
No. _____

In the

Supreme Court of the United States

January Term, 2021

LISA BERSHAN,
Petitioner.

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

Jeremiah Donovan
123 Elm Street, Unit 400
Post Office Box 554
Old Saybrook, CT 06475
(860) 388-3750
FAX 388-3181
jeremiah_donovan@sbcglobal.net

Attorney for the Petitioner

Question Presented

Should this Court should grant certiorari in order to resolve the following conflict among the circuits: Is a sentencing judge required specifically to rule on requests for downward departures before considering possible variances from the guideline range? Or is a sentencing judges authorized to subsume downward departure determinations into its consideration of requests for variances governed by the general rule of reasonableness?

List of Parties

There were no corporate parties below. Lisa Bershan's co-defendants in the district court were Barry Schwartz and Joel Margulies.

Table of Contents

Question Presented	ii
List of Parties	ii
Table of Authorities	iv
Petition for Writ of Certiorari	1
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	5
Statement of Facts -- the Sentencing	6
Reason for Granting the Petition	
This Court should grant certiorari in order to resolve the following conflict among the circuits: Is a sentencing judge required specifically to rule on requests for downward departures before considering possible variances from the guideline range? Or is a sentencing judges authorized to subsume downward departure determinations into its consideration of requests for variances governed by the general rule of reasonableness?	15
Conclusion	20

Index to Appendices

Appendix A	Decision of the United States Court of Appeals for the Second Circuit (slip opinion)
Appendix B	Decision of the District Court for the Southern District of New York (transcript excerpts)

Table of Authorities

CASES

Gall v. United States, 552 U.S. 38 (2007)	10
United States v. Adelsen, 441 F. Supp. 2d 506 (S.D.N.Y. 2006)	6
United States v. Cavera, 550 F.3d 180 (2d Cir. 2008).....	11
United States v. Diosdado-Star, 630 F.3d 359 (4th Cir. 2011)	16
United States v. Fleming, 397 F.3d 95 (2d Cir. 2005).....	9
United States v. Fleming, 397 F.3d 95 (2d Cir. 2005).....	10
United States v. Fuller, 426 F. 3d 556 (2d Cir. 2005)	14
United States v. Grier, 585 F. 3d 138 (3d Cir. 2009).....	16
United States v. Gupta, 904 F. Supp. 2d 349 (S.D.N.Y. 2012).....	6
United States v. Hawk Wing, 433 F.3d 622 (8th Cir. 2006).....	16
United States v. Johnson, 567 F. 3d 40 (2d Cir. 2009)	13
United States v. Jordi, 418 F.3d 1212 (11th Cir. 2005).....	16
United States v. Lofink, 564 F.3d 232 (3d Cir. 2009).....	16, 17
United States v. Madera-Ortiz, 637 F. 3d 26 (1st Cir. 2011).....	16
United States v. Marcus, 560 U.S. 258 (2010)	6
United States v. Maxfield, 812 F.3d 1127 (7th Cir. 2016)	16
United States v. McBride, 434 F.3d 470 (6th Cir. 2006).....	16
United States v. Messina, 806 F. 3d 55 (2d Cir. 2015)	13
United States v. Mohamed, 459 F.3d 979 (9th Cir. 2006).....	16
United States v. Robertson, 568 F. 3d 1203 (10th Cir. 2009).....	16

United States v. Robinson, 702 F. 3d 22 (2d Cir. 2012).....	10
United States v. Sanchez, 517 F. 3d 651 (2d Cir. 2008)	13
United States v. Selioutsky, 409 F.3d 114 (2d Cir. 2005).....	13
United States v. Villafuerte, 502 F.3d 204 (2d Cir. 2007)	10

STATUTES

18 U.S.C. § 2.....	3
18 U.S.C. § 924(j).....	3
18 U.S.C. § 1958	3
18 U.S.C. § 3231	2
18 U.S.C. § 3557	2
18 U.S.C. § 3742	2
21 U.S.C. § 848(e)(1)(A)	3
28 U.S.C. § 1254(1)	1, 2
28 U.S.C. § 1291	2

RULES

Fed. R. App. Procedure, Rule 4(b).....	2
U.S.S.G. § 5K2.13	4, 8, 12, 13, 16

No. _____

In the
Supreme Court of the United States

January Term, 2021

LISA BERSHAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

Petitioner Lisa Bershan respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit dated February 18, 2021.

Opinions Below

The decision of the Court of Appeals is an unpublished summary affirmation and is set forth at A 1, *infra*.¹ The decision of the district court is contained in the sentencing transcript. The relevant portions of that transcript are set forth at A 12, *infra*.

¹In this petition, "A" followed by a page number refers to the Appendix to this Petition for Certiorari, which follows the petition.

Jurisdiction

The judgment of the Court of Appeals entered on February 18, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The basis for subject matter jurisdiction in district court was 18 U.S.C. § 3231 (jurisdiction over offenses against the United States). The basis for the jurisdiction of the court of appeals was 28 U.S.C. § 1291 (appeals from final judgments of district courts), Rule 4(b), Fed. R. App. Proc. (appeals from criminal convictions), 18 U.S.C. § 3557 and 18 U.S.C. § 3742 (appeals from sentences)

Constitutional and Statutory Provisions Involved

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;

* * * *

(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.

(b) Application of Guidelines in Imposing a Sentence.—

(1) In general.—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of

an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

* * * *

(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 a statement of reasons form issued under section 994(w)(1)(B) of title 28, 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.

* * * *

USSG § 5K2.13.

A downward departure may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense. Similarly, if a departure is warranted under this policy statement, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and

circumstances of the defendant's offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; (3) the defendant's criminal history indicates a need to incarcerate the defendant to protect the public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code.

Statement of the Case

Lisa Bershan pleaded guilty in the Southern District of New York to a nine-count information charging fraud, drug and firearms counts.² A 2-3

The district court sentenced Bershan to 84 months of imprisonment followed by five years of supervised release and ordered her to pay approximately \$3 million in restitution to her victims. *Id.*

Lisa Bershan appealed challenged the procedural reasonableness of her sentence, which was three months longer than the maximum sentence recommended under the United States Sentencing Guidelines, A 3, and far longer than her co-conspirators, husband, Barry Schwartz, and Joel Margulies, each of whom received 48 months' incarceration, and each of whom appears to have been as culpable as Lisa Bershan.

The Court of Appeals affirmed the sentence:

² To be specific, she pleaded guilty to conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349; wire fraud in violation of 18 U.S.C. §§ 1343 and 2; aggravated identity theft in violation of 18 U.S.C. §§ 1028A and 2; conspiracy to commit securities fraud in violation of 18 U.S.C. § 371; securities fraud in violation of 15 U.S.C. §§ 78j(b) and 78ff, 17 C.F.R. § 240.10b-5, and 18 U.S.C. § 2; money laundering in violation of 18 U.S.C. §§ 1956(a)(B)(ii) and 2; conspiracy to distribute narcotics in violation of 21 U.S.C. § 846; and unlawful receipt of a firearm in violation of 18 U.S.C. §§ 922(a)(3), 924(a)(1)(D), and 2. A2-3.

[W]e hold that Bershan's sentence was procedurally reasonable. At sentencing, the parties agreed that the district court accurately calculated the applicable sentencing range under the Guidelines and that the pre-sentencing report on which it relied did not contain any material factual errors. App'x 191-93. Moreover, the district court's comments at the sentencing hearing manifestly show that it did not treat the Guidelines as mandatory or fail to consider the sentencing factors provided in 18 U.S.C. § 3553(a). *Id.* at 192, 285-88. The district court also provided an adequate explanation for its upward variance from the Guidelines. *Id.* at 236-37, 285-88. On this record, we see no basis for concluding that the district court committed any procedural error, let alone error that is "clear or obvious, rather than subject to reasonable dispute" or that "seriously affects the fairness, integrity or public reputation of judicial proceedings." *[United States v.] Marcus*, 560 U.S. [258] ,262 [(2010)] (alteration omitted).

A 5-6.

Statement of Facts -- the Sentencing

The sentencing judge, U.S.D.J. Jed S. Rakoff would probably be the first to agree that he despises the federal sentencing guidelines. He has written about his contempt,³ spoken about it,⁴ and frequently mentions it in sentencing proceedings over which he presides.⁵ The issue which we ask this Court to consider is an

³Judge Jed S. Rakoff, Why the Federal Sentencing Guidelines Should Be Scrapped, 26 FED. SENT. R. 6 (Oct. 2013)

⁴Keynote Address to ABA National Institute on White Collar Crime, reported at: Judge Rakoff Speaks Out At Harvard Conference, Full Speech, set forth at <https://biglawbusiness.com/judge-rakoff-speaks-out-at-harvard-conference-full-speech> (last viewed 2/17/2020).

⁵ See, e.g., *United States v. Gupta*, 904 F. Supp. 2d 349, 351 (S.D.N.Y. 2012) ("the numbers assigned by the Sentencing Commission to various sentencing factors appear to be more the product of speculation, whim, or abstract number-crunching than of any rigorous methodology — thus maximizing the risk of injustice"); *United States v. Adelsen*, 441 F. Supp. 2d 506, 512 (S.D.N.Y. 2006)(referring to "the utter travesty of justice that sometimes results from the guidelines' fetish with abstract arithmetic, as well as the harm that guideline calculations can visit on human beings if not cabined by common sense"); *United*

example of the district court's utter disregard of the sentencing guidelines in reaching its sentencing decisions: the court declined to rule on Lisa Bershan's request for a downward departure, subsuming her sentencing-guideline departure arguments into the non-guideline inquiry as to whether the court should grant a variance – a procedure, as noted below, that is approved by some circuits and disapproved by others.

The sentencing court did duly began the proceedings by setting forth the PSR's Sentencing Guideline calculations.

The probation office has calculated the total offense level as 23; the criminal history category is I, leading to a guideline range on all but Count Three of 46 to 57 months, and then Count Three has a mandatory two year, consecutive to all other counts.

Sent Tr 2, A 13.

