08-4248-cr

To Be Argued By:
FELICE M. DUFFY

==

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-4248-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

MIGUEL FLAQUER,
Defendant-Appellant.

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

==

BRIEF FOR THE UNITED STATES OF AMERICA

==

NORA R. DANNEHY
United States Attorney
District of Connecticut

FELICE M. DUFFY
Assistant United States Attorney
WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

TABLE OF CONTENTS

Table of Authorities iv

Statement of Jurisdiction. x

Statement of the Issue Presented xi

Preliminary Statement. 1

Statement of the Case 3

Statement of Facts and Proceedings
Relevant to this Appeal. 4

A. The Plea Agreement. 4

B. The Guilty Plea. 6

C. The Presentence Report. 10

D. The Sentencing Memorandum. 11

E. The Sentencing. 12

Summary of Argument.. 24

Argument. 25

I. The government did not breach the plea agreement by arguing for a role enhancement, because the plea agreement contained no guideline stipulation at all. 25

A. Governing law and standard of review.. 25

B. Discussion.. 28

1. There was no error, because the plea agreement contained no guideline stipulation, and so the Government's advocacy of a role enhancement did not breach the plea agreement.. 28

2. Even if there was error, it was not plain. . . 33

3. Any error did not affect Flaquer's substantial rights, and did not "seriously affect the fairness, integrity or public reputation of judicial proceedings.". 33

II. Defense counsel was not ineffective for failing to claim that the Government breached the plea agreement, where no breach occurred. 34

A. Governing law and standard of review. 34

B. Discussion.. 35

III. The district court did not clearly err in finding that the Government proved beyond a preponderance of the evidence that the defendant was a supervisor, and applying a two-point enhancement for his role in the offense, where he set up cocaine deals and instructed another participant as to when, where and how to deliver the cocaine and collect the money owed to the defendant. 37

A. Governing law and standard of review.. 37

B. Discussion. 38

IV. The district court did not abuse its discretion by concluding that a within-Guideline sentence was reasonable, where the district court properly calculated the Guideline range and complied with the dictates of 18 U.S.C. § 3553(a), and where the Government had not entered into a cooperation agreement or filed a substantial-assistance motion. 44

A. Governing law and standard of review. 44

B. Discussion.. 47

Conclusion. 52

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

Addendum

TABLE OF AUTHORITIES

CASES

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.

Anderson v. Bessemer City,
470 U.S. 564 (1985). 43

Blackledge v. Allison,
431 U.S. 63 (1977). 32

Gall v. United States,
128 S. Ct. 586 (2007). 44, 45

Hartjes v. Endicott,
456 F.3d 786 (7th Cir. 2006). 35

Knowles v. Mirzayance,
129 S. Ct. 1411 (2009). 34

Koch v. Puckett,
907 F.2d 524 (5th Cir. 1990). 35

Krist v. Foltz,
804 F.2d 944 (6th Cir. 1986). 35

Massaro v. United States,
538 U.S. 500 (2003). 35

Puckett v. United States,
129 S. Ct. 1423 (2009). 25, 26, 28

Rita v. United States,
127 S. Ct. 2456 (2007). 44

Strickland v. Washington,
466 U.S. 668 (1984). 34

United States v. Arena,
180 F.3d 380 (2d Cir. 1999). 35

United States v. Blount,
291 F.3d 201 (2d Cir. 2002). 38

United States v. Booker,
543 U.S. 220 (2005). 44

United States v. Canova,
412 F.3d 331 (2d Cir. 2005). 46

United States v. Carter,
489 F.3d 528 (2d. Cir. 2007). 41, 42

United States v. Cavera,
550 F.3d 180 (2008) (en banc). . . . 43, 44, 45, 46, 47

United States v. Colon,
220 F.3d 48 (2d Cir. 2000). 27

United States v. Cronic,
466 U.S. 648 (1984). 35

United States v. Crosby,
397 F.3d 103 (2d Cir. 2005).. 45

United States v. Espinoza,
514 F.3d 209 (2d Cir. 2008).. 42

United States v. Fairclough,
439 F.3d 76 (2d Cir. 2006) (per curiam). 46

United States v. Fentress,
792 F.2d 461 (4th Cir. 1986). 27, 32

United States v. Fernandez,
443 F.3d 19 (2d Cir. 2006)
(per curiam). 45, 46, 49, 51

United States v. Fernandez,
877 F.2d 1138 (2d Cir. 1989).. 28

United States v. Fleming,
397 F.3d 95 (2d Cir. 2005).. 46

United States v. Garcia,
413 F.3d 201 (2d Cir. 2005).. . . . . 38, 43

United States v. Garcia,
936 F.2d 648 (2d Cir. 1991).. 44

United States v. Gaskin,
364 F.3d 438 (2d Cir. 2004).. . . . . 34, 36

United States v. Griffin,
510 F.3d 354 (2d Cir. 2007). 26, 27

United States v. Habbas,
527 F.3d 266 (2d Cir. 2008). 27, 28, 32

United States v. Hamdi,
432 F.3d 115 (2d Cir. 2005). 26, 28

United States v. Hargrett,
156 F.3d 447 (2d Cir.1998). 48

United States v. Hertular,
562 F.3d 433 (2d Cir. 2009). 37, 38

United States v. Jass,
569 F.3d 47 (2d Cir. 2009). 43, 45, 50

United States v. Mendez,
315 F.3d 132 (2d Cir. 2002). 43

United States v. Ogman,
535 F.3d 108 (2d Cir. 2008). 49

United States v. Ojeikere,
545 F.3d 220 (2d Cir. 2008). 37

*United States v. Palladin*o
347 F.3d 29 (2d Cir. 2003). 28, 29, 36

United States v. Peglera,
33 F.3d 412 (4th Cir. 1994). 27

United States v. Pimentel,
932 F.2d 1029 (2d Cir. 1991). 28

United States v. Rattoballi,
452 F.3d 127 (2d Cir. 2006). 47

United States v. Rigas,
490 F.3d 208 (2d Cir. 2007). 46

United States v. Rivera,
971 F.2d 876 (2d. Cir. 1992). 38

United States v. Roe,
445 F.3d 202 (2d Cir. 2006). 48

United States v. Stevens,
985 F.2d 1175 (2d. Cir. 1993). 41, 42

United States v. United Medical and Surgical Supply Corp.,
989 F.2d 1390 (4th Cir. 1993). 27

United States v. Vaughn,
430 F.3d 518 (2d Cir. 2005). 37

United States v. Vaval,
404 F.3d 144 (2d Cir. 2005). 26

United States. v. Verkhoglyad,
516 F.3d 122 (2d Cir. 2008). 45, 46

United States v. Villafuerte,
502 F.3d 204 (2d Cir. 2007). 46

STATUTES

18 U.S.C. § 3231. xi

18 U.S.C. § 3553. . . . . *passim*

18 U.S.C. § 3742. . . . . xi, 48

21 U.S.C. § 841. 4

21 U.S.C. § 846. 4

28 U.S.C. § 1291. xi

RULES

Fed. R. App. P. 4. xi

Fed. R. Crim. P. 52.. 25

GUIDELINES

U.S.S.G. § 3B1.1. 47, 48, 52, 54

U.S.S.G. § 3E1.1. 9

U.S.S.G. § 5K1.1. 20

U.S.S.G. § 5K2.0. 20

Statement of Jurisdiction

The United States District Court for the District of Connecticut (Alan H. Nevas, Senior U.S. District Judge) had subject matter jurisdiction over this federal criminal case under 18 U.S.C. § 3231. Judgment entered on July 30, 2008. A18-19. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on August 1, 2008. A16. This Court has appellate jurisdiction over the defendant's challenge to his sentence pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Statement of Issues
Presented for Review

1. Whether the Government breached the plea agreement by arguing for a role enhancement at sentencing, such that there was plain error, where there was no stipulation to any Guideline range or promise not to argue for a role enhancement in the plea agreement.

2. Whether defense counsel was ineffective for failing to claim that the Government breached the plea agreement, where no breach occurred.

3. Whether the district court clearly erred in finding that the Government proved beyond a preponderance of the evidence that the defendant was a supervisor, and applying a two-point enhancement for his role in the offense, where he set up cocaine deals and instructed another participant as to when, where and how to deliver the cocaine and collect the money owed to the defendant.

