

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2006

4 (Argued: December 15, 2006 Decided: March 5, 2007

5 As Amended: May 21, 2007)

6 Docket No. 06-2245-cr

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8 UNITED STATES OF AMERICA,

9 Appellee,

10 - v -

11 FELIX SINDIMA,

12 Defendant-Appellant.

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14 Before: SACK, KATZMANN, AND PARKER, Circuit Judges.

16 Appeal from a judgment of the United States District  
17 Court for the Western District of New York (Richard J. Arcara,  
18 Chief Judge) sentencing the defendant to thirty-six months'  
19 incarceration for violations of probation, where the high end of  
20 the advisory Guidelines range is ten months.

21 Remanded.

22 MARYBETH COVERT, Federal Public Defender's  
23 Office, Buffalo, NY, for Defendant-  
24 Appellant.

25 STEPHAN BACZYNSKI, Assistant United States  
26 Attorney for the Western District of New  
27 York (Terrance P. Flynn, United States  
28 Attorney, Joseph J. Karaszewski, Assistant  
29 United States Attorney, of counsel),  
30 Buffalo, NY, for Appellee.

1 SACK, Circuit Judge:

2           Following a guilty plea on federal mail fraud charges,  
3 the United States District Court for the Western District of New  
4 York (Richard J. Arcara, Chief Judge) imposed upon the defendant,  
5 Felix Sindima, a sentence under the United States Sentencing  
6 Guidelines (the "Guidelines") of, principally, three years'  
7 probation. The terms of probation included a prohibition against  
8 Sindima's commission of any further crime. Thereafter, while still  
9 on probation, Sindima was charged with two violations of that  
10 prohibition. The district court found Sindima guilty of both. On  
11 April 13, 2006, the court imposed a sentence of thirty-six months'  
12 imprisonment, twenty-six months above the high end of the advisory  
13 Guidelines range. Sindima appeals, asserting that the sentence is  
14 substantively unreasonable.

15           We conclude that, based on the present record, the  
16 district court has not given an explanation of its reasons for the  
17 length of the above-Guidelines sentence that is sufficient under  
18 the circumstances to allow us to conclude with confidence that the  
19 sentence is reasonable. Cf. United States v. Rattoballi, 452 F.3d  
20 127, 128, 137 (2d Cir. 2006) (remanding where the district court  
21 imposed upon the defendant a sentence "represent[ing] a substantial  
22 deviation from the recommended Guidelines range" and the  
23 "considerations [relied upon by the district court in so doing  
24 were] neither sufficiently compelling nor present to the degree  
25 necessary to support the sentence imposed"). Accordingly, we  
26 remand for further proceedings.

1 **BACKGROUND**

2 On December 9, 2002, Sindima pleaded guilty to one count  
3 of mail fraud arising out of a scheme in which he caused two  
4 computer retailers to send computer equipment to him using the  
5 names and social security numbers of others. On May 15, 2003, the  
6 district court sentenced Sindima within his Guidelines range of  
7 zero-to-six months by imposing three years' probation and  
8 restitution in the amount of \$9,356.88. The provisions of  
9 Sindima's probation included the standard condition that he not  
10 commit another crime while on probation.

11 On August 10, 2005, while Sindima remained on probation,  
12 the government filed a petition alleging two violations of that  
13 condition -- crimes he had allegedly committed and for which he had  
14 been arrested by the Buffalo Police Department.<sup>1</sup> On September 21,  
15 2005, the district court conducted an evidentiary hearing.  
16 Thereafter, on December 29, 2005, the court found Sindima guilty of  
17 both charges.

18 The evidence presented at the hearing indicated that on  
19 or about April 26, 2005, almost two years after his mail fraud  
20 sentence, Sindima opened a series of bank accounts in the name of  
21 "FS Computers." The first was with Bank of America, where he  
22 deposited \$3,200 with two checks that were eventually returned for  
23 insufficient funds. Prior to the checks being returned, Sindima  
24 withdrew \$3,400 from the Bank of America account, \$3,000 of which

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<sup>1</sup> The state charges against Sindima were eventually dismissed.

