13-54(L)

To Be Argued By:
TRACY L. DAYTON

United States Court of Appeals

FOR THE SECOND CIRCUIT

**Docket Nos. 13-54(L),
13-875(Con), 13-948(Con),
13-1093(Con)**

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UNITED STATES OF AMERICA,

Appellee,

-vs-

LAKESHA BOWLES, RALPH CORA, aka Petey, aka Pito, RAQIESHA DAVIS, aka

(For continuation of Caption, See Inside Cover)

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

BRIEF FOR THE UNITED STATES OF AMERICA

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Defendants,

ANTHONY GILLIAM, aka Flac, JOSEPH REYES, aka Fat Joe, aka RJ, RICHARD DANIELS, aka Wap, aka Po, STEFAN WINSTON, aka Cuda, aka Pooh,

Defendants-Appellants.

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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

This is a consolidated appeal from judgments entered in the United States District Court for the District of Connecticut (Janet Bond Arterton, J.), which had subject matter jurisdiction over these federal criminal prosecutions under 18 U.S.C. § 3231. Judgment entered against Stefan Winston on February 21, 2013. WA3-5; GA49.[1] On February 21, 2013, Winston filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b)(2). WA6; GA49. Judgments entered against Joseph Reyes and Richard Daniels on March 8, 2013. RSPA1-3; DA287-89; GA17; GA36. Reyes and Daniels filed timely notices of appeal, respectively, on March 8, 2013, and March 11, 2013, pursuant to Fed. R. App. P. 4(b). RA462, DA290-91; GA17; GA36.

This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. 3742(a).

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[1] "WA" refers to Winston's Appendix, "RA" refers to Reyes' Appendix, "RSPA" refers to Reyes' Special Appendix, "DA" refers to Daniels' Appendix, "GA" refers to the Government Appendix, and "Tr." refers to the trial transcript. Because Winston's Appendix does not have separate page numbers, the government has cited to the electronically generated page numbers in the e-filing header for that appendix.

Statement of Issues Presented for Review

I. Defendants Reyes and Daniels raise several challenges to the guilty verdicts entered against them:

A. Whether the trial evidence, viewed in the light most favorable to the guilty verdict, was sufficient to support the jury's findings that the charged conspiracy existed and that Reyes and Daniels were members of the conspiracy.

B. Whether the trial evidence, viewed in the light most favorable to the guilty verdict, was sufficient to support the jury's findings that it was reasonably foreseeable to Daniels and Reyes that the conspiracy involved one kilogram or more of heroin.

C. Whether, in a multi-object conspiracy case, evidence sufficient to establish Daniels' guilt on at least one of the objects is sufficient to support his conviction for conspiracy?

II. Was the district court's instruction on quantity erroneous because the court did not specifically refer to quantity as an element, when the court did instruct the jury that it must find beyond a reasonable doubt the

quantity of narcotics reasonably foreseeable to each defendant?

III. Did the district court properly exercise its discretion to deny a motion for mistrial following a witness's fleeting reference to a shooting where the court found, and the defense agreed, that the government did not act in bad faith in eliciting the testimony and the court instructed the jury to disregard the testimony?

IV. Did the district court commit clear error in finding Reyes and Daniels responsible for at least one kilogram of heroin where the court's findings were based on specific evidence introduced at trial, including the testimony of four cooperating witnesses?

V. Whether a sentence of 165-months of incarceration, which was 23 months below the bottom of the advisory Guideline range of 188 to 235 months' imprisonment, was procedurally reasonable where the court thoroughly considered the sentencing factors set forth at 18 U.S.C. § 3553(a), and declined to grant Winston's requested downward departures?

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Preliminary Statement

In 2010, Joseph Reyes, Richard Daniels and Stefan Winston, together with several others, operated a heroin and crack cocaine distribution conspiracy in and around Bridgeport, Connecticut. The defendants and their coconspirators

used a house at 105/107 Johnson Street in Bridgeport, directly across the street from a public housing project, as the base of operations for their narcotics trafficking activities. There, they packaged and sold both heroin and crack cocaine to other dealers and to street level users. Reyes, Daniels, Winston and other members of the conspiracy also regularly possessed firearms in connection with their narcotics trafficking activities.

In 2011, Winston pleaded guilty to conspiracy to possess with intent to distribute one kilogram or more of heroin and 28 grams or more of cocaine base. In 2012, a jury found Reyes and Daniels guilty of: (1) conspiracy to distribute and to possess with intent to distribute one kilogram or more of heroin and 280 grams or more of cocaine base, and (2) conspiracy to maintain a drug-involved premises within 1,000 feet of a public housing facility. The jury also found Reyes guilty of possession of a firearm by a convicted felon.

On appeal, the defendants raise multiple challenges to their convictions and sentences. In particular, Reyes and Daniels raise a number of challenges to the sufficiency of the evidence against them. As set forth below, however, the record was replete with evidence supporting the guilty verdicts, including the testimony of multiple cooperating witnesses who named Reyes and Daniels as central members of the narcotics conspiracy and who testified about the prolific heroin and cocaine base trafficking in which Reyes

and Daniels engaged with other members of the conspiracy. There was also ample evidence in the record to establish that the quantity of heroin reasonably foreseeable to both defendants as a result of their participation in the conspiracy was at least one kilogram. In addition, because there was ample evidence that Daniels conspired to distribute crack cocaine, he was properly found guilty of the conspiracy charge.

In addition to these challenges to the evidence, Reyes argues that the court failed to instruct the jury that drug quantity was an element of the offense. This claim fails because the court *did* instruct the jury that it had to find drug quantities beyond a reasonable doubt.

Together again, Reyes and Daniel also claim that the court should have granted their mistrial motions following a witness's inadvertent reference to a shooting. The court properly exercised its discretion to deny the motion, however, finding that its curative instruction was sufficient to overcome any prejudice that arose from the fleeting reference to a shooting.

With respect to sentencing, Reyes and Daniels both argue, principally, that the court improperly factored in the acts of others when determining the quantity of narcotics attributable to each of them. These arguments are nothing more than a restatement of their claims regarding the sufficiency of the evidence, and thus they fail for the same reasons.

Finally, Winston challenges his sentence claiming that the district court erred by failing to consider sentencing disparities between him and his codefendants and by refusing to depart from his criminal history category. As set forth below, the record demonstrates that the court carefully considered all of the factors delineated in 18 U.S.C. § 3553(a) prior to imposing Winston's sentence. The court also correctly declined to depart from Winston's criminal history category due to his extensive and violent criminal history.

For all of these reasons, the district court's judgments should be affirmed.

Statement of the Case

On August 16, 2011, Stefan Winston pleaded guilty to conspiracy to distribute and to possess with intent to distribute 28 grams or more of cocaine base and one kilogram or more of heroin. GA44. The district court (Janet B. Arterton, J.) sentenced him to 165 month's imprisonment on January 28, 2013. GA49.

On August 29, 2012, a federal jury convicted Joseph Reyes and Richard Daniels of one count of conspiracy to distribute and to possess with intent to distribute one kilogram or more of heroin and 280 grams or more of cocaine base, and one count of conspiracy to maintain a drug-involved premises within 1,000 feet of a public housing facility. GA13; GA33. Additionally, the

jury convicted Reyes of possession of a firearm by a convicted felon. GA13. On March 1, 2013, Judge Arterton sentenced Reyes to 300 months' imprisonment. GA17. On the same day, she sentenced Daniels to 228 months' imprisonment. GA36.

All three defendants are serving the sentences imposed.

I. The offense conduct

A. The defendants were leaders of a prolific heroin and crack cocaine trafficking conspiracy that used a house across the street from the Marina Village housing complex as its base of operations.

In the Spring of 2010, defendants Joseph Reyes, a.k.a. "Fat Joe" and "RJ," and Richard Daniels, a.k.a. "Wap" and "Po," together with several members and associates of the Sex, Money, Murder set of the Bloods street gang ("Sex, Money, Murder" or "SMM") began using a house at 105/107 Johnson Street in Bridgeport, Connecticut, as the base of operations for their narcotics trafficking activities. GA84-91; GA169-72 (Tr. 83, 85, 92-95, 100-110, 424-28, 430, 434). The residence at 105/107 Johnson Street is directly across the street from the Marina Village housing complex.[2] GA169 (Tr. 421).

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[2] Both trial defendants stipulated that 105/107

The members of SMM did not live at 105/107 Johnson Street, which they alternatively referred to as the "Trap," the "Kitchen," the "Porch," and the "White House" ("Trap"). GA169-70; GA253; GA310; GA373 (Tr. 423, 428, 757, 986, 1237). Rather, they claimed to work at the Trap, where "work" was a colloquial reference to selling narcotics. GA157; GA186-87; GA318-19 (Tr. 373-74, 492-93, 1020, 1022); Gov't Exs. 22, 44, 124. Reyes and other members of the SMM gang gained access to 105/107 Johnson Street by providing Ed Gibson and Darlene Jordan, the people who lived there, with cocaine base and heroin in exchange for permission to sell drugs from the house. GA82; GA92; GA176; GA313-14; GA316 (Tr. 74, 114-16, 452, 1000-01, 1109-10). The members of SMM also used Gibson as a human tester, providing him with samples of heroin in order to determine its potency. GA92; GA177; GA314 (Tr. 115-16, 453, 1002-03); Gov't Ex. 75.

Daniels was the leader of the SMM gang. He was responsible for recruiting and initiating new members and coordinating gang activities. GA172; GA324 (Tr. 433, 1044); Gov't Ex. 67. Other members and associates of SMM included Reyes, Alexis Ramos, a.k.a. "Snake" and "Rattle," Winston, a.k.a. "Cuda" and "Pooh," Jona-

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Johnson Street was within 1,000 feet of Marina Village, a housing complex owned by a public housing authority. GA65; GA440; Gov't Ex. 252.

thon Williamson, a.k.a. "Rue," Ernest Williamson, a.k.a. "Twin" and "Harlem," Anthony Gilliam, a.k.a. "Flac," Angel Millan, a.k.a. "Stoney," David Johnson, a.k.a. "Double D," and Xavier White, a.k.a. "X." Together, the members and associates of the SMM sold crack and heroin from the Trap seven days a week. GA172-75; GA177; GA255; GA311-12; GA326 (Tr. 433, 437, 439-46, 454-55, 766, 989-994, 1050).

Reyes, Daniels, Winston and others obtained narcotics from a variety of sources, including, but not limited to, Rafael Cora, a.k.a. "Pito" and "Petey," Raqiesha Davis, a.k.a. "Brooklyn," Lakesha Bowles, and an individual they referred to as Murdaveli. GA251-53; GA259; GA324-25; GA327; GA376 (Tr. 751-59, 782-83, 1044-46, 1048, 1055-56, 1249-50); Gov't. Exs. 34, 70, 72, 76, 95, 96. The defendants purchased narcotics that were already packaged for street-level resale. They also purchased narcotics in bulk and then re-packaged them at the Johnson Street residence into smaller quantities for redistribution. GA183; GA254; GA327; GA376 (Tr. 477-78, 762-63, 1055-56, 1251); Gov't Exs. 60, 96.

The conspiracy had standardized distribution quantities for both heroin and crack cocaine. Heroin was packaged into paper folds that contained between approximately .01 and .05 grams per fold. GA233-34; GA292-94; GA314-15 (Tr. 680-81, 915-16, 920-21, 1004-05); Gov't Exs. 200, 248. Each paper fold was stamped with a "brand

name" and then sold individually for $10 per fold. GA177; GA234; GA314-15 (Tr. 455-56, 682-83, 1004-05); Gov't Ex. 96. Heroin was also packaged into larger "bundles" comprised of ten folds; each bundle sold for between $60 and $100. GA177; GA234; GA341 (Tr. 455, 681, 1110). Crack cocaine was packaged into one-inch plastic bags that contained approximately .5 grams of crack cocaine per bag and sold for $10 per bag. GA177; GA230-31; GA292-95; GA314 (Tr. 454, 667-69, 915-919, 921-26, 1003-04); Gov't Exs. 200, 235, 236. Crack was also packaged into 3.5 gram quantities, referred to as "eight balls," for distribution to street-level dealers. GA175-77; GA182; GA256; GA312; GA315 (Tr. 447-49, 454, 474, 769, 995-96, 1008); Gov't Exs. 61, 68, 69. Buyers who purchased multiple folds, bags, bundles or eight-balls were often given a bulk discount, *e.g.,* six bags of heroin for $50. GA234; GA378 (Tr. 682, 1259); Gov't Exs. 27, 28, 32, 35, 42.

The members of the conspiracy played varying roles in the organization. For example, while Reyes and Daniels were partners in the Trap, Gov't Exs. 49, 70, Reyes was the day-to-day manager of operations. He supplied drugs to members of the conspiracy to be resold from the Trap, set the price for the drugs sold from the Trap and also sold directly to individuals who used drugs, such as Maeve Tuite, Jordan Haas, Joshua Troost, Steven Delaney, Peter Johnson

and many others. GA172-73; GA182; GA199-200; GA370-72 (Tr. 436-37, 473-74, 544-47, 1228-33); Gov't Exs. 24-26, 30, 32, 37-38, 40, 42, 43, 45. While Reyes spent the majority of his time at the Trap, in his absence he would direct other members of the conspiracy, such as Ramos and Millan, to "serve" or sell drugs to his customers on his behalf. GA186; GA329; GA372 (Tr. 492, 1063-64, 1234); Gov't Exs. 27, 28, 42, 47, 51, 55.

For his part, Daniels occasionally made hand-to-hand sales at the Trap, but he also used White to sell drugs on his behalf. GA170; GA189; GA253; GA310; GA330; GA342 (Tr. 426-27, 503-04, 758, 986, 1068, 1116). Daniels also steered customers to the Trap to purchase narcotics from other members of the conspiracy. Gov't Exs. 65, 66, 71. In addition, Daniels and Reyes together served as narcotics suppliers for the organization. GA182; GA323; GA326-27; GA339; GA341 (Tr. 474, 1038-39, 1049-50, 1054, 1101, 1110); Gov't Exs. 68-69, 75-77, 93. In fact, at times, Daniels controlled the entire supply of heroin being sold from the Trap. Gov't Ex. 93.

There were also several other members of the conspiracy who worked together to advance the goals of the organization, that is, to sell large quantities of narcotics from the Trap in order to generate a profit. GA189-90 (Tr. 500-02, 506); Gov't Exs. 20, 48, 64. For example, Ramos sold heroin and crack from the Trap at least five days a week. GA439. Winston sold narcotics from the

Trap every day of the week. GA174 (Tr. 441-42). Jonathan Williamson not only sold drugs himself, but also had his brother, Ernest Williamson, selling narcotics on his behalf. GA174 (Tr. 442-44). David Johnson not only sold crack that he obtained from Reyes, but also served as security for the organization due to his size and his history of assaultive behavior. GA172; GA212; GA313 (Tr. 434-35, 594, 997-98). Millan sold narcotics from the Trap and stored narcotics and the organization's guns at his house, which was located only two doors away from the Trap. GA175; GA320; GA322-24; GA328 (Tr. 445-46, 1026-27, 1036-37, 1040-41, 1058); Gov't Exs. 44, 55, 61-63, 74, 191, 195. Gilliam began selling narcotics from the Trap only a few months before the defendants' January 2011 arrests. GA173-74 (Tr. 440-41). Because he had not yet established his own customer base, Gilliam often served narcotics to customers on Reyes' behalf and also worked as a runner picking up heroin from Daniels and delivering it to Reyes. GA173-74; GA311-12 (Tr. 440-41, 989-94); Gov't Exs. 76-78.

Together, the members of the conspiracy sold approximately 35 to 105 bundles of heroin and approximately eight to 20 eight-balls of crack per week. GA182; GA253; GA320; GA323 (Tr. 473, 476, 757-59, 1025-26, 1040).

The members of the SMM narcotics trafficking organization worked together to avoid detec-

tion by law enforcement. For example, Daniels warned Reyes about the presence of the ATF in the parking lot near what Daniels characterized as "our Trap." GA324 (Tr. 1041-42); Gov't Ex. 49. Additionally, members of the organization only made drug sales inside the Trap so as to avoid detection by law enforcement, and hung a blanket over the windows to the Trap to obscure their activities from the police. GA188; GA372 (Tr. 498, 1235).

In a further effort to avoid detection by law enforcement, members of the SMM gang used code words when discussing narcotics and weapons. For example, they used "plastic," "hard," or "girl" to refer to crack cocaine, and "paper" or "dog food" to refer to heroin. GA178; GA180; GA314-16; GA318-19; GA325 (Tr. 458-59, 466, 1004-11, 1018-22, 1047); Gov't Exs. 26, 42, 48, 50-51, 54, 63, 71, 76. They also referred to a 3.5 quantity of crack as an "eight-ball," "ball," or "AI,"[3] and to guns as "schwammys." GA178-79; GA315-16; GA318 (Tr. 459-64, 1005-11, 1019-20); Gov't Exs. 31, 61, 64, 68, 74.

