09-5171-cr

To Be Argued By:
H. GORDON HALL

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-5171-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

MICHAEL DANZI,
Defendant-Appellant.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Mark R. Kravitz, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on December 8, 2009. Joint Appendix ("JA") 11. On December 15, 2009, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA11, 348. This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a).

Statement of Issue
Presented for Review

After an evidentiary hearing, the district court concluded that the defendant was responsible for distributing *at least* 100 kilograms of marijuana, relying on evidence of currency seized, testimony from cooperating witnesses, evidence of the defendant's unexplained wealth, and evidence from recorded conversations. Was this finding clear error?

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Preliminary Statement

In this sentencing appeal, the defendant, Michael Danzi, challenges the district court's factual finding that he was responsible for at least 100 kilograms of marijuana in a drug conspiracy. The district court made that finding after a two-part hearing on drug quantity and the review of multiple written submissions by the parties. In a thoughtful written decision, the court concluded that a preponderance of the evidence supported a finding that the defendant was responsible for *at least* 100 kilograms of marijuana, and

specifically noted that this was a conservative estimate based on all of the evidence.

Although no single piece of evidence independently established Danzi's responsibility for at least 100 kilograms of marijuana, as the district court noted, the evidence as a whole fully supported that finding. Because the district court's quantity finding was not clearly erroneous, the defendant's sentence should be affirmed.

Statement of the Case

On December 20, 2007, a Connecticut grand jury returned an indictment charging Michael Danzi, his brother Brian Danzi, and others with conspiracy to distribute 100 kilograms or more of marijuana in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)(vii), and 846. JA4, 12-13. The indictment also charged Michael Danzi with conspiracy to smuggle more than $10,000 in U.S. currency out of the United States, in violation of 31 U.S.C. § 5332 and 18 U.S.C. § 371. JA13-16.

On May 5, 2009, Michael Danzi pleaded guilty to Count Three of the indictment, charging him with conspiracy to smuggle more than $10,000 in U.S. currency out of the United States, in violation of 31 U.S.C. § 5332 and 18 U.S.C. § 371. He also waived indictment and pleaded guilty to a one-count information charging him with conspiracy to distribute marijuana in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 846. JA8, 20-22.

On August 13, 2009, the district court (Mark R. Kravitz, J.) began a hearing to determine the quantity of marijuana attributable to Danzi by virtue of his participation in the conspiracy. JA9. The court concluded the hearing on September 23, 2009, after reviewing supplemental briefing and hearing additional testimony. JA9-10. At the close of the hearing, the district court ruled from the bench that Michael Danzi was responsible for at least 100 kilograms of marijuana. JA276. On October 9, 2009, the court issued a lengthy opinion explaining the evidentiary basis for its quantity finding. JA10, 279-304.

On December 8, 2009, the district court sentenced Michael Danzi to a non-Guidelines sentence of 48 months of imprisonment and three years of supervised release. JA10-11, 345. Michael Danzi filed a timely notice of appeal on December 15, 2009. JA11, 348.

The defendant is currently serving the term of imprisonment imposed by the district court.

Statement of Facts and Proceedings Relevant to this Appeal

A. Overview of the offense conduct

During the summer of 2007, the Drug Enforcement Administration ("DEA") began an investigation into suspected marijuana distribution in lower Fairfield County by Michael Danzi and others. Pre-Sentence Report ("PSR") ¶ 7. Court-authorized wire intercepts established that Danzi and his confederates were obtaining large quantities of high-grade marijuana from a source of supply in Canada and distributing the drugs in the area of Fairfield County, Connecticut. PSR ¶ 8.

The investigation also revealed that the cash proceeds from the drug sales by Danzi and others were being transported over land to the marijuana suppliers in Canada, and that Danzi participated in this activity. PSR ¶ 9. This was confirmed by the seizure of over $600,000 in U.S. currency as it was being transported toward Canada by co-conspirators of Danzi. PSR ¶¶ 11-13.

B. The quantity dispute

On May 5, 2009, Michael Danzi pleaded guilty to a one-count substitute information charging him with conspiracy to possess with intent to distribute marijuana, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C) and 846. JA20-23, 81. He also pleaded guilty to Count Three of the indictment, which charged him with conspiracy to smuggle more than $10,000 in currency out of the United

States in violation of 31 U.S.C. § 5332 and 18 U.S.C. § 371. JA8, 23, 81. The district court ordered the Probation Office to prepare a Pre-Sentence Report.

