09-4410-cr(L)

To Be Argued By:
HAROLD H. CHEN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 09-4410-cr(L)
10-241(CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

ANTHONY ARMSTEAD, also known as Most,
JUAN ORTIZ, also known as Nano,
Defendants-Appellants.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on January 20, 2010. Joint Appendix ("A") 20 (docket entry). On January 21, 2010, the defendant filed a timely notice of appeal. A21 (docket entry); A112-13 (notice). This Court has appellate jurisdiction over the defendant's challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

Statement of Issue Presented for Review

Whether the district court erred in failing to impose a sentence below the 120-month statutory mandatory minimum applicable to the defendant's conviction on the theory that the parsimony clause of 18 U.S.C. § 3553(a) overrides the mandatory nature of the minimum sentences set forth in 21 U.S.C. § 841.

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FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
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Defendants-Appellants.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This is a sentencing appeal by the defendant Juan Ortiz, who pleaded guilty to conspiracy to possess with intent to distribute, and to distribute, 50 grams or more of crack cocaine. In his plea agreement, the defendant stipulated, among other things, that his attributable drug quantity was 100 grams of crack cocaine and 100 grams of heroin, that

the applicable mandatory minimum penalty was 120 months of imprisonment, and that a sentence between 120 months to 132 months of imprisonment would be sufficient, but not greater than necessary, to achieve the statutory objectives of sentencing under 18 U.S.C. § 3553(a). The district court imposed a sentence of 120 months of imprisonment.

On appeal, the defendant now challenges his sentence on a single ground, claiming that the statutory minimum sentences established by 21 U.S.C. § 841 are nullified by the parsimony clause of 18 U.S.C. § 3553. This Court expressly rejected this precise argument in *United States v. Samas*, 561 F.3d 108 (2d Cir.) (per curiam), *cert. denied*, 130 S. Ct. 184 (2009). Moreover, this argument contravenes the bedrock principle of statutory interpretation that laws should not be read in ways that render portions of them superfluous.

For these reasons, this Court should affirm the sentence imposed by the district court.

Statement of the Case

On January 29, 2009, a federal grand jury returned an Indictment charging the defendant in Count One with conspiracy to possess with intent to distribute, and to distribute, 500 grams or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B) and 846, and in Count Two with conspiracy to possess with intent to distribute, and to distribute, 50 grams or more of crack cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846. A5 (docket

entry); A22-31 (Indictment). On February 26, 2009, a federal grand jury returned a Superseding Indictment charging the defendant with the same offenses. A6-7 (docket entry); A32-46 (Superseding Indictment). On July 29, 2009, a federal grand jury returned a Second Superseding Indictment charging the defendant with the same offenses. A13 (docket entry); A47-60 (Second Superseding Indictment).

The case was assigned to United States District Judge Janet C. Hall, sitting in Bridgeport, Connecticut. On October 8, 2009, the defendant entered a plea of guilty to Count Two of the Second Superseding Indictment. A19 (docket entry); A61-68 (plea agreement).

On January 15, 2010, the district court sentenced the defendant to 120 months of imprisonment on Count Two to be followed by a five-year term of supervised release. A98-100. The district court also imposed a special assessment of $100. A99.

On January 20, 2010, the judgment entered. A20 (docket entry); A109-11 (judgment). On January 21, 2010, the defendant filed a timely notice of appeal. A21 (docket entry); A112-13 (notice of appeal).

The defendant is currently serving the sentence imposed by the district court.

