

06-5490-cr
USA v. Carr

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

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4 August Term, 2008

5 (Argued: October 22, 2008
6 Final briefs submitted
7 October 29, 2008

Decided: February 19, 2009)

8 Docket No. 06-5490-cr

9
10 UNITED STATES OF AMERICA,

11 Appellee,

12 - v. -

13 SEAN CARR,

14 Defendant-Appellant.
15

16 Before: KEARSE, SACK, and KATZMANN, Circuit Judges.

17 Appeal from an amended judgment of the United States
18 District Court for the Southern District of New York, Thomas P.
19 Griesa, Judge, who resentenced defendant to 40 years' imprisonment
20 after a remand from this Court pursuant to United States v.
21 Crosby, 397 F.3d 103 (2d Cir. 2005).

22 Affirmed; remanded for clerical correction of judgment.

23 JESSICA ROTH, Assistant United States Attorney,
24 New York, New York (Michael J. Garcia,
25 United States Attorney for the Southern
26 District of New York, Helen V. Cantwell,
27 Celeste L. Koeleveld, Assistant United
28 States Attorneys, New York, New York, on
29 the brief), for Appellee.

30 TINA SCHNEIDER, Portland, Maine, for Defendant-
31 Appellant.

1 KEARSE, Circuit Judge:

2 This case returns to us on the appeal of defendant Sean
3 Carr from an amended judgment of the United States District Court
4 for the Southern District of New York, Thomas P. Griesa, Judge,
5 resentencing him after a decision of this Court, United States v.
6 Carr, 424 F.3d 213 (2d Cir. 2005) ("Carr I"), cert. denied, 546
7 U.S. 1221 (2006), which upheld Carr's convictions and the
8 district court's various calculations under the 2002 version of
9 the Sentencing Guidelines ("Guidelines") and remanded to the
10 district court pursuant to United States v. Crosby, 397 F.3d 103
11 (2d Cir. 2005) ("Crosby"), cert. denied, 549 U.S. 915 (2006), for
12 consideration of resentencing in light of the ruling in United
13 States v. Booker, 543 U.S. 220, 245 (2005), that application of
14 the Guidelines is not mandatory. Carr was convicted, following a
15 jury trial, on one count of participating in a racketeering
16 enterprise, in violation of 18 U.S.C. § 1962(c) (Count 1); one
17 count of racketeering conspiracy, in violation of id. § 1962(d)
18 (Count 2); one count of conspiracy to distribute cocaine base (or
19 "crack"), in violation of 21 U.S.C. § 846 (Count 3); one count of
20 possession with intent to distribute cocaine base, in violation
21 of id. §§ 812, 841(a)(1), and 841(b)(1)(C) (Count 5); and one
22 count of using and carrying a firearm during and in relation to a
23 drug trafficking crime, in violation of 18 U.S.C. § 924(c)
24 (Count 4). Carr was originally sentenced principally to life
25 imprisonment. On the Crosby remand, the court resentenced Carr
26 principally to 40 years' imprisonment, comprising two 35-year

1 terms for Counts 1 and 2 (the racketeering (or "RICO") counts) to
2 be served concurrently; two 20-year terms for Counts 3 and 5 (the
3 narcotics counts), to be served concurrently with each other and
4 with the terms imposed for the racketeering counts; and a five-
5 year term for Count 4, the firearm count, to be served
6 consecutively to the 35-year terms imposed for the racketeering
7 counts; his 40-year total prison term was to be followed by a
8 five-year period of supervised release.

9 On this appeal, Carr asks this Court principally (1) to
10 revisit the Carr I decisions that affirmed his conviction and
11 upheld the district court's Guidelines calculations, arguing that
12 the law-of-the-case doctrine should not be applied where the
13 district court imposes a new sentence following a Crosby remand,
14 and (2) to vacate his sentence on the ground that a 40-year term
15 of imprisonment is unreasonable. In addition, Carr urges us to
16 remand for further resentencing in light of Gall v. United States,
17 128 S. Ct. 586 (2007), and Kimbrough v. United States, 128 S. Ct.
18 558 (2007). For the reasons that follow, we reject all of Carr's
19 arguments in support of this appeal and affirm his new sentence;
20 we remand, however, for correction of the amended judgment to
21 reflect accurately the sentence imposed.

1 I. BACKGROUND

2 The present prosecution centered on the operation of a
3 street gang called Sex Money and Murder ("SMM") that sold
4 narcotics in the Soundview section of the Bronx, New York. The
5 trial evidence leading to Carr's convictions on the five counts
6 listed above included videotapes, an audiotape, and testimony from
7 former SMM members who were cooperating with the government. The
8 evidence was summarized in Carr I, 424 F.3d at 217-18, familiarity
9 with which is assumed.

10 A. The Trial and Carr's First Appeal

11 Briefly, the evidence at trial showed that Carr was a
12 member of the SMM narcotics distribution enterprise. Carr
13 himself, though denying that he was a member of SMM, testified
14 that he had been a drug dealer nearly all of his adult life and
15 had sold crack all over the Soundview area. As to his membership
16 in SMM, the government introduced an audiotape of an SMM meeting
17 at which Carr was present, and former SMM members "testified as to
18 Carr's participation in crack sales and robberies, acts of
19 intimidation, and other acts of violence," Carr I, 424 F.3d
20 at 217.

21 With respect to the RICO counts, three predicate acts of
22 racketeering activity were alleged: (1) the 1994 murder of one
23 Tony Morton, (2) a 1996 armed robbery to which Carr had pleaded
24 guilty in state court, and (3) narcotics conspiracy. The evidence

1 as to the murder was that Morton, who was unarmed, had been
2 dragged from his automobile by armed SMM members other than Carr;
3 that while Morton was being physically restrained, Carr went up to
4 Morton and, from inches away, shot him in the neck; and that while
5 Morton then lay on the ground, Carr shot him in the head. (See
6 Trial Transcript 150, 159, 282-83, 286, 374-75.) Morton's wounds
7 were fatal.

