10-5123

To Be Argued By:
STEPHEN B. REYNOLDS

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-5123

UNITED STATES OF AMERICA,
Appellee,

-vs-

JERMAINE BUCHANAN also known as Ski,
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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DAVID B. FEIN
United States Attorney
District of Connecticut

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

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Statement of Jurisdiction

The district court (Hall, J.) had subject matter jurisdiction pursuant to 18 U.S.C. § 3231.

On February 11, 2003, following a six week, multi-defendant trial, the jury returned a verdict finding Jermaine Buchanan and other trial defendants guilty of various racketeering and narcotics-related charges. (Joint Appendix ("JA") 28).

On April 12, 2004, the district court sentenced Buchanan to life in prison. (JA 31-32; 92). Buchanan timely filed a notice of appeal that same day. (JA 31). The judgment of conviction for Buchanan entered on May 3, 2004. (JA 32).

Buchanan appealed, and on February 14, 2005, the government moved for a limited remand pursuant to this Court's decision in *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). (Government Appendix ("GA") 149).

On April 1, 2005, this Court issued an order granting the motion and remanding Buchanan's case so that the district court could consider whether the sentence imposed would have been non-trivially different and, if so, to re-sentence accordingly. (GA 149-50; JA 33).

On January 19, 2006, the district court, in a written ruling, declined to hold a re-sentencing for Buchanan. (GA 135-37). Buchanan's appeal was reinstated. (GA 150-53).

On March 31, 2010, this Court issued a published opinion, affirming Buchanan's convictions and the judgment of the district court, but remanding Buchanan's case for possible re-sentencing in accordance with *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008). *See United States v. Burden*, 600 F.3d 204 (2010). (GA 159; JA 35).

In a five-page written ruling entered on December 7, 2010, the district court declined to re-sentence Buchanan. (JA 36; 87-91).

Buchanan filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), on December 17, 2010. (JA 36; 93).

This Court has appellate jurisdiction over defendant-appellant's claim pursuant to 18 U.S.C. § 3742(a).

Statement of Issue Presented for Review

Was the district court's life sentence and its decision not to hold a re-sentencing pursuant to *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008) reasonable, where, as here, the defendant's sentence was not the result of the then-applicable crack Guidelines, but was primarily the result of his participation in, and conviction at trial for the VCAR murder of an innocent bystander that he killed while attempting to shoot and kill another person, who was rendered a paraplegic during the incident?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-5123

UNITED STATES OF AMERICA,
Appellee,
-vs-

JERMAINE BUCHANAN also known as Ski,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This is an appeal from the district court's decision not to re-sentence the defendant, Jermaine Buchanan, on a remand under *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008).

After hearing from more than sixty witnesses over the course of a six week, multi-defendant trial, a jury found Buchanan and his co-defendants guilty of violations of the Racketeering Influenced and Corrupt Organizations Act

("RICO"), violent crimes in aid of racketeering ("VCAR") and conspiring to distribute cocaine and cocaine base. 18 U.S.C. §§ 1962(c), 1962(d), 1959(a); 21 U.S.C. §§ 846, 841(b)(1)(A). (JA 28-29).

On April 12, 2004, the district court sentenced Buchanan to life in prison. (JA 31-32; 92). Buchanan's sentence was not the result of the then-applicable crack Guidelines, but rather was the result of his participation in, and conviction for the VCAR murder of Derek Owens, an innocent bystander that Buchanan killed while attempting to shoot and kill Marquis Young, who was rendered a paraplegic during the incident.

While Buchanan's appeal of his conviction and sentence was pending, this Court issued an order pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), remanding his case so that the district court could consider whether the sentence imposed would have been non-trivially different and, if so, to re-sentence him accordingly. (GA 149-50; JA 33).

The district court declined to re-sentence Buchanan under *Crosby*, and this Court ultimately affirmed his conviction. (GA 135-37, 159-60; JA 35, 37-51). The Court remanded, however, for possible resentencing in accordance with *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008). *See United States v. Burden*, 600 F.3d 204 (2010), *cert. denied*, 131 S. Ct. 251 (2010), and *cert. denied*, 131 S. Ct. 953 (2011). (GA 159-60; JA 35, 37-51).

On December 7, 2010, the district court issued a written ruling in which it again declined to re-sentence Buchanan. (JA 36, 87-91).

The instant appeal challenges only the district court's decision declining to re-sentence Buchanan pursuant to *Regalado*.

Because the district court's decision declining to re-sentence Buchanan was procedurally reasonable, and because his sentence is substantively reasonable as well, this Court should reject the appellant's challenge and affirm his sentence.

Statement of the Case

This is an appeal from the United States District Court (Janet C. Hall, J.), challenging a decision in which it declined to re-sentence the defendant pursuant to *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008).

On December 20, 2001, a federal grand jury returned an indictment charging the defendant-appellant Jermaine Buchanan, a/k/a "Ski," and others, with violations of the Racketeering Influenced and Corrupt Organizations Act ("RICO"), violent crimes in aid of racketeering ("VCAR") and conspiring to distribute cocaine and cocaine base. 18 U.S.C. §§ 1962(c), 1962(d), 1959(a); 21 U.S.C. §§ 846, 841(b)(1)(A). (JA 7).

On February 11, 2003, the jury returned a verdict finding the defendant and others guilty of the various racketeering and narcotics-related charges. (JA 28-29).

The jury found the defendant Buchanan guilty of five counts: Count One (Substantive RICO), Count Two (RICO Conspiracy), Counts Three and Five (VCAR), and Count Twelve (Narcotics Conspiracy). (JA 28-29; 92).

On April 12, 2004, the district court sentenced Buchanan to life in prison. (JA 31-32; 92). Buchanan appealed and on April 1, 2005, this Court issued an order remanding his case under *Crosby* so that the district court could consider whether the sentence imposed would have been non-trivially different and, if so, to re-sentence accordingly. (GA 149-50; JA 33).

In a written ruling, the district court declined to hold a re-sentencing for Buchanan. (JA 34; GA 135-37).

Buchanan's appeal was reinstated and on March 31, 2010, the Court issued a published opinion, affirming Buchanan's convictions and the judgment of the district court, but remanding Buchanan's case for possible re-sentencing in accordance with *Regalado*. *See Burden*, 600 F.3d 204. (GA 159-60; JA 35, 37-51).

On December 7, 2010, the district court issued a written ruling in which it again declined to re-sentence Buchanan. (JA 36, 87-91). Buchanan is currently serving his sentence.

Buchanan filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), on December 17, 2010. (JA 93).

Statement of Facts and Proceedings Relevant to this Appeal

From 1997 through June 12, 2001, a racketeering enterprise existed, through which Buchanan and his co-defendants: (1) engaged in prolific narcotics trafficking; and (2) committed acts of violence and intimidation related to the enterprise and its core business of drug trafficking for the purposes of maintaining its reputation in the Norwalk, Connecticut drug market, promoting its power, and protecting the members of the organization.

1. Narcotics Trafficking Activities

Specifically, in 1997, Kelvin Burden immersed himself in the sale of cocaine and cocaine base ("crack"). Kelvin Burden developed relations with kilogram-quantity sources of supply, and began developing a large customer base. By the end of 1997, Kelvin Burden began to dominate high intensity drug areas in South Norwalk, in particular, the King Kennedy housing project, the Roodner Court housing project, Bouton Street, and an area near South Main Street and the Carlton Court housing project, known as the "Maniac Block." (Trial Tr. 1473-91; 1514-24; 2739; 2742; 3834-36; 3877-78; PSR ¶¶ 8-14).[1]

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[1] The parties have not included, in the appendices, the trial transcript, which numbers in excess of 3,500 pages. The (continued...)

