08-5035-cr

To Be Argued By:
EDWARD CHANG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-5035-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

JENNIFER VALLOMBROSO,
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

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

TABLE OF CONTENTS

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.

STATUTES

RULES

GUIDELINES

OTHER AUTHORITIES

Statement of Jurisdiction

The district court (Janet Bond Arterton, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on October 9, 2008. (*See* Appendix ("A") 10). That same day, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). (*Id.*). This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a).

Issues Presented for Review

1. Was it plain error to allow a drug addict to give lay opinion testimony about the effect of methadone on heroin use, where the testimony was rationally based on the perception of the witness, helpful to the determination of a fact in issue, and not based on scientific, technical, or specialized knowledge?

2. Was the evidence of the defendant's intent to join the conspiracy sufficient, where, *inter alia*, she made telephone calls in furtherance of the conspiracy, was present for one completed transaction and one attempted transaction, and knew that the transactions involved the purchase and sale of crack cocaine?

3. Did the district court act reasonably in imposing a sentence of 120 months in prison, when the uncontested Guidelines sentencing range was 120 to 150 months?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-5035-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

JENNIFER VALLOMBROSO,
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 Jennifer Vallombroso was convicted after a jury trial of conspiring with her husband, John Vailette, to distribute crack cocaine and to possess the same with intent to distribute. Her defense at trial, that she was merely a drug addict hoping to obtain drugs for her own use, was rejected by the jury.

On appeal, the defendant argues that Gerald Cobb, the Government's cooperating witness, gave improper expert testimony about the effect of methadone on heroin use. But Cobb's testimony was properly offered and admitted as lay opinion testimony under Rule 701, not as expert testimony under Rule 702, so this claim is meritless.

The defendant also renews her argument that she was merely a drug addict, not a conspirator. But joining a drug conspiracy in order to obtain drugs for personal use does not make one less of a conspirator; it is a motive, not a defense. Because there was more than sufficient evidence for a rational jury to find that the defendant joined the conspiracy, the jury's verdict should be upheld.

Finally, the defendant contends that the 120-month sentence imposed by the district court was unreasonable. The sentence was at the bottom of the applicable Guidelines range of 120 to 150 months, and the applicable Guidelines range was largely based on the defendant's lengthy criminal history. As the district court observed, the defendant had accumulated 48 criminal history points, whereas only 13 points are needed to reach criminal history category VI. Under the circumstances, the defendant's sentence was reasonable, and the judgment of the district court should be affirmed.

Statement of the Case

On September 27, 2007, a federal grand jury returned a one-count indictment charging the defendant with conspiracy to distribute crack cocaine, and to possess the

same with intent to distribute, in violation of 21 U.S.C. § 846. (*See* A 4 & 18-19).

The defendant's trial commenced on February 25, 2008. (*See* A 6). On February 27, having heard two days of evidence, the jury found the defendant guilty. (*See* A 7).

On March 5, 2008, the defendant filed a timely post-trial motion for a judgment of acquittal or, alternatively, for a new trial. (*See* A 8). By order entered October 6, 2008, the motion was denied. (*See* A 10).

On October 6, 2008, the district court (Janet Bond Arterton, J.) calculated a recommended Guidelines sentencing range of 120 to 150 months in prison. (*See* A 92). The district court imposed a sentence of 120 months in prison, a term of 5 years of supervised release, and a $100 special assessment. (*See* A 125-28). Judgment entered on October 9, 2008. (*See* A 10).

On October 9, 2008, the defendant filed a timely notice of appeal. (*See* A 10). The defendant is currently serving her sentence.

Statement of Facts

A. The defendant's trial

The trial in this case lasted two days, with jury instructions, closing arguments, and the jury verdict coming on the third day.

The Government's case-in-chief was presented through four law enforcement witnesses, including a DEA chemist, and through a cooperating witness, Gerald Cobb. The Government's evidence focused on four days in 2007: April 7, when a rapid sequence of telephone calls demonstrated the defendant's initial involvement in the conspiracy; April 13, when Cobb and co-conspirator John Vailette purchased nearly an ounce of crack cocaine; April 24, when Cobb, Vailette, and the defendant purchased an "eight ball" of crack cocaine (approximately an eighth of an ounce); and May 2, when Cobb, Vailette, and the defendant unsuccessfully attempted to purchase a quarter-ounce of crack cocaine.

The Government's investigation initially centered on Vailette, the defendant's husband. *See* Trial Transcript ("Tr."), dated Feb. 25, 2008, at 38. In January 2007, the Government, through Cobb, made several controlled purchases of crack cocaine from Vailette. *See* Tr. at 39-40, 87, 112. No purchases were made in February or March. *See* Tr. at 42, 87.

On April 7, at approximately 10:10 a.m., Cobb called Vailette. *See* Tr. at 51. The following sequence of telephone calls ensued:

10:10 a.m. Cobb called Vailette
10:18 a.m. Vailette called Vallombroso
10:19 a.m. Vallombroso called Vailette
10:22 a.m. Vallombroso called Cobb
10:25 a.m. Cobb called FBI

See Tr. at 51-57.

During the call from Vallombroso to Cobb, Vallombroso, the defendant, told Cobb that Vaillette had a "new connect" for crack cocaine and asked whether Cobb's "friend" would be interested in making a purchase. *See* Tr. at 42, 188-89. Cobb immediately notified his "friend," who was actually an FBI agent acting in an undercover capacity. *See* Tr. at 42-43, 189. Over the next few days, Cobb negotiated the purchase of an ounce of crack cocaine from Vailette. *See* Tr. at 57-58.

On April 13, Vailette and Cobb purchased the crack cocaine from Vailette's supplier. *See* Tr. at 60-64. Cobb wore a recording device, and the purchase was conducted under law enforcement surveillance. *See* Tr. at 59-61.

Although the defendant was not physically present during the April 13 deal, *see* Tr. at 68, 192, she was involved nevertheless. Specifically, the defendant's phone records showed that she called Vailette's supplier shortly before the deal was consummated. *See* Tr. at 73. Also, after the deal was consummated, Vailette took a "chip" of the crack cocaine for the defendant and another individual. (Government Appendix ("GA") 2); *see also* Tr. at 139-40, 193, 276-77.

On April 24, Vailette, Cobb, and the defendant purchased an "eight ball" of crack cocaine from a second supplier. Again, Cobb wore a recording device. *See* Tr. at 74-75.

Cobb saw the defendant use heroin that day, *see* Tr. at 230-31, but he testified that the defendant appeared to know where she was, what she was doing, and whom she was with. *See* Tr. at 234-35; *see also* Tr. at 237 ("Q: Is there any way that she seemed out of it to you that day? A: No."). The recording made by Cobb also showed that the defendant was fully aware of her surroundings. In one portion of the recording, the defendant listened as Vailette made a phone call to arrange the buy. When Vailette referred obliquely to an eight-ball of crack cocaine as "that pool game," the defendant quickly jumped in:

> Vailette: (TALKING ON PHONE .... I got a question for ya, curiosity. 8, that pool game. ehhh, you know that pool game? No, 8, 8, 8?
>
> Cobb: (UI) You right?
>
> Vailette: (TALKING ON PHONE .... (UI). You know an 8, you know what I'm talking about? Okay, the pool game, you know the, the ...
>
> Defendant: An 8 ball! Just say it!
>
> Vailette: (TALKING ON PHONE .... An 8 ball. You know 8 ball?)
>
> Defendant: (UI) What the fuck!

