

08-3488-cr(L)

To Be Argued By:
ALINA P. REYNOLDS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 08-3488-cr (L)
09-0220-cr (CON), 09-0316-cr (CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

LEONIDAS DEJESUS PEREZ-DOMINGUEZ, also known
as Loca, EDGAR NIEVES, also known as K, JORGE
MORALES, also known as G, also known as Fat Georgie,
Defendants-Appellants.

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

BRIEF FOR THE UNITED STATES OF AMERICA

DAVID B. FEIN
*United States Attorney
District of Connecticut*

ALINA P. REYNOLDS
HAROLD H. CHEN
SANDRA S. GLOVER
Assistant United States Attorneys

TABLE OF CONTENTS

Table of Authorities.....	vi
Statement of Jurisdiction.....	xiii
Statement of Issues Presented for Review.....	xiv
Claims of Leonidas DeJesus Perez-Dominguez.	xiv
Claims of Jorge Morales.	xiv
Preliminary Statement.	1
Statement of the Case.....	2
Statement of Facts and Proceedings	
Relevant to this Appeal.	4
A. The offense conduct.....	4
1. Perez-Dominguez’s role as heroin supplier for the Sanchez drug-trafficking organization.....	4
2. Morales’s duties as a lieutenant for the Sanchez drug-trafficking organization.	6
B. Perez-Dominguez’ guilty plea and sentencing. .	8
C. Morales’s guilty plea and sentencing.	8
Summary of Argument.....	9

Claims of Leonidas Perez-Dominguez.....	9
Claims of Jorge Morales.....	10
Argument.....	13
Claims of Leonidas Perez-Dominguez.....	13
I. Perez-Dominguez’s sentence reasonable.....	13
A. Relevant facts.....	13
B. Governing law and standard of review.....	17
C. Discussion.....	21
1. The defendant waived any challenge to the facts relied upon by the district court, and his arguments are meritless in any event.	21
2. Perez-Dominguez’s sentence was reasonable because the district court properly considered the § 3553(a) sentencing factors and imposed a substantively reasonable Guidelines sentence.....	25
Claims of Jorge Morales.....	29

II. The deficiency in the government’s second-offender information under 21 U.S.C. § 851 was harmless because Morales received a non-Guideline sentence 8 years greater than the 20-year mandatory-minimum sentence.	29
A. Relevant facts.	30
B. Governing law and standard of review.	31
1. 21 U.S.C. §§ 841(b)(1)(A) and 851, and the analysis of potential predicate offenses.	31
2. Conn. Gen. Stat. § 21a-277(a).	34
3. Harmless error.	34
C. Discussion.	35
III. Morales waived any challenge to the drug quantity attributable to him by stipulating to a drug quantity, and relatedly, any error by the district court in failing to make express findings that quantity was not plain error.	39
A. Relevant facts.	39
B. Governing law and standard of review.	41
C. Discussion.	41

IV. The district court’s refusal to depart downward is not reviewable, and the district court’s alleged failure to rule on departure requests was not plain error.....	45
A. Relevant facts.	45
B. Governing law and standard of review.....	48
C. Discussion.....	49
1. The district court’s refusal to depart downward is not reviewable on appeal. . . .	49
2. To the extent Morales challenges the district court’s failure to expressly rule on his departure requests, there was no plain error.	50
V. The district court’s imposition of a non-Guidelines term of imprisonment of 336 months, which was less than the advisory Guidelines range, did not violate the Eighth Amendment.....	54
A. Relevant facts.	54
B. Governing law and standard of review.....	54
C. Discussion.....	56

Conclusion..... 60

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

Addendum

TABLE OF AUTHORITIES

CASES

PURSUANT TO “BLUE BOOK” RULE 10.7, THE GOVERNMENT’S CITATION OF CASES DOES NOT INCLUDE “CERTIORARI DENIED” DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

<i>Barber v. Thomas</i> , ___ S. Ct. ___, 2010 WL 2243706 (June 7, 2010).....	29
<i>Ewing v. California</i> , 538 U.S. 11 (2003).....	56
<i>Graham v. Florida</i> , ___ S. Ct. ___, 2010 WL 1946731 (May 17, 2010).....	55, 57
<i>Harmelin v. Michigan</i> , 501 U.S. 957 (1991).....	54, 55, 56
<i>Hutto v. Davis</i> , 454 U.S. 370 (1982).....	55
<i>Johnson v. United States</i> , 520 U.S. 461 (1997).....	20
<i>North Carolina v. Alford</i> , 400 U.S. 25 (1970).....	33, 35, 36
<i>Rita v. United States</i> , 551 U.S. 338 (2007).....	17, 18, 19

<i>Rummel v. Estelle</i> , 445 U.S. 263 (1980).....	55, 56
<i>Taylor v. United States</i> , 495 U.S. 575 (1990).....	32
<i>United States v. Aiello</i> , 864 F.2d 257 (2d Cir. 1988).....	57
<i>United States v. Banks</i> , 464 F.3d 184 (2d Cir. 2006).....	19
<i>United States v. Booker</i> , 543 U.S. 220 (2005).....	17
<i>United States v. Canova</i> , 412 F.3d 331 (2d Cir. 2005).....	18
<i>United States v. Carter</i> , 489 F.3d 528 (2d Cir. 2007).....	19
<i>United States v. Cavera</i> , 550 F.3d 180 (2d Cir. 2008), <i>cert. denied</i> , 129 S. Ct. 2735 (2009).....	17, 18, 35, 36
<i>United States v. Chalarca</i> , 95 F.3d 239 (2d Cir. 1996).....	43
<i>United States v. Cotton</i> , 535 U.S. 625 (2002).....	20

<i>United States v. Crosby</i> , 397 F.3d 103 (2d Cir. 2005).....	17, 19
<i>United States v. Deandrade</i> , 600 F.3d 115 (2d Cir.), <i>cert. denied</i> , ___ S. Ct. ___, 2010 WL 1186308 (Apr. 26, 2010).....	37, 38
<i>United States v. Feliciano</i> , 223 F.3d 102 (2d Cir. 2000).....	54, 56
<i>United States v. Fernandez</i> , 443 F.3d 19 (2d Cir. 2006).....	17, 18, 19, 25, 28
<i>United States v. Flaharty</i> , 295 F.3d 182 (2d Cir. 2002).....	56
<i>United States v. Fleming</i> , 397 F.3d 95 (2d Cir. 2005).....	19, 27, 28
<i>United States v. Frady</i> , 456 U.S. 152 (1982).....	23
<i>United States v. Garcia</i> , 926 F.2d 125 (2d Cir. 1991).....	52, 53
<i>United States v. Gonzalez</i> , 281 F.3d 38 (2d Cir. 2002).....	49
<i>United States v. Gonzalez</i> , 922 F.2d 1044 (2d Cir. 1991).....	55

<i>United States v. Gonzalez</i> , 970 F.2d 1095 (2d Cir. 1992).....	52, 53
<i>United States v. Granik</i> , 386 F.3d 404 (2d Cir. 2004).....	43
<i>United States v. Hargrett</i> , 156 F.3d 447 (2d Cir. 1998).....	49
<i>United States v. Ibarra</i> , 737 F.2d 825 (9th Cir. 1984).....	21
<i>United States v. Jackson</i> , 59 F.3d 1421 (2d Cir. 1995) (per curiam).	57
<i>United States v. Jackson</i> , 301 F.3d 59 (2d Cir. 2002).....	32
<i>United States v. Jass</i> , 569 F.3d 47 (2d Cir. 2009).....	22, 35, 36, 41
<i>United States v. Jimenez-Villasenor</i> , 270 F.3d 554 (8th Cir. 2001).....	21
<i>United States v. Kang</i> , 225 F.3d 260 (2d Cir. 2000).....	42
<i>United States v. Lanni</i> , 970 F.2d 1092 (2d Cir. 1992).....	42
<i>United States v. Lopez</i> , 938 F.2d 1293 (D.C. Cir. 1991).....	50

<i>United States v. Nelson</i> , 277 F.3d 164 (2d Cir. 2002).....	41
<i>United States v. Olano</i> , 507 U.S. 725 (1993).....	20, 41
<i>United States v. Perrone</i> , 936 F.2d 1403 (2d Cir.), <i>clarified on other grounds</i> , 949 F.2d 36 (2d Cir. 1991).....	42
<i>United States v. Quinones</i> , 511 F.3d 289 (2d Cir. 2007).....	41
<i>United States v. Rizzo</i> , 349 F.3d 94 (2d Cir. 2003), <i>cert. denied</i> , 130 S. Ct. 1149 and ___ S. Ct. ___, 2010 WL 979033 (Apr. 19, 2010).....	22, 41
<i>United States v. Safirstein</i> , 827 F.2d 1380 (9th Cir. 1987).....	21
<i>United States v. Savage</i> , 542 F.3d 959 (2d Cir. 2008).....	29, 32, 33, 36
<i>United States v. Shepard</i> , 544 U.S. 13 (2005).....	32, 33, , 35, 36
<i>United States v. Snow</i> , 462 F.3d 55 (2d Cir. 2006).....	43

<i>United States v. Stinson</i> , 465 F.3d 113 (2d Cir. 2006) (per curiam). . . .	49, 50
<i>United States v. Torres</i> , 941 F.2d 124 (2d Cir. 1991)..	57
<i>United States v. Valdez</i> , 426 F.3d 178 (2d Cir. 2005)..	49
<i>United States v. Villafuerte</i> , 502 F.3d 204 (2d Cir. 2007)..	20, 23
<i>United States v. Wellington</i> , 417 F.3d 284 (2d Cir. 2005)..	41
<i>United States v. Yu-Leung</i> , 51 F.3d 1116 (2d Cir. 1995)..	41
<i>Williams v. United States</i> , 503 U.S. 193 (1992)..	38

STATUTES

18 U.S.C. § 922.	3
18 U.S.C. § 3231.	xiv
18 U.S.C. § 3553.	passim
18 U.S.C. § 3742.	xiv
21 U.S.C. § 802.	32, 33, 35

21 U.S.C. § 841.	<i>passim</i>
21 U.S.C. § 846.	2, 3, 31, 57
21 U.S.C. § 848.	3
21 U.S.C. § 851.	<i>passim</i>
50 Fed. Reg. 43698 (Oct. 29, 1985)..	34
51 Fed. Reg. 43025 (Nov. 28, 1986).	34
Conn. Gen. Stat. § 21a-277(a).	34, 35

RULES

Fed. R. App. P. 4.	xiii
Fed. R. Crim. P. 52.	20, 41, 49

GUIDELINES

U.S.S.G. § 2D1.1.	39
U.S.S.G. § 2L1.1.	43
U.S.S.G. § 5K1.1.	52

Statement of Jurisdiction

The district court (Alan H. Nevas, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231.

