 (2009). In making that threshold determination on a *Crosby* remand, “the District Court should obtain the views of counsel, at least in writing, but ‘need not’ require the presence of the defendant. . . .” *Crosby*, 397 F.3d. at 120 (internal citations omitted).

“Upon reaching its decision (with or without a hearing) whether to resentence, the District Court should either place on the record a decision not to resentence, with an appropriate explanation, or vacate the sentence and, with the Defendant present, resentence in conformity with the [Sentencing Reform Act], *Booker/Fanfan*, and [the *Crosby*] opinion, including an appropriate explanation, see § 3553(c).” *Id.* With respect to the required explanation, 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). In a straightforward case, where the record is “clear that the district court has considered the evidence and arguments,” there is no requirement that the sentencing order spell out the reasoning applied. *Rita v. United States*, 551 U.S. 338, 359 (2007). Moreover, the decision whether to resentence

must be based on the circumstances that existed at the time of the original sentence. *Crosby*, 397 F.3d at 118.

When a district court elects not to re-sentence pursuant to *Crosby*, the Court of Appeals “retain[s] authority to review for reasonableness both the procedure whereby the District Court decided not to resentence and the substance of the undisturbed sentence.” *United States v. Williams*, 475 F.3d 468, 471 (2d Cir. 2007); *United States v. Johnson*, 567 F.3d 40, 52 (2d Cir. 2009). However, “the law of the case doctrine ordinarily will bar a defendant from renewing challenges to rulings made by the sentencing court that were adjudicated by [the Court of Appeals] – or that could have been adjudicated by [the Court of Appeals] had the defendant made them – during the initial appeal that led to the *Crosby* remand.” *Williams*, 475 F.3d at 475. “The law of the case ordinarily forecloses relitigation of issues expressly or impliedly decided by the appellate court. . . . [It] ordinarily prohibits a party, upon resentencing or an appeal from that resentencing, from raising issues that he or she waived by not litigating them at the time of the initial sentencing.” *United States v. Quintieri*, 306 F.3d 1217, 1229 (2d Cir. 2002) (internal quotations omitted).

B. Discussion

The defendant’s central contention is that the district court’s order denying re-sentencing was procedurally unreasonable because the court failed to adequately explain its reasons for declining to re-sentence him. The defendant’s argument is without merit. The district court

fully complied with the procedural requirements of a *Crosby* remand by acknowledging its authority to impose a lower sentence based on an advisory guidelines regime, indicating that it had fully reviewed the record, considering the facts and circumstances as they existed at the time of the original sentencing, and expressly finding that it would not have imposed a materially different sentence under an advisory guidelines regime.

The defendant identifies several alleged errors in the district court's *Crosby* remand decision, but as described more completely below, none of those alleged errors amount to procedural error in the remand proceeding.

1. The law of the case doctrine precludes the defendant's challenges to the PSR or the calculation of his guidelines range.

The defendant complains that the district court's ruling was procedurally unreasonable because it failed to resolve his objections to the calculation of his guidelines range. Specifically, the defendant claims that in the *Crosby* remand proceedings, the court never resolved his objections to (1) the two-level enhancement under U.S.S.G. § 3C1.1 for obstruction of justice, and (2) the two-level enhancement under U.S.S.G. § 1B1.3 for use of a minor to commit a crime. Similarly, the defendant argues that the court erred in failing to address his objections to his criminal history score. Defendant's Br. at 19-24.

These arguments are all foreclosed by the law of the case doctrine. As relevant here, the law of the case

doctrine “requires a trial court to follow an appellate court’s previous ruling on an issue in the same case. This is the so-called ‘mandate rule.’” *Quintieri*, 306 F.3d at 1225 (citation omitted). “The mandate rule ‘compels compliance on remand with the dictates of the superior court and foreclose relitigation of issues expressly or impliedly decided by the appellate court.’” *United States v. Bryce*, 287 F.3d 249, 253 (2d Cir. 2002) (quoting *United States v. Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (quoting, in turn, *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993))) (emphasis deleted).

