10-412

To Be Argued By:
S. DAVE VATTI

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-412

UNITED STATES OF AMERICA,
Appellee,

-vs-

RICHARD JUDGE,
Defendant,

MARK NALBANDIAN,
Defendant-Appellant.

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 (Vanessa L. Bryant, J.) had jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on January 22, 2010. Joint Appendix ("JA") 11. On January 27, 2010, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA 11. This Court has jurisdiction over this appeal of a criminal sentence pursuant to 18 U.S.C. § 3742(a).

Statement of Issues Presented for Review

1. Whether the district court plainly erred in placing the burden on the defendant to establish inability to pay a fine, and in imposing an $80,000 fine where the amount fell within the undisputed advisory guideline range, and where the defendant, who is 27 years old, was in good health, had a steady employment history, and earned at least $40,000 from his participation in a bulk marijuana distribution operation.

2. Whether the district court plainly erred in declining to offset from the $80,000 fine $27,000 in drug proceeds that was seized from the defendant at the time of his arrest and forfeited to the Government.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-412

UNITED STATES OF AMERICA,
Appellee,

-vs-

RICHARD JUDGE,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The defendant, Mark Nalbandian, was the distributor of large-scale marijuana shipments from suppliers based in Canada to Sean Werner, an individual residing in New York City. On March 3, 2008, Nalbandian was arrested in Queens, New York, following the delivery of 96.8 pounds

of marijuana to co-defendant Richard Judge, who worked for Werner as a drug courier. Nalbandian was convicted by a jury of conspiracy to possess with the intent to distribute, and to distribute, 100 kilograms or more of marijuana and sentenced to 87 months' imprisonment concurrent on each of the two counts of conviction to be followed by four years of supervised release concurrent on each count, and a fine of $80,000.

On appeal, Nalbandian challenges the $80,000 fine, arguing that the district court improperly shifted to him the burden of establishing his gain from the drug trafficking offenses of which he was convicted, and that the fine is not supported by the record. Further, Nalbandian claims that $27,000 in drug proceeds that was seized from him at the time of his arrest and was forfeited to the Government should be offset against the amount of the fine imposed.

Neither argument was raised by Nalbandian at sentencing, and Nalbandian cannot establish plain error. The district court did not place the burden on Nalbandian to establish the amount of the fine, but rather, appropriately placed the burden on him to support his claim that he had the *inability* to pay a fine. In addition, the court appropriately found that the record supported a fine of $80,000. Finally, the district court was not required to offset the amount of the fine by the $27,000 in drug proceeds seized from the defendant at the time of his arrest and forfeited to the Government because fines and forfeiture are not mutually exclusive under 21 U.S.C. § 853 and are independent aspects of sentencing.

Statement of the Case

On March 26, 2009, a federal grand jury returned a Superseding Indictment against the defendant, charging him with conspiracy to possess with intent to distribute, and to distribute, 100 kilograms or more of marijuana in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846 (Count One), and possession with intent to distribute, and distribution of, marijuana in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C) (Count Two). JA 7, 13. On April 7, 2009, the defendant pled not guilty to both counts of the Superseding Indictment. JA 8.

The defendant's trial on the charges in the Superseding Indictment began on April 27, 2009. JA 8. On April 30, 2009, the jury returned a guilty verdict as to both counts of the Superseding Indictment. JA 9. On January 21, 2010, the district court sentenced the defendant to a term of imprisonment of 87 months on each count of conviction to run concurrently, four years of supervised release on each count to run concurrently, a fine of $80,000 and a mandatory special assessment of $200. JA 11, 76, 109.

Judgment entered on January 22, 2010. JA 11. On January 27, 2010, the defendant filed a timely notice of appeal. JA 11.

The defendant is currently serving his sentence of imprisonment.

Statement of Facts and Proceedings Relevant to this Appeal

A. Nalbandian's offense conduct

The following facts are taken from the Pre-Sentence Report ("PSR"), which were adopted by the district court and not objected to by Nalbandian. JA 19-20.

In approximately September 2007, Sean Werner and Richard Judge, marijuana traffickers, attended a meeting with Nalbandian at the Atlantic Diner at 112th Street and Atlantic Avenue in Queens, New York, concerning Nalbandian's role as the contact person between the Canadian marijuana suppliers and Werner. PSR ¶7. At this meeting, Werner and Nalbandian determined that the marijuana would be delivered by Nalbandian on credit and Werner would resell the drugs and pay back Nalbandian prior to any subsequent shipments. *Id.*

On that same occasion, Judge reported observing Nalbandian and Werner transfer five black plastic garbage bags from the trunk of Nalbandian's car into Werner's car. Judge stated that he was present on two other occasions when Nalbandian dropped off marijuana at the Atlantic Diner to Werner, and Judge met Nalbandian on his own on approximately six occasions between November 2007 and March 2008 to take delivery of marijuana. *Id.* Nalbandian brought, on average, 60-80 pounds of marijuana on each trip. *Id.* On three occasions, the total load delivered was between 150-180 pounds, and on one occasion, the load

was 500 pounds. *Id.* Nalbandian gave the coconspirators each of these loads of marijuana on credit. *Id.*

On March 1, 2008, DEA agents followed Nalbandian to a warehouse facility located at 285 State Street in North Haven, Connecticut. GA 6, PSR ¶ 10. After some time, agents then followed Nalbandian to the Atlantic Diner. *Id.* Agents later observed Judge drive Nalbandian's car out of the parking lot and onto 112th Street and parked the car adjacent to Judge's own Ford Windstar minivan. PSR ¶ 11. Judge then opened the trunk of Nalbandian's car and transferred five plastic garbage bags into his own minivan. *Id.* Agents later apprehended Judge and seized the five plastic bags inside the van, which contained 96.8 pounds of marijuana. *Id.* Nalbandian was arrested inside the diner.

On the evening of March 3, 2008, search warrants were executed at Nalbandian's residence at 4 Hines Place and 285 State Street, Unit 6, in North Haven. PSR ¶12. In Nalbandian's residence, agents found a package of marijuana, weighing 158.6 grams net, and $27,000 in cash hidden in various locations throughout the apartment. *Id.* A heat sealer and plastic bags were also found in the apartment. *Id.*

A search of Nalbandian's North Haven warehouse revealed thousands of empty black plastic containers, hundreds of which had their bottoms sliced open. *Id.* A narcotics dog alerted positive on several pallets of the containers and the containers themselves indicating that at some point there had been narcotics in the containers. *Id.*

B. The sentencing

Sentencing was held on January 21, 2010. JA 11. At the outset of the sentencing hearing, the district court adopted the factual findings of the PSR, absent objection from either party. JA 19-20. The district court also articulated the factors it was required to consider under 18 U.S.C. § 3553 in fashioning a sentence that was sufficient but not greater than necessary to achieve the purposes of sentencing. JA 20-21.