The defense immediately noted that it had made "a specific application for downward departure" from the offense level and the court responded:

Yes, of course. To set your mind at ease on that score, as I have had occasion to say on many sentences past, I regard the sentencing guidelines as essentially irrational. They probably would be diagnosed by the doctor as --

States v. Albi Doka, 2d Cir. docket no. 18-3311 (argued, January 30, 2019), Appendix at 238 (reproducing the District Court Sentencing Transcript at App'x 6) ("[A]s you know, I think the guidelines are irrational, I pay only the minimum attention to the guidelines that I am required to by law, and in my view that is quite minimal"); *United States v. Jose Montanez-Elias*, S.D.N.Y. docket no. 17 CR 121 (JSR), Sentencing Transcript (7/22/2019) at 2 ("as I have stated on many, many occasions, and state so now, I think the guidelines are inherently irrational").

well, I'm not sure which DSM⁶ it would qualify for, maybe pathetic.

I'm required to calculate them. I've calculated them. I adopt the calculation of the probation office. It will play no role in this sentence beyond what is required by law, which is my responsibility.

A 14.

Later in the sentencing proceeding, while the defense was making its case for a downward departure pursuant to USSG § 5K2.13 (diminished capacity), an argument that had been extensively briefed by both the defendant and the government, the court interjected:

Forgive me. I don't even know why that's relevant, because I have full power to grant a variance, so I don't need to meet the particulars of any given departure. My view of sentencing is that you need to look at all the factors -- small, large, complicated, or otherwise -- which is, of course, my problem, one of my problems, with the guidelines. But even if she didn't meet the requirements for a departure, I still would have full power on the arguments you're making to grant a variance if I thought it was appropriate.

Sent. Tr. 53, A 33.

On appeal, Lisa Bershan argued that 18 U.S.C. § 3553(a)(4) imposes upon sentencing judges the duty to “consider” the applicable category of offense committed by the applicable category of the defendant set forth in the guidelines. She recognized that, according to the Court of Appeals for the Second Circuit, it does not take much consideration for a sentencing court to satisfy its requirement

⁶A reference to the Diagnostic and Statistical Manual of Mental Disorders (DSM), a handbook used by health care professionals in much of the world as the authoritative guide to the diagnosis of mental disorders. The DSM lists and describes various categories of mental disorders. “Pathetic,” of course, is not one.

to consider the sentencing guidelines. The court "take[s] a deferential approach and refrain[s] from imposing any rigorous requirement of specific articulation by the sentencing judge." *United States v. Fleming*, 397 F.3d 95, 99 (2d Cir. 2005). It is enough that a judge be aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and that nothing in the record indicates misunderstanding about such materials or misperception about their relevance. *Id.*

Here, the district court's consideration of the guidelines was to describe them as irrational, deserving of a subsection of their own in the Diagnostic and Statistical Manual of Mental Disorders (category: Pathetic) and to inform the parties that, now that the duty to set forth the guideline range had been fulfilled, the Sentencing Guidelines would play no further part in the sentencing. Sent. Tr. 3, A 14.

This less-than-lip-service to the Guidelines, Lisa Bershan argued, in combination with other factors described below, fell short of fulfilling the duty to "consider" the sentencing guidelines imposed on district courts by the sentencing statute.

The Court of Appeals disagreed:

Bershan argues that the district court violated its obligation under 18 U.S.C. § 3553(a)(4) to "consider" the Guidelines because the court expressed contempt for the Guidelines during the sentencing hearing. The district court's commentary on the Guidelines, however, does not establish that it refused or failed to consider the Guidelines. The record shows that the district court expressly acknowledged its legal obligation to consult the Guidelines and confirmed that it would consider the Guidelines to the extent "required by law." App'x 192.

The court also stated that it was bound by law to “take account of” the factors listed in 18 U.S.C. § 3553(a), which it described as “the law that binds me and every other judge.” Id. at 285. That law commands judges to “consider,” among other things, “the kinds of sentence and the sentencing range established for … the applicable category of offense committed by the applicable category of defendant as set forth in the [G]uidelines … issued by the Sentencing Commission.” 18 U.S.C. § 3553(a)(4)(A)(I). The district court was not required to analyze that particular sentencing factor on the record to demonstrate that it was considered. *See United States v. Villafuerte*, 502 F.3d 204, 210 (2d Cir. 2007) (“[W]e do not insist that the district court … discuss every § 3553(a) factor individually. We do not prescribe any formulation a sentencing judge will be obliged to follow in order to demonstrate discharge of the duty to ‘consider’ the Guidelines.”) (internal citation and quotation marks omitted); *see also United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005) (“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, we will accept that the requisite consideration has occurred.”).

Moreover, the district court ultimately imposed a sentence just three months above the upper end of the Guideline range, suggesting that it used the Guidelines as a “benchmark or a point of reference or departure.” *Villafuerte*, 502 F.3d at 209. That approach to sentencing is procedurally reasonable. See *Gall* [v. United States, 552 U.S. 38, 49 (2007)] (“As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.”).

A 6-7.

Lisa Bershan argued that while it is error to treat the sentencing guidelines and policy statements as mandatory, *United States v. Robinson*, 702 F. 3d 22, 38 (2d Cir. 2012), it is equal error to treat them as contemptible. The statutory requirement obliging sentencing courts to “consider” the guidelines, she argued, is an obligation that is not satisfied by the court’s pronouncement that it considers the guidelines insane – a pronouncement that does not do much to advance the

statutory sentencing objective of promoting respect for the law. 18 U.S.C. §3553(a)(2)(A).⁷

This argument did not persuade the Court of Appeals.

Bershan argues that just as it is error to treat the Guidelines as mandatory, so too is it error to treat the Guidelines as contemptible. Appellant's Br. 32-33. Bershan offers no support for that assertion. We have never held that a district judge may not express disagreement with the Guidelines as long as he or she affords the Guidelines the consideration required by law. We have even recognized that "a district court may vary from the Guidelines range based solely on a policy disagreement with the Guidelines." [United States v. Cavera, 550 F.3d [180, 191 (2d Cir. 2008)]. Such disagreement, even if strongly worded, is not tantamount to error.

A-8.

Lisa Bershan also argued on appeal that 18 U.S.C. § 3553(a)(4)(B)(5)

⁷If most defense attorneys are like the undersigned, they explain to the defendants, their families, and their courtroom supporters that the Federal Sentencing Guidelines were promulgated at great cost and with considerable effort after exhaustive surveys of the sentencing practices of federal judges over a period of time, and that the guidelines are constantly updated by continuing surveys, and that the guideline range represents a consensus among federal judges throughout the country as to the appropriate sentence to be imposed on roughly similar cases. A sentencing judge is not required to do what other judges do, but she will place great weight upon the recommendation of the sentencing guidelines, as reflecting a kind of rough compromise among judges of varying political viewpoints, sentencing philosophies and geographies as to a just outcome in cases like the defendant's. One can imagine the reaction of defendants and their families when, during the course of a sentencing proceeding, they hear the federal sentencing judge describe the federal sentencing guidelines as akin to madness. If the sentencing judge then departs downwards, he is a veritable Solomon, a beacon of justice shining brightly among all the rest of the boobs included in the surveys. If she departs upwards, she is an arrogant Mohammed Sadeq Givi Khalkhali who thinks she knows God's (or her own) path to justice better than all her more merciful colleagues. A federal judicial expression of vehement contempt for the federal sentencing guidelines uttered a few moments prior to imposing a federal sentence hardly advances the statutory purpose of "promot[ing] respect for the law."

imposes upon sentencing courts the duty to “consider” any pertinent policy statements issued by the Sentencing Commission, such as the diminished capacity policy statement set forth at USSG § 5K2.13. That policy statement provides:

A downward departure may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense. Similarly, if a departure is warranted under this policy statement, the extent of the departure should reflect the extent to which the reduced mental capacity contributed to the commission of the offense.

However, the court may not depart below the applicable guideline range if (1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant’s offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; (3) the defendant’s criminal history indicates a need to incarcerate the defendant to protect the public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110, or 117, of title 18, United States Code.

Prior to sentencing, the defense submitted a lengthy sentencing memorandum, presented the testimony of a psychiatrist, and argued extensively that Lisa Bershan had “committed the offense while suffering from a significantly reduced mental capacity and . . . the significantly reduced mental capacity contributed substantially to the commission of the offense. *Id.* The government argued equally vehemently that the court should not depart because “the defendant’s criminal history indicates a need to incarcerate the defendant to protect the public.” Lurking in the background was Lisa Bershan’s history of

substance abuse: no downward departure was available if “the significantly reduced mental capacity was caused by voluntary use of drugs. . . .” *Id.*

The district court never explicitly ruled, however, as to whether the diminished-capacity downward departure requested by the defense should or should not be granted.

From Judge Rakoff’s perspective, it made sense not to bother explicitly to rule on the defense’s request that he depart from a guideline range that he was going to ignore in any case. As he said, “I don’t even know why [the appropriateness of a downward departure is] relevant, because I have full power to grant a variance, so I don’t need him to meet the particulars of any given departure.” Sent. Tr. 53, A 242.

Lisa Bershan argued in the Court of Appeals that failing to rule specifically on the defense motion for a downward departure was procedural error. *See United States v. Selioutsky*, 409 F.3d 114, 117-18 (2d Cir. 2005) (pursuant to Booker, a “sentencing judge must consider the factors set forth in 18 U.S.C. § 3553(a), including the applicable Guideline range and available departure authority. The sentencing judge may then impose either a Guidelines sentence or a non-Guidelines sentence”). Numerous previous decisions of the Court of Appeals had stated that a sentencing judge must determine “the availability of departure authority” and that the failure to do so is procedurally unreasonable. *United States v. Messina*, 806 F. 3d 55, 62 (2d Cir. 2015); *United States v. Johnson*, 567 F. 3d 40, 51-52 (2d Cir. 2009); *United States v. Sanchez*, 517 F. 3d 651, 661-62 (2d Cir.

2008); *United States v. Fuller*, 426 F. 3d 556, 562 (2d Cir. 2005). None of those decisions, however, determined whether a judge was required to do so prior to considering whether a variance was appropriate or whether the downward-departure consideration was properly subsumed into the consideration of whether the statutory sentencing factors suggested that a variance was appropriate.

The Court of Appeals did not agree that the sentencing court had failed to rule on her motion for downward departure:

Next, Bershan argues that the district court committed procedural error by failing to consider the availability of a downward departure from the Guidelines range under U.S.S.G. § 5K2.13 and by failing to rule on Bershan’s request for a downward departure under that section. Section 5K2.13 provides that in certain circumstances, “[a] downward departure [from the Guidelines range] may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense.” Bershan’s claim that the district court refused to consider its departure authority under this provision is inaccurate. Far from failing to consider its departure authority, the district court acknowledged that it could grant a variance regardless of whether “the particulars of any given departure,” including § 5K2.13, were met. App’x 242. The district court thereby indicated that it was aware of the authority to grant a downward departure based on the defendant’s diminished mental capacity.

