03-1631-cr

To be Argued By:
ROBERT M. SPECTOR

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 03-1631-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

JEAN GERANCON
Defendant-Appellant.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

This is an appeal from a judgment entered in the District of Connecticut (Stefan R. Underhill, J.) after the defendant pleaded guilty to distribution of 5 grams or more of cocaine base. The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), and, except as to the defendant's challenge to the district court's discretionary determination not to grant a downward departure, this Court has appellate jurisdiction over the defendant's challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

STATEMENT OF THE ISSUE PRESENTED

I. Were the defendant's Sixth Amendment rights violated under *Blakely v. Washington* when the district court placed him at an adjusted offense level of 32 based on the total quantity of cocaine based involved in the defendant's criminal activity?

II. Does this Court have jurisdiction to reconsider the district court's decision not to depart based on the defendant's claim that the Government engaged in "sentencing manipulation" by making excessive undercover purchases of cocaine base from the defendant?

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PRELIMINARY STATEMENT

From March 20 to May 24, 2001, Drug Enforcement Administration ("DEA") Special Agent Joseph Benson, acting in an undercover capacity, purchased various quantities of cocaine base, i.e., crack cocaine, on six different occasions from the defendant. Four separate times, the defendant sold just under 4 grams, once the defendant sold just over 13 grams, and once the defendant sold just over 26 grams. Based on these sales, the defendant was arrested as he came out of his residence at 151 Fairfield Avenue, in Stamford, Connecticut, on August 7, 2001. On that date, he was found in possession of 24 grams of cocaine base and 21 grams of powder cocaine.

The defendant was subsequently charged in federal court with seven counts of distribution of cocaine base and possession with intent to distribute cocaine base. He pleaded guilty to the most serious count, which was distribution of 5 grams or more of cocaine base, and was sentenced to 87 months' incarceration based, in part, on his stipulation that his offense conduct involved 78 grams of cocaine base. In this appeal, the defendant challenges his sentence on two grounds. First, he claims that it violates the principles set forth in *Blakely v. Washington* because it was based on the district court's determination of drug quantity, which was an enhancing factor not proven beyond a reasonable doubt to a jury. Second, he claims that his sentence was improperly manipulated by the Government when it sought to purchase cocaine base from the defendant on so many different occasions.

These claims have no merit. First, as this Court has previously held, *Blakely* does not apply to the Sentencing Guidelines. Moreover, at the plea proceeding, the defendant orally stipulated to the sole enhancing factor for sentencing, i.e., drug quantity. Second, the district court recognized that it had the discretion to depart downward under the defendant's sentencing manipulation argument, but found that the facts of this case did not support such a departure. This Court does not have jurisdiction to revisit that decision.

STATEMENT OF THE CASE

On August 7, 2001, the defendant-appellant, Jean Gerancon, was arrested outside his residence in Stamford, Connecticut on state narcotics charges. Pre-Sentence

Report ("PSR"), Addendum.[1] The state charges were dismissed on or about February 11, 2002, when the defendant was arrested and presented on similar charges in federal court and detained in federal custody. PSR, Addendum. On February 13, 2002, a federal grand jury in New Haven, Connecticut returned a seven-count indictment charging the defendant with four counts of distribution of cocaine base, two counts of distribution of 5 grams or more of cocaine base, and one count of possession with intent to distribute five grams or more of cocaine base, all in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)(iii) and 841(b)(1)(C). GA150.[2] On March 18, 2003, the defendant changed his plea to guilty as to Count Five of the Indictment, which charged him with distribution of five grams or more of cocaine base. GA36. On September 19, 2003, the district court (Stefan R. Underhill, J.) sentenced the defendant to 87 months' imprisonment and five years' supervised release. GA113.

On September 26, 2004, the defendant filed a timely notice of appeal. GA149. The defendant has been incarcerated in federal custody since the February 11, 2002, arrest and is currently serving his sentence. PSR, Addendum.

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[1] The Government has filed the Pre-Sentence Report and the May 23, 2003, Addendum to that report in a separate, sealed appendix, and citations to those documents will reference the appropriate paragraph or page numbers within the documents themselves.

[2] The Government's Appendix will be cited as "GA" followed by the page number.