Defendant Leonidas DeJesus Perez-Dominguez was sentenced on March 25, 2008, following a guilty plea to Count One of the superseding indictment in this case. PAX.¹ Judgment entered on March 26, 2008, and the defendant filed a timely notice of appeal on April 3, 2008. PAXi, 53.

Defendant Morales was sentenced on January 14, 2009, following a guilty plea to Count One of the superseding indictment. GA23. Judgment entered on January 22, 2009. GA24. On January 16, 2009, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). GA23, MA321.

This Court has appellate jurisdiction over the defendants' sentencing appeals pursuant to 18 U.S.C. § 3742(a).

¹ The Appendix for Perez-Dominguez is cited as "PA." Morales filed an appendix and two supplemental appendices, with sequential numbering continuing through all three volumes. His appendix is thus cited simply as "MA." The Government Appendix is cited as "GA."

**Statement of Issues
Presented for Review**

Claims of Leonidas DeJesus Perez-Dominguez

- I. Whether Perez-Dominguez's sentence was substantively and procedurally reasonable when the district court (a) relied upon undisputed facts in the Pre-Sentence Report at sentencing, and (b) considered the sentencing factors in 18 U.S.C. § 3553(a), and imposed a sentence at the bottom of the stipulated Guidelines range.

Claims of Jorge Morales

- II. Whether any error from a deficient second-offender information under 21 U.S.C. § 851 was harmless when the record shows that the information had no impact on the sentence because the district court sentenced the defendant 8 years above the mandatory minimum that would have applied but for the error.
- III. Whether the district court committed plain error in failing to make explicit findings as to drug quantity when the defendant stipulated to a drug quantity amount and then failed to object when the PSR attributed that same amount to him.
- IV. Whether the district court's refusal to depart downward is reviewable, and whether the district court's alleged failure to rule on certain downward departure requests was plain error.

- V. Whether this Court should review Morales's Eighth Amendment challenge to his sentence when he failed to raise it below and where his sentence of 336 months of imprisonment was not grossly disproportionate to his offense in any event.

United States Court of Appeals

FOR THE SECOND CIRCUIT

**Docket Nos. 08-3488-cr (L)
09-0220-cr (CON), 09-0316-cr (CON)**

UNITED STATES OF AMERICA,
Appellee,

-vs-

LEONIDAS DEJESUS PEREZ-DOMINGUEZ, also known
as Loca, EDGAR NIEVES, also known as K, JORGE
MORALES, also known as G, also known as Fat Georgie,
Defendants-Appellants.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Edwin Sanchez led a narcotics-trafficking organization that was responsible for the distribution of multi-kilogram quantities of heroin in Bridgeport, Connecticut. Defendant Leonidas DeJesus Perez-Dominguez supplied heroin to the Sanchez organization, and defendant Jorge Morales was a high-ranking and trusted lieutenant in the organization

who oversaw, among other things, the processing and packaging of Sanchez-brand heroin, and its day-to-day operations. Pursuant to written plea agreements, both defendants pleaded guilty to conspiring to possess with intent to distribute in excess of 1,000 grams of heroin, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846. The district court sentenced Perez-Dominguez to 168 months' imprisonment, the bottom of his Guidelines range, and sentenced Morales to a non-Guideline sentence of 336 months' imprisonment, 24 months below his stipulated range.

On appeal, Perez-Dominguez claims that his sentence was unreasonable because the district court relied on unreliable information at sentencing and failed to properly consider the sentencing factors at 18 U.S.C. § 3553(a). For his part, Morales claims that the "section 851" notice filed by the government to enhance his sentence was deficient, that the court erred in calculating the drug quantity attributable to him, that the court failed to grant him various downward departures, and that his sentence violated the Eighth Amendment.

For the reasons set forth below, the defendants' claims should be rejected, and the judgments should be affirmed.

Statement of the Case

On October 5, 2006, a federal grand jury returned an indictment charging Perez-Dominguez, Morales, and 16 other individuals with conspiracy to possess with intent to distribute 1,000 grams or more of heroin, in violation of 21

U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. GA5, 26-33. On December 7, 2006, the grand jury returned a superseding indictment against the same defendants. GA7, 34-45. Both Perez-Dominguez and Morales were charged in the same heroin conspiracy charge. GA34-38 (Count One). In addition, the superseding indictment charged Morales with possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1), and with engaging in a Continuing Criminal Enterprise, in violation of 21 U.S.C. § 848(c). GA39-40 (Counts Three and Five).

On January 2, 2008, Perez-Dominguez pleaded guilty to Count One of the superseding indictment. GA10. On March 25, 2008, the district court (Alan H. Nevas, D.J.) sentenced Perez-Dominguez to 168 months' imprisonment. GA10. Judgment entered March 26, 2008, and the defendant filed a timely notice of appeal on April 3, 2008. GA10-11, PA53.

On January 7, 2008, Jorge Morales pleaded guilty to Count One of the superseding indictment. GA19. On January 14, 2009, the court sentenced Morales to 336 months' imprisonment. GA23. Judgment entered January 22, 2009, and the defendant filed a timely notice of appeal on January 16, 2009. GA23-24.

Both defendants are serving their sentences.

**Statement of Facts and
Proceedings Relevant to this Appeal**

A. The offense conduct

Sanchez and his associates operated a narcotics-trafficking organization responsible for the distribution of large, wholesale quantities of heroin throughout Bridgeport. From 2000 through 2006, Perez-Dominguez supplied large quantities of raw, unprocessed heroin to Sanchez and his organization. Morales, who was one of Sanchez's high-ranking and most trusted lieutenants, supervised the heroin processing and packaging sessions, the deliveries of Sanchez-brand heroin to customers, and the collection of drug proceeds.

**1. Perez-Dominguez's role as heroin supplier for
the Sanchez drug-trafficking organization**

Perez-Dominguez had a long-standing relationship with Sanchez. He began supplying heroin to Sanchez and his associates as early as 2000. PA29. From 2004 to 2006, Perez-Dominguez and Sanchez increased their business dealings, so that Perez-Dominguez became one of Sanchez's primary heroin suppliers and was responsible for the distribution of at least 30 kilograms of heroin over the course of his drug-trafficking relationship with Sanchez. Perez-Dominguez PSR ¶ 37.

Cooperating witnesses identified Perez-Dominguez as one of Sanchez's main sources of supply. For example, according to Marco Tacco, who pled guilty to the heroin

conspiracy, Perez-Dominguez regularly transported kilogram quantities of unprocessed heroin from New York to Connecticut, often times secreted inside computer hard drives, coffee makers, or other appliances to avoid detection by law enforcement. PA30. Perez-Dominguez delivered approximately 500 grams of raw heroin every two to three weeks to Sanchez and his associates, who then processed and packaged the heroin for street-level distribution. *Id.*

On several occasions, Tacco met with Perez-Dominguez to pick up heroin and to deliver large amounts of cash as payment. Tacco recalled four specific instances during the summer of 2006 in which he delivered cash payments to Perez-Dominguez in exchange for heroin. PA32-33.

Cooperating co-defendant Antonio Pesante corroborated Tacco's information. Pesante stated that, in 2005, he met with Perez-Dominguez on several occasions, both in New York and in Bridgeport, to pick up heroin for the Sanchez organization. PA33-34. Pesante further indicated that Perez-Dominguez would deliver between 500-600 grams of heroin hidden inside small appliances. The heroin that Pesante obtained from Perez-Dominguez was hidden in bread-maker machines. *Id.*

In addition, numerous drug-related conversations between Perez-Dominguez and Sanchez were intercepted during the wiretap phase of the case. Both men used coded language during the conversations. Physical surveillance conducted in conjunction with the intercepted calls

confirmed that Perez-Dominguez met with Sanchez to carry out the transactions discussed during the calls. PSR ¶ 36, PA33.

Perez-Dominguez also installed “traps” or stash boxes (hidden compartments for drugs, money, guns or other contraband) into the cars of several Sanchez organization members. Pesante paid Perez-Dominguez \$3,500 to have a stash box installed in his vehicle. PA37-39.

Finally, on November 14, 2006, the day before the arrests were made in this case, Perez-Dominguez delivered approximately 1 kilogram of heroin secreted inside a computer monitor to the Sanchez organization. PA31. On November 15, 2006, law enforcement seized the monitor and found inside pre-packaged Sanchez-brand heroin worth more than \$85,000. PA31.

2. Morales’s duties as a lieutenant for the Sanchez drug-trafficking organization

Sanchez employed a number of lieutenants in his organization, including Morales, Tacco, Pesante, Edgar Nieves, and Michael Pesante. The lieutenants were responsible for, among other things, delivering the Sanchez-brand heroin to the organization’s customers, including the leaders of street-level narcotics-distribution organizations. Morales PSR ¶ 10.

Morales was one of Sanchez’s highest ranking lieutenants who, along with co-defendant Nieves and Sanchez himself, was responsible for the supervision of

heroin packaging sessions during which workers prepared and packaged the heroin for street-level distribution. Morales PSR ¶ 8. Morales supervised the workers at these sessions, which often times lasted for twelve hours. PSR ¶ 8.

The heroin was processed and packaged into small, glassine folds and plastic bags that were stamped with brand names unique to the Sanchez organization such as “Son of Sam” and “Evil Empire.” Morales PSR ¶¶ 19, 29. Morales and the other lieutenants possessed firearms while they supervised the heroin-packaging sessions. PSR ¶ 19.

The Sanchez organization had numerous customers. Morales and Nieves were primarily responsible for supplying the customers with the Sanchez-brand packaged heroin. PSR ¶ 21. For example, Morales and Nieves supplied co-defendant Victor Colon. During the course of the investigation, numerous intercepted conversations revealed Morales and Colon discussing the purchase and sale of heroin using coded language. PSR ¶ 21.

At the direction and under the supervision of law enforcement, several cooperating witnesses made controlled purchases of heroin from members of the Sanchez organization, including from Morales and Nieves. Several of these controlled purchases involved Morales. Morales PSR ¶¶ 22-29. By 2004, the Sanchez organization was already responsible for the distribution of approximately 1.5 kilograms of heroin per week in Bridgeport. Morales PSR ¶ 21.

