11-2562

To Be Argued By:
SUSAN L. WINES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-2562

UNITED STATES OF AMERICA,
Appellee,

-vs-

THOMAS E. GALLAGHER,
Defendant-Appellant.

(For continuation of Caption, See Inside Cover)

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

BRIEF FOR THE UNITED STATES OF AMERICA

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Defendants.

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Pursuant to "Blue Book" rule 10.7, the Government's citation of cases does not include "certiorari denied" dispositions that are more than two years old.

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Statement of Jurisdiction

This is an appeal from the judgment entered in the United States District Court for the District of Connecticut (Alvin W. Thompson, J.). The district court had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on June 17, 2011. Appellant's Appendix 33-34 ("A__"). On June 21, 2011, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A34, A164. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Statement of Issue Presented for Review

Whether the district court abused its discretion and imposed an unreasonable sentence when it correctly applied the Sentencing Guidelines and sentenced the defendant to 60 months' imprisonment, a term within the advisory Guidelines range.

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Preliminary Statement

The defendant, Thomas Gallagher, was a licensed real estate appraiser who prepared fraudulent appraisals for a mortgage fraud scheme responsible for at least $3 million in losses to lenders. Gallagher's appraisals contained doctored photographs, misrepresentations about square footage and the condition of the properties, and false certifications to his lender clients that Gallagher believed the information contained in the appraisals to be true and correct.

Gallagher took tens of thousands of dollars in cash for his part in the fraud.

During the scheme, Gallagher was questioned about his appraisal work on at least two occasions, once by a potential lender and once by a state regulatory agency. Rather than stop participating in the fraud or coming clean about his role, Gallagher lied about supposed errors in his work and continued his fraud.

Gallagher eventually pleaded guilty to making a false statement in a matter within the jurisdiction of the Federal Housing Administration ("FHA"). After a lengthy sentencing hearing during which the district court made detailed findings about the applicable sentencing factors, the court sentenced Gallagher principally to 60 months in prison. In this appeal, Gallagher argues that his sentence was unreasonable. But as set forth below, given the nature and extent of defendant's fraud and his refusal to stop his conduct when questioned about it, the sentence imposed was reasonable, both procedurally and substantively.

Statement of the Case

On June 22, 2010, a federal grand jury returned an indictment against Gallagher and five others charging Gallagher with engaging in a mortgage fraud conspiracy, in violation of 18 U.S.C. § 371; wire fraud in violation of 18 U.S.C.

§ 1343, and false statement in violation of 18 U.S.C. § 1001. A5.

On July 29, 2010, a federal grand jury returned a Second Superseding Indictment which added four more defendants and a charge of mail fraud in violation of 18 U.S.C. § 1341 against Gallagher. A6, A35-52.

On March 14, 2011, six defendants started jury selection, including Gallagher. A20. Evidence started on March 16, 2011. A22. On March 21, 2011, Gallagher pled guilty without a plea agreement to Count Fourteen of the Second Superseding Indictment charging him with making a false statement to the FHA in violation of 18 U.S.C. § 1001. A24. Gallagher acknowledged his guilt on Count Fourteen and agreed with the government's recitation of the facts of the offense. A76-79.

On June 7, 2011, the district court sentenced Gallagher principally to 60 months of imprisonment. A33, A154. On June, 17, 2011, judgment was entered. A33-34. On June 21, 2011, Gallagher filed a timely notice of appeal. A34, A164.

Gallagher is currently serving his prison sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. The offense conduct and conduct relevant to the underlying scheme

1. The fraudulent scheme

From 2006 to 2010, Gallagher served as the appraiser for a mortgage fraud ring that obtained millions of dollars in residential real estate loans through the use of sham sales contracts, false loan applications and fraudulent property appraisals. Pre-Sentence Report ("PSR") ¶8.[1] The fraudulent loans were based on sales prices inflated above the value of the property and above what the seller agreed to take from the sale. PSR ¶9. Once the loan was funded, the seller took the proceeds he or she had agreed to take, and the excess was distributed amongst the other conspirators. PSR ¶9.

Gallagher generated the fraudulent appraisals used to justify the inflated sales prices. PSR ¶9. In exchange, Gallagher received payments, often in cash, of thousands of dollars per proper-

[1] Because Gallagher pleaded guilty after trial had already started, the facts set forth here come from trial testimony and other facts set forth in the PSR. These facts were undisputed and available to the trial court at sentencing.

ty, well beyond the basic appraisal fee he disclosed to the lenders. PSR ¶11.