The record also demonstrates that, contrary to Bershan’s suggestion, the district court ruled on Bershan’s request for a downward departure under § 5K2.13. After hearing from a doctor who testified to Bershan’s struggles with mental illness and from Bershan’s counsel, the district court stated that it was not “convinced that this defendant is in the same boat as someone who has a really major, major mental illness.” Id. at 244. Despite that impression, the court acknowledged that Bershan’s “many indications of mental illness … need to be taken into account” but concluded, after “balancing” all of the relevant factors, that a “very substantial sentence” was nevertheless warranted. Id. at 286-88. It is thus clear that the district court considered and rejected Bershan’s request for a downward

departure under § 5K2.13, a disposition that is reflected on the court’s Statement of Reasons, which left the box for a departure under that provision unchecked. We will not infer a procedural error based on the court’s failure to rule more expressly on Bershan’s request for a departure at the hearing. See Smith, 949 F.3d at 66 (“[W]e do not require district courts to engage in the utterance of ‘robotic incantations’ when imposing sentences.”).

A 9-10.

Lisa Bershan also complained that the district court failed to comply with the requirement set forth in 18 U.S.C. §3553(c)(2) that the court’s reason or reasons for sentencing outside of the guideline range be stated with specificity in a written statement of reasons. The Court of Appeals rejected this argument because even though no statement of reasons is listed on the docket sheets of the case, the district judge did fill out a form AO 245 B (statement of reasons - not for public disclosure), a form which in the Southern District of New York is apparently forwarded from a sentencing judge to the probation office to be transmitted to the Sentencing Commission. A 10. (In other districts, the form is filed under seal and is available to the defendant and the government.)

Reason for Granting the Petition

This Court should grant certiorari in order to resolve the following conflict among the circuits: Is a sentencing judge required specifically to rule on requests for downward departures before considering possible variances from the guideline range? Or is a sentencing judges authorized to subsume downward departure determinations into its consideration of requests for variances governed by the general rule of reasonableness?

The procedural requirement that a district court consider and rule on

requests for downward departure prior to considering variances is recognized the First, Third, Eighth, Tenth, and Eleventh Circuits.⁸

In this decision, the Second Circuit joined the Fourth, Sixth, Seventh and Ninth Circuits in holding that the guideline scheme of downward and upward departures has essentially been replaced by the requirement that judges impose a reasonable sentence.⁹

The contrast between the circuits is illustrated by a comparison of Lisa Bershan's sentencing to the sentencing described in *United States v. Lofink*, 564 F.3d 232, 240 (3d Cir. 2009). There, as here, a defendant moved for a downward departure pursuant to USSG § 5K2.13. The district court stated that its general practice was not specifically to rule on downward departure motions, but rather to consider arguments for departure as part of its evaluation of the sentencing factors set forth in 18 U.S.C. § 3553(a). Similarly, the sentencing judge in this case responded to counsel's arguments as to whether Lisa Bershan satisfied the factors justifying a downward departure by observing "I don't even know why that's relevant, because I have full power to grant a variance, so I don't need to meet the

⁸United States v. Madera-Ortiz, 637 F. 3d 26, 29-30 (1st Cir. 2011); United States v. Grier, 585 F. 3d 138, 141-42 (3d Cir. 2009); United States v. Hawk Wing, 433 F.3d 622, 631 (8th Cir. 2006); United States v. Robertson, 568 F. 3d 1203, 1210 (10th Cir. 2009); United States v. Jordi, 418 F.3d 1212, 1215 (11th Cir. 2005).

⁹United States v. Diosdado-Star, 630 F.3d 359, 364-66 (4th Cir. 2011); United States v. McBride, 434 F.3d 470, 476 (6th Cir. 2006); United States v. Maxfield, 812 F.3d 1127, 1129-30 (7th Cir. 2016); United States v. Mohamed, 459 F.3d 979, 986 (9th Cir. 2006).

particulars of any given departure. . . . Even if she didn't meet the requirements for a departure, I still would have full power on the arguments you're making to grant a variance if I thought it was appropriate." A 33.

In evaluating the statutory sentencing factors, the *Lofink* sentencing court did carefully consider defense claims of diminished capacity, along with a number of other factors, and sentenced the defendant to a term of incarceration three months below the lower end of the guideline range.

Similarly, in this case, the district court conducted a lengthy sentencing hearing, entertaining argument and questioning counsel and witnesses concerning the scope of Lisa Bershan's mental incapacity, but never specifically ruled on the record on her request for a downward departure, subsuming the request into the court's analysis of the statutory (and the judge's personal) sentencing factors.

The Court of Appeals for the Third Circuit held that although the district court had invested "thoughtful consideration" in the sentencing, "we cannot endorse the procedure it adopted." 564 F.3d at 242. The district court's discussion at the variance stage did not shed light on what it would have done at the departure stage. The Guidelines are highly structured and the more free-ranging approach in determining variances is unlikely to answer all the questions that must be answered in making departure determinations, the Third Circuit held. Without a specific ruling on the departure request, the Court of Appeals for the Third Circuit was unable to determine whether the sentencing court had denied the motion for downward departure because it concluded that there was no basis to

grant it under § 5K13.2 or because the court was exercising its discretion. From an appellate perspective, such a distinction is crucial, since courts of appeals are not at liberty to review of discretionary denial.

So, too, in Lisa Bershan’s case, although Judge Rakoff was not quite as explicit as the Delaware district judge about *refusing* to rule on the downward departure motion, he made clear that such a ruling would be pointless and that his decision not to make an explicit ruling was a conscious choice to consider the request in the context of deciding the advisability of a variance from the guideline range.

Here, as in *Lofink*, appellate review is stymied by lack of a ruling on the motion for departure. From the record of the case, it is impossible to determine whether the district court departed downwardly because of Lisa Bershan’s diminished capacity, and then varied upwards because of the heartache and sorrow that her crime had engendered.¹⁰

If the judge denied the motion, significant appellate questions of law would be presented by the denial. The guideline recommends against departure where “the defendant’s criminal history indicates a need to incarcerate the defendant to protect the public.” If that was the reason for the sentencing court’s denial of the

¹⁰As the Court of Appeals noted, the district judge did fill out a form AO 245 B (statement of reasons - not for public disclosure), which is not listed in the docket of the case and is, as best we can tell, forwarded from the sentencing judge to the probation office to be transmitted to the Sentencing Commission. While the questions asked above concerning the district court’s decision cannot be answered from the record of the case, a couple of them can be answered from the AO 245 B sent to probation.

request for downward departure, the denial gives rise to the question: Does the guideline refer to protecting the public from violent crimes or does it also encompass protection from purely financial crimes such as Lisa Bershan's? When the guideline refers to the "defendant's criminal history," does it refer to past convictions (of which Lisa Bershan had none) or does "criminal history" include the relevant conduct of the offense of conviction?

Perhaps none of this matters. Perhaps the district court denied the downward departure motion because of Lisa Bershan's cocaine use, a factual evaluation not subject to appellate review.

Some of the sentencing court's statements suggest that the court might have viewed the departure as inappropriate because Lisa Bershan's mental capacity was not *significantly* reduced, despite her psychiatric infirmities and that may have been the reason for declining to grant a downward departure.

These questions concerning Lisa Bershan's sentencing illustrate that a district court's declining specifically to rule on requests for departures before considering the applicability of variances is procedurally unreasonable. This Court should grant the petition in order to settle a conflict among the circuits as to whether a sentencing judge is required to decide motions for departure prior to considering requests for variances, or whether the non-mandatory nature of the sentencing guidelines has rendered motions for downward departures virtually indistinguishable from requests for variances, so that both are appropriately decided together under the general principle of reasonableness.

Conclusion

For the reasons set forth above, the petitioner, Lisa Bershan, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

/s/

JEREMIAH DONOVAN
123 Elm Street--Unit 400
P.O. Box 554
Old Saybrook, CT 06475
(860) 388-3750
Juris no. 305346
Fed.bar.no. CT 03536

No. _____

In the

Supreme Court of the United States

January Term, 2021

LISA BERSHAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

**Appendix to the Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit**

Jeremiah Donovan
123 Elm Street, Unit 400
Post Office Box 554
Old Saybrook, CT 06475
(860) 388-3750
Attorney for the Petitioner

Appendix
Table of Contents

Summary Order, <i>United States v. Lisa Bershan</i>	1
Excerpt from sentencing proceeding -- pages 1-4 (introductory matters)	12
Excerpt from sentencing proceeding -- pages 5 to 20 (court questions defense psychiatrist)	16
Excerpt from sentencing proceeding -- pages 52 to 53 (excerpt from argument of defense counsel - colloquy with sentencing judge)	32
Excerpt from sentencing proceeding -- pages 89 to 94 (argument of government counsel)	34
Excerpt from sentencing proceeding -- pages 94 to 96 (allocution of defendant)	39
Excerpt from sentencing proceeding. pages 96 to 103 (imposition of sentence)	41

19-4024-cr

United States v. Bershan

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 18th day of February, two thousand twenty-one.

PRESENT: John M. Walker, Jr.,
Robert D. Sack,
Steven J. Menashi,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

v.

No. 19-4024-cr

LISA BERSHAN,
Defendant-Appellant,

BARRY SCHWARTZ, JOEL MARGULIES,

*Defendants.**

For Appellee:

CHRISTINE MAGDO, Assistant United States Attorney (Negar Tekeei, Karl Metzner, Assistant United States Attorneys, *on the brief*), for Audrey Strauss, United States Attorney for the Southern District of New York, New York, NY.

For Defendant-Appellant:

JEREMIAH DONOVAN, The Law Offices of Jeremiah & Terry Donovan, Old Saybrook, CT.

Appeal from a judgment of the United States District Court for Southern District of New York (Rakoff, J.).

Upon due consideration, it is hereby **ORDERED, ADJUDGED, and DECREED** that the judgment of the district court is **AFFIRMED**.