For purposes of calculating the defendant's advisory sentencing guidelines range, the PSR attributed a drug quantity to the defendant of at least 400 kilograms of marijuana but not more than 700 kilograms. PSR ¶13. The defendant was also assigned a Criminal History Category of I. PSR ¶ 28. Using these figures, the district court determined the defendant's advisory guidelines range as to each count of conviction to be 78 to 97 months' imprisonment, a period of four to five years supervised release, and a fine between $10,000 to $2,000,000. JA 21-22. The defendant was also subject to a statutory mandatory minimum term of imprisonment of five years on Count One, PSR ¶ 62, and statutory mandatory minimums of four years' supervised release on Count One, and three years on Count Two, PSR ¶ 64. Furthermore, the maximum statutory fine for Count One was $2,000,000, and the maximum statutory fine for Count Two was $1,000,000. PSR ¶ 68.

The PSR addressed the defendant's financial status and matters relating to his earning capacity in several respects.

The defendant graduated from Western Laval High School in Laval, Quebec, in 2000. PSR ¶ 47. The defendant's father owned and operated a contracting business, L.G.M. Renovations, PSR ¶ 30, and the defendant would work with his father in the family business on an "as needed basis," PSR ¶ 32. In addition, the PSR noted that between 2003 and 2006, the defendant maintained steady employment. PSR ¶¶ 49-55. For example, from 2003 to 2004, the defendant held full-time positions with a grocery store and telemarketing company in Quebec. PSR ¶¶ 52-53. From 2004 to 2005, the defendant was employed in the watch department of The Bay, another store located in Quebec. PSR ¶51. Then, from 2005 to 2006, the defendant worked at a Sears call center as a customer service agent providing support to individuals purchasing telecommunications products through Sears. PSR ¶ 50.

At the age of 22 in 2006, the defendant and two friends opened a telemarketing company, Canada, Inc., that offered prepaid debit cards to individuals who did not qualify for credit cards. PSR ¶33, 49. The defendant estimated that he and his business partners each earned between $10,000 to $15,000 per month from the business. PSR ¶33. At the time the business was closed in May 2007, the business employed ten customer service representatives along with the defendant and his partners. *Id*.

The PSR also noted that the defendant's health was "very good" and that the defendant did not have any history of mental or emotional issues. PSR ¶ 43.

The PSR also indicated that on April 30, 2009, a personal financial statement was furnished to the defendant and that additional requests for this information were made to the defendant's attorney on May 19, 2009, June 4, 2009 and June 25, 2009. PSR ¶ 58. After noting that no information had been received, the PSR concluded that "based upon what is currently known about the defendant, the Probation Office is unable to determine the defendant's ability to pay a fine in this matter." PSR ¶ 61.

The defendant sought a downward departure on the grounds that he had engaged in the offenses of convictions as a result of duress, JA 31-32, and that his status as a deportable alien would render the conditions of his incarceration particularly burdensome, JA 67-69. In response, the Government argued that there was no credible evidence that the defendant had engaged in marijuana trafficking because he was coerced to do so or was otherwise under duress and further argued that the consequence of likely deportation did not support a departure or a non-guidelines sentence where there was nothing about those consequences extraordinarily unique to the defendant. JA 64-67, 69-70. Accordingly, the Government urged the district court to impose a sentence at the low end of the advisory guidelines range, specifically, 78 months. JA 67.

In imposing sentence, the district court noted that "there is no credible evidence whatsoever that the Defendant committed this crime in duress." JA 71. The district court stated that it appeared that the primary motivating factor for the defendant's drug trafficking was,

in his own "honest words," "pure greed," JA 71, and that the defendant's "lack of remorse and continued denial of [his] culpability is disappointing," JA 73. After further noting the defendant's privileged upbringing in which he enjoyed the benefits of a loving home, economic resources, a good education, athletic outlets and musical instruction, the district court commented that "you have absolutely no excuse, whatsoever, for being here, where you are, other than personal greed, and you have no concern, no concern for the effect that your conduct has had on others." JA 74-75. The district court also noted that the defendant did not proffer with the government and therefore was not eligible for "safety valve" relief to reduce his sentence and eliminate the statutory mandatory minimum. JA 74. Ultimately, the district court sentenced the defendant to concurrent 87-month terms of imprisonment on each count, to be followed by concurrent four-year terms of supervised release. JA 76.

C. The fine

After imposing terms of imprisonment and supervised release, the district court addressed the issue of a fine. The district court noted that the defendant had refused to file a financial statement and stated that the district court "must resort to the evidence to determine your ability to pay a fine." JA 76. The district court made clear that "[a]s the law provides, it is your responsibility to establish that you are unable to pay a fine, and you have elected not to show that you are unable to pay a fine." *Id.* After concluding that the trial evidence reflected that the gross value of the *undisputed* amount of marijuana sold by the defendant was

approximately $1,400,000, the district court initially imposed a fine of $700,000. JA 76-77.

The defendant then inquired whether the district court would reconsider the fine if he submitted a financial statement. JA 79. The district court initially declined and stated that the defendant already "had the opportunity to do so. He has elected not to." *Id.* The Probation Office then confirmed to the court that requests for the financial affidavit had also been made on five prior occasions to defense counsel. JA 80. The defendant acknowledged that he had been aware that financial documents were required to be completed as part of the pre-sentence investigation but claimed that he had not received the documents. JA 80-81. In light of the foregoing, the district court called a recess and afforded the defendant the opportunity to submit the financial affidavit. JA 81-83.

After an approximately ninety-minute recess, the defendant submitted a financial affidavit that the district court noted "consist[ed] primarily of zeros." JA 89. The district court found the affidavit to be "devoid of any credibility whatsoever" and noted that it did not even disclose income that was undisputed in the PSR. JA 89, 107.

The Government then advised the district court that, based on the evidence at trial, the district court was correct as to the value of the marijuana that had been delivered by the defendant, but noted that there had been no evidence that the defendant had received any percentage of the gross revenues from the sale of that marijuana. JA 90.