Michael Danzi's PSR stated that he had obtained a quantity of marijuana "in excess of 100 kilograms," PSR ¶ 8, and the sentencing options contained in the PSR were based on an attribution to him of 100 to 400 kilograms. PSR ¶¶ 19, 49, although there is some suggestion in the record that Probation recommended a lower quantity prior to the sentencing hearing ultimately held by the district court. *See* JA280. Danzi objected that there was no factual basis for attributing to him "'distribution of over 100 kilograms of marijuana, or even any particular lesser amount.'" *See id.* (quoting letter from Danzi's counsel). He requested an evidentiary hearing to determine the quantity of marijuana to be used in calculating the applicable advisory Sentencing Guidelines imprisonment ranges. *Id.*

On August 10, 2009, the government submitted a memorandum in aid of sentencing regarding the scope of the conspiracy and the amount of marijuana that could be attributed to each of the Danzi brothers. JA90. The memorandum discussed a broad range of evidence, including information gathered from government informants, wiretaps, and Danzi's financial records. It recommended that the court hold Danzi responsible for at least 100 but less than 400 kilograms of marijuana. JA90-105.

The district court began a quantity hearing on August 13, 2009. JA9. The court acknowledged both its responsibility to determine quantity by a preponderance of the evidence and its ability to use currency or other funds to infer quantity, "assuming there's an adequate evidentiary basis" for the inference. JA108. The most contested evidence concerned Danzi's financial situation. The government argued that a lack of reported income for Michael Danzi coupled with his luxury purchases and significant buy-ins at Connecticut casinos indicated his involvement in large-scale marijuana sales. JA99-100, 131-32. Michael Danzi argued that casino buy-ins did not necessarily reflect his financial situation. JA134-35. The court continued the hearing in order to allow for additional briefing and testimony. JA144-49.

At the continued quantity hearing on September 23, 2009, the district court heard testimony by the Director of Operational Accounting for Mohegan Sun Casino, David Tomlinson, regarding the nature of accounting records at Connecticut casinos. JA208-52.

C. Evidence in the record

Although a large portion of the quantity hearing was devoted to determining the significance of Michael Danzi's gambling records, these records constituted only one piece of a broad array of quantity evidence gathered during the investigation and presented by the government.

1. Money seizures

This case began with several large cash seizures indicating a marijuana distribution operation of significant scope. On October 18, 2007, co-defendant Christian Fortier-Kaeslin was stopped in upstate New York by New York State Troopers and was found to be in possession of $376,000 in U.S. currency. JA91. Fortier-Kaeslin explained to federal agents that he was delivering the proceeds of a marijuana smuggling operation to his uncle in Canada. JA91-92. He stated that he had made approximately 15 to 18 money pick-ups, each of which involved hundreds of thousands of dollars, from co-defendant George Tsellos between May 2006 and October 18, 2007. JA92.

The government corroborated George Tsellos's role in the conspiracy when it seized large amounts of money from two individuals immediately after the individuals received it from George Tsellos: $157,000 from co-defendant Jose Legeun-Mejia on November 8, 2007, and $120,000 from co-defendant Soterios Tsellos on November 9, 2007. *Id*.

Fortier-Kaeslin also helped establish Michael Danzi's role when he told federal agents that Michael Danzi had accompanied George Tsellos on approximately four of Fortier-Kaeslin's currency pick-ups. *Id*. This statement is consistent with surveillance conducted during the case, which established that George Tsellos was accompanied by Michael Danzi on November 8, 2007, when Tsellos delivered the $157,000 to Jose Legeun-Mejia. JA92-93.

2. George Tsellos's statement

On November 11 and 12, 2007, George Tsellos submitted to a post-arrest interview at the Greenwich Police Department. JA173-90. At one point in the interview, Tsellos referred to Danzi's sale of "ounce quantities," *see* JA186, and yet other parts of Tsellos's statement inculpate both Michael and Brian Danzi in a large-scale conspiracy. Tsellos stated, for example, that he first met Brian Danzi when he was directed by a co-conspirator to deliver a duffle bag of marijuana to him, JA179; that he delivered 30-35 pounds of marijuana to Brian Danzi each month for a two-year period, JA185; that Brian Danzi routinely delivered $70,000 to $80,000 in cash to Tsellos in payment for the marijuana, JA180; and that Michael Danzi often accompanied Tsellos when he smuggled drugs or money, JA179, 186.