On November 15, 2006, Morales was arrested at his home in Stratford, Connecticut. A search warrant was executed at the residence. Agents and officers recovered a 9mm Keltec firearm from Morales's bedroom, and a duffel bag which contained digital scales, small baggies used for packaging heroin, stamps, and other drug packaging materials used at the heroin packaging sessions. Morales PSR ¶ 19, MA184.

B. Perez-Dominguez's guilty plea and sentencing

On January 2, 2008, Perez-Dominguez pleaded guilty to conspiracy to possess with intent to distribute 1000 grams or more of heroin. GA10. On March 25, 2008, the district court sentenced him to 168 months' imprisonment.

C. Morales's guilty plea and sentencing

On January 7, 2008, Morales pleaded guilty to conspiracy to possess with intent to distribute 1,000 grams or more of heroin. MA161. Prior to the guilty plea, the government filed a second-offender information, pursuant to 21 U.S.C. §§ 851 and 841(b)(1)(A), giving notice to Morales that the government would rely on his prior felony drug conviction to increase his mandatory minimum sentence from 10 years to 20 years. At Morales's sentencing on January 14, 2009, the district court sentenced him to 336 months' imprisonment.

Summary of Argument

Claims of Leonidas Perez-Dominguez

I. Perez-Dominguez's sentence was reasonable. He claims (a) that the district court made certain factual findings that were not supported by reliable evidence, and (b) that the court failed to consider certain 18 U.S.C. § 3553(a) sentencing factors. These claims are not supported by the factual record.

First, the defendant waived any challenge to the facts relating to an incident in 1999 by failing to object to those facts in the PSR. But even if this Court were to consider his arguments they would fail plain error review. The facts as reported in the PSR were based on police records, and the defendant provides no reason to doubt the reliability of those records. Although he contends that the court relied on information that came from unreliable cooperating witnesses, even if the record could be read to support that contention, he cannot show that such reliance was plain error. At a minimum, the defendant cannot show that any reliance on these facts affected his substantial rights. The defendant's sentence was driven by his long-term role in a substantial drug conspiracy, not by the district court's consideration of one incident in 1999.

Second, the record reflects that the district court properly considered the sentencing factors of 18 U.S.C. § 3553(a) when imposing sentence. The PSR and the defendant's written and oral sentencing submissions raised numerous issues about the defendant for the court to

consider at sentencing, and the court expressly considered many of them. Because there is no record evidence suggesting that the court misunderstood its authority or the relevance of any factor, the district court is presumed to have fulfilled its duty to fully consider all of the § 3553(a) factors.

Moreover, the resulting sentence – at the bottom of the applicable Guidelines range – was substantively reasonable. The defendant supplied multi-kilogram quantities of heroin to the Sanchez narcotics organization, over many years, which they in turn distributed throughout Bridgeport. The district court properly concluded that this offense conduct warranted a significant, albeit a Guidelines sentence.

Claims of Jorge Morales

II. The government agrees that the second-offender information it filed to enhance the defendant's sentence under 21 U.S.C. §§ 841 and 851 was invalid. Nevertheless, any error flowing from this deficiency was harmless because the district court's sentence of 28 years of imprisonment approximated the low end of the 360 month to life Guideline range, and substantially exceeded the 20-year mandatory sentence pursuant to 21 U.S.C. § 841(b)(1)(A). In other words, the record shows that the district court would have imposed the same sentence regardless of the error. Consequently, because the error was harmless, there is no need to remand Morales's case for resentencing.

III. Morales waived any challenge to the drug quantity finding by stipulating to the drug quantity in his plea agreement and by failing to object to that same drug quantity in the PSR. And to the extent Morales argues that the district court erred by failing to make an explicit finding on the quantity of drugs attributable to him, any such failure was not plain error. It is far from clear that the district court was required to make explicit findings when the defendant had already stipulated to the drug quantity. Moreover, when the defendant had already stipulated to a drug quantity, the district court's failure to "find" that fact can hardly be said to have affected the defendant's substantial rights. And finally, it would not undermine the integrity of the judicial system to hold the defendant to his stipulation on drug quantity in this case.

IV. The district court's refusal to depart downward based on certain of the defendant's requests for downward departures is not reviewable on appeal in the absence of some reason to believe the district court misapprehended its sentencing authority. There is no reason to believe that happened here, so this Court should not review the defendant's challenges to the denial of his departure motions.

To the extent the defendant argues that the court erred by failing to expressly rule on his departure requests, there was no plain error. The district court's decision implicitly rejected the defendant's request for a departure based on his tumultuous childhood, and thus there is no basis for believing that the absence of an explicit ruling affected Morales's substantial rights. Similarly, because the

defendant did not meet the established criteria for a “logjam” departure, any failure to explicitly deny that request did not affect his substantial rights.

V. This Court should reject Morales’s Eighth Amendment challenge to his sentence. He waived this constitutional claim by failing to raise it below, and thus this Court should not consider it now. In any event, his Eighth Amendment claim is meritless. Morales’s sentence – which was 2 years below the stipulated Guidelines range – was not grossly disproportionate to his crime. He was a high-ranking official in a major narcotics trafficking organization responsible for distributing multiple kilograms of heroin onto the streets of Bridgeport. His conduct was serious and his sentence appropriately reflected that conduct. Indeed, this Court has upheld similar sentences for significant narcotics offenses in the past. Finally, even if a comparison of Morales’s sentence to the sentence received by Sanchez were relevant, it would not help Morales. Sanchez received a lower sentence because he had a less serious criminal history.

Argument

Claims of Leonidas DeJesus Perez-Dominguez

I. Perez-Dominguez's sentence was reasonable.

Perez-Dominguez claims (1) that the district court's findings at sentencing concerning a 1999 car stop were based upon unreliable information, Perez-Dominguez Br. 11-12, and (2) that his 168-month sentence was unreasonable, *id.* at 9-11, 15-20. Neither argument has merit.

A. Relevant facts

On January 2, 2008, Perez-Dominguez pleaded guilty to conspiracy to possess with intent to distribute 1000 grams or more of heroin. GA10. At the time of his plea, he entered into a written plea agreement that contained a Guideline stipulation in which the parties agreed that the defendant faced a mandatory-minimum sentence of 120 months' imprisonment. GA47. In the stipulation, the parties further agreed (1) that the defendant's base offense level was 38; (2) that 3 levels should be subtracted for acceptance of responsibility; (3) that a total offense level 35 with a criminal history category I, resulted in a range of 168-210 months' imprisonment; and (4) that he faced a fine range of \$250,000 to 4 million dollars. GA48. The government agreed that a sentence of 168 months would be appropriate, and the defendant agreed that he was subject to automatic deportation at the completion of any sentence of incarceration. GA49.

The PSR, which calculated the defendant's Guidelines range as the parties had stipulated in the plea agreement, Perez-Dominguez PSR ¶¶ 42- 49, contained several additional paragraphs of relevance to this appeal. The PSR estimated that the defendant supplied at least 30 kilograms of heroin to the Sanchez organization, and that his involvement dated back to 2002. PSR ¶ 37. The PSR, relying upon law enforcement information, cooperating witness information, historical information, and wiretap evidence found that the defendant was one of the "main sources of supply for the Sanchez organization." PSR ¶¶ 36, 37.

Although the PSR noted that the defendant had no prior convictions, PSR ¶¶ 50, 51, it also described an incident involving the defendant on May 28, 1999. On that day, New York State Troopers stopped the defendant as a passenger in a car with two other individuals near Syracuse, New York. The Troopers were investigating a robbery that had recently occurred in Rochester, New York and stopped the car because the occupants fit the description of the robbery suspects. PSR ¶ 52. Items that had been reported stolen were found in the vehicle, and a search warrant for the vehicle was obtained. PSR ¶ 52. Two hidden compartments, one under the driver's seat and one under the front passenger's seat, were also found as a result of the search. A loaded firearm was recovered from inside the hidden compartment under the front passenger seat. According to the PSR, the defendant repeatedly told the New York authorities that he was lawfully in the United States when he was not. PSR ¶ 52.

In his sentencing memo, the defendant listed numerous factors for the court to consider under 18 U.S.C. § 3553(a), including, as relevant here, his impoverished and “tragic” background, his previously law-abiding life, his dedication to his mother, his lack of criminal sophistication or history, his acceptance of responsibility, his efforts at obtaining higher education and maintaining employment, his low likelihood of recidivism, and his drug addiction. PA16.

The defendant appeared for sentencing March 25, 2008. The district court confirmed that the defendant and his lawyer had reviewed the PSR, and upon specific questioning, defense counsel stated that there were no disputes about anything contained in the PSR, including the guidelines calculation. PA23-24. With no objection, the district court adopted the calculation as set forth in the PSR, setting a guidelines range of 168-210 months’ imprisonment. PA24. The court heard from both defense counsel and the defendant, who argued for consideration of many of the factors identified in the sentencing memo. PA24-27. After this presentation, which concluded with the reading of letters in support of the defendant, counsel for the government argued for a guidelines sentence. PA29-36.

At the conclusion of government counsel’s argument, the district court asked both parties questions about ¶ 52 of the PSR, which described the 1999 car-stop incident in New York. The court commented that the hidden compartment devices referenced in ¶ 52 of the PSR were “common devices that are installed in automobiles that are

used by drug dealers.” PA41. The court went on to note that it appeared that the defendant’s drug trafficking activities dated back to 1999 when he had been found riding in the car with the hidden compartments. PA41. In response, defense counsel indicated that he understood the “reference to the compartments, and the reasonableness of the Court’s deductions. . . . I can only indicate my client that – that wasn’t a car registered to him, although he really doesn’t deny being in the car.” PA41.

After a short recess, the court pronounced sentence after explaining the reasons for its sentence. The court responded to the defendant’s earlier statement by focusing the defendant’s attention on the seriousness of the offense conduct, including the significant problems for individuals and communities caused by narcotics trafficking. PA41-43. The court noted that it had “considered a non-guideline sentence, but . . . believes that there are compelling reasons not to depart downward and give a non-guideline sentence” PA43. With this explanation, the court sentenced the defendant to 168 months’ imprisonment, the low end of the guidelines range, and 5 years’ supervised release. PA43.

The defendant raised no objections to the district court’s statement of reasons or to any other part of the sentencing. *See* PA45.

B. Governing law and standard of review

After the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which rendered the Sentencing Guidelines advisory rather than mandatory, a sentence satisfies the Sixth Amendment if the sentencing judge "(1) calculates the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) considers the calculated Guidelines range, along with other § 3553 factors; and (3) imposes a reasonable sentence." *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005). This Court reviews a sentence for reasonableness. *See Rita v. United States*, 551 U.S. 338, 340 (2007); *Fernandez*, 443 F.3d at 26-27. In undertaking this analysis, this Court does not substitute its judgment for that of the district court. "Rather, the standard is akin to review for abuse of discretion." *Fernandez*, 443 F.3d at 27.

