

10-182

To Be Argued By:
GEOFFREY M. STONE

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-182

UNITED STATES OF AMERICA,
Appellee,

-vs-

FREDDY JIMENEZ, aka Gaguito, aka Gago,
Defendant,

ODARIS JIMENEZ, aka Baron,
Defendant-Appellant.

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

=====

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Stefan R. Underhill, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on December 16, 2009.¹ Joint Appendix (“A”) 55 (docket entry). On December 16, 2009, the defendant filed a timely notice of appeal. A55 (docket entry); A17-18 (notice). This Court has appellate jurisdiction over the defendant’s challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

¹ The original judgment entered on December 16, 2009 incorrectly reflected a sentence of 120 months’ imprisonment to be followed by five years’ supervised release. On March 25, 2010, an amended judgment was entered which set forth the correct sentence of 120 months and one day of imprisonment to be followed by five years’ supervised release. A55.

**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 § 3553(a) overrides the mandatory nature of the minimum sentences set forth in 21 U.S.C. § 841?

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Preliminary Statement

This is a sentencing appeal by the defendant Odaris Jimenez, who brokered cocaine deals between two other individuals, acquired substantial weights of cocaine for redistribution to others and attempted to facilitate the transport of approximately five kilograms of cocaine from

Ohio to Connecticut on behalf of a third party. Jimenez ultimately pleaded guilty to one count of conspiracy to possess with the intent to distribute, and to distribute, five kilograms or more of cocaine. He received a sentence of 120 months and one day of imprisonment, one day more than the applicable statutory mandatory minimum sentence of 10 years.

On appeal, the defendant challenges his sentence on a single ground. The defendant claims 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), and moreover, the argument runs afoul of 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 November 24, 2008, a federal grand jury returned an indictment charging the defendant in Count One with conspiracy to possess with intent to distribute, and to distribute, 5 kilograms or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846. A52 (docket entry); A3-5 (Indictment).

The case was assigned to United States District Judge Stefan R. Underhill, sitting in Bridgeport, Connecticut. On May 21, 2009, the defendant entered a plea of guilty to Count One of the indictment. A54 (docket entry).

On December 11, 2009, the district court sentenced the defendant to 120 months and one day of imprisonment on Count One to be followed by a five year term of supervised release. A55 (docket entry). The district court also imposed a special assessment of \$100. A55 (docket entry).

Judgment entered on December 16, 2009. A55; A14-16. However, the judgment stated that the sentence imposed was 120 months' imprisonment rather than the 120 months and one day of imprisonment actually imposed by the district court. On December 16, 2009, the defendant filed a timely notice of appeal. A55 (docket entry); A17-18 (notice). An amended judgment reflecting the correct sentence imposed by the district court entered on March 25, 2010. A55 (docket entry); A48-50.

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

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

A. Jimenez brokered cocaine deals between two other parties, acquired substantial quantities of cocaine for distribution to third parties, and attempted to facilitate the transport of five kilograms of cocaine from Ohio to Connecticut.

In October, 2005, the FBI began an investigation into a Drug Trafficking Organization (“DTO”) operating in Meriden, Connecticut. Pre-Sentence Report (“PSR”) ¶7. During the investigation, the FBI engaged in several controlled purchases of multi-ounce quantities of cocaine base from a variety of different sources. *Id.* Through these controlled purchases, the FBI identified Milton Roman as a primary source of supply for cocaine base in Meriden and decided to commence a wiretap investigation as to cellular telephones utilized by Roman. PSR ¶8. The wiretap investigation as to Roman concluded in June, 2006, after approximately sixty days of interceptions. *Id.* As a result of the wiretap, it was determined that Roman distributed cocaine and cocaine base to a customer base of approximately 35 individuals. *Id.* Based on intercepted telephone calls, it was estimated that Roman distributed kilogram quantities of powder and crack cocaine on a monthly basis. *Id.*

During the investigation of Roman, the FBI identified Eluid Rivera, a.k.a. “Smoke” and “Smokey,” as a primary source of supply for Roman’s DTO and received authorization from the district court to intercept

communications occurring over a cellular telephone utilized by Rivera. PSR ¶9. For his part, Rivera obtained kilogram quantities of cocaine from various individuals in Waterbury, including co-conspirators Luis A. Colon, a.k.a. “Anthony,” Christian Echevarria, a.k.a. “Piti,” and Sammy Medina. *Id.* In addition to Milton Roman, Rivera distributed cocaine and cocaine base on a regular basis to approximately 20 individuals in the Waterbury area. *Id.*