In 1998, Kelvin Burden's narcotics operation began to thrive, as a result of which a number of individuals (mostly members of the Burden family) began to associate and form what became the core of the organization. By 1999, in addition to Kelvin Burden, the core members of the organization included, among others, David "DMX" Burden, Jermaine Buchanan, David "QB" Burden, Tony Burden, and St. Clair Burden. These individuals participated in many of the critical phases of the organization's business. They packaged narcotics, distributed crack and powder cocaine to street-level dealers in the various housing projects and Burden-dominated locations, carried and shared weapons, met routinely at their "stash house" to discuss the status of the business, and engaged in acts of extreme violence. (*See, e.g.*, Trial Tr. 1508-40; 1667-72; 1701-09; 1921-29; 1941-50; 2763-66; 3543-81; PSR ¶¶ 8-14).

Kelvin Burden was, at all times, the leader – even during periods of incarceration in 2000 and 2001. Kelvin Burden controlled the flow of cocaine and cocaine base, he organized acts of violence, recruited members, and prescribed roles for his associates. From 1999 forward, David "DMX" Burden was a lieutenant. He made deliveries to street level dealers. David "DMX" Burden also collected money from the drug dealers which he funneled back to Kelvin Burden. In addition to packaging

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[1] (...continued)
government, however, is willing to provide the trial transcript, or any portion thereof, if necessary, upon request of the Court.

and selling drugs supplied to the organization, Jermaine Buchanan, David "QB" Burden and St. Clair Burden served as enforcers. They routinely carried weapons and responded to threats to the organization's members. (*See, e.g.,* Trial Tr. 715-20; 1488; 1535-36; 1701-09; 2763-74; PSR ¶¶ 8-15).

The defendants conducted their narcotics activities and prepared for acts of violence through an apartment within a residence located at 27 Lincoln Avenue in Norwalk (the "stash house"). At various times from 1997 through June 2001, members of the Burden Organization lived at the stash house. Within the stash house, the organization stored an arsenal of weapons that were shared by its members. Among the various firearms and accessories were a Mac-11 nine millimeter, a Barretta nine millimeter, a Glock nine millimeter with a laser siting, a shot gun, and a bullet proof vest. The stash house also served as a storage location for narcotics, drug packaging materials, and cash. (*See, e.g.*, Trial Tr. 521-25; 1509-14; 3830-34; PSR ¶¶ 13, 17, 21).

Kelvin Burden, David "DMX" Burden, Jermaine Buchanan, David "QB" Burden, and Cedric Burden congregated at the stash house to plan and discuss acts of violence against other significant South Norwalk drug dealers. They also used the stash house to discuss the operation of the narcotics business and package crack cocaine for distribution to street level dealers. In addition, Kelvin Burden and David "DMX" Burden routinely met with their sources of supply at the stash house. (*See*, *e.g.*,

Trial Tr. 521-25; 1509-14; 1571-85; 3830-34; 3903-07; PSR ¶¶ 13, 17, 21).

2. Violent Crimes Related to the Organization

At various points from 1998 through 2000, as the organization's drug trafficking business flourished, Kelvin Burden, David "DMX" Burden, Jermaine Buchanan and David "QB" Burden engaged in numerous acts of violence that furthered the organization's drug business by promoting respect for, and maintaining the power of, the Burden Organization in the drug community. (Trial Tr. 2941-43). Moreover, through a series of shooting incidents in 1998 and 1999, the Burden Organization succeeded in preserving – even enhancing – its dominance in the South Norwalk drug market. The violence predominantly related to two disputes, or "beefs," that were ongoing from 1998 through 1999. (*See*, *e.g.*, Trial Tr. 1921-29; 1941-50; 2941-43; 3543-81; PSR ¶ 15).

First. The organization developed tense relations with members of a group of crack dealers referred to as the Hill Crew. Specifically, Rodrick Richardson, Shaki Sumpter, Terrence McNichols, Eric McKinney, Michael Dawson, Fred Hatton, and Terra Nivens were associated with the Hill Crew and, at that time, they dominated the drug trade in the Carlton Court housing project. (*See*, *e.g.*, Trial Tr. 1492-1507; 1541-46; 3877-83; PSR ¶16).

Tension developed on January 21, 1998, when Rodrick Richardson and Shaki Sumpter each fired multiple gunshots into a car occupied by members of the Burden

Organization – namely, defendant Jermaine Buchanan and Willie Prezzie, Demetrius Story and Sean Burden. Before the shooting, Prezzie had fronted drugs to Richardson for street-level distribution. Richardson failed to pay Prezzie, despite demands from Prezzie and Buchanan. In the guise of promising payment, Richardson called Buchanan and Prezzie and arranged to meet at a location in Norwalk. Their true intentions, however, were to rob Prezzie and shoot up the area with gunfire. After Buchanan, Prezzie, Story, and Sean Burden arrived, Sumpter and Richardson attempted to rob them and, in the process, fired their respective handguns into the car, striking, but not killing, Sean Burden. The shooting incident increased animosity between the Burden Organization and the Hill Crew. (Trial Tr. 1904-08; 3878-83; PSR ¶ 16).

Kelvin Burden organized a response. He met with his core members, including Buchanan and David "DMX" Burden, distributed weapons that were stored at the stash house and orchestrated a search for Richardson and Sumpter. Kelvin Burden, Buchanan, and David "DMX" Burden searched for Richardson and Sumpter in Bridgeport to no avail. (Trial Tr. 3883-85; PSR ¶ 16).

On March 21, 1998, an exchange of gunfire occurred in front of the Burden Organization's stash house. Terrence McNichols drove to the stash house with other members of the Hill Crew. Buchanan struck McNichols in the face with a firearm. McNichols opened fire on Buchanan, Kelvin Burden, Lavon Godfrey, Terrence Burden and Sean Burden. Sean Burden fired back, using a handgun. Although no one was seriously injured, this

incident further increased tensions between the Burden Organization and the Hill Crew. (Trial Tr. 1490-1502; PSR ¶ 17).

Second. As relations deteriorated between the organization and the Hill Crew, another rift developed. Throughout 1997 and early 1998, Kelvin Burden supplied an individual by the name of Marquis Young with crack cocaine. In the Spring of 1998, Peter Diaz and Brandon Miles, two of Young's associates, beat up Terrence Burden in the Burden-dominated area of the King Kennedy housing project as Young stood by and watched. As a result, Kelvin Burden stopped supplying Young with narcotics. (Trial Tr. 1677-83; 3557-63; 3576-77; PSR ¶ 16, 18).

On May 13, 1998, matters worsened. Marquis Young, Peter Diaz and Aida Young were driving in the area of South Main Street in Norwalk, when they encountered Sean Burden. Sean Burden began making hostile comments to Diaz, who responded by fatally shooting Sean Burden. Kelvin Burden held both Diaz and Marquis Young responsible for the shooting of his brother Sean and, accordingly, Kelvin Burden wanted to retaliate against Young. (Trial Tr. 1686-88; 3565-67; PSR ¶ 19).

Young was eventually arrested for his involvement in the homicide. In connection with two different court proceedings, Kelvin Burden attempted to harm Young. On one occasion, Kelvin Burden, Keith Lyons and Chuck Lyons beat up Young during a court recess. Subsequently, when the charges against Young were dropped for lack of

probable cause, Kelvin Burden and Jermaine Buchanan approached Young and threatened him. The altercation, however, dissipated with the assistance of Young's uncle. (Trial Tr. 3385-94; 3565-70; PSR ¶ 19).

