11-509

To Be Argued By:
ALINA P. REYNOLDS

==========

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-509

UNITED STATES OF AMERICA,
Appellee,

-vs-

CLINTON COX,
Defendant-Appellant,

JASON COX, aka JC, WILLIE GRANT,
Defendants.

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

==========

BRIEF FOR THE UNITED STATES OF AMERICA

==========

DAVID B. FEIN
United States Attorney
District of Connecticut

ALINA P. REYNOLDS
ROBERT M. SPECTOR *(of counsel)*
Assistant United States Attorneys

Table of Contents

Table of Authorities

Cases

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

Statutes

Rules

Guidelines

Regulations

Statement of Jurisdiction

The district court (Alvin W. Thompson, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The defendant was resentenced to 360 months' incarceration and 10 years' supervised release after the court granted his § 2241 petition and vacated his original 540-month sentence. Appendix ("A") 54. Judgment entered on February 8, 2011. A54. On February 7, 2011, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A54. This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a).

Statement of Issues Presented for Review

I. Whether the district court committed any procedural error in its application of the law of the case doctrine, its factual determinations of the attributable drug quantity and the defendant's aggravating role in the offense, and its consideration and weighing of the 18 U.S.C. § 3553(a) factors?

II. Whether the district court's 360-month sentence, which was 15 years below the defendant's initial sentence, was substantively reasonable in light of the sentencing factors set forth under 18 U.S.C. § 3553(a)?

III. Whether the district court committed harmful error in concluding that the Fair Sentencing Act of 2010 did not apply in this case, where the court's 360-month sentence was significantly higher than both the old and new statutory mandatory minimum incarceration terms?

IV. Whether the district court properly applied the modified categorical approach in determining that the defendant's prior state court conviction for possession of narcotics was a "prior conviction for a felony drug offense" under 21 U.S.C. §§ 841(b)(1)(A) and 851?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-509

UNITED STATES OF AMERICA,

Appellee,

-vs-

CLINTON COX,

Defendant-Appellant,

JASON COX, aka JC, WILLIE GRANT,

Defendants.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

A trial jury convicted Clinton Cox and his brother Jason on the basis of overwhelming evidence that they dealt large quantities of crack cocaine in Bridgeport, Connecticut, and used multiple firearms to promote their

trafficking activities. Cox appealed, and his conviction and sentence were affirmed. The district court initially imposed a sentence of 360 months' incarceration on the drug convictions and a consecutive 180 months on the three 924(c) convictions, but then dismissed the 924(c) convictions and vacated the entire sentence. At the resentencing, the court imposed a total effective sentence of 360 months' incarceration. The defendant now appeals the resentencing.

The defendant first claims that his sentence was procedurally unreasonable because the district court erred in applying the law of the case doctrine, erred in its findings on drug quantity and role, and failed to consider properly the sentencing factors at 18 U.S.C. § 3553(a). Second, he argues that his sentence was substantively unreasonable because the district court failed to balance properly the § 3553(a) factors. Third, he claims that the district court erred in not applying the FSA's new statutory penalties. Finally, in a *pro se* letter brief, the defendant maintains that the district court improperly concluded that his prior Connecticut conviction for possession of narcotics qualified as a prior felony drug offense under 21 U.S.C. §§ 841(b)(1)(A) and 851.

For the reasons set forth below, the defendant's claims should be rejected, and the judgment should be affirmed.

Statement of the Case

On August 1, 2001, a grand jury returned a twenty-count Superseding Indictment against the

defendant, Clinton Cox, and his brother Jason Cox. Government Appendix ("GA")3-11. Count One charged the defendant with conspiring to possess with the intent to distribute and to distribute 50 grams or more of cocaine base between approximately January 1, 1997 and April 2000, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)(iii). GA3-GA4. Counts Four, Seven and Ten charged the defendant with possessing with the intent to distribute and distributing cocaine base, in violation of 21 U.S.C. § 841(a)(1). Counts Five, Eight and Eleven charged him with using and carrying a firearm during and in relation to the drug trafficking crimes alleged in Counts Four, Seven and Ten, in violation of 18 U.S.C. § 924(c). Counts Six, Nine, and Twelve charged the defendant with felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). GA4, GA6, GA8.

On August 28, 2000, the government filed notice of its intent to seek enhanced sentencing penalties against the defendant based on his prior felony drug conviction. A18, A75.

On January 9, 2001, the district court granted the government's motion to sever the felon-in-possession counts from the remaining counts. A23. On January 23, 2001, the jury returned guilty verdicts against the defendant on all other counts. A25. The government subsequently moved to dismiss the felon-in-possession counts. A23

On September 12, 2001, the district court sentenced the defendant to concurrent terms of 360 months'

imprisonment on Counts One, Four, Seven and Ten, and to consecutive terms of 60 months' imprisonment on each of Counts Five, Eight and Eleven, for a total effective incarceration term of 540 months. A31. It also imposed a ten-year period of supervised release and a $700 special assessment. A31.

On September 12, 2001, the defendant filed a timely notice of appeal. A31. On September 13, 2001, the district court entered final judgment. A31.

On March 9, 2003, by way of a summary order and in a separate published opinion, this Court affirmed the defendant's conviction. *See United States v. Cox*, 324 F.3d 77 (2d Cir. 2003); *United States v. Cox*, 59 Fed. Appx. 437, 2003 WL 1343014 (2d Cir. Mar. 19, 2003).

On December 19, 2008, the defendant filed a § 2241 petition in the Middle District of Pennsylvania challenging the legality of his § 924(c)(1)(A) convictions. GA37-GA60. On October 20, 2009, the government filed a response, conceding that the petition should be granted, and requesting that the case be transferred to Connecticut. GA61-GA63. On November 19, 2009, the district court in Pennsylvania ordered that the petition be transferred to Connecticut. GA71. On December 14, 2009, the case was transferred, and on January 7, 2010, the defendant's petition was granted. GA2, GA73.

On January 26, 2011, the district court vacated the defendant's § 924(c)(1)(A) convictions and resentenced him on his remaining drug convictions to concurrent terms

of 360 months' imprisonment and 10 years' supervised release. A54, A242, A294-A295. The amended judgment entered on February 8, 2011, and the defendant filed a timely notice of appeal on February 7, 2011. A54, A297-A298.

The defendant is currently serving his sentence.

