

Docket No. **04-6661-cr**

In the
United States Court of Appeals
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

CHRISTIAN WILLIAMS,
a.k.a Blast, Bless, Chris

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, Asst. U.S. Atty.
Office of the U.S. Attorney
James Hanley Federal Building
100 South Clinton St., Room 7198
P.O. Box 7198
Syracuse, NY 13261-7198
(315) 448-0690

Respectfully submitted,

ALEXANDER BUNIN
Federal Public Defender
MOLLY CORBETT, *on brief*
39 North Pearl Street, 5th Floor
Albany, NY 12207
(518) 436-1850
(518) 436-1780 facsimile

Christian Williams, *Defendant-Appellant*

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Statement of Jurisdiction

This appeal is taken from a Judgment of Conviction and Sentence entered against Defendant-Appellant, Christian Williams, in the Northern District of New York by the Honorable Norman A. Mordue, Chief United States District Court Judge, on March 7, 2005 .

The District Court had subject matter jurisdiction, pursuant to 18 U.S.C. § 3231, because this was a criminal case alleging violations of the laws of the United States under 18 U.S.C. § 1962(d). Jurisdiction in this appeal is invoked in this Court pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

A Notice of Appeal was timely filed on March 9, 2005, pursuant to Rule 4 (b) of the Federal Rules of Appellate Procedure.

Statement of the Issues Presented

- I. Whether the Government Breached the Plea Agreement By Requesting a Sentence Greater than the Lowest Within the Advisory Guidelines Range ?

- II. Whether the Sentence Imposed was Substantively and Procedurally Unreasonable Because it Failed to Revisit Sentencing Arguments Made Prior to the Decisions of *United States v. Booker* and *United States v. Crosby* Renewing Consideration of Factors under 18 U.S.C. § 3553(a) ?

Statement of the Case

In early 2003 as part of an initiative to crack down on gang violence in parts of the city of Syracuse, New York a multi-law enforcement task force began investigating a gang known as “Boot Camp.” The investigation resulted in an indictment and arrests of over twenty-five individuals.

On June 19, 2003 a sealed two-count indictment was voted in the Northern District of New York alleging violations of title 18, Section 1962 by twenty-four sealed defendants. *Docket Entry No. 1* Arrest warrants issued on the same day. The indictment was unsealed on June 23, 2003. *Docket Entry No. 5*. Initially seven defendants were arrested in the Syracuse area, arraigned and detained.¹ *Docket Entry No. 6*. The indictment was superseded on August 7, 2003. *A. 4, Docket Entry No. 69*. Two new sealed defendants were added. One of the defendants added was Christian Williams. *A. Docket Entry No. 81*. The other was Leonard Holdby. *Docket Entry No. 81*.

Mr. Williams and Mr. Holdby were arrested and arraigned on August 8, 2003. *A. 4, Docket Entry No. 73*. Counsel Thomas Robertson, Esq. was appointed to represent Mr. Williams. Mr. Williams pled not guilty and was remanded to custody.

¹ This information is drawn from the full district court docket for Indictment No. 03-243. For the sake of length, the docket in the Appendix relates only to Christian Williams.

A second superseding indictment was brought on July 12, 2004. A. 42.

Suppression motions were filed and a hearing was granted. On the eve of the hearing after a scheduled deposition to record witness testimony a plea offer was accepted.

On June 28, 2004, Christian Williams executed a plea agreement with the government in which he plead guilty to Count 1 of the second superseding indictment. Count 1 charged a violation of 18 U.S.C. § 1962(d) stating that, “[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.” The allegations in Count One was broken into subject areas tracking the elements of the offense followed by supporting facts. The “enterprise” alleged to include Mr. Williams with others was known as “Boot Camp”. A. 16. The members of the enterprise and associates engaged in attempted murders, drug trafficking, robberies, witness tampering, and other crimes within the Northern District of New York and elsewhere. A. 16. The enterprise was alleged to be associated in fact and its activities affected interstate commerce. A. 17. Specific overt acts were alleged to have been committed by Mr. Williams after he joined the conspiracy. A. 21, 31, ¶¶ 44-45.