1 he used to establish a similar account at Evans National Bank. On  
2 June 13, 2005, after this \$3,000 check and another check for \$760  
3 were returned for insufficient funds, Evans National Bank informed  
4 Sindima that his account had been suspended. Undaunted, Sindima  
5 deposited another check, but it was also returned for insufficient  
6 funds. On June 24, 2005, he then wrote a \$3,700 check drawn on his  
7 still-suspended Evans account which he used to open a third account  
8 at the Greater Buffalo Savings Bank. In accordance with its  
9 policy, however, the bank placed an automatic nine-day hold on the  
10 newly opened account. This check was subsequently returned for  
11 insufficient funds, along with another check from a bank account in  
12 his wife's name, which Sindima had also sought to deposit. Sindima  
13 was eventually arrested following an attempt to withdraw \$200 from  
14 and deposit \$11 to the Greater Buffalo Savings Bank account.

15 On January 23, 2006, the district court held an initial  
16 sentencing hearing, at which time it evidently accepted the  
17 Probation Office's calculation that Sindima's violations were  
18 "Grade B"<sup>2</sup> and his criminal history category was I, for which the  
19 Guidelines prescribe an advisory range of four-to-ten months.<sup>3</sup> The

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<sup>2</sup> A Grade B violation is defined as "conduct constituting [a] . . . federal, state, or local offense punishable by a term of imprisonment exceeding one year." U.S. Sentencing Guidelines Manual ("U.S.S.G.") § 7B1.1(a)(2). A Grade B violation is the middle tier of a three-tiered scheme for punishment of probation violations. Grade A violations are those crimes involving violence, controlled substances, or firearms, or those punishable by more than twenty years in prison. Grade C violations are crimes punishable by one year of imprisonment or less or the violation of any other probation condition. *Id.* §§ 7B1.1(a)(1), (3).

<sup>3</sup> The Guidelines here at issue are ranges derived from "advisory policy statements" with respect to probation violations. *See* U.S.S.G. §§ 7B1.1-7B1.5. These policy statements provide various "Guidelines ranges" based upon the grade of probation violation and the violator's criminal history. *Id.* § 7B1.4. Sentences imposed thereunder were advisory even prior to United

1 court gave the government and Sindima notice, however, that it was  
2 considering a non-Guidelines sentence of sixty months, the  
3 statutory maximum.<sup>4</sup> Following adjournment of the sentencing  
4 hearing, defense counsel submitted additional letters from various  
5 persons attesting to Sindima's good character and a supplemental  
6 memorandum urging leniency.

7 On April 13, 2006, the district court sentenced Sindima  
8 for violation of probation. Although the high end of the advisory  
9 Guidelines range is ten months, and defense counsel and the  
10 government had "urge[d]" the district court to impose a Guidelines  
11 sentence, Tr., Apr. 13, 2006, at 14, 15, the court sentenced  
12 Sindima to, principally, thirty-six months in prison.<sup>5</sup> After  
13 expressing its view that Sindima was "a danger to the community,"  
14 id. at 10, the district court explained the reasons for its  
15 sentence. First, the court indicated that it sentenced Sindima to  
16 a term of imprisonment above the recommended  
17 [G]uideline[s] range because of what I consider  
18 egregious conduct while on probation. Despite  
19 being given a substantial break by this Court  
20 by being sentenced to probation, [Sindima] went  
21 out and committed numerous additional acts  
22 of . . . fraud. He, obviously, did not learn  
23 his lesson while on probation. He's exhibited  
24 complete disregard for the rules of law.

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States v. Booker, 543 U.S. 220 (2005). See United States v. Goffi, 446 F.3d 319, 322 (2d Cir. 2006). Following Booker, the standard of review of sentences issued under the formerly mandatory Guidelines and the long-advisory probation policy statements is the same. See United States v. Lewis, 424 F.3d 239, 243 (2d Cir. 2005).