Statement of Facts and Proceedings Relevant to this Appeal

A. Offense conduct

In approximately 1995, Clinton Cox and his brother, Jason Cox, began to sell crack cocaine together in Bridgeport, Connecticut. Over the next several years, they expanded their business to outlying areas, including Stratford, Derby, and Milford, and, by the fall of 1999, they started distributing crack cocaine in South Carolina. PreSentence Report ("PSR") ¶¶ 11, 13, 25.

As their operation grew, the defendants recruited others to assist them–often using the services of crack addicts and others to purchase firearms, rent cars, act as drivers, answer pages from customers, deliver crack cocaine to customers, pick up money from customers, purchase powder cocaine from suppliers in New York, and cook powder cocaine into crack. PSR ¶¶ 9, 12, 14, 16, 24.

At trial, the government's evidence included the testimony of three cooperating witnesses, each of whom worked for the Cox brothers in their drug business: Willie

Grant, Thomas Marazita, and Robert Davis. The government's evidence also included the testimony of law enforcement officers who conducted undercover purchases of crack cocaine from Jason Cox and his associates on several occasions between April and June 1998 and then again in February 2000, and who also recovered 397 grams of crack cocaine on October 9, 1999 from a car in which both Clinton and Jason were passengers. PSR ¶¶ 6, 10, 12, 26.

B. September 2001 sentencing proceedings

Following his conviction at trial, the defendant was sentenced to 540 months' imprisonment, the bottom of the guideline range set forth in the PSR. PSR ¶¶ 48, 55, 90, 91. For the drug offenses, the PSR calculated that the offense level was 38 under U.S.S.G. § 2D1.1(a)(3)(1), and that four levels were added for the defendant's aggravated role in the offense, resulting in a total offense level of 42. PSR ¶¶ 41, 43, 48. The PSR also determined that the defendant had accumulated eight criminal history points and, therefore, fell into Criminal History Category IV. PSR ¶ 55. Finally, the PSR noted that the defendant's three § 924(c) convictions required the imposition of consecutive five-year terms for each count of conviction, for a total consecutive sentence of fifteen years. PSR ¶ 39.

The district court's conclusion that the defendant had been involved in a conspiracy to distribute in excess of 1.5 kilograms of crack cocaine was largely based on the trial testimony of Willie Grant, who performed various roles in the drug conspiracy as a driver, street-level seller, buyer,

cook, packager, and deliveryman. Grant sold .5 grams of crack for $50 and sold "no less than $1500 a day." A132, A160. He further testified that "the most productive part [of the week] was on a . . . Thursday, Friday and Saturday [when] it could range from anywhere from 15 to 35 . . . [h]undred dollars." A133. Grant sold crack for the defendant and his brother for one year from the time he got out of jail in 1998. A132, A134.

The district court made extensive and detailed drug quantity findings, concluding on the basis of Grant's activity alone that the defendant's conspiracy involved more than 1.5 kilograms of crack cocaine and that the PSR's quantity estimate was very conservative. In particular, it stated:

> On October 9, 1999, the New York State Police seized approximately 397 grams of crack cocaine from the defendant, and Grant testified that he started selling again for the Coxes in the spring and summer of 1998, and that when he began working for them again, and their business was booming, he also testified that they packaged crack cocaine in point five gram bags and sold it to customers for $50, and he said that he sold at least $1,500 of crack cocaine on weekdays, and between $1,500 and $3,500 worth of crack cocaine on Thursdays, Fridays, and Saturdays.
>
> Using the lower of the $1,500 a day figure, that means that the Coxes would've been responsible for approximately 15 grams of crack cocaine per

day, and using a starting point of September of 1998 and January of 1999, the Coxes conspired to distribute approximately 1,680 grams of crack between those two periods.

If you take the 396 grams of crack seized on October of 1999 with the crack distributed, the calculation is that the defendant's possessed with intent to sell, and they actually sold at least 2,077 grams of crack cocaine between January 1, 1997 and April of 2000.

The trial evidence was conclusive that Clinton and Jason conspired to sell crack together in November of '97, and the drug quantity calculation takes into consideration only the quantity which they distributed during this limited four-month period, even though they were selling long before then, and that also takes into consideration the crack that was seized in New York in October of 1999.

It also does not include Grant's testimony about Clinton Cox's purchase of between a hundred and 200 grams of powder cocaine twice a week in New York, and the conversion of that powder cocaine into crack in Bridgeport. There was a loss in the conversion, and it does not take into account Jason's purchase of between 25 and 75 grams of powder cocaine in New York, and its conversion into crack, and it does not take into consideration Robert Davis' trips to New York to assist the

> Coxes in purchasing powder to convert into crack, and it does not take into account the crack which Clinton took to South Carolina, or the quantity of crack cocaine that Neil Schmidt was given, starting in 1998, and who was receiving from Clinton at least 3.3 grams of crack on April 11, 2000.
>
> So that the PSR, when it calculates that the defendant conspired to distribute more than 1.5 kilograms of cocaine base between January 1997 of — and April of 2000, is clearly accurate, and the calculation is very, very conservative, and is appropriate.

A160-A162.[1]

With regard to the guidelines adjustment for role in the offense under § 3B1.1, the district court found that the defendant and his brother were the "organizers or leaders of a crack cocaine distribution conspiracy that involved five or more participants, and was very extensive." A163. The court found that the participants in the organization included "Willie Grant; Robert Davis; Harry Daniels; Neil

---

[1] The district court conducted the sentencing hearing for Jason Cox on May 17, 2001. During that hearing, the court made its extensive findings of fact as to quantity and role based on its recollection of the evidence admitted at trial. A160-A164. At the defendant's sentencing on September 12, 2001, the district court specifically adopted the factual findings from Jason Cox's sentencing and reiterated that they were based on the evidence presented at trial. A193-A194.

Schmidt; Jennifer Leary Cox and other persons who delivered and carried crack at different time periods." A164.

The district court found that "the defendants, Clinton and Jason Cox, played crucial roles in the planning, coordination and implementation of the distribution of crack cocaine in the Bridgeport area, and they recruited accomplices, and many of their accomplices were those persons who became involved because of their desire to acquire crack for their own use." A164.