Mr. Williams also executed a “cooperation agreement” in which he agreed to provide complete and truthful cooperation in the investigation and prosecution of

others.² *Cooperation Agreement, pp.1-2.* This cooperation further entailed cooperating in any criminal investigation, truthfully testifying before a grand jury or trial upon matters about which he may be questioned. *Cooperation Agreement, p. 2, ¶ 3 (a)-(c).* Further the cooperation included complete, truthful and accurate testimony without attempt to protect any person involved in criminal activity or falsely implicate others. *Cooperation Agreement, p. 2, ¶ 3(e).*

In exchange the U.S. Attorney would bring no further charges relating to the conspiracy, reserved the right to recommend a specific sentence within the guidelines range, would advise the Court and Probation of any information in aggravation or mitigation of sentencing limited by U.S.S.G. § 1B1.8. *Cooperation Agreement, p. 4, ¶ 4.* The government further agreed to advise the Court of the nature and extent of the cooperation and assistance provided. The government also could make a motion for a downward departure if it determined the cooperation provided substantial assistance. *Cooperation Agreement, p. 5, ¶ (f).*

The U.S. Attorney also maintained that in the event of a breach it could in its sole discretion void in whole or part the cooperation and the plea agreement. *Cooperation Agreement, p. 6, ¶ 5.*

² As a result of the sensitive nature of cooperation in this prosecution this agreement is submitted under separate cover and references are to the original.

The plea was entered before the Honorable Norman Mordue. A presentence report was ordered. The resulting presentence report was provided to defense counsel, Mr. Williams and the Government. Counsel for Mr. Williams filed a memoranda in support of an appropriate sentence.

In between the plea and the sentencing, Mr. Williams decided to withdraw his plea. He requested the plea be withdrawn at what was to be the sentencing. The District Court adjourned the sentencing and allowed for Mr. Williams to file a motion in support of withdrawal. A. 72. Mr. Williams filed the motion to which the Government responded. A. 73-77, 78-110. New counsel was appointed. A. 13, *Docket No. 563*. A hearing on the motion to withdraw was held and the relief was denied. A. 128-135.

The rescheduled sentencing was held. The District Court adopted the calculations of the presentence report. The base offense level was calculated at 40 with a criminal history of V. A. 145. The corresponding guidelines range was 360 months to life. The District Court imposed a sentence of 480 months to be followed by five years of supervised relief. A. 148-49.

Statement of Relevant Facts

Count 1 charged a violation of 18 U.S.C. § 1962(d) which states that, “[it] shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section (§ 1962).”

Christian Williams executed a plea agreement with the government in which he plead guilty to Count 1 of the second superseding indictment. Count 1 charged a violation of 18 U.S.C. § 1962(d) stating that, “[i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.” The allegations in Count One was broken into subject areas tracking the elements of the offense followed by supporting facts. The “enterprise” alleged to include Mr. Williams with others was known as “Boot Camp”. A. 16. The members of the enterprise and associates engaged in attempted murders, drug trafficking, robberies, witness tampering, and other crimes within the Northern District of New York and elsewhere. A. 16. The enterprise was alleged to be associated in fact and its activities affected interstate commerce. A. 17. Specific overt acts were alleged to have been committed by Mr. Williams after he joined the conspiracy. A. 21, 31, ¶¶ 44-45.

The indictment alleged the manner and means of the enterprise was based upon furthering drug dealing in a specific area of Syracuse, New York and

actions taken in relation to protecting the area from competing dealers and other gangs. A. 17. The indictment stated that Mr. Williams agreed to become part of the enterprise and took a number of acts to further the conspiracy. Specific acts alleged to have been committed by Mr. Williams included drug distributions and a murder. A. 31.

The elements of the offense delineated in the agreement stated, first, that the conspiracy, agreement, or understanding (described in Count 1), was formed, reached or entered into by two or more persons. Second, that at some time during the existence or life of the conspiracy, agreement or understanding, the Defendant knew the purpose of the agreement and then deliberately joined the conspiracy, agreement or understanding; and, third that the conspiracy involved the participation, directly or indirectly in the affairs of the enterprise, namely the “Boot Camp Gang” which was engaged in a pattern of racketeering activity that included the possession with intent to distribute and the distribution of cocaine base (crack) and marijuana, and the Defendant admits each of the forgoing elements. A. 34-35, ¶ 3 (a-c).