Defendant-appellant Lisa Bershan appeals from a judgment of conviction entered by the United States District Court for the Southern District of New York. Bershan pleaded guilty pursuant to a plea agreement to a nine-count information charging her with conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349;

* The Clerk of Court is directed to amend the caption as set forth above.

wire fraud in violation of 18 U.S.C. §§ 1343 and 2; aggravated identity theft in violation of 18 U.S.C. §§ 1028A and 2; conspiracy to commit securities fraud in violation of 18 U.S.C. § 371; securities fraud in violation of 15 U.S.C. §§ 78j(b) and 78ff, 17 C.F.R. § 240.10b-5, and 18 U.S.C. § 2; money laundering in violation of 18 U.S.C. §§ 1956(a)(B)(ii) and 2; conspiracy to distribute narcotics in violation of 21 U.S.C. § 846; and unlawful receipt of a firearm in violation of 18 U.S.C. §§ 922(a)(3), 924(a)(1)(D), and 2. The district court sentenced Bershan to 84 months of imprisonment followed by five years of supervised release and ordered her to pay approximately \$3 million in restitution to her victims. Bershan challenges the procedural reasonableness of her sentence, which was three months longer than the maximum sentence recommended under the United States Sentencing Guidelines. We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

I

Ordinarily, “[w]e review a challenged sentence for ‘reasonableness,’” *United States v. Friedberg*, 558 F.3d 131, 133 (2d Cir. 2009), which is “akin to review for abuse of discretion, under which we 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," *United States v. Corsey*, 723 F.3d 366, 374 (2d Cir. 2013). But where, as here, "[the] defendant [did] not object at sentencing to [the] district court's failure to explain its reasoning, we review the ... challenge for plain error." *United States v. Smith*, 949 F.3d 60, 66 (2d Cir. 2020). "[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it." *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004). To carry her burden, the defendant must show "(1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights ...; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings." *United States v. Marcus*, 560 U.S. 258, 262 (2010) (internal quotation marks and alteration omitted).

A district court commits procedural error if it fails to calculate the sentencing range recommended under the federal Sentencing Guidelines, makes a mistake in calculating the Guidelines range, or treats the Guidelines as mandatory. *United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc). The district court also commits procedural error if it fails to consider the sentencing factors listed in 18 U.S.C. § 3553(a), rests its sentence on a clearly erroneous finding

of fact, or fails adequately to explain its sentence. *Id.* The court's explanation of its sentence "must satisfy us that it has 'considered the parties' arguments' and that it has a 'reasoned basis for exercising its own legal decisionmaking authority.'" *Id.* at 193 (quoting *Rita v. United States*, 551 U.S. 338, 356 (2007)) (alteration omitted). In addition, the court "must include 'an explanation for any deviation from the Guidelines range,'" which requires the court to "say why [it] is doing so, bearing in mind ... that 'a major departure from the Guidelines should be supported by a more significant justification than a minor one.'" *Id.* at 190, 193 (quoting *Gall v. United States*, 552 U.S. 50-51 (2007)) (alteration omitted).

Applying these principles, we hold that Bershan's sentence was procedurally reasonable. At sentencing, the parties agreed that the district court accurately calculated the applicable sentencing range under the Guidelines and that the pre-sentencing report on which it relied did not contain any material factual errors. App'x 191-93. Moreover, the district court's comments at the sentencing hearing manifestly show that it did not treat the Guidelines as mandatory or fail to consider the sentencing factors provided in 18 U.S.C. § 3553(a). *Id.* at 192, 285-88. The district court also provided an adequate explanation for its upward variance from the Guidelines. *Id.* at 236-37, 285-88. On

this record, we see no basis for concluding that the district court committed any procedural error, let alone error that is “clear or obvious, rather than subject to reasonable dispute” or that “seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Marcus*, 560 U.S. at 262 (alteration omitted).

II

Bershan’s arguments to the contrary are unavailing. First, Bershan argues that the district court violated its obligation under 18 U.S.C. § 3553(a)(4) to “consider” the Guidelines because the court expressed contempt for the Guidelines during the sentencing hearing. The district court’s commentary on the Guidelines, however, does not establish that it refused or failed to consider the Guidelines. The record shows that the district court expressly acknowledged its legal obligation to consult the Guidelines and confirmed that it would consider the Guidelines to the extent “required by law.” App’x 192. The court also stated that it was bound by law to “take account of” the factors listed in 18 U.S.C. § 3553(a), which it described as “the law that binds me and every other judge.” *Id.* at 285.

That law commands judges to “consider,” among other things, “the kinds of sentence and the sentencing range established for … the applicable category of offense committed by the applicable category of defendant as set forth in the

[G]uidelines ... issued by the Sentencing Commission." 18 U.S.C. § 3553(a)(4)(A)(i). The district court was not required to analyze that particular sentencing factor on the record to demonstrate that it was considered. *See United States v. Villafuerte*, 502 F.3d 204, 210 (2d Cir. 2007) ("[W]e do not insist that the district court ... discuss every § 3553(a) factor individually. We do not prescribe any formulation a sentencing judge will be obliged to follow in order to demonstrate discharge of the duty to 'consider' the Guidelines.") (internal citation and quotation marks omitted); *see also United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005) ("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, we will accept that the requisite consideration has occurred.").

Moreover, the district court ultimately imposed a sentence just three months above the upper end of the Guideline range, suggesting that it used the Guidelines as a "benchmark or a point of reference or departure." *Villafuerte*, 502 F.3d at 209. That approach to sentencing is procedurally reasonable. *See Gall*, 552 U.S. at 49 ("As a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark.").

Bershan argues that just as it is error to treat the Guidelines as mandatory, so too is it error to treat the Guidelines as contemptible. Appellant's Br. 32-33. Bershan offers no support for that assertion. We have never held that a district judge may not express disagreement with the Guidelines as long as he or she affords the Guidelines the consideration required by law. We have even recognized that "a district court may vary from the Guidelines range based solely on a policy disagreement with the Guidelines." *Cavera*, 550 F.3d at 191. Such disagreement, even if strongly worded, is not tantamount to error.

III

Next, Bershan argues that the district court committed procedural error by failing to consider the availability of a downward departure from the Guidelines range under U.S.S.G. § 5K2.13 and by failing to rule on Bershan's request for a downward departure under that section. Section 5K2.13 provides that in certain circumstances, "[a] downward departure [from the Guidelines range] may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense." Bershan's claim that the district court refused to consider its departure authority under this

provision is inaccurate. Far from failing to consider its departure authority, the district court acknowledged that it could grant a variance regardless of whether “the particulars of any given departure,” including § 5K2.13, were met. App’x 242. The district court thereby indicated that it was aware of the authority to grant a downward departure based on the defendant’s diminished mental capacity.

The record also demonstrates that, contrary to Bershan’s suggestion, the district court ruled on Bershan’s request for a downward departure under § 5K2.13. After hearing from a doctor who testified to Bershan’s struggles with mental illness and from Bershan’s counsel, the district court stated that it was not “convinced that this defendant is in the same boat as someone who has a really major, major mental illness.” *Id.* at 244. Despite that impression, the court acknowledged that Bershan’s “many indications of mental illness … need to be taken into account” but concluded, after “balancing” all of the relevant factors, that a “very substantial sentence” was nevertheless warranted. *Id.* at 286-88. It is thus clear that the district court considered and rejected Bershan’s request for a downward departure under § 5K2.13, a disposition that is reflected on the court’s Statement of Reasons, which left the box for a departure under that provision unchecked. We will not infer a procedural error based on the court’s failure to rule

more expressly on Bershan’s request for a departure at the hearing. *See Smith*, 949 F.3d at 66 (“[W]e do not require district courts to engage in the utterance of ‘robotic incantations’ when imposing sentences.”).

IV

Finally, Bershan argues that the district court erred by failing to provide a Statement of Reasons explaining its upward variance from the Guidelines in accordance with 18 U.S.C. § 3553(c)(2). This argument is mistaken because the court issued a Statement of Reasons acknowledging the above-Guidelines sentence and listing “Victim Impact” as the reason for the variance. That justification was consistent with the district court’s remarks at sentencing, which noted the “immense pain and suffering” inflicted by Bershan’s crimes. App’x 285-86.

Moreover, because the district court’s deviation from the Guidelines was “a minor one,” it was not required to provide a lengthy statement explaining its upward variance. *Cavera*, 550 F.3d at 193. Under these circumstances, the court’s explanation was sufficient to “satisfy us that it has ‘considered the parties’ arguments’ and that it has a ‘reasoned basis for exercising its own legal decisionmaking authority.’” *Id.* (quoting *Rita*, 551 U.S. at 356) (alteration omitted).

* * *

We have considered Bershan's remaining arguments, which we conclude are without merit. For the foregoing reasons, we **AFFIRM** the judgment of the district court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court



The image shows a handwritten signature of Catherine O'Hagan Wolfe in black ink, positioned above the official circular seal of the United States Court of Appeals for the Second Circuit. The seal is blue and white, featuring the text 'UNITED STATES' at the top, 'COURT OF APPEALS' at the bottom, and 'SECOND CIRCUIT' in the center, flanked by two stars.

JbmWbers

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
3 -----x

4 UNITED STATES OF AMERICA,

5 v.

17 Cr. 638 (JSR)

6 LISA BERSHAN,

7 Defendant.

Sentence

8 -----x
9 New York, N.Y.
10 November 22, 2019
11 2:00 p.m.

12 Before:

13 HON. JED S. RAKOFF,

14 District Judge

15 APPEARANCES

16 GEOFFREY S. BERMAN
17 United States Attorney for the
18 Southern District of New York
19 BY: NEGAR TEKEEI
20 CHRISTINE I. MAGDO
21 Assistant United States Attorneys

22 CHRISTOPHER P. MADIOU
23 Attorney for Defendant

24 Also Present: Emily Abrams, Paralegal Specialist
25 Special Agent Michael Preis, FBI

SOUTHERN DISTRICT REPORTERS, P.C.
(212) 805-0300

A-012

JbmWbers

1 (Case called)

2 MS. TEKEEI: Good afternoon, your Honor. Negar Tekeei
3 and Christine Magdo on behalf of the United States. Joining us
4 at counsel's table is Paralegal Specialist Emily Abrams and
5 Special Agent Michael Preis of the FBI.

6 THE COURT: Good afternoon.

7 MS. MAGDO: Good afternoon.

8 MR. MADIOU: Good afternoon, your Honor. Christopher
9 Madiou, for Lisa Bershan, who's seated to my right.

10 THE COURT: Good afternoon.

11 We're here for two purposes. The general purpose is
12 sentencing, but I also want to hear from and perhaps have some
13 questions for the psychiatrist, who presented a very
14 interesting report in mitigation of sentence. But first, the
15 issue is to look at the, as I'm required to do, guidelines.

