IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

DOCKET NO. 06-2343-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

MAURICE YOUMANS,

Appellant.

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

BRIEF FOR DEFENDANT-APPELLANT
MAURICE YOUMANS

JURISDICTIONAL STATEMENT

This is an appeal from a final sentence rendered in a criminal case in the United States District Court for the District of Connecticut (Droney, J.) on April 27, 2006. Jurisdiction of this action was in the District Court pursuant to 18 U.S.C. § 3231. A timely notice of appeal was filed pursuant to Federal Rule of Appellate Procedure 4(b) on May 10, 2006. This Court's jurisdiction is invoked under 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Mr. Maurice Youmans was charged in the United States District Court for the District of

Connecticut on May 3, 2005, in a two-count indictment with (count 1) possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1) and (count 2) possession of ammunition by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). (J.A. I at 9). Mr. Youmans was arraigned on May 19, 2005, and promptly pled guilty to count 1 on June 14, 2005. The government agreed that count 2, which was superfluous to count 1 for sentencing purposes, would be dismissed at the time of sentencing. (J.A. I at 12).

At the time of the guilty plea the court below ordered the preparation of a presentence report pursuant to 18 U.S.C. § 3552(a) and, in conjunction therewith, a psychological evaluation in aid of sentencing pursuant to 18 U.S.C. § 3552(c) by Madelon Baranoski, Ph.D., of the Connecticut Mental Health Center, Law & Psychiatry Division. (J.A. I at 20). The presentence report along with Dr. Baranoski's report were prepared and submitted. (J.A. II). Mr. Youmans' advisory guidelines imprisonment range was 92 to 115 months. Sentencing memoranda were filed by the parties. (J.A. I at 22, 26 and 30). Mr. Youmans sought, and the government opposed, a sentence below the range suggested by the advisory guidelines under the circumstances of his case and on the strength of the findings in the court-ordered psychological evaluation of mental and emotional illness which contributed to the offense conduct. On April 27, 2006, the court below, without meaningful explanation, rejected his request of a sentence below his advisory guidelines imprisonment range and instead sentenced Mr. Youmans to the low end of the advisory guidelines range, 92 months, followed by three years of supervised release.

QUESTION PRESENTED

Whether Mr. Youmans' sentence of 92 months of imprisonment should be vacated as unreasonable and remanded for re-sentencing because (1) the sentencing court failed to explain its

reason for rejecting a legally and factually compelling argument for a sentence lower than the prescribed Guidelines range and/or (2) the court considered a sentence within the Guidelines imprisonment range as a heavily presumptive sentence as opposed to a mere starting point for analysis and as a consequence imposed an unduly harsh punishment under the totality of the circumstances.

STANDARD OF REVIEW

In reviewing a sentence provided to a defendant by a district court, an appellate court must determine whether or not the sentence is reasonable under 18 U.S.C. § 3553. United States v. Booker, 543 U.S. 220, 261 (2005). Appellate review of a sentence for reasonableness "is akin to review for abuse of discretion." United States v. Fernandez, 443 F.3d 19, 26-28 (2d Cir. 2006). This Court, "examine[s] the record as a whole to determine whether a sentence is reasonable in a specific case." Id. at 28. This Court has expressly stated that it "do[es] *not* hold that a Guidelines sentence, without more, is 'presumptively' reasonable." Id. (emphasis in original). "In making discretionary judgments, a district court abuses its discretion when a relevant factor deserving of significant weight is overlooked . . . or when the court considers the appropriate mix of factors, but commits a palpable error of judgment in calibrating the decisional scales." United States v. Roberts, 978 F.2d 17, 21 (1st Cir. 1992).

STATEMENT OF FACTS

Maurice Youmans was born from the unmarried relationship of Pamela Horton and Arthur Cosgrove in a housing project in New Haven, Connecticut, on February 21, 1978. (J.A. II at 10; 34). Arthur Cosgrove, although remaining in the New Haven area (specifically Woodbridge), never visited Maurice while he was growing up and never provided any support, financial or otherwise.

(J.A. II at 10; 34). Pamela Horton married Alfred Youmans and they gave Alfred's last name to Maurice. (J.A. II at 10; 34). The housing project where they lived was violent and filled with drug abusers and dealers. (J.A. II at 35). Pamela was a drug addict and an alcoholic. (J.A. II at 35). Alfred physically abused Pamela in Maurice's presence. (J.A. II at 35). As a young boy, Maurice frequently tried to stand up for Pamela and on occasion took her beatings by standing in the way of Alfred's blows. (J.A. II at 35). On one such occasion Maurice sought to ward off Alfred's attack by holding a baseball bat to guard his mother. (J.A. II at 35). Alfred grabbed the baseball bat and chased Maurice, who jumped off a balcony to the concrete below and broke his ankle. (J.A. II at 35). Alfred finally separated from Pamela and left. (J.A. II at 35).

Pamela's post-Alfred household soon filled with adults who came to get high on drugs with Pamela. (J.A. II at 35). Maurice received numerous beatings from Pamela and was generally neglected. (J.A. II at 35). Hospital and other records confirm that as a young child Maurice at times was locked out of his house and had to sleep under the porch or in a parking garage. (J.A. II at 35). Maurice later described the beatings by his mother as "the worst" because he felt rejected by her and "alone in the world because she hated me." (J.A. II at 35). Apart from the frequent beatings and outright abandonment, Pamela was often unavailable to care for Maurice because she was frequently incapacitated by drugs and alcohol. (J.A. II at 35). Maurice often went hungry and occasionally had to search garbage bins for discarded food to eat. (J.A. II at 35).

