10-4791

To Be Argued By:
H. GORDON HALL

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-4791

UNITED STATES OF AMERICA,
Appellee,

-vs-

SERGIO TORRES,
Defendant-Appellant,

MARIO FERMIN, FAUSTO CANDELARIO, EDUARDO ESCALARA TORRES, JUAN GABRIEL ARTEAGA CARTAGENA, HERIBERTO TRINIDAD,
Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

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Statement of Jurisdiction

The district court (Alvin W. Thompson, C.J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on September 5, 2003. Joint Appendix ("JA")283. On September 8, 2003, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA283. On November 7, 2006, the case was remanded to the district court based on the Government's motion for a determination as to whether re-sentencing was appropriate, pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). Government's Appendix ("GA")18. On remand, the district court denied the defendant's request for re-sentencing, and judgment entered on October 25, 2010. JA294. On November 9, 2010, the defendant filed a notice of appeal pursuant to Fed. R. App. P. 4(b).[1] JA294. This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a).

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[1] The defendant mailed a *pro se* notice of appeal on November 8, 2010, which was the fourteenth day after entry of judgment, so the appeal may be considered timely. *See* Fed. R. App. P. 4(b)(1)(A) and 4(c)(1).

Statement of Issue Presented for Review

Whether the district court's decision on a *Crosby* remand that it would not have imposed a different sentence under an advisory Guidelines regime was both procedurally and substantively reasonable.

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Preliminary Statement

In this appeal, the defendant, Sergio Torres, challenges the district court's decision not to re-sentence him after a *Crosby* remand and claims that the sentence originally imposed by the district court was procedurally and

substantively unreasonable. At the original sentencing, the district court imposed a sentence of 235 months' incarceration based on a guideline calculation with which the defendant agreed. On direct appeal, the defendant did not challenge the guideline calculation or the procedural or substantive reasonableness of the sentence.

On *Crosby* remand, however, the defendant sought to be re-sentenced based on unsupported allegations that the sentence originally imposed by the court was procedurally and substantively unreasonable and, specifically, that the court's findings on drug quantity and role in the offense were erroneous. The district court denied the defendant's request for a re-sentencing. In a carefully crafted written decision in which it declined to disturb the original sentence, the court observed that the Government's proffer at sentencing established that the defendant was responsible for at least 50 kilograms of cocaine and that the defendant qualified as a leader in the offense conduct. The court also pointed out that the defendant had expressly agreed to both of these determinations at the original sentencing. After reviewing the procedural aspects of the sentencing as well as the evidence before the court at that time, the court concluded that, had the Sentencing Guidelines been advisory at the time the original sentence was imposed, it still would have imposed the same sentence.

On appeal, the defendant claims that the district court's original sentence was procedurally and substantively unreasonable. He challenges the district court's adoption of the factual determinations contained in the Presentence

Investigation Report ("PSR") that he was responsible for at least 50 kilograms of cocaine in a drug conspiracy and that he acted as a leader during the offense conduct were not adequately supported in the record. He also claims that the 235 month sentence, which was at the bottom of the agreed-upon guideline range, was too high based on a consideration of the factors set forth under 18 U.S.C. § 3553(a). For the reasons stated below, the district court's decision not to re-sentence the defendant should be affirmed.

Statement of the Case

On March 6, 2002, a grand jury returned an indictment charging the defendant and others with conspiracy to distribute cocaine and related violations. Specifically, the indictment charged the defendant in Count One with conspiracy to possess with intent to distribute 5 kilograms or more of cocaine, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)(ii); and in Counts Two and Three with possession of 500 grams or more of cocaine with intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(ii). JA1-JA3; JA272.

On February 18, 2003, the defendant pleaded guilty to Count One of the indictment, charging him with conspiracy to possess with intent to distribute 5 kilograms or more of cocaine, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)(ii). JA281.

On September 3, 2003, the district court sentenced the defendant to 235 months of imprisonment and five years

of supervised release. JA141, JA146, JA283. The defendant filed a timely notice of appeal on September 8, 2003. JA147, JA283.

On February 18, 2004, the defendant's appellate counsel moved to withdraw from representation pursuant to *Anders v. California*, 386 U.S. 738 (1967). GA8. On October 8, 2004, this Court granted the motion to withdraw and the Government's motion for summary affirmance. The Court withheld the mandate, however, pending the anticipated decision of the Supreme Court in *United States v. Booker*, 543 U.S. 220 (2005). GA10. On June 6, 2006, the Government moved for a limited remand, in light of this Court's decision in *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), GA16, which was granted on November 7, 2006. GA17.

On October 25, 2010, the district court denied the defendant's motion for a full re-sentencing and found that it would not have imposed a materially different sentence had the guidelines been advisory. JA261-JA264.

The defendant is currently serving the term of imprisonment imposed by the district court.

Statement of Facts and Proceedings Relevant to this Appeal

A. The PSR

The PSR contained a specific finding that a quantity of at least 50 kilograms, but not more than 150 kilograms of cocaine should be attributed to the defendant by virtue of his participation in the offense to which he pleaded guilty, pursuant to U.S.S.G. § 2D1.1(c)(2). *See* PSR ¶ 17. The PSR also recommended that the defendant be assessed a four-level enhancement for his role in the offense, pursuant to U.S.S.G. § 3B1.1(a). *See* PSR ¶ 19.

Prior to sentencing, the defendant submitted his objections to the PSR. JA54-JA57. In the objection letter, the defendant complained about the characterization of a shooting in which he had been involved in connection with the calculation of his criminal history, corrected the spelling of the names of several of the his family members, corrected the date of an auto accident in which the defendant had been involved, disputed a conclusion in the report concerning the defendant's financial situation, and questioned the report's overall evaluation of the defendant. JA54-JA56. The defendant interposed no objection, however, to the role or quantity findings contained in the report and, in fact, did not even comment on them.

The defendant also submitted a sentencing memorandum on August 5, 2003 in which he outlined several potential grounds for departure, including the existence of extraordinary family circumstances. JA58-

JA62. Again, he made no mention of any objection to the PSR's findings as to drug quantity and role in the offense.

B. The August 6, 2003 sentencing hearing

On August 6, 2003, the defendant appeared in court for sentencing. JA63-JA90. At the outset, defense counsel advised the court that he had reviewed the PSR and its two addenda and had summarized these materials for the defendant. JA67-68. In response to the court's inquiry as to whether there was any objection to the PSR, defense counsel stated that, other than the matters raised in the objection letter and the sentencing memorandum, there were no objections, and there was no need for the court to make separate factual findings. JA67-68. The Government likewise had no objection to the factual statements contained in the PSR. JA69.

After defense counsel read a series of letters into the record, he made reference to his sentencing memorandum, stating:

> Your Honor, we, in addition to providing letters in support of Mr. Torres, provided a sentencing memorandum. And within that memorandum, it essentially lays out, Your Honor, what our argument before the Court is that we were dealing with extraordinary family circumstances.

JA77. Counsel went on to repeat the arguments raised in the sentencing memorandum. JA77-80. He indicated that the defendant was "before the Court accepting

responsibility" and requested a sentence at or near the applicable ten-year statutory mandatory minimum term. JA80. Again, he made no reference to drug quantity or role in the offense.

