08-5028-cr(L)

To Be Argued By:
ROBERT M. SPECTOR

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 08-5028-cr(L)
09-0902-cr(CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

DOMINGO GUZMAN, also known as Mingo, and
MARCOS RIVAS, also known as El Negro,
Defendants-Appellants.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court had subject matter jurisdiction over this criminal prosecution under 18 U.S.C. § 3231. Judgment entered October 10, 2008. Joint Appendix ("JA") 10. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on October 10, 2008, JA10, and this Court has appellate jurisdiction over the defendant's challenge to his sentence under 18 U.S.C. § 3742(a).

Statement of Issues Presented for Review[1]

I. Did the district court commit plain error in not being sufficiently specific as to its reasons for imposing a four-level role enhancement under U.S.S.G. § 3B1.1 and did it err as a matter of law in concluding that the undisputed facts supported the enhancement?

II. Was the defendant's 220-month sentence, which was within the guideline range found by the court and 42 months below the guideline range set forth in the Pre-Sentence Report, substantively reasonable?

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[1] The appeal involving co-defendant Marcos Rivas (09-0902-cr) was consolidated with this appeal. Rivas's counsel filed an *Anders* brief on August 19, 2010, and the Government has filed a separate motion for summary affirmance as to his appeal.

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Preliminary Statement

From in or about January, 2006 through in or about June 20, 2006, the defendant, Domingo Guzman, ran a drug trafficking operation based in Bridgeport, Connecticut and supplied powder cocaine, crack cocaine and heroin to various distributers in Connecticut, Massachusetts, New Hampshire, and Pennsylvania. He relied on several people to help him manage the enterprise,

including his girlfriend, Shirley Rivera, who collected drug proceeds for him on a regular basis from his various customers, co-defendant Edgardo Diaz, who maintained a stash house for the defendant, and several others who signed for and received packages containing kilograms of cocaine sent from Puerto Rico.

The defendant pleaded guilty to one count of conspiracy to distribute five kilograms or more of cocaine. At sentencing, the district court found that the appropriate guideline incarceration range was 188-235 months and imposed a sentence of 220 months' incarceration. In this appeal, the defendant makes two claims: (1) that the district erred in applying a four-level role enhancement; and (2) that the district court's sentence was substantively unreasonable as compared to the 262-month sentence imposed on a co-defendant who was also importing cocaine and heroin for re-sale from Puerto Rico. For the reasons that follow, the district court did not commit any error in its sentencing determination, and its sentence in this case should be affirmed.

Statement of the Case

On June 29, 2006, a federal grand jury sitting in Hartford returned an Indictment against the defendant and others charging him in Counts One and Two with conspiring to possess with the intent to distribute and to distribute five kilograms or more of powder cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846, in Count Three with conspiring to possess with the intent to distribute one hundred grams or more of heroin, in

violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846, and in Count Eight distribution of 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). JA11-JA21. The defendant changed his plea to guilty as to Count Two of the Indictment on November 15, 2007. JA33.

On October 8, 2008, the district court (Peter C. Dorsey, J.) sentenced the defendant to a term of 220 months' incarceration, followed by a term of five years' supervised release. JA197. The court issued a written judgment on October 10, 2008. JA198.

On October 10, 2008, the defendant filed a notice of appeal. JA200. He has been in federal custody since his arrest in this case on June 20, 2007 and is currently serving his federal sentence.

Statement of Facts

A. Factual basis

1. The initial investigation into Soto-Solivan

Had the case against the defendant gone to trial, the Government would have presented the following facts, which were set forth almost verbatim in the Government's sentencing memorandum (JA109-JA127) and the PSR (sealed appendix):

In approximately January 2006, a cooperating witness ("CW-1") supplied information to the DEA Task Force

regarding a drug trafficking organization ("DTO") run by a Luis Joel Soto-Solivan. CW-1 stated that he/she had known Soto-Solivan for approximately 15 years and that he/she knew him to possess and distribute wholesale quantities of heroin and cocaine. According to CW-1, Soto-Solivan was a source of supply for those narcotics to persons in, but not limited to, several cities in Connecticut, as well as areas in Massachusetts and Pennsylvania. CW-1 also stated that Soto-Solivan had a heroin/cocaine source of supply in Puerto Rico. According to CW-1, for a period of six months prior to February, 2006, Soto-Solivan had been supplying CW-1 with approximately 100 grams of heroin every five days. *See* PSR ¶ 8; JA111.

Starting in January, 2006, the DEA Task Force used CW-1 to engage in numerous controlled purchases of narcotics from Soto-Solivan, all of which occurred under DEA direction and supervision. On January 26, 2006, under DEA surveillance, CW-1 contacted Soto-Solivan via cellular telephone and arranged to pay him $6,000 in DEA funds for 100 grams of heroin that Soto-Solivan had previously supplied CW-1 before CW-1 had started cooperating with the DEA Task Force. On February 11, 2006, CW-1 purchased approximately 70 grams of heroin from Soto-Solivan. On February 22, 2006, Soto-Solivan arranged for CW-1 to meet this defendant, Domingo Guzman, and pay him $4,600 in DEA funds for the previously supplied 70 grams of heroin. On March 1, 2006, CW-1 purchased approximately 107 grams of heroin from co-defendant Hector Santiago, acting on behalf of Soto-Solivan, who was in Puerto Rico at the time. On March 17, 2006, after the DEA had seized approximately

one kilogram of cocaine as a result of an ongoing investigation independent of this investigation, CW-1, who had not been privy to the kilogram seizure, reported to the DEA that Soto-Solivan had contacted CW-1 on March 16 and stated that police had seized a kilogram of cocaine that had belonged to him the night before (March 15). On March 28, 2006, CW-1 purchased approximately 84 grams of cocaine base from Guzman in exchange for $2250 in pre-recorded DEA funds. On April 27, 2006, CW-1 purchased 50 grams of heroin from Soto-Solivan, and on May 4, 2006, CW-1 purchased another 50 grams of heroin from Soto-Solivan. *See* PSR ¶ 9; JA111-JA112.

The Government began intercepting wire communications over two different cellular telephones utilized by Soto-Solivan on April 11, 2006, and all interceptions ceased on June 8, 2006. Based on those interceptions, it was apparent that Soto-Solivan was operating a DTO that was responsible for distributing kilogram quantities of powder cocaine and hundred gram quantities of heroin in Connecticut, Pennsylvania, Rhode Island, New York, New Hampshire, Massachusetts and elsewhere. *See* PSR ¶ 10; JA112-JA113.

2. The investigation expands to Guzman

Wire interceptions also revealed that Guzman operated his own DTO in the Bridgeport area and had his own customer base. At times, he was provided with cocaine and heroin by Soto-Solivan, and at times, he supplied Soto-Solivan with cocaine and heroin. In addition, at times, the defendant discussed referring large-scale

customers from out-of-state to Soto-Solivan. For example, on April 14, 2006, at approximately 6:50 p.m., the defendant told Soto-Solivan that a "Linda" and her boyfriend, both from New Hampshire, had given him a check for some quantity of cocaine. He told Soto-Solivan that he had advised Linda that he would "hook her up," but that the price was fixed for now. He said that he sold the "whole thing" (kilogram of cocaine) for "a quarter" ($25,000). Linda told the defendant that she was willing to buy the "whole thing" (kilogram of cocaine) next time if it was of good quality. The defendant told Soto-Solvian that he would "hook him up with Linda," but that he wanted "three bucks" ($3,000) for himself. Soto-Solivan agreed. The defendant said that he would give Soto-Solivan "two two ($22,000) . . ." and that it would be good if Linda would be able to take "four, five, six or something like that" (kilograms of cocaine). According to the defendant, Linda and her boyfriend were very impressed with his product. *See* PSR ¶ 11; JA113.