3. Informant and supervised purchase

The government also presented statements by a long-time Danzi customer that helped establish Michael Danzi's role in the marijuana distribution operation as illustrated by the money seizures and by the statements of Fortier-Kaeslin and Tsellos.

Richard Breglia made several statements to DEA agents regarding his marijuana purchases from Michael Danzi and his brother and co-conspirator, Brian. JA93. Breglia reported that he purchased approximately one pound per month between 2005 and 2007, paying between $3,000 and $4,000 per pound. *Id.* Based on his interaction

with other Danzi customers – at least some of whom purchased 10 to 20 pounds per month for redistribution – Breglia estimated that the Danzis purchased and redistributed at least 100 pounds per month. *Id.* He stated that he believed the Danzis sold marijuana to their customers at a mark-up of $600 to $1,000 per pound. *Id.*

Breglia also participated in a DEA supervised purchase on November 8, 2007, that partially corroborated his statements. *Id.* In that incident, Breglia negotiated with Michael Danzi and his brother for the purchase of one pound of marijuana at the price of $4,700, which Breglia ultimately purchased from Brian Danzi. *Id.*

4. Wiretaps

Fortier-Kaeslin's, Tsellos's, and Breglia's characterizations of the marijuana distribution scheme were corroborated by telephone conversations recorded during court-authorized interceptions of wire communications occurring over telephones used by Michael and Brian Danzi. Intercepts were conducted until the arrests in the case. Hundreds of conversations were intercepted over three telephones, with many of the conversations clearly concerning the acquisition and distribution of marijuana and the attempts of the defendants to smuggle the proceeds back to Canada. They paint a vivid picture of the business relationship which existed between George Tsellos, the marijuana importer and money smuggler, Michael Danzi, the organizer and driving force of the local bulk distribution operation, and Brian Danzi, his partner and co-worker. They include

conversations among those three principals regarding their efforts to move the product into lower Fairfield County, and arrangements Tsellos and Michael Danzi made to move the proceeds back out of Connecticut. They also include conversations between one or both of the Danzis and their prospective customers for bulk marijuana, and the difficulties they faced in coordinating their distribution efforts. *See* JA94-99 (describing recorded conversations).

5. Michael Danzi's finances

Michael Danzi's financial records provided one more piece of circumstantial evidence that corroborated his involvement in a large-scale marijuana distribution operation as illustrated by the money seizures, the relationship between Michael Danzi and George Tsellos, the statements by Fortier-Kaeslin, Tsellos, and Breglia, and the government-supervised purchase.

Michael Danzi has reported no income or wages to the Connecticut Department of Labor, and the Office of Probation was unable to confirm any legitimate employment. JA99. He nevertheless owns a Mercedes-Benz, among other vehicles, and has engaged in significant gambling activity. JA100.

Michael Danzi's cash buy-ins at Connecticut casinos totaled more than $400,000 between 2001 and 2007. JA100. His losses amounted to approximately $140,000. *Id.* The district court heard extensive testimony regarding the import of these figures. JA209-52. The central witness, David Tomlinson, was an employee of Mohegan Sun, a

Connecticut casino, and his testimony pertained to Mohegan Sun in particular. Tomlinson had, however, previously been employed as the Accounting Manager at Foxwoods Casino, another Connecticut casino, and he testified that the types of records kept there were "similar." JA210. His testimony established a number of key facts regarding the nature of accounting methods at Connecticut casinos.

At Mohegan Sun, a patron can play for money at the gaming tables using only three methods: cash buy-ins, chips, or credit. JA212-13. When a patron leaves a table, he is paid in chips. JA216-17. He cannot exchange chips for cash at the tables, but he can exchange chips for cash, or vice versa, at any time by going to a "cage." JA218. Records, however, are kept at the tables. It is therefore impossible to tell from a record whether cash placed on a table represents a fresh buy-in or whether it constitutes recycled winnings. JA228-30, 232. Because Michael Danzi did not have a line of credit, his only options were to place bets with cash or chips. JA213. The amount of cash he brought into the casino might therefore be more or less than the recorded amounts. JA232.

