10-2994

To Be Argued By:
DAVID T. HUANG

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-2994

UNITED STATES OF AMERICA,
Appellee,

-vs-

SADIKI KOMUNYAKA LESLIE,
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 (Alvin W. Thompson, C.J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on July 12, 2010. Defendant's Appendix ("DA") DA2. On July 14, 2010, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). DA34. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Statement of Issue Presented for Review

Whether the district court clearly erred by attributing the undisputed actual loss from a conspiracy to the defendant at sentencing, where the only fact the defendant presented in support of his alleged withdrawal from the conspiracy was that he was incarcerated for part of the charged time period?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 10-2994

UNITED STATES OF AMERICA,
Appellee,

-vs-

SADIKI KOMUNYAKA LESLIE,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The Defendant-Appellant Sadiki Komunyaka Leslie pled guilty to conspiracy to commit bank fraud for a scheme that he devised, executed, and led. At sentencing, he argued that he was not responsible under the Sentencing Guidelines for the conspiracy's losses after he began serving a state sentence some three months into the charged conspiracy because his incarceration was tantamount to a withdrawal from the conspiracy. The

district court rejected this argument, and attributed to the defendant the entire loss amount of the conspiracy.

On appeal, the defendant challenges the district court's Guidelines loss calculation, arguing that it was unfair to place the burden on him of proving that he withdrew from the conspiracy. This Court's cases establish, however, that a defendant bears the burden of proving at trial that he withdrew from a conspiracy and there is no reason to adopt a different rule in the sentencing context. In any event, regardless of which party bore the burden of proof, the district court's finding that he did not withdraw was not clearly erroneous. Other than the fact of the defendant's incarceration, nothing in the record suggests that the defendant tried to dissociate himself from the charged conspiracy.

Statement of the Case

On January 27, 2010, a federal grand jury in New Haven returned an indictment charging the defendant in a three-count indictment. Government's Appendix ("GA") GA1-7. Count One charged the defendant with conspiracy to commit bank fraud, in violation of 18 U.S.C. § 1349. GA1-4. Counts Two and Three each charged the defendant with bank fraud, in violation of 18 U.S.C. § 1344. GA5-6.

On April 5, 2010, the defendant entered a guilty plea to Count One of the indictment.[1] GA67, GA70. At the

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[1] Counts Two and Three of the indictment were (continued...)

sentencing on July 6, 2010, the district court (Alvin W. Thompson, C.J.) imposed a Guidelines sentence, in relevant part, of 51 months in prison. GA64. Judgment entered on July 12, 2010. DA2.

The defendant filed a timely notice of appeal on July 14, 2010. DA34.

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

Statement of Facts

Beginning from approximately April 2005, the defendant led a conspiracy to commit bank fraud in the greater Bridgeport area. GA16. The defendant, along with his co-conspirators, obtained checks associated with closed bank accounts or open accounts with little or no balance. *Id.* As part of the conspiracy, he and co-conspirators also obtained and used Automatic Teller Machine ("ATM") cards and Personal Identifying Numbers ("PIN"s) associated with open bank accounts with little or no balance. *Id.* Sometimes, the defendant and his co-conspirators would pay others to get checks associated with closed bank accounts, checks associated with open bank accounts with little or no balance, and ATM cards and PINs associated with those accounts. *Id.*

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[1] (...continued)
dismissed on July 6, 2010. DA1.

The defendant and his co-conspirators would then deposit one of the above-described "dummy" checks at a People's Bank ATM using the ATM card and PIN of another individual. *Id.* At the time of the deposit, the individual depositing the check knew that the check would not be honored by the bank from which the check was allegedly issued. *Id.* Indeed, members of the conspiracy would open People's Bank accounts specifically for the purpose of using them as "ghost" accounts in which to deposit "dummy" checks. *Id.* The amount of these "dummy" check deposits typically ranged from $2,500 to $6,000. *Id.*