The Government also intercepted wire communications over one of the defendant's cellular telephones from May 18, 2006 through June 19, 2006. The defendant utilized at least five different cellular telephones and changed them often to avoid interception. Pen register information revealed that one of those cellular telephones was primarily utilized to contact individuals in Puerto Rico. The wiretap investigation targeted this particular cellular telephone and did not target the other telephones that the defendant used to contact his many customers. For this reason, the Government gathered significant evidence against the defendant, his suppliers (co-defendant Carmen

Rondon-Feliciano and others identified only by first name and not charged), various individuals he used to help him operate his DTO (co-defendants Shirley Rivera, Joel Guzman, and Edgardo Diaz), and various individuals to whom he sold large, wholesale quantities of cocaine and heroin (Marcos Rivas in Pennsylvania and Banger Vergara in Massachusetts), but did not gather evidence as to the defendant's retail customers in Bridgeport. *See* PSR ¶ 12; JA114.

3. The delivery of drugs from Puerto Rico to Massachusetts and Connecticut

Various individuals in Puerto Rico, including co-defendant Rondon-Feliciano, supplied the defendant and Soto-Solivan with quantities of cocaine and heroin. Initial intercepted communications indicated that the narcotics were flown into the country, but they did not reveal the exact method of transport. *See* PSR ¶ 13; JA114.

In May 2006, however, intercepted communications revealed that the suppliers were using the Express Mail service provided by the United States Postal Service to transport the narcotics. Based on these communications, DEA special agents and inspectors with the United States Postal Service were able to intercept, search and seize two packages. One of the packages was sent by Feliciano to Soto-Solivan to the name "Angel Santiago" and at the address "25B Pleasant View, Fall River, Massachusetts." That package contained approximately two kilograms of powder cocaine and 250 grams of a cutting agent for cocaine. One of the suspected kilograms of cocaine was

imprinted with the insignia "JJJ," and the other was imprinted with the insignia "R2." The other package was sent by an unidentified individual in Puerto Rico to Guzman at 19 Seeley Street, Bridgeport, Connecticut. That package was intercepted on June 15, 2006 and was found to contain approximately two kilograms of cocaine. Both kilograms appeared to be imprinted with the insignia "LUX." The kilograms of cocaine sent to Soto-Solivan in Fall River on June 1, 2006 had a purity of 90%, and the kilograms of cocaine sent to this defendant in Bridgeport on June 15, 2006 has a purity of 78%. Based on the high purity of the cocaine and the insignia imprinted on the kilograms, it appears that the cocaine was shipped from a source country, through Puerto Rico, to Massachusetts and Connecticut. *See* PSR ¶ 13; JA114-JA115.

Based on information contained on both seized packages, the United States Postal Service was able to identify other, similar packages that had been sent to Soto-Solivan and the defendant in Fall River and Bridgeport from February, 2006 through June, 2006. Specifically, on February 9, 2006, April 4, 2006, and May 3, 2006, packages weighing 1 pound 9 ounces, 4 pounds 5 ounces, and 3 pounds 7 ounces, respectively, were sent from Bayamon, Puerto Rico to "Luis Soto" at 275 County Street, Apartment 3, in Fall River. Physical surveillance confirmed that Soto-Solivan lived at the 275 County Street address. Signature cards for those deliveries showed that Luis Soto signed for the packages. *See* PSR ¶ 15; JA115-JA116.

On February 21, 2006, April 20, 2006, May 10, 2006, and May 31, 2006, packages weighing 3 pounds 11 ounces, 5 pounds 11 ounces, 4 pounds 4 ounces, and just over 6 pounds, respectively, were sent from Bayamon and Toa Baja Puerto Rico, to various individuals, including "Angel Santiago" and "Felix Martinez" at 7D Pleasant View, Fall River. Signature cards for those deliveries showed that "Felix Martinez," "W Torres" and a "Windy Tavares" signed for some of those deliveries. JA116.

On March 9, 2006 and April 24, 2006, packages weighing 6 pounds 2 ounces, and 6 pounds 8 ounces, respectively, were sent from Bayamon, Puerto Rico to Jose Santiago at 25B Pleasant View, Fall River, Massachusetts. Signature cards for those deliveries showed that "Jose Santiago" signed for those packages. JA116.

On March 14, 2006, April 6, 2006 and May 10, 2006, packages weighing 3 pounds 9 ounces, 3 pounds 15 ounces and 5 pounds 6 ounces, respectively, were sent from Puerto Rico to 19 Seeley Street, Bridgeport, Connecticut. The first package was sent to a "J. Lopez," and the second and third packages were (like the June 15th package) were sent to a "Noel Lopez." *See* PSR ¶ 16; JA116.

On April 6, 2006 and June 6, 2006, packages weighing 5 pounds 7 ounces, and 3 pounds 11 ounces, respectively, were sent from Puerto Rico to 355 Chamberlain Avenue, Bridgeport, Connecticut. Both packages were sent to "Sheila Rivera," the defendant's wife, but Sheila's sister,

Jennifer Rivera, signed for them. *See* PSR ¶ 16; JA116-JA117.

Finally, on March 24, 2006 and April 12, 2006, packages were sent to Sheila Rivera at 117 Holly Street, which was the defendant's previous address. Sheila signed for the March 24th package and subsequently confirmed that, at that time, she knew that the package contained narcotics. The signature line for the April 12, 2006 package, which weighed 4 pounds 7 ounces, was illegible. *See* PSR ¶ 16; JA117.

One pound is equivalent to approximately 500 grams. The June 1, 2006 package, which contained approximately 2 kilograms of cocaine and 250 grams of a cutting agent commonly used for cocaine, weighed just over six pounds. The June 15, 2006 intercepted package containing the two kilograms of cocaine weighed over five pounds. *See* PSR ¶ 13; JA117.

4. The defendant's arrest

The defendant was arrested on June 20, 2006. At the time of his arrest, a federal search warrant was executed at his residence at 355 Chamberlain Avenue, in Bridgeport. The execution of that warrant revealed approximately $56,000 in cash in the defendant's bedroom, all of which has been forfeited as drug proceeds. JA117.

B. Guilty plea

The defendant pleaded guilty to Count Two of the Indictment on November 15, 2007. JA33. At the time of the guilty plea, the defendant entered into a written plea agreement. JA22. In connection with the guilty plea, the Government agreed not to file a second offender notice under 21 U.S.C. § 851, which would have doubled the ten-year mandatory minimum term applicable to the defendant's count of conviction. JA23. The defendant agreed to forfeit $55,980 in United States currency and a tan Ford Excursion. JA23. Although the agreement contained a detailed guideline stipulation, the parties crossed out that stipulation at the time of the guilty plea. JA25-JA26. In addition, the parties both reserved their respective appeal rights. JA26. The Government agreed to move to dismiss Counts One, Three and Eight of the Indictment because the conduct underlying those counts was taken into account in the written factual stipulation entered into by the parties. JA29.

This factual stipulation provided as follows:

> From in or about January, 2006 through in or about June 20, 2006, the defendant conspired together with others, including, co-defendants Luis Joel Soto-Solivan, Carmelo Rondon-Feliciano, a.k.a. "Panzon," Shirley Rivera, Joel Guzman, Marcos Rivas, a.k.a. "El Negro," Aurea Casiano, Edgardo Diaz, a.k.a. "Galdy," and Banger Vergara, a.k.a. "Valdil," to possess with the intent to distribute, and also to distribute, various quantities

of powder cocaine. During this same time period, the defendant also conspired with others, including Luis Joel Soto-Solivan and Carmelo Rondon-Feliciano, to possess with the intent to distribute and to distribute one hundred grams or more of heroin.

During this time period, this defendant, Domingo Guzman, a.k.a. "Mingo," purchased quantities of cocaine and heroin from various suppliers from Puerto Rico, including co-defendant Carmelo Rondon-Feliciano. The defendant operated a drug trafficking operation based in Bridgeport, Connecticut and supplied narcotics to various distributers in Connecticut, Massachusetts, New Hampshire, and Pennsylvania. Specifically, he supplied quantities of narcotics for redistribution to various individuals known and unknown, some of whom are named as defendants in the Indictment, including Banger Vergara in Holyoke, Massachusetts, Marcos Rivas in Pennsylvania, Luis Joel Soto-Solivan in Fall River, Massachusetts, and Joel Guzman in Bridgeport, Connecticut. As to Joel Guzman, who is the defendant's cousin, the defendant regularly supplied him with quantities of powder cocaine, which Joel Guzman then redistributed to customers in the Bridgeport area. In addition, the defendant advised Joel Guzman that he was receiving kilogram quantities of powder cocaine from Puerto Rico. As to co-defendant Shirley Rivera, she helped the defendant operate his drug trafficking enterprise by knowingly

collecting drug proceeds for him on a regular basis from his various customers, including Luis Joel Soto-Solivan. As to co-defendant Edgardo Diaz, he helped the defendant in the daily operation of his drug trafficking enterprise by maintaining a stash house for the defendant at 19 Seeley Street in Bridgeport. On March 28, 2006, the defendant sold approximately three ounces of cocaine base to a DEA cooperating witness in exchange for $2250 in pre-recorded DEA funds.