After Luis A. Colon, a.k.a. “Anthony,” was identified as a supplier to Rivera, the district court authorized interception of cellular phones used by Colon. PSR ¶10. This wiretap investigation of Colon lasted for approximately ninety days. *Id.* Over the course of that wiretap, it was determined that Colon was the head of a drug trafficking ring that operated out of a building located at 262 Walnut Street in Waterbury. *Id.* Colon primarily distributed kilogram quantities of cocaine and ounce quantities of cocaine base. *Id.* In turn, Colon was supplied by co-defendant Arnulfo Andrade. *Id.* Phones utilized by Andrade were also the subject of wiretaps during this investigation. *Id.* This investigation revealed that, within Connecticut, Andrade was at the top of the supply chain connected to Colon. *Id.* Andrade was Colon’s principal cocaine supplier. *Id.*

As to the defendant Odaris Jimenez, a cooperating witness (“CW”) developed by the government indicated that Andrade dealt in kilogram quantities of cocaine and that, during the spring of 2006, Jimenez acted as a “middleman” in facilitating cocaine deals between the CW and Andrade. PSR ¶11. According to the CW, Jimenez had

played the role of Andrade's middleman for some time. *Id.* The CW indicated that Jimenez eventually had a falling out with Andrade and Andrade cut Jimenez out of the deals. *Id.* However, intercepted telephone calls indicate that during the summer of 2006, Andrade continued to supply Jimenez with cocaine. *Id.*

For example, on August 29, 2006, Jimenez called Andrade and said "talk to me." Andrade said that "it should be soon." Jimenez informed Andrade that he had "that ready and everything." Here, Jimenez was seeking to acquire cocaine and he told Andrade that he had money ready. Andrade told Jimenez that he was still waiting for a supply. PSR ¶12. On September 5, 2006, Jimenez and Andrade spoke again. Jimenez said that "this man just called me and that he wants to do it tomorrow at 9:00 in the morning sharp." Andrade said "all right." Jimenez said "I told him that I wanted to do it today. I do not have any money." Jimenez added "if you get anything . . . I do not have even fifty cents in my pockets." Andrade replied "around 3:00 in the afternoon come on by and I'll give you something." Here, Jimenez was indicating that he had a customer for cocaine and that he needed to obtain that cocaine from Andrade in order to make some money for himself. Andrade agreed to provide the cocaine to him. PSR ¶13.

Later, on September 6, Andrade called Jimenez and told him that the "family that I have is ugly, ugly, ugly like a dog." Jimenez replied that it is not worthwhile like that because you know how that "Tigre is very picky." Andrade responded "on Friday . . . God willing I'll be

ready. . . .” Andrade added that you can tell him that “I’ll be ready by Friday”. . . and that is “one cajeta” (round sweet box) of “pretty.” On Saturday, September 9, Andrade told Jimenez that he was “ready” and that Jimenez should call his customer. PSR ¶14. According to the CW, “ready” is a code word that Andrade frequently used to indicate he had cocaine available. *Id.* Shortly thereafter, Jimenez reported back to Andrade that the customer could not be ready until the following day. *Id.* Intercepts on September 10 indicated that Jimenez and Andrade met that day. *Id.*

On another occasion, in October 2005, Jimenez made arrangements for two associates to travel to Ohio to pick up five kilograms of cocaine that belonged to Andrade and bring them back to Connecticut. PSR ¶15. Jimenez supplied these associates with a vehicle to transport the cocaine. *Id.* These individuals were the subject of a traffic stop in Ohio and a search of the vehicle revealed five kilograms of cocaine in a hidden compartment in the car. *Id.* Lab testing confirmed the substance was cocaine with a net weight in excess of five kilograms. *Id.* The vehicle was registered in the name of Jimenez’s long-time girlfriend. *Id.*

The defendant was arrested on July 21, 2008. PSR ¶16. In a voluntary statement, given post-arrest, Jimenez also confirmed that he had engaged in cocaine transactions directly with Andrade totaling approximately 1400 grams of cocaine. *Id.*

B. Jimenez pleaded guilty to a single drug conspiracy count based on his involvement in the distribution of cocaine.

On November 24, 2008, a federal grand jury returned a one count indictment against the defendant charging conspiracy to possess with the intent to distribute, and to distribute, five kilograms or more of cocaine in violation of Title 21, United States Code Sections 841(a)(1), 841(b)(1)(A) and 846. A3-5; A52.

