09-3366-cr

To Be Argued By:
DAVID E. NOVICK

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-3366-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

TROY NAPPER,

Defendant-Appellant.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

This is an appeal from a judgment entered in the United States District Court for the District of Connecticut (Janet B. Arterton, J.), which had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231.

On July 29, 2009, the district court sentenced the defendant-appellant to 188 months' incarceration after he pleaded guilty to distributing and possessing with the intent to distribute five grams or more of cocaine base. JA 71-72. Judgment entered on August 3, 2009. JA 5-6, 71-72. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on August 5, 2009. JA 6, 74. 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

Was the defendant's 188-month sentence, which was 74 months below the bottom of the undisputedly applicable Guidelines range, both substantively and procedurally reasonable?

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Preliminary Statement

In this appeal, a defendant who has spent the last fifteen years of his life committing various felonies argues that the district court unreasonably sentenced him to 188 months in prison for selling a total of 63.5 grams of crack cocaine less than a year after completing his 1997 federal sentence for selling crack cocaine in the same neighborhood. On the contrary, the defendant's sentence, which is 74 months below the advisory Guidelines range, constitutes a carefully considered balance by the district

court of the Guidelines and the factors enumerated in 18 U.S.C. § 3553(a). This Court should not disturb the district court's sound sentencing decision.

Statement of the Case

On February 25, 2009, a federal grand jury sitting in New Haven, Connecticut, returned a six-count indictment charging the defendant with two counts of possession with intent to distribute and distribution of five grams or more of a mixture and substance containing a detectable amount of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(iii), one count of possession with intent to distribute five grams or more of a mixture and substance containing a detectable amount of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(iii), two counts of possession with intent to distribute and distribution of a mixture and substance containing a detectable amount of heroin, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C), and one count of possession with intent to distribute a mixture and substance containing a detectable amount of heroin, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). JA 7-10. On April 1, 2009, the Government filed an information pursuant to 21 U.S.C. § 851, to provide notice of the defendant's prior felony drug conviction. JA 11-14.

On May 15, 2009, the defendant pleaded guilty to Count One of the indictment, which charged him with possession with intent to distribute and distribution of five grams or more of a mixture and substance containing a detectable amount of cocaine base. JA 15-22. On July 29,

2009, the district court sentenced the defendant to 188 months' incarceration and 96 months' supervised release. JA 71-72. Judgment entered on August 3, 2009. JA 5-6, 71-72. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on August 5, 2009. JA 6, 74. In this appeal, the defendant challenges the reasonableness of the district court's sentence.

Statement of facts and proceedings relevant to this appeal

A. The defendant repeatedly sells crack cocaine and heroin to a confidential source, and inquires about buying a gun

Had the case against the defendant gone to trial, the Government would have presented the following facts, which were set forth in the Pre-Sentence Report (sealed appendix) ("PSR"):

On January 26, 2009, a Confidential Source ("CS") informed agents of the Drug Enforcement Administration ("DEA") that the defendant was selling cocaine, crack cocaine, and heroin from the defendant's apartment at 109 Foster Street in Manchester, Connecticut. *See* PSR ¶ 6.

On January 29, 2009, the DEA agents, in conjunction with the Manchester Police Department ("MPD"), arranged to allow the CS to purchase crack cocaine and heroin from the defendant, in the parking lot of a Friendly's Restaurant located on Spencer Street in Manchester. The transaction took place at approximately

1:45 p.m. inside the defendant's vehicle, and followed several phone calls between the defendant and the CS. Once inside the vehicle, the defendant asked the CS about purchasing a gun, or "ratchet," from the CS. The defendant indicated that he would take any kind of gun, and referred specifically to a "nine," a "forty-five," an "MP-5," and an "AR-15." The defendant explained to the CS that he wanted to "get that paper," which the CS and DEA agents understood to mean that the defendant intended to use the gun to commit a robbery. At some point during the course of this conversation, the CS handed the defendant $800, in exchange for which defendant handed the CS a plastic bag containing 10 bundles (100 bags) of heroin, and a plastic bag of crack cocaine. DEA analysis showed that the net weight of the heroin was 2.0 grams and the net weight of the crack cocaine was 13.2 grams. *See* PSR ¶ 7.

