07-3487-cr

To Be Argued By:
PETER S. JONGBLOED

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-3487-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

PHILIP A. GIORDANO,
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 August 6, 2007 (Alan H. Nevas, S.J.) in which the district court issued a written ruling refusing to resentence the defendant in light of *United States v. Booker*, 543 U.S. 220 (2005) and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). Joint Appendix[1] ("JA") 133. The district court had subject matter jurisdiction over this criminal case under 18 U.S.C. § 3231. On August 14, 2007, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), JA 135, and this Court has appellate jurisdiction over the defendant's challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

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[1] Reference is made to the Joint Appendix filed with the defendant's first brief on this appeal.

Statement of Issues Presented for Review

1. Whether the district court's decision on a *Crosby* remand that it would not have imposed a different sentence under an advisory Guidelines regime was both procedurally and substantively reasonable.

2. Whether the sentencing judge's comments about the seriousness of the defendant's criminal conduct were both proper and based entirely on the record, and therefore do not suggest bias warranting resentencing before a different district judge.

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Preliminary Statement

Philip A. Giordano, a lawyer and three-term Mayor of Waterbury, was convicted of various federal crimes arising from his repeated sexual abuse of two young girls, ages eight and ten. At sentencing, the district court determined that the defendant's Sentencing Guidelines range was life, but departed downward after granting a U.S.S.G. § 5K1.1 substantial assistance motion and imposed a 37-year prison sentence.

On appeal, this Court affirmed the judgment of conviction. *United States v. Giordano*, 442 F.3d 30, 172 Fed. Appx. 340 (Mar. 3, 2006), *cert. denied*, 127 S. Ct. 1253 (2007); JA 65-86. On remand pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), the sentencing court issued a written decision concluding that it would not have imposed a different sentence under an advisory Guidelines regime and thus denying the defendant's request for resentencing.

In this appeal, the defendant claims that the experienced district judge's decision not to lower his original 37-year sentence was procedurally and substantively unreasonable. Also, he asks that the case be assigned to a different judge on remand. These claims have no merit. The district court fully complied with its sentencing obligations and its obligations under *Crosby*. The court fully understood its authority to impose a lower sentence based on an advisory Guideline regime and on the factors set forth in 18 U.S.C. § 3553(a), and its decision not to resentence the defendant was reasonable.

Statement of the Case

On July 26, 2001, the Government arrested the defendant without a warrant for violations of 18 U.S.C. §§ 2425 and 371. JA 101 (docket sheet). On September 12, 2001, a federal grand jury in Connecticut returned an indictment charging the defendant with two counts of civil rights violations (18 U.S.C. § 242), one count of conspiracy to violate 18 U.S.C. § 2425 (18 U.S.C. § 371), and eleven counts of unlawful use of interstate facilities to

transmit information about a minor (18 U.S.C. § 2425). JA 69, 107 (docket sheet). On January 16, 2003, the grand jury returned an 18-count superseding indictment which added four additional charges under 18 U.S.C. § 2425. JA 70, 116 (docket sheet).

On March 25, 2003, after a three-week trial, the jury returned with its verdict, unanimously finding the defendant guilty of the two civil rights offenses (Counts 1 and 2), conspiring to use an interstate facility to transmit information about a minor (Count 3), and using an interstate facility to transmit information about a minor (Counts 4-9 and 11-18). The jury specifically found that the defendant committed aggravated sexual abuse in connection with Counts 1 and 3. The jury could not reach a unanimous verdict on Count 10; that count was later dismissed on the Government's motion. JA 72, 123, 125-26. (docket sheet).

On June 13, 2003, the court sentenced the defendant primarily to an aggregate 444 months (37 years) of imprisonment, to be followed by five years of supervised release, plus a $1,700 special assessment. JA 1, 126; Government Appendix[2] ("GA") 1-49.

On appeal, he raised a host of challenges to his convictions and sentence, including claims that the district court erred in calculating the Sentencing Guidelines range

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[2] Reference is made to the Government Appendix filed with the Government's first brief in response to the defendant's first brief filed on this appeal.

and in declining to downwardly depart further than it did. This Court affirmed the judgment of conviction and sentence by published decision, *United States v. Giordano*, 442 F.3d 30 (2d Cir. 2006), JA 65-86, and unpublished decision, *United States v. Giordano*, 172 Fed. Appx. 340 (2d Cir. 2006), JA 87-92. Because the defendant's appeal was pending when the Supreme Court decided *United States v. Booker*, 543 U.S. 220 (2005), this Court's decision permitted the defendant to seek a remand pursuant to *United States v. Fagans*, 406 F.3d 138 (2d Cir. 2005) or *Crosby*, 397 F.3d 103, as appropriate. JA 92, 131 (docket sheet).

On remand pursuant to *Crosby*, the parties submitted memoranda to the district court. JA 133 (docket sheet), 52-64 (Government memorandum), 32-51 (defendant's memorandum).

On July 26, 2007, the Court conducted a hearing at which the defendant sought resentencing to a "substantially lower sentence." JA 10-30.

On August 6, 2007, the district court issued a written decision concluding that it would not have imposed a different sentence under a post-*Booker* regime and denying the defendant's request for resentencing. JA 3-9.

On August 14, 2007, the defendant filed a notice of appeal. JA 133-34, 135. He is presently serving his sentence.

On December 7, 2007, the defendant, who continued to be represented by his trial counsel, filed his appeal brief.

On February 6, 2008, the Government filed its brief and Appendix.

On March 14, 2008, the Court granted the defendant's counsel's motion to withdraw his appearance because the defendant had just filed a habeas petition in the district court claiming, among other things, that his trial counsel was ineffective. The Court ordered the appointment of new counsel.

On September 5, 2008, with the assistance of new counsel, the defendant filed an appeal brief.

Statement of Facts and Proceedings Relevant to this Appeal

A. The defendant's sexual abuse of two minors

This Court's reported decision from the first appeal outlines the facts developed at trial about the defendant's repeated sexual abuse of two minor children while he was the mayor of the City of Waterbury, Connecticut. *Giordano*, 442 F.3d at 33-37; JA 68-72. Guitana Jones, a prostitute with whom the defendant had a long-term sex-for-money relationship, was the mother of one victim and the aunt of the second. JA 68, 70. Starting in November 2000, Jones brought the two minors to the defendant and he made them perform oral sex. JA 70. The first victim was eight years old and the second one was ten years old

when the regular sexual abuse started. The abuse occurred at various locations, including the defendant's law office, the defendant's home, the defendant's office at City Hall, and in the defendant's official city car. JA 70-71.