<sup>4</sup> Because the district court sealed Simdima's pre-sentence report in its entirety, we omit its findings and recommendations from this account.

<sup>5</sup> Sindima was also sentenced to three years' supervised release and ordered to pay restitution. He does not appeal these aspects of his sentence.

1 It is clear this sentence . . . was necessary  
2 to address the extent of the criminal behavior  
3 and to deter the defendant from future acts of  
4 fraud. This is not a situation where the  
5 defendant has made an isolated bad judgment  
6 call while on probation. Instead, he engaged  
7 in a calculated pattern of fraudulent activity  
8 on a repeated basis in complete disregard of  
9 the terms of his probation.

10 Tr., Apr. 13, 2006, at 17.

11 Second, however, the district court was persuaded in some  
12 respects by the mitigating factors presented by defense counsel --  
13 that Sindima provided financial and emotional support to five  
14 children, that he had continued his college studies while on  
15 probation, and that he had volunteered in a center for the elderly  
16 and in his church. Id. at 6-7; see also Def's. Second Sent'g Mem.  
17 These factors "were considered and [were] the reason why" Sindima  
18 received a "lesser sentence" than the five-year statutory maximum.  
19 Tr., Apr. 13, 2006, at 17.<sup>6</sup>

20 The district court did not record its reasons for the  
21 sentence in its written judgment.

## 22 DISCUSSION

### 23 I. Standard of Review

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<sup>6</sup> During the sentencing colloquy, the district court devoted much of its attention to Sindima's relationship with his church, which the court seemed to regard as inconsistent with his protestations of sincerity and remorse. For example, the court remarked:

[W]hen you go to church and you share the services and your religion with other people . . . everybody in that church . . . kind of bonds together. . . . Unless, maybe, someone isn't quite sincere. . . . I think that's very unfortunate that you go to church, being very outwardly,[sic] appears to be very sincere, very religious, and will follow all the precepts of the religion, and I am sure -- I'm not sure what all the religious beliefs are, but I'm sure it doesn't say you can defraud banks.

Tr., Apr. 13, 2006, at 11.

1           We review sentences for reasonableness, United States v.  
2 Booker, 543 U.S. 220, 261 (2005), which has both substantive and  
3 procedural dimensions, see United States v. Crosby, 397 F.3d 103,  
4 114 (2d Cir. 2005). In the substantive dimension in which this  
5 appeal is raised, we determine "whether the length of the sentence  
6 is reasonable," Rattoballi, 452 F.3d at 132, focusing our attention  
7 on the district court's explanation of its sentence in light of the  
8 factors detailed in 18 U.S.C. § 3553(a),<sup>7</sup> see id. at 134-35.<sup>8</sup>

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<sup>7</sup> Section 3553(a) provides, in pertinent part:

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 [and recommended by the Sentencing Guidelines] . . .

(5) any pertinent policy statement . . . issued by the Sentencing Commission . . .

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

1 Reasonableness review "is akin to review for abuse of  
2 discretion." United States v. Fernandez, 443 F.3d 19, 27 (2d  
3 Cir.), cert. denied, 127 S. Ct. 192 (2006). A district court  
4 abuses its discretion when its decision "cannot be located within  
5 the range of permissible decisions" or is based either on an error  
6 of law or a clearly erroneous factual finding. United States v.  
7 Fuller, 426 F.3d 556, 562 (2d Cir. 2005) (citations and internal  
8 quotation marks omitted). We have observed that "'reasonableness'  
9 is inherently a concept of flexible meaning, generally lacking  
10 precise boundaries," Crosby, 397 F.3d at 115; that it involves  
11 "some degree of subjectivity that often cannot be precisely  
12 explained," United States v. Jones, 460 F.3d 191, 195 (2d Cir.  
13 2006); and that our function in reviewing sentences is to "exhibit  
14 restraint, not micromanagement," United States v. Fleming, 397 F.3d  
15 95, 100 (2d Cir. 2005). Accordingly, "[a]lthough the brevity or  
16 length of a sentence can exceed the bounds of 'reasonableness,' we  
17 [have] anticipate[d] encountering such circumstances infrequently."  
18 Id. Nevertheless, "in any particular case a sentence, assessed  
19 even against the flexible standard of reasonableness, [may] be so  
20 far above or below a Guidelines range and so inadequately explained