Subsequently, as defense counsel began to articulate why the defendant was supposedly similarly situated to several co-defendants who previously had been sentenced to terms of imprisonment below the advisory range set forth in the defendant's PSR, the following colloquy took place:

> Mr. Sachs: We would argue that Mr. Torres himself is an intermediary player in terms of his involvement and that his overall participation in this conspiracy, Your Honor, is I think tantamount to be a very, very small piece in an otherwise very large puzzle. And it is because of that, Your Honor, that we would ask that his acceptance of responsibility be given the benefit of the three levels, Your Honor, and that he not be penalized for otherwise leadership responsibilities.
>
> The Court: But he has an adjustment for role in the offense that wasn't objected to.
>
> Mr. Sachs: Your Honor, I beg your pardon?
>
> The Court: Paragraph 19 of the Presentence Report.
>
> Mr. Sachs: Your Honor, if I can take note for the record that the actual role in the offense and his

> categorization as a leader, if I can note for the record, Your Honor, while it may not have been part of the Addendum Two, Your Honor, is in fact contended, Your Honor. We feel –
>
> The Court: You mean contested?
>
> Mr. Sachs: Contested, Your Honor.
>
> The Court: Do you want a hearing on the objection?
>
> Mr. Sachs: Your Honor, we believe that the relevance of his role and his categorization as a leader is not a full four-level increase . . . . Again, Mr. Torres actually accepts the responsibilities for his participation within the conspiracy itself, but we believe that the categorization, Your Honor, which would bump him up a full four levels, Your Honor, is not appropriate . . . . Your Honor, I apologize if the offense level computation wasn't clarified or wasn't talked about in the actual PSR objections itself, but it is the categorization which would bump him up four levels, which we believe is a very big part of this.

JA81-JA83. In response, the Government indicated a willingness to offer evidence on the issue at a later, continued proceeding, and the court called a brief recess to allow the attorneys to confer. JA83-JA84.

Following the recess, defense counsel advised the court that, having consulted with the Government and the defendant "with respect to paragraph 19[‘s four-level role enhancement], Your Honor, my client will withdraw any objections that he has to that and would like to proceed with sentence, Your Honor." JA85.

The court addressed the defendant directly and explained to him the factual underpinnings of the role enhancement finding in the PSR. JA85. Defense counsel consulted further with the defendant and reported to the court, "Your Honor, I believe we're ready to proceed." JA86. The court then addressed the defendant again, describing the importance of the issue and emphasizing that the defendant should take sufficient time to decide what he wanted to do. After the defendant again consulted with his attorney, the court asked, "Would you like more time to think about it, Mr. Torres?" JA87. The defendant replied, "No." JA87. The court reviewed the specific facts in the record which could support the role enhancement and, after allowing further consultation between the defendant and his attorney, stated:

> I can't help but observe that I've looked at Mr. Torres' body language and he seems to be concerned about this point, and it's my responsibility to make sure that he's making a fully informed and fully considered decision not to object to this provision in the Presentence Report. And I want to be absolutely confident that he believes that the adjustment for role in the offense, four-level increase, is what's right in this case. So

> I need Mr. Torres – Mr. Sachs has stood up and said that he's withdrawing the objection on your behalf, but I need to know you're agreeing with that decision. If you need more time to think about it, that's not a problem. And you have to understand that you're making the decision and you're making it once. So if you need more time and you want more time or you think you might want more time, you should take more time.

JA88. Ultimately, defense counsel asked for more time, and the court continued the hearing to September 3, 2003. JA89.

C. The September 3, 2003 sentencing hearing

On September 3, 2003, the court reconvened the sentencing hearing. At the outset, defense counsel advised that "after further consideration, Mr. Torres not only [objects to the role enhancement], but also objects to the quantity involved in terms of the actual evidentiary aspect of any proposed proceeding." JA95-JA96. The court then indicated that it intended to proceed immediately with an evidentiary hearing. JA96. Prior to the start of the evidentiary hearing, both the Government and the court made clear that, at the conclusion of the hearing, the court would make factual findings that could lead to a more or less favorable guideline calculation than the one currently contained in the PSR. JA99, JA103.

At that point, defense counsel conferred with the defendant for approximately 43 minutes while the

Government and the court waited. JA104. Then, both counsel approached for a sidebar at which defense counsel stated,

> My client, after further conversations, chooses to be sentenced at the current level in the PSR. He does not want to proceed forward with evidence. And I just want to make abundantly clear that it is the client's decision to do this, and I want the record to perfectly reflect that is his decision at this point that the Court imposes sentence without the necessity of evidentiary hearing.

JA104.

At the direction of the court, the Government then proffered its evidence as to drug quantity and role in the offense. JA106-JA123. According to the proffer on drug quantity, a Connecticut DEA task force initiated its investigation in 2000 following the arrest of Miguel Machuca and the seizure of substantial quantities of cocaine, crack and heroin in connection with the arrest. JA107. In the wake of the arrest, agents learned of a parallel investigation by state authorities in New York into suspected trafficking of Jose Cosme, a narcotics-trafficking associate of Machuca, whose criminal relationship with Machuca was documented in wire intercepts authorized by New York state courts. JA107. Review of the New York intercept materials disclosed that a cellular telephone held by Jose Ramos was being used in connection with Cosme's distribution activity, which continued after the arrest of Machuca. JA107-JA108.

Additional investigation in Connecticut led to the discovery of another cellular telephone being used by Ramos, and wire intercepts authorized by the U.S. District Court for the District of Connecticut established that Ramos was actively engaged in distributing cocaine and crack in the New Haven, Connecticut area. JA108-09. This was corroborated by a program of undercover purchases of those drugs from Ramos and several of his associates. JA108. The wire intercepts also confirmed that Cosme was in charge of the distribution organization of which Ramos and his associates were part. JA109. In addition, intercepts established that Jose and Hector Martinez of Waterbury, Connecticut were a source of narcotics for the Cosme organization, providing to it multiple kilogram quantities of cocaine on a regular and on-going basis. JA109.

Agents sought and obtained authorization to intercept conversations over telephones being used by the Martinezes, and the resulting intercepts confirmed that Cosme owed the Martinezes hundreds of thousands of dollars for cocaine. JA109. Continued intercepts also established that Cosme had another source for cocaine: Sergio Torres of New Haven, the defendant. JA109.

In late spring or early summer 2001, agents sought and obtained authorization to intercept conversations over a cellular telephone used by the defendant. JA110. These intercepts, and court-authorized intercepts over a series of telephones used by the defendant through the summer and fall, and into the winter of 2001, preserved hundreds, or even thousands, of telephone calls among the defendant

and his associates. JA110. Using codes such as "getting the girls ready to dance," and "how many girls would there be," the defendant and his associates engaged in conversations which surveillances and seizures confirmed concerned the large-scale distribution of cocaine. JA110-JA111.