In short, by the Summer of 1998, with the narcotics business flourishing and with dominance in critical South Norwalk drug markets, the Burden Organization faced challenges and disruption from the Hill Crew and Marquis Young. To preserve their reputation and dominance in the drug market and to display their cohesiveness as an organization, the defendants escalated their resort to violence against dominant area drug dealers. (Trial Tr. 2941-43).

Violence Associated with the Hill Crew

In late 1998 and 1999, members of the Burden Organization committed numerous acts of violence against members of the Hill Crew. For example, Kelvin Burden organized a drive-by shooting of Rodrick Richardson, who had been seen in an area near Carlton Court. Kelvin Burden, David "DMX" Burden, Jermaine Buchanan, David "QB" Burden, Lavon Godfrey and others, picked up a Barretta nine millimeter from the stash house. Buchanan took possession of the gun, drove by the area in which Richardson had been seen and fired off multiple rounds in Richardson's direction. Kelvin Burden told associate Willie Prezzie that Richardson was the "heart of the Hill Crew" and needed to be "dealt with sooner or later." (Trial Tr. 1558-62; 3893; PSR ¶¶ 16-17).

In June 1999, Richardson and Kelvin Burden exchanged hostile words in front of Les' New Moon Café, a South Norwalk bar dominated by the Burden Organization, which was later acquired by the Burdens. The bar was also the site of large-scale and open narcotics trafficking and drug distribution by the Burden Organization. As Richardson walked by Kelvin Burden's Mercedes Benz, he heard Kelvin Burden cock a gun. In response, Richardson openly confronted and challenged Kelvin Burden, asking him why he had not avenged his brother Sean Burden's death. (Trial Tr. 1909-14; PSR ¶ 22).

The day after Richardson's exchange with Kelvin Burden, Jermaine Buchanan shot Richardson. Clad in a hooded sweatshirt, Buchanan positioned himself "in the cut" alongside Bouton Street. Buchanan spotted Richardson, approached him, and fired two shots in Richardson's direction, one of which hit Richardson in the arm just below his left bicep. Buchanan returned to the stash house, where he reported to Kelvin Burden, David "DMX" Burden, Lavon Godfrey and others that he had shot Richardson. Kelvin Burden responded, "It's about time you did something." (Trial Tr. 1565-68; PSR ¶ 22).

Violence Associated with Marquis Young

During the same time period that the Burden Organization was trying to neutralize the Hill Crew, members of the organization – in particular Kelvin Burden and Jermaine Buchanan – also maintained a keen interest in retaliating against Marquis Young for his involvement

in the shooting death of Kelvin Burden's brother, Sean. Tensions mounted from the Spring of 1999 until July 1, 1999, when Kelvin Burden, Jermaine Buchanan and Angel Cabrera carried out a drive-by shooting in Bridgeport that resulted in the death of Derek Owens and the paralysis of Marquis Young. (Trial Tr. 1682-98; 3557-73; 3908-36; 3448-54; PSR ¶¶ 18-19, 21, 23-24).

In the Spring of 1999, Kelvin Burden, David "QB" Burden, Willie Prezzie, and others attended a parade in New Haven, Connecticut. Marquis Young was also in attendance. As Young approached members of the organization, Kelvin Burden told Young that he would be killed ("You are not tough. Since when you became a killer? You will get yours in due time."). As Kelvin said this, David "QB" Burden stood by him and gestured to his waistband where he had placed a .38 caliber revolver. Notwithstanding the verbal exchange between Kelvin Burden and Young, no physical violence occurred at that time. (Trial Tr. 1688-90; 3915-18).

Subsequently, on a Friday night in June 1999, Prezzie saw Young at Les' New Moon Café. Young told Prezzie to leave town and steer clear of the Burdens so he would not get caught in any cross-fire. When Prezzie told Kelvin Burden about his conversation with Young, Kelvin Burden was initially upset with Prezzie for Prezzie's failure to call him when he encountered Young, as Kelvin had previously instructed members of the Burden Organization. The following week Kelvin Burden called a meeting and organized an effort to murder Young. Specifically, Kelvin Burden, David "DMX" Burden, Jermaine Buchanan and

others planned a return to the bar the following Friday night. The plan called for members of the organization to carry firearms and search for Young. Upon finding Young, members of the organization were to shoot Young after he got into his car. (Trial Tr. 3918-21; PSR ¶ 21).

Kelvin Burden set the plan in motion the next Friday night. Specifically, Kelvin Burden, David "DMX" Burden, Jermaine Buchanan, and others, met at the stash house, where they obtained weapons and assembled themselves in various cars. Jermaine Buchanan was armed as was Kelvin Burden, who carried the Glock nine millimeter with the laser siting. Members of the organization searched for, but did not find, Young at the bar that night. (Trial Tr. 1691-93; 1909-14; PSR ¶ 21).

In June 1999, Jermaine Buchanan and Kelvin Burden fine-tuned their plans to kill Young. Among other things, Kelvin and Buchanan discussed their interest in having the murder of Young take place in Bridgeport rather than Norwalk. Kelvin Burden indicated that it would be better if Young were killed in Bridgeport because of Kelvin's belief that shootings were more frequent there and that killing Young in Bridgeport would reduce the likelihood of Young's murder being traced back to their organization in Norwalk. Kelvin Burden also provided Buchanan with a firearm and suggested that girlfriends be lined up so that, if necessary, they could provide a false alibi defense. Buchanan also told Prezzie that Young knew the Burdens were looking for him and that he wanted to kill Young as a preemptive measure that would ensure his own safety as well. (Trial Tr. 3925-29; PSR ¶ 24).

On July 1, 1999, just after midnight, Buchanan and Cabrera rode as passengers in a white car. They followed Young and Derek Owens from a sandwich shop in Bridgeport to Young's residence on Lenox Avenue in Bridgeport. Young was seated in the passenger seat of a green Honda Accord; Derek Owens was the driver. Young and Owens arrived at Lenox Avenue in Bridgeport and parked in front of Young's residence, where they sat and talked about taking their children on a planned trip to Hershey Park the following morning. (Trial Tr. 3548-57).

Positioned on the right side of their car's interior, Buchanan and Cabrera drove by Young and Owens and opened fire. Buchanan and Cabrera fired off in excess of 25 nine millimeter rounds, many of which struck Owens and Young. Owens was fatally wounded and pronounced dead at the scene. Young was also riddled with bullets and critically wounded, becoming a paraplegic. Ballistics evidence established that two nine millimeter guns were used in connection with the shooting and that each victim was struck by both guns. (Trial Tr. 3447-54; 3548-57; PSR ¶ 23).

The morning of July 1, 1999, Kelvin Burden told Prezzie about the shooting of Owens and Young, indicating that the shooters "did the Burdens a favor." Kelvin Burden also told Prezzie that Buchanan was going around "bragging about the shooting." (Trial Tr. 1694-98; 3929-32).

Following the shooting, members of the Burden Organization took concerted steps to maintain a low

profile. For example, Kelvin Burden ordered David "DMX" Burden and St. Clair Burden to clear any drugs out of the stash house. In addition, within two days of the Owens/Young shooting, Kelvin Burden, David "DMX" Burden, and others left the state and traveled to Virginia Beach. Similarly, Jermain Buchanan, who before the Owens/Young shooting spent nearly every day in South Norwalk, avoided South Norwalk after the shooting. (Trial Tr. 3929-34; PSR ¶ 25).