Michael Danzi's losses were nonetheless consistent with what the casino would expect from fresh buy-ins in the amount recorded. A patron at Mohegan Sun generally recoups about 85 cents of every dollar placed on the table. JA234. According to Mohegan Sun's records, Michael Danzi's buy-ins totaled approximately $210,000 and his losses totaled approximately $70,000. JA224. Tomlinson accordingly testified that in order to sustain losses in the

amount of $70,000, total actual buy-ins "in the neighborhood" of $200,000 would be "typical." JA232-34.

D. The district court's decision on drug quantity

After considering the testimony and evidence from the hearings, and the briefing submitted by both parties, the district court concluded that it was reasonably foreseeable to Michael Danzi that the conspiracy involved at least 100 kilograms of marijuana. JA276. Following the conclusion of the hearings, the court issued a seventeen-page ruling in which it outlined the evidence that supported its finding. JA279-95. The opinion of the court is discussed in further detail below.

E. The sentencing

The PSR calculated Danzi's base offense level as 26, based on an attribution of 100 to 400 kilograms of marijuana. ¶ 19. It recommended a reduction of two levels for acceptance of responsibility, ¶ 25, and thus arrived at a total offense level of 24. ¶ 26. Using a Criminal History Category I, ¶ 28, it recommended a Guideline range of 51 to 63 months. ¶ 49.

At sentencing, the district court adopted the guidelines calculation as set out in the PSR, JA314, and imposed a non-Guidelines sentence of 48 months. JA338, 345. As described by the district court, this sentence reflected an appropriate balance of various § 3553(a) factors, including the need to avoid unwarranted sentencing disparities, the relevant sentencing guidelines, the need for just

punishment, the desire to promote respect for the law and provide effective general deterrence, and the goal of affording the defendant rehabilitative help for his gambling addiction. JA336-38. The court sentenced him below his guidelines range to reflect his lack of criminal history, his good work history, and a hope that the lower sentence would encourage him to lead a law-abiding life. JA338.

Summary of Argument

The district court did not clearly err in calculating the drug quantity attributable to Michael Danzi for purposes of calculating his Sentencing Guidelines range. In a drug case where "the amount [of drugs] seized does not reflect the scale of the offense," the Guidelines allow a district court to "approximate" the quantity of drugs for which a particular defendant is responsible. U.S.S.G. § 2D1.1 Application Note 12. Here, the district court relied on multiple pieces of evidence to conclude that Danzi was responsible for 100 kilograms of marijuana, including the currency seized from the conspiracy, Danzi's financial records, cooperating witness statements, and recorded conversations. Taken together, the court found that this evidence established, by a preponderance of the evidence, that Danzi was responsible for the distribution of *at least* 100 kilograms of marijuana.

Danzi attacks individual pieces of the evidence relied upon by the district court, noting problems with particular pieces of evidence. He raised these issues before the district court, however, and they were resolved against

him. Further, that no piece of evidence may, on its own, establish the amount of marijuana for which the Danzi was responsible does not undermine the district court's quantity determination. The district court expressly noted that its quantity determination was made based on the composite strands of the evidence taken as a whole. And when considered as a whole, the evidence fully supported the district court's drug quantity finding. Because that finding was not clearly erroneous, the defendant's sentence should be affirmed.

Argument

I. The district court's careful estimation of drug quantity attributable to the defendant was not clearly erroneous.

A. Governing law and standard of review

1. Quantity guidelines

A district court is expected to "begin all sentencing proceedings by correctly calculating the applicable Guidelines range," and to use that range as "the starting point and the initial benchmark" for its decision. *Gall v. United States*, 552 U.S. 38, 49 (2007). Under the Sentencing Guidelines, the court must begin by determining the defendant's "base offense level," U.S.S.G. § 1B1.1, which is determined based on:

> (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity . . . .

U.S.S.G. § 1B1.3(a)(1).

In a drug case, this Guideline requires a determination of the quantity of drugs attributable to the defendant, and in the case of a drug conspiracy, the quantity reasonably foreseeable to him. *United States v. Jones*, 531 F.3d 163, 174-75 (2d Cir. 2008); *United States v. Payne*, 591 F.3d 46, 70 (2d Cir.), *cert. denied*, 131 S. Ct. 74 (2010). "The quantity of drugs attributable to a defendant is a question of fact" that the government must prove by a preponderance of the evidence. *Jones*, 531 F.3d at 175.