The scheme involved 29 properties throughout Connecticut, most of which ended up in foreclosure and in disrepair. PSR ¶¶8, 10. Gallagher was the appraiser for each of the transactions, except for one property which involved the fraudulent sale of his second home in Florida to a straw buyer and co-conspirator. PSR ¶10.

2. Gallagher's fraudulent appraisals

a. Lake Street Houses

Gallagher's involvement in the charged conspiracy began at least as early June 17, 2006 when he prepared fraudulent appraisals for three properties on Lake Street in Norwich, Connecticut. Before the conspiracy began, a co-conspirator purchased the properties in 2001 for $15,000 each. PSR ¶12. Members of the conspiracy then sold those same houses in 2006 for $260,000, $270,000 and $270,000—an aggregate increase of $755,000 over what the houses sold for in 2001. PSR ¶12.

Gallagher prepared fraudulent appraisals used to support the inflated sales prices for the Lake Street properties. PSR ¶12. In the appraisal for 41 Lake Street dated June 17, 2006, for example, Gallagher represented to the lender that "The subject is in average to good condition

overall having recently been renovated inside and out. All mechanicals, walls, floors, windows & doors are new. No significant deficiencies were observed and no repairs are required at this time." PSR ¶13. Gallagher also described the property as including "decks; all new sheetrock; all new kitchen & baths; all new vinyl replacement windows." PSR ¶13. These representations were patently false. PSR ¶13.

Trial testimony by David Neary, a property owner on Lake Street and a licensed home improvement contractor, established that 41 Lake Street was not "recently renovated" as Gallagher had described. PSR ¶14. Instead, Mr. Neary's testimony established that the property was in significant disrepair, as it had no framing, no electrical and no plumbing. PSR ¶14. Mr. Neary described the property as "a shell," like "a city that's been bombed out." PSR ¶14. The appraisals Gallagher prepared for the other two Lake Street properties (35 and 37 Lake Street) made similarly false representations about the condition of those properties. PSR ¶14.

b. 211 Lloyd Street

Gallagher also prepared a fraudulent appraisal for the sale of 211 Lloyd Street, New Haven, Connecticut, the property that is the subject of the offense of conviction. Gallagher's appraisal included a doctored photograph that concealed

the actual condition of the property to the lender. The actual photograph of 211 Lloyd Street showed the house with a boarded-up door, boarded-up windows, and the house next door with siding falling off of it. PSR ¶15. Ken Perkins, a cooperating witness, testified at trial that at Gallagher's request and after receiving the photograph from Syed Babar (who, in turn, had received it from Gallagher), Perkins altered it by replacing the home's boarded-up windows and front door with photos of new ones, and cleaning up the siding on the house next door. PSR ¶15. Gallagher then used the altered photograph in his appraisal. PSR ¶15.

Gallagher's appraisal also represented that the property has been "totally gutted and rehabilitated," and that the property has "all new mechanicals." PSR ¶15. But a tenant of 211 Lloyd Street from October 5, 2009, through the date of trial testified that the property's basement remained charred by fire and had electrical wires hanging out in obvious view. PSR ¶15. Further, although a family of five lived on the third floor of the property, there was no electricity on the third floor, forcing the tenants to run electrical wires from the second floor up to the third floor. PSR ¶15.

c. 221 Starr Street

In late 2009 and early 2010, Gallagher worked with various members of the conspiracy in an attempted sale of 221 Starr Street, New Haven. PSR ¶16. A co-conspirator originally purchased the property in or around May 2009 for $20,000. PSR ¶16. The proposed deal later that year was for a straw buyer to purchase the property for $125,000. PSR ¶16. Gallagher prepared a fraudulent appraisal to support the more than sixfold increase in price in less than a year. PSR ¶16.

Gallagher also generated false paperwork purporting to show construction work had been performed at 221 Starr Street, when, in fact, no such work had been done. From January 22, 2010 through January 25, 2010, Syed Babar and Ken Perkins communicated about getting a fake invoice from a construction company owned by Gallagher's friend to be used as evidence that work had been done to the property. PSR ¶17. On January 22, 2010, Babar told Perkins that "Tom just made the receipt he send me over," a reference to a fake invoice. PSR ¶17. A search of the active files on Gallagher's computer showed a document purporting to be an invoice from his friend's construction company. PSR ¶17. Further, an email seized from Gallagher's computer confirmed that Gallagher sent the invoice to Babar via email. PSR ¶17.