Cooperating witness testimony about the operational details of the organization was corrob-

[3] "AI" is a reference to Allen Iverson, a former Philadelphia 76er who wore Jersey number "3." The SMM used Iverson's number to refer to a 3.5 gram quantity of crack cocaine. GA179; GA190; GA315; GA339 (Tr. 461, 506, 1008, 1069).

orated by the testimony of FBI Special Agent Matthew King and FBI Task Force Sergeant Juan Gonzalez, Jr., both of whom were assigned to the SMM investigation. GA298 (Tr. 939-40). Both testified regarding the FBI's use of calls intercepted through the court-authorized wiretap to identify individuals who were en route to the Trap to purchase narcotics. This enabled the FBI to conduct surveillance of the narcotics transactions and, upon occasion, to arrest and seize drugs from individuals, such as Tuite and Troost, to whom Reyes or other coconspirators had sold narcotics. GA347; GA349 (Tr. 1136, 1141); Gov't Ex. 248.

In short, the evidence at trial established that the members of the conspiracy, including Reyes and Daniels, all sold the same drugs, in the same packaging, for the same amount of money and from the same location. GA183; GA375 (Tr. 477-78, 1248); Gov't Exs. 48, 64, 69, 77, 93, 96. While they each had customers that they considered their own, they also regularly made sales to the same individuals and would alternate sales to new walkup customers. GA186-87 (Tr. 491-94); Gov't Exs. 28, 47, 51, 64. The members of the conspiracy also shared several guns that they used to protect their drug operation. GA183; GA186 (Tr. 479, 491). In fact, several photographs admitted at trial showed different members of the conspiracy holding the same guns at various times while posing inside the

Trap. GA185-86; GA328-29 (Tr. 486-91, 1060-63); Gov't Exs. 108-112.

B. Coconspirators describe Reyes' frequent possession of firearms.

Lakesha Bowles, a cooperating witness, testified at trial about her role in obtaining guns and ammunition for Reyes. Bowles explained that in approximately September 2010, she obtained a pistol permit from the state of Connecticut. GA261 (Tr. 791); Gov't Ex. 97. Then, on November 15, 2010, Bowles took Reyes and Winston to a firearm store in Orange, Connecticut, to buy guns for them. GA238; GA263 (Tr. 697-99, 798). Bowles purchased two weapons: a Glock 9 millimeter handgun and a Taurus .40 Model PT140. GA240-41; GA263 (Tr. 708-09, 800).

After buying the guns, Bowles took Reyes and Winston to purchase ammunition. GA267 (Tr. 813-15). Bowles then drove Reyes and Winston to Marina Village and dropped them off at the Trap. GA267 (Tr. 815-16). When Reyes and Winston got out of the car, they took both handguns and one box of ammunition. They left behind a handgun carrying case, an ammunition magazine, one box of ammunition and a plastic bag containing the firearm receipts.[4] GA267-68 (Tr. 816-17).

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[4] These items that were left behind in Bowles' car were subsequently recovered by law enforcement af-

Two months later, on January 5, 2011, the FBI arrested Winston. During his arrest, the FBI recovered the Glock 9 mm handgun that Bowles had purchased. The FBI also recovered an assault rifle, several boxes of ammunition, crack cocaine and heroin from Winston's residence. GA362 (Tr. 1193); Gov't Exs. 191-198, 200.

The FBI arrested Reyes the same day. In a search incident to that arrest, law enforcement seized two cellular telephones from Reyes' pockets. The FBI later searched the cell phones wherein they discovered several photographs of Reyes and his co-defendants posing with various firearms, including the assault rifle seized from Winston's residence. GA107; GA151; GA153-55 (Tr. 176, 350, 358-365); Gov't Exs. 100, 121.

At trial, Robert Rich, the manager of the gun store where Bowles purchased the firearms, viewed the photographs recovered from Reyes' telephone. Rich testified that two of the weapons depicted in the photographs appeared to be the Glock handgun and Taurus handgun that he sold to Bowles. GA247 (Tr. 734-35); Gov't Exs. 108-109.

In addition to this testimony, the jury also heard from two other co-conspirators—David Johnson and Angel Millan—about Reyes' use of

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ter Bowles' arrest. GA269 (Tr. 821-23); Gov't Exs. 206-208, 211-212.

firearms in connection with his narcotics conspiracy. Johnson testified that Reyes possessed a firearm every day at the Trap as part of his narcotics trafficking activities and that one of the weapons that Reyes carried was a .40 caliber handgun. GA183-85 (Tr. 479-482, 484, 486-87). Johnson identified the .40 caliber firearm in the photographs recovered from Reyes' cell phone. GA185 (Tr. 486-87); Gov't Exs. 107, 108. Johnson also testified that, on one occasion, Reyes shot at him with one of the handguns shown in the photographs. Johnson explained that he was not hit by the bullet. Rather, it went through his shoe and ricocheted off the pavement. GA190 (Tr. 508).

Millan similarly testified that Reyes had a .40 caliber handgun and that he (Millan) stored that weapon, amongst other weapons, at his house on Reyes' behalf. GA319; GA329 (Tr. 1020-21, 1061-62); Gov't Exs. 108, 109. Reyes eventually traded the .40 caliber firearm for another weapon. GA183-84; GA340 (Tr. 480-82, 1106); Gov't Ex. 94.

Reyes stipulated to the fact that prior to November 15, 2010, he had been convicted of a felony punishable by a term of imprisonment exceeding one year. GA289 (Tr. 901). He also stipulated to the fact that the Taurus .40 caliber handgun that he was convicted of possessing had been transported in interstate commerce. GA237 (Tr. 694-95).

II. The indictment and trial

On January 5, 2011, a grand jury sitting in Bridgeport, Connecticut, returned a four-count indictment. Reyes, Daniels and Winston were charged in Count One with conspiracy to distribute and to possess with intent to distribute one kilogram or more of heroin and 28 grams or more of cocaine base, in violation of Title 21, United States Code, Sections 841(a)(1), 841(b)(1)(A)(i), 841(b)(1)(B)(iii) and 846, and in Count Two with conspiracy to maintain a drug-involved premise within 1,000 feet of a school and a housing facility, in violation of Title 21, United States Code, Sections 846 and 860. RA4. Reyes, Daniels and Winston were not charged in Counts Three or Four of the original indictment.

On February 1, 2011, the grand jury returned a superseding indictment that added counts against co-defendant Cora. GA4. The superseding indictment also added three charges against Winston, including possession with intent to distribute cocaine base, in violation of Title 21, United States Code, Section 841(a)(1), possession of a firearm in furtherance of a drug trafficking offense, in violation of Title 18, United States Code, Section 924(c)(1)(A)(i) and possession of firearms by a convicted felon, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2). WA7-15.

On August 16, 2011, Winston pleaded guilty to Count One of the superseding indictment,

which charged him with conspiracy to distribute and to possess with intent to distribute 28 grams or more of cocaine base and one kilogram or more of heroin. GA44.

On August 15, 2011, the grand jury returned a second superseding indictment that added two new defendants, Gilliam and Millan, to the conspiracy charges in Counts One and Two. The charges against Reyes and Daniels remained the same. GA5.

On January 4, 2012, the grand jury returned a third superseding indictment that increased the quantity of cocaine base alleged in Count One from 28 grams to 280 grams. The third superseding indictment also added a charge against defendant Reyes, namely, possession of a firearm by a convicted felon, in violation of Title 18, United States Code, Sections 922(g)(1) and 924(a)(2). GA7; RA27-31.

A jury trial was held in New Haven, Connecticut, before the Hon. Janet Bond Arterton, United States District Judge. Evidence against Reyes and Daniels began on August 20, 2012. GA11. At the close of evidence, Reyes and Daniel moved for a judgment of acquittal. GA12; GA32. The court denied their motions. GA12; GA32-33.

On August 29, 2012, the jury convicted Reyes and Daniels of: (1) Count One: conspiracy to distribute and to possess with intent to distribute one kilogram or more of a mixture and substance

containing a detectable amount of heroin and 280 grams or more of a mixture and substance containing a detectable amount of cocaine base, and (2) Count Two: conspiracy to maintain a drug-involved premises within 1,000 feet of a housing facility owned by a public housing authority. GA13. Defendant Reyes additionally was convicted of Count Three: possession of a firearm by a convicted felon. GA13.

III. The post-trial proceedings and sentencings

Reyes and Daniels both filed post-trial motions for acquittal; Reyes moved, alternatively for a new trial. RA217; RA233; DA124; DA142. The district court denied those motions in a written ruling on February 19, 2013. GA16; GA36; DA181.

In separate sentencing proceedings, the district court sentenced Reyes to 300 months' imprisonment, GA17, Daniels to 228 months' imprisonment, GA36, and Winston to 165 months' imprisonment, GA49.

A. The district court sentenced Reyes to a below-guidelines 300-month term of imprisonment.

The Pre-Sentence Report prepared for Reyes ("RPSR") concluded that his base offense level was 32 based upon the quantity of heroin and crack cocaine involved in the conspiracy, which

the PSR determined to be at least one kilogram of heroin and at least 280 grams of crack cocaine. RPSR ¶ 19. After enhancements for selling drugs within 1,000 feet of a housing complex, for possession of a firearm, and for a leadership role in the offense, the PSR concluded that Reyes' total offense level was 39. RPSR ¶¶ 19-21, 24. With a criminal history category VI, RPSR ¶ 41, due to Reyes' extensive criminal history, which included multiple convictions for narcotics trafficking, possession of a firearm without a pistol permit, assault in the third degree and escape, the PSR calculated the advisory Guidelines range to be 360 months' imprisonment to life imprisonment. RPSR ¶ 63.

On February 28, 2013, the district court sentenced Reyes. RA413-61. After concluding that the PSR properly calculated the quantity of narcotics involved in the conspiracy that were properly attributable to Reyes, RA432, the court rejected Reyes' other challenges to the guidelines calculation,[5] RA433-42. Accordingly, the court calculated the Guidelines range to be 360 months' to life imprisonment subject to a mandatory minimum of 240 months' imprisonment. RA442.

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[5] Reyes raised numerous challenges to the guidelines calculation, arguing for example, against the firearms enhancement and the role enhancement. Because he did not raise those issues on appeal, they are not discussed here.

Reyes advocated for a downward departure or a non-Guideline sentence based on the fact that he grew up in a difficult area and had not previously served a lengthy term of incarceration. RA443-46. Reyes asked the court to impose a sentence of no more than twenty years. RA446.

The government then addressed the court and advocated for a Guideline sentence of 360-months based upon Reyes' lengthy criminal history, extensive narcotics and firearm trafficking activities, role as a leader of a violent street gang and the fact that he essentially allowed a woman who had overdosed to die. RA447-50.

After hearing from the defendant, the district court imposed sentence. The court identified several factors driving its decision, including the nature and circumstances of the offense conduct, Reyes' history and characteristics, including his significant prior criminal history, and the need to impose a sentence to promote respect for the law and protect the public. RA454-56. On this record, the court found that a sentence of 360 months was longer than necessary to achieve the goals of sentencing in this instance. RA456. Instead, the court imposed a non-Guideline sentence of 300 months' imprisonment. RA457.

B. The district court sentenced Daniels to a below-guidelines 228-month term of imprisonment.

The Pre-Sentence Report prepared for Daniels ("DPSR") concluded that his base offense level was 32 based upon the quantity of heroin and crack cocaine involved in the conspiracy, which the PSR determined to be at least one kilogram of heroin and at least 280 grams of crack cocaine. DPSR ¶ 20. After enhancements for selling drugs within 1,000 feet of a housing complex, for possession of a firearm, and for a leadership role in the offense, the PSR concluded that Daniels' total offense level was 39. DPSR ¶¶ 20-22, 25. With a criminal history category III, DPSR ¶ 30, the PSR calculated the advisory Guidelines range to be 324 to 405 months of imprisonment. DPSR ¶ 84.

On February 28, 2013, the district court sentenced Daniels. DA211-86. After rejecting Daniels' challenge to the calculation of drug quantity involved in the conspiracy and attributable to him, DA236, and Daniels' other challenges to the guidelines calculations,[6] DA237-52, the court calculated Daniels' adjusted Guidelines range to be 324 to 405 months' imprisonment subject to a

[6] Like Reyes, Daniels raised several other challenges to the guidelines calculation that are not relevant on appeal and so are not discussed here.

mandatory minimum of 120 months' imprisonment. DA252.

Daniels advocated for a downward departure or a non-Guideline sentence based on a number of factors, including his difficult upbringing, his drug use and his "exemplary record" while in prison. DA253-61.

The government then addressed the court and advocated for a sentence at the top of the Guideline range based upon Daniels' extensive narcotics trafficking activities, his leadership role in a violent street gang, his possession of a firearm in connection with his drug trafficking activities and his efforts to get a cooperating witness to commit perjury on his behalf. DA262-67; GA206 (Tr. 571); Gov't Ex. 254a-254d. The government also responded to Daniels' argument that his difficult upbringing impacted his future criminality. In particular, the government argued that Daniels chose to engage in drug trafficking and gang activity and that his upbringing did not have a causal connection to his criminal conduct. DA264-67.

After hearing from the defendant, the district court imposed sentence. The court identified several factors that impacted its sentencing decision, including Daniels' leadership role in the offense conduct, Daniels' history and characteristics, including his difficult upbringing and his role as a father, and the need for the sentence imposed to provide deterrence and protect the

community. DA274-78. Ultimately the court found that a sentence of 324 to 405 months was longer than necessary to achieve the goals of sentencing in this case. DA279. Instead, the court imposed a non-Guideline sentence of 228 months, citing Daniels' youth and the court's belief that Daniels had the potential to lead a law abiding life in the future. DA280.

C. The district court sentenced Winston to a below-guidelines 165-month term of imprisonment.

As set forth above, Winston pleaded guilty to one drug conspiracy count on August 10, 2011. At the time he pleaded guilty, he also entered into a cooperation agreement with the government, in which he agreed to cooperate against his former conspirators. WA3; WA49.

By the time of Winston's sentencing on January 28, 2013, however, Winston had breached that agreement, and thus the government did not file a motion for sentence reduction under U.S.S.G. § 5K1.1. *See* WA3; WA28; WA42; WA74-75. At sentencing, the court concluded that Winston's final Guidelines range was 188-235 months' imprisonment, and sentenced him to 165 months' imprisonment. WA45; WA83.

* * *

Additional facts relevant to the defendants' arguments on appeal are set forth in the relevant sections below.

Summary of Argument[7]

I.A. The evidence was more than sufficient to support the existence of the charged conspiracy and further, to show that both Reyes and Daniels participated in the conspiracy. Part I.C.1., *infra*. At trial, six witnesses testified regarding the existence of the narcotics distribution conspiracy. These witnesses explained how the conspiracy operated, where it operated, and how long it operated. They explained how the conspirators packaged and branded their products, how the conspirators managed their retail operations at the "Trap," and how the conspirators used code words to communicate regarding narcotics and weapons. From this evidence, the jury could have reasonably concluded that the charged conspiracy existed.

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[7] In his Summary of Argument, Reyes states, "Alleged gang affiliations, weapons and violence should not have been admitted." Reyes Br. at 6. Reyes failed to fully develop this argument. In fact, other than in the Summary of Argument, this issue appears nowhere in Reyes' brief. Hence, he was waived this issue on appeal and it is an inappropriate ground for relief. *See United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991) (stating that skeletal arguments do not preserve claims because "[j]udges are not like pigs, hunting for truffles buried in briefs").

Further, the jury could have reasonably concluded that both Reyes and Daniels knowingly and willfully became members of the conspiracy. Cooperating witnesses provided ample evidence that both defendants were leaders of the SMM gang that ran the Trap, and that they each played vital roles in the conspiracy: both sold drugs at the Trap (or directed customers to the Trap), and both supplied narcotics to other conspirators.

B. The evidence further established that the quantity of narcotics involved in the conspiracy was at least one kilogram of heroin and that this quantity was reasonably foreseeable to both Daniels and Reyes. Part I.C.2., *infra*. The fact that Reyes was not involved in one single transaction involving at least one kilogram of heroin is beside the point; the relevant point is that he joined a conspiracy that sold more than one kilogram of heroin over the course of the conspiracy. And the evidence more than established that the conspiracy Reyes joined was a single conspiracy designed to distribute large quantities of narcotics and that it was reasonably foreseeable to him that over the course of the conspiracy, that network distributed more than one kilogram of heroin. Similarly, the evidence established that the distribution of more than one kilogram of heroin was reasonably foreseeable to Daniels. Although Daniels quibbles with some of the calculations relied upon by the jury, he fails to focus on *all* of

the evidence presented to the jury and on the *entire* time period of the conspiracy. Finally, neither Daniels nor Reyes contest the jury's finding that they conspired to distribute more than 280 grams of cocaine base and thus their conspiracy convictions can be upheld on that ground alone.