(GA 5); *see also* Tr. at 201-02. The defendant further demonstrated her awareness of her surroundings when she left the car later that day to smoke a cigarette. As she stepped out, she warned Cobb and Vailette that the car was overparked:

> I'm gonna get out and have a cigarette. I'm overparked, okay?

(GA 7); *see also* Tr. at 202-03. The defendant then attempted, unsuccessfully, to send a text message to Vailette's supplier. (*See* GA 8-9); *see also* Tr. at 202-03.

Eventually, Vailette, Cobb, and the defendant did purchase approximately an eighth of an ounce of crack cocaine that day. *See* Tr. at 203.

On May 2, Vailette, Cobb, and the defendant unsuccessfully attempted to purchase a quarter-ounce of crack cocaine. *See* Tr. at 152, 205. Again, Cobb wore a recording device. *See* Tr. at 151-52, 205.

On that occasion, the defendant had evidently recommended the supplier, "Jay," because the defendant called and left the following message for him when he did not respond to Vailette's calls:

> Jay, we're down here. We're waiting for ya, you know what, I'm a little upset cause I, I told John you know that . . . you were straight up and, I don't know, I feel like you're gonna blow him off, and I, I'm a little upset about that so. You know just call

> him back regardless, you know whether you wanna do this or not, cause we're down here waiting for ya. 6, 2, 7, 7, 0, 4, 6. Thanks.

(GA 18); *see also* Tr. at 207.

The defendant's case-in-chief consisted of medical records, offered to show that she was addicted to cocaine and heroin. *See* Tr. 322-24. The records also showed that the defendant was being treated with methadone in April and May of 2007. *See* Tr. at 325.

On rebuttal, the Government recalled Gerald Cobb. Cobb testified that he had used methadone "on a few occasions." Tr. at 327. When asked for an estimate, he explained that the mother of his children had been in a methadone program and that, when he was sick, she would give him half of her dose, "40 times or more." Tr. at 328. Cobb also testified that he had observed a number of heroin addicts, "at least 20," who had been on methadone. Tr. at 328-29. Finally, Cobb testified that he had observed others who took methadone followed by heroin, and that he himself had done so. *See* Tr. at 329-30.

The defendant made several objections during Cobb's testimony. *See* Tr. at 328-330. The most salient objection, made immediately before Cobb testified about the effect of methadone on subsequent heroin use, asserted that the witness had "no personal knowledge." Tr. at 330. The objection was overruled. *See id.* At no point did the defendant object that Cobb's testimony was expert

testimony rather than lay opinion testimony. *See* Tr. at 327-34.

After the foundation for his testimony was established, Cobb testified about the effect of methadone on subsequent heroin use. Cobb testified that "[y]ou need more heroin to feel the effects of the heroin if you're on methadone." Tr. at 331. An addict who used more heroin to overcome the methadone would then "feel higher." *See* Tr. at 332. Cobb could not estimate how much more heroin would be needed to feel high after using methadone, explaining that "it would depend on the person because . . . everybody's body is different as far as tolerance." Tr. at 333.

On cross-examination, Cobb admitted that he was not a scientist, a chemist, or a drug counselor, and that he had never worked in a methadone treatment program. *See* Tr. at 334-35. Cobb testified that methadone might not eliminate an addict's craving for heroin, depending on the severity of the addiction. *See* Tr. at 336. Cobb also testified that methadone would not have an effect on subsequent cocaine use. *See* Tr. at 339.

Both parties then rested. *See* Tr. at 341.

During summation, the Government addressed the defendant's claim of voluntary intoxication. The Government began by pointing out that there was no evidence of how drugs affected the defendant and no evidence that the defendant was actually high when she was participating in the drug deals. *See* Tr. at 453-54. The

Government repeated Cobb's testimony that the defendant knew where she was, whom she was with, and what she was doing. *See* Tr. at 454. The Government also directed the jury's attention to the recordings, urging the jury to consider for itself how the defendant sounded on the tapes. *See id.* ("You don't have to take Jerry Cobb's word for it, it is right there on the tapes for you to hear.").

The Government then reminded the jury that addicts such as the defendant can develop a tolerance for drugs and that, moreover, the defendant had been taking methadone during her involvement in the conspiracy. *See* Tr. at 455. The Government then made a single, brief reference to Cobb's testimony about the effects of methadone: "[A]lthough we don't know the exact effect on each person of the methadone, we do know that it has a tendency to dilute the high or to prevent the high." *Id.* But, the Government continued, the jury did not need to know *why* the defendant was not high, as long as the evidence showed she was *not* high. *See id.*

Finally, the Government pointed to the defendant's statement, made after taking heroin on April 24: "I'm overparked." *See* Tr. at 460. The Government argued to the jury that, by warning Vailette and Cobb that she was overparked, the defendant clearly demonstrated that she was fully aware of her surroundings and fully capable of distinguishing right from wrong. *See id.*

The jury returned a guilty verdict. *See* Tr. at 488.

B. The defendant's sentencing

The defendant was sentenced on October 6, 2008. (A 84). According to the Guidelines calculations in the Pre-sentence Report, the defendant's offense level was 26 and her criminal history category was VI, yielding a recommended Guidelines sentencing range of 120 to 150 months in prison. (*See* A 92). The defendant had a total of 48 criminal history points, as to which the district court remarked: "[Y]ou only need 13 to get into Criminal History Category VI, it may be the most I've seen, I'm not quite sure . . . ." (*Id.*). The defendant did not object to the Guidelines calculations. (*See* A 94, 101).

After hearing from both counsel and the defendant (*see* A 93-121), the district court provided a thoughtful explanation of the sentence it would impose. The court observed that the seriousness of the offense was demonstrated by the history of the defendant herself, whose "adult life has little to show but a steady revolving door in and out of court, in and out of prison, in and out of rehab, with no change and no improvement and no redirection." (A 123). The court also observed that the imposition of prior terms of incarceration, including a term served of more than two years, "hasn't made a dent, it hasn't made a change, and leaves Ms. Vallombroso on her self-destructive course to being lost, and leaves the public in continual exposure to her crimes." (A 124). The court found it "apparent . . . that a lengthy sentence [was] required to serve the purposes of the sentencing statute, but more importantly, to serve the purpose of making a change

in the defendant's life so that she will make a difference in her own life afterwards." (*Id.*).

Throughout the proceedings, the district court gave consideration to the statutory sentencing factors. (*See* A 122-25; *see also* A 100, 109). The district court also recognized that it was "not bound" by the Sentencing Guidelines and that it could permissibly consider the sentencing disparity between crack and powder cocaine. (A 125; *see also* A 109). Nevertheless, the district court concluded that a sentence of 120 months in prison would be appropriate, together with a term of 5 years of supervised release and a $100 special assessment. (*See* A 125-28).