The fake invoice Gallagher provided purported to be from "Paolillo Painting and Remodeling," indicating that approximately $50,249 of work had been done at 221 Starr Street. PSR ¶18. But the principal of that company, Jerry Paolillo, confirmed that no such work was ever done. PSR ¶18. Indeed, on February 2, 2010, during a recorded conversation, Gallagher told Perkins that the prospective lender on 221 Starr was demanding more documentation regarding the condition of the house. PSR ¶18. Gallagher stated that the lender "is . . . suspicious of the amount of money that . . . he [the seller, a co-conspirator] claims to put into that house [221 Starr Street]," and "between you and me, if he put $5,000 into the house, it was probably a lot." PSR ¶18. By contrast, Gallagher's appraisal represented to the lender that the property had been rehabilitated and that he found the $50,249 invoice for the rehabilitation to be "reasonable." PSR ¶18.

3. Cash payments to Gallagher

For each property, Gallagher charged an appraisal fee typically between $300 and $600 and disclosed that fee to the lenders. PSR ¶20. In addition to his disclosed fees, Gallagher also typically took secret cash payments of between $5,000 and $10,000 for each property appraisal. PSR ¶20. In a recorded conversation on January

14, 2010, Babar and Perkins corroborated Gallagher's receipt of several thousand dollars per property. PSR ¶20. In that call, they discussed how the proceeds of a fraudulent transaction would be distributed, with "Tom"—meaning Thomas Gallagher—getting "eight"—meaning $8,000—and confirmed that Gallagher "usually" got between $5,000 and $10,000, depending on the size of the house being appraised. PSR ¶20.

Ken Perkins testified at trial that he accompanied Babar on several occasions when Babar paid Gallagher in cash after a closing. PSR ¶21. Perkins described one such occasion when he and Babar met Gallagher at Good Fellas restaurant in New Haven and Babar paid Gallagher an envelope full of cash while the three were inside of a car in the parking lot. PSR ¶21. Gallagher's own datebook corroborated this meeting showing an entry on March 26, 2008 for "GoodFellas"; Gallagher's bank account showed a $2,000 cash deposit the next day, on March 27, 2008. PSR ¶21.

Perkins also testified that he personally made cash payments to Gallagher on a couple of occasions. PSR ¶22. The evidence at trial showed that Gallagher prepared a fraudulent appraisal for a sale that closed on February 20, 2008. PSR ¶22. Two days later, on February 22, 2008, the sale proceeds were wired into Ken Perkins' bank account even though Perkins had no formal role

in the transaction whatsoever. PSR ¶22. The day after that, Gallagher's bank records show a $5,000 cash deposit bearing a handwritten notation with the initials "KCP" (Kenneth C. Perkins' initials). PSR ¶22.

At trial, the government introduced a summary of available bank records from Gallagher's bank account showing more than $60,000 in cash deposits during the period November 2006 through February 2009. PSR ¶23. Many of those cash deposits correlated closely to property closings conducted by the conspiracy. PSR ¶23. In addition, several deposits also coincided with Gallagher's handwritten entries in his datebook for meetings with "Ali"—a name for Syed Babar. PSR ¶24. For example, Gallagher's datebook had an entry "Lunch Ali" on January 16, 2008, the day before a $5,000 check signed by a co-conspirator property seller was deposited into Gallagher's account. PSR ¶24. On July 1, 2008, Gallagher's date book showed a meeting "Ali at office" the day before $4,000 in cash was deposited into Gallagher's bank account, and two days after the closing for another property in the scheme. PSR ¶24. Gallagher's date book also showed a meeting with "Ali" on July 15, 2008, the same day $1,980 in cash was deposited into the account. PSR ¶24. Three days later, another $2,000 in cash was deposited into that same bank account. PSR ¶24. On October 15, 2008,

Gallagher's datebook bore the entry "Ali $$$$" and on October 20, 2008 two cash deposits were made into his account, one for $2,000, the other for $1,800. PSR ¶24.

Summary of Argument

The 60-month sentence imposed on Gallagher—the statutory maximum sentence that fell squarely within the advisory Guidelines range—was reasonable. The district court correctly calculated the Guideline range and set forth the relevant § 3553(a) factors it considered in its decision. Indeed, Gallagher agreed with the advisory Guidelines range. The court carefully considered all that Gallagher had to offer, including counsel's written submissions, Gallagher's personal statement, statements of his counsel, letters submitted to the court, and statements by individuals who spoke on Gallagher's behalf at sentencing.