C. The defendant's direct appeal

On direct appeal, the defendant raised several issues, including a specific challenge to the district court's drug quantity finding at sentencing. On March 19, 2003, this Court rejected all of the defendant's claims, and affirmed his conviction and sentence. *See Cox*, 324 F.3d 77; *Cox*, 59 Fed. Appx. 437. This Court specifically held that, at the initial sentencing hearing, the district court did not err when it credited cooperating witness testimony from the trial as a basis for calculating the attributable drug quantity, and when it concluded that the defendant was responsible for distributing in excess of 1.5 kilograms of crack cocaine. *See Cox*, 59 Fed. Appx. at 441.

D. The defendant's § 2241 petition

On December 19, 2008, the defendant filed a *pro se* §2241 petition seeking dismissal of his § 924(c)(1)(a) convictions in light of the Supreme Court's decision in

Watson v. United States, 552 U.S. 74 (2007). GA1, GA37. In its response, the government conceded that *Watson* applied and that the defendant's petition should be granted. GA61-GA63. The defendant had been convicted of three § 924(c)(1)(A) counts based upon his exchange of firearms for drugs, but in *Watson*, the Supreme Court held that a person who receives a firearm in exchange for drugs has not "used" that firearm within the meaning of § 924(c)(1)(A). *See Watson*, 552 U.S. at 83. The government further requested that the case be transferred back to Connecticut. GA61-GA63. On November 19, 2009, an order of transfer entered, and the case was sent to Connecticut. GA71. On January 8, 2010, the district court granted the defendant's petition, and the case was scheduled for resentencing. GA73.

E. The defendant's re-sentencing

On January 26, 2011, the district court entered an order vacating the defendant's § 924(c)(1)(A) convictions in light of *Watson*. GA74. The Probation Department prepared a Second Addendum to the PSR using the November 1, 2009 guidelines, and recalculated the defendant's guideline range. Specifically, the PSR concluded that the base offense level was 36, based on an attributable quantity of at least 1.5 kilograms, but less than 4.5 kilograms of crack cocaine. PSR, Second Addendum ¶ 2. The PSR then added two levels for possession of a firearm in connection with the offense. PSR ¶ 3. The PSR also added four levels for the defendant's aggravated role in the offense, for a total offense level of 42. PSR ¶ 4. A total offense level 42 and a Criminal History Category IV

resulted in a guideline imprisonment range of 360 months to life. PSR ¶¶ 9, 11.

Further, the Second Addendum correctly noted that the guideline imprisonment range would remain unchanged whether the court applied a 20-1 or 18-1 crack/powder ratio, both of which would result in a total offense level of 40 and a guidelines incarceration range of 360 months to life. PSR ¶ 22. The Second Addendum also explained that, if the district court wanted to apply a 1-1 crack/powder ratio, the "defendant would be responsible for the equivalent of 2,077 grams or 2.07 kilograms of cocaine," resulting in a total offense level of 34 and an incarceration range of 240-262 months. PSR ¶ 23.

At the start of the sentencing hearing, the district court summarized the disputed issues: (1) whether the defendant faced a mandatory minimum incarceration term of 240 months based on the Government's filing of the second offender information and the statutory penalties in effect at the time of his commission of the offense; (2) whether the PSR's drug quantity calculation was correct; (3) whether the defendant should receive a four-level enhancement for role in the offense; and (4) whether the defendant should receive a two-level enhancement for use of a firearm in connection with a drug offense. A245.

The district court first addressed the defendant's claims concerning the retroactive application of the Fair Sentencing Act of 2010 ("FSA"). A247. Relying on Second Circuit precedent, the district court declined to apply the FSA to the defendant's sentence, finding that "it

is established in this circuit, and a number of other circuits have also held, that the [FSA] is not retroactive. I refer you to the *United States v. Diaz* . . . ." A247. In *Diaz,* the Court found the FSA should not be applied retroactively because it contained no explicit or implied language that "it is intended to have retroactive effect." *United States v. Diaz*, 627 F.3d 930, 930 (2d Cir. 2010).

The district court next addressed the defendant's challenge to the second offender notice and rejected his claim that the prior conviction for possession of narcotics did not qualify as a prior felony drug offense. The court agreed with the parties' position that it had to "apply the modified categorical approach to assess whether the defendant's prior drug conviction under Connecticut General Statute Section 21a-279(a) qualifies as a prior conviction for a felony drug offense . . . ." A247. The court held, "Having reviewed the transcript of the plea colloquy on November 20, 1997 in Connecticut Superior Court, the defendant confirmed that the particular drug involved in this prior drug felony offense was cocaine, actually cocaine and cocaine base." A248. The court further explained, "The defendant was directed by the judge to listen to the facts as stated by the state's attorney, who recited a number of times that the offense involved cocaine and cocaine base. The defendant was then asked whether the prosecutor's version of the facts was correct. The defendant unequivocally confirmed that the facts as stated by the prosecutor were correct." A248. The court stated that, "[a]lthough the judge used the phrase 'substantially correct' and the phrase 'basically it' during his colloquy, I conclude that the transcript nonetheless

establishes that the defendant had a prior drug felony offense." A248. Finally, the court rejected the defendant's claim that "mere possession" is not a felony offense because "there is no authority for such a proposition." A249.

With regard to the drug quantity calculation and the role enhancement, the court first noted that the defendant was precluded from challenging these guideline calculations under the "law of the case" doctrine. The court explained that, because "[t]he defendant challenged the drug quantity calculation for sentencing purposes not only during the original sentencing hearing but also on direct appeal, and his claim was rejected by the Court of Appeals," he was precluded from raising the same challenge again. A249-A250. The court came to the same conclusion as to the role enhancement, pointing out that, at the initial sentencing hearing, the defendant had raised the same objection, and the sentencing judge had rejected it and applied the enhancement. A250.

The district court also made its own particularized findings as to drug quantity and role. A250. It based these findings on its review of the PSR, the transcript of the first sentencing, and the transcript of Jason Cox's sentencing. A250.

First, the court concluded the PSR's drug quantity calculations were "based on a conservative estimate during a four-month period taking the days on which you have the lowest amount of quantity sold as opposed to even averaging it out," and even though "the defendant was

selling drugs long before that period." A250. The quantity finding was also based upon the quantity of drugs that had been "seized on a particular day when the defendant was stopped by police." A251.