The agreement then provided the “Factual Basis for the Plea,” which referenced the shooting of Demetrius Elmore. A. 35, ¶ 4, b. The agreement further stated that Mr. Williams was responsible for 50 to 150 grams of crack cocaine as relevant conduct. A. 36.

The agreement further stated that in exchange for the plea of guilty by Mr. Williams and his continuing compliance with the all of the terms of the agreement the U. S. Attorney's office agreed to forgo bringing further federal charges pre-dating the agreement, and dismissal of Count Two. The Government further agreed that any self-incriminating information provided by Mr. Williams during his debriefing not previously known to the Government would not be used to determine the applicable Guidelines range pursuant to U.S.S.G. §1B1.8. A. 37, ¶ 6(b).

In paragraph 6, subsection c. the U.S. Attorney's Office agreed not to oppose the imposition of the least severe sentence permitted within the applicable Sentencing Guidelines range determined by the Court. A. 37, ¶ 6(c). The U.S. Attorney further reserved the right to advise the court and probation of any information, in aggravation or mitigation of sentencing, whether or not encompassed within Count One subject to limits U.S.S.G. §1B1.8. A. 37, ¶ 6(d). Mr. Williams and the government further agreed that a total offense level of 43 would govern the sentencing calculations. A. 37-38, ¶ 7(c).

The agreement also provided that if the defendant continued to demonstrate acceptance of responsibility for the offense of conviction through the time of sentencing, the government would recommend the downward adjustment pursuant to U.S.S.G. § 3E1.1(a) and an additional one level adjustment under U.S.S.G.

§ 3E1.1(b)(2). A.38, ¶ 7(a).

Mr. Williams executed a “cooperation agreement” which controlled the plea agreement. In the cooperation agreement he agreed to provide complete and truthful cooperation in the investigation and prosecution of others.³ *Cooperation Agreement*, pp.1-2. This cooperation further entailed cooperating in any criminal investigation, truthfully testifying before a grand jury or trial upon matters about which he may be questioned. *Cooperation Agreement*, p. 2, ¶ 3 (a)-(c). Further the cooperation included complete, truthful and accurate testimony without attempt to protect any person involved in criminal activity or falsely implicate others. *Cooperation Agreement*, p. 2, ¶ 3(e).

In exchange the U.S. Attorney would bring no further charges relating to the conspiracy, reserved the right to recommend a specific sentence within the guidelines range, would advise the Court and Probation of any information in aggravation or mitigation of sentencing limited by U.S.S.G. § 1B1.8. *Cooperation Agreement*, p. 4, ¶ 4. The government further agreed to advise the Court of the nature and extent of the cooperation and assistance provided. The government also could make a motion for a downward departure if it determined the cooperation provided substantial

³ As a result of the sensitive nature of cooperation in this prosecution this agreement is submitted under separate cover and references are to the original.

assistance. *Cooperation Agreement*, p. 5, ¶ (f).

The U.S. Attorney also maintained that in the event of a breach it could in its sole discretion void in whole or part the cooperation and the plea agreement. *Cooperation Agreement*, p. 6, ¶ 5.

Prior to sentencing the government “advised” the Court that it had requested that the probation office include information in the PSR which would reflect Mr. Williams’ refusal to testify and maintained that information should be included in the report. A. 67. Further, the government advised it was not making a motion for a downward departure again based upon Mr. Williams’ refusal to testify. The government indicated it had relied heavily on information Mr. Williams had provided at the debriefing in formulating a trial strategy against Karo Brown and by not testifying Mr. Williams had effectively prevented the government from presenting at trial any of the valuable information the defendant previously provided. A. 68.⁴

The Government did not advise the Court of the information provided by Mr. Williams during his debriefing on June 30, 2004. A. 102-110. Nor did the Government indicate how that information was used even though a third superseding

⁴ At the time Mr. Williams pled fourteen days before the trial started and was debriefed twelve days before. At that time more than twenty-two other co-defendants had pled, six of whom provided testimony against Mr. Brown during his trial. *see generally* Full Docket Indictment No. 03-243, Entry No. 507, *Government’s Response to Motion for Judgment of Acquittal*.

indictment was handed down against Mr. Karo Brown on July 1, 2004 one day after Mr. Williams debriefing. *Indictment No. 03-243. Docket Entry No. 344.*

The government agreed with the total offense level calculations and the criminal history category. A. 70. It then undercut its own support by advocating that the three level reduction to which it had agreed in the plea agreement should not apply based upon Mr. Williams refusal to testify against Mr. Brown. A. 70.