On February 6, 2009, DEA law enforcement officials again arranged to allow the CS to buy crack cocaine and heroin from the defendant, in the same Friendly's parking lot in Manchester. The transaction took place at approximately 3:55 p.m., this time inside the CS's vehicle. The defendant handed the CS a plastic bag containing several pieces of crack cocaine, as well as several "bundles" of heroin, in exchange for which the CS handed defendant $1,200. DEA analysis showed that the net weight of the heroin was 2.2 grams and the net weight of the crack cocaine was 26.3 grams. *See* PSR ¶ 8.

On February 17, 2009, DEA agents and local law enforcement executed an arrest warrant for the defendant

and a search warrant for the defendant's apartment. Prior to executing the warrants, the CS again ordered crack cocaine and heroin from the defendant. This time, surveillance units watched the defendant leave 109 Foster Street, get into his minivan, and drive to a 7-Eleven convenience store. Defendant went into the store, then went to pump gas. When he got back into his vehicle, agents and officers approached the minivan and yelled "police." The defendant got out of the minivan and ran. He initially had what appeared to be a plastic bag in his hand. He was apprehended in an alley next to the 7-Eleven, but at that point had no bag in his possession. Law enforcement retraced defendant's path of flight and recovered crack cocaine and heroin. A search of the defendant's apartment yielded marihuana that had been packaged for sale, several hundred dollars in currency, and a bottle of Super Manthanol (a cocaine cutting agent), but no other narcotics. DEA analysis revealed that the seized heroin had a net weight of 2.8 grams, the seized crack cocaine had a net weight of 24.0 grams, and the seized marihuana had a net weight of 47.1 grams. *See* PSR ¶¶ 9-10.

In total, during the course of the investigation, the defendant distributed and/or possessed with the intent to distribute 63.5 grams of cocaine base, 7 grams of heroin, and 47.1 grams of marijuana. *See* PSR ¶ 11; JA 22.

B. The defendant pleads guilty to distribuing over five grams of crack cocaine

The defendant pleased guilty to Count One of the indictment on May 15, 2009. JA 4. Specifically, Count One of the indictment charged:

> On or about January 29, 2009, in the District of Connecticut, TROY NAPPER aka "Troy Mote", the defendant herein, did knowingly and intentionally distribute and possess with the intent to distribute 5 grams or more of a mixture and substance containing a detectable amount of cocaine base ("crack cocaine"), a Schedule II controlled substance.
>
> In violation of Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(B).

JA 7-10. In pleading guilty, the defendant entered into a written plea agreement in which the parties stipulated that the quantity of cocaine base involved in the defendant's relevant conduct was 63.5 grams. JA 22. No stipulation was entered into regarding a calculation of the appropriate punishment under the Sentencing Guidelines.

C. The district court sentences the defendant to 188 months in prison – 74 months below the advisory Guidelines range for a career offender like the defendant

On July 29, 2009, following the submission of sentencing memoranda by the Government and defendant, and following a hearing, the defendant was sentenced to 188 months' imprisonment followed by eight years supervised release. JA 64-65. At outset of the hearing, the court agreed with the parties and the United States Probation Office that, as a "career offender," the defendant's advisory Guidelines sentencing range was 262 to 327 months' imprisonment. JA 35. Indeed, the defendant does not now challenge that calculation. Def. Br. 3. The Court then heard the remarks of defense counsel, JA 35-48, 53-56; the defendant's mother, Tracy Connors, JA 37-38; the Assistant United States Attorney, JA 48-52; and the defendant, JA 52-53.