In most cases, funds from the fraudulently deposited check became available for withdrawal before People's Bank could detect the fraud. *Id.* Soon after the fraudulently obtained funds became available, a co-conspirator would typically withdraw from a People's Bank ATM the maximum daily limit of $400. *Id.*

In addition, after the daily maximum ATM cash withdrawal had been made, members of the conspiracy would make point of sale ("POS") withdrawals at local stores. *Id.* Using the same ATM card, a co-conspirator would purchase goods at the store and then withdraw additional funds from the People's Bank account. *Id.* Thus, for example, a co-conspirator would make a nominal purchase of goods at a grocery store and make an additional $200 cash withdrawal in the same transaction. *Id.* In addition, members of the conspiracy would pass the same ATM card to each other and make a series of purchases at local stores, each time obtaining additional

cash from the fraudulently deposited check. *Id.* In this way, the conspiracy was able to withdraw more than the $400 ATM maximum limit in a short amount of time and before People's Bank discovered the fraud. *Id.*

The defendant devised this scheme and, in or around 2004, began to show others how to execute the scheme. *Id.* Those co-conspirators, in turn, recruited other members to join the conspiracy. *Id.*

The defendant approached other individuals to give him their checkbooks and would pay them for the checks. GA16-17. He would also get someone else's ATM card and PIN and would pay them if he was able to withdraw money from the account. GA17. These other individuals consisted of members the conspiracy as well as other individuals. *Id.*

As part of the plea agreement, the parties agreed that the total actual loss from the conspiracy was $310,475. *Id.* The total amount of intended loss from the 142 fraudulent checks included in the charged scheme was $509,447. *Id.*

During the course of the conspiracy, the defendant was incarcerated for a period of time on related state charges. On April, 5, 2005, shortly before the charged conspiracy began, the defendant was arrested on state charges for larceny and conspiracy to commit larceny that he committed in 2004, before the conduct in this case. PSR ¶ 36. The conduct underlying the state charges was for similar, related conduct to the conspiracy. DA12; GA37-39. While out on bail on those charges, the defendant led

and participated in the federal conspiracy. On July 1, 2005, approximately three months into the conspiracy, the state court sentenced the defendant to ten years in prison, to be suspended after four years, and the defendant began serving his state sentence. PSR ¶ 33. He was released from prison on March 16, 2007, but was incarcerated again on July 24, 2007 for a parole violation. *Id*.

Summary of Argument

At sentencing, the defendant bears the burden of proving that he withdrew from a conspiracy and thus not liable for the conspiracy's losses after his withdrawal. In an analogous context, it is well-settled in this Court that a defendant bears the burden of demonstrating withdrawal from a conspiracy at trial. Equally settled is that the mere fact of a conspirator's incarceration does not create a presumption that he withdrew from the conspiracy. Thus, the defendant's reliance on *United States v. Steele*, 685 F.2d 793 (3d Cir. 1982), for the proposition that a conspirator's resignation is sufficient *prima facie* evidence to shift the burden to the government to demonstrate the defendant's continued involvement in the conspiracy, is inapposite to this Court's cases and, in any case, not binding.

Regardless of which party bears the burden of proof, the district court's conclusion that the defendant did not withdraw from the conspiracy was not clearly erroneous. Here, the defendant concedes that, other than the fact of his incarceration, there was no affirmative evidence of his alleged withdrawal from the bank fraud conspiracy that he

devised and led. In the absence of such evidence, under this Court's cases, the record does not support a finding that the defendant withdrew from the conspiracy. Accordingly, the district court did not commit clear error when it rejected the defendant's "withdrawal" defense and attributed to him the undisputed actual loss amount from the conspiracy in calculating his applicable Guidelines range.

Argument

I. Because the defendant did not meet his burden of showing withdrawal from the conspiracy, the district court did not commit clear error in declining to reduce his loss amount based on the alleged withdrawal.