STATEMENT OF FACTS

A. FACTUAL BASIS

Had this case gone to trial, the Government would have presented the following facts, which were set forth, almost verbatim, in the Government's July 9, 2003, sentencing memorandum (GA130-GA133) and the PSR (sealed appendix):

In January 2001, the Stamford Police Department contacted the Drug Enforcement Administration ("DEA") and advised that an individual named "Jean Gerancon," the defendant in this case, was operating a powder and crack cocaine organization in Stamford, Connecticut. According to a confidential informant, the defendant regularly sold ounce quantities of powder and crack cocaine to customers. In March 2001, the confidential informant introduced undercover DEA Special Agent Joseph Benson to the defendant for the purpose of buying crack cocaine.

Over the next several months, Special Agent Benson purchased approximately 54.9 grams crack cocaine from the defendant on multiple occasions. The first four sales, which occurred on March 20, 2001, March 23, 2001, March 29, 2001, and April 12, 2001, were for just under 4 grams of crack cocaine for $400 each. Special Agent Benson and the defendant typically communicated via cell phone to negotiate the purchase of the cocaine, and the defendant advised Special Agent Benson to use a specific code when ordering drugs. He told him that he should refer to powder cocaine as "girls" and crack cocaine as "guys" and that he should order it in $200 increments. For example, if Special Agent Benson wanted to order $400 worth of crack cocaine, he would simply tell the defendant that he wanted "two guys to play pool."

On several different occasions, the defendant discussed his source of supply with Special Agent Benson. During the March 29, 2001, sale, Special Agent Benson asked the defendant about the purchase of an ounce of cocaine,[3] and the defendant responded that he would have to discuss it with his "associate" and that the price would likely be no lower than $1200. During the March 30, 2001, sale, they discussed the ounce purchase again, and the defendant stated that his associate was not willing to sell the ounce for less than $1400. The defendant told Special Agent Benson that he would try to convince his supplier to lower the price, and the two agreed to talk later that same evening. When they did talk, they agreed upon a price of $1300 for an ounce of crack cocaine, which was the price set by the defendant's source. The defendant sold the ounce of crack cocaine for that price to Special Agent Benson on April 26, 2001. On May 24, 2001, after refusing to sell Special Agent Benson another ounce of cocaine because his supplier supposedly had run out, the defendant sold him half an ounce for $650.

Their final conversation occurred on June 25, 2001. On that date, during a tape recorded cell phone conversation, the defendant told Special Agent Benson that he was not willing to sell him any more crack cocaine because his source of supply and several other associates had just been arrested by the Federal Bureau of Investigation ("FBI") on drug charges. Initially, the defendant had stated that the source was nervous and did not want to continue to sell him cocaine because of the federal crackdown on several of the source's associates,

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[3] An ounce is approximately equal to 28 grams.

but then changed his story slightly by stating that the source himself had been arrested as well.[4]

On August 7, 2001, law enforcement authorities arrested the defendant as he was leaving his residence at 151 Fairfield Avenue in Stamford. They found him carrying a box containing a total of 24.5 grams of crack cocaine, which had been separated into twelve small plastic baggies contained within one larger bag, and 21.1 grams of powder cocaine, which likewise had been separated into twelve small plastic baggies contained within one larger bag. Officers then spoke to Marie Monsie Joseph, who was the defendant's girlfriend and the lessee of the first floor apartment at 151 Fairfield Avenue. She gave them written consent to search the apartment. In the master bedroom, officers found $4920 in cash hidden behind a dresser drawer. Inside the dresser, they found an envelope containing several pictures of the defendant and another individual posing with a handgun and different denominations of money. They also found a Berretta handgun loaded with nineteen rounds of .40 caliber bullets, a holster, and an extra magazine in the closet. In the second bedroom, where the defendant's

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[4] In fact, less than two weeks earlier, the FBI had arrested several individuals involved in a drug organization which had operated out of Norwalk, Connecticut. Claude Gerancon, the defendant's brother and one of the alleged cocaine suppliers of the drug organization, was not arrested at that time, but was later indicted and charged in a drug conspiracy with Jean Gerancon and several previously indicted members of the Norwalk drug organization. In November 2002, a jury in New Haven acquitted Claude Gerancon of the conspiracy charge; in February 2003, a jury in Bridgeport convicted the other members of the drug organization who had not already pleaded guilty.

brother Claude Gerancon had been staying the night before the arrest, police found two additional handguns: a loaded, silver COP .38 Special/.357 Magnum pistol, and a loaded, silver .380 caliber Accu-Tek semi-automatic pistol. A firearms trace revealed that, on June 9, 1999, the defendant, who has a state gun permit, purchased the Beretta pistol from a gun dealer in Norwalk, Connecticut.