Second, as to role, the court indicated that "[a]t the time the defendant was originally sentenced, Judge Nevas had presided over the trial . . . Judge Nevas stated that based on the evidence at trial, he found the enhancement was appropriate." A251. The court went on to explain:

> [A]lthough the Presentence Report does not set forth all of the details as to the participants, the sentencing judge's finding was based not simply on the language in the Presentence Report but on having presided over the trial. And the judge observed that the defendant and his brother had a very extensive drug distribution organization, in addition to the specifically named individuals having been participants.

A251.

After overruling the defendant's quantity and role objections, the district court overruled the defendant's objection to the two-level increase for possession of a dangerous weapon. The court noted that "[p]ursuant to Guideline Section 2D1.1(b)(1), as the defendant concedes, this objection lacks merit based on *United States v. Gardner*, 602 F.3d 97." A251. Finally, the court found that the "total offense level is 40 and his criminal history category is Category IV," and adopted the factual

statements set forth in the PSR as its findings of fact. A252.

The court next explained that it had considered imposing a non-guideline sentence, but after weighing all of the § 3553(a) factors and listening to counsel and the defendant, it chose to impose a 360-month incarceration term. A284, A288. The court indicated that it had rejected the defendant's two grounds for a non-guidelines sentence – the 18-to-1 ratio for crack and powder cocaine penalties, and the fact that the defendant's only prior prison sentence was approximately one year. The court stated, "In determining whether the case is an appropriate case, one thing that I look at and consider carefully is the nature and circumstances of the offense and the history and characteristics of the defendant. Having done that here, I've concluded that this is not an appropriate case for a non-Guideline sentence." A285. The court focused on "the need to impose a sentence that provides just punishment, the need for the sentence imposed to reflect the very serious nature of the offense here and promote respect for the law." A284. The court was also concerned that the defendant presented a high risk of recidivism so that "specific deterrence is a real concern for me." A284.

With regard to the 18-to-1 ratio, the court was aware of it's discretion to "make an adjustment in the appropriate case," but found that the defendant "is the person that the proponents of the 18-to-1 ratio have in mind, and so he is not the person, based on his activity and his personal characteristics, where a non-Guideline sentence on that basis would be appropriate." A286.

Nor was the district court persuaded by the defendant's incremental punishment argument. A286. The court explained, "[I]t is true that we're talking about a significant multiplier in terms of the sentences previously imposed and the time previously served by this defendant. But his conduct also reflects a significant multiplier in terms of the scope and the conduct in which he was involved." A286. The court found that the defendant's "history and actions" were troubling, so that a non-guideline sentence was not warranted based on the fact that he had not previously served long incarceration terms. A286.

Finally, the court explained that, in considering the defendant's personal characteristics, one significant fact was that "he did attempt to commit fraud on the Court and that is something that's not to be taken lightly." A287. This reference stemmed from a series of documents that the defendant had submitted to the original sentencing court in April 2004 in support of a motion for a new trial. A35, GA13-GA26. In essence, he doctored a letter from a gun manufacturer in an attempt to show that the firearm charged in Count Eight of the Superseding Indictment had not been manufactured until after the charged offense conduct. GA15-GA24. The fraud involved the defendant and his family members, who made several misrepresentations to the gun manufacturer to obtain information about the charged firearm and then, after receiving letters back from the manufacturer which did not support his claims, altered one of these letters and submitted it to the court in an attempt to convince the court that he could not have possessed the firearm. GA15-

GA24. At the re-sentencing, the court explained, "If there's one thing that I want Mr. Cox to take away from this hearing when he's sitting around and talking with people as to why he didn't get a lower sentence, he should understand that the fact that he attempted to commit a fraud on the Court is a significant reason why he did not get a lower sentence." A287.

After hearing from defense counsel, the defendant and government counsel, the court sentenced the defendant to concurrent terms of 360 months' imprisonment and ten years' supervised release. A287-A288. As the court explained, "I read through the sentencing transcript with Judge Nevas and I've listened to the defendant now on a couple of occasions and I've read his letters, and the reason I have a real concern about a high risk of recidivism is that I have concluded that this defendant has only a passive acquaintance with the truth." A287.

Summary of Argument

I. The district court did not make any procedural errors when it re-sentenced the defendant to 360 months' incarceration. The court correctly calculated the defendant's guideline range. Its findings as to quantity and role were not only predetermined under the law of the case doctrine, but were also correct, and certainly not clearly erroneous, in light of the trial evidence supporting both findings. Moreover, the court properly considered the defendant's arguments for a lower sentence and, in rejecting them, gave specific reasons which were tied to

the § 3553(a) factors that it considered to be most important in this case.

II. The district court's imposition of a 360-month sentence, which was at the bottom of the applicable guideline range, was substantively reasonable. The defendant founded and led a drug-trafficking organization that distributed more than 1.5 kilograms of crack-cocaine; he frequently possessed firearms to further his drug trafficking activities; he demonstrated a high risk of recidivism; and, during the pendency of his various post-conviction proceedings, he attempted to commit a fraud on the court. This Court should not substitute its judgment for that of the district court, which carefully reviewed the record of the prior sentencing hearings and proceedings in this case, and properly considered the § 3553(a) sentencing factors before imposing a sentence at the bottom of the guideline range.

III. This Court does not have to reach the issue of whether the district court correctly concluded that the FSA is not retroactive to a defendant, like this one, who is sentenced after the statute's enactment because the ultimate sentence here was well-above both the old and new statutory mandatory minimum incarceration terms applicable for crack cocaine offenses. In light of the 360-month sentence imposed, any error made by the district court in concluding that the FSA was not retroactive was harmless.

IV. The district court did not err when it applied the modified categorical approach and determined that the

defendant's Connecticut conviction for possession of narcotics was a prior felony drug offense under 21 U.S.C. §§ 841(a)(1) and 851. The plea transcript for this conviction establishes that the defendant admitted to having possessed cocaine, which is a narcotic under both Connecticut and federal law.

Argument

I. The district court's sentence was procedurally reasonable

A. Relevant facts

The relevant facts are set forth above in the "Statement of Facts."

B. Governing law and standard of review

1. Procedural reasonableness

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 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." *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005).

Consideration of the guideline 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. *See id.; Rita v. United States*, 551 U.S. 338, 356-59 (2007). There is no "rigorous requirement of specific articulation by the sentencing judge." *Crosby*, 397 F.3d at 113. And although the judge must state in open court the reasons behind the given sentence, 18 U.S.C. § 3553(c), "robotic incantations" are not required. *See*, *e.g.*, *United States v. Goffi*, 446 F.3d 319, 321 (2d Cir. 2006). "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 Fernandez*, 443 F.3d at 26-27. Reasonableness review has generally been divided into procedural and substantive reasonableness. *See United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc).

