11-2708

To Be Argued By:
CAROLYN A. IKARI

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-2708

UNITED STATES OF AMERICA,
Appellee,

-vs-

CARLOS DAVID VANEGAS-GOMEZ,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Ellen Bree Burns, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on July 6, 2011. JA5, JA95-97. On July 6, 2011, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA5, JA130. This Court has appellate jurisdiction over this appeal of a criminal sentence pursuant to 18 U.S.C. § 3742(a).

Statement of Issue Presented for Review

Whether the district court's 57-month sentence, which was at the bottom of the guideline range, was procedurally and substantively reasonable?

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

On April 7, 2011, convicted child molester Carlos David Vanegas-Gomez pleaded guilty to illegal re-entry of a removed alien in violation of 8 U.S.C. § 1326. He was sentenced at the bottom of the applicable guideline range to 57 months' incarceration. On appeal, the defendant argues that this sentence was procedurally and substantively unreasonable.

The defendant's claims lack merit. The sentencing judge gave meaningful consideration to

the guidelines, the requisite statutory factors, and arguments for a higher or lower sentence, and sufficiently explained the reasons for her decisions. The sentence was also substantively reasonable, being fairly reflective of the circumstances presented: a sex offender, who, having been deported from the United States, illegally re-entered only six months later.

Statement of the Case

On December 14, 2010, a federal grand jury returned an indictment charging the defendant with one count of unlawful presence of a deported alien (and aggravated felon) in violation of 8 U.S.C. §§ 1326(a) and (b)(2). JA2, JA7. On April 7, 2011, the defendant pleaded guilty to Count One of the Indictment. JA4.

On June 30, 2011, the district court sentenced the defendant principally to 57 months of imprisonment. JA95-97. Judgment entered on July 6, 2011, and on the same date the defendant filed a timely notice of appeal. JA5, JA130.

The defendant is currently serving his federal sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. The defendant's immigration and criminal history

The defendant is a native and citizen of Guatemala. JA15. He entered the United States in 1992 as a Lawful Permanent Resident and is

now 38 years of age. JA137-38. The defendant received his first criminal conviction in the State of Connecticut, Superior Court at Stamford in July 1998 for Breach of Peace. He received a suspended sentence and was placed on probation. JA135.

In November 2004, the defendant was convicted of Risk of Injury to a Minor in the same court. This offense involved a report by the mother of the defendant's two step-daughters, then ages 11 and 13, that the defendant had forcibly kissed the older daughter on the mouth while holding her wrist and fondled the breasts of the 11-year old. The defendant received a suspended sentence with a period of 5 years' probation. JA135-36. Three years later, the defendant's probation from the Risk of Injury offense was revoked and he received a sentence of 45 days to serve and 29 months' probation. JA135-36.

On March 15, 2005, the defendant was arrested again for charges of Risk of Injury to a Minor, Illegal Sexual Contact. JA136. The new charges involved a 12-year old female, who was known to the defendant, and with whom he was lawfully inside of a residence. The defendant entered a bedroom where the 12-year old was located and fondled her breasts and genitals. For this charge, on January 30, 2008, the defendant received a suspended sentence with a period of 10 years of probation and was required to register as a sex offender. JA136.

The defendant was removed from the United States as an aggravated felon by the Department of Homeland Security in May 2009. JA15.

B. The offense conduct

The defendant has acknowledged his subsequent illegal re-entry into the United States approximately six months after his removal. JA15.

Upon his return to the United States, the defendant did not update his residence as required by the State of Connecticut Sex Offender Registry. JA15, JA136-37. When located in Connecticut, the defendant was convicted on July 19, 2010 in the Superior Court at Stamford of Failure to Register. The defendant was sentenced to 25 months in state custody. JA136.

A federal investigation followed and the defendant was indicted on December 14, 2010. JA2, JA7.

C. The plea agreement and guilty plea hearing

On April 7, 2011, the defendant pleaded guilty to the sole count of the indictment pursuant to a plea agreement. JA4.

In the plea agreement, the parties agreed only that the defendant's base offense level was 8, pursuant to U.S.S.G. § 2L1.2. JA10. The Government noted that its calculation would include a 16-level specific offense characteristic increase, because the defendant had been removed after sustaining a state court conviction for what the

Government believed was a crime of violence: Risk of Injury to a Minor – Illegal Contact. The Government stated its view that a two level reduction for acceptance of responsibility would be appropriate, or, if the total offense level was 16 or greater, a total reduction of three levels would be appropriate. JA10-11.

D. The sentencing briefs and hearing

In his sentencing memorandum, the defendant first engaged in a lengthy challenge to the 16-level enhancement for "crimes of violence" pursuant to U.S.S.G. § 2L1.2(b)(1)(A). The proposed guideline calculation in that scenario was 57 to 71 months. JA142. He contended that his state conviction for Risk of Injury to a Minor – Illegal Sexual Contact was not a crime of violence. JA21-23. He conceded that the 8-level enhancement for an aggravated felony did apply to him. In the defendant's view, with these corrections, the applicable guideline range was 24-30 months. JA23. The defendant has abandoned this issue in this appeal.

