

2005 WL 287400 (S.D.N.Y.)

## [Motions, Pleadings and Filings](#)

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United States District Court,  
S.D. New York.  
UNITED STATES OF AMERICA,  
v.  
Nora Elena OCHOA-SUAREZ, Defendant.  
No. 03 CR. 747(JFK).  
Feb. 7, 2005.

### MEMORANDUM OPINION and ORDER

[KEENAN](#), J.

#### *Background*

\*1 On March 9, 2004, defendant pleaded guilty to the one-count indictment which charged her with conspiracy to distribute and possess with intent to distribute one kilogram and more of heroin (18 U.S.C. §§ 812, [841\(a\)\(1\)](#), [841\(b\)\(1\)\(A\)](#) and [846](#)). The Probation Department has submitted a detailed Presentence Report. It concluded that, under the Sentencing Guidelines, the defendant should be sentenced at an offense level 34, Criminal History Category I, creating a range of from 151 to 188 months. This report and conclusion satisfied neither side. Initially, I filed an opinion on January 11, 2005 which I set aside because of the Supreme Court decision in *United States v. Booker* and *United States v. Fanfan* on January 12, 2005. ([U.S. , --- U.S. ----, 125 S.Ct. 738, --- L.Ed.2d ----](#)).

The defense contends:

- (1) That the defendant should not be found to be a manager or supervisor of the conspiracy ([U.S.S.G. § 3B1.1](#));
- (2) That the defendant is eligible for "safety valve" treatment ([18 U.S.C. § 3553\(f\)](#) and § 5C1.2 of the U.S.S.G.); and
- (3) That the defendant is entitled to a downward departure because of "extraordinary family circumstances" ([§ 5H1.6 of the U.S.S.G.](#)).

The Government still disagrees with the Probation Report and wants the defendant to be sentenced at a level 37 with a guideline range of 210 to 262 months, thereby denying any three-level reduction for acceptance of responsibility.

#### *Discussion*

In *Booker*, *supra*, the Supreme Court directed that in sentencing, I consider [18 U.S.C. § 3553\(a\)](#) and that we district judges be "reasonable" in imposing sentence. Just last week in *United States v. Crosby*, No. 03-1657 (2d Cr. Feb. 2, 2005), Judge Newman wrote:

"First, the Guidelines are no longer mandatory. Second, the sentencing judge must consider the Guidelines and all of the other factors listed in [section 3553\(a\)](#). Third, consideration of the Guidelines will normally require determination of the applicable Guidelines range, or at least identification of the arguably applicable ranges, and consideration of applicable policy statements. Fourth, the sentencing judge should decide, after considering the Guidelines and all the other factors set forth in [section 3553\(a\)](#), whether (i) to impose the sentence that would have been imposed under the Guidelines, *i.e.*, a sentence within the applicable Guidelines range or within permissible departure authority, or (ii) to impose a non-Guidelines sentence. Fifth, the sentencing judge is entitled to find all the facts appropriate for determining whether a Guidelines sentence or a non-Guidelines sentence.

These principles change the Guidelines from being mandatory to being advisory, but it is important to bear in mind that *Booker / Fanfan* and [section 3553\(a\)](#) do more than render the Guidelines a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge. Thus, it would be a mistake to think that, after *Booker / Fanfan*, district judges may return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum. On the contrary, the Supreme Court expects sentencing judges faithfully to discharge their statutory obligation to "consider" the Guidelines and all of the other factors listed in [section 3553\(a\)](#). [FN13] (in Judge Newman opinion)

[FN13](#). See Remedy Opinion, --- U.S. at ----, 125 S.Ct at 766 ("[Section 3553\(a\)](#) remains in effect, and sets forth numerous factors that guide sentencing. Those factors in turn will guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable.").

**\*2** I shall try, to the best of my ability to follow these new cases and their holdings in this sentence and all future ones.

Although pre-*Booker*, the Court originally concluded that the defendant did qualify as a manager or supervisor under § 3.1.1 of the U.S.S.G. This finding does not pass muster under the holding in *Booker, supra*, because there has been no finding beyond a reasonable doubt by a jury to this effect. Accordingly, the three-level enhancement of defendant's offense level, under the now advisory-only sentence guidelines, for role in the offense, is rejected and there is no three-level adjustment for "role in the offense."

Now, let us turn to item 2 above. Does defendant qualify for "safety valve" treatment under [18 U.S.C. § 3553\(f\)](#)?

The decisions in *United States v. Booker* and *United States v. Fanfan, supra*, do not affect the application of the "safety valve" in this case. [18 U.S.C. § 3553\(f\)](#), restated in [§ 5C1.2 of the U.S.S.G.](#) The section sets forth the five criteria the defendant must meet to qualify for "safety valve" treatment. Testimony at the *Fatico* hearing on December 2, 2004 disclosed she was a manager and supervisor in the criminal activity here for safety valve purposes and the criminal enterprise in which she was involved was a continuing one. That has nothing to do with the Guidelines which are not implicated by the mandatory minimum statute. At one "safety valve" proffer, the defendant indicated "that she was involved in seven drug deliveries from Florida." (Government Letter, January 6, 2005). At the *Fatico* hearing, Mr. Largo-Hoyas testified as to several drug-related trips to Florida. Moreover, a fair reading of the Government submissions discloses that she failed to make full and truthful disclosures at her proffer sessions. The defense suggestion at page 11 of the February 3, 2005 submission that I now rule on the propriety of some of the Government questions at the proffer sessions is rejected. The fact is that her answers at these sessions were not completely truthful. As to a reduction of offense level because of "extraordinary family circumstances," it must be observed that defendant's offense level under the "advisory" Guidelines is now 31, not 34, as suggested by the Presentence Report. I note that the Guidelines range for level 31, Criminal History Category I, is 108-135 months, 9 years to 11 years, 3 months. Because I reject the "safety valve," the mandatory minimum is within the "advisory" range.

Finally, the Government asks me to deny the three-level reduction in offense level because defendant has not "clearly demonstrated acceptance of responsibility for her offense," (page 2, January 6, 2005 Government Letter). The application is denied. She may not have completely articulated her full involvement in the conspiracy at the proffer sessions, but she did plead guilty to the exact charge in the indictment and saved the Government the costs of a trial. (Transcript of guilty plea, March 9, 2004, page 12). The defendant is, after all, a first offender and 108 to 135 months is a substantial period of incarceration. In my view, this a "reasonable" range in this case.

**\*3** In any event, both sides have a right to appeal my ruling and the sentence of 10 years that I impose today, the mandatory minimum.

SO ORDERED.

S.D.N.Y., 2005.

U.S. v. Ochoa-Suarez

2005 WL 287400 (S.D.N.Y.)

### Motions, Pleadings and Filings ([Back to top](#))

- [1:03CR00747](#) (Docket) (Jun. 12, 2003)

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