12-4836

To Be Argued By:
ROBERT M. SPECTOR

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-4836

UNITED STATES OF AMERICA,
Appellee,

-vs-

JASON DANTLEY DAVIS, aka Handsome,
Defendant-Appellant,

MYRON ORLANDO HENRY,
JOSEPH MARCELL RAY,
Defendants.

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

BRIEF FOR THE UNITED STATES OF AMERICA

DEIRDRE M. DALY
Acting United States Attorney
District of Connecticut

ROBERT M. SPECTOR
SANDRA S. GLOVER *(of counsel)*
Assistant United States Attorneys

Table of Contents

Table of Authorities iii

Statement of Jurisdiction viii

Statement of Issue Presented for Review.......... ix

Preliminary Statement..1

Statement of the Case 3

Statement of Facts and Proceedings
Relevant to this Appeal 4

A. Offense conduct 4

B. The first sentencing 6

C. The first appeal 9

D. The second sentencing 10

Summary of Argument 25

Argument... 28

I. The district court's 112 month sentence
was both procedurally and substantively
reasonable 28

A. Governing law and standard
of review 28

1. Reviewing a sentence for reasonableness 28

2. Career offender designation 31

3. Second offender designation 36

4. The mandate rule and the law of the case doctrine 40

B. Discussion 42

1. The defendant is a career offender 42

2. The defendant is a second offender.......... 48

3. The sentence was substantively reasonable 51

Conclusion 53

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

Addendum

Table of Authorities

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.

Cases

Begay v. United States,
553 U.S. 137 (2008) 33, 44, 45

Descamps v. United States,
133 S. Ct. 2276 (2013) 35, 40, 45

Gall v. United States,
552 U.S. 586 (2007) 29, 30

James v. United States,
550 U.S. 192 (2007) 33, 34

Johnson v. United States,
130 S. Ct. 1265 (2010) 35

McCoy v. United States,
707 F.3d 184 (2d Cir. 2013) 38, 39, 40

Morris v. Holder,
676 F.3d 309 (2d Cir. 2012) 42

Shepard v. United States,
544 U.S. 13 (2005) 36, 38

Sykes v. United States,
131 S. Ct. 2267 (2011)............................ 33, 44

Taylor v. United States,
495 U.S. 575 (1990)...................................... 39

United States v. Ben Zvi,
242 F.3d 89 (2d Cir. 2001) 41

United States v. Booker,
543 U.S. 220 (2005)................................ 29, 48

United States v. Brown,
52 F.3d 415 (2d Cir. 1995) 34, 42

United States v. Brown,
629 F.3d 290 (2d Cir. 2011) 34, 35

United States v. Cavera,
550 F.3d 180 (2008).......................... 29, 30, 31

United States v. Daye,
571 F.3d 225 (2d Cir. 2009 35

United States v. Fernandez,
443 F.3d 19 (2d Cir. 2006) 30

United States v. Folkes,
622 F.3d 152 (2d Cir. 2010) 38

United States v. Frias,
521 F.3d 229 (2d Cir. 2008) 48

United States v. Gray,
535 F.3d 128 (2d Cir. 2008) 44

United States v. Hernandez,
604 F.3d 48 (2d Cir. 2010) 41

United States v. Houman,
234 F.3d 825 (2d Cir. 2000) 42

United States v. Johnson,
616 F.3d 85 (2d Cir. 2010) 33

United States v. Malki,
718 F.3d 178 (2d Cir. 2013) 40, 41, 47

United States v. Quintieri,
306 F.3d 1217 (2d Cir. 2002) 41, 46, 48

United States v. Rigas,
490 F.3d 208 (2d Cir. 2007) 29

United States v. Rosa,
507 F.3d 142 (2d Cir. 2007) 35

United States v. Savage,
542 F.3d 959 (2d Cir. 2008) ....*passim*

United States v. Spencer,
955 F.2d 814 (2d Cir. 1992) 42

United States v. Torres-Diaz,
438 F.3d 529 (2d Cir. 2006) 42

United States v. Walker,
442 F.3d 787 (2d Cir. 2006) 42

Yick Man Mui v. United States,
614 F.3d 50 (2d Cir. 2010) 41

Statutes

18 U.S.C. § 924 .... 34, 42

18 U.S.C. § 3231 viii

18 U.S.C. § 3553 .... *passim*

18 U.S.C. § 3742 viii

21 U.S.C. § 802 .... 37, 38, 39

21 U.S.C. § 841 .... *passim*

21 C.F.R. § 1308.12 38

Conn. Gen. Stat. § 21a-277 .... 6, 10, 17, 40

Conn. Gen. Stat. § 21a-279 .... 7, 39, 40

Conn. Gen. Stat. § 53a-60 .... 43, 45

Rules

Fed. R. App. P. 4 viii

Fed. R. Evid. 404 .... 3, 6, 9

Guidelines

U.S.S.G. § 4B1.1 .... 18, 26, 31, 33, 34

U.S.S.G. § 4B1.2 .... *passim*

Statement of Jurisdiction

The United States District Court for the District of Connecticut (Alvin W. Thompson, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on December 3, 2012. Appendix ("A")242. On November 29, 2012, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A245. This Court has appellate jurisdiction over the defendant's challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

Statement of the Issue Presented for Review

Did the district court, at re-sentencing, commit procedural error by designating the defendant as a career offender and second offender, or abuse its discretion and order a substantively unreasonable sentence when it imposed an incarceration term that was significantly below both the guideline range and the original sentence?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 12-4836

UNITED STATES OF AMERICA,
Appellee,

-vs-

JASON DANTLEY DAVIS, aka Handsome,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The defendant was convicted, after trial, of selling 27 grams of crack cocaine to a co-defendant. At his original sentencing in 2008, he faced a guideline incarceration range of 360 months to life as a career offender and a second offender. The district court rejected his request for the ten-year mandatory minimum and imposed a sentence of 240 months' incarceration. On direct appeal, the parties agreed that a re-

mand was appropriate so that the district court could apply the then-recent holding of *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008), which impacted the determination of whether the defendant was a career offender.

On remand, though the defendant did not benefit from the *Savage* decision in that he remained both a career offender and a second offender, he did benefit from the Fair Sentencing Act of 2010 ("FSA"), which removed the mandatory minimum 120-month statutory penalty and decreased the guideline range to 262-327 months. After a careful consideration of the 18 U.S.C. § 3553(a) factors, the district court imposed a non-guideline sentence of 112 months' incarceration.

The defendant claims on appeal that this sentence was both procedurally and substantively unreasonable. In particular, he argues that he was not a career offender because one of his two qualifying convictions, second degree assault, criminalized reckless conduct and, therefore, did not categorically qualify as a crime of violence. He also claims that the district court's decision to rely on the second degree assault conviction as a qualifier violated the mandate rule. In addition, he challenges for the first time his second offender designation based on his arguments that his prior possession of narcotics conviction resulted from an *Alford* plea and that his admissions during the plea colloquy were not sufficient

to establish that the conviction was a prior felony drug offense. Finally, he claims that the court erred substantively by imposing a sentence that was too long in light of the § 3553(a) factors and that did not account sufficiently for his post-conviction rehabilitation and the disparity between the powder and crack cocaine penalties.

For the reasons that follow, these claims have no merit.

Statement of the Case

On May 31, 2006, a federal grand jury returned a three-count Indictment charging the defendant in Count Three with possession with the intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). A10-A11. On April 30, 2007, the government filed a notice advising that the defendant faced enhanced penalties as a result of his prior felony drug convictions. A4, A13. On May 7, 2007, a jury found the defendant guilty of Count Three of the Indictment. A5.