This statement was followed by the disclaimer that government would not make the argument, but this statement is of no consequence given the argument still was on paper in front of the eyes of probation and the district court judge.

The Government then concluded its argument in support of an aggravated sentence by requesting the District Court impose a sentence of 420 months five years above the sentence the government had agreed it would not oppose. A. 66 *compare* to A. 37.

During the sentencing the District Court focused primarily upon the offense conduct and information provided by Mr. Williams during his debriefing and presentence interview. A. 145-149. The only additional factual information addressed by the district court related to Mr. Williams' refusal to testify at the trial of Karo Brown. A. 145-146. The District Court did not address 18 U.S.C. § 3553(a) as it related to any of the specific information provided by Mr. Williams in support

of his sentence.

The District Court adopted the recommendations of the PSR. A base offense level of 40 was applied with a criminal history category of V. A. 148. The corresponding range was 320 months to life. A. 149. The District court imposed a sentence of 480 months because of the nature of the acts in which Mr. Williams participated, his history of challenging authority and lawlessness. A. 148.

Summary of the Argument

The Government breached the plea agreement by advocating for a sentence that was five years greater than the sentence the Government had agreed not to oppose. The District Court cannot base its sentencing decisions upon the refusal of a defendant to testify. Further, the information provided by the Government as part of its sentencing advocacy violated the tenor of the plea agreement. The Government's injection of the refusal into the sentencing proceedings forever tainted the sentencing proceedings requiring withdrawal of the plea.

Alternately, the template for arriving at an appropriate sentence changed in the time between the plea and the sentencing. The District Court did not properly incorporate that changes into the proceedings requiring a remand for resentencing giving consideration to 18 U.S.C. §3553(a) under *United State v. Fagans*, 403 F.3d 138, 141-42 (2d Cir. 2005).

Argument

I. The Government Breached its Obligations under the Plea Agreement Requiring Withdrawal of the Plea.

In the present case on appeal, the government and the defendant, appellant Mr Williams entered into a plea agreement that also entailed cooperating with the government. Mr. Williams initially cooperated providing information during a debriefing session two days after his plea. He later could not fulfill an obligation under the cooperation agreement to testify in any matter about which he may be questioned. As a result of this choice, the government refused to move for a decrease in his sentence and advocated for an increase in sentence.

The Government did not present “new” mitigating or aggravating information related to the offense as it could have under the terms of the agreement, sentence other than the refusal of Mr. Williams to testify at the trial of Mr. Brown. Mr. Williams had already had his sentencing options impacted by that refusal because the Government did not seek a reduction in sentence for his debriefing under U.S.S.G. § 5K1.1. In addition, the government’s further advocacy related to acceptance of responsibility also violated the agreement since Mr. Williams did not repudiate his admission of the offenses that were the basis of his conviction.

Standard of Review

The Second Circuit reviews “interpretations of plea agreements *de novo* and in accordance with principles of contract law.” United States v. Riera, 298 F.3d 128, 133 (2d Cir. 2002).

Plea agreements are construed strictly against the government and courts do not “hesitate to scrutinize the government's conduct to ensure that it comports with the highest standard of fairness.” United States v. Vaval, 404 F.3d 144, 153 (2d Cir. 2005)(quoting *United States v. Lawlor*, 168 F.3d 633, 637 (2d Cir. 1999)). Mr. Williams maintains that the agreement to plead and waive his fundamental rights was premised on his plea to Count 1, an acceptance of a sentence based upon a total offense level of 43, which would be unopposed by the government. A. 37. *See Lawlor*, 168 F.3d 633, 636 (Determining whether a plea agreement has been breached, a court must look to what the parties reasonably understood to be the terms of the agreement.”