8 The jury found that Carr had committed all three of the
9 alleged acts of racketeering activity, and it found him guilty on
10 all of the counts against him.

11 The Guidelines applicable to racketeering offenses
12 provided that the base offense level should be the greater of 19
13 or "the offense level applicable to the underlying racketeering
14 activity," Guidelines § 2E1.1, and that "[i]f the underlying
15 conduct violates state law, the offense level corresponding to the
16 most analogous federal offense is to be used," id. Application
17 Note 2. The district court concluded that Carr's base offense
18 level was 43 as prescribed by Guidelines § 2A1.1 ("First Degree
19 Murder") because the murder of Morton, a racketeering act that the
20 jury found proven, was conduct that the court concluded was most
21 analogous to the federal offense of first-degree murder, see 18
22 U.S.C. § 1111(a) ("Murder is the unlawful killing of a human being
23 with malice aforethought. Every murder perpetrated by . . . any
24 . . . kind of willful, deliberate, malicious, and premeditated
25 killing . . . is murder in the first degree."). For an offense
26 level of 43, the Guidelines recommended life imprisonment. The

1 district court--stating that "[i]f the murder were not in the
2 picture the sentence would be somewhere between 20 and 30 years"--
3 concluded,

4 based on the jury's verdict and their specific
5 findings, it is my duty to impose a sentence of life
6 imprisonment on Count One and on Count Two.

7 (Transcript of Original Sentencing, January 14, 2004 ("Original
8 S.Tr."), at 16, 17.) Accordingly, Carr was sentenced principally
9 to life imprisonment for the racketeering counts, with shorter
10 sentences imposed for the narcotics counts to be served
11 concurrently with the sentences on the racketeering counts, and a
12 five-year term for Count 4, the firearm count, to be served
13 consecutively to the life imprisonment terms imposed for the
14 racketeering counts, see 18 U.S.C. § 924(c)(1)(D)(ii)
15 ("Notwithstanding any other provision of law . . . no term of
16 imprisonment imposed on a person under this subsection shall run
17 concurrently with any other term of imprisonment imposed on the
18 person").

19 Carr appealed, challenging both his conviction and his
20 sentence. As to his conviction, Carr contended principally that
21 certain of the trial court's instructions to the jury were
22 erroneous and that the government, in summation, had improperly
23 vouched for the credibility of its witnesses. As to his sentence,
24 Carr contended, inter alia, that because the indictment alleged
25 that the killing of Morton constituted the state-law crime of
26 second-degree murder, the district court should not have
27 calculated Carr's offense level using Guidelines § 2A1.1, which

1 applies to the federal crime of first-degree murder and prescribed
2 an offense level of 43, but should instead have used Guidelines
3 § 2A1.2, which governs the federal crime of second-degree murder
4 and prescribed an offense level of 33. He also challenged the
5 district court's Guidelines enhancements based on drug quantity,
6 brandishing of a firearm, and criminal history.

7 While Carr's appeal was pending, the Supreme Court decided
8 Booker, holding that the Guidelines are advisory rather than
9 mandatory. Accordingly, we concluded that a remand pursuant to
10 our post-Booker decision in Crosby was required in order to permit
11 the district court to determine whether it would have imposed a
12 nontrivially different sentence on Carr if it had known that the
13 Guidelines are merely advisory. Prior to remanding, however, we
14 considered and rejected Carr's challenges to his conviction, see
15 Carr I, 424 F.3d at 218-30, and his challenges to the district
16 court's Guidelines calculations, see id. at 230-31. In rejecting
17 Carr's "conten[tion] that the district court erred in applying the
18 base offense level for the federal offense of first degree
19 murder," id., we stated that

20 as we made clear in considering a virtually identical
21 challenge in United States v. Minicone, 960 F.2d 1099
22 (2d Cir.), cert. denied, 503 U.S. 950, 112 S.Ct.
23 1511, 117 L.Ed.2d 648 (1992), "the district court did
24 not err in concluding that the most analogous federal
25 offense [to the New York offense of second degree
26 murder] was first degree murder under [18 U.S.C.]
27 § 1111," id. at 1110. "[T]he absence of reference
28 to premeditation or malice aforethought [in the state
29 law] does not mean that federal first degree murder
30 is not the most analogous federal offense." United
31 States v. Diaz, 176 F.3d 52, 123 (2d Cir.), cert.
32 denied sub nom. Rivera v. United States, 528 U.S.
33 875, 120 S.Ct. 181, 145 L.Ed.2d 153 (1999). We

1 therefore conclude that Carr's argument in this
2 regard is without merit.

3 Carr I, 424 F.3d at 231; see also United States v. Diaz, 176 F.3d
4 52, 123 (2d Cir.) ("Diaz") (noting that there was "no error, much
5 less clear error, in the district court's conclusion that federal
6 first degree murder was the most analogous federal offense" even
7 though there was no reference to "premeditation or malice
8 aforethought" in the state statute), cert. denied, 528 U.S. 875
9 (1999).

10 B. The Proceedings on Remand

11 On remand, both sides made written submissions to the
12 district court. The government pressed for adherence to the
13 sentence of life imprisonment; Carr urged that his prison term be
14 only 30 years. The court held two hearings in order to determine
15 whether to resentence Carr and, if so, to determine what prison
16 term would be appropriate. At the hearings, most of the
17 discussion as to Carr's offenses centered on the circumstances of
18 the Morton murder, which would most impact his sentence on the
19 RICO counts. At the first hearing, the court noted that under New
20 York law, "this would be a second degree murder" and that such a
21 murder is by definition intentional, though not premeditated
22 (Hearing Transcript, August 25, 2006 ("August 2006 Hearing
23 Transcript" or "Aug. Tr."), at 20.). The court agreed with the
24 government that the Guidelines offense level for the federal
25 offense of first-degree murder was applicable (see id. at 20-21);
26 the court stated that it was "not really terribly concerned about

1 what [degree] the state law would regard [Morton's murder] as";
2 rather, it was concerned with "the degree of [Carr's]
3 culpability" (id. at 21).

