

Docket No. **07-1677-cr**

In the
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

BENJAMIN HARRIS,

Defendant-Appellant.

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

Brief on Appeal for Defendant-Appellant

Copies to:
BRENDA SANNES, AUSA
U.S. Attorney's Office
James Hanley Courthouse
P.O. Box 7198, 100 S. Clinton St
Syracuse, NY 13261-7198
(315) 448-0689

Respectfully submitted,
TIMOTHY AUSTIN
Assistant Federal Public Defender
MOLLY CORBETT, *on brief*
39 North Pearl St., 5th Floor
Albany, NY 12207
(518) 436-1850

Mr. Benjamin Harris, *Defendant-Appellant*

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Preliminary Statement

This is an appeal by the Defendant- Appellant, Benjamin Harris (“Mr. Harris”) from a Judgment in a Criminal Case and a sentence imposed after a guilty plea in the District Court of the Northern District of New York before the Honorable Lawrence E. Kahn. The Appellant, Benjamin Harris, pled guilty to an information charging a violation of 18 U.S.C. § 844(i) pursuant to a plea agreement. The information alleged that between February of 1999 and September of 2001 Mr. Harris had used fire to maliciously damage approximately 23 properties in Schenectady and Montgomery counties. A. 8-9.

Mr. Harris entered the plea of guilty on August 30, 2006 pursuant to a plea agreement. On April 11, 2007, Mr. Harris was sentenced to a term of incarceration of 132 months on Count 1 to be served concurrent with a sentence imposed on October 17, 2005 in the District Court for the Southern District of Florida. A. 100. The Judgment in a Criminal Case was entered on April 18, 2007. A timely notice of appeal was filed on April 20, 2007. A. 105.

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 Appellant pled guilty to a violation of 18 U.S.C. § 844(i). 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 April 18, 2007. A notice of appeal was filed on April 20, 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. Harris.

Statement of Issues Presented

- I. Whether the Sentence Imposed Was Substantively Unreasonable When the District Court Based its Increase in Sentence Upon Mr. Harris' Assertion of His Right to Remain Silent and Failing to Seek Treatment ?
- II. Whether the Sentence Calculation was in Error When it Failed to Follow the Advisory Sentencing Guidelines Methods for Calculating an Increase in Sentence ?
- III. Whether the Sentence was Unreasonably Long when it Exceeded the Guidelines Range by Twice the Advisory Sentence Range ?
- IV. Whether the District Court Erred by Including Unreliable Information in its Sentencing Considerations and Failing to Make a Specific Ruling On a Controverted Matter ?

Statement of the Case

On March 24, 2005 Mr. Harris was charged in the Southern District of Florida with setting a number of fires in that district. He eventually pled guilty as part of a plea agreement to a violation of 18 U.S.C. § 844(i). A. 65-70. During his discussion with legal authorities in that district, he revealed that he had set additional fires in the Northern District of New York and was willing to cooperate with authorities in that area. On December 14, 2005, Mr. Harris was transferred to the Northern District of New York. *PSR*, p. 5, ¶ 12. An arrest warrant had issued on April 4, 2005. A. 3, *Docket No. 2*. Mr. Harris was brought before the magistrate for an initial appearance on January 11, 2006. A. 3, *Docket No. 3*.

A waiver of indictment was executed on August 30, 2006 and Benjamin Harris pled guilty to an information charging a violation of 18 U.S.C. § 844(i) pursuant to a plea agreement. The information alleged that between February 24, 1999 and September of 2001, Mr. Harris had used fire to maliciously damage approximately 23 properties in Schenectady and Montgomery counties. A. 8-9.

Mr. Harris entered a plea of guilty before Judge Kahn on August 30, 2006 pursuant to a plea agreement. The presentence investigation was ordered and a

presentence investigation report was composed.¹ The PSR calculated a total offense level of 21 and a criminal history score of III. *PSR*, p. 15, ¶ 49; p. 18, ¶ 55. The corresponding sentence range was 46 to 57 months. However, the offense of conviction carried a mandatory minimum sentence of 5 years. As a result, the 5 years became the recommended sentence. U.S.S.G. § 5G1.1(b).

Counsel for Mr. Harris submitted a number of objections to the factual contents of the report but maintained that the guidelines sentence was appropriate and requested that the sentence be imposed to be served concurrent and coterminous with the Florida sentence. A. 53-54. The Government agreed with the recommendations of the PSR and also requested that the sentence be concurrent and coterminous as agreed to in the plea agreement. A. 43.