4. Whether the district court abused its discretion by concluding that a within-Guideline sentence was reasonable, where the district court properly calculated the Guideline range and complied with the dictates of 18 U.S.C. § 3553(a), and where the Government had not entered into a cooperation agreement or filed a substantial-assistance motion.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-4248-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

MIGUEL FLAQUER,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Defendant-appellant, Miguel Flaquer, was the main supplier to Victor Marrero of multiple kilograms of cocaine from 1997-2005 in Bridgeport, Connecticut. During that time, Flaquer arranged for others (including co-defendant Luis Noboa) to deliver the cocaine to Marrero, and to collect money that Marrero owed him. Flaquer pled guilty, pursuant to a written plea agreement in which Flaquer admitted participating in a conspiracy to distribute 5 kilograms or more of cocaine. The agreement

did not set forth a guideline estimate or a promise from the Government not to argue for a role enhancement pursuant to U.S.S.G. § 3B1.1. Flaquer proffered after his plea in hopes of receiving a motion for a downward departure pursuant to U.S.S.G. § 5K1.1 based on substantial assistance with the Government. The Government later learned that Flaquer participated in an illegal scheme, whereby he paid $50,000 to a lawyer and third party who promised Flaquer they could offer false information to the Government, which could be attributed to Flaquer to assist in his earning a § 5K1.1 motion. After the lawyer and third party were federally indicted in Massachusetts for that conduct, Flaquer came forward and provided information about the scheme to the agents and prosecutors who were investigating that case. Flaquer was not charged in that case. The Government did not offer to, or enter into, a cooperation agreement with Flaquer in either case.

Two years afer Flaquer pleaded guilty, the district court held a contested sentencing hearing regarding the disputed issues of role and possession of a weapon in connection with the offense.

At the conclusion of the hearing, the district court determined that Flaquer supervised Noboa, and increased his offense level by two points for his role in the offense, pursuant to U.S.S.G. § 3B1.1. The district court declined to increase his offense level for possession of a gun in connection with the offense. Moreover, the district court did not downwardly depart or give Flaquer any benefit for providing information about the scheme to defraud the Government in which he participated. The district court

sentenced Flaquer to 168 months in prison, which fell within his advisory guidelines range of 151 to 188 months.

Flaquer makes a number of claims on appeal. Primarily, he claims: (1) the Government breached the plea agreement by arguing for a role enhancement at sentencing; (2) defense counsel was ineffective for not arguing that the Government breached the plea agreement; (3) the district court erred in finding that Flaquer was Noboa's supervisor and applying a two-level enhancement for role; and (4) the 168-month sentence was unreasonable because the district court, among other things, did not credit Flaquer's cooperation.

For the reasons that follow, those claims are meritless.

Statement of the Case

This is an appeal from the United States District Court for the District of Connecticut (Alan H. Nevas, Senior U.S.D.J.).

On February 2, 2001, a federal grand jury in the District of Connecticut returned a Superseding Indictment against four defendants alleged to be involved in drug trafficking activity in Bridgeport, Connecticut, including, among others, the defendant-appellant Miguel Flaquer and co-defendant Luis Noboa. A21, 22, and 23.[1] Count One

---

[1] References are indicated as follows:

Government Appendix.. . . . . (“GA_.”);
(continued...)

charged Flaquer and others with unlawfully conspiring to distribute 5000 grams or more of cocaine, in violation of 21 U.S.C. § 846. Count Two charged Flaquer and others with possession with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B).

On June 20, 2006, Flaquer entered a guilty plea to Count One before U.S. Magistrate Judge Holly B. Fitzsimmons. A24-30.

On July 30, 2008, Judge Nevas conducted a sentencing hearing, A16, and sentenced Flaquer principally to 168 months in prison. A18. Judgment entered on July 30, 2008, A18-19, and on August 1, 2008, Flaquer filed a timely notice of appeal, A16. Flaquer is presently serving his sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. The Plea Agreement

On June 20, 2006, Flaquer executed a plea agreement, whereby he pled guilty to Count One of the Superseding Indictment. A24-30.

---

[1] (...continued)
Flaquer Appendix. . . . . ("A_.").

The executed plea agreement provided that Flaquer conspired to possess with intent to distribute and to distribute 5,000 grams or more of cocaine, an "offense [that] carries a maximum penalty of life imprisonment, a $4,000,000 fine, and a mandatory minimum penalty of ten years' imprisonment." A24-25.

The plea agreement made it clear that it was up to the sentencing judge to determine Flaquer's sentence. The plea agreement explained that the court would consider the Sentencing Guidelines as an advisory matter, in conjunction with the other factors listed in 18 U.S.C. § 3553(a). A26. The defendant acknowledged in the agreement that it was up to the district court to make the guidelines determinations by a preponderance of the evidence, after receiving input from the defendant, the Government, and the United States Probation Officer. A24-25.

The agreement also made clear that the parties did not agree upon any guidelines calculation, sentencing range, or specific sentence. The only agreement with respect to the guidelines was that the Government would recomment a two-level reduction under § 3E1.1 of the U.S. Sentencing Guidelines for acceptance of responsibility for the offense. A27. In other respects, the Government reserved "its right to address the Court with respect to an appropriate sentence to be imposed in this case," and the agreement stated that "that the Government will discuss the facts of this case, including information regarding the defendant's background and character . . . with the United States Probation Office." A27.

The defendant acknowledged that there were no other promises, beyond those set forth in the plea agreement, that induced his guilty plea:

> The defendant further acknowledges that he is entering into this agreement without reliance upon any discussions between the Government and him (other than those described in the plea agreement letter), without promise of benefit of any kind (other than the concessions contained in the plea agreement letter), and without threats, force, intimidation, or coercion of any kind.

A28-29. The agreement also included an integration clause, which provided that no other promises would be entered unless set forth in writing. A30.

B. The Guilty Plea

On June 20, 2006, at the change of plea hearing, Magistrate Judge Holly B. Fitszimmons ensured that Flaquer understood the interpreter, GA2, that he had no difficulty in speaking with his lawyer in the past, GA6, that he was satisfied with his lawyer's representation, GA13, that his mind was clear and that he understood the proceedings, GA 8, and made clear that he should ask any questions if he did not understand, GA4, and that he could take time if he wanted to speak with his lawyer, GA4. The magistrate ensured that his lawyer had no doubt as to Flaquer's competence, GA12, had discussed the case with his client, and that his client understood the nature of the proceedings. *Id.*

Flaquer affirmed that he understood the nature of the charges in the Indictment, and had discussed them with his lawyer. GA13. The magistrate confirmed that Flaquer understood his various rights, including the right not to plead guilty, GA13-19, and that Flaquer had the plea agreement translated to him and that he understood it and had signed it, GA19.

The magistrate's canvass continued after prosecutor outlined the terms of the plea agreement.

> THE COURT: Okay. Good. Thank you. Mr. Flaquer, does the agreement in writing that's in front of you, as Ms. Duffy has outlined it, fully and accurately reflect your understanding of the agreement that you have entered into with the government?
>
> FLAQUER: Yes.
>
> THE COURT: And yours, Mr. Walkley?
>
> MR. WALKLEY: Yes, Your Honor.
>
> . . . .
>
> THE COURT: Okay. And if you plead guilty to this charge, which includes an allegation that the quantity of drugs involved was 5,000 grams or more of cocaine, that is a concession that is going to have a significant impact on your sentence, and you're

> giving up any right that you might have to demand that any facts used to enhance your sentence be decided by a jury, using a "beyond a reasonable doubt" standard, because here, any of those necessary decisions will be made by the judge who will use a lesser standard of preponderance of the evidence.
>
> FLAQUER: Yes. Yes.

GA25.

The magistrate ensured that no other promises other than the one in the plea agreement had been made to Flaquer. GA25-26.

> THE COURT: Has anyone specifically promised you that if you plead guilty, Judge Nevas will give you a particular sentence?
>
> FLAQUER: No.

GA26. The magistrate specifically canvassed Flaquer on his understanding of the potential sentence that he faced, including a sentence of life imprisonment, a mandatory minimum sentence of 5 years. GA27-28. The magistrate discussed the operation of the Sentencing Guidelines. GA28-29.

> THE COURT: And have you discussed with him the applicability and operation of the Sentencing Guidelines?

MR. WALKLEY: Yes, I have.

GA12. The magistrate judge then confirmed that the defendant understood that it would be up to Judge Nevas to determine what the appropriate sentence was, and that no one could know precisely what the Guidelines range would be. A29-31.

The magistrate also raised the issue of the potential for disputed facts to arise.

> THE COURT: All right. Do you further understand that even after the presentence report is completed, there may be disputed facts that Judge Nevas must resolve, and how he resolves them may affect the applicable guidelines?
>
> FLAQUER: I understand. Yes.

GA31. The magistrate made clear that the sentence would depend on what was included in the PSR, and the defendant confirmed that he was willing to plead guilty despite that uncertainty about his sentence. GA32-33.

Based on this thorough canvas, the magistrate found that Flaquer was competent to plead guilty, and that "he understands the role that the Sentencing Guidelines will play in determining his sentence." GA42-43.