At the tender age of eight Maurice first tried marijuana that was left burning by his mother when she passed out. (J.A. II at 35). He had learned by then that when Pamela drank alcohol she would turn mean and beat him, but that when she smoked marijuana she laughed and went to sleep. (J.A. II at 35). At first he did not like the feeling he got from smoking marijuana but then he added

alcohol and liked it. (J.A. II at 35). By the time he was ten, Maurice began to drink enough to get intoxicated. (J.A. II at 35).

On several occasions Pamela spent all her money on drugs and alcohol and, as a consequence, they got evicted and would stay in shelters or abandoned buildings. (J.A. II at 35). Even when they had an apartment in the projects, Pamela spent most of her money on drugs and alcohol, such that they never had furniture or adequate clothing. (J.A. II at 35). At age eleven, Maurice was placed in foster care on one occasion when Pamela was evicted and arrested. (J.A. II at 35). At age twelve, Maurice was reunited with Pamela, who had a new boyfriend who physically abused Maurice. (J.A. II at 36). Pamela's brother – Maurice's uncle – briefly agreed to take Maurice when he was twelve. (J.A. II at 36). Although the uncle used drugs and alcohol, he did so far less than Pamela and he was kind to Maurice. (J.A. II at 36). The brief time that he spent with his uncle at age twelve was the first time that he lived with an adult who was kind to him and did not beat him. (J.A. II at 36). That respite lasted four months. (J.A. II at 36).

When Maurice was 13 his uncle sent him back to Pamela. (J.A. II at 36). Maurice began drinking heavily, the fighting at home increased and one day, after yet another beating by his mother, Maurice took a shotgun that belonged to his mother's boyfriend and shot it into the air. (J.A. II at 36). He was arrested and taken to juvenile court, which adjudicated him as being in "A Family With Service Needs" and placed him in the State Receiving Home at Warehouse Point, Connecticut. (J.A. II at 36). Maurice was sexually abused by two older boys at the Receiving Home (Maurice has "blocked out" the memory of that incident). (J.A. II at 36). After the sexual assault, Maurice was afraid to go to sleep and, after five months at the Receiving Home, he attempted suicide by hanging. (J.A. II at 36). Maurice was transferred to the psychiatric unit of Mount Sinai Hospital and then to

Elmcrest Hospital, where he was diagnosed with Post Traumatic Stress Disorder,[1] Major Depression, Conduct Disorder, Attention Deficit Hyperactivity Disorder, Bipolar Disorder and alcohol and polysubstance abuse. (J.A. II at 36). Hospital records confirmed an abusive home environment and disclosed that Pamela never came to the hospital as requested to provide information or to participate in counseling sessions. (J.A. II at 36). Maurice was treated with antipsychotic and mood stabilizing medications and discharged to long-term placement at Riverview Hospital in Middletown, Connecticut, where he stayed for six months before being sent back to the State Receiving Home. (J.A. II at 36). He showed improvement at Riverview Hospital but upon his return to the State Receiving Home his medication and therapy were discontinued and he began to deteriorate. (J.A. II at 36). Three months later he was transferred to Alto Bellows Therapeutic School for two months and then to the Hamden Children's Center. (J.A. II at 36). Pamela finally showed up to participate in family therapy, but she was intoxicated so the sessions were terminated. (J.A. II at 36).

Maurice left the Hamden Children's center to go back to his mother. (J.A. II at 36). Pamela began using him to buy crack and alcohol for her. (J.A. II at 36). At age 15 he was arrested for buying crack and sent to Long Lane School, a juvenile detention facility, where he again attempted to commit suicide. (J.A. II at 36). Since then, Maurice's only psychiatric treatment was through the Connecticut Department of Correction ("DOC") during periods of incarceration. (J.A. II at 36).

The treatment Maurice Youmans received from the DOC was minimal. In 1996, at age 17, Maurice was convicted of sale of narcotics and sentenced to 18 months, which he served at Manson Youth, a prison in Connecticut for young adult offenders, where he again attempted to commit

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[1] Post Traumatic Stress Disorder ("PTSD") is an anxiety disorder that can develop after exposure to extremely traumatic stressors such as being beaten or raped. See Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision ("DSM-IV-TR") § 309.81.

suicide. (J.A. II at 38). In 1998, at age 19, he was convicted of carrying a dangerous weapon – a baseball bat – and sentenced to probation. (J.A. II at 7). In 1999, at age 19, he was convicted of sale of narcotics and sentenced to 30 months in prison. (J.A. II at 8). In 1999, at age 20, he was additionally convicted and sentenced to 90 days for injury to property. (J.A. II at 9). In 2002, at age 23, he was convicted of second degree threatening and sentenced to one year. (J.A. II at 9). DOC records from that time frame reflect three suicide attempts and "treatment" by placement in segregation and administration of anti-depressants. (J.A. II at 38).

On January 9, 2005, Maurice Youmans was living with a girlfriend, Yvonne Wright, at her mother's apartment in New Haven. (J.A. II at 4). Yvonne's mother called the New Haven Police to complain that Maurice and Yvonne had taken over her bedroom and would not allow her to enter except to retrieve clothing. (J.A. II at 4-5). Police responded by accompanying Yvonne's mother to the bedroom, where they found Yvonne, Maurice and, behind a dresser, a firearm and ammunition. (J.A. II at 5). Maurice told the officers that the gun was his and that he had it for protection. (J.A. II at 5). He was taken into custody and charged with carrying a firearm without a permit and breach of peace. (J.A. II at 5). In March of 2005, Maurice was offered a sentence of four years of incarceration followed by three years of probation if he were to plead guilty. (J.A. at 22). Maurice, despondent that once again he would get no help or treatment for his psychological and emotional problems from the DOC while serving such a sentence, attempted suicide by hanging himself in the courthouse lockup. (J.A. at 22; J.A. II at 39). He lost consciousness and was rushed to Yale New Haven Hospital, where he was revived. (J.A. II at 38-39). Then the federal government stepped in and took over.