A. Relevant facts

In the defendant's plea agreement, the parties disagreed on the loss amount under United States Sentencing Guidelines ("U.S.S.G.") § 2B1.1. GA11. The government argued that the applicable loss amount was $509,447, which the parties stipulated was the intended loss from the conspiracy. *Id.*, GA17. Accordingly, the government advocated for a fourteen-level enhancement under the Guidelines. GA11; U.S.S.G. § 2B1.1(b)(1)(H). In contrast, the defendant argued that the applicable loss amount attributable to him was between $30,000 and $70,000, which represented the loss intended by the conspiracy between April 2005 (the beginning of the conspiracy) and July 1, 2005, when the defendant was incarcerated on state

convictions for similar conduct. GA11. Accordingly, the defendant argued that, under U.S.S.G. § 2B1.1(b)(1)(D), only six levels should be added to the base offense level. *Id.*[2]

At sentencing, the district court agreed with the government that the entire intended loss from the conspiracy was attributable to the defendant. GA27-28. The court stated: "I think incarceration is a factor to be considered, but mere incarceration I don't think establishes that as a matter of law that he's not responsible in terms of knowledge, lack of knowledge and lack of foreseeability." GA28. The court then found that the applicable Guidelines should reflect the entire intended loss amount from the conspiracy. GA28, GA32 (finding a total offense level of 22).

Upon turning to the statutory factors under 18 U.S.C. § 3553(a), the court outlined a number of concerns, including its observation that the defendant committed the charged conspiracy knowing that he was going to go to prison on a state conviction. At sentencing, the district court found it "quite striking that someone in that situation

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[2] The defendant argued principally that the lower loss level applied because the defendant withdrew from the conspiracy when he started serving his state prison sentence. DA6-8. In the alternative, he argued to the district court that the lower loss calculation was appropriate because the intended loss after he was incarcerated was not reasonably foreseeable to him. DA8. The defendant is not pressing this latter argument in this appeal. *See* Defendant's Br. at 1.

would be out sort of getting in one last shot on this group of victims, or the victim, and it doesn't – well, it doesn't cast the defendant in a favorable light." GA36-37. Thus, the court concluded that its sentence should specifically deter the defendant from committing further offenses and protect the public from his actions. GA37, GA53. Nevertheless, the district court found that the intended loss from the conspiracy attributable to the defendant was "more attenuated than is typically the case and the benefit that [the defendant] received in terms of [his] participation in the conspiracy was materially less than is typical." GA55. After explaining that the "most appropriate proxy in terms of looking at the loss in this case is the actual loss," i.e., approximately $310,000, the court departed two levels under U.S.S.G. § 5K2.0 to reach a total adjusted offense level of 20. GA55-56. The court then imposed a Guidelines sentence and sentenced the defendant to 51 months in prison, which corresponded to the bottom of the applicable Guidelines range. GA56, GA64.

B. Governing law and standard of review

1. Sentencing law and the burden for proving withdrawal from a conspiracy

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).

Under the Sentencing Guidelines, the offense level for the crime the defendant here committed – conspiracy to commit bank fraud – is determined, in part, by the amount of loss. U.S.S.G. § 2B1.1(b). The greater the loss amount, the higher the offense level under the Guidelines. *See id.*

Here, when the defendant seeks to limit his responsibility for losses incurred by a conspiracy based on an argument that he withdrew from the conspiracy, the defendant should bear the burden of proving that he, in fact, withdrew from the conspiracy.[3] The government

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[3] The government has not located any cases by this Court addressing the specific issue of which party carries the burden (continued...)

generally bears the burden of proving facts relevant to sentencing by a preponderance of the evidence. *United States v. Irving*, 554 F.3d 64, 72 (2d Cir. 2009). In a variety of situations, however, this Court has held that where the defendant seeks a lesser punishment at sentencing, he bears the burden of demonstrating the basis for a more lenient sentence. *See United States v. Smith*, 174 F.3d 52, 55-56 (2d Cir. 1999) ("Generally, under the Sentencing Guidelines, a defendant who seeks to take advantage of a sentencing adjustment carries the burden of proof." (internal quotation marks omitted)); *United States v. Leiva-Deras*, 359 F.3d 183, 193 (2d Cir. 2004) (explaining that defendant bears the burden of demonstrating basis for departure grounds); *United States v. Valdovinos-Soloache*, 309 F.3d 91, 94 (2d Cir. 2002) (per curiam).