On April 11, 2007, Mr. Harris was sentenced to a term of incarceration of 132 months on Count 1 to be served concurrent with a 97 month sentence imposed on October 17, 2005 in the District Court for the Southern District of Florida. A. 100. A three year term of supervised release was imposed. The District Court also ordered restitution in the amount of \$2750.00. A. 95.

¹ The Presentence Investigation Report or “PSR” along with the Addendum is submitted under seal.

Statement of Relevant Facts

Mr. Harris was prosecuted in two federal districts based upon a number of arsons he admitted. As part of those prosecutions he cooperated with law enforcement authorities and later agreed to plead guilty in two separate federal prosecutions. A. 10-29; 43; 65-70. One component of the agreements reached and acknowledged by the U.S. Attorneys in Florida and New York was for the sentences eventually imposed to be concurrent and coterminous with each other. A. 15, 43, 68-69.

During the presentence interview conducted after the plea to the present information Mr. Harris admitted his conduct with respect to each of the alleged fires. He was credited a reduction for acceptance of responsibility but he declined to discuss further details of the offense of conviction. *PSR*, p. 14, ¶ 37. Mr. Harris did not answer questions seeking why he started the fires? Why locations were chosen? Whether he set other fires not in the Information or Plea Agreement? How the fires were started? Whether he was helped? Whether he was paid? Whether he knew “Richard Agony”? Whether he tried to set fire to his parents house in South Carolina? Why he went to South Carolina and Florida? *PSR*, p. 14, ¶ 37.

Mr. Harris had conveyed that he was sorry for what he had done and that he would not do it again. *PSR*, p. 14, ¶ 36. The *PSR* calculated a total offense level of

21 and a criminal history score of III. *PSR*, p. 15, ¶ 49; p. 18, ¶ 55. The corresponding sentence range was 46 to 57 months. However, the offense of conviction carried a mandatory minimum sentence of 5 years. As a result, the 5 years became the recommended sentence. U.S.S.G. § 5G1.1(b).

Counsel for Mr. Harris submitted and maintained objections to specific factual content included in the *PSR* but agreed with the advisory sentence recommendation. A. 81. The Government agreed with the sentence recommendation as well. The Government also followed its earlier promise to recommend the sentence be coterminous and concurrent with the previously imposed sentence in Florida. A. 15, ¶ 8(d). At sentencing, the District Court Judge adopted the factual components of the *PSR* above the objections of defense counsel and disregarded the sentence recommendation. The District Court more than doubled the recommended sentence by imposing 132 months of imprisonment. A. 93.

Statements at Sentencing

Upon imposing sentence Judge Kahn expressed his reservations at Mr. Harris' actions, "there's no indication that there's any steps being taken by him to cure him or treat this behavior and it has been a key factor in my decision," A. 90-91. Judge Kahn made no mention of the fact that Mr. Harris had been incarcerated at all times after his arrest in Florida and cooperation with no opportunity to seek treatment for

any mental health or behavioral disorders.

Judge Kahn further stated,

Based on the following factors, the Court believes that the Guidelines do not adequately measure the dangerousness of the defendant and substantially underrepresents the likelihood that the defendant will commit other crimes, in particular further arson. Thus, a sentence different from the calculated sentence under the USSG is warranted. In making this determination, the Court finds the following: Number one, that the total number of fires admittedly started by the defendant in Florida and in the Northern District of New York is 53 fires and the number of fires admitted to by the defendant in the Northern District of New York alone is 23, which is substantial and alarming; Number two, that the defendant has admitted to an additional 13 fires in South Carolina; Number three, the defendant's Criminal History Category of III substantially underrepresents the likelihood that the defendant will recidivate and continue to commit arson. His history represents someone who frequently and repeatedly commits arson. And, four, the defendant has not provided the Court with any insight as to why he committed arson repeatedly or why he selected the locations that he did to commit arson.

A. 92-93

Statement of Reasons

The District Court imposed a sentence outside of the advisory guidelines range. The District Court marked the three boxes which indicated the reasons for the sentence outside of the advisory guidelines system. The reasons marked where

because of the nature and circumstances of the offense, the history and characteristics of the defendant, reflection of the seriousness of the offense, to promote respect for the law, to provide just punishment for the offense and to protect the public from further crimes of the defendant. *Statement of Reasons dated April 18, 2007*, p.3, sec.VI. subsec. C.

The District Court further stated in its statement of reasons that the sentence was based on the total number of fires admittedly started by the defendant in Florida and the Northern District of New York (53) and that the number of fires admitted to by the defendant in the Northern District of New York (23) was substantial and alarming and the admission of Mr. Harris to 13 additional fires in South Carolina . *Statement of Reasons dated April 18, 2007*, p.3, sec. VI, subsec. D. The District Court summarized its reasoning stating that it believed that the criminal history category underrepresented Mr. Harris' potential to commit further arsons. *Statement of Reasons dated April 18, 2007*, p.3, sec.VI, subsec. D.