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similar conduct; and

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

18 U.S.C. § 3553(a) (emphasis added).

<sup>8</sup> For a sentence to be procedurally reasonable, the district court must have correctly "(a) identified the Guidelines range supported by the facts found by the court, (b) treated the Guidelines as advisory, and (c) considered the Guidelines together with the other [§ 3553(a)] factors." Rattoballi, 457 F.3d at 131. Sindima does not allege his sentence was procedurally unreasonable.



1 by the sentencing judge as to require rejection on appeal." Jones,  
2 460 F.3d at 196.

3 II. Section 3553(c)

4 A district court is statutorily required to "state in  
5 open court the reasons for its imposition of [a] particular  
6 sentence." See 18 U.S.C. § 3553(c). Where, as here, the sentence  
7 is outside of an advisory Guidelines range, the court must also  
8 state "with specificity in the written order" "the specific reason"  
9 for the sentence imposed. Id. § 3553(c)(2); see also Jones, 460  
10 F.3d at 196; United States v. Lewis, 424 F.3d 239, 243-45 (2d Cir.  
11 2005).

12 "[O]ur . . . ability to uphold a sentence as reasonable  
13 will be informed by the district court's statement of reasons (or  
14 lack thereof) for the sentence that it elects to impose."  
15 Rattoballi, 452 F.3d at 134. Fulfilment of the statutory  
16 requirements of section 3553(c) thus enables us to perform  
17 reasonableness review. Cf. United States v. Pereira, 465 F.3d 515,  
18 524-25 & n.9 (2d Cir. 2006) (discussing sufficiency of oral  
19 explanation under § 3553(c) in terms of its ability to render  
20 sentence reasonable).

21 Yet as much as our review of a sentence depends upon the  
22 reasons given for it, we have declined to encroach upon the  
23 province of district courts by dictating a precise mode or manner  
24 in which they must explain the sentences they impose. As we have  
25 frequently observed, we do not require district courts to engage in  
26 the utterance of "robotic incantations" when imposing sentences in

1 order to assure us that they have weighed in an appropriate manner  
2 the various section 3553(a) factors. Crosby, 397 F.3d at 113; see  
3 also Fernandez, 443 F.3d at 29 ("'[N]o specific verbal formulations  
4 should be prescribed to demonstrate the adequate discharge of the  
5 duty to "consider" matters relevant to sentencing.'" (quoting  
6 Fleming, 397 F.3d at 100)). And where, as here, the district court  
7 imposes a non-Guidelines sentence, unlike many other circuits we  
8 have been -- and remain -- disinclined to adopt a more mechanical  
9 rule requiring "a more compelling accounting the farther a sentence  
10 deviates from the advisory Guidelines range." Rattoballi, 452 F.3d  
11 at 134; id. (citing cases).

12 "We have declined to articulate precise standards for  
13 assessing whether a district court's explanation of its reason for  
14 imposing a non-Guidelines sentence is sufficient . . . ." Pereira,  
15 465 F.3d at 524. But, in the course of imposing a sentence, the  
16 district court's statement of reasons must at least explain -- in  
17 enough detail to allow a reviewing court, the defendant, his or her  
18 counsel, and members of the public to understand, see Lewis, 424  
19 F.3d at 247 -- why the considerations used as justifications for  
20 the sentence are "sufficiently compelling [ ]or present to the  
21 degree necessary to support the sentence imposed." Rattoballi, 452  
22 F.3d at 137.