Although, a cooperation agreement was also signed in regard to this case, that agreement was premised upon a number of conditions yet to be fulfilled and lacked the specific obligations that had been met by Mr. Williams at the time that he entered his plea making the plea agreement the guiding documentation of what the parties had agreed upon. *See United States v. Rexach*, 896 F.2d 710, 713 (2d Cir. 1990) (quoting

Restatement (Second) of Contracts § 228, Comment a) (“[W]here the explicit terms of a cooperation agreement leave the acceptance of the defendant's performance to the judgment of the prosecutor, the prosecutor may reject the defendant's performance provided he or she is honestly [even though “unreasonably”] dissatisfied.”) . *Cf.* United States v. Mullins, 399 F.3d 888, 890 (8th Cir. 2005) (where plea agreement does not require government to file substantial assistance motion, district court may intervene only if government's refusal to make such motion was based on unconstitutional motive, such as unlawful discrimination or other action not rationally related to legitimate governmental interest).

In *United States v. Palladino*, 347 F.3d 29 (2d Cir. 2003) the defendant argued that a six-point sentencing enhancement was contrary to the language and the spirit of the plea agreement because the Government had no new information which, under the terms of the Plea agreement, could have justified its enhancement request. *Id.* at 32. The defendant argued that the Government violated the agreement by seeking the six-point enhancement. The Government had made a separate pledge aside from the estimate of the proper offense level to make no recommendation as to the proper sentence within the guidelines range or to make no motion for an upward departure. *Id.* at 32. The district court concluded that the Government had merely requested a “sentencing enhancement,” and had not requested a specific sentence within the

Guidelines range or an “upward departure.” The Court observed that “[t]he issue really is ... whether the estimated guideline calculation in the agreement[-which is] followed by [a] very clear statement that the estimate isn't binding on the office, the Probation Department or the court[-] whether that estimate is correct.” Even with repeated assurances at the plea and in the agreement that the recommendation contained therein, the Circuit found that, the plea agreement was ambiguous at the very least as to whether the Government could justifiably pursue the enhancement sought in this case. Palladino, 347 F.3d at 34-35.

Mr. Williams is in a position similar to that of Mr. Palladino. Mr. Williams agreement barred the use of information that was obtained as a result of a post-plea debriefing to assist the Government. Although, the choice between the remedies is generally “a discretionary one guided by the circumstances of each case, this case militates toward withdrawal of the plea. Palermo v. Warden, Green Haven State Prison, 545 F.2d 286, 297 (2d Cir. 1976)(citing *Santobello v. New York*, 404 U.S. 257, 263, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971)).

Just as in *Palladino*, the defendant in the present case entered into a bargain with the government for a sentence calculated on certain information and at an agreed upon offense level. Specific performance in this case is rendered difficult by the fact that, on remand, the District Court cannot simply erase its knowledge that Mr.

Williams chose not to testify. In response, the government advocated that fact and did not submit any information related to Mr. Williams' other cooperation.

Just as in *Palladino*, the plea agreement in the present case is hopelessly tainted by the introduction of conduct unrelated to the offense. The refusal to testify could have been made for any number of reasons and should not have been used to aggravate his sentence. *See, e.g., DiGiovanni v. United States*, 596 F.2d 74, 75 (2d Cir.1979) (remanding case for resentencing because defendant had been “punished for exercising his right to remain silent,” and noting that silence in narcotics cases often stems from “well-founded fears of reprisal to the witness or his family”), . The information submitted to Judge Mordue on balance, cannot be ignored The defendant should be permitted to withdraw his plea. *Palladino* at 35.

II. The District Court Failed to Address 18 U.S.C. § 3553(a) Factors or Whether the Sentence was Sufficient but Not Greater than Necessary to Promote the Purposes of the Sentence.