Thus, for example, this Court has found that, at sentencing, a defendant bore the burden of demonstrating the following: a lower loss amount when there has been a challenge to the government's loss calculation, *United States v. Confredo*, 528 F.3d 143, 150-53 (2d Cir. 2008); the applicability of a mitigating role reduction, *United States v. Carpenter*, 252 F.3d 230, 234 (2d Cir. 2001) ; the

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[3] (...continued)
of proof at sentencing for the defendant's withdrawal from a conspiracy. The Court in *United States v. Greenfield*, 44 F.3d 1141, 1149-50 (2d Cir. 1995), appeared to adopt the rule advocated here, noting that the defendant bears the burden of proving withdrawal from a conspiracy, but the question of burden of proof was not squarely addressed by the Court.

defendant's diminished capacity as a basis for a downward departure, *United States v. Valdez*, 426 F.3d 178, 184 (2d Cir. 2005); whether a defendant's prior convictions were part of a common scheme or plan such that the career offender guidelines did not apply, *United States v. Butler*, 970 F.2d 1017, 1026 (2d Cir. 1992); a departure based on duress or coercion, *United States v. Cotto*, 347 F.3d 441, 445 (2d Cir. 2003); and the defendant's eligibility for the safety valve relief, *United States v. Jimenez*, 451 F.3d 97, 102-103 (2d Cir. 2006).

Placing the burden on the defendant in these situations is consistent with the general principle that "[the] party with an affirmative goal and presumptive access to proof on a given issue normally has the burden of proof as to that issue." *Butler*, 970 F.2d at 1026; *cf. Jimenez*, 451 F.3d at 102 (observing, in the context of considering safety valve eligibility, that "[t]he defendant has full knowledge of the scope of his wrongdoing, and it is the defendant who seeks an adjustment in the otherwise applicable sentencing range") (quotations omitted)).

Consistent with the principles animating these cases, the defendant should bear the burden of demonstrating conspiracy withdrawal at sentencing. *See United States v. Watford*, 894 F.2d 665, 670 (4th Cir. 1990) (noting, in context of sentencing challenge, that the defendant had the burden to show withdrawal from a conspiracy but had failed to meet that standard); *United States v. Schorovsky*, 202 F.3d 727, 729 (5th Cir. 2000) (finding that defendant had met burden of demonstrating withdrawal from conspiracy for purposes of establishing relevant conduct

at sentencing); *United States v. Zimmer*, 299 F.3d 710, 723 (8th Cir. 2002) (noting that defendant bears burden of proving that he withdrew from conspiracy in sentencing context); *United States v. Dale*, 991 F.2d 819, 854 (D.C. Cir. 1993) (holding, in sentencing context, that defendants had burden of proving that they withdrew from the conspiracy). As with the other grounds for a departure or otherwise lower sentence that this Court has considered, a defendant advocating for a lesser sentence because of his alleged withdrawal is in a superior position to bring facts and circumstances to the district court's attention. Thus, for example, the defendant in *Confredo*, 528 F.3d 143, challenged the government's argument that the applicable loss amount was the face value of all of the fraudulent loans involved in the defendant's scheme. In ordering a remand, this Court explained that "the defendant should have an opportunity to persuade the sentencing judge that the loss he intended was less than the face amount of the loans." *Id.* at 152 (noting that intended loss depends on the defendant's subjective expectation). Similarly, here, the actions that might demonstrate a defendant's withdrawal from a conspiracy are peculiarly within his control and knowledge.

