

No. 03-_____

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

SHANNON _____,
Defendant-Appellant.

On appeal from the United States District Court
for the Western District of Wisconsin
Case No. 0_-CR-_
Honorable John C. Shabaz, United States District Judge, Presiding.

APPELLANT'S BRIEF AND REQUIRED SHORT APPENDIX

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DISCLOSURE STATEMENT

The undersigned, counsel for Defendant-Appellant, furnishes the following list in compliance with Circuit Rule 26.1:

1. The full name of every party or amicus the attorneys represent in the case: Shannon _____.

2. Said party is not a corporation.

3. The names of all law firms whose partners or associates have appeared for a party in the district court or are expected to appear for the party in the case: T. Chris Kelly, Kelly & Habermehl, S.C., 145 W. Wilson St., Madison, WI 53703; Richard H. Parsons, Federal Public Defender, Central District of Illinois; Jonathan E. Hawley, Appellate Division Chief; Kent V. Anderson.

Dated: March 22, 2005

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JURISDICTIONAL STATEMENT

The United States District Court for the Western District of Wisconsin had jurisdiction pursuant to Title 18 U.S.C. Section 3231, which provides exclusive jurisdiction of offenses against the United States, and Fed.R.Crim.P. 18. The superseding indictment charged appellant, Shannon _____, and Jovan Alexander with: one count of distribution of over five grams of cocaine base. (21 U.S.C. 841(a) & (b)(1)(B), 2.)

This appeal is from a final judgment of conviction and sentence. The United States Court of Appeals for the Seventh Circuit has appellate jurisdiction pursuant to 28 U.S.C. sections 1291 and 1294 and 18 U.S.C. sections 3742(a)(1) and (2) and is based on the following particulars:

- i. Date of entry of judgment sought to be reviewed: judgment of conviction and sentence imposed in this case on July 23, 2003 (CR 34; App. 7-12¹.)
- ii. Filing date of motion for new trial: N/A
- iii. Disposition of motion and date of entry: N/A

¹ CR is used as an abbreviation for the district court clerk's record of Mr. _____ case. PT is used as an abbreviation for the reporter's transcript of Mr. _____-Rule 11 or plea hearing. ST is used as an abbreviation for the reporter's transcript of the sentencing hearing. PSR is used as an abbreviation for the probation officer's presentence report. App. is used as an abbreviation for the appendix to this brief.

iv. Filing date of notice of appeal: August 4, 2003. (CR 38, App. 1.)

ISSUES PRESENTED

1. Does *United States v. Booker*, 5__ U.S. ____, 125 S.Ct. 738, 2005 U.S. LEXIS 628 (2005), require that Mr. _____ be resentenced because the trial court improperly based his sentence on facts that were not either proven to a jury beyond a reasonable doubt or admitted by him?
2. Is Mr. _____ -sentence unreasonable because the district court failed to consider the sentence disparity between crack and powder cocaine and did not adequately consider the facts of Mr. _____ -substantial assistance?

STATEMENT OF THE CASE

This is a direct appeal of a criminal conviction and sentence.

On January 29, 2003, the grand jury for the Western District of Wisconsin returned a superseding indictment charging appellant, Shannon _____, and Jovan Alexander with distribution of over five grams of cocaine base. (CR 7; App. 2; 21 U.S.C. 841(a) & (b)(1)(B), 2.)

On May 2, 2003, the government filed a notice, pursuant to 21 U.S.C. 851, of its intention to seek an enhanced penalty based on Mr. _____'s prior convictions for controlled substance offenses. (CR 19.)

On the same day, May 2, 2003, Mr. _____ pled guilty, pursuant to a plea agreement. Mr. _____ did not waive his right to appeal. (CR 17-18, PT 2-24, App. 3-6.)

In her presentence report, the probation officer recommended that Mr. _____'s sentence be based on her finding that he distributed over one and a half kilograms of crack cocaine. (PSR 5-14.) The probation officer also recommended that Mr. _____ receive a three-level adjustment for acceptance of responsibility. (PSR 15.) She also found that Mr. _____ was in criminal history category six, based on both his criminal history score and being a career offender. (PSR 15-18.)

The government filed a motion for a downward departure, pursuant to U.S.S.G. 5K1.1, based on Mr. _____'s substantial assistance. (CR 29-30.)