Maurice Youmans was charged on May 3, 2005, in a two-count indictment with (count 1)

possession of a firearm by a convicted felon on January 9, 2005, in violation of 18 U.S.C. § 922(g)(1) and (count 2) possession of ammunition by a convicted felon on January 9, 2005, in violation of 18 U.S.C. § 922(g)(1). (J.A. I at 9). He was arraigned on May 19, 2005, and promptly pled guilty to count 1 on June 14, 2005. (J.A. at 3-4). The court below ordered the preparation of a presentence report and a psychological evaluation in aid of sentencing pursuant to 18 U.S.C. § 3552(c) by Madelon Baranoski, Ph.D., of the Connecticut Mental Health Center, Law & Psychiatry Division. (J.A. I at 20). Dr. Baranoski prepared and submitted a report which outlined and addressed Maurice's mental and emotional illnesses, including post traumatic stress disorder ("PTSD"), bipolar disorder and chronic depression. (J.A. II at 30).

In answer to the court's question of "How Mr. Youmans' mental disease or defect may have affected his offense conduct in this case, ... and Mr. Youmans' prospects for rehabilitation through counseling and treatment," Dr. Baranoski wrote:

> <u>Mr. Youmans has a long criminal history but no violent offenses</u>. He is a young man who was reared in chaos and exposed to physical abuse, substances, alcohol, and illegal activity as early as eight years of age. <u>The PTSD and his chronic depression contributed to his choice to arm himself</u>. <u>A component of PTSD is a pervasive sense of danger against which Mr. Youmans feels hopeless and overwhelmed</u>. <u>The gun relieved some anxiety and decreased his sense of helplessness</u>. <u>In his analysis he took an active step toward making his world safe</u>. <u>His bipolar illness also contributed to his choosing to have a gun</u>. <u>His mood swings and irritability along with suicide ideation created a mental disorganization and urgency</u>. He also described his plan that if arrested, he had plans to point the gun and provoke the officer to shoot him. He described a 'suicide by cop' plan 'to end my suffering once and for all.'
>
> * * *
>
> <u>He has a number of strengths that make him a good candidate for rehabilitation</u>.
>
> First, he is a young man who <u>does not have a history of treatment failure</u>. Indeed, after Riverview Hospital when he was 13 through 15 years of age, he has never had treatment either for his substance abuse or his psychiatric difficulty. His only

> psychiatric care has been while he was incarcerated. He has a ninth grade education and has had no further education.
>
> Mr. Youmans has a strong desire to be connected to others. He seeks out relationships to fill a void and meet strong dependency needs. This desire for connection will enable him to engage in productive therapy. In a stable therapeutic relationship he can develop self-confidence and define future goals and a direction for himself.
>
> Mr. Youmans has the intellectual capacity to learn. His attention deficits which are in part related to his extensive use of PCP and formaldehyde, can be mitigated through a structured learning program, use of computers, and a sustained exposure to class-work and basic learning skills.
>
> Mr. Youmans is immature; he has not completed the usual landmark activities that enable an adolescent to successfully transition to adulthood. This immaturity means that he is susceptible to his environment and will develop accordingly. If he is exposed to structured programming, he can be redirected toward appropriate goals.
>
> To his credit, Mr. Youmans recognizes that 'something is very wrong.' He has the insight that his life is 'falling apart' and he has expressed the desire to change. This desire makes him an excellent candidate for rehabilitation, if the program is an intensive, supportive, and structured intervention.

(J.A. II at 33) (emphasis added).

The presentence report ("PSR") provided the Sentencing Guidelines analysis: base offense level of 24 for possessing a firearm subsequent to two controlled substance convictions, 2 levels added because the firearm was missing a serial number, and 3 levels subtracted for acceptance of responsibility, for a total offense level of 23. (J.A. II at 6). At criminal history category VI, Maurice Youmans faced an advisory imprisonment range of 92 to 115 months. (J.A. II at 13).

Mr. Youmans filed a memorandum in aid of sentencing requesting a sentence of incarceration below the range suggested by the advisory Guidelines. (J.A. I at 22). The memorandum referenced a letter written to the District Judge from the undersigned counsel which explained the background to Mr. Youmans' decision to plead guilty:

> Mr. Youmans was arrested in New Haven on January 9, 2005, upon being found to possess the firearm in question. Mr. Youmans provided a lengthy confession to the New Haven police but thereafter refused to plead guilty to the ensuing state charges because, he states, to have done so would not, he believes, have led to appropriate treatment of his long-standing mental illness. Mr. Youmans has informed me that he had intended to commit suicide with the firearm that the police found and would have done so but for his arrest. On March 29, 2005, he tried to commit suicide in the state courthouse lockup by hanging himself. He has, since that time, been held at Garner Correctional Institution, which is where the state currently houses its mentally ill inmates. He has rejected an offer of seven years suspended after four by the state upon a guilty plea there to the firearms charge and, as a consequence, now faces a federal sentencing guidelines incarceration range of seven years and eight months to nine years and seven months to serve. He is anxious to plead guilty to the federal charge, even though the guidelines apparently double his exposure to incarceration from what the state had offered, because of his belief that he will get superior mental health treatment in the federal system.