3. Buchanan's Conviction and Sentence

On February 11, 2003, the jury found Buchanan guilty of five counts: Count One (Substantive RICO), Count Two (RICO Conspiracy), Count Three (VCAR – conspiracy to murder Rodrick Richardson), Count Five (VCAR – attempted murder of Rodrick Richardson); and Count Twelve (Narcotics Conspiracy).[2] (JA 28-29).

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[2] The jury acquitted on Count Nine (VCAR conspiracy to murder members of the Hill Crew); and Count Eleven (the VCAR attempted murder of members of the Hill Crew). Prior to the trial, the district court had also severed Counts Six, Seven and Eight (involving a conspiracy and attempt to murder Marquis Young and the murder of Derek Owens) in order to allow Buchanan to take an interlocutory appeal as to whether the institution of those federal charges implicated double jeopardy concerns following a state case on similar charges. Following his conviction, Buchanan withdrew his interlocutory appeal and the district court granted the government's motion to dismiss Counts Six, Seven and Eight.

On April 12, 2004, the court sentenced Buchanan to a term of life on Counts One, Two and Twelve of the Third Superseding Indictment, and for a term of ten years on Counts Three and Five, all terms to run concurrently. (JA 31; 92).

Buchanan's Guidelines were calculated in the Pre-Sentence Report ("PSR") – which the district court adopted as its findings, (GA 96-99; 102-03) – as follows:

Group One: Count One, Act One, Count Twelve – Drug Conspiracy

Drug Quantity (1.5 kilograms or more of cocaine base) U.S.S.G. § 2D1.1(c)(1)	38
Use of Firearm(s) in Connection with the Offense	+2
Adjusted Offense Level (Subtotal):	40

Group Two: Count One, Acts 2A, 2C, Counts Three and Five – Conspiracy / Attempted Murder of Rodrick Richardson

VCAR / Attempted Murder – U.S.S.G. §§2E1.1(a)(2), 2A2.1(a)(1)	28
Victim Suffered Serious Bodily Injury – U.S.S.G. §2A2.1(b)(1)(B)	+2
Adjusted Offense Level (Subtotal):	30

Group Three: Count One, Acts 3A, 3B Conspiracy / Attempted Murder of Marquis Young

VCAR / Attempted Murder – U.S.S.G. §§2E1.1(a)(2), 2A2.1(a)(1) 28
Victim Suffered Permanent Bodily Injury – U.S.S.G. §2A2.1(b)(1)(A) +4

Adjusted Offense Level (Subtotal): 32

Group Four: Count One, Act 4

VCAR Murder / First Degree Homicide – U.S.S.G. §§2A1.1(a) 43

Adjusted Offense Level (Subtotal): 43

Group	**Adjusted Offense Level**	**Units**
Group One	40	1
Group Two	30	0
Group Three	32	0
Group Four	43	1

Total Number of Units: 2

Increase in Offense Level Based on Total Number of Units: 2

Highest Adjusted Offense Level: 43

Combined Adjusted Offense Level: 45

Total Offense Level: 43

(PSR ¶¶ 44-70; GA 96-98).

Both the PSR and the court also determined that Buchanan was squarely in Criminal History Category VI, not only in light of his status as a Career Offender, but also because Buchanan's criminal history points, even absent Career Offender status, totaled 22 – placing him well beyond the minimum points necessary for Category VI. (PSR ¶¶71-80; GA 102-03). Buchanan's criminal record included, among other things, felony convictions for narcotics charges, including one incident during which he resisted arrest and threw eighty-one (81) pieces of crack cocaine during a foot chase; an assault in the third degree in which Buchanan beat his ex-girlfriend, held a knife to her throat and threw a small bicycle at her; and an assault in the first degree in which Buchanan had shot a .38 caliber firearm and wounded two victims in their legs. (PSR ¶¶ 71-80).

A total offense level 43 with a criminal history category VI, resulted in an applicable Guidelines range of life. (PSR ¶ 107).

At Buchanan's sentencing on April 12, 2004, the district court – well versed in the evidence and the overall record from having presided over the trial – conducted a thorough analysis in reaching its determination of what it believed to be the appropriate sentence for Buchanan.

First, the court confirmed that, although there were a number of legal and Guideline issues to address, the defendant had no objections to the facts set forth in the PSR. (GA 2) (defense counsel: "as far as the recitation of the facts, I think it was pretty much from the trial. There are no disputes stated.").

The court then carefully considered the Guidelines issues argued by Buchanan as well as his arguments for downward departure. First, with respect to the gun enhancement issues, the court reviewed the evidence and found that Buchanan frequented the stash house at which guns were routinely kept; that Buchanan had obtained a Mac-11 from the stash house and brandished it; that Buchanan had once carried a bag of guns from the stash house at the request of Kelvin Burden in connection with a dispute; and that there was "no question that this defendant possessed a firearm when he fired into the car and killed Derek Owens and [wounded] Marquis Young." (GA 63).

With respect to certain drug quantity issues raised by Buchanan, the court found that Buchanan not only assisted, at the stash house, in the packaging of crack cocaine for distribution to street dealers, but that he also personally sold "on the streets of Norwalk at various locations . . . somewhere between 7 and 14 grams of crack cocaine roughly every week for a two-year period." (GA 83-84; 89). The court further found that Buchanan's role in terms of violence made him "unlike other street dealers"; that Buchanan's involvement in violence on behalf of the Burden organization was connected to the

drug dealing; and that Buchanan's role as an enforcer "further[ed] the overall drug conspiracy and the overall drug conspiracy quantity." (GA 91-94). The court also noted that the jury had specifically found 50 grams or more of cocaine base and 5 kilograms or more of powder cocaine attributable to Buchanan. (GA 83-84). Taken with the trial evidence that the powder was converted to crack, the court found: "that conversion alone would be sufficient to trigger the maximum quantity." (GA 93). Accordingly, the court found that the evidence easily sufficed "that the quantity attributable to Mr. Buchanan [wa]s more than 1.5 kilograms" of crack cocaine. (GA 93; 94).

The court also carefully considered and rejected Buchanan's related argument for a minor role adjustment, pursued in light of the court's finding that the maximum guideline quantity was attributable to the defendant. In rejecting a minor role adjustment, the court commented that Buchanan was "at the core of this conspiracy"; that "[h]e was involved in all aspects of it"; and that "his involvement with the violence [and] . . . his knowledge of the quantities involved . . . implicate[d] him in supporting that volume and that size conspiracy." (GA 95-96).

After determining the applicable Guidelines range, (GA 96-98, 102-03), the court went on to carefully consider Buchanan's claims for a downward departure – from the murder Guideline – based upon his claim that wrongful conduct by the victim contributed significantly in provoking Buchanan's offense conduct. During this colloquy the court made unequivocally clear that Buchanan's conviction on Count One, Act 4 (involving the

VCAR murder of Derek Owens) drove his sentencing exposure:

> *[W]e have a victim her[e], the murder victim, who – a victim that causes the level 43 to be triggered here. A level that obviously drives the guideline range*. Who other than going around with Marquis Young, made no – I know of no record evidence that he made any threat to Mr. Buchanan. And I think that while I don't know what Mr. Buchanan would say, because obviously he has his right to remain silent, but even if I were to assume that he acknowledged he committed the crimes, he was sorry that Mr. Owens got in the middle, I think that he nonetheless intended to discharge a firearm on a number of occasions while sitting on the right side of a car next to a vehicle in which Mr. Owens is in the driver seat and therefore first in the line of fire of the fire he's discharged. I don't know what wrongful conduct of Mr. Owens provoked that response.

(GA 107-08) (emphasis added).

