09-2909-cr

To Be Argued By:
JAMES R. SMART

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-2909-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

FELIX DEJESUS,

Defendant-Appellant.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Stefan R. Underhill, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. A resentencing hearing on remand was held on June 26, 2009. JA39, 292-316. Final judgment entered on July 6, 2009, JA39, and the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on that same date. JA39. 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 Issue
Presented for Review

Did the district court act reasonably in imposing a sentence of 300 months' imprisonment, when the uncontested Guidelines range – after a downward departure – was 360 months to life imprisonment?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-2909-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

FELIX DEJESUS,

Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The defendant-appellant Felix DeJesus was a trusted, high ranking member of a massive, violent narcotics trafficking organization that was responsible for the distribution of multi-kilogram quantities of heroin and crack-cocaine primarily in Bridgeport, Connecticut. After a month-long trial, a jury convicted him on April 2, 2002, of drug trafficking charges. Numerous other participants in the conspiracy were also convicted after multiple trials or entry of guilty pleas.

Following his conviction, the defendant was sentenced by the district court to 360 months' imprisonment, the bottom of the applicable sentencing range after a downward departure, and he appealed his sentence to this Court. This Court remanded the matter for proceedings pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). On April 30, 2007, the district court declined to resentence the defendant, and he appealed a second time. This Court remanded the case for resentencing pursuant to *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008), and to consider the defendant's claim that he had been inappropriately sentenced to a term of imprisonment 20 months longer than that imposed on his brother.

On June 26, 2009, the district court presided over a resentencing hearing and reduced defendant's term of incarceration by 60 months, to 300 months' incarceration, which is 60 months below the bottom of the applicable Guidelines range. The defendant has appealed a third time.

In this appeal the defendant argues that his sentence was substantively unreasonable in light of his personal history and characteristics and the statutory purposes for sentencing. The defendant's claims are belied by the record, however, which shows that the district court carefully considered the factors relied upon by the defendant and imposed a reasonable sentence. As described more completely below, the defendant's claims should be rejected, and the sentence imposed by the district court should be affirmed.

Statement of the Case

On June 20, 2001, a federal grand jury in Connecticut returned a Third Superseding Indictment against numerous defendants alleged to be involved in drug trafficking activity primarily in and around Bridgeport, Connecticut, including the defendant-appellant Felix DeJesus. *See* JA16, 40-68.[1] Count Twelve of the Third Superseding Indictment charged the defendant with unlawfully conspiring to possess with intent to distribute 1000 grams or more of heroin, in violation of 21 U.S.C. § 846. Count Thirteen charged him with unlawfully conspiring to possess with intent to distribute 50 grams or more of cocaine base ("crack"), in violation of 21 U.S.C. § 846. JA60-62.

Jury selection for the trial of DeJesus and several co-defendants began on February 7, 2002. JA25. On March 4, 2002, the government began presentation of its trial evidence, JA26, and the trial continued to March 27, when the district court gave final instructions to the jury. JA28, 179. On April 2, 2002, the jury rendered verdicts of guilty

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[1] Hereinafter, all references to the Joint Appendix filed by the defendant are designated "JA." References to the Special Appendix filed by the defendant are designated "SPA." References to the Government's Appendix are designated "GA." References to the PreSentence Report are designated "PSR." References to the appendices are followed by the relevant page number, and references to the PreSentence Report are followed by the relevant paragraph number.

on Counts Twelve and Thirteen against the defendant. JA29, 70-71, 78.

On September 4, 2002, the district court (Stefan R. Underhill, J.) sentenced the defendant to a term of 360 months' imprisonment on each count of conviction, to be served concurrently, to be followed by a term of ten years' supervised release. JA31, 157-58. On appeal, this Court affirmed the convictions, but remanded for proceedings pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). *United States v. Estrada*, 430 F.3d 606 (2d Cir. 2005); *United States v. DeJesus*, 160 Fed. Appx. 15, 2005 WL 3263788 (2d Cir. Nov. 29, 2005).

On April 30, 2007, the district court determined that it would not have sentenced the defendant to a nontrivially different sentence under an advisory Guidelines regime. JA37, 169-70. The defendant filed a timely notice of appeal on May 4, 2007. JA171-72. On July 1, 2008, this Court remanded the case for resentencing pursuant to *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008), and to consider the defendant's assertion that the district court had improperly sentenced him to a term of imprisonment 20 months longer than his brother, Charles. *See United States v. Rosario*, 280 Fed. Appx. 78, 80-81, 2008 WL 2235369 (2d Cir. May 30, 2008).

On June 26, 2009, the district court resentenced the defendant pursuant to this Court's remand order. JA39, 292-316. The district court reduced the defendant's term of imprisonment by five years, imposing a sentence consisting principally of 300 months' incarceration on

each count, to be served concurrently, followed by five years of supervised release. JA314.

Judgment entered on July 6, 2009, JA39, and the defendant filed a timely notice of appeal on that same date. JA39.