Further, the Government informed the district court that the testimony at trial established that the marijuana was delivered by the defendant on credit and that money in payment for that marijuana would be delivered to third parties, not the defendant. *Id.* Finally, the Government noted that defense counsel had advised the Government that the defendant had indicated that he had been paid $40,000 for his services as a transporter, which the Government did not find unreasonable. JA 91, 95-96. Additionally, both defense counsel and the Government agreed that there had been evidence at trial that the defendant had paid the monthly rent for the North Haven warehouse in cash to the property manager on site. JA 96. The Government also noted that $27,000 in cash had been seized from the defendant's residence. JA 97.

After this discussion, the district court asked the defendant "is there anything more you would like to offer on the subject of the fine?" JA 97. At this point, the defendant stated that he was "only a courier" and that he had been paid $40,000. *Id*. Thereafter, the district court inquired further as to the manner in which the defendant's compensation was calculated. JA 98-102. The district court did not find the defendant's explanations of his payment scheme or his role credible and concluded that "[the defendant] is not a trustworthy person," and "I cannot rely upon what he tells me." JA 106. The court then implied that it was going to maintain its initial conclusion that a fine of $700,000 was appropriate, stating that "50 percent of the street value of what we know he was involved in selling, in my mind, is not unreasonable, in the absence of any credible information whatsoever, as to

what he earned." JA 105. Defense counsel asked for another recess, which the court granted, JA 107-108.

Following that 75-minute recess, the defendant requested that the district court consider whether the fine was excessive under the Eighth Amendment. JA 109. The district court then noted that it had "given serious consideration to everything which has transpired," and stated that "giving full deference to Mr. Nalbandian and considering the fact that the sentence should not be greater than necessary to achieve the purposes of sentencing, the Court believes that twice the gross gain of $40,000, assuming that Mr. Nalbandian was a mere courier, is a fair and adequate sentence to impose." JA 109. The district court therefore imposed a fine of $80,000. JA 109. The defendant did not voice any further objection to the fine. JA 109-10.

Summary of Argument

Following the district court's imposition of a fine of $80,000, the defendant did not lodge an objection, and therefore his claim is reviewable only for plain error. Similarly, the defendant did not raise any claim at sentencing that the fine should be offset by the amount of drug proceeds seized from the defendant which were forfeited to the Government. Accordingly, this claim is also subject to plain error review.

The district court did not plainly err in imposing the fine of $80,000. First, the district court did not place the burden on the defendant to establish the amount of the fine, but rather, appropriately placed the burden on him to support his claim that he had the *inability* to pay a fine.

Furthermore, the court did not clearly err in deciding, as a factual matter, that the defendant had failed to meet his burden of establishing both a present and future inability to pay a fine of that amount – particularly given that the defendant was a 27-year old high school graduate in good health, had a steady employment record for the five years prior to his arrest in the instant matter, and had demonstrated business acumen in establishing a business that generated a net monthly income of $10,000 to $15,000 to him for an approximately one-year period. Moreover, in light of the fact that the defendant had played a significant role in a sophisticated, international marijuana smuggling operation and had coordinated the delivery of substantial quantities of marijuana, any questions posed by the district court in an effort to determine whether the defendant had

any undisclosed drug proceeds were appropriate in the context of determining whether he had carried his burden of proving an inability to pay a fine.

Nor was the amount of $80,000 substantively unreasonable. This amount fell within the advisory fine guidelines range calculated in the Pre-Sentence Report. In light of this Court's limited role in reviewing the broad reasonableness of sentences and in the context of the extensive marijuana trafficking conspiracy of which the defendant was a part, the $80,000 fine was entirely appropriate.

Finally, the district court did not commit plain error in failing to offset the amount of the fine by the $27,000 in drug proceeds seized from the defendant at the time of his arrest and forfeited to the Government. Forfeiture and fines are not mutually exclusive under 21 U.S.C. § 853. Nor does the existence of one require a corresponding reduction in the other. Indeed, they serve different purposes and relate to different aspects of a sentencing. Forfeiture forces a defendant to disgorge drug proceeds to which he was never lawfully entitled. A fine is punitive in nature. Here, the district court made the determination that the appropriate amount of a fine for punitive purposes was twice the amount gained by the defendant. This did not require that the amount of the fine be offset by any drug monies that had already been forfeited by the defendant as to which title had vested in the Government at the time the criminal offense had been committed.

Argument

I. The district court did not commit plain error in placing the burden on the defendant to establish inability to pay a fine, in imposing an $80,000 fine where the fine was within the correctly calculated sentencing guideline range, and in declining to offset the fine by the amount seized from the defendant and forfeited to the Government.

A. Governing law and standard of review

1. Statutory and guideline provisions governing fines

"A defendant who has been found guilty of an offense may be sentenced to pay a fine." 18 U.S.C. § 3571(a). When imposing a fine, courts must also look for guidance from the general sentencing provisions found in 18 U.S.C. § 3553(a), which includes consideration of what sentence entails "just punishment." In determining whether to impose a fine, sentencing courts are required to consider various factors, including "(1) the defendant's income, earning capacity, and financial resources; (2) the burden the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person...that would be responsible for the welfare of any person financially dependent on the defendant . . . . (3) any pecuniary loss inflicted upon others as a result of the offense; (4) whether restitution is ordered or made and the amount of such restitution; (5) the need to deprive the defendant of illegally obtained gains from the offense; the

expected costs to the government of any imprisonment, supervised release, or probation component of the sentence. . . ." 18 U.S.C. § 3572(a).

While the statute, 18 U.S.C. § 3571(a), authorizes the imposition of a fine, the Sentencing Guidelines also provide additional guidance on fines. Section 5E1.2(a) (2009) states that "[t]he court shall impose a fine in all cases, except where the defendant establishes that he is unable to pay and is not likely to become able to pay any fine." The Guidelines further advise that "[t]he amount of the fine should always be sufficient to ensure that the fine, taken together with other sanctions imposed, is punitive." U.S.S.G. § 5E1.2(d). With respect to indigent defendants, § 5E1.2(e) states:

> If the defendant establishes that (1) he is not able and, even with the use of a reasonable installment schedule, is not likely to become able to pay all or part of the fine required by the preceding provisions, or (2) imposition of a fine would unduly burden the defendant's dependents, the court *may* impose a lesser fine or waive the fine.