After carefully considering all relevant factors, the district court found that the aggravating factors in this case overwhelmed those weighing in favor of a shorter sentence. Gallagher participated in the mortgage fraud conspiracy for over three years and participated in each of the 29 separate fraudulent transactions. His fraudulent appraisals, which included misrepresentations about square footage, renovations, prior sales history, and in some cases, included

doctored photographs of the properties, were essential to the success of the conspiracy. And Gallagher's civic activities did not nag at his conscience but rather provided an opportunity for him to promote a co-conspirator for elected office. Moreover, after being confronted with problems in his appraisals, first by a lender, and later by a state regulatory authority, Gallagher falsely promised to do better, but then continued his fraud just as before. Given these facts, a 60-month sentence was entirely reasonable.

Argument

I. Gallagher's sentence was both procedurally and substantively reasonable.

A. Relevant facts

1. The guilty plea and PSR

On March 21, 2011, after four days of trial, Gallagher plead guilty to Count Fourteen of the Second Superseding Indictment charging him with making a false statement in a matter under the jurisdiction of the Federal Housing Administration in violation of 18 U.S.C. § 1001. A79. The parties did not have a plea agreement. A68.

The PSR set forth Gallagher's sentencing guidelines range as 51 to 63 months' imprisonment, subject to a statutory maximum term of 60 months. PSR ¶87. The PSR noted that "[t]he Court may wish to consider, given the defen-

dant's lack of criminal history and previously imposed custodial sentences, whether a sentence within the guideline range is more than necessary to meet the purposes of sentencing detailed at 18 U.S.C. § 3553 (a)." PSR ¶99.

2. The sentencing hearing

On June 7, 2011, the district court held Gallagher's sentencing hearing. A87. The court confirmed that Gallagher had reviewed the PSR with counsel and that Gallagher had no corrections or objections to the PSR. A93.

The court heard argument about a two-point enhancement for abuse of a position of trust under U.S.S.G. § 3B1.3, and declined to apply the enhancement. A94-110. The district court concurred with the PSR's calculation of Gallagher's adjusted offense level of 24, and found Gallagher's criminal history category to be Category I. A112, and that calculation was undisputed, A93, 112.

a. Gallagher's arguments

Gallagher offered several arguments for a downward departure or non-guidelines sentence. He argued that his civic and personal acts of charity either alone or in combination with other factors warranted a downward departure. A123-24. Gallagher also argued that the loss substantially overstated the seriousness of the offense.

A150-51. Gallagher further argued that the applicable sentencing enhancements were substantially overlapping and unduly magnified the sentence. A151. Finally, Gallagher argued that his age and physical condition merited a more lenient sentence. A124.

The court heard from two individuals who spoke on Gallagher's behalf at sentencing, a family friend and one of Gallagher's daughters. A114-20.

b. Documents submitted by the government at sentencing

The government argued for a Guidelines sentence subject to the statutory maximum. In opposing Gallagher's request for leniency based on his civic involvement, the government pointed out that Gallagher used his position as a commissioner for the West Haven Police Department ("WHPD") as a way to promote his co-conspirator, Syed Babar. A138-39. The government submitted a January 27, 2008 letter Gallagher wrote to Senator Joseph Lieberman asking that a visa for an individual who was engaged to Babar's sister be expedited, saying that "Ali [a nickname for Babar] and I have become wonderful friends over the past several years," and that "[w]hile he is young he is well respected in his community. He has a deep interest and [sic] politics. At my urging he became a regis-

tered Democrat and even ran for office recently." GSA46. Gallagher failed to mention in this letter that he had allowed Babar to use his address in West Haven in order to make it look like Babar lived in town so he could be eligible to vote and run for political office there. GSA47.

The government also submitted a letter Gallagher wrote on or about May 10, 2010, in his capacity as a WHPD Commissioner to recommend Babar who was applying to the Federal Bureau of Investigation for employment. GSA43. The letter vouched for Babar's integrity, saying that Babar and his family are "deeply religious, moral and charitable people." GSA43. Gallagher failed to mention that he and Babar had already completed 29 separate fraudulent transactions together and caused millions of dollars of losses to lenders.

In addition to these letters, the government also submitted documents to demonstrate the need for specific deterrence in this case. For example, the government submitted a letter Gallagher wrote on August 15, 2007 to J.P. Morgan Chase, the proposed lender on a deal that the conspiracy was trying to close. GSA71-72. After Chase had discovered irregularities in Gallagher's appraisal and its own appraiser had valued the property at $90,000, GSA65, less than half the inflated value of $210,000 that Gallagher had submitted, GSA52, Gallagher wrote the let-

ter to explain the discrepancy. In the letter, Gallagher apologized for what he called a "horrible piece of work" and stated that he was going through a difficult personal situation. GSA71-72. Gallagher accepted blame for the appraisal and assured that "all future work for Chase will be to your satisfaction." GSA72.