In one such series of calls in June 2001, Cosme told the defendant that a quantity of cocaine which had been destined for the defendant had been stolen from Cosme. In the same time frame, state police seized a vehicle which had been abandoned on a highway exit/entrance ramp which was found to contain kilogram quantities of cocaine. JA111-12. Cosme had the purported driver of the vehicle call the defendant and claim that the driver had been robbed of the bulk of the cocaine which had been intended for the defendant. Directed by Cosme, the driver told the defendant that, if the defendant would provide the driver with a large quantity of cocaine, the driver would work off the debt to the defendant for the stolen cocaine. JA112.

In a series of intercepted calls that followed, Cosme and the defendant discussed a very substantial debt for the stolen cocaine and the fact that individuals outside Connecticut were awaiting payment for that cocaine. JA112. As the series continued, an individual called Bogan spoke to the defendant about the debt, and calls were intercepted in which the defendant, Cosme and Bogan discussed who among them should bear the loss. In the course of these conversations, Cosme indicated that the amount at issue was some $400,000, which would

correspond to the 20 kilograms of cocaine that Cosme claimed had been stolen. JA112-JA113.

A week after this episode, New York wire intercepts involving Oscar Arteaga, one of the defendant's associates, led to the seizure of 20 kilograms of cocaine from a Ford Windstar vehicle. At the time of the seizure, New York authorities observed a truck registered to the defendant's wife in the immediate vicinity. JA113.

In July 2001, California authorities intercepted conversations involving Bogan, now identified as Ramon Perez and others, who were in California at the time, as they critically discussed having provided 36 kilograms of cocaine to the defendant, and the fact that the defendant had crammed the 36 kilograms into an electronically controlled compartment in a Ford Windstar which was only intended to hold 30 kilograms. JA114.

On August 5 and 6, 2001, federal authorities in New Haven seized approximately nine kilograms of cocaine and $38,000 in currency. In the first seizure, authorities seized from an associate of the defendant's approximately five kilograms of cocaine which was to be provided to co-defendant Mario Fermin, so Fermin could provide the cocaine to a third party. JA114-15. After that seizure, calls involving the defendant's associates were intercepted in which they told the defendant's accountant to move his vehicle from the back of his residence so they could access the area. JA115. A subsequent stop of a van which left the accountant's home yielded the seizure of four to five

kilograms of cocaine and $38,000 from a hidden compartment within the vehicle. JA115.

In March 2002, the defendant was intercepted negotiating the delivery of 15 kilograms of cocaine to an individual in New York. The cocaine was delivered by Luis Arteaga, an associate of the defendant, and was seized by New York authorities. JA116.

Based on the referenced seizures, and on quantities of cocaine and currency referred to in intercepted calls, the Government conservatively estimated the evidence to establish the defendant's direct involvement in the distribution of at least 100 kilograms of cocaine. JA116. In addition, the Government discussed information provided by cooperating witnesses from various parts of the United States who referenced the defendant's involvement in other substantial quantities of cocaine. One individual asserted that the defendant had provided 20 to 100 kilograms of cocaine per month to Cosme over an extended period; another confirmed that Cosme had stolen 20 kilograms of cocaine from the defendant in June or July 2001, which appears to corroborate the defendant's connection to the two kilograms found in an abandoned vehicle in June 2001. JA116-JA117. Finally, during the wire intercepts, the defendant was recorded speaking to narcotics associates in Los Angeles, California; Chicago, Illinois; New Jersey; and Mexico. Several of the correspondents in these calls were arrested during the investigation, and provided information to the effect that they were directing large shipments of cocaine from Mexico, across the United States, to New Haven. JA117.

At the conclusion of this portion of the proffer, the court asked the Government to pause to allow defense counsel to consult with the defendant. Defense counsel then advised that the defendant would agree to the PSR's finding that he was responsible for at least 50 kilograms of cocaine, but less than 150 kilograms. Specifically, defense counsel stated:

> While we do not concur with a great deal of what Mr. Hall proffered, for the purposes of our proceeding, think we can agree that in imposing the guideline of the 36 or the 50 to 150, I believe that Mr. Torres is willing to concur for the purposes of this proceeding that in fact that would be an appropriate range.

JA119.

The court then addressed the defendant directly:

Q: Is that correct, Mr. Torres?

A: Yes.

Q: Did you understand what Mr. Sachs said?

A: Yes.

Q: And was it correct what Mr. Sachs said?

A: Yes.

JA119-JA120.

The court directed government counsel to provide a proffer on the issue of role in the offense. JA120. The Government detailed the identities and roles of several of the narcotics associates who worked for Torres: Oscar Arteaga arranged cocaine deals; Luis Arteaga facilitated deals and transported cocaine; Jose Santos stored cocaine; Martin Arteaga facilitated deals; Alberto Torres facilitated deals; Ramon Morrobel facilitated deals; Juan Arteaga transported cocaine; Julio Arteaga transported cocaine; Ramon Cervantes arranged the storage of cocaine; and Sergio Segura arranged the storage of cocaine. JA120-JA121. The Government also reminded the court that the proffer regarding the quantity of cocaine involved in the defendant's offense conduct reflected long-term international narcotics relationships between the defendant, his suppliers and his customers, and an on-going transcontinental narcotics transportation network. JA122.

At the conclusion of the proffer, defense counsel conferred with the defendant, and the following colloquy took place:

> Mr. Sachs: Your Honor, with regard to role in the offense, Mr. Torres accepts responsibility as set forth in the Presentence Report.
>
> The Court: Is that correct, Mr. Torres?
>
> The Defendant: Yes.

> The Court: . . . . And I'm satisfied that the defendant has knowingly and intelligently decided not to object to the [drug quantity and role in the offense provisions] of the Presentence Report. You understand that, Mr. Torres?
>
> The Defendant: Yes, Your Honor.
>
> The Court: In other words, we've talked about this for quite a long time. We've had the government say what the evidence would be because I wanted you to know, I wanted the record to be clear, but my point is now that we spent this much time talking about it, I want to be certain that you know what you're doing. Are you confident that you know what you're doing in terms of deciding that you're not going to object to [the drug quantity and role in the offense provisions] in the Presentence Report?
>
> The Defendant: Yes, Your Honor.

JA123-JA124.

The court then went on to review with the defendant, in detail, the resulting guideline calculation, including the base offense level as determined by the drug quantity and the role enhancement, and asked the defendant whether he understood the calculation. JA125. The defendant replied, "Yes, but I didn't want to be accused of 150." JA125. The court said, "More than 50," and the defendant replied, "I don't believe I had more than 50." JA125.

The court then turned to the role in the offense adjustment:

> Q: Do you understand, Mr. Torres, that there are four offense levels added for role in the offense? And they are added because the Presentence Report states that you were a leader in the conspiracy which involved more than five participants. And it names certain people, it says it includes those people. And a participant is someone who is criminally responsible for conduct. Do you understand that? Do you understand what I am saying, first of all?
>
> A: Yes.
>
> Q: Okay. And my question is: Are you in agreement that you were a leader in the conspiracy which involved more than five participants?
>
> A: Yes.
>
> Q: So you agree that that four-level increase is appropriate? I'm not asking if you like it.
>
> A: Yes, Your Honor, I don't have anything else to say.

JA127-JA128.