In the context of *Crosby* remands, this Court has held that “the law of the case doctrine ordinarily will bar a defendant from renewing challenges to rulings made by the sentencing court that were adjudicated by this Court – or that could have been adjudicated by us had the defendant made them – during the initial appeal that led to the *Crosby* remand.” *Williams*, 475 F.3d at 475. The reason why further reconsideration of the district court’s guidelines calculations would be inappropriate, the government submits, lies with the concept of finality, which is the core concept animating the law of the case doctrine. As this Court has explained:

Very high among the interests in our jurisprudential system is that of finality of judgments. It has become almost a commonplace to say that litigation must end somewhere, and we reiterate our firm belief that courts should not encourage the reopening of final judgments or casually permit the relitigation of litigated issues

out of a friendliness to claims of unfortunate failures to put in one's best case.

United States v. Cirami, 563 F.2d 26, 33 (2d Cir. 1977). The *Cirami* court went on to find that the systemic interest in finality in the case at hand was outweighed by one party's presentation of compelling, newly available evidence – a traditional exception to the mandate rule. The point here is that a given issue should not be defaulted in a first appeal, and yet still remain open to relitigation on a second appeal.

In his initial appeal, the defendant did not raise any of these guidelines issues, even though they were all ripe at that time. Because he could have raised these issues in his first appeal, but did not do so, the law of the case doctrine precludes him from raising them now. *See Williams*, 475 F.3d at 475-76 (noting that party may not relitigate issue that “was ripe for review at the time of an initial appeal”) (internal quotation marks omitted).

Moreover, there was nothing about the *Crosby* remand procedure itself that would require the district court to resolve guidelines issues that were not resolved during the first sentencing. *Booker* rendered the sentencing guidelines advisory, but, even under an advisory guidelines regime, the defendant's offense level remains the same as it was at the original sentencing. That is, on remand, the district court faced the same fact that existed at the original sentencing, namely, that resolution of the defendant's objections in his favor would not affect his now advisory guideline range.

Finally, in its order denying re-sentencing, the district court stated that it had reviewed the guidelines in an advisory fashion, noting that “the sentencing guidelines are now required to be considered and are not mandatory.” A 11. The district court also stated that it had conducted a “full review of the record,” which would include the PSR, the original sentencing transcript, and the parties’ submissions on remand. Having conducted that review, the district court was not obliged to make an express finding sustaining or overruling objections that had no bearing whatsoever on the calculation of the advisory guidelines range. *Fleming*, 397 F.3d at 100 (“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.”). Even so, the district court effectively addressed the defendant’s objections by stating, after considering the defendant’s arguments, that it would not have imposed a different sentence. A 11.

2. The record reflects that the district court considered the defendant's arguments for re-sentencing.

The defendant claims that the district court failed to undertake an “individualized assessment” of the sentencing factors in 18 U.S.C. § 3553(a). *See* Defendant’s Br. at 24-27. This argument, which appears to be premised primarily on the brevity of the district court’s opinion on remand, *see* A 11, misses the mark. In the absence of some reason to believe that the district court misunderstood its authority, this Court “will accept that the requisite consideration has occurred.” *Fleming*, 397 F.3d at 100. In other words, there is “no rigorous requirement of specific articulation by the sentencing judge.” *Crosby*, 397 F.3d at 113.

Here, there is no reason to believe that the district court misunderstood its authority in this *Crosby* remand. The court acknowledged that it considered the guidelines advisory, stated that it reviewed the record, and considered the factors as of the time of the original sentencing. With this foundation, this Court “presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged [his] duty to consider the [§ 3553(a)] factors.” *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006). A close inspection of the record bears this out.

a. The defendant's incarceration during the conspiracy

The defendant claims that the district court's denial of re-sentencing was procedurally unreasonable because it failed to address a series of arguments based on his assertion that he was incarcerated during part of the conspiracy. First, the defendant argued that the PSR over-estimated the quantity of narcotics attributed to him by failing to account for the fact that he was incarcerated during part of the conspiracy. The defendant fails to note that he advanced this same argument during the initial appeal, and this Court deemed it waived. *See Jones*, 296 Fed. Appx. at 183. He was thus foreclosed from raising that issue on remand. *See Williams*, 475 F.3d at 475. Even so, the district court's denial of re-sentencing indicates that it considered the entire record, which necessarily included the quantity determination, and decided that it would not have imposed a different sentence under an advisory guidelines regime.