In the sentencing memorandum, Mr. Youmans cited to United States v. Brady, 417 F.3d 326 (2d Cir. 2005), for several points pertinent to his case:

1. That "there are indeed certain situations where a person's mental and emotional conditions may be taken into account in granting a downward departure" from the guidelines under Section 5H1.3 (irrespective of whether the defendant suffered "diminished capacity" which would support a departure under Section 5K2.13) (Id. at 333);
2. That the determination of whether childhood abuse was "extraordinary" is to be made on an individualized basis in which the abuse need not be "shocking and tragic" but rather must be substantial and significant in causing mental and emotional difficulties (Id. at 333 - 34);
3. That to support a downward departure the defendant's history of abuse must have "contributed" substantially to his commission of the offense of conviction (Id. at 334); and
4. That where a defendant's mental and emotional condition borne of a history of abuse has not contributed sufficiently to the offense conduct to support a downward departure, the

sentencing court may impose a lower non-guidelines sentence in light of the mental and emotional illness as long as the sentence is reasonable in light of the 18 U.S.C. § 3553(a) factors. (Id. at 336).

(J.A. I at 24).

Sentencing occurred on April 27, 2006. The following colloquy occurred:

> [MR. WEINBERGER]: I would submit, consistent with my sentencing memorandum, that he as an individual is outside the norm. This is not the ordinary person who comes before the court broadly categorized as a felon in possession of a firearm with a particular record which calls for a particular sentence. I believe that his history here does clearly connect, as I argued in my sentencing memos, to the possession of the firearm. The government argues that there's no connecting piece between the abuse and possession of the firearm. And my response is, the connecting piece is the post-traumatic stress disorder. That the abuse is the trauma which caused the post-traumatic stress disorder, and the post-traumatic stress disorder is connected by Dr. Baranoski to the possession of the firearm. And the reason that's significant is that if he can obtain meaningful counseling and be on proper medication to deal with the post-traumatic stress disorder, then his likelihood of re-offending goes way down. And because of that causal relationship, because of that linkage, I believe this is an appropriate case for a departure from the guidelines. And I would argue furthermore that, as I said in my memo, if the Court believes, after interpreting the Brady case, that perhaps a stronger connection needs to exist between the abuse and the commission of the offense, it's nevertheless reasonable to impose this sentence as a non-guideline sentence when the Court does the Title 18 section 3553(a) factors, that it falls into place that a sentence of more in the neighborhood of, I would argue, five years is sufficient to stabilize him, get him the help he needs, and get him out while he's still young enough . . . that he can have a realistic shot at achieving his dream and his laudable goals. * * *
>
> THE COURT: Let me just ask you a question. I'll let you talk in just a second, Mr. Youmans. I certainly want to hear from you. The aspect of the departure basis that his situation contributed substantially to the offense, there's no question that he had a terrible childhood, I know that, and suffers from some very serious emotional, psychological, psychiatric problems that need to be treated as well. But is it your view that the possession of the loaded weapon was a product of the PTSD in the sense of self-protection or self-destruction?
>
> MR. WEINBERGER: Your Honor, he's a complex person. In his afflictions, his emotional difficulties are complex. Dr. Baranoski connects his desire to have a

> gun to the post-traumatic stress disorder in a way of expressing his feeling comforted and protected from others. At the same time he's very depressed. And borne of that depression, he was at risk of suicide.

(J.A. I at 42 - 44). The Court heard an impassioned plea from Mr. Youmans and then announced its decision to adhere to the Guidelines with no meaningful explanation of why it rejected his argument:

> THE COURT: Now, as to departures from the guidelines, although I recognize I have the authority to depart from the sentencing range on the bases identified by Mr. Weinberger as well as others bases, I choose not to do so as the facts do not warrant a departure here. I've also determined that Mr Youmans should be sentenced within the guidelines range that I have found. I also note for the record, however, I would give him the same sentence were I to impose a non-guideline sentence.

(J.A. I at 55). The only apparent consideration of Mr. Youmans' character and circumstances given to him by the Court below was in its determination of where to sentence him within the prescribed Guidelines imprisonment range. (J.A. I at 55-56).

SUMMARY OF THE ARGUMENT

Maurice Youmans sentence should be vacated and remanded to the district court for two reasons.

First, Mr. Youmans presented factually and legally compelling grounds for a sentence below the prescribed Guidelines range. The court below failed to make any findings pertaining to the factual basis of that argument and gave no reason for rejecting it. Absent an analysis by the sentencing court, with specific factual findings applied not only to the Sentencing Guidelines but also to the factors of 18 U.S.C. § 3553(a), meaningful appellate review of the reasonableness of the sentence in accordance with United States v. Booker, 543 U.S. 220 (2005), is impossible. See United States v. Vonner, 452 F.3d 560 (6th Cir. 2006) (Holding that it is procedurally unreasonable for a sentencing court to fail to explain its reason for rejecting an argument for a sentence lower than the

prescribed Guidelines range); United States v. Cunningham, 429 F.3d 673 (7th Cir. 2005) (same).

Second, to the extent that it is possible to glean the reasoning of the court below from the record, it appears that the court considered a sentence within the Guidelines range as a heavily presumptive sentence as opposed to a mere starting point for analysis. Based on the statutory scheme after Booker's excision of 18 U.S.C. § 3553(b), the Guidelines should be entitled to no greater weight than any of the other factors listed in 18 U.S.C. § 3553(a). See United States v. Zavala, 443 F.3d 1165 (9th Cir. 2006); United States v. Hunt, __F3d.__, 2006 WL 2285715 (11th Cir. Aug. 10, 2006). Given the history and characteristics of Mr. Youmans, in imposing upon him the unduly harsh sentence of 92 months imprisonment the sentencing court below made, in the words of the Court in United States v. Roberts, 978 F.2d 17, 21 (1st Cir. 1992), "a palpable error of judgment in calibrating the decisional scales."

Accordingly, Mr. Youmans' sentence should be vacated and this matter should be remanded to the district court for resentencing.