The recency of the Supreme Court decision in *United States v. Booker*, the Second Circuit decisions of *United States v. Crosby* at the time of sentencing coupled with the failure of the court to account for section 3553(a) at all during the sentencing especially in light of the numerous arguments raised and maintained by Mr. Williams in support of sentence indicates the court did not formulate the sentence in a manner

consistent with the decisions. Rather the court imposed a de facto mandatory sentence with an increase based upon the negative performance of a potential witness unbalanced by mitigating information. A sentence based solely on the sentencing information the Court referenced coupled with the lack of additional submissions addressing section 3553(a) is a mistake of law requiring remand and resentencing. *See United States v. Fernandez*, 443 F.3d 19, 32 (2d Cir. 2006) (The factors under section 3553(a) that must be weighted and balanced by the sentencing judge). *See also United States v. Gonzalez*, 281 F.3d 38, 42 (2d Cir. 2002)(A defendant must point to "clear evidence of a substantial risk that the judge misapprehended the scope of his departure authority.")(quotation omitted). *Accord United States v. Thorpe*, 191 F.3d 339, 342 (2d Cir.1999)(A sentence is imposed in violation of law when "the judge's sentencing remarks create ambiguity as to whether the judge correctly understood an available option.)(citation and quotation marks omitted). *Compare United States v. Kalust*, 249 F.3d 106, 110 (2d Cir. 2001)(To prevail in showing that the sentencing judge's denial of departure was based on a "mistaken conclusion that it lacked the authority to depart.").

Part of the District Court's newly resurrected obligations in sentencing procedures was to consider both the Guidelines and information submitted related to the factors outlined in 18 U.S.C. § 3553(a), the Court must then decide whether to

impose a Guidelines sentence, i.e, a sentence within the applicable Guidelines range or within permissible departure authority, or a non-Guidelines sentence. United States v. Crosby, 397 F.3d 103, 112 (2d Cir. 2005). *See, e.g.,* United States v. Lake, 419 F.2d 111, 114 (2d Cir. 2005) (commenting that "absent the strictures of the Guidelines, counsel would have had the opportunity to urge consideration of circumstances that were prohibited as grounds for a departure" under § 5K2.0.). After the initial calculation of sentence the Court must then consider whether the sentence is sufficient but not greater than necessary to fulfill the purposes of sentence. *See* United States v. Ministro-Tapia, 470 F.3d 137, 138-41 (2d Cir. 2006) (Discussing parsimony clause and recognizing district courts are to impose sentences pursuant to the requirements of § 3553(a) which includes the requirements of § 3553(a)'s parsimony clause).

The sentencing strategy of the court upon sentencing Mr. Williams in essence rendered a guidelines sentence based upon sentencing procedures held unconstitutional in *United States v. Booker*. The Supreme Court upon seeking to maintain the integrity of the sentencing guidelines in conformity with the intent of Congress chose to specifically excise the part of the statute that made the guidelines mandatory. *See* United States v. Booker, 543 U.S 220, 246 (2005) (The excision of 18 U.S.C. § 3553(b)(1) effectively made the Guidelines advisory yet still required a

sentencing court to consider Guidelines ranges, while also permitting the court to tailor the sentence in light of other statutory concerns under § 3553(a))(*remedial opinion of J. Breyer*). The statement of the district court at sentencing appears to violate the spirit of the remedial opinion of *Booker*. The failure of a district court to consider section 3553(a) factors results in an unreasonable sentence. United States v. Rattoballi, 452 F.3d 127, 131-32 (2d Cir. 2006); *accord* Fernandez, 443 F.3d 19, 26(2d Cir. 2006)(Review of a sentence for reasonableness includes not only the consideration of the sentence itself, but the procedures employed at arriving at the sentence.

The District Court Judge failed to consider all the sentencing factors under section 3553(a) and not just the applicable sentence range. Ignoring the need to obtain newly relevant information and proceeding from the status quo led to an unreasonable sentence. “[W]here the record indicates misunderstanding by the district court as to the statutory requirements and the sentencing range or ranges that are arguably applicable, or a *misperception about their relevance*, we may conclude that the requisite consideration has not occurred.” *See* United States v. Toohey, 448 F.3d 542, 545 (2d Cir. 2006). The District Court mistook the basis for the sentence by not incorporating of all the information available under § 3553(a) in its deliberations.

Although the defendant submitted a number of arguments based upon traditional sentencing according to guidelines and departures,⁵ the defendant did not address nor did the PSR reflect the reconstructed sentencing procedures wrought by *Booker* and *Crosby*. As a result, the case should be sent back for resentencing under *Fagans* if the court refuses to withdraw the plea.