Statement of Facts and Proceedings Relevant to this Appeal

A. The defendant was a long-time distributor of illegal narcotics who distributed cocaine, crack cocaine, and heroin.[1]

The defendant Juan Ortiz was a long-time narcotics distributor in the Bridgeport area who regularly transacted cocaine, crack cocaine, and heroin with, among others, co-defendants George Sanchez, Adrian Rivera, Lashawn Ruff, and Terrence Brown. Second Addendum of PSR at 1. The government's evidence, which included the statements of cooperating witnesses and a court-authorized Title III wiretap, demonstrated that the defendant was tasked by George Sanchez to receive two-kilogram shipments of cocaine from Puerto Rico that were shipped to various residences around Bridgeport, Connecticut. *Id.* Once these packages were received, the defendant would call Sanchez, as Sanchez was the only person allowed to open the box of cocaine. *Id.* Sanchez and his associates would then meet in various locations around Bridgeport to convert some of the cocaine into crack cocaine and to weigh and package the drugs for street sale. *Id.* In addition, the defendant would distribute the Sanchez-supplied drugs to the defendant's own customers. *Id.* Moreover, in the intercepted wiretap calls, the defendant discussed in coded terms, among other things, possessing crack cocaine, meeting to hand off narcotics to his co-conspirators, and

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[1] The following facts are not in dispute and are taken from the defendant's Pre-Sentence Report ("PSR").

warning his co-defendants about the presence of undercover vehicles. *Id*. at 1-2.

B. The defendant pleaded guilty to a single drug conspiracy count based on his involvement in distributing crack cocaine.

On July 29, 2009, a federal grand jury returned a Second Superseding Indictment charging the defendant with conspiracy to possess with intent to distribute, and to distribute, 500 grams or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(B) and 846 (Count One) and conspiracy to possess with intent to distribute, and to distribute, 50 grams or more of crack cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846 (Count Two). A13 (docket entry); A47-60 (Second Superseding Indictment).

On October 8, 2009, the defendant pleaded guilty to Count Two of the Second Superseding Indictment, charging him with conspiracy to possess with intent to distribute, and to distribute, 50 grams or more of crack cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846. A19 (docket sheet); A61-68 (plea agreement). In a written plea agreement between the parties, the government and the defendant stipulated that his attributable drug quantity under U.S.S.G. §§ 1B1.3 and 2D1.1 involved 100 grams of crack cocaine and 100 grams of heroin. A63. Although the plea agreement did not include a stipulation on the defendant's Guidelines calculation, the government agreed to defer to the district court's discretion to depart from the Guidelines range or

impose a non-Guidelines sentence, subject to the mandatory minimum term of 120 months of imprisonment, if the court concluded that the 100-to-1 ratio for crack cocaine and powder cocaine cases did not reflect the factors set forth in 18 U.S.C. § 3553(a). A63-64. The parties further agreed that the defendant's applicable Criminal History Category ("CHC") was VI. A64. Significantly, the parties stipulated that "a sentence between 120 months to 132 months of imprisonment would be sufficient, but not greater than necessary, to achieve the statutory objectives of sentencing under 18 U.S.C. § 3553(a)." *Id.* Finally, the defendant agreed to waive his rights to appeal and to collaterally attack his sentence as long as the sentence of imprisonment did not exceed 132 months, A64-65, except for "the discrete issue of whether the district court is required to impose a mandatory-minimum sentence pursuant to 21 U.S.C. § 841, even if the district court finds that a sentence below the mandatory-minimum sentence would have been sufficient, but not greater than necessary, to achieve the sentencing objectives under 18 U.S.C. § 3553(a)," A64 n.1.

C. The district court imposed a sentence of 120 months of imprisonment, the mandatory minimum sentence.

On January 15, 2010, the district court conducted the defendant's sentencing hearing. A69. At the beginning of the hearing, the district court noted that the United States Probation Office had prepared the PSR and related addenda and inquired whether the defendant and his counsel had the opportunity to review these materials. A70-72. The defendant and defense counsel indicated that those materials had been reviewed. *Id.* The district court inquired if the defendant "had any objections to the Presentence Report[,] including the addenda." A72. Defense counsel replied, "No." *Id.* The government also had no objection to the factual statements contained in the PSR. A71. The district court further inquired whether the parties objected to the PSR's calculation of the defendant's adjusted offense level as 27 with a CHC VI, which yielded a Guidelines range of 130-162 months of imprisonment. PSR ¶¶ 19-26, 44, 69; A73. Neither party objected. A79. Per the terms of the plea agreement, the district court then exercised its discretion to recalculate the Guidelines calculation by treating the 100 grams of crack cocaine as 100 grams of powder cocaine, which yielded an adjusted offense level of 23 and a Guidelines range of 92-115 months of imprisonment. A79-80. Neither party objected to the district court's revised Guidelines calculation. *Id*.