16 The probation office has calculated the total offense
17 level as 23; the criminal history category is I, leading to a
18 guideline range on all but Count Three of 46 to 57 months, and
19 then Count Three has a mandatory two year, consecutive to all
20 other counts.

21 Any disagreement with that calculation?

22 MS. TEKEEI: No, your Honor.

23 MR. MADIOU: No, your Honor. But as you know, we do
24 make a specific application for a downward departure, which I
25 think is the purpose of having Dr. Bardey testify.

JbmWbers

1 THE COURT: Yes, of course. To set your mind at ease
2 on that score, as I have had occasion to say on many sentences
3 past, I regard the sentencing guidelines as essentially
4 irrational. They probably would be diagnosed by the doctor
5 as -- well, I'm not sure which DSM it would qualify for, maybe
6 pathetic.

7 I'm required to calculate them. I've calculated them.
8 I adopt the calculation of the probation office. It will play
9 no role in this sentence beyond what is required by law, which
10 is my responsibility.

11 Is there any disagreement with the facts set forth in
12 the presentence report other than the government has brought
13 out that the loss amount is slightly less than the figure in
14 the presentence report, or the restitution amount -- we should
15 address that, and will -- but anything than that slight
16 adjustment, any disagreement with any of the facts recited in
17 the report?

18 MS. TEKEEI: Not from the government, your Honor.

19 MR. MADIOU: Your Honor, I don't think that it is
20 particularly material, but I would like to address one factual
21 objection that I made to the probation department which did not
22 make it into the final PSR.

23 In paragraph 125, on page 19, under the section
24 monthly income, probation lists my client as receiving \$2,750 a
25 month from her cousin. That's not correct.

JbmWbers

1 What is accurate is that Mr. Serota, Ms. Bershan's
2 cousin --

3 THE COURT: I got a very nice letter from him, which
4 you submitted.

5 MR. MADIOU: Yes, and he's actually here, your Honor.

6 But the situation was that he was paying \$2,700 a
7 month for Ms. Bershan and Mr. Schwartz's rent, and then
8 Ms. Bershan was paying him back, when she could, \$500. So it's
9 not accurate to say that she has \$2,700 from a gift as a
10 cousin.

11 THE COURT: What do you say it should say?

12 MR. MADIOU: I just think that that line should be
13 stricken, because that rent is paid directly to the landlord.
14 I think the only way this is relevant is when your Honor --

15 THE COURT: I don't think it's relevant, in any event,
16 but in the broad situation of the restitution and financial
17 condition it's small potatoes, to say the least.

18 What's the government's view?

19 MS. TEKEEI: Our view is that it's a gift, but however
20 you characterize it, and we don't think that this is --

21 THE COURT: I will have that stricken from the PSR.

22 Now I think we need to hear from the doctor, so if he
23 could come forward and take the stand, that would be very much
24 appreciated.

25 ALEXANDER BARDEY,

JbmWberS

called as a witness by the Court,

having been duly sworn, testified as follows:

THE COURT: Dr. Bardey, thank you for being here.

I wasn't quite sure what weight I should give to your report, although it was extremely well written and interesting.

First, do you have a copy of the report in front of you?

THE WITNESS: I do indeed, your Honor.

THE COURT: Great. Thank you.

I'm looking at the conclusion of the original report, and then there was a follow-up letter after your examination. Your sort of bottom line is, at page 19, in the middle of the page:

"Therefore, it is my opinion, with a reasonable degree of medical certainty, that Ms. Bershan's involvement in her current offense was the direct product of a combination of her psychiatric conditions, including her use disorder. As such, her psychological afflictions could be considered as mitigating factors when reaching an appropriate disposition of her criminal charges."

What do you mean by reasonable degree of medical certainty?

THE WITNESS: That means I am more sure than not that that is the case.

THE COURT: So what it really means is not certainty

JbmWbers

1 at all.

2 THE WITNESS: Well, reasonable degree of certainty.

3 It's not complete certainty.

4 THE COURT: Reasonable degree of certainty, as I heard
5 you identify, it was preponderance of the evidence.

6 THE WITNESS: Yes. That's our --

7 THE COURT: More likely than not.

8 THE WITNESS: That's our standard, your Honor.

9 THE COURT: Well, I wonder whose standard it is. The
10 federal government has abandoned that standard as inherently
11 misleading because it suggests to someone not familiar with the
12 legalities of it a degree of certainty -- in fact, a reasonable
13 degree of certainty -- when, in fact, it's 51 percent.

14 THE WITNESS: Well, in this case, my degree of
15 certainty was significantly higher than 51 percent, your Honor.

16 THE COURT: When you say this is your standard, whose
17 standard are we talking about? I don't think that's the
18 psychiatric community's standard.

19 THE WITNESS: When we reach a diagnosis, your Honor,
20 we don't consider that particular standard. Right? The
21 process of diagnosing in medicine involves the consideration of
22 a differential diagnosis, so on the top of that list are the
23 afflictions that we feel most strongly correspond to the
24 diagnostic picture before us, and then we rank order the
25 conditions that we consider then beneath that.

JbmWbers

1 THE COURT: OK. Let's turn to the specifics. A
2 couple of pages earlier, your diagnosis is bipolar disorder
3 type II; stimulant-use disorder, cocaine severe; narcissistic
4 personality disorder. And if I read your report right, it's
5 really the combination of those that you feel created such a
6 problem here.

7 THE WITNESS: Precisely, your Honor.

8 THE COURT: So, correct me if I'm wrong. Bipolar
9 disorder type II normally does not lead to the same highs as
10 type I.

11 THE WITNESS: Correct. The differentiation is between
12 reaching a hypomanic state versus a manic state, a manic state
13 being characterized by psychotic symptoms; in other words, a
14 loss of contact with reality. Hallucinations or delusions
15 would be examples of those.

16 An individual with bipolar type II has hypomanic
17 symptoms -- pressured speech, a sense of entitlement,
18 grandiosity, at times a lack of need for sleep -- but never
19 reaches the point that they're psychotic.

20 THE COURT: So you're not saying, I take it, that
21 Ms. Bershan is psychotic.

22 THE WITNESS: Correct.

23 THE COURT: But she has these various disorders that,
24 in combination, have contributed, in your view, as I understand
25 it, to her antisocial behavior.

JbmWbers

1 THE WITNESS: Yes.

2 THE COURT: True?

3 So what reason is there to believe that that won't
4 continue indefinitely?

5 THE WITNESS: Well, inasmuch as they are the
6 manifestations or the product of acute symptoms of her illness,
7 it's my contention that should she receive sufficient treatment
8 for the conditions that I diagnosed her with, the chance of her
9 engaging in such conduct again would be significantly
10 mitigated.

11 THE COURT: I don't know who's brought your attention,
12 I think it was that, first, after she entered her cooperation
13 agreement, she committed new crimes, and then even after she
14 pled guilty, she committed new crimes, and that was after
15 she -- I think it was after she went off cocaine. And I think
16 the latter may have been after she began receiving treatment.

17 Why shouldn't I infer that it's a sad case, but she's
18 a lifelong swindler and we might as well lock her up forever?

19 THE WITNESS: Certainly that's the question to be
20 answered.

21 My review of Dr. Matsuki's records, her psychiatrist,
22 between February and October of this year, indicate that
23 despite relatively aggressive pharmacological intervention, she
24 remained symptomatic. So she continued to have acute symptoms
25 of the bipolar disorder, some disorganization in her thinking,

JbmWbers

1 some accelerated speech, grandiosity, inappropriate
2 interpersonal relations, and that's just in terms of the
3 bipolar disorder. She's never been treated for the
4 narcissistic personality disorder. The treatment rendered
5 by --

6 THE COURT: Is there a treatment for that?

7 THE WITNESS: Yes. It's long-term individual
8 psychotherapy. There are different types. Certainly the most
9 classic would be psychoanalytic therapy to help the individual
10 understand their defense mechanisms and structures and help
11 them change those, but there are different kinds of --

12 THE COURT: I don't pretend to have any expertise in
13 this area, but I thought at least classic psychoanalysis had
14 been severely questioned as not being truly scientific.

15 THE WITNESS: Well, yes, it is scientific. It's a
16 sound psychological practice, especially for treating
17 personality disorders.

18 Now, I think it's important to distinguish -- we used
19 to, in the DSM-IV, classify certain psychiatric symptoms under
20 axis one, which were specific diseases, like anxiety disorder,
21 schizophrenia, and major depression. And we would classify,
22 under axis two, longer state that the individual was in,
23 personality disorders, mental retardation, developmental
24 disorders, and things like that.

25 The DSM-V did away with those distinctions, so all

JbmWbers

1 these diagnoses are lumped together, but there is still a
2 significant difference. The psychiatric illnesses like bipolar
3 disorder cause the individual who's afflicted by them severe
4 angst. People feel depressed, they feel manic, they feel
5 psychotic. This is not a comfortable or adaptive way of
6 functioning, so they seek treatment for it.

7 Personality disorders are much more pervasive. They
8 represent the core, the individual's core defense strategies to
9 deal with the world. In the case of the ten personality
10 disorders, as defined by DSM-V, they lead to maladaptive
11 functioning in the community. So they're maladaptive defense
12 mechanisms, and it takes an extended period of some version of
13 psychoanalytic-type of treatment. I'm not talking about
14 traditional psychoanalysis, on the couch five days a week. I'm
15 talking once or twice a week.

16 THE COURT: No one can afford that anymore.

17 THE WITNESS: No one does that, no one can afford it.

18 But it's more the examination of the person's own
19 defense mechanisms through the lens of examining the
20 relationship and the intimacy between the therapist and the
21 patient.

22 THE COURT: I had been under the impression, but this
23 may be out of date, that the DSM, while descriptive, does not
24 purport to be predictive and that, indeed, psychiatry as a
25 whole does not have such a great track record on

JbmWbers

1 predictiveness.

2 THE WITNESS: True. However, if a behavior is a
3 function of a symptom of an illness and you can reduce the
4 symptoms, then you can predict the fact that this type of
5 behavior will happen again.