For a sentence to be procedurally reasonable, the sentencing court must calculate the guideline range, treat the guideline range as advisory, and consider the range along with the other § 3553(a) factors. *See Cavera*, 550 F.3d at 190. 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 v. United States*, 552 U.S. 3851 (2007)).

A district court need not specifically respond to all arguments made by a defendant at sentencing. *See United States v. Bonilla*, 618 F.3d 102, 111 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1698 (2011). Where a defendant fails to object at the time of sentencing to the district court's alleged procedural error in not fully considering the § 3553(a) factors or in making a mistake in the guideline calculation, this Court reviews the claim for plain error. *See United States v. Villafuerte*, 502 F.3d 204, 208 (2d Cir. 2007).

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 *cert. denied,*130 S. Ct. 2128 (2010).

2. The law of the case doctrine

The law of the case doctrine "requires a trial court to follow an appellate court's previous ruling on an issue in the same case. This is the so-called 'mandate rule.'" *United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002) (citation omitted). "The mandate rule compels compliance on remand with the dictates of the superior court and forecloses relitigation of issues expressly or impliedly decided by the appellate court." *United States v. Bryce*, 287 F.3d 249, 253 (2d Cir. 2002) (internal quotation marks omitted).

"The second and more flexible branch [of this doctrine] is implicated when a court reconsiders its own ruling on an issue in the absence of an intervening ruling on the issue by a higher court." *Quintieri*, 306 F.3d at 1225. "It holds that when a court has ruled on an issue, that decision should generally be adhered to by that court

in subsequent stages in the same case, unless cogent and compelling reasons militate otherwise." *Id.* (internal quotation marks omitted). "The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000) (citations and internal quotation marks omitted). "[T]his branch of the doctrine, while it informs the court's discretion, does not limit the tribunal's power." *United States v. Uccio*, 940 F.2d 753, 758 (2d Cir. 1991) (internal quotation marks omitted). A court may therefore revisit an earlier, unreviewed, decision of its own so long as it has a valid reason for doing so, and provides the opposing party "sufficient notice and an opportunity to be heard." *Uccio*, 940 F.2d at 759.

In the context of *Crosby* remands, this Court has held that "the law of the case doctrine ordinarily will bar a defendant from renewing challenges to rulings made by the sentencing court that were adjudicated by this Court - or that could have been adjudicated by us had the defendant made them - during the initial appeal that led to the *Crosby* remand." *United States v. Williams*, 475 F.3d 468, 475 (2d Cir. 2007); *see also United States v. Negron*, 524 F.3d 358, 360 (2d Cir. 2008) (holding that, on *Crosby* remand, defendant cannot raise argument that was adjudicated on direct appeal).

3. Determination of drug quantity

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. *See Gall*, 552 U.S. at 49. Under the Sentencing Guidelines, the court must begin by determining the defendant's "base offense level," U.S.S.G. § 1B1.1, which is calculated 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. *See 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. *See Jones*, 531 F.3d at 175.

The guidelines provide that "[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." U.S.S.G. § 2D1.1, comment. (n.12); *see also Jones*, 531 F.3d at 175. All transactions entered into by a defendant's coconspirators may be attributable to him, if they were known to him or reasonably foreseeable by him. *See United States v. Miller*, 116 F.3d 641, 684 (2d Cir. 1997). "In deciding quantity involved, any appropriate evidence may be considered, or, in other words, a sentencing court may rely on any information it knows about." *United States v. Jones*, 30 F.3d 276, 286 (2d Cir. 1994) (citations omitted).

4. Role in the offense

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).

C. Discussion

1. The law of the case doctrine applies

The defendant first claims that the district court erred in concluding, at the outset, that the law of the case doctrine barred the defendant from raising the same challenges to the factual findings on drug quantity and role that he had previously raised at his September 12, 2001 sentencing hearing. *See* Def.'s Brief at 12. He further argues that this alleged error resulted in an improper guideline calculation and that a remand is required to allow the district court to make specific factual findings on these two disputed issues. *See* Def.'s Brief at 13. But the record in this case clearly shows the defendant raised identical guideline challenges that had been denied by the district court at the first sentencing. Then, on direct appeal, he chose only to challenge the quantity determination, and this Court affirmed that finding. Thus, at the second sentencing hearing, the defendant was precluded from relitigating these very same factual issues.

It is well-settled that the law of the case doctrine or "mandate rule" requires trial courts "to follow an appellate court's previous ruling on an issue in the same case." *Quintieri*, 306 F.3d at 1225. As to drug quantity, the defendant claimed at the initial sentencing hearing that the PSR's factual finding was not correct. A183. Despite the jury's finding, the defendant himself claimed he had "no involvement" in drug trafficking and that all the witnesses who had testified at trial had lied. A191-A192. The sentencing court rejected these claims and found that the defendant was responsible for distributing in excess of 1.5 kilograms of crack-cocaine. A193-A194. This Court affirmed that decision on direct appeal, finding that the district court was entitled to credit the cooperating co-defendant's testimony and thereby make "a conservative estimate based on (i) Willie Grant's testimony that he sold half-gram bags of crack for the defendants at a rate of $1500 per day on weekdays and $1500-$3500 per day on weekends for several months, plus (ii) the quantity seized on October 9, 1999 . . . ." *Cox*, 59 Fed. Appx. at 441. As a result, at the second sentencing hearing, the district court was bound to follow this Court's decision on quantity.

The analysis is similar for the role enhancement. There is no question that the defendant objected to the role enhancement at his original sentencing hearing. Indeed, he expressly denied that he was a leader of the charged drug conspiracy. A190. His counsel also argued, "[A]t the most, [the role enhancement] should be a three-level, not four, at this point." A189. The district court disagreed and stated, "[H]e went to trial and he was convicted, and the evidence at trial, over which I presided, was extensive

with respect to his involvement with his brother. They had a very extensive drug distribution organization, so that objection is rejected." A190. The defendant then chose not to challenge this finding on direct appeal. The district court, at the second sentencing hearing, was entitled to rely on the court's factual findings from the first sentencing hearing. *Cf. United States v. Frias*, 521 F.3d 229, 234-35 (2d Cir. 2008) (holding that in appeal after *Booker* remand, the defendant could not raise claims that he could have raised in the first appeal). Moreover, under the second prong of the law of the case doctrine, the district court was entitled to rely on its previous factual findings, given that there was no intervening ruling by this Court and that there was no "cogent and compelling reasons" to change these findings. *See Quintieri*, 306 F.3d at 1225. Thus, it cannot be said that the district court's reliance on previous factual findings when determining the appropriate sentence for the defendant resulted in a procedurally unreasonable sentence.