The court announced a half-hour recess and its intention to return to revisit the drug quantity issue, saying

to the defendant, "Let me emphasize, Mr. Torres, if we come back and you tell me, yes, I was responsible for at least 50 kilograms of cocaine, that's it. You won't be able to come back and tell me next week, 'I changed my mind.' You understand that?" JA129. The defendant replied in the affirmative. JA129.

Following the recess, defense counsel indicated that the defendant agreed with the quantity recommendation in the PSR. He stated, "I believe that my client is willing to accept the Presentence Report as it is relative to quantity, Your Honor." JA129. The court again addressed the defendant directly on the issue:

> Q: And Mr. Torres, can I inquire of you, sir, what your position is on the Presentence Report in terms of paragraph 17, which says that there's a Base Offense Level of 36 for offenses involving the distribution of between 50 and 150 kilograms of cocaine? Is that an accurate statement, sir, or do you disagree with it?
>
> A: Yes, Your Honor.
>
> Q: Yes, you dis —
>
> A: Yes.
>
> Q: Yes it is accurate? Or yes, you disagree?
>
> A: Yes, that I agree, Your Honor.

Q: You agree?

A: Yes.

Q: And you've had enough time to think about that?

A: Yes, Your Honor.

Q: And I need to know that this is your decision, that it's not a decision that your lawyer has forced you to make. Is it your decision?

A: Yes.

JA129-JA130.

The court then adopted the recommendations in the PSR, concluding that the total offense level was 37, and the Criminal History Category was II, resulting in a recommended guideline range of 235 to 293 months' incarceration, five years' supervised release, a $20,000 to $4 million fine and a special assessment of $100. JA130. The court invited comments from defense counsel, who reviewed the sentencing arguments he had advanced in his sentencing memorandum and called upon a Torres family member to speak on behalf of the defendant. JA131-JA135. The defendant also addressed the court. JA135. Government counsel then addressed the court and opposed the departure grounds proposed by the defendant. JA135-JA137.

The district court then recited the sentencing factors set forth in 18 U.S.C. § 3553, and related that it had considered each of those factors and attempted to balance them in arriving at a sentence for the defendant. JA138. The court related the matters it had reviewed and considered in its deliberations: the PSR and its attachments; the remarks of defense counsel, the defendant and his daughter, who spoke in court; the remarks of Government counsel; and the in-court discussions, including those of August 6, relating to the drug quantity and role issues. JA138.

The court then reviewed each of the purposes a criminal sentence may serve, and related them to the defendant's case. JA139-40. With specific reference to the defendant, the court indicated it did not feel that protection of the public from the defendant or specific deterrence of the defendant from future misconduct were serious issues in his case. JA139. Rather, the court stated that it was particularly aware of a need for just punishment and general deterrence. JA140. Turning to defense counsel's departure request based on family circumstances and other factors, the court indicated that those circumstances did not rise to the standard for it to grant the departure, but also observed that, even had the standard been met, it would not exercise its discretion to depart, due to the seriousness of the offense. JA141.

The court then imposed a sentence of 235 months of incarceration, stating:

> I am imposing a sentence at the bottom of the range because I believe it adequately serves the purposes of just punishment and general deterrence, and this is not a situation where a higher sentence is needed in order to afford specific deterrence or protecting society.

JA141. In addition to the sentence of imprisonment, the court imposed a term of five years of supervised release, no fine, and a $100 special assessment. JA141-43. Judgment entered accordingly. JA283.

D. Direct appeal

On September 8, 2003, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA283. On February 18, 2004, appellate counsel for the defendant filed a brief under *Anders v. California*, 386 U.S. 738 (1967), and moved to be relieved as counsel. GA7. On March 23, 2004, the Government moved for summary affirmance. GA8. On April 22, 2004, the defendant filed a *pro se* motion seeking appointment of new counsel for the purpose of raising claims that (1) the Government had withheld exculpatory evidence, and (2) his trial counsel had been ineffective in failing to oppose the determination by the district court to impose an enhancement for role in the offense. GA8.

On October 8, 2004, the Court filed an order granting the *Anders* motion and the Government's motion for summary affirmance, and denying the *pro se* motion, but directing defense counsel to file a letter with the Court as

to whether the Supreme Court's decision in *Blakely v. Washington*, 124 S.Ct. 2531 (2004) or related decisions raised any non-frivolous issues in the case. GA10. On November 7, 2006, the Court remanded the case to the district court based on a motion by the Government to allow the district court to determine whether a full re-sentencing was appropriate under *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). GA17.

E. *Crosby* remand

On remand, the district court denied the defendant's request for re-sentencing. In an eight-page written decision, the court recited the direction of this Court in *Crosby* regarding the procedures and factors to be considered on a remand. JA258-59. The court then turned to the defendant's claim that his sentence was unreasonable because he did not freely admit to the drug quantity and role in the offense determinations of the court. JA259. The court indicated that, treating the guidelines as advisory, after a review of the arguments defense counsel submitted in writing on the remand, the transcripts of the August 6 and September 3 hearings, and the sentencing factors set forth in 18 U.S.C. § 3553(a), it was unpersuaded by the defendant's arguments.

The court explained that, in the August 6th hearing, the defendant had objected initially to the four-level role enhancement, but had withdrawn the objection through counsel. Still, because the court sensed that the defendant was uncomfortable with the withdrawal, the court adjourned the sentencing to a give him more time to

consider his position. JA260. The court then reviewed the September 3rd sentencing hearing, during which the defendant initially objected to both the role enhancement and the drug quantity finding. JA260. The court recalled the fact that the parties had specifically discussed the necessity of holding an evidentiary hearing on role and quantity and the fact that the results of the hearing could produce a more or less favorable guideline calculation than the one set forth in the PSR. JA261. The court stated that, following lengthy discussions, defense counsel indicated unequivocally that the defendant was withdrawing his objections on both issues. JA261. Nonetheless, the court directed Government counsel to provide a detailed proffer of its evidence on both issues. JA261.

The court then reviewed the details of the Government proffer as to quantity:

> There was an extensive proffer by the government as to evidence that would have shown the defendant's involvement with 40 kilograms of cocaine in June 2001, another 36 kilograms in July 2001, another 9 kilograms in August 2001 and then another 15 kilograms in March 2002. The government then observed that it would thus establish "right off the bat 100 kilograms of cocaine," . . . and that it expected "The more you dig and look at all these calls [by the defendant] and make the associations among the New York and Chicago and Los Angeles people," . . . there would be a "huge amount of cocaine out there."

JA261-62. At that point, the defendant advised the court directly that he was agreeing to the quantity finding contained in the PSR. JA262. He affirmed this agreement again after being explicitly told that he would not be able to "change his mind later." JA263. The court asked him directly whether the PSR was correct in attributing between 50 and 150 kilograms of cocaine to his conduct, and he said that it was. JA263-JA264.

The court also discussed the government's proffer as to the defendant's role in the offense, stating, "It named seven people and explained that 'the special agent would testify that while Mr. Torres often told these people what to do, and while these people told Mr. Torres what they were doing, these people never told Mr. Torres what to do.'" JA263. The court recalled, "When the court asked whether there was any issue with respect to the four-level increase for role in the offense, the defendant agreed it was appropriate." JA263.

