DOCKET NO. **07-2485-cr**

In the

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

-v-

SHAWN COONS

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX ON APPEAL FOR DEFENDANT-APPELLANT

Copy to:
BRENDA SANNES, Esq.
Assistant U.S. Attorney
Office of the U.S. Attorney
PO Box 7198
100 S. Clinton Street
Syracuse, New York 13261
(315) 448-0672

Shawn Coons, Defendant-Appellant

Respectfully submitted:

ALEXANDER BUNIN
Federal Public Defender
MOLLY K CORBETT, ESQ., *On Brief*
GENE V.PRIMOMO, AFPD
Federal Defender Office , NDNY
39 North Pearl St., 5th Floor
Albany, NY 12207
(518) 436-1850

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Statement of Jurisdiction

The District Court had subject matter jurisdiction of this case under 18 U.S.C. § 3231. This case involves a criminal prosecution wherein the Defendant-Appellant, Shawn Coons, pled guilty to a violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). This Court has appellate jurisdiction under 28 U.S.C. § 1291. The Judgment was entered in the Office of the Clerk, Northern District of New York on May 30, 2007. A notice of appeal was filed on June 8, 2007. This appeal was taken from a judgment of conviction and sentence imposed after a guilty plea that disposed of all federal claims against Mr. Coons.

Statement of the Issue Presented

I. DID THE DISTRICT COURT FAIL TO RECOGNIZE THAT IT HAD THE LEGAL AUTHORITY TO GRANT THE DEFENDANT-APPELLANT A CONCURRENT SENTENCE PURSUANT TO U.S.S.G. § 5G1.3(b) OR (c) AND 18 U.S.C. § 3553(a)?

Statement of the Case

On October 12, 2006 Mr. Coons was charged in the Northern District of New York with possession of a firearm after having been convicted of a felony. A. 8. He eventually pled guilty to the one count indictment. A. 9-24.

Mr. Coons entered his plea of guilty before Judge Kahn on December 19, 2006. The presentence investigation was ordered and a presentence investigation report was composed.[1] The PSR calculated a total offense level of 12 and a criminal history score of V. *PSR*, p. 18, ¶ 69. The corresponding sentence range was 27to 33 months

Counsel for Mr. Coons submitted a memorandum in opposition to a guidelines sentence and argued a non-guidelines sentence was appropriate which would include a concurrent sentence to the state sentence Mr. Coons was serving.

On May 17, 2007, Mr. Coons was sentenced to a term of incarceration of 27 months to be served concurrent with the state sentence. A. 71. A three year term of supervised release was imposed. A. 71. Standard conditions were imposed with a number of special conditions. A. 71-72.

[1] The Presentence Investigation Report or "PSR" along with the Addendum is submitted under seal.

Statement of Relevant Facts

At the time of his initial appearance on the federal charge, Mr. Coons was in state custody for a violation of his state parole stemming from the conduct that comprised the federal charges. *PSR p. 11-12, ¶ 38.* He had been arrested on a state parole warrant on January 13, 2006. *PSR p. 3, ¶ 2.*

Sentence Recommendation and Arguments

The PSR calculated a total offense level of 12 and a criminal history score of V. *PSR*, *p. 18, ¶ 69.* The corresponding sentence range was 27 to 33 months. Counsel for Mr. Coons submitted and maintained objections to the advisory guidelines sentence as recommended in the PSR. A. 44-46. Specifically, counsel for Mr. Coons' argued that Mr. Coons' should receive a reduction in the amount of imprisonment and a wholly concurrent sentence because of the time that he had served in state custody that would not be credited toward the federal sentence. Counsel sought to reduce his ultimate sentence by 492 days. A. 41. In addition, counsel cited to the abuse suffered by Mr. Coons as a child and his early introduction to marijuana for consideration under section 3553(a). A. 43. Last, counsel argued that the criminal history over represented the likelihood of Mr. Coons committing another offense.

At the time of sentencing, defense counsel again reiterated that a "guidelines

sentence" could take into account the time that was "served" on the state parole violation on the related conduct because the conduct that was the basis for the imprisonment was relevant to the federal charge.[2] A. 60. Counsel expressed his concern that Mr. Coons had been arrested on the parole violation in January of 2006 and had not been indicted on the federal offense until October of 2006. A. 51. Mr. Coons then pled to the federal violation in December of 2006. The PSR did not issue until April 2007. Sentencing was not held until May 2007. Mr. Coons had been incarcerated for 16 months. A. 51-54. Counsel summarized the sentencing departure issues for the judge related to the amount of time served in state custody for the violation and the delay would warrant a sentence in the range of 11 to 14 months. A. 64.