Defense counsel focused his argument on an alleged disparity in sentences between districts caused by different rates of filing 21 U.S.C. § 851 notices. JA 40. In support of this argument, counsel referenced a conversation with an attorney who practices in the Southern District of New York, who indicated that "they just don't file [851 notices] down there." JA 40.

Before imposing sentence, the district court outlined the rationale for its decision. The court first emphasized the seriousness of the defendant's crime, observing that "one can't underestimate the devastation that drug

trafficking does in our neighborhoods." JA 60. The court then noted that although the defendant had experienced "many factors that have impacted [his] emotional well-being," he also had a "history of an uninterrupted series of crimes, serious crimes, that just keep on happening, and it leads to the conclusion that at least to this point, [he does not] have much respect for the law . . . ." JA 60-61. Given the defendant's history, the court moved to "a prominent position the goal of sentencing of protecting the public from further crimes and providing deterrence . . . ." JA 61. However, the court expressly balanced that goal with the hope that at some point the defendant "will emerge from prison no longer a threat to the public and finally ready to comply with the laws' requirements . . . ." JA 61.

Continuing, the court observed that, in spite of the defendant's aspirations to improve, there was nothing in the record to indicate that "a sentence less than what [the defendant] got before is going to make any difference," or "that anything has changed" from the last time the defendant committed similar crimes. JA 62. In fact, the defendant's crime here was similar to his prior federal conviction both in type as well as location. JA 63.

Turning to the goal of rehabilitation, the court implored the defendant to use the resources that would be available to him while incarcerated to improve himself, saying that "[i]t may be a counselor, it maybe a therapist, it might even be a fellow inmate, but you have to search that out and make yourself whole and different because . . . your situation is not something that has been caused to

happen to you." JA 63. There is not, as the court observed, a right to commit crime simply because one was abused as a child and needs help. JA 63.

Notwithstanding the seriousness of the offense, the defendant's life of crime, and his hollow proclamation to change, the court concluded that a Guidelines sentence would be "greater than is necessary to serve the objectives of sentencing, which I identified as set out in 18, United States Code, 3553(a)." JA 63-64. In ultimately imposing the sentence of 188 months' imprisonment, the court considered "the crack/powder disparity, and . . . all the characteristics that we have spoken of and that the presentence report and counsels' briefing identifies . . . ." JA 64. The court observed that if the sentence were according to a Guidelines range which took into account the crack/powder disparity, it would put the total offense level at 31 and the range of imprisonment at 188 to 235 months. JA 64. This is consistent with a Guidelines range which eliminated the crack/powder distinction, as suggested by the United States Probation Office. PSR ¶ 74. However, the court emphasized that the sentence was not pursuant to the Guidelines. JA 64.

Finally, the court made certain recommendations for programs while incarcerated. First, at the defendant's request, the court recommended that the defendant participate in the 500-hour drug treatment program. JA 67. Next, the Court agreed to recommend that the defendant be housed at FCI Schuylkill because, according to defense counsel, "[a]pparently they have good job training programs there, prison industries, and he's hoping

to avail himself of that." JA 68. The defendant specifically expressed an interest in working with furniture. JA 68.

Summary of Argument

The record amply demonstrates that the district court fulfilled its obligation to calculate the relevant guidelines range, consider that range and the relevant factors set forth in 18 U.S.C. § 3553(a), and impose a sentence that is sufficient but no greater than necessary to achieve the purposes of sentencing. The district court explained what led it to impose a non-guideline sentence and why it chose to impose a sentence of 188 months' incarceration. There is no basis to find that the district court exceeded the bounds of allowable discretion, misunderstood its discretion to depart under the Sentencing Guidelines or violated the law in imposing the sentence it did.

