

## UNITED STATES DISTRICT COURT

EASTERN

District of

NEW YORK

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

V.

CECIL SIMON, a/k/a Cecil Jackson

Case Number: CR-90-00216(CPS)

USM Number:

Brian Sheppard, Esq.

Defendant's Attorney

## THE DEFENDANT:

☐ pleaded guilty to count(s) \_\_\_\_\_☐ pleaded nolo contendere to count(s) \_\_\_\_\_  
which was accepted by the court.☒ was found guilty on count(s) 1  
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

<u>Title &amp; Section</u>	<u>Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21:846; 841(b)(1)(A)(iii)	Conspiracy to distribute & possess with intent to distribute cocaine		1

The defendant is sentenced as provided in pages 2 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.☒ The defendant has been found not guilty on count(s) 2☒ Count(s) all remaining and any underlying indictments ☐ is ☒ are dismissed with the consent of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

March 14, 2005

Date of Imposition of Judgment

Signature of Judge

Charles P. Sifton, U.S.D.J.

Name and Title of Judge

March 16, 2005

Date

DEFENDANT: CECIL SIMON  
CASE NUMBER: CR-90-00216

Judgment — Page 2 of 4

## IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

262 months.

X The court makes the following recommendations to the Bureau of Prisons:

1) That the defendant be designated to a facility as close to New York City as possible, in order to facilitate family visits.

2) That the defendant receive appropriate medical care for his several disabilities, especially, but not limited to, his eyes, to prevent the loss of vision in a 2<sup>nd</sup> eye, and his gastrointestinal disorder.

X The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at \_\_\_\_\_ ☐ a.m. ☐ p.m. on \_\_\_\_\_

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on \_\_\_\_\_

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

## RETURN

I have executed this judgment as follows:

Defendant delivered on \_\_\_\_\_ to \_\_\_\_\_

a \_\_\_\_\_, with a certified copy of this judgment.

UNITED STATES MARSHAL

By \_\_\_\_\_  
DEPUTY UNITED STATES MARSHAL

DEFENDANT: CECIL SIMON  
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Judgment—Page 3 of 4

### SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

five years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)
- ☐ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)
- ☐ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- ☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

### STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **CECIL SIMON**  
CASE NUMBER: **CR-90-00216**

Judgment — Page 4 of 4**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
<b>TOTALS</b>	\$ 50.00	\$	\$

☐ The determination of restitution is deferred until \_\_\_\_\_. An *Amended Judgment in a Criminal Case* (AO 245C) will after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
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<b>TOTALS</b>	\$ _____	\$ _____
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☐ Restitution amount ordered pursuant to plea agreement \$ \_\_\_\_\_

☐ The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

\* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: CECIL SIMON  
CASE NUMBER: CR-90-00216  
DISTRICT: E.D.N.Y.

## SUPPLEMENTAL STATEMENT OF REASONS

### APPLICABILITY OF THE FEDERAL SENTENCING GUIDELINES

- ☐ The court applied the Guidelines and all relevant enhancements in this case.
- ☐ The court found the Guidelines unconstitutional in part, and imposed a sentence in accordance with the constitutionally applied portions of the Guidelines.
- ☐ The court did not apply the federal sentencing guidelines at all in this case and imposed a discretionary sentence.
- ☒ The court took some other action (Please explain below.): **The Court imposed the sentence as a non-guideline sentence after considering the Sentencing Guidelines and other factors set forth in 18 USC 3553..**
- ☐ This judgment includes an alternative sentence.

DEFENDANT: CECIL SIMON  
CASE NUMBER: CR-90-00216  
DISTRICT: EDNY

**STATEMENT OF REASONS**  
(Not for Public Disclosure)

☐ THE COURT ADOPTS THE PRESENTENCE REPORT AND GUIDELINE APPLICATIONS WITHOUT CHANGE.

**OR**

☒ THE COURT ADOPTS THE PRESENTENCE REPORT AND GUIDELINE APPLICATIONS BUT WITH THESE CHANGES: (Use Page 3, if necessary.)

A one, rather than two point adjustment for obstruction of justice is applied, and a non-Guideline sentence is imposed.

☐ Chapter Two of the U.S.S.G. Manual determinations by court (including changes to base offense level or specific offense characteristics):

☒ Chapter Three of the U.S.S.G. Manual adjustment determinations by court (including changes to victim-related adjustments, role in the offense, obstruction of justice, multiple counts, or acceptance of responsibility):

☐ Chapter Four of the U.S.S.G. Manual determinations by court (including changes to criminal history category or scores, career offender, or criminal livelihood determinations):

☐ THE COURT ADOPTS THE PRESENTENCE REPORT WITH THESE COMMENTS OR FINDINGS (including comments or factual findings concerning certain information in the presentence report that the Federal Bureau of Prisons may rely on when it makes inmate classification, designation, or programming decisions. Specify court comments or findings, including paragraphs in the presentence report.) (Use Page 3, if necessary.)

**GUIDELINE RANGE DETERMINED BY THE COURT (BEFORE DEPARTURES):**

Total Offense Level: 39

Criminal History Category: III

Imprisonment Range: 324 to 405 months

Supervised Release Range: 5 to 5 years

Fine Range: \$ to \$

☒ Fine waived or below the guideline range because of inability to pay.

☐ THE SENTENCE IS WITHIN THE GUIDELINE RANGE, THAT RANGE DOES NOT EXCEED 24 MONTHS, AND THE COURT FINDS NO REASON TO DEPART.

**OR**

☐ THE SENTENCE IS WITHIN A GUIDELINE RANGE, THAT RANGE EXCEEDS 24 MONTHS, AND THE SPECIFIC SENTENCE IS IMPOSED FOR THESE REASONS: (Use Page 3, if necessary.)

DEFENDANT: CECIL SIMON  
CASE NUMBER: CR-90-00216  
DISTRICT: EDNY

**STATEMENT OF REASONS**  
(Not for Public Disclosure)

## RESTITUTION DETERMINATIONS

Total Amount of Restitution: \$ \_\_\_\_\_

- ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because the number of identifiable victims is so large as to make restitution impracticable under 18 U.S.C. § 3663A(c)(3)(A).
- ☐ For offenses for which restitution is otherwise mandatory under 18 U.S.C. § 3663A, restitution is not ordered because determining complex issues of fact and relating them to the cause or amount of the victims' losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim would be outweighed by the burden on the sentencing process under 18 U.S.C. § 3663A(c)(3)(B).
- ☐ For other offenses for which restitution is authorized under 18 U.S.C. § 3663 and/or required by the sentencing guidelines, restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweigh the need to provide restitution to any victims under 18 U.S.C. § 3663(a)(1)(B)(ii).
- ☐ Restitution is not ordered for other reasons:
- ☐ Partial restitution is ordered under 18 U.S.C. § 3663(c) for these reasons:

**DEPARTURE (Check all that apply)**

- ☐ The sentence departs below the guideline range for the following reasons; or
- ☐ The sentence departs above the guideline range for the following reasons:

**Pursuant to a Plea Agreement**

- ☐ based on 5K1.1 motion of the government based on the defendant's substantial assistance;
- ☐ based on a government motion pursuant to an early disposition program;
- ☐ based on a binding plea agreement for departure which the court has accepted (cite below reason, if applicable);
- ☐ based on a plea agreement which cites the below reason for departure, which the court finds to be justified; or
- ☐ based on a plea agreement which states that the government will not oppose a defense departure motion and cites the below reason.

**Pursuant to a Motion Not Addressed in a Plea Agreement**

- ☐ pursuant to a 5K1.1 motion of the government based on the defendant's substantial assistance;
- ☐ pursuant to a government motion based on the below reason for departure; or
- ☐ pursuant to a defense motion based on the below reason for departure to which the government has not objected; or
- ☐ pursuant to a defense motion based on the below reason for departure to which the government has objected.
- ☐ Other than plea agreement or motion by the parties based on the below reason for departure.

## Reason(s) for Departure

- ☐ 4A1.3 Criminal History Adequacy (explain)

☐ 5K2.0 Aggravating or Mitigating Circumstances (explain):

☐ 5K2.1 Death

☐ 5K2.2 Physical Injury

☐ 5K2.3 Extreme Psychological Injury

☐ 5K2.4 Abduction or Unlawful Restraint

☐ 5K2.5 Property Damage or Loss

☐ 5K2.6 Weapons and Dangerous Instruments

☐ 5K2.7 Disruption of Government Function

☐ 5K2.8 Extreme Conduct

☐ 5K2.9 Criminal Purpose

☐ 5K2.10 Victim's Conduct

☐ 5K2.11 Lesser Harm

☐ 5K2.12 Coercion and Duress

☐ 5K2.13 Diminished Capacity

☐ 5K2.14 Public Welfare

☐ 5K2.16 Voluntary Disclosure of Offense

☐ 5K2.17 High-Capacity Semiautomatic Firearm

☐ 5K2.18 Violent Street Gang

☐ 5K2.20 Aberrant Behavior

☐ 5K2.21 Dismissed and Uncharged Conduct

☐ 5K2.22 Age or Health of Sex Offenders

☐ 5K2.23 Discharged Terms of Imprisonment

☐ 5K3.1 Early Disposition, "fast-track" Program

☐ Other (e.g., 2B1.1 commentary, 5H1.1-5H1.6 or 5H1.11)(explain and state guideline and/or statutory basis). (Use Page 3, if necessary.)