After imposing sentence, the district court advised the defendant of her right to appeal (*see* A 128-29), and this appeal followed.

Summary of Argument

I. The district court did not commit plain error by allowing Cobb to testify about the effect of methadone on subsequent heroin use. *See* Point I., *infra*. The plain-error standard applies because the defendant failed to object at trial on the ground that she raises now on appeal, *i.e.*, that Cobb was not qualified to offer expert testimony under Rule 702. *See* Point I.C.1., *infra*.

In fact, Cobb's testimony was properly admitted as lay opinion testimony under Rule 701. *See* Point I.C.2., *infra*. Cobb's testimony was based on his personal experience

and observations, not on expert reasoning or knowledge. *See id.*

Even if Cobb's testimony was improperly admitted, the error was not plain. *See* Point I.C.3., *infra*. Moreover, the error, if any, did not affect the defendant's substantial rights, *see* Point I.C.4., *infra*, or result in a miscarriage of justice, *see* Point I.C.5., *infra*.

II. The evidence of the defendant's intent to join the conspiracy was overwhelming. *See* Point II.C., *infra*. The evidence showed that the defendant made a telephone call to arrange a crack deal between Vailette and Cobb, that she was involved in a second crack deal, and that she attempted to arrange a third crack deal through a supplier that she identified. *See id.* The evidence also included audio recordings, which permitted the jury to evaluate first-hand the nature and extent of the defendant's involvement. *See id.* Accordingly, the jury's verdict should stand.

III. The district court's sentence was reasonable, both procedurally and substantively. *See* Point III.C., *infra*. The district court committed no procedural error, because it expressly recognized that it was not bound by the Sentencing Guidelines and that it could consider the sentencing disparity between crack cocaine and powder cocaine. *See* Point III.C.1., *infra*. The sentence imposed was substantively reasonable, both because the sentence was at the low end of the recommended Guidelines range and because the district court carefully fashioned a sentence that accounted for the defendant's lengthy

criminal history and need for rehabilitation. *See* Point III.C.2., *infra*.

The district court's judgment should therefore be affirmed.

ARGUMENT

I. The admission of lay opinion testimony during the Government's rebuttal case was not plain error

A. Relevant facts

After the first day of trial, shortly before midnight, the defendant requested a jury instruction on the defense of voluntary intoxication. *See* Tr. at 218. The next morning, out of the presence of the jury, the defendant produced medical records showing that she was addicted to cocaine and heroin and was being treated with methadone. *See* Tr. at 215. The defendant's disclosures were made in the middle of a two-day trial, even though the defendant had signed a consent for the release of her medical records more than seven months earlier. *See* Tr. at 223-24.

A portion of the records were brought to court by the defendant's treating therapist. *See* Tr. at 216. The defendant's therapist was available to testify, but was not called by either party. *See* Tr. at 225-26, 309.

The medical records offered advantages to both parties: for the defendant, the records provided a formal diagnosis of opiate addiction, *see* Tr. at 310-11; for the Government, the records showed that the defendant was receiving

methadone treatment while involved in the conspiracy, *see* Tr. at 315-16. Because it was unclear whether the records would benefit the defendant more than the Government, counsel for the defendant dithered over whether to offer the medical records at all. *See* Tr. at 316-17. The parties also disagreed as to whether the records would be introduced by the Government or by the defendant. *See* Tr. at 315-16.

Eventually, the defendant chose to offer the medical records in her case-in-chief, which led to the following colloquy outside the presence of the jury:

> THE COURT: . . . And the understanding here is that when those [medical records] go in, then the government's entitled on rebuttal to recall Mr. Cobb for his vast expertise in drug effects and he will be asked about methadone, if he knows anything about that.
>
> MR. KOFFSKY: Certainly, your Honor.
>
> THE COURT: So does that satisfy you, Mr. Chang?
>
> MR. CHANG: Yes, it would. Thank you, your Honor.
>
> THE COURT: We have our lay pharmacological expert.

MR. CHANG: It's all we can do at the last second, your Honor. We just got these records today.

THE COURT: That being the case.

Tr. at 317-18. The trial court and the parties never characterized Cobb as an "expert" in the presence of the jury, nor did they ever refer to him as such. *See* Tr. at 326-41.

B. Governing law and standard of review

1. Lay opinion testimony

Rule 701 of the Federal Rules of Evidence permits "lay opinion" testimony as follows:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Cf. Fed. R. Evid. 702 (establishing requirements for admission of expert testimony based on "scientific, technical, or other specialized knowledge").

The purpose of the third requirement in Rule 701 "is to prevent a party from conflating expert and lay opinion testimony thereby conferring an aura of expertise on a witness without satisfying the reliability standard for expert testimony set forth in Rule 702 and the pre-trial disclosure requirements set forth in [the federal rules]." *United States v. Garcia*, 413 F.3d 201, 215 (2d Cir. 2005) (citing Advisory Committee Notes on 2000 amendment to Rule 701).

In distinguishing between lay opinion testimony permissible under Rule 701 and expert testimony subject to the strictures of Rule 702, "a court must focus on 'the reasoning process' by which a witness reached his proffered opinion." *Id.* (citing 4 Jack B. Weinstein, *Weinstein's Federal Evidence* § 701.03[1]). Whereas a lay opinion "must be the product of reasoning processes familiar to the average person in everyday life," an expert opinion "'results from a process of reasoning which can be mastered only by specialists in the field.'" *Id.* (quoting Advisory Committee Notes on 2000 amendment to Rule 701).

2. Review for plain error

To preserve a claim that evidence was improperly admitted at trial, the defendant must state "the specific ground of objection, if the specific ground was not apparent from the context." Fed. R. Evid. 103(a)(1). Otherwise, the claim is reviewed only for plain error. *See United States v. Dukagjini*, 326 F.3d 45, 60-61 (2d Cir. 2003) (holding that hearsay objection did not preserve

Confrontation Clause claim); *see also United States v. Walker*, 142 F.3d 103, 109-10 (2d Cir. 1998) (holding that error alleged during trial under Rule 801(d)(1) did not preserve error alleged on appeal under Rule 801(d)(2)); *United States v. Mennuti*, 679 F.2d 1032, 1036 (2d Cir. 1982) (holding that error alleged during trial under Rule 403 did not preserve error alleged on appeal under Rule 608).

A defendant's failure to specify the proper ground of objection at trial denies the Government "a fair opportunity to reply, to properly limit its questions . . . [or] to decide to call" another witness. *Dukagjini*, 326 F.3d at 61; *see also Puckett v. United States*, 129 S. Ct. 1423, 1428 (2009) (noting that objection permits trial court to "correct or avoid the mistake so that it cannot possibly affect the ultimate outcome").

To constitute plain error, "'there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *Dukagjini*, 326 F.3d at 61 (quoting *Johnson v. United States*, 520 U.S. 461, 467 (1997)). Reversal for plain error "is 'to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *Id.* (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)). As the Supreme Court recently observed, "anyone familiar with the work of courts understands that errors are a constant in the trial process, that most do not

much matter, and that a reflexive inclination by appellate courts to reverse because of unpreserved error would be fatal." *Puckett*, 129 S. Ct. at 1428 (internal quotation marks omitted).