C. The Presentence Report

The Presentence Report[2] ("PSR") prepared by the Probation Officer calculated Flaquer's total offense level as 36, starting from a base level of 34 for 15-50 kilograms of cocaine, PSR ¶23, plus a two-level increase for providing Victor Marrero with a firearm and instructing Marrero that he needed the weapon in order to protect the cocaine that Flaquer had provided to Marrero, PSR ¶24, plus an additional two-level increase for a supervisory role because he directly supervised the activities of co-defendant Luis Noboa, PSR ¶25, with a two-level reduction for acceptance of responsibility, PSR ¶29. With no criminal convictions, resulting in a Criminal History Category I, the PSR's calculation resulted in a guidelines range of imprisonment of 188-235 months. PSR ¶63.

In addition, the PSR detailed the nature and circumstances of the offense charged, Flaquer's other criminal conduct, and his offender characteristics, including his personal and family data, marital status, physical condition, substance abuse, mental and emotional health, educational and vocational skills, and employment record. PSR ¶¶31-61. The PSR also stated that there were no identified factors warranting departure from the applicable Sentencing Guideline. PSR ¶73.

---

[2] The Government is filing the PSR separately under seal.

D. The Sentencing Memorandum

On December 19, 2007, Flaquer filed a memorandum in aid of sentencing, which set forth that his "guilty plea was the culmination of negotiations between the government and defendant since the time of his arrest." A13; GA277-294. "After careful consideration of the plea agreement he had been offered, the application of the sentencing guidelines, and the factual background of his case, Mr. Flaquer elected to enter his plea of guilty in this case." GA278. Flaquer requested a full evidentiary hearing because "*Defendant and the government have not agreed to all aspects of sentencing, including* the calculation of the quantity of cocaine attributable to him, *Miguel Flaquer's role in the offense,* and the involvement of a firearm in the offense." GA281 (emphasis added).

The sentencing memorandum also set forth that the "defendant and the government never entered into a formal cooperation agreement," and that the Government had not filed a motion for a downward departure pursuant to U.S.S.G. § 5K1.1. GA285. Regarding an early proffer session that the Government conducted with Flaquer, Flaquer admitted that two individuals (John Bevilacqua and Lisa Torres, who were later federally indicted in Massachusetts) had attended the proffer session and "had guided, if not instructed Mr. Flaquer about how much he should say and how far he should go in offering information to the government," GA285, and that the "session ended abruptly when it appeared that the guidance Mr. Flaquer had been given by those individuals strayed from where the truth needed to take him." *Id.*

Moreover, Flaquer did "not expect the Court to award [him] with a downward departure based upon § 5K1.1 of the sentencing guidelines," GA285-87, but requested a departure under 5K2.0 of the guidelines based on the fact that Flaquer "did proffer here and assist federal law enforcement authorities in other Districts," GA286. On July 29, 2008, defense counsel filed a supplemental sentencing memorandum, incorporating the original sentencing memorandum. A15; GA253.

E. The Sentencing

On July 30, 2008, the district court conducted a sentencing hearing. A16. The hearing was scheduled to address the contested factual issues concerning drug quantities attributable to Flaquer as set forth in the PSR, Flaquer's possession of a gun in connection with the offense, and his role in the offense. GA103, 115-16, 119.

At the beginning of the hearing, before the introduction of evidence, the district court warned Flaquer that it could find that the quantity was higher than 50 kilograms based on the government's proffer regarding Marrero's anticipated testimony, which could result in a higher sentence. GA115-18. After consulting with his lawyer, Flaquer agreed that he was responsible for not less than 15, but not more than 50 kilograms of cocaine. GA119.

The Government then introduced evidence regarding the remaining disputed issues, which were Flaquer's role and possession of a weapon. GA119.

Victor Marrero testified to the following. Flaquer was his main source of supply from 1997 through the date of his arrest in March 2005, beginning with his purchasing five kilograms of cocaine once a month and ending with his purchasing at least one kilogram of cocaine once a month. GA139-41, 144, 160, 168, 171. During those years, Flaquer negotiated the terms of the cocaine deals, including the financial arrangements, GA128, 140-44, 145, 156, 160-61, 171-72, and the locations and methods of delivering the cocaine and collecting the money, GA142-73.

At the beginning, Flaquer set up a meeting with his nephew and Marrero, at a clothes shop the nephew owned in New York. GA142. Flaquer met Marrero at the shop with the nephew and arranged that Marrero would pick up the cocaine and deliver the money he owed for it to the shop. GA142-43.

> PROSECUTOR: Mr. Flaquer had set this up with you?
>
> MARRERO: Yes.
>
> PROSECUTOR: And when you got to the clothes shop and one of his family members was there and Mr. Flaquer was there, what happened that – then?
>
> MARRERO: Well, he told me this is – that was his nephew. He owned the shop, and that I would be dealing with him, going there to pick up and bring

> money there when I – whenever I got so much together, to bring it there to his nephew.
>
> PROSECUTOR: So Mr. Flaquer arranged with you, that you would bring money or pick up cocaine from his nephew at the clothing store?
> MARRERO: Yes. Correct.

GA145. Thereafter, Marrero picked up five kilograms a month in 1997 for approximately one year, and brought the money he owed Flaquer for the cocaine to the shop of the nephew at Flaquer's instruction. GA144-47, 150.

After 1998, the arrangements with Flaquer changed. GA150. Flaquer introduced his brother-in-law Freddie to Marrero and put Freddie in charge of the cocaine transactions, rather than his nephew. GA151-52. Freddie would deliver the cocaine to, and collect the money owed to Flaquer from, Marrero in Connecticut. GA151-53. Even when Flaquer would leave the United States, he was still in charge of the cocaine deals. GA153.

In about 1999-2000, Marrero stopped purchasing cocaine from Flaquer for approximately 8-9 months. GA 154. In about 2001, Flaquer visited Marrero at his restaurant, and arranged to meet later to discuss further arrangements regarding buying cocaine from Flaquer again. GA157-58. At that meeting, Flaquer introduced Luis Noboa as the person who would be delivering the cocaine and picking up the money owed to Flaquer. GA158-59, 162-63,198-202.

> MARRERO: Yes. That's when I met the driver. We met at Red Lobster off the exit in New York, and when I got there, he was there with the – with his driver, and he introduced me to him and he said this was the new guy he would be coming down with. . . .
>
> PROSECUTOR: Who was the driver?
>
> MARRERO: Noboa.
>
> . . . .
>
> PROSECUTOR: And what did you and Mr. Flaquer arrange with respect to the driver and the drugs? How was that going to work?
>
> MARRERO: Well, that – when he couldn't come down, he would send this guy down, the driver, and he would take care of things for him.

GA158-59.

That arrangement lasted from about 2002 through the date of Marrero's arrest in March 2005. GA161. When Marrero had problems with the cocaine, he would complain to Flaquer about it. GA164.

> PROSECUTOR: Was there ever a time that, in your opinion, the driver delivered bad cocaine to you?

MARRERO: Yes. There was a couple of times he deliver something bad, and when I looked at it, I told him it was no good, it was compress, and then I complained to Miguel about it, and then he said that he'll make sure next time that with bad – when he had something bad in New York, he wouldn't bring it down to waste a trip going back and forth for that, so he always made sure it was shiny and good.

PROSECUTOR: So you had the driver take the cocaine back?

MARRERO: Yes.

PROSECUTOR: And then you called Miguel Flaquer to complain about it?

MARRERO: Yes.

GA164-65.

Flaquer had arranged with Marrero that Flaquer would call to tell Marrero the driver was on his way and Marrero should call Flaquer when the deal was complete to let him know how the deal went. GA165-66.

PROSECUTOR: . . . did Mr. Flaquer ever call you to let them know – to let you know that the driver might be coming with cocaine?

> MARRERO: Yeah. Yeah. He let me know he's coming down.
>
> PROSECUTOR: Did he ever call you to check to see if his driver had made it?
>
> MARRERO: Yeah. Well, he had – I mean, once the driver got there and everything was all set, to call him and tell him, "No, everything went good and he's on his way back." So –
>
> PROSECUTOR: So –
>
> MARRERO: – he'd be expecting him to get there within a hour, two hours.
>
> PROSECUTOR: So you had arranged with Mr. Flaquer that after the driver delivered, you'd call Mr. Flaquer and let him know that the deal had gone well?
>
> MARRERO: Yeah, everything's good and he's on his way there, so he could be expecting him.

GA165-66; *see also* GA199.

On the day of Flaquer's arrest, Marrero had arranged to purchase three kilograms of cocaine from Flaquer, under the direction and supervision of the FBI. Flaquer had been driven to the prearranged location by Noboa, flanked by a second car with two other individuals carrying one kilogram of cocaine. GA125-33.