Summary of the Argument

The non-guidelines sentence imposed by the District Court above the advisory guidelines range was unreasonable. The District Court relied on facts that were constitutionally protected and otherwise erroneous. The sentencing statements of the District Court placed Mr. Harris in the precarious position of maintaining his constitutional right to stay silent protecting himself from further implication in criminal acts and an increase in sentence by the Court because of that silence. United States v. Garcia, 544 F.2d 681 (1976). Further, his failure to seek treatment should not have been held against him because his ability to obtain treatment was governed by the authorities incarcerating him during the period between his admissions and his sentencing.

The District Court also failed to use the appropriate method for assessing the increase in sentence according to the guidelines. The resulting increase was excessive.

Unreliable and inherently prejudicial information in the PSR was controverted by counsel and accepted by the Court without a ruling as to whether it was considered or disregarded by the Court. As a result the sentencing failed to comply with Rule 32 of the Federal Rules of Criminal Procedure. Without specific factual findings about the controverted matters and their use in the sentence formulations, the sentence

cannot stand.

Argument

When a defendant challenges the procedures of his sentencing proceeding or the reasonableness of the sentence imposed, he effectively claims that the sentence, whether a Guidelines sentence or a non-Guidelines sentence, was “imposed in violation of law,” 18 U.S.C. § 3742(a)(1). The Second Circuit has the authority to review sentences, whether Guidelines sentences or non-Guidelines sentences, for reasonableness. United States v. Rattoballi, 452 F.3d 127, 133 (2d Cir. 2006);

United States v. Fernandez, 443 F.3d 19, 26 (2d Cir. 2006). The factual findings supporting a district court’s calculations are reviewed for clear error. United States v. Velez, 357 F.3d 239, 241 (2d Cir. 2004).

A sentencing judge may impose a term lower or higher than the recommended Guidelines range, but must start with a legally correct interpretation of the Guidelines. United States v. Kingdom, 157 F.3d 133, 136 (2d Cir. 1998). A District Court’s interpretation of the federal sentencing guidelines will be reviewed *de novo*. United States v. McNeil, 415 F.3d 273, 277 (2d Cir. 2005).

The Presentence Report recommended a guidelines sentence. This recommendation was accepted by both by Mr. Harris and the Government. Mr. Harris and the Government also requested that the sentence be imposed coterminous

and concurrent to a sentence imposed in the Southern District of Florida.

The total offense level calculated by probation was 21. *PSR*, p. 15, ¶ 49.

Mr. Harris' criminal history score totaled four points which equated to a category III.

Three of the four points from the criminal history were related to the conviction in Florida for nine counts of arson pled to on July 11, 2005. As a result of those convictions, Mr. Harris had been sentenced to 97 months to run concurrent to each other. He was ordered to pay \$515, 870.46 in restitution. *PSR*, p. 17, ¶ 54. It was during his pre-plea disclosures in the Florida case, that Mr. Harris revealed his activities in New York and in South Carolina. *PSR*, p. 21, ¶ 61.

The corresponding guidelines range was 46 to 57 months. However, because the guidelines range was less than the mandatory minimum, the mandatory minimum of five years overrode the advisory guidelines. *PSR*, p. 17, ¶ 54; U.S.S.G. § 5G1.1(b).

I. The Sentence Imposed was Substantively Unreasonable Because it Was Based Upon Legally Erroneous Factors.

At the sentencing proceeding the District Court Judge indicated for the first time he was going to impose a sentence higher than the advisory guidelines range. He gave counsel a brief adjournment after which counsel declined additional time for addressing the upward departure and instead chose to address it immediately.

The District Court chose not to use the advisory guidelines sentence range. Instead

the Court imposed a sentence of 132 months to run concurrent to the Florida sentence. A. 93. Upon imposing sentence, the Court began by rejecting the defense statements in support of an appropriate sentence. In so doing the Court initially stated two of the key “factors” in its sentence determination. First, the number of fires and second the “addiction” to the behavior as a serial arsonist and failing to get treatment. A. 90-91.

The Court further stated that “a non-guideline [sentence] upward from the calculated range [was] appropriate pursuant to 18 U.S. (*sic.*) 3553(a)(1), (a)(2)(A) and (a)(2)(C).” A. 92. The Court then restated the statutory language of the cited provisions which related to the nature and circumstances of the offense, and the history and characteristics of the defendant, the need for the sentence imposed to promote respect for the law and to provide just punishment for the offense and to protect the public from further crimes of the defendant. A. 92.