DEFENDANT: CECIL SIMON  
CASE NUMBER: CR-90-00216  
DISTRICT: EDNY

**STATEMENT OF REASONS**

(Not for Public Disclosure)

**ADDITIONAL PRESENTENCE REPORT AND GUIDELINE APPLICATION CHANGES**

(If necessary.)

**SPECIFIC SENTENCE IS IMPOSED FOR THESE REASONS**

(If necessary.)

For the reasons set forth in the transcript of the sentencing proceedings in open court and in the sentencing memorandum dated March 16, 2005, copies of which are annexed.

**ADDITIONAL COMMENTS OR FINDINGS CONCERNING INFORMATION IN PRESENTENCE REPORT**

(If necessary.)

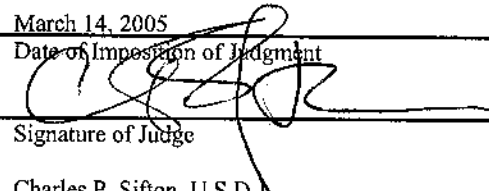
**ADDITIONAL REASONS FOR DEPARTING FROM THE GUIDELINE RANGE**

(If necessary.)

Defendant's Soc. Sec. No.: 105-58-9168  
Defendant's Date of Birth: July 13, 1961

Defendant's Residence Address: Undomiciled

Defendant's Mailing Address: Same

March 14, 2005Date of Imposition of Judgment  
Signature of JudgeCharles P. Sifton, U.S.D.J.Name and Title of JudgeMarch 16, 2005Date Signed



UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X

Cecil Simon, a/k/a Cecil Jackson,

Petitioner,

CR-90-216 (CPS)

- against -

SENTENCING  
MEMORANDUM

United States of America,

Respondent.

-----X

SIFTON, Senior Judge.

Cecil Simon was convicted in 1990 of one count of conspiring to distribute more than 50 grams of cocaine base in violation of 21 U.S.C. § 846 and one count of using a firearm in relation to that conspiracy in violation of 18 U.S.C. § 924(c)(1).

Previously, the undersigned, with the Government's consent, granted Simon's petition for habeas corpus pursuant to 28 U.S.C. § 2241 and vacated his § 924(c)(1) conviction. For the reasons that follow, on March 15, 2005, I resentenced Simon principally to a term of 262 months imprisonment and five years supervised release.<sup>1</sup>

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<sup>1</sup> In addition, I mistakenly imposed a \$100 special assessment. The applicable assessment for Simon's 1990 offense was \$50, which Simon has already paid. The filed judgment of conviction corrects this error.

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Background

The following facts are drawn from the amended report of presentence investigation and an addendum to that report prepared in connection with Simon's resentencing, this Court's September 8, 1992, memorandum and order denying petitioner's motion to set aside his sentence due to ineffective assistance of counsel made pursuant to 28 U.S.C. § 2255, and the parties' submissions in connection with the resentencing.

Simon was arrested in February, 1990, and was indicted on March 15, 1990, on various narcotic and drug offenses related to the December 6, 1988, search of his home at 14 Turner Place. Simon was thereafter convicted after trial of one count of conspiring to distribute and possess with intent to distribute in excess of 50 grams of cocaine base in violation of 21 U.S.C. § 846 and one count of using firearms during and in relation to that conspiracy in violation of 18 U.S.C. § 924(c)(1).<sup>2</sup> He was acquitted of possessing cocaine base with intent to distribute.

On August 14, 1990, I sentenced Simon to 322 months of

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<sup>2</sup> Section 942(c)(1) provides in pertinent part:

Whoever, during an in relation to any crime of violence or drug trafficking crime...uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years. . . Notwithstanding any other provision of law, ... the term of imprisonment imposed under this subsection [shall not] run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried.

18 U.S.C. § 924(c)(1).

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imprisonment. I calculated that Simon's base offense level for the narcotics offense was 36 due to his participation in a conspiracy involving 660 grams of crack. I adjusted that level upward one level to account for Simon's obstruction of justice due to his attempt to alter his handwriting when giving a handwriting exemplar to use at his trial. Given Simon's criminal offense history of III, the resulting Guidelines sentencing range for the narcotics offense was 262 to 327 months imprisonment. I sentenced Simon to 262 months on the drug count plus a consecutive statutory 60 month term of imprisonment on the weapons count, for a total term of 322 months. In addition, I imposed four years of supervised release and a special assessment of \$100. The Second Circuit affirmed Simon's sentence and conviction on April 3, 1991. See *United States v. Simon*, 932 F.2d 955 (2d Cir. 1991) (table).

On December 27, 1991, Simon filed a motion pursuant to 28 U.S.C. § 2255 to set aside his sentence due to ineffective assistance of his trial counsel. I denied the motion by memorandum and order dated September 8, 1992. Simon appealed, but the Second Circuit dismissed the appeal for failure to comply with its briefing schedule. The Second Circuit denied Simon's motion to reinstate the appeal on August 16, 1993.

In 1996, Simon filed a motion pursuant to 18 U.S.C. § 3582(c)(2), seeking to vacate his weapons conviction in light of *Bailey v. United States*, 516 U.S. 137, 150 (1995) (holding that §

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924(c) "requires evidence sufficient to show an active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense.")<sup>3</sup> I observed that Simon's motion could not be granted pursuant to § 3582 and that § 2255 relief had become unavailable because of his previous § 2255 motion. I did not, however, dismiss the application on that basis. Relying on the Second Circuit's decision in *Triestman v. United States*, 124 F.3d 361 (2d Cir. 1997) (holding that litigants can pursue *Bailey* claims on a § 2241 motion even if a § 2255 motion raising the same challenge would be barred by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, 1220 (1996), I construed petitioner's § 3582 motion as a § 2241 petition. I vacated Simon's § 924(c)(1) conviction in light of the Government's concession that *Bailey* rendered it invalid, and held that he would be resentenced on his drug conspiracy conviction.<sup>4</sup>

In calculating a new sentence, I began with the offense level 37 that was originally applied to Simon's conspiracy

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<sup>3</sup> Prior to *Bailey*, a defendant in this Circuit was guilty of violating § 924(c) if "[t]he circumstances surrounding the presence of a firearm in a place where drug transactions take place suggest that it was strategically located so as to be quickly and easily available for use during such a transaction." *United States v. Feliz-Cordero*, 859 F.2d 250, 254 (2d Cir. 1988).

<sup>4</sup> Prior to the resentencing hearing, Simon filed papers raising several claims, which I declined to address on the ground that they addressed the part of his underlying conviction which had not been vacated and thus, were inappropriately raised during re-sentencing. I explained that the claims could be raised in a new § 2255 motion, but that such an application would in all likelihood be barred by AEDPA.

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conviction and obstruction of justice enhancement. I then added a two-point enhancement pursuant to section 2D1.1(b)(1) of the United States Sentencing Guidelines ("U.S.S.G."), which requires a two-level increase in a defendant's offense level "if a dangerous weapon (including a firearm) was possessed."<sup>5</sup> This resulted in a final offense level of 39 and a sentencing range of 324 to 405 months. In recognition of Simon's original 322 month sentence, I departed downward, with the Government's consent, and imposed a 322-month term of imprisonment, which was equal to Simon's original sentence.

Simon appealed the sentence, and the Second Circuit held that "in view of the various potential obstacles to relief on

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<sup>5</sup> I was precluded from applying this two-level enhancement for possession of a firearm at the original sentencing because the petitioner had been sentenced under § 924(c)(1). See U.S.S.G. § 2K2.4, Comment (n.2 & Backg'd) (to avoid double counting, "[w]here a sentence under [§ 924(c)] is imposed in conjunction with a sentence for an underlying offense, any specific offense characteristic for the possession, use, or discharge of an explosive or firearm...is not to be applied in respect to the guideline for the underlying offense."); *United States v. Howard*, 998 F.2d 42, 48 (2d Cir. 1993).