But instead of ensuring the honesty of his future work, Gallagher continued the fraud. On September 5, 2007, just a few weeks later, the conspirators submitted the same appraisal that Gallagher called a "horrible piece of work" to another lender in nearly identical form. GSA74. Although Chase appraised the house at $90,000, Gallagher left the appraised value at $210,000, and certified that "I have not knowingly withheld any significant information from this appraisal report and, to the best of my knowledge, all statements and information in this appraisal report are true and accurate." GSA80. The new lender did not catch the fraud and the sale closed at the fraudulently inflated price of $210,000. GSA1.

The government also submitted a March 23, 2009 letter from the Connecticut Department of Consumer Protection notifying Gallagher that he was being investigated for an appraisal he performed that failed to accurately reflect the actual value of the property. GSA91. On October 2, 2009, in a letter submitted by Gallagher's coun-

sel responding to that investigation, Gallagher cited personal hardships (his health and the death of his wife in 2008) and promised regulators that he was now "diligent[ly] performing all assignments." GSA92. But just a day earlier, the conspiracy closed the 211 Lloyd Street deal—a sale that relied on Gallagher's fraudulent appraisal with doctored photographs and misrepresentations about the property's condition. PSR ¶15; GSA1.

c. The court's imposition of sentence

During the hearing, the court described the factors that would weigh in its sentencing decision under 18 U.S.C. §3553(a), including the nature and circumstances of the offense and the history and characteristics of the defendant, A147; the need for the sentence imposed to serve the various purposes of a criminal sentence, A147; the kinds of sentences available, A147; the sentencing range established for a defendant with Gallagher's criminal history, A148; any pertinent policy statement, A148; the need to avoid unwarranted sentence disparities, A148; and the need to provide restitution, A148.

The court stated that it had taken each of those factors into account, noting that some of the factors suggested a shorter term of imprisonment and others suggested that a longer

term of imprisonment was appropriate. A148. The court set forth the materials it reviewed in arriving at the sentence, including the PSR, the sentencing memoranda, the letters submitted on Gallagher's behalf (which the court said it had "read and thought about,"), the cases of Gallagher's co-defendants and other related cases, the remarks of counsel, and the defendant's statement regarding sentencing. A148-49.

Regarding the need for the sentence to serve the various purposes of a criminal sentence, the court specifically acknowledged that the sentence "should be sufficient but not greater than necessary to serve these purposes." A149. The court then detailed the factors it would consider in this regard, including the need for the sentence imposed to provide just punishment for the offense, the potential need to protect the public from further crimes committed by Gallagher, the need for the sentence to afford adequate deterrence to criminal conduct, the need for the sentence to reflect the serious nature of the offense and to promote respect for the law, and the need for the sentence to serve the goal of rehabilitation. A149-50.

The court specifically noted that "I'm most aware of the need to impose a sentence that constitutes just punishment under the circumstances of this case and the need for the sentence imposed to reflect the serious nature of the of-

fense, and in particular, the specific conduct by the defendant here and promote respect for the law." A150. The court considered the offense to be a serious one, highlighting that the loss was "just about $3 million and that is a significant amount of money [by] anybody's calculation." The court also stressed that "it's not just something that happened as a result of an act on one occasion. We're talking about approximately 29 transactions and they occurred during the period from about August 2006 to October 2009." A150-51.

The district court stated that it had considered a number of different grounds for downward departure and also considered each of those arguments in the context of deciding whether a non-guidelines sentence would be appropriate. A150. The court addressed two of those arguments specifically, stating that it did not believe the loss overstated the seriousness of the offense, pointing out that the loss arose out of 29 separate transactions occurring over an extended period of time, from August 2006 to October 2009. A150-51. The court also declined to find any overlap between sophisticated means and amount of loss for the reasons substantially stated in the government's memorandum. A151; GSA17-20.

The court discussed several other factors "to which I've given a lot of thought." A151. For example, the court stated:

> I think you have justifiably been commended for civic activities, community service and acts of charity and compassion. I have no doubt that you've done those things and that you've had a positive impact on many people.
>
> I also think that though some of the activities have been things that have been helpful to you and there's nothing wrong with that. You did them and you should be commended for them. And I think that is a positive factor in your case.