The Court based its determination on its conclusions about the total number of fires admittedly started by the defendant in Florida and New York; on the fact that the defendant had admitted an additional 13 fires in South Carolina;² that the defendant’s criminal history underrepresented his likelihood to recidivate; and that

² As of sentencing, an arrest warrant had issued from the Walterboro Police Department in South Carolina based upon the alleged admission attributed to Mr. Harris to a South Carolina Law Enforcement Division Special Agent. *PSR*, p.21, ¶ 61.

Mr. Harris had not provided any insight as to why he committed arson repeatedly or why he selected the locations he did. A. 92-93.

The Court stated that on the basis of these factors it believed that the Guidelines did not adequately measure the dangerousness of the defendant and substantially under represented the likelihood that defendant would commit further crimes. A. 92.

A. *The Consideration and Calculations of the Sentence Imposed Upon Mr. Harris Was Partially Based Upon Two Areas Which Should Not Have Been Considered*

i. Refusing Further Disclosure and the Assertion of the Privilege Against Self-Incrimination

The statement of the district court at sentencing and in its written statement of reasons focused on the failure of Mr. Harris had to provide any insight as to why he committed arson repeatedly or why he selected the locations he did. A. 93. *Statement of Reasons, sec. VI, subsec.D.*³

During the presentence interview Mr. Harris admitted and accepted responsibility for the offense conduct but declined to discuss other details beyond the offense of conviction or alleged relevant conduct upon advice of counsel for fear that it would further incriminate him or impact his treatment at a later date . *PSR*, p. 14,

³ Following local court rules and for privacy considerations the “Statement of Reasons” is provided under separate cover and seal with the Presentence Report.

¶ 37. Mr. Harris did not answer questions seeking why he started the fires? Why locations were chosen ? Whether he set other fires not in the Information or Plea Agreement ? How the fires were started ? Whether he was helped? Whether he was paid? Whether he knew “Richard Agony” ? Whether he tried to set fire to his parents house in South Carolina ? Why he went to South Carolina and Florida ? *PSR*, p. 14, ¶ 37.

Among other concerns, was the additional sentencing impact the answers could have. Support could have been provided for an enhancement pursuant to U.S.S.G. §2K1.4(b)(1) for concealing commission of another offense. Mr. Harris may also have otherwise implicated himself in other crimes not readily clear to him at the time of the interview.

In *United States v. Ramos*, 572 F.2d 360, 362 (2d Cir. 1978) a defendant in a drug case had agreed to initially cooperate with the Government. He gave the name of the person for which he had been carrying heroin but later could not testify for the Government. The District Court had the opportunity to assess the cooperation and other facts related to Mr. Ramos at sentencing. Upon review of the record, this Court indicated that it had doubts about the influence that Mr. Ramos’ refusal to testify had upon the length of the sentence because the district judge did not give reasons for his sentence. *See United States v. Ramos*, 572 F.2d 360, 362 (2d Cir. 1978)(en banc)

(Sentence vacated and remanded for resentencing where part of the sentence may have been based upon the defendant's refusing to cooperate).

Mr. Harris had declined to answer some questions asked as part of his presentence interview relying on his Fifth Amendment privilege against self-incrimination. That invocation was later included in the PSR and submitted to the district court judge. Later, as part of the sentencing considerations his refusal was addressed by the district court judge during the sentencing. The inclusion of this information in the PSR and consideration by the district court judge was constitutional error. *See* United States v. Bradford, 645 F.2d, 115, 117 (2d Cir. 1981)(A refusal to cooperate cannot be the basis for an increase in punishment from what would have been given if defendant had cooperated).

Mr. Harris' assertions were within the protection of his privilege against incriminating himself. *See* United States v. Garcia, 544 F.2d 681, 685 (3rd Cir. 1976)(Sentence vacated and remanded to the district court for resentencing where the trial judge pressed for answers regarding other offenses). Mr. Harris had relied upon the possibility of a concurrent and coterminous sentence of 97 months. In so doing, he had given information about a number of unsolved criminal acts resulting in their resolution. His later decision not to provide further information that potentially exposed him to increased punishment should not have negated his earlier affirmative

steps to help authorities in not just one crime but in resolving multiple crimes across multiple jurisdictions. A.88-89. In a sense, not only did Mr. Harris receive a harsher punishment, but the acts of the probation officer and the decision of the court effectively negated the potential mitigating impact of the information he had provided to law enforcement authorities previously.