The presentence report recommended application of the enhancement, a recommendation supported by the Government. Simon objected to the adjustment. However, I overruled this objection, reasoning that the gun found in the bedroom was connected with the narcotics conspiracy:

With regard to the objection to the two point enhancement, because of the presence of firearms in the apartment, I have no hesitation, although indeed neither I nor the government attorney were there in the room to say on the basis of personal knowledge that this was Mr. Simon's room from which he jumped and in which there were found hard guns. Nevertheless it is an almost compelled inference from the evidence that was introduced at the trial that these guns were in Mr. Simon's room, that the room was Mr. Simon's and that they were used in connection with a narcotics conspiracy that was going on.

(Resentencing Tr. at 32)

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successive § 2241 petitions, and in the absence of Simon's consent" the "sua sponte recharacterization of his § 3582 motion as a § 2241 petition was improper." *Simon v. United States*, 359 F.3d 139, 145 (2d Cir. 2004). The Second Circuit vacated the case and remanded "to give Simon an opportunity to decline to have his § 3582 motion converted into a § 2241 petition." *Id.* This Court was instructed that if Simon agreed to proceed pursuant to § 2241, the "district court should act on the converted § 2241 petition." *Id.* at 145 n.12. Although Simon had raised various other claims on appeal regarding his sentence, including the validity of the two-point firearms enhancement, the Second Circuit did not address the validity of those claims, and ruled only on the threshold issue of this Court's *sua sponte* conversion.

Simon advised this Court that having been apprised of the consequences of the conversion, he consented and wished to proceed pursuant to § 2241. Simon argued that his weapons conviction should be vacated as it was in the previous § 3582 application, and that he should have been resentenced on the drug conspiracy charge *de novo*; the Government concurred on both these points. Because of the Supreme Court's intervening decision in *United States v. Booker*, 125 S.Ct. 738 (2005), Simon sought a reduction in his sentence.

#### Discussion

Subsequent to Simon's first resentencing, the Supreme Court

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held in *United States v. Booker*, 125 S.Ct. 738 (2005), that the mandatory nature of the United States Sentencing Guidelines violated the Sixth Amendment. In its remedy opinion, the Court severed 18 U.S.C. § 3553(b)(1), which had rendered the Guidelines binding on federal sentences. *Id.* at 764. This left 18 U.S.C. § 3553(a) in effect, which states:

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 . . . .;
- (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 statements by act of Congress . . . . .
- (6) the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct; and



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

A first step in post-*Booker* sentencing is to determine the applicable Guideline range after making such findings of fact as are necessary, as required by 18 U.S.C. § 3553(a)(4). *United States v. Crosby*, 397 F.3d 103, 112 (2d Cir. 2005). Then a court is to consider policy statements issued by the Sentencing Commission, as required § 3553(a)(5). *Id.* This applicable Guideline range is determined in the same manner as before *Booker*. *Id.* Once this Guideline range is determined, the court has the duty to "consider" it along with the other factors listed in § 3553(a). *Id.* at 112-13.

The Second Circuit has yet to rule on the "degree of consideration" of the Guidelines that is required, or what weight they are to be given. The Second Circuit has instead opted "to permit the concept of 'consideration' in the context of the applicable Guidelines range to evolve as district judges faithfully perform their statutory duties." *Id.* at 113. In the absence of guidance from the courts of appeals, district courts have differed as to the weight to be given to the formerly mandatory Guidelines. Compare *United States v. Wilson*, 350 F. Supp. 2d 910, 925 (D. Utah 2005) (giving "heavy weight" to the Guidelines and only granting non-Guideline sentences in "unusual cases for clearly identified and persuasive reasons), with *United States v. Peach*, -- F. Supp. 2d --, 2005 WL 352636 (D.N.D. 2005) (giving Guidelines "substantial weight" because they provide a

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"presumptively reasonable" sentence), and *United States v. Ranum*, 353 F. Supp. 2d 984 (E.D. Wis. 2005) (giving equal weight to each factor listed in § 3553(a)); *United States v. Myers*, 353 F. Supp. 2d 1026 (S.D. Iowa 2005) (same).

I adopt the view that the Guidelines are advisory and entitled to the same weight accorded to each other factor that the Court is instructed to consider by § 3553(a). I do so for three reasons, which have been elaborated upon in the post-*Booker* opinions of several other district courts. First, § 3553(a), the statute that this Court is required to apply, does not distinguish between the weight to be given to any of the factors listed.

Second, the greater the weight given to the Guidelines, the closer the Court draws to committing the act that *Booker* forbids — a Guideline sentence based on facts found by a preponderance of the evidence by a judge. *United States v. Biheiri*, -- F. Supp. 2d --, 2005 WL 350585 (E.D. Va. Feb. 9, 2005); *United States v. Huerta-Rodriguez*, -- F. Supp. 2d --, 2005 WL 318640 (D. Neb. Feb. 1, 2005). Such a regime threatens a *de facto* mandatory sentence.

Third, as discussed in *United States v. Ranum*, 353 F. Supp. 2d 984, the Guidelines permit a court to grant a departure based on certain offender-specific characteristics only in "exceptional cases," U.S.S.G. § 5H1.1. For example, age, educational and vocational skills, mental and emotional conditions, physical condition, employment record, and family ties and

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responsibilities are not normally relevant. U.S.S.G. §§ 5H1.1-6. Yet these are the sort of characteristics a court is likely to find relevant when determining "the history and characteristics of the defendant" as required by § 3553(a)(1). Similarly, § 3553(a)(2)(C) requires a court to consider the need to protect the public from future crimes of the defendant. But at least one post-*Booker* court has noted that the Guidelines fail to consider that recidivism drastically declines with the defendant's age. See *Nellum*, 2005 WL 300073, at \*3. Depending on the individual case, giving "heavy" weight to the Guidelines may therefore be in tension, if not conflict, with § 3553(a)'s command to consider a multitude of factors.

That the Guidelines are not accorded "heavy weight" does not mean that a district court's discretion is unfettered. Any sentence imposed by this Court is cabined within the limits of "reasonableness." It is this Court's function to determine, in light of all of the factors provided in § 3553(a), the range of reasonable sentences applicable to this case, and where within that range Simon's sentence lies.

Accordingly, in sentencing Simon, I first determined the sentence recommended by the applicable Guidelines and policy statements, and then considered whether any factor listed in § 3553(a) warranted deviating from the Guidelines' recommendation.

§ 3553(a)(4) & (5): Advisory Guideline Range

As previously noted, Simon's base offense level is 36 due to

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his participation in a conspiracy involving 660 grams of crack. The base offense level was upwardly adjusted by one level due to Simon's obstruction of justice when he attempted to alter his handwriting when giving a handwriting exemplar. A two-point enhancement pursuant to U.S.S.G. § 2D1.1(b)(1), was appropriate because of Simon's possession of a firearm. U.S.S.C. § 2D1.1(b)(1). This results in final offense level of 39. Given Simon's criminal offense history of III, the Guidelines range is 324 to 405 months imprisonment.<sup>6</sup>

§ 3553(a)(1): Offense Characteristics

After being advised that the Simon was operating a cocaine processing laboratory, DEA Agents Gerard McAleer and Adele Hanay conducted surveillance of 14 Turner Place in Brooklyn, on December 6, 1988. At 4:00 p.m., a male fitting Simon's general description entered the property accompanied by a female and a child. They left approximately an hour later. The male and female returned to 14 Turner Place at 7:45 p.m. At 10:15 p.m., another male, later identified as Jorge Fuentes, entered 14 Turner Place empty-handed and left moments later with a plastic bag. Fuentes got into a livery cab, which was stopped by DEA Agents Gerard McAleer and Kenneth Dinino. The agents found

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<sup>6</sup> Although Simon presents a number of arguments that may be construed as applications for a traditional Guideline departure, none is warranted for the reasons stated at the time of sentencing. Neither defendant's medical condition, family circumstances, lack of guidance as a youth, or post-conviction rehabilitation is so extraordinary as to warrant a departure under the Sentencing Commission policy statements.

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approximately \$32,000 in cash, bundled with rubber bands, in the plastic bag carried by Fuentes. Thereafter, another male, later identified as Michael Wood, entered the premises.

Approximately a half hour later, DEA agents executed a search warrant on 14 Turner Place. Agents Dinino and McAleer, among others, first knocked on the front door and announced themselves as DEA agents. When no one answered, the agents broke down the door with a sledgehammer. While the front door was being broken down, other agents including Agent Hanay proceeded to the rear of 14 Turner Place. Drawn to the noise, a woman in a neighboring building looked out her window and saw a man fitting Simon's description jump from the rear of the building. She then yelled to Agent Hanay "they are getting out the back." The agents were unable to locate the fleeing man.