The police also found in the second bedroom closet several shoebox-sized packages wrapped in black electrical tape. Each package contained a white powdery substance with a perfume odor. As the officers were removing the packages, Claude Gerancon, who was sitting in the living room at the time, stated that they were only "dummies." A lab test showed that the total weight of the substance was 1777 grams and that there were no narcotic substances contained in the packages. Finally, on a shelf in a hall closet, the police found a notebook containing suspected drug records.

B. GUILTY PLEA

On March 18, 2003, the defendant agreed to plead guilty to Count Five of the Indictment, which charged him with distribution of 5 grams or more of cocaine base on April 26, 2001. GA151. The parties prepared a written plea agreement (GA153-GA158) which did not include a guideline or offense conduct stipulation, but did included the following stipulation as to the quantity of narcotics involved in the defendant's criminal conduct:

> By this plea agreement, the defendant and the Government acknowledge that the quantity commensurate with the defendant's criminal activity which forms the basis of the violations charged in the indictment and the defendant's relevant conduct, and which resulted from the same

> course of conduct, was 78 grams of cocaine base. U.S.S.G. § 1B1.3, app. note 1. The defendant and the Government acknowledge that this stipulation as to the quantity of cocaine base involved in the conduct which is the basis for the offenses charged in the indictment results in a Base Offense Level of 32. The defendant acknowledges that this stipulation is only between the parties to this agreement and, as such, does not bind the Probation Department or the Court.

GA155-GA156.

The district court placed the defendant under oath and conducted a full Rule 11 canvass. GA5-GA14. Among other things, the court advised the defendant that, by pleading guilty, he was waiving his right to have the jury determine issues of fact related to sentencing, and that such facts would be decided by the court by the lower preponderance of the evidence standard, and after full consideration of all reliable information. GA14-GA15.

As to the written plea agreement, the defendant indicated that he agreed to its terms, but refused to sign it because he felt "uncomfortable" doing so. GA17. The district court confirmed that "there will not be a signed agreement in this case," but that "the written plea agreement accurately sets forth what [the defendant is] willing to agree to today." GA17. The court then marked the plea agreement as an exhibit and had the Government review its terms. GA18-GA21. Among other things, the Government indicated that the parties were agreeing "that the quantity commensurate with this criminal activity, which is set forth in all seven counts of the indictment, is 78 . . . grams of cocaine base." GA22. At the completion of this recitation, the court once again asked whether the

plea letter "accurately states what it is you're agreeing to today," and the defendant confirmed that it did. GA27.

C. SENTENCING PROCEEDING

The PSR was first disclosed to the parties on April 30, 2003. It calculated the defendant's base offense level as 32 under U.S.S.G. § 2D.1.1(c)(4), based on the 78 grams of cocaine base involved in the offense, and subtracted three levels for acceptance of responsibility under U.S.S.G. § 3E1.1(a). PSR ¶¶ 26, 32. The PSR attributed no criminal history points to the defendant and, consequently, placed him in Criminal History Category I. PSR ¶¶ 34-35. The resulting guideline range based on these calculations was 87-108 months' incarceration. PSR, Addendum.

On May 16, 2003, the defendant met with the Government in a proffer session to attempt to qualify for a two-level reduction under the safety valve provision set forth under U.S.S.G. § 5C1.2.[5] A court reporter was

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[5] All references are to the U.S. Sentencing Guidelines Manual in effect at the time of sentencing, effective November 1, 2002.