Counsel sought the District Court's intention upon how the sentence was going to run. A. 60.[3] The District Court sought input from the Government. A. 61. The Government explained and eventually agreed that Court could give the defendant credit for the time served since his arrest. A. 62-63. The parties also agreed that the conduct forming the basis for the federal charge was also the basis

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[2] At the time of the federal sentencing the state parole revocation proceeding has not been held. Mr. Coons was being held on the violation warrant in state custody. *PSR p. 11-12, ¶ 38*

[3] A brief recess was taken for counsel to further consult with Mr. Coons because the late submission of the Government's sentencing memorandum had raised some questions. A. 57.

for the parole violation. A. 63.

Statements at Sentencing

The District Court Judge addressed defense counsel's sentencing argument related to 5G1.3(b) and (c) by questioning whether he had discretion to do what counsel was asking. A. 64. The District Court hesitated and expressed its opinions that it did not have the authority to depart in the way that counsel was asking. A. 64.

Upon imposing sentence, the District Court Judge found that the total offense level was 12, the criminal history category was V and the sentencing range was 27 to 33 months. A. 70. The Court impose d a sentence of 27 months to be served concurrently with any other sentence. A. 71.

Judge Kahn further expressed that he believed his sentence would to begin to be counted that day. A. 74. Judge Kahn made no mention of the specific basis for his sentence and making it concurrent. At one point he indicated it was concurrent and later indicated that the sentence started from that day of federal sentencing. A.71, 74

Counsel sought further clarification:

MR. PRIMOMO: The sentence was a 27 month sentence to run concurrent, and based on basic, general sentencing law, that sentence begins — your intent is that the sentence begins to run

today, is that correct?

THE COURT: That's usually standard. I think that's when it begins, yeah.

MR. PRIMOMO: Okay, so I mean with regard to my position that you are not adjusting the time to reflect from October?

THE COURT: I did accept that, just for the record.

MR. PRIMOMO: Under the guidelines, are you applying which section under 5G1.3 with regards to implementing the total sentence of imprisonment?

THE COURT: You want me to explain the law to you now?

MR. PRIMOMO: No, I just want to know which —

THE COURT: You have full rights to appeal anything you want. I'm not going to explain how you should go about it. My sentence speaks for itself.

A. 74-75.

Mr. Coons is scheduled to be released in December of 2007 according to the Bureau of Prisons web site. There is no written statement related to the type of sentence be served and how it was formulated. A. 77-82, *Statement of Reasons. pp. 1-4.*[4]

[4] The Statement of Reasons is submitted under separate cover and seal with the PSR because it is not for public disclosure.

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Summary of the Argument

The District Court mistook its authority to reduce the sentence based upon the amount of time Mr. Coons' had served in state custody on conduct that was the basis for both state and federal action. The District Court had a number of legally recognized bases upon which to depart and expressed its belief that there was no authority to do so.

The District Court failed to rule on whether the parole violation was taken into account when formulating the sentence for the federal offense even though, the original offense conduct had increased the total offense level and the parties had agreed that the conduct was included in both offenses.

Argument

If a district court has declined to depart based upon the mistaken belief that it lacked authority to depart, its decision is appealable. United States v. Ekhator, 17 F.3d 53, 56 (2d Cir. 1994). Where a District Court mistakenly believes that it lacks the authority to exercise discretion or the record is ambiguous at to the court's understanding of its authority, the case should be remanded for resentencing. *See* United States v. Genao, 343 F.3d 578, 586-87 (2d Cir. 2003). United States v. Ventrilla, 233 F.3d 166, 169 (2d Cir. 2000); United States v. Thorpe, 191 F.3d 339, 342-43 (2d Cir.1999) (collecting cases).

Standard of Review

A district court's sentencing determination is reviewed for reasonableness. Rita v. United States, __ U.S. __, 127 S.Ct. 2456, 2459, 168 L.Ed.2d 203 (2007). This recent Supreme Court decision also supports the previous findings that the review for reasonableness includes not only an examination of the length of sentence but also the process at which the sentence was arrived at both substantively and procedurally. Rita, ___ U.S. ___, 127 S. Ct. at 2468-69. United States v. Rattoballi, 452 F.3d 127, 133 (2d Cir. 2006); United States v. Fernandez, 443 F.3d 19, 26 (2d Cir. 2006). A challenge to the reasonableness of sentence also requires the Circuit to "focus ... on the sentencing court's compliance with its

statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a)." United States v. Canova, 412 F.3d 331, 350 (2d Cir. 2005).