C. As the jury expressly found, the evidence was sufficient to prove that Daniels was guilty of both objects of the conspiracy charged, *i.e.*, to distribute one kilogram or more of heroin and 280 grams or more of crack cocaine. Part I.C.3., *infra*. When, as here, a guilty verdict on an indictment charging acts in the conjunctive is returned, the verdict stands if the evidence is sufficient with respect to any one of the acts charged. Here, the evidence was sufficient with respect to both acts charged, and thus Daniels' conviction should be affirmed.

II. The jury instructions properly charged the jury on all elements of the narcotics conspiracy offense. The jury was told it had to find the existence of the charged conspiracy, and further find whether the defendants knowingly and intentionally joined that conspiracy. The jury was then instructed that if it made those two findings, it next had to find—beyond a reasonable doubt—the drug type and quantity attributable to each defendant. Those instructions, read as a whole, fully and properly charged the jury on the charged conspiracy offense.

III. The district court properly exercised its discretion to deny Reyes' and Daniels' motion for a mistrial based upon their claim that David Johnson's testimony unduly prejudiced them. The district court found that the introduction of the testimony was not done in bad faith, and promptly struck that testimony from the record, instructing the jury to disregard the testimony for all purposes. Moreover, where the record contained overwhelming evidence of the defendants' guilty on all counts, and where there was ample evidence about guns already properly admitted at trial, David Johnson's testimony was not so prejudicial that the jury could not be expected to follow the limiting instruction. Thus, even assuming the introduction of the Johnson testimony was error, the district court properly exercised its discretion to deny the mistrial motions.

IV. The district court properly calculated the drug quantity applicable for sentencing, concluding—consistent with the jury verdict—that Reyes and Daniels were both responsible for more than one kilogram of heroin. This estimate was based on extrapolations from seized narcotics, as well as testimony by co-conspirators, law enforcement, and a chemist. In any event, any error in the calculation of the quantity of heroin attributable to the defendants was harmless error because there is no dispute that they were both responsible for distributing more than 280

grams of crack cocaine, a quantity that would result in the same guidelines calculation.

V. The sentence imposed on Winston was procedurally reasonable. Winston claims that the court failed to consider his argument for sentencing "parity" with his co-defendants, but the record refutes this claim. The parties discussed this issue at length at sentencing, and the record reflects the court considered the argument. The fact that the court did not give the argument significant weight does not mean the court failed to consider the argument.

The court's refusal to grant Winston's motion for a downward departure for overstatement of criminal history category is not reviewable by this Court. The record reflects that the court was aware of its authority to depart but elected not to do so as a matter of discretion. And, in any event, that discretion was properly exercised. The defendant's lengthy and troubling criminal history put him squarely within criminal history category V, and there was nothing to suggest that his criminal history category—which reflected repeated demonstrations of a lack of respect for the law—was not an accurate assessment of his likelihood of recidivism.

Argument

I. There was sufficient evidence to prove that Reyes and Daniels were members of the conspiracy charged in the indictment and that the conspiracy involved at least one kilogram of heroin.

A. Relevant facts

Facts stemming from the evidence adduced at trial, which are pertinent to consideration of this issue, are set forth in the statement of facts above. Additional pertinent facts are set forth below.

B. Governing law and standard of review

1. Standard of review

A defendant challenging the sufficiency of the evidence bears a "heavy burden." *United States v. Mercado*, 573 F.3d 138, 140 (2d Cir. 2009) (internal quotation marks omitted). This Court will affirm "if 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Ionia Management S.A.*, 555 F.3d 303, 309 (2d Cir. 2009) (per curiam) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). All permissible inferences must be drawn in the government's favor. *See United States v. Lee*, 549 F.3d 84, 92 (2d Cir. 2008).

"Under this stern standard, a court . . . may not usurp the role of the jury by substituting its own determination of . . . the weight of the evidence and the reasonable inferences to be drawn for that of the jury." *United States v. MacPherson*, 424 F.3d 183, 187 (2d Cir. 2005) (citations and internal quotation marks omitted). "[I]t is the task of the jury, not the court, to choose among competing inferences that can be drawn from the evidence." *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003). The evidence must be viewed in conjunction, not in isolation; and its weight and the credibility of the witnesses is a matter for argument to the jury, not a ground for legal reversal. *See United States v. Best*, 219 F.3d 192, 200 (2d Cir. 2000).

"[T]he law draws no distinction between direct and circumstantial evidence," and "[a] verdict of guilty may be based entirely on circumstantial evidence as long as the inferences of culpability . . . are reasonable." *MacPherson*, 424 F.3d at 190. Indeed, "jurors are entitled, and routinely encouraged, to rely on their common sense and experience in drawing inferences." *United States v. Huezo*, 546 F.3d 174, 182 (2d Cir. 2008). Because there is rarely direct evidence of a person's state of mind, "the *mens rea* elements of knowledge and intent can often be proved through circumstantial evidence and the reasonable inferences drawn therefrom." *MacPherson*, 424 F.3d at 189; *see also United States*

v. Crowley, 318 F.3d 401, 409 (2d Cir. 2003). In particular, "the existence of a conspiracy and a given defendant's participation in it with the requisite knowledge and criminal intent may be established through circumstantial evidence." *United States v. Chavez*, 549 F.3d 119, 125 (2d Cir. 2008) (internal quotation marks omitted).

"The possibility that inferences consistent with innocence as well as with guilt might be drawn from circumstantial evidence is of no matter . . . because it is the task of the jury, not the court, to choose among competing inferences." *MacPherson*, 424 F.3d at 190 (internal quotation marks omitted). The evidence must be viewed "in its totality, not in isolation, and the government need not negate every theory of innocence." *Lee*, 549 F.3d at 92 (internal quotation marks omitted).

In short, this Court may not disturb a conviction on grounds of legal insufficiency absent a showing that "no rational trier of fact could have found each essential element of the crime beyond a reasonable doubt." *United States v. Walsh*, 194 F.3d 37, 51 (2d Cir. 1999) (internal quotation marks omitted). "The ultimate question is not whether *we believe* the evidence adduced at trial established defendant's guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find*." *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998) (emphasis in original).

"In cases of conspiracy, deference to the jury's findings is especially important because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel." *United States v. Snow*, 462 F.3d 55, 68 (2d Cir. 2006) (internal quotation marks omitted). While the government must show that a defendant acted purposefully to further a conspiracy, this Court has emphasized that "[w]here the existence of a conspiracy has been proved, evidence sufficient to link another defendant with it need not be overwhelming and it may be circumstantial in nature." *United States v. Desena*, 260 F.3d 150, 154 (2d Cir. 2001) (internal quotation marks and citation omitted).

2. Elements of a drug conspiracy

In order to prove a defendant guilty of engaging in a narcotics conspiracy, the government must prove: (1) that the conspiracy alleged in the indictment existed; and (2) that the defendant knowingly joined or participated in it. *See Chavez,* 549 F.3d at 125; *see also Snow*, 462 F.3d at 68; *United States v. Richards*, 302 F.3d 58, 69 (2d Cir. 2002). In addition, the government must prove (3) "that it was either known or reasonably foreseeable to the defendant that the conspiracy involved the drug type and quantity charged." *United States v. Santos*, 541 F.3d 63, 70-71 (2d Cir. 2008).

To prove the first element and establish that a conspiracy existed, the government must show that there was an unlawful agreement between at least two persons. *See United States v. Rea*, 958 F.2d 1206, 1214 (2d Cir. 1992). The conspirators "need not have agreed on the details of the conspiracy, so long as they agreed on the essential nature of the plan." *United States v. Geibel*, 369 F.3d 682, 689 (2d Cir. 2004) (internal quotation marks omitted). The agreement need not be an explicit one, as "proof of a tacit understanding will suffice." *Rea*, 958 F.2d at 1214. The co-conspirators' "goals need not be congruent, so long as they are not at cross-purposes." *Id.*

To prove a defendant's membership in the conspiracy, the government must show that the defendant "knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it." *Snow*, 462 F.3d at 68 (internal quotation marks omitted). This requires proof of the defendant's "purposeful behavior aimed at furthering the goals of the conspiracy." *Chavez*, 549 F.3d at 125 (internal quotation marks omitted). The defendant need not have known all of the details of the conspiracy "so long as he knew its general nature and extent." *Id.* (internal quotation marks omitted). The evidence of a defendant's participation in a conspiracy should be considered in the context of surrounding circumstances, including the actions of co-conspirators and others because "[a] seeming-

ly innocent act . . . may justify an inference of complicity." *United States v. Calabro*, 449 F.2d 885, 890 (2d Cir. 1971). Finally, "[t]he size of a defendant's role does not determine whether that person may be convicted of conspiracy charges. Rather, what is important is whether the defendant willfully participated in the activities of the conspiracy with knowledge of its illegal ends." *United States v. Vanwort*, 887 F.2d 375, 386 (2d Cir. 1989).

While "mere presence . . . or association with conspirators" is insufficient to prove membership in a conspiracy, a reasonable jury may convict based on "evidence tending to show that the defendant was present at a crime scene under circumstances that logically support an inference of association with the criminal venture." *Snow*, 462 F.3d at 68 (internal quotation marks omitted).

Moreover, if "there be knowledge by the individual defendant that he is a participant in a general plan designed to place narcotics in the hands of ultimate users, the courts have held that such persons may be deemed to be regarded as accredited members of the conspiracy." *United States v. Rich*, 262 F.2d 415, 418 (2d Cir. 1959); *see also United States v. Sureff*, 15 F.3d 225, 230 (2d Cir. 1994) (finding defendants who did not know each other to be members of single conspiracy since they had reason to know they were part of a larger drug distribution opera-

tion). A defendant's knowledge of the existence of a conspiracy may be inferred from evidence regarding the nature and scope of the enterprise itself. *See United States v. Taylor*, 562 F.2d 1345, 1352 (2d Cir. 1977).

In sum, "'[a] conviction for conspiracy must be upheld if there was evidence from which the jury could reasonably have inferred that the defendant knew of the conspiracy . . . and that he associat[ed] himself with the venture in some fashion, participat[ed] in it . . . or [sought] by his action to make it succeed.'" *Richards*, 302 F.3d at 69 (quoting *United States v. Podlog*, 35 F.3d 699, 705 (2d Cir. 1994)). This Court, however, has overturned conspiracy convictions where the government presented insufficient evidence from which the jury reasonably could have inferred that the defendant had knowledge of the conspiracy charged. *See e.g., United States v. Torres*, 604 F.3d 58, 69-72 (2d Cir. 2010); *see also Santos*, 541 F.3d at 71. Similarly, where the evidence establishes the defendant's knowledge of the conspiracy, but is insufficient for the jury reasonably to have inferred that the defendant intended to join it, reversal is appropriate. *See Santos*, 541 F.3d at 71.

C. Discussion

Reyes and Daniels make several sufficiency arguments. First, Reyes claims that the evidence did not establish the existence of a drug conspiracy, and in a related point, Reyes and Daniels both claim that the evidence did not show that they entered into narcotics conspiracy. Second, Reyes and Daniels both claim that the evidence was insufficient to establish that it was reasonably foreseeable to them that the conspiracy involved one kilogram or more of heroin. Third, Daniels claims that the jury's verdict against him on one object of the conspiracy was insufficient even though the jury found him guilty of both objects of the conspiracy. These claims have no merit; the jury's verdict was well-supported by the evidence.

1. The evidence established the existence of the charged conspiracy and that Reyes and Daniels were members of that conspiracy.

Reyes argues that the evidence did not show the existence of the charged conspiracy or that he was a member of that conspiracy. Reyes Br. at 13. Reyes offers no factual support for his argument. Instead, he argues that the government improperly charged him with conspiracy, rather than substantive offenses, and that the statute criminalizing narcotics trafficking conspiracies

was not meant to apply to drug dealers like him.[8] Reyes attempts to bolster his argument by citing to excerpts of legislative history rather than relying upon legal precedent. *See* Reyes Br. at 10-12. Reyes then concludes that, "[a]t most, [he] could be construed as one who conspired to possess with intent to distribute a small quantity of narcotics once, and then did it again on other occasions." Reyes Br. at 9. Aside from being legally incorrect, Reyes' argument ignores significant pieces of evidence that established the existence of the charged conspiracy and his knowing and voluntary participation therein.

Daniels argues, almost in passing, that "there was no evidence presented that Mr. Daniels entered into an agreement for the distribution of one kilogram or more of heroin or two hundred eighty grams or more of cocaine base." Daniels Br. at 17. Daniels contends that the evidence at trial was that "he did his own thing" and "was not around as much as the others." Daniels Br. at 17, 18. Like Reyes, Daniels fails to address all of the evidence that established his membership and leadership role in the conspiracy.

Specifically, at trial, six witnesses testified regarding the existence of the conspiracy. Of those witnesses, Millan and David Johnson were

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[8] Here, as at trial, Reyes does not dispute that he was a drug dealer. *See* Reyes Br. at 13 ("[T]here was ample evidence that [he] sold narcotics . . . .").

themselves members of the conspiracy, Bowles supplied narcotics to members of the conspiracy, Peter Johnson and Steven Todd Delaney bought drugs from members of the conspiracy and Gibson allowed the members of the conspiracy to sell narcotics from his residence. Gibson also tested samples of narcotics provided to him by members of the conspiracy.

The testimony at trial established that in early 2010, Reyes, Daniels and several other members and associates of SMM took over 105/107 Johnson Street—the Trap—and began selling heroin and crack from the residence. GA84-91; GA169-72 (Tr. 83, 85, 92-95, 100-110, 424-28, 430, 434). Only those affiliated with SMM were permitted to sell narcotics from that location. GA172; GA177; GA188; GA215 (Tr. 435, 454-55, 499, 605-606).

The members of the conspiracy sold narcotics from the Trap every day. GA172-75; GA177; GA255; GA311-12 (Tr. 433, 437, 439-46, 454-55, 766, 989-994). While the conspirators each had their "own" customers, they also regularly made sales to the same individuals. GA186-87 (Tr. 491-94); Gov't Exs. 28, 47, 51, 64. The members of the conspiracy also made sales on one another's behalf. GA186; GA329; GA372 (Tr. 492, 1063-64, 1234); Gov't Exs. 27, 28, 42, 47, 51, 55. When new customers approached the Trap, the members of the conspiracy would rotate who made the next sale. GA187 (Tr. 494).

All of the members of the conspiracy sold drugs packaged in precisely the same manner—crack in plastic bags and heroin in paper folds—and for the same price of $10 a unit. GA314-15 (Tr. 1004-05); Gov't Ex. 96. The heroin the members of the conspiracy sold was all labeled with the same brand names, *i.e.*, Takeover or Max Pain. GA177; GA315; GA325-26; GA341; GA343; GA376 (Tr. 456, 1005, 1047, 1052, 1110, 1117, 1249). *See United States v. Hawkins*, 547 F.3d 66, 74 (2d Cir. 2008) (standardized dealings are a factor indicative of an agreement to participate in a distribution conspiracy).

Further, the members of the drug trafficking conspiracy all used the same coded language to refer to the narcotics they distributed and the weapons they collectively possessed. For instance, "twork" was a general reference to the narcotics they sold, and "schwammy" was a general reference to the gangs' guns. GA234 (Tr. 1042); Gov't Exs. 44, 48, 74. "Paper" and "dog food" were coded references to heroin, and "plastic," "hard" and "girl" were coded references to crack cocaine. GA178; GA180; GA314-16; GA318-19; GA325 (Tr. 458-59, 466, 1004-11, 1018-1022, 1047); Gov't Exs. 26, 31, 42, 48, 50-51, 54, 61, 63, 71, 76. *See United States v. Cirillo*, 499 F.2d 872, 887-88 (2d Cir. 1974) (use of "Slanguage" or "narcotics code language" is a factor to be considered in determining whether defendants are members of a single conspiracy).

In addition to using coded language, the coconspirators warned one another about the presence of law enforcement in an effort to avoid detection. GA324 (Tr. 1041-42); Govt' Ex. 49.

Certainly, jurors could have reasonably concluded that the evidence regarding the operations of the conspiracy, the regularity with which the conspirators interacted with one another and the substantial quantities of narcotics that they purchased and redistributed supported an inference of knowledge, dependency and participation in a single conspiracy to traffic in drugs. *See United States v. Williams*, 205 F.3d 23, 33 (2d Cir. 2000) ("A single conspiracy may be found where there is mutual dependence among the participants, a common aim or purpose or a permissible inference from the nature and scope of the operation, that each actor was aware of his part in a larger organization where others performed similar roles equally important to the success of the venture." (internal quotations omitted)); *see also Sureff*, 15 F.3d at 230; *Taylor*, 562 F.2d at 1352.

