

**IN THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

CASE NO.: 12-15231

BHARDWAAJ SEECHARAN,

Defendant-Appellant,

v.

UNITED STATES OF AMERICA,

Plaintiff-Appellee.

A DIRECT APPEAL OF A CRIMINAL CASE FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

APPELLANT'S INITIAL BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1 of the Federal Rules Appellate Procedure and Rules 26.1-1 through 26.1-3 of the 11th Circuit Rules, Appellant hereby lists the trial judges, attorneys, and parties who have an interest in this appeal.

- 1) Brownlee, Michael M. (Appellate Counsel for Mr. Seecharan)
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- 6) Lynch Jr., The Honorable Frank J. (United States District Court Magistrate)
- 7) Martinez, The Honorable José E. (United States District Court Judge)
- 8) Neustein, Charles L. (Trial Counsel for Mr. Seecharan)
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- 10) Schultz, Anne (Counsel for U.S.A.)
- 11) Seecharan, Bhardwaaj (Appellant)
- 12) Seecharan, Gergawattie (Appellant's Wife and Co-Defendant)

STATEMENT REGARDING ORAL ARGUMENT

Mr. Seecharan requests oral argument because this case raises important questions about the process for sentencing and committing severely vulnerable defendants to prison. In addition, Mr. Seecharan desires oral argument because resolution of this case has dire consequences for Mr. Seecharan, due to his fragile medical condition.

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STATEMENT OF JURISDICTION

This Jurisdictional Statement is submitted pursuant to Federal Rule of Appellate Procedure 28(a)(4). This is an appeal from a Final Judgment and Sentence in a criminal case from the United States District Court for the Southern District of Florida. The district court sentenced Mr. Seecharan to a term of 60 months imprisonment with the Bureau of Prisons after he pled guilty to one count of conspiracy to commit bank fraud, in violation of 18 U.S.C. § 1349. The Final Judgment was entered on September 26, 2012. No further issues are currently pending in the underlying criminal case against Mr. Seecharan. The Notice of Appeal in this case was timely filed on October 5, 2012, within fourteen days after entry of the Final Judgment. FED. R. APP. P. 4(b)(1)(A)(i) (2011). Accordingly, pursuant to 28 U.S.C. § 1291, jurisdiction lies in this Honorable Court.

STATEMENT OF THE ISSUE

Is imprisonment for 5 years a reasonable sentence when: (1) a defendant provides the sentencing court with his treating physicians' testimony that he risks amputation or loss of life if imprisoned; (2) the testimony is not contested or in any way undermined by the Government; and (3) the district court relies solely on an unsubstantiated claim from the Bureau of Prisons that it "can handle anything" to determine that imprisonment is appropriate?

STATEMENT OF THE CASE

In this appeal, Mr. Seecharan challenges his sentence on the basis that incarceration is unreasonable given his delicate physical condition. He is not currently incarcerated, because this Court temporarily granted his Emergency Motion for Release Pending Appeal on November 26, 2012.

In its December 9, 2010, Indictment, the Government charged Mr. Seecharan with: (1) Conspiracy to Commit Wire Fraud and Mail Fraud in violation of 18 U.S.C. § 1349; (2) Wire Fraud in violation of 18 U.S.C. § 1343; (3) Mail Fraud in violation of 18 U.S.C. § 1341; (4) Conspiracy to Commit Bank Fraud in violation of 18 U.S.C. §§ 1344 and 1349; (5) Conspiracy to Commit Money Laundering in violation of 18 U.S.C. § 1956(h) and; (6) Money Laundering in violation of 18 U.S.C. § 1956(a)(1)(A)(i), (a)(1)(B)(i). (*Dkt.* 7).

Mr. Seecharan agreed to plead guilty to Conspiracy to Commit Bank Fraud. (*Dkt.* at 85). In exchange, the Government agreed to dismiss the remaining claims in the Indictment. The district court accepted the plea agreement on April 25, 2012. (*Dkt.* 97).