On July 23, 2003, the court held a sentencing hearing for Mr. _____. The court adopted the Guidelines –calculations in the presentence report. (ST 3-4, App. 14-15.) The court granted the government’s motion for a downward departure, but only departed by one level. (ST 9, App. 20.)

The court sentenced Mr. _____ to a term of 327 months imprisonment. The court also sentenced him to a term of eight years of supervised release, following his incarceration. In addition, the court ordered Mr. _____ to pay a \$100 special assessment. (CR 34; ST 13-14; App. 7-12, 23-24.)

Mr. _____ filed a timely notice of appeal on August 4, 2003, pursuant to F.R.A.P. 4(b). (CR 38, App. 1.)

On February 27, 2004, appellate counsel filed a brief , pursuant to *Anders v. California*, 386 U.S. 738 (1967). On June 29, 2004, counsel filed a motion to withdraw his *Anders* brief and for this court to set a new briefing schedule in light of *Blakely v. Washington*, ___ U.S. ___, 124 S. Ct. 2531; 159 L. Ed. 2d 403 (2004). On July 6, 2004, this Court granted counsel’s motion. On August 20, 2004, counsel filed a motion to suspend the briefing schedule pending the Supreme Court’s decision in *United States v. Booker*, 375 F.3d 508, (7th Cir. 2004), *cert. granted*, 2004 U.S. LEXIS 4788 (Aug. 2, 2004). On August 27, 2004, this Court granted counsel’s motion to suspend the briefing schedule. On February 8, 2005,

this Court reinstated the briefing schedule.

STATEMENT OF FACTS

I. Facts of the offense.

On January 3, 2003, Mr. _____ sold 17.23 grams of crack cocaine to an undercover officer, with the assistance of his co-defendant, Jovan Alexander. (PT 17-23; PSR 7.)

II. Guilty plea hearing.

On May 2, 2003, Mr. _____ pled guilty, pursuant to a plea agreement. As part of the plea agreement, Mr. _____ agreed to cooperate with the government. In return for Mr. _____-cooperation, the government agreed to file a motion for a downward departure, pursuant to U.S.S.G. §5K1.1, or a motion for reduction of sentence, pursuant to F.R.Crim.P. 35. The government also agreed to recommend that Mr. _____ be given a three level reduction for acceptance of responsibility, pursuant to U.S.S.G. §3E1.1. (CR 17-18, PT 2-24, App. 3-6.) Mr. _____ admitted the above facts and drug quantity when he pled guilty. (PT 17-23.)

III. Sentencing

A. The presentence report.

In her presentence report, the probation officer recited several instances of relevant conduct, in addition to the conduct underlying Mr. _____'s conviction. Those events include the following admissions which Mr. _____ made to agents after he was arrested. In early 2001, Mr. _____ began getting four and a half ounces of crack every other day and redistributing it in Chicago. He moved the sales end of his operation to La Crosse, Wisconsin in May or June, 2002. Mr. _____ gave Andre Williams four and a half ounces of crack three to four times, for a total of at least 382.74 grams. In the middle of June, 2002, Mr. _____ and Williams became partners. Mr. _____ obtained 255.15 grams of crack for Williams. From late June to October, 2002, Mr. _____ took four and a half to nine ounces of crack from Chicago to La Crosse every week, for a total of at least 1,530.9 grams. Mr. _____ sold four and a half to nine ounces of crack to Saterial Stuttley six to seven times, for a total of at least 765.48 grams. Mr. _____ also sold four and a half to nine ounces of crack to Kanika Little four or five times, for a total of at least 510.32 grams. In December, 2002, Mr. _____ brought 56.7 grams of crack from Chicago to La Crosse. On December 31, 2002, Mr. _____ and Mr. Alexander brought 127.58 grams of crack from Chicago to La Crosse. The above amounts equal approximately 3.63 kilograms of crack. (PSR 9-10.)

Therefore, the probation officer recommended that Mr. _____ sentence be based on over 1.5 kilograms of crack cocaine. This resulted in an initial base offense level of 38. (PSR 14.) However, the probation officer also recommended that Mr. _____ receive a three-level reduction for acceptance of responsibility. This reduced his base offense level to 35. The probation officer then concluded that Mr. _____ was a career offender, but this did not affect his offense level. (PSR 15.) In addition, the probation officer found that Mr. _____ had 15 criminal history points and was therefore, in category six even without the career offender enhancement. Mr. _____ had four prior convictions for controlled substance offenses and one prior conviction for a crime of violence. (PSR 15-18.)

