

10-285

To Be Argued By:
BRIAN P. LEAMING

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-285

UNITED STATES OF AMERICA,
Appellant,

-vs-

JOSHUA ACOFF,
Defendant-Appellee.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

Table of Authorities.....	iii
Statement of Jurisdiction.....	vii
Statement of Issue Presented for Review.....	viii
Preliminary Statement.....	1
Statement of the Case.....	2
Statement of Facts and Proceedings	
Relevant to this Appeal.....	3
A. The offense conduct.....	3
B. The indictment.....	5
C. The guilty plea.....	5
D. The presentence report.....	7
E. The sentencing.....	8
Summary of Argument.....	9
Argument.....	10

I. The district court erred in imposing a 15-month sentence, when neither of the permissible bases for sentencing below the mandatory minimum of 60 months were present.....	10
A. The 15-month sentence was imposed in violation of the applicable 60-month statutory mandatory minimum sentence.	10
B. The defendant affirmatively waived any challenge to the 60-month mandatory minimum sentence applicable to his offense.....	17
Conclusion.....	21
Addendum	

TABLE OF AUTHORITIES

CASES

PURSUANT TO “BLUE BOOK” RULE 10.7, THE GOVERNMENT’S CITATION OF CASES DOES NOT INCLUDE “CERTIORARI DENIED” DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

<i>Harris v. United States</i> , 536 U.S. 545 (2002).....	15
<i>Kimbrough v. United States</i> , 552 U.S. 85 (2007).....	14, 15, 16, 17
<i>United States v. Booker</i> , 543 U.S. 220 (2005).....	14, 15
<i>United States v. Bradbury</i> , 189 F.3d 200 (2d Cir. 1999).....	20
<i>United States v. Brumer</i> , 528 F.3d 157 (2d Cir. 2008) (per curiam).	20
<i>United States v. Chavez</i> , 549 F.3d 119 (2d Cir. 2008).....	17
<i>United States v. Cook</i> , 447 F.3d 1127 (8th Cir. 2006).	18, 19
<i>United States v. Crosby</i> , 397 F.3d 103 (2d Cir. 2005).....	10

<i>United States v. Delgado</i> , 288 F.3d 49 (1st Cir. 2002).	20
<i>United States v. Durham</i> , 963 F.2d 185 (8th Cir. 1992).	19
<i>United States v. Gonzalez</i> , 420 F.3d 111 (2d Cir. 2005).	11
<i>United States v. Granik</i> , 386 F.3d 404 (2d Cir. 2004).	19, 20
<i>United States v. Lee</i> , 523 F.3d 104 (2d Cir. 2008).	14, 15
<i>United States v. Martinez</i> , 122 F.3d 421 (7th Cir. 1997).	20
<i>United States v. Medley</i> , 313 F.3d 745 (2d Cir. 2002).	12
<i>United States v. Moore</i> , 54 F.3d 92 (2d Cir. 1995).	14
<i>United States v. Nelson</i> , 277 F.3d 164 (2d Cir. 2002).	18
<i>United States v. Nguyen</i> , 46 F.3d 781 (8th Cir. 1995).	19
<i>United States v. Olano</i> , 507 U.S. 725 (1993).	18

<i>United States v. Phillips</i> , 382 F.3d 489 (5th Cir. 2004).	12
<i>United States v. Regalado</i> , 518 F.3d 143 (2d Cir. 2008) (per curiam). . . .	14, 15
<i>United States v. Samas</i> , 561 F.3d 108 (2d Cir.) (per curiam), <i>cert. denied</i> , 130 S. Ct. 184 (2009).	14, 17
<i>United States v. Stevens</i> , 19 F.3d 93 (2d Cir. 1994)..	14
<i>United States v. Then</i> , 56 F.3d 464 (2d Cir. 1995)..	14
<i>United States v. Wellington</i> , 417 F.3d 284 (2d Cir. 2005)..	18
<i>United States v. Womack</i> , 985 F.2d 395 (8th Cir. 1993)..	18
<i>United States v. Yu-Leung</i> , 51 F.3d 1116 (2d Cir. 1995)..	18

STATUTES

18 U.S.C. § 3231.	vii
18 U.S.C. § 3553.	1, 10, 12, 15, 17
18 U.S.C. § 3742.	vii

21 U.S.C. § 841. *passim*
21 U.S.C. § 851. 20

RULES

Fed. R. App. P. 4. vii

GUIDELINES

U.S.S.G. § 2D1.1. 6, 7, 16
U.S.S.G. § 3C1.2. 6, 7
U.S.S.G. § 3E1.1. 6, 7

Statement of Jurisdiction

The Solicitor General of the United States has personally authorized this government sentencing appeal. *See* 18 U.S.C. § 3742(b).