Mr. Seecharan's sentencing took place in two separate hearings. The district court conducted the first sentencing hearing on August 21, 2012. (*Dkt.* 146). The court continued the hearing because it wanted the Bureau of Prisons to assess whether it was equipped to handle Mr. Seecharan's medical needs. (*Id.* at 14).

The second hearing took place on September 25, 2012. (*Dkt.* 147). On September 26, 2012, the district court sentenced Mr. Seecharan to 60 months imprisonment, followed by 5 years of supervised release. (*Dkt.* 143). This appeal follows.

STATEMENT OF THE FACTS

In 1982, Mr. Seecharan and his brother were moving a broken-down vehicle from the roadway when they were hit by a drunk driver. (Gov't Nov. 26, 2012, Opp. to Mtn. for Bond Pending Appeal at 7, quoting Pre-Sentence Investigation Report). *Id.* Mr. Seecharan's brother was killed instantly and Mr. Seecharan was hospitalized for approximately one year. *Id.* His right leg was crushed and had to be "rebuilt." *Id.* The accident left him with no blood flow to his knees or toes, which necessitated a vein transplant. *Id.* Mr. Seecharan lost many of the muscles in his legs and had a tibia removed completely. *Id.*

Since the accident, Mr. Seecharan has had multiple surgeries performed on his legs, but they remain vulnerable and badly deformed. (*Dkt.* 139-2). The damage to Mr. Seecharan's legs had a degenerative effect on his back, which necessitated his recent lumbar fusion surgery. *Id.* Mr. Seecharan is legally disabled, heavily medicated to mitigate his chronic and persistent pain, and essentially bedridden. (*Dkt.* 130 at 2). All of this information was submitted to the district court prior to sentencing.

At sentencing, Mr. Seecharan argued that he should not be imprisoned due to his precarious physical state. In support, Mr. Seecharan presented the district court with un rebutted medical evidence regarding the acute risk imprisonment would pose to his health, including the following documents:

1. A letter from one of his treating physicians, Dr. Calvin Gibson, who detailed Mr. Seecharan's serious medical condition and wrote: "It is in my professional medical opinion that the incarceration of Mr. Seecharan would be detrimental to his health and lead to possible loss of limb(s) and possibly his life." (*Dkt.* 139-2). Dr. Gibson also wrote that Mr. Seecharan requires further foot and ankle surgery. However, given Mr. Seecharan's fragile condition and numerous prior surgeries, future surgery carries the risk of amputation "due [to] severe vascular compromise and increased risk of infection." *Id.*

2. A letter from another treating physician, Dr. Joseph D. Funk, of the Orlando Orthopedic Center, who wrote that Mr. Seecharan is "at high risk for breakdown of tissue, infection, and amputation." (*Dkt.* 136-2).

3. A letter from a third treating physician, Dr. Steven E. Weber, also a member of the Orlando Orthopedic Center, who wrote that it was his opinion that "incarceration may result in significant deterioration to [Mr. Seecharan's] healing in his lumbar spine" and that Mr. Seecharan's condition is "severe and permanent." Dr. Weber described Mr. Seecharan's condition as "chronic and permanent." Finally, Dr. Weber opined that "[t]he public facility may make him a high-risk for infection, which would certainly be debilitating for his overall condition and may be significant for his overall state of health." (*Dkt.* 130-1).

At Mr. Seecharan's first sentencing hearing, after acknowledging his medical issues, the district court *sua sponte* continued the sentencing so that U.S. Probation could ascertain whether the Bureau of Prisons was equipped to handle Mr. Seecharan.

...I will recess this hearing until September, at which time I would like a report from Probation as to how I go about it. And before then obviously, as soon as possible, how I go about having him assessed by the Bureau of Prisons so if they tell me we can't take this guy, we could kill him. Obviously, that's not what he's supposed to go to jail for. I want to know what they say. And I don't really know what they say at this point.