One method that Carmelo Rondon-Feliciano and other suppliers in Puerto Rico used to transport controlled substances for re-distribution from Puerto Rico to the continental United States was to send the controlled substances using the Express Mail service provided by the United States Postal Service. From February, 2006 through June 20, 2006, Carmelo Rondon-Feliciano and other suppliers in Puerto Rico sent numerous Express Mail packages containing controlled substances to Luis Joel Soto-Solivan at three different addresses in Fall River, Massachusetts, and to this defendant, at different addresses in Bridgeport, Connecticut. Specifically, from February, 2006 through June, 2006, the defendant received approximately 19 packages of narcotics from Puerto Rico at 19 Seeley Street and 355 Chamberlain Avenue, both in Bridgeport, Connecticut.

On June 1, 2006 and June 15, 2006, law enforcement officers with the Drug Enforcement

> Administration and the United States Postal Inspection Service intercepted and seized two of these Express mail packages. The June 1, 2006 package was sent to Luis Joel Soto-Solivan at 25B Pleasant View, Fall River, Massachusetts, and the June 15, 2006 package was sent to this defendant at 19 Seeley Street, Bridgeport, Connecticut. The June 1, 2006 package contained two separately-wrapped kilograms of cocaine, and approximately 250 grams of a non-narcotic, cutting agent commonly used as a diluent with cocaine. The June 15, 2006 package contained two separately-wrapped kilograms of cocaine.

JA31-JA32.

C. Sentencing proceedings

The Pre-Sentence Report ("PSR") found that the base offense level, under Chapter Two of the Sentencing Guidelines, was 34 by virtue of the quantity of powder cocaine and heroin attributable to the defendant's conduct. *See* PSR ¶ 24. The PSR also added four levels to his base offense level because it found that he was a leader of criminal activity involving five or more participants. *See* PSR ¶ 26. After a three-level reduction for acceptance of responsibility the PSR found that the defendant's adjusted offense level was 35. *See* PSR ¶¶ 30-31. The PSR also concluded that the defendant had accumulated seven criminal history points by virtue of his prior convictions, two criminal history points because he was on state probation at the time of this offense and one criminal

history point because he committed the instant offense within two years of being released from incarceration. *See* PSR ¶ 39. At a Criminal History Category V, the resulting guideline incarceration range was 262-327 months. *See* PSR ¶ 75.

The Government filed a sentencing memorandum advocating for a sentence of 262 months' incarceration, which it noted was the same term of incarceration ordered for co-defendant Soto-Solivan. In the memorandum, as relevant here, the Government addressed the disputed issues of quantity and role. As to quantity, the Government made three principle arguments. First, it enumerated all of the narcotics seizures that occurred during the case. The DEA seized approximately four kilograms of powder cocaine from Express Mail packages, purchased approximately 84 grams of crack cocaine directly from the defendant on March 28, 2006, and seized over 300 grams of heroin that was distributed by Soto-Solivan between January, 2006 and June, 2006. Moreover, the defendant was present during a January 26, 2006 meeting, when CW-1 paid Soto-Solivan $6000 for a prior supply of heroin, and the defendant collected $4600 from CW-1 on February 22, 2006, which monies were for 70 grams of heroin supplied on February 11, 2006. JA119.

Second, the Government relied on the evidence that, between February 2006 and June 2006, the defendant and Soto-Solivan received numerous packages containing kilograms of cocaine from Puerto Rico. Using conservative estimates, and relying on the June 1st and June 15th seized packages as guides, the Puerto Rican

source sent approximately ten kilograms of powder cocaine to Soto-Solivan in Fall River (excluding the June 1st package) and approximately nine kilograms of powder cocaine to Guzman in Bridgeport (excluding the June 15th package). Intercepted telephone calls, especially those intercepted after the Government seized the June 1st and June 15th packages, revealed that the defendant and Soto-Solivan shared the powder cocaine sent from Puerto Rico to Fall River and Bridgeport. Using the estimates set forth above, the defendant and Soto-Solivan received approximately nineteen kilograms of powder cocaine from February, 2006 through June, 2006, not including the two seized packages. JA120.

Third, the Government pointed to intercepted telephone calls during the wiretap investigation which revealed that the defendant was purchasing and reselling large quantities of both heroin and cocaine. Often, he was intercepted selling multi-hundred gram quantities of powder cocaine and heroin to wholesale customers such as co-defendants Banger Vergara and Marcos Rivas. JA120-JA121.

Next, the Government addressed the defendant's role in the offense. JA121. It argued that the PSR had correctly attributed a four-level role enhancement to the defendant. JA121. In support of its argument, the Government relied on the factual stipulation to allege that the defendant had operated an extensive cocaine and heroin enterprise from his home in Bridgeport, Connecticut and was responsible for distributing large quantities of cocaine and heroin to distributers in several states in the northeast United States.

JA122. The Government explained that the defendant employed other individuals to help him operate this enterprise. JA122. For example, in arranging for his suppliers in Puerto Rico to mail him kilogram quantities of cocaine, he enlisted the help of his wife, Sheila Rivera, and her sister, Jennifer Rivera, both of whom were listed as the addressees on packages of cocaine sent from Puerto Rico, and both of whom agreed to sign for those packages to facilitate the defendant's receipt of the narcotics. JA122. In addition, the defendant used co-defendant Edgardo Diaz to run errands for him and to help manage the stash house at 19 Seeley Street. JA122. He also relied on Aurea Casiano to transport drug proceeds back to his suppliers back in Puerto Rico. JA122. Finally, although it is unclear what role the defendant's cousin and co-defendant, Joel Guzman, played in the conspiracy, he certainly was subservient to this defendant. JA122. For example, on June 15, 2006, after the Government seized one of the Express Mail packages, Joel Guzman agreed, at the defendant's demand, to return cocaine to the defendant so that he could sell it to a different customer. JA122.

The Government concluded its sentencing memorandum by examining the factors listed in 18 U.S.C. § 3553(a). JA123. It claimed that the sentence should reflect the seriousness of the defendant's conduct in purchasing and redistributing enormous quantities of heroin and powder cocaine to various customers throughout the Northeast and reaping substantial profits from this enterprise, as evidenced by the $56,000 in cash seized from his residence at the time of his arrest. JA125. The Government also emphasized the defendant's prior

criminal record. JA125. By the time he engaged in the offense conduct underlying this case, he had already sustained multiple felony convictions, two of which were for narcotics trafficking and many of which were committed while under some form of court supervision. JA125. Indeed, since his release from prison in 2004, and while still on probation from his 2003 sale of narcotics conviction, the defendant grew his drug business substantially, so that, by the time he was arrested in this case in 2006, he was no longer the street level drug dealer found in possession of five baggies of heroin and a few hundred dollars, as he was in 2003; he was a large scale, high volume narcotics trafficker. JA126.

The defendant filed a sentencing memorandum which challenged several findings from the PSR. First, the defendant argued that the PSR erred in attributing three criminal history points to his 1997 controlled substance conviction because the original five-year sentence in that case had been suspended entirely and there was insufficient evidence that he had served any additional jail time in that case on a subsequent probation violation. JA137. As a result, the defendant asserted that he had accumulated seven criminal history points and was in Criminal History Category IV. JA138.