The defendant is serving his federal sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. The offense conduct

Frank Estrada, a.k.a. "The Terminator," and his criminal associates began running a violent drug trafficking organization within the city of Bridgeport, Connecticut in the late 1980's. Beginning in or about 1995, upon his release from state prison on a conviction for ordering a fatal shooting, Estrada expanded his narcotics trafficking organization and distributed large, wholesale quantities of heroin and cocaine base throughout Bridgeport, New Haven, and Meriden, Connecticut, for street-level distribution. *See, e.g.*, Tr. 3/14/02 at 231-35; PSR ¶¶ 6-8.

As described below, at the time of both the original sentencing in 2002 and the resentencing proceeding in 2009, the district court was deeply familiar with the facts and circumstances of this large-scale narcotics operation and with the defendant's extensive participation within it. Over the course of several trials, and in numerous plea

colloquies and sentencing proceedings, the court received extensive evidence showing, among other things, the nature and extent of the drug trafficking conspiracy and the roles of its participants.

Estrada, who pleaded guilty to fourteen federal charges related to his drug trafficking organization and entered into a cooperation agreement with the government in January 2002, Tr. 3/15/02 at 174-77, testified that in the early stages of his organization, his "main thing was selling heroin," but that, seven or eight months after his 1995 release from state prison, he merged his organization with Hector Gonzalez's crack cocaine organization in order to maximize profits. Tr. 3/15/02 at 75-78. Defendant Felix "Dino" DeJesus was placed in charge of significant portions of this combined operation at the time of the merger. Tr. 3/15/02 at 78-80. The defendant remained active in the organization from approximately mid-1996 through 1999. PSR ¶¶ 7-8, 23; JA143, 148 (district court finding at sentencing that the defendant's involvement did not continue into 2000).

Operation of the drug trafficking organization depended on numerous "lieutenants" who, in turn, supervised "runners" or street-level dealers. Tr. 3/5/02 at 86-99; 3/15/02 at 97; 3/2/02 at 89; PSR ¶¶ 14-15. The defendant served as one of the important lieutenants in the Estrada-Gonzalez operation. *See, e.g.*, Tr. 3/15/02 at 78-80; 3/7/02 at 77-80; PSR ¶¶ 8-9, 15 ; GA5-7, 11. The lieutenants would obtain narcotics that had been packaged for retail distribution by the organization, which they would distribute to their respective street-level dealers for

retail sale. Tr. 3/5/02 at 86-99; 3/7/02 at 72; 3/21/02 at 81, 89-91, 137. The lieutenants would then be responsible for remitting the proceeds, after payment to the runners and exacting a cut for themselves, to Estrada or another lieutenant who would turn them over to Estrada. Tr. 3/5/02 at 86-99; PSR ¶ 14; GA7-8.

The heroin sold by the Estrada organization was prepared for sale at "bagging sessions." During these sessions, wholesale quantities of uncut heroin obtained by Estrada from New York were cut, ground into powder, spooned into glassine "fold" baggies, taped for sale, and then sometimes stamped with distinct brand names, such as "Judgment Day," "No Fear," "No Way Out," and "Set It Off." *See, e.g.*, Tr. 3/5/02 at 104-15, 123-24; 3/8/02 at 190-205; PSR ¶¶ 9-12; GA11-12, 21-30.

The organization held regular heroin bagging sessions, supervised by high-level conspirators such as the defendant and attended by many other co-conspirators. Tr. 3/5/02 at 104-115; 3/8/02 at 197-99; 3/7/02 at 77-80; PSR ¶¶ 8-12; GA21-32. Estrada arranged these sessions regularly, in various apartments and other locations in Bridgeport, including the defendant's residence, beginning in or about early 1996, and continuing through 1999. Tr. 3/5/02 at 97-101, 110; 3/14/02 at 266-267; PSR ¶ 23. The sessions typically involved groups of ten or more people and were supervised by Estrada, Hector Gonzalez or trusted lieutenants in the organization, including the defendant. Tr. 3/5/02 at 104-09, 113-15; 3/8/02 at 197-98; PSR ¶ 10; GA27, 29-31. Participants in the sessions headed by the defendant included minors, such as Glenda

Jiminez, who was less than eighteen years of age at the time. Tr. 3/8/01 at 193, 197-98; PSR ¶ 12; GA25, 27. Guns, which were routinely carried by members of the organization, were ordinarily present and visible during bagging sessions. *See, e.g.*, Tr. 3/8/02 at 197-98; GA13-16, 26-32. The defendant was one of the lieutenants who carried guns at these sessions. Tr. 3/8/02 at 198-99; GA27, 30-31. After the bagging sessions, highly ranked members of the organization would distribute the packaged drugs to the other lieutenants, as they brought money to pay for their previous supplies. Tr. 3/5/02 at 114-16.