ARGUMENT

I THE SENTENCING COURT ERRED IN FAILING TO MAKE ADEQUATE FINDINGS ON THE RECORD BY WHICH ITS REASONING IN REJECTING MR. YOUMANS' ARGUMENT FOR A SENTENCE BELOW HIS ADVISORY GUIDELINES CAN BE DETERMINED, THEREBY PRECLUDING MEANINGFUL APPELLATE REVIEW OF THE REASONABLENESS OF THE SENTENCE IMPOSED.

Title 18 U.S.C. § 3553(c) mandates that a court "at the time of sentencing shall state in open court the reasons for imposition of the particular sentence. . . ." A defendant in a criminal case has a statutory right under 18 U.S.C. § 3742 to direct appellate review by this Court of his sentence. In reviewing a sentence imposed by a district court, an appellate court must determine whether or not the sentence is reasonable under 18 U.S.C. § 3553(a). United States v. Booker, 543 U.S. 220, 261 (2005). Absent an analysis by the sentencing court, wherein that court makes specific factual findings and applies those findings not only to the Guidelines but also to the factors of 18 U.S.C. § 3553(a), meaningful appellate review of the reasonableness of a sentence in accordance with Booker is impossible. This Court has previously emphasized the importance of such findings. In United States v. Crosby, 397 F.3d 103 (2d Cir. 2005), this Court expressed the following expectation of sentencing courts post-Booker:

> District judges will, of course, appreciate that whatever they say or write in explaining their reasons for electing to impose a Guidelines sentence or for deciding to impose a non-Guidelines sentence will significantly aid this Court in performing its duty to review the sentence for reasonableness. In this regard, we note that, in the Remedy Opinion, the Supreme Court [in Booker] left unimpaired section 3553(c), which requires a district court to 'state in open court the reasons for its imposition of a particular sentence' and, in subsection 3553(c)(2), to state in writing 'with specificity' the reasons for imposing a sentence outside the calculated Guidelines range.

Id. at 116. The court below failed to make such necessary findings in response to Mr. Youmans'

factually and legally compelling argument for a sentence below his advisory Guidelines range, and thus precluded meaningful appellate review of the reasonableness of the sentence imposed.

As detailed in the Statement of Facts, supra, the court below, in conjunction with the presentence report, ordered a psychological evaluation in aid of sentencing. The psychologist concluded that Mr. Youmans' significantly impaired (but remediable) mental and emotional condition borne of a history of severe abuse and neglect contributed to his offense conduct. In United States v. Brady, 417 F.3d 326 (2d Cir. 2005), which was cited to the court below both in sentencing memoranda and orally at the time of sentencing, this Court held that (1) "there are indeed certain situations where a person's mental and emotional conditions may be taken into account in granting a downward departure" from the Guidelines under Section 5H1.3 (irrespective of whether the defendant suffered "diminished capacity" which would support a departure under Section 5K2.13) and (2) where a defendant's mental and emotional condition borne of a history of abuse has not contributed substantially enough to the offense conduct to support a downward departure, the sentencing court nevertheless has discretion to impose a lower non-guidelines sentence in light of the mental and emotional illness as long as the sentence is reasonable in light of the 18 U.S.C. § 3553(a) factors.

The court below plainly had the authority to depart even if the Guidelines were still mandatory. The United States Sentencing Commission declared regarding the formerly mandatory Guidelines in Chapter One, Part A, subpart 4(b), that,

> The Commission intends the sentencing courts to treat each guideline as carving out a "heartland," a set of typical cases embodying the conduct that each guideline describes. When a court finds an atypical case, one to which a particular guideline linguistically applies but where the conduct significantly differs from the norm, the court may consider whether a departure is warranted.

With that provision in mind, the undersigned counsel argued to the sentencing court as follows:

> I would submit, consistent with my sentencing memorandum, that he as an individual is outside the norm. This is not the ordinary person who comes before the court broadly categorized as a felon in possession of a firearm with a particular record which calls for a particular sentence. I believe that his history [of abuse] here does clearly connect, as I argued in my sentencing memos, to the possession of the firearm.

(J.A. I at 42). The court below had even greater discretion now that the Guidelines are merely advisory. The critical question on appeal is how that discretion was exercised.

Mr. Youmans raised a factually and legally compelling claim for a sentence below the prescribed Guidelines range. Most of the applicable section 3553(a) factors weighed in favor of Mr. Youmans: (1) the nature and circumstances of the offense; (2) the history and characteristics of the offender; (3) the seriousness of the offense; (4) the need to afford adequate deterrence; (5) the need to protect the public from further crimes of the defendant; and (6) the need to provide Mr. Youmans with rehabilitative treatment. The last factor, especially, weighed heavily in favor of a shorter sentence of imprisonment. Title 18 U.S.C. § 3582(a) commands that, when determining whether to impose a sentence of imprisonment and the length of any term of imprisonment to be imposed, a court "shall consider the factors set forth in section 3553(a) to the extent that they are applicable, *recognizing that imprisonment is not an appropriate means of promoting* correction and *rehabilitation*." (emphasis added). The only factor that weighed against Mr. Youmans was the advisory Guidelines range, and that should not have outweighed all of the other factors. In United States v. Crosby, 397 F.3d 103 (2d Cir. 2005), this Court declined to decide "what weight the sentencing judge should normally give to the applicable Guidelines range." Id. at 113. However, as made clear elsewhere in Crosby, that does not mean that a sentencing court need not explain how

it determines that weight or why it was found to outweigh all of the other factors combined.