In rejecting the request for a departure, the court also expressed its view that Buchanan's participation in the long running efforts to kill Marquis Young, which resulted in the death of Derek Owens, was "premeditated murder," (GA 116). The court concluded:

> [T]here's no question in this Court's mind based on the testimony that this Defendant, Jermaine

> Buchanan, intended to and knowingly killed Derek Owens. He intended to do so by the firing of multiple rounds into the car in which Derek Owens was seated. He did so from the passenger's side of a car as it drove slowly by Derek Owens' car and Derek Owens was in the driver's side of that car; therefore going to be the person to take the first line of bullets as they were poured into that vehicle that was parked on the side of the road . . . the Defendant did intend to kill and – he intended to do the acts which indeed killed Derek Owens.

(GA 122). The court continued:

> The record is absolutely devoid of any evidence of provocation or any wrongful conduct that contributed, let alone significantly, to [Derek Owens'] premeditated murder. That he was with Marquis Young on some occasions when Marquis Young was making threatening statements, running his mouth, trash talking, however it is characterized, even in making a direct threat. Doesn't mean that Derek Owens engaged in any wrongful conduct. The fact that Derek Owens dealt drugs, while it is wrongful conduct, it cannot be said by any stretch of the imagination to have been conduct which contributed, let alone significantly, to his premeditated murder by this Defendant.

(GA 127).

Later, when the court indicated that it would decline to depart even if it were to take a broader view of provocation or somehow "transfer" the wrongful conduct of Marquis Young to the offense conduct involving the murder of Derek Owens, the court reiterated the fact that Buchanan's sentencing exposure was being driven by his conviction on Count One, Act 4:

> If the Court is mistaken and . . . defense counsel is correct that the Court needs to not parse out so narrowly the victim's conduct but rather to look at all of the conduct of the two victims for the conduct, *that is the driving conduct here in the guidelines, that is the shooting of this car on the night of July 1st*, the Court would still be inclined and would not find a basis to conclude that this Defendant fits within the parameters of 5K2.0 . . .

(GA 128) (emphasis added).

After rejecting Buchanan's claims for a departure, the court proceeded to impose its sentence of a term of life on Counts One, Two and Twelve of the Third Superseding Indictment, and for a term of ten years on Counts Three and Five, all terms to run concurrently. (GA 131; JA 92). On April 12, 2004, the defendant timely filed his notice of appeal. (JA 31).

4. The *Crosby* Remand

On April 4, 2005, this Court ordered a limited remand in Buchanan's case, upon request of the Government, in

light of the Supreme Court's decision in *Booker*, and this Court's decision in *Crosby*, 397 F.3d 103. (GA 149-50; JA 33).

After reviewing briefing from the parties, the court issued a ruling declining to re-sentence Buchanan on the *Crosby* remand. In that ruling, the court stated:

> Jermain[e] Buchanan was originally sentenced to life imprisonment upon his conviction by a jury of racketeering, racketeering conspiracy, VCAR conspiracy to murder Roderick Richardson on June 27, 1999, and a conspiracy to possess with intent to distribute and to distribute 5 kilograms or more of cocaine and 50 grams or more of cocaine base. The court concludes that a re-sentencing is not called for. In other words, had it known at the time of sentencing that the Guidelines were advisory and that it should consider them along with all the other factors in §3553(a) before imposing sentence, it would have sentenced Mr. Buchanan to the same sentence it did, life imprisonment. The court does so for primarily the reasons that were articulated at the original sentencing. *See* Sentencing Transcript (4/12/04).
>
> The court would determine the Sentencing Guidelines the same as they were originally determined in the initial sentencing, for a Guideline range of life imprisonment. While considering all of the §3553(a) factors, the court is particularly informed in this case by the need to protect the

> public and for deterrence. Jermain[e] Buchanan is responsible for the murder of an innocent man, the crippling (paraplegia) of another, and the attempted murder of a third person. While a street dealer, he played a critical part – enforcer – in a large volume, long-standing drug conspiracy. He has an extensive criminal history, primarily of assaultive conduct with a gun, beatings, and assault on a police officer. The sentence reflects the serious and violent circumstances of his offense, and particularly the need to promote respect for the law, to deter, and to protect the public.
>
> After consideration of all of the §3553(a) factors, including treating the Guidelines as a factor that is not mandatory, as well as the prior record, including the pre-sentence report, and the recently filed Memoranda, it is this court's conclusion that there is no reason to order a re-sentencing in this case because, if one were ordered, the sentence would be the same of that previously imposed.

(GA 136-37).

5. The *Regalado* Remand

On March 31, 2010, this Court issued its opinion affirming Buchanan's convictions and the judgment of the district court, but remanding Buchanan's case for possible re-sentencing in accordance with *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008). In that regard, the Court stated:

> All of the five defendants in this case were convicted of and sentenced for offenses involving crack cocaine. The parties submitted their briefs prior to the Supreme Court's decision in *Kimbrough v. United States*, 552 U.S. 85, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007), in which the Court held that a sentencing judge may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses. *Id.* at 575, 128 S. Ct. 558. None of these defendants raised the issue before the district court. Accordingly, we must remand "to give the district court an opportunity to indicate whether it would have imposed a non-Guidelines sentence knowing that it had discretion to deviate from the Guidelines to serve [the] objectives [of sentencing under 18 U.S.C. § 3553(a)]." *United States v. Regalado*, 518 F.3d 143, 149 (2d Cir. 2008) (per curiam).

Burden, 600 F.3d at 231.

On or about October 21, 2010, the district court invited briefing on whether career offenders were entitled to re-sentencings under *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008) (per curiam), and otherwise in aid of the proceedings on remand. In its brief, the government, relying on such cases as *United States v. Ogman*, 535 F.3d 108, 109 (2d Cir. 2008) (per curiam) and *United States v. Jones*, 294 Fed. Appx. 624 (2d Cir. 2008), argued that where, as here, a defendant's sentence was not the result of the crack-to-powder cocaine ratio, or where, as here, the effect of other Guidelines would still trigger the same

offense level, there was no reason for a re-sentencing under *Kimbrough v. United States*, 552 U.S. 85 (2007) or *Regalado*. The government argued that Buchanan was not eligible for a resentencing under *Regalado* in light of (1) his status as a career offender; and (2) the fact that his sentence was driven by his conviction on Count One, Act 4 (involving the VCAR murder of Derek Owens).

On December 7, 2010, the district court issued a five-page ruling in which it again declined to re-sentence Buchanan. The district court acknowledged that in *Ogman*, this Court

> clarif[ied] that where . . . a district court sentences a defendant pursuant to a Guidelines range that results from his status as a career offender, and without reliance upon the Guidelines' drug quantity table and the crack to powder ratio that it incorporates, the sentence does not present the type of error for which remand in accordance with *Regalado* is appropriate." *Ogman*, 535 F.3d at 111.

(JA 88-89). In declining to find that Buchanan's case had been remanded in error, however, the district court held that *Ogman* simply stands for the proposition that remand is not *required*:

> In *Ogman*, the Second Circuit decided whether *Regalado required* the Second Circuit to remand the case of a career offender defendant for resentencing. The Second Circuit concluded that career offenders were not entitled to remand, but it

> did not address whether remand was permissible. In the case of Mr. Buchanan, the court assumes that the Second Circuit was familiar with its own decisions in *Regalado* and *Ogman* when it ordered the remand for Mr. Buchanan. The Second Circuit elected to remand "to give the district court an opportunity to indicate whether it would have imposed a non-Guidelines sentence knowing that it had discretion to deviate from the Guidelines to serve [the] objectives [of sentencing under 18 U.S.C. § 3553(a)]." *United States v. Burden*, 600 F.3d 204, 231 (2d Cir. 2010) (citing *United States v. Regalado*, 518 F.3d 143, 149 (2d Cir.2008) (per curiam)). The court declines to endorse the government's position that the Court of Appeals remanded the case in error. Pursuant to the Mandate from the Court of Appeals, the court now addresses whether it would have imposed a non-Guidelines sentence on Mr. Buchanan.