The evidence established that the amount of narcotics and cash handled by the conspiracy was immense. An individual bag of approximately .05 grams of heroin ordinarily sold on the street for $10. The baggies were collected in "bundles" of ten, and ten bundles made up a "brick" or "G pack" of heroin, worth $1,000 for street-level sale. Tr. 3/5/02 at 110-13; PSR ¶¶ 13-14. Approximately 190 to 200 bricks would be produced from a kilogram of heroin at typical bagging sessions, Tr. 3/20/02 at 130; PSR ¶¶ 10, 14-15, 23, which were held one to two times per week. *See, e.g.*, Tr. 3/5/02 at 110; 3/7/02 at 216, 224, 231, 236; 3/20/02 at 127-30, 135, 140.

According to one lieutenant, Jermaine Jenkins, during the course of his participation in the organization in 1997 and 1998, "kilos and kilos and kilos of crack cocaine," "kilos and kilos and kilos of heroin," and "tens of thousands of dollars, hundreds of thousands of dollars," and "more than a million dollars" passed through his hands

alone. GA17-18. Jenkins further testified that he had six to ten dealers working for him at P.T. Barnum – a Bridgeport housing complex controlled by the Estrada organization – and sold up to $200,000-$300,000 of heroin per week. GA10-11.

Testimony from law enforcement witnesses confirmed the very large volume of narcotics packaged by the operation. Bridgeport Police Detective Richard DeRiso testified that as a result of information provided by William Rodriguez on or about March 7, 1997, he obtained a Connecticut Superior Court search and seizure warrant for an apartment at 80 Granfield Avenue in Bridgeport. In that apartment, the police found evidence of a massive "bagging" operation, including boxes containing hundreds of empty glassine envelopes commonly used to package narcotics, handguns, large quantities of crack cocaine and heroin, multiple coffee grinders, small spoons, tape, and other narcotics packaging equipment and materials. Tr. 3/4/02 at 150-74.

The evidence established that the defendant was active in both the heroin and crack cocaine distribution activities of the Estrada narcotics operation. Estrada testified that at the time of the merger of his and Hector Gonzalez' organizations in 1996, the defendant was placed in charge of the entire crack cocaine operation. Tr. 3/15/02 at 75, 78-80. In or about 1997, Jermaine Jenkins was placed in control of the organization's crack distribution activities. Tr. 3/21/02 at 93. However, when Jenkins was unable to sell the crack fast enough, Estrada continued to employ the defendant, along with Isaias Soler, Ricardo Rosario,

Michael Hilliard, and Charles DeJesus, to flood the market with kilograms of cheaper crack-cocaine. Tr. 3/21/02 at 94-95. Jenkins testified that the defendant and Charles DeJesus regularly sold crack-cocaine in P.T. Barnum for the Estrada organization, and Jenkins observed the defendant regularly handing out packages of crack-cocaine for street-level distribution. Tr. 3/21/02 at 95-96, 101; PSR ¶ 15. This testimony was corroborated by another cooperating witness, Hector Cruz, who testified that in the mid-1990's he was purchasing crack cocaine in P.T. Barnum when he observed defendant and Estrada drop the defendant off with packages of crack that the defendant distributed to street sellers. Tr. 3/12/02 at 202-04.

The defendant's close relationship with Estrada was further corroborated by testimony from Special Agent Mark Kelling of the Drug Enforcement Administration in Miami. He testified that he stopped the defendant and Estrada on March 4, 1998, and questioned them because it appeared they were engaged in narcotics trafficking activity. Tr. 3/15/02 at 8-10. As a result of this encounter, DEA agents in Miami recovered over $14,000 from the defendant and Estrada. Tr. 3/15/02 at 17.

The evidence at trial further established that members of the organization, including the defendant, regularly carried firearms during and in relation to the narcotics trafficking activity. Tr. 3/15/02 at 80; PSR ¶ 12. Guns were tools of the trade, used by the defendant and others to protect the drug dealing operation. Estrada testified that the defendant carried a .45 pistol with him in his drug dealing. Tr. 3/15/02 at 80. According to Jose Lugo, when

Estrada suspected that William Rodriguez was responsible for law enforcement's search of the 80 Granfield Avenue stash location, Estrada organized an armed search for Rodriguez. Tr. 3/5/02 at 92-94. Lugo identified the defendant, Hector Gonzalez, Estrada and himself as participants in the hunt, and stated that he clearly saw firearms in the possession of Estrada and the defendant. *Id.*

As noted above, Estrada and other high ranking members of the organization – including the defendant – frequently carried guns in connection with the heroin bagging sessions. *See, e.g.*, Tr. 3/8/02 at 189, 197-202; GA26-32. For example, Viviana Jimenez testified that she attended one heroin bagging session in early 1998 that was supervised by the defendant, Michael Hilliard, and Isaias Soler. Tr. 3/8/02 at 189, 200, 202. Jimenez explained that at one point during the session someone unexpectedly knocked on the door. Not knowing who it was, the defendant, Hilliard, and Soler rushed the door with their guns drawn. The defendant and Hilliard instructed the workers to duck because they were going to shoot if they discovered a stranger at the door. Ultimately, they discovered it was Estrada. Tr. 3/8/02 at 198; GA30-31.