Subsequently, defense counsel asked the court "to impose the mandatory minimum, if you could," and noted

that "it is a good argument that . . . tension [exists] between 3553(a) and the mandatory minimums," but recognized that "[no court] has listened to me and [no court] has listened to anybody up to now." A83. Per the terms of the plea agreement, the government argued for a sentence between 120 to 132 months of imprisonment. A91.

In imposing sentence, the district court recognized that the sentence "is a reflection of the consideration of all the factors that are listed in [§ 3553(a)]," A98, including "the nature and circumstances of [the] offense, [the defendant's] history and characteristics, the guidelines, and avoiding unwarranted sentencing disparities," as well as the mandatory minimum sentences prescribed by statute, A92. The district court emphasized that the defendant had committed "a very serious offense because of the effect it has upon [the] community," A93, and that the defendant had 10 prior felony convictions by the age of 30, including five for narcotics-related offenses, A97. Ultimately, the district court imposed a sentence of 120 months of imprisonment to be followed by five years of supervised release. A98-99.

When asked to state what sentence it would have imposed in the absence of the mandatory minimum, the district court declined to do so. A101-03. Rather, the court reaffirmed its obligation to impose at least the statutory minimum sentence of 120 months of imprisonment. A101-03.

Summary of Argument

The parsimony clause of § 3553(a) does not override the mandatory nature of the minimum sentences set forth in 21 U.S.C. § 841. In *United States v. Samas*, this Court explicitly held that 18 U.S.C. § 3553(a) does not conflict with statutorily mandated minimum sentences under 21 U.S.C. § 841(b). 561 F.3d 108, 110-11 (2d Cir.) (per curiam), *cert. denied*, 130 S. Ct. 184 (2009). This decision fully controls this case unless and until it is overruled by the Supreme Court or this Court sitting *en banc*.

Moreover, *Samas* was correctly decided. One of the fundamental rules of statutory interpretation is that laws must be construed to give effect to all of their terms and not to render any of their provisions superfluous. Sections 3553(e) and 3553(f) of Title 18 of the United States Code set forth specific circumstances in which a district court may impose a sentence below the statutory minimum. These provisions would be rendered surplusage if the defendant's argument were adopted because courts have always read § 3553(a) and § 841(b) in harmony. By instructing judges to impose a sentence that is sufficient, but not greater than necessary, to achieve the purposes of sentencing, § 3553(a) authorizes them to select any appropriate sentence within the minimum and maximum sentences fixed by statute. Anything less than the congressionally mandated minimum is, by definition, insufficient to achieve the purposes of sentencing, which include consideration of the "available" sentences, 18 U.S.C. § 3553(a)(3).

Argument

I. The district court properly sentenced the defendant to 120 months of imprisonment because the parsimony clause of § 3553(a) does not override the mandatory nature of the minimum sentences set forth in 21 U.S.C. § 841.

A. Governing law and standard of review

This Court engages in *de novo* review of "challenges to the meaning and constitutionality of statutes . . . ." *United States v. Cullen*, 499 F.3d 157, 162 (2d Cir. 2007); *United States v. Pettus*, 303 F.3d 480, 483 (2d Cir. 2002) (reviewing "question of statutory interpretation and of the constitutionality of [a statute] *de novo*").