The second portion of defendant's brief put forward alternative arguments, advocating a below-guideline sentence in the event that the court found that the 16-level enhancement applied. The defendant argued as follows: (1) pursuant to *Kimbrough v. United States*, 552 U.S. 85 (2007), the court should reject, wholesale, U.S.S.G. § 2L1.2, because it was not based on empirical study and failed to consider past sentencing practices, JA23-27; (2) the operation of

this guideline double-counts criminal history because past convictions both increase offense levels and add history points, JA27-28; (3) application of the guidelines creates unwarranted disparities with similarly-situated defendants in "fast-track" jurisdictions, JA28-30; (4) multiple section 3553 considerations warranted a below guidelines sentence, JA30-32, JA36-37; (5) the 8-month time lapse between the state prosecution and this federal prosecution deprived the defendant of the chance to serve concurrent sentences, JA32-35; (6) the defendant's criminal history points total was overstated because his state offense of failure to register as a sex offender and his illegal re-entry should have been treated as a single event, JA35-36; (7) the defendant's inevitable deportation would serve as cumulative punishment, JA36; (8) the jump from his only previous sentence of incarceration, 45 days, to a guideline sentence was excessive, JA37; and (9) a lower sentence was sufficient for specific and general deterrence, JA37-38.

Like the defendant's brief, the principal portion of the Government's brief addressed the applicability of the 16-level enhancement for specific offense conduct. JA50-52. However, the overarching theme of the Government's submission was the seriousness of the defendant's previous crimes. JA54-58. The Government summarized the intersection of the defendant's criminal and immigration history as follows:

> Defendant Vanegas-Gomez has a significant criminal history involving crimes

> against children. He has shown a complete disregard for the physical and psychological welfare of the children he violated. He additionally has an immigration history which evidences a complete disregard for the immigration laws of this country. While he claims to have returned to be with his children, his actions speak otherwise. Instead of supporting his children financially and emotionally, he continued to engage in criminal conduct by returning to this country illegally and failing to follow the sex offender registration requirement. In the Government's view, the defendant has earned a sentence within the Sentencing Guideline range and respectfully requests that the Court sentence him accordingly.

JA55.

At sentencing, the district judge stated that she had read the briefs. JA61. She also announced that she understood the arguments that the defendant was making. JA91.

The bulk of briefing, argument and the sentencing court's remarks were in regard to the 16-level "crime of violence" question, which the defendant is not pursuing in this appeal. That issue was the first and principal argument in the defendant's brief and at the sentencing hearing. JA21-23, JA61-65, JA81-83, JA86-88. The court resolved this issue in the Government's favor, concluding that the 16-level enhancement did

apply, and thus that the correct guideline range was 57 to 71 months. JA83.

In a series of colloquies, the court addressed the defendant's other arguments. JA83-84, JA88-91. Judge Burns found none of the defendant's arguments persuasive enough to grant his motion for a downward departure. JA84. However, she explained that she did find the defendant's arguments, taken together, sufficient reason not to sentence the defendant in the middle or at the top of guideline range. JA90, JA91. Judge Burns, having considered all the section 3553 factors and her obligation to sentence the defendant to a term sufficient, but not greater than necessary to serve the purposes of sentencing, sentenced the defendant to 57 months, at the very bottom of the guideline range. JA84.

Summary of Argument

The sentence imposed was both procedurally and substantively reasonable.

The sentencing judge was aware of her statutory obligations, the applicable guideline range, and her ability to depart from the range. During the hearing, the court stated that she had read the briefs, she engaged in colloquies with defense counsel about his arguments, and she conveyed her assessment of those arguments and how they served to determine the sentence imposed. Review of those colloquies and the court's remarks, including the judge's statement that she understood and considered the defendant's

arguments for departure and took them into account when determining sentence, demonstrate that the court engaged in sufficient consideration of the arguments and presented sufficient explanation of her reasons.

Furthermore, the sentence imposed, at the bottom of the guideline range, was substantively reasonable. The defendant's criminal history of sexually molesting three girls with whom he apparently had a position of trust was the principal fact that generated both a substantial offense level total and criminal history points. The sentencing judge was well within the bounds of her discretion to advert to defendant's arguments by sentencing at the bottom of the guideline range, but no lower.

Argument

I. The district court's 57-month sentence, which was at the bottom of the guideline range, was procedurally and substantively reasonable.

A. Governing law and standard of review

Title 18, United States Code, Section 3553(a) provides that 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" and then sets forth seven specific considerations:

(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 [in the Sentencing Guidelines];

(5) any pertinent policy statement [issued by the Sentencing Commission];

(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.

18 U.S.C. § 3553(a).

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the United States Sentencing Guidelines, as written, violate the Sixth Amendment principles articulated in *Blakely v. Washington*, 542 U.S. 296 (2004). *See Booker*, 543 U.S. at 243. The Court determined that a mandatory system in which a sentence is increased based on factual findings by a judge violates the right to trial by jury. *See id.* at 245. As a remedy, the Court severed and excised the statutory provision making the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), thus declaring the Guidelines "effectively advisory." *Booker*, 543 U.S. at 245.