The district court (Peter C. Dorsey, Senior United States District Judge) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. On December 4, 2009, the district court orally sentenced the defendant to 15 months in prison. JA 89. Judgment entered December 7, 2009, Joint Appendix (“JA”) 5, and the United States filed a timely notice of appeal on December 18, 2009, JA 6, 7. *See* Federal Rule of Appellate Procedure 4(b).

This Court has appellate jurisdiction over this sentencing appeal under 18 U.S.C. § 3742(b).

**Statement of Issue
Presented for Review**

Whether the district court erred in imposing a 15-month prison sentence on a defendant convicted of drug possession in violation of 21 U.S.C. § 841(a)(1) and § 841(b)(1)(B), which carries a statutory minimum sentence of 60 months, when neither of the permissible bases for sentencing below the mandatory minimum term of imprisonment were present.

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Preliminary Statement

Joshua Acoff pleaded guilty to possessing with intent to distribute 5 grams or more of cocaine base. That violation carried a minimum penalty of 60 months in prison. 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). It was undisputed at sentencing that Acoff did not qualify for a sentence below the mandatory minimum: He had not provided substantial assistance to the government under 18 U.S.C. § 3553(e), and he was ineligible for the “safety-valve” provisions of 18 U.S.C. § 3553(f) because he had more than one criminal history point. Notwithstanding the

mandatory minimum penalty set by statute, on December 4, 2009, the district court sentenced the defendant to 15 months in prison over the government's objection.

The district court clearly violated 21 U.S.C. § 841(b)(1)(B)(iii) when it sentenced the defendant to 15 months in prison, far below the statutory minimum penalty of 60 months.

Regardless of how dissatisfied a district court may be with the mandatory minimum sentence that applies to a defendant after he has entered a valid guilty plea, 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) are statutes mandated by Congress that must be followed by the district court. Accordingly, this Court should vacate that sentence and remand for imposition of a sentence at or above the 60-month statutory minimum.

Statement of the Case

On April 1, 2009, a federal grand jury sitting in New Haven, Connecticut, returned an indictment charging Joshua Acoff with possession with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). JA 4, 8. On September 15, 2009, Acoff pleaded guilty to a single count of possession with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). JA 5.

At a sentencing hearing on December 4, 2009, the district court (Peter C. Dorsey, J.) orally sentenced the

defendant to 15 months in prison, over the government's objection. JA 84. The written judgment of conviction was filed and entered on December 7, 2009. JA 5, 26-28. The government filed a timely notice of appeal on December 18, 2009. JA 6, 7.

Acoff is currently serving a state sentence; he has not yet started serving his federal sentence.

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

A. The offense conduct

On February 14, 2009, Acoff had outstanding State of Connecticut arrest warrants issued by Hartford Superior Court. Presentence Report ("PSR") ¶ 5. On that date, a confidential informant had provided information to law enforcement officers that Acoff was driving a white Honda Accord. *Id.* Late that same evening, Acoff was observed by a Hartford Police Officer driving a white Honda Accord in the area of Norfolk Street and Blue Hills Avenue. *Id.* The officer recognized Acoff from previous police encounters and from the wanted flyers distributed and/or posted at the Hartford Police Department which pertained to the outstanding warrants. *Id.*

With the assistance of fellow officers, a traffic stop was attempted on Kent Street. *Id.* Acoff immediately engaged the officers in a high-speed pursuit by driving on the sidewalk and running a stop sign. *Id.* Acoff continued his flight eastbound on Albany Avenue without his

headlights and ignoring multiple red traffic signals. *Id.* Acoff continued southbound onto Main Street, again ignoring red traffic signals, until he entered Interstate 84 (“I-84”). *Id.* As Acoff traveled east on I-84, his speed exceeded 90 mph as he continuously weaved through traffic. *Id.*