Mr. _____ was born on August 24, 1973. (PSR 19.) He has seven half-siblings who all have different fathers. (PSR 20.) Mr. _____ dropped out of high school. However, at the time of sentencing, he was in a G.E.D. program at Dane County Jail. (PSR 21.)

Mr. _____ did not object to the presentence report. (06/23/03 letter from defense counsel to the probation officer.)

The government filed a motion for a downward departure, pursuant to U.S.S.G. § 5K1.1, based on Mr. _____ substantial assistance. (CR 29-30.)

B. Sentencing hearing

On July 23, 2003, the court held a sentencing hearing for Mr. _____.

The court adopted the Guidelines –calculations in the presentence report. (ST 3-4, App. 14-15.) The government then argued for a downward departure, pursuant to U.S.S.G. § 5K1.1. The government asked the court to either depart by three levels and sentence Mr. _____ at the high end of the resulting guideline range or depart by two levels and impose a sentence at the low end of the resulting range. The government noted that Mr. _____ cooperated with investigators as soon as he was arrested. However, he was not yet represented by counsel when he gave his first statement and that information was used against him at sentencing. He had always been truthful. The government was able to obtain an additional conviction and the pleas of other people, as a result of Mr. _____ –cooperation. (ST 5-6, App. 16-17.) Mr. _____ argued that his cooperation was extraordinary because he did not wait to see how it was going to benefit him before he gave a detailed statement. In addition, Mr. _____ gave subsequent statements and even testified in another defendant’s trial. Counsel also noted that Mr. _____ –family was threatened as a result of his cooperation. (ST 6-8, App. 17-19.) The court granted the government’s motion for a downward departure, but only departed by one level. It found that, while Mr. _____ –assistance was substantial, it was not extraordinary. The court focused

on the fact Mr. _____ had given evidence against a confederate who was less culpable than he was. The court observed that such cooperation ~ happens all the time.TM(ST 9, App. 20.)

Mr. _____ trial counsel then argued for a sentence at the low end of the range. Mr. _____ then apologized to the court for his conduct and asked for leniency. (ST 11, App. 21.) The government then joined in the defense request for a sentence at the bottom of the guideline range. The prosecutor noted that Mr. _____ chose to go forward with his testimony even after he heard that his girlfriend was threatened. (ST 12, App. 22.)

The court then noted that Mr. _____ had been dealing drugs or in prison for most of his adult life. It stated that it ~ believes he has an extensive criminal record and believes the seriousness of his past criminal conduct is a likelihood of recidivism and that he belongs in prison for as long as the law will allow.TMThe court stated that it would have imposed the upper end of the original range if it had not departed. It then stated that:

The Court believes that there is only sentence that can be provided here and that is at the top of the guideline imprisonment range. His conduct goes beyond the top. He ~~s~~ off the scales and he ~~s~~ full of recidivism as soon as he gets out. A sentence near the top of the guideline range may be sufficient to hold him accountable for his ongoing criminal activity and provide the community, which apparently no one has been thinking of up to now, that much needed reprieve.

(ST 13, App. 23.) The court then sentenced Mr. _____ to a term of 327 months imprisonment, which was the high end of the guideline range. The court also sentenced him to a term of eight years of supervised release, following his incarceration. The court imposed a special condition of supervised release that Mr. _____ abstain from alcohol. In addition, the court ordered Mr. _____ to pay a \$100 special assessment. (CR 34; ST 13-15; App. 7-12, 23-25.)

SUMMARY OF ARGUMENT

Mr. _____ Guidelines range and resulting sentence was increased based on facts which were not found by a jury beyond a reasonable doubt or admitted by him. This violated the Fifth and Sixth Amendments. *United States v. Booker*, 5__ U.S. ___, 125 S.Ct. 738, 746, 160 L. Ed. 2d 621 (2005). Mr. _____ did not object to his sentence on this basis in the district court. However, his sentence is plain error. Mr. _____ was sentenced under an illegal sentencing scheme which did not allow full consideration of the mitigating factors in his personal history and disparity between similarly situated defendants. As a result, the district court did not decide whether, in light of those factors, the sentence it imposed was ~sufficient, but not greater than necessary™to achieve the purposes of sentencing in 18 U.S.C. 3553(a). As a result, this Court should, at least, order a limited remand for the district court to indicate whether it would impose a lower sentence in a new sentencing hearing. However, the better course would be to order a full remand of Mr. _____ -case to the district court for resentencing.