The cooperators' eyewitness accounts of the defendant's use of firearms in connection with his narcotics trafficking activities were corroborated by Bridgeport Police Detective Juan Gonzalez. The detective testified that on February 5, 1997, during the course of arresting the defendant, he recovered a semi-automatic handgun and a quantity of "Set it Off" brand heroin from

the defendant's jacket inside his apartment. Tr. 3/12/02 at 79, 82-84, 86, 119; 3/15/02 at 89-90; PSR ¶ 12.

Indeed, gun violence was a hallmark of the Estrada organization. PSR ¶ 16. The organization was involved in numerous shootings, murders and assaults, although the district court determined that the defendant was not personally involved in these violent activities. PSR ¶¶ 12, 16-21; JA308.

B. Relevant proceedings

1. The original sentencing and related proceedings: The district court departs downward from an advisory Guidelines range of life imprisonment and sentences the defendant to 360 months' incarceration.

The defendant was charged in Count Twelve of the Third Superseding Indictment with conspiring to possess with intent to distribute in excess of 1000 grams of heroin, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846, and in Count Thirteen with conspiring to possess with intent to distribute in excess of 50 grams of crack, also in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846. JA16, 40-68. On April 2, 2002, after a month-long jury trial, the defendant was convicted of both Counts Twelve and Thirteen. JA26-29, 70-71, 78.

On September 4, 2002, the district court conducted the initial sentencing of the defendant. *See* JA31, 157-58. The defendant's Guidelines were calculated at sentencing, as follows:

> Drug Quantity (1,000 grams or more of Heroin and 50 grams or more of cocaine base) (§ 2D1.1(c)(1)). 38
>
> Use of Firearm in Connection with Offense (§ 2D1.1(b)(1)). . . . . +2
>
> Management Role (§ 3B1.1(b)). . . . . +3

Use of Minor (§ 3B1.4). . . . . +2

Total Offense Level. 45

PSR ¶¶ 32-41; *see* JA105-06, 149. Pursuant to Guidelines Chapter 5, Part A, Application Note 2, the total offense level of 45 was automatically adjusted downward to the maximum level of 43. PSR ¶ 41. The Guidelines imprisonment range applicable to the defendant, at level 43, was life in prison. Sentencing Table.

The defendant moved for downward departure on the grounds of extraordinary rehabilitation. JA113. Noting that by the date of his arrest at the end of 2000 the defendant had obtained legitimate employment and left the drug conspiracy, the district court granted a one-level departure. JA147-48. In making this decision, the district court stated that "[w]hat is extraordinary, it seems to me, is that this defendant who was so heavily involved in the biggest drug conspiracy in Bridgeport history probably, that he was someone who acted as a violent individual and that he was at such a high level of this organization, could step back and make a change in his life[.]" JA147. After the one-level departure for extraordinary rehabilitation, which brought the defendant's offense level to 42, the Guidelines range became 360 months to life imprisonment. JA148.

The PSR calculated the defendant's criminal history category as V, based on ten criminal history points for, among other things, four prior misdemeanor assault convictions and a conviction for threatening. PSR ¶¶ 42-

48. The district court adjusted the defendant's criminal history points to eight, however, and further departed downward to category III, on the grounds that the defendant's criminal history overstated the seriousness of his past criminal conduct. JA113, 149, 306-07.

Judge Underhill then imposed a sentence at the low end of the Guidelines range, sentencing the defendant to 360 months' imprisonment on each count, to be served concurrently, and to be followed by a ten-year term of supervised release. JA32, 82, 157. The district court stated: "[W]hat you've done is terribly, terribly wrong. You were involved in one of the worst drug conspiracies the city's ever seen. You were involved at a high level. And clearly . . . you hurt a lot of people by doing it." JA155. In imposing sentence, the district court noted that it had considered, among other things, the § 3553(a) factors, the seriousness of the offense conduct, the need to punish the defendant, the need for incapacitation and deterrence, and the potential for rehabilitation. JA154-57.

On appeal, this Court affirmed the conviction, but remanded for proceedings pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). *United States v. Estrada*, 430 F.3d 606 (2d Cir. 2005); *United States v. DeJesus*, 160 Fed. Appx. 15, 2005 WL 3263788 (2d Cir. Nov. 29, 2005). On remand, in a written ruling dated April 30, 2007, the district court, having considered the parties' briefing, the PSR, and the original sentencing transcript, found that resentencing was unnecessary. JA37, 169-70. The district court relied upon "two principal facts":

> First, at the initial sentencing, I was able to depart from the Sentencing Guidelines incarceration range. This meant that the mandatory nature of the Sentencing Guidelines did not prevent me from imposing the sentence of incarceration that I believed was appropriate, taking into account all of the information I had available to me about DeJesus. Second, having decided to depart, I weighed the factors set forth in 18 U.S.C. § 3553(a) when deciding upon the sentence imposed. The facts I relied upon at the initial sentencing remain pertinent under an advisory Sentencing Guidelines scheme: a long record of prior convictions, a history of violence, a supervisory role in "one of the worst drug conspiracies" Bridgeport has ever seen, the need for punishment commensurate with the seriousness of the crime, and the impact of the crime on the community. At the same time, I was able to consider mitigating factors that formed the basis for the downward departure. These are the same facts that would have led me to impose a sentence not trivially different than 360 months' imprisonment had I been able to sentence DeJesus under an advisory Sentencing Guideline scheme in September 2002.