The two minor victims testified at trial "that they were hurt by and disliked the abuse but did not tell anyone about it out of fear of what Giordano could do to them." JA 71. According to the second victim, she knew the defendant was the mayor and "[s]he 'thought the Mayor could rule people, like be their boss.'" JA 71. She further testified that she "'was afraid he could have someone hurt my family and I was afraid he own everybody.'" JA 71. The first victim testified that Jones told her the defendant was the mayor and "she understood that the a mayor's role was to '[p]rotect the city' and '[w]atch over us, like God.'" JA 71. The first victim told no one because "she was scared of Giordano," and she "believed she 'would get put in jail' if she told other people because she 'thought he had power.'" JA 71.

B. The original sentencing hearing

After the defendant's conviction on seventeen charges related to his sexual abuse of the two girls, on June 13, 2003, the district court conducted a sentencing hearing. GA 1-48. The Government had filed a motion for downward departure, pursuant to U.S.S.G. § 5K1.1, based on the defendant's substantial assistance to the Government on another matter after he was initially contacted by federal agents. GA 9-10. The court indicated that it was granting the motion. GA 8. The

court adopted the findings and conclusions of the Pre-Sentence Report ("PSR"). GA 10, 20. The district court specifically found that the final offense level was 43, and that such a result would be appropriate even under alternative calculations. GA 9, 11. At offense level 43 and criminal history category I, the defendant's Guideline range was life. GA 9. The court indicated that, in granting the § 5K1.1 motion, it intended to sentence within the range of 360 months or more. GA 9.

The defendant advanced various grounds for a departure from the Guidelines. GA 11. Specifically, he asked for a departure based on the following grounds: (1) the defendant's unusual susceptibility to abuse in prison, relying on *Koon v. United States*, 518 U.S. 81 (1996) and U.S.S.G. § 5K2.0, GA 12; (2) the fact that the defendant had endured 23 hours a day in lock-down because of the nature of the offense and his cooperation with the Government, GA 12; (3) the defendant's military service, GA 12; (4) the extraordinary impact his sentence would have on his family, GA 12; and (5) the negative consequences arising from his cooperation with the Government, namely the fact that he would be in 23-hour lock-down for his entire period of incarceration, GA 12. In elaborating on this last ground, the defendant argued that as a result of his cooperation, "he has now been forced to endure and will have to endure conditions of confinement that are extraordinary and much more onerous than a normal prisoner. His isolation, therefore, will not be just from his family, but also from other individuals where he is confined. These are terrible conditions under which to live . . . ." GA 13. He asked

the court to consider that he was 40 years old and that he was at risk in prison. GA 14. The defendant asked for the court to exercise leniency within its discretion and impose a sentence of less than 30 years. GA 16-17. The defendant himself declined to speak. GA 17.

The court indicated that it was aware of the defendant's special circumstances as a cooperator and the need for a designation of an institution within the Bureau of Prisons to accommodate his particular vulnerability. GA 24. The court said it intended to write the Bureau of Prisons to bring this to its attention. GA 24.

In explaining the sentence to be imposed, the court said:

> I've thought long and hard about this case and about your sentencing. I probably have spent more time thinking about this case and your sentence than I have on any case that I can remember. I've been on the bench almost 18 years, and before that I was United States Attorney for four years. I presided over many trials, drug trafficking, murder, and a whole range of cases involving antisocial behavior. This case is the worst I've ever seen. Your conduct is the worst I've ever seen and I've seen drug dealers and murderers, but what you did is indescribable.

GA 41. The court continued, stating "[y]ou're an educated man. You went to college. You went to law school. At a young age you embarked on a political career. You were

a golden boy. You were a state legislator, a mayor of a major Connecticut city." GA 41.

The sentencing court then said that the defendant engaged in "the worst kind of antisocial sexual behavior that one can image. Preying on two small, innocent children, eight and ten years old. They knew nothing." GA 41. The court then called him a "sexual predator." GA 41. The court read from reports of the children's therapist elaborating on how the defendant's assaultive and threatening conduct had damaged the two children. GA 41-43. The court explained:

> You destroyed these girls emotionally and psychologically. You preyed upon them and you destroyed their innocence to satisfy your own sexual desires.

GA 44.

The district court stated that the defendant's Guidelines range provided for a life sentence, a sentence it would have imposed based on his conduct. GA 44. The court granted the Government's § 5K1.1 motion permitting the court the discretion to sentence to a term of less than life. GA 44. The court departed downward to a range of 360 months to life imprisonment. JA 4; GA 9. The district court explained that it understood its authority to depart on the various grounds the defendant advanced, but declined to exercise its discretion to do so. GA 47-48; JA 92.

With this explanation, the court sentenced the defendant to concurrent sentences of 444 months on each of the first two counts, and 60 months for each of the remaining counts. JA 1; GA 45-46.

C. The direct appeal

On appeal, the defendant raised a host of challenges to his convictions and sentence. As relevant to this appeal, he claimed that the district court erred in calculating the Sentencing Guidelines range and in declining to downwardly depart further than it did. JA 91. This Court affirmed the convictions and sentence. *Giordano*, 442 F.3d 30, 172 Fed. Appx. 340. With respect to the defendant's sentencing arguments, this Court found that while there was an error in the Guideline calculations, the error was harmless because the combined offense level remained 43 as the sentencing court had determined. JA 91-92. Therefore, the defendant's Guidelines range remained life imprisonment.

The defendant was permitted to seek a remand pursuant to *Fagans*, 406 F.3d 138, or *Crosby*, 397 F.3d 103, as appropriate. JA 92. Thus, on August 8, 2006, this Court remanded the case under *Crosby* to allow the district court to determine whether it would have imposed a materially different sentence had the Sentencing Guidelines been advisory. JA 131 (docket entries).

D. The parties' memoranda on remand

On June 12, 2007, the defendant filed a memorandum in support of his request for a resentencing. JA 32-51, 133. He argued that the 37-year sentence was tantamount to a life sentence without parole and advanced various factors to be considered in imposing a reasonable and individualized sentence under 18 U.S.C. § 3553(a). JA 33. The defendant further argued that a 20-year sentence would reflect the seriousness of the offense, be consistent with the public respect for the law, provide just punishment for the offenses committed, afford adequate deterrence both to the defendant personally and the public at large, protect the public from the defendant committing further crimes, and provide correctional treatment in the context of punishment. JA 41.

The defendant asked the court to consider the following factors as it decided whether to resentence him: (1) his unusual susceptibility to abuse in prison, JA 43-45; (2) the conditions of his pre-sentencing confinement (i.e., segregation in a state facility), JA 45-46; (3) his military service, JA 46-47; and (4) the sentence's extraordinary impact upon his family, JA 47-48. Specifically, he asked the court to impose a non-Guideline sentence or grant a substantial downward departure for each of these grounds alone or in combination with each other. JA 48. In addition, the defendant asked the court to consider the fact that the 37-year sentence was more than twice the length of the sentence imposed on him in state court for the same conduct. JA 49. Arguing that the sentence was

unreasonable as a matter of fact and law, he asked the court to impose a 25-year sentence. JA 50.