Under U.S.S.G. §§ 2D1.1(b)(1) and 5C1.2, a court should subtract two offense levels and impose a sentence "in accordance with the applicable guidelines without regard to any statutory minimum sentence" if the defendant meets the following five criteria:

> (1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(continued...)

present for the session. At sentencing, the Government maintained that the defendant did not qualify for the safety valve reduction because he was not truthful during the proffer session under § 5C1.2(a)(5), and because his possession of several firearms in connection with his criminal activity otherwise disqualified him under § 5C1.2(a)(2). GA47-GA56, GA134-GA147. The Government also maintained that a two-level increase in the defendant's offense level was warranted under § 2D1.1, based on the firearms, drug proceeds, dummy

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[5] (...continued)

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

U.S.S.G. § 5C1.2.

drugs, and photographs depicting the defendant posing with a gun and money, all of which were found in his apartment at the time of his state arrest. GA68-GA83, GA135-GA137. The court reviewed the transcript of the proffer session, found that the defendant had not been truthful on several key subjects related to his drug dealing activity, and refused to apply the safety valve reduction. GA67-GA68. The court also rejected the Government's argument that the firearms found in the apartment were connected to the drug offense. GA84-GA85. Based on these findings and the findings concerning drug quantity and acceptance of responsibility, the court concluded that the adjusted offense level was 29, and the resulting guideline range was 87-108 months' incarceration. GA85.

At that point, the court considered the defendant's various arguments for departures from the range. GA86. The defendant argued, *inter alia*, that the court should depart downward because the Government had improperly manipulated his sentencing guideline range by engaging in excessive undercover purchases from him. GA87-GA91, GA124-GA127. The defendant relied on *United States v. Gomez*, 103 F.3d 249, 256 (2d Cir. 1997), and claimed that the Government had engaged in "outrageous" conduct by inducing the defendant to sell greater quantities of cocaine base than he would have otherwise sold. GA124-GA125. The defendant asked the court "to depart downward to reflect the true level of drug activity engaged in by the defendant." GA125. In response, the Government argued that, although the sentencing manipulation argument appeared to be "a viable downward departure claim" in the Second Circuit, the facts of this case did not support its application. GA101-GA108.

The court held that the case was not "outside the heartland of drug cases" and refused to depart. GA111. The court stated:

> This is a relatively straightforward situation with an undercover officer making drug purchases from a source, and I do not at all have the sense that there was sentencing manipulation that took place here. In my view the agent here reasonably, logically and properly developed a relationship, some consistent purchases that gave rise to sufficient trust to ask for a larger purchase. I don't think it's improper for the government to start small to develop that trust and then to test the water to see how big a fish that they have on the line. And I haven't heard anything that suggests outrageous conduct by government or even improper conduct by government.
>
> It's true that the quantities here, given that we're dealing with crack cocaine, very quickly drive the guidelines but that's not government misconduct, that's a decision by Congress and the Sentencing Commission that we're all here living with and obviously *I have the discretion to depart downward* under the guidelines on either of the grounds sought by the defendant, but in my view a departure would not be appropriate in this case because I don't see any evidence of sentencing manipulation within the meaning of the case law and I don't see that this case is outside the heartland.

GA111-GA112 (emphasis added). The court ultimately sentenced the defendant to 87 months' incarceration and 5 years' supervised release. GA113.

SUMMARY OF ARGUMENT

I. The district court's placement of the defendant at adjusted offense level 32 based on the quantity of narcotics involved in his criminal activity did not violate his Sixth Amendment rights. Under this Court's recent decision in *United States v. Mincey*, the proposition set forth in *Blakely v. Washington*, that facts which enhance a defendant's maximum possible sentence must be proven beyond a reasonable doubt to a jury, does not apply to the federal sentencing guidelines. Moreover, even assuming *arguendo* that *Blakely* applies to this case, its application does not invalidate the defendant's sentence under the Sixth Amendment because the defendant stipulated to drug quantity, which was the sole enhancing factor under the guidelines.

II. This Court lacks jurisdiction to consider the defendant's "sentencing manipulation" argument because, in essence, the argument challenges the district court's decision that the facts of this case do not warrant a downward departure from the applicable guideline range.

ARGUMENT

I. THE DISTRICT COURT'S SENTENCE DID NOT VIOLATE THE DEFENDANT'S CONSTITUTIONAL RIGHTS UNDER THE SIXTH AMENDMENT

The defendant first claims that the district court's sentence violated his Sixth Amendment rights because it was based on facts not found by the jury beyond a reasonable doubt. Specifically, he relies on the Supreme Court's recent decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), and argues that the district court improperly determined that the quantity of cocaine base commensurate with his offense conduct was 78 grams,

placing him at an adjusted offense level of 32. The defendant claims that, under *Blakely*, he has a constitutional right to have the issue of drug quantity established by facts which are proven to a jury under the reasonable doubt standard.