Argument

The defendant asserts that his sentence was unreasonable because it was greater than necessary to comply with the factors set out in 18 U.S.C. § 3553(a)(2), namely to provide training, medical care, or other correctional treatment, § 3553(a)(2)(D), and to avoid unwarranted sentencing disparities between similarly situated defendants. Def. Br. 9. The defendant's arguments fail. The record reflects that the sentence was procedurally reasonable, in that the district court properly considered the applicable Sentencing Guidelines range, the § 3553(a) factors, and the Sentencing Guidelines'

disparities between cocaine and cocaine base. Moreover, given the defendant's lengthy criminal history, as well as the seriousness of his offense and the need to avoid unwarranted sentencing disparities among similarly situated defendants, a sentence of 188 months, which was 72 months below the bottom of the applicable Guidelines range, was substantively reasonable.

I. The district court's below-Guidelines sentence of 188 months was reasonable

A. Governing law and standard of review

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.* (citations omitted) (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)). 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. 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." *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006).

Because the Guidelines are only advisory, district courts are "generally free to impose sentences outside the recommended range." *Cavera*, 550 F.3d at 189. "When

they do so, however, they 'must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.'" *Id.* (quoting *Gall*, 552 U.S. at 50).

On appeal, a district court's sentencing decision is reviewed for reasonableness. *See United States v. Booker*, 543 U.S. 220, 260-62 (2005). 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 *United States v. Crosby*, 397 F.3d 103, 114-15 (2d Cir. 2005)). "A district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory." *Cavera*, 550 F.3d at 190 (citation 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).

After reviewing for procedural error, this Court reviews the sentence for substantive reasonableness under an abuse-of-discretion standard. *See Gall*, 552 U.S. at 51. The Court "will not substitute [its] own judgment for the district court's"; rather, a district court's sentence may be set aside "only in exceptional cases where [its] decision cannot be located within the range of permissible decisions." *Cavera*, 550 F.3d at 189 (internal quotation

marks omitted); *see also United States v. Verkhoglyad*, 516 F.3d 122, 134 (2d Cir. 2008) ("Our review of sentences for reasonableness thus exhibits restraint, not micromanagement.") (internal quotation marks omitted).

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). While the Court does not presume that a Guidelines sentence is reasonable, "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. Finally, no one fact or statutory factor may dictate a particular sentence; rather "a district judge must contemplate the interplay among the many facts in the record and the statutory guideposts." *Id.* at 28.

B. Discussion

The district court adhered faithfully to the precedents of the Supreme Court and this Court in sentencing the defendant. First, the defendant concedes that the district court correctly determined the applicable Guidelines range to be 262-327 months' imprisonment. JA 35. The district court considered the remarks of defense counsel, the Assistant United States Attorney, the defendant, and the defendant's mother. JA 35-53. The district court then explained its assessment of the statutory sentencing factors

as they applied to the defendant and in so doing, demonstrated its recognition that it was not bound by the Sentencing Guidelines. JA 59-64. The district court proceeded to sentence the defendant to a term of 188 months in prison, a term 74 months below the bottom of the applicable Guidelines range. JA 64.

1. The sentence was substantively reasonable

On appeal, the defendant first makes what appears to be a substantive reasonableness claim, that is, that the sentence of 188 months' imprisonment "is greater than necessary to comply with the § 3553(a)(2) factors, in particular with the mandate in § 3553(a)(2)(D) 'to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.'" Def. Br. 9. In support of this argument, the defendant contends that (1) he has reconciled with his mother, (2) he has expressed disgust with his own criminality, and (3) a 120-month sentence would permit the defendant's release at age 40 when, according to the defendant's brief, people are less likely to re-offend. This argument is without merit.