JA169-70.

The defendant again appealed. JA171-72. On July 1, 2008, this Court remanded the case for resentencing. *See United States v. Rosario*, 280 Fed. Appx. 78, 80-81, 2008 WL 2235369 (2d Cir. May 30, 2008). The remand order,

in pertinent part, invited the district court "to consider [the defendant's] claim that it was inappropriate to sentence him to 20 months more imprisonment than his brother, Charles[.]" *Id.*[2]

2. The 2009 sentencing on remand: The district court further exercises its discretion and imposes a non-Guidelines sentence of 300 months of imprisonment – five years below the previously imposed sentence.

On remand, the district court held a resentencing hearing on June 26, 2009. JA39, 292-316. The district court noted that it had reviewed the PSR, its prior *Crosby* ruling, the transcript from the defendant's 2002 sentencing, and the parties' memoranda, among other things. JA294-95, 310. Judge Underhill noted that he was "familiar, quite familiar, with this case, having presided at three trials in the *Estrada* matter . . . and having presided

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[2] The mandate also ordered the district court, pursuant to *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008), to determine "'whether it would have imposed a non-Guidelines sentence knowing that it had discretion to deviate from the [crack] Guidelines to serve [the objectives of sentencing under 18 U.S.C. § 3553(a)].'" *Rosario*, 280 Fed. Appx. at 80-81 (quoting *Regalado*, 518 F.3d at 149). On remand, the district court concluded that, in light of the substantial volumes of heroin that were involved in the offense conduct, among other things, intervening changes in the law regarding the crack Guidelines were of no moment with respect to the defendant's sentence. JA305. The defendant does not challenge this portion of the district court's decision. *See* Def. Br. 13-15.

at literally dozens of sentencings in connection with the defendants in this case." JA295. With the consent of the defendant, the court re-adopted its prior rulings regarding the PSR, and it affirmed its prior Guidelines calculations. JA293-94, 304-307.

After hearing argument from the parties and a statement from the defendant, the district court principally imposed a sentence of 300 months of imprisonment on Counts Twelve and Thirteen, to run concurrently. This sentence constituted a five-year reduction in the punishment previously meted out, and was 60 months below the bottom of the Guidelines range. JA310, 314. The court also decreased the defendant's term of supervised release from ten years to five years. *Id.* Judge Underhill explained that he was decreasing the defendant's sentence "in light of the comparison to [the sentence of defendant's] brother and coconspirator, Charles [DeJesus]," JA310, who had received a sentence of 340 months. JA309. The district court stated that "all of the things that I said at your original sentencing as well as in the ruling on your *Crosby* remand, those still apply," and the court noted again that "[t]here's simply no way around the seriousness of the offense [and] your top level involvement, at least for a time[.]" JA309.

The district court then confirmed that it had considered all of the factors required by 18 U.S.C. § 3553(a), specifying that it had considered "the need to make sure that your sentence is not greater than necessary to serve the purposes of sentencing[.]" JA309-10. Finally, the court noted that it would have imposed the same sentence "as a

nonguideline sentence," independent of any Guideline calculation. JA311.

Judgment entered on July 6, 2009. JA39. The defendant filed a timely notice of appeal pursuant to Federal Rule of Appellate Procedure 4(b) that same day. JA39.

Summary of Argument

The district court properly exercised its discretion in imposing a sentence of 300 months' imprisonment. Considering the defendant's extended, high-level role in one of the largest and most violent drug conspiracies ever to plague Bridgeport, and given his long record of prior convictions for violent offenses, this sentence – which was five years below the bottom of the Guidelines range, as calculated after a downward departure – constituted appropriate punishment. The district court thoroughly considered all the § 3553(a) factors and, taking all those factors into consideration, imposed a sentence that is reasonable.

ARGUMENT

I. The district court imposed a substantively reasonable sentence.

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

In light of the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), a sentencing judge is required to "(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the calculated Guidelines

range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence." *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006); *Crosby*, 397 F.3d at 113. This Court reviews a sentence for reasonableness. *Rita v. United States*, 551 U.S. 338, 341 (2007); *United States v. Sero*, 520 F.3d 187, 189 (2d Cir. 2008) (per curiam); *Crosby*, 397 F.3d at 114 (finding that review should be for both substantive and procedural reasonableness). Substantive reasonableness, the only issue on appeal here,[3] is contingent upon the length of the sentence in light of the case's facts and the factors outlined in § 3553(a). *United States v. Rattoballi*, 452 F.3d 127, 132 (2d Cir. 2006).