A151.

The court considered Gallagher's age and health problems to be a "neutral factor" because, as noted in the government's briefing, those issues did not interfere with Gallagher's ability to travel during the period of supervision. A151-52.

The court then stated that there were several aggravating factors in Gallagher's case. First, the court noted that "this is not the kind of situation where a defendant made a mistake on one occasion or gave in to temptation for a short period of time[.]" A152. Instead, the offense involved "repeated transactions, namely, 29, over a period of a little over three years." A152.

Second, the court found defendant's role as appraiser as "something that was essential for each transaction to occur." A152.

Third, the district court pointed out that as the "flip side" to Gallagher's civic and public activities was the fact that he had "constant reminders in [his] daily life that should have nagged at [his] conscience about how very wrong this conduct over this long period of time was." A152. The court found further reminders in the certifications Gallagher was required to sign as an appraiser and "as a trusted and respected professional who taught other professionals." A152.

The court then detailed what it viewed as "the most disturbing aspects of [Gallagher's] conduct." A153. The court referred to the August 2007 letter Gallagher wrote to Chase Bank explaining why his appraisal had been so far off. The court noted that this incident, "instead of something that was a wake-up call and deterred you from involving yourself in further activity, [was] followed by 19 or so additional transactions." A153. The court went on to note that "then on March 23, 2009, there was a letter from the regulatory authorities. Again, this was followed by another transaction." A153.

The court also referred to the letter Gallagher wrote on the letterhead of the West Haven Police

Department vouching for Syed Babar's honesty to one of the top elected officials of the state. The court found this to be an "aggravating factor" and further found it "disturbing" that Gallagher allowed Babar to use his address in West Haven so that Babar could be eligible to run for public office in West Haven. A153.

The court then stated its conclusion that "the aggravating facts and circumstances here not simply outweigh the positives, but they overwhelm them. So for that reason, I am not going to depart downward, nor am I going to impose a non-Guidelines sentence. I just do not think it is appropriate. This will constitute a Guideline sentence." A154. The court then imposed a sentence of 60 months' imprisonment. A154.

B. Governing law and standard of review

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court declared the United States Sentencing Guidelines "effectively advisory." *Id.* at 245. After *Booker*, at sentencing, a sentencing judge is required to "(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the calculated Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence." *See United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir.

2006); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005).

The requirement that the district court consider the section 3553(a) factors does not require the judge to precisely identify the factors on the record or address specific arguments about how the factors should be implemented. *Crosby*, 397 F.3d at 113; *Rita v. United States*, 551 U.S. 338, 356-59 (2007) (affirming a brief statement of reasons by a district judge who refused downward departures and then 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. "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, [this Court] will accept that the requisite consideration has occurred." *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005). Indeed, this Court "presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged [his] duty to consider the [§ 3553(a)] factors." *Fernandez*, 443 F.3d at 30.

On appeal, a district court's sentencing decision is reviewed for reasonableness. *See Booker*, 543 U.S. at 260-62. The Supreme Court has reaf-

firmed that the reasonableness standard for sentencing challenges is essentially an abuse-of-discretion standard. *See Gall v. United States*, 552 U.S. 38, 46 (2007). In this context, reasonableness has both procedural and substantive dimensions. *See United States v. Avello-Alvarez*, 430 F.3d 543, 545 (2d Cir. 2005) (citing *Crosby*, 397 F.3d at 114-15).

"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). 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). A district court need not specifically respond to all arguments made by a defendant at sentencing. *See United States v. Bonilla*, 618 F.3d 102, 111 (2d Cir. 2010) ("[W]e never have required a District Court to make specific responses to points argued by counsel in connection with sentencing . . . ."), *cert. denied*, 131 S. Ct. 1698 (2011).

With respect to substantive reasonableness, this Court has recognized that "[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge 'exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.'" *Fernandez*, 443 F.3d at 27 (citations omitted). A sentence is substantively unreasonable only in the "rare case" where the sentence would "damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 140 (2010). Although this Court has declined to adopt a formal presumption that a within-Guideline sentence is reasonable, it has "recognize[d] 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." *Fernandez*, 443 F.3d at 27; *see also Rita*, 551 U.S. at 347-51 (holding that courts of appeals may apply presumption of reasonableness to a sentence within the applicable Sentencing

Guidelines range); *United States v. Rattoballi,* 452 F.3d 127, 133 (2d Cir. 2006) ("In calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.").