On June 12, 2007, the Government submitted its memorandum in aid of post-*Crosby* proceedings on remand. JA 52-64, 133. The Government submitted that the court would have imposed the same sentence even if the Sentencing Guidelines were advisory at the time it sentenced the defendant. JA 58. The Government argued in its memorandum that a 37-year sentence was fair, just, and reasonable because the defendant used his position as a mayor from approximately November 2000 to July 2001 to sexually abuse two children under the age of 12 and to coerce them to keep quiet about the abuse. JA 60-61.

The Government further argued that none of the factors enumerated in § 3553(a) weighed in favor of reducing the defendant's sentence and thus that resentencing the defendant was unnecessary. JA 62-63.

E. The hearing on remand

On July 26, 2007, the district court held a hearing on the defendant's request for resentencing. JA 10-30, 133. Counsel for the defendant advanced various arguments for a substantially lower sentence, including his claim that the 37-year sentence was tantamount to a life sentence and that because it would be served in isolation was cruel, "truly inhumane," and "terribly harsh." JA 12-13, 14-16, 27. In response to this argument, the court noted that it had recently received letters (with supporting attachments) from the Department of Children and Families about the

two victims. In addition, the court noted that it had received letters from the girls themselves, reflecting, "in the Court's view, two children whose lives have literally been destroyed." JA 13. The court commented that the children "continue to suffer, to this day, from nightmares, anti-social behavior which they're beginning to exhibit, all of which the therapists attribute to the horrendous experience that they went through during the period that they were abused by your client." JA 13-14. Thus, said the court, "the fact that [the defendant's] gonna spend a miserable future in prison does not move me. It doesn't move me at all." JA 14. Defense counsel responded by arguing that the sentence – effectively a life sentence in isolation – was greater than necessary. JA 14. He argued that under all the factors under § 3553(a), the sentence was unreasonable. JA 16.

The Government acknowledged that the court was best positioned to determine whether it would have imposed a different sentence under an advisory Guidelines regime, but argued that the record suggested that the court's sentence would have been the same. JA 17-18. As the Government noted, at the original sentencing, the court had explained that it had spent considerable time thinking about the appropriate sentence. JA 18. Furthermore, the Government argued that the court had previously reviewed the § 3553(a) factors, including the nature and circumstances of the offense and the defendant's history and characteristics. In addition, before the original sentencing, the court had considered an extensive PSR, presided over the trial, listened to the two children testify about how the defendant sexually abused them, heard

about the defendant's background (including his military career, his law school career, and his work in the city), and heard about the defendant's criminal conduct. JA 19. Further, the court had also watched the defendant testify and found that he had obstructed justice by testifying untruthfully and threatening to kill his codefendant. JA 19-20. Finally, with respect to the victims, the Government argued that the same bleak prospect for the two victims had continued. JA 22.

In response to the defendant's assertion that the court should take into account that he received an 18-year sentence in state court for the same conduct, the Government argued that it should have no bearing. As the Government noted, the disposition in state court was the result of a plea bargain, negotiated between the defendant, his counsel, and the state prosecutor. JA 23. In addition, the Government noted that the defendant did not admit his guilt in state court as he pleaded guilty under the *Alford* doctrine and that there was no contrition or sense of responsibility on the defendant's part. JA 23-24. Finally, the Government pointed out that the state proceedings were further distinguishable because in the federal case, the two child victims – one of whom who was curled up in a fetal ball before she testified and the other of whom was throwing up – had to testify at trial about being sexually abused by the city's mayor. JA 24.

Defense counsel responded by explaining that one of the reasons for the state disposition was so that the children did not have to testify at another trial. JA 25. He

then again argued for leniency based on the defendant's condition in prison.

At this point, the court interrupted counsel and read from a letter recently received from one of children's caretakers:

> Like any child who has endured the trauma of the level of terror and invasion that she has, [the victim] has been permanently changed by her abuse, which has left her with a variety of conditions that affect her everyday, and in every part of her life. It is common knowledge that when a child lives with chronic terror and stress, it changes the development of her brain and brain chemistry. This change in chemistry affects the developing personality, with subsequent thought processes and behaviors which impact relationships in all areas of life, from social functioning to academic performance. Although [she] was a child and the victim, she had to be displaced from her family and community with subsequent disruptive foster placements, and has lived for a period in a residential setting, where she has become institutionalized.
>
> Her educational history is full of gaps, and her level of academic functioning has been greatly affected. This contributes to her image of herself as stupid, and her already existing shame from the abuse that's compounded by her school performance. She has learned that anger and aggression are the

> best defenses, and the behaviors that we see in the location can be very disruptive and unpredictable, sometimes threatening her own and others' safety.

JA 25-27. The court referenced a second letter about the other child and described it as "equally troubling and heartrending." JA 27. In light of these letters describing the consequences of the defendant's sexual abuse, the court asked defense counsel, "and you're telling me that his life in prison is going to be difficult?" JA 27.

The defendant continued to assert that his sentence was tantamount to a life sentence, that his time in prison was cruel, and that he was asking the court to consider it. JA 27-28. The defendant asked the court to resentence him. JA 28. The Government reasserted that the court should not change the sentence, and the court took the matter under advisement. JA 29.

F. The court's written decision not to resentence

On August 6, 2007, the court issued a written ruling finding that it would not have imposed a different sentence under a post-*Booker* regime and denying the defendant's request for resentencing. JA 3, 7, 9. After reciting the background to the case, the court explained the law governing post-*Booker* sentencing proceedings:

> Pursuant to *Booker*, the Second Circuit has instructed district courts to consider the Guidelines as advisory and to consider them along with all of the other factors listed in 18 U.S.C. § 3553(a) when

> imposing a sentence. *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). As the court of appeals explained in *Crosby,* this normally requires the sentencing court to determine the applicable Guidelines range, or at least identify the arguably applicable range, and the applicable policy statements and then, after considering the Guidelines and the § 3553(a) factors, decide "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." *Id*. at 113. The court, however, admonished that even though advisory, the Guidelines were more than just "a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge." *Id.*

JA 5.

The court went on to explain the procedure applicable for cases remanded under *Crosby*:

> [T]he Second Circuit decided that the then-pending direct appeals involving challenges to sentences imposed before *Booker* were to be remanded "not for the purpose of a required resentencing, but only for the more limited purpose of permitting the sentencing judge to determine whether to resentence, now fully informed of the new sentencing regime, and if so, to resentence." [*Crosby*, 397 F.3d] at 117. In other words, on

> remand of such a case, the sentencing judge is to determine whether it would have imposed a materially different sentence, under the circumstances existing at the time of the original sentence, if the post-*Booker/Fanfan* regime was followed. *Id.* If, on remand, the court concludes that it would not have imposed a materially different sentence, that is the end of the matter. *Id.* at 120. If the court decides otherwise, it must resentence the defendant under the new sentencing regime. *Id.*

JA 5-6. The court went on to write that the

> Second Circuit did not define the required degree of consideration or the weight that the sentencing court was to give to the applicable Guidelines range. Rather, it preferred "to permit the concept of 'consideration' . . . to evolve as district judges faithfully perform their statutory duties." *Id.* at 113; *see also United States v. Fernandez*, 443 F.3d 19, 29-30 (2d Cir. 2006) (stating that a "district judge must contemplate the interplay among the many facts in the record and the statutory guideposts"). The court did hold, however, that the sentencing court is not required to make a specific articulation of the manner in which the § 3553(a) factors were considered. *Crosby*, 397 F.3d at 113; *see also Fernandez*, 443 F.3d at 32 (advising that

> the weight given to any single § 3553(a) factor is firmly committed to the discretion of the sentencing judge).