(Emphasis added).

In case law predating *United States v. Booker*, 534 U.S. 220 (2005), this Court offered extensive guidance about the proper interpretation of U.S.S.G. § 5E1.2, which "authorizes, but does not mandate, the imposition of a lesser fine or waiver of any fine in the case of an indigent defendant." *United States v. Wong*, 40 F.3d 1347, 1383 (2d

Cir. 1994). "[T]he discretion vested in sentencing courts by § 5E1.2[(e)] to waive a fine where indigence is shown should generally be executed in favor of such a waiver." *Id.*

It is the defendant who "bears the burden" of showing that he is unable to pay the fine. *United States v. Corace,* 146 F.3d 51, 56 (2d Cir. 1998); *see also United States v. Rivera*, 22 F.3d 430, 440 (2d Cir. 1994) (upholding $100,000 fine imposed on defendant sentenced to life imprisonment); *United States v. Rivera*, 971 F.2d 876, 895 (2d Cir. 1992) ("A defendant seeking to avoid a Guidelines fine on the basis of inability to pay must come forward with evidence of that financial inability."). Defendants can satisfy their burden with regard to indigency "either by independent evidence or by reference to the Presentence Report." *United States v. Thompson*, 227 F.3d 43, 45 (2d Cir. 2000). A sentencing judge, of course, "is not bound by the recommendations of the PSR." *United States v. Miller*, 116 F.3d 641, 685 (2d Cir. 1997).

A sentencing court, however, is "not required to accept uncritically a representation by the defendant that he has no assets." *Rivera*, 22 F.3d at 440 (citing *United States v. Marquez*, 941 F.2d 60, 66 (2d Cir. 1991)). "Evidence that a defendant has failed to disclose the existence of assets to the court may support a determination that the defendant is able to pay a fine with those undisclosed assets." *United States v. Rowland*, 906 F.2d 621, 624 (11th Cir. 1990). Further, "evidence of lucrative illegal activity can support a judge's finding that a defendant is able to pay a fine

levied against him." *United States v. Orena*, 32 F.3d 704, 716 (2d Cir. 1994) (citing *United States v. Amato*, 15 F.3d 230, 237 (2d Cir. 1994).

This Court has understood "indigence" to mean "present and future inability to pay." *Rivera*, 22 F.3d at 440. A sentencing court may not impose a fine upon "its mere suspicion that the defendant has funds," *id.*, or "based upon some remote fortuity like the possibility that a defendant will win a lottery," *Wong*, 40 F.3d at 1383 (vacating $250,000 fine imposed on indigent defendant sentenced to life because "I would not want anyone to buy a lottery ticket, get lucky and then not have to pay the fine"). This Court has also stated that "'[i]n attempting to predict future ability to pay, district courts must be realistic and must avoid imposing a fine when the possibility of a future ability to pay is based merely on chance.'" *Wong*, 40 F.3d at 1383 (quoting *United States v. Seale*, 20 F.3d 1279, 1286 (3d Cir. 1994)).

Even so, "[c]urrent indigence is not an absolute barrier to imposition of a fine. Even an incarcerated defendant can earn money in his prison account to pay the fine by working within the prison." *United States v. Workman*, 110 F.3d 915, 918 (2d Cir. 1997) (citation omitted) (finding no plain error in $1,000 fine imposed on defendant sentenced to 95 months in prison); *see also Thompson*, 227 F.3d at 45 (affirming $5,000 fine on prisoner sentenced to 120 months followed by deportation, in part because defendant could pay part of the fine out of prison earnings); *United States v. Hernandez*, 85 F.3d 1023, 1031 (2d Cir. 1996) (affirming $10,000 fine to be

paid out of prison earnings over 25-year sentence); *United States v. Fermin*, 32 F.3d 674, 682 n.4 (2d Cir. 1994) (affirming $2,500 fine imposed with 30-year prison sentence). This Court has found that a fine may be imposed on a currently indigent defendant if there is "'evidence in the record that he will have the earning capacity to pay the fine after release from prison.'" *Wong*, 40 F.3d at 1382-83 (quoting *Rivera*, 971 F.2d at 895).

2. Standard of Review

This Court reviews a sentence for reasonableness. *See United States v. Booker*, 543 U.S. 220, 260-62 (2005). This Court has explained that "[b]ecause *Booker* rendered the whole of the Guidelines advisory, it stands to reason that the Guidelines' fine requirements were likewise rendered advisory." *United States v. Rattoballi*, 452 F.3d 127, 139 (2d Cir. 2006).

> [A] district court must engage in the same type of analysis it applies in determining the appropriate term of imprisonment: After consulting the Guidelines recommendation, the district court should consider the § 3553(a) factors, including any pertinent policy statement issued by the Commission; it should then consult the standards
>
> outlined in 18 U.S.C. §§ 3571 and 3572 to determine whether the imposition of a fine is appropriate.

Id.

Reasonableness has both procedural and substantive dimensions. *See United States v. Avello-Alvarez*, 430 F.3d 543, 545 (2d Cir. 2005) (citing *United States v. Crosby*, 397 F.3d 103, 114-15 (2d Cir. 2005)). "A district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory." *United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc) (citations omitted), *cert. denied*, 129 S. Ct. 2735 (2009). A district court also commits procedural error "if it does not consider the § 3553(a) factors, or rests its sentence on a clearly erroneous finding of fact." *Id.* Finally, a district court "errs if it fails adequately to explain its chosen sentence, and must include 'an explanation for any deviation from the Guidelines range.'" *Id.* (quoting *Gall*, 552 U.S. at 51).

After reviewing for procedural error, this Court reviews the sentence for substantive reasonableness under a "deferential abuse-of-discretion standard." *Cavera*, 550 F.3d at 189. The Court "will not substitute [its] own judgment for the district court's"; rather, a district court's sentence may be set aside "only in exceptional cases where [its] decision cannot be located within the range of permissible decisions." *Id.* (internal quotation marks omitted); *see also United States v. Verkhoglyad*, 516 F.3d 122, 134 (2d Cir. 2008) ("Our review of sentences for reasonableness thus exhibits restraint, not micromanagement.") (internal quotation marks omitted).