C. Discussion

Gallagher does not allege that the district court failed to calculate the guideline range—indeed, he agreed with the court's Guidelines calculations and sentencing range. Nor does he allege that the court relied on an erroneous finding of fact. Rather, Gallagher argues that: (1) although the district court claimed to have positively weighed Gallagher's civic and charitable activities, the 60-month sentence "belied that statement;" (2) the district court "gave no indication that it considered the parsimony clause of 3553(a) in deciding to impose the maximum possible sentence;" (3) the court "failed to justify the imposition of a Guidelines sentence of 60 months;" and (4) the court "failed to address why a shorter period of incarceration" would not be sufficient. Gallagher's Brief at 21-25.

The district court's expansive, detailed findings undermine Gallagher's claims. As for whether the court gave sufficient consideration to Gallagher's civic and charitable activities, the

record plainly shows that it did. The court reviewed the written submissions by Gallagher's counsel and numerous letters submitted on Gallagher's behalf, "each of which [the court] read and thought about." A148. The court heard from two individuals who spoke on Gallagher's behalf at sentencing, and remarked that it had considered that "people have spoke [sic] highly of you as well here today." A149.

Moreover, the court specifically included Gallagher's civic and charitable activities among those factors to which it had given "a lot of thought." A151. It stated: "I think you have justifiably been commended for civic activities, community service and acts of charity and compassion. I have no doubt that you've done those things and that you've had a positive impact on many people." A151. In short, the court stated that Gallagher's civic and charitable service was a "positive factor" in his case. A151.

The district court then went on to explain the aggravating facts in Gallagher's case. The court's conclusion after all of this was that "the aggravating facts and circumstances here [do] not simply outweigh the positives, but they overwhelm them." A154. To be sure, the district court considered Gallagher's civic activities as partially negative factors (*e.g.*, the fact that none of these civic activities prompted Gallagher to re-consider his criminal conduct, A152), but giv-

en the district court's detailed explanation of these facts, Gallagher's argument that the court failed to consider his civic and charitable activities is misguided. That the district court came to a different conclusion than Gallagher would have liked simply does not mean that it failed to consider the issue.

Likewise, Gallagher's argument that the court "gave no indication that it considered the parsimony clause of 3553(a) in deciding to impose the maximum possible sentence," Gallagher's Brief at 23, is inconsistent with the record. The district court judge specifically stated that he had "thought about the need for the sentence in this case to serve the various purposes of a criminal sentence." A149. Before giving a detailed explanation of how it viewed certain facts within the framework of the sentencing factors, the court expressly referred to the parsimony clause, stating that "[p]ursuant to Section 3553, the sentence should be sufficient but not greater than necessary to serve these purposes." A149. Thus, contrary to Gallagher's argument, the court gave every indication that it considered the parsimony clause and did so carefully.

To the extent Gallagher is arguing that the district court was required to explain in particular why a 60-month sentence rather than any other sentence was "sufficient, but not greater than necessary," that argument is foreclosed by

the established law of this Court. The sentencing judge is simply not required to explain why one particular sentence over any other should be imposed. Indeed, the sentencing court is not required even to address specific arguments about how the sentencing factors should be implemented. *Fernandez*, 443 F.3d at 29; *Rita*, 551 U.S. at 356-59 (affirming a brief statement of reasons by a district judge who refused downward departures and noted that the sentencing range was "not inappropriate"). There was no indication whatsoever that the district court misunderstood the requirements under § 3553(a) or failed to consider what length of sentence would be sufficient, but not greater than necessary. *Fleming*, 397 F.3d at 100 (finding the requisite consideration to have occurred "[a]s 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"). The district court's thoughtful explanation of the facts it considered and how it considered them was clearly sufficient.

Gallagher's other arguments, namely, that the court "failed to justify the imposition of a Guidelines sentence of 60 months," and "failed to address why a shorter period of incarceration" would be insufficient, challenge the substantive

reasonableness of his sentence. Gallagher relies on *United States v. Preacely*, 628 F.3d 72 (2d Cir. 2010) for the proposition that a sentence may be unreasonably long in light of the section 3553(a) factors even if it was a "significant downward departure from the guideline sentence." Gallagher Brief at 21-22. But *Preacely* dealt with a procedural defect, not whether the sentence was substantively reasonable.