JA 6.

After outlining these standards, the court noted that because the defendant's sentence was imposed pre-*Booker* and was on direct appeal at the time of the *Crosby* decision, the question before the court was whether a re-sentencing was warranted. JA 7.

On this question, the court ultimately determined that re-sentencing was not warranted. The court determined that had the Guidelines been advisory at the time Giordano was sentenced the court would have imposed the same 37-year concurrent sentence. JA 7. The court explained that because it had granted the Government's § 5K1.1 motion, it "was not bound by the Guidelines and Giordano's sentence was considerably below the otherwise then-mandatory applicable Guidelines range of life imprisonment. *Cf. United States v. Duffy*, 133 F. Supp.2d 213, 217 (E.D.N.Y. 2001) (noting pre-*Booker* that a § 5K1.1 motion has the singular power to yield a sentence far lower than otherwise required by the Guidelines)." JA 7. The court went on to write that it "effectively treated the Guidelines as advisory and imposed a non-Guidelines sentence. *See Crosby*, 397 F.3d at 111 n.9 (finding it 'advisable to refer to a sentence that is neither within the applicable Guidelines range nor imposed pursuant to the departure authority in the Commission's policy statements as a "non-Guidelines sentence" in order to distinguish it

from the term departure')." JA 7. The written decision explained that "the court's remarks at sentencing make clear [that] the sentence reflected, at least implicitly, the court's consideration of the § 3553(a) factors, which were, even before *Booker*, relevant to the determination of a just sentence." JA 7-8.

In turning to whether a resentencing was warranted, the court noted that it had considered and given "due weight to the advisory sentencing range recommended by the Guidelines along with all of the § 3553(a) factors, the PSR and other relevant portions of the record, and the post-remand arguments of counsel." JA 8. The court found that "[a]ll of these considerations convince the court that resentencing is not required because it would not have imposed a different sentence if the *Booker/Fanfan* regime had been in place at the time Giordano was originally sentenced." JA 8. The court explained further:

> The 444-month sentence was, and still remains, just, reasonable, and sufficient, but not greater than necessary given the nature of his crimes and the need to reflect the seriousness of those crimes, the need to promote respect for the law, the need to afford adequate deterrence to criminal conduct, the need to protect the public from further crimes of this individual, and the need to avoid unwarranted sentencing disparities. The sentence also accounts for Giordano's cooperation with the government as reflected in its § 5K1.1 motion.

JA 8. The court continued:

> The court is not persuaded otherwise by Giordano's arguments in support of resentencing. Rather than providing the court with new mitigating circumstances that existed at the time of the original sentence, but were not available for consideration given the then-mandatory nature of the sentencing regime, Giordano essentially only argues that the harsh conditions of his confinement justify a lesser sentence. But, as the Second Circuit made clear, the court cannot consider such arguments in deciding whether or not to resentence a defendant. That decision must be based solely on the circumstances that existed at the time of the original sentence. *Crosby*, 397 F.3d at 118.

JA 8-9. The district court concluded: "Based on the circumstances at the time of the original sentence, and giving the required consideration to the currently applicable statutory requirements as set forth in *Booker/Fanfan* and *Crosby*, the court concludes that the sentence imposed on Giordano would have been the same as originally imposed and thus finds that resentencing is not required." JA 9.

Summary of Argument

The district court committed no procedural error in the proceedings on remand. The court explained that it chose not to resentence the defendant because the original sentence was appropriate in light of the § 3553(a) factors as applied to this case. The fact that the court found the original sentence to be appropriate does not mean that the

court failed to consider the proper factors on the *Crosby* remand.

The defendant's sentence, reaffirmed by the district court on a *Crosby* remand, was substantively reasonable. The record amply demonstrates that the experienced district court judge, who had presided over the defendant's trial, properly followed this Court's directives in *Crosby* and determined that it would have not have imposed a different sentence under the circumstances existing at the time of the original sentence had the post-*Booker* regime been followed. The district court's ruling is properly read as declining to consider the defendant's claim that he had continued to suffer from isolation and harsh treatment in prison since the time of his original sentencing, since a *Crosby* decision must not be based on later-arising facts. Moreover, there is no basis to find that the district judge exceeded the bounds of allowable discretion or violated the law in determining the original sentence was sufficient but no greater than necessary to achieve the purposes of sentencing.

Finally, the sentence should be affirmed and not remanded to a different district judge. Judge Nevas, who handled the pretrial litigation and before whom the case was tried, remained objective in deciding that the original, pre-*Booker,* sentence was appropriate on the *Crosby* remand. A judge is entitled – indeed, expected – to express his views about the seriousness of a defendant's conduct at sentencing. Because the views expressed by Judge Nevas were based entirely on information he learned in the

course of judicial proceedings, there is no basis for seeking his recusal.

Argument

I. The defendant's sentence was procedurally and substantively reasonable.

A. Governing law and standard of review

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the United States Sentencing Guidelines, as written, violate the Sixth Amendment principles articulated in *Blakely v. Washington*, 542 U.S. 296 (2004). *See Booker*, 543 U.S. at 243. The Court determined that a mandatory system in which a sentence is increased based on factual findings by a judge violates the right to trial by jury. *See id.* at 245. As a remedy, the Court severed and excised the statutory provision making the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), thus declaring the Guidelines "effectively advisory." *Booker*, 543 U.S. at 245.

After the Supreme Court's holding in *Booker* rendered the Sentencing Guidelines advisory rather than mandatory, a sentencing judge is required to: "(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence." *See United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir.), *cert. denied*, 127 S. Ct. 192 (2006); *Crosby*, 397 F.3d at 113.

The § 3553(a) factors include: (1) "the nature and circumstances of the offense and history and characteristics of the defendant"; (2) the need for the sentence to serve various goals of the criminal justice system, including (a) "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment," (b) to accomplish specific and general deterrence, (c) to protect the public from the defendant, and (d) "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner"; (3) the kinds of sentences available; (4) the sentencing range set forth in the Guidelines; (5) policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to victims. *See* 18 U.S.C. § 3553(a).