After *Booker*, at sentencing, a district court must begin by calculating the applicable Guidelines range. *See United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc). "The Guidelines provide the 'starting point and the

initial benchmark' for sentencing, and district courts must 'remain cognizant of them throughout the sentencing process.'" *Id.* (internal citations omitted) (quoting *Gall v. United States*, 552 U.S. 38, 49, 50 & n.6 (2007)). Consideration of the guideline range requires a sentencing court to calculate the range and put the calculation on the record. *See United States v. Fernandez*, 443 F.3d 19, 29 (2d Cir. 2006).

After giving both parties an opportunity to be heard, the district court should then consider all of the factors under 18 U.S.C. § 3553(a). *See Gall*, 552 U.S. at 49-50. The requirement that the district court consider the section 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. *See id.*; *Rita v. United States*, 551 U.S. 338, 356-59 (2007) (affirming sentence despite district judge's brief statement of reasons in refusing downward departure as "not inappropriate"). There is no "rigorous requirement of specific articulation by the sentencing judge." *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005). And although the judge must state in open court the reasons behind the given sentence, 18 U.S.C. § 3553(c), "robotic incantations" are not required. *See, e.g. United States v. Goffi*, 446 F.3d 319, 321 (2d Cir. 2006).

This Court "presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her

duty to consider the [§ 3553(a)] factors." *Fernandez*, 443 F.3d at 30. "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). Furthermore, a judge need not address every "specific argument[] bearing on the implementation of those factors" in order to execute the required consideration. *See Fernandez*, 443 F.3d at 29.

On appeal, a district court's sentencing decision is reviewed for reasonableness. *See Booker*, 543 U.S. at 260-62. 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." *Cavera*, 550 F.3d at 190 (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, however. *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).

Moreover, in the case of an argument for a downward departure by a defendant, it is the defendant who bears the burden to prove by a preponderance of the evidence that a downward departure is appropriate. *See, e.g.*, *United States v. Valdez*, 426 F.3d 178, 184 (2d Cir. 2005). Typically, "[a] sentencing court's refusal to grant a departure is not appealable unless the court committed an error of law or was unaware of its power to depart." *United States v. Fernandez*, 127 F.3d 277, 282 (2d Cir. 1997); *see also United States v. Jackson*, 658 F.3d 145, 153-54 (2d Cir.), *cert. denied*, 132 S. Ct. 858 (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.").

B. Discussion

1. The sentencing of the defendant was procedurally reasonable.

Review of the record demonstrates that Judge Burns was aware of her statutory obligations, the applicable guideline range, and her power to depart from the range. She considered the defendant's myriad arguments, considered the need for an adequate sentence to satisfy the purposes set forth in section 3553 without being greater than necessary, and imposed sentence accordingly.

Throughout the hearing, Judge Burns demonstrated an understanding of every matter presented for her consideration. She appreciated the nature and circumstances of the offense and the history and characteristics of the defendant. The court affirmatively announced that she had read defendant's lengthy, 23-page sentencing memorandum. JA61. She knew the facts of the prior felony sex offenses. JA63, JA83, JA87-88. She was familiar with the provisions of the plea agreement; for example, she noted that there was no appeal waiver as to the sentence. JA85. She sought clarification of whether the defendant's state sentence had concluded. JA68. She understood the immigration consequences of this conviction and specifically addressed the defendant about them. JA85 ("this is very important. . . [your removal] which I expect will happen. . . "). She understood the facts regarding the defendant's inability to pay a fine. JA84.

Judge Burns addressed the issue of the relative timing of the federal and the state prosecutions, as well as the defendant's assertion that his criminal history score was too high. JA83-84, JA90-91.

The judge acknowledged that the defendant had made multiple arguments in addition to his challenge to the "crime of violence" 16-level enhancement. JA83-84, JA88, JA90-91. "I have not ignored them," she told counsel. JA91. She explained that she found them somewhat persuasive, not enough to depart downward, but enough to impose a sentence at the bottom of the guideline range. JA90, JA91.

Judge Burns explicitly stated that her calculation of a sentence was based on her application of the section 3553(a) factors. JA84. Based on those considerations, she concluded, "I am not inclined to downwardly depart from the guidelines." JA84. She continued by noting that "I think a sentence at the bottom of the guideline range is appropriate and not excessive, and it does address the issues that we have in front of us, but I don't think anything below that is justified, and I'm not going to do that." JA84.

In spite of this record, the defendant argues that his sentence was procedurally unreasonable because the district court failed to adequately explain her rejection of four "non-frivolous, meaningful arguments" for a below-guideline sentence. Def.'s Br. at 13-16. This argument is based on a mis-reading of the record and a mi-

sunderstanding of the district court's obligations at sentencing.