On July 18, 2008, the district court sentenced the defendant to 240 months' incarceration and eight years' supervised release. A6. Judgment entered on July 23, 2008, and the defendant filed a timely notice of appeal on July 24, 2008. A6.

On March 1, 2010, this Court issued a mandate rejecting the defendant's challenge to the admission of 404(b) evidence at trial, declining to address his ineffective assistance of counsel

claim, and remanding the case for re-sentencing in light of the *Savage* decision. A64-A71.

On November 21, 2012, after ordering an updated Pre-Sentence Report and appointing new CJA counsel, the district court (Alvin W. Thompson, J.) conducted another sentencing hearing and imposed a non-guideline term of 112 months' incarceration and eight years' supervised release. A242. On November 29, 2012, the defendant filed a timely notice of appeal. A9, A245.

The defendant is currently serving his sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. Offense conduct

Based on the evidence presented at trial, the jury could have reasonably found the following facts, which were set forth almost verbatim in the Pre-Sentence Report ("PSR") and the government's December 19, 2012 sentencing memorandum (A94-A126):[1]

[1] At trial, the government presented its case through, *inter alia*, the testimony of FBI Special Agent Robert Bornstein and two cooperating witnesses (Felix Soto and Joseph Ray), as well as recorded conversations and seized narcotics from two controlled purchases of crack cocaine, one of which involved Soto, Ray and

In the winter of 2006, after receiving information about an increase in narcotics trafficking activity and violent crimes in and around the Mary Sheppard public housing project in the north end of Hartford, FBI Special Agent Robert Bornstein "surveyed sources of information that could help . . . authorities penetrate and infiltrate the drug activity in this area." PSR ¶ 6. On or about March 7, 2006, a known and reliable cooperating witness (Felix Soto) advised that he could purchase crack cocaine from Joseph Ray, who was actively selling crack in this area. PSR ¶ 7.

On March 15, 2006, Soto, who was under constant surveillance and was wearing a recording device, purchased about 63 grams of crack cocaine from Ray for $1,450 in official funds. PSR ¶¶ 8-12. During the purchase, Ray and Soto drove to meet with co-defendant Myron Henry, who was one of Ray's sources of supply and who provided the crack cocaine for this transaction. PSR ¶¶ 9-11.

On March 29, 2006, officers directed Soto to meet with Ray again and purchase another 63 grams of crack cocaine. PSR ¶¶ 13-14. This time, Ray contacted the defendant and told him, "I got business for you right now." PSR ¶ 14. Ray then told Soto that his source was coming in

---

co-defendant Myron Henry, and the other of which involved Soto, Ray and the defendant.

a few minutes and was not the same person who supplied the crack the last time. PSR ¶ 14. After the defendant arrived at Soto's vehicle, Ray drove away with him for a few minutes. PSR ¶ 16. When they returned, Ray told Soto that he had "good news and bad news. . . . [T]he good news is that I got some work. The bad news is I didn't get the order." PSR ¶ 16. He told Soto that the defendant could only supply "half of it" for $700. PSR ¶ 16. After Soto agreed, he paid Ray $700, and Ray provided him with a knotted plastic baggie containing several chunks of crack cocaine, the total weight of which was about 27 grams. PSR ¶ 17.[2]

B. The first sentencing

On April 30, 2007, the government filed a second offender notice advising the defendant that he faced enhanced penalties based on his May 2, 2006 conviction for sale of a controlled substance, in violation of Conn. Gen. Stat. § 21a-277, and his August 20, 1999 conviction for pos-

[2] The government also offered evidence under Fed. R. Evid. 404(b). A Hartford police officer testified that, on the evening of December 1, 2005, he pulled over the defendant for a routine traffic violation and, after a lengthy foot chase, found him in possession of several small plastic baggies of crack cocaine and numerous bags of phencyclidine mixed with dried mint leaves. PSR ¶ 39. The defendant eventually pleaded guilty to sale of a controlled substance. PSR ¶ 39.

session of narcotics, in violation of Conn. Gen. Stat. § 21a-279(a). A13. On May 7, 2007, the jury returned a guilty verdict as to the defendant on Count Three of the indictment. A5, A16.

The defendant was sentenced on July 18, 2008, two months prior to this Court's decision in *Savage*. A15. At sentencing, counsel for the defendant and government agreed that the PSR had correctly designated the defendant as a career offender and a second offender, and neither party objected to the calculation of the defendant's sentencing guidelines range of 360 months to life imprisonment. A17. The district court adopted the factual statements in the PSR as its findings of fact in the case, and also found the defendant's applicable guidelines range to be 360 months to life imprisonment. A17-A19. Defense counsel then requested that the court impose a non-guidelines sentence of 120 months' imprisonment. A20-A24. The government deferred to the court's discretion as to the ultimate sentence, but noted that the defendant's extensive criminal history and pattern of recidivism, in conjunction with all of the other factors set forth in 18 U.S.C. § 3553(a), required that a lengthy sentence be imposed. A42-A48.

In imposing sentence, the district court noted its consideration of all the appropriate factors outlined in 18 U.S.C. § 3553(a). A49-A52. The court also stated, "I think I made it clear that I didn't believe the defendant's career [offender]

designation overstates his criminal history earlier." A52. The court explained, "I think specific deterrence is something that I have to put a good deal of weight on here because of the real concern about recidivism. And that means that I believe I need to impose a sentence which is substantial." A54. And the court noted, "When I look at the fourth factor, which is the Sentencing Guidelines, I think it's apparent that I am considering the fact that the guidelines range is 360 months to life." A55.

In the end, the court imposed a 240-month sentencing, explaining,

> But the fact of the matter, he did know that he was looking at being sentenced and committed another offense, . . . and that in and of itself is a situation that should be of concern to a judge who is looking at the purposes of sentencing. The sentences that were imposed in the state court system, I believe, totaled 17 years, if I've totaled them up accurately.
>
> When I balance all of these factors, I conclude that a sentence that is twice what the defendant would have gotten had he not gotten the Career Offender designation sends a very serious message that if because of his Career Offender status, he's being punished in a very substantial way, and I believe that that sentence is sufficient but not greater than necessary to

> serve the purposes of a sentence in this case. . . .
>
> I wish that I could look at all the factors in your case and conclude that a lesser sentence would serve the purposes of sentencing, but I cannot if I look at it objectively. I was very touched by your comments. I think they reflected a lot of the pain that you've gone through in your life. But I also have to balance society's needs and look not only [at] the pain that you've gone through in your life but the effect that your actions have had on society.

A56-A57.

C. The first appeal

The defendant filed a timely notice of appeal and argued, in short, that (1) the district court committed plain error in admitting evidence under Fed. R. Evid. 404(b), (2) his trial counsel was constitutionally ineffective, and (3) his career offender designation was erroneous in light of *Savage*. A65. The defendant did not challenge his second offender designation. This Court rejected the 404(b) claim, refused to address the ineffective assistance claim and remanded the case for re-sentencing in light of *Savage*. A65-A71.

As to the sentencing issue, the Court found, based on the government's concession, that one of the two convictions relied upon in the PSR

was no longer a career-offender qualifier. A70. Specifically, the Court noted that the PSR had relied upon a first degree robbery conviction and a narcotics conviction under Conn. Gen. Stat. § 21a-277(b) in concluding that the defendant was a career offender. A70. The Court concluded that, since the government could not establish, under the modified categorical approach, that the § 21a-277(b) conviction was a controlled substance offense under U.S.S.G. § 4B1.2, the defendant was not a career offender. A69-A70.