Further, jurors could have reasonably concluded that the evidence amply established that Reyes and Daniels knowingly and willfully became members of the charged conspiracy. Cooperating witnesses testified that Reyes and Daniels were leaders of the SMM gang, whose members and associates sold heroin and crack cocaine from the Trap seven days a week. GA170-

75; GA308; GA311-12; GA324; GA330 (Tr. 426-30, 433, 439-46, 979-80, 989-94, 1004, 1044, 1068). While Reyes and Daniels were partners in the Trap, they played different roles. Gov't Exs. 49, 70. Reyes spent the majority of time at the Trap selling drugs. GA170; GA173; GA378 (Tr. 428, 437, 1258). During his brief absences, he directed other members of the conspiracy to sell drugs to his customers on his behalf. GA186-87; GA329; GA372 (Tr. 492-94, 1063-64, 1234); Gov't Exs. 27, 28, 42, 47, 51, 55. Daniels occasionally sold drugs from the Trap, but also had White selling drugs on his behalf and would steer customers to the Trap to purchase narcotics from other members of the conspiracy. GA170; GA189; GA310; GA330; GA342 (Tr. 426-27, 503-04, 986, 1068, 1116); Gov't Exs. 65, 66, 68, 71.

Both Daniels and Reyes supplied narcotics to the other members of the conspiracy. Reyes and Daniels would obtain the narcotics from their suppliers in bulk quantities and then distribute them to their coconspirators for resale to street-level customers. GA182; GA323; GA326-27; GA339; GA341 (Tr. 474, 1038-39, 1049-50, 1054, 1101, 1110); Gov't Exs. 68-69, 75-77, 93. At times, Reyes re-packaged the bulk quantities of crack and heroin at the Trap prior to providing it to the other members of the conspiracy. GA183; GA254; GA327; GA376 (Tr. 477-78, 762-63, 1055-56, 1251); Gov't Exs. 60, 96.

In addition, Reyes and Daniels used the same code to refer to guns and drugs as the other members of the conspiracy. GA170; GA175; GA330 (Tr. 426-27, 448, 1068); Gov't Exs. 31, 68-69, 71-72, 76. And the drugs Reyes and Daniels sold were packaged in the same manner and sold for the same price as those sold by other members of the conspiracy. GA183; GA375 (Tr. 477-78, 1248); Gov't Exs. 48, 64, 69, 77, 93, 96. In short, the evidence established that Reyes and Daniels were members of the conspiracy who shared a common goal with their coconspirators, which, quite simply, was the distribution of substantial quantities of crack cocaine and heroin for profit. GA189-90; GA221; GA339 (Tr. 504-06, 630, 1104); Gov't Exs. 31, 49, 70.

2. The evidence established that the quantity of narcotics involved in the charged conspiracy was at least one kilogram of heroin and that this quantity was reasonably foreseeable to both Reyes and Daniels.

Reyes argues, as he did to the jury, that the evidence was insufficient to prove that the conspiracy involved at least one kilogram of heroin or that such a quantity was reasonably foreseeable to him. In particular, Reyes argues that he cannot be guilty of conspiring to distribute over one kilogram of heroin unless he "targeted" that quantity. Reyes Br. at 8. He attempts to support his position by reasoning that it is, "difficult to

conspire to move 1,000 grams of heroin and 280 grams of crack, one street-level baggie at a time." Reyes Br. at 9. Moreover, Reyes complains that he should not have been charged with a narcotics conspiracy claiming that Congress intended conspiracy laws to be used to punish the "kilogram-quantity kingpin" rather than "street level dealers" such as him. Reyes Br. at 10, 13. Reyes is wrong.

To begin, in *United States v. Pressley*, 469 F.3d 63 (2d Cir. 2006) (per curiam), this Court expressly considered and rejected Reyes' argument regarding the intended application of the conspiracy laws. There, the defendant argued, as Reyes does here, that the conspiracy laws were enacted to punish "kingpins" rather than "street level dealers." The Court rejected Pressley's contention and explained that conspiratorial liability was, in fact, intended to apply to street-level dealers who "exhibit remarkable longevity and engage in consistently brisk business." *Id.* at 65.

> Regarding § 841(b), it is true that in enacting the Narcotics Penalties and Enforcement Act of 1986, of which the present version of § 841(b) was one component, Congress sought to target "major traffickers, the manufacturers or heads of organizations, who are responsible for creating and delivering very large quantities of drugs." H.R.Rep. No. 99-845 (1986). Yet Congress also sought to target self-styled

> retailers such as Pressley. The House Judiciary Committee Report specifically included within its "focus" those "managers of the retail level traffic, the person who is filling the bags of heroin, packaging crack into vials or wrapping PCP in aluminum foil, and doing so in substantial street quantities. The Committee is calling such traffickers serious traffickers because they keep the street markets going." *Id.*

Id. at 66. The evidence at trial readily established that Reyes' narcotics trafficking activity was a "consistently brisk business." He not only personally sold heroin and crack cocaine every day, but also packaged narcotics and provided them to other dealers for re-sale. As such, he is precisely the type of drug-dealer the laws were intended to target.

Next, Reyes argues that in order to be found guilty of the charged conspiracy he must have agreed to deliver a kilogram of heroin during a single transaction "rather than selling many small quantities of heroin adding up to a kilogram." Reyes Br. at 8. In *Pressley*, this Court similarly considered and rejected Reyes' contention regarding the aggregation of sales explaining:

> [A] conspiracy *is* a single violation. It is an illegal agreement that may, and often does, encompass an array of substantive illegal acts carried out in furtherance of the

> overall scheme. *United States v. Broce*, 488 U.S. 563, 570-71, 109 S. Ct. 757, 102 L.Ed.2d 927 (1989) ("A single agreement to commit several crimes constitutes one conspiracy."); *Braverman v. United States*, 317 U.S. 49, 53-54, 63 S. Ct. 99, 87 L.Ed. 23 (1942). Within the context of a conspiracy to distribute large amounts of narcotics, these subsidiary crimes may take the form of a series of smaller drug sales.

469 F.3d at 65; *see also United States v. Tutino*, 883 F.2d 1125, 1141 (2d Cir. 1989) (aggregation of narcotics amounts across multiple transactions is permissible so long as the transactions form part of "single continuing scheme"). Here, the prolific series of narcotics transactions engaged in by Reyes, Daniels and other members of the conspiracy, were, for all of the reasons delineated above, part of a single, continuing scheme. As such, they were properly aggregated in order to prove the quantity involved in the conspiracy.

Finally, Reyes asserts that the evidence was insufficient to establish that his "target" was the sale of one kilogram of heroin. In substance, he contends that one cannot agree to sell a large quantity of a product one unit at a time. This was an argument that Reyes made to the jury and the jury rejected. GA428-29 (Tr. 1457, 1460-61). As the government responded, it is not reasonable to assume that Reyes only agreed to sell

the precise amount of drugs that he and his coconspirators had already sold prior to the day of their arrests. GA439 (Tr. 1501). Rather, the evidence established that the narcotics trafficking business at the Trap was booming and that there was a steady flow of customers. Reyes was, of course, aware of this fact as he was present at the Trap almost every day and supplied his coconspirators with narcotics to sell from the Trap. GA173 (Tr. 437). It was therefore proper for the jury to rely upon the aggregation of transactions that Reyes personally conducted, which included several sales of heroin in quantities larger than would be for a single use, and those conducted by his coconspirators. In sum, the evidence amply established that Reyes reasonably foresaw that the conspiracy involved over one kilogram of heroin as his success relied upon the large-scale distribution of narcotics, even if that distribution occurred one $10 unit at a time.

Daniels similarly argues that the evidence was insufficient to support the jury's finding that the conspiracy involved one kilogram of heroin and that such an amount was reasonably foreseeable to him. In an effort to support his argument, Daniels performs a series of contorted mathematical calculations that fail on several accounts. Daniels Br. at 11-14. First, Daniels estimates the quantity per unit of heroin in the light most favorable to him, rather than in the light most favorable to the government, as is re-

quired by law. In particular, relying upon but a portion of the testimony of Special Agent Dinnan's testimony, Daniels concludes that each $10 bag of heroin contained .01 grams of heroin at the low end[9] and .03 grams at the high end, as Agent King testified. GA104; GA234 (Tr. 162, 681-82). Notably, Daniels fails to weigh into his calculations that Agent Dinnan also opined that a "brick" of heroin—or 100 $10 bags—contained a combined total of five grams of heroin, an opinion supported by the chemists' findings. *See Best*, 219 F.3d at 200 ("[E]vidence must be viewed not in isolation but in conjunction."). Specifically, chemists testified at trial about the analysis of narcotics seized from members of the conspiracy and from some of Reyes' customers. The chemical analyses demonstrated that the bags of heroin sold by members of the conspiracy *actually* contained approximately .05 grams of heroin. GA292 (Tr. 913-916); Gov't Ex. 248. Accordingly, when viewed in the light most favorable to the government, the evidence established that the members of the conspiracy sold between five to 15 bundles, or 2.5 to 7.5 grams, of heroin a day. GA182; GA323 (Tr. 476, 1040).

Second, Daniels dissects the conspiracy into periods based upon each cooperating witness's testimony, *i.e.*, approximately five months for

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[9] Agent Dinnan opined that a $10 bag of heroin contained between .01 and .02 grams of heroin. GA233-34 (Tr. 680-81).

Peter Johnson, 219 days for David Johnson and 158 days for Millan, in an effort to lower the quantity of narcotics attributable to him. However, the time period charged in the indictment was January 2010 to January 2011. Thus, the artificial and limited time periods upon which Daniels attempts to rely are irrelevant for the purpose of determining quantity. Nonetheless, at an average rate of five grams a day, it would take the members of the conspiracy approximately 200 days to sell over a kilogram of heroin. Thus, even using the limited time periods suggested by Daniels, the conspiracy easily sold more than one kilogram of heroin.

Finally, and most notably, neither Reyes nor Daniels have challenged the proof with respect to the quantity of crack cocaine sold by the members of the conspiracy. Perhaps that is because the evidence readily proved that the members of the conspiracy sold far in excess of 280 grams of crack cocaine during the period charged in the superseding indictment. In particular, the testimony of Millan and David Johnson established that the members of the conspiracy sold between eight and 20 eight-balls of crack cocaine a week, which equates to between four and ten grams of crack a day. GA182; GA251-53; GA320 (Tr. 473, 752-53, 758, 1025-26). Accepting the evidence in the light most favorable to the prosecution, it would take fewer than three months of narcotics trafficking at a *conservative* rate of

four grams a day for the members of the conspiracy to reach the 280 gram quantity. Accordingly, any error in the jury's finding that Reyes and Daniels were responsible for one kilogram or more of heroin was harmless beyond a reasonable doubt.

In sum, the evidence at trial established that the defendants conspired to work towards a common goal, namely, to earn a profit through the sale of narcotics. The strategy they chose to reach that goal was the repeated sale of heroin and crack cocaine, one bag a time. Provided that the acts committed, in this case, the repeated sale of narcotics, were within the scope of the defendants' agreements with their coconspirators and that those acts were reasonably foreseeable to them, then they are responsible for those quantities. *United States v. Culbertson*, 670 F.3d 183, 189-90 (2d Cir. 2012). Here, the defendants' own words and actions, as captured on the wiretap interceptions, demonstrated that they not only agreed to the scope of the criminal activity undertaken by the members of the conspiracy, but that they actually directed that activity. Considered in that light, the evidence was sufficient to establish that it was reasonably foreseeable to Reyes and Daniels that the prolific sales of heroin from which they profited would, over the course of the conspiracy, equate to at least one kilogram of heroin.

3. The evidence was sufficient to prove Daniels guilty of both objects of the charged multi-object conspiracy.

Finally, Daniels argues that because the evidence was allegedly insufficient to prove that the conspiracy involved one kilogram or more of heroin that the government failed to prove one of the necessary elements in a multi-object conspiracy. Daniels reasons, incorrectly, that when a case is "pled in the conjunctive, i.e. a specific amount of heroin and a specific amount of cocaine base, is tried in the conjunctive, is charged to the jury in the conjunctive and the jury renders a special verdict," Daniels Br. at 15, the government's "failure" to prove one of the objects of the conspiracy mandates an acquittal.[10]

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[10] It is unclear to what Daniels is referring when he states "charged in the conjunctive." The court instructed the jury that it must first determine if a conspiracy existed and if Daniels knowing and voluntarily became a member of that conspiracy. If the jury found Daniels guilty of being a member of the conspiracy, the jury was instructed to then make distinct findings, first with respect to the quantity of heroin attributable to Daniels and then with respect to the quantity of cocaine base attributable to Daniels. The jury was not instructed it must find Daniels responsible for conspiring to distribute both heroin *and* cocaine base. Rather, the instructions made clear that the jury was to determine the object and

As demonstrated above, the evidence easily demonstrated that the conspiracy involved at least one kilogram of heroin so Daniels' claim is moot. However, assuming for the sake of argument that the evidence was insufficient to prove one of the objects of the multi-object conspiracy, Daniels' argument still fails.

It is well-established that, "when a jury returns a guilty verdict on an indictment charging several acts in the conjunctive . . . the verdict stands if the evidence is sufficient with respect to any one of the acts charged." *Turner v. United States*, 396 U.S. 398, 420 (1970); *see also Griffin v. United States*, 502 U.S. 46, 56-57 (1991) (the lack of sufficient evidence to support one of the objects of a multi-object conspiracy did not invalidate the conspiracy conviction where there was sufficient evidence to support the other object); *United States v. Berger*, 224 F.3d 107, 113 (2d Cir. 2000) ("The district court was correct as a matter of law to charge that the government needed only to prove agreement on one of the objectives charged in the indictment in order to establish that a conspiracy existed."); *United States v. Papadakis*, 510 F.2d 287, 297 (2d Cir. 1975) ("Where a conspiracy has multiple objectives, a conviction will be upheld so long as evidence is sufficient to show that an appellant

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purpose of the conspiracy, whether that be to distribute heroin, to distribute cocaine base or to distribute both. DA122; GA409-410.

agreed to accomplish at least one of the criminal objectives."); *United States v. Delano*, 55 F.3d 720, 730-31 (2d Cir. 1995) (holding that when jury returns general verdict on charge presenting two theories of criminal liability, verdict will be upheld where the evidence is sufficient so support either of the two theories).

In *United States v. Coriarty*, 300 F.3d 244 (2d Cir. 2002), the defendant was indicted on one count of conspiracy to commit wire fraud and securities fraud, one substantive count of securities fraud and 16 substantive counts of wire fraud. *Id.* at 248-49. While the indictment charged the conspiracy in the conjunctive, the jury instructions described the conspiracy as one to commit wire fraud *or* securities fraud. *Id.* at 249-250. The jury found the defendant guilty of the conspiracy and, using a special verdict form, found the defendant guilty of both objects of the conspiracy: wire fraud and securities fraud. *Id.* The jury also found the defendant guilty of one substantive count of securities fraud and eight substantive counts of wire fraud. *Id.* at 249.

Thereafter, upon the defendant's motion, the district court dismissed the substantive securities fraud conviction finding that the evidence was insufficient to support the charge. *Id.* The court did not dismiss the conspiracy charge finding that there was "'sufficient evidence to sustain the charge of conspiracy to commit wire

fraud.'" *Id.* (quoting *United States v. Coriarty*, 2001 WL 1910843, at 8 (S.D.N.Y July 16, 2001)).

Coriarty appealed arguing that the district court erred in failing to dismiss his conspiracy conviction. The defendant reasoned that he had been indicted for conspiracy to commit wire fraud and securities fraud. However, following the district court's ruling he only stood convicted of conspiracy to commit wire fraud. Thus, the defendant claimed that "the indictment was constructively amended or he was convicted of a crime not alleged in the indictment in violation of the Fifth Amendment." *Id.* at 250. This Court disagreed:

> [T]he right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means of committing the same crime provided that each offense whose elements are fully set out in an indictment can independently sustain a conviction. Hence the lack of sufficient evidence to support one of the objects of a multi-object conspiracy [does] not vitiate the conspiracy conviction, where there was sufficient evidence to support the other object.

Id. (internal citations and quotation marks omitted). This Court also held that, "[t]he rule that a jury's guilty verdict on a conjunctively worded indictment stands if the evidence is sufficient with respect to any of the acts charged, obviously

extends to a trial court's jury instructions in the disjunctive in the context of a conjunctively worded indictment." *Id.* (citations and quotations marks omitted). In other words, since a jury's finding of guilt on any one object of a multi-object conspiracy is sufficient to support a conspiracy conviction, it is not error for a court to charge that a defendant may be convicted if the jury finds he has conspired to commit any one object of the conspiracy. Finally, this Court held that because the defendant had not alleged that the conspiracy charge "did not include a charge of conspiracy to commit wire fraud, or that he lacked notice that he was being prosecuted for [that] crime" his claim was without merit. *Id.*

Ignoring *Coriarty*, Daniels asserts that this Court has never considered the issue he now raises regarding multiple-object conspiracies, Daniels Br. at 15, and cites to *United States v. Schramm*, 75 F.3d 156 (3d Cir. 1996), in an effort to support his position that his conspiracy conviction must be reversed. But Daniels has cited *Schramm* for a proposition for which the case does not stand. Specifically, Daniels states that, "In *Schramm*, the Circuit court ordered an acquittal because the government failed to prove all objects of a multi-object conspiracy which was pled in the conjunctive, tried in the conjunctive and charged in the conjunctive wherein the jury rendered a special verdict." Daniels Br. at 15. Daniels' analysis of the case is flawed because

the *Schramm* Court ordered an acquittal due to the government's failure to prove *any* object of the charged multi-object conspiracy.