"[T]he excision of the mandatory aspect of the Guidelines does not mean that the Guidelines have been discarded." *Crosby*, 397 F.3d at 111. "[I]t 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." *Id.* at 113.

Consideration of the Guidelines range requires a sentencing court to calculate the range and put the calculation on the record. *See Fernandez*, 443 F.3d at 29. The requirement that the district court consider the section 3553(a) factors, however, does not require the judge to precisely identify the factors on the record or address

specific arguments about how the factors should be implemented. *Id.*; *Rita v. United States*, 127 S. Ct. 2456, 2468-69 (2007). There is no "rigorous requirement of specific articulation by the sentencing judge." *Crosby*, 397 F.3d at 113. "As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, [this Court] will accept that the requisite consideration has occurred." *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005). Moreover, the decision whether to resentence is to be based on the circumstances that existed at the time of the original sentence, not that arise after sentencing. *Crosby*, 397 F.3d at 118.

This Court reviews a sentence for reasonableness. *See Rita*, 127 S. Ct. at 2459; *Fernandez*, 443 F.3d at 26-27; *United States v. Castillo*, 460 F.3d 337, 354 (2d Cir. 2006). The same standard applies to a district court's decision not to re-sentence after a *Crosby* remand. *United States v. Williams*, 475 F.3d 468, 474-75 (2d Cir. 2007). The Court has generally divided reasonableness review into procedural and substantive reasonableness. For a sentence to be procedurally reasonable, the Court must review whether the sentencing court identified the Guidelines range based upon found facts, treated the Guidelines as advisory, and considered the other § 3553(a) factors. *United States v. Rattoballi*, 452 F.3d 127, 131-32 (2d Cir. 2006). Substantive reasonableness is contingent upon the length of the sentence in light of the case's facts and the factors outlined in § 3553(a). *Id.* at 132.

This Court has recognized that "[r]easonableness review does not entail the substitution of [its own] judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion." *Fernandez*, 443 F.3d at 27. As the Supreme Court recently instructed the "explanation of 'reasonableness' review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions." *Gall v. United States*, 128 S. Ct. 586, 594 (2007) (citing *Booker*, 543 U.S. at 260-62). *See also Rita*, 127 S. Ct. at 2465 ("appellate 'reasonableness' review merely asks whether the trial court abused its discretion").

Under this deferential standard, in determining "whether a sentence is reasonable, [the Court] ought to consider whether the sentencing judge 'exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.'" *Fernandez*, 443 F.3d at 27 (quoting *Crosby*, 397 F.3d at 114). Furthermore, in assessing the reasonableness of a particular sentence imposed:

> [a] reviewing court should exhibit restraint, not micromanagement. In addition to their familiarity with the record, including the presentence report, district judges have discussed sentencing with a probation officer and gained an impression of a defendant from the entirety of the proceedings, including the defendant's opportunity for

> sentencing allocution. The appellate court proceeds only with the record.

United States v. Fairclough, 439 F.3d 76, 79-80 (2d Cir.) (per curiam) (quoting *Fleming*, 397 F.3d at 100) (alteration omitted), *cert. denied*, 126 S. Ct. 2915 (2006).

While it is rare for a defendant to appeal a below-Guidelines sentence for reasonableness, the standard of review in such situations is the same as for an appeal of a within-Guidelines sentence. *See Gall*, 128 S. Ct. at 596 ("[T]he abuse-of-discretion standard of review applies to appellate review of all sentencing decisions – whether inside or outside the Guideline range."); *United States v. Kane*, 452 F.3d 140 (2d Cir. 2006) (per curiam). In *Kane*, for instance, the defendant challenged the reasonableness of a sentence six months below the Guidelines range, and this Court stated that in order to determine whether the sentence was reasonable, it was required to consider "whether the sentencing judge exceeded the bounds of allowable discretion, committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact." *Id.* at 144-45 (quoting *Fernandez*, 443 F.3d at 27). The defendant must therefore do more than merely rehash the same arguments made below because the court of appeals cannot overturn the district court's sentence without a clear showing of unreasonableness. *Id.* at 145 ("[The defendant] merely renews the arguments he advanced below – his age, poor health, and history of good works – and asks us to substitute our judgment for that of the District Court, which, of course, we cannot do.").

As the Supreme Court recently articulated in *Gall*, the sentencing court "must make an individualized assessment based on the facts presented. If [the court] decides that an outside-Guidelines sentence is warranted, [the court] must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall*, 128 S. Ct. at 597.

The *Gall* Court further stated:

> [I]f the sentence is outside the Guidelines range, the court may not apply a presumption of unreasonableness. It may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance. The fact that the appellate court might reasonably have concluded that a different sentence was appropriate is insufficient to justify reversal of the district court.
>
> Practical considerations also underlie this legal principle. "The sentencing judge is in a superior position to find facts and judge their import under § 3553(a) in the individual case. The judge sees and hears the evidence, makes credibility determinations, has full knowledge of the facts and gains insights not conveyed by the record." Brief for Federal Public and Community Defenders et al. as *Amici Curiae* 16. "The sentencing judge has access to, and greater familiarity with, the individual case and the individual defendant before

> him than the Commission or the appeals court." *Rita*, [127 S. Ct. at 2469]. Moreover, "[d]istrict courts have an institutional advantage over appellate courts in making these sorts of determinations, especially as they see so many more Guidelines sentences than appellate courts do." *Koon v. United States*, 518 U.S. 81, 98 (1996).

Id. at 597-98 (footnote omitted).

B. Discussion

1. The district court considered the defendant's claim of harsh treatment in prison and its decision not to resentence the defendant on that basis was procedurally proper.

The defendant claims that he should be resentenced because the district court committed procedural error by refusing to consider his harsh treatment in prison. Def. Br. 23. This claim is without merit.

The defendant raised a host of arguments before the district court to support his argument that the sentence is unreasonable. For example, he argued that the following factors support a lower sentence: (1) his unusual susceptibility to abuse in prison, GA 12, JA 43-45; (2) the fact that he endured two years of segregation in state rather than a federal facility, GA 12, JA 45-46; (3) the fact that his sentence is cruel and inhumane because of his

susceptibility to abuse in prison and his current isolation in prison, GA 12, JA 13, 14-16, 27-28; (4) his military service, GA 12, JA 46-47; (5) the sentence's extraordinary impact upon his family, GA 12, JA 47-48; and (6) the fact that his sentence was more than twice as long as the state sentence imposed for the same conduct, JA13, 49-50.