The "substantial" arguments that the defendant raised—and for which he claims the court erred in failing to detail an individualized point-by-point rebuttal—are not unique to this case at all. His arguments were routine sentencing arguments, appropriately considered and rejected by the court in this case.

a. The *Kimbrough* challenge to the Guideline

The first argument that the defendant claims was overlooked is his challenge to the very structure and content of the applicable sentencing guideline, U.S.S.G. § 2L1.2. He argues that, pursuant to *Kimbrough v. United States*, 552 U.S. 85 (2007), and *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010), this guideline should be ignored because it was not formulated based on empirical study and past sentencing. Def.'s Br. at 13-14. This argument was not overlooked at all.

This argument was presented at length in the defendant's brief, which the court confirmed she had read. JA23-27, JA61. At the sentencing hearing, after the defendant and the Government presented their principal arguments, the defendant's counsel came back to the lectern at the court's request. JA81. The defendant's counsel responded to the Government's "crime of violence" argument, and the court made her find-

ings on that and other issues and began to impose sentence. JA81-86.

At that point, defense counsel announced that he wanted to "state a few things for the record" and also ask for a particular Bureau of Prisons designation. JA86.

Defense counsel said, "And then I just want to make sure I'm preserving the record with respect to my argument that the guidelines, the way they were formulated under *Kimbrough*, *Dougherty* [sic], that because they weren't based on, in our view, empirical study, past practices, that they are deserving of less efforts—" JA88.

Judge Burns, recognizing this argument, interrupted and assured him: "Yes, I understand what your argument was sir, and certainly it's preserved for an appeal." JA88. She went on to assure counsel that she had taken the argument into account but did not feel a downward departure was appropriate. JA91.

In any event, by the time of the defendant's sentencing hearing, this Court had already considered and rejected a *Kimbrough*-type challenge to U.S.S.G. § 2L1.2. *See United States v. Perez-Frias,* 636 F.3d 39, 43 (2d Cir. 2011). There, this Court noted that the guideline was soundly based in the Sentencing Commission's own determination that the 16-level enhancement appropriately reflected the seriousness of the crimes. *Id.* (citing U.S.S.G. Appx. C (amend 375, Reason for Amendment). Thus, by the time of this sentencing, it had already been settled that

the re-entry guideline did not have any *Kimbrough* or *Dorvee*-type flaw. *See id.* And even though the district court did not reference this Court's decision in *Perez-Frias*, the court can hardly be faulted for failing to give a lengthy explanation for why it rejected an argument that this Court had already found to be without merit. In other words, even if the sentencing court had failed to duly consider the argument, such oversight was harmless.

b. Loss of opportunity for concurrent sentence

The second argument that the defendant claims was inadequately addressed was that the relative timing of the federal prosecution denied him the opportunity to serve his federal sentence concurrently with his state sentence. Def.'s Br. at 14-15.

This argument was presented at length in the defendant's principal address to the court. JA68-70. Counsel noted that the concurrent time argument had already been "made," apparently referring to his brief. JA67. He then cited supporting case law and made his argument that "through no fault of Mr. Vanegas-Gomez," he had lost the opportunity to argue for a concurrent or partially concurrent sentence. JA67-68.

The court, cutting to the chase, interrupted him to inquire what time was left on the defendant's state sentence. JA68. Counsel admitted that there was no state sentence remaining with

which the federal sentence could run concurrently: "Couldn't do that here." The court acknowledges the admission, "Yes." JA69.

Counsel went on to argue that the defendant's loss of chance should amount to a ten month reduction in his federal sentence. JA68-69. The court echoed counsel's bottom line: "So you take ten months off the bottom of the guideline range? Is that what you're suggesting?" JA69-70. Counsel clarified, and the court confirmed, that the defendant sought a ten-month reduction in sentence from the bottom of the applicable guideline. JA70.

Later, immediately after the court concluded her calculation of the guidelines, she explicitly addressed this argument. "Now, the question you raised about if this had been done at the same time he was serving his State sentence, I mean, if our standards had been—at the same time might have been concurrent, it might have been, I don't know, but that's something over which the Court has no control, and I don't really feel that I—I don't feel compelled to give him any particular consideration because of that factor." JA83-84. Later again, when defense counsel asked the court to re-state its conclusion on this issue, the court again stated that it had considered the argument, but rejected it. JA90.

On this record, it cannot be shown that the court failed to address the defendant's argument. The court, having noted that the loss of chance to serve a concurrent sentence was simp-

ly an accident of timing over which the court had no control, declined to reduce the sentence on this basis. To be sure, the court did not address this argument in detail, but the record reveals the court's careful consideration—and rejection—of the argument.

The court's spare comments on this issue are all the more understandable because the defendant did not show that he was eligible for a departure on this ground. As the case cited by the defendant shows, a defendant seeking a downward departure on this basis must show bad faith or an unreasonable amount of time spent investigating by the Government, neither of which was shown or claimed here. *See United States v. Los Santos*, 283 F.3d 422, 428 (2d Cir. 2002). The defendant acknowledged that, in his case, the time lag was an accident attributable to the ordinary course of federal prosecutions: "[C]learly, the Government needs time to investigate and do their work, and there's no fault put on anyone, it's just the timing of things, and sort of the structure of things. . . " JA68. *Los Santos* stands for the proposition that it is within the discretion of the sentencing court to grant a downward departure for bad faith or unreasonable delay, and no such abuse can be found in this case. *See Los Santos*, 283 F.3d at 425. So again, even if the court had failed to duly consider or address this argument, any such failure was harmless.

c. Three-point criminal history reduction

The third alleged procedural deficiency argued by the defendant concerns his argument that his state crime of failure to register as a sex offender should have been collapsed into his illegal re-entry crime. Def.'s Br. at 15; JA35-36. He argued that his failure to register was coincident with re-entry and avoidance of detection and thus that his criminal conduct should have been effectively grouped for sentencing purposes. According to the defendant, had this been done, it would have erased the three criminal history points he received for his recent state conviction for failure to register.