Second, the defendant argued that his readily foreseeable quantity of cocaine was between five and fifteen kilograms. JA138. The defendant argued that he should not have been held responsible for the cocaine sent to Soto-Solivan in Massachusetts. JA139. He claimed that he and Soto-Solivan were simply friends and that there

was no evidence that the defendant had knowledge or participation in the quantities of cocaine received and sold by Soto-Solivan. JA141.

Third, the defendant argued that the court should not impose any enhancement for his alleged aggravated role in the offense. JA144. He described his operation as "more of a Mom and Pop operation than Wal-Mart." JA143. He characterized the help that others gave him as "services [which] amounted mostly to the defendant's occasional use of a mailing address other than his own and a very loose association with a limited number of family members with an even more limited knowledge of [the defendant's] small scale business." JA143. He argued that there was no "direct evidence of the type of oversight typically seen when a defendant is a leader or organizer of a drug operation . . . ." JA143.

Finally, the defendant argued for a downward departure and/or a non-guideline sentence. JA144-JA148. He relied upon his struggle with drug abuse, his extraordinary responsibilities to his family, his lack of education, and the fact that he had never before faced any significant term of incarceration. JA144. In the end, he asked for a sentence within the range of 135 to 168 months' incarceration, which was the range that resulted by using a Criminal History Category IV, with no role enhancement and a quantity of between five and fifteen kilograms of cocaine. JA147-JA148.

A third addendum to the PSR addressed the "disagreement between the parties with respect to the drug

quantity involved in the defendant's relevant and readily foreseeable conduct." PSR, Third Addendum. In that addendum, the probation officer listed each of the packages sent from Puerto Rico to Bridgeport and from Puerto Rico to Massachusetts. It also summarized the facts underlying the various controlled purchases involving the defendant. Finally, it reviewed various intercepted telephone calls which revealed the quantities of cocaine and heroin being purchased and distributed by the defendant. The addendum concluded that, based on the packages sent from Puerto Rico alone, the reasonably foreseeable quantity of cocaine attributable to the defendant's conduct was 33.7 kilograms. *See* PSR, Third Addendum.

At the start of the sentencing hearing, rather than launch immediately into the parties' sentencing arguments, the district court summarized the various disputed issues in the PSR and its preliminary resolution of those issues so that the parties could address their comments accordingly. JA152-JA175. First, as to the criminal history category, it indicated that, although Probation had received a letter from the probation office in Puerto Rico describing the probation violation sentence on the 1997 conviction, it would "give Mr. Guzman the benefit of the doubt and drop him to a Category IV." JA152. Second, as to the quantity of cocaine involved in the offense, the court detailed the evidence presented on the issue and concluded that "if he's not in the 15 to 50 kilogram range, but is more properly put in the 5 to 15, he's very much close to 15 than he is to 5, which would suggest that maybe the appropriate thing to do is to . . . give him the benefit of the doubt . . . ."

JA154. The court then commented that the defendant was "a drug dealer of very considerable significance, and therefore, if I drop him down to a Category 33, and a Level History IV, the range of 188 to 235 months would prompt me to use the higher end of that range . . . ." JA154-JA155. Here, the court noted its concern that "some consistency" with Soto-Solivan's 262 month sentence "is seemingly required" which would "somewhat justify the use of the higher end of the range, if he is to be regarded as a Level 33, Category IV." JA155.

Next, the court briefly reviewed the defendant's departure grounds and found them without merit. As to his drug use, the court explained, "I'm not convinced that . . . his addictions should in any way be a factor, as far as his sentencing in concerned. Yeah, I know he's got a problem[,] . . . but that's of his own making." JA155. As to his family circumstances, the court said that the defendant should have thought on the potential impact of incarceration on his three children "before he got involved in this matter, and it's not that . . . he engaged in this to support those children, because according to his own statement to the probation office, he was making 6 to $7,000 a month in the work that he was doing." JA156. As to the fact that the defendant had not previously faced such long incarceration terms, the court indicated that it was not planning to depart on that ground. JA156. In sum, the court stated, "I don't see that there is any real justification in departing on any of the grounds that you've cited, nor indeed, on the basis of those issues cumulatively . . . . I basically regard [the defendant] as a drug dealer of some considerably magnitude, and on that basis, as I say, giving

him the benefit of the doubt, and the using the lesser range at the upper reaches may well be the appropriate thing to do." JA157.

The Government then reminded the court to address the issue of role. JA158. The court began by listing all of the various co-conspirators who were working with the defendant: "I have one, two, three, four, five, six, seven people involved . . . . Shirley Rivera is one. Joel Guzman is one. . . .The next person is Jennifer Rivera. There's Mr. [Edgardo] Diaz, who was supposedly the stash supervisor. There's Aurea Casiano. . . . and she's transporting the money . . . back there to Puerto Rico, Mr. Carmelo Rondon Feliciano." JA158-JA159. The court then stated, "So while you are correct, Mr. Walkley, in that [the defendant] did not have what might be regarded in the traditional sense, extensive utilization of a supervisory position with respect to each of these people, they were related to the overall undertaking, and so, therefore, it seemed to me that the role in the offense enhancement is appropriate, to the extent as calculated in the Presentence Report." JA159. The court then stated, "So, I think that resolves all of the questions that have been raised about the Presentence Report, again, unless I've missed something." JA159.

The Government indicated that it did not "have a problem with the range proposed, 188 to 235 months, but . . . if [the] defense puts on any kind of argument as to role, that might be convincing, I do think that the evidence that I could present today would clearly show 15 kilograms or more, and really, from my point of view, I

base it entirely on the packages, and the seized packages." JA160. The Government summarized its evidence on quantity, and concluded by stating that"I don't have a problem with the way the Court has analyzed it, and I think the way the Court has analyzed it is essentially saying, even if we give him the benefit of the doubt of the 5 to 15, he's certainly at the top of that range, that result is appropriate . . . ." JA162.

The court then summarized the Government's evidence regarding quantity and said that it was a "reasonable inference, at least possibly, even though there is no direct evidence as to the precise weights of the cocaine in any of the packages, that just would, potentially, at least, justify a finding that each package involved multiples of one kilogram." JA164. Still, the court thought that the defendant had "raised a legitimate point" regarding quantity because "there's no definitive evidence as to how much was in each package, and rather than get into a dispute as to whether it's a reasonable inference to find that each of the packages that we know were mailed to the respective addresses in Bridgeport and in Fall River, and that what was involved was at least one kilogram of cocaine, finding that there is enough evidence to justify at least the 5 to 15, with the probability that what's involved is closer to 15 than 5, seems to me to be the justifiable thing, rather than go slightly over the 15, to put him in the 15 to 50 category, having in particular mind that the ranges are fairly close." JA165.

The defendant conceded that the court could infer, based on a review of the tracking numbers from the

various seized and identified packages, that one sender likely grabbed a stack of labels to mail all of the packages. JA165-JA166.

The court confirmed with both sides: "Well, on that basis, then it would be my sense that I would correct the Pre-Sentence Report to reflect the history of category of IV, and a guideline calculation offense level of 33, which produces the 188 to 235 range." JA166. Defense counsel clarified, "And if I could just, to spell out for the record, that would be a base offense level of 32, Your Honor, less three for the acceptance, and then a four-level increase as a role in the offense." JA166. The court replied, "Yes. . . . Is there anything else? Any other issue that I should deal with." JA166.

Defense counsel revisited the role issue. He conceded that "the cases . . . weigh heavily in favor of the government, and the probation finding with regard to a four-level enhancement, but I would ask the Court to consider, in fashioning a sentence, . . . [that this was a] small enterprise . . . a 'mom and pop' operation . . . ." JA167. He stated that the drug enterprise in this case was not "a large drug operation." JA167. He argued, "Perhaps the quantity is extensive, and that makes it a bigger enterprise, but at the same time, . . . I would classify it, as I said in my memorandum, closer to a 'mom and pop' operation than Wal-mart." JA168. Defense counsel asked the court to consider imposing a three-level upward adjustment for role, instead of a four-level adjustment, which would bring the defendant's adjust offense level down to 32. JA171.