Moreover, in the analogous context of considering whether a defendant has withdrawn from a conspiracy at trial, it is well-settled in this Circuit that withdrawal from a conspiracy is an affirmative defense for which the defendant bears the burden of proof. *United States v. Pizzonia*, 577 F.3d 455, 466 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 1088 (2010); *United States v. Flaharty*, 295 F.3d 182, 192 (2d Cir. 2002). To satisfy this burden, the

defendant must demonstrate that he withdrew from the conspiracy by a preponderance of the evidence. *United States v. Hamilton*, 538 F.3d 162, 173 (2d Cir. 2008). Whether the defendant withdrew is a question of fact. *United States v. Massino*, 546 F.3d 123, 137 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1928 (2009). This Court's law on conspiracy withdrawal comports with the majority of its sister circuits. *United States v. Dyer*, 821 F.2d 35, 39 (1st Cir. 1987); *Watford*, 894 F.2d at 670; *Schorovsky*, 202 F.3d at 729; *United States v. Lash*, 937 F.2d 1077, 1083 (6th Cir. 1991); *Zimmer*, 299 F.3d at 723; *United States v. Hughes*, 191 F.3d 1317, 1322 (10th Cir. 1999); *United States v. Westry*, 524 F.3d 1198, 1216-17 (11th Cir. 2008); *Dale*, 991 F.2d at 854.[4]

Similar to the reasoning that the defendant bears the burden on sentencing issues for which he has better information, the common law of affirmative defenses is that "where the facts with regard to an issue lie peculiarly in the knowledge of a party, that party has the burden of proving the issue." *Dixon v. United States*, 548 U.S. 1, 9 (2006). Because conspirators have a better understanding of the facts underlying any attempt to withdraw from a conspiracy, such as to whom they communicated the

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[4] A minority of circuits, however, have held that, once the defendant makes a *prima facie* case of withdrawal, the burden shifts to the government to prove that the defendant did not withdraw from the conspiracy. *United States v. Antar*, 53 F.3d 568, 582-83 (3d Cir. 1995) (abrogated on other grounds); *United States v. Lothian*, 976 F.2d 1257, 1261 (9th Cir. 1992) (dictum).

withdrawal and what actions they took to effectuate it, this Court's precedents properly place the burden of proving withdraw from the conspiracy on the party best placed to meet the burden.

2. Incarceration does not constitute withdrawal as a matter of law, nor does it create a presumption of withdrawal.

A defendant's imprisonment during a conspiracy is not, as a matter of law, a withdrawal from the conspiracy. *United States v. Salameh*, 152 F.3d 88, 155 (2d Cir. 1998). Nor does incarceration create a presumption of withdrawal. *Massino*, 546 F.3d at 137; *United States v. Diaz*, 176 F.3d 52, 98 (2d Cir. 1999) ("[N]either authority nor reason would suggest that imprisonment necessarily shows a withdrawal.") (internal quotations omitted).

Rather, this Court has consistently required more; a defendant's mere cessation of conspiratorial activities is "not enough. [The defendant] must also show that he performed some act that affirmatively established that he disavowed his criminal association with the conspiracy, either the making of a clean breast to the authorities, or communication of the abandonment in a manner reasonably calculated to reach co-conspirators." *United States v. Eppolito*, 543 F.3d 25, 49 (2d Cir. 2008) (citations and internal quotation marks omitted). "Unless a conspirator produces affirmative evidence of withdrawal, his participation in a conspiracy is presumed to continue until the last overt act by any of the conspirators." *Diaz*,

176 F.3d at 98 (quoting *United States v. Greenfield*, 44 F.3d 1141, 1150 (2d Cir. 1995)).

3. 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). "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*, 552 U.S. at 49, 50 & n.6). 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.[5] *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).

This Court reviews a district court's determination of issues of law under the Guidelines *de novo*, and it reviews issues of fact for clear error. *United States v. Markle*, 628 F.3d 58, 63 (2d Cir. 2010). Accordingly, to the extent the defendant argues that the district court mis-allocated the burden of proof under the Guidelines, this Court reviews *de novo*; to the extent the defendant contests the district

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

court's factual finding that he did not withdraw from the conspiracy, this Court reviews for clear error.[6] *See, e.g.*, *Confredo*, 528 F.3d at 149-50. "A finding is clearly erroneous when[,] although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *Markle*, 628 F.3d at 63 (quoting *United States v. Guang*, 511 F.3d 110, 122 (2d Cir. 2007)).