B. Discussion

The defendant argues that the mandate in § 3553(a), which requires a court to impose a sentence that is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing in § 3553(a)(2), conflicts with the penalty provisions of the Controlled Substances Act, 21 U.S.C. § 841, which establish mandatory minimum penalties.[2] Defendant's Brief ("Def. Br.") 5-6, 14-21. For

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[2] The defendant spends considerable time in his brief attacking the rationality and effectiveness of mandatory minimum prison terms for drug offenses and describing the circumstances in which the Controlled Substances Act was (continued...)

example, 21 U.S.C. § 841(b)(1)(A) provides that defendants like Ortiz "*shall* be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . . ." (Emphasis added). The defendant claims that this purported conflict must be resolved in favor of § 3553(a) for two reasons. First, he argues that § 3551(a) asserts the pre-eminence of § 3553 by stating that "[e]xcept as otherwise specifically provided, a defendant . . . shall be sentenced in accordance with the provisions of this chapter[,]" which includes § 3553. *See* Def. Br. 14-15. The defendant claims that since § 841(b) does not specifically provide for sentencing without regard for § 3553(a), § 3553(a) must prevail. Def. Br. 15-17. Second, the defendant claims that the minimum prison terms listed in § 841(b) are said to subordinate themselves to § 3553(a) because, unlike other provisions in § 841(b) dealing with probation and supervised release, they do not contain trumping language such as "notwithstanding any other provision of law." Def. Br. 17-18.

This Court recently squarely addressed this issue and rejected the arguments advanced by the defendant in *United States v. Samas*, 561 F.3d at 110-11. The defendant in *Samas* pleaded guilty to several charges, including one count of possession with intent to distribute and distribution of 50 grams or more of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). *Id.*

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[2] (...continued)
promulgated. Def. Br. 11-14. The government simply notes that these issues would be more appropriately addressed by Congress after appropriate fact-finding, and not by this Court.

at 109-10. On that charge, the district court sentenced Samas to a term of imprisonment of 240 months, the mandatory minimum term applicable under § 841(b)(1)(A). *Id*. at 110. On appeal, Samas argued that the parsimony clause in 18 U.S.C. § 3553(a) requiring district courts to "impose a sentence sufficient, but not greater than necessary" was incompatible with and in conflict with the mandatory sentencing provisions of 21 U.S.C. § 841(b). *Id*. at 110-11.

This Court rejected Samas's claim and held that while mandatory minimum sentences are in "'tension with section 3553(a), . . . that very general statute cannot be understood to authorize courts to sentence below minimums specifically prescribed by Congress . . . .'" *Id*. (quoting *United States v. Chavez*, 549 F.3d 119, 135 (2d Cir. 2008) (internal quotation marks omitted)). In reaching its holding that § 3553(a) does not override the mandatory sentencing scheme of § 841(b), the Court observed:

> The wording of § 3553(a) is not inconsistent with a sentencing floor. The introductory language of the federal sentencing scheme is qualified: "*[e]xcept as otherwise specifically provided*, a defendant who has been found guilty of an offense described in any Federal statute . . . shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3552(a)(2) . . . ." 18 U.S.C. § 3551(a) (emphasis added). In this case, § 841(b)(1)(A) specifically

> provides for a mandatory minimum sentence of twenty years.

Samas, 561 F.3d at 111. In other words, the existence of a congressionally-mandated minimum sentence in § 841(b) was sufficient to fall within the scope of the "except as otherwise specifically provided" language in § 3551(a) and trump the parsimony clause. *Id*. The fact that § 841(b) does not contain specific language exempting it from the applicability of § 3553(a) was immaterial. *Id*.

In addition, this Court noted that § 3553 contains expressly enumerated provisions that authorize a district court to depart from a statutory minimum sentence. *Id*. Specifically, §§ 3553(e) and 3553(f) delineate the limited circumstances in which a district court may depart from a statutory minimum sentence. *See id*.; *see also United States v. Medley*, 313 F.3d 745, 749-50 (2d Cir. 2002); *United States v. Franklin*, 499 F.3d 578, 585 (6th Cir. 2007). As this Court observed, "[t]hese provisions would be surplusage if we adopted Samas' interpretation of §3553(a)." *Samas*, 561 F.3d at 111. Accordingly, this Court rejected Samas's interpretation of the statute and affirmed the district's court imposition of the mandatory twenty-year sentence required by § 841(b). *Id.*