The probation officer's questioning, the use of Mr. Harris' refusals in the PSR and the judge's note of those refusals in considering sentence imposed an unconstitutional condition on the petitioner's Fifth Amendment rights: he could go into the details of other offenses that might constitute a confession or he could exercise his right to be silent and receive a long sentence. See United States v. Conforte, 624 F.2d 869 (9th Cir.) *cert. denied*, 449 U.S. 1012 (1980)(sentencing court imposed additional penalties on defendant because he claimed Fifth Amendment privilege in refusing to disclose sources of income on tax returns; district court's conclusion that the only possible incrimination would be for filing false and fraudulent returns was without factual support and hence improper ground for enhancing sentence). Garcia, 544 F.2d 681, 685 (3rd Cir. 1976).

This case is also similar to *Thomas v. United States*, 368 F.2d 941 (5th Cir. 1966). In *Thomas*, the sentencing court attempted to induce the defendant who pleaded not guilty to confess his guilt as a sign of repentance before the sentence was

announced. The Fifth Circuit vacated the sentence and remanded the case for a new sentencing hearing stating that the defendant received a harsher punishment than the court would have decreed had he waived his Fifth Amendment rights, and as a result he paid a judicially imposed penalty for exercising his constitutionally guaranteed rights. Further the Court found that “Upon that ground alone . . . his sentence is “subject to collateral attack,” and (we) have *little* doubt as to the authority and duty of the district court to vacate the sentence.” 368 F.2d at 946.

Although, this Court also commented on Mr. Harris’ lack of remorse, the thrust of its dismay was the exercise of his right not to give further potentially incriminating information about the purpose for committing the crime to which he had pled *Cf. United States v. Vermeulen*,, 436 F.2d 72 (2d Cir. 1970).

As in *Thomas*, as in this case, the trial judge put the defendant in a hopeless dilemma: he could waive his Fifth Amendment rights or pay the costly penalty of receiving a long or maximum sentence when he had reason to expect a lighter sentence. 368 F.2d at 946.

By remaining silent, Mr. Harris’ refusal to incriminate himself beyond admitting the conduct underlying the offense of conviction led to a harsher sentence which imposed an unconstitutionally ‘costly’ penalty for the exercise of his rights under the Fifth Amendment. *See Vermuelen*, 436 F.2d 72, 76 (2d Cir. 1970)(Question

is whether the court put a “price tag” on exercise of constitutional principles and was seeking penitence for possible crimes not then charged against appellant).

ii. The Addiction of Mr. Harris and Failing to Seek Treatment

_____ One of the “key” factors cited to by the district court at sentencing, but not included in its written statement of reasons, was Mr. Harris’ apparent “addiction” to the behavior as a serial arsonist and his failing to get treatment. A. 90-91. From the time that Mr. Harris initially admitted his conduct he had been incarcerated. The court premised part of its sentencing determination upon a lack of acting which was beyond his control. *PSR*, p.5, ¶ 11. *See United States v. Brewster*, 127 F.3d 22, 30 (1st Cir. 1997)(Recognizing that the absence of a mitigating factor cannot ordinarily be treated as the presence of an aggravating factor, and arguably would result in sentencing error if an upward departure was premised on a finding, *simpliciter*, that a defendant refused to seek voluntary treatment.). For Mr. Harris to have received some sort of mental health treatment for arson, it would have had to come through the local county authorities incarcerating him or the federal authorities. Such treatment was simply not provided. At sentencing, to hold him accountable for that lack of action is error. *See e.g. United States v. Bennett*, 252 F.3d 559, 564 (2d Cir. 2001)(Enhancing sentence of defendant when wife failed to take actions which would assist his sentence determination was error).

II. The Calculation of the Increase in Sentence and the Amount of Increase in the Sentence were Unreasonable.

The District Court rejected the sentence recommendation of 60 months imprisonment to run concurrent to a previously imposed 97 month sentence in the PSR which had been accepted by Mr. Harris and the Government. Instead, the District Court believed that a sentence of 132 months was more appropriate. The crux of the District Court's basis for increasing the sentence was the belief that the Guidelines *did not adequately measure the dangerousness of the defendant and substantially under represented the likelihood that defendant would commit further crimes.* A. 92

The calibration of the review for reasonableness continues to be guided by the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress. Rattoballi, 452 F.3d at 134 (Listing cases). This Circuit has expressed its intent to view as inherently suspect a non-Guidelines sentence that rests primarily upon factors that are not unique or personal to a particular defendant, but instead reflects attributes common to all defendants. Rattoballi at 134.