Based on this review of the record, the court confirmed its view that the defendant knowingly and intelligently decided not to object to the drug quantity and role recommendations it ultimately adopted. The court also explained that, even had the defendant objected to these findings, it was satisfied that the record supported both. JA264. "In any event, the court was satisfied then, and is satisfied now, based on the proffer by the government and the defendant's responses to the court's inquiries, that those parts of the Guideline calculations are accurate and supported by the record." JA264.

As to the defendant's departure arguments, the court indicated that it remained of the view that

> the defendant was a large-scale cocaine distributor and a sentence of 235 months best served the purposes of just punishment and general deterrence. The court believes the sentence 235 months was reasonable under the totality of the circumstances, considered in light of all the factors in § 3553(c), and the court would have imposed the same sentence had the Sentencing Guidelines been advisory.

JA265. The court then denied the motion to re-sentence. JA265.

Summary of Argument

The district court properly followed the sentencing requirements for a *Crosby* remand. After soliciting and considering written arguments from the parties, it properly exercised its discretion in determining that it would have imposed the same sentence had the Sentencing Guidelines been advisory at the time the previous sentence was imposed. The court explained that it had previously gone through an analysis of the § 3553(a) factors and concluded that 235 months of incarceration was the appropriate sentence.

In addition, the defendant waived at the original sentencing any challenge to the factual findings contained in the PSR by expressly agreeing to those facts.

Specifically, the defendant indicated that no evidentiary hearing was necessary and that the PSR's conclusion as to drug quantity and role were correct. Moreover, the district court did not commit plain error in adopting the factual findings in the PSR as those findings were amply supported by the record.

Argument

I. The district court's decision, on the *Crosby* remand, that it would not have imposed a different sentence under an advisory Guidelines regime was both procedurally and substantively reasonable.

A. Relevant facts

The relevant facts are set forth above in the Statement of Facts.

B. Governing law and standard of review

1. Reviewing sentence for reasonableness

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the United States Sentencing Guidelines as written, violate the Sixth Amendment principles articulated in *Blakely v. Washington*, 124 S. Ct. 2531 (2004). As a remedy, the Court severed and excised the statutory provision making the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), thus declaring the Guidelines "effectively advisory." This results in a system in which

the district court, while required to consider the Guidelines, may impose a sentence within the statutory maximum penalty for the offense of conviction. Such a sentence will be subject to appellate review for "reasonableness."

This Court summarized the impact of *Booker* as follows:

> First, the guidelines are no longer mandatory. Second, the sentencing judge must consider the guidelines and all of the other facts listed in Section 3553(a). Third, consideration of the guidelines will normally require determination of the applicable guideline range, or at least identification of the arguably applicable ranges, and consideration of applicable policy statements. Fourth, the sentencing judge should decide, after considering the guidelines and all other factors set forth in Section 3553(a), whether (i) to impose the sentence that would have been imposed under the Guidelines, i.e., a sentence within the applicable guidelines range, or within permissible departure authority, or (ii) to impose a non-Guideline sentence. Fifth, the sentencing judge is entitled to find all the facts appropriate for determining either a guideline sentence or a non-guideline sentence.

Crosby, 397 F.3d at 103.

After the Supreme Court's holding in *Booker* rendered the Sentencing Guidelines advisory rather than mandatory,

a sentencing judge is required to: "(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence." *See United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006); *Crosby*, 397 F.3d at 113. Consideration of the guidelines range requires a sentencing court to calculate the range and put the calculation on the record. *See Fernandez*, 443 F.3d at 29. The requirement that the district court consider the section 3553(a) factors, however, does not require the judge to precisely identify the factors on the record or address specific arguments about how the factors should be implemented. *Id.*; *Rita v. United States*, 551 U.S. 338, 356-59 (2007). There is no "rigorous requirement of specific articulation by the sentencing judge." *Crosby*, 397 F.3d at 113. And although the judge must state in open court the reasons behind the given sentence, 18 U.S.C. §3553(c), "robotic incantations" are not required. *See*, *e.g. United States v. Goffi*, 446 F.3d 319, 321 (2d Cir. 2006). "As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, [this Court] will accept that the requisite consideration has occurred." *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005).

In *Crosby*, this Court determined that it would remand most pending appeals involving challenges to sentences imposed prior to *Booker* "not for the purpose of a required resentencing, but only for the more limited purpose of

permitting the sentencing judge to determine whether to resentence, . . . and if so, to resentence." *Crosby*, 397 F. 3d at 117. Thus, this Court stated that a remand would be necessary to "permit the district court to determine whether it would have imposed a non-trivially different sentence . . . if it had known that the Guidelines are merely advisory." *United States v. Carr*, 557 F. 3d 93, 98-99 (2d Cir. 2009). In making that threshold determination upon a *Crosby* remand, "the District Court should obtain the views of counsel, at least in writing, but 'need not' require the presence of the defendant. . . ." *Crosby*, 397 F. 3d. at 120 (internal citations omitted).

"Upon reaching its decision (with or without a hearing) whether to resentence, the district court should either place on the record a decision not to resentence, with an appropriate explanation, or vacate the sentence and, with the defendant present, resentence in conformity with the [Sentencing Reform Act], *Booker/Fanfan*, and [the *Crosby*] opinion, including an appropriate explanation, see § 3553(c)." *Id*. A hearing pursuant to Rule 32 of the Federal Rules of Criminal Procedure ("Rule 32") is only required if the district court actually decides to resentence the defendant. *See Id*.

This Court still "review[s] a sentence for reasonableness even after a District Court declines to resentence pursuant to *Crosby*." *United States v. Williams*, 475 F.3d 468, 474 (2d Cir. 2007). Reasonableness review has generally been divided into procedural and substantive reasonableness. *See United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc). For a sentence to be

procedurally reasonable, the sentencing court must calculate the guideline range, treat the guideline range as advisory, and consider the range along with the other § 3553(a) factors. *Id.* Where a defendant fails to object at the time of sentencing to the district court's alleged procedural error in not fully considering the § 3553(a) factors or in making a mistake in the guideline calculation, this Court reviews the claim for plain error. *See United States v. Villafuerte*, 502 F.3d 204, 208 (2d Cir. 2007). In the context of a *Crosby* remand, any claimed error in the procedure for selecting the original sentence under the formerly-mandatory Guidelines would be harmless, and not prejudicial under plain error analysis, if the district court decided on remand, in full compliance with applicable requirements that, post-*Booker,* the sentence would have been the same as the one originally imposed. *See Williams*, 475 F.3d at 475 (citing *Crosby*, 397 F.3d at 118).

The Supreme Court has reaffirmed that the reasonableness standard requires review of sentencing challenges under an abuse-of-discretion standard. *See Gall v. United States*, 552 U.S. 38, 46 (2007). Although this Court has declined to adopt a formal presumption that a within-guidelines sentence is reasonable, it has "recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Fernandez*, 443 F.3d at 27; *see also Rita*, 551 U.S. at 347-51 (holding that courts of appeals may apply presumption of reasonableness to a sentence within the applicable Sentencing Guidelines

range); *United States v. Rattoballi*, 452 F.3d 127, 133 (2d Cir. 2006) ("In calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.").