(*Dkt.* 146 at 14). In the meantime, the Court ordered Mr. Seecharan to home confinement and GPS monitoring until sentencing resumed. *Id.*

At the second sentencing hearing, the Court indicated that it had reviewed the medical evidence supplied by Mr. Seecharan and was "up to date on his physical condition." (*Dkt.* 147 at 7). The Government did not contest any of the medical evidence provided by Mr. Seecharan. Instead, it expressly recognized Mr. Seecharan's plight, commenting that "you can't really ignore the obvious in this case. He does have a serious impediment." *Id.*

The Government even lamented the Bureau of Prisons' unwillingness to object to taking Mr. Seecharan: "There had been, at least in my mind, a hope that BOP might come out and have some objection of their own, from their own point of view...and they essentially stated they take all comers." *Id.* at 9. Presumably,

the Government would have been comfortable recommending home confinement if the Bureau of Prisons decided it could not care for Mr. Seecharan. Nonetheless, the Government refused to recommend home confinement for Mr. Seecharan. Instead, the Government recommended imprisonment with this macabre warning: “there is an open question as to whether and how much of that duration this defendant could successfully serve.” *Id.* at 13.

Ultimately, the Government declined to recommend home confinement because it believed that statutory measures would allow the Bureau of Prisons to adjust the terms of Mr. Seecharan’s incarceration in the event his condition became “life-threatening or otherwise extraordinary.” *Id.* at 14. The Court, however, was skeptical that such statutory provisions would provide adequate relief for Mr. Seecharan, noting that it was “troubled” because, based on the judge’s own experience as an attorney dealing with the Bureau of Prisons, he knew “the system doesn’t always work.” *Id.* at 14-15. Ultimately, the Court sentenced Mr. Seecharan below the guidelines recommendation.

It did not, however, believe that Mr. Seecharan’s “physical problems and conditions” warranted home confinement, *id.* at 21-22, presumably because U.S. Probation reported that the Bureau of Prisons could “handle anything,” despite the absence of any specific information that corroborated the Bureau’s claim. *Id.* at 9. The government submitted no evidence at sentencing regarding the Bureau of

Prisons' ability to provide adequate medical care for Mr. Seecharan. In fact, despite this Court's November 26, 2012, order requiring the Government to provide documentation setting out the Bureau's ability to address Mr. Seecharan's medical needs, it is still unclear where he will serve his time, and whether the facility where he is ultimately incarcerated will be able to forestall the threat of amputation or death anticipated by his physicians.

SUMMARY OF THE ARGUMENT

A sentence of imprisonment for Mr. Seecharan is both procedurally and substantively unreasonable because the district court failed to give meaningful consideration to his treating physicians' uncontested testimony that he risks amputation or loss of life if imprisoned. Instead, the district court relied solely on an unsubstantiated claim from the Bureau of Prisons that it "can handle anything" to determine that imprisonment is appropriate. Based on the record before the district court, its decision to sentence Mr. Seecharan to imprisonment, without making any effort to vet the Bureau of Prisons' ability to keep him alive, was not only unreasonable, it was shocking.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE DISTRICT COURT’S DECISION TO SENTENCE MR. SEECHARAN TO IMPRISONMENT WAS PROCEDURALLY UNREASONABLE BECAUSE THE COURT FAILED TO GIVE MEANINGFUL CONSIDERATION TO WHETHER THE BUREAU OF PRISONS COULD PROVIDE MR. SEECHARAN WITH NECESSARY AND EFFECTIVE MEDICAL CARE.

A. Standard of Review

Appellate courts assess the propriety of a sentence imposed by a lower court by determining whether the sentence is reasonable. *U.S. v. Booker*, 543 U.S. 220, 244 (2005). The reasonableness of a district court’s sentencing decision is reviewed for abuse of discretion. *U.S. v. Irey*, 612 F.3d 1160, 1188 (11th Cir. 2010) (en banc), *cert. denied*, 131 S.Ct. 1813, 179 L.Ed.2d 772 (2011).