### 23 III. Sindima's Sentence

24 Sindima's thirty-six month sentence was twenty-six months  
25 greater than the ten-month high end of the advisory Guidelines  
26 range applicable to his violation of probation. We find it

1 instructive, for purposes of comparison, that Sindima's criminal  
2 record put him in the minimum criminal history category: I. Had he  
3 been, by stark contrast, a career criminal with a criminal record  
4 placing him in the maximum category, VI, the high end of his range  
5 would have been twenty-seven months, nine months shorter than the  
6 sentence the district court imposed upon him. See U.S. Sentencing  
7 Guidelines Manual ("U.S.S.G.") § 7B1.4(a) (setting forth a  
8 Guidelines range of 21-27 months for a Grade B violator with  
9 criminal history category VI). Similarly, had Sindima's conduct  
10 fallen within the most serious of probation violations -- crimes of  
11 violence, drug or firearms crimes, and crimes punishable by more  
12 than twenty years' imprisonment -- the high end of the applicable  
13 Guidelines range would have been eighteen months, half the length  
14 of incarceration imposed upon him by the district court. Id.  
15 Sindima's sentence therefore strikes us as "marginal." Rattoballi,  
16 452 F.3d at 135. The statement of reasons given by the district  
17 court does not on the present record support the severity of the  
18 sentence. We do not foreclose the possibility that there may be  
19 reasons that impelled the court to impose it which, if identified,  
20 would persuade us that the sentence was appropriate.

21           The first articulated basis for the length of the  
22 district court's sentence was that the defendant engaged in  
23 "egregious conduct" despite being given a "substantial break" at  
24 the time of his original sentencing. But the Sentencing Commission  
25 has indicated that while the three-tiered system for probation  
26 violations is "based on the defendant's actual conduct," U.S.S.G.

1 § 7B1.1 cmt. n.1, sentences for probation violations are not  
2 intended to punish defendants for the conduct underlying the  
3 violation "as if that conduct were being sentenced as new federal  
4 criminal conduct." U.S.S.G. Chap. 7, Pt. A.3(b). The Commission  
5 adopted the policy, instead, that "the primary goal of a revocation  
6 sentence" ought to be "to sanction the violator for failing to  
7 abide by the conditions of the court-ordered supervision," in order  
8 to account for the breach of trust inherent in failing to  
9 appreciate the privileges associated with such supervision. Id.  
10 Thus, "at revocation the court should sanction primarily the  
11 defendant's breach of trust, while taking into account, to a  
12 limited degree, the seriousness of the underlying violation and the  
13 criminal history of the violator." Id. (emphasis added); see also  
14 id. at § 7B1.3(f) (indicating sentence for probation violation to  
15 be served consecutively with any other sentence imposed).

16 Thus, it seems to us, when the district court relied on  
17 Sindima's recidivism in the face of the "substantial break" he  
18 received in his original sentence to impose a sentence  
19 substantially in excess of the advisory Guidelines maximum, Tr.,  
20 Apr. 13, 2006, at 17, it was relying on a factor for which the  
21 Guidelines range was designed to account: Sindima's breach of the  
22 district court's trust that he would abide by the terms of his  
23 probation in return for having avoided incarceration. "When a  
24 factor is already included in the calculation of the [G]uidelines  
25 sentencing range, a judge who wishes to rely on that same factor to  
26 impose a sentence above or below the range must articulate

1 specifically the reasons that this particular defendant's situation  
2 is different from the ordinary situation covered by the  
3 [G]uidelines calculation." United States v. Zapete-Garcia, 447  
4 F.3d 57, 60 (1st Cir. 2006). Accordingly, it may well have been  
5 reasonable for the district court to have imposed a non-Guidelines  
6 sentence based upon section 3553(a) factors already accounted for  
7 in the Guidelines range. The Guidelines "'can point to outcomes  
8 that may appear unreasonable to sentencing judges in particular  
9 cases.'" Rattoballi, 452 F.3d at 133 (quoting United States v.  
10 Jimenez-Beltre, 440 F.3d 514, 518 (1st Cir. 2006) (en banc)); see  
11 also United States v. Pickett, 475 F.3d 1347, 1353 (D.C. Cir. 2007)  
12 (noting that district courts sentencing defendants ought to  
13 "evaluate how well the applicable Guideline effectuates the  
14 purposes of sentencing enumerated in § 3553(a)"). But we cannot  
15 properly conduct our review absent an explanation by the district  
16 court of why a Guidelines sentence did not sufficiently account for  
17 those factors in Sindima's case. We do not know why the district  
18 court thought that the breach of trust inherent in Sindima's  
19 probation violations warranted a sentence of the magnitude imposed.