C. Discussion

The defendant did not sustain his burden of demonstrating his withdrawal from the charged conspiracy. It is undisputed that he did not "disavow[] his criminal association with the conspiracy," as this Court has

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[6] The defendant states, without elaboration, that the district court did not rule on his claim that he withdrew from the conspiracy, *see* Defendant's Br. at 8-9. His brief to this Court does not argue that this alleged "failure to rule" was an error and thus he has waived any such argument. *Tolbert v. Queens Coll.*, 242 F.3d 58, 75 (2d Cir. 2001) ("It is a settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (internal quotation marks omitted)). Even if his brief were construed to raise the issue, however, it would be reviewed for plain error because he never raised this issue before the district court. *United States v. Ware*, 577 F.3d 442, 452 (2d Cir. 2009). And there is little doubt that such a claim would fail under plain error review. As set forth in the text, the district court's ruling necessarily rejected the defendant's argument that he should not be held liable for the conspiracy's losses after the date of his incarceration.

required, such as by notifying the authorities or by communicating his abandonment to his co-conspirators. *Eppolito*, 543 F.3d at 49. Accordingly, the district court did not commit clear error when it rejected the defendant's argument that he withdrew from the conspiracy when he started serving his state sentence in July 2005.

Notwithstanding the clear law in this Court on conspiracy withdrawal, the defendant argues that his incarceration during a portion of the conspiracy is, by itself, *prima facie* evidence of his withdrawal. *See United States v. Steele*, 685 F.2d 793, 803-04 (3d Cir. 1982). Therefore, the defendant argues, the burden shifts to the government to show that he did not withdraw from the conspiracy. *Id.*

The defendant's argument fails because he argues that the mere fact of his incarceration during the conspiracy entitles him to a burden shifting that this Court has already rejected. The defendant relies principally on Third Circuit authority that, as discussed further below, actually supports the government. *Steele*, 685 F.2d at 803-04; *United States v. Lowell*, 649 F.2d 950, 955-60 (3d Cir. 1981). In *Steele*, the court concluded that a defendant's resignation from a corporation involved in a bribery prosecution was sufficient *prima facie* evidence of withdrawal from a conspiracy such that the burden shifted to the government to rebut or impeach that evidence before the issue of withdrawal went to the jury. *Steele*, 685 F.2d at 804. Because the government failed to do so in that case, the court concluded, the trial court erred in denying the defendant's motion for judgment of acquittal. *Id.*

Other than the fact that it is not binding on this Court, *Steele* is inapposite on other grounds. This Court has repeatedly rejected the notion that the simple act of resignation from a conspiracy is sufficient to demonstrate withdrawal. "[R]esignation from a criminal enterprise, *standing alone*, does not constitute withdrawal as a matter of law; *more is required*." *United States v. Berger*, 224 F.3d 107, 118-19 (2d Cir. 2000) (emphases added). Additional, "[p]ositive" evidence is necessary "in order to provide assurance that the defendant genuinely removed himself from the conspiracy and is not simply attempting an after-the-fact escape from liability." *Flaharty*, 295 F.3d at 192; *see also Greenfield*, 44 F.3d at 1150 ("[I]t is all too easy after the fact for a defendant to claim that he or she withdrew from a plot.").

Thus, even assuming that a defendant's incarceration is tantamount to a conspirator's voluntary resignation from a company involved in a conspiratorial fraud, some additional affirmative conduct is necessary to satisfy this Court's threshold requirement for withdrawal. Indeed, *Steele* itself stated that "[m]ere cessation of activity in furtherance of an illegal conspiracy does not necessarily constitute withdrawal." *Id.* at 803. Rather, the Third Circuit explained that, by way of example, "[t]he defendant must present evidence of some affirmative act of withdrawal on his part, typically either a full confession to the authorities or communication to his co-conspirators that he has abandoned the enterprise and its goals." *Id.* at 804. Similarly, in *Lowell*, the court there observed that the jury in that case could properly conclude that the defendant's retirement from the corporation was

insufficient of itself to establish withdrawal. *Lowell*, 649 F.2d at 957-58.