In response, the court stated,

> Well, the difficulty, of course, Mr. Walkley, is that the guidelines, for better or for worse, articulate the distinctions to be drawn, and I am of the view that the facts of the case rather clearly bring him within the four-level role enhancement. I recognize that in the relationships between [the defendant] and the others that are involved, the six others that are involved that I listed for you before, is somewhat less than the classic supervisor relationship. Nonetheless, within the imperfection of the articulation that's to be found in the guidelines, it seems to me that the four-level [adjustment] does apply, and not the three-level. So, I am going to adhere to the Presentence Report's calculation of the four-level guideline.

JA171.

The Government then decided to "add some facts to the record, to the extent this is ever looked at." JA172. As to the size of the enterprise, which appeared to be the defendant's only point of contention, it claimed that, in addition to those individuals listed by the court, the defendant dealt with large-scale cocaine and heroin distributers such as co-defendants Marcos Rivas and Banger Vergara, and with multiple sources of supply. JA172. As to the defendant's role, the Government characterized him as a "puppet master" and reiterated that he used several different people to sign for the packages of narcotics sent from Puerto Rico, that he relied on co-

defendant Diaz to maintain the stash house, that he relied on different individuals to transport monies back to his sources of supply in Puerto Rico, and that, on at least one occasion, he forced his cousin, Jose Guzman, to return previously supplied cocaine to him so that he could provide it to another customer. JA172-JA174. The Government also explained that, although the defendant used several cellular telephones to talk to his customers, it was only intercepting calls over the cellular telephone that he used to talk with his source of supply, his largest wholesale customers, and his trusted inner circle. JA174. "By the time we hit [the defendant's] phone, we were already onto Puerto Rico, and so our focus was not in trying to arrest every small town drug dealer in Bridgeport, but to try to use [the defendant's] phone to figure out who was sending the packages and, of course, it was during that part of the wire that we actually identified [one of his sources of supply]." JA175. In other words, the fact that the indictment did not charge thirty or forty defendants did not reflect the size or extent of the defendant's drug trafficking operation. JA175.

In response, the court stated, "[T]he implication is clear to me that each one of these people had a sufficient role, under [the defendant's] overall role in the matter, to warrant the enhancement." JA176.

After giving the parties its preliminary views on the disputed issues, the court turned to the defendant and asked whether he had read the PSR. JA176. The defendant confirmed that he had and that his lawyer had explained its contents to him. JA177. The court asked if there was

anything in the PSR that was not correct that had not already been raised during the hearing, and the defendant reiterated that he did not think that the four-level role enhancement was "right." JA177. The court also asked whether anything needed to be added to the PSR, and the defendant stated, "No. It's okay." JA177. The Government indicated that it had no objections to the PSR. JA177.

Defense counsel then made his formal presentation to the court, emphasizing the defendant's intelligence, commitment to his family, and desire to lead a law-abiding life.JA178. Defense counsel reiterated some of the same points that he made in his sentencing memo about the defendant's struggles with drug addiction and about his potential for success after his service of the sentence in this case. JA179. He then asked the court "to consider a sentence in the range of level 32, which I said is an overlapping range. It's between 168 to 210 months, versus 188 to 235 months." JA180. He asked the court to consider a sentence "nearer to the top of the range of level 32" which would still be "in the middle" of the court's proposed range. JA180. The defendant personally addressed the court, apologized to the court and to his family for his actions, and asked to be designated to a facility close to Connecticut so that he could see his family on a regular basis. JA181.

The court turned to the Government for its sentencing comments. The Government emphasized the defendant's prior criminal record, and the fact that the defendant continued to operate his drug enterprise in this case even after he knew that law enforcement officers had seized the

June 1st and June 15th packages. JA184-JA185. Based on the court's earlier comments, the Government concluded, "I will back off my request for 262 months, given the Court's indication of its desire to impose a sentence near the top of the range, the lower range, 188 to 235 month[s]." JA185.

In sentencing the defendant, the court explained that it was troubled by the fact that his prior two drug felony convictions did not encourage him to "comport yourself with what the community expects." JA186. It also stated that the sentence here would have a real, negative impact on the defendant's children and that the defendant had "failed in [his] responsibilities due them." JA186.

The court went on to analyze the factors under 18 U.S.C. § 3553(a) and explain the justification for its sentencing decision. It stated:

> But on the other hand, obliged, as I am, to consider the guidelines, in order to fulfill the requirements of 3553(a), to reflect the seriousness of the offense, to provide a deterrence to you, which your involvement with the courts in the past has not prompted to a significant degree at all, to insulate the community from further criminal activity, which I would hope wouldn't be necessary, but I can't be assured of that, from what has happened in the past . . . .
>
> I do think that given the range of 188 to 235 months, having in mind that if you legitimately

> should be regarded as in the 5 to 15 kilogram category, an upper level of the range is appropriate because of your prior history, and because of the fact that more likely, it was 15 kilograms that were involved, than it was five.
>
> So therefore, my sense of what is fair and appropriate to accomplish those purposes, and reasonable under the circumstance[s], having in mind that you should get . . . credit for the two years and four months that you have been detained, ... Giving consideration to the fact that you have entered in a plea, it is a judgment and the sentence of the Court that the defendant will be committed to the custody of the Attorney General for 220 months, which represents some credit towards the upper level of the guideline range but, at the same time, closer to the upper level of the range than the lower end. All is reflective of the factual situation, as I've discussed it.

JA187-JA188.

Summary of Argument

I. At sentencing the Government established by a preponderance of the evidence that the defendant should receive a four-level role enhancement based on the parties' factual stipulation at the guilty plea. That stipulation established that the defendant operated a lucrative and extensive cocaine and heroin trafficking enterprise in Bridgeport and, used his wife and her sister to sign for and

receive packages containing kilograms of cocaine, used another associate to manage one of the defendant's stash houses, used different individuals to transport drug proceeds to his supplier in Puerto Rico and ordered his own cousin to return cocaine to him after law enforcement officers had seized one of the defendant's cocaine packages.

The defendant's claim, for the first time on appeal, that the district court's factual findings on role were not specific enough to be reviewed fails because, although the court did not make its findings in one concise ruling, it did, throughout the course of the sentencing hearing parties make clear its reasons for concluding that the defendant was a leader of a drug trafficking organization which was extensive and involved at least five individuals. Moreover, any error was harmless because the facts underlying the enhancement were not in dispute and supported the court's decision that the enhancement should apply.

II. The defendant's 220-month sentence, which was 42 months below the guideline incarceration range set forth in the PSR, was substantively reasonable and reflected the fact that the defendant had multiple prior drug felony convictions and was serving a term of state probation on a sale of narcotics conviction when he became the leader of a lucrative and extensive drug trafficking operation in Bridgeport that involved the importation and redistribution of kilogram quantities of powder cocaine and hundred gram quantities of heroin to customers throughout the Northeast.

Argument

I. The district court properly applied a four-level enhancement based on the defendant's aggravated role in the offense.

The defendant makes two claims with respect to the court's role enhancement. First, he claims, for the first time on appeal, that the court failed to set forth specific factual findings to justify the enhancement. Second, he claims that the court made an incorrect legal conclusion when it found that the facts put forth by the Government, which were not disputed, justified the application of a four level role enhancement. Both of these claims lack merit.

A. Governing law and standard of review

Under U.S.S.G. § 3B1.1, a defendant may receive an upward adjustment in his adjusted offense level if he played an aggravated role in the offense. Where a defendant is "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive," the adjusted offense level increases by four levels. *See id.*, § 3B1.1(a). Where the defendant is "a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive," the adjusted offense level increases by three levels. *See id.*, § 3B1.1(b). Where the defendant is "an organizer, leader, manager or supervisor in any criminal activity [involving more than one participant]," the adjusted offense level increases by two levels. *See id.*, § 3B1.1(c). "In assessing whether a

criminal activity "involved five or more participants," only knowing participants are included." *United States v. Paccione*, 202 F.3d 622, 624 (2d Cir. 2000). "By contrast, in assessing whether a criminal activity is 'otherwise extensive,' unknowing participants in the scheme may be included as well." *Id.*

In distinguishing between an organizer and a mere manager, the district court should consider "the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." U.S.S.G. § 3B1.1, comment. (n.4). "Whether a defendant is considered a leader depends upon the degree of discretion exercised by him, the nature and degree of his participation in planning or organizing the offense, and the degree of control and authority exercised over the other members of the conspiracy." *United States v. Beaulieu*, 959 F.2d 375, 379-80 (2d Cir. 1992). The Government must prove by a preponderance of the evidence that a defendant qualifies for a role enhancement. *See United States v. Molina*, 356 F.3d 269, 274 (2d Cir. 2004).