This Court has recognized that "[r]easonableness review does not entail the substitution of [its own] judgment for that of the sentencing judge." *Fernandez*, 443 F.3d at 27. As the Supreme Court has instructed, the "explanation of 'reasonableness' review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions." *Gall v. United States*, 552 U.S. 38, 46 (2007) (citing *Booker*, 543 U.S. at 260-62); *see also Rita*, 551 U.S. at 351 ("appellate 'reasonableness' review merely asks whether the trial court abused its discretion").

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[3] The defendant does not challenge the procedural reasonableness of his sentencing. *See* Def. Br. iv, 9-10, 12-15.

Under this deferential standard, in determining "whether a sentence is reasonable, [the Court] ought to consider whether the sentencing judge 'exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.'" *Fernandez*, 443 F.3d at 27 (quoting *Crosby*, 397 F.3d at 114). Furthermore, in assessing the reasonableness of a particular sentence imposed:

> [a] reviewing court should exhibit restraint, not micromanagement. In addition to their familiarity with the record, including the presentence report, district judges have discussed sentencing with a probation officer and gained an impression of a defendant from the entirety of the proceedings, including the defendant's opportunity for sentencing allocution. The appellate court proceeds only with the record.

United States v. Fairclough, 439 F.3d 76, 79-80 (2d Cir. 2006) (per curiam) (quoting *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005) (alteration omitted)). The substantive unreasonableness standard merely "provide[s] a backstop for those few cases that, although procedurally correct, would nonetheless 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). Moreover, as this Court has explained, "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 Fleming*, 397 F.3d at 100 (explaining that while length of a sentence could make it unreasonable, the Court "anticipate[s] encountering such circumstances infrequently").

C. Discussion

Judge Underhill reasonably sentenced the defendant to a term of 300 months' imprisonment – five years below the bottom of the Guidelines range. The defendant was a key participant for many years in one of "the worst drug conspiracies the city [of Bridgeport has] ever seen." JA155; *see also* Tr. 3/15/02 at 75-78; PSR ¶¶ 7-9, 15, 23; JA143, 148. That conspiracy involved trafficking in immense quantities of both heroin and crack cocaine, *see* PSR ¶¶ 10, 15, 23; JA305, and "[v]iolence was a hallmark of the" organization. PSR ¶ 16. A trusted confidant of the organization's notorious leader, the defendant served as one of the important lieutenants in the massive operation. *See, e.g.*, Tr. 3/15/02 at 8-10, 17, 78-80; 3/7/02 at 77-80. Among other things, he: (1) headed up its extensive crack cocaine packaging and distribution activities for a period of time, *see, e.g.*, Tr. 3/15/02 at 78-80; 3/21/02 at 94-96, 101; 3/12/02 at 202-04; PSR ¶ 15; (2) served as an armed supervisor for the massive bagging sessions in which minors and numerous other participants were used to prepare tremendous volumes of heroin for retail sale, *see, e.g.*, Tr. 3/8/02 at 193-99; 3/5/02 at 91-95; PSR ¶¶ 8-10, 12, 32-41; JA105-06, 149; GA21-32; and (3) regularly carried a firearm in support of his trafficking activities, using a pistol, for example, in the armed hunt for a

suspected law enforcement cooperator, and drawing a gun to confront a suspected intruder during a bagging session. *See, e.g.*, Tr. 3/5/02 at 92-94; 3/8/02 at 198; GA30-31; PSR ¶¶ 32-41. Moreover, the defendant had a history of violence, with a criminal history that included four misdemeanor assault convictions and a conviction for threatening. PSR ¶¶ 43-48.[4] On this record, the district court's decision to sentence the defendant to 300 months in prison was eminently reasonable.

This Court has instructed 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. Similarly, the Supreme Court has stated that "when the judge's discretionary decision accords with the Commission's view of the appropriate application of § 3553(a) . . . it is probable that the sentence is reasonable." *Rita*, 551 U.S. at 351. It is all the more likely, therefore, that a sentence is not unreasonably high where the district court has imposed a sentence well below the Guidelines range. The reasonableness of the sentence here is thus underscored by the fact that defendant's term of incarceration was five years below the bottom of the Guidelines range – especially given that the calculated range was the product of a downward departure for rehabilitation. JA147-49.

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[4] In the exercise of its discretion, the district court reduced the defendant's criminal history category from category V to category III. JA113, 149, 306-07.

The defendant's arguments to the contrary are devoid of merit. In arguing that his sentence is substantively unreasonable, the defendant claims that he should have received a lower sentence in light of certain aspects of his history and character, including that: (1) the defendant was "just twenty-nine years old" at the time of his initial sentencing; (2) his "life up until that point was wrought with difficulty including depression[,] drug addiction," an absent father, a drug-addicted mother, and a childhood in PT Barnum Housing Complex; (3) his criminal history was supposedly mild; (4) he allegedly had not engaged in acts of violence in connection with the offenses of conviction; and (5) he had substantially rehabilitated himself prior to his arrest and conviction. Def. Br. 14. The defendant additionally asserts that his sentence is longer than justified by the purposes of sentencing. Def. Br. 15. Finally, without further elaboration, the defendant asserts that the sentence is substantively unreasonable in light of "the overlapping enhancements impacting DeJesus' Guidelines offense level calculation." Def. Br. 9-10.