D. The second sentencing

On October 21, 2011, after conducting two status conferences, the district court granted former CJA counsel's motion to withdraw and appointed new CJA counsel to represent the defendant. A8. On November 9, 2011, the district court ordered that the PSR be updated. A8. On February 27, 2012, the Probation Office issued the updated PSR, which was amended again on November 21, 2012. A8-A9.

According to the amended PSR, the defendant was still a career offender by virtue of his 1999 convictions for first degree robbery and second degree assault. PSR ¶¶ 21, 38 and 40. But, under the FSA, he no longer faced the statutory penalties provided for by 21 U.S.C. § 841(b)(1)(B) because he was not charged and convicted of an offense involving at least 28 grams of cocaine base. Instead, he faced a maximum penalty of thirty years in prison under 21 U.S.C.

§ 841(b)(1)(C). PSR ¶ 82. As a result, the defendant's total offense level lowered to 34, and his guideline incarceration range lowered to 262 – 327 months. PSR ¶¶ 34 and 83.

In his December 11, 2011 sentencing memorandum, the defendant argued for a sentence of 46 months' incarceration. A92. He claimed that he should receive the benefit of the lower crack penalties enacted by the FSA, that he was not a second offender, and that, under the Chapter Two guidelines, his base offense level should be based on the powder cocaine guidelines for an offense involving 27 grams of cocaine, resulting in a range of 37 to 46 months' incarceration. A74, A77, A78.

In the government's December 19, 2011 sentencing memorandum, it argued that the court should impose the same 240-month sentence it had imposed the first time. A100. Specifically, the government agreed that the lower FSA penalties should apply to the defendant, but maintained that the defendant was still a career offender, by virtue of his prior felony robbery and assault convictions, and a second offender, by virtue of his prior possession of narcotics conviction. A103-A109. The government attached to its memorandum the state court transcripts detailing the defendant's guilty pleas to the robbery, assault and narcotics convictions and establishing that the defendant was indeed a career offender and a second offender. As a result,

although the guideline incarceration range was no longer 360 months to life, it only reduced to 262-327 months, which was still higher than the original sentence. A111. As the government argued,

> At the original sentencing in this case, the Court determined that a non-guideline sentence of 240 months was appropriate and reflected the factors set forth under 18 U.S.C. § 3553(a). The Court stated that it thought the defendant was appropriately categorized as a career offender and explained that a sentence that was twice the ten-year mandatory minimum was sufficient to reflect this career offender designation. The defendant is still a career offender. Although the career offender guideline range has gone down from 360 months to life, to 262-327 months, that reduction is a reflection of the reduced statutory penalties in the Fair Sentencing Act, not any change in the defendant's criminal record or the way in which this criminal record is being counted. In the Government's view, the same considerations that motivated the Court's sentence at the original sentencing continue to apply. The defendant has engaged in very serious offense conduct and has an extensive criminal record which includes felony convictions for first degree robbery, second de-

> gree assault, sale of a controlled substance, possession of narcotics and unlawful possession of a firearm. He [was] appropriately designated as a career offender and should be sentenced as such.

A110-A111.

On December 21, 2011, the district court held a sentencing hearing. After reviewing the procedural history of the case, the court raised a concern related to the PSR. Specifically, in discussing a letter that the defendant had addressed to the court, it noted that the probation officer who had re-interviewed the defendant for the revised PSR had not seen the letter or had the benefit of its contents when she had spoken with the defendant. A130. As the court explained, "[T]he picture that he's presenting himself in his letter is quite different" from the person who appeared for sentencing in 2008. A131. Thus, the court indicated that the probation officer wanted to interview the defendant and his mother prior to going forward with sentencing. A132.

The court also addressed the defendant personally and asked him questions about the contents of the letter. A141. In response to those questions, the defendant spoke at length about how his mindset had changed since being sentenced in this case, the poor effect his bad choices have had on his family members and the lessons he had learned while serving the federal

sentence. A141-A162. The court asked, "And I guess one thing I am wondering as I sit here and listen to you talk, obviously imposing a sentence of 20 years had quite an effect on you." A164. The defendant replied, "I don't think I could explain to you how hard that felt. . . . Because you let me know basically that the way society felt about how I was living my life, that they didn't want people out there in society. I mean no matter how I felt that I should be a part of society, I have to admit that I wasn't showing society my best face." A164.

The court also addressed the defendant's mother and asked her about the change in the defendant's attitude. A173. She explained that he no longer talked "with the bravado," like a "hoodlum." A173. "It's just that he's changed. . . . [H]e has more compassion. He sees that things have a ripple effect; what I do today is going to affect what happens to me tomorrow[.]" A174. She explained, in great detail, the defendant's difficult upbringing, its effect on his criminal conduct, and the ways in which he had changed since going to federal prison. A174-A180.

On August 15, 2012, the defendant filed a supplemental sentencing memorandum arguing that he was not a career offender. A186. He claimed that, because the government had failed, at the first sentencing, to rely on the second degree assault conviction as a career offend-

er qualifier, any reliance on this conviction at the second sentencing violated the mandate rule. A188. He alleged that the government was trying to gain a "second bite at the apple" by relying on a conviction that it had not considered a career offender qualifier during the first hearing. A190. He also maintained that, without the career offender designation, he was only a Criminal History Category V, so that his powder cocaine range was 33-41 months and his crack cocaine range was 92-115 months. A191.

On November 20, 2012, the defendant filed another sentencing memorandum arguing again that he was not a career offender, but this time maintaining that his prior second degree assault conviction did not count because the statute did not qualify categorically as a crime of violence. A194-A195. In particular, he claimed that the Connecticut crime of second degree assault criminalized both intentional and reckless conduct and therefore could not serve as a career offender predicate. A196.

On November 21, 2012, the court held a second sentencing hearing. After reviewing the procedural history, including what occurred at the first sentencing, and highlighting some technical corrections to the PSR, the court confirmed that the defendant had read the PSR and had no objections to it other than those already briefed in his various sentencing memoranda. A201-A202.

The court then resolved the various objections raised by the defendant. In particular, it overruled his objections to his career offender and second offender designations. A203-A204.

On the career offender issue, the court noted that it was undisputed that the defendant's first degree robbery was a crime of violence and served as one qualifier. A204. As to the second degree assault conviction, the court agreed that it was not categorically a crime of violence because it criminalized both reckless and intentional conduct, but found that it qualified under the modified categorical approach. A204. Relying on the August 20, 1999 plea transcript submitted by the government, the court found that the defendant had specifically admitted to a factual basis that detailed an intentional physical assault against a victim. A204-A205. The court also rejected the defendant's argument that the government was precluded from relying on the assault conviction during the second sentencing because it had not relied upon it at the first sentencing. A205. The court explained:

> The defendant agreed in his sentencing memorandum – and I refer to Document Number 162 – in connection with the first sentencing that he was a career offender. The government, the probation office and the Court were entitled to rely on that stipulation. And, in any event, Savage had not yet been decided and both sides

> assumed that the defendant's conviction under Connecticut General Statutes Section 21a-277(b) qualif[ied] categorically as a controlled substance offense under Section 4B1.2.
>
> Also, the Court notes that there is no element of surprise here because the conviction for assault in the second degree was included in the original Presentence Report.

A205-A206.

On the second offender issue, the court found that, applying the modified categorical approach, the prior conviction for possession of narcotics qualified as a prior felony drug offense under 21 U.S.C. §§ 841(b)(1)(C) and 851. A206. The court ruled as follows:

> The parties agree that with respect to this conviction the Court is required to use the modified categorical approach. The defendant contends that this conviction cannot serve as the basis for enhancement because he recalls entering his plea [under] the Alford doctrine, notwithstanding the fact that the transcript fails to make note of such a plea, and also that his statements made to the Court at that time do not constitute a sufficient admission to the factual basis for the conviction.