The defendant's argument that his 37-year sentence was unduly harsh, like his many others for a lower sentence, were all presented to the district court, whether during the original sentencing proceeding or the proceeding on remand. With respect to the defendant's claim that his prison term would be cruel and inhumane, this argument was known to the court at the time of sentencing. GA 12. Thus, to the extent it was known prior to sentencing, the court considered this argument as part of the original sentencing process. In addition, the court considered – and rejected – this argument again during the *Crosby* remand process. In response to the defendant's claim that prison was going to be difficult, the court read portions of the letters about the difficulties the child victims were experiencing. JA 14. The court said, "the fact that he's gonna spend a miserable future in prison does not move me. It doesn't move me at all." *Id.*

The defendant properly concedes, as he must, that the district court "was correct to this very limited extent: a *Crosby* remand does look to the record of the original sentencing to determine whether a defendant should be re-sentenced." *Id.* at 12. Moreover, to the extent that the defendant's argument related to the defendant's incarceration after sentencing, the court correctly noted

that under *Crosby*, post-sentencing circumstances are not to be considered on a *Crosby* remand. *Crosby*, 397 F.3d at 118; JA 9.

The defendant misreads one portion of Judge Nevas's *Crosby* ruling when he claims that the judge declined to consider the conditions of Giordano's confinement even as they existed at the time of the original sentencing. Def. Br. 12-15. Giordano points to the following section:

> The court is not persuaded otherwise by Giordano's arguments in support of resentencing. Rather than providing the court with new mitigating circumstances that existed at the time of the original sentence, but were not available for consideration given the then-mandatory nature of the sentencing regime, Giordano essentially only argues that the harsh conditions of his confinement justify a lesser sentence. But, as the Second Circuit made clear, the court cannot consider such arguments in deciding whether or not to resentence a defendant. That decision must be based solely on the circumstances that existed at the time of the original sentence. *Crosby*, 397 F.3d at 118.

JA 8-9.

This passage must be read in the context of how Giordano presented his harsh-confinement argument during the *Crosby* remand. Specifically, Giordano's post-*Crosby* brief asked Judge Nevas to "consider *once again* the factors presented at the defendant's original

sentencing," including his susceptibility to abuse and resultant time spent "in segregation for the nearly 2 years spent in pretrial detention." JA 12 (emphasis added). Then, at the *Crosby* remand hearing, counsel went further and asked Judge Nevas to revisit the sentence 'given the realities of what's happened to him *over the last six years in prison.*" JA 13 (emphasis added). Counsel then complained that Giordano had spent time in isolation "at a U.S. Penitentiary in California," *id.*, and then reiterated that although the conditions under which Giordano was then confined were "foreseeable at the time sentence was imposed, . . . *now we know that it's been ratified*, that this existence is a punishment which is so cruel." JA 15-16 (emphasis added). It was therefore apparent that during the *Crosby* remand, the defendant sought to expand upon the harsh-confinement argument to include not only the conditions of his incarceration before sentencing, but also the conditions between sentencing and the *Crosby* remand proceedings.

Against that backdrop, Judge Nevas's comments about declining to consider post-sentencing developments can only be understood as responding to Giordano's newly expanded claims that his *ongoing* terms of confinement merited more lenient treatment. Earlier in his ruling, Judge Nevas had already concluded that "[b]ased on the circumstances *at the time of the original sentence,*" re-sentencing was unwarranted. JA 9 (emphasis added). It was clear that the circumstances at the time of the original sentencing included Giordano's complaints about his conditions of confinement. Accordingly, Judge Nevas's observation that the defendant had not proffered "new

mitigating circumstances that existed at the time of the original sentence" can only be read to mean that he (quite properly) did not view Giordano's complaints about his *present* terms of confinement as capable of triggering a resentencing under *Crosby*.

2. The district court complied with *Crosby* in all other respects.

The district court's written decision demonstrates that it was well aware of the advisory nature of the Guidelines and recognized that they were not binding on the court. JA 3, 5-6, 7, 9. Furthermore, the experienced district judge carefully explained his reasoning in deciding not to resentence the defendant. As Judge Nevas noted, when he originally imposed sentence, he had granted a § 5K1.1 motion and thus viewed the Guidelines at that time as non-binding. JA 7. Judge Nevas further explained that in this context, "the sentence reflected, at least implicitly, the court's consideration of the § 3553(a) factors, which were, even before *Booker*, relevant to the determination of a just sentence." JA7-8. In other words, according to the judge, the original sentence already incorporated a careful balancing of all the § 3553(a) factors.

Nevertheless, as demonstrated by the court's decision, the court reconsidered its original decision on the *Crosby* remand, "giving due weight to the advisory sentencing range recommended by the Guidelines along with all of the § 3553(a) factors, the PSR and other relevant portions of the record, and the post-remand arguments of counsel."

JA 8. This analysis confirmed its original decision and led it to conclude that resentencing was unnecessary. JA 8.

Although Judge Nevas did not go into intricate detail in his analysis, this Court does not impose a "rigorous requirement of specific articulation by the sentencing judge. *Crosby*, 397 F.3d at 113. In any event, Judge Nevas's decision reflects a careful consideration of the facts of this case in conjunction with the § 3553(a) factors. At a minimum, the district judge here is entitled to the presumption that he fully and properly considered all relevant factors. *Crosby*, 397 F.3d at 118. *See Fernandez*, 443 F.3d at 29-30 ("'[a]s long as the judge is aware of both the statutory requirements and the sentencing range . . . and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, we will accept that the requisite consideration has occurred.'") (quoting *Fleming*, 397 F.3d at 100) (emphasis omitted).

The district court neither misapprehend its authority to resentence the defendant nor denied him the opportunity to present any claim, including that his sentence was unreasonably long. The district court considered the defendant's various arguments for a lesser sentence, was well aware of the advisory nature of the Guidelines, recognized that it was not bound by them, and decided not to resentence the defendant. The court's decision was procedurally proper and should be upheld.

3. The defendant's 37-year sentence was substantively reasonable.

The district court denied the defendant's request for resentencing on a *Crosby* remand, finding that even under an advisory Guidelines regime the original sentence of 37 years "was, and still remains, just, reasonable, and sufficient, but not greater than necessary" given the § 3553(a) factors, specifically mentioning "the nature of [the defendant's] crimes and the need to reflect the seriousness of those crimes, the need to promote respect for the law, the need to afford adequate deterrence to criminal conduct, the need to protect the public from further crimes of this individual, and the need to avoid unwarranted sentencing disparities." JA 8. In addition, the court noted that the sentence "accounts for [the defendant's] cooperation with government as reflected in its § 5K1.1 motion." JA 8. In short, the record shows that the district court was aware of the statutory requirements, understood the need to consider all of the relevant factors, and after giving them due consideration, determined that a 37-year sentence was appropriate and reflected the proper balance of all of the § 3553(a) factors.

As the Supreme Court and this Court have repeatedly emphasized, the district court's judgment about the appropriate sentence in a criminal case is entitled to deference and should only be disturbed if it is an abuse of discretion. *Gall*, 128 S. Ct. at 594; *Fernandez*, 443 F.3d at 27. Here, the defendant has not shown, because he cannot, that the district court abused its discretion. Accordingly, this Court should not substitute its judgment

for that of the district court's. *Fernandez*, 443 F.3d at 27 ("Reasonableness review does not entail the substitution of [the appellate court's] judgment for that of the sentencing judge.").