20 The district judge did emphasize that Sindima's probation  
21 violation was not "an isolated bad judgment call" and that it  
22 constituted an "egregious" scheme involving "a calculated pattern  
23 of fraudulent activity on a repeated basis," the same type of  
24 conduct for which he had been placed on probation in the first  
25 instance. Tr., Apr. 13, 2006, at 17. We do not doubt that these  
26 considerations are relevant in assessing the severity of Sindima's

1 breach of trust. But we are instructed by the Sentencing  
2 Commission's policy to consider the conduct underlying the  
3 violation only "to a limited degree," U.S.S.G. Chap. 7, Pt. A.3(b),  
4 and by our prior case law that where a district court imposes its  
5 sentence based on "factors incompatible with the Commission's  
6 policy statements," the sentence may be substantively unreasonable  
7 absent a "persuasive explanation as to why the sentence actually  
8 comports with the § 3553(a) factors," Rattoballi, 452 F.3d at 134.  
9 The district court was required to consider the policies  
10 articulated by the Sentencing Commission related to the purposes of  
11 punishing probation violators. See 18 U.S.C. § 3553(a) (4) (B);  
12 Rattoballi, 452 F.3d at 134. The district court's stated reasons  
13 do not give us sufficient confidence that it did so. We understand  
14 that Sindima's repeated fraudulent conduct may very well have  
15 rendered reasonable a variance above the ten-month high end of the  
16 advisory range. But in light of the overall scope of the conduct  
17 involved, the limited criminal history of the defendant, and the  
18 relevant advice of the Guidelines, we cannot understand the  
19 striking size of the variance imposed in this case absent a more  
20 persuasive explanation for it.

21 We do not find the district court's statement of its  
22 second ground for Sindima's sentence, his personal characteristics,  
23 sufficiently compelling, either. The district court's decision to  
24 sentence the defendant to less than the statutory maximum of five  
25 years on the basis of defense counsel's submissions as to Sindima's  
26 character tells us little about why the statutory maximum sentence

1 might have been reasonably considered or why a sentence of thirty-  
2 six months was reasonable under the circumstances.

3 We therefore conclude that on the present record, we are  
4 not confident that the grounds upon which the district court relied  
5 are "sufficiently compelling [and] present to the degree necessary  
6 to support the sentence imposed." Rattoballi, 452 F.3d at 137. We  
7 therefore remand the case to the district court. If the district  
8 court determines that the same sentence as that which is now in  
9 effect is indeed warranted, it may reimpose such a sentence  
10 accompanied by a statement of reasons that is "sufficiently  
11 compelling." Id. If, however, in light of the foregoing  
12 discussion, it determines that a different sentence is called for,  
13 it may impose that sentence accompanied by a statement of the  
14 reasons for it. The court should also record its reasons for the  
15 sentence in its written judgment pursuant to 18 U.S.C.  
16 § 3553(c)(2).

17 We urge the district court to act within sixty days after  
18 the amended date of this decision. After an amended judgment is  
19 issued by the district court, jurisdiction may be restored to this  
20 court by letter from any party, and the Clerk's Office of this  
21 court shall set an expeditious briefing schedule and send such  
22 proceeding to this panel for disposition. See United States v.  
23 Jacobson, 15 F.3d 19, 21-22 (2d Cir. 1994).

#### 24 **CONCLUSION**

25 For the foregoing reasons, we remand this cause to the  
26 district court for further proceedings consistent with this

1 opinion.