Further, the Court has recognized that "[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge 'exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.'" *Fernandez*, 443 F.3d at 27 (citations omitted). A sentence is substantively unreasonable only in the "rare case" where the sentence would "damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 140 (2010). This Court recently likened its substantive review to "the consideration of a motion for a new criminal jury trial, which should be granted only when the jury's verdict was 'manifestly unjust,' and to the determination of intentional torts by state actors, which should be found only if the alleged tor 'shocks the conscience.'" *United States v. Dorvee*, 616 F.3d 174, 183 (2d Cir. 2010) (quoting *Rigas*, 583 F.3d at 122-23). On review, this Court will set aside only "those outlier sentences that reflect actual abuse of a

district court's considerable sentencing discretion." *United States v. Jones*, 531 F.3d 163, 174 (2d Cir. 2008).

2. Determination of drug quantity

A district court is expected to "begin all sentencing proceedings by correctly calculating the applicable Guidelines range," and to use that range as "the starting point and the initial benchmark" for its decision. *See Gall*, 552 U.S. at 49. Under the Sentencing Guidelines, the court must begin by determining the defendant's "base offense level," U.S.S.G. § 1B1.1, which is determined based on:

> (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity . . . .

U.S.S.G. § 1B1.3(a)(1).

In a drug case, this guideline requires a determination of the quantity of drugs attributable to the defendant, and in the case of a drug conspiracy, the quantity reasonably foreseeable to him. *See Jones*, 531 F.3d at 174-75; *United States v. Payne*, 591 F.3d 46, 70 (2d Cir.), *cert. denied*,

131 S. Ct. 74 (2010). "The quantity of drugs attributable to a defendant is a question of fact" that the government must prove by a preponderance of the evidence. *Jones*, 531 F.3d at 175.

The guidelines provide that "[w]here there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance." U.S.S.G. § 2D1.1, comment. (n.12); *see also Jones*, 531 F.3d at 175. All transactions entered into by a defendant's coconspirators may be attributable to him, if they were known to him or reasonably foreseeable by him. *See United States v. Miller*, 116 F.3d 641, 684 (2d Cir. 1997) (citing U.S.S.G. § 1B1.3, comment. (n.1)); *United States v. Podlog*, 35 F.3d 699, 706 (2d Cir. 1994). "In deciding quantity involved, any appropriate evidence may be considered, or, in other words, a sentencing court may rely on any information it knows about." *United States v. Jones*, 30 F.3d 276, 286 (2d Cir. 1994) (citations omitted).

3. Role in the offense

Under U.S.S.G. § 3B1.1, a defendant may receive an upward adjustment in his adjusted offense level if he played an aggravated role in the offense. Where a defendant is "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive," the adjusted offense level increases by four levels. *See id.*, § 3B1.1(a). Where the defendant is "a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or

was otherwise extensive," the adjusted offense level increases by three levels. *See id.*, § 3B1.1(b). Where the defendant is "an organizer, leader, manager or supervisor in any criminal activity [involving more than one participant]," the adjusted offense level increases by two levels. *See id.*, § 3B1.1(c). "In assessing whether a criminal activity "involved five or more participants," only knowing participants are included." *United States v. Paccione*, 202 F.3d 622, 624 (2d Cir. 2000). "By contrast, in assessing whether a criminal activity is 'otherwise extensive,' unknowing participants in the scheme may be included as well." *Id.*

In distinguishing between an organizer and a mere manager, the district court should consider "the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." U.S.S.G. § 3B1.1, comment. (n.4). "Whether a defendant is considered a leader depends upon the degree of discretion exercised by him, the nature and degree of his participation in planning or organizing the offense, and the degree of control and authority exercised over the other members of the conspiracy." *United States v. Beaulieu*, 959 F.2d 375, 379-80 (2d Cir. 1992). The Government must prove by a preponderance of the evidence that a defendant qualifies for a role enhancement. *See United States v. Molina*, 356 F.3d 269, 274 (2d Cir. 2004).

"Before imposing a role adjustment, the sentencing court must make specific findings as to why a particular subsection of § 3B1.1 adjustment applies." *United States v. Ware*, 577 F.3d 442, 452 (2d Cir. 2009); *see also Molina*, 356 F.3d at 275. "A district court satisfies its obligation to make the requisite specific factual findings when it explicitly adopts the factual findings set forth in the presentence report." *Molina*, 356 F.3d at 276. If there are disputed facts, the district court must make factual findings for appellate review. *See United States v. Thompson*, 76 F.3d 442, 456 (2d Cir. 1996).

4. Plain error

A defendant may – by inaction or omission – forfeit a legal claim, for example, by simply failing to lodge an objection at the appropriate time in the district court. Where a defendant has forfeited a legal claim, this Court engages in "plain error" review pursuant to Fed. R. Crim. P. 52(b). Applying this standard, "an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute'; (3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 129 S. Ct. 1423, 1429 (2009)); *see also Johnson v. United States*, 520 U.S. 461, 467 (1997); *United States v. Cotton*, 535 U.S.

625, 631-32 (2002); *United States v. Deandrade*, 600 F.3d 115, 119 (2d Cir.), *cert. denied*, 130 S. Ct. 2394 (2010). "To be plain, the error must be clear or obvious . . . at the time of appellate review." *Villafuerte*, 502 F.3d at 209 (internal citations omitted). "In fact, the threshold is high enough that the Supreme Court has stated that the error must be so plain that the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it." *Id.* (internal quotation marks omitted).

To "affect substantial rights," an error must have been prejudicial and affected the outcome of the district court proceedings. *United States v. Olano*, 507 U.S. 725, 734 (1993). This language used in plain error review is the same as that used for harmless error review of preserved claims, with one important distinction: In plain error review, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.*

This Court has made clear that "plain error" review "is a very stringent standard requiring a serious injustice or a conviction in a manner inconsistent with fairness and integrity of judicial proceedings." *United States v. Walsh*, 194 F.3d 37, 53 (2d Cir. 1999) (internal quotation marks omitted). Indeed, "[t]he error must be so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *United States v. Plitman*, 194 F.3d 59, 63 (2d Cir. 1999) (internal quotation marks omitted).

5. Waiver

A defendant may do more than merely forfeit a claim of error. A defendant may – through his words, his conduct, or by operation of law – waive a claim, so that this Court will altogether decline to adjudicate that claim of error on appeal. *See Olano*, 507 U.S. at 733; *United States v. Polouizzi*, 564 F.3d 142, 153 (2d Cir. 2009); *United States v. Hertular*, 562 F.3d 433, 444 (2d Cir. 2009); *United States v. Quinones*, 511 F.3d 289, 320-21 (2d Cir. 2007); *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995). "Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *Olano*, 507 U.S. at 733 (internal quotation marks omitted). "The law is well established that if, 'as a tactical matter,' a party raises no objection to a purported error, such inaction 'constitutes a true "waiver" which will negate even plain error review.'" *Quinones*, 511 F.3d at 321 (quoting *Yu-Leung*, 51 F.3d at 1122) (footnote omitted).