The district court considered defense counsel's arguments at the sentencing hearing, and effectively balanced them with all of the other factors set out in 18 U.S.C. § 3553(a)(2). *See Ferndanez*, 443 F.3d at 28 ("a district judge must contemplate the interplay among the many facts in the record and the statutory guideposts"). First, the defendant argues that his mother's recognition of a change in the defendant, and her plea for leniency on his

behalf, argues for a 120-month sentence in this case. Def. Br. 10. The district court, in considering Ms. Connors' statement, correctly pointed out that this "insight" was based on "one meeting" between the defendant and his mother. JA 62. In fact, Ms. Connors' statement was hardly a ringing endorsement of the defendant's prospects for change:

> I just want to say that if the Court finds it in your heart to grant my son leniency, I would try to do everything in my power to make sure he doesn't reoffend. I know we've been going through this for a long time. I saw him on Sunday and I did notice a change in him. He expressed regret, and, you know – you know he's concerned that he left me and his sister yet again, and I think he really maybe gotten it – got it this time, you know. So I hope that if you did give him leniency he would come out, he would be a productive citizen.

JA 37-38. Ms. Connors did not say that her son had recognized the inherent problem with his criminal activities; she did not discuss his recognition of how he had consistently placed his own interests above those of society; nor did she express a great degree of certainty that the defendant would in fact reform. Rather, she talked about the defendant's regret for having left his mother and sister alone, and that he had "really maybe gotten it . . . this time." JA 38. When balanced against the defendant's criminal history and the seriousness of the defendant's criminal activity, the court rightly pointed out that it did not have "anything else . . . to think that a sentence less

than what you got before is going to make any difference." JA 62.

Nor does the defendant's "promise to myself that I won't come back" and "promise to my mother that I won't come back" compel a lesser sentence. Def. Br. 11. Again, the district court considered the defendant's letter and statements to the court, but pointed out that, despite his aspirations to become a law-abiding citizen, it was the defendant who placed himself in the "vicious cycle" of criminal activity. JA 63. The court was completely reasonable in according limited weight to a "promise" to reform from a defendant who has shown no inclination towards it other than in self-serving statements in anticipation of sentencing.

Nor does the defendant's age upon release from incarceration require a 120-month sentence. Def. Br. 11. Defense counsel offered at sentencing that "people reach an age when they're just too old to continue in this lifestyle. Mr. Mote is at that point in his life." JA 44. Counsel argued that after a sentence of 10 years, which would place the defendant near forty upon release, the defendant would be simply too old to resume criminal activity. While at sentencing the defendant's contention regarding age was supported by counsel's arm-chair empiricism, on appeal the defendant references an article from 1995 which in part discusses trends in the age of offenders. Def. Br. 11 (citing Alfred Blumenstein, *Youth, Violence, Guns, and the Illicit Drug Industry*, 86 J. Crim. L. & Criminology 1, 10 (1995)).

The article discusses statistical trends that are over fifteen years old and concern robbery, burglary, and murder, not drug crimes. The defendant here was convicted of selling cocaine base from a vehicle, a notably less strenuous endeavor. PSR ¶¶ 6-8. Moreover, the defendant's conduct in this case and his recent criminal history indicate, as the Government noted at the sentencing hearing, that he has "grown more violent over time." JA 52. The defendant was convicted in 2007 for beating someone with a frying pan, while in possession of 37 bags of heroin. PSR ¶ 31. In this case, while in the midst of purchasing crack and heroin from a confidential informant, the defendant asked to purchase firearms in order to commit robberies. PSR ¶ 7. These are not the actions of a man who has renounced his criminal past, or even who is on a path towards that end. Rather, these are the actions of a man from whom society must be protected. 18 U.S.C. § 3553(a)(2)(C). Additionally, as the district court noted, a 188-month sentence "is not going to be the end of [the defendant's] life. You are not going to be an old man when you come out." JA 65. Indeed, absent any time off, the defendant will be forty-five years old at release, or about twenty years shy of the typical retirement age.