"Before imposing a role adjustment, the sentencing court must make specific findings as to why a particular subsection of § 3B1.1 adjustment applies." *United States v. Ware*, 577 F.3d 442, 452 (2d Cir. 2009); *see also Molina*, 356 F.3d at 275. "A district court satisfies its

obligation to make the requisite specific factual findings when it explicitly adopts the factual findings set forth in the presentence report." *Molina*, 356 F.3d at 276. If there are disputed facts, the district court must make factual findings for appellate review. *See United States v. Thompson*, 76 F.3d 442, 456 (2d Cir. 1996). "[A] lack of specificity devoid of any statement of reasons does not permit meaningful appellate review of the enhancement the district court imposed." *Molina*, 356 F.3d at 276 (faulting district court for granting two-level role enhancement with absolutely no explanation or discussion).

To the extent that the district court errs in not stating, with sufficient specificity, its reasons for the role enhancement, this Court must determine whether the error was harmless. *See Molina*, 356 F.3d at 277. Moreover, where a defendant fails to "object at the time to the lack of specificity in the district court's factual findings, [this Court] review[s] this issue for plain error." *Id.*; *see also Ware*, 577 F.3d at 452. Pursuant to Fed. R. Crim. P. 52(b), plain error review permits this Court to grant relief only where (1) there is error, (2) the error is plain, (3) the error affects substantial rights, and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Williams*, 399 F.3d 450, 454 (2d Cir. 2005) (citing *United States v. Cotton*, 535 U.S. 625, 631-32 (2002), and *United States v. Olano*, 507 U.S. 725, 731-32 (1993)).

To "affect substantial rights," an error must have been prejudicial and affected the outcome of the district court

proceedings. *Olano*, 507 U.S. at 734. This language used in plain error review is the same as that used for harmless error review of preserved claims, with one important distinction: In plain error review, it is the defendant rather than the government who bears the burden of persuasion with respect to prejudice. *Id.*

This same prejudice standard applies in the sentencing context. In some cases, a "significant procedural error," may require a remand to allow the district court to correct its mistake or explain its decision, *see Cavera*, 550 F.3d at 190, but when this Court "identif[ies] procedural error in a sentence, [and] 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." *United States v. Jass*, 569 F.3d 47, 68 (2d Cir. 2009) (quoting *Cavera*, 550 F.3d at 197), *cert. denied*, 130 S. Ct. 1149 (2010) and 130 S. Ct. 2128 (2010).

B. Discussion

1. The district court did not commit plain error in failing to set forth sufficiently specific factual findings on role.

The defendant claims that the district court did not set out specific factual findings to support its four-level role enhancement. He did not raise this claim below and, therefore, must show plain error to achieve a remand. He cannot do so.

There was no error, and, to the extent that there was error, it was not plain. During the sentencing hearing, after the court had advised the parties that it intended to give the defendant the benefit of the doubt on his challenges to the PSR's findings with respect to his criminal history category and the quantity of cocaine involved in his offense, the Government asked the court to address the role enhancement. JA158. The court named the individuals involved in the drug conspiracy and found that the conspiracy involved more than five participants. JA158. The court also found that, although the defendant "did not have what might be regarded in the traditional sense [as] extensive utilization of a supervisory position with respect to each of these people, they were related to the overall undertaking." JA158. The court noted that co-defendant Edgardo Diaz was "the stash supervisor" and co-defendant Aurea Casiano was "transporting the money . . . back there to Puerto Rico." JA159.

When defense counsel revisited the issue, conceding that he understood "the Court's justification" for the enhancement, the court rejected his argument that the defendant's operation was a "small enterprise" and was better characterized as a "mom and pop operation." JA167. Defense counsel stated that, although the quantities of narcotics distributed by the operation were extensive, the operation itself was not. JA167-JA168. After the court rejected that argument, defense counsel asked for a three-level adjustment instead. In response, the court stated,

> Well, the difficulty, of course, Mr. Walkley, is that the guidelines, for better or for worse, articulate the

> distinctions to be drawn, and I am of the view that the facts of the case rather clearly bring him within the four-level role enhancement. I recognize that in the relationships between [the defendant] and the others that are involved, the six others that are involved that I listed for you before, is somewhat less than the classic supervisor relationship. Nonetheless, within the imperfection of the articulation that's to be found in the guidelines, it seems to me that the four-level does apply, and not the three-level. So, I am going to adhere to the Presentence Report's calculation of the four-level guideline.

JA171.

The defendant did not ask for more specific findings; however, at that point, the Government, summarized the facts supporting the enhancement. First, it named three additional individuals directly involved in the defendant's operation, two of whom were large-scale distributors, and one of whom helped send the subsequently seized June 15, 2006 package containing two kilograms of heroin. JA172. Next, it characterized the defendant's role in more detail:

> And then just to expand a little bit on what the Court already said in terms of role. It was [the defendant] using . . . several people to sign for the packages and, of course, his wife, Shirley Rivera and her sister, Jennifer Rivera, are the two most blatant examples of that . . . . Of course, Shirley Rivera, ended up having to be charged and being

> convicted . . . based largely on this one thing that she was doing, which was . . . knowingly signing for these packages, and then, of course, when you mentioned Edgardo Dia[z], who was in charge of the stash house, and then, of course, from the calls from Joel Guzman, it was apparent he had a very minor role. . . . [H]e's clearly somebody who's taking orders from [this defendant], and the call that I think was the basis for the guilty plea, was an example where he agrees, at [the defendant's] behest, to give him drugs back, because we just seized the package on June 15th.

JA173. The Government also discussed "some Fall River people who . . . fall into . . . the [defendant's] area" such as Moises Figueroa, who also collected money and delivered it to Puerto Rico for the defendant. The Government concluded, "[T]here was a bunch of different people who had different roles, whether they were money collectors keeping an eye on the stash house, signing for packages, . . . [and] [the defendant] was the puppet master." JA174. Finally, the Government explained that the operation was extensive and did involve numerous participants, but that the indictment itself reflected those individuals who were intercepted off of the target telephone, which was the telephone that the defendant used, not to talk with his run-of-the-mill customers, but to talk with his most trusted associates, his sources of supply and his large scale distributers. JA175. In response to this recitation, the court stated, "[T]he implication is clear to me, that each one of these people had a sufficient role, under [the defendant's] overall role in the matter, to

warrant the enhancement." JA176. Again, the defendant did not ask for a more specific factual finding.

Although the district court's factual findings were not as specific as they could have been and were not contained in one concise ruling on the role issue, a review of the sentencing transcript as a whole makes it clear why the district court thought the role enhancement was appropriate. First, the court listed the individuals involved in the operation and specifically found that it involved more than five participants. Second, although the court did not make specific findings regarding what the defendant did to qualify for the adjustment, it immediately responded to, and reaffirmed, the Government's recitation of those necessary facts. The Government's recitation was specific and mirrored the facts set out in the PSR, the Government's sentencing memo, and, in part, the written stipulation attached to the plea agreement.

Even if the defendant can establish plain error by virtue of the court's failure to be specific enough on the role issue, he cannot show how this error affected his "substantial rights" or "the fairness, integrity, or public reputation of judicial proceedings." *Molina*, 356 F.3d at 277 (internal quotation marks omitted). As this Court has explained, "[i]f the defendant does not object and there is evidence to sustain the enhancement, the error is not reversible under the plain error standard." *Id.* (internal quotation marks omitted). In this case, the defendant did not object to the extent of the court's factual findings, and as set forth below, the Government presented ample evidence to justify the enhancement.

2. The district court's decision to impose a four-level role enhancement was proper.

The defendant also claims that the district court erred, as a matter of law, in concluding that a four-level role enhancement was appropriate. In advancing this argument, the defendant articulates many of the same claims he made before the district court. These claims have no merit.