4 The court announced that it would resentence Carr and that
5 the only remaining issue was what the new sentence should be, an
6 issue that the parties should address in additional submissions.
7 (See id. at 26-27.) The court pointed out that

8 [t]he degree of culpability is important. Under
9 the guidelines, we almost forgot that, but under the
10 statute that is applicable and under any common sense
11 view of things, the degree of culpability is
12 important, and this is not something that is listed
13 in some numerical list in the guidelines. And both
14 sides should give serious thought to this. It is
15 important.

16 I do not understand, even a mitigating factor in
17 this shooting, even if Mr. Morton drove by and was
18 suspected in being in some hostile group, by the time
19 of the shooting, I believe, and you can consider the
20 evidence in the record and maybe what I'm saying is
21 not completely accurate, . . . but I believe, subject
22 to correction, that Mr. Morton was no longer a menace
23 to anyone, even if he possibl[y] was before he had
24 been pulled out of the car.

25 So the question before me is whether the
26 shooting of Mr. Morton was simply an act of sheer
27 cruelty, even if it was impulsive and on the spot,
28 someone who has a gun in the situation of Mr. Carr
29 here, had the opportunity to decide whether to shoot
30 or not to shoot, and he decided to shoot under
31 circumstances that are quite impossible for me to
32 understand in any rational way, except that this was
33 perhaps what I said.

34 (Id. at 27.)

35 At the sentencing hearing some three months thereafter,
36 the court again focused principally on the prison term to be
37 imposed for Carr's RICO offenses. It stated, inter alia, as
38 follows:

1 [T]he sentence has been considered in view of the
2 current state of the law. The guidelines are now
3 advisory and the court can apply the guidelines or
4 take a different course if there's a reasonable
5 ground[] to do so. The court is also obliged to give
6 specific attention to the factors listed in 18 United
7 States Code Section 3553(a). There has been some
8 debate about exactly what guideline applies to the
9 RICO counts in which the charge of murder is
10 contained but that debate has been settled and the
11 . . . level is a level 43 and the guidelines range is
12 simply life.

13 There are other counts involving narcotics and
14 the weapons but the crucial thing here for this
15 sentence is what the sentence will be on the two RICO
16 counts, that's Counts 1 and 2, and the sentence that
17 was imposed before was a life sentence on each of
18 those counts.

19 The defense has recommended that there be a
20 substantial sentence but a definite term instead of
21 life, a definite term of years, and the
22 recommendation was 30 years. The suggestion was to
23 use level 42 of the guidelines. And the range there
24 would be 360 months to life or 30 years to life. And
25 if that were done, the court could follow that
26 guideline range and impose a sentence of 30 years.

27 (Sentencing Transcript, November 15, 2006 ("S.Tr."), at 17-18.)

28 The court then reviewed the trial evidence as to the
29 killing of Morton. It stated that after other SMM members had
30 pulled Morton from his car and an SMM member was talking to him at
31 the trunk of the car, Carr

32 walks . . . to the back of the car. He shoots Tony
33 Morton once in the head. Tony Morton falls down.
34 And [Carr] shoots Tony Morton again in the neck while
35 Tony Morton is down.

36 There's conversation within the gang afterwards,
37 and the other gang members were convinced that this
38 was an unnecessary shooting, had nothing to do with
39 any need to protect or defend the Sex, Money and
40 Murder people. Exactly how it appeared to Sean Carr,
41 I really don't know. I will give him a little of a
42 benefit of the doubt that he may have thought there
43 was still some menace. But the others in the gang

1 really didn't think so. And he showed no remorse at
2 the time at all.

3 (Id. at 19-20.)

4 The court determined that, in light of the sentencing
5 factors set out in 18 U.S.C. § 3553(a), the appropriate total
6 prison term for Carr's offenses was 40 years:

7 Mr. Carr was 24 years old at the time of this
8 murder. He is about 34 now. He's been in prison
9 about five years. I believe that there can be a
10 sentence which justly and fairly takes into account
11 the gravity of the killing that Mr. Carr perpetrated.
12 I think there could be a sentence which protects
13 society sufficiently, and I'm now referring to the
14 factors in Section 3553, although I might not go down
15 them doggedly, each one, but I certainly have them in
16 mind, and the principal one is the seriousness of the
17 offense and to have an appropriate punishment of that
18 offense and also protect society from any occurrence
19 of criminal behavior by Mr. Carr. Those are the two
20 main factors--also to be a deterrent to other
21 criminal activity because that gang apparently still
22 goes its way up there. And a serious punishment is
23 necessary for the protection of the community and the
24 deterrent effect on--that we hope that criminal
25 sentences have. . . .

26 I'm sure that Mr. Carr and his family came in
27 hoping that I could accept the recommendation of his
28 lawyer and make the sentence 30 years. . . . I do
29 not think that that is sufficient. . . . [T]he
30 problem is that this was a crime[] that . . .
31 involve[d] killing an innocent person. It involved
32 firing a shot into his head and firing another shot
33 into his neck when he was down. That is very
34 serious. What I have decided to do--and I know this
35 is not the degree of change that he hoped for, but I
36 am imposing a sentence of 40 years in prison. I feel
37 that I cannot do less and be fair to the community
38 and--there is a community out there that we have to
39 consider. So I'm imposing a sentence of 40 years in
40 prison

41 (S.Tr. 21-22.) The 40-year prison term was ultimately constructed
42 as follows:

1 Counts 1 and 2, 35 years. Those are to be
2 served concurrently.

3 Count 3, 20 years.

4 Count 5, 20 years.

5 All those sentences are to be served
6 concurrently.

7 Count 4 is 5 years to run consecutively to all
8 the other counts.

9 And that means a total of 40.

10 (Id. at 23.)