On May 21, 2009, the defendant pleaded guilty to this charge. A54. In a written plea agreement between the parties, the government and the defendant stipulated that the drug quantity which formed the basis of the offense to which the defendant pled, including his relevant conduct, was at least five kilograms of cocaine but less than fifteen kilograms. A8. The parties did not reach an agreement on the defendant's applicable criminal history category and left the determination of the criminal history score and calculation of the advisory sentencing guidelines imprisonment range to the probation office. *Id.* The defendant reserved the right to argue for any downward departures he believed were applicable and reserved the right to advocate a non-guidelines sentence. A9. The government reserved the right to oppose any such requests. *Id.* In further consideration of the defendant's guilty plea, the government agreed not to oppose a sentence of 120 months' imprisonment, the applicable mandatory minimum sentence, and also agreed to forego the filing of a second offender notice under 21 U.S.C. § 851 predicated upon any prior convictions for felony drug convictions,

which would have doubled the mandatory minimum period of incarceration to twenty years.² A7; A9. Finally, the defendant agreed to waive his right to appeal and rights of collateral attack as long as the sentence of imprisonment did not exceed 120 months. A9.

C. The district court imposed a sentence of 120 months and one day of imprisonment, one day more than the mandatory minimum sentence applicable to Count One of the Indictment to which the defendant pleaded guilty.

On December 11, 2009, the district court conducted a sentencing hearing. A55. At the beginning of the hearing, the district court noted that the United States Probation Office had prepared a Pre-Sentence Report and inquired whether the defendant and his counsel had the opportunity to review the PSR. A22. Defense counsel stated “[y]es, we have, your Honor.” *Id.* The district court then inquired “do you have any objection to the factual statements that are set forth there?” *Id.* Defense counsel replied “[n]o, we do not, your Honor.” *Id.* The government also had no objection to the factual statements contained in the PSR. *Id.* Thereafter, the district court adopted the factual statements in the PSR as the findings of fact of the court and also accepted the plea agreement that had been signed

² In fact, the defendant had a 1994 federal conviction for use of a telephone to facilitate a drug trafficking felony in violation of 21 U.S.C. § 843(b) and also a 1993 conviction for sale of narcotics in the Connecticut Superior Court. PSR ¶¶ 35-36.

by the parties on May 21, 2009, during the change of plea hearing. *Id.*

The district court then set forth the minimum and maximum penalties applicable to the offense of conviction, including the mandatory minimum term of 10 years' imprisonment, which the defendant acknowledged. A23. The district court also determined, based on the PSR, that the defendant's adjusted offense level under the sentencing guidelines was 29 and that defendant was in Criminal History Category III. A23-24. Accordingly, the district court calculated an advisory sentencing guidelines imprisonment range of 120 months to 135 months. The parties agreed with the district court's determination of the sentencing guidelines calculation. A24.

Subsequently, the defendant invited the district court to impose a sentence below the applicable ten year mandatory minimum sentence on the ground that "there's a viable conflict between 3553(a) and the mandatory minimum." A30. In declining to do so, the district court noted that "legally I don't believe I'm permitted to do that, not only because there's 2nd Circuit case law on point, but quite frankly, I don't see a conflict between 3553 and 841." A36. The district court elaborated further by stating that "3553(e) expressly provides the circumstances under which the court can go below the mandatory minimum established by 841, and those circumstances are not met here. And so I don't see that Congress has created a conflict between those two statutes." *Id.*

Initially, the district court imposed a sentence of 120 months' imprisonment to be followed by five years' supervised release. A38. However, after noting that the defendant had waived the right of appeal if the sentence imposed did not exceed 120 months, the district court modified the term of incarceration to 120 months and one day to afford the defendant the opportunity to file an appeal. A41.

Summary of Argument

The district court properly concluded that 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 at 110-11. 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 most 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. 18 U.S.C. §§ 3553(e) and 3553(f) 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. 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 declined to impose a sentence below the 120-month statutory minimum 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 interpretation and of the constitutionality of [a statute] *de novo*”).

B. Discussion

The defendant argues that § 3553(a) requires a court to impose a sentence that is “sufficient, but not greater than necessary, to comply with the purposes” of sentencing laid out in § 3553(a)(2) and that this mandate conflicts with the penalty provisions of the Controlled Substances Act, 21 U.S.C. § 841, which establish mandatory minimum penalties.³ Def. Br., pp. 11-17. For example, 21 U.S.C.