When a defendant fails to preserve an objection to the procedural reasonableness of a sentence, this Court reviews for plain error. *See Verkhoglyad*, 516 F.3d at 128; *United States v. Villafuerte*, 502 F.3d 204, 208 (2d Cir. 2007). To show plain error, a defendant must demonstrate "(1) error (2) that is plain and (3) affects substantial rights." *Villafuerte*, 502 F.3d at 209. Even then, the Court will exercise its discretion to correct the error "only if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id*. (internal quotation marks omitted). Reversal for plain error should "'be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *Villafuerte*, 502 F.3d at 209 (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)). "Meeting all four prongs is difficult, 'as it should be.'" *Puckett v. United States*, 129 S. Ct. 1423, 1429 (2009) (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004)). This is because if a litigant believes that an error has occurred during a judicial proceeding which is to his detriment and he objects, the district court can correct the mistake so that it cannot possibly affect the ultimate outcome. *Puckett*, 129 S. Ct. at 1428.

B. Discussion

1. The district court did not plainly err in placing the burden on the defendant to establish an inability to pay or in imposing an $80,000 fine upon the defendant.

In the present case, the defendant cannot establish plain error with regard to the district court's imposition of the $80,000 fine. *See Verkhoglyad*, 516 F.3d at 128.

First, the district court did not err at all. The defendant argues that the district court shifted "the burden of proof from the Government to the defendant to require the defendant to estimate his involvement in trafficking removing from the Government the burden of proving that fact." Def. Br. 17. However, a fair reading of the totality of the sentencing hearing transcript discloses that the district court was keenly aware of the proper burdens and carefully circumscribed its inquiry accordingly.

The district court made clear to the defendant that it was his responsibility to establish his inability to pay a fine. JA 76. Immediately prior to imposing a fine, the district court stated:

> The Court notes that because you refused to file a financial statement, the Court must resort to the evidence to determine your ability to pay a fine. As the law provides, it is your responsibility to

> establish that you are unable to pay a fine, and you have elected not to show that you are unable to pay a fine.

JA 76. The district court went on to calculate the fine based on the evidence that the defendant sold "between 1,300 and 1,600 pounds of marijuana at a going rate of between [$]1,000 and $2,000 per pound of marijuana," and then halved that amount, arriving at a fine of $700,000. JA 76-77. Defense counsel then asked the district court if it would reconsider the fine if the defendant provided a financial statement. JA 79. After discussion of why the defendant had not previously provided a financial statement, the district court ultimately decided to call a recess and allow the defendant to submit a financial statement. JA 83. The district court, cautioned, however, that she was unlikely to change her findings as to the fine based on (what she believed would be) a false financial statement with "lots of zeros," rather than an indication of "what happened to the money that was put in his hand when he delivered those drugs." JA 83.

Accordingly, the district court was not requiring anything of the defendant other than his bearing his burden of proving he had no ability to pay. Indeed, when defense counsel indicated that the defendant had already filed a financial affidavit in connection with his appointment of counsel, the district court clarified that it was looking for "*credible* evidence of an inability to pay." JA 84 (emphasis added).

Although the district court stated that the defendant "com[ing] clean" and providing "some factual basis to arrive at more factually grounded conclusion than I've come to" would assist the district court in arriving at a fine amount, JA 85, such was in the context of the defendant carrying his burden of establishing his inability to pay a fine, JA 86. Even when defense counsel inquired whether the district court was requiring something of the defendant beyond the provision of a financial affidavit in order to meet the requisite burden, the district court correctly reiterated that the defendant "bears the burden of establishing that he cannot pay a fine." JA 88. The district court also emphasized that the defendant

> can provide whatever information he wants to convince me of is inability to pay. I am not establishing any litmus test. I'm not putting words in his mouth. I'm not telling him what I want. *I don't want anything*. He wants to bear his burden of proving that he cannot pay a fine in excess of a certain dollar amount. That's what he wants. It is his burden, and I will recess to afford him yet another opportunity to do that.

JA 88 (emphasis added). Accordingly, the district court did not shift the burden to the defendant to establish the fine amount, but rather, properly required him to establish his inability to pay. *Cf. Rowland*, 906 F.2d at 623-24 (upholding fine where district court used similar language in discussing fine burdens).

When the defendant returned from the recess, he presented a financial affidavit representing that he had no assets and failed to disclose prior income that had been earned by the defendant and which was contained in the PSR. JA 89. The district court found the affidavit to be "devoid of any credibility whatsoever." JA 89.

The district court was not required simply to accept the defendant's self-serving statements of indigency and to refrain from any further critical analysis of whether the defendant had assets that would enable him to pay a fine. A court may reasonably draw inferences from circumstantial evidence that the defendant, despite claims to the contrary, retains funds. *See, e.g.*, *Marquez*, 941 F.2d at 66 (affirming imposition of $100,000 fine, particularly when that defendant was found on numerous occasions to be in possession of significant amounts of cash); *Rivera*, 22 F.3d at 440 (upholding $100,000 fine where defendant reported that he had forfeited all of his cash and property to the Government and that his house had been destroyed by hurricane, and district court stated that purpose of fine was "just in case anything is left over" beyond forfeited assets).

The credibility of the defendant's claim was even more suspect in light of the sheer scope of the marijuana trafficking in which the defendant had been involved, a fact that was not lost on the district court. In this regard, *United States v. Fields*, 113 F.3d 313 (2d Cir. 1997), is instructive. In *Fields*, the defendant was arrested while he and a confederate were in the process of packaging $40,000 worth of crack cocaine for resale. *Id*. at 317.

Fields was convicted following a jury trial and was sentenced to 20 years' imprisonment, eight years' supervised release, and a $25,000 fine. *Id*. at 319. On appeal, Fields challenged the imposition of the fine and argued that he was indigent, had been assigned counsel, and that the pre-sentence report had stated that he was unable to pay a fine. *Id*.