11 This appeal followed.

12 II. DISCUSSION

13 On this appeal, Carr principally challenges his sentence,
14 (1) arguing chiefly, now as he did in Carr I, that the district
15 court erred in calculating his Guidelines offense level by
16 reference to the guideline for the federal offense of first-degree
17 murder, and (2) contending that the 40-year prison term imposed on
18 him is unreasonable. The government contends that Carr's
19 challenges to the calculation of the Guidelines-recommended range
20 of imprisonment, having been rejected by this Court in Carr I, are
21 barred by the law of the case; and it contends that the sentence
22 imposed is reasonable.

23 Carr also suggests that his conviction should be
24 overturned because of certain of the court's instructions to the
25 jury and statements by the government in summation, contentions
26 that were also rejected in Carr I. Carr appears to acknowledge

1 that his renewal of the challenges to his conviction is barred by
2 the law-of-the-case doctrine but states that he renews them here
3 in order to "preserv[e] these issues for presentation in a
4 Petition for Writ of Certiorari" (Carr brief on appeal at 13). We
5 agree that these challenges are foreclosed by the law-of-the-case
6 doctrine and we do not address them. We reject Carr's challenges
7 to his sentence for the reasons that follow.

8 A. Application of the Law-of-the-Case Doctrine to Carr's
9 Sentencing Challenges

10 The law-of-the-case doctrine has two facets. First, when
11 a court has ruled on an issue, "that decision should generally be
12 adhered to by that court in subsequent stages in the same case."
13 United States v. Quintieri, 306 F.3d 1217, 1225 (2d Cir. 2002)
14 ("Quintieri") (internal quotation marks omitted), cert. denied,
15 539 U.S. 902 (2003); see, e.g., United States v. Williams, 475
16 F.3d 468, 475 (2d Cir. 2007) ("Williams"), cert. denied, 128 S.
17 Ct. 881 (2008); United States v. Minicone, 26 F.3d 297, 300 (2d
18 Cir.) ("Minicone"), cert. denied, 513 U.S. 940 (1994); United
19 States v. Fernandez, 506 F.2d 1200, 1203 (2d Cir. 1974). Second,
20 when the court of appeals has ruled on an issue and has remanded
21 the case to the district court, the district court on remand is
22 required to follow that ruling. See, e.g., Quintieri, 306 F.3d at
23 1225; Minicone, 26 F.3d at 300. Both facets of the law-of-the-
24 case doctrine are driven by considerations of fairness to the
25 parties, judicial economy, and the societal interest in finality.
26 See generally County of Suffolk v. Stone & Webster Engineering

1 Corp., 106 F.3d 1112, 1117 (2d Cir. 1997); United States v.
2 Stanley, 54 F.3d 103, 107 (2d Cir.), cert. denied, 516 U.S. 891
3 (1995).

4 A court's reconsideration of its own earlier decision in a
5 case may, however, be justified in compelling circumstances,
6 consisting principally of (1) an intervening change in controlling
7 law, (2) new evidence, or (3) the need to correct a clear error of
8 law or to prevent manifest injustice. See, e.g., Quintieri, 306
9 F.3d at 1230; Minicone, 26 F.3d at 300; United States v.
10 Fernandez, 506 F.2d at 1203-04 & n.7. For example, a defendant
11 who has obtained a remand on his first appeal will not be barred
12 from raising sentencing issues if they "arise[] as a result of
13 events that occur[red] after the original sentence," Quintieri,
14 306 F.3d at 1230.

15 Applying these principles in the context of an appeal
16 following a Crosby remand on which the district court has
17 concluded that it will not resentence the defendant, we have held
18 that the parties are free to challenge the procedures used by the
19 district court on remand in reaching its conclusion and are free
20 to challenge the reasonableness of the sentence originally
21 imposed. See, e.g., Williams, 475 F.3d at 476. But "challenges
22 to rulings made by the sentencing court that were adjudicated by
23 this Court--or that could have been adjudicated by us had the
24 defendant made them--during the initial appeal that led to the
25 Crosby remand" are ordinarily barred. Id. at 475; see, e.g.,

1 United States v. Negron, 524 F.3d 358, 360 (2d Cir.), cert.
2 denied, 129 S. Ct. 252 (2008).

3 In other words, when we have reached the Guidelines
4 issues--or other sentencing issues--raised by
5 defendants in their initial appeal, further
6 challenges to our resolution of these issues after a
7 district court has declined to resentence pursuant to
8 Crosby will be foreclosed by the law of the case.

9 Williams, 475 F.3d at 476.

10 In addition, we have applied the law-of-the-case doctrine
11 to foreclose renewal of challenges to jury instructions and
12 Guidelines calculations that had been adjudicated on the
13 defendant's first appeal where, on the Crosby remand, the district
14 court conducted sentencing proceedings anew but reimposed the same
15 sentence. See United States v. Frias, 521 F.3d 229, 231, 235 (2d
16 Cir.), cert. denied, 129 S. Ct. 289 (2008). However, we have not
17 heretofore determined "what effect the law of the case doctrine
18 might have on a defendant who is resentenced pursuant to Crosby"
19 and given a different sentence. Williams, 475 F.3d at 476 n.4.
20 Carr argues that a defendant who is given a different sentence
21 following a Crosby remand is entitled to challenge all components
22 of the sentencing decision, arguing that the sentencing
23 proceedings conducted on such a remand are de novo.

24 If this Court in the prior appeal declined to adjudicate
25 the sentencing challenges before remanding, see, e.g., United
26 States v. Irving, 452 F.3d 110, 126 (2d Cir. 2006), we agree that
27 the parties are entitled to raise any properly preserved
28 challenges to the sentence--whether or not the district court on
29 remand imposed a new sentence. But to the extent that this Court