In addition to Marrero's testimony, the Government offered the FBI report of Flaquer's proffer session to corroborate Marrero's testimony, which included that he knew Noboa and had delivered kilograms of cocaine to Marrero. GA232. The Government also offered the transcript of Marrero's testimony before the grand jury to corroborate his testimony at the hearing. GA232-34.

The district court reviewed those exhibits to determine the extent to which "the exhibits are going to affect the Court's finding as to . . . relating to his role, and the gun, and so forth?" GA235-37. The district court noted it received documents filed by defense counsel under seal, including reports concerning Flaquer's assistance to law enforcement officers in Rhode Island. GA238-40; 254. Further, the district court explained that it had reviewed Flaquer's sentencing memorandum. GA239.

The district court then canvassed Flaquer to ensure that he had reviewed and understood the PSR, GA240, and that the PSR had been interpreted for him. GA242-44. Flaquer answered that he did not understand "a lot of things that, you know, about the PSI." GA 244. Defense counsel explained that "his concerns are that once the presentence report was written, that that enlarged, in some way, his role in this offense, beyond what he believes that was appropriate or correct." GA245.

THE COURT: But now you know about them?

MARRERO: Yes. Now, I understand.

> THE COURT: And also, the record should reflect that the last hearing, when many of these issues arose, I give you the opportunity, if you wished to, to withdraw your guilty plea and go to trial. You recollect that?
>
> MARRERO: Yes. Yes, I remember.
>
> THE COURT: And you – Your response, after conferring with your attorney, was that you did not wish to withdraw your guilty plea, you wanted to proceed with sentencing based on your guilty plea, correct?
>
> MARRERO: Yes. Yes, that's correct, that I pled guilty, and yes, that's correct.

GA245-46; *see also* GA93-94. Moreover, defense counsel confirmed that she was "satisfied . . . that all of the issues that could be raised have been raised, and that [her] client understands the nature of these proceedings, what's in the presentence – the current presentence report." GA247.

Defense counsel argued that the Government had not "proved by a preponderance of the evidence, that Mr. Marrero supervised Mr. Noboa." GA249.

> MS. POLAN: I think that the fairest reading of Mr. Marrero's testimony is that over the course of the period of time that he knew Mr. Flaquer, and did business with him, he had a number of business partners, one being Freddie, one being Roy, and

> that – one being the Dominican man, who was well-dressed, who came to try to get Mr. Marrero to pay off his $12,000 debt, and I think the fact that the government has characterized or described Mr. Noboa as "the driver" doesn't make him a – doesn't make him an employee – subordinate –
>
> THE COURT: The one constant, the one constant in this case is Mr. Flaquer. He's the constant. He's always there.
>
> MS. POLAN: Right. But I think the question of whether he was in a supervisory relationship, which is how the –
>
> THE COURT: But that's –
>
> MS. POLAN: – PSR describes it –
>
> THE COURT: – my point. But that's my point, that he was always there, and in the Court's view, he was the supervisor. He was running this operation.

GA249-50. The Government argued that it had proved that Flaquer supervised Noboa, and others, beyond a preponderance of the evidence. GA251-52.

At the conclusion of the evidence, the district court found that the defendant's role in the offense was correctly calculated in the PSR. GA248. The court found that the defendant's total offense level was 34, that he fell within criminal history category I, and that his guideline range

was 151 to 188 months. GA248. The court also clarified that it was adopting the factual findings of the PSR. GA252-53.

The parties then argued about whether Flaquer should receive any benefit for his cooperation with law enforcement officers in Rhode Island, for supplying information about the Torres scheme to assist him in cooperating. Defense counsel argued that the court should grant Flaquer such credit, GA253-56, and that he should receive a lower sentence because of, among other things, his advanced age and lack of criminal history. GA257-61. The Government, by contrast, argued that Flaquer was well aware that Torres' scheme was illegal and that he "was involved and complicit in an attempt to defraud the government in this case, by fabricating third-party cooperation, and that Mr. Flaquer in no way should benefit," GA267, and that the "sentencing range that the Court has found, 151-188 months, is a reasonable sentence." GA262.

The district court set forth its reasons for imposing the particular sentence:

THE COURT: . . . .

> I've already indicated, Mr. Flaquer, that you were responsible for putting large quantities of cocaine onto the streets of Bridgeport, and apparently, based on other evidence I've heard, not just Bridgeport, but apparently Boston, as well, and there very well may be other communities that I'm

not aware of, and I can't take those into consideration, but certainly, I have heard considerable evidence with respect to the quantities you've put out here in Bridgeport.

The estimate is 15 to 50 kilograms, and that's what your guidelines are based on, but certainly, based on the testimony I heard today from Mr. Marrero, if you just did the simple arithmetic, it's probably a lot more than that, but I'm bound by the 15 to 50 kilograms, and that's what the sentence will be based on.

With respect to Rhode Island, you get no credit for that. That was a sleazy operation that was being conducted up there by an attorney, and what I assumed was either his paralegal or his secretary. I don't know exactly what her role was.

. . . .

The fact that you and/or your family paid them $50,000 does not influence me at all. I fail to understand why that money was paid, and what you thought they could do for you, or what your family thought they could do for you, but I suspect at the time you were represented here in Connecticut by Mr. Walkley, who is an able and competent defense counsel, and I just don't understand what you thought they could do for you in Rhode Island, while you were confined in a – in jail.

So, whatever information you furnished with respect to that, is not going to influence your sentence at all.

This sentence that I'm going to impose takes into consideration the you were Victor Marrero's main source of supply of cocaine for several years, and that you were able to supply multi-kilogram quantities of cocaine on relatively short notice, and you did so over a period – a fairly long period of time.

The Court doesn't find that there is any justification for a nonguideline sentence in this case. A sentence within the guideline range is consistent with the statutory purposes of sentencing, as defined in 18 United States Code, Section 3553(a), and the sentence to be imposed will reflect the seriousness of the offense, taking into account your role as the supplier of large, wholesale quantities of cocaine, and I believe that the sentence to be imposed will provide just punishment for your involvement in drug trafficking, and hopefully will serve to deter you from future criminal conduct, and others who may be similarly inclined.

Although the sentence that I am going to impose is a guideline sentence, the record should reflect that the Court would have imposed the same sentence as a nonguideline sentence, considering

> all of the factors provided for in 18 U.S. Code, Section 3553(a).

GA269-72. The district court then imposed a 168-month sentence; one that was in the middle of the applicable Guideline range. GA272.

Summary of Argument

1. The Government did not breach the plea agreement by arguing for a role enhancement at sentencing, because the plea agreement did not contain a promise not to argue for a role enhancement. Indeed, the plea agreement contained no stipulation at all about the Guideline range that the defendant would face.

2. Defense counsel was not ineffective for failing to object to the Government's breach of the plea agreement because there was no breach. As noted above, the Government did not enter into any Guideline stipulation, much less agree not to seek a role enhancement. Moreover, even if the Government had made and broken such a promise, Flaquer has not shown that he was prejudiced. Even had the Government not argued for a role enhancement, the district court could have awarded a two-level enhancement for role based on the recommendation in the PSR.

3. The district court properly found, based on the record, by a preponderance of the evidence that Flaquer supervised at least one other individual, and that a two-level enhancement for role applied where the evidence

showed that Flaquer set up cocaine deals and instructed another participant as to when, where and how to deliver the cocaine and collect the money owed to Flaquer.

4. The district court's within-Guideline sentence of 168 months' incarceration was reasonable in light of all the factors set forth in 18 U.S.C. § 3553(a). The district court correctly calculated the Sentencing Guidelines; properly accounted for all the relevant sentencing factors, such as leadership role, using the preponderance standard of proof; properly considered the § 3553(a) factors and imposed a sentence that reflected the nature and circumstances of the offense, and the need for specific and general deterrence, punishment and the protection of society from further crime, and that was not greater than necessary. In imposing a reasonable sentence, the district court reasonably found that Flaquer should receive no sentence reduction for providing information about a scheme to defraud the Government in which he participated to assist him in getting credit for cooperating.

Argument

I. The government did not breach the plea agreement by arguing for a role enhancement, because the plea agreement contained no guideline stipulation at all.

A. Governing law and standard of review

Because Flaquer did not raise the issue that the Government breached the plea agreement to the district court, plain error analysis applies. *Puckett v. United States*,

129 S.Ct. 1423, 1428-29 (2009). Rule 52(b) of the Federal Rules of Criminal Procedure provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." As the Supreme Court has explained, plain-error review

> involves four steps, or prongs. First, there must be an error or defect-some sort of deviation from a legal rule – that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the district court proceedings. Fourth and finally, if the above three prongs are satisfied, the court of appeals has the discretion to remedy the error – discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings. Meeting all four prongs is difficult, as it should be.