In *Schramm*, the defendant was charged with conspiracy under Title 18, United States Code, Section 371. The indictment alleged two objects of the conspiracy: (1) to defraud the Internal Revenue Service by obstructing the collection of federal diesel fuel excise taxes, and (2) to use the United States mail to defraud Pennsylvania with respect to the payment of a state diesel motor fuel use tax (*i.e.*, a retail tax). 75 F.3d at 160. The trial court provided the jury with a special verdict form upon which the jury, if they found the defendant guilty of conspiracy, was to select either, or both, the first object or the second object as the purpose and object of the conspiracy. The jury found that the second object, that is, that the defendant agreed to "violate federal law, namely federal law prohibiting mail fraud," was the sole purpose and object of the conspiracy. *Id.* at 160.

The district court upheld that jury's verdict, although on a different theory than that alleged in the indictment. In substance, the district court found that the evidence was sufficient to support the jury's conclusion that the defendant used the mail to evade taxes. *Id.* at 162. However, the court found that the evidence proved the defendant evaded Pennsylvania's Oil Franchise Tax, which is a tax on the sale of oil at the

wholesale level, rather than Pennsylvania's Fuel Use Tax, which is a tax on the sale of oil at the retail level. *Id.* at 163.

The Third Circuit overturned the district court's ruling. The Court held that even if there was sufficient evidence to support the court's finding that the defendant participated in a scheme to evade Pennsylvania's Oil Franchise Tax (the wholesale tax), the conviction could not stand on that basis. The Court explained that because the indictment had charged only a conspiracy to evade Pennsylvania's retail use tax, any conspiracy to evade the wholesale tax was not fairly included as an object of the conspiracy. *Id.* at 163. And, as the Court explained, "[i]f the government had intended to charge [the defendant] with agreeing to participate in a scheme to violate Pennsylvania's wholesale tax as well, it easily could have, and certainly should have, done so." *Id*. at 163. Because the indictment did not charge a conspiracy to violate the wholesale tax, the verdict could not be upheld on that basis. *Id.*

Furthermore, the Third Circuit concluded that there was insufficient evidence to establish that the defendant was guilty of the second object of the conspiracy as it *was* charged. Specifically, the Court found no evidence to establish that the defendant was aware of, or sought to evade, the Pennsylvania retail fuel tax as alleged as the second object of the conspiracy. *Id.*

at 160-62. Because the government failed at trial to produce sufficient evidence to prove the first object of the conspiracy, and because the evidence was insufficient for the jury to have found that the defendant entered into an agreement to achieve the *specific* unlawful purpose charged in the second object, the Court reversed and entered a judgment of acquittal. *Id*. at 164.

The reasoning in *Schramm* is plainly inapplicable here. As both the jury and the district court found, the evidence was sufficient to prove that Daniels entered into an agreement to achieve the *specific* unlawful purposes named in the indictment, namely, the distribution and possession with intent to distribute at least one kilogram of heroin and at least 280 grams of cocaine base. However, even if the defendant had been acquitted of conspiring to distribute heroin, his conviction would still stand because, as Daniels concedes, the evidence was sufficient to support both the jury's and the court's finding that he conspired to distribute at least 280 grams of cocaine base. *See Turner*, 396 U.S. 420 ("[T]he verdict stands if the evidence is sufficient with respect to any one of the acts charged.").

II. The district court properly instructed the jury that it must find the quantity of narcotics attributable to each defendant beyond a reasonable doubt.

Reyes argues that the court did not properly instruct the jury on the elements of Count One, claiming that the "jury was instructed that only two elements were required to convict Mr. Reyes of Count One." Reyes Br. at 15. In an effort to support his claim, Reyes parses out only three paragraphs of the court's jury instructions, *see* Reyes Br. at 16, and entirely disregards the remainder of the court's very thorough jury charge. The defendant further places substantial weight on the fact that there was a "separation in the document between the two actual elements and the quantity instruction" claiming that there was a "lack of any connection to the first two essential elements." Reyes Br. at 16. The defendant is wrong.

A. Relevant facts

The district court charged the jury, with respect to the conspiracy charged in Count One, in relevant part, as follows:

> To satisfy its burden on Count One, the government must prove with respect to each defendant the following elements beyond a reasonable doubt: (1) that two or more persons entered into the unlawful agreement charged in Count One of the

> indictment, that is, an agreement to distribute and to possess with intent to distribute controlled substances; and (2) that the defendants knowingly and willfully became members of the conspiracy.

GA407 (Tr. 1374). After describing and defining the first element of the offense, the court continued as follows:

> So, the second element is membership in the conspiracy. The second element, which the government must prove beyond a reasonable doubt to establish the offense of conspiracy, is that each of the defendants knowingly, willfully and voluntarily became a member of the conspiracy. If you are satisfied that the conspiracy charged in Count One existed, you must next ask yourself who the members of the conspiracy were.

GA408 (Tr. 1379). After this instruction, the court provided guidance to the jury on how to determine who was a member of the conspiracy. The court continued with the following language:

> Now, if you find that the government has proved beyond a reasonable doubt the elements of conspiracy that I've just described to you, then there is one more issue that you will decide. I provided you with a special verdict form that asks you to fill in the type and amount of drugs that

each of the defendants conspired to distribute or to possess with intent to distribute. Specifically, defendants Reyes and Daniels are charged with conspiring to distribute and to possess with intent to distribute one kilogram, that's 1,000 grams, or more of heroin, and 280 grams or more of cocaine base, crack cocaine. *The burden is on the government to establish the type and amount of drugs attributable to each defendant beyond a reasonable doubt. Remember, you should address this issue of types and quantities of drugs and complete that part of the form only if you find the first two elements have been established as to each individual defendant.* If you do not find that the government has proved both elements as to one of the defendants, do not complete this form as to that defendant.

In making your determination about quantity of narcotics involved in the conspiracy, you must reach a unanimous decision. You may not rely upon speculative extrapolation when determining the quantities, if any, of heroin or cocaine base attributable to each defendant. Specific evidence, including, but not limited to, phone calls, evidence seized or witness testimony, is required for calculating drug quantities. *As with any element of the charged con-*

> *spiracy*, although you may draw reasonable inferences from the facts presented concerning the quantity or weight of narcotics attributed to a specific defendant, you may not engage in guesswork or speculation.
>
> Quantities of narcotics are attributable to a specific defendant if that defendant took actions in furtherance of the conspiracy with respect to the narcotic or if it was reasonably foreseeable to that defendant that a co-conspirator would do so. *The government has the burden of proving beyond a reasonable doubt that the specific quantities charged in Count One were within the scope of a particular defendant's agreement and foreseeable to him.*

GA409-10 (Tr. 1384-85, 1385-86) (emphasis added).

The defendant did not object to this instruction. GA418 (Tr. 1420).

B. Governing law and standard of review

When challenging jury instructions on appeal, a defendant must show that he was prejudiced by a charge that misstated the law. *See United States v. Ferguson*, 676 F.3d 260, 275 (2d Cir. 2011); *United States v. Goldstein*, 442 F.3d 777, 781 (2d Cir. 2006). No particular form of

words is required, so long as "taken as a whole" the instructions correctly convey the required legal principles. *See Victor v. Nebraska*, 511 U.S. 1, 5 (1994). Accordingly, a single jury instruction "may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973); *see also United States v. Sabhnani*, 599 F.3d 215, 237 (2d Cir. 2010). The review of the instructions in their entirety is to determine "whether, on the whole, they provided the jury with an intelligible and accurate portrayal of the applicable law." *United States v. Weintraub*, 273 F.3d 139, 151 (2d Cir. 2001). Even if a particular instruction, or portion thereof, is deficient, this Court reviews "the entire charge to see if the instructions as a whole correctly comported with the law." *United States v. Jones*, 30 F.3d 276, 283 (2d Cir. 1994).

This Court reviews the propriety of jury instructions *de novo*. *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004). If there is error, this Court will vacate a criminal conviction only if the error prejudiced the defendant. *Goldstein*, 442 F.3d at 781. But where, as here, a defendant fails to object to a jury instruction, this Court reviews only for plain error. *See* Fed. R. Crim. P. 30(d); Fed. R. Crim. P. 52(b); *Ferguson*, 676 F.3d at 276. Under that 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*, 560 U.S. 258, 262 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)); *see also United States v. Wagner-Dano*, 679 F.3d 83, 94 (2d Cir. 2012).

C. Discussion

Because Reyes never objected to the court's conspiracy instructions, much less suggested that those instructions left out an "essential element," Reyes Br. at 17, this Court reviews the instructions for plain error. But here, regardless of the standard of review, there was no error. Reversal is not mandated because the court's instruction was entirely appropriate.

In order to convict a defendant of a narcotics trafficking conspiracy, "[t]he record must . . . permit a rational jury to find: (1) the existence of the conspiracy charged; (2) that the defendant had knowledge of the conspiracy; and (3) that the defendant intentionally joined the conspiracy." *Santos*, 541 F.3d at 70 (citations omitted). "Furthermore, in a conspiracy punishable under 21 U.S.C. § 841(b)(1)(A), the government must

also prove (4) that it was either known or reasonably foreseeable to the defendant that the conspiracy involved the drug type and quantity charged." *Id.* at 70-71 (citing *United States v. Adams*, 448 F.3d 492, 499 (2d Cir. 2006)). Here, the jury was plainly instructed that it must find all of the above factors beyond a reasonable doubt.

A review of the record demonstrates that the district court instructed the jury that it must first determine whether the government had proved beyond a reasonable doubt that a conspiracy existed and that the defendant knowingly and voluntarily joined it. GA407-409. Only if the jury found that the government satisfied its burden of proof on the first two elements was the jury to determine if the government had proven the quantity involved in the conspiracy beyond a reasonable doubt. GA409-410.

As is evident from the court's charge as set forth above, the court clearly instructed the jury that in determining quantity it was required to rely upon the facts presented and the reasonable inferences to be drawn therefrom "[a]s with any element of the charged conspiracy." GA410. Furthermore, the court also instructed that the jury's finding on quantity must be unanimous and that it must have been proven by the government beyond a reasonable doubt. GA410. The fact that the court did not label the drug and quantity findings as "elements" of the conspiracy

offense is beside the fact when the jury had to find those facts—just as with all elements—beyond a reasonable doubt.

The defendant's claim that there was a "lack of connection" between the first two essential elements of the conspiracy charge and the quantity instruction is belied by the plain text of the instruction. In fact, the court repeatedly reminded the jury of the connection between the first two elements and the question as to quantity, *i.e.*, "you should address this issue of types and quantities of drugs and complete that part of the form only if you find the first two elements have been established as to each individual defendant." GA410. The form to which the court referred was the special verdict form that specifically directed the jury to first make a determination as to whether each defendant was guilty or not guilty of conspiracy to distribute and to possess with intent to distribute narcotics. RA120-23; DA120. The verdict form then directed that if the jury found the defendant not guilty of conspiracy, it need not make a determination on quantity. If, however, the jury found the defendant guilty of conspiracy, it was directed to answer the next question, which required it to make a finding of drug quantity for each charged drug. DA122.

Therefore, contrary to Reyes' claim, when the jury instructions are read as a whole, the jury was properly instructed that if it found the first

two elements satisfied, it must also make a determination beyond a reasonable doubt about the quantity of heroin involved in the conspiracy that was reasonably foreseeable to Reyes.

III. The district court properly declined to grant the defendants' motions for a mistrial.

A. Relevant facts

On August 1, 2012, the district court held a final pretrial conference in the instant matter. GA51-63. During that conference a number of issues were discussed, including Reyes' concern that the government was going to introduce Rule 404(b) evidence regarding two shootings which had taken place during the course of the investigation. Defendant Reyes also expressed concern regarding the admission of testimony concerning the overdose death of a woman in January 2011 who had been at 105/107 Johnson Street immediately preceding her death. Specifically, Reyes sought to exclude bad act evidence related to shootings which he was alleged to have committed or conspired to commit, and to exclude evidence that would suggest that he played a role in the woman's overdose death. GA60 (Tr. 37-38). In particular, Reyes' counsel stated, "I really do think we need to know beforehand, especially about the death of a woman or any other shooting that resulted in injury or death or shootings in general. If the government has a plan for in-

terjecting that evidence, we've not been put on formal notice, to my knowledge, of any of bad acts evidence coming in." GA60 (Tr. 38).

The district court then inquired of the government whether there was "evidence in this case of shootings or deaths that are attributed to either of the conspiracies that are alleged?" GA60 (Tr. 39). In response to that question, the government stated:

> So, with respect to the shootings of other human beings, no, we're not planning to elicit any information about any of these defendants shooting another human being or killing another human being or any of their co-defendants doing that. There's testimony that will come in about defendant Ramos firing a gun, not at anyone, but firing a gun, and there is plenty of testimony about the possession of weapons during the course of the conspiracy and, in fact, in furtherance of the conspiracy. But as far as assaults with firearms or homicides, there's nothing.[11]

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[11] During the pretrial conference, the government believed defense counsel's concern was focused upon two separate shootings that occurred during the course of the investigation, one that resulted in a victim's death and one that resulted in a victim sustaining serious bodily injury. When the government made its representations to the court, it was focused

GA60 (Tr. 39).

On August 20, 2012, Reyes and Daniels proceeded to trial. On August 21, 2012, the government called David Johnson, a co-conspirator, to testify. During the course of his testimony, the following colloquy took place:

> Q: At some point between August 2010 and January 2011, did you get into an altercation with Mr. Reyes and Mr. Ramos?
>
> A: Oh, yes.
>
> Q: Okay, and without going into the details of why you got into that altercation with them, just explain to the jury what happened.
>
> A: I was talking to Rattle about a situation, we ended up having an argument. It was him, Fat Joe and Cuda was out there. We proceeded to argue. Rattle picked up a milk crate and was hitting me with the milk crate, and I was blocking it, but I never hit him back. He just was drunk and hitting me with the crate. I was also drink-

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upon those shootings, both of which fell under the ambit of Rule 404(b), and readily agreed it would not seek to admit evidence of either shooting in its case-in-chief. As the court and defense counsel recognized, the government's subsequent error in this regard was unintentional. GA191; GA196.

ing. We was both loud and, you know, it got kind of heated.

That's when Fat Joe walked off, and Cuda and me and Rattle were in almost in a fight. Fat Joe came back about five minutes later, he had a handgun, one of the guns that was in the pictures. He get about maybe to where the jury booth is toward me and he shot at me.

Q: You didn't get hit?

A: No, the bullet went through my shoe and ricocheted through my shoe off the ground and just kept going, I guess.

Q: When you indicate Mr. Reyes shot at you, were Cuda and Rattle near you as well?

A: They kind of seen him walking up. We all kind of seen him. So, they kind of backed up, because we all saw him with the gun. So, I was just stuck right there, and that's when he just shot at me.

GA190 (Tr. 507-508). Reyes did not contemporaneously object to the testimony. Immediately after the testimony, the court dismissed the jury, not because of the testimony but rather because it was the end of the trial day. GA190-91 (Tr. 508-509).

Reyes and Daniels moved for a mistrial, GA191 (Tr. 509-510); GA197 (Tr. 534-35), and

the following morning, the court heard argument regarding their motion. GA193-96 (Tr. 520-531). The court found that the government should not have elicited the above described testimony as it contravened its representation during the pre-trial conference that it did not plan to introduce evidence of shootings. GA196 (Tr. 529). The court also found, and the defense agreed, that the government had not elicited the testimony in bad faith, but rather had done so under the mistaken belief that testimony regarding the non-injury shooting was permissible. GA196 (Tr. 531).

The court ruled that it would strike the testimony from the record and that it would admonish the jury to disregard the testimony. GA194; GA195 (Tr. 523-524, 528). The court then brought the jury into the courtroom and issued a curative instruction:

> Good morning, ladies and gentlemen. Please be seated.
>
> Before we continue with the testimony of Mr. Johnson—actually we're going to have another witness who is short and has time problems go before we pick up again with Mr. Johnson. I wanted to give you a limiting instruction. You remember at the beginning I told you that there would be—there may be evidence that's offered for a limited purpose, that I would tell you what the limited purpose was, and that if I tell

you to exclude and not consider evidence, it's no longer evidence. So, this is one of those instructions.

You heard yesterday testimony from Mr. Johnson about an altercation sometime between August 2010 and January 2011 that involved Mr. Johnson, Mr. Reyes, Mr. Ramos and Cuda. You heard testimony about Rattle, Mr. Ramos, picking up a milk crate and hitting Mr. Johnson, and then you heard testimony in the context that Mr. Johnson explained that Ramos was drunk, and he was also drinking, "we were both loud," it "got heated," and that Mr. Reyes came back and fired a handgun into Mr. Johnson's shoe.