> As to the first point, the Court has reviewed the transcript and there is no basis for concluding that the defendant enter[ed] an Alford plea.
>
> As to the second point, the prosecutor outlined the factual basis for the conviction at pages 3 to 4 of the transcript and explicitly asserted that the defendant had possessed crack cocaine, and at page 9 of the transcript the defendant admitted to the factual basis for the conduct set forth by the prosecutor.

A206-A207.

Based on these holdings, the court found that the maximum statutory penalty for the offense of conviction was 30 years in prison, and that the applicable guideline incarceration range, under U.S.S.G. § 4B1.1, was 262-327 months. A208-A209.

Defense counsel addressed the court and argued for a sentence far below the original 240-month term, based primarily on the defendant's difficult upbringing, A210, and his post-sentencing rehabilitation, A211-A212. He also asked the court to reduce his sentence by 25 months, which was the time he spent in state custody during the pendency of the federal case that could not be credited toward his federal sentence. A214-A215. In addition, his mother,

his aunt, and the defendant himself addressed the court and asked for leniency. A215-A221.

In the government's remarks, it pointed out that, whereas at the first sentencing, the court was dealing with a guideline range of 360 months to life, as compared to a statutory mandatory minimum of 120 months, at the second sentencing it was still confronting a similarly stark disparity between the 262-327 month career offender range, and the 100-125 month Chapter Two range. In particular, the government stated:

> I also read through the sentencing transcript many times to try to figure out what was different here today. Obviously what's different [for] Mr. Davis is the last five years he spent in jail and what he's done during that time. And that's significant.
>
> . . . The bottom line, I know that from what Mr. Davis just said that he feels that things might have worked out differently, and I don't know that he understands how fortunate he is that they did . . . . So many people that were sentenced in 2008 and 2009 and up to August 2, 2010 don't get the benefit of the Fair Sentencing Act. He does. And for him, that's a big deal. That decreases the maximum sentence and, more importantly, decreases his guideline

> range from 360 months to 262 months. That's almost 100 months.
>
> So as much as I know he was hoping that there would be a much more drastic difference in some of the numbers that we're sort of talking about, there is a difference. And the difference is because he does get the benefit of a new law that many – all defendants in his shoes don't benefit from.
>
> So I'm not here to advocate for a specific sentence other than to point out that we don't appear to be in that different a position. I think the two ranges are different. I think the range before of 120 months and 360 months is really now 100 months and 262 months.
>
> But I think many of the Court's comments at the original sentencing were obviously comments that still apply.

A222-A224.

In explaining its sentence, the court began by reviewing all of the factors under 18 U.S.C. § 3553(a) that a sentencing court must consider. A226-A227. Next, the court listed all of the documents and information it had reviewed in helping it reach its sentencing decision, including the PSR, the letters from the defendant and his mother, the transcript of the original sentencing and the evidence it recalled from the trial. A227.

And the court listed, by reference to § 3553(a), the various purposes its sentence must serve, including that the sentence "not by unduly different from sentences received by defendants with similar records who have been convicted of similar conduct." A228. The court stated, "When I originally sentenced you, I had concluded that the purposes of sentencing that were most significant were specific deterrence and just punishment. At this time I conclude that the purposes of sentencing that are most significant are the need to provide just punishment and the need for general deterrence. . . . I am no longer of the view that specific deterrence is a consideration that needs any material weight in your case." A229.

At that point, the court provided what it viewed as a "lengthy explanation for the sentence I'm going to impose . . . [,]" and indicated that it would be a non-guideline sentence. A229. It referred to several factors, some of which "are mitigating and some are not." A230.

First, although the court thought that the defendant's career offender designation was appropriate at the first sentencing, it no longer held that view. A230 ("[A]lthough the defendant's criminal history remains unchanged, the defendant himself has changed in very significant ways."). The court stated, "The defendant's remarks on December 21, 2011 reflect the difference between the person I originally sentenced

and the person who is here today. And I'm not just relying on his remarks, but there are other indicators as well." A230. The court remarked:

> For example, the defendant I originally sentenced though that going to jail would give him street credibility. . . . He found it much easier to succumb to peer pressure and fall in line with the other people who were living a life of crime. . . . And he thought that people who were deterred from committing further offenses because they had been required to serve jail time had . . . "sold out."
>
> The man who's here today realizes that he has thrown away a significant portion of his life. He realized that the so-called friends that he thought he had are not even around, but his family is. He realizes that if he can work hard at a low paying job in prison, he can just as easily do that out in the real world and not rely on selling drugs to earn a living.
>
> He recognizes that the likely sentence that was imposed on him in 2008 was nobody's fault but his own because it was imposed because of his criminal record and the people he chose to associate with.
>
> He has an interest in and willingness to perform any of a number of different kinds of legitimate work.

> And he is full of regret and concern that he provided a seriously damaging role model for a young relative. . . .
>
> Many defendants say that they have changed and they manage to sound sincere in saying so, but few explain their thoughts and feelings about an evolution and their view of themselves and society in such detail so as to be persuasive evidence of significant change. Mr. Davis has.

A230-A232. The court explained that, although the defendant based his argument on the concept of "post-offense rehabilitation," it relied on the argument in considering whether the defendant "fit into the career offender class." A232.

Second, the court noted that the crack cocaine penalties had reduced significantly since the original sentencing.

Third, the court noted that, although specific deterrence was no longer an issue, "the fact does remain that the defendant is in Criminal History Category VI, and it is the appropriate category for his past criminal conduct, even taking into account the defendant's explanation for certain offenses." A232-A233.

Fourth, "[t]he offense of conviction is a serious offense. And even the defendant conceded that he did sell drugs. This criminal conduct was engaged in while the defendant had state

charges pending against him for the December 1, 2005 arrest . . . ." A233.

Fifth, the defendant repeatedly engaged in criminal conduct during the 13-year period from 1995 through 2008, as discussed at the first sentencing hearing, and should face a longer sentence here than the state sentences he has received in the past. A233 (cross referencing A42-A43).

Finally, the court specifically rejected many of the other mitigating arguments made by the defendant, including that he suffered from a diminished capacity at the time of the offense, that his upbringing contributed to his offense conduct, and that there continued to be a disparity between the powder and crack cocaine guidelines. A234-A235.

Thus, "balancing all the factors in Section 3553(a), and placing weight on . . . the purposes of . . . just punishment and general deterrence, the Court conclude[d] that a non-Guideline sentence of 112 months is sufficient but not greater than necessary to serve the purposes of sentencing in this case." A235.

In its written judgment, the court explained its non-Guideline sentence as follows:

> The court imposed a non-Guidelines sentence to reflect its balancing of the following factors: (i) although the defendant continues to be properly classified as a ca-

> reer offender, he has changed in very significant ways since the court imposed the original sentence; (ii) the penalties for crack cocaine have changed since the court imposed the original sentence; (iii) the offense of conviction is a serious one and the defendant had state charges pending against him at the time he committed it; (iv) the defendant's sentence should not be unduly different from sentences received by defendants with similar records who have been convicted of similar conduct; and (v) the other arguments advanced by the defendant for a lower sentence were either ones the court found unpersuasive or ones that relied on facts that had already been taken into account by the court in determining that the defendant is no longer the type of individual for whom being classified as a career offender is consistent with the purposes of sentencing that are now most important in this case.

A242.

Summary of Argument

The district court's sentence on remand was procedurally and substantively reasonable. Contrary to the defendant's claims below and on appeal, he was properly categorized as a career offender and a second offender. In addition, in imposing a sentence that was 150 months below the bottom of the guideline range, the district

court considered and gave a tremendous amount of weight to the defendant's mitigation arguments.