The District Court's assessment of an appropriate sentence failed to incorporate the determinations outlined in the Guidelines. Although the District Court couched its sentencing findings in the factors of section 3553(a), the assessment of whether

the sentence was substantively or procedurally reasonable will still be guided by sentencing considerations accounted for in the guidelines and the body of case law that derives therefrom. *See Rattoballi*, at 134 (The district courts still must consider the guidelines even when imposing a non-Guidelines sentence). *See also United States v. Crosby*, 397 F.3d 109, 112-13 (2d Cir. 2005)(stating that district courts must consider applicable policy statements).

A. *Calculation of Variance Failed to Follow the Policy Statements*

The concern of the District Court is directly cited in U.S.S.G. § 4A1.3 addressing the potential inadequacy of a defendant’s criminal history and how the District Court could react. *Id.* The Guidelines recognize that the criminal history scoring system will sometimes underrepresent (or overrepresent) the seriousness of an offender's criminal past. Section 4A1.3(a)(1) therefore provides that “[i]f reliable information indicates that the defendant's criminal history category substantially under-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, an upward departure may be warranted.” *Id.*

The Guidelines direct that a District Court should structure the departure by moving incrementally down the sentencing table to the next higher offense level in Category VI until it found the guideline range appropriate to the case. U.S.S.G. §

4A1.3(a)(4)(B).

When departing horizontally under U.S.S.G. § 4A1.3 for criminal history, “the court must state its reasons both for departing.” United States v. Tropicano, 50 F.3d 157, 162-163 (2d Cir. 1995). This Court in *Tropicano* advised that a district court must provide an adequate statement of its reasons when it sequentially proceeds from the criminal history category determined by the defendant's criminal history point score through each higher criminal history category until it settles upon a category that fits the defendant. *Id.* at 163. Along the way, the district court must pause at each category to consider whether that category adequately reflects the seriousness of the defendant's record. Only upon finding a category inadequate may the court proceed to the next category. Once the court finds a category that fits, it must “ ‘use the corresponding sentencing range for that category’ ” to guide the departure. *Id.*

Just as the Court in *Tropicano* condemned the District Court’s jump of seven offense levels under the guise of the government’s 5K2.0 motion, the actions of the district court here are equally erroneous. Although taken under the auspices of § 3553(a), the reasonableness of the acts and resulting sentence are guided by the Sentencing Guidelines. *Id.* The applicable provision of U.S.S.G § 4A1.3 is more cabined in its approach. United States v. Deutsch, 987 F.2d 878, 887 (2d Cir. 1993)(Congress

mandated specific procedures to be used in making a departure under section 4A1.3 and failing to comply results in an unlawful sentence).

Even in the post-Booker realm of advisory guidelines and consideration of section 3553(a) factors, the sentencing court's discretion is guided and judged against the policy statements of the guidelines. In a more recent case, *United States v. Allen*, the Tenth Circuit considered whether an appellant's prior statements and criminal history warranted an upward departure. In so doing the Circuit advised that such a departure would have to be considered and weighed in a manner similar to that employed for acts of prior misconduct already contemplated by the Guidelines, that is, as increasing the defendant's criminal history score, but not his offense level. *See United States v. Allen*, __ F.3d __, 2007 WL 1560152 *13 (10th Cir. May 21, 2007) *citing* U.S. Sentencing Guidelines Manual § 4A1.3(a)(4) (2004); *United States v. Thornton*, 922 F.2d 1490, 1494 (10th Cir.1991)(District court erred in determining the degree of upward departure because it ignored the distinction between offense level and criminal history category departures by considering prior uncharged criminal conduct as reflecting on the base offense level as well as the criminal history).

In the present case, the District Court failed to adequately assess the original criminal history score against each horizontal move toward category VI and beyond.

The District Court elevated Mr. Harris' sentence by four offense levels and added at least nine points to achieve the criminal history score and category VI without ever connecting the facts of Mr. Harris' case to an equivalent defendant, or stopping to consider whether another category might better apply. See Deutsch, 987 F.2d at 887 (The District Court cannot circumvent the dictates of section 4A1.3 by treating criminal history factors as aggravating circumstances to justify an upward departure).

As in *Rattoballi*, the District Court in the present case overlooked the policy statements related to addressing the criminal history of the defendant and its impact upon the sentence calculations, requiring the sentence to be vacated and remanded. *Id.* at 135. (Assessing the reasonableness of a sentence includes whether the District Court overlooked or ignored the Commission's policy statements in violation of 18 U.S.C. § 3553(a)(5)). Accordingly the resulting sentence is flawed and requires remand.