After cautioning that a sentencing court should not uncritically accept a defendant's self-serving statements alleging indigence, this Court stated that "although imposition of a fine may not be based upon suspicion that a defendant has sufficient funds to pay it, circumstantial evidence may be considered to decide what defendant earns or is capable of earning and what his financial resources are." *Id*. at 325. The Court went on to hold that "[e]vidence of lucrative illegal activity may support an inference that such funds, although hidden, remain at the defendant's disposal." *Id.* The Court then instructed that "in determining ability to pay, the sentencing court cannot rely on the general notion that drug dealing is often lucrative; the specific nature of a defendant's illegal scheme and conduct must be carefully examined." *Id.*

The *Fields* Court concluded that the remunerative nature of Fields' drug trafficking, his purchase of an expensive automobile for cash and his lack of cooperation in furnishing financial reports supported a finding that Fields had the ability to pay the $25,000 fine imposed. *Id*. at 326; *see also United States v. Kassar*, 47 F.3d 562, 567-69 (2d Cir. 1995) (ample evidence of the profitability of the defendant's illegal schemes supported the imposition

of a fine), *abrogated on other grounds by Spencer v. Kemna*, 523 U.S. 1 (1998); *United States v. Artley*, 489 F.3d 813, 826 (7th Cir. 2007) (defendant failed to meet his burden of showing inability to pay $50,000 fine where he failed to address at sentencing the issue of missing drug proceeds and district court properly relied on the uncontested finding that significant drug proceeds were generated over the course of the conspiracy and all of the proceeds were not accounted for).

Here, the district court did not merely rely upon a generalized notion that drug dealing is profitable in determining that the defendant had failed to carry his burden of demonstrating an ability to pay a fine. Nor did the district court speculate as to the drug proceeds, Def. Br. 18-20, or merely rely on the $27,000 seized from the defendant's home, Def. Br. 16, as the defendant argues in his brief. Rather, the court had before it detailed evidence of the nature of the extensive marijuana trafficking operation in which the defendant was involved. PSR ¶¶ 4-13.

The evidence showed that the defendant and his co-conspirators smuggled marijuana in bulk from Canada inside thousands of plastic containers that were transported by tractor trailer. PSR ¶12. The defendant made monthly rental payments in cash to the property manager for leased warehouse space. JA 96. On approximately a dozen occasions, the defendant delivered bulk quantities of marijuana to New York. PSR ¶¶ 7-8. The value of the marijuana he delivered was approximately $1,400,000. JA 76, 90. $27,000 in cash was seized from the defendant at

the time of his arrest. PSR ¶12. Furthermore, the defendant admitted that he was paid approximately $40,000 for his services as a transporter. JA 97-102. The Government noted further that this amount was consistent with related cases where transporters make approximately $3,000 per delivery, and, here, the defendant made approximately 10 or 11 deliveries. JA 91-92.

Given the sheer scope of this international trafficking operation in which the defendant was involved, the district court was rightfully concerned that there were other assets that remained undisclosed and unaccounted for in determining whether the defendant had carried his burden of showing an inability to pay. The district court need not have merely rubber-stamped the defendant's self-serving statements of indigence in light of the extent of the drug trafficking in which he was involved. As sanctioned by *Fields*, it was entirely appropriate for the district court to require the defendant to account for any drug proceeds to which he might have access in determining whether he had carried his burden of proof as to inability to pay. To the extent that the district court, which was in the best position to assess the veracity of the defendant, could not credit the defendant's explanations of his gains from criminal activity, it was not clearly erroneous for the court to conclude from all the circumstances that there was no credible evidence of the defendant's inability to pay a fine. Therefore, both the district court's finding that the defendant had the ability to pay, and the fine amount of twice the gross gain, $80,000, were fully supported by the record.

In addition, the defendant made no effort to show that he lacked any earning capacity and therefore that he lacked a future ability to pay a fine. *Wong*, 40 F.3d at 1383. The defendant failed to submit a financial statement prior to his sentencing hearing despite the fact that the Probation Office had made *five* requests for the information and notwithstanding the defendant's own admission that he was aware of the need to submit that information. JA 80. The PSR which was disclosed to the defendant in July 2009, approximately six months prior to the sentencing, made clear that the defendant had not submitted the required financial statement and that, accordingly, the Probation Office was unable to determine the defendant's ability to pay a fine. PSR ¶¶ 58-61. Thus, even if the defendant had not received the forms, as he claimed, he was certainly on notice from the PSR (to which he did not object) that a financial statement was required. The defendant nonetheless made no effort to submit the form prior to the sentencing hearing.[1]

Accordingly, the district court was well within its bounds to treat the defendant's lack of cooperation in providing financial information as a failure to satisfy his burden in demonstrating an inability to pay. *See United States v. Sasso*, 59 F.3d 341, 352 (2d Cir. 1995) (holding that a "court is not required to accept a defendant's unsubstantiated claim of penury, and it is entitled to reject such a claim when he has refused to cooperate with the

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[1] The defendant did not address the issue of inability to pay a fine in his sentencing memorandum. *See* GA ("Government Appendix") 7-20.

Probation Department in exploring his financial resources").

Furthermore, there was ample evidence that the defendant had a significant future earning capacity, undermining any claim that the amount of the fine was substantively unreasonable. The PSR, which the district court adopted, disclosed that the defendant was an able-bodied twenty-seven-year-old high school graduate. PSR ¶¶ 42, 47. The defendant described his current health as "very good," reporting no significant health issues during his lifetime with exception of an appendectomy as a young boy. PSR ¶ 43. He takes no medication and is not under the care of a physician. PSR ¶ 43. Moreover, the defendant's work history showed that he had been employed for several years on a full-time basis in various capacities. PSR ¶ 49-57. He also was able to establish his own business with two partners which proved lucrative over a one year period, resulting in net earnings of $10,000 to $15,000 monthly. PSR ¶ 49. In light of the evidence of the defendant's future earning capacity and the scope of the drug conspiracy of which he was a significant part, the fine of $80,000, that was within the advisory fine guidelines range of $10,000 to $2,000,000, PSR ¶ 69, falls comfortably within the zone of substantive reasonableness.[2]

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[2] The defendant's brief makes passing reference to the "Excessive Fines clause of the Eighth Amendment and the Due Process Clause of the Fifth Amendment of the United States Constitution," Def. Br. 17, but does not (continued...)