This Court has generally divided reasonableness review into procedural and substantive reasonableness. For a sentence to be procedurally reasonable, the Court must review whether the sentencing court identified the Guidelines range based upon found facts, treated the Guidelines as advisory, and considered the other § 3553(a) factors. *United States v. Cavera*, 550 F.3d 180 (2d Cir. 2008) (en banc), *cert. denied*, 129 S. Ct. 2735 (2009). Substantive reasonableness is contingent upon the length of the sentence in light of the case's facts. *Id.* at 188.

The reasonableness standard is deferential and focuses “primarily on the sentencing court’s compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a).” *United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005). Although this Court has declined to adopt a formal presumption that a within-guidelines sentence is reasonable, it has noted 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.” *Id.*; see also *Rita*, 551 U.S. at 345-52 (courts of appeals may apply presumption of reasonableness to a sentence within the applicable Sentencing Guidelines range).

In *Cavera*, this Court reaffirmed a sentencing court’s wide discretion, particularly as a factfinder: “Because appellate courts are not factfinders, when we review a challenged factual inference we do not ourselves weigh competing evidence. We ask only whether any reasonable factfinder, applying common sense and experience to the task could have drawn the challenged inference from the record facts according to the applicable burden of proof, which at sentencing is a preponderance of the evidence.” *Id.* at 205.

Consideration of the Guidelines range requires a sentencing court to calculate the range and put the calculation on the record. *Fernandez*, 443 F.3d at 29. The requirement that the district court consider the § 3553(a) factors, however, does not require the judge to precisely identify the factors on the record or address specific arguments about how the factors should be implemented.

Id.; *Rita*, 551 U.S. at 357-58 (affirming a brief statement of reasons by a district judge who refused downward departure; judge noted that the sentencing range was “not inappropriate”). There is no “rigorous requirement of specific articulation by the sentencing judge.” *Crosby*, 397 F.3d at 113. Indeed, a court’s reasoning can be inferred from what the judge did in the context of what was argued by the parties and contained in the PSR. *See United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005) (“As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, we will accept that the requisite consideration has occurred.”). Thus, this Court “presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the statutory factors [under § 3553(a)].” *Fernandez*, 443 F.3d at 30.

This Court further presumes that a sentencing judge considers all arguments presented, unless the record clearly suggests otherwise. *See United States v. Carter*, 489 F.3d 528, 540-41 (2d Cir. 2007); *Fernandez*, 443 F.3d at 29-30. As explained by this Court, “there is no requirement that the court mention the required [§ 3553(a)] factors, much less explain how each factor affected the court’s decision. In the absence of contrary indications, courts are generally presumed to know the laws that govern their decisions and to have followed them.” *United States v. Banks*, 464 F.3d 184, 190 (2d Cir. 2006); *Fernandez*, 443 F.3d at 29-30 (“We will not

conclude that a district judge shirked her obligation to consider the § 3553(a) factors simply because she did not discuss each one individually or did not expressly parse or address every argument related to those factors that the defendant advanced.”).

As described below, the defendant has waived any challenge to the facts considered by the district court at sentencing. At a minimum, his challenge would be reviewed for plain error because he did not raise it in the court below. *See* Fed. R. Crim. P. 52(b). Similarly, because the defendant did not object to the district court’s alleged failure to consider sentencing factors under 18 U.S.C. § 3553(a), this Court reviews for plain error. *United States v. Villafuerte*, 502 F.3d 204, 208 (2d Cir. 2007).

The Supreme Court has interpreted Rule 52(b) as establishing a four-part plain error standard. *See United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Olano*, 507 U.S. 725, 732 (1993). Under plain error review, before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that was “plain” (which is “synonymous with ‘clear’ or equivalently ‘obvious’”), *see Olano*, 507 U.S. at 734; and (3) that affected the defendant’s substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *Johnson*, 520 U.S. at 466-67.

C. Discussion

1. The defendant waived any challenge to the facts relied upon by the district court, and his arguments are meritless in any event.

For the first time on appeal, the defendant claims that the court's findings regarding information contained in the PSR about the 1999 New York car stop were unsupported by reliable evidence, and therefore should not have been considered at sentencing. The defendant further claims, again, for the first time on appeal, that ¶ 52 of the PSR inaccurately notes that during the car stop he lied to law enforcement officers about his immigration status.

The defendant has waived any challenge to these facts as set forth in the PSR. Perez-Dominguez did not object at sentencing to the facts noted in the PSR.² PA24. Nor did he object to either the district court's discussion of the May 1999 car stop incident as a whole, or the singular point that he was not legally in the country at the time.

² For this reason, the cases relied upon by the defendant are simply inapposite. In two of those cases, the defendant objected to the relevant facts as presented in the PSR. *See United States v. Jimenez-Villasenor*, 270 F.3d 554, 562-63 (8th Cir. 2001); *United States v. Ibarra*, 737 F.2d 825 (9th Cir. 1984). Similarly, in *United States v. Safirstein*, 827 F.2d 1380, 1385-86 (9th Cir. 1987), the defendant objected "vigorously" to the inferences the district court was drawing from the facts in the PSR. Here, by contrast, the defendant raised no objection to the facts (or the inferences to be drawn therefrom) as considered by the district court.

Perez-Dominguez has, therefore, waived any challenge to the facts noted in the PSR because “[w]hen a ‘defendant fails to challenge factual matters contained in the presentence report at the time of sentencing, the defendant waives the right to contest them on appeal.’” *United States v. Jass*, 569 F.3d 47, 66 (2d Cir. 2009) (quoting *United States v. Rizzo*, 349 F.3d 94, 99 (2d Cir. 2003), *cert. denied*, 130 S. Ct. 1149 and ___ S. Ct. ___, 2010 WL 979033 (Apr. 19, 2010)).

But even if this Court were to review the defendant’s claims for plain error, they would fail because the district court’s findings were supported by credible and reliable evidence. The district court’s finding about the 1999 car-stop incident was limited to its conclusion that the incident “suggest[ed] . . . that as far back as 1999, [the defendant] was engaged in the drug trade.” PA41. This conclusion was directly tied to the undisputed facts as set forth in the PSR. And as stated in the PSR, ¶ 52 was based on police records; the defendant cites no reason to doubt the veracity or reliability of those records. Indeed, defense counsel admitted at sentencing that he “underst[ood] the reference to the [hidden] compartments, and the reasonableness of the Court’s deductions.” PA41.

Instead of challenging the police reports, the defendant claims that the information about the 1999 incident was unreliable because it came from proffered statements by cooperating witnesses with an inherent bias in favor of the government. This argument misses the mark. As described above, the information reported in the PSR came from police reports. While the 1999 incident *was* discussed with

cooperating witnesses during proffer sessions as described by government counsel during sentencing, PA38, the district court did not make any findings based on such information. The only finding made was that “in May of 1999 [the defendant was] traveling in a car with hidden compartments in it, which would suggest to the Court that as far back as 1999, he was engaged in the drug trade.” PA41. This information was drawn directly from PSR ¶ 52 and available in police reports. Thus, this evidence was sufficiently reliable and accurate to be relied upon at sentencing.

To the extent the district court considered information that came from cooperating witnesses, *see, e.g.*, PA37-40, the defendant makes no attempt to explain how this was error, much less plain error. A cooperating witness’s statements are not automatically unreliable by virtue of the fact of cooperation. Nor were the statements so inherently incredible that the court should have recognized a problem with relying on them. *Villafuerte*, 502 F.3d at 209 (an error is plain if “the trial judge and prosecutor were derelict in countenancing it”) (quoting *United States v. Frady*, 456 U.S. 152, 163 (1982)).

Moreover, the defendant makes no attempt to show how the district court’s reliance on this information affected his substantial rights. Although the district court questioned counsel about the 1999 incident, as described above, the court’s ultimate conclusion about it was merely to find that the defendant had been involved in drug trafficking as early as 1999. Other evidence in the PSR (not challenged on appeal) already established that Perez-

Dominguez was involved in drug trafficking at least as early as 2002; adding a few years to this lengthy trafficking history could hardly be said to have had any impact on his sentence. This is especially true here, where the defendant's sentence was driven by the massive quantities of heroin he helped distribute in Bridgeport, and his own stipulation to an appropriate guidelines range.

Perez-Dominguez's challenge to the district court's reliance on an alleged misstatement about his immigration status meets a similar fate. Perez-Dominguez objects to the district court's reliance on the statement in ¶ 52 of the PSR that during the 1999 stop, the defendant told the police "that he was lawfully in the United States when, of course, he was not." PSR ¶ 52. This does not amount to plain error. The PSR, taken as a whole, presents Perez-Dominguez as a legal resident of the United States for the purposes of sentencing. Most significantly, the PSR notes that the defendant immigrated to the United States in 1991, and was granted lawful permanent resident status. PSR ¶ 62.

While this conclusion appears to conflict with the statement in ¶ 52 that he was not lawfully in the United States, the defendant cannot show how this error affected his substantial rights. The district court never mentioned this discrepancy or fact when it announced its reasons for imposing a sentence, and as described above, in light of the overwhelming evidence showing the defendant's active and crucial participation in a multi-kilogram heroin-trafficking conspiracy, it strains credulity to suggest that a

minor error in the PSR could have had any impact on his sentence.

2. Perez-Dominguez’s sentence was reasonable because the district court properly considered the § 3553(a) sentencing factors and imposed a substantively reasonable Guidelines sentence.

Perez-Dominguez claims that his sentence was unreasonable because the district court failed to consider certain § 3553(a) factors. Perez-Dominguez Br. 18. This claim is without merit because the district court properly considered the § 3553(a) factors, and the sentence it ultimately imposed – the bottom of the applicable Guidelines range – was substantively reasonable.

Here, the record demonstrates that the district court fully considered the § 3553(a) factors when imposing sentence. The court responded to the defendant’s arguments for leniency, and then explained its sentence by focusing primarily on the seriousness of the offense conduct and the harmful consequences of that conduct for individuals and the community at large. PA41-43. The court expressly acknowledged its authority to depart downward from the Guidelines range or give a non-Guidelines sentence, but found that “there [were] compelling reasons not” to do so. PA43.

The record further reflects that the court considered the § 3553(a) factors that the defendant identifies on appeal.

Thus, although the defendant's argument on this point is reviewed for plain error because he did not object below, regardless of the standard of review, there is no error at all.