C. Discussion

At trial, the defendant never claimed that Cobb's testimony was expert testimony subject to Rule 702. Instead, the defendant's objection went to "personal knowledge," which is a requirement of Rule 701 rather than Rule 702. *Compare United States v. Rea*, 958 F.2d 1206, 1215 (2d Cir. 1992) (recognizing that first requirement of Rule 701 imposes requirement of personal knowledge) *with Barefoot v. Estelle*, 463 U.S. 880, 903-04 (1983) (holding that expert testimony may be based on hypothetical question rather than personal knowledge). Accordingly, the defendant's claim on appeal – that Cobb's testimony was expert testimony and inadmissible under Rule 702 – is subject only to review for plain error.

In fact, the trial court did not err in treating Cobb's testimony as admissible lay opinion testimony. And even assuming, *arguendo*, that the trial court erred, the error was not obvious, did not affect the defendant's substantial rights, and did not result in a miscarriage of justice.

1. Because the defendant did not object to Cobb's testimony as impermissible expert testimony, the plain-error standard of review applies

When Cobb testified in the Government's rebuttal case, the defendant raised several objections, including lack of foundation and lack of personal knowledge. *See* Tr. at 329-31. But the defendant did not object on the ground that Cobb's testimony was inadmissible expert testimony under Rule 702. To the contrary, the defendant appeared to agree, during colloquy outside the presence of the jury, that Cobb could properly testify if he had personal knowledge:

> THE COURT: . . . And the understanding here is that when those [medical records] go in, then the government's entitled on rebuttal to recall Mr. Cobb for his vast expertise in drug effects and he will be asked about methadone, if he knows anything about that.
>
> MR. KOFFSKY: Certainly, your Honor.

See Tr. at 317-18; *see also* Brief and Appendix for Appellant, dated Oct. 16, 2009 ("Def. Br."), at 24 (recognizing that "the defense . . . went along with" admission of Cobb's testimony). Accordingly, the defendant has forfeited her claim that Cobb provided impermissible expert testimony.

By failing to raise a proper objection below, the defendant denied the trial court and the Government an opportunity to correct the error now alleged on appeal. Instead, the court and the Government corrected the error asserted at trial, *i.e.*, Cobb's supposed lack of personal knowledge:

> MR. KOFFSKY: There is no personal knowledge here, your honor.
>
> THE COURT: You have – you know personally that [your children's mother] took heroin after having taken methadone?
>
> THE WITNESS: Yes.
>
> THE COURT: All right, overruled.
>
> Q. And you have personally yourself taken heroin on top of methadone?
>
> A. Yes.

Tr. at 330. Because the defendant's failure to object deprived the trial court and the Government of an opportunity to correct the error now alleged, this Court should review only for plain error.

The defendant's failure to raise a proper objection also denied the Government an opportunity to limit its questions or to call a different witness. *See Dukagjini*, 326 F.3d at 61. In particular, the defendant's treating therapist

was present that day and could have been called by the Government had the trial court excluded Cobb's testimony. *See* Tr. at 225-26, 309. That opportunity, of course, is also lost now.

To be sure, the defendant was not required to cite Rule 702 *in haec verba*. It would have been sufficient for the defendant to object "in such a way [as] to put [the] trial court on notice" as to the basis of her objection. *Dukagjini*, 326 F.3d at 60; *see, e.g.*, *United States v. Massino*, 546 F.3d 123, 129 (2d Cir. 2008) (per curiam) (holding that objection to improper lay opinion testimony was preserved where counsel argued at sidebar that testimony amounted to opinion that defendant was guilty), *cert. denied*, 129 S. Ct. 1928 (2009); *United States v. Doyle*, 130 F.3d 523, 545-46 (2d Cir. 1997) (holding that objection to hearsay testimony was preserved where counsel objected to absence of records custodian).

In this case, however, there was nothing to put the trial court on notice of the error that is now alleged on appeal. To the contrary, both counsel and the trial court were focused on Rule 701 and concerned solely with whether Cobb had the requisite personal knowledge to offer a lay opinion. *See* Tr. at 317-18, 330. And, far from objecting, defense counsel appeared to acquiesce in Cobb's testimony, assuming that a foundation of personal knowledge was first shown. *See* Tr. at 317-18.

The defendant's misplaced objection at trial – based on Cobb's lack of personal knowledge – also distinguishes this case from cases such as *United States v. Garcia*, 291

F.3d 127 (2d Cir. 2002). In *Garcia*, the Court held that objections made at trial to lay opinion testimony were sufficient to preserve the issue on appeal, but there was no indication that the objections were made on a different basis at trial than on appeal. *See id.* at 140; *see also Bank of China v. NBM LLC*, 359 F.3d 171, 180 n.10 (2d Cir. 2004). Here, the defendant's objection based on Cobb's alleged lack of personal knowledge, and her accompanying silence as to the allegedly impermissible "expert" nature of his testimony, constituted a forfeiture of her claim on appeal. Accordingly, her claim should be subject to plain-error review.

Finally, even if the defendant's claim was not forfeited, the Court should find that any error from the admission of Cobb's testimony was harmless. *See Garcia*, 413 F.3d at 217 (setting forth factors relevant to harmless error review of inadmissible evidence). For the reasons set forth below, *see* Point I.C.4., *infra*, the alleged error "had no 'substantial and injurious effect or influence' on the jury verdict," *Garcia*, 413 F.3d at 217, and was therefore harmless.

2. The district court did not err in admitting Cobb's testimony as lay opinion testimony

The three requirements of Rule 701 were met in this case, so the district court did not err in admitting Cobb's testimony during the Government's rebuttal case as lay opinion testimony.

First, Cobb established personal knowledge as to the effects of methadone on subsequent heroin usage. *See* Fed. R. Evid. 701(a) (requiring that testimony be "rationally based on the perception of the witness"). Cobb testified that he had personally taken methadone followed by heroin and that he had observed others who had done the same, *see* Tr. at 329, including his children's mother, *see* Tr. at 330. Based on those observations, Cobb testified that more heroin was needed to feel high after taking methadone. *See* Tr. at 331. Cobb also testified that an addict who used more heroin to overcome the methadone would "feel higher." *See* Tr. at 332. Cobb was unable to say how much more heroin would be needed. *See* Tr. at 333. Cobb's testimony was properly founded on his personal knowledge.

Second, Cobb's testimony was helpful to the determination of a fact in issue, *i.e.*, the defendant's mental state. Cobb testified earlier that the defendant had ingested heroin on April 24, *see* Tr. at 231, and the defendant's medical records showed that she had received methadone that morning, *see* Tr. at 325. Therefore, Cobb's testimony was helpful to the jury in understanding the effect of the methadone on the defendant's subsequent heroin use.

Third, Cobb's testimony was not based on "scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701(c). While "the line between expert testimony . . . and lay opinion testimony . . . is not easy to draw," *United States v. Ayala-Pizarro*, 407 F.3d 25, 28 (1st Cir. 2005) (internal quotation

marks omitted), Cobb's testimony falls comfortably on the side of lay opinion. In particular, Cobb's testimony was based on the simple (and personal) observation that methadone inhibits the effect of heroin; Cobb did not rely on reasoning based in biology, pharmacology, or any other body of specialized knowledge.