(JA 89).

Turning to the question whether the court would have imposed a different sentence on Buchanan had it known of its discretion to account for the Guidelines' disparate treatment of crack and powder cocaine offenses, the district court ruled as follows:

> The court is familiar with the *Kimbrough* and *Regalado* decisions. In addition, the court presided at the trial of this matter and has a present recollection of the trial and the evidence presented

there. Further, the court has reviewed the Pre-Sentence Report, the court's 2006 Ruling declining to resentence Buchanan following a post-*Crosby* remand (Doc. No. 1771), and the two Memoranda submitted subsequent to the most recent remand. Finally, the court is familiar with all the factors set forth at 18 U.S.C. § 3553(a).

Jermaine Buchanan was originally sentenced to life imprisonment upon his conviction by a jury of racketeering, racketeering conspiracy, VCAR conspiracy to murder Roderick Richardson on June 27, 1999, VCAR attempted murder of Roderick Richardson, and a conspiracy to possess with intent to distribute 5 kilograms or more of cocaine and 50 grams or more of cocaine base. The court concludes that a resentencing is not warranted. In other words, had it known at the time of sentencing that it had the authority to impose a non-Guidelines sentence in order to mitigate the sentencing range produced by the 100-to-1 ratio between the treatment of crack and powder cocaine offenses, it would have sentenced Mr. Buchanan to the same sentence: life imprisonment.

The court does so for primarily the reasons that were articulated at the original sentencing. *See, e.g.*, Sentencing Tr. 4/12/04, at 107, Doc. No. 1662 ("[W]e have a victim her[e], the murder victim, who – a victim that causes the [offense] level 43 to be triggered here. A level that obviously drives the guideline range."). The court would determine the

Sentencing Guidelines the same as they were originally determined in the initial sentencing, for a Guideline range of life imprisonment. While considering all of the section 3553(a) factors, the court is particularly informed in this case by the need to protect the public and for deterrence. Jermaine Buchanan is responsible for the murder of an innocent man, the crippling (paraplegia) of another, and the attempted murder of a third person. While a street dealer, he played a critical part – enforcer – in a large volume, long-standing drug conspiracy. He has an extensive criminal history, primarily of assaultive conduct with a gun, beatings, and assault on a police officer. The sentence reflects the serious and violent circumstances of his offense, and particularly the need to promote respect for the law, to deter, and to protect the public. The court's original sentencing decision was driven essentially by the VCAR murder, attempted murder, and serious assault. That this conduct took place in the context of a longstanding and substantial drug dealing conspiracy was significant, but the type of drug (crack) did not enter into the court's assessment of the violent activity.

After consideration of all of the section 3553(a) factors, with the knowledge that the court has discretion to account for the Guidelines' disparate treatment of crack and powder cocaine offenses, it is this court's conclusion that there is no reason to proceed with a resentencing in this case because the

> court would impose the same sentence it imposed previously.

(JA 89-91) (footnote omitted).

It is from this decision that Buchanan presently appeals.

Summary of Argument

The district court's sentence and its decision not to hold a re-sentencing pursuant to *United States v. Regalado*, 518 F.3d 143, 149 (2d Cir. 2008) were reasonable. First, as a threshold matter, where, as here, a defendant's sentence was not the result of the crack-to-powder cocaine ratio, and the effect of other Guidelines still triggers the same offense level, there is no reason for a re-sentencing under *Kimbrough* or *Regalado*. Second, the district court's consideration of the question whether to hold a re-sentencing hearing pursuant to *Regalado* was procedurally proper and fair. The district court's original sentence – life imprisonment – rested on a proper calculation of the guidelines range and reflected the factors outlined in 18 U.S.C. § 3553(a). Moreover, during both the *Crosby* and *Regalado* remands, the district court considered written submissions from the parties, the prior record, the pre-sentence report, and all of the § 3553(a) factors, and after careful consideration, reasonably and properly concluded that a re-sentencing was not necessary.

Finally, the district court's life sentence was substantively reasonable. Among other things, Jermaine

Buchanan was responsible for the murder of an innocent man, the crippling (paraplegia) of another, and the attempted murder of a third person. The court's sentence – which it has now twice revisited and confirmed – was driven by a VCAR murder, attempted murder, and a serious assault. Because the district court's decision declining to re-sentence Buchanan was procedurally reasonable, and because his sentence is substantively reasonable as well, this Court should reject the appellant's challenge and affirm his sentence.

Argument

I. The district court's sentence and its decision not to re-sentence Buchanan were reasonable.

A. Governing law and standard of review

After the Supreme Court's holding in *United States v. Booker*, 543 U.S. 220 (2005), which rendered the Sentencing Guidelines advisory rather than mandatory, a sentence satisfies the Sixth Amendment if the sentencing judge "(1) calculates the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) considers the calculated Guidelines range, along with the other § 3553 factors; and (3) imposes a reasonable sentence." *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006); *Crosby*, 397 F.3d at 113.

Consideration of the Guidelines range requires a sentencing court to calculate the range and put the calculation on the record. *Fernandez*, 443 F.3d at 29. The

requirement that the district court consider the § 3553(a) factors, however, does not require the judge to precisely identify the factors on the record or address specific arguments about how the factors should be implemented. *Id.*; *Rita v. United States*, 551 U.S. 338, 356-59 (2007) (affirming a brief statement of reasons by a district judge who refused downward departure; judge noted that the sentencing range was "not inappropriate"). There is no "rigorous requirement of specific articulation by the sentencing judge." *Crosby*, 397 F.3d at 113; *see also Fernandez*, 443 F.3d at 30 ("[N]o robotic incantations are required to prove the fact of consideration, . . . and we will not conclude that a district judge shirked her obligation to consider the § 3553(a) factors simply because she did not discuss each one individually or did not expressly parse or address every argument relating to those factors that the defendant advanced.") (footnote and internal quotation omitted). Indeed, a court's reasoning can be inferred by what the judge did in the context of what was argued by the parties and contained in the PSR. *See United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005) ("As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, we will accept that the requisite consideration has occurred."). Thus, this Court "presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the statutory factors [under § 3553(a)]." *Fernandez*, 443 F.3d at 30.

On a *Regalado* remand, a district court is not necessarily required to recalculate the defendant's advisory Guidelines range as it may properly decide, in the first instance, that no re-sentencing is required because it would have imposed the same sentence. *See Regalado*, 518 F.3d at 149 (adopting the "*Crosby* mechanism" in which the Court "remand[s] to give the district court an opportunity to indicate whether it would have imposed a non-Guidelines sentence knowing that it had discretion to deviate from the Guidelines"); *see also Crosby*, 397 F.3d at 117 (explaining that a *Crosby* remand is "not for the purpose of a required resentencing, but only for the more limited purpose of permitting the sentencing judge to determine *whether* to resentence, now fully informed of the new sentencing regime"). In short, *Regalado* requires that if a court decides on remand that it would have issued a different sentence had it fully understood its discretion to do so, then "the court should vacate the original sentence and resentence the defendant." 518 F.3d at 149. If the court understands the extent of its authority, but nevertheless declines to re-sentence the defendant, then "the court should state on the record that it is declining to resentence, and it should provide an appropriate explanation for this decision." *Id*.