1 has, on the prior appeal, adjudicated challenges to the district
2 court's Guidelines calculations, we disagree. Although a
3 district court, in the wake of Booker and its progeny, is not
4 required to impose the now-advisory Guidelines-recommended
5 sentence, the court is nonetheless normally required to calculate
6 the sentencing range that the Guidelines recommend. See, e.g.,
7 Gall, 128 S. Ct. at 596 ("a district court should begin all
8 sentencing proceedings by correctly calculating the applicable
9 Guidelines range" (emphasis added)); Crosby, 397 F.3d at 111 ("In
10 order to fulfill this statutory duty to 'consider' the Guidelines,
11 a sentencing judge will normally have to determine the applicable
12 Guidelines range."); id. at 115 ("a sentencing judge would commit
13 a statutory error in violation of section 3553(a) if the judge
14 failed to 'consider' the applicable Guidelines range (or arguably
15 applicable ranges)"). And this Court, on reviewing a sentence, is
16 required to determine whether the district court's calculations
17 under the Guidelines are correct: "[T]he appellate court," which
18 is to review the sentence under an abuse-of-discretion standard,
19 "must first ensure that the district court committed no
20 significant procedural error, such as failing to calculate (or
21 improperly calculating) the Guidelines range" Gall, 128
22 S. Ct. at 597 (emphasis added). "The abuse-of-discretion standard
23 incorporates de novo review of questions of law (including
24 interpretation of the Guidelines)" United States v.
25 Legros, 529 F.3d 470, 474 (2d Cir. 2008). As "the interpretation
26 of a sentencing guideline is a question of law," United States v.

1 Vasquez, 389 F.3d 65, 68 (2d Cir. 2004), when a party contends in
2 the initial appeal that Guidelines calculations made by the
3 district court were erroneous, this Court will usually, in the
4 interests of judicial efficiency and economy, address those
5 contentions prior to remanding, in order that the district court
6 either have the assurance that its prior calculations were correct
7 or be sufficiently informed so that it will not repeat an error.
8 See, e.g., United States v. Gonzalez, 407 F.3d 118, 124 (2d Cir.
9 2005) (determining a Guidelines application issue previously
10 decided by the district court, because that issue might be raised
11 again in the district court in the course of the Crosby remand).
12 Thus, in Carr I itself, we addressed Carr's challenge to the
13 calculation of his offense level precisely because

14 [t]his [wa]s a question the district court w[ould]
15 again be required to decide on remand because, post-
16 Booker, it must still consider the appropriate
17 Guidelines sentence along with the other section
18 3553(a) factors in arriving at the correct sentence.

19 424 F.3d at 230.

20 Accordingly, given (a) that the sentencing court,
21 regardless of its ultimate sentence, must first calculate the
22 Guidelines-recommended sentence, (b) that interpretations of
23 guidelines are questions of law, and (c) that such questions are
24 addressed by this Court prior to remand in the interests of
25 judicial efficiency and economy, we conclude that, in the absence
26 of compelling circumstances such as those mentioned above that
27 could warrant exceptions to application of the law-of-the-case
28 doctrine, the doctrine bars the district court on remand from

1 revisiting issues that were adjudicated on the prior appeal, and
2 it forecloses the parties from renewing their previously
3 adjudicated challenges on a subsequent appeal, even if the
4 district court has imposed a new sentence on the Crosby remand.

5 In a letter brief submitted subsequent to oral argument of
6 this appeal--at which this Court solicited briefing with respect
7 to the effects, if any, of Gall and Kimbrough on this appeal--Carr
8 in effect contends that Kimbrough represents a change in the law
9 that should prevent application of the law-of-the-case doctrine to
10 his renewed challenge to the use of the first-degree murder
11 guideline to calculate his offense level (see Carr letter brief
12 dated October 29, 2008 ("Carr supplemental brief on appeal") at
13 1-2, 4-7). Carr argues that in light of Kimbrough, the district
14 court has "authority to fashion a sentence based in part on its
15 disagreement with this Court's interpretation of a Guideline."
16 (Id. at 1.) Elaborating, he states as follows:

17 At issue in this case is the district court's
18 authority to deviate from the Guidelines because of
19 disagreements with this Court's interpretation of
20 those Guidelines. In the original appeal of
21 conviction and sentence that lead [sic] to the Crosby
22 remand here, Carr challenged the use of the first
23 degree murder guideline in calculating his sentence.
24 This Court held that the most analogous federal
25 offense to New York second degree murder is first
26 degree murder under 18 U.S.C. sec. 1111. United
27 States v. Carr, 424 F.3d 213, 231 (2d Cir. 2005),
28 citing United States v. Minicone, 960 F.2d 1099, 1110
29 (2d Cir. 1992).

30 On resentencing, Carr again challenged the use
31 of the first degree murder guideline. . . . The
32 district court did not revisit the issue, because the
33 "debate about exactly what guideline applies to the
34 RICO counts in which the charge of murder is
35 contained . . . has been settled and the guideline

1 range is for - the level is a level 43 and the
2 guideline range is simply life." [S.Tr. 17.]

3 However, the district court's comments and
4 questions at the resentencing hearing (which took
5 place over two days) show that the court was
6 concerned that federal first degree murder was not
7 the most analogous federal offense in the
8 circumstances of this case.

9 (Carr supplemental brief on appeal at 2-3 (footnote omitted)
10 (emphasis in original).) Pointing out that in imposing sentence
11 originally "in 2004, the court stated 'because of the guideline
12 calculations, based on the jury's verdict and their specific
13 findings, it is my duty to impose a sentence of life imprisonment
14 on Count One and on Count Two'" (id. at 3 n.1 (quoting Original
15 S.Tr. 17)), Carr states that the district court on remand

16 inquired extensively and repeatedly about Carr's
17 culpability for the murder. [Aug. Tr.] at 16 ("Let's
18 talk about the question of culpability."); [Aug. Tr.]
19 at 16-17 (court notes that this murder was not
20 premeditated); [Aug. Tr.] at 21 (court finds that
21 killing was "on the spot"); [Aug. Tr.] at 27 ("[T]he
22 degree of culpability is important, and this is not
23 something that is listed in some numerical list in
24 the guidelines."); [S.Tr. 18] ("I have been very
25 concerned to assess the degree of culpability in the
26 shooting.").

27 The court's inquiries and statements at the
28 sentencing hearing suggest that it disagreed with
29 this Court's interpretation of the Guidelines, but
30 felt itself bound--as it was at that point by this
31 Court's jurisprudence--to use the first degree
32 murder guideline as its baseline for determining
33 sentence. However, in light of Kimbrough,
34 disagreement with the Commission's policy judgment
35 (as interpreted by this Court in Minicone and
36 Carr[I]) is a permissible reason to deviate from the
37 guideline.