The Court's decision in *Samas* wholly addresses and resolves the exact arguments presented by the defendant here. As a threshold matter, the defendant's sentence should be affirmed because *Samas* is controlling on this Court unless and until it is overruled by the Supreme Court or by this Court sitting *en banc*. *See United States v. Jass*,

569 F.3d 47, 58 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 1149 (2010) and 130 S. Ct. 2128 (2010).

Furthermore, in any event, *Samas* was correctly decided. Section 3553(a)(1)'s requirement that a court impose a sentence that is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing is fully consistent with the notion that Congress can and may determine, as to particular categories of crimes, ceilings and floors for sentences. Selection of a statutory minimum sentence reflects a congressional determination that anything below that level would not be "sufficient" punishment. Conversely, fixing a statutory maximum reflects a legislative decision that anything above that level would be "greater than necessary." Moreover, the defendant's attempt to create a false conflict with § 3553 conflicts with the fundamental interpretive canon that "courts should disfavor interpretations of statutes that render language superfluous." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992); *see also Tablie v. Gonzales*, 471 F.3d 60, 64 (2d Cir. 2006) ("We are . . . obliged to give effect, if possible, to every clause and word of a statute, and to render none superfluous.") (internal quotation marks omitted).[3]

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[3] Given the absence of any conflict, no significance can be ascribed to the fact that § 841 contains no language that carves it out from the application of § 3553(a). *Cf. United States v. Mueller*, 463 F.3d 887, 890-91 (9th Cir. 2006) (holding that 18 U.S.C. § 3561 does not authorize sentence of probation where offense specifies mandatory minimum prison

(continued...)

In addition to *Samas*, every other circuit court of appeals to consider claims analogous to the instant defendant's argument has rejected them. *See, e.g., Franklin*, 499 F.3d at 583-86 (reversing where judge failed to impose fully consecutive minimum punishment in compliance with § 924(c); endorsing prior unpublished circuit decisions that rejected attempts to invoke § 3553(a) as authority to impose sentences below the mandatory minimums in 21 U.S.C. § 841(b)); *United States v. Roberson*, 474 F.3d 432, 434 (7th Cir. 2007) (reversing judge's failure to impose statutorily mandated consecutive sentence on 18 U.S.C. § 924(c) count; explaining that the judge "is of course entitled to her view, but she is not entitled to override Congress's contrary view"); *United States v. Gregg*, 451 F.3d 930, 937 (8th Cir. 2006) (upholding district court's imposition of mandatory minimum consecutive 120-month sentence on § 924(c) count; holding that § 3553(a) does not confer discretion to impose sentence below statutory minimum prescribed by § 924(c)); *United States v. Shelton*, 400 F.3d 1325, 1333 n.10 (11th Cir. 2005) (remanding sentence imposed under pre-*Booker* mandatory Guidelines system, but emphasizing that "that the district court was, and still is, bound by the statutory minimums"); *United States v. Kellum*, 356 F.3d 285, 289 (3d Cir. 2004) ("[T]he mandatory minimum sentence[] Kellum was exposed to pursuant to . . . 21 U.S.C. § 841(b)(1)(A) clearly fit within the 'except as

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[3] (...continued)
term, irrespective of whether statute defining offense contains preclusion language such as "notwithstanding any other provision of law").

otherwise specifically provided' exclusion of § 3551(a)."). As the Seventh Circuit has explained, "[r]ecidivist provisions do set floors, and judges must implement the legislative decision whether or not they deem the defendant's criminal record serious enough; the point of such statutes is to limit judicial discretion rather than appeal to the court's sense of justice." *United States v. Cannon*, 429 F.3d 1158, 1160 (7th Cir. 2005).