The defendant relies on this Court's decision in *United States v. Triestman*, 178 F.3d 624 (2d Cir. 1999), to argue that a remand is necessary because the district court supposedly failed to conduct a full re-sentencing. *See* Def.'s Brief at 12-13. In *Triestman,* the defendant had successfully challenged his § 924(c) conviction through a habeas petition that was granted by the district court. *See id.*, 178 F.3d at 627. In granting the petition, the district court ordered that the defendant be resentenced on the remaining drug convictions, and the defendant challenged this decision on appeal, claiming it was not authorized under 18 U.S.C. § 3582(c). *Id.* at 628. This Court held

that, in the context of a successful habeas petition resulting in the dismissal of counts of conviction against a defendant, it was well within the district court's authority to resentence a defendant on the remaining counts of conviction. *See Triestman*, 178 F.3d at 630.

The decision in *Triestman* is not applicable to this case. Here, the district court did conduct a full re-sentencing after vacating the defendant's § 924(c) convictions. The defendant may not be happy with the district court's guideline calculations, but he cannot seriously maintain that the district court failed to conduct a full re-sentencing of him.

2. The record fully supports the district court's independent quantity and role findings

Despite the application of the law of the case doctrine, the district court, out of an excess of caution, conducted its own thorough review of the record, including the sentencing transcripts for both the defendant and his brother. A250. The court reviewed the findings that the first sentencing court had made and then engaged in a full reconsideration of the disputed issues and recalculated the guideline range. The court carefully explained its findings and conclusions, and only then imposed sentence. Despite the court's careful reconsideration of all the relevant issues at the resentencing, the defendant insists that the court relied on the prior guideline calculation from the first sentencing and failed to conduct a full re-sentencing hearing, so that a remand for further factual findings is required. *See* Def.'s Brief at 13-14.

The defendant is simply incorrect. The district court found that the defendant's attributable crack cocaine quantity was more than 1.5 kilograms due to his leadership of, and participation in, the drug conspiracy he and his brother Jason operated from January 1, 1997, to April 2000. A193-A194, A250-A251 ("[w]e are talking about a very substantial drug business"), A284. The court explained that "[t]he quantities reflected in the PreSentence Report were conservative[,] . . . very, very conservative." A284-A285. The court found, "There was a time period long before the period that was used for computing the quantity during which the defendant was engaged in this very harmful activity. And in fact by the time he was arrested, he had expanded the business into South Carolina." A285.

The quantity calculations were based upon the trial testimony of cooperating witnesses whom the original sentencing court had observed and found to be credible. The PSR summarized this evidence, and the district court adopted those findings. PSR ¶¶ 24, 26 (summarizing trial testimony of Robert Davis who drove Cox to New York City to purchase cocaine and helped cook the powder into crack), 34 (summarizing testimony of Grant who sold at least $1,500 of crack cocaine on weekdays and between $1,500 and $3,500 of crack cocaine on weekends), 36 (detailing seizure of 397 grams on October 9, 1999). Specifically, the district court held, "[T]he calculation of quantity was based on a conservative estimate during a four-month period taking the days on which you have the lowest amount of quantity sold as opposed to even averaging it out. And this was during a four-month period,

even though the defendant was selling drugs long before that period." A250. Indeed, as the district court explained during the original sentencing, the PSR's drug quantity calculation did not even account for the testimony of Grant and Davis which described the defendant's purchase of "between a hundred and 200 grams of powder cocaine twice a week in New York, and the conversion of that powder cocaine into crack in Bridgeport." A162. Nor did it account for crack cocaine which the defendant sold in South Carolina or which other co-conspirators obtained during trips to New York. A162.

Thus, contrary to the defendant's argument on appeal, the district court made a specific finding as to the quantity of crack cocaine attributable to the defendant and based that finding on evidence admitted at trial, which the PSR recounted and discussed in detail. Accordingly, the district court did not make any procedural error in calculating the base offense level.

The defendant also attacks the district court's role enhancement. This enhancement, however, was also based on the trial evidence. As the district court explained, "[T]he sentencing Judge's finding was based not simply on the language in the Presentence Report but on having presided over the trial." A251. At the original sentencing, the court found that the defendant and his brother were the "organizers or leaders of a crack cocaine distribution conspiracy that involved five or more participants, and was very extensive." A163. The court listed the various participants in the organization "who delivered and carried crack at different time periods."

A164. The court pointed out that the operation "used the services of crack addicts and others to buy guns, to rent cars, to act as drivers, to deliver crack, pick up money from customers, buy powder in New York and then bring it back to Bridgeport where it was converted into crack at various locations, and also to carry drugs from New York to Bridgeport." A164. At the re-sentencing, the court found that "the defendant and his brother had a very extensive drug distribution organization, in addition to the specifically named individuals having been participants." A251. Moreover, the district court adopted the findings of fact in the PSR, which explained how the defendant and his brother had been in charge of a lucrative crack cocaine operation and had employed several others to prepare, package, store and sell crack cocaine for them. A252, PSR ¶¶ 11, 12. Thus, the district court did not commit any procedural error in determining that a role enhancement was appropriate.

On appeal, the defendant again endeavors to discredit the testimony of Grant, claiming it was insufficient to sustain the court's findings. *See* Def.'s Brief at 15-16. As a threshold matter, it is clear that the court based its factual findings on the entirety of the record, not just on Grant's testimony. In any event, the court was within its fact-finding authority to credit Grant's testimony. *See United States v. McLean*, 287 F.3d 127, 133 (2d Cir. 2002). Furthermore, this Court has already rejected this very same argument in the first appeal. *See Cox*, 59 Fed.Appx. at 441 (stating, "The court could (and did) decide to credit Grant's testimony, notwithstanding Cox's argument that Grant was not credible.").