A sentencing court, in rejecting an argument for a lower sentence than the prescribed Guidelines range based upon mitigating circumstances, must explain its basis for rejecting it. See United States v. Vonner, 452 F.3d 560, 567 (6th Cir. 2006) ("Where a defendant raises a particular argument in seeking a lower sentence [than the prescribed Guidelines range], the record must reflect both that the district judge considered the defendant's argument and that the judge *explained the basis for rejecting it*.") (emphasis added); United States v. Cunningham, 429 F.3d 673 (7th Cir. 2005) (same). See generally, Comment, United States v. Pho: Reasons And Reasonableness In Post-Booker Appellate Review, 115 Yale L.J. 2183 (June 2006). The court below did not make findings of fact, such as whether it found that Mr. Youmans' mental and emotional condition borne of a history of abuse contributed to the offense conduct or whether such contribution was, in the court's view, substantial or minimal, nor did it explain how it weighed the section 3553(a) factors in its decision to reject Mr. Youmans' argument for a lower sentence than the prescribed Guidelines range. Rather than explain how it performed the analysis required by the Supreme Court in Booker and expected by this Court in Crosby, the court below instead ritualistically declared that it had "considered" the 18 U.S.C. § 3553(a) factors. With no real explanation of how those factors bore on its sentencing decision in light of the particular facts and circumstances of Mr. Youmans' case, the court below simply stated:

> Now, as to departures from the guidelines, although I recognize I have the authority to depart from the sentencing range on the bases identified by Mr. Weinberger as well as others bases, I choose not to do so as *the facts do not warrant a departure here.* I've also determined that Mr Youmans should be sentenced within the guidelines range that I have found. I also note for the record, however, *I would give him the same sentence were I to impose a non-guideline sentence*.

(emphasis added). Without an articulation of factual findings and legal analysis supporting the sentence required by Booker and Crosby, a defendant is denied the right of meaningful direct appellate review of his sentence for reasonableness. Accordingly, Mr. Youmans' sentence should be vacated and this matter should be remanded to the district court for resentencing.

II EVEN IF SUFFICIENT FACTUAL FINDINGS HAD BEEN MADE BY THE SENTENCING COURT, MR. YOUMANS' SENTENCE IS UNREASONABLE UNDER THE SENTENCING REFORM ACT AND THE SUPREME COURT'S DECISION IN UNITED STATES V. BOOKER.

Crime and punishment, as Dostoevsky memorably linked those concepts, presents a dilemma in a civilized society: how much punishment is fair and reasonable for a particular person who has committed a particular crime? When Maurice Youmans was first arrested and charged his case was in Connecticut Superior Court. There a sentence of four years of incarceration, followed by three years of probation, was deemed to be fair and reasonable.[2] If Mr. Youmans had received that sentence, he would have served only ***two years*** prior to release (per C.G.S. § 54-125a, assuming good behavior). The District Court determined that a sentence of seven years and eight months of incarceration, followed by three years of supervised release, would be fair and reasonable. Mr. Youmans will have to serve ***six years and eight months*** prior to release (per 18 U.S.C. § 3624(b), assuming good behavior). The determination of the court below regarding the length of time that was "reasonable" for Mr. Youmans to spend in prison was ***333% higher*** than the determination made in state court in the same case. Only two things were different about the case when it came before the District Court (other than the absence of sentence bargaining): (1) the psychological

[2] In Connecticut Superior Court, unlike United States District Court, judges not only participate actively in negotiating non-trial dispositions of criminal cases, they actively engage in sentence bargaining as well. Thus, the offer to Mr. Youmans came from a judicial officer.

evaluation was done after the case came to federal court and (2) the advisory federal Sentencing Guidelines had to be considered. It would be incongruous to suggest that the psychological evaluation aggravated rather than mitigated the assessment of appropriate punishment. Therefore, the only possible aggravating variable was the operation of the advisory Guidelines. The "advice" of the Guidelines would have to be extremely influential to offset the mitigating weight of the psychological evaluation and lead to a 333% increase. As discussed above, it is impossible to discern what weight the court below gave to the various section 3553(a) factors. Apart from the weight each factor may have received as it was placed on the Court's balance, the placement of the fulcrum of the district court's balance is subject to review. Putting a pound on one side of a balance and an ounce on the other does not assure that the side with the pound will prevail if the fulcrum is improperly shifted to that side.

A. In Calibrating The Decisional Scales When Deciding Punishment, A Sentencing Court Must Be Mindful Of The Fact That The Sentencing Guidelines Are Now Subordinate To 18 U.S.C. § 3553(a) And The Other Statutes Related Thereto.

The United States Code is quite explicit about the role of 18 U.S.C. § 3553(a) in sentencing determinations. 18 U.S.C. § 3582(a) specifically states:

> The court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, in determining the length of the term, shall consider the factors set forth in section 3553(a) to the extent they are applicable, recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.

Further, 18 U.S.C. § 3661 provides that:

> No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purposes of imposing an appropriate sentence.

The holding of the Supreme Court in Booker "requires a sentencing court to consider Guidelines ranges . . . but it permits the court to tailor the sentence in light of the other statutory concerns as well, see § 3553(a)." Booker, 543 U.S. at 245. Based on the statutory scheme after Booker's excision of 18 U.S.C. § 3553(b), the remaining provisions of section 3553 and those statutes enumerated above have full effect – that is, they are no longer subordinated to the previous section 3553(b) requirement that a sentencing court must follow the federal sentencing Guidelines over other factors. This Court has expressly stated that it "do[es] *not* hold that a Guidelines sentence, without more, is 'presumptively' reasonable." United States v. Fernandez, 443 F.3d 19, 28 (2d Cir. 2006) (emphasis in original). In the current era, the Guidelines should be the starting point of sentencing analysis but not treated as presumptively reasonable. See United States v. Zavala, 443 F.3d 1165, 1171-72 (9th Cir. 2006) ("Here, the district court gave the Guideline calculation exaggerated weight, treating it as a presumptive sentence from which the court was 'free to depart.' This was error."). In order to calibrate the decisional scales correctly, section 3553(a) must be the focus. In that regard, there is a particular aspect of section 3553(a) that must be borne in mind.