For example, the defendant *first* claims that the district court did not take into consideration the fact that he “is a source [of] support for his girlfriend and her children and for his parents who are elderly and in poor health.” Perez-Dominguez Br. 18. These issues were discussed in the PSR, *see* ¶¶ 65-67, in the defendant's sentencing memorandum, *see* PA16, and in the defendant's statements at sentencing, PA26. The court is presumed to fulfill its duty to consider the issues before it, and here, the court even mentioned the defendant's devotion to his girlfriend's children before it imposed sentence. *See* PA42.

Second, the defendant claims that the district court did not adequately consider his lack of a criminal history. Perez-Dominguez Br. 18. But this factor was adequately captured by the defendant's criminal history calculation, PSR ¶¶ 50-51, and was raised in the defendant's sentencing memorandum, PA16, and in the remarks at sentencing, *see* PA24. The district court expressly considered the Guidelines range, *see* PA24, 43, and is presumed to fulfill its obligation to consider this factor even if not expressly delineated.

Third, the defendant claims that the district court should have taken into account that the defendant suffered from “a history of alcohol and substance abuse” Perez-Dominguez Br. 18. Again, this issue was before the district court through the PSR ¶¶ 72-74, and through the

defendant's sentencing memorandum, PA16. The district court considered this factor during sentencing, and even specifically ordered the defendant to participate in substance abuse treatment as a condition of supervised release. PA44.

Fourth, the point that “the defendant will in all likelihood be deported” was explicitly mentioned by the district court at sentencing. PA43. Additionally, the deportation issue was noted in PSR ¶¶ 63-64, as well as in the defendant's sentencing memorandum, PA17, and in counsel's argument at sentencing, PA25.

In short, the district court carefully considered the § 3553(a) factors as part of the sentencing process. The record reflects that all of the issues identified were raised before the district court, and there is nothing in the record to suggest that the court misunderstood its authority or its discretion to consider them. Accordingly, the court is entitled to the presumption that it fulfilled its duty to consider the § 3553(a) factors. *Fleming*, 397 F.3d at 100. At a minimum, on this record, it cannot be said that any error in the district court's process was plain or effected the defendant's substantial rights.

Moreover, the district court's careful consideration resulted in a substantively reasonable sentence. The district court sentenced the defendant to 168 months' imprisonment, the bottom of the applicable Guidelines range. This is certainly one of the “overwhelming majority of cases,” where “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. The defendant was a long-standing source of supply of multi-kilogram quantities of heroin to one of the most prolific drug organizations in Bridgeport. PA35, 42. He met with leaders of the Sanchez organization on a routine basis and sold them hundreds of thousands of dollars of heroin, which, in turn, they packaged for re-distribution in Bridgeport. PA29-35.

Although the defendant believes that a shorter sentence would have served the purposes of sentencing, *see* *Perez-Dominguez* Br. 18-19, this Court should decline his invitation to substitute its judgment for that of the district court. *See Fernandez*, 443 F.3d at 27; *Kane*, 452 F.3d at 145; *Fleming*, 397 F.3d at 100. Accordingly, the defendant’s claims should be rejected and his sentence affirmed.

Claims of Jorge Morales³

II. The deficiency in the government's second-offender information under 21 U.S.C. § 851 was harmless because Morales received a non-Guideline sentence 8 years greater than the 20-year mandatory-minimum sentence.

Morales claims that the second-offender information filed in his case was deficient because (a) it identified the wrong prior narcotics conviction, Morales Supp. Br. 4-10, and (b) even if the conviction was properly identified, that conviction was insufficient to increase his mandatory minimum sentence under *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008), Morales Second Supp. Br. 5-9. The government agrees that the defendant's conviction would be insufficient to enhance his sentence under § 851, but any error in filing this information was harmless because the district court's sentence of 28 years of imprisonment far exceeded the 20-year mandatory sentence pursuant to 21 U.S.C. § 841(b)(1)(A).⁴

³ In addition to the arguments discussed in the text, Morales also argues that the Bureau of Prisons improperly calculates "good time credits." Morales Second Supp. Br. 9-10. This argument is not properly before this Court, and in any event was just rejected by the Supreme Court. *See Barber v. Thomas*, ___ S. Ct. ___, 2010 WL 2243706 (June 7, 2010).

⁴ In light of the government's concession that the second-offender information was deficient, the government has not addressed Morales's alternative argument that the
(continued...)

A. Relevant facts

On January 7, 2008, prior to Morales's guilty plea to a charge of conspiracy to possess with the intent to distribute 1,000 grams or more of heroin, the government filed a second-offender information pursuant to 21 U.S.C. § 851. GA19, MA337-39. The second-offender information notified Morales that due to his 1994 felony narcotics conviction, his mandatory minimum penalty was increased from 10 years to 20 years. MA338. The enhanced penalties flowing from the second-offender information were further memorialized in the "Penalties" section of the written plea agreement. MA19.

On December 17, 2008, at Morales's first sentencing hearing, the government filed a certified copy of his July 29, 1994, felony conviction to reflect that the correct offense of conviction was actually "Aiding and Abetting a Drug Sale" under Conn. Gen. Stat. §§ 53a-8(a) and 21a-277(a), rather than "Operating a Drug Factory" under Conn. Gen. Stat. § 21a-277(c). MA351, MA196-97.

The defendant argued that *Savage* precluded the use of his prior narcotics conviction to enhance his mandatory minimum sentence under 21 U.S.C. §§ 841 and 851, but the district court rejected that argument. MA199.

⁴ (...continued)
information was deficient for failing to properly identify his prior conviction.

At the defendant's sentencing on January 14, 2009, the district court noted that he had a mandatory minimum term of 20 years. MA255. The court calculated the defendant's guidelines range to be 360 months' to life imprisonment. MA255. The court sentenced the defendant to 28 years' imprisonment – eight years above the mandatory minimum sentence and a mere two years below the calculated guidelines range. MA313, 318.

B. Governing law and standard of review

1. 21 U.S.C. §§ 841(b)(1)(A) and 851, and the analysis of potential predicate offenses

Any person who violates 21 U.S.C. § 841(a), or conspires to violate it, *see* 21 U.S.C. § 846, is subject to penalties enumerated in § 841(b)(1). That subsection establishes a system of graduated penalty ranges, which increase according to the quantity of narcotics involved in the offense and the defendant's criminal history.

As relevant here, § 841(b)(1)(A) provides that for a narcotics offense involving one kilogram or more of heroin, the defendant is subject to a mandatory minimum of 10 years' imprisonment and a maximum of life. The statute provides for an enhanced 20-year mandatory minimum penalty for individuals who commit such a violation "after a prior conviction for a felony drug offense has become final," *id.*, provided that the government has given appropriate notice under Section 851 of its intent to seek the enhancement. Under the applicable definitions section, the term "felony drug offense" is "an offense that

is punishable by imprisonment for more than one year under any law of . . . a State . . . that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.” 21 U.S.C. § 802(44). Each category of substance included in the definition is itself a defined category of substance controlled under federal law. *See* 21 U.S.C. §§ 802(17); 802(16); 802(9); and 802(41).

In light of the Sixth Amendment concerns discussed in *United States v. Shepard*, 544 U.S. 13, 24-26 (2005), the categorical and modified categorical approaches developed by courts for analyzing sentencing enhancements under the Armed Career Criminal Act and the Sentencing Guidelines should be employed in determining whether a prior conviction constitutes a predicate offense for second offender enhancements under 21 U.S.C. §§ 841(b)(1) and 851. *See, e.g., id.* at 26.

Courts start with a “categorical approach,” looking first to the “fact of conviction” and “the statutory definition of the prior offense” *United States v. Jackson*, 301 F.3d 59, 61 (2d Cir. 2002). However, when the state statute criminalizes both conduct included in the relevant federal statute and conduct not covered by the federal statute, courts conduct a second inquiry, using a “modified” categorical approach to examine certain sources beyond the mere fact of conviction. *Taylor v. United States*, 495 U.S. 575, 602 (1990); *see also Savage*, 542 F.3d at 964. In cases that are resolved short of trial, to prove that the prior conviction qualifies as a predicate offense, the government may rely upon court documents such as “the

terms of the charging document [or] the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant” *Shepard*, 544 U.S. at 26. Under this Court’s recent decision in *Savage*, a defendant’s invocation of the *Alford* doctrine in connection with a prior plea, allowing him to plead guilty without admitting his participation in the acts constituting the crime, *see North Carolina v. Alford*, 400 U.S. 25 (1970), precludes reliance on the prosecutor’s statement of the facts in a plea colloquy – without more – to narrow the defendant’s conviction to conduct that would necessarily constitute a felony drug offense under 21 U.S.C. §§ 841(b)(1) and 802(44). *Savage*, 542 F.3d at 966.

2. Conn. Gen. Stat. § 21a-277(a)

Section 21a-277(a) of the Connecticut General Statutes – the narcotics statute under which Morales was convicted in 1994 – makes it a felony to engage in certain conduct (“distribut[ing], sell[ing],” etc.) with respect to two categories of substances on Connecticut’s Controlled Substances Schedules: “hallucinogenic substance[s] other than marijuana” and “narcotic substance[s].” Conn. Gen. Stat. § 21a-277(a). As of 1986, Connecticut listed on its Controlled Substance Schedules two obscure chemicals, thenylfentanyl and benzylfentanyl, which it categorized as “narcotic substances.” Conn. Regs. § 21a-243-7. The substances had been temporarily listed by federal authorities on the federal controlled substances schedules, while research was conducted concerning the abuse potential of these substances, 50 Fed. Reg. 43698 (Oct. 29, 1985), and Connecticut followed suit, scheduling the substances in 1986 in an effort to conform with federal law. 29 Conn. H.R. Proc., Pt. 5, 1986 Sess., p. 1626 (April 19, 1986). Upon completion of the federal studies of the substances, their temporary federal scheduling was allowed to expire later in 1986. *See, e.g.*, 51 Fed. Reg. 43025 (Nov. 28, 1986). However, the substances remained on Connecticut’s regulatory drug schedules.

3. Harmless error

As this Court recently explained, when it “identif[ies] procedural error in a sentence, but the record indicates clearly that ‘the district court would have imposed the same sentence’ in any event, the error may be deemed

harmless, avoiding the need to vacate the sentence and to remand the case for resentencing.” *Jass*, 569 F.3d at 68 (quoting *United States v. Cavera*, 550 F.3d 180, 197 (2d Cir. 2008) (en banc)).