B. Argument on the Merits

The district court’s decision to sentence Mr. Seecharan to prison was procedurally unreasonable because the court failed to adequately consider whether imprisonment would provide Mr. Seecharan with necessary medical care “in the most effective manner,” as required by 18 U.S.C. § 3553(a)(2)(D).

In reviewing the reasonableness of a sentence, this Court must first ensure that the sentence was procedurally reasonable. *Gall v. United States*, 552 U.S. 38, 41 (2007). A sentence is procedurally reasonable as long as the district court properly calculated the guideline range, treated the guidelines as advisory, considered the 18 U.S.C. § 3553(a) factors, did not select a sentence based on

clearly erroneous facts, and adequately explained the chosen sentence. *Id.* If this Court finds that remand is necessary to cure procedural errors in the sentencing process, it need not review the substantive reasonableness of the sentence. *U.S. v. Luster*, 388 Fed. Appx. 936, 939 (11th Cir. 2010).

On the other hand, if this Court determines a sentence is procedurally reasonable, it should examine whether the sentence was substantively reasonable under the totality of the circumstances. *Id.* A sentence may be remanded if we are left with a “definite and firm conviction that the district court committed a clear error of judgment in weighing the § 3553(a) factors by arriving at a sentence that lies outside the range of reasonable sentences dictated by the facts of the case.” *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008) (internal quotation marks omitted). “The party challenging the sentence bears the burden to show it is unreasonable in light of the record and the § 3553(a) factors.” *United States v. Tome*, 611 F.3d 1371, 1378 (11th Cir. 2010). Finally, a sentence is procedurally reasonable if the record reflects that the sentencing judge had a reasoned basis for exercising his own legal decision-making authority. *U.S. v. Billings*, 263 Fed. Appx. 795, 801 (11th Cir. 2008).

District courts are “obliged to consider *all* of the § 3553(a) factors to determine whether they support the sentence requested by a party.” *Pugh*, 515 F.3d at 1191 (emphasis in original). One of the § 3553(a) factors is whether the

requested sentence provides the defendant with needed medical care “in the most effective manner.” 18 U.S.C. § 3553(a)(2)(D). In this case, the district court failed to consider whether a sentence of imprisonment would provide Mr. Seecharan with necessary and effective medical care.

At sentencing, Mr. Seecharan provided letters from three treating physicians, as well as X-rays of his crippled legs. Dr. Gibson opined that Mr. Seecharan requires additional surgery, but that given his deteriorated condition, such a surgery risked “loss of limb due [to] severe vascular compromise and increased risk of infection.” (*Dkt.* 139-2). Both Dr. Gibson and Dr. Weber noted that Mr. Seecharan cannot care for himself and requires assistance to get out of bed, bathe, and walk. (*Dkt.* 139-2); (*Dkt.* 130-1). Dr. Weber described his condition as “severe,” “permanent,” and “chronic.” (*Dkt.* 130-1). Dr. Funk noted that Mr. Seecharan is at “very high risk for breakdown and amputation.” (*Dkt.* 136-2). Dr. Gibson wrote that in his professional opinion, imprisonment could lead to “loss of limb(s) and possibly his life.” (*Dkt.* 139-2). Although these medical opinions were never contested or in any way undermined at sentencing, it is worth noting that all three letters were printed on office letterhead and were from reputable physicians who had been treating Mr. Seecharan long before sentencing.

Although the district court expressed concern with the Bureau of Prisons’ ability to provide adequate care for Mr. Seecharan at different points during the

sentencing proceedings, a review of the record reveals that the district court ultimately failed to consider whether Mr. Seecharan would receive necessary and effective medical treatment if imprisoned. The district court's failure to ascertain whether Mr. Seecharan's medical needs could be accommodated by the Bureau of Prisons is difficult to reconcile with its continuation of sentencing for the express purpose of having Mr. Seecharan evaluated:

...I will recess this hearing until September, at which time I would like a report from Probation as to how I go about it. And before then obviously, as soon as possible, *how I go about having him assessed by the Bureau of Prisons so if they tell me we can't take this guy, we could kill him.* Obviously, that's not what he's supposed to go to jail for. I want to know what they say. And I don't really know what they say at this point.