The defendant not only briefed this issue, but expressly raised it at sentencing. After the colloquy with the court about the concurrent time argument (discussed above), the defendant moved on to this argument about his criminal history score. JA70. He posed it as an accident of timing: "If Mr. Vanegas-Gomez had been brought into federal court sooner, while that state court case was unresolved, again, this is routine, we tell the state defense attorney, 'Don't have our client plead yet because he'll pick up criminal history points.'" JA70. The court clearly understood, echoing, "Yes. Not because he's not guilty, just because you don't want the criminal history. Is that what you're saying?" JA70. Defense counsel agreed that the defendant was, in fact, guilty of the state crime, and the court followed, interjecting, "Yes," and "Uh-huh." JA70-71.

Later, when defense counsel raised this issue again to preserve it for appeal, he asked the court to specifically address his argument that the defendant's criminal history score was overstated by three points. JA90. The court asked him to identify the argument, "Repeat that one, please?" JA90. Counsel obliged, and the court, recognizing the argument, interrupted, "Yes." JA90-91. Counsel finished his argument, and the court responded: "I tried to listen to all of your arguments, sir, and take them into consideration in determining what the appropriate sentence is in this case, and they are largely responsible for the fact that I give him the bottom of the guideline range. I have not ignored them. I have, when trying to decide where within that range, and I thought the range was appropriate, but trying to decide where within that range to place this gentleman, I have tried to give consideration to the arguments you've made, okay?" JA91.

In sum, the court considered this argument and rejected it insofar as it was meant to justify a downward departure or below guidelines sentence. JA90-91. The judge herself said it was not overlooked. JA91.

Moreover, this argument did not merit substantial analysis or discussion by the court. In his sentencing memorandum, the defendant offered no case law to support his position. JA35-36. He did not argue that his criminal history score was calculated incorrectly, or even that his state conviction was invalid for some reason. He merely asked the court to pretend that he had

not incurred the state conviction for purposes of calculating his criminal history score. But the court evidently found his argument unpersuasive, and for good reason. Simply because an individual does not have an incentive to re-register does not erase the separate offense conduct of failing to abide by the sex offender registration requirement. Just because it is foreseeable or common does not mean it should be excused. If anything, the defendant's criminal history points were understated because somehow he received exceedingly light sentences for the child sex offenses—each of the two convictions merited only one point.

In sum, when faced with these arguments, the district court properly rejected them, and had no obligation to spend considerable time doing so.

d. Consideration of section 3553(a) factors

Fourth, the defendant argued that the sum of the positive parts of his record combined to make his 57-month sentence unreasonable. Def.'s Br. at 15-16. He claims the judge's lack of commentary on these aspects of the defendant and his offense was error. The defendant's argument is misplaced.

As described above, the sentencing judge was familiar with both the defendant and this case. She showed familiarity with the record, including the plea agreement, the pre-sentence report,

the briefs, and was attentive to the parties' arguments. The defendant had ample opportunity to paint himself as a remorseful, hard-working individual who encountered a rough patch in his past, and he took advantage of those opportunities in both his brief and at argument. JA16-19, JA30-32, JA37-38, JA65-74. The defendant mistakes the judge's rejection of these arguments for a conclusion that she overlooked them. To the contrary, as the judge advised, she considered "the nature of the crime, the nature of the individual involved," and concluded, "I am not inclined to downwardly depart from the guidelines. I think a sentence at the bottom of the guideline range is appropriate and not excessive, and it does address the issues that we have in front of us, but I don't think anything below that is justified, and I'm not going to do that." JA84.

The defendant claims error because the district court did not specifically mention three section 3553(a) grounds he raised: sentencing disparities with fast-track districts, a claimed lack of need for incapacitation, and the "jump" to a years-long sentence from the previous 45-day sentence undermining respect for the law. Def.'s Br. at 18. These arguments correspond with 18 U.S.C. §§ 3553(a)(6), (a)(2)(C), and (a)(2)(A).

It is correct that the court did not ask questions about these arguments. This does not mean that they were impermissibly ignored, rather, it seems the court did not have any questions about them. As the defendant points out, he argued them in his brief and at the sentenc-

ing hearing. Def.'s Br. at 18. The Government countered with argument and authority in its brief to show why these arguments (*i.e.*, the existence of fast-track prosecution in other districts, the defendant's pattern of failure to register and illegal re-entry, and the defendant's good fortune of having received very low sentences for previous offenses) did not warrant a lowered sentence. JA 53-56. The court read the defendant's brief. JA61. And as demonstrated in the foregoing discussion, throughout the hearing, the court followed counsel's arguments, asked questions, responded to counsel's queries, and provided her conclusions.