C. Discussion

The government agrees that the defendant’s conviction is insufficient to enhance his sentence under Sections 841(b)(1) and 851. However, that error was harmless.

Because thenylfentanyl and benzylfentanyl have remained listed in Connecticut’s controlled substance schedules as illicit narcotic substances, Conn. Regs. § 21a-243-7, there remains an abstract theoretical possibility that, under Conn. Gen. Stat. § 21a-277(a), an individual could have been convicted in July 1994 – the time of Morales’s Connecticut drug conviction at issue here – for conduct relating to a substance that did not constitute a controlled substance under federal law. Consequently, the government concedes that defendant’s 1994 state conviction does not qualify categorically as a prior felony drug offense under 21 U.S.C. §§ 841(b)(1)(A), 851, and 802(44). *See Shepard*, 544 U.S. at 26. Moreover, the government acknowledges that due to the lack of specification in the charging document, as well as Morales’s invocation of the *Alford* doctrine in pleading guilty, the government cannot prove that the conviction constituted a felony drug offense through the limited forms of proof permitted under a modified categorical analysis. *See* MA351 (charging document lacks specification as to substance involved); MA345-50 (transcript of plea

colloquy showing defendant's invocation of *Alford* doctrine); *Shepard*, 544 U.S. at 21, 26; *Savage*, 542 F.3d at 966.

Any procedural error flowing from the government's infirm second-offender information was harmless, however, because the record shows that "the district court would have imposed the same sentence" regardless of the error. *Jass*, 569 F.3d at 68 (quoting *Cavera*, 550 F.3d at 197). At the time of sentencing, the district court understood that the second-offender information required it to sentence the defendant based on a 20-year mandatory minimum. And yet, the court sentenced the defendant to 28 years and the record shows that the court never even considered sentencing the defendant as low as 20 years.

Indeed, there is no indication that the defendant's 20-year mandatory minimum factored at all into the court's selection of an appropriate sentence. In arriving at a sentence far above the 20-year mandatory minimum, the court emphasized, among other things, Morales's extensive criminal history and involvement with organized street gangs, MA310; his coercion of his nephew and co-defendant to work in Morales's heroin conspiracy, *id.*; and his return to large-scale heroin trafficking after being granted early termination of supervised release by a federal judge for a federal firearms conviction, *id.* In fact, the court expressly stated that it had originally intended to sentence the defendant to 30 years (*i.e.*, the bottom of the Guidelines range), but had elected to sentence him to 28 years in light of the defendant's supportive family. MA312. In short, because the district court would have

imposed the same sentence even without a second-offender information, any error in that information was harmless.

Morales's case is on all fours with *United States v. Deandrade*, 600 F.3d 115, 120 (2d Cir.), *cert. denied*, ___ S. Ct. ___, 2010 WL 1186308 (Apr. 26, 2010), in which the Court affirmed a 300-month sentence (60 months below the Guidelines range) for a defendant's large-scale narcotics-distribution violations. There, the defendant challenged the district court's finding that his prior drug-related juvenile adjudication constituted a "prior conviction" triggering the 20-year mandatory minimum under § 841(b)(1)(A). 600 F.3d at 120. This Court found no need to consider the merits of the defendant's second-offender information claim "because it is clear that the sentence was unaffected by [his] juvenile drug offense." *Id.* In holding that a remand for re-sentencing was unnecessary, this Court recognized that "[t]he 300-month sentence actually imposed exceeded (by 60 months) the 20-year mandatory minimum prescribed by § 841(b)(1)(A)," thereby making it "hard to see how any consideration of the juvenile adjudication [i.e., the prior drug conviction] – *which mattered only as to that mandatory minimum – contributed to the sentence imposed.*" *Id.* (emphasis added).

By the same reasoning, notwithstanding the erroneous second-offender information, there is no need to remand for re-sentencing here because the district court's sentence of 28 years of imprisonment was 96 months – a 40% increase – more than the 20-year mandatory minimum

sentence. As the district court did in *Deandrade*, the district court explicitly stated its intention to impose a sentence close to the Guideline range and substantially greater than mandatory minimum. *See id.* (quoting district court). In fact, the district court here recognized that but for Morales's "supportive family," it would have imposed "the minimum of 360 [months]" as its sentence. MA312. Nor did the district court state, implicitly or explicitly, that its sentence was driven by the 20-year mandatory minimum found in 21 U.S.C. § 841(b)(1)(A). Consequently, a remand for re-sentencing would be inappropriate because "the error did not affect the district court's selection of the sentence imposed." *Williams v. United States*, 503 U.S. 193, 203 (1992).

Finally, Morales's attempt to analogize his circumstances to those of co-defendant Edwin Nieves is misplaced. While it is true that in both cases the government filed deficient second-offender information, the erroneous information was not obviously harmless in Nieves's case. Nieves, like Morales, faced a Guidelines range of 360 months to life imprisonment. MA360-62. However, unlike Morales, Nieves initially received a 20-year mandatory-minimum sentence from the district court, which reflected a 10-year reduction, or a one-third reduction, from the bottom of the Guideline range. MA387. Consequently, after the government concluded that Nieves's second-offender information was invalid, it consented to a remand for re-sentencing because the defendant's original sentence made it impossible to determine that the erroneous second-offender information was harmless. In stark contrast, because Morales received

a sentence 8 years above the mandatory minimum sentence (calculated with the second-offender information), the record shows that the invalid second-offender information had no impact on the district court's selection of the appropriate sentence.

III. Morales waived any challenge to the drug quantity attributable to him by stipulating to a drug quantity, and relatedly, any error by the district court in failing to make express findings that quantity was not plain error.

Morales contends that the district court erred in failing to find the amount of narcotics reasonably foreseeable to him. This finding, however, was unnecessary because Morales stipulated in his plea agreement that his offense conduct involved 30 or more kilograms of heroin, and did not dispute this attributable drug quantity in the PSR or at sentencing. As a result, Morales has waived his right to challenge the drug quantity in this appeal, and any error by the district court in failing to make express findings was not plain error.

A. Relevant facts

Morales pleaded guilty pursuant to a written plea agreement that contained a detailed Guideline stipulation. As relevant here, the stipulation provided that the parties “agree that under the guidelines set forth at U.S.S.G. § 2D1.1(c)(1) (*30 kilos or more of heroin*), the defendant’s base offense level is 38.” MA21 (emphasis added). After accounting for a two-level increase for a firearm

enhancement, a three-level role enhancement, and a three-level reduction for acceptance of responsibility, the plea agreement further states: “The parties agree that a total offense level of 40 with a criminal history category VI, results in a range of 360 months to life” *Id.*

During his plea colloquy before the district court, Morales did not object to the total offense level of 40, even though he reserved his right to challenge several other issues, including the validity of the second-offender information and his status as a career offender. MA177-80.

After his guilty plea, the Probation Department prepared the PSR in preparation for sentencing. Paragraph 33 of the PSR expressly stated that “the defendant’s relevant conduct involved 30 kilograms or more of heroin.” MA36. Based on this finding, the PSR established a base offense level of 38 (consistent with the plea agreement stipulation), the level set for a drug offense involving at least 30 kilograms or more of heroin. MA36 (PSR ¶ 38). The record, including Morales’s sentencing memorandum, discloses no objection to this quantity finding in the PSR. MA71-90.

At sentencing, the district court twice stated that the defendant’s guidelines range, as recommended by Probation, was 360 months to life, calculated using a total offense level of 40, and a criminal history category of V. MA250, 255. Morales did not object to either statement of the guidelines range, or otherwise voice any objection to the guidelines calculation as set by the court.

B. Governing law and standard of review

A defendant may – through his words, his conduct, or by operation of law – waive a claim, so that this Court will altogether decline to adjudicate that claim of error on appeal. See *United States v. Olano*, 507 U.S. 725, 733 (1993); *United States v. Quinones*, 511 F.3d 289, 320-21 (2d Cir. 2007); *United States v. Wellington*, 417 F.3d 284, 289-90 (2d Cir. 2005); *United States v. Nelson*, 277 F.3d 164, 204 (2d Cir. 2002); *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995).

Thus, in the specific context of sentencing, “[w]hen a ‘defendant fails to challenge factual matters contained in the presentence report at the time of sentencing, the defendant waives the right to contest them on appeal.’” *Jass*, 569 F.3d at 66 (quoting *United States v. Rizzo*, 349 F.3d 94, 99 (2d Cir. 2003)).

Moreover, when a defendant fails to raise a claim before the district court, that claim is reviewed for plain error on appeal. Fed. R. Crim. P. 52(b). The standard for plain error review is set forth in section I.B., *supra*.

C. Discussion

To the extent Morales challenges the quantity of drugs attributable to him for sentencing purposes, he has waived his right to make that argument. As part of his plea agreement, Morales entered into a binding guidelines stipulation that attributed a quantity of 30 kilograms or more of heroin to him. MA21. He affirmed that he had

read the plea agreement during the plea colloquy, and raised no objection to the drug quantity stipulation at that time. MA177-80. Later in the process, the PSR attributed the same quantity of heroin to him, MA36 (PSR ¶¶ 33, 38), and he raised no objection to the quantity, either in the PSR or during his sentencing hearing. Now, after having stipulated to a drug quantity and failing to object to the PSR when it attributed that same quantity to him, he should not be heard to challenge that drug quantity.

To the extent Morales argues that the district court erred by failing to make specific quantity findings, that alleged failure would be reviewed for plain error because he never raised this issue before the district court. And even a cursory review of the record demonstrates that even if there were error on this point, it would not warrant reversal as plain error.

First, there was no error, much less plain error. While a district court must make explicit factual findings to resolve disputed issues, the defendant identifies no similar requirement that a district court make explicit findings on *undisputed* facts.⁵ *See, e.g., United States v. Kang*, 225

⁵ This distinction undermines Morales's reliance on *United States v. Perrone*, 936 F.2d 1403, 1416 (2d Cir.), *clarified on other grounds*, 949 F.2d 36 (2d Cir. 1991), and *United States v. Lanni*, 970 F.2d 1092 (2d Cir. 1992). In both cases, the defendants were convicted after trial and hence there was no stipulated drug quantity. In cases such as *Perrone* and *Lanni* where the attributable drug quantity was in dispute, it
(continued...)