Section 3553(a) mandates: "The court shall impose a sentence sufficient, *but not greater than necessary*, to comply with the purposes ... [of § 3553(a)(2)]." (emphasis added). The sufficient-but-not-greater-than-necessary sentencing mandate is often referred to as the "parsimony provision." The "parsimony provision" is not just another "factor" to be considered along with the others set forth in section 3553(a). Rather, it creates a fundamental over-arching value regarding the exercise of sentencing discretion. The "parsimony provision" should be understood as creating a utilitarian presumption of the lowest punishment necessary to accomplish the goals of sentencing in light of the 3553(a) factors. Hence, when the Guidelines were mandatory, that provision created

a presumption in favor of the low end of the prescribed range, just as a statutory command of "*but not less than necessary*" would have created a presumption of erring on the side of greater punishment and hence, within the Guidelines, the high end of the prescribed range (and the absence of any statutory command would create no presumption either way). See generally United States v. Chartier, 933 F.2d 111, 117 (2d Cir. 1991). Based on the statutory scheme after Booker's excision of 18 U.S.C. § 3553(b), the "parsimony provision" of section 3553(a) has broader application than simply influencing the decision of where to sentence within a mandatory range. Now that the Guidelines are "advisory" and therefore subordinate to 18 U.S.C. § 3553(a) as a whole, the "parsimony provision" should be understood in the broader context of assessing how much punishment is fair and reasonable for a particular person who has committed a particular crime.

B. Maurice Youmans' Sentence Was "Unreasonable" Because The Sentencing Court Made A Palpable Error Of Judgment In Calibrating The Decisional Scales.

Historically, for many years, United States District Judges sentenced *people* who committed crimes (as opposed to sentencing *crimes*). Central to that consideration was the judge's own sense of what was a fair and just sentence under all the circumstances, particularly including the character of the defendant. That historical practice, of course, led to tremendous variations in sentences because individualized factors such as motive varied from offender to offender. Whether a previously deported alien re-entered this country (1) to rejoin and support his children who remained in this country or (2) to rejoin and lead the criminal gang he left behind made a big difference at sentencing. Whether a person stole money (1) to provide a life-saving operation to a family member or (2) to buy a yacht and sail to Tahiti made a big difference at sentencing. Whether a felon (1) (as

in the case at bar) possessed a firearm for a perceived need for self-protection or to commit suicide due to mental illness or (2) got caught carrying a firearm while committing a violent crime made a big difference at sentencing. It was recognized by most participants in the sentencing process – most judges, prosecutors and defense counsel – that such variation was right and proper; that any uniform sentencing policy for any particular crime was an abuse of, or failure to exercise, discretion. Put differently, "unwarranted consistency" was the chief concern of courts in that era. Judge Lumbard addressed that principal in his partial dissent in United States v. Baker, 487 F.2d 360 (2d Cir. 1973):

> As any uniform policy is an abuse of discretion, there can be no doubt of our power to remand for the kind of consideration which it is the duty of a district judge to give in imposing sentence. * * * If, as appears, Judge Wyatt sentenced Baker in accordance with a uniform policy, he failed to exercise fully his discretion when he sentenced Baker by category of crime rather than by Baker's particular situation.

487 F.2d at 362. See also United States v. Schwarz, 500 F.2d 1350, 1354 (2d Cir. 1974) (Moore, J., dissenting) (explaining how appellate courts determine "unwarranted consistency").

The converse of "unwarranted consistency" is "unwarranted disparity." A radical shift in focus from one extreme to the other occurred with the advent of the United States Sentencing Guidelines in 1987. "Unwarranted disparity" became the primary concern of sentencing in the mandatory Guidelines era and any concern about "unwarranted consistency" essentially vanished. Under the command of 18 U.S.C. § 3553(b), *crimes* were punished instead of *people*. See United States v. Merritt, 988 F.2d 1298, 1307-08 (2d. Cir 1993) ("The contrast between th[e] highly detailed categorization of offense conduct and the treatment of the character of the defendant [in the Guidelines] could scarcely be more marked."). The Guidelines generally fail to take into account and generally forbid departures based on a defendant's motive. In the instance of firearms, the Guidelines actually give some limited consideration to motive. U.S.S.G. § 2K2.1(b)(5) contains an

upward adjustment for a defendant who "possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense." However, there is no provision for any downward adjustment for those who possess in self-defense or, as in this case, for one who possesses due to mental or emotional illness. In the case at bar, Maurice Youmans received a two-level upward adjustment under the Guidelines, resulting in an additional year and a quarter in prison at the low end of his Guidelines imprisonment range, because the firearm he possessed happened to be missing a serial number (the fact that he did not remove it is irrelevant under the Guidelines). On the other hand, he received absolutely no mitigating consideration under the Guidelines for the fact that the offense conduct was due to his mental and emotional illness borne of a history of terrible abuse and neglect. Indeed, the Guidelines at section 5H1.3 state that, "[m]ental and emotional conditions are not ordinarily relevant in determining whether a departure is warranted . . . [but] may be relevant in determining the conditions of probation or supervised release."

The Guidelines restriction on consideration of a defendant's mental or emotional condition is more problematic when, as in this case, that mental or emotional condition is remediable with a favorable prognosis for rehabilitation. In that regard, the Guidelines run counter to statutory commands to courts when imposing sentence and, indeed, run counter to Congress' mandate to the Sentencing Commission.