The government has located no authority, either in this Court or any other federal court, in support of the defendant's novel proposition that the mere fact of incarceration shifts the burden to the government to show the defendant's continued involvement or encouragement in the conspiracy. In fact, in *United States v. Borelli*, this Court expressed skepticism about – without deciding – the defendant's argument. 336 F.2d 376, 389-90 (2d Cir. 1964) (finding "difficulty in reconciling such broad statements with . . . Supreme Court [precedent]"); *but see United States v. Morales*, 185 F.3d 74, 80-81 (2d Cir. 1999) (finding insufficient evidence that criminal enterprise existed for duration charged because, *inter alia*, all of its members were incarcerated for eight years during enterprise).

In any event, regardless of the burden of proof, the record in this case does not show that the district court's rejection of the defendant's "withdrawal" defense was clearly erroneous. Here, the defendant conceded at sentencing that he could offer no evidence other than the mere fact of his incarceration to suggest withdrawal from the conspiracy. GA43 ("Other than the fact that [the defendant] was incarcerated we can't really come forward with anything more than that."); Defendant's Br. at 8. Because "more is required" for a withdrawal from conspiracy, *Berger*, 224 F.3d at 118, the district court properly attributed the entire actual loss of the conspiracy

to the defendant.[7]

Moreover, the only record evidence indicates that the defendant did *not* withdraw from the conspiracy. First, it is undisputed that the defendant met with an unindicted co-conspirator while he was at liberty in 2008, after the end of the charged conspiracy. The co-conspirator told the defendant that the scheme was still ongoing, but not to the same extent as before. DA22 n.4, DA32. Second, the defendant acknowledged that he led the conspiracy from the beginning of the charged conduct in April 2005 until his incarceration on July 1, 2005. As indicated above, however, by then the defendant had already pled to state charges arising from similar conduct and was awaiting sentencing on those charges, but nevertheless continued to participate in the fraudulent scheme that he devised. Such activity casts grave doubt on the defendant's professed attempt to withdraw when he entered prison. *Cf. Diaz*, 176 F.3d at 98 (finding no withdrawal where defendant was imprisoned after he committed "crimes that formed the basis of his racketeering and narcotics convictions in this case").[8] Thus, even if this Court were inclined to conclude

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[7] This Court need not decide in resolving this case *how* much more is required to demonstrate withdrawal, because what is clear under the facts of this case is that the defendant did not come forward with anything other than the fact of his incarceration.

[8] At sentencing, the district court found it "quite striking that someone in that situation would be out sort of getting in one last shot on this group of victims, or the victim, and it (continued...)

that the government had the burden of showing that the defendant did *not* withdraw from the conspiracy, the district court properly rejected his sentencing argument on the record before it.

In sum, this Court need not resolve, as a matter of law, which party bears of burden at sentencing of demonstrating a defendant's withdrawal from a conspiracy. On the undisputed facts presented in this appeal, the defendant did not withdraw from the conspiracy. The record is barren as to any attempt by the defendant to take any affirmative steps to dissociate himself from the scheme that he formulated, led, and executed. Accordingly, the district court did not commit clear error by attributing to the defendant the loss from the entire conspiracy.

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[8] (...continued)
doesn't – well, it doesn't cast the defendant in a favorable light." GA36-37. Although the court did not make this observation specifically with regard to the defendant's issue on appeal, it is at least indirect evidence of the district court's assessment of its merit.

Conclusion

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

Dated: March 28, 2011

Respectfully submitted,

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ADDENDUM

U.S.S.G. § 1B1.3(a)(1)

> (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 . . . .