F.3d 260, 262 (2d Cir. 2000) (finding that “there was no need for the district court to state its findings separately from its ruling” when facts underlying enhancement for reckless creation of serious bodily injury under U.S.S.G. § 2L1.1(b)(5) were “not disputed”). This is especially true because a district court is entitled to rely on stipulations in finding facts for sentencing. *See, e.g., United States v. Granik*, 386 F.3d 404, 412 (2d Cir. 2004). Moreover, in this case, on two separate occasions at sentencing, the district court made implicit findings on drug quantity when it adopted the Probation Department’s calculation of the defendant’s offense level, a calculation based in part on drug quantity. MA250, 255.

Second, any failure by the district court to make explicit drug quantity findings could not have affected the defendant’s substantial rights when he had already stipulated to the relevant drug quantity. As described

⁵ (...continued)

was incumbent upon the district court to find “the quantity of drugs attributed to a defendant . . . when he personally participates, in a direct way, in a jointly undertaken drug transaction,” *United States v. Chalarca*, 95 F.3d 239, 243 (2d Cir. 1996), and to determine if the defendant “may be held responsible for all reasonably foreseeable acts of others in furtherance of the conspiracy,” *United States v. Snow*, 462 F.3d 55, 72 (2d Cir. 2006). Here, by contrast, where the defendant has already stipulated to the relevant drug quantity, there is no similarly rigid requirement that the district court make specific fact findings.

above, Morales stipulated to the drug quantity in his plea agreement, failed to object to the quantity during his plea colloquy, raised no objection to the attribution of the same quantity in the PSR, and failed to raise an objection to drug quantity in the sentencing process. On this record, where Morales either expressly agreed to the drug quantity or failed to object to the quantity at every conceivable juncture, the district court's failure to "find" that quantity at sentencing cannot have affected his substantial rights.

Finally, the defendant's stipulation on drug quantity should foreclose any argument that the failure to correct the district court's alleged error would undermine the integrity or public reputation of judicial proceedings. Indeed, to reverse for more particular findings on drug quantity would itself undermine the public reputation of judicial proceedings where, as here, the defendant has already stipulated to the relevant quantity.

IV. The district court’s refusal to depart downward is not reviewable, and the district court’s alleged failure to rule on departure requests was not plain error.

Morales claims that the district court erred by not departing from the agreed-upon Guideline range based upon (1) his “traumatic childhood,” (2) his relatively short participation in the conspiracy,⁶ and (3) his breaking of a “logjam” on the ground that his guilty plea conserved judicial resources. Morales Br. 17, 19; Morales Supp. Br. 12. The district court’s refusal to depart downward is not reviewable on appeal. To the extent that Morales challenges the district court’s failure to expressly rule on his departure requests, any such failure was not plain error.

A. Relevant facts

On January 8, 2009, Morales was sentenced principally to a term of imprisonment of 336 months. MA318. At sentencing, Morales did not object to the facts and Guidelines calculations set forth in the PSR and adopted by the district court. MA255, 283. The PSR noted a total

⁶ This claim is entirely without merit because it simply does not matter whether or not the defendant participated in the Sanchez heroin trafficking organization for a shorter time than other members of the conspiracy. This claim was properly rejected by the district court because the defendant agreed that he was responsible for the distribution of over 30 kilograms of heroin, and that he was a leader of the organization who, among other things, supervised the heroin packaging sessions.

offense level 40, a criminal history category V, and a corresponding imprisonment range of 360 months to life. MA255, 283, PSR ¶¶ 45, 55, 93. The defendant had agreed to the same applicable Guidelines range in his written plea agreement, and had reserved his right to argue for downward departures including a “log jam” departure. MA21.

The defendant asked for several downward departures. In support of his motion for a downward departure based upon his “traumatic childhood,” the defendant argued that he was “the poster child for a rough life,” and [h]is abilities to cope and manage problem situations has been limited, again, because of his traumatic childhood.” MA284-85. He further argued that his “life was certainly difficult, unusually difficult and, as such, we ask that the Court take that into consideration.” MA289.

Morales also asked the district court to take into account the length of time he was in the conspiracy, and to depart downward because he was incarcerated for part of the duration of the conspiracy and allegedly participated in it for only 18 months. MA 285. Defense counsel further argued that “the final reason why I ask this Court for consideration is that he helped break a logjam.” MA288.

The district court did not expressly rule on the defendant’s motions for downward departure, although the court acknowledged at various times that it had the authority to impose a non-guidelines sentence. *See, e.g.*, MA255, 312. At no time did the defendant object to the court’s failure to rule on his motions.

The district court commented, “[s]omeone coming from his background and knowing the impact of heroin on the streets, and how it affects children and teenagers, should be the last person in the world to want to distribute heroin.” MA285-86. After listening to the comments made by the defendant, his family and his friends, the district court went on to say:

Judges have feelings and they understand people, and I reacted when your mother stood here and spoke about you. She’s your mother. You’re her only child, and it must be a terrible, terrible experience for her, and a terrible time for her to go through, as well as your cousin, your uncle, people who know you and love you, but you brought yourself here, and until you recognize that your standing here today because of what you did, you made the choices, you mother didn’t make those choices, your uncle didn’t make those choices, you made the choices.

And I did recently read the PreSentence Report on Ruben Cardona, your nephew, because he is going to be sentenced in a few days, and I was astonished when I read that he came to Bridgeport looking for help from his family, and he turned to you, his uncle, and what did you do? You put him into the heroin business. That’s what yo did, and your family should know it. You took your own nephew and you put him into the heroin business.

My guess is that if you were able to walk out this courtroom today which, of course, you're not, you'd go right back into selling heroin. I'm not sentencing your mother, and I'm not sentencing your uncle and your cousin, I'm sentencing you. They're good, honest, hard-working people, but you've let them down badly.

* * *

[M]y intentions when I came out here were to give you the 30 years, but I'm going to cut you a break. I'm not going to impose a guideline sentence, I'm going to impose a non-guideline sentence and consider the factors in 3553(a), and impose a sentence of 28 years. That's a long time. Thirty years is a long time. Twenty-eight years is a long time, but it's two years less than the minimum of 360, and I did it because of your mother and your family who, I think, are supportive, and two years isn't going to make that much difference, but it's an acknowledgment on my part, that you have a supportive family

MA309-312.

B. Governing law and standard of review

This Court has held that a district court's "refusal to downwardly depart is generally not appealable," and an appeals court may review such a denial only "when a sentencing court misapprehended the scope of its authority to depart or the sentence was otherwise illegal." *United*

States v. Valdez, 426 F.3d 178, 184 (2d Cir. 2005); *see also United States v. Stinson*, 465 F.3d 113, 114 (2d Cir. 2006) (per curiam) (refusal to downwardly depart from the guideline range is generally not appealable); *United States v. Hargrett*, 156 F.3d 447, 450 (2d Cir. 1998) (court lacks jurisdiction “to review a district court’s refusal to grant a downward departure or the extent of any downward departure that is granted”). “In the absence of ‘clear evidence of a substantial risk that the judge misapprehended the scope of his departure authority,’ [this Court] presume[s] that a sentenc[ing] judge understood the scope of his authority.” *Stinson*, 465 F.3d at 114 (quoting *United States v. Gonzalez*, 281 F.3d 38, 42 (2d Cir. 2002)).

To the extent that Morales argues that the district court failed to rule on his departures, that argument would be reviewed for plain error because he did not object on this ground in the district court. *See Fed. R. Crim. P. 52(b)*. The standard for plain error review is set forth in section I.B., *supra*.

C. Discussion

1. The district court’s refusal to depart downward is not reviewable on appeal.

The district court’s refusal to depart downward based on the defendant’s various requests for downward departures is unreviewable. Here, nothing in the record suggests that the 336-month sentence – 2 years below the low end of the Guidelines range – was illegal, or that the district court misunderstood its authority to grant

departures. To the contrary, the record at sentencing supports the opposite conclusion. Although the district court comprehended the scope of his departure authority, he simply chose not to exercise that authority based on the facts presented at sentencing. The court expressly noted that it was not bound by the guidelines, MA255, 312, and considered the arguments of counsel, both for and against departures. MA283-290, 301-309.

In sum, there is no evidence, let alone clear evidence, that the defendant's sentence was illegal or that there was a "substantial risk that the judge misapprehended the scope of his departure authority." *Stinson*, 465 F.3d at 114. Thus, based on this record, this Court can only "presume that [the] sentenc[ing] judge understood the scope of his authority." *Id.* Accordingly, the district court's refusal to depart downward is not reviewable.

2. To the extent Morales challenges the district court's failure to expressly rule on his departure requests, there was no plain error.

First, there was no plain error in the district court's failure to *expressly* deny Morales's motion to depart based on his "traumatic childhood."⁷ The district court's denial

⁷ The defendant's reliance on *United States v. Lopez*, 938 F.2d 1293 (D.C. Cir. 1991), is misplaced. In *Lopez*, the court held that when the district court had declined to consider a defendant's family history as a departure ground, it had too
(continued...)

of this motion was implicit in its decision, after hearing arguments for this departure, to impose a non-Guidelines sentence 2 years below the Guidelines range. Information about the defendant's departure request was before the court, both in the PSR, and in the sentencing memoranda, MA71-89, and the court is presumed to consider the materials before him and fulfill his statutory duties. Moreover, when the district court remarked, "I'm not sentencing your mother, and I'm not sentencing your uncle and your cousin, I'm sentencing you. They're good, honest, hard-working people, but you've let them down badly," it was weighing the information in the PSR as well as the comments made by counsel and Morales's family members about the family circumstances. MA312. The district court's decision to impose a non-Guidelines sentence based upon the § 3553(a) factors, including consideration of his supportive mother and family, MA309-312, further demonstrates consideration of this issue.

In light of the district court's evident consideration of the defendant's family history and circumstances, the defendant cannot show that any failure to expressly decline his motion affected his substantial rights.

⁷ (...continued)
broadly characterized family history as "socio-economic" background. The case was remanded for the district court to consider whether the family circumstances warranted departure. *Id.* at 1298-99.

Second, there was no plain error in the district court's failure to expressly decline his request for a "logjam" departure. Even assuming that the court erred, any such error would not have effected Morales's substantial rights because his actions did not meet the standards for a logjam departure.

This Court has identified an extremely limited ground for downward departure known as the "logjam" departure. In *United States v. Garcia*, 926 F.2d 125 (2d Cir. 1991), the Court upheld a downward departure for a defendant who did not receive a government motion under U.S.S.G. § 5K1.1 because his "relatively early guilty plea and willingness to testify against [his] co-defendants induced [both co-defendants] to enter guilty pleas." There, the Court affirmed the grant of the downward departure, despite the absence of a substantial-assistance motion, because the defendant's cooperation "conserved judicial resources by facilitating the disposition of the case without a trial." *Id.* at 128. In *United States v. Gonzalez*, 970 F.2d 1095 (2d Cir. 1992), the Court explained that *Garcia* permitted the grant of a "downward departure in the absence of a government motion where the defendant had rendered substantial assistance to the judicial system by pleading guilty early, giving information, and showing himself willing to testify, thereby inducing the guilty pleas of his co-defendants and breaking the 'logjam' in a multi-defendant case." *Id.* at 1103.