It is well within the ken of an average person that ingesting one substance can lessen the effect of another: it is for that reason, for example, that it is widely believed that one should not drink on an empty stomach. *See* Anahad O'Connor, *The Claim: Never Drink on an Empty Stomach*, N.Y. Times, Dec. 6, 2005, at F5 (confirming conventional wisdom). Because Cobb's testimony was "the product of reasoning processes familiar to the average person in everyday life," *Garcia*, 413 F.3d at 215, it was properly admissible as lay opinion testimony.

The fact that an average person may be unfamiliar with methadone and heroin does not change the analysis, because the Court "must focus on the reasoning process," *id.* (internal quotation marks omitted), not the underlying facts to which that reasoning process is applied. Thus, in *United States v. Yannotti*, 541 F.3d 112 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1648 (2009), the Court held that the trial court properly allowed lay opinion testimony about a loansharking operation. *See id.* at 125-26. In distinguishing between lay opinion testimony and expert testimony, the Court explained:

> While we do not profess that loansharking is an activity about which the average person has

> knowledge, we find that the opinion [the witness] reached from his own loansharking experience derived from a reasoning process familiar to average persons. In short, his opinion did not depend on the sort of specialized training that scientific witnesses or statisticians rely upon when interpreting the results of their own experiments or investigations.

Id. at 126; *see also Ayala-Pizarro*, 407 F.3d at 29 ("It required no special expertise for [the witness] to conclude, based on his observations, that places which sell drugs are often protected by people with weapons.").

The same is true here. Because Cobb's testimony was based simply on observing the cause and effect of one substance ingested after another, it was properly admitted as lay opinion testimony under Rule 701.

The defendant never explained, below or on appeal, why Cobb's testimony should be subject to Rule 702 rather than Rule 701. Because Cobb's testimony was properly admitted under Rule 701, the defendant's references to Rule 702 and to cases interpreting Rule 702 are wholly misplaced.

The defendant's argument is also replete with misstatements and inaccuracies. Contrary to the defendant's claims: (1) Cobb was never described to the jury, by the trial court or the parties, as an "expert"; (2) Cobb did not steal methadone, *see* Tr. at 335; and (3) Cobb never testified about the defendant's intent to

join the conspiracy. Because the defendant misapprehends both the law and the facts, her argument must fail.

3. Any error by the district court was not plain

Assuming *arguendo* that the admission of Cobb's testimony was error, the error was not plain. For an error to be plain, it must be "so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *United States v. Lombardozzi*, 491 F.3d 61, 73 (2007) (internal quotation marks omitted).

That was not the case here. As several courts of appeals have recognized, the line between expert testimony and lay opinion testimony is not easy to draw. *See Ayala-Pizarro*, 407 F.3d at 28; *see also United States v. White*, 492 F.3d 380, 401 (6th Cir. 2007); *United States v. Perkins*, 470 F.3d 150, 155 (4th Cir. 2006).

Furthermore, in this case, the defendant blurred the line herself by eliciting "quasi-expert" testimony from Cobb *before* the testimony elicited during the Government's rebuttal case. Specifically, the defendant elicited testimony from Cobb about the drug-seeking nature of heroin addiction, in order to support her argument that she was single-mindedly seeking heroin and not intending to join any conspiracy. *See* Tr. at 468-70 (relying on Cobb's testimony about heroin addiction during summation). For example, the defendant elicited the following testimony from Cobb:

> Q: As far as you know, an addict will get up first thing in the morning and get high, correct?
>
> A: Yeah.
>
> Q: And they'll try to stay high through the entire day; am I correct?
>
> A: Well, once again, like I said, it all depends on the person.

Tr. at 270; *see also* Tr. at 244-46 (eliciting testimony about drug-seeking behavior caused by addiction).

Given the fine line between expert testimony and lay opinion testimony, and the fact that the defendant herself approached or crossed that line, the Court should hold that any error by the trial court was not plain.

4. Any error by the district court did not affect the defendant's substantial rights

An error affects a defendant's substantial rights "if it is prejudicial and it affected the outcome of the case." *Lombardozzi*, 491 F.3d at 74 (internal quotation marks omitted). Where the effect of the error is uncertain, indeterminate, or only speculative, the Court will not conclude that a defendant's substantial rights were affected. *See id.*

The alleged error was harmless, rather than prejudicial, for several reasons. First, the disputed evidence was not

central to the issue, *i.e.*, whether the defendant was capable of forming the intent to join the conspiracy. On that issue, the Government's evidence was uncontradicted: Cobb testified that the defendant knew where she was and what she was doing, the jurors could listen to the defendant for themselves on the audio recordings, and the defendant amply demonstrated her awareness of right and wrong when she stated "I'm overparked." The evidence of how methadone affects subsequent heroin use merely provided a possible explanation for why the defendant was not high; it was therefore ancillary to the disputed issue of whether she *was* high, or not.

Second, Cobb was not identified or described to the jury as an expert, so he was not improperly cloaked with "an aura of expertise." *Garcia*, 413 F.3d at 215. To the contrary, Cobb was subjected to effective cross-examination, so the jury was fully aware that Cobb was *not* an expert but was merely describing his own experience as a drug addict. Thus, admission of Cobb's testimony under Rule 701 did not have the effect of improperly bolstering his credibility.

Finally, the Government made only a single, brief reference during summation to the challenged testimony. *See* Tr. at 455 ("[A]lthough we don't know the exact effect on each person of the methadone, we do know that it has a tendency to dilute the high or to prevent the high."). This single reference to the challenged testimony was immediately downplayed by the Government, which argued to the jury that it did not matter *why* the defendant was not high as long as she was *not* high. *See id.* Under

the circumstances, the challenged testimony did not likely have a significant impact.

In sum, any error in admitting Cobb's testimony during the Government's rebuttal case was harmless and not prejudicial to the defendant.

5. Any error by the district court did not result in a miscarriage of justice

Finally, any alleged error did not result in a miscarriage of justice. *See United States v. Johnson*, 529 F.3d 493, 502 (2d Cir. 2008) ("[P]lain error is reserved for 'those circumstances in which a miscarriage of justice would otherwise result.'" (quoting *United States v. Young*, 470 U.S. 1, 15 (1985)).

Although the defendant complains that Cobb's testimony should not have been admitted, the defendant does *not* complain that Cobb's testimony was inaccurate. Moreover, the impromptu nature of the testimony and the Government's rebuttal case was caused not by the Government, but by the defendant's own mid-trial disclosure of her medical records and defense of voluntary intoxication.

Under the circumstances, even if there was plain error, the Court should not exercise its discretion to correct the error because there was no miscarriage of justice.

II. The evidence of the defendant's intent to join the conspiracy was overwhelming

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

B. Governing law and standard of review

1. The law of drug conspiracies

To convict a defendant of conspiracy to distribute a controlled substance, the Government must prove "the existence of the conspiracy alleged and the defendant's membership in it beyond a reasonable doubt." *United States v. Chavez*, 549 F.3d 119, 125 (2d Cir. 2008).