In arguing that the fine imposed by the district court was inappropriate, the defendant relies principally upon the fact that he had appointed counsel during the criminal proceedings and that there was no evidence of his gains from the drug trafficking offenses of which he was convicted. These arguments are unavailing. It is undisputed that the defendant did not file the required financial disclosure forms with the Probation Office prior to the sentencing. As the district court noted, the affidavit filed in support of a request for appointed counsel is not a substitute for the financial disclosures required by the pre-sentence investigation, which require "significantly more information." JA 84. The defendant's claim that there was no evidence of the gains from his drug trafficking activity is also inaccurate. As the district court noted, the evidence at trial established that the defendant delivered shipments of marijuana valued at $1,400,000. The defendant himself

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[2] (...continued)
expound further. Accordingly, he has waived this issue before this Court. *See Yuequing Zhang v. Gonzales*, 426 F.3d 540, 546 n.7 (2d Cir. 2005) (issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal). In any event, even if the Court were to consider the merits of this claim, the amount of the fine imposed was not disproportionate to the gravity of the offense where the defendant had substantial involvement in an international marijuana trafficking operation, had delivered $1,400,000 worth of marijuana to third parties and where the fine imposed was well within the statutory maximums for the offense of conviction and the advisory fine guidelines range.

stated that he had been paid $40,000 for services as a courier. Given the breadth of this drug trafficking activity in which he was involved and the defendant's own disregard of the financial disclosures required prior to sentencing, the district court's conclusion that the defendant had not demonstrated an inability to pay and the imposition of an $80,000 fine did not plainly affect any substantial rights of the defendant.

Second, even assuming arguendo that the district court's actions established plain error that affected substantial rights, this Court should not exercise its discretion as the purported error does not "seriously affect[] the fairness, integrity or public reputation of judicial proceedings," as is required under the fourth plain error prong. *Villafuerte*, 502 F.3d at 209 (internal quotation marks omitted). To the contrary, the integrity of judicial proceedings would be undermined if a defendant could repeatedly ignore the obligation to submit a financial statement, submit a hastily completed affidavit that is devoid of credibility, fail to offer any credible explanation of proceeds of illegal activity which he may have at his disposal and expect that a court will accept self-serving statements of indigence in an effort to avoid a fine. If under the circumstances of this case, the defendant is deemed to have carried his burden of establishing an inability to pay a fine, the integrity of the judicial proceedings will have been compromised.

2. The district court did not commit plain error in failing to offset against the $80,000 fine, $27,000 in drug proceeds seized from the defendant.

At time of his arrest, the Government seized $27,000 from the defendant's apartment, which was administratively forfeited.[3] The defendant makes two arguments regarding the forfeiture.

First, the defendant argues that 21 U.S.C. § 853 does not permit the imposition of both a fine and forfeiture, but that "it was incumbent upon the Court to select either to forfeit the $27,000.00 in its possession or impose the $80,000.00 fine." Def. Br. 20. Second, the defendant argues that, even if it was proper to impose both a forfeiture and a fine, the $27,000 seized from him should have been offset against the $80,000 fine. Def. Br. 20-21. The defendant argues that "[s]ince [he] testified that he made $40,000.00 profit from trafficking in marijuana and the Government seized $27,000.00 of those funds in his apartment, it is only equitable that he be given a credit

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[3] As a result of the administrative forfeiture of the $27,000 pursuant to 18 U.S.C. § 983(a)(1), there was no further need to pursue forfeiture of these monies in the criminal proceeding. While there was a general forfeiture allegation in the Superseding Indictment, this would have permitted forfeiture of any other assets belonging to the defendant that might have been identified post-Indictment. The defendant has not claimed any improprieties in the administrative proceedings.

against his fine for funds he never spent and which the Government has in its custody." Def. Br. 20-21. The defendant did not raise these claims at sentencing, and accordingly, they are subject to plain error review. *See Verkhoglyad*, 516 F.3d at 128.

Here, the district court did not clearly err in imposing a fine when $27,000 had already been seized and administratively forfeited by the Government. As a preliminary matter, while defendant invokes 21 U.S.C. § 853 in support of his argument that an offset was required, the $27,000 seized was administratively forfeited by the Government pursuant to 18 U.S.C. § 983.

Administrative forfeiture is the commonly used procedure that permits a federal law enforcement agency to forfeit property without any judicial involvement if it sends proper notice of the forfeiture action to potential claimants and a claim is not filed. Administrative forfeitures are "favored" because they provide "a mechanism for the government and private parties to resolve their forfeiture-related disputes without the need for judicial actions." *United States v. Ninety-Three (93) Firearms*, 330 F.3d 414, 422 (6th Cir. 2003) (internal quotation marks omitted). The administrative forfeiture process is governed by 18 U.S.C. § 983. By its explicit terms, the statutory scheme set forth for administrative forfeiture applies only to "nonjudicial civil forfeiture proceeding[s] under a civil forfeiture statute." 18 U.S.C. § 983(a)(1)(A)(i). The statute itself makes clear that administrative forfeiture of property traceable to illegal activity is a civil remedy. Nothing in § 983 prohibits the

Government from pursuing a separate criminal prosecution with its attendant penalties of potential imprisonment and fines for those offenses which gave rise to the administrative forfeiture of property traceable to those offenses.

In any event, 21 U.S.C. § 853, which is invoked by the defendant, also makes clear that forfeiture and the imposition of a fine are not mutually exclusive. Section 853 provides in pertinent part:

> (a) Any person convicted of a violation of [the Uniform Controlled Substances Act] punishable by imprisonment for more than one year shall forfeit to the United States . . .
>
> (1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as a result of such violation;
>
> (2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; . . .
>
> The court in imposing sentence on such person shall order, *in addition to any other sentence imposed pursuant to [the Uniform Controlled Substances Act],* that the person forfeit to the United States all property described in this subsection. *In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other*

> *proceeds from an offense may be fined not more than twice the gross profits or other proceeds*.

(Emphasis added).

By the explicit terms of the statute, not only is forfeiture mandatory, but it is also separate and distinct from any other sentence authorized by the Controlled Substances Act, which would encompass the fine provisions set forth in 21 U.S.C. § 841(b)(1)(A)-(C). Section 853 does not offer the court a choice between forfeiture and a fine. Forfeiture is mandatory. The statute only offers, in the court's discretion, an alternative method for the calculation of a fine to be imposed. In short, 21 U.S.C. § 853 provides for *both* the forfeiture of proceeds of drug trafficking and, in the court's discretion, a fine of "not more than twice the gross profits or other proceeds." *See United States v. Betancourt*, 422 F.3d 240, 250 (5th Cir. 2005) (holding that 21 U.S.C. § 853 distinguishes between forfeiture and fines and that "the imposition of a fine is in addition to, not in lieu of, the mandatory forfeiture provided for in § 853(a)(1)-(3)"); *United States v. Nava*, 404 F.3d 1119, 1124 (9th Cir. 2005) ("At sentencing, the district court must order forfeiture of the property in addition to any other sentence."); *United States v. Reiss*, 186 F.3d 149, 156 (2d Cir. 1999) (holding, without discussion of any distinction between forfeiture and fines, that, where the defendant laundered $3,150,000 for drug dealer, district court did not err in imposing fine of $6.3 million which was equal to twice the amount laundered and ordering forfeiture of $1,000,000 in substitute assets); *Cf. Alexander v. United States*, 509 U.S.