In addition, if this Court does not remand Mr. _____ -case for resentencing based on the main *Booker* error, it should still reverse his sentence because it is unreasonable. For example, a sentence which fails to take the effect of the disparity in sentences between crack and powder cocaine into account and modify it is irrational and does not comply with the statutory purposes of

sentencing. In addition, the limited extent of the district court's downward departure is unreasonable. The court did not give substantial weight to the government's evaluation of Mr. _____'s substantial assistance and recommendation for a greater departure.

ARGUMENT

I. Mr. _____' sentence must be reversed, in light of *United States v. Booker*, 5__ U.S. ___, 125 S.Ct. 738, 160 L. Ed. 2d 621 (2005), because his sentence was increased on the basis of facts that were not proven to a jury beyond a reasonable doubt or admitted by him.

A. Standard of Review

Mr. _____ did not argue, in the district court, that his sentence was illegal because it was based on facts that were not contained in the indictment, proven to a jury beyond a reasonable doubt, or admitted by him. Therefore, this Court will only review his argument for plain error. *Johnson v. United States*, 520 U.S. 461, 465-466 (1997); *United States v. Paladino*, 3__ F.3d ___, 2005 U.S. App. LEXIS 3291, *23 (7th Cir. Feb. 25, 2005). This means that, unless the district court's error should be presumed prejudicial, Mr. _____ must show: (1) that there was an error; (2) that the error was plain or obvious; (3) that the error affected his substantial rights; and (4) that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *United States v. Olano*, 507 U.S. 725, 733-736 (1993).

B. Argument

Mr. _____' sentence must be reversed, in light of *United States v. Booker*, 5__ U.S. ___, 125 S.Ct. 738, 160 L. Ed. 2d 621 (2005), because his sentence was increased on the basis of facts that were not proven to a jury beyond a reasonable doubt or admitted by him.

1. There was error under *Booker*.

In *United States v. Booker*, 125 S.Ct. 738, the Supreme Court held that the rule it stated in *Blakely* applies to the Federal Sentencing Guidelines. *United States v. Booker*, 125 S.Ct. at 746.

A separate majority of the Court then held that the solution to this problem was to sever and excise 18 U.S.C. 3553(b)(1) and 3742(e) from the remainder of the Sentencing Reform Act. *Id.* at 764. This means that sentencing courts are no longer bound by the Guidelines. Instead, [t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account.TM*Id.* at 767. In addition, courts must also consider the purposes of sentencing set forth in 18 U.S.C. 3553(a), including the need to impose sentences that reflect the seriousness of the offense, promote respect for the law, provide just punishment, afford adequate deterrence, protect the public, and effectively provide the defendant with needed educational or vocational training and medical care.TM*Id.* at 764-765.

The court applied mandatory sentence enhancements on the basis of facts which Mr. _____ never admitted in court and were not found by a jury beyond a reasonable doubt. Therefore, his Fifth and Sixth Amendment rights were violated. In addition, the Court's opinion in *Booker* shows that Mr. _____ was sentenced under an illegal sentencing system when he was sentenced under mandatory Sentencing Guidelines. That was error. *United States v. Paladino*, 2005 U.S. App. LEXIS 3291, *23.

2. The error was plain.

The district court's error in sentencing Mr. _____ is plain. *United States v. Paladino*, 2005 U.S. App. LEXIS 3291, *23.

3. The error affected Mr. _____' substantial rights.

The district court's error affected Mr. _____'s substantial rights by depriving him of his Fifth and Sixth Amendment rights at sentencing and depriving him of his right to be sentenced under a Constitutional sentencing scheme.