Contrary to the defendant's suggestion that *United States v. Booker*, 543 U.S. 220 (2005), has somehow rendered statutorily prescribed mandatory minimums "advisory", Def. Br. 19-21, the same result is dictated by this Court's post-*Booker* decisions, which continue to recognize the binding nature of statutory minimum sentences. For example, in *United States v. Sharpley*, 399 F.3d 123, 127 (2d Cir. 2005), the Court held that "*Booker* makes the Guidelines advisory in nature, leaving sentences to the district court's discretion, guided by the Guidelines and the other factors of § 3553(a), *and bounded by any applicable statutory minimum and maximum*." (Emphasis added). Sharpley had been convicted of sexual exploitation charges, and he was sentenced to the mandatory minimum of 15 years fixed by his statute of conviction, 18 U.S.C. § 2251(d). Even though Sharpley had been sentenced before *Booker* was decided, this Court held that a remand under *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), was unwarranted because the existence of a statutory minimum sentence precluded any reduction in Sharpley's sentence. 399 F.3d at 127. "This is a prototypical example of harmless error. Sharpley cannot obtain any improvement in his sentence in resentencing,

and we therefore see no reason to remand to the district court." *Id.* As *Sharpley* makes clear, then, statutory minimum sentences are no less binding after *Booker* than they were before. Indeed, after *Booker*, both the Supreme Court and this Court have continued to enforce mandatory minimum sentences embodied in § 841[4] as well as other statutes such as 18 U.S.C. § 924(c) (firearms enhancement),[5] 18 U.S.C. § 924(e) (armed career criminal

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[4] *See United States v. Pressley*, 469 F.3d 63, 65-67 (2d Cir. 2006) (per curiam) (holding that district court must consider aggregate drug quantity that was admittedly involved in drug conspiracy when determining which "mandatory minimum" sentence applies); *United States v. Holguin*, 436 F.3d 111, 117-19 (2d Cir. 2006) (upholding constitutionality of judicial factfinding on safety-valve criteria in connection with mandatory minimum sentences of § 841(b)).

[5] *See Chavez*, 549 F.3d at 134-35 (reviewing a sentence applying the firearms enhancement under 18 U.S.C. § 924(c) and holding that district courts must impose a statutorily mandated sentence even if the court would reach a different determination if it considered only § 3553(a)).

act),[6] 18 U.S.C. § 2422(b) (enticement of minor),[7] and 18 U.S.C. § 2252A (child pornography).[8]

Not only would the defendant's interpretation of § 3553(a) undermine all of those decisions, but, as the Court correctly noted in *Samas*, 561 F.3d at 111, it would also render superfluous those carefully circumscribed provisions in the U.S. Code and the Federal Rules which sometimes authorize a sentence below the prescribed minimum: 18 U.S.C. § 3553(e) (for substantial assistance, upon motion of the government); 18 U.S.C. § 3553(f) ("safety valve" for certain drug offenses); and Fed. R. Crim. P. 35(b) (substantial assistance provided after sentencing).[9] As this Court stated in *United States v.*

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[6] The Supreme Court has repeatedly decided cases, in the wake of *Booker*, about how to determine whether a defendant's prior conviction renders him an armed career criminal subject to an enhanced sentence applicable to recidivists. *See, e.g., Begay v. United States*, 553 U.S. 137 (2008); *James v. United States*, 550 U.S. 192 (2007); *Shepard v. United States*, 544 U.S. 13 (2005). The Court would have had no reason to decide these cases if § 3553(a) permitted a district court to disregard the mandatory nature of the minimum sentences listed in § 924(e).

[7] *United States v. Gagliardi*, 506 F.3d 140, 148-49 (2d Cir. 2007) (rejecting claim of sentencing manipulation).

[8] *United States v. Stearns*, 479 F.3d 175, 178 (2d Cir. 2007) (per curiam) (affirming imposition of only partially concurrent 10-year mandatory minimum).

[9] The defendant is correct that neither § 3553(e) nor (continued...)