B. *The Extent of the Variance Was Excessive*

The District Court failed to articulate reasons why the specific sentence of 132 months was the appropriate sentence for Mr. Harris based upon its increase in his criminal history category. See Tropiano, 50 F.3d at 163. In addition, the District Court failed to incrementally assess why the range of 110 to 137 months which equated to a level 25 and criminal history category of VI was more appropriate than

the other ranges corresponding to criminal histories IV, V and VI at the same offense level. Implicit in the District Court's decision was the finding that assessing at least nine additional criminal history points along with four additional offense levels was necessary to more accurately reflect the seriousness of the defendant's past conduct or the likelihood of recidivism, but this conclusion was not connected to the specific facts related to Mr. Harris.

In determining the departure, the District Court should have determined the extent of the departure by using as a reference, the criminal history category applicable to defendants whose criminal history or likelihood of recidivism most closely resembled Mr. Harris's. U.S.S.G. § 4A1.3(a)(4)(A).

Even if the District Court decided that the better way to approach the calculation was to treat each act individually, the current sentence is still excessive. Counsel addressed that charging possibility because of the number of fires pled in a single count information. A. 86. In so doing, he juxtaposed what the sentence calculations would have been if each had been charged individually. Had each fire been charged in a separate count, Mr. Harris' applicable Guidelines range, was roughly estimated at 78 to 97 months based upon a total offense level of 36 accounting for multiple counts charged at the same time under section 3D1.4 and acceptance of responsibility. A. 87. Even at the high end of the range the variance

would be almost four years.

The *Allen* appeal did not question whether a sentencing court may vary upward based on the court's own evaluation of the defendant's likelihood of recidivism or reform but noted that courts of appeals have regarded extreme variances on the basis of such factors unreasonable. *Allen*, 2007 WL 1560152 *13-14 (listing cases with variances given in error). *See United States v. Rattoballi*, 452 F.3d 127, 134 (2d Cir. 2006)(The Second Circuit views as inherently suspect a non-Guidelines sentence that rests primarily upon factors that are not unique or personal to a particular defendant, but instead reflects attributes common to all defendants); *see also United States v. Sindima*, 478 F.3d 467, 473 (2d Cir.2007)(overturning an upward variance, based primarily on the need for deterrence, because the Guidelines already accounted for this factor); *see also United States v. Tucker*, 473 F.3d 556, 564-65 (4th Cir. 2007) (same).

III. The Sentence Was Unreasonable Because the Facts Included in the Presentence Investigation Report were Not Reliable and Were Inherently Prejudicial Undermining the Integrity of the Sentencing Considerations.

Counsel for Mr. Harris objected to the inclusion of the child protective complaint and investigation because it was inherently unreliable. A. 56-58. It is settled that,

a court is vested with broad discretion in determining what factors it will

consider in imposing sentence. The exercise of this virtually unlimited discretion, however, imposes on the court a corresponding duty to insure that the information relied upon is essentially accurate. A sentence cannot be predicated on materially incorrect information, *see*, United States v. Tucker, 404 U.S. 443, 447, 92 S.Ct. 589, 591, 30 L.Ed.2d 592 (1972); Townsend v. Burke, 334 U.S. 736, 740-41, 68 S.Ct. 1252, 1255, 92 L.Ed. 1690 (1948), or information so unreliable or untrustworthy that it would be unfair to proceed on the basis of that evidence. Moore v. United States, 571 F.2d 179, 183 (3d Cir. 1978).

United States v. Baylin, 535 F. Supp. 1145, 1153 (D.C. Del. 1982).

Only accurate and reliable information should be considered by the Court upon sentencing, and included within the presentence report. The report should be an accurate and objective recounting of “the background, character, and conduct of a person convicted of an offense...” 18 U.S.C. §3661. “Unfounded” allegations of misconduct offered by an estranged former spouse that have no relationship to the offense of conviction should not have been included in the PSR. In *United States v. Baylin*, the Third Circuit held that as a matter of due process, factual matters may be considered as a basis for sentence only if they have some minimal indicium of reliability beyond mere allegation. *Baylin* added the correlative notion that such information must also, either alone or in the context of other available information, bear some rational relationship to the decision to impose a particular sentence. *See Baylin*, 696 F.2d at 1041. Here, the information provided, as “background information” has no legitimate bearing on Mr. Harris’s “background” other than to

indicate that he had a contentious ending to his marriage and was accused of misconduct later determined to be without merit.