This Court has now held that, in most cases, the appropriate way to determine if a defendant's substantial rights were affected is to issue a limited remand of a case to a district court and ask it to make that determination by saying whether it would reimpose the original sentence if it resentenced the defendant. *United States v. Paladino*, 2005 U.S. App. LEXIS 3291, *32-*34. This

case falls under that procedure even though the district judge felt the high end of the guideline range was appropriate due to Mr. _____'s recidivism. The district court did not say that it would have imposed the same sentence even if the guidelines were merely advisory. Therefore, the court might have imposed a lower sentence if it did not think it was bound by the Guidelines and had considered all of the factors which *Booker* now makes relevant when imposing sentence. *Id.* at *27-*28.

As noted above, under *Booker*, courts must still consider the Guidelines. However, they must also consider all of the purposes of sentencing set forth in 18 U.S.C. § 3553(a). *United States v. Booker*, 125 S.Ct. at 764-765, 767. "[W]here the guidelines conflict with other factors set forth in § 3553(a), courts will have to resolve the conflicts." *United States v. Ranum*, ___ F.Supp.2d ___, 2005 WL 161223, *1 (E.D. Wis. Jan. 19, 2005). Thus, factors which mitigate a defendant's culpability for a crime now have much greater importance to the determination of an appropriate sentence.

In this case, the district court could now consider the effect of the disparity between guideline ranges for crack and powder cocaine. The Sentencing Commission has reported that the harms associated with crack cocaine do not justify its substantially harsher treatment compared to powder cocaine.TM

U.S.S.C., *Fifteen Years of Guidelines Sentencing* xvi,132 (2004). The crack/powder quantity ratio ~ contributes more to the differences in average sentences between African-American and White offenders than any possible effect of discrimination. Revising the crack cocaine thresholds would better reduce the gap [caused by higher sentences for African-Americans] than any other single policy change, and it would dramatically improve the fairness of the federal sentencing system.TM*Id.* at 132. See also *United States v. Smith*, ___ F.Supp.2d ___, 2005 WL 549057, *6-*10 (E.D. Wis. Mar. 3, 2005) (finding that the extent of the crack/ powder disparity was irrational and reducing it before imposing sentence).

There may also be other mitigating factors that were not brought out in Mr. _____-original sentencing hearing because they would not have affected the calculation of the Guidelines range.

If the district court had been allowed to fully consider all of the mitigating factors it may have found that a shorter sentence was ~ sufficient, but not greater than necessaryTMto achieve the purposes of sentencing. (18 U.S.C. 3553(a).)

The fact the court did not depart further due to Mr. _____-substantial assistance does not show that consideration of additional factors would not have affected its decision. Courts are not allowed to consider factors that are not

related to a defendant's substantial assistance when deciding the extent of a departure under U.S.S.G. § 5K1.1. *United States v. Thomas I*, 930 F.2d 526, 529 (7th Cir. 1991). In addition, a conscientious judge ... would pick a sentence relative to the guideline range. If he thought the defendant a more serious offender than an offender at the bottom of the range, he would give him a higher sentence even if he thought the entire range too high.TM *United States v. Paladino*, 2005 U.S. App. LEXIS 3291, *28.

Therefore, this Court should at least order a limited remand, pursuant to *Paladino*.

However, this Court should go further and fully remand Mr. _____'s case to the district court for resentencing. The procedure in *Paladino* fails to assure that all of the factors which are now relevant to a district court's determination of a sentence will come to light before a district court makes its decision about whether resentencing is warranted. The evidence regarding those factors will usually be incomplete if a district court chooses not to conduct a new sentencing hearing. As a result, without a new sentencing hearing, the record will also be insufficient for this court to review the reasonableness of a sentence on appeal. *United States v. Paladino*, 2005 U.S. App. LEXIS 3291, *45-*46 (Kanne, J. dissenting from denial of rehearing *en banc*); *Id.* at *38-*39 (Ripple, J., dissenting from denial

of rehearing *en banc*).

Moreover, this Court's solution to evaluating plain error improperly delegates its responsibility to independently evaluate plain error to the district court. *Id.* at *42 (Ripple, J., dissenting from denial of rehearing *en banc*); *United States v. Milan*, 3__ F.3d ___, 2005 U.S. App. LEXIS 2161, *24-*25 (6th Cir. Feb. 10, 2005).

The *Paladino* decision also ignores the fact the reasonableness of a sentence depends on the process by which the sentence is obtained, as well as the length of the sentence. *United States v. Paladino*, 2005 U.S. App. LEXIS 3291, *45 (Kanne, J., dissenting from denial of rehearing *en banc*).