This Court reviews a sentence for reasonableness. *See Rita*, 551 U.S. at 341; *Fernandez*, 443 F.3d at 26-27. Similarly, this Court reviews a sentence for reasonableness even after a district court declines to re-sentence pursuant to *Regalado*. *See, e.g.*, *Regalado*, 518 F.3d at 149; *cf. also United States v. Williams*, 475 F.3d 468, 474 (2d Cir. 2007) (Second Circuit reviews a sentence for

reasonableness after a district court declines to resentence pursuant to *Crosby*). The reasonableness standard is deferential and focuses "primarily on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a)." *United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005). This Court does not substitute its judgment for that of the district court. Rather, reasonableness review is akin to a "deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 52 (2007); *see also Fernandez*, 443 F.3d at 27 ("the standard is akin to review for abuse of discretion."). This Court has noted that "in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Id.*; *see also Rita*, 551 U.S. at 346-51 (courts of appeals may apply presumption of reasonableness to a sentence within the applicable Sentencing Guidelines range).

Review to determine whether a sentence is "reasonable" involves both "an examination of the length of the sentence (substantive reasonableness) as well as the procedure employed in arriving at the sentence (procedural reasonableness)." *United States v. Johnson*, 567 F.3d 40, 51 (2d Cir. 2009). To impose a procedurally reasonable sentence, a district court must "(1) normally determine the applicable Guidelines range, (2) consider the Guidelines along with the other factors under § 3553(a), and (3) determine whether to impose a Guidelines sentence or a non-Guidelines sentence." *United States v. Villafuerte*, 502 F.3d 204, 206-07 (2d Cir. 2007); *accord Gall*, 552 U.S. at 53. Procedural errors arise where the district court

miscalculates the Guidelines; treats them as mandatory; does not adequately explain the sentence imposed; does not properly consider the § 3553(a) factors; or deviates from the Guidelines without explanation. *See Johnson*, 567 F.3d at 51-52.

A sentencing court's legal application of the Guidelines is reviewed *de novo*, while the court's underlying factual findings are reviewed for clear error, acknowledging the lesser standard of proof at sentencing of preponderance of the evidence. *United States v. Gaskin*, 364 F.3d 438, 464 (2d Cir. 2004); *see also* 18 U.S.C. § 3742(e). In deciding upon a sentence, a district court has the discretion to rely on the wide array of facts available to it, including information set forth in the pre-sentence report, as well as circumstantial evidence. *See United States v. Sisti*, 91 F.3d 305, 312-13 (2d Cir. 1996).

B. Discussion

Buchanan argues that his life sentence is unreasonable. This argument is without merit. First, where, as here, a defendant's sentence was not the result of the crack-to-powder cocaine ratio, and the effect of other Guidelines still triggers the same offense level, there is no reason for a re-sentencing under *Regalado*. Second, the district court complied with the procedural requirements of *Booker, Fernandez* and *Regalado*. Third, the life sentence was substantively reasonable.

First, as a threshold matter, the district court's decision not to re-sentence Buchanan under *Regalado* was

reasonable because Buchanan was not eligible for a re-sentencing in light of (1) his status as a career offender; and (2) the fact that his sentence was driven by his conviction on Count One, Act 4 (involving the VCAR murder of Derek Owens).

This Court has expressly held that *Regalado* "has *no application* [where] . . . the Sentencing Guidelines range applied to [a defendant's] case was not the result of the Guidelines' 100-to-1 powder to crack ratio, but rather resulted from his status as a career offender . . . ." *United States v. Ogman*, 535 F.3d 108, 109 (2d Cir. 2008) (per curiam) (emphasis added). Similarly, this Court has held that where a defendant's sentence was not the result of the crack-to-powder cocaine ratio, or where the effect of other Guidelines would still trigger the same offense level, there is no reason for a resentencing under *Kimbrough* or *Regalado*. *See, e.g.*, *United States v. Jones*, 294 Fed. Appx. 624, 627-28, (2d Cir. 2008) (defendant not entitled to re-sentencing under *Regalado* because "separate and apart from the quantity of crack for which he was responsible - the large quantity of heroin for which Lonnie Jones was responsible would still trigger the same offense level, thereby making the crack-to-powder cocaine ratio irrelevant"). Buchanan was not eligible for a re-sentencing under *Regalado* because of (1) his status as a career offender; and (2) the fact that his sentence was driven by his conviction on Count One, Act 4 (involving the VCAR murder of Derek Owens). *See* (GA 107-08) ("[W]e have a victim her[e], the murder victim, who – *a victim that causes the level 43 to be triggered here. A level that obviously drives the guideline range*.") (emphasis added);

see also (GA 128) ("that is the driving conduct here in the guidelines, that is the shooting of this car on the night of July 1st"). Simply put, Buchanan's sentence was not driven by the quantity of controlled substances involved in his case. Because changes in the law regarding the crack to powder ratio did not change Buchanan's status as a career offender or the fact that his life sentence was driven by his conviction involving a VCAR murder, the district court's decision not to re-sentence him under *Regalado* was reasonable.

Second, the district court's sentence was procedurally reasonable because it complied with the dictates of *Booker*, *Fernandez* and *Regalado*. At the original sentencing, the district court carefully considered the defendant's arguments regarding a gun enhancement, drug quantity and a minor role adjustment, then properly calculated Buchanan's Guidelines range to be life. Next, the district court considered Buchanan's claims for a downward departure from the Guideline life range. While recognizing its discretion to depart below this range, the district court declined to do so. *See* (GA 63; 83-94; 95-98; 102-03; 107-08; 122; 127-28).

Following the United States Supreme Court's January 2005 decision in *Booker*, and after this Court's remand pursuant to *Crosby*, the district court invited written submissions by the parties on the question whether it would have imposed a non-trivially difference sentence if the Sentencing Guidelines had been advisory, and if it had been allowed to consider all of the factors in § 3553(a). (JA 33). In response to that order, the government and the

defendant each filed a memorandum. (JA 33). After consideration of both memoranda, the prior record and the PSR, as well as consideration of all of the § 3553(a) factors, including treating the Sentencing Guidelines as a factor that was not mandatory, the district court properly concluded that a re-sentencing was not necessary. (JA 34; GA 135-37). In so holding, the court set forth particular and individualized reasons why it would have sentenced Buchanan to the same sentence it previously did. (GA 136-37).

Although the district court was not required to identify with precision the § 3553(a) factors in its consideration, *Fernandez*, 443 F.3d at 29, the district judge essentially did so when sentencing Buchanan. For example, the district judge "[w]hile considering all of the §3553(a) factors," was particularly informed by "the need to protect the public and for deterrence," "the serious and violent circumstances of his offense," and "the need to promote respect for the law." (GA 136-37). The district court also considered, among other things, Buchanan's criminal history ("He has an extensive criminal history, primarily of assaultive conduct with a gun, beatings, and assault on a police officer."), and the nature and circumstances of the offense ("Buchanan is responsible for the murder of an innocent man, the crippling (paraplegia) of another, and the attempted murder of a third person. While a street dealer, he played a critical part – enforcer – in a large volume, long standing drug conspiracy."). (GA 136-37). The court properly concluded that "[a]fter consideration of all of the § 3553(a) factors, including treating the Guidelines as a factor that is not mandatory, as well as the

prior record, including the pre-sentence report, and the recently filed Memoranda, it is this court's conclusion that there is no reason to order a resentencing in this case because, if one were ordered, the sentence would be the same of that previously imposed."). (GA 137).