C. Discussion

1. The court's decision not to re-sentence the defendant was reasonable

In its ruling of October 25, 2010 denying re-sentencing after remand, the district court provided a detailed and undeniably "appropriate explanation" for its determination. *See Crosby*, 397 F.3d at 120. The court explained that it weighed the arguments advanced by the

defendant for a re-sentencing, reviewed the transcripts of the two hearings on which the sentencing was based, and considered the sentencing factors set forth in 18 U.S.C. § 3553(a). JA260. Treating the guidelines as advisory, the court remained unpersuaded that it had imposed an unreasonable sentence. JA260.

With respect to the two issues raised by the defendant on remand, drug quantity and role-in-the-offense, the court undertook a review of the record, including the detailed proffer of the Government at the sentencing, JA261-62, and the agreement of the defendant and his counsel to the guideline calculation ultimately used by the court. JA260-61. Based on its review of the record, the court reaffirmed its conviction that the defendant knowingly and intelligently withheld objection to the recommended guideline calculations. JA264.

Moreover, the court properly and appropriately concluded on review that, even had the defendant objected to the role and quantity aspects of the guideline calculation, the court remained satisfied that those portions of the calculations "are accurate and are supported by the record." JA264. Most importantly, the court concluded that, based on the whole record and the applicable law, it "would have imposed the same sentence had the Sentencing Guidelines been advisory." JA265.

Having scrupulously followed the prescription for proceedings on remand provided by this Court, *see Crosby*, 397 F.3d at 120, the district court fully and reasonably discharged its responsibility in this case, and

there was no error in the court's determination not to re-sentence the defendant.

2. The underlying sentence was procedurally and substantively reasonable

For the first time, the defendant challenges the procedural and substantive reasonableness of the sentence originally imposed by the court. The record in this case establishes that, on both scores, the defendant's claims are without merit.

a. Procedural reasonableness

This Court's review of the procedural reasonableness of a sentence entails whether the district court has failed to calculate, or has improperly calculated, the guideline range; treated the Sentencing Guidelines as mandatory; failed to consider the factors set forth in 18 U.S.C. § 3553(a); selected a sentence based on clearly erroneous facts; or failed to adequately explain the chosen sentence. *See Gall* 552 U.S. at 51; *see also Jones*, 531 F.3d at 170. Because the defendant did not challenge the district court's guideline calculation below or otherwise take issue with the procedure used by the court, his claim here is reviewed for plain error.

As set forth in detail above, the district court's calculation of the defendant's guidelines range was the subject of extensive discussion at his sentencing, and, ultimately, the defendant agreed with the court's calculation. JA123-24; 127-28. Indeed, even now, the

defendant does not challenge the calculations themselves. Therefore, given this record, there is no demonstrable error or impropriety in the calculation of the defendant's guideline range by the district court.

The defendant makes two specific claims of procedural error which relate to factual issues that affected the guideline calculation: drug quantity and role in the offense. Were these areas disputed at sentencing, the district court would have been required to make findings with sufficient clarity to permit meaningful appellate review. *See United States v. Skys*, 637 F.3d 146, 152 (2d Cir. 2010). Because the defendant agreed to both the quantity and role findings contained in the PSR, however, the court permissibly adopted those factual findings. *See United States v. Carter*, 489 F.3d 528, 539 (2d Cir. 2007).

In fact, the record clearly establishes that the defendant expressly waived any challenges to these factual findings. The court personally advised the defendant of the consequences of his waiver of the objections and the potential consequences of going forward with an evidentiary hearing, JA125, and the defendant made the strategic decision not to challenge the PSR's factual findings. Accordingly, his waiver was "not only . . . voluntary but . . . [a] knowing, intelligent act[] done with sufficient awareness of the relevant circumstances and likely consequences." *Plitman*, 194 F.3d at 63 (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970)). Because the defendant knowingly and intelligently waived any challenge to the guideline calculation set forth in the PSR, and the findings supporting that calculation, he is

precluded from raising these issues on appeal. *See Quinones*, 511 F.3d at 321 ("The law is well established that if, as a tactical matter, a party raises no objection to a purported error, such inaction constitutes a true waiver which will negate even plain error review.") (internal quotation marks omitted).

Even if the defendant had not waived any objection, however, the district court did not commit plain error in specifically adopted the quantity and role findings in the PSR, as both were amply supported in the record. According to the Government's proffer on drug quantity, which the defendant did not dispute, at a minimum, the following quantities were attributable to the defendant: (1) 20 kilograms of cocaine stolen from co-defendant Cosme in June 2001, for which the defendant was responsible and owed $400,000, JA111-13; (2) 20 kilograms seized by law enforcement in New York during June 2001, JA113; (3) 36 kilograms of cocaine provided to the defendant by co-conspirators, as discussed in intercepted conversations in July 2001, JA114; (4) 9 kilograms of cocaine and $38,000 in currency seized in New Haven in August 2001 from the defendant's subordinates, JA115; and (5) 15 kilograms of cocaine seized from another of the defendant's subordinates in March 2002, JA116, for a total of at least 100 kilograms of cocaine. In addition, the Government proffered evidence showing that the defendant was involved in the distribution of substantial additional quantities of cocaine. JA119. Thus, the district court did not commit plain error in finding that the quantity of cocaine attributable to the defendant's conduct was between 50 and 150 kilograms.

As to role, the Government's proffer reflected at least ten named individuals who worked for the defendant in his cocaine distribution operation, as well as their functions. JA120-JA121. According to the proffer, not only did the defendant oversee the ten named individuals, he worked with others to coordinate shipments of cocaine to Connecticut, JA110-11, and talked with a cocaine supplier concerning who was responsible for the loss of $400,000 worth of cocaine. JA112-13. Moreover, the breadth of the drug trafficking network with which the defendant was associated was significant; court-authorized wire intercepts document his cocaine connections, not only in Connecticut, but also in New York, New Jersey, Illinois, California and Mexico. JA117. Thus, the district court did not commit plain error in adopting the leadership enhancement set forth in the PSR. JA127-28.

The defendant also claims that the court failed to consider properly the § 3553(a) factors. With respect to these factors, however, the sentencing transcript reveals that the district court painstakingly and thoughtfully considered each of them. Prior to imposing sentence, the court recited each of the statutory factors, and said that it had considered each of them. JA137-38; *see Fernandez*, 443 F.3d at 30 (presuming that court has considered all 3553(a) factors, in the absence of record evidence suggesting otherwise). The court then went on to explain to the defendant the materials it weighed in connection with its evaluation of those factors: the PSR, including letters in support of the defendant which were attached to it; the remarks of defense and Government counsel, and of the defendant's daughter, who addressed the court; and the

in-court discussions touching upon the particulars of the offense conduct and the defendant's role in it. JA138.

The court indicated that it had considered the various purposes and goals of a criminal sentence. In connection with the goal of punishment, the court noted that punishment must be just, and not unduly different from sentences imposed on other, similarly situated defendants who have committed like offenses. JA139.