38 (Carr supplemental brief on appeal at 3-4 (emphasis in original).)

39 In support of this argument, Carr cites United States v. Boardman,

1 528 F.3d 86 (1st Cir. 2008) ("Boardman"), stating that "[t]he
2 First Circuit . . . held that Kimbrough allows district judges to
3 deviate from the Guidelines on the basis of categorical policy
4 disagreements, including disagreements with the Court's
5 interpretation of those Guidelines." (Carr supplemental brief on
6 appeal at 4 (emphases added).)

7 We disagree with Carr's interpretations of both Kimbrough
8 and Boardman. Preliminarily, however, we note our disagreement
9 as well with his description of the district court as
10 "disagree[ing] with this Court's interpretation of [the pertinent]
11 Guidelines" (Carr supplemental brief on appeal at 2, 4), and as
12 being "concerned that federal first degree murder was not the most
13 analogous federal offense in the circumstances of this case" (id.
14 at 3 (emphasis in original)). Although the district court
15 indicated--entirely properly--that the propriety of its
16 application of the federal first-degree murder guideline was no
17 longer in question, it did not express any disagreement with the
18 appropriateness of that guideline as the analog for Carr's murder
19 of Morton. Indeed, that was the guideline originally applied by
20 the district court; in Carr I, we held that the district court's
21 ruling was correct. The transcripts of the hearings held on
22 remand do not indicate that the district court disagreed with this
23 Court's jurisprudence; rather, they reveal clearly that the
24 district court was concerned simply with assessing the degree of
25 Carr's culpability for a callous murder that seemed senseless even
26 to his fellow gang members.

1 Even had the district court disagreed, however, with this
2 Court's jurisprudence--reflected in Carr I, Minicone, and Diaz--as
3 to the propriety of using the federal first-degree murder
4 guideline as the most appropriate analog for a RICO-related murder
5 such as that committed here, we reject Carr's contention that the
6 district court would have been free to disregard that
7 jurisprudence after Kimbrough. Kimbrough, which concerned the
8 Guidelines recommendations for severe sentencing of defendants
9 convicted of offenses involving cocaine in the form of crack, as
10 contrasted with cocaine in powder form, held that "under Booker,
11 the cocaine Guidelines, like all other Guidelines, are advisory
12 only," 128 S. Ct. at 564, and that "a district court may consider
13 arguments that 'the Guidelines sentence itself fails properly to
14 reflect § 3553(a) considerations,'" id. at 570 (quoting Rita v.
15 United States, 127 S. Ct. 2456, 2465 (2007)). The Kimbrough Court
16 discussed the fact that in adopting Guidelines provisions which,
17 as they then stood, equated one gram of crack with 100 grams of
18 powder cocaine, the Sentencing Commission had looked to certain
19 statutory mandatory minimum prison terms, rather than to empirical
20 evidence as was its general practice, see id. at 567, and that
21 numerous reports of the Commission revealed that the 100 to 1
22 ratio did not reflect the view of the Commission itself as to
23 appropriate proportionality, see id. at 568. The Kimbrough Court
24 held that "[g]iven all this, it would not be an abuse of
25 discretion for a district court to conclude when sentencing a
26 particular defendant that the crack/powder disparity yields a

1 sentence 'greater than necessary' to achieve § 3553(a)'s purposes,
2 even in a mine-run case." Id. at 575. See also id. (questioning,
3 but not deciding, whether "closer review may be in order when the
4 sentencing judge varies from the Guidelines based solely on the
5 judge's view that the Guidelines range fails properly to reflect
6 § 3553(a) considerations even in a mine-run case" as to which the
7 Commission formulated the Guidelines range based on its
8 institutional strengths, taking into account "empirical data and
9 national experience" (internal quotation marks omitted)).

10 Thus, Kimbrough stands for the proposition that the
11 sentencing court has discretion to deviate from the Guidelines-
12 recommended range based on the court's disagreement with the
13 policy judgments evinced in a particular guideline. Kimbrough did
14 not suggest that the district court may simply disregard the
15 relevant guidelines; to the contrary, the Kimbrough Court noted
16 that, "[a]s explained in Rita and Gall, district courts must treat
17 the Guidelines as the 'starting point and the initial benchmark,'"
18 128 S. Ct. at 574 (quoting Gall, 128 S. Ct. at 596). And we see
19 nothing in Kimbrough that suggests, as Carr would have it, that a
20 district court is free to disregard its circuit court's
21 interpretation of a particular guideline, which is a ruling on a
22 question of law.

23 Nor do we interpret the First Circuit's decision in United
24 States v. Boardman, 528 F.3d 86, as authorizing its district
25 courts, in light of Kimbrough, to "deviate from the Guidelines on
26 the basis of categorical policy disagreements . . . with the

1 Court[of Appeals'] interpretation of those Guidelines" (Carr
2 supplemental brief on appeal at 4). The Boardman court, in
3 addressing a Guidelines calculation for burglary of a
4 nonresidential building, noted the interpretation it had given the
5 pertinent guideline in a prior case ("Fiore") and observed that
6 the sentencing court in Boardman had indicated that it would have
7 imposed a lower sentence if it had had discretion to do so. See
8 Boardman, 528 F.3d at 86-87. The First Circuit in Boardman
9 remanded to the district court, reasoning that a sentencing court
10 "has broader freedom tha[n] it did before Kimbrough" to deviate
11 from the Guidelines based on the sentencing judge's "disagreement
12 with the Commission's policy judgment (as expressed in the
13 guideline as we interpreted it in Fiore)." Id. at 87 (emphasis
14 added). But nothing in Boardman stated that the district court
15 was free to deviate from the Court of Appeals' interpretation of
16 the relevant guideline itself. Indeed, the First Circuit preceded
17 its discussion of the effect of Kimbrough by pointing out that
18 "the district court [wa]s still required to calculate and consider
19 the guidelines range," and that "[t]he district court properly
20 recognized that it was bound by Fiore to treat the guideline as we
21 had interpreted it," id.