6 Your Honor, I do -- I do the evaluations for the
7 mental health court here in Brooklyn -- I mean, there in
8 Brooklyn, in Nassau County --

9 THE COURT: Yes, I've heard of Brooklyn.

10 THE WITNESS: Right.

11 THE COURT: It's out there in the Eastern District.

12 THE WITNESS: And we've now, in fact, just graduated
13 our 1,000th person from that program. It's a 20-year program
14 that -- where we evaluate individuals who have a mental illness
15 who've committed a felony and, if they're deemed appropriate,
16 divert them into the community with treatment. And it's been
17 successful and we've been fairly good at predicting good
18 outcomes in that if someone shows amenability to treatment,
19 shows a certain pattern of symptoms, and a response to
20 treatment, we can actually, with some degree of certainty,
21 predict that they will actually do well in the community.

22 THE COURT: Now, one of the things, of course,
23 inherent in your report is you had to rely, to some extent, on
24 what Ms. Bershan told you. I saw, and I think it was your
25 colleague who administered this test, that there was an

JbmWbers

1 anti-malingering instrument of some sort.

2 THE WITNESS: Sure.

3 THE COURT: How does that work?

4 THE WITNESS: How does that work?

5 In other words, in a number of the different tests
6 that were administered, there are built-in measures to gauge
7 two things: whether the person is pretending to be more
8 virtuous and more free of symptoms than they are -- in other
9 words, faking good; or whether they're exaggerating symptoms --
10 in other words, faking bad.

11 THE COURT: The reason it's of concern to me is one
12 could at least draw the inference from Ms. Bershan's past that
13 her relationship to the truth is problematic.

14 THE WITNESS: Oh, sure. Sure.

15 THE COURT: So she might be lying without even
16 thinking about lying and might be giving you, in one answer, an
17 exaggerated answer and in another an inadequate answer.

18 THE WITNESS: Certainly.

19 THE COURT: So I'm just wondering whether these tests
20 really deal with that kind of problem.

21 THE WITNESS: They do, because they look in the
22 scatter in her answer. In other words, they compare -- they
23 ask the same question several different ways and compare how --
24 they look at a bell curve of answers that similar individuals
25 who have taken the test have answered, and when the scatter

JbmWbers

1 starts to fall outside of the bell curve, that raises
2 questions, on the one hand, about faking bad; on the other
3 hand, about faking good.

4 So in her case, there was no evidence in her response
5 in these tests that she was at either extreme.

6 THE COURT: How do you test the test is my question?
7 Do we know what the error rate is?

8 THE WITNESS: Sure. There is an error rate in every
9 test. Right? Even CAT scans have error rates.

10 I'm not the one administering those tests. I'd have
11 to ask Dr. Termini, but it's several percentage points.

12 THE COURT: Another thing that sort of raised that
13 question related to a different test, which was on page 11 of
14 your report, the Wechsler Adult Intelligence Scale, Fourth
15 Edition, which I think we used to call IQ test. Right?

16 THE WITNESS: Correct, your Honor.

17 THE COURT: And she, according to that test, was found
18 to be in the low average range, the 9th percentile. I found
19 that extremely hard to believe.

20 THE WITNESS: Right. And in fact, the next line in
21 the report is that this is inconsistent with her estimate of
22 functioning, and in fact --

23 THE COURT: Well, no. In the next line you say, "This
24 was somewhat inconsistent with an estimate of premorbid
25 functioning" --

JbmWbers

1 THE WITNESS: Right.

2 THE COURT: -- "which measured his" --

3 THE WITNESS: Typo. Sorry.

4 THE COURT: -- "premorbid intelligence to be in the
5 average range. However, her FSIQ" --

6 THE WITNESS: Full scale IQ.

7 THE COURT: -- "consisted of significant scatter
8 amongst her domain scores. Thus, her FSIQ is not considered an
9 accurate representation of her overall IQ."

10 Forgive me, but putting aside the jargon, and I don't
11 mean that derogatorily --

12 THE WITNESS: I understand.

13 THE COURT: -- isn't that saying that the first test,
14 the 9th percentile test, was more reliable than the second
15 test?

16 THE WITNESS: In terms of her current functioning?

17 THE COURT: Yes.

18 THE WITNESS: Yes.

19 THE COURT: But how can it be? This woman has a
20 history that is consistent with high intelligence or certainly
21 well above average.

22 THE WITNESS: Yes.

23 THE COURT: I guess my question is doesn't that cast
24 doubt on the test?

25 THE WITNESS: I mean, at some level I do agree with

JbmWbers

1 you in terms of I understand your point. However, the way she
2 answered the questions there, with no evidence of putting in an
3 either poor effort or a misguided effort, showed these results.
4 So on very structured types of questions, this is how she
5 answered.

6 Now, keep in mind that intelligence is also
7 measured -- you know, our intelligence is complex. It's not
8 just solving certain problems or adding blocks together or
9 solving mathematical equations. The interpersonal aspect of
10 Ms. Bershan's intelligence is probably not accurately tested in
11 this kind of test, and that's, I think, at the heart of what
12 caused her to get involved or successfully involved in the
13 activities that she did.

14 THE COURT: The type of mental disorder that I see in
15 my court all the time and I'm more familiar with is drug
16 addiction.

17 THE WITNESS: Sure.

18 THE COURT: And the real problem that we've had in
19 dealing with drug addiction is recidivism, and I'm told that
20 this is because it causes changes in the brain that are hard to
21 reverse.

22 THE WITNESS: Correct.

23 THE COURT: Is that also a problem here?

24 THE WITNESS: It is a problem here, your Honor.
25 There's long-term -- both in terms of bipolar and the history

JbmWbers

1 of substance use -- impacts on the reward system of the brain.
2 So in other words, the substance use kind of gets your brain to
3 shut down on generating its own rewards because it's getting
4 all this reward from the outside, so when you stop the drug, it
5 takes months, if not years, for the brain to be able to
6 generate its own sense of reward and still requires or pushes
7 the individual to get, to involve themselves in behaviors that
8 will give them that reward.

9 THE COURT: Again, as I understand the thrust of your
10 report from a sentencing standpoint, and this is not
11 necessarily as much a question for you as for defense counsel,
12 but is that, No. 1, the reason she did all these bad things is,
13 at least in part, attributable to severe mental problems.

14 THE WITNESS: Correct.

15 THE COURT: And so you ought to have some mercy in
16 that situation.

17 THE WITNESS: Correct.

18 THE COURT: And the second is that she is, however,
19 not so far gone that she can't be helped, but it would be
20 unlikely that she would receive the treatment in prison that
21 would be of help to the same degree as the treatment she's now
22 receiving or could receive outside.

23 THE WITNESS: Exactly.

24 THE COURT: OK. So on the second part, I come back to
25 my question about predictiveness, because if she was committing

JbmWbers

1 crimes even after she entered into her cooperation agreement,
2 if she was committing crimes even after she pled guilty, which
3 in some ways is proof of her irrationality --

4 THE WITNESS: That was going to be my next point, your
5 Honor.

6 THE COURT: But on the other hand, it suggests that
7 it's a danger to the community to let her out there.

8 THE WITNESS: Well, I would add a couple things.

9 One is when you made the comment about it seems
10 insane, we used to think of the policeman-at-the-elbow test --
11 right -- as a very quick measure of insanity. Would the
12 individual have committed the same act if a policeman were
13 standing next to him or her? And in many ways Ms. Bershan did
14 just that. While she was in the midst of these significant
15 proceedings, facing significant prison time, she engaged once
16 again in that act, in certain acts like that.

17 But more specific, I think that throughout all this,
18 Ms. Bershan has never really felt the sting of repercussions,
19 true repercussions, of her actions, so she continued to engage
20 in behavior without really ever having paid any significant
21 price for that behavior, which is why, you know, I hate to say,
22 but I think a certain period of incarceration might be in order
23 to get her to that point.

24 THE COURT: Well, I don't think even her counsel is
25 advancing the argument that she should receive probation.

JbmWbers

1 Am I correct?

2 MR. MADIOU: That is correct, your Honor.

3 THE COURT: OK.

4 THE WITNESS: So, in that sense, a period of time
5 during which she would feel the real consequences of her
6 actions could bring her a lot closer to a point where she could
7 take a good look at herself and say not only do I need
8 treatment for my mood disorder, I really need to reassess what
9 makes me tick on a daily basis, but the very foundation of my
10 personality. And that could happen, is more likely to happen
11 after a ceratin amount of time with these deprivations.

12 THE COURT: All right. Let me look at my notes and
13 see if there was anything else I wanted to ask you before I
14 find out from counsel if they have any questions.

15 The probation office, in an excellent, typically
16 excellent report, takes the more, if you will, nonscientific
17 view that Ms. Bershan just liked to live the high life,
18 regardless of her responsibilities to investors, and so forth.
19 I understand that sort of correlates a little bit with your
20 narcissistic analysis, but what reason is there to believe she
21 won't continue in those desires?

22 THE WITNESS: Until those aspects of her personality
23 are addressed, she is at high risk of continuing. So just like
24 treatment for any illness, if the symptoms are not dealt with,
25 then the risk of recidivism remains high. If she's afforded

JbmWbers

1 treatment and can resolve some of these personality issues as
2 well as her mood disorder, then the likelihood will decrease.

3 THE COURT: All right. And do you want to put a time
4 frame on what you think would be sufficient time for her to
5 become a lawful citizen, if she was given the treatment you
6 think she should get?

7 THE WITNESS: I mean, my understanding is there is
8 some mandatory sentencing involved in this situation.

9 THE COURT: Yes, there are options.

10 THE WITNESS: You'll make that decision.

11 THE COURT: Let's assume, for the sake of argument,
12 she's sentenced. I've imposed the sentence and she's served
13 her sentence. Now she's out, but she's getting the treatment
14 you think she should get.

15 THE WITNESS: Right.

16 THE COURT: How long after that would one have -- this
17 may go to, for example, length of supervised release.

18 THE WITNESS: Sure.

19 THE COURT: How long before she is -- "cured" is the
20 wrong word.

21 THE WITNESS: I understand what you're saying.

22 THE COURT: OK.

23 THE WITNESS: Several years.

24 THE COURT: Several meaning? Are we talking magnitude
25 of three? Are we talking magnitude of ten? Are we talking

JbmWbers

Bardey - Direct

1 magnitude of 20, or is it unpredictable?

2 THE WITNESS: No. Can I give a specific number? Of
3 course not. However, there are a couple of factors here.

4 One is that what she's facing now in terms of
5 incarceration is a significant event in her life. Plus she's
6 entering -- she's in her seventh decade of her life.
7 Personality disorders, like narcissism, tend to diminish in
8 intensity as an individual enters their 60s and 70s, so there's
9 a natural --

10 THE COURT: Recent political events notwithstanding.

11 THE WITNESS: Precisely, your Honor. Yes. It all
12 depends where you start, right? Some people started really
13 high, but still, in general, history and science tells us that
14 there is a softening of those traits.