The court observed that another purpose of sentencing can be to isolate a defendant from society for society's protection, which, if applicable, would call for a relatively longer sentence, but the court stated its conclusion that this should not be a factor in the sentencing of the defendant. Similarly, the court discounted the need in the defendant's case for a relatively longer sentence to act as a specific deterrent. JA139.

Ultimately, the court rested its analysis upon the need for punishment and general deterrence. Reflecting on the remarks of the defendant's daughter, the court concluded,

> And the purposes that have to be served are punishing you for what you did, which is a very, very serious crime. It's a crime that has terrible consequences for our society. There are lots of families that aren't as beautiful as yours because the children have been using drugs. And we need to also have general deterrence and the Sentencing Guidelines, I believe, provide that in your case.

JA140. The court imposed a sentence of 235 months, stating, "I am imposing a sentence at the bottom of the range because I believe it adequately serves the purposes of just punishment and general deterrence, and this is not a situation where a higher sentence is needed in order to afford specific deterrence or protecting society." JA141. Thus, the court did not "fall back on the Guidelines." Def.'s Brief at 21. Rather, it employed them, and tailored their application to the specific sentencing needs presented by the defendant, as articulated by the court.

The defendant makes several specific claims with respect to his more general assertion that the court did not adequately address the § 3553(a) factors. First, the defendant argues that the court did not provide sufficient justification for its rejection of his arguments that a downward departure was warranted for extraordinary family circumstances. *See* Def.'s Brief at 20. The court had the benefit of the memorandum filed by defense counsel in which the argument was made, as well as the comments of defense counsel at sentencing. JA138. In rejecting the argument, the court explained that it concluded that such a departure was unwarranted because the defendant simply did not meet the departure standard. JA141. The court also stated, "I must say, based on what I've come to learn about the offense conduct, even if you did meet the standard for a downward departure, I would not choose to exercise my discretion to depart downward in this case because I do view the offense conduct as so serious." JA141. This explanation provided sufficient reasons to justify the court's decision not to depart.

The defendant also argues that the court failed to consider "the 'unwarranted disparities' argument" of 18 U.S.C. 3553(a)(6). *See* Def.'s Brief at 22. In explaining its sentence, however, the court specifically stated that the "first and foremost" purpose of a criminal sentence was to "provide just punishment," which means that the sentence "not be unduly different from sentences received by defendants with similar records who have been convicted of similar conduct." JA139. From these comments, it is clear that the court did consider unwarranted sentencing disparities in imposing its sentence.

For the first time on appeal and having never proffered these facts to the district court either at the original sentencing or in his motion for re-sentencing on the *Crosby* remand, the defendant cites several federal prosecutions with which his appellate attorney is apparently familiar and which he claims show that his guideline sentence was disparate. *See* Def.'s Brief at 24. Even the descriptions that he himself provides for these cases, however, do not support his argument. According to the defendant, Alex Luna was sentenced to a 30 year term for leading a violent conspiracy over the course of three years; Frank Estrada was sentenced to 29 years on conspiracy, murder and associated charges, following his cooperation with the government; Kevin Burden was sentenced to a life term for RICO and VICAR convictions; Edwin Sanchez was sentenced to just less than 25 years for selling heroin over a ten-year period; and Isni Gjuraj received a 320-month term for selling approximately 4.5 kilograms of crack and threatening to kill a witness. In contrast, the defendant was sentenced to a term of less

than 20 years for leading a cocaine conspiracy involving from 50 to 150 kilograms of cocaine. Even accepting the defendant's factual statements as accurate and without knowing more information about these other cases, it is difficult to understand how the defendant's sentence is disparate. In all of the cases cited by the defendant, the defendants received longer, and sometimes significantly longer, terms of incarceration than the defendant, who was the leader of an extensive and lucrative cocaine enterprise. In terms of procedural reasonableness, which is the context for the defendant's argument, the sentencing transcript clearly demonstrates that the district court understood the most important purpose of its sentence to be the imposition of a sentence which did not create unwarranted disparities between similarly situated defendants.[2]

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[2] The defendant also recites, accurately, that New Haven Police Lieutenant William White was charged with and convicted of federal corruption offenses years after the defendant was sentenced, and that this fact was not considered by the court at sentencing or after remand. *See* Def.'s Brief at 17. The defendant, however, in both his post-remand sentencing memo and his opening brief fails to point to any connection whatsoever between the conviction of Lieutenant White and any aspect of his sentence. More specifically, the defendant has failed to articulate how the sentencing court should have weighed this unrelated conviction and in what way it was possibly relevant to any of the § 3553(a) factors in the defendant's case.

b. Substantive reasonableness

Substantive reasonableness review is intended to provide relief from sentences that are "shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *Dorvee*, 616 F.3d at 183. On review, this Court will set aside only "those outlier sentences that reflect actual abuse of a district court's considerable sentencing discretion." *Jones*, 531 F.3d at 174.

Here, the district court imposed its sentence on the defendant only after carefully considering the factors enumerated in § 3553(a). The nature and circumstances of the offense and the recommended guideline range were the subject of extensive discussion and consideration during the hearing at which the sentencing was imposed. Prior to imposing sentence, the court addressed each of the purposes of a sentence, and explained to the defendant why punishment and general deterrence were of particular significance in fashioning the sentence in his case, and protection of the public and specific deterrence were not. JA139-JA140. The court declined to depart from the recommended Guideline range because it did not feel a departure was warranted, and commented that it would have declined to depart in any event due to the seriousness nature of the offense conduct. JA141. The court selected a sentence at the bottom of the recommended guideline range on the basis that it adequately served the purposes it had identified as being paramount: just punishment and deterrence. And the court explained that a higher sentence was not needed to serve the purposes of specific deterrence and public protection, which it had determined

not to be of particular concern in the defendant's case. JA141.

While the court's selection of a sentence within the recommended guideline range is not a guarantee of substantive reasonableness, *see Fernandez*, 443 F.3d at 27, this particularized tailoring of the sentence the court originally imposed is a strong indication that it should not be viewed as "shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *Rigas*, 583 F.3d at 123; *see also Gall*, 552 U.S. at 46-47. In support of his argument to the contrary, the defendant appears simply to repeat the same arguments he raised in his challenge to the procedural reasonableness of the sentence, arguments which he raised for the first time in this appeal and expressly waived below. *See* Def.'s Brief at 28-29. He challenges the court's factual findings on role and drug quantity and claims that his guideline incarceration sentence was too high because it was based on these flawed findings. As discussed at length above, these factual findings were agreed to by the defendant and were well-supported by undisputed facts in the record. Thus, the court's guideline calculation was correct, and its sentence at the bottom of the resulting range was substantively reasonable.

Conclusion

For the foregoing reasons, the judgment and sentence of the district court should be affirmed.

Dated: September 22, 2011

Respectfully submitted,

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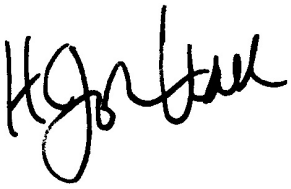

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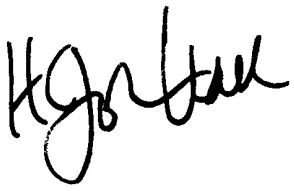
Certification per Fed. R. App. P. 32(a)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,700 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



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