POINT I

MR. COONS' S SENTENCE MUST BE VACATED BECAUSE THE DISTRICT COURT MISTAKENLY BELIEVED IT LACKED AUTHORITY TO DEPART FROM THE ADVISORY GUIDELINES UNDER U.S.S.G. § 5G1.3(b) or (c) 18 U.S.C. § 3553(a).

In the present case, Mr. Coons was arrested on a parol warrant and placed in custody at the Albany County Correctional Facility. The federal indictment was handed down nine months later. A. 8-9. Over the next sixteen months he was maintained in the custody of Albany County except when he appeared in federal district court.

Counsel for Mr. Coons argued that the conduct that formed the basis for the period of incarceration that had not been credited at the time of sentencing was also the basis for the federal charge and as a result should be considered as for an amount of reduction in the sentence. In addition, counsel discussed the amount of time that the Government had taken to pursue the federal case against Mr. Coons. Although counsel admitted to having not pushed the issue with the Government, the length of time still represented an irrational delay given the facts forming the basis for the charge were known to law enforcement and the federal authorities

within a short time of the arrest for the parole violation.

A. *The District Court Mistakenly Thought It Lacked Authority to Grant the Relief Requested by Mr. Coons.*

Upon addressing the sentencing arguments raised by counsel the remarks by the District Court indicated a belief that it did not have the authority to depart under U.S.S.G. § 5G1.3. The District Court questioned if it had the discretion to depart in the way the counsel was asking and then stated that it was unsure. A. 64. Further, the District Court did not address the fact that the pursuit of the federal case had taken an unreasonable amount of time, during which Mr. Coons remained in state custody and was unsure as to when and how the amount of time he had spent incarceration would be credited.

Upon declining to depart the district court believed that is had no power to depart. That belief was erroneous. First, a reduction of sentence as a departure under a policy recommendation in U.S.S.G § 5G1.3. Second, a reduction in sentence under Second Circuit precedent. Third, a reduction in sentence based upon consideration of 18 U.S.C. § 3553(a) and the parsimony clause.

All of defense counsel's arguments: the fortuitousness of dual prosecutions, the delay in prosecution, or the nature of the case, was an authorized basis for departure. *See* U.S.S.G. § 5G1.3 (c)(Allowing for a departure for which would

reflect a reasonable amount of punishment had the charges been brought and sentenced together). *See also* United States v. Montez-Gaviria, 163 F.3d 697, 702 (2d Cir. 1998)(A delay in prosecuting a case resulting from the Government's delay in transferring a defendant into federal custody may warrant a downward departure.). *Accord* United States v. Brennan, 468 F.Supp.2d 400, 406 (E.D.N.Y. 2007) (Recognizing that the overlap of federal and state laws resulting in dual prosecution exacerbate the disparity between state and federal sentences and may be taken into account when sentencing)(citations omitted).

Under the section 5G1.3 of the federal sentencing guidelines the District Court had the discretion to take into account the 16 months imprisonment Mr. Coons had served for conduct that was charged as an offense in state court, but not yet prosecuted as the basis for a parole violation. *PSR, p. 12, ¶ 38 and p. 13, ¶ 45.* That conduct, the possession of a firearm was also the basis for the current federal charge.

The offense for which Mr. Coons' was incarcerated was a violation of state parole and upon pending possession of a weapon charges in state court. Arguably the conduct was relevant to the federal offense. Further, the conduct, committing the additional criminal conduct resulted in an offense level increase because two levels were added for the offense having been committed while Mr. Coons' was

serving another sentence. The intent of section 5G1.3 is not to promote increases in sentences, but rather to allow for leniency.

Under subsection (c), the sentence for the instant offense may be imposed run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment *to achieve a reasonable punishment for the instant offense*. According to the application note in the Commentary in extraordinary cases involving undischarged terms of imprisonment, a court may downwardly depart. U.S.S.G. § 5G1.3, *comment. (n.3). See* Witte v. United States, 515 U.S. 389,404-405 (1995)("§ 5G1.3 operates to mitigate the possibility that the fortuity of two separate prosecutions will grossly increase a defendant's sentence.") .

The District Court had the discretion under Section 5G1.3(c) to reduce the sentence for the amount of time served in state custody prior to the adjudication of the federal offense. Under the Guidelines and Second Circuit case law the district court has discretion to impose a concurrent, partially concurrent, or consecutive sentence, with an adjustment for time served in state custody if the case is extraordinary. U.S.S.G. § 5G1.3(c) United States v. Brown, 232 F.3d 44 (2d Cir. 2000); United States v. Fermin, 252 F.3d 102 (2d Cir. 2001).