As to his career offender status, it is undisputed that he has one prior conviction for first degree robbery, which is categorically a crime of violence under U.S.S.G. § 4B1.1. Moreover, it is undisputed that, in analyzing the second degree assault conviction, it was permissible to apply the modified categorical approach to determine whether the assault at issue was the result of reckless or intentional conduct. Using that approach and reviewing a transcript of the guilty plea for the assault case, the court properly concluded that the defendant had pleaded guilty to an offense involving an intentional physical assault, so that the conviction qualified as a crime of violence, and the defendant was properly designated as a career offender. Also, reliance on the second degree assault conviction did not violate the mandate rule, since this Court's mandate contemplated that the district court would make the career offender decision anew, and the court's failure to rely on this conviction at the first sentencing was because the defendant had specifically stipulated to his career offender designation.

As to his second offender status, the defendant is precluded under the law of the case doctrine from challenging this designation because, although he relied on *Savage* to attack his career

offender status in his first appeal, he failed to raise a similar claim as to his second offender status, and cannot now raise claims that he could have raised at that time. His claim likewise fails on its merits, as it is undisputed that he was previously convicted of possession of narcotics and that, in analyzing that conviction, it was appropriate for the district court to use the modified categorical approach under *Savage*. Using that approach, the district court properly concluded that the defendant's prior possession conviction resulted from a non-*Alford* guilty plea, involved crack cocaine and, therefore, counted as a prior felony drug offense.

As to the substantive reasonableness of the 112-month sentence, it cannot seriously be argued that the district court did not give adequate consideration to the defendant's mitigating factors, his difficult upbringing or his post-arrest rehabilitation. Indeed, it was these very factors that caused the court to impose a sentence that was both below the mandatory minimum that had originally applied in this case and was more than half the minimum of the revised guideline range.

Argument

I. The district court's 112 month sentence was both procedurally and substantively reasonable

A. Governing law and standard of review

1. Reviewing a sentence for reasonableness

Under 18 U.S.C. § 3553(a), in determining an incarceration term, a sentencing court should consider: (1) "the nature and circumstances of the offense and 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," (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) any policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to victims. *Id.*

Following *United States v. Booker*, 543 U.S. 220 (2005), appellate courts are to review sentences for reasonableness, which amounts to review for "abuse of discretion." *Gall v. United States*, 552 U.S. 586, 591 (2007); *United States v. Cavera*, 550 F.3d 180, 187 (2008) (en banc). This reasonableness review consists of two components: procedural and substantive review. *Cavera*, 550 F.3d at 189.

Substantive review is exceedingly deferential. This Court has stated it will "set aside a district court's substantive determination only in exceptional cases where the trial court's decision 'cannot be located within the range of permissible decisions.'" *Id.* (quoting *United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007)). This review is conducted based on the totality of the circumstances. *Cavera*, 550 F.3d at 190. Reviewing courts must look to the individual factors relied on by the sentencing court to determine whether these factors can "bear the weight assigned to [them]." *Id.* at 191. However, in making this determination, appellate courts must remain appropriately deferential to the institutional competence of trial courts in matters of sentencing. *Id.* Finally, this Court neither presumes that a sentence within the Guidelines range is reasonable nor that a sentence outside this range is unreasonable, but may take the degree of variance from the Guidelines into account when assessing substantive reasonableness. *Id.* at 190.

This system is intended to achieve the Supreme Court's insistence on "individualized" sentencing, *see Gall*, 552 U.S. at 50; *Cavera*, 550 F.3d at 191, while also ensuring that sentences remain "within the range of permissible decisions," *Cavera*, 550 F.3d at 191.

This deference is appropriate, however, only when a reviewing court determines that the sentencing court has complied with the procedural requirements of the Sentencing Reform Act. *Cavera*, 550 F.3d at 190. Sentencing courts commit procedural error if they fail to calculate the Guidelines range, erroneously calculate the Guidelines range, treat the Guidelines as mandatory, fail to consider the factors required by statute, rest their sentences on clearly erroneous findings of fact, or fail to adequately explain the sentences imposed. *Cavera*, 550 F.3d at 190. These requirements, however, should not become "formulaic or ritualized burdens." *Cavera*, 550 F.3d at 193. This Court thus presumes that a district court has "faithfully discharged [its] duty to consider the statutory factors" in the absence of evidence in the record to the contrary. *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006). Moreover, the level of explanation required for a sentencing court's conclusion depends on the context. A "brief statement of reasons" is sufficient where the parties have only advanced simple arguments, while a lengthier explanation may be required when the parties'

arguments are more complex. *Cavera*, 550 F.3d at 193. Finally, the reason-giving requirement is more pronounced the more the sentencing court departs from the Guidelines or imposes unusual requirements. *Id.* This procedural review, however, must maintain the required level of deference to sentencing courts' decisions and is only intended to ensure that "the sentence resulted from the reasoned exercise of discretion." *Id.*

2. Career offender designation

Under U.S.S.G. § 4B1.1, "[a] defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." *Id.* A controlled substance offense is defined as "an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the . . . distribution . . . of a controlled substance . . . or the possession of a controlled substance . . . with intent to . . . distribute . . . ." *Id.*, § 4B1.2(b). A crime of violence is defined as "any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that – (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is bur-

glary of a dwelling, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.*, § 4B1.2(a). The guideline further provides that "[t]he term 'two prior felony convictions' means . . . the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense . . . ." *Id.*, § 4B1.2(c)).

"'Prior felony conviction'" is a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed." U.S.S.G. § 4B1.2, comment. (n.1). "A conviction for an offense committed at age eighteen or older is an adult conviction." *Id.* "A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult)." *Id.*

"A career offender's criminal history category in every case under this subsection shall be Category VI." U.S.S.G. § 4B1.1(b). Where the offense of conviction exposes the defendant to a maxi-

mum penalty of twenty-five years or more, but less than life, the base offense level will be 34. *See id.*

When determining whether a prior conviction qualifies as a crime of violence, courts consider whether the crimes are one of the enumerated crimes expressly listed or "whether the elements of the offense are of the type that would justify its inclusion within the residual provision [i.e., conduct that presents a serious potential risk of physical injury to another], without inquiring into the specific conduct of this particular offender." *James v. United States*, 550 U.S. 192, 202 (2007) (brackets added). Crimes not specifically enumerated in § 4B1.2(a) but that nonetheless "involve[ ] conduct that presents a serious potential risk of physical injury to another" fall within the "residual clause" of subsection (a)(2). *See United States v. Johnson*, 616 F.3d 85, 89 (2d Cir. 2010). This clause reaches crimes "typically committed by those whom one normally labels armed career criminals, that is, crimes that show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger." *Sykes v. United States*, 131 S. Ct. 2267, 2275 (2011) (quoting *Begay v. United States*, 553 U.S. 137, 146 (2008)) (internal quotation marks omitted). An offense of intent that poses roughly the same degree of risk as the enumerated offenses themselves qualifies as a predicate under the residual clause. *See id.*

at 2276 ("The felony at issue here is not a strict liability, negligence, or recklessness crime and because it is . . . similar in risk to the [enumerated offenses], it is a crime that 'otherwise involves conduct that presents a serious potential risk of physical injury to another.' ") (quoting 18 U.S.C. § 924(e)(2)(B)(ii)). The law governing what constitutes a "violent felony" under 18 U.S.C. § 924(e) is generally applicable to the determination of what constitutes a "crime of violence" under § 4B1.2. *See United States v. Brown*, 52 F.3d 415, 425 (2d Cir. 1995).