The Guidelines provide that in a drug case,

> [w]here there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, [and] similar transactions in controlled substances by the defendant . . . .

U.S.S.G. § 2D1.1, Application Note 12. *See also Jones*, 531 F.3d at 175.

Quantity estimates must be based on "specific evidence." *United States v. Shonubi*, 103 F.3d 1085, 1087 (2d Cir. 1997). The "specific evidence" requirement, however, does not establish a higher standard of proof than a preponderance of the evidence. *United States v. Cordoba-Murgas*, 233 F.3d 704, 708 (2d Cir. 2000); *see also Jones*, 531 F.3d at 176. Moreover, in approximating quantity in a drug case, "the court has broad discretion to

consider all relevant information." *United States v. Blount*, 291 F.3d 201, 215-16 (2d Cir. 2002).

In exercising this broad discretion, courts have considered a wide variety of information in estimating drug quantity. *See United States v. Richards*, 302 F.3d 58, 70 (2d Cir. 2002) (amount of drugs received by defendant and foreseeable amounts received by co-conspirators); *Blount*, 291 F.3d at 215-16 (cooperating witness testimony regarding amounts of drugs purchased and sold over time); *United States v. McLean*, 287 F.3d 127, 133 (2d Cir. 2002) (amount of drugs seized from defendant and from co-conspirators, and statements regarding drug quantity from buyers); *United States v. Cousineau*, 929 F.2d 64, 67 (2d Cir. 1991) (determination of quantity based on testimony of witnesses as to actual purchases from defendant); *United States v. Vazzano*, 906 F.2d 879, 884 (2d Cir. 1990) (quantity based on amount of cocaine defendant told informant he had sold and amount he told informant he possessed).

And as particularly relevant here, evidence of funds possessed by a defendant (or currency seized) has been used to determine the quantity of drugs for which he is responsible. Thus, in *Jones*, this Court joined eight other circuits in expressly holding that when seized currency appears, by a preponderance of the evidence, to be the proceeds of drug trafficking, a court may "consider the market price for the drugs" in determining the attributable drug quantity represented by that currency. 531 F.3d at 175 (citing cases). And evidence of a defendant's unexplained

wealth may "create an inference of illicit gain." *See United States v. Amuso*, 21 F.3d 1251, 1263 (2d Cir. 1994).

2. 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. 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 *Booker*, at sentencing, a district court must begin by calculating the applicable Guidelines range. *See United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc), *cert. denied*, 129 S. Ct. 2735 (2009). "The Guidelines provide the 'starting point and the initial benchmark' for sentencing, and district courts must 'remain cognizant of them throughout the sentencing process.'" *Id.* (internal citations omitted) (quoting *Gall v. United States*, 552 U.S. 38, 49, 50 & n.6 (2007)). After giving both parties an opportunity to be heard, the district court should then consider all of the factors under 18 U.S.C. § 3553(a). *See Gall*, 552 U.S. at 49-50. This Court "presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully

discharged her duty to consider the [§ 3553(a)] factors." *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006).

On appeal, a district court's sentencing decision is reviewed for reasonableness. *See Booker*, 543 U.S. at 260-62. In this context, reasonableness has both procedural and substantive dimensions.[1] *See United States v. Avello-Alvarez*, 430 F.3d 543, 545 (2d Cir. 2005) (citing *United States v. Crosby*, 397 F.3d 103, 114-15 (2d Cir. 2005)). "A district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory." *Cavera*, 550 F.3d at 190 (citations omitted). A district court also commits procedural error "if it does not consider the § 3553(a) factors, or rests its sentence on a clearly erroneous finding of fact." *Id.* Finally, a district court "errs if it fails adequately to explain its chosen sentence, and must include 'an explanation for any deviation from the Guidelines range.'" *Id.* (quoting *Gall*, 552 U.S. at 51).

A district court's determination of drug quantity is a finding of fact subject only to clear-error review. *See Jones*, 531 F.3d at 176; *United States v. Markle*, ___ F.3d ___, No. 06-1600-cr, 2010 WL 5071481, *4 (2d Cir. Dec. 14, 2010). "A finding is clearly erroneous when[,] although there is evidence to support it, the reviewing

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[1] The defendant does not argue that his sentence was substantively unreasonable.

court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Markle*, 2010 WL 5071481, at *4 (quoting *United States v. Guang*, 511 F.3d 110, 122 (2d Cir. 2007)).