22 Finally, Carr argues that the law-of-the-case doctrine
23 should not be applied to his sentencing challenges because of a
24 change in circumstances, to wit, that his "first sentencing" had
25 "t[aken] place under the mandatory guidelines scheme." (Carr
26 brief on appeal at 12.) He concedes, however, his convictions

1 having been upheld, that "the constellation of offenses for which
2 he was sentenced remained the same." (Id. (internal quotation
3 marks omitted).) And it is indisputable that the change
4 consisting of the Guidelines' being advisory rather than mandatory
5 was dealt with by the remand itself. The remand instructed the
6 district court to resentence Carr if it determined that it would
7 have imposed a nontrivially different sentence had it known the
8 Guidelines were not mandatory; and on remand the district court
9 acknowledged its understanding that "[t]he guidelines are now
10 advisory and the court can apply the guidelines or take a
11 different course if there's a reasonable ground[] to do so" (S.Tr.
12 17). We see no change in circumstances that would warrant
13 nonapplication of the law-of-the-case doctrine here. Certainly
14 there was no change in the circumstances surrounding the Morton
15 murder.

16 In sum, we conclude that there was no relevant change in
17 the law or the circumstances, nor any interest of justice that
18 would indicate that the law-of-the-case doctrine should not be
19 applied to foreclose Carr's present challenges to the Guidelines
20 calculations that were approved in Carr I. We accordingly decline
21 to revisit those issues.

22 B. The Reasonableness of the Sentence Imposed

23 In reviewing a sentence post-Booker, the court of appeals
24 is required to determine whether the sentence is "reasonable."
25 Gall, 128 S. Ct. at 594 (internal quotation marks omitted);

1 Booker, 543 U.S. at 261-62. As adverted to in the preceding
2 section, in making that determination, we use "the familiar abuse-
3 of-discretion standard of review," Gall, 128 S. Ct. at 594,
4 regardless of whether the sentence was within or outside the
5 Guidelines-recommended range, see id. at 591; United States v.
6 Jones, 531 F.3d 163, 170 (2d Cir. 2008). This standard of review
7 applies as well to our review of a sentence imposed after a Crosby
8 remand. See Williams, 475 F.3d at 474.

9 Reasonableness review has both a procedural and a
10 substantive component. See, e.g., United States v. Irving,--
11 F.3d --, 2009 WL 194386 (2d Cir. Jan. 28, 2009), at *5; United
12 States v. Jones, 531 F.3d at 170; United States v. Canova, 485
13 F.3d 674, 679 (2d Cir. 2007). Review for procedural
14 reasonableness requires us to

15 ensure that the district court committed no
16 significant procedural error, such as failing to
17 calculate (or improperly calculating) the Guidelines
18 range, treating the Guidelines as mandatory, failing
19 to consider the § 3553(a) factors, selecting a
20 sentence based on clearly erroneous facts, or failing
21 to adequately explain the chosen sentence.

22 Gall, 128 S. Ct. at 597. In determining whether the district
23 court has considered the appropriate factors, we do not require
24 "robotic incantations" by the sentencing judge. United States v.
25 Brown, 514 F.3d 256, 270 (2d Cir. 2008); United States v.
26 Fernandez, 443 F.3d 19, 30 (2d Cir.), cert. denied, 549 U.S. 882
27 (2006); Crosby, 397 F.3d at 113. In the absence of record
28 evidence suggesting otherwise, we presume that the district court
29 has faithfully discharged its duty to consider the § 3553(a)

1 factors. See, e.g., United States v. Brown, 514 F.3d at 264;
2 United States v. Fernandez, 443 F.3d at 30. In reviewing a
3 sentence for substantive reasonableness, we are guided by the
4 § 3553(a) factors that the sentencing court is required to apply.
5 See, e.g., Booker, 543 U.S. at 261; Crosby, 397 F.3d at 114-15 &
6 n.13.

7 In the present case, Carr contends that his sentence is
8 unreasonable, arguing principally that the district court
9 "unjustifiably relied on certain sec. 3553 factors, while not
10 giving due weight to others," and that it committed an error of
11 law in

12 characteriz[ing] subsection (2) of that statute
13 (setting forth the goals of sentencing) as "the
14 principal one." . . . As a matter of law, no single
15 factor in sec. 3553(a) is controlling, and no single
16 factor is "the principal one."

17 (Carr brief on appeal at 16 (quoting (S.Tr. 21).) He also argues
18 that his new sentence is "greater than necessary to accomplish the
19 statutory sentencing goals." (Id.)

20 The record belies these contentions. The statute directs
21 the sentencing court to "impose a sentence sufficient, but not
22 greater than necessary, to comply with the purposes set forth in
23 paragraph (2) of this subsection." 18 U.S.C. § 3553(a). Other
24 than concerns for training and treatment, see id.
25 § 3553(a)(2)(D), which Carr has not suggested have any relevance
26 whatever here, the sentencing purposes spelled out in paragraph
27 (2) of § 3553(a) are

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

1 to promote respect for the law, and to provide just
2 punishment for the offense;

3 (B) to afford adequate deterrence to criminal
4 conduct; [and]

5 (C) to protect the public from further crimes of
6 the defendant[.]