Puckett, 129 S. Ct. at 1429 (citations, alterations, and internal quotation marks omitted).

This Court reviews "interpretations of plea agreements . . . in accordance with principles of contract law." *United States v. Griffin*, 510 F.3d 354, 360 (2d Cir. 2007); *see also Puckett*, 129 S.Ct. at 1430 ("plea bargains are essentially contracts"); *United States v. Vaval,* 404 F.3d

144, 152-53 (2d Cir. 2005); *United States v. Hamdi*, 432 F.3d 115, 122-23 (2d Cir. 2005). "A central tenet of contract law is that no party is obligated to provide more than is specified in the agreement itself." *United States v. Peglera*, 33 F.3d 412, 413 (4th Cir. 1994)). "Accordingly, in enforcing plea agreements, the government is held only to those promises that it actually made to the defendant." *Id.* at 413; *United States v. Fentress*, 792 F.2d 461, 464 (4th Cir. 1986) ("If the agreement does not establish a prosecutorial commitment on the full range of possible sanctions, we should recognize the parties' limitation of their assent."); *see also United States v. United Medical and Surgical Supply Corp*., 989 F.2d 1390, 1401 (4th Cir. 1993) (ruling no breach: "Government cannot be required to abide by a promise that it never made.").

In determining whether the Government has breached a plea agreement, this Court looks to the "'reasonable understanding of the parties as to the terms of the agreement,'" and "'any ambiguities in the agreement must be resolved in favor of the defendant.'" *Griffin*, 510 F.3d at 360 (quoting *United States v. Colon,* 220 F.3d 48, 51 (2d Cir. 2000)). Moreover, breaches of pleas are very fact-specific determinations. *United States v. Habbas,* 527 F.3d 266, 272 (2d Cir. 2008) ("Each case tu[r]ns on its facts, and the number of significant variables potentially in play in such an inquiry is enormous."); *Griffin*, 510 F.3d at 361 ("[The] circumstances must [therefore] be carefully studied in context.") (internal quotation marks omitted). While this Court has "urged the government in making plea agreements to provide estimates to defendants of their likely Guidelines range to help 'ensure that guilty pleas

indeed represent intelligent choices by defendants,'" it has also "recognized that the government had no 'legal obligation to provide this information.'" *Habbas*, 527 F.3d at 270 (quoting *United States v. Pimentel,* 932 F.2d 1029, 1034 (2d Cir. 1991)); *see also Hamdi*, 432 F.3d at 124 ("estimate[s] of the likely adjusted offense level . . . are neither necessary elements of a plea agreement nor necessary predicates of a guilty plea itself") (citing *United States v. Fernandez,* 877 F.2d 1138, 1143 (2d Cir. 1989)).

"The remedy for a breached plea agreement is either to permit the plea to be withdrawn or to order specific performance of the agreeement." *United States v. Palladino*, 347 F.3d 29, 34 (2d Cir. 2003) (internal quotation marks and alteration omitted); *see also Puckett*, 129 S. Ct. at 1420.

B. Discussion

1. There was no error, because the plea agreement contained no guideline stipulation, and so the Government's advocacy of a role enhancement did not breach the plea agreement.

Flaquer argues that the Government breached the plea agreement because the plea agreement "provided for no role in the offense enhancement which the Government urged to [sic] Court to charge at sentencing," based on the facts that were known to the Government at the time of the plea. Defendant-Appellant's Brief ("Brief") at 25. Flaquer relies on *United States v. Palladino,* 347 F.3d 29, 34 (2d

Cir. 2003), to support his contention that the "Government breaches a plea agreement when it advocates for a sentencing enhancement not included in the estimate contained in the plea agreement based on information known to the government at the time of the agreement." Brief at 26.

Flaquer's reliance on *Palladino* is misplaced, and his argument is based on incorrect facts. *Palladino* holds that the Government breaches a plea agreement when the agreement contains an estimate of a Guideline range, and the Government at sentencing advocates a "sentencing enhancement on the basis of information that was known to the Government at the time of the agreement, but was not reflected in the estimated offense level in the plea agreement," and the "defendant had a reasonable expectation that the Government would not press the Court for an enhanced offense level in the absence of new information." 347 F.3d at 34.

Here, unlike in *Palladino*, the plea agreement contains no estimate of a Guideline range. In fact, the plea agreement contains no Guideline stipulation section at all, much less one that addresses which enhancements may or may not apply in this case. The plea agreement also contains no provision prohibiting the Government from arguing for any particular enhancement, much less one prohibiting the Government from arguing that no role enhancement should apply in determining Flaquer's sentence. The plea agreement is simply silent on the issue.

The plea agreement did, however, specifically set forth that Flaquer understood that the court was "required to consider the Sentencing Guidelines to tailor an appropriate sentence," A26; that sentencing determinations would be made by the court, by a preponderance of the evidence, based on input from the Government, the defendant and the U.S. Probation Officer, A26; that the Government "expressly reserve[d] its right to address the Court with respect to an appropriate sentence in this case," A27; that Flaquer understood the nature of the offense, including the penalties, and in pleading guilty, placed no reliance upon discussions other than those in plea agreement; A28, 29; and that no other promises were made to him. A28, 30. Flaquer certified in writing that he had read the plea agreement or had it translated to him, had ample time to discuss it with his lawyer and that he fully understood and accepted its terms, which was verified in writing by his lawyer, A30. Thus, based on the terms of the plea agreement, construed most favorably to Flaquer, he could not have reasonably expected that the Government had agreed not to argue for a role enhancement at sentencing. Rather, Flaquer was forewarned that the Government would be addressing the court with respect to the appropriate sentence without limitation, other than the statutory minimum and maximum sentence. A25.

Further, the canvass by Magistrate Fitzsimmons prior to Flaquer's guilty plea makes it clear that he could have no reasonable expectation that the Government had promised it would not argue for a role enhancement at his sentencing. The magistrate placed Flaquer under oath, GA3, and canvassed him in detail about his understanding

of the plea agreement, including the statutory penalties, GA30, and ensured that he had discussed the applicability and operation of the Guidelines with his lawyer, GA12. Flaquer also confirmed that he understood that "any facts used to enhance [his] sentence . . . will be made by the judge who will use a lesser standard of preponderance of the evidence." GA25. Flaquer confirmed that there were no promises other than those contained in the plea agreement. GA25-26. The magistrate made clear, and Flaquer understood, that Judge Nevas would not decide the appropriate sentence until he had read the PSR and heard from defense counsel and the Government on the day of his sentencing. GA26. The magistrate specifically asked whether Flaquer had discussed the sentencing guidelines with his lawyer and "how they might affect your case," GA29; whether his lawyer had explained to him the "various considerations which go into determining which guidelines shall be applied, and how they're calculated;" and whether Flaquer was aware that the "Sentencing Guidelines will require the Court to consider . . . the role that you played," which Flaquer acknowledged. GA30.

The magistrate inquired whether Flaquer was aware that until the PSR was completed, it was impossible for anyone to know "precisely what sentence range will be prescribed by the Guidelines for the Court's consideration," and that even after the PSR was completed, "there may be disputed facts that Judge Nevas must resolve and how he resolves them may affect the applicable guidelines." GA31. Flaquer again stated that he understood. *Id.*

To suggest that Flaquer reasonably expected that the Government promised that no role enhancement applied or not to argue for such an enhancement flies in the face of the record. The plea agreement and the magistrate's canvass at the change of plea make clear not only that there was no promise that the Government would not argue for a role enhancement, but that the Government was going to argue for an appropriate sentence. *See, e.g., Blackledge v. Allison*, 431 U.S. 63, 73-74 (1977) (noting "the representations of the defendant, his lawyer, and the prosecutor at [a plea] hearing, as well as any findings made by the judge accepting the plea, constitute a formidable barrier in any subsequent collateral proceedings").

Indeed, at sentencing, the Government did argue for three enhancements, including the two-level enhancement for role, a position which the Government consistently held throughout, and which was in accordance with the PSR. *See*, *e.g*., *Habbas,* 527 F.3d at 270-71 (holding no Government breach even where the plea agreement contained an estimate of the offense level and the Government changed its position with respect to that estimate, when it was clearly a non-binding estimate, the defendant was warned that the Government was likely to advocate for a higher sentence, there was "no suggestion that the government acted in bad faith, . . and the defendant was not harmed by the change of position"); *Fentress*, 792 F.2d at 464-65 (ruling that the Government did not breach the plea agreement when it argued for a particular sentence to run consecutively to another sentence and also argued for a restitution payment, when

the plea agreement contained no promises about those two issues, and, therefore, defendant's argument that "the prosecution would offer no recommendations other than those identified in the plea bargain instrument . . . cannot stand") (citing cases that have "regularly upheld analogous prosecutorial measures that were not precluded by agreement"). Accordingly, the Government did not breach the plea agreement.