I am telling you—I am striking that testimony and telling you to exclude it because it does not bear on the issues that are before you. It doesn't bear on the existence of a conspiracy to possess with intent to distribute, it doesn't bear on the thousand—conspiracy to maintain a premises, drug premises within the 1,000 feet of the school and housing project, it doesn't bear on the weapons charge against Mr. Reyes.

Because of that, I am striking it. I am telling you to disregard it. It just is not part of the evidence in this case.

GA197-98 (Tr. 535-37).

After the jury convicted both defendants on all counts, Reyes moved for a judgment of acquittal, and alternatively for a new trial, arguing that there was insufficient evidence to convict him on any counts charged and thus that the verdict must have been the result of the prejudice resulting from the inadvertent presentation of the Johnson testimony at trial. DA192. The court rejected this argument, noting first that it had instructed the jury to disregard the testimony and concluding that this instruction cured any impact from the testimony: "[T]he Court has no basis for believing that the jury was unable to or did not follow this instruction, nor was this testimony 'devastating' to the outcome of the trial." DA192 (quoting *United States v. Elfgeeh*, 515 F.3d 100, 127 (2d Cir. 2008)). Further, the court found, after reviewing all of the evidence at trial, that "there was ample evidence presented at trial to establish his guilt as to each count of the Third Superseding Indictment." DA193. Accordingly, because the guilty verdicts resulted from the evidence presented and not from any improper prejudice, the court concluded that there was no basis for granting a new trial. DA193-95.

B. Governing law and standard of review

"Courts have the power to declare a mistrial 'whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public

justice would otherwise be defeated.'" *United States v. Klein*, 582 F.2d 186, 190 (2d Cir. 1978) (quoting *United States v. Perez*, 22 U.S. 579, 580 (1824)). "The decision to declare a mistrial is left to the 'sound discretion' of the judge, but 'the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes.'" *Renico v. Lett*, 559 U.S. 766, 774 (2010) (quoting *Perez*, 22 U.S. at 580).

"A district court's denial of a motion for mistrial is reviewed for abuse of discretion." *United States v. Rodriguez*, 587 F.3d 573, 583 (2d Cir. 2009). In order to find such an abuse of discretion, this Court must conclude that the "trial judge ruled in an arbitrary and irrational fashion." *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001) (internal quotations omitted).

C. Discussion

1. Reyes and Daniels were not deprived of a fair trial.

The district court did not abuse its discretion when it denied Reyes' and Daniels' motion for a mistrial based upon their claim that David Johnson's testimony unduly prejudiced them. Assuming that admission of the testimony was error, the admission did not affect either Reyes or Daniels in such a way as to warrant a mistrial. Johnson's testimony was brief on the issue in question. Johnson stated that he had an alterca-

tion with Reyes and Ramos. Johnson continued that Ramos hit him with a milk crate and that Reyes then obtained a gun and fired at him—from approximately 20 feet away—striking him in the shoe. The court struck this limited testimony from the record and instructed the jury to disregard it.

Nevertheless, Reyes argues that the testimony, in combination with a variety of other factors, was "extremely prejudicial and led to a conviction notwithstanding the lack of evidence supporting a kilogram of heroin." Reyes Br. at 6. As detailed above, there was ample evidence to support Reyes' conviction for conspiracy to distribute and to possess with intent to distribute one kilogram or more of heroin absent this brief reference to a non-injury shooting. More importantly, the testimony at issue can hardly be characterized as "extremely prejudicial" in light of the other firearm evidence that was introduced to the jury throughout trial without objection. For instance, there were several photographs admitted that depicted Reyes and his coconspirators in possession of numerous firearms, including an assault rifle, all while clad in ski masks. *See* Gov't Exs. 108-112. There was also testimony from witnesses who saw Reyes in possession of firearms on numerous occasions at 105/107 Johnson Street. In addition, there was testimony regarding Reyes using Bowles as a straw purchaser to obtain two firearms, and that

the reason Bowles agreed to act as a straw purchaser was because she lost Reyes' AK-47 assault rifle. GA260 (Tr. 788).

Daniels argues that "the taint or association with [Reyes] and his acts of violence was unduly prejudicial to [him]. No curative instruction would suffice to remove the prejudice." Daniels Br. at 10. Of particular note is the fact that Daniels was not present for the altercation that was the subject of the testimony, and he was not implicated in the shooting in any manner. Under those circumstances, it cannot reasonably be argued that Johnson's testimony regarding *Reyes* firing a weapon created a "manifest necessity" for *Daniels* to receive a new trial. This is especially so given the other testimony—properly admitted—regarding witnesses seeing Daniels in possession of firearms on various occasions at 105/107 Johnson Street.

Further, neither Reyes nor Daniels objected to the questions posed to David Johnson or the testimony he provided. Their failure to make a timely objection during the direct examination itself demonstrates that the testimony did not create an "urgent circumstance[]" requiring a mistrial. *See Renico*, 559 U.S. at 774. "To be timely, an objection . . . must be made as soon as the ground of it is known, or reasonably should have been known to the objector." *United States v. Yu-Leung*, 51 F.3d 1116, 1120 (2d Cir. 1995) (internal quotations omitted); *see also* Fed. R.

Evid. 103(a)(1). "When a defendant has been made fully aware of the response which a question is bound to elicit, he should object when the question is asked, rather than delay with the hope of inviting error and laying the foundation for a mistrial." *United States v. Armedo-Sarmiento*, 545 F.2d 785, 795 (2d Cir. 1976). Here, the defendants had been provided with reports documenting the substance of David Johnson's prior statements, which included information regarding the shooting altercation, well in advance of trial. GA194 (Tr. 524). The fact that neither Reyes nor Daniels objected to the question when it was posed to David Johnson, or during his testimony, demonstrates that neither the question nor the answer was so obviously improper as to create an urgent circumstance requiring a mistrial.

2. Less drastic remedies than a mistrial adequately cured any alleged prejudice.

Finally, to the extent that David Johnson's testimony was prejudicial, the court addressed this concern by striking the testimony and providing the jury with a curative instruction. As the case law makes clear, limiting instructions are the appropriate remedy to address any concerns raised by the testimony. For example, in *Armedo-Sarmiento*, this Court held that the district court properly denied a defendant's motion for a mistrial where the defendant argued

that an improper question of a police officer had elicited inadmissible information harmful to him. The Court noted that the defendant failed to object to the question, but instead objected only after the witness had answered. 545 F.2d at 795. Moreover, the Court noted that any prejudicial effects from the answer were addressed by the district court's "careful admonitions" to the jury to disregard the answer. *Id.* Similarly, in *United States v. Levy*, 578 F.2d 896, 902 (2d Cir. 1978), this Court held that a curative instruction by the district court, not a mistrial, was the appropriate remedy where a government witness inadvertently testified that the defendant had been in prison.

In *United States v. Watson*, 599 F.2d 1149, 1158 (2d Cir. 1979), this Court held that the district court properly denied a motion for a mistrial when a witness expressed fear about testifying and abruptly left the stand during cross-examination. The Court found that the curative instruction given by the district court sufficiently addressed any prejudice to the defendants. As this Court has explained, "[w]here an inadmissible statement is followed by a curative instruction, the court must assume that a jury will follow an instruction to disregard inadmissible evidence inadvertently presented to it, unless there is an overwhelming probability that the jury will be unable to follow the court's instructions, . . . and a strong likelihood that the effect of the evi-

dence would be devastating to the defendant." *United States v. Elfgeeh*, 515 F.3d 100, 127 (2d Cir. 2008) (internal citations omitted).

Similarly, this Court has repeatedly affirmed the denial of mistrial motions predicated on the submission of evidence of uncharged criminal conduct or "other act" evidence. *See United States v. Anzalone*, 626 F.2d 239, 245-46 (2d Cir. 1980) (district court properly exercised its discretion by denying mistrial motion after the government presented evidence of the defendant's uncharged criminal conduct to counter an entrapment defense that the defendant did not clearly raise, where "the court instructed the jury to disregard the testimony" about the other crimes); *cf. United States v. McKee*, 462 F.2d 275, 276-77 (2d Cir. 1972) (no abuse of discretion to deny a mistrial motion based on the prosecutor's improper question regarding the defendant's selection of a particular defense attorney). Even in situations where the government has adduced evidence that not only referred to a defendant's uncharged conduct, but also varied from information contained in the indictment, cautionary instructions have generally been found sufficient to cure the prejudice and obviate the need for a mistrial. *See United States v. Caballero*, 277 F.3d 1235, 1242-44 (10th Cir. 2002) (affirming denial of mistrial motion based on variance involving the admission of evidence "regarding the defendants' involvement in prior

bad acts . . . . [including] events that varied in time, place, and persons involved from the crimes alleged in the indictment").

Daniels asserts that there was an "overwhelming probability that the jury would not be able to follow the judge's instructions," Daniels Br. at 9, but does not explain why this is so. Daniels also does not explain why the district court's instruction was insufficient to remedy any concerns.

Here, as the district court found, there is no basis for concluding that the jury could not follow the court's instructions. The nature of the testimony was not the kind of prejudicial evidence that a jury would be unable to disregard, especially given the other evidence presented at trial. There was overwhelming evidence to support both Reyes' and Daniels' convictions on the narcotics trafficking charges, including wiretap recordings, physical surveillance, narcotics seizures and the testimony of four cooperating witness. There was also overwhelming evidence to support Reyes' conviction for being a convicted felon in possession of a firearm, including wiretap calls between Reyes and Bowles related to the purchase of the guns, Bowles' testimony that she purchased the weapons on Reyes' and Winston's behalf, the recovery of one of the weapon's from Winston's residence, Rich's testimony that Reyes and Winston accompanied Bowles into the gun store and Rich's identification of the weap-

ons Bowles purchased in photographs recovered from Reyes' cellular telephone. In short, there is no reason to believe that the court's limiting instruction was ineffective on this record. Therefore, neither Reyes nor Daniels demonstrated an entitlement to the extreme remedy of a mistrial, which is warranted only upon a showing of actual prejudice. *See United States v. Abrams*, 137 F.3d 704, 708-09 (2d Cir. 1998) (per curiam); *United States v. Cohen*, 177 F.2d 523, 527 (2d Cir. 1949) (mistrial is an "extreme remedy" which was properly denied where remedial instructions could have cured the error).

The district court properly exercised its discretion when it denied the defendants' motions for a mistrial. Even if David Johnson's challenged testimony was admitted improperly, the district court appropriately addressed that issue through a careful and thorough limiting instruction. Furthermore, on the record here, there is no reason to believe that the jury could not follow that instruction.

IV. The district court's finding that Reyes' and Daniels' Pre-Sentence Reports set forth an accurate assessment of the quantity of heroin (one kilogram) attributable to each defendant was amply support by the evidence.

Reyes claims that the sentencing court erroneously calculated the quantity of heroin that was reasonably foreseeable to him because it relied upon the jury's "advisory opinion" with respect to the quantity of heroin involved in the conspiracy. Reyes continues that the jury's quantity determination was incorrect because it factored in "the acts of others" and was "unsupported by the evidence." Reyes Br. at 23.

Daniels argues that the sentencing court "committed the same error as the jury in its analysis," in that it utilized what Daniels characterizes as an improper multiplier to calculate the quantity of heroin involved in the conspiracy. Daniels Br. at 14. Daniels also argues that court incorrectly factored the acts of others into its quantity determination without first finding that those acts were within the scope of Daniels' agreement and reasonably foreseeable to him, as well. Daniels Br. at 16.

Both Reyes' and Daniels' arguments are without merit.

A. Relevant facts

On February 28, 2013, the district court sentenced both Reyes and Daniels. Prior to the commencement of the sentencing hearings, Reyes and Daniels jointly moved for reconsideration of their Rule 29 and Rule 33 motions, which had been denied by the court pursuant to a written ruling issued February 19, 2013. DA181. Both defendants claimed that the court, in denying their post-trial motions, utilized an incorrect multiplier to calculate the quantity of heroin involved in the conspiracy. DA216-17. The defendants argued that the court should have calculated each dose of heroin as weighing .01 grams rather than .05 grams and claimed that the court's calculations were faulty because they relied upon the narcotics expert's "math error" and a heroin seizure that Reyes characterized as "an aberration." DA217; DA220.

The government countered that while the expert testified that each bag of heroin contained between .01 and .02 grams, she also testified that a brick, or 100 bags of heroin, weighed approximately five grams meaning that each individual bag would actually weigh .05 grams. DA222. In addition, the government stated that the evidence at trial, which is to be reviewed in the light most favorable to the guilty verdict, included testimony from two chemists regarding narcotics seizures. DA223. The testimony from those chemists established that heroin seized

from Cora, one of the organization's suppliers, and Tuite, one of the organization's customers, weighed .05 grams per bag. Thus, the government argued, while it was likely that the weight of each bag of heroin varied, there was ample evidence presented to the jury from which they could reasonably conclude that the conspiracy involved at least one kilogram of heroin. DA223. Finally, the government noted that neither Reyes nor Daniels had attacked the jury's finding that it was reasonably foreseeable to each defendant that the conspiracy involved at least 280 grams of heroin. DA224. Pursuant to U.S.S.G. § 2D1.1(c)(4), 280 grams of crack cocaine or more results in a base offense level of 32. Accordingly, regardless of the quantity of heroin found by the court, the defendants' base offense level would remain unchanged.

With respect to calculating the quantity of heroin reasonably foreseeable to the defendants, the court explained the following:

> Defendants [] don't dispute that several cooperating witnesses testified that the gang typically sold between 5 and 15 bundles, or between 50 and 150 bag of heroin per day from 105-107 Johnson Street. Thus, defendants do not appear to dispute that there was evidence at trial from which the jury could have concluded a maximum that the gang sold of 7.5 grams of heroin per day, and arithmetically over

the period of the conspiracy could have concluded that the gang sold over 2.7 kilograms within the year.

* * *

Assuming each bag sold by the gang was .02 grams of heroin, that would be supported by Agent Dinnan's testimony, not subject to bad math, and would have been supported by the chemical analysis. At a rate of 15 bundles per day, then the gang would have sold three grams of heroin per day, amounting to slightly more than a kilogram in a year. If you take the average of all of the weights introduced at trial, you would get .025 [per bag], which would lead still to a kilogram or more.

Therefore, the defendants' analysis works only if the only multiplier available to the jury was .01 to calculate the amount of heroin involved in the charged conspiracy. Since the other evidence supports the use of .02, .025, .03, or .05, the defendants' argument that using the multiplier of .01 would "reasonably be expected to alter the conclusion reached by the court under the *Schrader* standards" does not comport with the existence of other evidence supporting a level of .02 or more, and thus, the outcome would not be changed because there was evidence for the jury's consider-

> ation of a multiplier of more than .01 supporting their finding of a kilo or more . . . .

DA227-30. In short, the court concluded that the evidence at trial, viewed in the light most favorable to the verdict, established that it was reasonably foreseeable to each defendant that the quantity of heroin involved in the conspiracy was at least one kilogram of heroin. DA233; RA429-30.

B. Governing law and standard of review

"A Sentencing Guidelines calculation must begin with an identification of the defendant's relevant conduct, which in the case of a drug possession offense includes the quantity of drugs controlled by the defendant, whether as a principal or as an aider and abettor." *United States v. Jones*, 531 F.3d 163, 174-75 (2d Cir. 2008). "Determining drug quantity is a task for the sentencing court, and in performing that task it is not bound by jury findings or evidence presented at trial, but may consider any reliable proof." *United States v. Shonubi*, 998 F.2d 84, 89 (2d Cir. 1993) (internal citations omitted).

Section 2D1.1 of the Sentencing Guidelines sets forth the base offense levels for drug convictions, which levels are determined in part by the drug quantity table found at U.S.S.G. § 2D1.1(c). The drug quantity table sets forth a graduated scale of offense levels based upon the weight of

the drugs involved in the offense. With respect to drug quantity determinations in conspiracy cases, "[a] defendant convicted for a 'jointly undertaken criminal activity' such as [a drug trafficking conspiracy], may be held responsible for 'all reasonably foreseeable acts' of others in furtherance of the conspiracy." *Snow*, 462 F.3d at 72 (quoting U.S.S.G. § 1B1.13(a)(1)(B) (2002)). Thus, a defendant need not actually know the exact quantities involved in the conspiracy; instead, "it is sufficient if he could reasonably have foreseen the quantities involved." *Id.*

In drug conspiracy cases such as the instant one, the offense of conviction spans a time period and a large number of transactions. If the district court finds that the drugs seized by law enforcement under-represent the actual amount of narcotics sold, "a district court must estimate the amount of drugs involved in a crime for sentencing purposes, [and] that estimation 'need be established only by a preponderance of the evidence.'" *United States v. McLean*, 287 F.3d 127, 133 (2d Cir. 2002) (quoting *United States v. Prince*, 110 F.3d 921, 925 (2d Cir. 1997)); *see also* U.S.S.G. § 2D1.1, Note 5. In making such an estimate, "a sentencing court may rely on any information it knows about, including evidence that would not be admissible at trial, as long as it is relying on 'specific evidence—*e.g.*, drug records, admissions, or live testimony.'" *McLean*, 287 F.3d at 133 (citing U.S.S.G. § 6A1.3 and

United States v. Brinkworth, 68 F.3d 633, 641 (2d Cir. 1995), and quoting *Prince*, 110 F.3d at 925, and *United States v. Shonubi*, 103 F.3d 1085, 1087 (2d Cir. 1997)); *see also United States v. Blount*, 291 F.3d 201, 215 (2d Cir. 2002) ("In making such an estimate [of drug quantity], the court has broad discretion to consider all relevant information . . . [and] the court is not restricted to accepting the low end of a quantity range estimated by a witness.").