In determining whether an offense qualifies as a "crime of violence" under § 4B1.1, this Court employs a "categorical approach." *United States v. Brown*, 629 F.3d 290, 294 (2d Cir. 2011). Under this approach, the Court looks only to the fact of conviction and the statutory definition of the prior offense, and does not generally consider the particular facts disclosed by the record of conviction. That is, the Court considers whether the elements of the offense are of the type that would justify its inclusion within the residual provision, without inquiring into the specific conduct of the particular offender. *James*, 550 U.S. at 202 (internal citations and quotation marks omitted). Notably, the categorical approach does not "requir[e] that every conceivable factual offense covered by a statute must necessarily present a serious potential risk of injury before the offense can be deemed a violent felo-

ny." *Id.* at 208. The relevant inquiry is "whether the conduct encompassed by the elements of the offense, in the ordinary case, presents a serious potential risk of injury to another." *Id.* (emphasis added).

Statutory language defining a criminal offense on occasion may be divisible and may encompass both violent and non-violent felonies. *See Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). "In such circumstances, we may undertake a limited inquiry into which part of the statute the defendant was convicted of violating, at least where the statute of conviction is divisible in that it 'describe[s] the violent felonies . . . in distinct subsections or elements of a disjunctive list.'" *Brown*, 629 F.3d at 294–95 (quoting *United States v. Daye*, 571 F.3d 225, 229 n. 4 (2d Cir. 2009)) (internal citations and quotation marks omitted); *see also Descamps*, 133 S. Ct. at 2283 (upholding use of the modified categorical approach for "a divisible statute, listing potential offense elements in the alternative."); *Johnson v. United States*, 130 S. Ct. 1265, 1273 (2010). We are constrained in this "modified categorical approach" by the Supreme Court's requirement that we consult only "particular documents that can identify the underlying facts of a prior conviction with certainty." *United States v. Rosa*, 507 F.3d 142, 161 (2d Cir. 2007) (emphasis added). In cases that are resolved short of trial, to prove that the prior con-

viction qualifies as a predicate offense, the government may rely upon court documents such as "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or . . . some comparable judicial record of this information." *Shepard v. United States*, 544 U.S. 13, 26 (2005); *see also Savage*, 542 F.3d at 966.

3. Second offender designation

Pursuant to the penalty provisions set forth in 21 U.S.C. § 841(b)(1), enhanced penalties – including increased mandatory minimum and maximum terms of imprisonment – apply if the offense of conviction was committed after the defendant sustained a conviction for a "felony drug offense." Under the applicable definitions section of the Controlled Substances Act ("CSA"), the term "felony drug offense" has the following meaning:

> The term "felony drug offense" means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

21 U.S.C. § 802(44). Each category of substance included in the definition is itself a defined category of substance under the CSA. For example, the term "narcotic drug" is defined as follows:

> The term "narcotic drug" means any of the following whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:
>
> (A) Opium, opiates, derivatives of opium and opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation . . ..
>
> (B) Poppy straw and concentrate of poppy straw.
>
> (C) Coca leaves . . . .
>
> (D) Cocaine . . . .
>
> (E) Ecgonine . . .
>
> (F) Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subparagraphs (A) through (E).

21 U.S.C. § 802(17); *see also* 21 U.S.C. §§ 802(16) (defining marihuana), 802(41) (defining anabolic

steroid), 802(9) (defining depressant or stimulant substance (which includes substances with a potential for abuse due to their hallucinogenic effect)). These categories of substance are controlled in various places within the federal Schedules of Controlled Substances. *See*, *e.g.*, 21 C.F.R. § 1308.12 (listing as Schedule II controlled substances "opium" and "opiate," substances specifically identified in the definition of "narcotic drug" in the CSA).

In light of the Sixth Amendment concerns discussed in *Shepard*, 544 U.S. at 24-26, the categorical and modified categorical approaches developed by courts for analyzing sentencing enhancements under the Armed Career Criminal Act and the Sentencing Guidelines should be employed in determining whether a prior conviction constitutes a predicate offense for second offender enhancements under 21 U.S.C. §§ 841(b)(1) and 851. *See McCoy v. United States*, 707 F.3d 184, 187 (2d Cir. 2013). As stated above, courts start with a "categorical approach" in determining whether a prior conviction qualifies as a predicate offense, looking first to the "fact of conviction" and "the statutory definition of the prior offense of conviction rather than to the underlying facts of that offense." *Folkes*, 622 F.3d at 157. But when the state statute criminalizes both conduct included in the relevant federal statute and conduct not covered by the federal statute, courts use a "modified" categori-

cal approach to examine certain sources beyond the mere fact of conviction. *See Taylor v. United States*, 495 U.S. 575, 602 (1990) (where trial has taken place, court may look to documents such as indictment, information and jury instructions); *see also Savage*, 542 F.3d at 964.

Conn. Gen. Stat. § 21a-279(a) makes it a felony offense to engage in conduct with respect to "any narcotic substance." *Id.* The primary question with respect to the categorical analysis in this matter is whether this category at the time of the defendant's conviction included substances not covered by the category of federally controlled substances enumerated in the definition of felony drug offense at 21 U.S.C. § 802(44). The answer, in short, is that at the time of the defendant's convictions, Conn. Gen. Stat. § 21a-279(a) was over-inclusive in relation to 21 U.S.C. § 802(44). In other words, Connecticut law criminalized conduct relating to substances that were not covered by federal law. This was so because in May 1986, in an effort to conform its controlled substance schedules to federal law, the State of Connecticut listed on its Controlled Substance Schedule I two obscure chemicals, thenylfentanyl and benzylfentanyl, which it categorized as "narcotic substances," but these substances have not been controlled as narcotics under federal law since November 29, 1986, when DEA's temporary, emergency scheduling of them expired as a matter of law. *See McCoy*, 707

F.3d at 187 ("Connecticut criminalizes conduct involving two obscure opiate derivatives, thenylfentanyl and benzylfentanyl, that no longer fall within the federal definition of a 'felony drug offense.'").[3]

4. The mandate rule and the law of the case doctrine

When this Court "overturn[s] a sentence without vacating one or more underlying convictions and remand for resentencing, the 'default rule' is that the remand is for limited, and not *de novo*, resentencing." *United States v. Malki*, 718 F.3d 178, 182 (2d Cir. 2013) (citing *United States*

---

[3] The Supreme Court recently explained in *Descamps* that "sentencing courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements[,]" but may use the approach for "a divisible statute, listing potential offense elements in the alternative." *Id.*, 133 S. Ct. at 2282-2283. This Court has already determined that section 21a-277(b) is a divisible statute, and *Descamps* does not bear on the application of the modified categorical approach to section 21a-279(a), which suffers from the similar over-inclusiveness problem as § 277(b) with respect to the type of controlled substance possessed. *See Savage*, 542 F.3d at 964; *McCoy*, 707 F.3d at 187 (noting that 21a-277(a) was over-inclusive as to the type of narcotics substance possessed requiring use of the modified categorical approach to determine if the conviction qualified as a second offender enhancer).

v. Quintieri, 306 F.3d 1217, 1228–29 n.6 (2d Cir. 2002)). When the remand is "limited, the mandate rule generally forecloses re-litigation of issues previously waived by the parties or decided by the appellate court." *Id.* The rule "also precludes re-litigation of issues impliedly resolved by the appellate court's mandate." *Yick Man Mui v. United States*, 614 F.3d 50, 53 (2d Cir. 2010).