The record indicates or is at least is ambiguous as to whether the District Court understood the application of 5G1.3 in its entirety to the present sentencing

or its ability to depart under the argument of unreasonable delay and the nature of a case with dual prosecutions. As a result counsel cannot determine what the sentencing decision was based upon and whether section 5G1.3 were accounted for in that sentence.

The District Court also had the ability to depart based upon the dual prosecution of state and federal offenses derived from the same conduct. United States v. Clark, 434 F.3d 684, 687-88 (4th Cir.2006). In addition, a departure has been recognized for a delay in prosecution. Montez-Gaviria, 163 F.3d at 702. Neither of these arguments were addressed by the District Court as a basis for its ability to depart..

Just as in *United States v. Ekhator*, the District Court Judge in the case of Mr. Coons' misapprehended his ability to reduce the advisory guidelines sentence of Mr. Coons' on three separate legal bases. In *Ekhator,* the district court acknowledged the specific arguments submitted in support of a reduction in sentence based upon the defendant-appellant's family circumstances. 17 F.3d 53, 54. The Court then summarized the other materials it had received and considered and finished by saying, "I wish that you had thought about of this before you had decided to bring drugs into the country. I also wish that the law permitted me to do something, but it doesn't." *Id.* at 54.

After presentation of the defendant-appellant's arguments at sentencing, the District Court in the present case reacted similarly. It expressed an uncertainty of its authority and later refused to state its basis for the sentence. Just as in *Ekhator* this appeal requires a remand to insure that it was correctly appreciating the legal bases upon which the sentence was calculated and imposed. A. 64, 74-75.

Mr. Coons is entitled to a remand for review of the sentence. *See* Montez-Gaviria, 163 F.3d at 701. The extent that of the district's courts confusion over its ability to adjust Mr. Coons sentence for the amount of time spent in state custody prior under 5G1.3 or depart impacted its sentencing calculus.

In *Montez-Gaviria*, the District Court mistakenly believed that it could designate when a sentence could begin. 163 F.3d at 699-701 However that power is held by the Bureau of Prisons. This mistaken belief was one of the reasons the sentence was vacated and remanded. It is also a belief that is shared by the District Court in the present case. A. 74.

The District Court in *Montez-Gaviria* the defendant had asserted that the loss of credit for the uncredited time was an additional reason to consider departing down more than one level. The Government in response suggested a "sentencing credit could be given" to adjust the sentence for the time served. The Circuit found that the record on appeal did not support a finding that the District Court would

have given the same sentence had it not considered the "credit". *Id. at* 703.

The mistake of the District Court Judge in failing to consider all the sentencing factors under section 3553(a) and not just the applicable sentence range led to an unreasonable sentence. "[W]here the record indicates misunderstanding by the district court as to the statutory requirements and the sentencing range or ranges that are arguably applicable, or *a misperception about their relevance*, we may conclude that the requisite consideration has not occurred." *See* United States v. Toohey, 448 F.3d 542, 545 (2d Cir. 2006)(Comparing the differences in the record with *United States v. Fernandez, 443 F.3d 19 (2d Cir. 2006)* for finding the sentence unreasonable without the necessary consideration and remanding)(emphasis in original).

In *Fernandez*, the Second Circuit reiterated the requirements for sentencing that were established in *United States v. Crosby*. 443 F.3d at 26-27. To fulfill the requirements, the District Court Judge must calculate the relevant guidelines range, *including any applicable departure*; must consider the calculated range, *along with other § 3553(a) factors*; and must impose a reasonable sentence. *See* Fernandez, 443 F.3d at 26-27 (Review of a sentence involves the consideration of the procedure employed in arriving at the sentence)(emphasis added). *See also* United States v. Talley, 431 F.3d 784, 785, 788 (11th Cir. 2005)(Sentences

imposed after *United States v. Booker* are reviewed for reasonableness in light of the § 3553(a) factors and whether the sentence fails to achieve the purposes of sentencing as stated therein).