Finally, the defendant argues that he is "more likely to find helpful mentors and role models outside the federal prison system than inside it" and therefore should be resentenced to 120 months' imprisonment. Def. Br. 12. This argument was also considered by the district court. Indeed, the district court challenged the defendant to extricate himself from a criminal lifestyle "with your own strength, inner strength, and you need to reach out and find

within a prison facility those with whom you can work through your issues." JA 63. The court rightly pointed out that it was the defendant who repeatedly turned to crime, and that his incarceration was not something that "has been caused to happen" to him. JA 63. To assist in the defendant's rehabilitation, the district court recommended him for a five hundred hour drug treatment program. The district court also agreed, at the defendant's request, to recommend to the Bureau of Prisons that the defendant be placed at a facility that would provide him with work opportunities. JA 67-68.

Additionally, the simple, if tautological, reality that there are more law-abiding role models outside prison than inside does not render the defendant's sentence substantively unreasonable. Such an argument would preclude prison in every case. Here, the defendant has not sought out, or at least does not discuss having sought out, such role models during prior periods of freedom. Moreover, here again the court must balance the potential for the defendant to receive "correctional treatment" with the other § 3553(a) factors, which, as the district court pointed out, suggest a harsher sentence. Ultimately, the district court did not reject out of hand the defendant's arguments, but found that balance in a sentence that was 74 months below the bottom of the defendant's Guidelines range.

2. The sentence was procedurally reasonable

In addition to this substantive reasonableness claim, the defendant further contends that the sentence was

procedurally unreasonable in that the sentence "failed to properly consider § 3553(a)(5) and § 3553(a)(6)'s requirement to avoid disparity in sentencing similarly-situated defendants." Def. Br. 12. Ironically, the defendant's disparity claim is not based on an above-Guidelines sentence; the defendant received a sentence well below the applicable Guideline range. Rather, the defendant contends that the filing of the notice under 21 U.S.C. § 851 would create "an unwarranted disparity between himself and similarly situated defendant [sic] in a district where such notices are routinely not filed." Def. Br. 13. The defendant's argument here, too, is without merit, both because there is no evidence of disparate filing of § 851 notices and because the Court nonetheless properly balanced all of the § 3553(a) factors.

The defendant rightly points to this Court's decision in *United States v. Sanchez*, 517 F.3d 651, 671 (2d Cir. 2008), as sanctioning the use of prosecutorial discretion in deciding whether to file an § 851 notice, provided that the decision "is not based upon improper factors." Def. Br. 13. However, the defendant's suggestion that a particular district's decision to file more notices than another district is somehow an "improper factor" is not supported by the *Sanchez* decision. Rather, the defendant, to support a claim that the decision to file an 851 notice was improper, must show that "he was singled out for reasons that are invidious or in bad faith." 517 F.3d at 671. It is the defendant's obligation to come forward with at least "some evidence" that would show the use of such an improper factor. *Id.* Absent such a showing, a sentencing disparity between defendants who receive and those who do not

receive 851 notices "is a foreseeable – but hardly improper – consequence of the statutory notice requirement." *Id.*

Of course, here the defendant does *not* contend that the Government exercised bad faith, only that there is a geographical disparity in the filing of § 851 notices. Stated differently, the defendant has not come forward with any evidence to show that the filing of the § 851 notice in this case was improper. In this same vein, the defendant has not identified any competent authority to show that there is a geographical disparity in the filing of § 851 notices. Indeed, the only proof of geographical disparity in the filing of § 851 notices came at the sentencing hearing, in which counsel anecdotally advised the court of a conversation with an attorney who practices in the Southern District of New York, who indicated that "they just don't file [851 notices] down there." JA 40.

The defendant's analogy between this case and *United States v. Mejia*, 461 F.3d 158 (2d Cir. 2006), where the Court permitted geographical sentencing disparities as a result of "fast track" programs in the immigration context under U.S.S.G. § 5K3.1, is misplaced. In *Mejia*, this Court recognized that since "Congress had expressly approved of fast-track programs without mandating them[,] Congress thus necessarily decided that they do not create the unwarranted sentencing disparities that it prohibited in Section 3553(a)." 461 F.3d at 164. The defendant argues that, in contrast, since geographical disparity in § 851 notices is neither a "congressional choice nor a conscious decision by the Sentencing Commission," it is therefore not authorized. Def. Br. 13.