(*Dkt.* 146 at 14) (emphasis added). Odder still is the district court's confusion regarding the process for having Mr. Seecharan evaluated by the Bureau of Prisons, given the specific statutory instructions for doing so provided in 18 U.S.C. § 3552(b)¹.

Mr. Seecharan was never evaluated by the Bureau of Prisons. Instead, when sentencing resumed, the only explanation provided by the Bureau of Prisons regarding its ability to care for Mr. Seecharan was the categorical boast that it could "handle anything," or, as crassly paraphrased by the Government, "they take

¹ 18 U.S.C. § 3552(b) expressly authorizes the court to issue an order requiring evaluation of the defendant by a qualified consultant or the Bureau of Prisons if the court desires more information than is otherwise available to craft an appropriate sentence.

all comers.” (*Dkt.* 147 at 9). The record does not divulge the basis for the Bureau of Prisons’ glowing review of its own medical capabilities. No Bureau of Prisons representative appeared at sentencing, and the Government failed to introduce any evidence to substantiate the Bureau’s claim.

The Government contends otherwise. In its response to this Court’s November 26, 2012, order requesting documentation from the Bureau of Prisons regarding its ability to address Mr. Seecharan’s medical needs, the Government alleged that it had previously submitted an exhibit to the district court which addressed the Bureau’s ability to accommodate inmates requiring medical care. (Nov. 30, 2012 Response). The document the Government references, however, was not submitted for purposes of Mr. Seecharan’s sentencing. Instead, it was provided to the district court during a co-defendant’s sentencing as evidence the Bureau of Prisons could accommodate her medical needs. (Co-defendant Rovetto *Dkt.* 125-9).

Setting aside concerns that the Government was less than forthright in suggesting the document was considered for purposes of Mr. Seecharan’s sentencing, the Government’s argument that the Bureau of Prisons report is probative of the Bureau’s ability to care for Mr. Seecharan highlights the problem in this case. 18 U.S.C. § 3553(a)(2)(D) directs the sentencing court to consider whether a prospective sentence provides the defendant - not any sickly defendant -

with necessary medical care in the most effective manner possible. If the district court did, in fact, rely on the report to consider whether the Bureau of Prisons could properly care for Mr. Seecharan, that reliance was misguided.

The report was used to sentence a different defendant, with different medical needs. Further, the “report” is nothing more than a generic program statement from the Bureau of Prisons regarding its general policies and procedures for administering medical care for all inmates. It does not mention Mr. Seecharan or his medical problems (or his co-defendant’s for that matter). In sum, the record does not reflect that the district court relied on the Bureau of Prisons’ program statement. Even if it did, the report does not reflect the consideration required by § 3553(a)(2)(D), because it does not address Mr. Seecharan’s unique and acute medical needs.

Similarly, the cryptic and wholly unsubstantiated explanation from the Bureau of Prisons that it can “handle anything” is evidence that the district court failed to give § 3553(a)(2)(D) meaningful consideration. The language of § 3553(a)(2)(D) is clear. “The court, in determining the particular sentence to be imposed, shall consider...the need for the sentence imposed...to provide the defendant with needed...medical care...in the most effective manner possible. 18 U.S.C. § 3553(a)(2)(D).