Acoff exited I-84 at Exit 60 in Manchester and headed westbound on State Route 44. *Id.* ¶ 6. He drove into East Hartford before losing control of his vehicle at Burnside Avenue and Bidwell Street. *Id.* Acoff then reversed direction and continued eastbound towards I-84. *Id.* Still driving without headlights, Acoff drove directly into the path of pursuing police units. *Id.* When Acoff arrived back at the intersection for I-84, assisting officers deployed stop sticks which caused the tires of Acoff’s vehicle to deflate. *Id.* Acoff continued driving eastbound until his vehicle was driving only on its rims. *Id.* Acoff’s vehicle came to a stop at 784 Center Street, Manchester. *Id.*

Officers ordered Acoff from the vehicle. *Id.* ¶ 7. When Acoff did not comply with officers’ commands to get on the ground, he was forcibly taken to the ground and handcuffed. *Id.* In the driver’s side door map pocket, officers observed what turned out to be approximately 17 grams of a white rock-like substance in a knotted plastic bag. *Id.*; JA 54. The substance was sent to the State of Connecticut Toxicology Lab for analysis which confirmed the substance to be cocaine base with a net weight of 16.8 grams. PSR ¶ 7; JA 54-55.

Acoff was transported to the Hartford Police North Substation on Albany Avenue where he was advised of his constitutional rights. PSR ¶ 8. When the arresting officer asked Acoff why he did not throw the cocaine base out of the window while they were chasing him, Acoff responded, “yo, that ain’t shit, I ain’t worried about that, I deal with real weight. I’m talking ounces. That’s just some little shit, I sell to get through the day.” PSR ¶ 8.

B. The indictment

On April, 1, 2009, a federal grand jury returned a one-count indictment against Joshua Acoff. JA 4, 8-9. He was charged with possession with intent to distribute 5 or more grams of cocaine base, in violation of Title 21, United States Code, Sections 841(a)(1) and (b)(1)(B). JA 8-9.

C. The guilty plea

At a hearing on September 15, 2009, Acoff pleaded guilty to count one of the indictment which charged him with possession with intent to distribute 5 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). JA 55-56. Acoff signed a plea agreement that confirmed the penalties applicable to his drug offense. JA 10-18, 43. As relevant here, the plea agreement memorialized the parties’ understanding that the offense carried “a minimum mandatory term of imprisonment of five (5) years and a maximum term of imprisonment of 40 years.” JA 10.

The plea agreement also contained a guideline stipulation in which the parties agreed that the United States Sentencing Guidelines recommended an imprisonment range of 60 to 71 months. JA 12-13. That range was premised on a base offense level of 24 pursuant to U.S.S.G. § 2D1.1, a two level enhancement for Acoff's reckless endangerment during flight under U.S.S.G. § 3C1.2, a three level reduction for Acoff's acceptance of responsibility, U.S.S.G. § 3E1.1, and a criminal history category III. *Id.* The plea agreement acknowledged that the district court's discretion to impose a non-Guideline sentence or downward departure based on the 100 to 1 ratio for crack cocaine and powder cocaine was limited by the applicable statutory mandatory minimum penalty. JA 12-13. The plea agreement further acknowledged that neither party would seek a departure or adjustment from the agreed upon sentencing range of 60 to 71 months of imprisonment. JA 13.

During the plea allocation, the district court advised Acoff that among the penalties he faced, a conviction on Count One included a "a mandatory minimum of five years" in prison. JA 36. In discussing the parties' stipulation on the sentencing guidelines calculation, the district court advised: "In any event, that recommended sentencing guideline range is subject to the mandatory minimum sentence set forth by the statute, of 60 months." JA 40-41. When it came time for Acoff to admit to the underlying conduct, he agreed that he possessed 5 grams or more of cocaine base with the intent to distribute it. JA 53. The district court thereafter accepted Acoff's guilty plea. JA 56.