The prove the existence of the conspiracy, the Government must show that "two or more persons entered into a joint enterprise with consciousness of its general nature and extent." *Id.* The conspiracy "may be established by proof of a tacit understanding among the participants, rather than by proof of an explicit agreement . . . ." *United States v. Santos*, 541 F.3d 63, 71 (2d Cir. 2008) (internal quotation marks omitted), *cert. denied*, 129 S. Ct. 960 (2009). The goals of the co-conspirators "need not be congruent, so long as they are not at cross-purposes." *United States v. Rea*, 958 F.2d 1206, 1214 (2d Cir. 1992); *see also United States v. Eppolito*, 543 F.3d 25, 48 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1027 (2009).

To prove the defendant's membership in the conspiracy, the Government must show that the defendant "knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it." *United States v. Snow*, 462 F.3d 55, 68 (2d Cir. 2006) (internal quotation marks omitted). This requires proof of the defendant's "purposeful behavior aimed at furthering the goals of the conspiracy." *Chavez*, 549 F.3d at 125 (internal quotation marks omitted). The defendant need not have known all of the details of the conspiracy "so long as [she] knew its general nature and extent." *Id.* (internal quotation marks omitted) (citing cases).

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

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

2. Review for sufficiency of the evidence

A defendant challenging the sufficiency of the evidence bears a "heavy burden." *United States v. Mercado*, 573 F.3d 138, 140 (2d Cir. 2009) (internal quotation marks omitted). This Court will affirm "if 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Ionia Management S.A.*, 555 F.3d 303, 309 (2d Cir. 2009) (per curiam) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). "Under this stern standard, a court . . . may not usurp the role of the jury by substituting its own determination of the weight of the evidence and the reasonable inferences to be drawn for that of the jury." *United States v. MacPherson*, 424 F.3d 183, 187 (2d Cir. 2005) (citations and internal quotation marks omitted).

"[T]he law draws no distinction between direct and circumstantial evidence," and "[a] verdict of guilty may be based entirely on circumstantial evidence as long as the inferences of culpability . . . are reasonable." *Id.* at 190. Indeed, "jurors are permitted, and routinely encouraged, to rely on their common sense and experience in drawing inferences." *United States v. Huezo*, 546 F.3d 174, 182 (2d Cir. 2008), *cert. denied*, 130 S. Ct. 142 (2009). Because there is rarely direct evidence of a person's state of mind, "the *mens rea* elements of knowledge and intent can often be proved through circumstantial evidence and the reasonable inferences drawn therefrom." *MacPherson*, 424 F.3d at 189; *see also United States v. Crowley*, 318

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

"The possibility that inferences consistent with innocence as well as with guilt might be drawn from circumstantial evidence is of no matter . . . because it is the task of the jury, not the court, to choose among competing inferences." *MacPherson*, 424 F.3d at 190 (internal quotation marks omitted). The evidence must be viewed "in its totality, not in isolation, and the government need not negate every theory of innocence." *United States v. Lee*, 549 F.3d 84, 92 (2d Cir. 2008) (internal quotation marks omitted).

"In cases of conspiracy, deference to the jury's findings 'is especially important because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel." *Snow*, 462 F.3d at 68 (internal quotation marks omitted) (citing cases).

C. Discussion

There was more than sufficient evidence for a reasonable jury to conclude that the defendant knowingly joined the conspiracy and participated with the intent of furthering its objectives.

Specifically, the evidence showed a quick sequence of telephone calls on the morning of April 7 that culminated in a call from the defendant to Cobb, in which the defendant told Cobb that Vailette had a "new connect" for crack cocaine. Tr. at 188. The sequence of calls – Cobb to Vailette, Vailette to Vallombroso, Vallombroso to Vailette, and Vallombroso to Cobb – irrefutably showed that Vallombroso, the defendant, was working with Vailette in dealing with Cobb. The call from the defendant to Cobb also showed explicitly that the defendant knew what those dealings were: the purchase and sale of crack cocaine.

The telephone calls on April 7, after some further negotiation, led to the sale of nearly one ounce of crack cocaine on April 13. *See* Tr. at 60-64. Although the defendant was not physically present that day, she made a telephone call to Vailette's supplier a few minutes before Vailette called him, right before the deal was completed. *See* Tr. at 73. The defendant also received part of the crack cocaine from the deal. (*See* GA 2); *see also* Tr. at 139-40, 193, 276-77. Based on the telephone call, a reasonable jury could infer that the defendant knew about the deal in considerable detail; based on the defendant's receipt of crack cocaine, a reasonable jury could infer that the defendant had a stake in the conspiracy and was a knowing and willing participant.

On April 24, the defendant and Vailette arranged for Cobb to buy an "eight-ball" of crack cocaine. *See* Tr. at 74-75. When Vailette tried to refer obliquely to the drugs as that "pool game," the defendant exclaimed: "An 8-ball!

Just say it!" (GA 5); *see also* Tr. at 201-02. The defendant also attempted, at Vailette's request, to send a text message to Vailette's supplier. (*See* GA 8-9); *see also* Tr. at 202-03. The defendant's involvement that day provided further evidence of her knowing and willing participation in the conspiracy.

Finally, on May 2, the defendant and Vailette attempted to arrange for Cobb to buy a quarter-ounce of crack cocaine. When "Jay," the supplier identified by the defendant, did not return Vailette's telephone calls, the defendant left him the following telephone message:

> Jay, we're down here. We're waiting for ya, you know what, I'm a little upset cause I, I told John you know that . . . you were straight up and, I don't know, I feel like you're gonna blow him off, and I, I'm a little upset about that so. You know just call him back regardless, you know whether you wanna do this or not, cause we're down here waiting for ya. 6, 2, 7, 7, 0, 4, 6. Thanks.

(GA 18); *see also* Tr. at 207. The message showed that the defendant was not merely an incidental bystander to the drug deals; she was a knowing and willing participant, vouching for suppliers and pushing them to get deals done.

The defendant argues, at length, that she was only trying to obtain crack to feed her addiction. *See* Def. Br. at 29-35. But, as the evidence showed beyond a reasonable doubt, the means she used to obtain crack was by helping Vailette sell drugs to Cobb. In doing so, the

defendant knowingly and willfully participated in the drug sales, and she engaged in purposeful behavior aimed at furthering the goal of the conspiracy. The fact that the defendant joined the conspiracy because she wanted crack for herself does not change the fact that she joined the conspiracy.

The defendant also argues that a conspiracy is not formed by merely introducing a willing buyer to a willing seller, citing *United States v. Tyler*, 758 F.2d 66 (2d Cir. 1985). While that proposition is true, it has no application here. In *Tyler*, the defendant directed an undercover officer to a drug dealer that the defendant and the officer appeared to encounter largely at random on the street. *Id.* at 67. There was no evidence that the defendant had any other connection to the drug dealer; specifically, while walking with the undercover officer, the defendant did not appear to have a specific drug dealer in mind, did not know where to find the drug dealer, did not expect to find the drug dealer in the area, and had not made previous deals with the drug dealer. *Id.* at 68-69. On those facts, the Court held that there was no conspiracy between the defendant and the drug dealer. *Id.* at 69.