544, 562 (1993) ("[A] RICO conviction subjects the violator not only to traditional, though stringent, criminal fines and prison terms, but also mandatory forfeiture under [18 U.S.C.] § 1963.").

Additionally, the district court was not required to offset the $27,000 in forfeited proceeds from the fine that it imposed. The defendant cites nothing in support of his argument as to why an offset is required, merely stating that an offset would be "equitable." Def. Br. 21. In arguing for an offset, however, the defendant misunderstands the fundamental purpose of forfeiture versus that of a fine.

The Guidelines advise that "[t]he amount of the fine should always be sufficient to ensure that the fine, taken together with other sanctions imposed, is punitive." U.S.S.G. § 5E1.2(d). As a preliminary point, nothing in § 5E1.2 suggests that the district court, in considering the appropriate amount of a fine, should take forfeiture into account. *Cf. United States v. Trotter*, 912 F.2d 964, 965-66 (8th Cir. 1990) (defendant cannot use forfeited funds to satisfy amount of fine imposed). While a fine is intended to be punitive and to serve a deterrent purpose, the purposes of forfeiture are to force a defendant to disgorge gains from illegal activity that the defendant was never lawfully entitled to possess and/or to confiscate property used to facilitate an offense. *See United States v. Ursery*, 518 U.S. 267, 284 (1996) ("Forfeitures serve a variety of purposes, but are designed primarily to confiscate property used in violation of the law, and to require disgorgement of the fruits of illegal conduct."); *see also United States v. Various Computers and Computer Equipment*, 82 F.3d

582, 587-89 (3d Cir. 1996) (noting the divergent purposes of fines and forfeiture). The forfeiture allegations in the instant case provided for the forfeiture of "proceeds" as well as "property used, or intended to be used, . . . to commit, or to facilitate the commission of the said violations." JA 14. Given the different purposes which fines and forfeiture serve, the district court did not plainly err in failing to offset the amount of forfeited proceeds from the punitive fine that it imposed upon the defendant.[4]

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[4] In an analogous context, it has also been held that the amount of restitution ordered cannot be offset against an order of forfeiture. *See United States v. Alalade*, 204 F.3d 536, 540 (4th Cir. 2000) (defendant not entitled to an offset against the restitution order for the value of the fraud proceeds the Government forfeited administratively); *United States v. Bright*, 353 F. 3d 1114, 1122-23 (9th Cir. 2004) (same, following *Alalade*); *United States v. Emerson*, 128 F.3d 557, 567 (7th Cir. 1997) (forfeiture and restitution are not mutually exclusive; defendant may be made to pay twice and is not entitled to reduce restitution by the amount of the forfeiture). As one district court noted, forfeiture "generally serves to remove from an offender the fruits and instrumentalities of his crime, and thereby provides a powerful disincentive to commit the crime in the first instance" while restitution "serves primarily to compensate victims for any losses suffered as a result of a defendant's criminal activity." *United States v. O'Connor*, 321 F. Supp. 2d 722, 729 (E.D. Va. 2004) (holding that because restitution and forfeiture serve different goals, defendant has no right to

(continued...)

Conclusion

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

Dated: November 24, 2010

Respectfully submitted,

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[4] (...continued)
use forfeited property to satisfy a restitution order).

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9,495 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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ADDENDUM

Fed. R. Crim. P. 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the Court's attention.

§ 3553. Imposition of a sentence

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

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

(2) the need for the sentence imposed --

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

(B) to afford adequate deterrence to criminal conduct;

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

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

(3) the kinds of sentences available;

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

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

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

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

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

(5) any pertinent policy statement–

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

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

(6) the need to avoid unwarranted sentence disparities among defendants with similar

records who have been found guilty of similar conduct; and

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

* * *

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence --

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such

statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

§ 3572. Imposition of a sentence of fine and related matters

(a) Factors to be considered.--In determining whether to impose a fine, and the amount, time for payment, and method of payment of a fine, the court shall consider, in addition to the factors set forth in section 3553(a)--

(1) the defendants income, earning capacity, and financial resources;

(2) the burden that the fine will impose upon the defendant, any person who is financially dependent on the defendant, or any other person (including a government) that would be responsible for the welfare of any person financially dependent on the defendant, relative to the burden that alternative punishments would impose;

(3) any pecuniary loss inflicted upon others as a result of the offense;

(4) whether restitution is ordered or made and the amount of such restitution;

(5) the need to deprive the defendant of illegally obtained gains from the offense;

(6) the expected costs to the government of any imprisonment, supervised release, or probation component of the sentence;

(7) whether the defendant can pass on to consumers or other persons the expense of the fine; and

(8) if the defendant is an organization, the size of the organization and any measure taken by the organization to discipline any officer, director, employee, or agent of the organization responsible for the offense and to prevent a recurrence of such an offense.

(b) Fine not to impair ability to make restitution.--If, as a result of a conviction, the defendant has the obligation to make restitution to a victim of the offense, other than the United States, the court shall impose a fine or other monetary penalty only to the extent that such fine or penalty will not impair the ability of the defendant to make restitution.

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21 U.S.C. § 853. Criminal forfeitures

(a) Property subject to criminal forfeiture

Any person convicted of a violation of this subchapter or subchapter II of this chapter punishable by imprisonment for more than one year shall forfeit to the United States, irrespective of any provision of State law--

(1) any property constituting, or derived from, any proceeds the person obtained, directly or indirectly, as the result of such violation;

(2) any of the person's property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, such violation; and

(3) in the case of a person convicted of engaging in a continuing criminal enterprise in violation of section 848 of this title, the person shall forfeit, in addition to any property described in paragraph (1) or (2), any of his interest in, claims against, and property or contractual rights affording a source of control over, the continuing criminal enterprise.

The court, in imposing sentence on such person, shall order, in addition to any other sentence imposed pursuant to this subchapter or subchapter II of this chapter, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this part, a defendant who derives profits or other proceeds

from an offense may be fined not more than twice the gross profits or other proceeds.

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