The defendant argues that his 37-year sentence "is far longer than necessary to achieve the legislative goals of sentence." Def. Br. 16. The harshness of the conditions under which he has served his sentence, so he argues, makes the length of his sentence unreasonable. *Id.* The defendant asks this Court to find that the sentence is substantively unreasonable and warranting a reversal solely because "37 years in segregation, when imposed on a 40 year old man, is as harsh a sentence can be that is not a sentence of death." *Id*. at 19. The defendant argues now, as he did before the court during the original sentencing proceeding, GA 12, and the proceeding on remand, JA 44, that the cases of *Koon v. United States*, 518 U.S. 81 (1996), and *United States v. Volpe*, 78 F. Supp.2d 76, 87-89 (E.D.N.Y. 1999), *aff'd*, 224 F.3d 72, 85 (2d Cir. 2005), warrant a sentence reduction because of the defendant's unusual susceptibility to abuse in prison. Def. Br. 17-18.

In essence, the defendant asks this Court to reweigh the § 3553(a) factors and second-guess the district judge's decision on how best to balance those factors to fashion an appropriate sentence. But it is well settled that this Court will not substitute its own judgment for that of the district court. *Kane*, 452 F.3d at 145 ("[The defendant] merely renews the arguments he advanced below . . . and asks us to substitute our judgment for that of the District Court, which, of course, we cannot do."). *Accord Fairclough*, 439

F.3d at 79-80 (a reviewing court "'should exhibit restraint, not micromanagement'") (quoting *Fleming*, 397 F.3d at 100). As this Court reiterated in *United States v. Capanelli*, 479 F.3d 163, 165 (2d Cir. 2007) (per curiam), "[w]hile a district court must consider each § 3553(a) factor in imposing a sentence, the weight given to any single factor 'is a matter firmly committed to the discretion of the sentencing judge and is beyond our review.'" (quoting *Fernandez*, 443 F.3d at 32).

On the basis of the record here, the district court properly concluded after considering the defendant's arguments that resentencing was unwarranted because it would not have imposed a different sentence had the Guidelines been advisory when the defendant was originally sentenced. JA 8. Accordingly, the defendant's arguments for a lower sentence should be rejected.

Also, as he did at the proceeding on remand, JA 13, 49, the defendant asserts that the sentence "was more than twice as long as the sentence imposed by the State of Connecticut in a parallel prosecution." Def. Br. 19. This apparent argument for a lower sentence (the comparison with his state sentence), while arguably a new argument in the *Crosby* remand process, did not present compelling grounds for a lower sentence. The defendant's state sentence was imposed *after* the original sentence in this case, and thus was irrelevant to the court's analysis on a *Crosby* remand. *See Crosby*, 397 F.3d at 118. In addition, the federal penalty reflected many factors not at issue in the state case, such as the fact that the defendant went to trial in the federal case, thereby forcing the child victims

to testify against him, and in that trial testified falsely. JA 23-24; GA 21. Moreover, this Court recently held that a district court does not abuse its discretion by declining to consider sentencing disparities between federal and state penalties for a given crime. *United States v. Johnson*, 505 F.3d 120, 123 (2d Cir. 2007).

In sum, the district court properly exercised its discretion under § 3553(a), balancing a variety of factors, including the seriousness of the crimes the defendant committed, the damage to the victims, the need to promote respect for the law, the need to afford adequate deterrence to criminal conduct, the need to protect the public from further crimes of the defendant, and the need to avoid unwarranted sentencing disparities, along with accounting for the defendant's cooperation with the government. JA 8. A 37-year prison sentence for a public official who cloaked himself in the trappings of his office while repeatedly sexually abusing two minors is reasonable and should not be disturbed.

II. The sentencing judge's comments about the seriousness of the defendant's criminal conduct were both proper and based entirely on the record, and therefore do not suggest bias warranting resentencing before a different district judge.

The defendant argues that the case should be remanded to a new district judge, claiming that Judge Nevas "developed a contempt for Philip Giordano that interfered with his ability to render dispassionate justice." Def. Br. at

19. It is not clear whether this a free-standing claim of bias that the defendant believes warrants vacating the judgment below, or whether it is contingent upon his prevailing upon his claims that the sentence is either procedurally or substantively unreasonable. Either way, his claim fails.

A. Governing law

Section 144 of Title 28 provides that "[w]henever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein . . . ." Section 455(a) provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Under this section, "recusal is not limited to cases of actual bias; rather, the statute requires that a judge recuse himself whenever an objective, informed observer could reasonably question the judge's impartiality, regardless of whether he is actually partial or biased." *United States v. Bayless,* 201 F.3d 116, 126 (2d Cir. 2000). Put another way, "would an objective, disinterested observer fully informed of the underlying facts, entertain significant doubt that justice would be done absent recusal?" *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992). "Litigants are entitled to an unbiased judge; not to a judge of their choosing." *SEC v. Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1321 (2d Cir. 1988). Indeed, "[j]udges are not disqualified from trying defendants of whom, through prior judicial proceedings,

they have acquired a low view." *In re Cooper*, 821 F.2d 833, 844 (1st Cir. 1987).

The Supreme Court has explained that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994). Furthermore, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of *prior proceedings*, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* (emphasis added); *see also United States v. Bernstein*, 533 F.2d 775, 785 (2d Cir. 1976). "[W]hat a judge learns in his judicial capacity – whether by way of guilty pleas of codefendants or alleged coconspirators, or by way of pretrial proceedings, or both – is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification." *Id.; see also United States v. Colon*, 961 F.2d 41, 44 (2d Cir. 1992) (§ 455 mandates recusal only where judge has personal bias, meaning "prejudice based on 'extrajudicial' matters, and earlier adverse rulings, without more, do not provide a reasonable basis for questioning a judge's impartiality") (citing *Schiff v. United States*, 919 F.2d 830, 834 (2d Cir. 1990)).

In rare circumstances, when this Court remands a case for further proceedings in the district court, it may direct that the case be re-assigned to a different judge. This is in derogation of the "general rule [that] cases sent back to a district court for further proceedings are remanded without

any directions or suggestions as to the judge before whom they are to be conducted." *United States v. Robin*, 553 F.2d 8, 9 (2d Cir. 1977) (per curiam) (setting forth guidelines for deciding "whether to remand for retrial or resentencing before a different judge and to assure that no personal criticism of the original judge is involved"). "Remanding a case to a different judge is a serious request rarely made and rarely granted." *United States v. Awadallah*, 436 F.3d 125, 135 (2d Cir. 2006) (finding no basis for remanding case to a different district judge where Government had sought the remand based on the preservation of the appearance of justice factor). Or, as this Court has put another way, "'remanding to a different district judge is an "extraordinary remedy . . . [to] be reserved for the extraordinary case."'" *United States v. Gaviria*, 49 F.3d 89, 92 (2d Cir. 1995) (citations omitted). Remand to a different district judge for sentencing is resisted by this Court and is reluctantly done. *United States v. Griffin*, 510 F.3d 354, 367 (2d Cir. 2007) ("Although in most other contexts we resist [remand to a different district judge], we have concluded that it is appropriate where a plea agreement is concerned"). "Reassignment is warranted only 'where special circumstances warrant it, this is, where we are persuaded that the original judge would have substantial difficulty in putting out of her mind her previously expressed views, or where reassignment is advisable to preserve the appearance of justice.'" *Id*. (citation omitted).