³ The defendant spends considerable time in his brief attacking the rationality and effectiveness of mandatory minimum prison terms for drug offenses and advocating that statutes authorizing such sentences be repealed. Def. Br., pp. 4- (continued...)

§ 841(b)(1)(A) provides that defendants like Jimenez “*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)(1) 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. The defendant claims that since § 841(b) does not specifically provide for sentencing without regard for § 3553(a), § 3553(a) must prevail. Def. Br., p. 12. 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., p. 13.

This Court recently rejected the very arguments advanced by the defendant in *United States v. Samas*, 561 F.3d 108, 110-11 (2d Cir. 2009) (per curiam). The defendant in *Samas* pleaded guilty to several charges, including one count of possession with intent to distribute and distribution of fifty grams or more of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). On that charge, the district court sentenced Samas to a term of

³ (...continued)

10. The government notes only that this is an issue more appropriately addressed by Congress after appropriate fact finding, and not this Court.

imprisonment of 240 months, the mandatory minimum term applicable under § 841(b)(1)(A). 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).

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” 561 F.3d at 110-11 (quoting *United States v. Chavez*, 549 F.3d 119, 135 (2d Cir. 2008)). In reaching its holding that § 3553(a) did 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.

Id. 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. The fact that § 841(b) does not contain specific language exempting it from the applicability of § 3553(a) was immaterial.

In addition, this Court noted that § 3553 contains expressly enumerated provisions that authorize a district court to depart from a statutory minimum sentence. Specifically, §§ 3553(e) and 3553(f) delineate the limited circumstances in which a district court may depart from a statutory minimum sentence. *See United States v. Medley*, 313 F.3d 745, 749 (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* completely resolves the arguments presented by the defendant here. Because *Samas* is controlling on this Court unless and until it is overruled by the Supreme Court or by this Court sitting en banc, the defendant’s sentence should be affirmed. *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).

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 conjure up a false conflict with § 3553 collides 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).⁴

⁴ 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 term, irrespective of whether statute defining offense contains preclusion language such as "notwithstanding any other provision of law").

In addition to *Samas*, every other circuit to consider similar and directly analogous claims has rejected them. *See, e.g., United States v. Franklin*, 499 F.3d 578, 583-86 (6th Cir. 2007) (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 otherwise specifically provide’ 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 defendant's suggestion that *United States v. Booker*, 543 U.S. 220 (2005) has somehow rendered statutorily prescribed mandatory minimums "advisory", Def. Br., pp. 14-15, 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 § 841⁵ as well as other statutes such as 18 U.S.C. § 924(c) (firearms enhancement),⁶ 18 U.S.C. § 924(e) (armed career criminal

⁵ *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)).

⁶ *United States v. Chavez*, 549 F.3d 119, 135 (2d Cir. 2008) (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),⁷ 18 U.S.C. § 2422(b) (enticement of minor),⁸ and 18 U.S.C. § 2252A (child pornography).⁹

Not only would the defendant's interpretation of § 3553(a) undermine all of those decisions, but 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).¹⁰ This Court effectively said as much in

⁷ 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).

⁸ *United States v. Gagliardi*, 506 F.3d 140, 148-49 (2d Cir. 2007) (rejecting claim of sentencing manipulation).

⁹ *United States v. Stearns*, 479 F.3d 175, 178 (2d Cir. 2007) (per curiam) (affirming imposition of only partially concurrent 10-year mandatory minimum).

¹⁰ The defendant is correct that neither § 3553(e) nor § 3553(f) specifies that they constitute the exclusive methods
(continued...)

United States v. Richardson, 521 F.3d 149, 159 (2d Cir. 2008), where it held that 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).” *Richardson*, 521 F.3d at 159. Because this Court has held that § 3553(a) does not authorize a district court to select a sentence below what can be justified by

¹⁰ (...continued)

for imposing a sentence below a statutory minimum. Def. Br. at 15-16. 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., p. 16. *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.

reference to a defendant's 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 (1996) ("we 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 (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 a superfluity. *See also Holguin*, 436 F.3d at 117-19 (rejecting Sixth Amendment challenge to judicial factfinding 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 it did not commit error in declining to do. 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: June 28, 2010

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in cursive script, appearing to read "Geoffrey M. Stone".

GEOFFREY M. STONE
ASSISTANT U.S. ATTORNEY

Sandra S. Glover
Assistant United States Attorney (of counsel)

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.

* * *

Add. 10

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.