Richardson, 521 F.3d 149, 159 (2d Cir. 2008), in the context of a § 3553(e) motion, "both the decision to depart and the maximum permissible extent of this departure below the statutory minimum may be based only on substantial assistance to the government and on no other mitigating considerations." The other factors listed in § 3553(a) may be considered only insofar as they inform the decision "whether to grant the full extent of the departure permitted by § 3553(e)." *Id.* Because § 3553(a) does not authorize a district court to select a sentence below what can be justified by reference to a defendant's

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[9] (...continued)
§ 3553(f) specifies that they constitute the exclusive methods for imposing a sentence below a statutory minimum. Def. Br. 20 & n.10. Nevertheless, this Court has uniformly held that a district court may impose such a sentence only pursuant to a specific grant of authority – namely, for substantial assistance or under the safety-valve. *See Medley*, 313 F.3d at 749-50 (reversing sentence that was below mandatory minimum).

The defendant cites *United States v. Dorsey*, 166 F.3d 558 (3d Cir. 1999), for the proposition that courts may devise additional methods for imposing sentences that are less than a statutory minimum. Def. Br. 20-21. *Dorsey* did not, however, involve a statutory minimum sentence. In that case, the Third Circuit held simply that a sentencing judge is authorized by 18 U.S.C. § 3584(b), when imposing a federal sentence to run concurrently with a previously commenced state sentence, to credit the defendant with time already served on that state sentence. *Dorsey* did not authorize a judge to reduce the overall term of federal imprisonment; it simply permitted the federal judge to recognize that a portion of that sentence had already been served. 166 F.3d at 563.

substantial assistance under § 3553(e), then *a fortiori* § 3553(a) cannot independently authorize a court to dip below a statutory minimum sentence. *See also Melendez v. United States*, 518 U.S. 120, 126 (1996) ("[W]e agree with the Government that nothing in § 3553(e) suggests that a district court has *power* to impose a sentence below the statutory minimum to reflect a defendant's cooperation when the Government has not authorized such a sentence" through an appropriate motion triggering that authority, as distinct from a motion pursuant to U.S.S.G. § 5K1.1.) (Emphasis added).

Along those same lines, the defendant's position is also at odds with this Court's decision in *United States v. Jimenez*, 451 F.3d 97, 102-03 (2d Cir. 2006), which held that even after *Booker*, a defendant bears the burden of proving his eligibility for the safety valve provisions of § 3553(f). Again, if § 3553(a) independently authorized a district judge to hand down a sentence below the statutory minimum, then the safety valve would be superfluous. *See also United States v. Holguin*, 436 F.3d 111, 117-19 (2d Cir. 2006) (rejecting Sixth Amendment challenge to judicial fact-finding as to role in the offense under safety valve); *see also United States v. Barrero*, 425 F.3d 154, 156-57 (2d Cir. 2005) (holding that eligibility criteria of § 3553(f) are not "advisory" in the wake of *Booker*).

In summary, neither principles of statutory interpretation nor case precedent support the existence of a conflict between the parsimony clause of 18 U.S.C. § 3553(a) and the sentencing scheme of 21 U.S.C. § 841(b). The district court did not have any basis to

depart below the minimum sentence of 120 months' imprisonment and thus did not commit error in declining to do so. Accordingly, the judgment of the district court should be affirmed.

Conclusion

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

Dated: October 4, 2010

Respectfully submitted,

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ADDENDUM

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

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

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

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

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

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

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

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

(2) a fine as authorized by subchapter C.

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

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

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

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed--

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

(B) to afford adequate deterrence to criminal conduct;

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

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

(3) the kinds of sentences available;

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

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

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

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

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy

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

(5) any pertinent policy statement--

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

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

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

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

* * *

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

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

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

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

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

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

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

21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts

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

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

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

(b) Penalties

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

21 U.S.C. § 846. Attempt and Conspiracy

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

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Armstead

Docket Number: 09-4410-cr(L)

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 10/4/2010) and found to be VIRUS FREE.

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Record Press, Inc.

Dated: October 4, 2010

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October 4, 2010

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