Here, in contrast, the defendant and Vailette collaborated on at least two drug transactions and one attempted transaction during a one-month period. The defendant and Vailette had to expend significant time and effort to arrange the drug transactions for Cobb. Finally, the defendant and Vailette, far from being random strangers on the street, were married. There was more than

enough evidence from which a reasonable jury could find the existence of a conspiracy.

Finally, the defendant mistakenly claims that there was "overwhelming evidence" that she was constantly high and therefore unable to form an intent to join the conspiracy. *See* Def. Br. at 36. To the contrary, the evidence showed only that the defendant was an addict regularly receiving methadone. While Cobb testified that the defendant appeared high on occasion, *see* Tr. at 230, he also testified that she appeared to be fully aware of her surroundings on April 24, *see* Tr. at 234-37, and that she did not appear high on May 2, *see* Tr. at 232.

More importantly, the jury was able to evaluate the defendant directly, by listening to her on the audio recordings and by weighing the significance of her statement on April 24 that she was overparked. Because the jury was able to hear the defendant first-hand through the audio recordings, its determination that the defendant was not too high to join the conspiracy should not be disturbed.

III. The district court reasonably sentenced the defendant to 120 months in prison – the low end of the advisory Guidelines range

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

B. Governing law and standard of review

At sentencing, a district court must begin by calculating the applicable Guidelines range. *See United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc). "The Guidelines provide the 'starting point and the initial benchmark' for sentencing, and district courts must 'remain cognizant of them throughout the sentencing process.'" *Id.* (citations omitted) (quoting *Gall v. United States*, 552 U.S. 38, 49 (2007)).

After giving both parties an opportunity to be heard, the district court should then consider all of the factors under 18 U.S.C. § 3553(a). *See Gall*, 552 U.S. at 49-50. Because the Guidelines are only advisory, district courts are "generally free to impose sentences outside the recommended range." *Cavera*, 550 F.3d at 189. "When they do so, however, they 'must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.'" *Id.* (quoting *Gall*, 552 U.S. at 50).

On appeal, a district court's sentencing decision is reviewed for reasonableness. *See United States v. Booker*, 543 U.S. 220, 260-62 (2005). In this context, reasonableness has both procedural and substantive dimensions. *See United States v. Avello-Alvarez*, 430 F.3d 543, 545 (2d Cir. 2005) (citing *United States v. Crosby*, 397 F.3d 103, 114-15 (2d Cir. 2005)).

"A district court commits procedural error where it fails to calculate the Guidelines range (unless omission of

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

If the district court committed no procedural error, this Court reviews the sentence for substantive reasonableness under an abuse-of-discretion standard. *See Gall*, 552 U.S. at 51. The Court "will not substitute [its] own judgment for the district court's"; rather, a district court's sentence may be set aside "only in exceptional cases where [its] decision cannot be located within the range of permissible decisions." *Cavera*, 550 F.3d at 189 (internal quotation marks omitted); *see also United States v. Verkhoglyad*, 516 F.3d 122, 134 (2d Cir. 2008) ("Our review of sentences for reasonableness thus exhibits restraint, not micromanagement.") (internal quotation marks omitted).

A sentence is substantively unreasonable only in the "rare case" where the sentence would "damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009).

While the Court does not presume that a Guidelines sentence is reasonable, "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." *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006).

When a defendant fails to preserve an objection to the procedural reasonableness of a sentence, the plain-error standard of review applies. *See Verkhoglyad*, 516 F.3d at 128; *United States v. Villafuerte*, 502 F.3d 204, 208 (2d Cir. 2007). Reversal for plain error should "'be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'" *Id.* at 209 (quoting *United States v. Frady*, 456 U.S. 152, 163 n.14 (1982)).

The Court has not yet decided whether the plain-error standard applies when a defendant fails to preserve an objection to the substantive reasonableness of a sentence. *See Verkhoglyad*, 516 F.3d at 134.

C. Discussion

1. The district court did not commit procedural error in imposing sentence

The district court adhered faithfully to the precedents of the Supreme Court and this Court in sentencing the defendant. First, the district court correctly determined the applicable Guidelines range to be 120 to 150 months (*see* A 92), as to which the defendant raised no objection (*see*

A 94). The district court then heard from both counsel and the defendant. (*See* A 93-121).

The district court then explained its assessment of the statutory sentencing factors as they applied to the defendant (*see* A 121-126), correctly recognizing that it was not bound by the Sentencing Guidelines "beyond the point of considering them" (A 125). The district court proceeded to sentence the defendant to a term of 120 months in prison, a term at the bottom of the applicable Guidelines range. (*See* A 125). In doing so, the district court committed no procedural error.

On appeal, the defendant claims error in three respects: first, that the district court incorrectly presumed that the Guidelines should apply; second, that the district court failed to take account of the sentencing disparity between crack cocaine and powder cocaine; and third, that the district court incorrectly calculated the drug quantity. The defendant's claims are all meritless.

First, the district court explicitly recognized that it was not bound by the Sentencing Guidelines "beyond the point of considering them." (A 125; *see also* A 109 ("You've referred to the guidelines, which is only the advisory starting point for the Court's analysis.")). The district court's explicit recognition of its authority to impose a non-Guidelines sentence is sufficient to defeat the defendant's mistaken claim that the district court failed to apprehend its sentencing authority. *See Fernandez*, 443 F.3d at 33 (holding that "clear indication in the record"

was sufficient to establish that district court understood its authority to impose non-Guidelines sentence).

In claiming error, the defendant misinterprets two colloquies with the district court. In responding to the defendant's request for a downward departure under U.S.S.G. § 5K2.13 (based on reduced mental capacity resulting from her drug addiction), the district court asked whether there was evidence of a causal link between the reduced mental capacity and the offense of conviction. (*See* A 99). The defendant replied that, in light of her history of addiction and her criminal history, the link was inherent and obvious (*see* A 99-100), leading the district court to inquire:

> THE COURT: But then I get to the question of isn't the logical extension of that argument that addicted people are not then subject to the sentencing guidelines? I mean, where is this line to be drawn? Because part of the objective is to promote respect for the law and to provide deterrence, and thus provide protection for the public, and provide treatment in the best – in the most efficacious environment.
>
> So your argument, and it's undisputed that Ms. Vallombroso has a very serious drug addiction, which has led to her life of crime, but I'm trying to understand what that means in terms of why the sentencing guidelines shouldn't apply to her.

(A 100-01). Read in context, the district court was understandably asking how the defendant could be differentiated from the many other defendants with drug addictions and lengthy criminal histories that appear for sentencing; the court was not stating a presumption that a Guidelines sentence should be imposed.