To the extent these three specific issues received less attention at sentencing, it is because they were not controversial, persuasive, or deserving of commentary or discussion. As illustrated in the foregoing discussion, throughout the sentencing hearing, when the defendant raised specific arguments for the court's response, she responded. Presumably, she would have responded to these points, too, if asked.

A sentencing judge is not required to precisely identify either the factors set forth in § 3553(a) or specific arguments bearing on the implementation of those factors in order to comply with her duty to consider all the § 3553(a) factors along with the applicable Guidelines range. *Fernandez*, 443 F.3d at 29. In the absence of record evidence suggesting otherwise, this court presumes that a sentencing judge has faithfully discharged her duty to con-

sider the statutory factors. *Id.* at 30; *see also United States v. Jones*, 460 F.3d 191, 195 (2d Cir. 2006).

As is evident from the above discussion, there were quite a few arguments raised by the defendant: his sentencing memorandum included eight enumerated sections, some of which contained multiple arguments. The brevity of a court's rejection of a wide-reaching set of arguments does not render it legally insufficient. *Rita*, 551 U.S. at 358-59.

This is not a case like *United States v. Cunningham*, 429 F.3d 673 (7th Cir. 2005), cited by the defendant. In *Cunningham*, the sentencing judge passed over in silence the principal, well-substantiated and unopposed argument made by the defendant, that his history of psychiatric hospitalization and illness, including a suicide attempt, warranted a reduced sentence. *Id.* at 676-78. The sentencing court also heavily relied on an unexplained, unsubstantiated reference to a past failure to cooperate with prosecutors. *Id.* at 677-79. For those reasons, the case was remanded for resentencing. *Id.* at 680. However, even the *Cunningham* court emphasized that a sentencing judge is not obliged to address every argument a defendant makes at sentencing. *Id.* at 679.

Here, by contrast, the court addressed the defendant's central arguments, and specifically discussed all of the arguments that he asked the court to address. Moreover, there is no sugges-

tion that the court ignored a substantial argument for a below-guidelines sentence or relied on unsubstantiated facts when imposing sentence.

United States v. Jones, 460 F.3d 191 (2d Cir. 2006), cited by the defendant, is similarly unhelpful. *Jones* clarified the role of certain guidelines provisions and the court's personal, subjective opinion in a post-*Booker* sentencing. If anything, *Jones* supports the Government's position in this case: that when the overall record shows that the sentencing court gave meaningful consideration to the arguments and evidence, her statement that consideration of the necessary factors yielded her conclusion that a particular sentence is "appropriate" is sufficient articulation. *Id.* at 194.

In sum, the sentencing hearing was procedurally sound. Judge Burns identified the appropriate guidelines range. She appreciated her ability to deviate from that range. Then, Judge Burns considered the nature and circumstances of the offense and the history and characteristics of the defendant, including the defendant's arguments about these factors. She explicitly adverted to the direction of section 3553 to impose sentence sufficient but no more than necessary and determined that a term of 57 months would best serve the purposes of sentencing.

These are the requisite procedural landmarks in a sentencing proceeding. *Cavera*, 550 F.3d at 190. The sentencing court met each of these re-

quirements and therefore conducted a procedurally reasonable sentencing.

2. The substance of the district court's sentencing decision was also reasonable.

None of the defendant's many arguments overshadow the central facts of this case: the record of sex offenses committed by the defendant and his subsequent removal from the United States. The key nature and circumstances of this offense are that the defendant re-entered only six months after having been deported for a serious crime. The relevant history and characteristics of this defendant are that he committed three terrible acts of abuse upon children who should have been able to trust the adult members of their households.

The defendant raises a panoply of arguments in support of his assertion that the court's sentence of 57 months was substantively unreasonable "based on the totality of the circumstances." Def.'s Br. at 21-25. The arguments are as follows:

- The defendant entered the United States as a lawful permanent resident, not an illegal alien, Def.'s Br. at 23;
- The defendant has a substantial employment history and could fairly be called hard-working, Def.'s Br. at 23;

- With one exception, the defendant was compliant with the terms of his state probation, Def.'s Br. at 23;
- The defendant's stated motive for illegally re-entering the United States was to reunite with a girlfriend and children, not to pursue criminal activities, Def.'s Br. at 23;
- Re-entry of a removed alien is a non-violent offense, by contrast, similar guideline ranges apply to serious or violent crimes like aggravated assault with a firearm, JA25-26, Def.'s Br. at 24;
- The defendant has only ever served 45 days' incarceration despite his criminal history; a lengthy federal sentence is out of proportion to that which is necessary for this defendant, and a more "graduated" punishment is appropriate, JA37, 72, Def.'s Br. at 24.
- The defendant was ignorant of the criminal consequences of re-entry and is remorseful; therefore, a shorter federal sentence is adequate for deterrence and incapacitation purposes, Def.'s Br. at 24;
- Unlike others commonly prosecuted for this crime, the defendant is not a repeat offender, that is, he has only illegally re-entered once, Def.'s Br. at 25;

- A shorter federal sentence is sufficient to deter others who might re-enter illegally, Def.'s Br. at 24; and
- The defendant's guideline range is sharply in contrast with sentences for the same offense conduct in "fast-track" districts, JA28-30, Def.'s Br. at 25.