It is beyond dispute that this language contemplates an individualized assessment. *See, e.g., United States v. Long, et al.*, 977 F.2d 1264 (8th Cir. 1992) (rejecting Government argument that the Bureau of Prisons had the ability to care for defendant such that the sentencing court clearly erred in making factual findings in support of a departure based on defendant's physical condition; Government's failure to present the sentencing court with evidence of the facilities available to the defendant to treat his medical needs was fatal to its argument); *see also United States v. Pineyro*, 372 F. Supp. 2d 133 (D. Mass. 2005) (ruling that Government did not meet § 3553(a)(2)(D) requirements because "the BOP has not remotely met its burden of showing that it can provide the defendant with 'needed ... medical care, or other correctional treatment in the most effective manner'" because BOP offered no treatment plan whatsoever and nothing comparable to what defendant was receiving; BOP's conclusion that it could provide "necessary and appropriate treatment" was not only vague, it did not meet the statutory requirements that the defendant receive "the most effective" treatment).

Logic and the plain language of the statute dictate that in making this assessment, a district court must consider the medical needs of the individual defendant and the Bureau of Prisons' ability to provide that individual's needs "in the most effective manner possible." At the very least, the district court should have required the Bureau to identify a facility or facilities that could care for Mr.

Seecharan. *See, e.g., Gomez v. U.S.*, 899 F.2d 1124, 1126 (11th Cir. 1990) (denying prisoner's claim that the conditions of his imprisonment violated the Eighth Amendment because the Bureau of Prisons identified a specific facility in Missouri that could provide adequate treatment for AIDS).

Based on the opinions of Mr. Seecharan's treating physicians that imprisonment posed a risk of death or amputation, the utter lack of any evidence before the court to the contrary, and the corresponding lack of any indication that the Bureau of Prisons could provide necessary and effective care for Mr. Seecharan, the district court clearly did not adequately consider § 3553(a)(2)(D) in concluding that imprisonment is an appropriate sentence. Nonetheless, the Government will likely argue that the record reflects the district court properly considered § 3553(a)(2)(D) based on the following: at the first sentencing hearing the court noted that a sentence has to take into consideration a defendant's need for medical care (*Dkt.* 146 at 8), the district court's request for the Bureau of Prisons to opine on its ability to care for Mr. Seecharan; the Bureau's statement that it could "handle anything; and the extensive discussion of Mr. Seecharan's physical condition at both sentencing hearings.

This amounts to nothing. A court does not properly "consider" § 3553(a)(2)(D) where it: notes the requirement imposed by the statutory factor; inquires whether the Bureau of Prisons can accommodate a defendant whose

physicians listed death as a possible result of imprisonment, but elects not to seek a formal evaluation of the defendant because it is too “time-consuming” and would unduly burden the U.S. Marshals (*Id.*); and discounts uncontested medical testimony indicating death or amputation may result from imprisonment, in favor of a Bureau of Prisons’ unsubstantiated claim that it can “handle anything” as sufficient proof that it can care for a severely compromised defendant. A holding that this constitutes adequate consideration of § 3553(a)(2)(D) would be tantamount to holding that a sentencing court need not consider the medical needs of a defendant at all.

However, even if this Court finds that the district court adequately considered § 3553(a)(2)(D), it should still find Mr. Seecharan’s sentence is procedurally unreasonable because there is ample record evidence indicating that the district court selected a sentence of imprisonment based on clearly erroneous facts. First, the court noted it did not have the medical knowledge necessary to evaluate Mr. Seecharan’s medical condition (*Dkt.* 146 at 8). Since the testimony of Mr. Seecharan’s physicians was the only medical evidence adduced at sentencing, the district court’s statement confirms that it had absolutely no factual basis for determining that imprisonment would provide necessary and effective medical care for Mr. Seecharan.

In addition, the district court misconstrued Dr. Webber's opinion that imprisonment posed a risk of death or amputation. All the district court gleaned from Dr. Webber's letter was that imprisonment would render Mr. Seecharan vulnerable to infection. *Id.* at 11. In doing so, he equated the risk infection posed to Mr. Seecharan with the risk infection poses to any defendant: "if I were to say okay, I will accept the word of his doctor that if he goes in, he's liable to get infections, I think they could say that about anybody that goes into a prison population...Everybody has that problem." *Id.* at 11. Of course, everyone might have that problem, but everyone does not run the risk of amputation or death as a result of infection. The court's misinterpretation of Dr. Webber's opinion indicates that it failed to properly consider Mr. Seecharan's plight.