Such an argument is not supported by *Mejia*. First, unlike in *Mejia*, where there was clear evidence in the record of geographic disparity ("thirteen of the 94 federal districts have 'early disposition' or 'fast-track' programs"), 461 F.3d at 161, there is no such evidence in the record here of systemic geographical disparity in the filing of § 851 notices. Second, the defendant ignores that § 851 is itself a congressionally enacted federal statute that on its face permits disparate application, geographically or otherwise, depending on the prosecuting authority. Finally, that Congress has implicitly authorized geographical disparity in the immigration context does not show that it disapproved it in the filing of § 851 notices. Rather, it shows only that there was a significant enough geographical disparity in the use of "fast-track" programs that this Court was compelled to draw the inference at all.

Finally, even if there were competent evidence of geographical disparity among § 851 notices, the Court properly considered all statutory factors in rendering a sentence. In addition to the Guidelines range, the sentencing judge described in considerable detail the statutory factors she was considering as well as the disparity between cocaine and cocaine base sentences. JA 60-65. After enumerating those factors, the court stated:

> Having considered all of those factors and attempted to balance them in a way that is appropriate and required, I believe that the guidelines sentence of 262 to 327 months is greater than necessary to serve the objectives of sentencing,

> which I identified as sent out in 18, United States Code, 3553(a). . . .
>
> I, therefore, having reached the conclusion that a nonguideline sentence is justified here to be the just sentence where the guideline range would not be, to consider the crack/powder disparity, and to consider all the characteristics that we have spoken of and that the presentence report and counsels' briefing identifies, I believe the total offense level, if this were a guideline sentence, ought to be 31, with a Criminal History Category VI, and imprisonment range of 188 to 235 months. But because I am imposing a nonguideline sentence and I'm only looking at the guidelines advisorily, I am nonetheless imposing a sentence of 188 months.

JA 63-64. Thus the district court expressly stated that, in reaching the sentence, it was balancing the 3553(a) factors and taking into account all remarks, the PSR, and counsels' briefs. Simply because the district court did not spend time specifically rebutting defense counsel's argument concerning § 851 notices does not therefore entitle the defendant to a new sentence. Indeed, this Court has held that "we will not conclude that a district judge shirked her obligation to consider the § 3553(a) factors simply because she did not discuss each one individually or did not expressly parse or address every argument relating to those factors that the defendant advanced." *Fernandez*, 443 F.3d at 30. In this case, the court specifically acknowledged she had considered "all the characteristics we have spoken of" at the sentencing

hearing. JA 64. There is likewise nothing in the record supporting the contention that the district court did not consider geographic disparity in pronouncing sentence. *Fernandez*, 443 F.3d at 30 (noting presumption that district court considered all statutory factors in absence of record evidence to the contrary).

CONCLUSION

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

Dated: May 24, 2010

Respectfully submitted,

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ADDENDUM OF STATUTES

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.

(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.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Napper

Docket Number: 09-3366-cr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 5/24/2010) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: May 24, 2010

CERTIFICATE OF SERVICE

09-3366-cr USA v. Napper

I hereby certify that two copies of this Brief for the United States of America were sent by Regular First Class Mail to:

Gary D. Weinberger, Esq.
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Attorney for Defendant-Appellant

I also certify that the original and five copies were also shipped via Hand delivery to:

Clerk of Court
United States Court of Appeals, Second Circuit
United States Courthouse
500 Pearl Street, 3rd floor
New York, New York 10007
(212) 857-8576

on this 24th day of May 2010.

Notary Public:

_____

Sworn to me this

May 24, 2010

RAMIRO A. HONEYWELL
Notary Public, State of New York
No. 01HO6118731
Qualified in Kings County
Commission Expires November 15, 2012

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