In contrast, the Sixth Circuit came to a better reasoned decision than this Court, when it held that the deprivation of the right to be sentenced under a Constitutional sentencing scheme affected a defendant's substantial rights. *United States v. Barnett*, 3__ F.3d ___, 2005 U.S. App. LEXIS 2644, *24-*36 (6th Cir. Feb. 16, 2005). *Barnett* held that courts should apply a rebuttable presumption of prejudice to *Booker* errors on appeal. *United States v. Barnett*, 3__ F.3d ___, 2005 U.S. App. LEXIS 2644, *26-*34.

Therefore, the district court's error affected Mr. _____'s substantial rights by depriving him of his right to be sentenced under a Constitutional sentencing scheme.

4. The *Booker* error seriously affects the fairness, integrity, and public reputation of judicial proceedings.

Sentencing Mr. _____ under an unconstitutional system also affected the fairness, integrity, or public reputation of judicial proceedings.

This Court has found that if the district court says, on limited remand, that it would impose a lower sentence then this satisfies the fourth, as well as the third, prong of plain error review. *United States v. Paladino*, 2005 U.S. App. LEXIS 3291, *29-30, *33-34. *See also United States v. Williams*, 3__ F.3d ___, 2005 U.S. App. LEXIS 3198, *28 (2nd Cir. Feb. 23, 2005).

In addition, it would not be enough for this Court to say that the sentence imposed by the district court is reasonable irrespective of the error. ~ Moreover, declining to notice the error on the basis that the sentence actually imposed is reasonable would be tantamount to [this Court] performing the sentencing function [itself].TM*United States v. _____*, 3__ F.3d ___, 2005 U.S. App. LEXIS 4331, *38-39 fn. 14 (4th Cir. Mar. 16, 2005). *See also United States v. Oliver*, 3__ F.3d ___, 2005 U.S. App. LEXIS 1623, *23 fn. 3 (6th Cir. Feb. 2, 2005); *United States v. LaBastida-Segura*, 2005 U.S. App. LEXIS 1835, *6.

Therefore, this Court should remand Mr. _____-case for resentencing under the now-advisory Guidelines. If this Court disagrees with Mr. _____-argument against its decision in *Paladino*, it should follow the limited remand procedure set forth in that case. *United States v. Paladino*, 2005 U.S. App. LEXIS 3291, *32-*34. If the district court says that it would have imposed the same sentence and this Court finds the record sufficient to evaluate the reasonableness of Mr. _____-sentence, this Court should then allow for additional briefing so Mr. _____ can adequately address the district court's answer.

II. The district court's sentence was unreasonable because it failed to consider the sentence disparity between crack and powder cocaine and did not give adequate consideration to Mr. _____' substantial assistance.

A. Standard of Review

Booker held that sentences must now be reviewed for reasonableness. *United States v. Booker*, 125 S.Ct. at 765. This Court has not decided what that means. *Booker* analogized review for reasonableness to review of Guideline departures. *Ibid.* The problem is that this Court formerly reviewed the extent of a departure, based on whether it was linked to the structure of the sentencing guidelines. This aspect of the court's departure is reviewed deferentially. *United States v. Cross*, 289 F.3d 476, 478 (7th Cir. 2002). It does not make sense to speak of determining whether a non-Guidelines sentence is linked to the structure of the Guidelines. So, the standard of review is unclear. The most logical standard

of review would be for abuse of discretion. A *de novo* standard would place this Court in the position of determining the appropriate sentence without the advantages that a district court has of actually having the defendant, and possibly witnesses, appearing before it. On the other hand, a clearly erroneous standard would treat the question of reasonableness as simply a question of fact, when it is actually a mixed question of fact and law.

Mr. _____ did not specifically argue that his sentence was unreasonable. However, he did argue for a lower sentence. (ST 6-8, 11; App. 17-19, 21.) That would have necessarily included the argument that a higher sentence was inappropriate or unreasonable. Therefore, Mr. _____-argument for a lower sentence was sufficient to preserve the issue of reasonableness for appellate review.

B. Argument

Assuming this Court finds that it can review the reasonableness of Mr. _____'s sentence on the existing record, it should hold that his sentence is unreasonable.