In the building, the agents found Michael Wood and a woman named Patricia Crossman. A window in a rear bedroom was open. In that bedroom, the agents found a loaded .45 caliber semi-automatic pistol under the mattress of the bed and a cellular phone. They also found a variety of documents with Simon's name and, in some cases, signature, using both Simon's real name as well as an alias, Cecil Jackson, on the documents. In another bedroom, agents found over 600 grams of cocaine base of 90% purity, a loaded Tech 9 submachine gun, and a loaded 9 millimeter semi-automatic pistol. In the kitchen, agents found \$72,000 in cash, crack vials, glassine bags, a digital scale, ammunition,

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and a Pyrex pot containing crack residue.

Simon's offense is an extremely serious one, although for the reasons specified below, not as serious as to warrant a penalty based upon a 100:1 ratio with the penalties for powder cocaine.

§ 3553(a)(1): Offender Characteristics

Simon was born in Georgetown, Guyana on July 13, 1961. He is one of six children born to Olive Simon and Cecil Simon. Cecil Simon the elder was killed in an accident while working at a rice factory. Simon's mother, a nurse, immigrated to the United States in 1973. While she was gone, Simon stated that he had little contact with her, but he was cared for by friends and aunts. He joined his mother in the United States two years later and was granted permanent residency status. Because of his mother's long work hours, Simon and his siblings were often left on their own for extended periods.

Since 1986, Simon has maintained an intimate relationship with Elaine Almond, with whom he has fathered two daughters. Prior to his arrest, they had planned to marry. Almond reports that Simon had been a caring father, spent time with them on a regular basis, and assisted her in paying for their upbringing. Simon reports that he has tried to use his current predicament to educate his daughters concerning the mistakes he has made. Both of his daughters submitted letters expressing their wish to be reunited with their father.

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In addition, Simon's niece and sisters have written to the Court to describe Simon's development since being incarcerated for the instant offense fifteen years ago. They describe him as entering prison as "an angry, defiant young man." They state that he has since become remorseful, weak, frail, and exasperated.

There can be little dispute that Simon has not lived an exemplary life since his arrival in the United States. He was expelled from high school for fighting. In 1980, he was convicted of attempted criminal possession of a weapon after the police found a loaded gun in a car he was riding in. In 1981, he was involved in an altercation in a Brooklyn disco, which resulted in the shooting death of one individual. Simon pled guilty to manslaughter and spent approximately five years in state prison before being paroled. Prior to 2002, Simon had a lamentable prison disciplinary record. Since 2001, however, his record has been marred by only one outbreak, apparently related to the treatment of his many medical problems.

#### Health

The PSR reports that since his incarceration, Simon's health has deteriorated substantially. A blow to the head while at Riker's Island in 1982 caused glaucoma and a ruptured cornea in his left eye, which led to a loss of sight in that eye. Simon stated that he had undergone one operation, and had scheduled a second, which was cancelled due to his conviction for the instant



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offense. The PSR describes his left eye as containing "gray bubbles," glaucoma, and cataracts. Simon stated that the vision in his right eye is growing blurry, and he feared total blindness.

Additionally, in 1992, while incarcerated for the instant offense, Simon was stabbed in the neck and stomach by an inmate. Simon reported still suffering pain from this attack.

Finally, Simon suffers from colitis, for which he had been prescribed Mesalamine. A report from a recent colonoscopy states that Simon suffered "moderately severe pain," bleeding in his abdomen, "a localized area of erosion in the mid-sigmoid and rectum," "congested mucosa in the colon," and "white exudate . . . in the colon."

Although the Guidelines do not ordinarily account for a defendant's health problems, absent an "extraordinary physical impairment," U.S.S.G. § 5H1.4, post-Booker I may consider that Simon's health is substantially more impaired than most defendants'. This both renders Simon a greater burden on the federal prison system, and incarceration a greater burden on Simon.

§ 3553(a)(2): the Purposes of Punishment

Section 3553(a)(2) instructs the Court to consider the purposes of punishment when imposing a sentence, including the need for the sentence:

(A) to reflect the seriousness of the offense, to promote

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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;

§ 3553(a)(2).

§ 3553(a)(2)(A): The Seriousness of the Offense, Respect for the Law, and Just Punishment

Section 3553(a)(2)(A) instructs the Court to craft a sentence that reflects the seriousness of the offense, promotes respect for the law, and provides just punishment. As their grouping within this subsection of the statute reflects, these concepts are interrelated and in this case merit joint consideration.

A number of factors determine whether a particular sentence is "just." A punishment is "just" insofar as it "fit[s] the crime," *Wilson*, 350 F. Supp. 2d at 916, and "reflect[s] the gravity of the defendant's conduct." *Id.* (quoting S. Rep. 98-225, 1984 U.S.C.C.A.N. 3182, 3258-59). It also "requires the court to consider society's views as to appropriate penalties, not just a judge's own personal instincts."<sup>7</sup> A "just punishment"

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<sup>7</sup> *Id.* at 917; PETER H. ROSSI & RICHARD A. BERK, UNITED STATES SENTENCING COMMISSION, PUBLIC OPINION ON SENTENCING FEDERAL CRIMES 6 (1995) (stating that a "just" sentence should be "positively correlated with the punishment desired by the citizens"), available at [http://www.ussc.gov/nss/jp\\_exsum.htm](http://www.ussc.gov/nss/jp_exsum.htm).

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must also take into account the cost of the defendant's criminal conduct and the cost society must undertake to punish for the offense. *United States v. Zakhor*, 58 F.3d 464, 466 (9<sup>th</sup> Cir. 1995).

Simon's sentencing Guidelines would call for imprisonment between 324 and 405 months.<sup>8</sup> Simon's Guidelines have been predominantly determined by the weight of crack found during the search of his home. Had Simon been arrested with an equivalent amount of powder cocaine, the range would be a mere 108 to 135 months and he would, in all likelihood, be free. Simon contended that the discrepancy between sentences imposed for cocaine powder and crack offenses was unjust, out of proportion to the relative seriousness of crack offenses, and produced a disparate impact on black defendants. The disparity between sentences imposed for equivalent amounts of powder versus crack cocaine is now approaching common knowledge, and a source of popular and scholarly concern.<sup>9</sup>

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<sup>8</sup> I adhere to my earlier ruling that the presentence report should increase Simon's offense by only one level for obstruction of justice and that the two-level adjustment of the offense level for possession of a weapon should remain. Other objections to the PSR have been disposed of on the record in open court at the time of sentence.

<sup>9</sup> See, e.g., *United States v. Then*, 56 F.3d 464, 467 (2d Cir. 1995) (Calabresi, J., concurring); *United States v. Clary*, 846 F. Supp. 768 (E.D. Mo. 1994), rev'd 34 F.3d 709 (8<sup>th</sup> Cir. 1994); Kevin J. Cloherty & Dawn M. Perlman, *Powder vs. Crack*; FED. LAW., March/April 2003, at 50; Richard Dvorak, *Cracking the Code*, 5 MICH. J. RACE & L. 611 (2000); William Spade, *Beyond the 100:1 Ratio*, 38 ARIZ. L. REV. 1233 (1995); Jesseca R.F. Grassly, Comment, *Federal Cocaine Sentencing*

(continued...)

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Since *Booker*, a number of courts have accepted the argument that in cases involving crack, they should consider non-Guidelines sentences.<sup>10</sup> Simon contended that in light of these cases and the general criticism of the disparity between crack and cocaine powder sentences, this Court should grant a non-Guidelines sentence.

#### Origin and History of the Crack Guidelines

Prior to *Booker*, the sentencing structure for cocaine offenses was a result of the Anti-Drug Abuse Act of 1985. Pub. L. No. 99-570, 100 Stat. 3207 (1986). The Act created mandatory minimum sentences for trafficking in various controlled substances. See 21 U.S.C. § 841(b). In addition, it introduced what has come to be known as the "100-to-1" quantity ratio between powder cocaine and crack. To trigger the Act's ten-year mandatory minimum sentence, the offense had to either involve five kilograms of powder cocaine, or a mere 50 grams of crack.

The Act was moved through Congress with little discussion. *Clary*, 846 F. Supp. at 784. Generally, bills are referred to

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<sup>9</sup>(...continued)

Following the 1995 Cocaine Report, 21 HAMLINE L. REV. 347 (1998).

<sup>10</sup> See, e.g., *United States v. Smith*, 02-CR-163, 2005 WL 549057, -- F. Supp. 2d -- (E.D. Wis. March 2, 2005) (granting below Guidelines sentence to defendant convicted of crack offense); *United States v. Carvajal*, 2005 WL 476125 (S.D.N.Y. Feb. 22, 2005) (same); *United States v. Nellum*, 2:04-CR-30, 2005 WL 300073, at \*3 (N.D. In. Feb. 3, 2005) (same); see also SENTENCING COMMISSION, NUMBERS ON POST-BOOKER SENTENCINGS (March 3, 2005), available at [http://www.ussc.gov/Blakely/booker\\_030305.pdf](http://www.ussc.gov/Blakely/booker_030305.pdf) (reporting that 1.1% of post-*Booker* sentences are non-Guideline sentences above Guideline range, and 8.3% are non-Guideline sentences below Guideline range).