Estimates of total drug quantity based upon extrapolation from seized quantities are permissible if they are reasonable. For example, in *Prince*, this Court held that the district court permissibly calculated the weight of six missing boxes of marijuana based upon the lowest weight of the 42 boxes actually recovered by law enforcement. 110 F.3d at 925. This Court explained that the estimate for the six missing boxes "derived from the fact that the weight of each of the forty-two recovered boxes ranged from fifty to ninety pounds, [and] was a reasonable figure based on reliable evidence." *Id.* Similarly, in *United States v. Pirre*, 927 F.2d 694, 696 (2d Cir. 1991), this Court concluded that the district court permissibly relied on an expert's method of using the weight of two bricks of cocaine to determine the weight for 15 bricks of cocaine, explaining "[the expert's] testimony provided sufficient evidence for the district court to conclude that the estimate was reliable." *Id.*

This Court has instructed that a district court "satisfies its obligations to make findings [with respect to drug quantity] sufficient to permit appellate review . . . if the court indicates, either at the sentencing hearing or in the written judgment, that it is adopting the recommendations in the presentence report." *Prince*, 110 F.3d at 924. When a defendant makes a timely objection to the drug quantities set forth in the PSR, this Court will nonetheless affirm a district court's finding of fact relating to a sentencing issue unless it was "clearly erroneous." *United States v. Hamilton*, 334 F.3d 170, 188 (2d Cir. 2003); *Prince*, 110 F.3d at 924. This Court gives "due deference" to a district court's application of the Sentencing Guidelines to the facts. *Hamilton*, 334 F.3d at 188.

C. Discussion

1. The district court properly calculated the quantity of heroin that was reasonably foreseeable to Reyes and Daniels.

Despite the defendants' claims to the contrary, the district court scrupulously calculated the quantity of heroin attributable to them. In particular, the court considered all of the evidence before it, which included the testimony of David Johnson and Millan, both of whom were members of the conspiracy; Bowles, who supplied drugs to the conspiracy; Peter Johnson and

Delaney, who regularly purchased narcotics from members of the conspiracy and Gibson, who resided at the Trap, which was the base of operations for the conspiracy. The court also had before it evidence of drug seizures that were made from Cora, who supplied narcotics to members of the conspiracy, and several individual buyers, including Tuite, Troost and Haas. Additionally, the court heard the testimony of Agent Dinnan and Agent King regarding the quantity of narcotics packaged in each bag of crack and heroin. Finally, the court had dozens of wiretap recordings during which Reyes, Daniels and other members of the conspiracy blatantly discussed their prolific narcotics trafficking activities. On this record, the jury had little problem concluding that the quantity of heroin reasonably foreseeable to Reyes and Daniels was more than one kilogram.

Furthermore, on this record, the court formulated and articulated its own factual basis for determining what it recognized was a conservative estimation of one kilogram of heroin. Specifically, the court was under an obligation to estimate the controlled substance quantity, as the seizures in the case, while instructive, did not fully reflect the scale of the offense. *See Jones*, 531 F.3d at 175. Using information which was relatively detailed, and was gleaned by the court from presiding over the trial in the case, *see Jones*, 30 F.3d at 286, the court assembled a fac-

tually accurate model which reasonably, but conservatively, approximated a portion of the defendants' drug distribution activity. The court recognized that, based upon the evidence at trial, its calculation may not embrace the full measure of the drugs for which Reyes and Daniels should have been held responsible. In particular, the court noted that there was evidence from which to find that the conspiracy sold 2.7 kilograms of heroin within the time period of the charged conspiracy. DA228. Nonetheless, the court declined to adopt the greater quantity. Instead, the court concluded that the conspiracy involved at least one kilogram of heroin, a conclusion that was certainly supported by a preponderance of the evidence.

The court also found that a kilogram of heroin was reasonably foreseeable to "both" of the leaders of the organization. DA229; DA247; DA274. On this issue, the court found that the evidence at trial amply established that Reyes and Daniels were the leaders of the organization. With respect to Reyes, the court found that the evidence demonstrated that Reyes ran the Trap, supplied narcotics to the members of the conspiracy to be resold from the Trap and directed the activities of his coconspirators, including instructing them to sell drugs on his behalf. RA433; RA437-38. The court also gave weight to the evidence that showed Reyes to be "the one they would go to because he was the one with

the authority running the place" to deal with problems that arose in the Trap. RA437.

Similarly, with respect to Daniels' leadership role in the organization, the court found that the evidence established that Daniels oversaw the drug operation, supplied narcotics to the members of the conspiracy and directed the activity of other members of the conspiracy. DA241; DA243-47. The court characterized Daniels' activities as a member of the conspiracy as one who "played a leadership role in the drug trafficking undertakings in one of Bridgeport's most vulnerable communities." DA274.

Despite the court's well-reasoned conclusions, Reyes continued to argue that the court should not hold him responsible for the acts of others. The court rejected Reyes argument explaining:

> I think this parsing of the difference between how much Mr. Reyes himself was selling versus how much he could reasonably foresee his co-conspirators selling, and taking into account the period of time when he was not at the site, that we still have a the quantity that calls for a 33—a level 33 base offense level.[12]

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[12] The base offense level for the quantity of narcotics was a 32. The extra point that the court included was added because the house from which the conspiracy operated was within 1,000 feet of a public housing facility. PSR ¶ 19.

* * *

> To the extent that we're talking about joint acts where the defendant's success is tied to his other conspirators, and we—such as in *Studley*, and we have Mr. Reyes supplying the other dealers, and we have all of that photographic array of the guns that they shared and the evidence of how they shared and divvied up the walk up customers, I don't think that there is any misapplication of this base offense level for Mr. Reyes on the basis of the trial testimony and reflecting and considering your arguments.

RA430-32.

The evidence the court relied upon fully supports an attribution to both Reyes and Daniels of one kilogram of heroin. There was no miscalculation by the court, as urged by both defendants. In fact, the court's estimate was conservative. Further, the court properly found that Reyes and Daniels should be held accountable for the acts of their conspirators. Those acts were reasonably foreseeable to the defendants given their roles as managers of, and sources-of-supply for, the other members of the conspiracy and their knowledge of the pace and volume of the daily drug dealing from the Trap.

2. Any error in the calculation of the quantity of heroin involved in the conspiracy was harmless.

As demonstrated above, the district court arrived at an attributable quantity of heroin on a conservative basis, using less than the maximum amount suggested by the evidence. *See United States v. Thompson*, 76 F.3d 442, 457 (2d Cir. 1996) (holding that a defendant "has no basis for complaint" where the evidence shows a greater quantity of drugs than is attributed at sentencing). Putting that calculation aside completely, however, the court still properly calculated the defendants' guidelines ranges.

Significantly, neither Reyes nor Daniels contested at sentencing—or contest here—the court's finding that it was reasonably foreseeable to them that the conspiracy involved at least 280 grams of cocaine base. RA422-23; DA234-37. Pursuant to U.S.S.G. § 2D1.1(c)(4), a quantity of 280 grams or more of cocaine base results in a base offense level of 32. Accordingly, regardless of the quantity of heroin found by the court, the defendants' base offense level would remain unchanged.

The same holds true if, pursuant to U.S.S.G. § 2D1.1, App. Note 8, the heroin and cocaine base are each converted to their marijuana equivalents and then added together to determine the combined offense level. RA425; DA233. For example, a quantity of 280 grams of crack

cocaine converts to 999.88 kilograms of marijuana; one kilogram of heroin converts to 1,000 kilograms of marijuana. DPSR ¶ 20. Adding these two quantities together results in a total of approximately 2,000 kilograms of marijuana. Pursuant to U.S.S.G. § 2D1.1(c)(4), a quantity of marijuana that is at least 1,000 kilograms but fewer than 3,000 kilograms results in a base offense level 32.

Assuming for the sake of argument that the defendants are correct and the district court and the jury erred in calculating the quantity of heroin involved in the conspiracy, the defendants' base offense level would still be a level 32. Reyes and Daniels do not contest that they were selling heroin, only that it was reasonably foreseeable to them that the conspiracy involved at least one kilogram of heroin. As long as it was reasonably foreseeable to the defendants that the conspiracy involved at least *one gram* of heroin, their base offense level remains the same. That is, 280 grams of crack cocaine converts to 999.88 kilograms of marijuana and one gram of heroin converts to one kilogram of marijuana. Adding these two quantities together equates to 1000.88 kilograms of marijuana. As noted above, pursuant to U.S.S.G. § 2D1.1(c)(4), conduct involving over 1,000 kilograms of marijuana results in a base offense level of 32. Therefore, any error reasonably attributable to the court in this case is harmless. *See United States v. Jass*, 569 F.3d 47, 68

(2d Cir. 2009) (holding that when procedural error found in sentencing, "but the record indicates clearly that the district court would have imposed the same sentence in any event, the error may be deemed harmless") (internal quotations omitted); *United States v. Lacey*, 699 F.3d 710, 718 (2d Cir. 2012) (noting that any failure by the district court to calculate loss amount was harmless error where the defendants failed to explain how the alleged error prejudiced them).

V. The district court's imposition of a 165-month term of imprisonment on Wilson was procedurally reasonable.

A. Relevant facts

On September 27, 2011, Probation issued Winston's Pre-Sentence Report ("WPSR"). On March 5, 2012, and January 7, 2013, Probation issued addendums to the PSR.

Winston's PSR concluded that his base offense level was 32 based upon the quantity of heroin involved in the conspiracy, which the PSR determined to be at least one kilogram of heroin. WPSR ¶ 16. The PSR also included a two-level enhancement for possession of a firearm pursuant to U.S.S.G. § 2D1.1(b). WPSR ¶ 17. The PSR did not contain an adjustment for acceptance of responsibility because Winston failed to admit responsibility for the offense prior to the completion of the PSR. WPSR ¶ 22, Addendum.

The PSR concluded that Winston was in criminal history category V. WPSR ¶ 30. That determination was based upon Winston's five prior convictions, including for robbery in the first degree, no pistol permit, escape in the first degree, assault in the third degree and violation of a protective order, and upon the fact that he committed the present offense while on probation. WPSR ¶¶ 21-30.

Based upon a total offense level of 34 and a criminal history category of V, the PSR calculated the advisory Guidelines range as 235 to 293 months of imprisonment. WPSR ¶ 65.

On January 28, 2013, the district court held Winston's sentencing hearing. WA24-86. The district court first addressed Winston's disagreement with one factual issue in the PSR. WA26-29. After amending the PSR accordingly, the court adopted the factual findings contained within the PSR. WA29.

The court then heard argument with respect to whether Winston qualified for a reduction for acceptance of responsibility. WA35-44. Ultimately, the court granted Winston a two-point reduction for acceptance of responsibility. WA44. The government declined to move for the third point for acceptance, a decision that the court found was neither based upon an unconstitutional motive nor made in bad faith. WA43. Winston did not argue otherwise. After reducing Winston's offense level for acceptance, the court calculated

the adjusted Guideline range to be 188 to 235 months' imprisonment subject to a mandatory minimum of 120 months' imprisonment. WA45.

Winston advocated for a downward departure or a non-guideline sentence based on "parity." WA45-49. Winston also argued that he should get credit for his cooperation, even in the absence of a 5K1.1 motion, claiming that entering into a cooperation agreement amounted to a renunciation of his gang. WA52-54. Winston concluded that these factors should be balanced against the severity of his crime and his risk of reoffending in order to achieve parity in his sentence. WA60.

At the conclusion of Winston's presentation, the court addressed Winston's argument by focusing Winston on his 2009 domestic violence conviction, during which he had "throttle[d] his former girlfriend" and "throw[n] an 11-year-old girl around." WA60-61. The court noted that, "as you are trying to balance factors for parity, that doesn't exactly fall on the leniency side as indicative of whether there is a risk of reoffending, risk to the public." WA60-61; WA64.

The court also addressed Winston's argument that his criminal history category overstated the severity of his criminal history. In particular, the court inquired of Winston:

> What I'm trying to understand is why isn't the criminal history V perfectly with-

> in the range of the kind of activities, criminal activities for which we attribute a criminal history V? It has violence, it has guns, it has drugs, and it has a continuum from age 16 all the way through with disregard for court orders and laws.

WA64-65. Winston admitted that his prior conduct did fit squarely within the types of conduct contemplated by criminal history category V, but nonetheless continued argue that a category V overstated the seriousness of his criminal history. WA65.

The government then addressed the court and advocated for a sentence at the top of the Guideline range based upon Winston's extensive narcotics trafficking activities, involvement in a street gang, possession of an assault rifle and a stolen firearm, and because he obstructed justice by falsely accusing one of his codefendants of attempted murder. WA75-76. The government also responded to Winston's arguments on parity. WA71. In particular, the government explained why Winston was not similarly situated to the individuals to whom he compared himself due to a variety of factors including differing criminal histories, Winston's involvement in gang activity and firearms trafficking and his unwillingness to take full responsibility for his criminal conduct. WA71-73. The government also argued that Winston should not get credit for "cooperating" since he had lied and his information therefore

amounted to obstruction rather than significant assistance. WA75. Finally, the government addressed Winston's argument that his criminal history category overrepresented the seriousness of his criminal history by demonstrating that Winston had been convicted of several serious and violent offenses and that he had repeatedly violated probation and orders of the court. WA73-76.

Winston spoke on his own behalf stating that he admitted his "wrongdoings." WA77. Winston acknowledged that he had been in a gang, but said that he understood what it took "to be a man and walk away from a gang," presumably referring to his failed attempt at cooperation. WA77.

The court also heard from Winston's aunt, who informed the court that Winston lacked parental guidance and support resulting in "poor self-esteem and repetitive conduct." WA69. Winston's aunt also stated that Winston did not wish to spend his life in prison, but rather wanted to do the right thing and be with his family. WA71.

The district court then imposed sentence. First, the court noted that it had to consider the nature and circumstances of Winston's offense. In this context, the district court explained that Winston had a "major role in this big gang drug conspiracy that from the evidence at trial certainly made the Marina Village area quite at risk." WA78. The court continued:

> All those guns that we saw pictures of at trial, all the testimony that we heard about the relative ruthlessness, letting that woman who overdosed just die rather than call the police, I mean, this was a gang whose humanity was in short supply.

WA78-79.

The district court discussed Winston's history and characteristics stating that it had to balance his potential and intelligence against his background, including the fact that he had "been given chances before and [he'd] just walked away in a different direction." WA79.

The district court addressed Winston's extensive criminal history noting that while his attorney had done a "very good job of analyzing it, that analysis is in that less than precise way of using points and allocating points and counting points." WA80. The court explained:

> What I see, though, is someone who has guns and violence and drugs and gangs, and that's your public image. That's what you look like now. Whatever you could have looked like, that's not what the public sees from what you have done. . . . . You have demonstrated that when you're incapacitated you could get stuff done. You got your GED, you took some college management courses, you've had some employment that's been of some duration,

> which is different from others. But I don't think that your criminal history overstates, much less substantially overstates, an indication of likelihood of repeating. So, I don't think that is a ground for departure.

WA80-81.

Finally, the district court agreed that Winston's attempted cooperation amounted to a renunciation of his gang. WA81. Therefore, while troubled by his recent commission of domestic violence and the fact that he lied to the government, the court nonetheless felt it appropriate to give Winston "credit for having entered into the cooperation agreement." WA82. The court commented that she hoped other gang members would be encouraged to enter into cooperation agreements, as well. WA81-82.

The court ultimately sentenced Winston to 165 months' imprisonment. WA82-83. Neither Winston nor his counsel objected to the sentence imposed by the court at any time during the hearing.

Additional pertinent facts are set forth below.

B. Governing law and standard of review

Following *United States v. Booker*, 543 U.S. 220 (2005), a sentencing judge is required to "(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the calculated Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence." *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005).

Under 18 U.S.C. § 3553(a), in determining an appropriate term of incarceration, a sentencing court should consider: (1) "the nature and circumstances of the offense and the history and characteristics of the defendant;" (2) the need for the sentence to serve various goals of the criminal justice system, including (a) "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense," (b) to accomplish specific and general deterrence, (c) to protect the public from the defendant, and (d) "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;" (3) the kinds of sentences available; (4) the sentencing range set forth in the Guidelines; (5) policy statements issued by the Sentencing Commission; (6) the need to

avoid unwarranted sentencing disparities; and (7) the need to provide restitution to victims.