This Court's recent decision in *United States v. Mincey*, 380 F.3d 102 (2d Cir. 2004), is directly on point. In *Mincey*, this Court decided that it would not apply *Blakely* to the federal sentencing guidelines, so that enhancements and departures provided for under the guidelines need not be proven to a jury beyond a reasonable doubt. *Mincey*, 380 F.3d at 106. Specifically, the Court stated:

> We therefore reject appellants' arguments that, in this Circuit, the Sixth Amendment now requires every enhancement factor that increases a Guidelines range to be pleaded and proved to a jury beyond a reasonable doubt. Unless and until the Supreme Court rules otherwise, the law in this Circuit remains as stated in *Garcia, Thomas,* and our other related case law. We conclude that the district court did not err in sentencing defendants in accordance with the Guidelines as previously interpreted by this Court.
>
> In so holding, we expect that, until the Supreme Court rules otherwise, the courts of this Circuit will continue fully to apply the Guidelines.

Id.

The Supreme Court will address the issue squarely when it considers *United States v. Booker*, No. 04-104, and *United States v. Fanfan*, No. 04-105, during the October

2004 term. This Court, therefore, in accordance with its August 6, 2004, memorandum, can withhold the mandate in this case until after the Court's decision in the *Booker/Fanfan* cases.

Even assuming *arguendo*, however, that *Blakely* is held to apply to this case, the defendant's claim still fails. In *Blakely*, the Supreme Court specifically stated that one way the parties could avoid jury fact finding at sentencing was to stipulate to one or more of the enhancing factors. *See id.,* 124 S. Ct. at 2537, 2542. In this case, that is exactly what the parties did. The sole enhancing factor discussed on appeal is drug quantity. At the plea proceeding, the parties stipulated that the drug quantity commensurate with the defendant's criminal conduct in this case is 78 grams of cocaine base.

To the extent that the defendant attempts to seek advantage on appeal because he did not sign the written plea agreement at the plea hearing, he cannot overcome his plain admissions in open court. During the plea canvass, the defendant, while under oath, indicated to the court that he did not sign the plea agreement because he felt "uncomfortable" doing so, but he also advised the court that he explicitly agreed to all of the terms contained within the written agreement. GA17-GA25. The Government reviewed the terms of the agreement in open court, and the court confirmed with the defendant that he understood and agreed to all of them. GA21-GA25. In doing so, the Government specifically reviewed the drug quantity stipulation. GA22. The court then asked the defendant about the drug quantity stipulation, and he confirmed that he understood it and had agreed to it. GA25-GA27. The defendant was also advised that, by pleading guilty, he was waiving his right to have facts such as drug quantity determined beyond a reasonable doubt by a jury. GA15.

The defendant was certainly aware, both at the time of his guilty plea and the time of his sentencing, that his ultimate sentence in this case would hinge, in part, on a determination of the quantity of narcotics attributable to his criminal activity. At no time, however, did he raise a Sixth Amendment challenge to his sentence before the district court. His *Blakely* claim, therefore, is subject to review only for plain error. *See* Fed. R. Crim. P. 52(b). Under "plain error" review, "this Court must determine whether there was: 1) an error; 2) that was plain; 3) that affected the defendant's substantial rights; and 4) that seriously affected the fairness, integrity or public reputation of judicial proceedings." *United States v. Morris*, 350 F.3d 32, 36 (2d Cir. 2003) (internal brackets, quotation marks, and citations omitted); *see also United States v. Cotton*, 535 U.S. 625, 631-32 (2002) (listing the same four factors necessary for an appellate court to correct errors not raised at trial). The district court's sentence would not have amounted to plain error because the defendant had stipulated to drug quantity at the plea proceeding, which was the sole enhancing factor for *Blakely* purposes. *See United States v. Savarese*, No. 04-1099, 2004 WL 2106341, *6-*7 (1st Cir. Sept. 22, 2004) (holding that defendant's failure to dispute "factual basis underlying any of the enhancements . . . forecloses a finding of plain error" because "there is no basis for concluding that the failure to submit facts to a jury 'seriously affected the fairness, integrity or public reputation of judicial proceedings'") (quoting *Johnson v. United States*, 520 U.S. 461, 470 (1997) (internal brackets omitted)); *see also United States v. Cordoza-Estrada*, No. 03-2666, 2004 WL 2179594, *3-*4 (1st Cir. Sept. 29, 2004) (finding that alleged *Blakely* error did not satisfy plainness prong because "current law is unsettled" and future of sentencing guidelines is uncertain); *United States v. Duncan*, 381 F.3d 1070, 1075-76 (11th Cir. 2004) (same).