2. Even if there was error, it was not plain.

The error which Flaquer asserts – the breach of the plea agreement – is anything but clear or obvious. Flaquer points to nothing in the record that supports a claim that the Government promised in the plea agreement or elsewhere that it would not argue for such an enhancement at the sentencing. To the contrary, as set forth *infra* at 29-34, the record establishes that the plea agreement contained no promise about role, much less a promise not to argue that a role enhancement applied.

3. Any error did not affect Flaquer's substantial rights, and did not "seriously affect the fairness, integrity or public reputation of judicial proceedings."

Here, the district court gave Flaquer the option to withdraw his guilty plea and proceed to trial after he was well aware that the Government was going to argue for a role enhancement, which Flaquer declined to do. GA93-94, 245-46. Moreover, based on the PSR's recommendation for a role enhancement, the district court

could have independently determined that such a role enhancement applied, even had the Government not argued for role. Accordingly, even had the Government breached the plea agreement by arguing that Flaquer should receive an enhancement for role, that breach did not "seriously affect the fairness, integrity or public reputation of judicial proceedings."

II. Defense counsel was not ineffective for failing to claim that the Government breached the plea agreement, where no breach occurred.

A. Governing law and standard of review

To prevail on a claim of ineffective assistance of counsel, a defendant must establish (1) that his counsel's performance "fell below an objective standard of reasonableness" and (2) that counsel's unprofessional errors actually prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Under the familiar *Strickland* standard, "'[j]udicial scrutiny of counsel's performance must be highly deferential,' and 'a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Knowles v. Mirzayance*, 129 S.Ct. 1411, 1420 (2009) (quoting *Strickland*, 466 U.S. at 689).

When the factual record is fully developed and resolution of the Sixth Amendment claim on direct appeal is "beyond any doubt" or "in the interest of justice," it is appropriate to decide claims of ineffective assistance of counsel on direct appeal. *United States v. Gaskin,* 364 F.3d

438, 467-68 (2d Cir. 2004); *see also Massaro v. United States*, 538 U.S. 500, 508-09 (2003) (noting that there may be cases in which ineffective-assistance claims may be resolved on direct appeal).

B. Discussion

First, Flaquer has failed to demonstrate that defense counsel was ineffective. Flaquer argues that "[a]t sentencing counsel did not object to the Government violating its plea agreement with appellant." Brief at 24. As set forth *supra* at 29-34, the Government did not breach the plea agreement. Thus, counsel cannot be deemed ineffective for having failed to claim that such a breach had occurred. *See, e.g, Hartjes v. Endicott*, 456 F.3d 786, 792 (7th Cir. 2006) (lawyer was not ineffective for failing to object to the government's breach of a plea agreement when there was no material breach); *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990) ("counsel is not required to make futile motions or objections"). *Cf. United States v. Arena*, 180 F.3d 380, 396-97 (2d Cir. 1999) ("Failure to make a meritless argument does not amount to ineffective assistance. Nor does an action or omission that might be considered sound trial strategy constitute ineffective assistance.") (internal citation and quotation marks omitted); *Krist v. Foltz,* 804 F.2d 944, 946-47 (6th Cir. 1986) ("An attorney is not required to present a baseless defense or to create one that does not exist.") (citing *United States v. Cronic,* 466 U.S. 648, 656-57 n.19 (1984)).

Second, Flaquer does not set forth how, much less meet his burden to demonstrate that, he would have suffered prejudice. Had the Government breached the plea agreement and counsel failed to object, the district court could have awarded a two-level enhancement for role based on the recommendation in the PSR, in the absence of any argument from the Government.[3] Thus, Flaquer has not shown that an objection would have changed the outcome of the proceeding. *Gaskin*, 364 F.3d at 468 (defendant must show "that counsel's ineffectiveness prejudiced the defendant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different") (internal quotation marks omitted). Further, because the factual record is fully developed, the interests of justice would be served by deciding this issue on direct appeal. *Id.* at 467-68.

---

[3] In addition, as set forth *supra* at 34, Flaquer had already rejected the option to vacate his plea and go to trial after he was well aware that the Government intended to argue for a role enhancement. *Palladino*, 347 F.3d at 34 ("The remedy for a breached plea agreement is either to permit the plea to be withdrawn or to order specific performance of the agreement.") (alteration and internal quotation marks omitted).

III. The district court did not clearly err in finding that the Government proved beyond a preponderance of the evidence that the defendant was a supervisor, and applying a two-point enhancement for his role in the offense, where he set up cocaine deals and instructed another participant as to when, where and how to deliver the cocaine and collect the money owed to the defendant.

A. Governing law and standard of review

"In general, we review a district court's determination that a defendant deserves a leadership enhancement under § 3B1.1 *de novo*, but we review the court's findings of fact supporting its conclusion only for clear error." *United States v. Hertular*, 562 F.3d 433, 449 (2d Cir. 2009). Facts relied on at sentencing, including findings as to the defendant's role, need be established only by a preponderance of the evidence. *United States v. Ojeikere*, 545 F.3d 220, 221-22 (2d Cir. 2008) (citing *United States v. Vaughn*, 430 F.3d 518, 525 (2d Cir. 2005)).

A two-level increase in the offense level is appropriate "[i]f the defendant was an organizer, leader, manager, or supervisor in . . . criminal activity . . . ." U.S.S.G. § 3B1.1(c). "To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants." U.S.S.G. § 3B1.1, Application Note 2; *see also Ojeikere*, 545 F.3d at 221-22.

A defendant is properly considered a manager or supervisor if he "'exercised some degree of control over others involved in the commission of the offense or played a significant role in the decision to recruit or to supervise lower-level participants.'" *Hertular*, 562 F.3d at 448-49 (quoting *United States v. Blount*, 291 F.3d 201, 217 (2d Cir. 2002)); *see also United States v. Garcia,* 413 F.3d 201, 223 (2d Cir. 2005). It is well settled in this Circuit that individuals who procure illegal narcotics and employ or supervise others to distribute them are properly assessed an enhancement for their role in the offense. *See*, *e.g.*, *Blount*, 291 F.3d at 217; *United States v. Rivera*, 971 F.2d 876, 893 (2d Cir. 1992).

B. Discussion

Flaquer argues that there was "no evidence that appellant exercised the requisite control over Noboa, or played a significant role in the recruiting of Noboa, or supervised other lower-level case participants," and, thus, the court erred in awarding a two-level role enhancement. Brief at 29. To the contrary, however, there was evidence both that Flaquer exercised the requisite control over Noboa, and supervised other lower level participants. The evidence shows that Flaquer set up the cocaine deals with Marrero and instructed Noboa as to when, where and how to deliver the cocaine and collect the money owed to Flaquer, as he similarly did with his brother-in-law and his nephew.

At the lengthy contested sentencing hearing, which was primarily directed at the disputed issue of role, the

Government called Marrero to testify. Marrero testified at length about Flaquer's drug dealing and supervision of others. GA120-225. Marrero's testimony included the following. Flaquer was his main source of supply from 1997 through the date of his arrest in March 2005. GA139-41, 144, 160, 168, 171. During those years, Flaquer negotiated the terms of the cocaine deals, including the financial arrangements; GA128, 140-44, 145, 156, 160-61, 171-72; and arranged the locations for, and methods of, delivering the cocaine and collecting the money. GA142-173. At the beginning, Flaquer set up a meeting with his nephew and Marrero, at a clothes shop the nephew owned in New York. GA142. Flaquer arranged to meet Marrero at the shop with his nephew, and arranged with his nephew and Marrero that Marrero would pick up the cocaine and deliver the money he owed for it to his nephew at the shop, which he did. GA142-147.

After 1998, Flaquer introduced his brother-in-law, Freddie, to Marrero and put Freddie in charge of the cocaine transactions, rather than his nephew. GA151-52. Freddie would drive the cocaine to Connecticut for Flaquer. GA151-53. Flaquer would insist that Marrero call him after the deals and let him know how many kilograms Marrero had sold, so he would know how much money to collect from Freddie. GA153.

Contrary to Flaquer's assertion, Marrero did not merely identify Noboa "as someone who drove a car which contained appellant," Brief at 29, or testify only that "Marrero would complain directly to Noboa if a shipment of cocaine was not up to Noboa's standards." Brief at 29.