A mandate may "call for *de novo* resentencing, thereby allowing parties to reargue issues previously waived or abandoned," but it should not "be so interpreted unless it clearly says so or [the] intent that resentencing be *de novo* is evident from "the broader 'spirit of the mandate.'" *Malki*, 718 F.3d at 182 (quoting *United States v. Ben Zvi*, 242 F.3d 89, 95 (2d Cir. 2001). "The presumption of limited resentencing may be overcome if issues '*became relevant only after the initial appellate review*' or if the court is presented with a 'cogent or compelling reason for resentencing de novo.'" *Id.* (quoting *United States v. Hernandez*, 604 F.3d 48, 54 (2d Cir. 2010) (emphasis added).

In a similar vein, "[t]he law of the case ordinarily forecloses relitigation of issues expressly or impliedly decided by the appellate court." *Quintieri*, 306 F.3d at 1229. "[W]here an issue was ripe for review at the time of an initial appeal but was nonetheless foregone, it is considered waived and the law of the case doctrine

bars the district court on remand and an appellate court in a subsequent appeal from reopening such issues unless the mandate can reasonably be understood as permitting it to do so." *Id.*

B. Discussion

1. The defendant is a career offender.

The defendant was properly designated as a career offender. At the time of the instant offense, he had previously been convicted in Connecticut of first degree robbery and second degree assault, both of which are felonies. First degree robbery is categorically a crime of violence. *See Brown*, 52 F.3d at 425; *United States v. Houman*, 234 F.3d 825 (2d Cir. 2000); *United States v. Spencer*, 955 F.2d 814, 820 (2d Cir. 1992). An intentional assault involving a serious physical injury or use of a deadly weapon is also a crime of violence. *See, e.g. Morris v. Holder*, 676 F.3d 309, 315 (2d Cir. 2012) (holding that New York conviction for second degree assault categorically qualified as a crime of violence under 18 U.S.C. § 16(b)); *United States v. Walker*, 442 F.3d 787, 788 (2d Cir. 2006) (holding that New York conviction for attempted second degree assault categorically qualified as violent felony under 18 U.S.C. § 924(e) (2)(B); *United States v. Torres-Diaz*, 438 F.3d 529, 537-38 (2d Cir. 2006) (holding that subsection (2) of Connecticut's second degree assault statute categorically qualified as a crime of violence under U.S.S.G. § 2L1.2(b)(1)(A)).

The defendant does not contest his first degree robbery conviction, but makes two arguments challenging his second degree assault conviction. First, he claims that the conviction should not count because the Connecticut second degree assault statute criminalizes both intentional and reckless conduct. Next, he claims that the government, and the district court, violated the mandate rule by relying on a new conviction as a career offender qualifier, which decision was not contemplated by the limited remand.

The defendant is correct that Connecticut's second degree assault statute criminalizes intentional and reckless conduct. Conn. Gen. Stat. § 53a-60 provides:

> (a) A person is guilty of assault in the second degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person; or (2) with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument other than by means of the discharge of a firearm; or (3) *he recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument*; or (4) for a purpose other than lawful medical or therapeutic treatment, he intentionally

> causes stupor, unconsciousness or other physical impairment or injury to another person by administering to such person, without his consent, a drug, substance or preparation capable of producing the same; or (5) he is a parolee from a correctional institution and with intent to cause physical injury to an employee or member of the Board of Pardons and Paroles, he causes physical injury to such employee or member.

Id. (emphasis added). Assuming *arguendo* that a reckless assault cannot be a crime of violence, the defendant is correct that the entire statute cannot categorically qualify as a crime of violence.[4] *See United States v. Gray*, 535 F.3d 128,

[4] Whereas, after the Supreme Court's decision in *Begay*, it appeared well-settled for the moment that a reckless physical assault could not constitute a crime of violence, at least under ACCA's residual clause, the Court, in the subsequent *Sykes* decision, appeared to limit its holding in *Begay* and focus its inquiry less on the *mens rea* of the defendant at the time of his prior offense and more on the extent of the injury or risk of injury associated with the conduct. *See Sykes*, 131 S. Ct. at 2275 (noting that "the phrase 'purposeful, violent, and aggressive' has no precise textual link to the residual clause," and that this "*Begay* phrase is an addition to the statutory text."). As the *Sykes* court explained, "In many cases the purposeful, violent, and aggressive inquiry will be redundant with the inquiry into risk, for crimes

131-32 (2d Cir. 2008) (holding that New York's reckless endangerment statute does not qualify categorically as a crime of violence because "*Begay* places a strong emphasis on intentional-purposeful-conduct as a prerequisite for a crime to be considered similar in kind to the listed crimes" in the residual clause).

But the inquiry does not end there. It cannot be disputed that the statute is easily divisible, *Descamps*, 133 S. Ct. at 2283, and that an intentional physical assault under subsections (1) or (2) of the statute qualifies as a crime of violence because it "has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S.S.G. § 4B1.2(a)(1). Here, the plea transcript submitted by the government at sentencing established definitively that the defendant was convicted based on conduct that qualifies as an offense under both Conn. Gen. Stat. §§ 53a-60(1) and (2). During the plea colloquy for the assault, he specifically

---

that fall within the former formulation and those that present serious potential risks of physical injury to others tend to be one and the same."). Thus, an argument certainly could be made that Connecticut's second degree assault statute qualifies categorically as a crime of violence under the residual clause. But that argument is not dispositive here, since the defendant was convicted under a subsection of the assault statute that clearly qualifies as a crime of violence.

admitted to a serious, intentional physical assault. A117, A122. The defendant does not challenge that fact. He did not plead guilty under the *Alford* doctrine, and he specifically admitted to the prosecutor's factual basis, which described an intentional physical assault by the defendant, who used a glass bottle to strike a victim in the back of the head. A117. Thus, his prior second degree assault conviction did not involve reckless conduct.

As to his argument that the district court should have been prohibited from considering any other potential career offender qualifiers based on this Court's limited remand, he is misapplying the mandate rule. It appears well-settled that the mandate rule exists to prevent parties from either re-litigating issues that have already been decided or from raising new issues that could have previously been raised, but were not and, therefore, have been waived. *See Quintieri*, 306 F.3d at 1229.

Here, the government was addressing an issue left open on remand, *i.e.*, whether the defendant was a career offender. In doing so, it pointed out that one of the convictions that had always been listed in the PSR also qualified as a career offender predicate. This was not a new issue. And the only reason this conviction was not relied upon previously was because the defendant had originally stipulated that he was a career offender and specifically agreed that his

prior sale of a controlled substance conviction served as one of the qualifiers. As a result, the defendant had agreed that he had two qualifying convictions under the categorical approach, and it never became necessary to analyze the transcript of the assault plea to determine whether it also qualified under the modified categorical approach.

To the extent that there is any credence to the claim that the district court's reliance on the second degree assault conviction as a career offender qualifier converted a limited remand into a *de novo* resentencing, there still was no error. As stated above, "The presumption of limited resentencing may be overcome if issues became relevant only after the initial appellate review . . . ." *Malki*, 718 F.3d at 182 (internal quotation marks omitted). That is exactly what occurred here. At the time of the remand, the parties and this Court were focused on the fact that the prior sale of a controlled substance conviction no longer qualified under *Savage* as a career offender qualifier. The case was remanded for resentencing to allow the district court to reach that conclusion. But nothing about the remand removed from the district court the duty to recalculate the guideline range and, in doing so, determine whether the defendant was or was not a career offender. In that context, it was appropriate for the court to consider the remaining convictions set forth in the PSR to determine if

any of them qualified as crimes of violence or controlled substance offenses. This is especially true here where the defendant had stipulated to his career offender status in his original sentencing memorandum.