Morales simply does not meet the criteria, as outlined in the cases, for a logjam departure. Morales argued to the district court that he was entitled to the departure based

solely on the conservation of judicial resources, *see* MA288, but this showing is inadequate under *Garcia*, which holds that the logjam departure is appropriate only when the defendant’s “relatively early guilty plea and willingness to testify against [his] co-defendants” induces his co-defendants to plead guilty, thereby “conserv[ing] judicial resources by facilitating the disposition of the case without a trial.” *Garcia*, 926 F.2d at 128; *see also Gonzalez*, 970 F.2d at 1103. Here, there is no allegation that Morales cooperated, or was willing to testify, against his co-defendants. Nor is there any suggestion that Morales entered a “relatively early guilty plea” that had a domino effect on subsequent guilty pleas. *See Garcia*, 926 F.2d at 128. Much to the contrary, a review of the docket sheet reveals the Morales, Nieves, and Sanchez were the last three defendants to dispose of their cases and all pled guilty on January 7, 2008. GA19. Accordingly, because Morales cannot show that he cooperated and that his alleged cooperation led to the guilty pleas of his co-defendants, he does not qualify for the logjam departure.

In sum, any alleged error in failing to expressly rule on the defendant’s departure requests was not plain error.

V. The district court’s imposition of a non-Guidelines term of imprisonment of 336 months, which was less than the advisory Guidelines range, did not violate the Eighth Amendment.

A. Relevant facts

As set forth above, the defendant stipulated to a Guidelines range of 360 months to life imprisonment. MA21. On January 14, 2009, the district sentenced Morales to a non-Guidelines, 336-month term of imprisonment. MA312, 318. Morales did not object to his sentence on Eighth Amendment grounds in the district court.

B. Governing law and standard of review

This Court has previously declined to address constitutional challenges that were not initially raised in the district court, deeming them waived. “There is no reason why [the defendant’s] constitutional challenges could not have been raised below, where he had ample opportunity to raise them and where the district court would have had the opportunity to address them.” *United States v. Feliciano*, 223 F.3d 102 (2d Cir. 2000). At a minimum, “virtually all circuits in recent years” have deemed these challenges either waived, or subject only to a “plain error” standard. *Id.* The plain error standard of review is set out in section I.B., *supra*.

A defendant’s sentence constitutes cruel and unusual punishment only when it “shocks the collective conscience

of society.” *United States v. Gonzalez*, 922 F.2d 1044, 1053 (2d Cir. 1991). Successful Eighth Amendment challenges to the lengths of sentences are and should be “exceedingly rare” and “federal courts should be reluctant to review legislatively mandated terms of imprisonment.” *Hutto v. Davis*, 454 U.S. 370, 374 (1982). The Supreme Court has repeatedly emphasized that deference should be given to the legislature’s judgment regarding the appropriateness of punishment. *Rummel v. Estelle*, 445 U.S. 263, 275-76 (1980); *Harmelin v. Michigan*, 501 U.S. 957, 998 (1991) (Kennedy, J., concurring).

A sentence violates the Eighth Amendment if it is “grossly disproportionate” to the particular defendant’s crime. *Graham v. Florida*, ___ S. Ct. ___, 2010 WL 1946731, *8 (May 17, 2010). The Supreme Court recently summarized the proper application of this standard, a procedure set out in Justice Kennedy’s opinion in *Harmelin*:

A court must begin by comparing the gravity of the offense and the severity of the sentence. In the rare case in which this threshold comparison . . . leads to an inference of gross disproportionality the court should then compare the defendant’s sentence with the sentences received by other offenders in the same jurisdiction and with the sentences imposed for the same crime in other jurisdictions. If this comparative analysis validates an initial judgment that the sentence is grossly disproportionate, the sentence is cruel and unusual.

Id. (internal quotations, citations and alterations omitted).

C. Discussion

Because the defendant did not raise any Eighth Amendment challenge to his sentence at the district court level, this Court should decline to address the issue under *Feliciano*. His challenge also fails to meet the “plain error” standard, since the Supreme Court has previously upheld similarly lengthy sentences where the crimes were not as serious as that committed by Morales. For example, the Supreme Court upheld life sentences on recidivist offenders both for stealing three golf clubs worth \$1,200 and for obtaining \$120.75 under false pretenses. *Ewing v. California*, 538 U.S. 11 (2003); *Rummel v. Estelle*, 445 U.S. 263 (1980). Here, where the defendant was a three-time convicted felon who agreed to have participated at the highest levels of a heroin-trafficking organization that distributed at least 30 kilograms of heroin – conduct far more serious than the conduct at issue in *Rummel* and *Ewing* – it cannot be said that his sentence was grossly disproportionate to his crime. At a minimum, the defendant’s sentence fails to satisfy both the error requirement and the plainness requirement.

Even apart from plain error, the defendant’s sentence fails to rise to the level of “gross disproportionality” demanded by *Harmelin*. Indeed, this Court has rejected Eighth Amendment challenges even to life sentences imposed in drug-trafficking cases like this one. *See United States v. Flaharty*, 295 F.3d 182, 201 (2d Cir. 2002) (rejecting Eighth Amendment claim to life term by

defendant convicted for narcotics conspiracy under 21 U.S.C. § 846 and who was shown to have received \$30,000-\$40,000 per week of cash and narcotics for guns); *United States v. Torres*, 941 F.2d 124, 127-28 (2d Cir. 1991) (rejecting Eighth Amendment challenge to life term for drug trafficking offense and suggesting that “there can be little question that, as a matter of constitutional doctrine, a sentence of life imprisonment without parole for offenses as serious as those committed by [the defendants] as leaders of a multimillion dollar heroin trafficking organization does not constitute ‘cruel and unusual punishment’”); *United States v. Aiello*, 864 F.2d 257, 265 (2d Cir. 1988) (rejecting Eighth Amendment challenge to life sentence without parole for defendant who “was a large supplier of hard drugs to wholesale distributors for an extended period of time”); *see also United States v. Jackson*, 59 F.3d 1421, 1424 (2d Cir. 1995) (per curiam) (rejecting Eighth Amendment challenge to ten-year mandatory minimum term under § 841(b)(1)(A) for first-time drug offender involved with more than 50 grams of crack cocaine).

Because there is no basis for concluding that Morales’s sentence was grossly disproportionate to his crime, there is no need to move to the second step of comparing the defendant’s sentence to sentences received by other offenders in this jurisdiction and to sentences imposed for the same crime in other jurisdictions. *See Graham*, 2010 WL 1946731, *8.

And indeed, Morales makes no real attempt to meet this standard, choosing instead to focus his comparative

energies on other members of his heroin conspiracy. But even assuming that this “inter-conspiracy” comparison were somehow relevant, it would not demonstrate that Morales’s sentence was grossly disproportionate to his offense.

For example, Morales claims that his sentence was grossly disproportionate to his offense because Edwin Sanchez, the leader of the organization, received a lower sentence. Morales Br. 10-11. But a close examination of the record reveals that the disparate sentences were rationally based on the specific facts before the district court. The court made it abundantly clear that the most significant factors driving his selection of a sentence for Morales were the massive quantities of heroin which the defendant was responsible for distributing and the defendant’s extensive criminal record. MA285-86, 310. Although Sanchez was the leader of the organization, his criminal history was not as lengthy as Morales’s. The PSR placed Morales in a criminal history category V, while Sanchez was placed in criminal history category III. PSR ¶ 55, MA255, GA57. Morales, unlike Sanchez, has a prior federal firearms conviction for which the PSR assigned him three criminal history points, PSR ¶ 54, and an Assault in the Second Degree conviction for which he was assigned an additional three criminal history points. PSR ¶ 52. The seriousness of Morales’s prior convictions clearly outweighed the seriousness of Sanchez’s prior criminal convictions, and their sentences appropriately

reflected this distinction.⁸ In short, the different sentences imposed on Morales and Sanchez appropriately reflected a proportionally lengthier sentence for a proportionally more serious criminal history. There is no Eighth Amendment violation here.

⁸ In addition, the government presented the testimony of a cooperating witness at sentencing who described being assaulted in jail by two individuals who were sent by Morales to beat him up. MA203-204, 227-30. Based upon this post-plea conduct, the government sought an obstruction enhancement against Morales. The district court, while crediting the testimony of the witness, declined to impose an obstruction adjustment. MA282-83.

Conclusion

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

Dated: June 9, 2010

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



ALINA P. REYNOLDS
ASSISTANT U.S. ATTORNEY



HAROLD H. CHEN
ASSISTANT U.S. ATTORNEY



SANDRA S. GLOVER
ASSISTANT U.S. ATTORNEY

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 13,618 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

Alina Reynolds

ALINA P. REYNOLDS
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.

Eighth Amendment to the United States Constitution

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

* * *

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in

accordance with the provisions of Title 18, or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or \$8,000,000 if the defendant is an individual or \$20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

* * * *

21 U.S.C. § 851. Proceedings to establish prior convictions

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any

challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance

thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

Federal Rules of Criminal Procedure

Rule 52. Harmless and Plain Error

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

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

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Perez-Dominguez

Docket Number: 08-3488-cr(L)

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 6/9/2010) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: June 9, 2010

CERTIFICATE OF SERVICE

08-3488-cr(L)

USA v. Perez-Dominguez

I hereby certify that two copies of this Brief for the United States of America were sent by Regular First Class Mail to:

Evans D. Prieston, Esq.
75 Rowland Way
Novato, CA 94945

Richard C. Marquette, Esq.
60 Washington Ave., #302
Hamden, CT 06518

I also certify that the original and five copies were also shipped via Hand delivery to:

Clerk of Court
United States Court of Appeals, Second Circuit
United States Courthouse
500 Pearl Street, 3rd floor
New York, New York 10007
(212) 857-8576

on this 9th day of June 2010.

Notary Public:

Sworn to me this

June 9, 2010

RAMIRO A. HONEYWELL
Notary Public, State of New York
No. 01HO6118731
Qualified in Kings County
Commission Expires November 15, 2012

SAMANTHA COLLINS

Record Press, Inc.
229 West 36th Street, 8th Floor
New York, New York 10018
(212) 619-4949