B. Discussion

1. The district court reviewed the record and concluded, based on a preponderance of the evidence, that the defendant was responsible for the distribution of *at least* 100 kilograms of marijuana.

The district court considered a wide variety of evidence as it considered the defendant's challenge to the PSR's drug quantity calculation. It began the defendant's quantity hearing by recognizing that it could use currency to infer quantity so long as its determination was based on a preponderance of the evidence. JA108-10. It heard arguments from the parties about the potentially exculpatory nature of George Tsellos's statements, JA117-31, and the import of Danzi's gambling activities, JA131-35. Responding to Danzi's contention that his casino buy-ins did not necessarily reflect his finances, the court continued the hearing to allow for additional briefing and testimony. JA137-46. The court specifically asked the government to file a brief demonstrating how the evidence could be interpreted to produce an inference that the Danzis were responsible for 100 kilograms of marijuana. JA147.

Before the next hearing, both parties submitted briefs, JA9-10, and the district court stated on the record at the continued quantity hearing that it had read the briefs and the attachments. JA193. It then heard extensive testimony by the director of operational accounting at Mohegan Sun, JA208-52, before hearing further arguments about the significance of the other evidence. The ensuing discussion concerned Breglia's statements, JA258-61; the Danzis' "luxury purchases," JA259; Tsellos's statements, JA261-62; and Michael Danzi's participation in Tsellos's money smuggling activities, JA262-63.

Only after an extensive examination of all of this evidence did the court state that it was "satisfied that, by a preponderance of the evidence, that it was reasonably foreseeable to each of the defendants that the conspiracy involved at least 100 kilos, kilograms, of marijuana . . . ." JA277.

A few weeks later, the court reduced its drug quantity finding to writing. JA279-95. In its thoughtful and careful ruling, the district court reviewed in detail the description of the offense conduct contained in the PSR and the parties' submissions. *See* JA281-85. The court then recited the applicable legal standard for a quantity determination, correctly stating that the amount must be established by a preponderance of the evidence. *See* JA286. Noting that the total quantity of marijuana seized in the case was small, the court accepted the argument of the government that estimation of the drug amount based on the whole record was appropriate. *See* JA287-88. The court concluded that the record established by a preponderance of the evidence

that Danzi and his brother were "likely responsible for far *more* than 100 kilograms of marijuana and that, if anything, using that quantity for sentencing purposes probably underestimates the scale of Defendants' offense." JA288.

The court specifically identified the evidence supporting this conclusion:

> 1) the $653,000 of drug proceeds seized in just a three-week period; 2) the amount of Michael Danzi's gambling buy-ins and losses, combined with little evidence of a legitimate source of income; 3) Richard Breglia's statements about the size and frequency of Defendants' marijuana shipments; 4) Christian Fortier-Kaelsin's statements about how often he picked up large amounts of cash from George Tsellos, who was often accompanied by Michael Danzi; 5) aspects of George Tsellos' statements; 6) the fact that George Tsellos has pled guilty to a conspiracy to possess with intent to distribute 100 kilograms or more of marijuana,[record citation omitted]; and 6) [*sic.*] the recorded conversations – particularly those involving Mr. Breglia – that strongly suggest that both Danzis received and sold multi-pound quantities of marijuana on a routine basis.

JA288-89.

The court then specifically and carefully reviewed portions of the record, noting that the statements of

witness on the quantity issue were corroborated by cash seizures, and also by recorded conversations in which Danzi and his co-conspirators participated. *See* JA294. With particular reference to $140,000 Danzi lost gambling at casinos, the court observed that this amount would reflect only profits of the marijuana operation and, at the profit rate related by a witness, this amount alone would represent the possession and sale of 91 kilograms of marijuana. *See* JA293. Together with detailed witness statements documenting extensive and long-term marijuana importation and sale, numerous incriminating recorded conversations involving the defendant, and the seizure of approximately $650,000 in proceeds during the month preceding Danzi's arrest, this evidence satisfied the court that the preponderance standard had been met. *See* JA293-95. The court emphasized that its holding did not rely on any one piece of evidence or on one method of analysis but, rather, was based "on the composite of the various strands of specific evidence" which collectively supported its "very conservative" conclusion. JA295.