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subcommittee, hearings are held, comment is invited from the Administration, the Judicial Conference, and public groups with relevant expertise, a markup is held, and amendments are offered. For this bill, the process was substantially streamlined and "[t]he careful deliberative practices of the Congress were set aside." Spade, *supra* at 1250. The Senate conducted only a single hearing on the 100:1 ratio, which lasted less than four hours.<sup>11</sup> No committee report was produced, and the discussion and legislative history on the Act is therefore sparse. Spade, *supra* at 1252.

In 1987, the Sentencing Commission adopted the 100-to-1 ratio in developing Guidelines for drug offenses. Using the mandatory minimum, the Commission proceeded to set proportionate sentences for the entire range of cocaine and crack quantities.<sup>12</sup> Offenses involving five grams of crack were given the same Guidelines base offense level as offenses involving 500 grams of cocaine powder.

Congress revisited the issue in the Anti-Drug Abuse Act of 1988. Pub. L. No. 100-690, 102 Stat. 4181 (1988). The 1988 Act created a mandatory minimum penalty of five years for simple

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<sup>11</sup> *Id.* at 1253; "Crack" cocaine: Hearing Before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs, United States Senate, 99<sup>th</sup> Cong., 2d Sess. 20 (1986).

<sup>12</sup> U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 10 (2002) [hereinafter "2002 REPORT"], available at <http://www.ussc.gov/legist.htm>.

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possession of five grams or more of crack. By contrast, simple possession of any amount of powder cocaine by a first-time offender was punishable by a maximum of one year in prison. See 21 U.S.C. § 844.

#### Sentencing Commission Recommendations

The concern and criticism these sentencing disparities created prompted Congress to enact the Violent Crime Control and Law Enforcement Act of 1994, which directed the Sentencing Commission to create a report "on issues relating to sentences applicable to offenses involving the possession or distribution of all forms of cocaine." Pub. L. No. 103-322, § 280006, 108 Stat. 2097 (1994). The Act specifically directed the Commission to consider "the differences in penalty levels that apply to different forms of cocaine." *Id.*

The resulting report, issued in 1995, strongly recommended that the 100:1 ratio be reduced.<sup>13</sup> The Commission concluded that some unequal ratio between powder and crack cocaine was necessary to reflect the different harms associated with the two forms of the drug. *Id.* at 199. The Commission stated its intent to submit "one or more penalty scheme models" in the near future. *Id.* at 200.

On May 11, 1995, the Commission presented to Congress several amendments to the Guidelines. 60 Fed. Reg. 25,074

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<sup>13</sup> U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 198 (1995) [hereinafter "1995 REPORT"], available at <http://www.ussc.gov/legist.htm>.

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(1995). The Commission unanimously agreed that the 100:1 ratio was too great, and a majority recommended instead adopting a 1:1 equivalence between crack and powder cocaine. 60 Fed. Reg. 25077. The greater harms associated with the crack form of the drug were already accounted for by enhancements for the sale of controlled substances to juveniles and pregnant women, § 2D1.2, offenses involving death or serious bodily harm, § 2D1.1, or the use of juveniles to sell the drug, § 2D1.2. 60 Fed. Reg. 25076.

Congress ultimately rejected the amendment. But recognizing the need for change, it directed the Commission to make further recommendations regarding cocaine sentencing. See Pub. L. No. 104-38, § 2(a)(1)(A), 109 Stat. 334 (1995). In its subsequent recommendations, the Commission was directed to maintain stiffer sentences for crack offenses than cocaine, though it was free to recommend a less severe ratio. *Id.*

In 1997, the Commission issued another proposal, again stating that a 100:1 ratio was unjustifiable.<sup>14</sup> It recommended altering the quantity threshold for triggering mandatory minimum sentences for both powder and crack cocaine to reflect a 5:1 ratio. *Id.* Shortly after, on July 3, 1997, the Attorney General and Drug Czar McCaffrey recommended adopting a similar 5:1

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<sup>14</sup> U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 2 (1997) [hereinafter "1997 REPORT"], available at <http://www.ussc.gov/legist.htm>.



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ratio.<sup>15</sup> On July 22, 1997, the Clinton administration publicly proposed reducing the ratio to 10:1. *Id.* However, no bill was introduced to implement any of these solutions and no formal amendment to the Guidelines was proposed.

Finally, in 2002, the Commission again unanimously declared the 100-to-1 ratio was "unjustified." 2002 REPORT at 91. The Commission also declared that the ratio "fails to meet the sentencing objectives set forth by Congress in both the Sentencing Reform Act and the 1986 Act." *Id.* The Commission believed that sentencing proportionality could be better achieved by eliminating the mechanical ratio and instead apply specific enhancements "to target the minority of offenders who engage in the most harmful conduct that concerned Congress." *Id.* at 91-92. The current focus on a ratio to account for the additional dangers crack posed meant that "all crack cocaine offenders would be punished as if they engaged in certain more harmful conduct, even though sentencing data demonstrates that the overwhelming majority of federal crack cocaine offenders are not involved in such conduct." *Id.* at 92. The "intrinsic harms posed by the two drugs (e.g., addictiveness)" and crack's heightened association with systemic crime did, however, justify some degree of difference in base offense levels, which could be reflected in a less severe ratio. *Id.* at 93, 100. Although the Commission did not propose Guideline amendments, the 2002 report effectively

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<sup>15</sup> Elizabeth Tison, *Amending the Sentencing Guidelines for Cocaine Offenses*, 27 S. ILL. U. L.J. 413, 429 (2003).

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recommended reducing crack sentences to reflect a 20:1 ratio with powder cocaine. *Smith*, 2005 WL 549057; see 2002 REPORT at 106.

At oral argument, Simon contended that the Court could resentence him employing a ratio other than that employed by the Guidelines. Certainly the history of crack and powder cocaine reform efforts offers a variety of options and sentences to choose from.<sup>16</sup> Employing the 100:1 ratio that the Guidelines recommend produces a base offense level of 36. After factoring in the obstruction of justice and gun enhancement and Simon's criminal history, the recommended sentence is 324 to 405 months. If the Court were to employ either the 20:1 ratio most recently recommended by the Commission or the 10:1 ratio recommended by the Clinton administration, Simon's base offense level would be 32, ultimately resulting in a sentence of 210 to 262 months. The Commission's 1997 recommendation of 5:1 produces a base offense level of 28, and a sentence of 135 to 168 months. Finally, the Commission's 1995 recommendation of a 1:1 equivalency results in a base offense level of 26, and a sentence of 108 to 135 months.

Post-*Booker*, none of these sentences is strictly mandatory. See *Smith*, 2005 WL 549057 (granting a non-Guideline sentence in part due to the unfairness of the 100:1 ratio); *Biheiri*, 2005 WL 350585, at n.7 (noting that a judge could "conceivably" grant a non-Guideline sentence because of the severity of the crack

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<sup>16</sup> For discussion of other ratios, see Spade, *supra* at 1284-89 (discussing various proposals and advocating a 20:1 ratio).

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Guidelines); *Nellum*, 2005 WL 300073, at \*4 (considering granting a non-Guideline sentence due to Commission's recommendations but granting a non-Guideline sentence on other grounds). It is, however, not for this Court to adopt a specific ratio, but instead to craft a sentence that is reasonable and best satisfies the requirements of § 3553(a). In doing so, I rely in part on the research of the Commission and other sources, whose expertise in these matters is entitled to some deference. Although I decline to follow the Guidelines' 100:1 ratio, I nonetheless will follow the Guidelines in treating an offense involving crack more seriously than a similar offense involving powder cocaine, if only because of its relatively high level of addictiveness and the fact that the burden imposed by crack trafficking falls disproportionately on some of the most vulnerable in our community. See 1995 REPORT at 35 (reporting that crack users are disproportionately poor and minorities).