As a result of the inclusion of this information in the PSR, Defense counsel was legitimately concerned because the subject matter of the allegations themselves was itself prejudicial and potentially criminal and almost seven years old at the time of sentencing. Counsel also objected to the inclusion of the child protective information because of its potential impact upon Bureau of Prisons. A. 58-59

The Supreme Court in *United States v. Booker*, 543 U.S. 220, 245 (2005) reiterated the inherent problems associated with sentences which rely upon facts not necessarily pled in the indictment (lack of notice) and not found beyond a reasonable doubt by a jury (tested through adversarial process) and in so doing, recognized that sentences based upon those unnoticed and untested facts would violate the Sixth Amendment right to be tried upon indictment. *Id.*

In a similar case to the one at bar, the Ninth Circuit vacated a sentence and remanded for resentencing because the sentencing court had relied on an unsubstantiated charge, made to the probation officer by agents of the Federal Bureau of Narcotics and Dangerous Drugs and included in the PSI report, that the defendant was a large-scale heroin dealer. *United States v. Weston*, 448 F.2d 626 (9th Cir.), *cert. denied*, 404 U.S. 1061, 92 S.Ct. 748, 30 L.Ed.2d 749 (1971).

IV. The District Court Failed to Make Specific Findings Related to the Factual Objections.

Counsel for Mr. Harris raised his objections related to the family services records that were included in the PSR. Instead of ruling on the objections, the Court adopted the PSR in a wholesale manner. A. 81-82. The District Court accepted the factual statement in the PSR over these objections stating, “the Court is going to adopt the Presentence Report by a preponderance of the evidence...” A. 82. No further factual findings were made related to the family services information.

Rule 32(i)(3) of the Federal Rules of Criminal Procedure states, in relevant part:

- (3) Court Determinations. At sentencing, the court:
 - (A) may accept any undisputed portion of the presentence report as a finding of fact;
 - (B) must—for any disputed portion of the presentence report or other controverted matter—rule on the dispute or determine that a ruling is unnecessary either because the matter will not affect sentencing, or because the court will not consider the matter in sentencing; and
 - (C) must append a copy of the court’s determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons.

FED. R. CRIM. P. 32(i)(3)(This provision has been renumbered within Rule 32 over the years, although the substance of the rule has not changed. Prior to 2002 it was part of Rule 32(c)(1), and prior to 1993 it was part of Rule 32(c)(3)(D)). *See* FED. R. CR. P.

32 (notes to 1993 and 2002 amendments).

The previous version of Federal Rule of Criminal Procedure 32(c)(1) permitted a sentencing court to accept a presentence report as its findings of fact, except for “any unresolved objection” to the presentence report. *See* United States v. Gricco, 277 F.3d 339, 355-56 (3rd Cir. 2002)(Sole reliance by the district court upon the PSR which had adopted the government’s loss calculations was error requiring sentence to be vacated.) . The revision of that provision was to require the District Court to rule on “controverted matters” only. *See* FED. R. CR. P. 32 (notes to 2002 amendments)

In the present appeal the District Court made no specific statement relating to the factual objections maintained by Mr. Harris. The Court did not differentiate between accepting disputed and undisputed portion of the presentence report as to its finding of fact. Nor did the District Court for the disputed portion of the PSR rule on the dispute or determine that a ruling was unnecessary either because the matter would not affect sentencing, or because the court would not consider the matter in sentencing. Finally, because the Court did not address and rule on the dispute, it is believed that nothing was appended to any copy of the presentence report made available to the Bureau of Prisons. *See* FED. R. CRIM. P. 32(i)(3)(A)-(C)(Requiring specific decisions related to factual disputes and controverted matters as well as the record of that decision be provided to the BOP).

In *United State s v. Gricco*, the Third Circuit reiterated the importance of a specific factual finding stating that “[a] finding on a disputed fact or a disclaimer of reliance upon a disputed fact must be expressly made.... This Rule is strictly enforced and failure to comply with it is grounds for vacating the sentence.” Gricco, at 356. (Defendant’s objection to guidelines calculation and the district court's brief statement that it was adopting the PSR was inadequate to satisfy Rule 32(c)(1)'s requirements). The record does not reflect compliance with the rule requiring remand. Gricco, at 356.

Conclusion

Mr Harris respectfully requests the Second Circuit Court of Appeals grant vacatur of his sentence and remand for appropriate sentence consideration in accordance with the United States Sentencing Guidelines, the Federal Rules of Criminal Procedure and the governing case law.

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Respectfully submitted,

TIMOTHY AUSTIN
Office of the Federal Public Defender, NDNY
Assistant Federal Defender
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 6809 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.

Timothy Austin
Assistant Federal Defender

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See Second Circuit Local Rules 32(a)(1)(E)

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