Title 18 U.S.C. § 3582(a) provides that, when determining whether to impose a sentence of imprisonment and the length of any term of imprisonment to be imposed, a court "shall consider the factors set forth in section 3553(a) to the extent that they are applicable, *recognizing that imprisonment is not an appropriate means of promoting* correction and *rehabilitation*." (emphasis

added). That concept was intended to be reinforced by the command of Congress to the Sentencing Commission that,

> [t]he Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant or providing the defendant with needed educational or vocational training, medical care or other correctional treatment.

28 U.S.C. § 994(k). But the Guidelines contain no such "insurance," particularly in Chapter 5, Part H where one would expect to find it. Put simply, the Guidelines clearly and obviously emphasize retribution a/k/a "just punishment" (i.e., punishment which reflects the seriousness of the offense) and virtually eliminate rehabilitation (i.e., corrective treatment) as sentencing factors despite Congressional directives to the contrary. It is, therefore, fallacious to assert that the Guidelines comprehensively integrate the other section 3553(a) factors.

A new era has begun with the Supreme Court's determination in United States v. Booker, 543 U.S. 220 (2005), that 18 U.S.C. § 3553(b) is Constitutionally invalid. In this new era, the "Guidelines" are what their label implies: a guide. Id at 245. The Courts of Appeals have striven in this burgeoning new era to delineate for the benefit of District Courts, "the enhanced scope of a sentencing judge's discretion in the post-Booker world of advisory Guidelines." United States v. Jones, __F.3d__, 2006 WL 2167171 (2d Cir. 2006). This Court recently explained, in the context of reviewing and upholding the sentence of a court that did not adhere to the "advice" of the Guidelines, that,

> Although the sentencing judge is obliged to consider all of the sentencing factors outlined in [18 U.S.C.] section 3553(a), the judge is not prohibited from including in that consideration the judge's own sense of what is a fair and just sentence under all the circumstances. That is the historic role of sentencing judges, and it may continue to be exercised, subject to the reviewing court's ultimate authority to reject any sentence that exceeds the bounds of reasonableness.

Id. This appeal presents an extension of the question resolved in Jones: *Must* a sentencing judge do that which was historically mandated in cases such as United States v. Baker, 487 F.2d 360 (2d Cir. 1973), to avoid "unwarranted consistency," i.e., to consider and articulate his own sense of what is a fair and just sentence under all the circumstances? Is it "unreasonable" if he does not because, failing such consideration, he has not exercised appropriate discretion? The answers to those questions must be "yes." In this new era, avoiding "unwarranted consistency" and "unwarranted disparity" should be equally important considerations. In other words, the fulcrum of analysis must be at the center of the balance in order to derive a fair and just, i.e., "reasonable," result. The fulcrum was clearly not at the center of the balance when the court below decided Mr. Youmans' sentence and therefore that sentence was not "reasonable."

The court below adhered to the Guidelines in precisely the same manner that it approached sentencing pre-Booker. It is apparent from the record that the only real consideration of Mr. Youmans' mental and emotional illness given to him by the Court below was in deciding where to sentence him within the prescribed Guidelines range. (J.A. I at 55-56). It would therefore be illusory to assert that the court below demonstrated the exercise of appropriate discretion simply by concluding in light of the "parsimony provision" that the bottom of the Guidelines range was "sufficient" for Mr. Youmans. In any event, the fact that the court below considered Mr. Youmans' mental and emotional illness in relation to his offense conduct and his prospects for rehabilitation on the narrow issue of where to sentence within the Guidelines range does not suffice to explain why those same considerations were rejected as reasons to sentence below the advisory range. The only reasonable conclusion to be drawn from the record as a whole is that the court below gave the Guideline calculation exaggerated weight, treating it as a heavily presumptive sentence instead of

the starting point of its analysis.

Ninety-two months of imprisonment for Maurice Youmans in this case is unduly harsh and, under the circumstances, "unreasonable." As stated above, an appellate court reviewing a sentence meted out by a district court must determine whether that sentence is "reasonable" under 18 U.S.C. § 3553. Appellate review of a sentence for reasonableness, "is akin to review for abuse of discretion." United States v. Fernandez, 443 F.3d 19, 27 (2d Cir. 2006). "In making discretionary judgments, a district court abuses its discretion when . . . [it] considers the appropriate mix of factors, but commits a palpable error of judgment in calibrating the decisional scales." United States v. Roberts, 978 F.2d 17, 21 (1st Cir. 1992). In the words of the Court in Roberts, the court below made "a palpable error of judgment in calibrating the decisional scales."

CONCLUSION

Maurice Youmans presented factually and legally compelling grounds for a sentence below the prescribed Guidelines range. The court below failed to make any findings pertaining to the factual basis of that argument and gave no reason for rejecting it. Absent an analysis by the sentencing court, with specific factual findings applied not only to the Sentencing Guidelines but also to the factors of 18 U.S.C. § 3553(a), meaningful appellate review of the reasonableness of the sentence is impossible.

Moreover, based on the statutory scheme after Booker's excision of 18 U.S.C. § 3553(b), the Guidelines should be entitled to no greater weight than any of the other factors listed in 18 U.S.C. § 3553(a). To the extent that it is possible to glean the reasoning of the court below from the record, it appears that the court considered a sentence within the Guidelines range as a heavily presumptive sentence as opposed to a mere starting point for analysis.

Accordingly, for either or both of those reasons, Mr. Youmans' sentence should be vacated and this matter should be remanded to the district court for resentencing.

Respectfully submitted,

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Dated: September 18, 2006

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief contains 8,862 words and that it is therefore in compliance with Federal Rules of Appellate Procedure 28 and 32.

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Gary D. Weinberger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that two copies of the foregoing Brief and the Joint Appendix have been mailed to John A. Marrella, Assistant United States Attorney, 157 Church Street, 23rd Fl, New Haven, CT 06510, on this 18 day of September 2006.

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Gary D. Weinberger