3. The district court properly considered all of the § 3553(a) factors

Finally, the defendant argues that the district court committed a procedural error by allegedly applying an appellate "reasonableness" standard instead of the parsimony clause set forth in § 3553(a). *See* Def.'s Brief at 32. There is nothing in the record to support this claim. To the contrary, the district court carefully considered all of the § 3553(a) factors and specifically referenced the parsimony clause. A283. The court stated, "I've also taken into account in this case the need for the sentence in this case to serve the various purposes of a criminal sentence. Pursuant to Section 3553, the sentence should be sufficient but not greater than necessary to serve these purposes." A283.

Ignoring the totality of the record, and the context of the district court's comments, the defendant latches on to the court's reference to the reasonableness of a guideline sentence for the defendant and claims that the court misapprehended the standard and the factors it should consider when imposing sentence. The defendant does not provide the context for the district court's statement.

The court's reference to the "reasonableness" of a guideline sentence was made in the context of its explanation as to why a non-guideline sentence was not appropriate. The court specifically referenced the requirements of § 3553(a) and the considerations it must make in determining the sentence, including the need to impose "just punishment," the need to "protect the public

from further crimes," the need to "afford adequate deterrence," the need for the sentence "to reflect the seriousness of the offense and promote respect for the law," and the need "to serve the goal of rehabilitation." A283-A284. The court then explained that it was "most aware of the need to impose a sentence that provides just punishment, the need for the sentence imposed to reflect the very serious nature of the offense here and promote respect for the law." A284. The court also had "a very serious concern about a high risk of recidivism on the part of this defendant." A284.

At this point, the court indicated that it had been considering whether to impose a non-guideline sentence. In explaining why it had rejected this idea, it noted, "I was not suggesting that the Guideline range was inappropriate. In fact, I think the Guideline range would be a reasonable sentence and the question was whether it was the lowest reasonable sentence." A284. The court then went on to explain, in great detail, why it had rejected the main bases for a non-guideline sentence (the crack/powder ratio and the fact that the defendant had never before served more than a year in jail) and, in doing so, relied heavily on the seriousness of the offense conduct and the defendant's personal characteristics. A285-A287.

Indeed, the very comments that the defendant attacks rebut his own argument. In discussing the reasonableness of the guideline calculation, the court stated that the operative question was whether the guideline range provided for the "lowest reasonable sentence," a direct reference to the parsimony clause. A284. Nothing in the

record supports the defendant's claim of procedural unreasonableness. Rather, the record in this case demonstrates that the court thoroughly and carefully considered the applicable guideline range and all of the § 3553(a) factors. *See Fleming*, 397 F.3d at 100 ("As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, we will accept that the requisite consideration has occurred."). Accordingly, the defendant's claims of procedural unreasonableness fail and should be rejected.

II. The defendant's sentence was substantively reasonable.

A. Relevant facts

The relevant facts are set forth above in the "Statement of Facts."

B. Governing law and standard of review

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), *cert denied*, 129 S. Ct. 2735 (2009). The § 3553(a) factors include: (1) "the nature and circumstances of the offense and history and characteristics of the defendant"; (2) the need for the

sentence to serve various goals of the criminal justice system, including (a) "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment," (b) to accomplish specific and general deterrence, (c) to protect the public from 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 sentencing range set forth in the guidelines; (5) policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to victims. *See* 18 U.S.C. § 3553(a).

The Supreme Court has reaffirmed that the reasonableness standard requires review of sentencing challenges under an abuse-of-discretion standard. *See Gall*, 552 U.S. at 46. 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.

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 argues that the district court's imposition of a 360-month prison term was substantively unreasonable because it was too high and "overwhelming driven" by a crack cocaine guideline which "has been widely recognized as unfair and indeed racist in application." Def.'s Brief at 21. In essence, the defendant advances the same arguments on appeal that he raised in support of his request for a non-guideline sentence before the district court.

The record establishes that the district court fully complied with its sentencing obligations and imposed a substantively reasonable sentence. As discussed above, in explaining its sentence, the district court engaged in a thorough discussion of the 3553(a) factors. The court noted that it was "most aware of the need to impose a sentence that provides just punishment, the need for the sentence imposed to reflect the serious nature of the offense here and promote respect for the law." A284. The court also explained that it had decided against imposing

a non-guideline sentence because "this is a defendant who will do what he wants to do or what it takes to help himself," and "the rules the legal system imposes on him are not ones that are going to limit his conduct." A287.

The court also considered the defendant's attempt to commit fraud on the court as additional evidence that he presented a "high risk of recidivism" because he only had "a passive acquaintance with the truth." A287. The court explained, "[H]e did attempt to commit a fraud on the court and that is something that's not to be taken lightly." A287. In fact, the court compared the defendant's history and characteristics to those of other defendants and explained that, "in cases where I've concluded that such a non-Guideline sentence is appropriate, there's been something in the characteristics and the change in the defendant that has merited that. There's none of that here." A286. Indeed, instead of apologizing for attempting to deceive the court, the defendant claimed he had done nothing wrong. A262. This continued denial in the face of ample and irrefutable evidence of his fraud concerned the district court and provided further evidence that the defendant needed to be deterred specifically from engaging in criminal conduct in the future.

It is clear from the district court's statements that it considered all of the § 3553(a) factors in reaching its ultimate sentence because it thoroughly listed and explained each and every factor. A283-A284. Given the seriousness of the defendant's offense, his criminal record, and his history and characteristics, it was substantively

reasonable for the district court to sentence the defendant to the bottom of the applicable guideline range.

In making his argument on appeal, the defendant argues, as he did below, that the crack guidelines are too high and inherently unfair. *See* Def.'s Brief at 21, 31-32. The district court considered this argument, however, and rejected it based on a consideration of the § 3553(a) factors. Indeed, the court's expansive, detailed findings as to all of the § 3553(a) factors undermines the defendant's claim that the court's sentence was driven entirely by the crack cocaine quantity. As discussed above, the guideline range was based also on the defendant's aggravated role in the offense and his possession of firearms. Moreover, the district court specifically rejected the same disparity argument based on the defendant's offense conduct and personal characteristics. It stated, "This defendant, however, I think is the person that the people who are proponents of the 18-to-1 ration have in mind, and so he is not the person, based on his activity and his personal characteristics, where a non-Guideline sentence on that basis would be appropriate." A285-A286. In ruling on this argument, the court explained that, while the law permitted him to make an adjustment based on the disparity, this was not the appropriate case for such an adjustment. A285-A286.