Second, the defendant argued that the district court should reduce his sentence because he played a minor role in the conspiracy, as demonstrated by his assertion that he was incarcerated during part of the conspiracy. At the original sentencing, the district court was well aware of the defendant's incarceration in 1995, and the fact that he joined the conspiracy following his release. A 25, 28-29. Having reviewed and adopted the facts of the PSR, the district court was also well aware of the defendant's conspiratorial conduct following his release from prison and throughout the duration of the conspiracy. A 29.

Therefore, when the district court denied re-sentencing on remand after reviewing the full record and the factors as they existed at the time of sentencing, it did so with full awareness of the defendant's role in the conspiracy. No further explanation was necessary. *See Crosby*, 397 F.3d at 113 (finding no "rigorous requirement of specific articulation by the sentencing judge").

Finally, the defendant argued that the district court's ruling denying re-sentencing was procedurally unreasonable because it failed to address his request for a downward departure under U.S.S.G. §§ 5G1.3 and 5K2.23, a request made for the first time on remand. As these guidelines were enacted after the defendant's original sentencing, the defendant was not entitled to a departure under those guidelines during his *Crosby* remand proceeding.

But even if the policies underlying these guidelines (*i.e.*, giving a defendant credit for a completed sentence) were considered as a § 3553(a) factor, the record supports the conclusion that the district court considered it. The defendant claimed that the conduct underlying his 1995 New York drug conviction should be considered relevant conduct to the offense of conviction, and that the court should impose a non-guideline sentence in order to credit the time he spent incarcerated on that conviction. A 59-61. The issue of whether the defendant's 1995 drug conviction rested on relevant conduct was fully considered at the original sentencing. A 30-31. The district court determined that it did not. A 31. When asked on remand to reconsider that conclusion, the district court did so. A 11.

b. The sentencing disparities between co-conspirators

The defendant argues that the district court's ruling denying re-sentencing was procedurally unreasonable because it failed to address his assertion that re-sentencing was necessary to avoid unwarranted sentencing disparities between him and his co-conspirators. On remand, the defendant argued that several of his co-conspirators had been re-sentenced post-*Booker*, and that failure to re-sentence him to a non-guideline sentence would lead to unwarranted disparities. A 52-55. In its memorandum, the government advised the district court that the co-conspirators in this case, who engaged in the same or even less serious conduct, were sentenced to life imprisonment. A 81-82. In order to avoid unwarranted disparities, then, the government urged the district court not to re-sentence the defendant. Based on its full review of the record, which necessarily included a consideration of the sentences it imposed on other co-defendants, the district court found that it would not have imposed a different sentence under an advisory guidelines regime. It is worth noting, however, that a district court is not under any obligation to consider sentencing disparities among co-defendants. *See United States v. Frias*, 521 F.3d 229, 236 & n.8 (2d Cir. 2008); *Johnson*, 567 F.3d at 54.

c. The powder cocaine/cocaine base disparity

The defendant argues that the district court's ruling denying re-sentencing was procedurally unreasonable because it failed to address the disparate penalties applicable to powder cocaine and cocaine base offenses. On remand, the defendant asked the district court to downwardly depart and/or to impose a non-guideline sentence in light of this disparity. A 63-64. Given the experienced district court's statement that it had reviewed the full record and the defendant's motion, a review which necessarily included acknowledgment of the significant quantity of heroin involved in the offense (a quantity that would have independently placed the defendant at offense level 38, *see* A 79 n. 3), there is no reason to conclude that it did not consider and reject the defendant's request for a reduction based on the disparate penalties applicable to powder cocaine and cocaine base offenses.

d. The risk of recidivism posed by the defendant

The defendant argues that the district court's ruling denying re-sentencing was procedurally unreasonable because it failed to address his purported lower risk of recidivism, as measured by his expected age upon release. On remand, the defendant suggested that the district court should re-sentence him to 20 years imprisonment, the mandatory minimum, because he would be middle aged upon release and, therefore, pose a lower risk of recidivism. A 50-52.