After the district court set a date for the sentencing hearing, Acoff's attorney informed the court that a motion to postpone the sentencing might be forthcoming if it appeared that Congress was poised to eliminate the mandatory penalties for crack cocaine offenses insofar as the mandatory penalties were based on the 100 to 1 ratio. JA 58-59. The district court acknowledged the limitations in its sentencing authority by noting that "even though I might ignore the guideline if it's calculated based on the ratio, if the mandatory minimum is still in effect, it is not something I can ignore, much as I disagree with these mandatory minimum (sic), so." JA 59.

D. The presentence report

The PSR calculated Acoff's guideline range using a base offense level of 24 for a quantity of cocaine base of at least 5, but less than 20, grams of cocaine base in accordance with U.S.S.G. § 2D1.1(c)(8). PSR ¶ 13. Two levels were added for Acoff's actions in recklessly creating risk of death or serious bodily injury during flight under U.S.S.G. § 3C1.2. *Id.* ¶ 14. Three levels were subtracted for Acoff's acceptance of responsibility, pursuant to U.S.S.G. § 3E1.1. *Id.* ¶ 30. A total offense level of 23, with a criminal history category III, yielded an advisory Guideline range of 60 to 71 months of imprisonment, *id.* ¶¶ 24, 49, with a statutory range of five to forty years of imprisonment, *id.* ¶ 48. The probation officer stated that he was "not aware of any circumstances that would warrant a departure from the applicable guideline range." *Id.* ¶ 59.

E. The sentencing

In Acoff's sentencing memorandum filed on November 24, 2009, he agreed that the applicable sentencing range was 60 to 71 months of imprisonment and that he was subject to a mandatory minimum sentence of 60 months. JA 20. Acoff requested that the district court sentence him to "a sentence at the low end of the range, that is the mandatory minimum 60 months." *Id.*

At a sentencing hearing on December 4, 2009, the district court gave two principal reasons why it believed it appropriate to sentence Acoff below the guideline range set forth in the plea agreement. First, the district court noted that a conviction for a similar weight of powder cocaine does not mandate a minimum term of imprisonment. JA 63. Second, the district court concluded that the 100 to 1 ratio between crack and powder cocaine "does not make sense at all" and therefore applied the sentencing guideline range applicable to powder cocaine.¹ JA 63.

¹ The district court also reduced Acoff's criminal history category from III to II on the theory that Acoff has "two minimal prior[s] [convictions]" for which he received one point each and that "[b]ecause of the timing, he's jumped to a Category III." JA 63-64. The reduction of Acoff's criminal history category from III to II would not authorize the district court to impose a sentence below the mandatory minimum, however. The government does not challenge the district court's horizontal departure of one criminal history category.

The government reminded the district court that it was without discretion to impose a sentence of less than five years of imprisonment. JA 78. While the district court agreed with the government that the constitutionality of the mandatory component had been previously upheld, the district court reasoned that the statute “hasn’t been upheld on the basis that I have discussed here with you today, i.e. that the hundred to one ratio is, in and of itself, subject to serious question as to its validity[.]” JA 79. The government noted its objection to any sentence below 60 months of imprisonment and the certainty of an appeal of any below-Guideline sentence. JA 79-80.

After hearing from the parties, the district court sentenced the defendant to 15 months in prison. The court also ordered that the defendant be placed on supervised release for four years, and that he pay a \$100 special assessment. JA 26, 89.

Summary of Argument

The district court erred in imposing a 15 month sentence of imprisonment. It was undisputed that Acoff was subject to a statutory minimum sentence of 60 months because he pleaded guilty to a violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B) for possessing with intent to distribute 5 grams or more of cocaine base. It was also undisputed that Acoff did not satisfy the requirements for either of the two statutory exceptions for receiving a sentence below the mandatory minimum. Acoff had more than one criminal history point, and therefore was ineligible for the safety-valve provisions of 18 U.S.C.

§ 3553(f). Nor had the government filed a motion under 18 U.S.C. § 3553(e), certifying that the defendant had provided substantial assistance in the investigation or prosecution of another person. Indeed, Acoff never claimed to have provided such assistance. The 15-month sentence was clearly unlawful.