After hearing from the Government, the district court again raised with the defendant the issue of how she was different from other defendants with drug addictions and lengthy criminal histories:

> THE COURT: I will tell you what troubles me is that in effect the argument that is made on behalf of Ms. Vallombroso is because of her severe addiction and its relationship to her long criminal history, that an exception should be made, she should be sentenced to significantly less, and I'm troubled by the proposition because I don't see where that goes and how that is distinguished from regrettably so many people who appear before the Court and who are involved in crime, in offenses of drug conspiracy. . . .

(A 112). Again, the district court was not stating a presumption that a Guidelines sentence should be imposed. Instead, the court was reasonably asking whether and when a defendant's addiction to drugs should be a basis for a lower sentence.

While a district court may not presume that a Guidelines sentence should be imposed, it is entirely

proper for a district court to question whether a particular characteristic of a defendant warrants leniency at sentencing. From the transcript, it is clear that the district court was reasonably questioning whether the defendant's drug addiction was a sound basis for imposing a lower sentence. The district court's decision to not impose a particularly lenient sentence on that basis was reasonable and should not be disturbed. *See Cavera*, 550 F.3d at 191 ("[W]e do not consider what weight we would ourselves have given a particular factor."); *cf.* U.S.S.G. § 5K2.13 (2007) (prohibiting departure based on voluntary use of drugs or other intoxicants).

Second, the district court properly considered the disparity in sentencing between crack cocaine and powder cocaine. The court explicitly recognized its authority to consider the disparity. (*See* A 109 ("[H]ow do you propose the Court should consider the discretion it has under *Kimbrough* and *Regalado* to consider the disparities between crack and powder?"); *see also* A 125). The court even went so far as to compute the defendant's hypothetical Guidelines range, had she been involved with powder cocaine rather than crack cocaine. (*See* A 109). But ultimately, the court concluded that other factors were more important in the defendant's case:

> While I am deeply troubled by the disparities between crack and powder cocaine and take those disparities into account in other circumstances, and have considered them in these circumstances, the focus here is the other factors in the guidelines of how to impose an appropriate sentence. So I am

> aware that I can take that into consideration. I have, but I nonetheless have reached the conclusion that a sentence of 120 months is the appropriate sentence.

(A 125). Because the district court plainly understood its discretion under *Kimbrough*, it committed no procedural error. *Cf. Fernandez*, 443 F.3d at 32 ("[T]he requirement that a sentencing judge consider a [sentencing factor] is *not* synonymous with a requirement that the factor be given determinative or dispositive weight . . . .").

The court also did not err by failing to account for the reduced base offense level for crack cocaine sentencing that took effect in November 2007. *See* Def. Br. at 41. Based on a drug weight of 20 to 35 grams, the district court correctly computed a base offense level of 26. (*See* A 88); *see also* U.S.S.G. § 2D1.1(a)(3) & (c)(7) (2007). Had the prior version of the Guidelines been used, the base offense level would have been 28. *See* U.S.S.G. § 2D1.1(a)(3) & (c)(6) (2006).

Third, and finally, the defendant mistakenly argues that the district court incorrectly determined the drug weight by including drugs intended for the defendant's "personal use." *See* Def. Br. at 41-43. In fact, the record clearly establishes that the crack cocaine purchased on April 13 and April 24 weighed 26.5 grams and 2.2 grams, respectively. *See* Tr. at 164-65. Those drugs were purchased by Cobb, kept in the custody of the Government, and plainly not available for the defendant's

personal use. They were therefore properly counted by the district court in sentencing the defendant.

In sum, the district court committed no procedural error in sentencing the defendant.

2. The imposition of a sentence at the bottom of the applicable Guidelines range was substantively reasonable

The sentence imposed by the district court was also substantively reasonable. In the first place, the sentence was at the bottom of the applicable Guidelines range, a range as to which the defendant did not object. (*See* A 94, 101); *see also Fernandez*, 443 F.3d at 27 ("[I]n 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.").

Moreover, the district court's balancing of the statutory sentencing factors was eminently reasonable. The court began by recognizing that drug offenses "ravage . . . a person's life," as demonstrated by the defendant's own life history (A 121), so the defendant's offense was a serious crime despite the relatively small quantity of drugs involved (*see* A 122-23).

The court then turned to the defendant's criminal history and to the 48 criminal history points that she had accumulated. (*See* A 123; *see also* A 92 ("[I]t may be the most I've seen, I'm not quite sure . . . .")). The court

observed that the defendant's criminal history "demonstrate[d] a need to promote respect for the law" and "to provide just punishment, one that is sufficient but not greater than necessary." (A 123). The court stated that the "major goals" of its sentence were to "afford adequate deterrence to criminal conduct, and concomitantly, protect the public from further crimes of the defendant, . . . given the almost certain recidivism if she were to walk out today . . . [and] to provide her with the needed medical care, education and vocational training in the most effective manner." (A 123).

The court then reflected on the defendant's past terms of incarceration, compared to its estimate of the actual time that the defendant would serve on the sentence to be imposed. (*See* A 123-26). The court observed that one of the defendant's past terms of incarceration, "a seven-year sentence, for which 30 months was ordered to be served, hasn't made a dent, it hasn't made a change, and leaves Ms. Vallombroso on her self-destructive course to being lost, and leaves the public in continual exposure to her crimes." (A 124). The court found that "a lengthy sentence [was] required to serve the purposes of the sentencing statute, but more importantly, to serve the purpose of making a change in the defendant's life so that she will make a difference in her own life afterwards." (*Id.*).

On the issue of rehabilitation, the court estimated that the sentence imposed would actually yield a further term of incarceration of less than six years, assuming that the defendant successfully completed a 500-hour drug

program and avoided prison infractions that would reduce her good-time credits. (*See* A 125-26). The court concluded that its sentence would provide "the inducements to stay out of disciplinary problems, to commit thoroughly and over time to the drug rehabilitation that has thus far been so elusive, to obtain . . . vocational training . . . , and to undertaking with commitment the mental health counseling that can be provided . . . to unravel some of . . . the conditions that the psychological report has detailed for the Court." (A 126). The court's thorough, thoughtful sentence should be affirmed by this Court.

The defendant argues that the ten-year sentence was excessive and that a five-year sentence would have been sufficient for her to receive the treatment that she had never properly received before. *See* Def. Br. at at 43-49. It is unreasonable for the defendant to complain that she did not receive proper treatment in the past, when the defendant herself was refusing treatment, *see* Tr. at 324 ("Patient continues on 40 milligrams [of methadone] and reports that she doesn't want to increase dose despite daily heroin use." (internal quotation marks omitted)), and was failing to appear for treatment, *see* Tr. at 324-25.

Like the defendant, who contends that the need to provide medical treatment was "[t]he key in this case," Def. Br. at 45, the district court fully recognized the need for drug treatment. More broadly, the district court also recognized the need to provide vocational training, the need to provide mental health therapy, and the need to give the defendant a sufficient period of time to change her life-

long, destructive patterns of behavior. The district court's judgment in this case should not be second-guessed; it should be affirmed.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Dated: February 5, 2010

Respectfully submitted,

NORA R. DANNEHY
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

EDWARD CHANG
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 11,179 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

EDWARD CHANG
ASSISTANT U.S. ATTORNEY

ADDENDUM

§ 3553. Imposition of a sentence

(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.

* * *

(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.