Justice, the Guidelines Sentence, and Public Opinion

Proponents of the Guidelines have argued that they provide just sentences because they generally track public opinion.<sup>17</sup> One of the few areas where the Guidelines substantially deviate

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<sup>17</sup> See *Wilson*, 350 F. Supp. 2d at 917 (citing PETER ROSSI & RICHARD BERK, JUST PUNISHMENTS: FEDERAL GUIDELINES AND PUBLIC VIEWS COMPARED (1997)); Paul G. Cassell, *Too Severe?*, 56 STAN. L. REV. 1017, 1029 (2004) (describing crack sentencing as an exception to the Guidelines' consistency with public opinion). A summary of Rossi and Berk's findings is available at 12 FED. SENT. REP. 27 (1999) (reporting that for crack trafficking, "the sentences desired by the public were much lower than the Guidelines"). Their report to the Commission is available at [http://www.ussc.gov/nss/jp\\_exsum.htm](http://www.ussc.gov/nss/jp_exsum.htm).

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from the public's views, however, is with respect to the harsh difference in treatment between crack and other drugs.<sup>18</sup> A public opinion study sponsored by the Commission revealed that when asked to provide sentences for criminals convicted for trafficking in various drugs, the public chooses about the same median sentence for crack, heroin, and powder cocaine. See Rossi & BERK, *supra* note 6, at 83. In sum "the type of drug being sold is just not very important" to the public. *Id.* Where such a deviation between the Guidelines and public opinion exists, the reasonableness of the sentence they recommend diminishes. *Cf. Wilson*, 350 F. Supp. 2d at 917 (arguing that the Guidelines should be given great weight because they closely track public opinion).

#### Justice and Finality Considerations

Finally, I note that the Guidelines do not take into account the unusual procedural history of this case and personal situation of Mr. Simon, which counsels toward providing a more lenient sentence. Simon was originally improperly convicted of using a firearm in connection with a drug trafficking crime in violation of § 924(c). His motion to remedy this error was then improperly converted from a § 3582 motion to a § 2241 petition. This resulted in a first round of resentencing, which was then appealed and vacated due to the improper conversion. Simon now

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<sup>18</sup> *Wilson*, 350 F. Supp. 2d at 917; Mary Pat Flaherty & Joan Biskupic, *Rules Often Impose Toughest Penalties on Poor*, WASH. POST, Oct. 9, 1996, at A1.

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faces his third sentencing for the same conviction. For the entire fifteen years of his incarceration, Simon has not had a correct and final sentence. This lack of finality takes its toll on defendants, just as it does on the public and the courts.

I conclude that in this case, considerations related to the seriousness of the offense, respect for the law, and just punishment counsel a more lenient sentence than the Guidelines recommend.

§ 3553(a)(2)(B): General Deterrence

Section 3553(a)(2)(B) instructs the Court to consider whether the sentence recommended by the Guidelines provides adequate deterrence to criminal conduct. The resulting recommended sentence of 324 to 405 months is indisputably severe. But a longer sentence will almost always provide greater general deterrence. When considering this factor, therefore, a court must pay particular attention that the sentence imposed is not impermissibly "greater than necessary." See § 3553(a) (stating that a sentence may not be greater than necessary to comply with the purposes of punishment). A determination of what punishment provides "adequate deterrence" requires consideration of how strongly the conduct must be deterred, which is itself a product of the harm it produces.

The Commission's most recent report finds that the Guidelines' recommended sentences for crack "exaggerate[] the relative harmfulness of crack cocaine." 2002 REPORT at 93. Many

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of the assumptions that underlay the Commission's original crack and powder cocaine Guidelines have not held up after further research. Although the Commission has found that crack is more addictive than powder cocaine due to the different manner in which the two drugs are ingested, many of the harmful side effects are similar. For example, the Commission has concluded that the negative effects of prenatal exposure to the two drugs are identical, and less severe than originally believed. *Id.* at 93-94. The Commission also reports that powder cocaine use is two to seven times as high amongst juveniles as crack cocaine use. *Id.* at 96. Nor does youth play a major role in crack cocaine trafficking. Minors accounted for only 4.2% of federal crack cocaine offenses in 2000. *Id.* at 97

Finally, general deterrence, like the idea of a just sentence, should correlate with public opinion. For a punishment to deter, the public must view it as sufficiently severe as to offset the gains likely to be achieved from the commission of the crime. See ROSSI & BERK, *supra* note 6, at 7. And, as previously noted, the public views the recommended Guidelines sentence in this case as peculiarly lengthy.

It is indisputable, however, that Congress has concluded that sentences for crack-related offenses are to be lengthy, and in particular more lengthy than similar powder cocaine offenses. The Commission has concurred due to the intrinsic differences between the two forms of the drug. *Id.* at 92. I therefore

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concluded that general deterrence demands a sentence that is both lengthy, and in excess of what Simon would receive had his offense involved powder cocaine. A sentence of 262 months meets both of these qualifications and provides substantial and appropriate deterrence to those contemplating this offense.

§ 3553(a)(2)(C): Specific Deterrence

Section 3553(a)(2)(C) requires the Court to consider the need to protect the public from future crimes of this particular defendant. Simon is currently 43 years-old. He will be approximately fifty when released, having served a sentence in excess of twenty years. Under the Guidelines, age was not normally relevant to sentencing. § 5H1.1. Post-Booker, however, at least one Court has noted that recidivism drops substantially with age. *Nellum*, 2005 WL 300073 (granting non-Guideline sentence and noting that recidivism rate for defendants between the age of 41 and 50 with a criminal history category of III is less than half that of defendants under the age of 21). The Guidelines' failure to account for this phenomenon renders it an imperfect measure of how well a sentence protects the public from further crimes of the defendant. I therefore conclude that a sentence of 262 months provides sufficient, but not excessive, deterrence for this defendant.

§ 3553(a)(2)(D): Provision of Training, Medical Care and Correctional Treatment

Section 3553(a)(2)(D) requires the Court to consider the



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need for training, medical care, and correctional treatment. Rehabilitation and the improvement of the defendant are therefore goals of sentencing. As one post-*Booker* sentencing court has noted, rehabilitation "cannot be served if a defendant can look forward to nothing beyond imprisonment." *Carvajal*, 2005 WL 476125 (imposing non-Guideline sentence to defendant convicted of conspiring to distribute crack). It is doubtful whether a sentence of 324 to 405 months provides such hope.

§ 3553(a)(6): Sentencing Disparity

Avoidance of disparity is of particular importance in a case in which the court imposes a non-Guidelines sentence. Whatever other faults they had, the mandatory sentencing Guidelines achieve a remarkable measure of sentencing uniformity. For this reason alone, quite apart from the separate mandate that the sentencing Guidelines be considered, it is appropriate to consider the Guidelines sentences that would be imposed if ratios other than the 100:1 ratio between crack and powder cocaine were employed. As already noted, employing either the 10:1 or 20:1 ratios recommended by the Clinton administration and the Sentencing Commission would result in a Guideline range of sentences between 210 and 262 months. Within this range, a sentence below the high end would create a serious disparity between the sentences imposed on Simon's co-defendant for participation in the same offense.

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Statement of Reasons for Imposition of the Particular Sentence

As noted above, the recommended Guidelines sentencing range of 324 to 405 months substantially overstates the seriousness of the offense, particularly when compared with offenses involving comparable quantities of powder cocaine. Imposition of a sentence within that range would create unjust sentencing disparities and deterrence greater than that necessary to protect the public. In addition, a sentence within the Guidelines range would not give appropriate consideration to defendant's medical condition, his age at the time of release, and the amount of time he has lived with a lack of finality as to the length of time he would have to serve in prison. The particular sentence of 262 months is imposed because it is within, albeit at the top of, the range of sentences that would exist if either a 10:1 or 20:1 ratio of crack to powder cocaine were adopted and avoids disparity with the sentence imposed on Simon's co-defendant. Avoidance of such disparity is appropriate because both Simon and his co-defendant engaged in the same criminal conduct.<sup>19</sup> While Simon's personal characteristics, including his misconduct as a prisoner, absence of rehabilitation, and a higher criminal history category, might warrant a more serious sentence for him than for his co-defendant, significant mitigating factors exist in Simon's case which did not exist in that of his co-defendant,

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<sup>19</sup> The co-defendant's offense level was, of course, determined based on a 100:1 ratio between powder and crack cocaine. However, it also included adjustments for possession of a gun and obstruction of justice. His criminal history category was I.

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in particular Simon's medical condition, and the long delay in achieving finality. For all of these reasons, I have determined that a sentence of 262 months is appropriate. A five-year period of supervised release as provided for in 21 U.S.C. § 841(b)(1)(A) bolsters the protection of the public in view Simon's disciplinary record while in prison.

Conclusion

For the foregoing reasons, after consideration of the factors as set forth in § 3553(a), I sentenced Simon to 262 months imprisonment to be followed by five years supervised release.

The Clerk is directed to furnish a filed copy of the within to all parties.

SO ORDERED.

Dated : Brooklyn, New York

March 17, 2005

A handwritten signature in black ink, consisting of a large, stylized 'C' followed by a series of loops and a long horizontal stroke extending to the right.