In *Preacely*, the defendant was a career offender and faced a guidelines range of 188 to 235 months (subject to 60 month mandatory minimum term of imprisonment) based on a Criminal History Category VI. 628 F.3d at 77. The defendant cooperated and the Government filed a 5K1.1 motion allowing the court to sentence the defendant below the statutory mandatory minimum. *Id.* at 75. The district court sentenced Preacely to 94 months' imprisonment, exactly half the low end of the range based on a Criminal History Category VI. *Id.* at 78. In doing so, the district court repeatedly referred to Preacely's status as a Category VI career offender and stated that "I don't think I can—I'll give him credit for time served, but I don't think I can give him any less than 94 months in toto . . . ." *Id.* at 80.

This Court vacated the sentence and remanded for resentencing out of concern for the "sentencing judge's repeated emphasis on

Preacely's status as a Category VI career offender." *Id.* at 80. Even though the district judge clearly understood that he had the authority to (and did) depart from the advisory range by virtue of the government's 5K1.1 motion, this Court found it "unclear whether the sentencing judge understood that he could make a so-called 'horizontal departure' from the Career Offender Guideline and adopt a lower criminal history category." *Id.*

Unlike the district court in *Preacely*, there is no indication that the sentencing court here failed to understand that it could depart downward or impose a non-guidelines sentence. Instead, the court stated that it had considered "a number of different grounds in terms of arguments for a downward departure," and "also considered each of those arguments in the context of deciding whether a non-Guidelines sentence is appropriate here." A150. The district court recognized and understood its authority to give Gallagher a lower sentence than it did; the court simply elected not to do so. As such, *Preacely* bears no application here.

Gallagher also cites *United States v. Adelson*, 441 F. Supp. 2d 506, 514 (S.D.N.Y. 2006), a non-binding district court decision, for the proposition that "there is considerable evidence that even relatively short sentences can have a strong deterrent effect on prospective 'white collar' of-

fenders." In *Adelson*, the defendant was convicted of conspiracy, securities fraud, and false filings with the SEC. *Id.* at 507. The advisory guidelines called for life imprisonment, cabined by the maximum of 85 years permitted under the counts of conviction. *Id.* The court imposed a non-guideline sentence of 42 months. *Id.*

The *Adelson* court found that Adelson's past history was "exemplary," and further that he was "sucked into the fraud not because he sought to inflate the company's earnings, but because, as President of the company, he feared the effects of exposing what he had belatedly learned was the substantial fraud perpetrated by others." *Id.* at 513. The court concluded that Adelson was "closer (though not identical) to an accessory after the fact, a position that has historically been viewed as deserving lesser punishment than that accorded the instigators of the wrongdoing." *Id.*

Whatever the relevance of the district court decision in *Adelson*, it is not instructive here. Unlike the *Adelson* defendant, Gallagher was not belatedly "sucked into the fraud" and his conduct was not in the nature of an accessory after the fact. Gallagher actively participated in this fraud scheme for over three years, participating in 29 separate fraudulent transactions. The court found his fraudulently inflated appraisals, which included misrepresentations

about square footage, renovations, prior sales history, and in some cases, doctored photographs of the properties, to be "essential" to the transactions. A152. His civic activities provided "constant reminders" that should have "nagged at [his] conscience," but he continued in the fraud anyhow. A152. Indeed, even after Chase Bank confronted Gallagher about a bogus appraisal in 2007, and after the Connecticut Department of Consumer Protection investigated him in 2009, Gallagher continued with the fraud. A135-36; 153. Gallagher used his civic position as a police commissioner to promote Syed Babar, his criminal co-conspirator, for a position at the Federal Bureau of Investigation, and for an elected office in the town of West Haven, by writing letters on Babar's behalf on police department letterhead. He vouched for Babar's honesty in those letters, including one to Senator Joseph Lieberman, during the height of the fraud scheme in which he and Babar were involved.

On these facts and others, the court concluded that "the aggravating facts and circumstances here [do] not simply outweigh the positive, but they overwhelm them." A154. In other words, the district court specifically considered Gallagher's arguments for a below guidelines sentence—including his argument that white collar defendants should receive shorter sentences—and rejected them because of counter-

vailing aggravating factors. That the court reached a different conclusion than Gallagher would have liked does not make the sentence "shockingly high . . . or otherwise unsupportable as a matter of law." *Rigas*, 583 F.3d at 123. The district court's sentence was a reasonable one under these circumstances and this Court should decline Gallagher's invitation to substitute its judgment for that of the district court. *See* 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).

Conclusion

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

Dated: January 26, 2012

Respectfully submitted,

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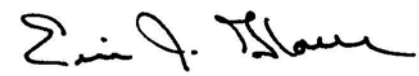

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Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7209 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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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.