2. Danzi has not shown that the district court's drug quantity determination was clearly erroneous.

The Guidelines specifically provide that where "the amount [of drugs] seized does not reflect the scale of the offense," a district court may approximate" the quantity for which a particular defendant is responsible. U.S.S.G. § 2D1.1 Application Note 12; *Jones*, 531 F.3d at 175. As demonstrated above, the district court applied this standard carefully and thoroughly, identifying specific evidence to

support its admittedly *conservative* estimate of the drug quantity attributable to the defendant.

Danzi nevertheless challenges the quantity determination on the grounds that the evidence cannot support a determination that he was responsible for 100 kilograms of marijuana. He argues, in effect, that although the district court professed to make its sentencing determination by a preponderance of the evidence, each piece of evidence was so flawed as to make the sentence unreasonable. Although Danzi may disagree with the district court's conclusion, the record fully supports the district court's quantity determination. In short, Danzi cannot show that that finding was clearly erroneous.

Danzi challenges the district court's quantity determination on multiple grounds, but none of those arguments demonstrate that the quantity finding was clearly erroneous. He argues, first, that the money seized from Fortier-Kraeslin, Jose Legeun-Mejia, and Soterios Tsellos cannot be used to estimate the quantity of marijuana for which he is responsible because (1) there was no evidence that the money seized from Fortier-Kaeslin on October 18, 2007, came from Michael Danzi; and (2) Tsellos, the delivery man, "regularly picked up currency" from other dealers. Def's Br. 13. Neither of these possibilities, however, precludes the district court's inference that the defendant was responsible for at least 100 kilograms of marijuana. Under conspiracy law, a participant in a drug conspiracy is responsible for the quantity that is "reasonably foreseeable" as part of the conspiracy. *See, e.g.*, *Payne*, 591 F.3d at 70. The

government wiretap established that Michael Danzi communicated regularly with George Tsellos. JA95-99. According to Fortier-Kaeslin, Danzi accompanied Tsellos on approximately four of his currency pick-ups. JA92. Danzi's interactions with these two central players in the marijuana distribution scheme suggest that he was familiar with the machinery of the conspiracy and that it was reasonably foreseeable to him that the conspiracy involved a considerable quantity of drugs.

Moreover, as the district court noted, even if some of the currency seized came from other dealers, the seized currency still provided a rationale basis for quantifying the quantity of drugs attributable to Danzi. In the course of a three-week period, the government seized approximately $650,000; extrapolating that amount over the course of the two year conspiracy would yield approximately $15.7 million in smuggled currency. JA289-90. Accordingly, even if Danzi were responsible for only a small portion of that money, that small portion would still translate into a significant quantity of marijuana. JA290. As calculated by the district court, using a conservative estimate of the market rate for marijuana, Tsellos smuggled approximately 1800 kilograms of marijuana over the course of the conspiracy. Thus, even assuming Danzi were responsible for only a small portion of this quantity (contrary to the evidence suggesting that he was responsible for a large portion of it), the 100 kilogram estimate was a conservative estimate of Danzi's role.

Danzi argues next that Richard Breglia's statements regarding the size of the Danzis' marijuana dealing

operation were not credible because they were not corroborated, and in fact contradicted by other evidence in the record. Def's Br. 14. To the contrary, during the investigation the DEA supervised a purchase in which Breglia obtained a pound of marijuana from the Danzi brothers for $4,700. JA93. Further, Breglia's statements were corroborated by Tsellos's statement, in which he told agents that he delivered 30 to 35 pounds of marijuana to Brian Danzi per month and that Michael Danzi routinely accompanied him on trips to smuggle money and marijuana. JA185-86. Finally, Breglia's statement was further corroborated by the recorded conversations that showed the Danzis routinely buying and selling substantial quantities of marijuana. JA94-95 (describing recorded conversations).

Although some of Breglia's statement was contradicted by other portions of Tsellos's statement (particularly Tsellos's characterization of Michael Danzi as a "dime bag" dealer, *see* JA180), this contradiction does not demonstrate that the court's factual finding was clearly erroneous. Because as the district court explained, even if Breglia's estimates of drug quantity were "off by a factor of 10, that would still put the Danzis over the 100 kilogram threshold." JA293.