Consideration of the Guideline 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 to address specific arguments about how the factors should be implemented. *Id.*; *Rita v. United States*, 551 U.S. 338, 356-59 (2007) (affirming a brief statement of reasons by a district judge who refused downward departure in which the judge noted that the sentencing range was "not inappropriate"). There is no "rigorous requirement of specific articulation by the sentencing judge." *Crosby*, 397 F.3d at 113. "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).

On appeal, a district court's sentencing decision is reviewed for reasonableness. *See Booker*, 543 U.S. at 260-62. Reasonableness review is akin to a deferential "abuse of discretion" standard. *Gall v. United States*, 552 U.S. 38, 40

(2007); *United States v. Watkins*, 667 F.3d 254, 260 (2d Cir. 2012); *United States v. Cavera*, 550 F.3d 180, 187 (2d Cir. 2008) (en banc). This reasonableness review consists of two components: procedural and substantive review. *Cavera*, 550 F.3d at 189.

"A district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory." *Cavera*, 550 F.3d at 190 (citations omitted). A district court also commits procedural error "if it does not consider the § 3553(a) factors, or rests its sentence on a clearly erroneous finding of fact." *Id*. Finally, it is error if the district court "fails adequately to explain its chosen sentence," including, "'an explanation for any deviation from the Guidelines range.'" *Id*. (quoting *Gall*, 552 U.S. at 51).

With respect to the consideration of departure grounds as a basis for procedural error, this Court has explained that "a refusal to downwardly depart is generally not appealable." *United States v. Stinson*, 465 F.3d 113, 114 (2d Cir. 2006) (per curiam) (quotation marks and citation omitted); *see also United States v. Valdez*, 426 F.3d 178, 184 (2d Cir. 2005); *United States v. Desena*, 260 F.3d 150, 159 (2d Cir. 2001). A narrow exception to this general rule exists "when a sentencing court misapprehended the

scope of its authority to depart or the sentence was otherwise illegal." *Stinson*, 465 F.3d at 114 (quotation marks and citation omitted). However, absent "clear evidence of a substantial risk that the judge misapprehended the scope of his departure authority," this Court presumes that the judge understood the scope of his authority. *Id.*; *see also United States v. Sero*, 520 F.3d 187, 192 (2d Cir. 2008) (per curiam) (noting that the "presumption that a district court understands its authority to depart may be overcome only" in a "rare situation") (quotation marks and citation omitted). Such a substantial risk may arise "where the available ground for departure was not obvious and the sentencing judge's remarks made it unclear whether he was aware of his options." *United States v. Silleg*, 311 F.3d 557, 561 (2d Cir. 2002) (quotation marks and citation omitted).

In addressing motions for downward departures, this Court "does not require that district judges by robotic incantations state 'for the record' or otherwise that they are aware of this or that arguable authority to depart but that they have consciously elected not to exercise it." *United States v. Diaz*, 176 F.3d 52, 122 (2d Cir. 1999) (quotation marks and citation omitted); *see also United States v. Margiotti*, 85 F.3d 100, 103 (2d Cir. 1996) (per curiam) ("Sentencing is rigid and mechanistic enough as it is without the creation of rules that treat judges as automatons."). Fur-

ther, a district court need not specifically respond to all arguments made by a defendant at sentencing. *See United States v. Bonilla*, 618 F.3d 102, 111 (2d Cir. 2010) ("[W]e never have required a District Court to make specific responses to points argued by counsel in connection with sentencing . . . .").

With respect to substantive reasonableness, this 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).

Although this Court has declined to adopt a formal presumption that a within-Guideline 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.").

C. Discussion

This sentencing appeal comes to the Court on a largely undisputed record. At sentencing, the parties agreed to the PSR's factual findings with one exception related to Winston's involvement in a shooting. WA27. The government asserted that Winston had shot another individual; Winston denied his involvement. WA27-29. The court resolved the factual dispute by amending the PSR to reflect each party's position and thereafter adopted the factual findings as set out in the PSR. WA29. The parties agreed that the PSR correctly calculated Winston's applicable base offense level to be a level 32, plus two levels for possession of a firearm, resulting in an adjusted offense level 34. WA29-30. The parties also agreed that Winston should receive a two-point reduction for acceptance of responsibility bringing his total offense level to 32. WA44. In

addition, the parties agreed with the PSR's calculation that the defendant fell within criminal history category V, although Winston noted that he believed a category V overstated the seriousness of his prior history and that he was seeking a downward departure or a non-Guideline sentence on that basis. WA44-45. Finally, the court calculated Winston's advisory Guideline range of imprisonment to be 188 to 235 months, subject to a 120-month mandatory minimum. WA45. Neither party objected to the court's calculation.

Against this backdrop, Winston now asserts that the 165-month term of imprisonment the district court imposed was unreasonable. Winston Br. at 15. Winston asserts that the court failed to consider what he views as unwarranted sentencing disparities between him and his codefendants prior to imposing sentence. Winston also asserts that the court improperly declined to depart from his criminal history category. Both arguments lack merit. As the record reflects, the district court did consider the § 3553 factors prior to imposing sentence. Further, the district court's decision not to depart downward based on an alleged overstatement of criminal history is not reviewable. But even if it were reviewable, the court's determination that the seriousness of Winston's offense, when combined with his lengthy criminal record and history of recidivism, did not warrant a departure from his criminal history category was entirely appropriate.

1. The district court fully considered the potential for sentencing disparities when it imposed sentence on Winston.

A review of the sentencing proceeding demonstrates that the court faithfully followed the procedural requirements of sentencing as outlined in § 3553(a). First, the court asked Winston whether he had reviewed the PSR, understood the PSR and had the opportunity to discuss it with his attorney. WA25-26. Winston responded in the affirmative. WA26. Second, the court made a finding that the base offense level was 32 predicated on an attributable quantity of more than one kilogram of heroin. WA29. Third, the court calculated the advisory Guideline range as 188 to 235 months' imprisonment based on a two-level enhancement for use of a firearm, a two-level reduction for acceptance of responsibility and a criminal history category V. WA30, 44-45. Fourth, the court heard from Winston's aunt, who spoke on his behalf and then from Winston himself. WA69-70; WA77-78.

Unmoved by this solid factual record, Winston contends that the court's sentence was procedurally unreasonable. Namely, Winston asserts that, when fashioning sentence, the court failed to consider "the need to avoid unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct." Winston Br. at 14 (citing 18

U.S.C. § 3553(a)(6)). Winston alleges "there is no indication the Court considered the argument of parity that was made." Winston Br. at 18. A review of the record, however, refutes this claim.

During sentencing, Winston argued at length about his request for a downward departure or non-Guideline sentence based upon what he termed "parity with defendants." WA45. Winston primarily focused upon how his sentence would compare to those of Ernest Williamson, Jonathan Williamson and Ramos, who Winston's counsel characterized as a mirror images of his client. WA47. First, Winston compared the drug quantities to which he stipulated in his plea agreement to the quantities to which the three other defendants stipulated pursuant to their plea agreements. WA46-47. Second, Winston discussed the variance in base offense levels amongst him and the same three defendants. The Williamsons each had a base offense level of 30 and Ramos, like Winston, had a base offense level of 32. WA47. Third, Winston discussed the impact of his criminal history category on his advisory Guideline range, again comparing himself to Jonathan Williamson, who was in criminal history category III, and Ernest Williamson, who was in criminal history category VI, and the impact their criminal history categories had on their Guideline ranges. WA47-48. Fourth, Winston compared the time at which he pled guilty to the times at which his co-defendants pled

guilty, noting that he pled at approximately the same time as the Williamsons which was a year before Ramos pled. WA49. Fifth, Winston raised the issue of his alleged cooperation. In this regard, Winston attempted to liken himself to Bowles, who cooperated and testified at trial. WA50. Winston argued that Bowles was only required to plead guilty to a "straightforward handguns violation," that she was not going to be "sentenced on a gram of anything because that's not what she pled guilty to" and that she was only "looking at 12 to 18 months." WA50. Winston also commented that Bowles—and Millan—began cooperating at a later date than he did, presumably suggesting that their cooperation was untimely. Winston failed to note that neither Bowles nor Millan breached their cooperation agreements as he had done. Nonetheless, Winston argued that he, like Bowles and Millan, should receive credit for cooperating. WA52-55. Winston reasoned that his cooperation, failed or otherwise, should offset what he termed as the "obstruction [of justice] issue." WA57; WA60.

When Winston concluded, the court inquired about Winston's conviction for domestic violence in 2009. WA60. In particular, the court noted, "But if—as you are trying to balance factors for parity, that doesn't exactly fall on the leniency side as indicative of whether there is risk of reoffending, risk to the public." WA61. Winston's counsel responded, "I agree, your Honor, and the

only thing I can say in response is that I've not had the benefit or privilege to have known what the Williamson' criminal histories were, what their individual convictions were." WA61. The court also stated, "So, how should the court consider the fact that he completed an anger management program in 2003 and then went on in 2007 to throttle his former girlfriend and throw the 11-year-old girl around? . . . But what was of concern is that having completed an anger management course and then gone on to violence, arguably resulting from lack of anger management, where the balance on the risk to the public falls." WA64.

The government then addressed Winston's parity argument delineating all of the reasons that Winston was unlike his codefendants.[13] WA71. Specifically, the government noted that Bowles had no criminal history, much less a violent criminal history, and was not a gang member. While Ernest Williamson did have a lengthy criminal history, he also was not a gang member. Jonathon Williamson was a gang member, but was in a criminal history category two levels below the defendant's. Further, none of the referenced defendants were arrested in possession

[13] The government did not address the factors relevant to determining Ramos' sentence as Ramos had not yet been sentenced at the time of Winston's hearing.

of a fully-loaded assault rifle, a fully-loaded, stolen handgun, numerous rounds of ammunition, crack cocaine and heroin. WA72; WA74-76. The government also addressed the fact that Winston, unlike his codefendants, had breached his cooperation agreement by falsely accusing an innocent man of a crime, lied to the government and obstructed justice. WA53.[14]

After hearing from Winston, the district court imposed sentence. In doing so, the court explicitly discussed several of the factors delineated in § 3553(a), such as the nature and circumstances of the offense, Winston's history and characteristics, various goals of the criminal justice system, including to accomplish specific and general deterrence and to protect the public from the defendant, and the advisory Guideline range. WA78-83. The court also explicitly stated that it had considered Winston departure argument on the ground that his criminal history was overstated and even complimented counsel for hav-

[14] At sentencing, Winston continued to deny his involvement in an attempted murder, during which the victim was shot nine times. In this regard, the court stated, "[t]he sorting out of who is to be believed about who shot [the victim] will have to remain for another day, but let it be said that people whose credibility was tested here in this courtroom have apparently given statements to law enforcement that are at odds with yours." WA79.

ing done "a very good job of analyzing" the issue. WA80.

The court did not again address the concept of parity. However, the argument regarding the need to avoid unwarranted sentencing disparities was fully developed by the parties and was addressed by the court earlier in the proceeding, notwithstanding Winston's argument to the contrary. *See* WA61. In other words, the ground upon which Winston was requesting a departure was obvious. *See Silleg*, 311 F.3d at 561. Under these circumstances, the court was not required to specifically respond beyond what it had already stated to counsel's arguments regarding parity. *See Rita,* 551 U.S. at 356 ("sometimes a judge simply writes the word "granted" or "denied" on the face of a motion while relying upon context and the parties' prior arguments to make the reasons clear"); *see also Fernandez*, 443 F.3d at 29; *Bonilla,* 618 F.3d at 111. The court also was not required to state for the record that it was aware of its authority to depart but consciously declined to do so. *See Diaz*, 176 F.3d at 122.

There is nothing in the record to overcome the presumption that the district court faithfully considered the § 3553(a) factors in imposing the 165-month term of imprisonment. Further, there is no indication that the court did not understand the scope of its departure authority. In fact, it is clear that the district court recognized

and understood its authority to give Winston a lower sentence than it did; the court simply elected not to do so. *See Fernandez,* 443 F.3d at 32 ("[E]ven if § 3553(a)(6) were a lawful basis for leniency here, the requirement that a sentencing judge consider an 18 U.S.C. § 3553(a) factor is not synonymous with a requirement that the factor be given determinative or dispositive weight in the particular case, inasmuch as it is only one of several factors that must be weighted and balanced by the sentencing judge."). The mere fact that the district court did not give Winston's "parity" argument as much weight as he had hoped it would does not mean that the court failed to consider that argument or erred.

2. The district court's decision to deny Winston a downward departure for overstatement of criminal history is not reviewable, and the court properly denied that motion in any event.

The district court's decision not to depart on the basis of an overstated criminal history category is not reviewable in this Court. The experienced district court was well aware that it had the legal authority to depart pursuant to U.S.S.G. § 4A1.3(b)(1), and clearly decided that no such departure was warranted here. Indeed, the district court expressly recognized that Winston was requesting a departure from his crimi-

nal history category. In this regard, the court inquired:

> What I'm trying to understand is why isn't the criminal history V perfectly within the range of the kind of activities, criminal activities, for which we attribute a criminal history V? It has violence, it has guns, it has drugs and it has a continuum from age 16 all the way through with disregard for court orders and laws.

WA64-65. Based upon the factors it cited, the court concluded, "I don't think that your criminal history overstates, much less substantially overstates, an indication of likelihood of repeating. So I don't think that is a ground for departure. WA81. Where, as here, the district court fully apprehended its authority to depart—and the defendant does not argue otherwise—its decision not to "downwardly depart is generally not appealable." *Stinson*, 465 F.3d at 114.

In any event, the district court correctly denied the criminal history departure. U.S.S.G. § 4A1.3(b)(1) permits a departure in limited circumstances if the defendant's criminal history category "substantially" overstates the seriousness of the defendant's criminal history or the likelihood that the defendant will commit another crime. Here, the defendant's criminal past fit squarely within criminal history category V.

As the district court noted, the defendant had 11 criminal history points stemming from five prior convictions covering a lengthy period of time from 1997 through 2009. WA44; PSR ¶¶ 25-30. His convictions included a May 3, 1997, first degree robbery during which Winston and a cohort robbed a young woman at gunpoint and forced her to remove her clothing. On October 17, 1997, Winston was convicted and sentenced to serve 12 years' imprisonment, execution suspended after two years and four years' probation. PSR ¶ 25. While incarcerated, the defendant received numerous infractions for fighting, security tampering, possession of contraband and false information. PSR ¶ 25.

On January 26, 2002, while still on probation, Winston was arrested for possession of a firearm without a pistol permit. PSR ¶ 26. On July 11, 2002, Winston was convicted and sentenced to four years' imprisonment, execution suspended after one year and three years' probation. While incarcerated, the defendant received infractions for disobeying a direct order and being out of place. PSR ¶ 26.

On May 20, 2005, Winston was discharged to a community halfway house. On October 16, 2005, Winston absconded from the halfway house. PSR ¶ 26. On December 15, 2005, Winston was arrested and charged with escape in the first degree. PSR ¶ 27. On January 8, 2006, Winston was convicted and sentenced to one-

year imprisonment, execution suspended after nine months and a one-day conditional discharge. PSR ¶ 27. On September 26, 2006, Winston was release on parole.

On July 27, 2007, Winston was arrested for assault in the third degree. PSR ¶ 28. On March 31, 2009, while on pretrial release, Winston was arrested for violation of a protective order. PSR ¶ 29. On September 9, 2009, Winston was convicted of assault in the third degree and violation of a protective order. PSR ¶¶ 28-29. Winston was sentenced to two years' imprisonment, execution suspended and two years' probation, and ordered to complete 25 hours of community service.

On this record, the district court's decision not to depart from Winston's criminal history category was well-founded. Winston's lengthy and serious criminal history, when viewed in light of his current offense conduct, fully supported the court's decision that criminal history category V did not substantially overstate the seriousness of Winston's prior criminal history. WA81. Winston's repeated probation violations, in-custody infractions, absconding from custody and violation of a protective order demonstrate an utter lack of respect for the law and the authority of the court. Moreover, Winston's past and present offenses, which include several violent offenses, the illegal purchase and possession of weapons and narcotics trafficking, show a dis-

turbing trend toward escalating criminal activity. On this record, the district court's decision was not an abuse of discretion.

Conclusion

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

Dated: May 21, 2014

Respectfully submitted,

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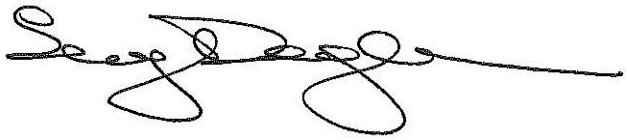

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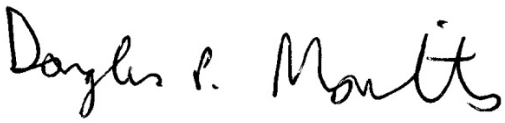

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Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

On January 28, 2014, the Court granted the government's motion to file a brief of no more than 28,000 words. This is to certify that the foregoing brief complies with that limitation, in that the brief is calculated by the word processing program to contain approximately 26,138 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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