The ultimate inquiry in the review of any sentence post-*Booker*, is whether the sentence was "reasonable." The touchstone of "reasonableness" is whether the record as a whole reflects rational and meaningful consideration of the factors enumerated in 18 U.S.C. § 3553(a). United States v. Grier, 439 F.3d 548, 573 (3d Cir. 2006). It must be clear from the record that the district court understood and reasonably discharged its obligation to take all of the relevant factors into account in imposing a final sentence. Grier, 439 F.3d at 573 (Statement by the district court that the sentence was reasonable in light of consideration of 3553(a) was insufficient because it lacked record for appellate review, failed to disclose meaningful consideration of statutory factors, in the exercise of independent judgment by weighing the factors and arriving at a sentence).

B. *The Sentencing Remarks Create Confusion about the Basis for the Sentence.*

At the very least upon this record, it is difficult to discern whether the court's refusal to depart was a result of its discretion or because of a perceived but mistaken lack of authority. Ekhator, 17 F.3d at 55. The confusion in the record

also forms the basis for remand. *Id.*

While in most sentencing appeals "a reviewing court is entitled to assume that the sentencing judge understood all the available sentencing options," it sometimes occurs that "the judge's sentencing remarks create ambiguity as to whether the judge correctly understood an available option." United States v. Rivers, 50 F.3d 1126, 1131-32 (2d Cir.1995). In such a circumstance, the Second Circuit hast "deem[ed] it prudent to remand for clarification." *Id.* at 1132. In the present case just as in *Montez-Gaviria,* the district court believed that it lacked authority to make a downward departure under the Sentencing Guidelines which was wrong in law. In such cases; and "[w]hen the record is ambiguous as to whether a district court has allowed a mistake of law to affect its sentencing decision, this Circuit has regularly remanded to allow the court to reconsider its decision in light of our correction of the mistake."163 F.3d 697, 703 (2d Cir. 1998).

A remand may be necessary when the district court's sentencing remarks indicate a mistaken belief that it lacked the power to make a downward departure. United States v. Thorpe, 191 F.3d 339, 342-43 (2d Cir. 1999). *See, e.g.,* Ekhator, 17 F.3d at 55 ("If in declining to depart the district court stated a belief that it had no power to depart, and if that belief was erroneous, we vacate the sentence and

remand for further proceedings within the proper legal framework. Further, if we are unable to discern whether the district court's refusal to depart resulted from the exercise of its discretion or instead from a perceived, but mistaken, lack of authority, we remand to the district court for resentencing.") (citations omitted); United States v. Ogbondah, 16 F.3d 498, 501 (2d Cir. 1994) (Considering whether the district court understood its authority to depart downward on this ground and finding the record ambiguous requiring remand to the district court to determine whether it understood the full scope of its authority.) (citation omitted).

Upon vacating and remanding in *Thorpe*, this Circuit reminded that by remanding to afford the District Judge an opportunity to clarify the bases of his sentencing decisions, there is no intention to disrespect to the able and conscientious District Judge but instead an avoidance of the risk that the sentencing judge did not fully appreciate his options. Thorpe, 191 F.3d at 343 (citations and quotations omitted). Further, this Court recognized this action as a "particularly important safeguard when what is really at risk is an individual's liberty." *Id.*

Conclusion

Remand is necessary because the rationale by which a district court reaches a final sentence is important to furthering the purposes of sentence and respect for

the law. "A clear record of the district court's reasoning offers the defendant, the government, the victim, and the public a window into the decision-making process and an explanation of the purposes the sentence is intended to serve. It promotes respect for the adjudicative process, by demonstrating the serious reflection and deliberation that underlies each criminal sentence, and allows for effective appellate oversight." *See* Grier, 439 F.3d at 573-74 (Vacating sentence and remanding for the district court to explain its sentence with reference to the factors of 18 U.S.C. § 3553(a)).

WHEREFORE, the Defendant-Appellant, Shawn Coons, respectfully requests remand for resentencing.

DATED: September 6, 2007

Respectfully submitted,

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GENE V. PRIMOMO
Assistant Federal Defender
Federal Defender Office for the NDNY
39 North Pearl St., 5th Floor
Albany, NY 12207
Telephone: 518-436-1850
Facsimile: 518-436-1780

CERTIFICATE OF COMPLIANCE

Pursuant to 2ND CIR. R. 32 (a)(7), undersigned counsel certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32 (a)(7).

1. Exclusive of the portions exempted by 2ND CIR. R. 32, this brief contains 3962 words.

2. This brief has been prepared in proportionally spaced typeface using Corel WordPerfect 8.0 software in Times New Roman 14 point font in text and Times New Roman 12 point font in footnotes.

3. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32 (a)(7), may result in the Court's striking this brief and imposing sanctions against the person using the brief.

____

Molly K. Corbett
Research and Writing Specialist