Two of these arguments are grounded in claimed sentencing disparities. Noting that Congress is the body that set punishments for illegal re-entry that may equal or exceed certain violent acts, this Court has already rejected the claim that this guideline is unduly harsh. *Perez-Frias*, 636 F.3d at 43-44. This Court has also rejected the argument that the existence of fast-track districts makes his sentence (out of a non-fast-track district) substantively unreasonable. *United States v. Hendry*, 522 F.3d 239, 242 (2d Cir. 2008) (per curiam).

In any event, all of these arguments were presented to the district court. They all advanced the idea that positive factors in the defendant's history and case should weigh in his favor and move the court to impose a sentence lower than the guidelines indicated. The district court's estimation and reception of these factors—and the weight she afforded those factors—lay within her sound discretion. *Gall*, 552 U.S. at 51; *Perez-Frias*, 636 F.3d at 42.

The defendant's objections boil down to his disagreement with the length of the sentence, in light of what he claims are positive factors that

should weigh in his favor. That the court reached a different conclusion than the defendant would have liked does not make the sentence "shockingly high . . . or otherwise unsupportable as a matter of law." *Rigas*, 583 F.3d at 123.

For the reasons set forth above, Judge Burns was well within her discretion in rejecting all of the defendant's arguments. As she explicitly stated three separate times at sentencing, she found the defendant's arguments somewhat persuasive, and for those reasons settled on a sentence no higher than 57 months. JA84, JA90, JA91.

In the end, the district court found that even when taken together, none of the defendant's arguments outweighed the seriousness of the felonies preceding his removal from the United States. Once the court had resolved the 16-level enhancement issue, the guideline range of 57 to 71 months was fairly reflective of his past as a child molester, as the Government forcefully put forward in both its brief and at the sentencing hearing: "Now, the Government views his criminal history as extraordinarily serious, ... These children often suffer for a lifetime because of the abuse imposed on them, and they cannot become the people that they were meant to be because of the psychological trauma involved. I think this is particularly true when there is an abuse of trust, as is the case when the victims are his stepchildren." JA77.

The strong policy reasons behind both the re-entry statute and the enhanced penalties for removed felons are obvious here. Congress intended to close the nation's borders to removed persons and set in place criminal consequences for those who return illegally. Furthermore, Congress and the Sentencing Commission intended to make longer sentences available for felons like this defendant. The sentence imposed on the defendant was a reasonable expression of this intent.

In fashioning a sentence for the crime of illegal re-entry, the district court is free, within the bounds of discretion, to weigh all relevant factors, including the seriousness of the earlier felony, the rapid re-entry after deportation, and the nature of any crimes after re-entry. *Perez-Frias,* 636 F.3d at 43. And once the court weighs those factors, this Court affords the district court's decision substantial discretion:

> '[W]e will not substitute our own judgment for the district court's on the question of what is sufficient to meet the § 3553(a) considerations in any particular case. *See United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006). We will instead set aside a district court's substantive determination only in exceptional cases where the trial court's decision 'cannot be located within the range of permissible decisions.'" *Cavera*, 550 F.3d at 189 (*quoting United*

States v. Rigas, 490 F.3d 208, 238 (2d Cir.2007)).

Id. at 42; *see also 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).

There is no indication in the record that Judge Burns abused her discretion in the imposition of this sentence. The 57-month sentence is not "shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *See Rigas*, 583 F.3d at 123. The term imposed is substantively reasonable and should be affirmed.

Conclusion

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

Dated: February 22, 2012

Respectfully submitted,

DAVID B. FEIN
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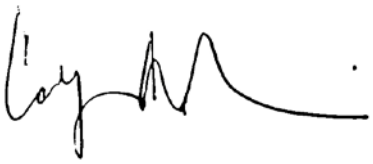

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Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

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 7,411 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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Addendum

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

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

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

(2) the need for the sentence imposed--

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

(B) to afford adequate deterrence to criminal conduct;

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

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

(3) the kinds of sentences available;

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

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

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

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

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

(5) any pertinent policy statement--

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

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced. [FN1]

(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.

U.S.S.G. § 2L1.2. Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) Apply the Greatest:

If the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by 16 levels;

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels;

(C) a conviction for an aggravated felony, increase by 8 levels;

(D) a conviction for any other felony, increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.

Commentary

Statutory Provisions: 8 U.S.C. § 1325(a) (second or subsequent offense only), 8 U.S.C. § 1326. For additional statutory provision(s), see

Appendix A (Statutory Index).

Application Notes:

1. Application of Subsection (b)(1).—

(A) In General.—For purposes of subsection (b)(1):

(i) A defendant shall be considered to be deported after a conviction if the defendant has been removed or has departed the United States while an order of exclusion, deportation, or removal was outstanding.