United States District Judge

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, :

CR 90-216

-against-

United States Courthouse  
Brooklyn, New York

CECIL SIMON,

Defendant.

March 14, 2005  
12:00 o'clock noon

TRANSCRIPT OF SENTENCE

BEFORE THE HONORABLE CHARLES P. SIFTON  
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:

ROSLYNN R. MAUSKOPF  
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BY: CECIL C. SCOTT  
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For the Defendant:

BRIAN SHEPPARD, ESQ.

Court Reporter:

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1 THE CLERK: Criminal cause for sentencing, United  
2 States versus Cecil Simon.

3 THE COURT: Who is appearing for the prosecution?

4 MS. SCOTT: Ceci Scott for the United States.

5 THE COURT: For Mr. Simon?

6 MR. SHEPPARD: Brian Sheppard, your Honor.

7 THE COURT: Let me first of all go over the Probation  
8 Department documents on the basis of which I intend to  
9 sentence the defendant.

10 I have a revised presentence investigation report  
11 dated February 14, and an addendum to that report dated March  
12 3rd.

13 Mr. Sheppard, have you and your client had an

14 opportunity to review those reports.

15 MR. SHEPPARD: Yes, we have, your Honor.

16 THE COURT: I assume the government has as well.

17 I received over the years many submissions on the  
18 sentencing, but the ones I have before me from Mr. Sheppard  
19 include an August 12, 2004 submission, a December 14, 2004  
20 submission, a March 4th letter-- I'm giving these in  
21 chronological order-- a February 16th letter and then in  
22 addition a memorandum dated February 21st.

23 I have also looked back because of a cross reference  
24 in one of Mr. Sheppard's submissions to a submission that was  
25 made in connection with the original sentencing, dated August

1 13th of 1990.

2 With respect to that, let me say that most of those  
3 were incorporated and, I assume, they are still incorporated  
4 in the sentencing memorandum, to the extent they are not going  
5 to affect the sentence, which I'm going to impose.

6 I also have submissions from Mr. Simon's relatives.  
7 Are there any other documents that I should have before me?

8 MR. SHEPPARD: Your Honor, I'm not sure if you  
9 mentioned it on September 27th of 2004. I submitted my post-  
10 Booker papers -- pre-Booker, post-Blakely --

11 THE COURT: This document?

12 MR. SHEPPARD: I'm not sure.

13 THE COURT: Pre-Blakely?

14 MR. SHEPPARD: There was one that I just submitted  
15 with the last one or so, then there was a before-Booker back  
16 in September.

17 THE COURT: Is there something in there that you  
18 haven't reiterated in the other documents?

19 MR. SHEPPARD: I referred back to it. The main thing  
20 that still exists there on the weapon enhancement challenging

21 that. Also your Honor's mention of --

22 THE COURT: I have that document. I've considered  
23 those arguments. Anything further?

24 MR. SHEPPARD: Yes, I just want to make sure -- I  
25 believe I sent a letter to the Court on February 16, but there

1 were also objections to the revised presentence report, a  
2 letter that I sent to the probation officer with a copy to the

3 Court dated February 16th as well 2005--

4 THE COURT: That's what I'm talking about.

5 MR. SHEPPARD: -- because I think there was also a

6 letter to your Honor. Just to make sure your Honor was

7 THE COURT: From the government I have most

8 predominantly a letter dated March 3rd and then another letter

9 dated December 14th of last year.

10 Are there any other submissions that I should have

11 from the government?

12 MS. SCOTT: Your Honor, just the original memorandum

13 that was submitted regarding the enhancement of--

14 THE COURT: Yes.

15 MS. SCOTT: -- November 8, 2004. I have other copies

16 here.

17 THE COURT: That's this document in blue backs.

18 MS. SCOTT: Yes.

19 THE COURT: I reviewed that as well.

20 MS. SCOTT: -- I just wanted to add in the addendum

21 there was a statement that there was some factual disputes

22 that the government would be the one to respond to, and there

23 are factual assertions that Mr. Simon made and I will agree to

24 their accuracy. They are on page three and four of the

25 presentence report.



1 THE COURT: I have had a lot of papers to consider in  
2 connection with this sentencing. I don't need for you to  
3 repeat what's already in the papers. If there is anything  
4 further that either side wishes to add, I would be happy to  
5 hear it. I intend to proceed with sentencing barring some  
6 unexpected developments today and to file a sentencing  
7 memorandum which seems to be called for now a days, in  
8 writing, explaining my sentence.

9 Go ahead, Mr. Sheppard, anything that you thought to  
10 add by way of oral submission at the time of sentence?

11 MR. SHEPPARD: Thank you, your Honor.  
12 I believe I covered basically everything. I would  
13 like to point out in the courtroom are Mr. Simon's two  
14 daughters, the mother of his two daughters; his niece, his  
15 stepson and his stepbrother. They were also here on Monday.

16 THE COURT: I was aware of that.

17 MR. SHEPPARD: The only other thing, and I thank your  
18 Honor for taking all of the time in receiving all of the  
19 submissions, I think Mr. Simon would like to speak briefly.

20 THE COURT: Of course, I'll give him an opportunity  
21 to speak.

22 MR. SHEPPARD: Other than that Thank you.

23 THE COURT: Anything further Ms. Scott that you wish  
24 to say?

25 MS. SCOTT: Nothing further from the government.

1 Thank you, judge.

2 THE COURT: Well, Mr. Simon go ahead, tell me

3 anything further that you would like me to consider.

4 THE DEFENDANT: The only thing considering the actual

5 fact, the Blakley issue that my counsel had put forward to the

6 Court earlier, the first motion challenging the level of my

7 sentence, the element -- the 50 grams in the indictment that

8 Ms. Scott conceded to in our motion answering back to it

9 December 14, 2004, because due to the fact at the time Mincy

10 was in effect and Mincy was blocking the Blakley argument, and

11 Ms. Scott stated at the time she was stating even if Blakley

12 applied to my sentence, under the level I was supposed to get

13 sentenced at 32 at a time, so prior now coming I would like

14 the Court to explain to me if the Court is going beyond that, or

15 what Ms. Scott had recommended to this Court, prior to Booker

16 THE COURT: Ms. Scott, do you have anything you want

17 to say in response?

18 MS. SCOTT: I think the confusion was that Booker had

19 not been decided at the time that I wrote the letter. That

20 letter was written in response to Blakley and in the

21 expectation that the Booker opinion would hold that the

22 enhancements under the guidelines would have to be proven

23 before the jury beyond a reasonable doubt, and my position --

24 THE COURT: You are not disagreeing?

25 MS. SCOTT: I'm not disagreeing that Booker has

1 completely change the basis for that argument.

2 THE COURT: But you are also not in disagreement that

3 you did make that statement at the time?

4 MS. SCOTT: That's right.

5 THE COURT: All right, I will take that into

6 account. However, in connection with the determining

7 appropriate sentence, in determining what guidelines would

8 apply as an advisory matter, is mine, and I see no reason for

9 deviating from the proof that is before me, that the amount of

10 crack involved was substantially in excess of 50 grams and as

11 stated in the presentence report, was approximately sixty

12 hundred grams.

13 MR. SHEPPARD: May I interrupt for a second?

14 THE COURT: Sure, go ahead.

15 MR. SHEPPARD: I'm sorry, your Honor. I asked Mr.

16 Simon, I basically said the same thing to him what he said to

17 your Honor as Ms. Scott said, I believe Mr. Simon planned on

18 saying something else to the Court generally about

19 sentencing. Not legal things.

20 THE DEFENDANT: Otherwise, I'm asking the Court, you

21 know, I'm saying my faith is before your Honor and I've been

22 incarcerated 15 years and I feel 15 years is more than enough

23 for a conspiracy, even though your Honor have the latitude and

24 everything before you right now, everything that is considered

25 before you right now to resentence me as your Honor feels, I'm

1 saying that you know changes come with trust within this  
 2 system and within freedom, you know what I'm saying, your  
 3 Honor, I'm saying when it comes down to Ms. Scott, the  
 4 prosecutor talking about my behavior and other things in the  
 5 penitentiary, I lost my sight in the penitentiary, without  
 6 getting any medical treatment, I put many issues before this  
 7 Court about my medical issues that I still don't get no  
 8 treatment and, you know, to consider all of these things  
 9 before you right now, because, you know, still I'm still in  
 10 pain, stomach pains and what not.  
 11 I'm trying to tell your Honor I need to be in jail  
 12 for the rest of my life for a conspiracy charge, your Honor,  
 13 and all I'm asking is mercy on this Court because my faith is  
 14 in your hands, even though god is mightier, today you my god,  
 15 your Honor, you know, what I'm saying. That is the only thing  
 16 that I can say, to find any faith or anything within your  
 17 Honor to sentence me less than what you already sentenced me  
 18 before, you know.