Argument

I. The district court erred in imposing a 15-month sentence, when neither of the permissible bases for sentencing below the mandatory minimum of 60 months were present.

A. The 15-month sentence was imposed in violation of the applicable 60-month statutory mandatory minimum sentence.

The district court's imposition of a 15-month sentence clearly violated 21 U.S.C. §§ 841(a)(1) and (b)(1)(B), which prescribe a minimum sentence of 60 months of imprisonment. Sentences are reviewed for reasonableness, *see generally United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), and it is plainly unreasonable for a judge to impose a sentence outside the range authorized by statute.

There was no dispute that Acoff pleaded guilty to a violation of 21 U.S.C. § 841(b)(1)(B),² and that he

² Section 841(b)(1)(B) provides that “any person who violates subsection (a) of this section shall be sentenced as
(continued...)”

specifically admitted that his offense involved a type and quantity of drugs that triggered the five-year mandatory minimum of that provision. Pursuant to a written plea agreement, Acoff admitted possessing with intent to distribute 5 grams or more of cocaine base. JA 10-18. In the written stipulation of offense conduct, Acoff admitted that his offense involved approximately 17 grams of cocaine base, a quantity more than sufficient to satisfy the threshold quantity of 5 grams. JA 18. This was sufficient to trigger the enhanced penalties of § 841(b)(1)(B). *See United States v. Gonzalez*, 420 F.3d 111, 122-31 (2d Cir. 2005) (requiring defendant to admit, or jury to find, drug type and quantity to trigger enhanced penalties of § 841).

Before the entry of his guilty plea, Acoff was reminded by the district court on two occasions that the offense to which he intended to plead guilty mandated a minimum term of imprisonment of five years. JA 36, 40. On each occasion, Acoff acknowledged his understanding of the mandatory penalties he faced at sentencing. JA 36-37, 40-41. The district court thereafter accepted Acoff's guilty plea. JA 56. Even after accepting Acoff's guilty plea, the district court acknowledged that it could not "ignore" the

² (...continued)

follows: (1) . . . (B) In the case of a violation of subsection (a) of this section involving . . . (iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base . . . such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years"

mandatory minimum provision if it was still in effect at the time of sentencing. JA 59.

Acoff did not claim, and the district court did not find, that he qualified for either of the two exclusive avenues for receiving a sentence below the mandatory minimum. “[A] district court may impose a sentence of imprisonment below a statutory minimum for a drug crime if: (1) the government makes a motion pursuant to 18 U.S.C. § 3553(e) asserting the defendant’s substantial assistance to the government; or (2) the defendant meets the ‘safety valve’ criteria set forth in 18 U.S.C. § 3553(f).” *United States v. Medley*, 313 F.3d 745, 749 (2d Cir. 2002); *see also United States v. Phillips*, 382 F.3d 489, 498-99 (5th Cir. 2004) (joining all other circuits that have addressed the issue and concluding that substantial assistance and safety-valve subsections of § 3553 “represent the exclusive routes to depart below the statutory minimum”) (collecting cases). The first of these avenues was foreclosed to Acoff because the government had not filed a motion under § 3553(e) certifying that he had provided substantial assistance. Indeed, Acoff never claimed he was entitled to a substantial assistance reduction. Likewise, Acoff did not qualify for the “safety-valve” provisions of 18 U.S.C. § 3553(f), because he had more than one criminal history point. PSR ¶ 24. Acoff made no claim that he was eligible for the safety-valve reduction, and the district court made no such finding. JA 63-64.

While it made no express ruling, the district court’s imposition of a sentence below the term mandated by statute is tantamount to a finding that the portion of the

statute mandating a minimum prison term is unconstitutional. The district court's comments at the sentencing hearing underscore the intention of its sentence. More particularly, the district court reasoned:

[I]t [the statute] hasn't been upheld on the basis that I have discussed here with you today, i.e. that the hundred to one ratio is, in and of itself, subject to serious question as to its validity, and indeed, it's of such questionable validity that your office has specifically flagged, in a number of the sentencings that I've had of recent time, that it calculates the resolution of the case based on the existing law, but with a full recognition that in view of what has developed, both with the law, as decided by case law, and by the commission, that it's within the discretion of the Court to decide what to do, and I have indicated repeatedly that if there is no rationale for a discrepancy between the appropriate penalty for cocaine, straight cocaine, powdered cocaine, and crack cocaine, then no ratio has any valid substantiation to it, and therefore, to pick a ratio out, 50 to 1, 75 to 1, 25 to 1, is just as invalid as a hundred to one, so therefore, the only ratios that I can find justified, is a 1 to 1 ratio.