This Court, absent a claim of personal bias, examines three principal factors to determine whether a case should be remanded to a different judge:

> (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness.

Robin, 553 F.2d at 10.

B. Discussion

The defendant asks for the rare relief of a remand for resentencing before a different district judge. Def. Br. 20. He asserts that the district judge who tried his case and sentenced him "developed a contempt [for him] that interfered with [the judge's] ability to render dispassionate justice." *Id.* at 19. He argues that the district judge found him to be the "worse than a murderer, the worst person that Judge Nevas had ever encountered in his professional life." *Id.* He further argues that the district judge "[b]y dwelling exclusively on the suffering sustained by the two young victims of Giordano's crime, and dismissing as irrelevant Giordano's own suffering, however great it became, Judge Nevas revealed his inability to fully consider the set of circumstances before him, and to fully apply all the factors enunciated by § 3553(a)." *Id.* at 20. This preoccupation with a single factor under § 3553(a),

so the defendant argues, means that the judge failed in his duty to consider all relevant § 3553(a) factors. *Id.*

First, to the extent that the defendant is arguing – for the first time on appeal – under § 455 that Judge Nevas was biased and that his sentence must be vacated as a result of that alleged bias, his claim is meritless. Each of the statements challenged by the defendant was made in the course of sentencing proceedings, when the judge was charged with evaluating the seriousness of the defendant's criminal conduct. Such a sentencing decision is a quintessential "judicial ruling[]" that, standing alone, can "almost never constitute a valid basis for a bias or partiality motion." *Liteky,* 510 U.S. at 555. Nor does the defendant dispute that Judge Nevas's opinions were based on evidence introduced during judicial proceedings. *Id.*; *see also Colon*, 961 F.2d at 44 (holding that recusal is not warranted absent personal bias). Indeed, the district court's comments were quite properly focused on the defendant's conduct, which was described at detail at trial, and not at any personal animus directed at the defendant himself. At the sentencing hearing, the judge said that the defendant's "*conduct* is the worst I've ever seen" and what he "*did* is indescribable." JA 41 (emphasis added). The district judge's statement that he was not moved by the defendant's confinement conditions simply reflects a determination that such factors were outweighed by the seriousness of the offense conduct. Particularly given that the defendant never raised this claim in the district court, his belated request for recusal does not rise to the heightened threshold needed to establish recusal for the first time on appeal. *See United States v. Holland*, 519

F.3d 909, 911-12 (9th Cir. 2008) ("if no motion is made to the [trial court] judge . . . a party will bear a greater burden on appeal in demonstrating that the judge . . . [erred] in failing to grant recusal under section 455") (internal quotation marks omitted). Certainly, the district court's use of strong language does not change the analysis. *See Liteky*, 510 U.S. at 555 ("judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge").

Second, to the extent that the defendant is raising his bias claim only as an adjunct to his challenges to the reasonableness of his sentence, he has likewise failed to show that any hypothetical remand should be to a different district judge. As previously discussed, Judge Nevas carefully considered the arguments of counsel and all of the § 3553(a) factors before explaining why the original sentence was appropriate and why he chose not to resentence the defendant. What weight the court gives to any single factor "is a matter firmly committed to the discretion of the sentencing judge and is beyond" this Court's review. *United States v. Capanelli*, 479 F.3d 163, 165 (2d Cir. 2007). If a judge's decision to emphasize a particular sentencing factor does not warrant reversal, it hardly justifies reassignment to a different district judge.

Even if remand were hypothetically warranted on some other grounds, there would be no reason to reassign the case to a different judge. None of the three factors outlined in *Robin* is satisfied here. First, there is no reason for concluding that Judge Nevas would be unwilling or unable

to set aside previously expressed views or findings that were determined by this Court to be erroneous. The defendant has certainly pointed to no proceeding in which the experienced district judge, in his many years on the federal bench, has ever disregarded this Court's mandate. Second, the defendant has offered no basis for concluding that "reassignment is advisable to preserve the appearance of justice." *Robin*, 553 F.2d at 10. Third, reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. Here, the district judge presided over extensive pretrial proceedings and a lengthy trial, gaining "an intimate insight into the circumstances of the defendant's crime, which [] prove[d] uniquely useful in determining the sentence to be imposed . . . ." *Id.* at 11.

Finally, it bears note that this is the second time that this defendant has sought to force reassignment of his case to a different district judge. In the defendant's previous appeal, this Court held that Judge Nevas did not abuse his discretion in denying a recusal motion "on the basis of remarks made at a bail hearing." *United States v. Giordano*, 172 Fed. Appx. 340, 345 (2d Cir. 2006); JA 92. Also, this Court held that the district judge was not required to recuse himself from ruling on the admissibility of wiretap evidence against the defendant because the judge had authorized the Title III applications and supervised the wiretap. *Giordano*, 442 F.3d at 48 ("authorization of a wiretap under Title III does not 'evidence the degree of favoritism or antagonism required' to necessitate recusal under [28 U.S.C.] § 455(a) from ruling on the admissibility of the resulting evidence."); JA

82. The Court should likewise deny this latest request for a remand to another district judge.

Conclusion

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

Dated: November 20, 2008

Respectfully submitted,

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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 11,151 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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ADDENDUM

18 U.S. C. § 3553. Imposition of a sentence

(a) Factors to be considered in imposing a sentence. The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider --

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed --

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines --

(I) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation, or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into

amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement–

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

* * *

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open

court the reasons for its imposition of the particular sentence, and, if the sentence --

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Giordano

Docket Number: 07-3487-cr

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 11/20/2008) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: November 20, 2008

CERTIFICATE OF SERVICE

07-3487-cr US v. GIORDANO

I hereby certify that two copies of this Brief for the United States of America were sent by Regular First Class Mail delivery to:

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Mysliwiec & Hammer
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Attorney for Defendant-Appellant

I also certify that the original and nine copies were also shipped via hand delivery to:

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United States Court of Appeals, Second Circuit
United States Courthouse
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New York, New York 10007
(212) 857-8576

on this 20th day of November 2008.

Notary Public:

Sworn to me this

November 20, 2008

NADIA R. OSWALD HAMID
Notary Public, State of New York
No. 01OS6101366
Qualified in Kings County
Commission Expires November 10, 2011

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