15 So the combination of having to deal with the
16 incarceration, her advancing age, and ongoing supervision could
17 accelerate the process to within a couple of years.

18 THE COURT: All right.

19 Questions from either counsel of Dr. Bardey.

20 MR. MADIOU: Your Honor, I think you've covered most
21 of what I had prepared, but I think there are just a couple of
22 things.

23 THE COURT: Go ahead.

24 DIRECT EXAMINATION

25 BY MR. MADIOU:

JbmWbers

1 they laid bare this attempt to start another Caffeinated Candy
2 Company, with her husband, Mr. Schwartz. It also followed
3 numerous interactions that she had with me, where I explained
4 to her the consequences of the meetings we had with the
5 government and what will happen next. And what I told her,
6 very frankly, is that you will be incarcerated for two years.
7 And before that, we were having very different conversations.
8 We were very proud that she cooperated successfully with the
9 government in that we achieved a cooperation agreement after
10 eight long months of trying.

11 For Ms. Bershan, your Honor, that was torturous,
12 because every time she met with the government, she was forced
13 to face these delusions that she had been spinning for years,
14 and she had to think linearly and speak clearly. And the
15 government, I'm sure, will attest that those were very, very
16 difficult proffer sessions over the course of eight months.

17 Your Honor, as I argue in my letter, we believe that
18 the guidelines, in their wisdom, have carved out a specific
19 consideration for people with mental illness, and we believe
20 that Ms. Bershan meets the elements for a departure.

21 Just to briefly go over that, the two things that
22 5K2.13 requires is that the defendant committed the offense
23 while suffering from a significantly reduced mental capacity,
24 and two, the significantly reduced mental capacity contributed
25 substantially to the commission of the offense. We believe

JbmWbers

1 that Ms. Bershan has a significantly reduced mental capacity.

2 THE COURT: Forgive me. I don't even know why that's
3 relevant, because I have full power to grant a variance, so I
4 don't need to meet the particulars of any given departure. My
5 view of sentencing is that you need to look at all the
6 factors -- small, large, complicated, or otherwise -- which is,
7 of course, my problem, one of my problems, with the guidelines.
8 But even if she didn't meet the requirements for a departure, I
9 still would have full power on the arguments you're making to
10 grant a variance if I thought it was appropriate.

11 MR. MADIOU: You're four points ahead of me.

12 The reason -- I spent a lot of time thinking about my
13 submission to your Honor in particular, and I have a little
14 experience with 5K2.13. I also know a lot about your
15 sentencing jurisprudence, and the reason I chose to ask for
16 this departure is because the government is going to stand up
17 after I sit down and say that the guidelines are appropriate.
18 And I fully understand that your Honor has plenary authority to
19 vary downward and give Ms. Bershan the sentence that I'm
20 requesting without ever bothering with a departure, but I think
21 it's important --

22 THE COURT: I have occasionally imposed a guidelines
23 sentence because even a stopped watch is right twice a day.

24 MR. MADIOU: I mean, I think the reason I spent the
25 time doing that is because if the government is going to say

JbmWbers

1 make it happen.

2 Thank you.

3 THE COURT: Thank you very much. Now I'll hear from
4 the government.

5 MS. TEKEEI: Thank you, your Honor.

6 Your Honor, what strikes us as particularly remarkable
7 in this case is that we can all agree on several factors that
8 weigh in the Court's sentencing. Everyone agrees that the
9 conduct that Ms. Bershan and her coconspirators engaged in was
10 extremely serious and it was long running. Everybody agrees
11 that the impact to Ms. Bershan's victims is nearly impossible
12 to quantify. Certainly there was the financial quantity, the
13 financial harm, but as the Court earlier remarked and as the
14 Court has now heard from Mr. Gershon and has heard from other
15 victims who have submitted statements, the impact, the
16 devastation, the psychological, emotional, familial ruin that
17 Ms. Bershan and her coconspirators committed on their victims
18 is impossible to quantify, and they're still picking up the
19 pieces at this day.

20 We can all agree on that, and we also can all agree
21 that Ms. Bershan and her coconspirators need to pay restitution
22 to these victims, and we also all agree that they'll be subject
23 to forfeiture. And we agree that Ms. Bershan should be
24 incarcerated for some period of time and, at least by statute,
25 it will be a minimum of two years.

JbmWbers

1 The issue that's being litigated at the moment is how
2 much time, and the comments that counsel has made and the
3 argument that counsel is making is that the issues reflected in
4 Dr. Bardey's report the Court should consider as mitigating
5 factors. Whether you call it a downward departure or whether
6 you call it a variance from the guidelines is of no moment,
7 because the government's position is, and this is a factor that
8 counsel did not address, that both the downward departure
9 request and the variance request should be viewed in the
10 context of the need to protect the public from further crimes
11 of this defendant.

12 That is a 3553(a) factor, and that factor is reflected
13 in one of the elements, one of the factors that the Court is
14 asked to consider under the guidelines provision that counsel
15 has pointed to.

16 The point of that provision is incapacitation,
17 physically preventing the defendant from committing crimes on
18 the outside by imprisoning her. It's a factor that the Court
19 is authorized to consider, and it's a factor that the Court
20 should consider. In this case, the mental illness issues, the
21 impulse control issues, the very difficult to treat
22 narcissistic personality disorder upon which Dr. Bardey and
23 counsel and Ms. Bershan rely heavily, are all aggravating
24 factors, from our perspective, and they're aggravating factors
25 because they inform the likelihood that Ms. Bershan, when

JbmWbers

1 released, will commit additional crimes.

2 I cannot emphasize the impact of those crimes and how
3 the Court should consider that.

4 THE COURT: Well, let me ask you this. I'm, frankly,
5 a little skeptical about predicting the future both in this
6 case and in most cases. I'm not particularly persuaded by
7 Dr. Bardey's prediction of what would happen if this defendant
8 received what he considers proper treatment. But I'm not
9 particularly persuaded by your prediction either. The history
10 of criminology, over many decades, if not centuries, is one of
11 mistaken predictions. And all those experts were just wrong
12 and wrong and wrong again. So why shouldn't I, instead, focus
13 as to the first part of what you said, as what the two victims
14 who just spoke said I should focus on, which is punishment for
15 past conduct?

16 What you're suggesting is that there should be
17 incapacitation, as you said, based on what you consider to be a
18 likelihood of future criminal conduct. There's certainly
19 evidence to support that inference, just as there is evidence
20 to support Dr. Bardey's inference, but I think, frankly, this
21 whole area of prediction is much too uncertain to be a material
22 factor in this Court's sentence.

23 MS. TEKEEI: Thank you, your Honor.

24 And we agree that the Court should focus and weigh
25 heavily the punishment that should be imposed because of the

JbmWbersS

1 conduct. We certainly agree with the Court.

2 Our arguments related to the unpredictability of the
3 future and the potential and the risk of recidivism are
4 designed to rebut arguments made by counsel and Dr. Bardey on
5 these issues. And I'd like to just highlight why the
6 seriousness of the crime is of the utmost importance here.
7 Counsel described in his remarks that in the course of a
8 criminal case, and I'm just paraphrasing, for a defendant in
9 these proceedings there is an arc of a rise and a fall.

10 Your Honor, it is the fall of this defendant that
11 drives our concerns here. It is her fall, her many falls that
12 have caused serious devastation and have left behind her a
13 trail of destruction. It is that fall that drives our concern.
14 It is the potential for further falls that drives many
15 concerns, but to the Court's point that the seriousness of her
16 offense cannot be overstated, that these are real dollars to
17 real people, who she stole from, we respect the Court's view of
18 the guidelines. We certainly respect the Court's view of the
19 3553(a) factors.

20 In this case, every single dollar is a dollar that the
21 victims could not put forward to their retirement, could not
22 put forward to their college tuition for their children, that
23 caused them to have to sell their homes. There's a real impact
24 to every penny that Ms. Bershan and her coconspirators stole,
25 and so it is the fall that drives our concern here.

JbmWbers

1 That is why, your Honor, it strikes us as particularly
2 troubling, the testimony of Dr. Bardey regarding the treatment
3 prognosis for narcissistic personality disorder. If we
4 understand that disorder correctly, that disorder describes a
5 person who believes that she can do no harm, a person who
6 believes that she deserves the best, a person who has no
7 remorse for her actions, a person who cannot control the lies.
8 Dr. Bardey himself said, he wouldn't say to this day, but he
9 certainly said as of last week and, I submit, not much has
10 changed from November 15 to today, her propensity to lie still
11 exists, and the propensity to lie and the harm that it can
12 cause is of particular concern to us and, as the Court has
13 already heard, to the victims in this case.

14 That is why, against the backdrop of her criminal
15 history and her actions, we don't think a variance is warranted
16 for the mental illness issues that counsel has raised.

17 Your Honor, we're here, as in many cases like this,
18 because of the victims, because they had the courage to come
19 forward. People who have very little or not as much money as
20 traditional white collar crime victims constantly communicated
21 with the government, constantly communicated with agents,
22 assisted in this investigation and brought to light the many
23 crimes that Ms. Bershan and her coconspirators committed. Many
24 of them are here today. Many of them submitted statements to
25 the Court.

JbmWbers

1 It's, in our view, the statements that the victims
2 provided -- the description they provided of the ways that
3 Bershan and her coconspirators lured their victims; the
4 pretense of wealth, the glowing that they did, the constant
5 lies, the fake documents that they sent, the amount of
6 communications ingratiating themselves with their victims --
7 these were all calculated, manipulative steps to get money for
8 their own desires. And that's why we're here today and that's
9 why we have submitted our recommendation for sentencing.

10 If it is the case that even a broken clock is correct
11 two times a day, we believe that our recommendation is the one
12 that the Court should adopt, because every factor that went
13 into that recommendation is a real factor to the victims here
14 in the court today and the victims from whom the Court heard in
15 their many statements.

16 THE COURT: Thank you very much. I'll hear from the
17 defendant if she wishes to be heard.

18 (Counsel and defendant conferred)

19 THE DEFENDANT: I'm here today to apologize for my
20 actions and take full responsibility. To the investors, my
21 actions have caused you suffering and I know I have caused.
22 That did not reflect my intentions, ever. Again, I apologize
23 to the investors. After reading I'm starting to understand
24 what my actions have caused and I can't say anything to fix
25 that.