Finally, and most importantly, in sentencing Mr. Seecharan to prison based on the Bureau of Prisons' claim that it could "handle anything," the district court chose a sentence based on clearly erroneous facts. Nothing indicated that the Bureau had specific knowledge of Mr. Seecharan's condition. Nothing indicated that the Bureau had the capability to provide Mr. Seecharan with necessary care in the most effective manner possible. In fact, nothing indicated the Bureau could provide necessary care at all. When the uncontested evidence presented by Mr. Seecharan regarding his deteriorated condition is compared to the absolute lack of evidence that the Bureau could even keep him alive, the inescapable conclusion is

that either (1) the court did not give meaningful consideration to § 3553(a)(2)(D), or (2) Mr. Seecharan's sentence was based on a clearly erroneous interpretation of the facts before the sentencing court. This Court should therefore hold that Mr. Seecharan's sentence is procedurally unreasonable and remand for resentencing.

II. THE DISTRICT COURT'S DECISION TO SENTENCE MR. SEECHARAN TO IMPRISONMENT WAS SUBSTANTIVELY UNREASONABLE.

A. Standard of Review

The reasonableness of a district court's sentencing decision is reviewed for abuse of discretion. *U.S. v. Irely*, 612 F.3d 1160, 1188 (11th Cir. 2010) (en banc), cert. denied, 131 S.Ct. 1813, 179 L.Ed.2d 772 (2011).

B. Argument on the Merits

A district court's choice of sentence is not unfettered. *Pugh*, 515 F.3d at 1191. Courts are duty-bound to impose a sentence "sufficient, but not greater than necessary," to achieve the penological goals specified in § 3553(a)(2). Substantively unreasonable sentences, which are "manifestly unjust" or "shock the conscience," fail that test. *U.S. v. Rigas*, 583 F.3d 108 (2d Cir. 2009). A district court is obliged to consider all of the § 3553(a) factors to determine whether they support the sentence requested by a party. *Id.* The Section 3553(a) "factors in turn ... guide appellate courts, as they have in the past, in determining whether a sentence is unreasonable." *Booker*, 543 U.S. at 261. Appellate courts should assess

the substantive reasonableness of a sentence by taking into account the totality of the circumstances present in a given case. *Gall*, 128 S.Ct. at 597.

A sentence may be substantively unreasonable when the district court selects the sentence arbitrarily, bases the sentence on impermissible factors or fails to consider pertinent section 3553(a) factors. *Pugh*, 515 F.3d at 1191-1192 *citing United States v. Ward*, 506 F.3d 468, 478 (6th Cir. 2007) (internal quotation marks omitted); *see also United States v. Ausburn*, 502 F.3d 313, 328 (3d Cir. 2007) (asking if the district court: (1) exercised its discretion by giving *meaningful* consideration to the § 3553(a) factors; and (2) applied those factors reasonably by selecting a sentence grounded on reasons logical and consistent with the factors) (internal quotation marks omitted) (emphasis added); *United States v. Willingham*, 497 F.3d 541, 543–44 (5th Cir. 2007) (asking if sentence: “(1) does not account for a factor that should have received significant weight, (2) gives significant weight to an irrelevant or improper factor, or (3) represents a clear error of judgment in balancing the sentencing factors”) (citation omitted); *United States v. Boleware*, 498 F.3d 859, 861 (8th Cir. 2007) (same).

The district court’s decision to sentence Mr. Seecharan to prison was substantively unreasonable because: (1) Mr. Seecharan presented evidence that incarceration poses a significant risk of amputation or death, that he needs constant assistance with the most basic activities of daily living, and that further specialized

medical care is necessary; (2) the government did not contest any of the evidence presented by Mr. Seecharan and acknowledged the severity of his condition; and (3) no evidence was adduced at sentencing to suggest that the Bureau of Prisons could provide Mr. Seecharan with necessary medical care in the most effective manner, as required by 18 U.S.C. § 3553(a)(2)(D).