Third, Danzi complains of the court's consideration of his "unexplained wealth," and specifically his gambling habits, arguing that the buy-in figures presented by the government "shed no light" on whether the cash represented "fresh" or "recycled" money. Def.'s Br. 16. Even if the buy-in figures did not definitively establish an

amount of "fresh" money, the loss figures provided a reasonable basis for estimating the quantum of money Danzi is likely to have brought in. David Tomlinson testified that the casino's "churn" rates suggest that in order to lose $70,000, Danzi would likely have had to bring in about $200,000 of "fresh" money – a considerable sum for a person with no record of legitimate employment. JA234. And the evidence before the court demonstrated that Danzi had lost a total of approximately $140,000 at three different casinos from 2001-2007. JA100.

Using these figures, the district court noted that even if casino's records about Danzi's buy-in rates captured some "recycled" money, the end result was the same. Over the course of several years, Danzi lost $140,000 in casinos, a considerable sum of money for someone with no legitimate source of income. JA292. This was an entirely reasonable inference, based on the specific evidence in the record, especially when combined with the other evidence before the court.

Danzi next complains about the court's use of the recorded conversations to establish drug quantity, arguing that there was no evidence that the quantities discussed in those conversations were pounds of marijuana. But Breglia's statement supported the conclusion that the parties were discussing pounds, JA93, 152, and as described above, Tsellos's statements also corroborated the characterization of the Danzi marijuana operation as one dealing in pounds. JA179-80.

Finally, Danzi complains about the district court's decision to extrapolate from the recorded conversations – which occurred during a two-week time period – to establish a quantity for the entire two-year conspiracy. However, the court did not rely on the recorded conversations in a vacuum, but rather considered them only as part of the evidence as a whole which, in totality, supported its conclusion. For example, Tsellos described an ongoing and significant marijuana operation, in which he delivered between 30 to 35 pounds of marijuana to the Danzis every month. JA179. Because the recorded conversations tended to corroborate this evidence, it was certainly reasonable for the court to rely on the recorded conversations as one further piece of evidence to support its quantity finding.

In sum, Danzi's arguments fail primarily because he launches a piecemeal attack on the evidence that the court had viewed as a whole. He challenges individual pieces of evidence, pointing to alleged flaws or inconsistencies to argue that the evidence was unreliable, but fails to consider, as did the district court, the evidence taken together. Thus, as emphasized repeatedly by the district court, even if one piece of evidence in isolation was not enough to support the 100 kilogram quantity finding, when that evidence was viewed in context with the rest of the evidence, the composite whole supported that finding. *See* JA288, 295 ("[The estimate] is based on the composite of the various strands of specific evidence which, taken as a whole, collectively confirm by a preponderance of the evidence that the Defendants were involved in a marijuana conspiracy of such scope and duration that the estimate of

100 kilograms of marijuana attributable to them appears to be a very conservative one.").

Moreover, Danzi's piecemeal attack on the evidence fails to acknowledge that the district court's careful consideration of the evidence repeatedly resulted in *conservative* estimates of the drug quantity attributable to him. Thus, for example, the district court relied on the large sums of money seized to come up with a drug estimate, and noting Danzi's objection to the attribution of all of that money to him, concluded that even if only a small portion were attributed to Danzi, he would still be well over the 100 kilogram threshold. JA289-90. *See also* JA290-92 (considering evidence of gambling losses and noting that even if Danzi's objection to that evidence were credited, the evidence still demonstrated that Danzi lost a significant sum of money in the casinos); JA293-94 (considering statements by Breglia, and in light of concerns about those statements, noting that even if Breglia's statement "is off by a factor of 10, that would still put Danzi over the 100 kilogram threshold"). Because the district court's estimates were conservative, even if it erred in some minor details, it still reasonably found Danzi responsible for 100 kilograms of marijuana. That finding was not clearly erroneous and it should be upheld.

Conclusion

For the foregoing reasons, the district court's sentence should be affirmed.

Dated: December 16, 2010

Respectfully submitted,

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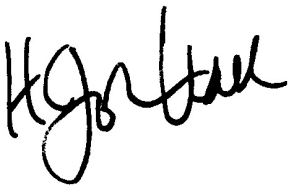

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