JbmWbers

1 I'm sorry. Hold on.

2 I do accept all the responsibility and I know what
3 I've done. I've been suffering every day and I'll continue to
4 suffer. Being at MCC on a prisoner bed, where I go to sleep,
5 the only thing I do think about is everything that I've done in
6 the past and all the turmoil and heartache that I brought to
7 everybody. I can't say how much I regret everything that I've
8 done. It's more than anybody can ever know.

9 I believe the punishment I deserve is no comparison to
10 the pain that I have put others through, and all they did was
11 trust and support me.

12 I want you to know, Judge, that I'm facing my own
13 lies, lies that I've told to myself and my loved ones for
14 years. And it's been a nightmare. At my age, starting from
15 ground zero in every way is no easy feat. I know I have to
16 take my illness seriously and work hard to maintain my health.
17 This will be my life's work, and I want you to know that I will
18 take it very seriously, or more seriously than I have in the
19 past.

20 I'm going to get a job when eventually I get out and
21 live just humbly. MCC has been a hellish experience. The
22 brief experience has scared me personally to death. I want the
23 Court to know whatever you decide I will accept without
24 complaint. I will prove to everyone when I eventually get out
25 that I can change and become the good person I know I have been

JbmWbers

1 in the past and in me.

2 THE COURT: Thank you very much.

3 Counsel for both sides are right to focus my
4 attention, as I would in any event, on the Section 3553(a) of
5 Title 18. This is the law that binds me and every other judge,
6 the law that says here are the factors that a judge needs to
7 take account of, and that the sentence should reflect those
8 factors but be no greater than what is necessary to fulfill
9 those factors.

10 The government's very, very excellent sentencing memo
11 in some ways did not totally accurately quote those factors,
12 because at page 21 of the government's memo, in listing those
13 factors, the government forgets to quote the full first factor,
14 which is the nature and circumstances of the offense and the
15 history and characteristics of the defendant. The government
16 mentions the first part of that clause but not the second. But
17 let's talk about that, because it is the very first factor that
18 Congress told the Court to focus on.

19 The offenses -- because it's not a single offense
20 here; it's a whole series of events -- are despicable. They're
21 worse than despicable. They caused immense pain and suffering.
22 I come back to the point I alluded to earlier. In many ways,
23 this is a worse series of crimes than many market manipulations
24 and other securities frauds that I've seen because here. It
25 was the personal deception of victim after victim who took

JbmWbers

1 their life savings in many cases and invested them in a lie, a
2 lie the defendant knew from day 1 was a total lie. She did it
3 again and again and again. So the nature and circumstances of
4 the offense favor a very substantial sentence.

5 Then we have the history and characteristics of the
6 defendant. I am so grateful that the victims are here and also
7 that many of them have sent me letters, because it's made me
8 acutely aware of the pain they have suffered and will continue
9 in many cases to suffer, but I think I disagree with the two
10 fine gentlemen who spoke here today in their notion that this
11 defendant acted sort of totally out of cold, calculated greed.

12 There's a quality in the way she conducted herself
13 that does bespeak mental illness. I don't remotely share
14 Dr. Bardey's view that psychiatry can lead to certainty or
15 anything remotely like it. And I certainly don't agree with
16 him that one can make meaningful predictions on the basis of
17 the kind of psychiatric illness that's present in this case.
18 But I think we blind ourselves to the reality of what the human
19 being who is before the Court for sentence is like if we don't
20 recognize that there are so many indications of mental illness
21 that need to be taken into account.

22 So, as so often in white collar cases in particular,
23 the Court has to achieve some sort of balance. We then get to
24 the factors that the government did cite in their memo, which
25 is that we need for the sentence imposed to reflect (a) the

JbmWbers

1 seriousness of the offense -- no question it was serious; must
2 promote respect for the law. That certainly means that, as
3 everyone agrees, this can't just be a slap on the wrist; and to
4 provide just punishment for the offense, always a hard thing to
5 specify, but that's the job of a judge.

6 It also has to afford adequate deterrence to criminal
7 conduct. That means general deterrence, and not much has been
8 spoken about that in this otherwise extremely helpful colloquy
9 that we have had here today. But there are too many Lisa
10 Bershans out there. Every day most people get robo-calls from
11 fraudsters who, under the guise of anonymity, are trying to
12 trick them into giving up their life savings, and sometimes
13 they do. It's so ironic that the laws of this nation have led
14 to such harsh punishments being imposed for other kinds of
15 crimes and yet have not fully, in this Court's view, come to
16 reckon with the need for great deterrence in the area of white
17 collar crime. So I think general deterrence cuts in favor of a
18 substantial sentence.

19 There is then the third factor: to protect the public
20 from further crimes of the defendant. I agree with the
21 government that this is not the usual case where one can, as in
22 any white collar case, can say with some confidence they'll
23 never see this defendant in front of me again. Her history
24 belies that assumption, but for reasons I've already put on the
25 record, I think predicting what will be her future, under

JbmWbers

1 either the approach of the defense or the approach of the
2 government, is just guesswork that should not inform the
3 Court's sentencing, because it's much too problematic.

4 And then there's the final factor: to provide the
5 defendant with needed education or vocational training, medical
6 care or other correctional treatment in the most effective
7 manner, and I view that to embrace what I certainly agree with
8 Dr. Bardey on, which is that any period of supervised release
9 should include very substantial mental health programs,
10 including medical treatment in the form of mental health drugs,
11 as well as psychotherapy and the like.

12 So balancing all those factors together, I have come
13 to the conclusion that the right sentence is seven years in
14 prison and five years of supervised release. And specifically,
15 breaking that down more technically, since two of the years are
16 mandatory, this would be five years, or 60 months, on Counts
17 One, Two, Four, Five, Six, Seven, Eight, and Nine, and 24
18 months consecutive under Count Three, for a total of 84 months.

19 This is to be followed by supervised release, and here
20 again, although the Court's intention is a five-year term of
21 supervised release, we have to break it down technically as
22 follows:

23 One year of supervised release on Count Three and
24 three years of supervised release on Counts One, Two, Four,
25 Five, Seven and Nine, and five years of supervised release on

JbmWbers

1 Count Eight, all those terms to run concurrently, for a total
2 of five years.

3 No fine will be imposed because the defendant is not
4 in a position to pay any meaningful fine now or in the
5 foreseeable future, given the very substantial restitution and
6 forfeiture that will be imposed.

7 The order of restitution spells this all out in great
8 detail. It comes to a grand total of \$2 million -- make sure I
9 get this right. Is it 2,350?

10 MS. TEKEEI: Your Honor, with respect to the Starship.

11 THE COURT: Oh, and then 576 added to that. So the
12 total, let me get it exactly right, would be \$2,926,702.54. I
13 think the arithmetic's right, although I forgot to take
14 arithmetic in law school.

15 I will sign the order of restitution and the companion
16 order of forfeiture and give them to my courtroom deputy to
17 file.

18 The terms of supervised release are:

19 First, the mandatory condition that the defendant must
20 not commit any other federal, state or local crime; must not
21 unlawfully possess a controlled substance; must refrain from
22 any unlawful use of a controlled substance; and submit, within
23 15 days of her release from prison, to one drug test then and
24 at least two periodic drug tests thereafter, as determined by
25 the probation office; must cooperate in the collection of DNA;

JbmWbers

1 and must comply with the standard conditions of release.

2 The standard conditions, 1 through 12, appear on the
3 face of the judgment and will be gone over with the defendant
4 again by the probation office when the defendant reports to
5 begin her period of supervised release.

6 The special conditions of supervised release are:

7 First, that the defendant shall participate in an
8 outpatient drug treatment program on the standard terms and
9 conditions;

10 Second, that the defendant will participate in an
11 outpatient mental health program.

12 In addition to the standard conditions, the further
13 conditions that the defendant submit, if the psychiatrist so
14 orders, to medical treatment, and also that the probation
15 office make every effort to enroll her in intensive
16 psychotherapy.

17 The third condition is the defendant must provide the
18 probation office with access to any requested financial
19 information; and

20 Fourth, must not incur new credit charges or open
21 additional lines of credit without the approval of the
22 probation officer unless she is in compliance with the
23 installment payment schedule, which will be 15 percent of her
24 gross monthly income beginning the second month of supervised
25 release.

JbmWbers

1 Finally, she must, within 72 hours of her release from
2 prison, report to the nearest probation office, and she will be
3 supervised by the district of her residence.

4 Now, before I advise the defendant of her right of
5 appeal, is there anything else either counsel needs to raise
6 with the Court?

7 Beginning with the government.

8 MS. TEKEEI: Your Honor, we'd move to dismiss the
9 underlying indictment in this case.

10 THE COURT: Yes. That motion is granted.

11 MR. MADIOU: Your Honor, I have two applications.

12 THE COURT: Yes.

13 MR. MADIOU: One, I would like your Honor to recommend
14 that Ms. Bershan be housed at the Dublin FCI, which is in
15 California, which will allow her to be close to family and
16 friends.

17 THE COURT: I will recommend that, but of course, as
18 I'm sure you've told her, I have no power to order that. And
19 these days the Bureau of Prisons has so many factors that they
20 have to take account of, they can't always accommodate
21 recommendations from the judge. But I will recommend it.

22 MR. MADIOU: I've so advised her.

23 I would also ask your Honor to recommend to the Bureau
24 of Prisons that Ms. Bershan be allowed to attend the RDAP
25 program, which is their 500-hour drug program.

JbmWbers

1 THE COURT: Yes. I never make that recommendation for
2 the following reason. There are many, many more applicants for
3 that program than there are places, and so to make an informed
4 recommendation, I would have to know what all the other people
5 are like, and I, of course, don't know that. I have no
6 objection, and I will state on the record that I have no
7 objection, if she qualifies for that program, but I'm not going
8 to be specifically recommending it.

9 MR. MADIOU: I understand that, your Honor. Thank
10 you.

11 THE COURT: Ms. Bershan, you have a right to appeal
12 the sentence.

13 Do you understand?

14 THE DEFENDANT: Yes.

15 THE COURT: If you can't afford counsel for the
16 appeal, the Court will appoint one for you free of charge.

17 Do you understand that?

18 THE DEFENDANT: Yes.

19 THE COURT: Very good.

20 (Adjourned)