To the contrary, Marrero testified that in about 2001, Flaquer introduced Luis Noboa to Marrero as the individual who thereafter would be delivering the cocaine and picking up the money owed to Flaquer. GA158-59, 162-63, 198-202. Noboa sometimes came alone to deliver the cocaine and sometimes Flaquer accompanied him. GA159, 162. When Marrero had problems with the quality of the cocaine, he would complain to Flaquer about it, and Flaquer would take the cocaine back. GS164. Flaquer also arranged with Marrero that Flaquer would call to tell Marrero Noboa was on his way with the cocaine and Marrero should call Flaquer when the deal was complete to let him know how the deal went. GA165-66.

In addition, on the day of Flaquer's arrest, Marrero had arranged over a recorded phone (at the direction of and under the supervision of the FBI) to purchase three kilograms of cocaine from Flaquer, according to their customary practice. GA 125-33. On the prearranged day for the cocaine transaction, Flaquer arrived at Marrero's house being driven by Noboa. GA132. Flaquer also was followed by a car, driven by two others, who had one of the three kilograms of cocaine in their car. GA132-33. The two driving the second car were going to take the money Marrero had for the three kilograms he had arranged to purchase from Flaquer and drive back to New York and pick up the other two kilograms and then drive back to Marrero's house. GA133. Flaquer had planned to wait with Noboa and Marrero while the others obtained the additional two kilograms. GA132.

This testimony made it clear that Noboa was a lower level participant, in that he was a drug courier for Flaquer, who delivered the cocaine, and collected the money owed to Flaquer, at Flaquer's instruction. Moreover, the testimony also depicted that Flaquer similarly instructed his nephew and his brother-in-law.

The district court also reviewed the FBI 302 report of Flaquer's proffer session (which included that Flaquer knew Noboa and had delivered kilograms of cocaine to Marrero), GA232, and the transcript of Victor Marrero's testimony before the grand jury (which the Government argued was consistent with his testimony on the stand), GA232-33, both of which the Government had offered to corroborate Marrero's testimony to determine the extent to which "the exhibits are going to affect the Court's finding as to . . . relating to his role." GA235-237.

Flaquer offered no evidence to show he should not be awarded a two-level enhancement for role.

The district court made findings that Flaquer supervised Noboa, and awarded a two-level enhancement for role. GA247-48. Flaquer asserts that the district court made no other finding other than that Flaquer was always present, Brief at 29, which he asserts is not sufficient, citing *United States v. Stevens*, 985 F.2d 1175, 1184 (2d. Cir. 1993) and *United States v. Carter*, 489 F.3d 528, 539 (2d. Cir. 2007) for support, Brief at 27. These two cases, however, support the rule in this Circuit that the court's express adoption of the factual findings in the PSR suffices to satisfy its obligation to make specific factual

findings. For example, in *Carter*, this Court reaffirmed that "[e]ven if a district court does not make the required factual findings at the sentencing hearing, a district court satisfies its obligation to make the requisite specific factual findings when it explicitly adopts the factual findings set forth in the presentence report." 489 F.3d at 539. This Court reversed the imposition of a role enhancement in that case only because the district court had not adopted the PSR's factual findings in open court, and in any event, the PSR's factual findings were insufficient to support a role enhancement because they merely reported that the defendant had supplied drugs to at least ten dealers. *Id.* at 540. Likewise, in *Stevens*, the sentencing court adopted the factual findings of the PSR, which recommended a two-level enhancement for role, but erred by making no additional factual finding to support its imposition of four-level enhancement. 985 F.2d at 1184-85; *see also United States v. Espinoza*, 514 F.3d 209, 212 (2d Cir. 2008) (per curiam) (A district court may satisfy the requirement that "a district court [] make specific factual findings to support a sentence enhancement under U.S.S.G. § 3B1.1. . . . by adopting the factual findings in the PSR, either at the sentencing hearing or in the written judgment.").

Here, the district court expressly adopted the factual findings in the PSR, GA252-53, and stated that "the role in the offense assigned – or ascribed in the presentence report, is correct." GA248.

The district court listened to Marrero's testimony, reviewed the exhibits, GA235-37; heard defense counsel

and the government argue concerning role, GA249-50, 251-52; reviewed the sentencing memorandum submitted by defense counsel, which contested a role enhancement, GA239, 253; credited Marrero's testimony, GA252-253; adopted the factual findings of the PSR regarding a two-level enhancement for role, GA248, 252-53; and found that Flaquer supervised at least one person, GA242-48. Moreover, because the district court's finding here was predicated on a credibility determination of a witness who testified before it, this Court affords particularly strong deference to those findings. *United States v. Mendez*, 315 F.3d 132, 135 (2d Cir. 2002); *see also Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985).

Thus, the district court properly found, which was amply supported by the record, that Flaquer supervised at least one other lower level participant, and that a two-level enhancement for role applied.[4] *See, e.g, United States v. Garcia,* 413 F.3d 201, 223 (2d Cir. 2005) (holding that court did not err in assigning leadership role to defendant

---

[4] Even if there were error, it was harmless because the district court expressly stated that "the Court would have imposed the same sentence as a nonguideline sentence, considering all of the factors provided for in 18 U.S. Code, Section 3553(a)." GA271-72; *see also United States v. Jass*, 569 F.3d 47, 68 (2d Cir. 2009) ("Where we identify procedural error in a sentence, but the record indicates clearly that 'the district court would have imposed the same sentence' in any event, the error may be deemed harmless . . . .") (quoting *United States v. Cavera*, 550 F.3d 180, 197 (2d Cir. 2008) (en banc)).

based on drug courier's testimony that defendant recruited him to transport drugs, that defendant "frequently instructed him as to drug transport, . . . [and] that [defendant] supervised the operation's finances"); *United States v. Garcia*, 936 F.2d 648, 655 (2d Cir. 1991) (concluding that defendant who negotiated the price and quantity of cocaine, found source of supply, and largely directed activities of others was leader or organizer within the meaning of U.S.S.G. § 3B1.1).

IV. The district court did not abuse its discretion by concluding that a within-Guideline sentence was reasonable, where the district court properly calculated the Guideline range and complied with the dictates of 18 U.S.C. § 3553(a), and where the Government had not entered into a cooperation agreement or filed a substantial-assistance motion.

A. Governing law and standard of review

This Court reviews a sentence, whether within or outside a guideline range, for reasonableness. *Gall v. United States*, 128 S. Ct. 586, 594 (2007); *Rita v. United States*, 551 U.S. 338, 341 (2007); *United States v. Booker*, 543 U.S. 220, 261 (2005); *United States v. Cavera*, 550 F.3d 180, 187 (2008) (en banc).

Appellate courts review challenges to the reasonableness of a sentence – "whether inside, just outside, or significantly outside the Guidelines range –

under a deferential abuse-of-discretion standard." *Gall,* 128 S. Ct. at 591; *see also Cavera*, 550 F.3d at 191 ("we will continue to patrol the boundaries of reasonableness, while heeding the Supreme Court's renewed message that responsibility for sentencing is placed largely in the precincts of the district courts"); *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006). This form of appellate scrutiny encompasses both procedural and substantive review. *Cavera*, 550 F.3d at 190; *United States. v. Verkhoglyad*, 516 F.3d 122, 127 (2d Cir. 2008).

"Even after *Gall* and *Kimbrough,* sentencing judges, certainly, are not free to ignore the Guidelines, or to treat them merely as a 'body of casual advice.'" *Cavera*, 550 F.3d at 189 (quoting *United States v. Crosby,* 397 F.3d 103, 113 (2d Cir. 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." *Fernandez*, 443 F.3d at 26; *see also Crosby*, 397 F.3d at 113.

"Our review proceeds in two steps: first, we must be 'satisfied that the district court complied with the Sentencing Reform Act's procedural requirements,'" *United States v. Jass*, 569 F.3d 47, 65 (2d Cir. 2009) (quoting *Cavera*, 550 F.3d at 189 (emphasis omitted)); "and second, if the sentence is 'procedurally sound,' we must 'consider [its] substantive reasonableness.'" *Id.* (quoting *Gall*, 128 S.Ct. at 597, 600; *Cavera*, 550 F.3d at 189.). "The procedural inquiry focuses 'primarily on the

sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a) . . . .'" *Verkhoglyad*, 516 F.3d at 127 (quoting *United States v. Canova,* 412 F.3d 331, 350 (2d Cir. 2005)). The substantive inquiry "assesses 'the length of the sentence imposed in light of the [§ 3553(a)] factors.'" *Verkhoglyad*, 516 F.3d at 127 (quoting *United States v. Villafuerte,* 502 F.3d 204, 206 (2d Cir. 2007)).

As to substance, this Court "will not substitute [its] own judgment for the district court's on the question of what is sufficient to meet the § 3553(a) considerations in any particular case." *Cavera*, 550 F.3d at 189 (citing *Fernandez,* 443 F.3d at 27); *see also United States v. Fairclough*, 439 F.3d 76, 79-80 (2d Cir. 2006) (per curiam) (in assessing the reasonableness of a particular sentence imposed, an appellate court "'should exhibit restraint, not micromanagement'") (quoting *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005)). This Court "will instead 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.'" *Cavera*, 550 F.3d at 189 (quoting *United States v. Rigas,* 490 F.3d 208, 238 (2d Cir. 2007)).