The role enhancement here was appropriate because, based on the undisputed facts, which were contained both in the PSR and the written stipulation attached to the plea agreement, the defendant was the leader of an extensive drug enterprise operating in Bridgeport, Connecticut. The defendant employed several individuals, including his wife and sister-in-law, to sign for and accept packages containing kilograms of cocaine that were mailed from Puerto Rico. He received 19 such packages during the course of the conspiracy, and this was the way in which he obtained the vast quantities of cocaine and heroin that he later resold. In addition, the defendant employed another individual to maintain one of his stash houses. He also relied on two different people to collect drug proceeds from him and deliver the proceeds to his sources of supply in Puerto Rico, and he relied on his wife to collect drug proceeds from his local customers. Finally, at least one other co-defendant, Joel Guzman, was subservient to the defendant, as evidenced by the fact that, after officers seized the June 15th package, the defendant demanded that Joel Guzman return previously supplied cocaine so that the defendant could provide it to one of his customers. *See* JA122.

Even if this Court concludes, as a matter of law, that a four-level role enhancement was not warranted, a remand is not required because the record reflects that the court would have imposed the same sentence in any event. *See Jass*, 569 F.3d at 68. In this case, there were several disputed issues contained in the PSR. First, the defendant alleged that he should have been placed in Criminal History Category IV, instead of Category V, because the probation officer's information related to the length of the defendant's sentence on a probation violation on his 1997 felony conviction out of Puerto Rico was not reliable. Second, the defendant alleged that he should not be held liable for more than 15 kilograms of cocaine. Third, the defendant alleged that no role enhancement was appropriate because of the limited nature of the drug enterprise.

The district court clearly had in mind its targeted sentence when it resolved these issues by saying that it thought a range of 188-235 was reasonable and reflected the § 3553(a) factors. JA187. The court said several times during the course of the sentencing hearing that it viewed an incarceration range of 188 to 235 months to be an appropriate reflection of the weighing of the § 3553(a) factors. JA154-155, JA166, JA187-JA188. In reaching this range, it rejected undisputed evidence by the Government, as repeated in the PSR, that the quantity of cocaine involved in the offense far exceeded 15 kilograms, and it also ignored the PSR's factual finding that the defendant had served five years' incarceration on his 1997 narcotics felony conviction, so that his correct criminal history category was a V. Thus, even if the district court

erred in its application of the role enhancement, this error was harmless in light of the court's other comments and findings during the sentencing hearing about its weighing of the § 3553(a) factors which show that it contemplated imposing an incarceration term within a range of 188 to 235 months.[2] Indeed, the defendant himself advocated for a guideline range of 168-210 months and a sentence "nearer to the top of [that] range," revealing how relatively insignificant the difference was between the defendant's and the courts' views of what constituted an appropriate balancing of the § 3553(a) factors.

II. The defendant's 220-month sentence was substantively reasonable.

The defendant claims that his 220-month sentence was substantively unreasonable as compared to the 262-month sentence imposed on his co-defendant, Luis Joel Soto-Solivan. This claim lacks merit.

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[2] Should this Court determine that a remand is necessary for further articulation of the facts supporting the role enhancement, the Government respectfully suggests that the Court permit the district court to reconsider its factual findings and conclusions on all guidelines issues, and not limit the district court to the question of the role enhancement. A review of the sentencing transcript reveals that the court viewed the incarceration range of 188 to 235 months to be the appropriate reflection of the § 3553(a) factors, and that its findings on role, quantity, and criminal history were inter-related and tied to achieving that targeted range.

A. Relevant facts

Co-defendant Luis Joel Soto-Solivan was sentenced to 262 months' incarceration on September 27, 2007. JA227-JA228. In his case, the PSR concluded that, although he was a career offender based on his 1992 conviction for voluntary manslaughter and his 1996 conviction for importation of heroin, his base offense level was higher under Chapters Two and Three because of the quantity of cocaine involved in his offense and a four-level enhancement for role. JA223. Specifically, Soto-Solivan was involved in the distribution of between 15 and 50 kilograms of cocaine, so that his base offense level was 34. JA208-JA209. A four-level role enhancement resulted in an adjusted offense level of 35, after a reduction for acceptance of responsibility. JA223. The Government sought a sentence within the career offender range of 262-327 months' incarceration, which was the range agreed upon by the parties in their written plea agreement. JA224, JA226.[3]

B. Governing law and standard of review

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the United States Sentencing Guidelines, as written, violate the Sixth Amendment principles articulated in *Blakely v. Washington*, 542 U.S.

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[3] In the written plea agreement, the parties did not agree on the application of a role enhancement; instead, the Government reserved its right to seek such an enhancement, and the defendant reserved his right to oppose it. JA209.

296 (2004). *See Booker*, 543 U.S. at 243. The Court determined that a mandatory system in which a sentence is increased based on factual findings by a judge violates the right to trial by jury. *See id.* at 245. As a remedy, the Court severed and excised the statutory provision making the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), thus declaring the Guidelines "effectively advisory." *Booker*, 543 U.S. at 245.

After the Supreme Court's holding in *Booker* rendered the Sentencing Guidelines advisory rather than mandatory, a sentencing judge is required to: "(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence." *See United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005). "[T]he excision of the mandatory aspect of the Guidelines does not mean that the Guidelines have been discarded." *Crosby*, 397 F.3d at 111. "[I]t would be a mistake to think that, after *Booker/Fanfan*, district judges may return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum." *Id.* at 113-14.

Consideration of the guidelines range requires a sentencing court to calculate the range and put the calculation on the record. *See Fernandez*, 443 F.3d at 29. The requirement that the district court consider the section 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 v. United States*, 551 U.S. 338, 356-59 (2007) (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. "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, [this Court] will accept that the requisite consideration has occurred." *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005).

This Court reviews a sentence for reasonableness. *See Rita*, 551 U.S. at 341; *Fernandez*, 443 F.3d at 26-27. 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). The Supreme Court has reaffirmed that the reasonableness standard requires of sentencing challenges under an abuse-of-discretion standard. *See Gall v. United States*, 552 U.S. 38, 46 (2007). Although this Court has declined to adopt a formal presumption that a within-guidelines sentence is reasonable, it has "recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Fernandez*, 443 F.3d at 27; *see*

also Rita, 551 U.S. at 347-51 (holding that courts of appeals may apply presumption of reasonableness to a sentence within the applicable Sentencing Guidelines range); *United States v. Rattoballi*, 452 F.3d 127, 133 (2d Cir. 2006) ("In calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.").

Further, the Court has recognized that "[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge 'exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.'" *Fernandez*, 443 F.3d at 27 (citations omitted). A sentence is substantively unreasonable only in the "rare case" where the sentence would "damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 140 (2010).

C. Discussion

The defendant's 220-month sentence was reasonable and reflects the factors set forth in § 3553(a). As the court stated, a lengthy sentence was necessary to reflect the seriousness of the offense, to protect the community from further criminal conduct by the defendant, and to deter the defendant from engaging in future criminal conduct. JA187. The court specifically indicated that it was concerned about the defendant's prior felony convictions for distributing narcotics and thought that a lengthy sentence was necessary to reflect the fact that the defendant had not stopped dealing drugs as a result of prior state sentences for the same conduct. JA186. The court also indicated that, despite the fact that it had applied the lower guideline range for distributing five to fifteen kilograms of cocaine, it viewed the defendant's conduct as involving at least the top end of that quantity range, so that a higher sentence within the 188 to 235 month range was appropriate. JA187-JA188.

As to the seriousness of the offense, the defendant was responsible for operating an extensive drug enterprise in Bridgeport which involved his purchase and redistribution of enormous quantities of heroin and powder cocaine to various customers throughout the Northeast. JA31. He was obtaining these narcotics through the United States mail directly from Puerto Rico and was using other individuals to sign for and receive the packages for him. JA31-JA32. Based on the intercepted telephone conversations, which were quite explicit, it was apparent that the defendant often engaged in the sale of large quantities of narcotics,

and, in doing so, was making a great deal of money, as evidence by the $56,000 in cash seized from his residence at the time of his arrest. JA113, JA117.