(ii) A defendant shall be considered to be deported after a conviction if the deportation was subsequent to the conviction, regardless of whether the deportation was in response to the conviction.

(iii) A defendant shall be considered to have unlawfully remained in the United States if the defendant remained in the United States following a removal order issued after a conviction, regardless of whether the removal order was in response to the conviction.

(iv) Subsection (b)(1) does not apply to a conviction for an offense committed before the defendant was eighteen years of age unless such conviction is classified as an adult conviction

under the laws of the jurisdiction in which the defendant was convicted.

(B) Definitions.—For purposes of subsection (b)(1):

(i) "Alien smuggling offense" has the meaning given that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(N)).

(ii) "Child pornography offense" means (I) an offense described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(iii) "Crime of violence" means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

(iv) "Drug trafficking offense" means an offense under federal, state, or local law that pro-

hibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(v) "Firearms offense" means any of the following:

(I) An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an explosive material as defined in 18 U.S.C. § 841(c).

(II) An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. § 5845(a), or of an explosive material as defined in 18 U.S.C. § 841(c).

(III) A violation of 18 U.S.C. § 844(h).

(IV) A violation of 18 U.S.C. § 924(c).

(V) A violation of 18 U.S.C. § 929(a).

(VI) An offense under state or local law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(vi) "Human trafficking offense" means (I) any offense described in 18 U.S.C. § 1581, § 1582, § 1583, § 1584, § 1585, § 1588, § 1589, § 1590, or § 1591; or (II) an offense under state or local law consisting of conduct that would have

been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(vii) "Sentence imposed" has the meaning given the term "sentence of imprisonment" in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.

(viii) "Terrorism offense" means any offense involving, or intending to promote, a "Federal crime of terrorism", as that term is defined in 18 U.S.C. § 2332b(g)(5).

2. Definition of "Felony".—For purposes of subsection (b)(1)(A), (B), and (D), "felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

3. Application of Subsection (b)(1)(C).—

(A) Definitions.—For purposes of subsection (b)(1)(C), "aggravated felony" has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.

(B) In General.—The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)),

with respect to which the offense level is not increased under subsections (b)(1)(A) or (B).

4. Application of Subsection (b)(1)(E).—For purposes of subsection (b)(1)(E):

(A) "Misdemeanor" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.

(B) "Three or more convictions" means at least three convictions for offenses that are not counted as a single sentence pursuant to subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History).

5. Aiding and Abetting, Conspiracies, and Attempts.—Prior convictions of offenses counted under subsection (b)(1) include the offenses of aiding and abetting, conspiring, and attempting, to commit such offenses.

6. Computation of Criminal History Points.—A conviction taken into account under subsection (b)(1) is not excluded from consideration of whether that conviction receives criminal history points pursuant to Chapter Four, Part A (Criminal History).

7. Departure Based on Seriousness of a Prior Conviction.—There may be cases in which the applicable offense level substantially overstates or understates the seriousness of a prior conviction. In such a case, a departure may be warranted. Examples: (A) In a case in which subsection (b)(1)(A) or (b)(1)(B) does not apply and the defendant has a prior conviction for possessing

or transporting a quantity of a controlled substance that exceeds a quantity consistent with personal use, an upward departure may be warranted. (B) In a case in which subsection (b)(1)(A) applies, and the prior conviction does not meet the definition of aggravated felony at 8 U.S.C. § 1101(a)(43), a downward departure may be warranted.

8. Departure Based on Cultural Assimilation.—There may be cases in which a downward departure may be appropriate on the basis of cultural assimilation. Such a departure should be considered only in cases where (A) the defendant formed cultural ties primarily with the United States from having resided continuously in the United States from childhood, (B) those cultural ties provided the primary motivation for the defendant's illegal reentry or continued presence in the United States, and (C) such a departure is not likely to increase the risk to the public from further crimes of the defendant.

In determining whether such a departure is appropriate, the court should consider, among other things, (1) the age in childhood at which the defendant began residing continuously in the United States, (2) whether and for how long the defendant attended school in the United States, (3) the duration of the defendant's continued residence in the United States, (4) the duration of the defendant's presence outside the United States, (5) the nature and extent of the defendant's familial and cultural ties inside the United States, and the nature and extent of such ties

outside the United States, (6) the seriousness of the defendant's criminal history, and (7) whether the defendant engaged in additional criminal activity after illegally reentering the United States.

Historical Note: Effective November 1, 1987. Amended effective January 15, 1988 se(e Appendix C, amendment 38); November 1, 1989 (see Appendix C, amendment 193); November 1, 1991 (see Appendix C, amendment 375); November 1, 1995 (see Appendix C, amendment 523); November 1, 1997 (see Appendix C, amendment 562); November 1, 2001 (see Appendix C, amendment 632); November 1, 2002 (see Appendix C, amendment 637); November 1, 2003 (see Appendix C, amendment 658); November 1, 2007 (see Appendix C, amendment 709); November 1, 2008 (see Appendix C, amendment 722); November 1, 2010 (see Appendix C, amendment 740).

(EFFECTIVE November 1, 2010)