Although this Court has declined to adopt a formal presumption that a within-Guidelines sentence is reasonable, it has "recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Fernandez*, 443 F.3d at 27; *see also 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."), *abrogated on other grounds*, *Cavera*, 550 F.3d at 187.

B. Discussion

The district court's imposition of the 168-month within-Guideline sentence at Flaquer's sentencing was reasonable because the record established that it considered a properly calculated advisory guidelines range, properly considered the factors listed in 18 U.S.C. § 3553(a), stated its reasons for imposing the sentence and imposed a reasonable sentence that served the goals of sentencing and was not greater than necessary.

The district court considered the PSR, GA240, 247-48, 249-50; the arguments of defense counsel and the Government, both oral and written, GA 235, 249-50, 251-52, 253; reviewed the evidence at the lengthy contested sentencing hearing; and calculated the Guideline range to be 151-188 months' imprisonment based on a base level 34, for a quantity of 15-50 kilograms of cocaine, with a two-level enhancement for role, and a two-level reduction for acceptance, with a Criminal History Category 1, GA247-48. In imposing a sentence, the district court treated the Guidelines as advisory, GA271-72, expressly stated detailed reasons for reaching the sentence, GA 269-72, and stated that the sentence it was imposing "is consistent with the statutory purposes of sentencing, as

defined in 18 United States Code, Section 3553(a)," GA271; *see also* GA272.

Flaquer does not argue, and points to no evidence suggesting, that the district court did not consider a properly calculated advisory guidelines range and the factors listed in § 3553(a). Flaquer, however, argues that his sentence was unreasonable because the district court did not credit his cooperation for providing information against Lisa Torres and reduce his sentence, and that his sentence was unreasonable based on his history and characteristics, including his age and his lack of criminal history. Brief at 14, 17-20.

First, there is no dispute that no cooperation agreement was offered to, or entered into with, Flaquer. GA322-23; GA90-91. *See*, *e.g.*, *United States v. Roe*, 445 F.3d 202, 207 (2d Cir. 2006) (absent a constitutionally impermissible reason, "the extent of our review of the government's decision not to file a substantial assistance motion depends on whether the defendant acted pursuant to a cooperation agreement"). With respect to both the present case and the Torres case in Rhode Island, Flaquer did not dispute the Government's determination not to enter into a cooperation agreement and that no § 5K1.1 departure was warranted. GA322-23; GA90-91.

To the extent that this is a challenge to the absence of the district court's downward departure, this Court lacks jurisdiction to review it. *See, e.g., United States v. Hargrett,* 156 F.3d 447, 450 (2d Cir. 1998) ("Section 3742(a) does not generally confer jurisdiction on courts of

appeals to review a district court's refusal to grant a downward departure or the extent of any downward departure that is granted."); *United States v. Ogman*, 535 F.3d 108, 111 (2d Cir. 2008) (per curiam) ("Review is available only 'when a sentencing court misapprehended the scope of its authority to depart or the sentence was otherwise illegal.'") (quoting *United States v. Valdez*, 426 F.3d 178, 184 (2d Cir. 2005). Here, nothing in the record suggests that the district court misunderstood its authority to grant a departure or that the sentence was otherwise illegal. In fact, the record shows that the district court was well aware of its authority to depart, and exercised its discretion not to do so. GA271-72.

Moreover, before sentencing Flaquer, the district court reviewed those reports that set forth the nature of the information Flaquer had provided regarding Lisa Torres, GA238-40; 254; heard argument from defense counsel that Flaquer should receive a reduced sentence for his cooperation with Lisa Torres, GA253-56, and from the Government "that Mr. Flaquer was involved and complicit in an attempt to defraud the government in this case, by fabricating third-party cooperation, and that Mr. Flaquer in no way should benefit," GA267; and reviewed Flaquer's sentencing memorandum that requested a benefit for his cooperation. GA239. The district court determined that Flaquer would not receive a benefit for providing information about that "sleazy operation" in which he was involved, GA270, and set forth its reasons on the record, which were supported by the factual record. GA270-71. S*ee Fernandez*, 443 F.3d at 34 (underscoring "that the requirement that the sentencing judge consider a § 3553(a)

factor that may cut in a defendant's favor does not bestow on the defendant an entitlement to receive any particular 'credit' under that factor," as long as the sentence imposed was reasonable, and that while the judge had the power "to reduce [defendant's] sentence in light of 'non-5K cooperation' under 18 U.S.C. § 3553(a), she was under no obligation to provide any such benefit").

In addition, the district court considered the argument that Flaquer should receive a lesser sentence due to his age, GA257-61; his lack of criminal history, GA255, and other personal characteristics at sentencing, GA256-262; PSR ¶¶31-61, and explained that it found no basis for downward departure or a non-guidelines sentence. GA271. The record establishes that the district court reasonably found that Flaquer should not receive a reduced sentence based on his cooperation, age, lack of criminal history or any other personal characteristic.

The district court then imposed a within-Guideline sentence of 168 months' imprisonment, while noting that "[a]lthough the sentence that I am going to impose is a guideline sentence, the record should reflect that the Court would have imposed the same sentence as a nonguideline sentence, considering all of the factors provided for in 18 U.S. Code, Section 3553(a)." GA271-72. *See Jass*, 569 F.3d at 68 (holding that procedural error is harmless if record clearly indicates that district court would have imposed same sentence anyway).

The reasonableness of the sentence is reinforced by the markedly conservative approach taken by the district court

in calculating Flaquer's advisory guidelines range. The district court stated that based on the testimony, the quantity should have been much higher, but because the parties agreed to 15-50 kilograms, it would abide by that, GA269-70; and the district court did not award a two-level enhancement for possession of a firearm. GA248. And even after the district court reviewed the evidence regarding Flaquer's post-guilty plea participation in a scheme to defraud the government to fabricate third-party cooperation so Flaquer could receive the benefit of cooperation in this case, the district court still awarded Flaquer a two-level reduction for acceptance of responsibility. GA248.

Thus, it is clear that the district court did not abuse its discretion, but considered the sentencing guidelines and the § 3553(a) factors, and explained the reasons for the sentence, in arriving at a reasonable sentence. *Fernandez*, 443 F.3d at 34 ("If the ultimate sentence is reasonable and the sentencing judge did not commit procedural error in imposing that sentence, we will not second guess the weight (or lack thereof) that the judge accorded to a given factor or to a specific argument made pursuant to that factor.").

CONCLUSION

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

Dated: October 30, 2009

Respectfully submitted,

NORA R. DANNEHY
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

FELICE M. DUFFY
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,659 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

FELICE M. DUFFY
ASSISTANT U.S. ATTORNEY

Addendum

Rule 52, Federal Rules of Criminal Procedure

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Title 18, United States Code, Section 3553

(a) Factors to be considered in imposing a sentence.–The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider–

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed –

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of 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 kinds of sentence and the sentencing range established for–

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and (ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission

into amendments issued under section 994(p) of title 28);(5) any pertinent policy statement–

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and
(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.–

(1) In general.–Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in

formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

(2) Child crimes and sexual offenses.–

(A) Sentencing. – In sentencing a defendant convicted of an offense under section 1201 involving a minor victim, an offense under section 1591, or an offense under chapter 71, 109A, 110, or 117, the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless –

(i) the court finds that there exists an aggravating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing

Commission in formulating the guidelines that should result in a sentence greater than that described;

(ii) the court finds that there exists a mitigating circumstance of a kind or to a degree, that–

(I) has been affirmatively and specifically identified as a permissible ground of downward departure in the sentencing guidelines or policy statements issued under section 994(a) of title 28, taking account of any amendments to such sentencing guidelines or policy statements by Congress;

(II) has not been taken into consideration by the Sentencing Commission in formulating the guidelines; and

(III) should result in a sentence different from that described; or

(iii) the court finds, on motion of the Government, that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense and that this assistance established a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence

lower than that described.

In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission, together with any amendments thereto by act of Congress. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission, together with any amendments to such guidelines or policy statements by act of Congress.

(c) Statement of reasons for imposing a sentence.–The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence–

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months,

the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

U.S.S.G. § 3B1.1. Aggravating Role

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

U.S.S.G. § 5K1.1. Substantial Assistance to Authorities (Policy Statement)

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

> **(1)** the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
>
> **(2)** the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
>
> **(3)** the nature and extent of the defendant's assistance;
>
> **(4)** any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
>
> **(5)** the timeliness of the defendant's assistance.