As to the issues of specific deterrence and protection of the community, the court concluded that the defendant posed a serious risk of recidivism. First, although he had figured out that law enforcement authorities had seized both the June 1st and June 15th packages, he did not stop dealing drugs or terminate his participation in the conspiracy and instead was motivated to be more careful and come up with new ways of countering law enforcement surveillance. Indeed, after the June 15th seizure, the defendant tried to come up with new ideas for shipping the cocaine to Connecticut from Puerto Rico to avoid detection. JA125.

Second, the defendant had already sustained multiple felony convictions, two of which were for narcotics trafficking, and had committed crimes repeatedly while under some form of court supervision. In 1997, he was convicted of sale of narcotics and sentenced to five years' incarceration, execution suspended. His probation was revoked in 2000, and he was sentenced to five years' incarceration. In 2003, he was convicted of second degree larceny, and in 2003, he was again convicted of sale of narcotics and sentenced to five years' incarceration, execution suspended after one year. *See* PSR ¶¶ 35-37. Had the probation officer obtained more information about the defendant's 1997 conviction out of Puerto Rico, he likely would have concluded that the defendant was a career offender under U.S.S.G. § 4B1.1. The defendant's

prior narcotics convictions did nothing to convince him to refrain from dealing drugs. To the contrary, since his release from prison in 2004, and while still on probation from his 2003 sale of narcotics conviction, the defendant grew his drug business substantially.

The court was also not convinced by the defendant's downward departure arguments. It concluded that the extensive nature of his operation, which involved the wholesale purchase and redistribution of kilogram quantities of cocaine and hundred gram quantities of heroin, rebutted any suggestion that his conduct was motivated by his need to purchase and use narcotics or that his sentence should be reduced to account for the harm to his children suffered as a result of a lengthy incarceration term. *See* JA155-JA157.

In the end, the court imposed a guideline sentence of 220 months' imprisonment, near the top of the recommended range to reflect the fact that, although the defendant had not been held responsible for a foreseeable quantity of greater than 15 kilograms, his offense conduct certainly involved an amount of cocaine at the top of the 5 to 15 kilogram range. This sentence was 42 months lower than the bottom of the 262-327 month guideline range recommended in the PSR, *see* PSR ¶¶ 75, 84, and only 10 months higher than the range advocated by defense counsel, *see* JA180.

The defendant argues that his sentence was substantively unreasonable based on the fact that it was only 42 months below the sentence of his co-defendant,

Soto-Solivan. Def.'s Brief at 57-59. The defendant claims that, because Soto-Solivan was a career offender and had sustained a state conviction for murder and a federal conviction for distribution of narcotics, he should have been sentenced to a far greater sentence than this defendant. Def's Brief at 58. He also argues that, because the Sentencing Guidelines will likely be (and have since been) amended to remove the attribution of any criminal history points for having committed an offense within two years of being released from incarceration, his sentence, which does not reflect this reduction, was too high. Def.'s Brief at 60.

These arguments lack merit. First and foremost, any comparison between this defendant and Soto-Solivan should start with their offense conduct. As discussed above, they both engaged in very serious, and similar, offense conduct. Both ran separate drug trafficking operations in their respective cities, and both depended on each other for supplies of heroin and cocaine. *See* PSR ¶ 11; JA69. They would import heroin and cocain through the mail from Puerto Rico and would share the packages they received, as evidenced by the fact that this defendant stated during one intercepted call that he was going to go to Fall River to help Soto-Solivan search for the missing June 1st package. *See* JA160-A161. In addition, both defendants were leaders of their operations, relying on others to store narcotics, deliver monies, and sign for, and receive packages of narcotics from Puerto Rico. *See* PSR ¶ 19; JA31.

Second, the district court, having been in the best position to weigh the § 3553(a) factors as they applied to these two defendants, specifically stated, "And whereas I don't know that [the defendant] necessarily is the precise equivalent to Mr. Soto-Solivan, he's fairly close to it, and a marked discrepancy between what Mr. Soto-Solivan got in the way of a sentence . . . some consistency is seemingly required, and he got 262 months, which would also somewhat justify the use of the higher end of the range, if he is to be regarded as a Level 33, Category IV." JA155. Thus, the district court was well aware of the sentence it imposed on Soto-Solivan and expressly stated that it did not want there to be a large disparity between his sentence and this defendant's sentence.

Soto-Solivan's guideline incarceration range, according to his PSR, was 295-365 months, which was based on a quantity of 15 to 50 kilograms of cocaine, a four-level role enhancement, and a Criminal History Category VI. This defendant's guideline incarceration range, according to his PSR, was 262-327 months, which was based on a quantity of 15-50 kilograms of cocaine, a four-level role enhancement, and a Criminal History Category V. There was a 33-month difference between the bottom of their respective guideline ranges. In both cases, the district court decided to impose a sentence below the guideline ranges set forth in the PSRs. For Soto-Solivan, the district court achieved this result by way of a departure, and for this defendant, the district court achieved the result by way of reducing his criminal history category and his base offense level. In the end, the 42-

month difference in their sentences reflects the disparity between their respective guideline ranges.

Although the defendant is correct that Soto-Solivan was a career offender by virtue of two prior, serious felony convictions from 1992 and 1996, he does not account for the fact that this defendant had a recent conviction for sale of narcotics, was on probation for that conviction when he committed the offense conduct in this case and had become far more entrenched in the drug trade since that conviction, thereby establishing that he was a high risk to re-offend. The district court specifically stated, in reviewing the § 3553(a) factors, that one primary motivation for its sentence was its concern that the defendant, based on the recency of his prior conviction, would re-offend. Finally, it is well-settled that "18 U.S.C. § 3553(a) does not require district courts to consider sentencing disparity among co-defendants" because "the primary purpose of [§ 3553(a)(6)] was to minimize *nationwide* disparities." *United States v. Wills*, 476 F.3d 103, 110 (2d Cir. 2007).

As to the defendant's argument regarding the amended Sentencing Guideline, it has no merit. First, the PSR placed the defendant in Criminal History Category V based on its view that the defendant had accumulated ten criminal history points. The defendant challenged the reliability of the PSR's conclusion that the defendant had been sentenced to five years' incarceration on a probation violation stemming from his 1997 drug conviction in Puerto Rico, and the district court, without objection by the Government and without an evidentiary hearing,

resolved this issue in the defendant's favor. It would be pure speculation to guess what the district court would have done had the defendant not received one additional criminal history point based on the recency of his release from incarceration from his last conviction. The defendant assumes that he would have fallen into Criminal History Category III, but that assumption is based on the premise that the district court would have handled the question regarding the 1997 drug conviction in the same manner. And that premise is questionable when a plain reading of the sentencing transcript reveals that the district court thought the range of 188 to 235 months' incarceration was reasonable and reflected the § 3553(a) factors. *See* JA187.

Moreover, the premise of the defendant's argument is faulty in that the recency of his prior conviction was in the forefront of the court's justification for its sentence. In handing down its sentence, the court specifically found that the fact of the defendant's 2003 sale of narcotics conviction and his commission of this more serious offense while on probation from that conviction showed that he posed a high risk for recidivism and a significant public safety risk. JA186-JA187. Thus, regardless of how the Sentencing Commission has decided how the issue of recency should be dealt with under the guidelines, the district court felt the issue was extremely important in the § 3553(a) calculus for this defendant.

The 220-month sentence in this case reflected a sensible application of the § 3553(a) factors, was not excessively high or low, and fell squarely within the advisory guideline range.

Conclusion

For the foregoing reasons, this court should affirm the judgment of the district court as to this defendant.

Dated: December 17, 2010

Respectfully submitted,

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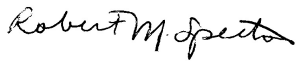

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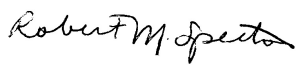
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,070 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



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ADDENDUM

18 U.S.C. § 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.

U.S.S.G. § 3B1.1 - Aggravating Role

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

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

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

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

Application Notes:

1. A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant.

2. To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a

defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.

3. In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.

4. In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.