JA 79. In short, the district court reasoned that if it is within its discretion to formulate an appropriate crack:powder ratio, then it may properly apply the 1 to 1 ratio regardless of any mandatory sentence. This reasoning, however, was specifically rejected by this Court

in *United States v. Samas*, 561 F.3d 108 (2d Cir.) (per curiam), *cert. denied*, 130 S. Ct. 184 (2009).

In *Samas*, the defendant was sentenced to a mandatory minimum term of imprisonment, pursuant to 21 U.S.C. § 841(b). 561 F.3d at 110. The defendant appealed his sentence to this Court, arguing that the mandatory sentencing scheme in 21 U.S.C. § 841(b) violated the equal protection component of the Fifth Amendment's Due Process Clause because there is no rational basis for the disparity between sentences for powder and crack cocaine. *Id.* at 109. This Court rejected the defendant's argument and held that the mandatory sentencing scheme in the narcotics sentencing statute, § 841(b), is not unconstitutional. *Id.* at 110. In so doing, this Court noted that it has "repeatedly rejected" such arguments in the past. *Id.* (citing *United States v. Regalado*, 518 F.3d 143, 149 n.3 (2d Cir. 2008) (per curiam); *United States v. Moore*, 54 F.3d 92, 97-99 (2d Cir. 1995); *United States v. Then*, 56 F.3d 464, 466 (2d Cir. 1995); and *United States v. Stevens*, 19 F.3d 93, 96-97 (2d Cir. 1994)).

Nothing in *United States v. Booker*, 543 U.S. 220 (2005) or *Kimbrough v. United States*, 552 U.S. 85 (2007), has undermined the validity of statutory minimum sentences. Indeed, In *Samas*, this Court held that "[n]othing in *Kimbrough* suggests that the powder to crack cocaine disparity in § 841(b) is unconstitutional." 561 F.3d at 110 (citing *United States v. Lee*, 523 F.3d 104, 106 (2d Cir. 2008)). This Court further stated that "[t]he *Kimbrough* Court explained that the federal narcotics 'statute, by its terms, mandates only maximum and

minimum sentences. . . . The statute says nothing about the appropriate sentences within these brackets” *Id.* (quoting *Kimbrough*, 552 U.S. at 102-103). “Thus, *Kimbrough* bears upon the discretion of district judges to sentence within the maximum and minimum sentence ‘brackets.’” *Id.*; see also *Regalado*, 518 F.3d at 149 n.3 (“In addition, Regalado’s (unpreserved) due process challenge to the 100-to-1 powder to crack cocaine ratio underlying his sentence is without merit as we have repeatedly rejected similar constitutional challenges.”); *Lee*, 523 F.3d at 106, (“It is not apparent to us that the principles set forth in *Kimbrough* have any application to mandatory minimum sentences imposed by statute.”).

This Court was correct when it stated that nothing in *Kimbrough* has any application to statutory minimum sentences. For one thing, *Kimbrough* is simply the latest in a series of cases holding, in light of the Sixth Amendment, that the statutory *maximum* sentence to which a defendant may be lawfully exposed is dictated by facts found by a jury beyond a reasonable doubt or admitted by the defendant himself. See, e.g., *Booker*, 543 U.S. at 231. These Sixth Amendment principles do not apply to statutory *minimum* sentences, like the ones at issue here. *Harris v. United States*, 536 U.S. 545, 560-68 (2002).