19 THE COURT: All right.  
 20 Well, first let me, as I'm required to do, go through  
 21 the unresolved issues that have been raised with respect  
 22 principally to guidelines, but also with respect to other  
 23 factual matters that have a bearing on issues to be considered  
 24 under Section 3553.

25 Considering further the objections to the presentence

1 report, I see no basis for deviating from my earlier  
2 determination with respect to the issue of the gun. I'm  
3 persuaded by more than a preponderance of the evidence that  
4 the gun was possessed in the course of the drug conspiracy,  
5 which Mrs. Simon was convicted. I also find again, as I have  
6 before, that Mr. Simon engaged in obstruction of justice,  
7 although I again determine that the adjustment in his offense  
8 level, because of that should only be one level.  
9 With respect to the -- both the miscellaneous  
10 objections set forth in Mr. Shepard's letters and the  
11 objections of prior counsel, as I said, to the extent that  
12 they haven't been agreed to by the Probation Department or  
13 adopted by the Probation Department, they are not going to be  
14 taken into account in sentencing.  
15 Now, with regard to the factual issues which may be  
16 considered, either as the basis for a departure under the  
17 sentencing guidelines, or as factors to be considered in  
18 connection with the 3553 factors, I do not believe Mr. Simon's  
19 lack of guidance as a youth is of such an extraordinary nature  
20 as to justify departure from the guidelines. However, I will  
21 take them into account as one of his personal characteristics  
22 to be considered under 3553(a).  
23 The guidelines recommend against age being taken into  
24 account and I see no reason not to follow the guidelines in  
25 that respect -- at least as far as determining the guideline

1 sentence.

2 With regard to Mr. Simon's family situation and  
3 responsibility, again I don't see a basis for a guideline  
4 departure, however, having read both the letters from the  
5 family and having seen them here conscientiously attending  
6 these sessions, I certainly take it into account in  
7 considering 3553(a) factors that he has the support of a  
8 family whose affection he still enjoys.

9 Lest I forget it, I intend to recommend to the Bureau  
10 of Prisons that, to the extent it accords with Bureau of  
11 Prison's policy, he be lodged as close to the New York City  
12 area as possible to facilitate family visits.

13 With regard to his medical situation, here again Mr.  
14 Simon's medical situation is serious. It makes his time in  
15 prison more onerous than it is for other people that don't  
16 suffer as he does and it's also something the Bureau of  
17 Prisons must attend to and I will make a recommendation to the  
18 Bureau of Prisons that he be afforded appropriate medical care  
19 for his several physical disabilities, most particularly his  
20 threat of a loss of a sight from second eye and his  
21 gastrointestinal problems, which are appropriately treated.

22 I will take these into account as well in considering  
23 these personal characteristics and the situation Mr. Simon has  
24 suffered, as his counsel has noted, in a manner in which he  
25 has been transported through local jails to the New York City



1 area for this resentencing.

2 He also, I must imagine, suffered from the  
3 uncertainties that he's lived through with respect to this  
4 sentence over the unfortunately long period during which his  
5 petitions have been pending before this Court and before the  
6 Circuit Court of Appeals and I think that is also a matter  
7 appropriately taken into account in determining the justice of  
8 the sentence that he has had to wait and go through this quite  
9 extraordinary delay in finding out finally what his final  
10 sentence will be.

11 Now, with all of that said, I should perhaps deal  
12 first with the applicable guidelines. I am not going to  
13 follow the guidelines to the extent that the guidelines  
14 recommend a one hundred to one ratio for crack to powdered  
15 cocaine, which is not to say that I will not follow the  
16 guidelines in distinguishing, in terms of the seriousness of  
17 the offense, the fact that crack, rather than powdered cocaine,  
18 was involved in this transaction. I will spell out in some detail, in a written  
19 sentencing memo, the reasons for not following the one hundred  
20 to one ratio, which has been extensively criticized and the  
21 criticism of which I, to a large extent share, but I want to  
22 speak to the point of why it seems to me necessary to maintain  
23 some difference between crack and powdered cocaine, and that  
24 is, principally from me, that the impact of crack, as it is



1 merchandized in this community, at least, and probably beyond  
2 this community falls with particular weight on people who are  
3 in difficulties already and least able to sustain the burdens  
4 of crack addiction. Crack is sold in small quantities,  
5 cheaply, and regularly and to people who become addicted and  
6 to my view is a plague on those who are among the most  
7 vulnerable in our society.  
8 While I do not intend to adopt the one hundred to one  
9 ratio, I nevertheless will, in considering the seriousness of  
10 the offense consider this a more serious offense than one  
11 involving powder cocaine.  
12 With that said in determining the appropriate  
13 sentence I have considered the defendant's personal  
14 circumstances, while I don't intend to depart from the  
15 guideline sentence on that basis, his health and the amount of  
16 time it has taken for him to obtain finality with respect to  
17 this sentence are personal characteristics that deserve  
18 serious consideration.  
19 He has had an obviously less than perfect  
20 disciplinary record while in prison. He has a serious criminal  
21 record, which is taken into account with the criminal history  
22 category recommended by the guidelines, which I adopt, that is  
23 in the sense I will in come up with an evaluation of an  
24 appropriate level to attribute to the offense, considering the  
25 criminal history category as it is in the presentence report

1 and impose a sentence within the range of prison sentences  
2 called for by the guidelines.

3 Again, in connection with the defendant's personal  
4 situation, as I said earlier, I will consider his lack of  
5 youthful guidance, his family situation and support, and most  
6 important, his medical situation and the delay in imposing  
7 sentence.

8 With respect to other 3553(a) factors, the sentence I  
9 intend to impose will, I believe, affect adequate deterrence  
10 for the criminal conduct of which he was convicted.  
11 Mr. Simon, as one of his relatives noted, is going to  
12 emerge from prison physically in poor shape and in terms of  
13 age a different man than he was when he committed these  
14 offenses.

15 As counsel have noted, as generally recognized, age,  
16 itself and certainly physical condition supplies a  
17 considerable deterrence to criminal conduct. I assume that  
18 once he's released from prison he will return to his  
19 supportive family and make up for lost time in living with them  
20 and staying out of trouble.

21 The same considerations apply to protecting the  
22 public from further crimes and I also have considered his need  
23 for medical care. I'm persuaded that he can receive adequate  
24 medical care while in prison for the remaining time that he  
25 will have to remain in prison and the Bureau of Prisons have

1 the facilities to afford him medical care, although as I say I  
2 will recommend that attention be paid to his medical  
3 situation.

4 With respect to the issue of disparities, the  
5 government has appropriately raised the question, what will  
6 happen if judges impose their own ratios of the relationship  
7 between crack and powder cocaine in terms of disparities  
8 between similarly situated defendants with similar records?

9 It's not my intention to establish a ratio to be  
10 applied by me in every case. In the absence of a ratio of  
11 this sort, what judges will do, and what I have done is to  
12 consider the other factors, apart from the sentencing quantity  
13 tables to arrive at a sentence, which reflects the seriousness  
14 of the offense, promotes respect for the law and provides just  
15 punishment.

16 Those considerations inevitably are going to lead to  
17 differences, but to say that they are the kind of disparities  
18 prohibited by Section 3553(a) ignores the fact that different  
19 offenses have always and will continue to call for different  
20 sentences for different people to stand before different  
21 judges, nor the disparities will be there, but they will not  
22 be, in my view, great or the sort prohibited by the case law  
23 law.

24 With all that said, as I'm obliged to say and as I  
25 will say again perhaps in somewhat greater detail in the

1 sentencing memo, I am going to sentence Mr. Simon on the  
 2 counts of conviction to the custody of the Attorney General  
 3 for a period of 262 months to be followed by a five-year  
 4 period of supervision. I impose the special assessment  
 5 required by law and no fine since the defendant is in no  
 6 position to pay a fine.

7 I will recommend that the defendant, as I say because of  
 8 lodged in an institution as close to New York as is feasible.  
 9 You have a right to appeal this sentence, Mr. Simon.  
 10 If you lack the funds to pay the cost of the appeal, the cost  
 11 can be waived and an attorney can be appointed to represent  
 12 you at no cost to you. The special assessment is \$100.

13 Anything else to take up?

14 MS. SCOTT: Your Honor, one point, is that he was  
 15 only convicted of one count.

16 THE COURT: Yes, that is right. \$100 special  
 17 assessment.

18 I said counts of conviction, I should have said the  
 19 count of conviction.

20 Thank you.

21 MR. SHEPPARD: Mr. Simon would like me to tell you  
 22 that he already paid the special assessment.

23 Thank you, your Honor.

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25