III. The Sentence Imposed is Unreasonable Because the District Court Failed to Consider the Factors in 18 U.S.C. § 3553(a)

Where the record indicates misunderstanding by a district court as to the statutory requirements and the sentencing range or ranges that are arguably applicable, or misperception about their relevance, we may conclude that the requisite consideration has not occurred.” *Toohey*, 448 F.3d 542, 545 (2d Cir. 2006). A review of a sentence for reasonableness entails not only consideration of the sentence, but also the procedure employed for arriving at that sentence. *Fernandez*, 443 F.3d at 26-27. A challenge to the reasonableness of sentence requires the Circuit to "focus ... on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a)." *United States v. Canova*, 412 F.3d 331, 350 (2d Cir.

⁵ Counsel for Mr. Williams argued a reduced sentence was appropriate because of the overrepresentation of criminal history, the previously served sentence for one of the predicate acts and disparate co-defendant sentences. All of this information and more became reinvigorated and was elevated to the scale for balance against the calculated guidelines range. *See, e.g., United States v. Wills*, 476 F.3d 103, 2007 WL 366071, at *5 (2d Cir. Feb. 5, 2007)(The district court could have properly considered co-defendant sentence disparity under 18 U.S.C. § 3553(a)(4).

2005). In the present case, the district court was sentencing based upon information submitted prior to the *Booker/Crosby* opinions which broadened the subject areas of sentencing and established procedures for addressing the revitalized advisory sentencing scheme.

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

Courts have found that a district court's unjustified reliance upon any one § 3553(a) factor is a symptom of an unreasonable sentence. Rattoballi, 452 F.3d 127, 137; see United States v. Crisp, 454 F.3d 1285, 1292 (11th Cir. 2006)(Listing cases including *Rattoballi* and finding the district court's single-minded focus on the goal of restitution to the detriment of all of the other sentencing factors to be unreasonable). In this instance, the comments by the District Court at sentencing, the presentence report and the sentencing submissions indicate that it significantly if not solely relied on the Guidelines in fashioning its sentence. A. 145-148. See Booker,

543 U.S. at 259 (“Without the ‘mandatory’ provision, the Act nonetheless requires judges to take account of the Guidelines *together with other sentencing goals.*”)(emphasis added). A district court commits error when it fails to assess the factors of 3553(a). *See United States v. Sitting Bear*, 436 F.3d 929, 935 (8th Cir. 2006) (A sentence is unreasonable when a district court failed to consider the 18 U.S.C. § 3553(a) factors. The district court abuses its discretion by failing to consider a relevant § 3553(a) factor and gives significant weight to an improper or irrelevant factor, or by makes a clear error of judgment in the weighing of the proper factors).

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

The comments of the District Court give no indication it considered any information outside of the information used to formulate the guidelines range. Further, the lack of supplemental submission post-*Crosby* but prior to the sentence being imposed tends to support the conclusion that the sentence was based only on pre-*Booker* sentencing information which at the very least requires remand under *United States v. Fagans* because counsel had addressed the impact *Blakely* may have on the guidelines and preserved the objection to the constitutionality of the resulting sentence. *Defendant's Sentencing Memorandum, p. 9*

Conclusion

WHEREFORE, the breach of the plea agreement by the government by its advocating for a sentence that was five years greater than the sentence the government had agreed not to oppose requires remand and withdrawal of the plea because the taint of the sentencing arguments cannot be divorced from the previous proceedings.

In the alternative, the sentence is unreasonable and subject to vacatur and remand for resentencing under *United States v. Fagans* and *United States v. Crosby*.

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Respectfully submitted,

ALEXANDER BUNIN
Federal Public Defender
Northern District of New York
39 North Pearl St., 5th Floor
Albany, NY 12207
Telephone: 518-436-1850
Facsimile: 518-436-1780

CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32 (a)

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

1. This brief contains 5437 words within the type volume limitation of Fed. R. App. P. 32 (a)(7)(B) exclusive of the portions exempted by Fed. R. App. P. 32 (a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type style requirements of Fed. R. App. P. 32 (a)(6) because it has been prepared in proportionally spaced typeface using Corel WordPerfect 12.0 software in Times New Roman, 14 point font in text and Times New Roman 12 point font in footnotes.

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ALEXANDER BUNIN
Federal Defender
Northern District of New York