These arguments fail. Notwithstanding defendant's claims, the district court fully considered all of the § 3553(a) factors, appropriately balanced the factors favoring a long sentence against the arguments urged by defendant, and imposed a reasonable sentence in an appropriate exercise of its discretion.

First, the defendant's assertion regarding the allegedly overlapping Guidelines enhancements has been waived, insofar as he offers no support or explanation. As this Court has instructed, "It is a 'settled appellate rule that

issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived.'" *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)); *see also Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal"). Moreover, at the resentencing in June 2009, the defendant expressly disclaimed before the district court any argument regarding the Guidelines calculation. JA293, 304-07.

In any event, such a claim would fail on the merits. The enhancements applied to the defendant here – for drug quantity, U.S.S.G. § 2D1.1(c)(1); use of a firearm, U.S.S.G. § 2D1.1(b)(1); use of a minor, U.S.S.G. § 3B1.4; and supervisory role, U.S.S.G. § 3B1.1(b) – are all based on independent criteria, with entirely independent rationales. For example, even the two enhancements that seem, superficially, to come closest to involving the same conduct, the enhancements for leadership and for drug quantity, actually involve fundamentally different considerations. The defendant's drug quantity determination was based primarily upon the massive amount of drugs distributed by the conspiracy, the length of his participation in the organization, and the types of transactions that he engaged in (for instance, his activity in sales and distribution), rather than just his supervisory role. *See* PSR ¶¶ 8-12, 23, 33. Similarly, the defendant's three-level role enhancement for being a supervisor was triggered not by the attributable drug quantity, but by the defendant's actions as a trusted, high-ranking member of

the organization. The defendant was one of Estrada's closest lieutenants, who even joined him in the armed hunt for William Rodriguez, Tr. 03/05/02, at 92-95, and traveled to Miami with Estrada carrying large quantities of U.S. currency, Tr. 03/15/02 at 8-10, 17. The defendant made sure that drugs were passed out to the street-level dealers and that money was collected on a regular basis, Tr. 03/21/02 at 95-96, 101; PSR ¶¶ 14-15, and he served as an armed supervisor at the bagging sessions. *See, e.g.*, PSR ¶¶ 9, 12; GA21-32. This conduct warrants enhancement separate and apart from the quantity of drugs involved in defendant's crime. As this Court has pointed out, each of these enhancements is properly factored into the Guidelines analysis in a case such as this, because the "enhancement for [leadership role] should result in a larger increment of punishment for a defendant who is the leader of an organization selling large quantities of narcotics than for a defendant who is the leader of an organization selling small quantities of narcotics." *United States v. Lauersen*, 362 F.3d 160, 163 n.6 (2d Cir. 2004), *rev'd on other grounds*, 543 U.S. 1097 (2005).

Thus, the advisory Guidelines range was not improperly increased by any overlapping enhancements, and there was no improper double counting in the Guidelines calculation. There is no basis, therefore, for any suggestion that the defendant's sentence was rendered unreasonably high in this regard. Moreover, any such claim would be unsustainable because the district court made clear that it would have imposed the same sentence irrespective of the Guidelines range. JA311.

Second, the defendant's claim that he deserved a lower sentence on account of certain aspects of his history and character is also unavailing. The record shows that Judge Underhill gave specific consideration to virtually all of the enumerated matters raised here by the defendant. In resentencing the defendant, the court incorporated its comments at the "original sentencing as well as in the ruling on [the defendant's] *Crosby* remand." JA309. At the original sentencing the court explicitly addressed the defendant's self-rehabilitation, finding that it was "extraordinary . . . that this defendant[,] who was so heavily involved in the biggest drug conspiracy in Bridgeport history probably . . . someone who acted as a violent individual . . . at such a high level of this organization, could step back and make a change in his life," JA147, and the court expressly factored that consideration into its sentencing decision, awarding a downward departure on that basis. JA147-48. In this same vein, the district court paid careful attention to the defendant's criminal history, departing downward on the grounds that the defendant's category overstated the seriousness of his past criminal conduct. JA113, 149; *see also* JA307. The court similarly considered the defendant's age; indeed, at the original sentencing the district court noted that the defendant's original term of imprisonment was longer than he had been alive. JA159. Moreover, the considerations regarding the defendant's difficult childhood were addressed in the PSR, ¶¶ 24, 51-54, which the district court indicated it had considered at both the original sentencing and at the resentencing. JA84, 294, 310. Finally, at resentencing, the district court determined that, with respect to violence, while the

defendant carried guns, in the court's view the defendant had not engaged in violence in connection with the conspiracy. JA308. Having given these factors due consideration, the district court had the authority to determine how to weigh each in setting the ultimate sentence. *See, e.g., Fernandez*, 443 F.3d at 32.