Similarly, on the *Regalado* remand, the district court invited the parties to submit a brief on whether career offenders may be entitled to resentencings under *Regalado* and otherwise in aid of proceedings on remand from this Court. In response to that order, the government and the defendant each filed a memorandum. (JA 36; 53-83; 84-86). After consideration of both memoranda, the prior record and the PSR, as well as consideration of all of the § 3553(a) factors, including the knowledge that the court has discretion to account for the Guidelines' disparate treatment of crack and powder cocaine offenses, the district court again properly concluded that a re-sentencing was not necessary, because it would still sentence Buchanan to life. (JA 36; 87-91).

In so holding, the court again set forth particular and individualized reasons why it would have sentenced Buchanan to the same sentence it previously did. (JA 90-91). First, the court stated that it would do so for "primarily the reasons that were articulated at the original sentencing." (JA 90) (citing Sent. Tr. 4/12/2004 at 107 [GA 107] "[W]e have a victim her[e], the murder victim, who – a victim that causes the [offense] level 43 to be triggered here. A level that obviously drives the guideline range."). The court also found that it would determine the Sentencing Guidelines the same as they were determined

at the initial sentencing, for a Guideline range of life. (JA 90). While considering all of the § 3553(a) factors, the court again noted the need to promote respect for the law; the need to protect the public; the need for deterrence; and the serious and violent circumstances of his offense. (JA 90-91). The court further stated that its sentence "was driven essentially by the VCAR murder, attempted murder and serious assault. That this conduct took place in the context of a longstanding and substantial drug dealing conspiracy was significant, but the type of drug (crack) did not enter into the court's assessment of the violent activity." (JA 91). Thus, the court concluded that even with the knowledge that the court has discretion to account for the Guidelines' disparate treatment of crack and powder offenses, there was no reason to proceed with a re-sentencing because the court would impose the same sentence – life imprisonment. (JA 91). In sum, the life sentence was the product of the district court's careful consideration and individualized assessment of this defendant's circumstances and his offense conduct through the prism of the § 3553(a) factors.

Because this process – including the district court's decisions not to hold a new sentencing hearing – was not only fair but also consistent with this Court's guidance in *Crosby* and *Regalado*, Buchanan's sentence was procedurally reasonable. *See Regalado*, 518 F.3d at 149 (adopting the "*Crosby* mechanism" in which the Court "remand[s] to give the district court an opportunity to indicate whether it would have imposed a non-Guidelines sentence knowing that it had discretion to deviate from the Guidelines"; requiring that if a court decides on remand

that it would have imposed a different sentence had it fully understood its discretion to do so, then "the court should vacate the original sentence and resentence the defendant"; if, however, the court understands the extent of its authority, but nevertheless declines to re-sentence the defendant, then "the court should state on the record that it is declining to resentence, and it should provide an appropriate explanation for the decision").

Finally, the district court's sentence was substantively reasonable. Buchanan was not merely involved in street level drug dealing; rather, he was "at the core of this conspiracy" (GA 95), and "played a critical part – enforcer – in a large volume, long-standing drug conspiracy." (GA 137; JA 90-91). Buchanan also had "an extensive criminal history" that included several acts of violence, including "assaultive conduct with a gun, beatings, and [an] assault on a police officer." (GA 137; JA 91).

Buchanan also brazenly shot people who dared to challenge members of the Burden Organization – and he seriously injured two and killed one. When Buchanan shot Roderick Richardson, he lay in wait for him and fired multiple rounds in his direction, one of which hit Richardson in the arm just below his left bicep. Buchanan also engaged in the tragic drive-by shooting and murder of Derek Owens, an innocent bystander that Buchanan killed while attempting to shoot and kill Marquis Young, who was rendered a paraplegic during the incident. As the PSR aptly noted, "Buchanan was feared within the South Norwalk Community. He deservedly had a reputation as someone willing to shoot and kill. As such, he was a

valuable asset to the Burden Organization as violence and intimidation [were] an essential element in the success of [the Burden Organization's] street level narcotics trafficking . . . . it is fortunate that the defendant only murdered one individual." PSR ¶¶ 118; 121. The court's life sentence was substantively reasonable because it reflected the serious and violent circumstances of Buchanan's offense and criminal history, as well as the need to promote respect for the law, to deter, and to protect the public.

Buchanan argues that the district court "placed little weight upon the need or the possibilities for rehabilitation," and "failed to reach an informed and individualized judgment as to what [wa]s 'sufficient, but not greater than necessary' to fulfill the purposes of sentencing" under 18 U.S.C. § 3553(a). Appellant's Br. at 18. A review of the record, however, indicates that the district court clearly understood its sentencing authority and the task before it during the *Crosby* and *Regalado* remands; it thoroughly considered the submissions of the parties, the prior record and the PSR, as well as the § 3553(a) factors; and it carefully determined that a sentence of life – the sentence also called for by the Guidelines – was appropriate. The sentencing court is not required to precisely identify all of the § 3553(a) factors on the record or address specific arguments about how the factors should be implemented. *See Fernandez*, 443 F.3d at 30 ("[W]e will not conclude that a district judge shirked her obligation to consider the § 3553(a) factors simply because she did not discuss each one individually or did not expressly parse or address every argument relating to

those factors that the defendant advanced."). Rather, this Court "presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the statutory factors [under § 3553(a)]." *Id.* And on the record in this case, there is no doubt that "[t]he factors on which the district court relied" – the seriousness of the crimes of conviction, deterrence, and protection of the public – "can bear the weight assigned [them] under the totality of the circumstances in the case." *United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2008) (en banc)).

Finally, Buchanan argues that "a sentence of less than life – say, of thirty years – would have been sufficient." Appellant's Br. at 18. The district court's life sentence, however, reflected the serious and violent nature of Buchanan's offense conduct and criminal history. Among other things, Buchanan shot three people in his capacity as an enforcer for a violent and prolific drug trafficking organization – wounding one, killing another and rendering the third a paraplegic for life. This is simply not "an exceptional case[] where the trial court's decision cannot be located within the range of permissible decisions." *Cavera*, 550 F.3d at 189 (internal quotation omitted). Accordingly, this Court should decline Buchanan's invitation to, in effect, substitute its judgment for that of the district court. *Fernandez*, 443 F.3d at 27 ("Reasonableness review does not entail the substitution of [the appellate court's] judgment for that of the sentencing judge."); *United States v. Kane*, 452 F.3d 140, 145 (2d Cir. 2006) (per curiam) (refusing to "substitute [its] judgment for that of the District Court" when reviewing sentencing

appeal); *Fleming*, 397 F.3d at 100 (when reviewing sentence for reasonableness, court of appeals "should exhibit restraint, not micromanagement").

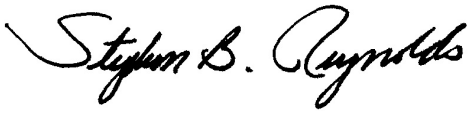
Conclusion

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

Dated: June 24, 2011

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

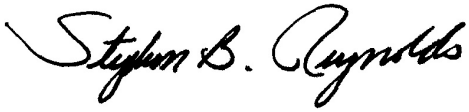


STEPHEN B. REYNOLDS
ASSISTANT U.S. ATTORNEY

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

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 10,904 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



STEPHEN B. REYNOLDS
ASSISTANT U.S. ATTORNEY

ADDENDUM

§ 3553. Imposition of a sentence

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

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

(2) the need for the sentence imposed --

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

(B) to afford adequate deterrence to criminal conduct;

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

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

(3) the kinds of sentences available;

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

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

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

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

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

amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement–

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

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

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

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

* * *

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open

court the reasons for its imposition of the particular sentence, and, if the sentence --

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

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

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