As noted above, the Sentencing Commission has now determined that the disparity between sentences for crack and powder cocaine is not warranted. U.S.S.C., *Fifteen Years of Guidelines Sentencing* xvi,132 (2004). The Commission also noted that eliminating or reducing the disparity would dramatically improve the fairness of the federal sentencing system.TM*Id.* at 132. Therefore, a sentence which does not take the unfairness of this disparity into account: overstates the seriousness of the crime; provides more than just punishment for the offense; and fails to promote respect for the law in violation of 18 U.S.C. § 3553(a)(2)(A). As a result, such a sentence is unreasonable. Indeed, Judge Adelman recently came to this conclusion when sentencing another defendant who was convicted of possession with intent to distribute over 50 grams of powder cocaine. *United States v. Smith*, 2005 WL 549057, *6-*10.

After examining the legislative history, subsequent research, and case law regarding the 100:1 ratio between sentences for crack and powder cocaine, Judge Adelman found that the Sentencing Commission's most recent recommendation of a 20:1 ratio was the appropriate basis for considering the impact of the weight

of crack cocaine when imposing sentence. *Ibid.* Applying this ratio to Mr. _____ would have reduced his now advisory base offense level from 38 to 36, before any reduction for acceptance of responsibility, based on the 3.63 kilograms of crack that the probation officer attributed to him. (PSR 14; U.S.S.G. $\bar{2}D1.1(c)$.)² The base offense level would actually be 37 if the career offender guideline was appropriate. (U.S.S.G. $\bar{4}B1.1(b)(A)$.)³ That may not seem like much difference, but with the other reductions in sentence, it would have made Mr. _____ – suggested guideline range 210 to 262 months or 235 to 293 months, rather than 262 to 327 months, for a 45 or 34 month difference in the high end of the range. The district court did not take any of the factors noted by the Sentencing Commission or the *Smith* decision into account when sentencing Mr. _____. As a result, the district court imposed an unreasonable sentence on Mr. _____.

In addition, the limited extent of the district court’s downward departure is unreasonable. The court did not give substantial weight to the government’s evaluation of Mr. _____ –substantial assistance and recommendation for a

² Mr. _____ is not conceding that a lower ratio is not more appropriate. He is simply using the 20:1 ratio for purposes of illustration.

³ The career offender guideline also seems inappropriate in light of the Sentencing Commission’s findings that recidivism rates for career offenders are much lower than for other defendants who are in criminal history category six and that the inclusion of drug offenses in the career offender guideline also disproportionately affects African-Americans. U.S.S.C., *Fifteen Years of Guidelines Sentencing* at 133-134.

greater departure. (ST 5-6, 9; App. 16-17, 20.) See *United States v. Thomas I*, 930 F.2d at 530 (holding that courts should give substantial weight to the government's evaluation of a defendant's substantial assistance). Instead, the court just opined that cooperation like Mr. _____ happens all the time. (ST 9, App. 20.) This was in spite of the fact, Mr. _____: gave unprotected statements as soon as he was arrested; was completely honest with the government; actually testified for the government in another defendant's case; and testified in the face of a threat to his family. (ST 5-8, App. 16-19.) Thus, all five factors in U.S.S.G. § 5K1.1(a) weighed in favor of Mr. _____. Contrary to the district court's assertion, that is not the case for every defendant who cooperates with the government. For example, this Court has decided cases in which the defendants were not completely candid with the government, but still received substantial reductions in their sentences. See *United States v. Atkinson I*, 979 F.2d 1219, 1226 (7th Cir. 1992); *United States v. Thomas I*, 930 F.2d at 530; *United States v. Thomas II*, 11 F.3d 732 (7th Cir. 1993).

Under these circumstances, limiting a departure to the bare minimum was unreasonable. Such a departure could also be given to someone whose cooperation was not immediate, who did not actually testify, and whose family was not threatened as a result of their cooperation.

As a result, Mr. _____'s sentence is unreasonable even without the consideration of additional mitigating factors which he might be able to present at a new sentencing hearing. Therefore, this Court should reverse his sentence and remand his case for resentencing to a lower term that comes within the broad range of reasonable sentences.

CONCLUSION

For the reasons stated above, this Court should reverse Mr. _____'
sentence and remand his case to the district court for resentencing.

Respectfully submitted
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