7 18 U.S.C. § 3553(a)(2). The district court clearly considered
8 these factors. The issue that received the most attention from
9 the court and the parties in this case was the degree of Carr's
10 culpability in killing Morton, as the court sought to arrive at "a
11 sentence which justly and fairly takes into account the gravity of
12 the killing that Mr. Carr perpetrated" (S.Tr. 21)--an act that the
13 court found "impossible . . . to understand" except as "an act of
14 sheer cruelty" (Aug. Tr. 27). But while using the phrases "the
15 principal one," or "the two main factors," the court in fact
16 expressly cited four of the above § 3553(a)(2) factors, stating
17 that

18 the principal one is the seriousness of the offense
19 and to have an appropriate punishment of that offense
20 and also protect society from any occurrence of
21 criminal behavior by Mr. Carr. Those are the two
22 main factors--also to be a deterrent to other
23 criminal activity

24 (S.Tr. 21 (emphases added).) And, as set forth in detail in Part
25 I.B. above, the district court expressly noted its "oblig[ation]
26 to give specific attention to the factors listed in 18 United
27 States Code Section 3553(a)" (S.Tr. 17), and stated "although I
28 might not go down them doggedly" one by one, "I certainly have
29 them in mind (id. at 21). Thus, the record does not support

1 Carr's contention that the district court ignored any of the
2 § 3553(a) factors.

3 Nor is there merit in Carr's suggestion that the district
4 court lost sight of its obligation to impose a sentence no
5 "greater than necessary to accomplish the statutory sentencing
6 goals" (Carr brief on appeal at 16). Having mentioned the above
7 factors (see S. Tr. 21), the court noted that Carr had proposed
8 that he be given a 30-year prison term, but the court stated "I do
9 not think that that is sufficient" (id.); it stated, however, that
10 "a very substantial penalty does not need to be endless" (id.);
11 and in concluding that Carr's prison term should be 40 years, the
12 court stated, "I cannot do less and be fair to the community" (id.
13 at 22). The court plainly followed the statutory mandate to
14 impose a sentence that it deemed sufficient, but not greater than
15 necessary, to accomplish the purposes set forth in § 3553(a)(2).

16 In sum, it is abundantly clear in this case that the court
17 considered the appropriate factors and rendered a thoughtful
18 judgment that complied with the requirements of § 3553(a). We see
19 no basis for concluding that the district court abused its
20 discretion or that the sentence it imposed is unreasonable.

21 C. The Request for a Remand With Respect to Sentencing for Crack

22 Lastly, in his postargument supplemental brief, Carr
23 argues that this Court should remand to the district court for
24 resentencing in light of (a) Kimbrough's holding that a sentencing
25 court has discretion to deviate from the harsh sentences for

1 defendants convicted of trafficking in crack as recommended in the
2 version of the Guidelines applicable to Carr, and (b) amendments
3 to the crack-related guidelines, adopted subsequent to his
4 resentencing. We disagree.

5 Carr's contention that he should be resentenced because of
6 the harshness of the crack-related guidelines that were applied to
7 him is subject to plain-error analysis because he made no
8 challenge to those guidelines on harshness grounds in the district
9 court. See, e.g., United States v. Regalado, 518 F.3d 143, 147
10 (2d Cir. 2008). To receive relief under plain-error analysis, "a
11 defendant must show (1) error, (2) that is plain at the time of
12 appellate review, and (3) that affects substantial rights. Where
13 these conditions are met, we have the discretion to notice a
14 forfeited error if (4) it seriously affects the fairness,
15 integrity, or public reputation of judicial proceedings.'" Id.
16 (quoting United States v. Quinones, 511 F.3d 289, 316 (2d Cir.
17 2007), cert. denied, 129 S. Ct. 252 (2008)). Carr cannot meet
18 this test, for if there was error it did not affect his
19 substantial rights. He was sentenced to two concurrent terms of
20 35 years' imprisonment on the RICO counts. His sentences on the
21 narcotics counts were 20 years, to be served concurrently with the
22 sentences on the RICO counts. There is no indication in the
23 record that the district court believed these 20-year sentences
24 were inappropriate for Carr's admitted dealing in narcotics
25 throughout virtually his entire adult life. Rather, at the
26 sentencing hearing, the district court noted that "[t]here are

1 other counts involving narcotics and the weapons but the crucial
2 thing here for this sentence is what the sentence will be on the
3 two RICO counts" (S.Tr. 17.) We cannot see that
4 Kimbrough warrants a remand with respect to Carr's sentence on the
5 narcotics counts.

6 As to Carr's contention that he should be resentenced anew
7 in light of amendments to the Guidelines adopted after his
8 resentencing on the Crosby remand, that contention is not properly
9 before us. Defendants who seek relief based on Guidelines
10 amendments "should move for modification of their sentences
11 pursuant to 18 U.S.C. § 3582(c)(2) in the district courts."
12 United States v. Regalado, 518 F.3d at 151.

13 D. Correction of the Amended Judgment

14 Finally, we note that the amended judgment entered in this
15 case does not accurately reflect the judgment imposed on Carr at
16 his sentencing hearing. The written amended judgment states that
17 the concurrent prison terms imposed for Counts 1 and 2 are 30
18 years. Yet the sentencing transcript reveals--and the parties'
19 briefs on appeal reflect--that the court orally announced a 40-
20 year total prison term that included imprisonment for 35 years on
21 Counts 1 and 2 (see S.Tr. 23, quoted in Part I.B. above).

22 "[W]here there is a direct conflict between an unambiguous
23 oral pronouncement of sentence and the written judgment . . . the
24 oral pronouncement, as correctly reported, must control." United
25 States v. Marquez, 506 F.2d 620, 622 (2d Cir. 1974) (internal

1 quotation marks omitted). See, e.g., United States v. DeMartino,
2 112 F.3d 75, 78-79 (2d Cir. 1997); United States v. Werber, 51
3 F.3d 342, 347 (2d Cir. 1995); United States v. Pagan, 785 F.2d
4 378, 380 (2d Cir.), cert. denied, 479 U.S. 1017 (1986); United
5 States v. Moyles, 724 F.2d 29, 30 (2d Cir. 1983).

6 Accordingly, we remand for entry of a corrected amended
7 judgment, reflecting the sentence actually imposed.

8 CONCLUSION

9 We have considered all of Carr's arguments on this appeal
10 and have found in them no basis for reversal. The amended
11 judgment, as announced orally, is affirmed. The matter is
12 remanded for the entry of a corrected written amended judgment to
13 reflect that Carr has been sentenced to concurrent prison terms of
14 35 years on Counts 1 and 2.