Second, *Kimbrough* nowhere suggested that the 100:1 powder:crack ratio was irrational. It merely reviewed some of the conflicting data on the relative harmfulness of powder and crack cocaine by way of background, 552 U.S. at 94-100, and held that § 3553(a) gives sentencing judges the discretion to decide for themselves whether to adhere

to the ratio selected by the Sentencing Commission, 552 U.S. at 108-110. In no way did the *Kimbro* Court undertake to evaluate the competing evidence regarding the societal harms caused by different drugs, or to determine any equivalences between specified quantities of heroin, marijuana, powder cocaine, crack cocaine, or any other drugs.³ The Court likewise offered no opinion about the rationality or desirability of the crack:powder ratios that the Sentencing Commission had recently adopted in the amended drug quantity table of U.S.S.G. § 2D1.1, which now range from 1:25 to 1:80. 552 U.S. at 106. The fact that there is an ongoing debate that involves the political branches and the Sentencing Commission about the proper equivalencies among different drugs hardly demonstrates the “irrationality” of the ratios that Congress chose when it enacted § 841. It would be highly unusual, to say the least, for an appellate court to make such a dramatic pronouncement without the slightest factual record having been developed below.

³ For example, although the Court noted in passing the Sentencing Commission’s conclusion that “crack is associated with ‘significantly less trafficking-related violence . . . than previously assumed,’” 552 U.S. at 98, the Court did not review the Commission’s recent statistic showing that crack offenders are twice as likely as powder offenders to have a weapon involved in their offense. U.S. SENTENCING COMMISSION, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 106 (Table 39, Weapon Involvement of Drug Offenders for Each Drug Type, Fiscal Year 2007) (29.8% of crack offenders v. 14.4% of powder offenders).

In *Samas*, this Court unequivocally affirmed that “*Kimbrough* does not disturb our precedents rejecting challenges to the constitutionality of the mandatory sentencing scheme in § 841(b).” 561 F.3d at 110. *Samas* is controlling precedent here and mandates a reversal of the sentence imposed by the district court. Acoff neither claimed nor established any circumstance under which the district court would have had authority to depart from the statutorily prescribed minimum sentence – such as a substantial-assistance motion under 18 U.S.C. § 3553(e) or the safety valve under 18 U.S.C. § 3553(f). This Court has repeatedly explained that statutory minimum sentences are in “tension with section 3553(a), but that very general statute cannot be understood to authorize courts to sentence below minimums specifically prescribed by Congress” *Samas*, at 110-11 (quoting *United States v. Chavez*, 549 F.3d 119, 135 (2d Cir. 2008) (rejecting argument that § 3553(a) conflicts with statutory minimum sentences in reviewing a sentence applying the firearms enhancement in 18 U.S.C. § 924(c)) (internal quotation marks omitted)). In *Samas*, this Court definitively held that it reached “the same conclusion with respect to mandatory sentences imposed under § 841(b).” *Id.* at 111.

B. The defendant affirmatively waived any challenge to the 60-month mandatory minimum sentence applicable to his offense.

The defendant signed a written plea agreement that unambiguously acknowledged the applicability of the 60-month mandatory minimum penalty and repeatedly confirmed in open court his understanding that he faced

that penalty. JA 10, 12-13, 36-37, 40-41. On this record, he has waived any argument that would defeat application of the mandatory minimum penalty applicable to his conviction.

A defendant may – through his words, his conduct, or by operation of law – waive a claim, so that this Court will altogether decline to adjudicate that claim of error on appeal. See *United States v. Olano*, 507 U.S. 725, 733 (1993); *United States v. Quinones*, 511 F.3d 289, 320-21 (2d Cir. 2007); *United States v. Wellington*, 417 F.3d 284, 289-90 (2d Cir. 2005); *United States v. Nelson*, 277 F.3d 164, 204 (2d Cir. 2002); *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995).