II. THIS COURT LACKS JURISDICTION TO REVIEW THE DISTRICT COURT'S RULING THAT THE FACTS OF THIS CASE DO NOT SUPPORT A DOWNWARD DEPARTURE FOR SENTENCING MANIPULATION

The defendant also claims that the district court erred in refusing to depart downward based on his claim of sentencing manipulation. In particular, the defendant alleges that the undercover DEA officer engaged in "outrageous" conduct by purchasing excessive amounts of crack cocaine from him and thereby driving up his exposure under the Sentencing Guidelines. This claim is not reviewable on appeal because the district court specifically recognized that it had the discretion to depart on the ground suggested and ruled that the facts of this case did not support such a departure.

A. GOVERNING LAW AND STANDARD OF REVIEW

This Court has refrained from interpreting its appellate jurisdiction in a manner that would intrude upon the traditional exercise of discretion by a sentencing court. It is well established that a district court's decision not to grant a request for a downward departure is generally not reviewable on appeal. *See United States v. Rosse*, 320 F.3d 170, 172 (2d Cir. 2003); *United States v. Duverge Perez*, 295 F.3d 249, 255 (2d Cir. 2002); *United States v. Tenzer*, 213 F.3d 34, 42 (2d Cir. 2000); *United States v. Stephenson*, 183 F.3d 110, 120 (2d Cir. 1999); *United States v. Chabot*, 70 F.3d 259, 260 (2d Cir. 1995) (per curiam); *United States v. Brown*, 98 F.3d 690, 694 (2d Cir. 1997) (per curiam) (noting "presumption that district judges understand the much-discussed processes by which they may, in circumstances permitted by law, exercise discretion to depart from the sentence range prescribed by the Guidelines calculus").

A district court's decision not to grant a departure is reviewable only where the record shows that "'the sentencing judge mistakenly believe[d] that he or she lack[ed] authority to grant a given departure.'" *Tenzer*, 213 F.3d at 42 (quoting *United States v. Clark*, 128 F.3d 122, 124 (2d Cir. 1997)); *see also United States v. Middlemiss*, 217 F.3d 112, 125 (2d Cir. 2000) (same); *Chabot*, 70 F.3d at 260-61 (same). The presumption of non-reviewability may only be "'overcome where the record provides a reviewing court with clear evidence of a substantial risk that the judge misapprehended the scope of his departure authority.'" *Tenzer*, 213 F.3d at 42 (quoting *Clark*, 128 F.3d at 124).

B. Discussion

The defendant does not claim that the court "'misapprehended the scope of his departure authority.'" *Tenzer*, 213 F.3d at 42 (quoting *Clark*, 128 F.3d at 124). Instead, he cites the case law on "sentencing manipulation" and argues that the district court abused its discretion in failing to depart on that ground. As this Court has made clear repeatedly, it has no jurisdiction to review a district court's discretionary determination not to grant a downward departure. This appeal, insofar as it challenges the failure to grant a departure, should be dismissed.

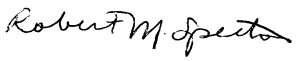
CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: October 7, 2004

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



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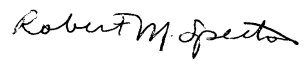
CERTIFICATION PER FED. R. APP. P. 32(a)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 4,980 words, exclusive of the Table of Contents, Table of Authorities, this Certification, and the Addendum of Statutes and Rules.



ROBERT M. SPECTOR
ASSISTANT U.S. ATTORNEY

ADDENDUM OF STATUTES

Statutory Provisions

21 U.S.C. § 841(a)(1)

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

. . . .

21 U.S.C. § 841(b)(1)(B)(iii)

(B) In the case of a violation of subsection (a) of this section involving--(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

. . .

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

21 U.S.C. § 841(b)(1)(C)

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at

least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

Guideline Provisions

U.S.S.G. § 5C1.2

(a) Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, the court shall impose a sentence in accordance with the applicable guidelines without regard to any statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5) set forth verbatim below:

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to to so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged

in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

(b) In the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five years, the offense level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall be not less than level **17**.