Having adopted the PSR's findings of fact at the original sentencing, the district court was well aware of the defendant's age. Moreover, on remand, the government described in detail some of the more troubling aspects of the defendant's conduct, including his involvement in multiple acts of violence. A 79-81. After reviewing the full record and the defendant's request for re-sentencing and considering the relevant factors, it was procedurally reasonable for the district court to reject the defendant's argument that his expected age upon release militated in favor of a different sentence on remand.

Moreover, the defendant is wrong to claim that "this case presents precise [sic] the same record that warranted vacatur and remand in *United States v. Hamilton*," 323 Fed. Appx. 28 (2d Cir. 2009). See Defendant's Br. at 29. In fact, *Hamilton* differed materially from this case. First, that case was an appeal from an original sentencing, not a review of a *Crosby* remand. Second, this Court's decision in *Hamilton* turned on the fact that the defendant raised the issue of his likelihood of recidivism at his original sentencing, only to have the judge reject it. The Court of Appeals pointed to the sentencing order, which stated that the court had considered "only 'factors in the Sentencing Guidelines,'" as evidence that the district court had positively excluded the question of the defendant's age from its deliberations. *Hamilton*, 323 Fed. Appx. at 30-31. As the Court noted, because the guidelines expressly preclude consideration of age as a factor that may correlate with recidivism, the district court's statement that it had only considered the guidelines raised the possibility that

the district court failed to understand it could consider age and its correlation with recidivism in sentencing. *Id.*

By contrast, here there is no indication that, on remand, the district court restricted its review to factors available under the guidelines only. On the contrary, the court wrote that it had undertaken “full review of the record and the pending motion.” A 11. Moreover, there is no evidence to suggest that the district court declined to consider the defendant’s age and corresponding risk of recidivism. The defendant points to one line in the government’s brief on remand as potentially “misleading” the court to believe that it could not consider the defendant’s age, *see* Defendant’s Br. at 27-29, but even if the government’s brief were misleading – and it is not – the defendant points to no evidence that the district court was actually misled on this point. In the absence of some reason to believe that the *district court* misapprehended its authority, this Court presumes that the able district judge has faithfully applied governing law and considered the appropriate sentencing factors. This record thus suffices to sustain the presumption that the district court considered all of the appropriate statutory factors, including the defendant’s argument about his likelihood of recidivism. *Fernandez*, 443 F.3d at 30.

**e. The defendant’s post-sentence
rehabilitation**

Finally, the defendant argues that the district court’s order denying re-sentencing was procedurally unreasonable because it failed to account for his post-

sentencing rehabilitative efforts. On remand, the defendant argued, “Lyle’s action since receiving the Life sentence he currently is serving demonstrate his positive disposition and capacity for rehabilitating himself.” A 65. In response, the government properly noted that “post-sentencing factors are irrelevant” to the district court’s determination of whether it would have imposed a non-trivially difference sentence in light of the advisory guidelines and “the circumstances existing at the time of the original sentence.” A 72.

By asking the district court to rely on an impermissible factor, the defendant invited the district court to violate *Crosby’s* mandate that the decision whether or not to resentence must be based solely on “circumstances existing at the time of the original sentence.” 397 F.3d at 117; *see also United States v. Ferrell*, 485 F.3d 687, 688-89 (2d Cir. 2007) (per curiam) (holding that a district court should not consider evidence of a defendant’s post-conviction rehabilitation on a *Crosby* remand). The district court’s refusal to re-sentence the defendant on this basis was entirely proper.

Conclusion

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

Dated: August 13, 2010

Respectfully submitted,

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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.