The Eighth Circuit has had occasion to hold that “a defendant who explicitly and voluntarily exposes himself to a specific sentence may not challenge that punishment on appeal.” *United States v. Womack*, 985 F.2d 395, 400 (8th Cir. 1993) (internal quotation marks omitted). For example, in *United States v. Cook*, 447 F.3d 1127, 1128 (8th Cir. 2006), a defendant who had pled guilty to a violation of 21 U.S.C. § 841(b)(1)(A) challenged – for the first time on appeal – the applicability of the 20-year mandatory minimum penalty. The Eighth Circuit held that the defendant had waived his “right to contest his sentence on the basis of the § 841(b)(1)(A) enhancement” by freely entering into a plea agreement that called for that penalty. *Id.* (“At the time of the plea, Cook did not object to the prior crime but stated he understood the plea agreement and was entering his plea freely and voluntarily with the knowledge his mandatory minimum sentence would be

twenty years.”); *see also United States v. Nguyen*, 46 F.3d 781, 783 (8th Cir. 1995) (same); *United States v. Durham*, 963 F.2d 185, 187 (8th Cir. 1992) (“[Defendant] waived any objection to the twenty-five-year sentence by agreeing that it was the minimum sentence mandated by the statutes, and by accepting the benefit of the plea agreement.”).

As in *Cook*, the defendant here knowingly entered into a written plea agreement that called for a mandatory minimum penalty. JA 10. He acknowledged that he had read that agreement, discussed it with his attorney, and understood it. JA 17, 36-37. Moreover, the defendant repeatedly acknowledged that he faced a 5-year minimum sentence during the plea hearing. JA 36-37, 40-41. Having “explicitly and voluntarily expose[d] himself” to a 5-year minimum sentence, the defendant should not now be permitted to challenge that sentence. *Cook*, 447 F.3d at 1128.

The Eighth Circuit’s approach is consistent with this Court’s enforcement of plea agreements more generally. The Court has “noted the dangers of piecemeal non-enforcement of plea agreements,” in the contexts of enforcing factual stipulations as well as appellate waivers. *United States v. Granik*, 386 F.3d 404, 412 (2d Cir. 2004). Both defendants and the government benefit from the enforceability of plea agreements. “If defendants are not held to their factual stipulations, therefore, the government has no reason to make concessions in exchange for them.” *Id.* at 412-13. In this case, it was made clear that in exchange for the defendant’s plea to an offense bearing a

5-year minimum sentence, the government had forgone the filing of a second-offender notice pursuant to § 851, which would have elevated the mandatory minimum sentence to 10 years' imprisonment. JA 13. To ignore the defendant's concession about the applicability of the mandatory minimum sentences would be to ignore the "mutuality of plea agreements." *Granik*, 386 F.3d at 412; *see also United States v. Brumer*, 528 F.3d 157, 159 (2d Cir. 2008) (per curiam) (holding that when defendant breaches plea agreement, government is entitled to choose between specific performance or being relieved of its obligations under agreement); *United States v. Bradbury*, 189 F.3d 200, 208 n.4 (2d Cir. 1999) (rejecting defendant's claim that his base offense level under the Guidelines should be calculated as if his conspiracy involved no drugs at all, where defendant had signed plea agreement acknowledging that conspiracy involved 378 pounds of marijuana); *United States v. Delgado*, 288 F.3d 49, 56-57 (1st Cir. 2002) (holding that defendant's concession in plea agreement that there was no basis for downward departure constituted waiver of this claim on appeal); cf. *United States v. Martinez*, 122 F.3d 421, 422-23 (7th Cir. 1997) (holding that factual stipulations in plea agreement are binding unless defendant validly withdraws from agreement).

In sum, Acoff should not be heard to argue that the 60-month mandatory minimum sentence is inapplicable to his case. He waived any such argument by signing a plea agreement acknowledging the applicability of that sentence and repeatedly affirming in open court his understanding that he faced that penalty.

Conclusion

Accordingly, the government respectfully requests that this Court reverse the 15-month sentence imposed by the district court, and remand for imposition of a sentence at or above the 60-month minimum established by 21 U.S.C. § 841(b)(1)(B)(iii).

Dated: June 23, 2010

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, appearing to read "B. Leaming", with a stylized flourish at the end.

BRIAN P. LEAMING
ASSISTANT U.S. ATTORNEY

SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

ADDENDUM

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

* * *

(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.

* * *

(b) Penalties

* * *

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

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

* * *

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years 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 \$2,000,000 if the defendant is an individual or \$5,000,000 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 10 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 \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both.

Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 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.