Third, the defendant's claim that his sentence should have been shorter in light of the purposes of sentencing fails for essentially the same reasons. The defendant claims specifically that the goal of incapacitation was rendered irrelevant by his supposed rehabilitation, and that the goal of deterrence could theoretically have been satisfied by a lower sentence, given that his longest prior sentence was approximately one year of imprisonment. He asserts, therefore, that the sentence imposed on him was unnecessarily high. Def. Br. 15. Once again, however, the record shows that the district court carefully considered these matters, explicitly addressing the purposes of sentencing, including the goals of incapacitation and deterrence. JA156. The court expressed the "hope" that incapacitation was not necessary, and Judge Underhill made clear that deterring the defendant (whose record establishes that he had not learned from his previous convictions to conduct himself in accordance with the law) constituted an important consideration in his sentencing decision. Moreover, the court emphasized that other purposes of sentencing were also "very important" to its decision, including the goal of deterring "others like [the defendant] who might be tempted to do what [the defendant] did, [and] to make the mistakes [the defendant] made," and the goal of imposing just punishment for

defendant's very serious offense. JA155-56. Once again, having given these factors due consideration, the district court had the authority to determine the weight that would be given to each in the determination of the final sentence. *See, e.g., Fernandez*, 443 F.3d at 32.[5]

At bottom, the defendant's claim in this appeal is simply that the district court did not give adequate weight to the sentencing factors favorable to him. This position, of course, cannot succeed given the law and the facts at

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[5] Furthermore, and notwithstanding the court's thorough treatment of all the issues raised by defendant, it is well established that a district court is not required to "'*precisely identify* either the factors set forth in § 3553(a) or specific arguments bearing on the implementation of those factors in order to comply with [its] duty to consider all the § 3553(a) factors along with the Guidelines applicable range.'" *United States v. Carter*, 489 F.3d 528, 541 (2d Cir. 2007) (quoting *Fernandez*, 443 F.3d at 29 (emphasis in original)); *see also United States v. Pereira*, 465 F.3d 515, 523 (2d Cir. 2006) (finding that the district judge need not explain consideration of § 3553(a) factors). Further, this Court "will not assume a failure of consideration simply because a district court fails to enumerate or discuss each § 3553(a) factor individually." *United States v. Verkhoglyad*, 516 F.3d 122, 131 (2d Cir. 2008) (citing *Fernandez*, 443 F.3d at 30). Indeed, in the absence of record evidence to the contrary, this Court *presumes* that the sentencing judge has fulfilled his duty to consider all of the statutory sentencing factors. *Pereira*, 465 F.3d at 523. There is no such contrary evidence in the record here; all indications are that the district court carefully considered all the factors required by 18 U.S.C. § 3553(a). *See, e.g.*, JA309-310 (court notes its consideration of all the statutory factors).

bar. As this Court has repeatedly held, the weight to be given any particular factor in the § 3553(a) analysis is a matter firmly committed to the sound discretion of the district judge, *see, e.g., Fernandez*, 443 F.3d at 32, and this Court 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." *Id.* at 34. While the district court gave significant weight to the factors beneficial to the defendant – departing downward one offense level and one criminal history category, and then imposing a term of imprisonment substantially below the post-departure Guidelines range – the sentencing judge properly exercised his discretion to give due weight to other factors favoring a lengthy term of incarceration. As the district court explained, "[t]here's simply no way around the seriousness of the offense [and the defendant's] top level involvement[.]" JA309. *See also* JA155 (district court explaining sentence at original sentencing, "[W]hat you've done is terribly, terribly wrong. You were involved in one of the worst drug conspiracies the city's ever seen. You were involved at a high level. And clearly . . . you hurt a lot of people by doing it[.]"); and JA170 (district court, in ruling on *Crosby* remand, noting its reliance on "a long record of prior convictions, a history of violence, a supervisory role in 'one of the worst drug conspiracies' Bridgeport has ever seen, the need for punishment commensurate with the seriousness of the crime, and the impact of the crime on the community").

In sum, the record demonstrates that Judge Underhill, who conducted several trials involving the Estrada organization and who presided over dozens of sentencings

in this and related prosecutions, fully considered all the relevant sentencing factors in this case. The record further shows that the below-Guidelines sentence that he imposed on the defendant – a high ranking, closely trusted and armed member of one of Bridgeport's worst drug trafficking operations – was substantively reasonable. The court carefully balanced the seriousness of the offense, the defendant's role in the conspiracy, the impact of the crime on the community and the need for deterrence against the defendant's arguments for leniency in arriving at a sentence five years below the advisory Guidelines range. As in *United States v. Kane*, "[t]he Judge considered the relevant sentencing factors in careful and reasoned fashion, premised his conclusions on a sound view of the facts, and understood the applicable legal principles. . . . [The defendant] asks [this Court] to substitute [its] judgment for that of the District Court, which, of course, [this Court] cannot do." 452 F.3d 140, 145 (2d Cir. 2006).

CONCLUSION

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

Dated: June 10, 2010

Respectfully submitted,

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

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,410 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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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.

* * *