Consequently, the totality of the circumstances described above reveal the district court failed to consider or give adequate weight to § 3553(a)(2)(D), and imposed a sentence that was “greater than necessary” to comply with the purposes set forth in 18 U.S.C. § 3553(a)(2). Mr. Seecharan has no criminal history and he pled guilty to conspiracy to commit a non-violent crime. The only specific guideline factor cited by the district court in explaining its decision to sentence Mr. Seecharan to prison was deterrence. However, studies have called into question the correlation between harsh sentencing and deterring white-collar crime. *See, e.g.,* Frank O. Bowman, III, *Pour encourager les autres? The Curious History and Distressing Implications of the Criminal Provisions of the Sarbanes-Oxley Act and the Sentencing Guidelines Amendments That Followed*, 1 OHIO ST. J.CRIM. LAW 373, 419 (2003-2004) (“A general increase in federal economic crime sentences might have been justifiable on deterrence grounds if there were evidence that existing penalties were failing to deter potential offenders. One indicator of insufficiently stringent penalties for a class of crimes would be an increase in the

general incidence of such crimes. However, the available statistics show exactly the opposite trend for economic offenses.”); *see also* David Weisburd et al., *Specific Deterrence in a Sample of Offenders Convicted of White Collar Crimes*, 33 *CRIMINOLOGY* 587 (1995); Zvi D. Gabbay, *Exploring the Limits of the Restorative Justice Paradigm: Restorative Justice and White Collar Crime*, 8 *CARDOZO J. CONFLICT RESOL.* 421, 448-49 (2007) (“[T]here is no decisive evidence to support the conclusion that harsh sentences actually have a general and specific deterrent effect on potential white-collar offenders.”).

Home confinement with appropriate restrictive conditions is sufficient punishment for Mr. Seecharan. He experiences persistent physical agony. His wife, who formerly doubled as his full-time caretaker, is serving a lengthy prison sentence for involvement in the same conspiracy. Imprisonment, on the other hand, is a greater punishment than is necessary, because it entails an unreasonable risk of amputation or death. Mr. Seecharan’s sentence is substantively unreasonable because the Government has made no effort, despite repeated opportunity, to show the Bureau of Prisons can mitigate the possibility that Mr. Seecharan will perish in prison. This shocks the conscience, is manifestly unjust, and is therefore substantively unreasonable.

In closing, Mr. Seecharan recommends that this Court exercise its supervisory power over the district courts by providing instructions for sentencing

physically vulnerable defendants. *See United States v. Jones*, 899 F.2d 1097, 1102 (11th Cir. 1990). The test can be stated simply: where medical evidence is presented by a defendant that suggests prison poses a serious and acute risk to the defendant's health, and the Government makes no effort to contradict that evidence, a district court must order the Government to show that the Bureau of Prisons can care for the defendant. This showing must be based on an individualized assessment of the defendant that pinpoints a facility equipped to meet the defendant's medical needs. Generic Bureau of Prisons literature that reads like a press-release should be deemed presumptively insufficient. Of course, if the Government does elect to provide countervailing evidence of its own to undermine the defendant's evidence, the district court would be free to weigh the evidence and make a determination without an individualized assessment.

CONCLUSION

Mr. Seecharan's physicians believe he might die or lose a limb if imprisoned. The Government's comments at sentencing indicate that it agreed with his physicians and it provided no argument or evidence to the contrary. The Bureau of Prisons' response, based on nothing other than its own word, was that it can "handle anything." Evidently the district court agreed. Based on the record at sentencing, the district court's sentence was not only unreasonable, it was unconscionable. This Court should remand for resentencing.

DATED this 30th day of January, 2013.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was furnished to the Court and all counsel of record via electronic filing through the CM/ECF system on January 30, 2013.

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