2. The defendant is a second offender.

At the outset, this claim fails because it is not reviewable under the mandate rule. The defendant had the opportunity to raise this claim under *Savage* in his first appeal and failed to do so. "The scope of this second appeal is limited by the 'law of the case' doctrine." *United States v. Frias*, 521 F.3d 229, 234-35 (2d Cir. 2008) (refusing to review challenges to jury instructions, guideline calculation and findings of fact at first sentencing where purpose of remand was for court to apply *Booker*). Although there are exceptions to this doctrine, such as "when the appellant did not previously have an incentive or opportunity to raise the issue," "when the issue arises from events that occurred after the original appeal," or where there is "an intervening change of controlling law," *Quintieri*, 306 F.3d at 1230, none of those exceptions apply here.

This claim also fails on its merits. The second offender notice filed in this case identified two potential enhancing convictions: the defendant's 2006 sale of a controlled substance conviction and his 1999 possession of narcotics conviction. For similar reasons as those preventing the sale conviction from being used as a career offender

qualifier, the conviction could not be used as a second offender qualifier. Under *Savage* and its progeny, the statute of conviction for the sale offense is not categorically a felony drug offense and must be analyzed under the modified categorical approach. As this Court found in resolving the first appeal, the 2006 conviction resulted from an *Alford* plea, so that there is no reliable evidence from a court document showing which narcotic was possessed and sold in connection with that offense.

The 1999 possession conviction, however, was a prior felony drug offense. There is no dispute whatsoever about the fact that the Connecticut possession of narcotics statute is divisible and must be analyzed under the modified categorical approach because it criminalizes a few substances that are not federally prohibited. The transcript of the guilty plea for this offense reveals that the defendant did not avail himself of the *Alford* doctrine, fully accepted responsibility for his offense and specifically admitted that he had knowing possessed crack cocaine, a substance clearly prohibited by federal law. As a result, this conviction was properly determined to be a prior felony drug offense.

On appeal, the defendant repeats the same arguments he made before the district court. First, despite the fact that all available evidence shows that he did not enter his plea under the *Alford* doctrine, he continues to insist, without

offering any supporting evidence, that he entered the plea pursuant to *Alford*. Second, he maintains that his statements during his guilty plea canvass are insufficient to constitute the necessary admissions to render the conviction a prior felony drug offense. *See* Def.'s Br. at 18.

These arguments, which are accompanied by no legal analysis or factual support, are absolutely contradicted by the guilty plea transcript for the possession of narcotics offense. According to that transcript, the defendant entered a straight guilty plea without relying on the *Alford* doctrine. A114-A115. In addition, the factual basis provided by the prosecutor indicated that the police "were observing what they believe to be a drug transaction. They observed the defendant drop a folded napkin to the ground." A116. And the napkin contained a controlled substance that appeared to be crack cocaine and field-tested positive for the presence of cocaine. A117. The court asked the defendant whether the facts "as summarized by the prosecutor . . . [were] essentially correct." A122. The defendant confirmed that they were. A122.

Thus, according to the guilty plea transcript for the possession of narcotics conviction, the defendant entered a straight guilty plea and specifically acknowledged and agreed to a factual basis which placed the conviction within the statutory definition of felony drug offense, so that the

defendant was properly designated as a second offender.

3. The sentence was substantively reasonable.

The court imposed a sentence that was 150 months below the guideline range and, in doing so, properly balanced the § 3553(a) factors to achieve a sentence that was just, reasonable and not greater than necessary to serve the purposes of a criminal sanction. As the district court explained, in great detail, it was balancing several factors in reaching its ultimate sentencing decision. It was attempting to account for the defendant's post-conviction rehabilitation, the changes in the crack cocaine penalties, the seriousness of the offense conduct, and the defendant's extensive criminal record, which spanned thirteen years. As it carefully explained at sentencing, the two primary goals the court was focused on were just punishment and general deterrence. In light of the defendant's efforts at rehabilitation since the first sentencing, it no longer considered specific deterrence a suitable goal or an important factor. And it did not view the career offender guidelines as an appropriate reflection of the defendant's risk of recidivism.

On appeal, the defendant does not claim that the 112-month sentence somehow shocks the conscience. Instead, he simply maintains, with very little legal or factual analysis, that the district court failed to account for the disparity be-

tween the crack and powder cocaine penalties and the defendant's post-conviction rehabilitation. *See* Def.'s Br. at 19-20. But this argument is factually inaccurate.

The defendant may not like the ultimate sentencing decision, but he cannot seriously argue that the court did not give sufficient weight to these two mitigating factors. In fact, the court specifically indicated in explaining its sentence that it had given weight to the fact that the crack penalties had changed since the first sentencing and that the defendant had undergone a significant transformation while serving the sentence in this case. Although the court explicitly refused to reduce the defendant's sentence any further to account for the continued disparity between the crack and powder cocaine penalties, it seemed very much influenced by the defendant's post-conviction rehabilitation. It cited this factor both in its explanation of why specific deterrence was no longer a legitimate goal of sentencing, and in its discussion of why the career offender guideline was excessive. A229-A232, A242.

In the end, the defendant is upset that the court did not lower his sentence more than it did. But that is not a legitimate basis for a substantive challenge. The defendant has failed to show how the court abused its discretion and how the sentence was somehow excessive in light of the various § 3553(a) factors, including the 262-327 month guideline range.

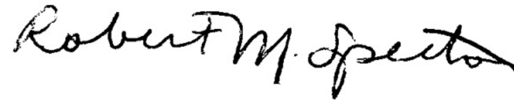
Conclusion

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

Dated: August 28, 2013

Respectfully submitted,

DEIRDRE M. DALY
ACTING U.S. ATTORNEY
DISTRICT OF CONNECTICUT

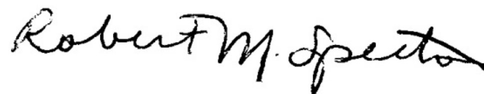


ROBERT M. SPECTOR
ASSISTANT U.S. ATTORNEY

Sandra S. Glover
Assistant United States Attorney (of counsel)

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

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,440 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.



ROBERT M. SPECTOR
ASSISTANT U.S. ATTORNEY

Addendum

U.S.S.G. § 4B1.2.
Definitions of Terms Used in Section 4B1.1

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that--

> **(1)** has as an element the use, attempted use, or threatened use of physical force against the person of another, or
>
> **(2)** is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e.,

two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of § 4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.

Conn. Gen. Stat. § 21a-279(a).

(a) Any person who possesses or has under his control any quantity of any narcotic substance, except as authorized in this chapter, for a first offense, may be imprisoned not more than seven years or be fined not more than fifty thousand dollars, or be both fined and imprisoned; and for a second offense, may be imprisoned not more than fifteen years or be fined not more than one hundred thousand dollars, or be both fined and imprisoned; and for any subsequent offense, may be imprisoned not more than twenty-five years or be fined not more than two hundred fifty thousand dollars, or be both fined and imprisoned.

* * *

Conn. Gen. Stat. § 53a-60. Assault in the second degree: Class D felony

(a) A person is guilty of assault in the second degree when: (1) With intent to cause serious physical injury to another person, he causes such injury to such person or to a third person; or (2) with intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument other than by means of the discharge of a firearm; or (3) he recklessly causes serious physical injury to another person by means of a deadly weapon or a dangerous instrument; or (4) for a purpose other than lawful medical or therapeutic treatment, he intentionally causes stupor, unconsciousness or other physical impairment or injury to another person by administering to such person, without his consent, a drug, substance or preparation capable of producing the same; or (5) he is a parolee from a correctional institution and with intent to cause physical injury to an employee or member of the Board of Pardons and Paroles, he causes physical injury to such employee or member.

(b) Assault in the second degree is a class D felony.