In support of his disparity argument, the defendant relies on this Court's decision in *United States v. Dorvee*, 616 F.3d 174 (2d Cir. 2010), which addressed a sentence in a child pornography case. The defendant argues that, even though crack cocaine cases and child pornography

cases are very different, the applicable guidelines in each type of case are equally unreasonable. He tethers his claim to this Court's reversal and finding that the district court acted unreasonably in *Dorvee.* But the circumstances in *Dorvee* were completely different than the circumstances in his case. First, in *Dorvee*, the district court had miscalculated the guideline range, resulting in a procedurally unreasonable sentence. *See id.*, 616 F.3d at 181. Second, in *Dorvee*, the district court did not adequately explain its reasons for sentencing the defendant to the maximum allowable penalty. *See id.* at 178. Here, the district court did not commit any procedural error, was well-aware of its authority to impose a non-guideline sentence, imposed an incarceration term at the very bottom of the applicable guideline range, and clearly articulated its analysis and application of the § 3553(a) factors. A281-A288.

In support of his argument, the defendant also takes some of the Government's comments at sentencing out of context. Specifically, the defendant refers to his organization as a small "mom and pop" type operation. *See* Def.'s Brief at 26. In their full context, however, the Government's comments were clearly meant to convey the opposite point:

> He is in a 360-to-life range because of what he did. He is in that range because he ran a drug operation with his brother. He is in that range because he used guns to further his business. He is in that range because they distributed boatloads of drugs; really kind of almost a very different kind of an

> organization than we're used to seeing in the Bridgeport/Stratford area in that they ran almost kind of a mom-and-pop shop. We're used to organizations where we have the leaders and the suppliers and we have the workers on the street corners and the turf battles. And Mr. Cox and his brother were smart enough to cut out the middlemen, cut out the women and men that other organizations would have to hire to cook up the crack and package it. They did it all themselves and all the profit went to them as well. And they got a few people along the way to help them out and, as a result of that, they ran a very lucrative organization.

A264-A265.

In rejecting the defendant's argument that the guideline range was too high, the district court explained, "[I]t is true that we're talking about a significant multiplier in terms of the sentences previously imposed and the time previously served by this defendant. But his conduct also reflects a significant multiplier in terms of the scope and the conduct in which he was involved." A286. In sum, the court's guideline sentence was substantively reasonable because, as the court explained, it "will serve the need of specific deterrence, [and] best constitute a sentence that reflects just punishment and the serious nature of this defendant's conduct in view of his history and characteristics . . . ." A288. Where, as here, the court carefully explained its analysis of the § 3553(a) factors and the basis for its sentence, the resulting 360-month sentence

is clearly not "shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *Rigas*, 583 F.3d at 123.

III. Any error committed by the district court in ruling that the FSA is not retroactive was harmless because the court imposed an incarceration term substantially higher than both the old and new mandatory minimum sentences.

The defendant argues that the district court erred in finding that the FSA was not retroactive and that the applicable mandatory minimum incarceration term should have been 120 months, not 240 months. *See* Def.'s Brief at 36. The defendant concedes that his offense conduct occurred prior to the enactment of the FSA, but argues that the FSA should apply retroactively to this case because he was sentenced after its enactment. He relies on the new position taken by the Attorney General of the United States that the FSA should apply retroactively to any defendants sentenced after the FSA was enacted. *See id.* at 39. But this Court should decline to remand this case for resentencing because the FSA's new mandatory minimums had no impact on the district court's sentence, and any error by the district court in ruling that the FSA did not apply was harmless.

The Anti-Drug Abuse Act of 1986, 100 Stat. 3207, established a ten-year mandatory minimum sentence for drug offenses involving 50 grams or more of cocaine base. *See* 21 U.S.C. § 841(b)(1)(A)(iii)(2009). After years of

debate, Congress passed the FSA, which was signed by the President on August 3, 2010. The FSA amended § 841(b)(1)(A)(iii) to require 280 grams or more of cocaine base to trigger the ten-year mandatory minimum. Pub. L. No. 111-220, 124 Stat. 2372, § 2(a) (August 3, 2010). These new penalties govern sentences imposed on or after August 3, 2010, the date when the FSA was signed.

For sentences imposed before August 3, 2010, the mandatory penalties for 50 grams of cocaine base set forth at that time in 21 U.S.C. § 841(b)(1)(A)(iii), continue to apply under the general "Savings Statute" or "Savings Clause," set forth at 1 U.S.C. § 109. *See United States v. Acoff*, 634 F.3d 200, 202 (2d Cir. 2011); *United States v. Baptist*, 646 F.3d 1225, 1229 (9th Cir. 2011) (joining "every other circuit court to have considered this question" in holding that the FSA does not "apply to defendants who have been sentenced prior to the August 3, 2010 date of the Act's enactment"). Under 1 U.S.C. § 109, "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty . . . incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty." 1 U.S.C. § 109.

Immediately following the enactment of the FSA, the government took the view that the Act's new threshold quantities for mandatory minimum penalties applied only to offense conduct that occurred on or after the date of its enactment. That view was based on the general savings

statute, 1 U.S.C. § 109, which provides that the repeal of a criminal statute does not extinguish liability for previous violations of that statute, unless the repealing law expressly so states. The FSA has no express statement extinguishing existing liability under the old threshold quantities. Accordingly, the government concluded that the prior crack thresholds would continue to apply for all offense conduct that occurred before the date of enactment.

Some defendants, including this one, have countered this position and distinguished this Court's decision in *Acoff* by claiming that the FSA should apply retroactively to defendants who are sentenced after August 3, 2010, even though their conduct occurred prior to that date.[2]

---

[2] In *Acoff*, this Court observed, "Acoff argues that principles of equal protection require us to read the FSA as applying not only to future offenders, but also to those who violated the statute before it was amended but whose sentences were not yet final when the FSA was enacted. That is not correct." *Id.*, 634 F.3d at 202. These statements in *Acoff* appear to undermine any effort to peg the FSA's retroactivity to whether a defendant has been sentenced and instead indicate that the date of the defendant's conduct is the touchstone of the analysis. Nevertheless, *Acoff* does not control here because this case involves a post-FSA sentencing. The Government notes that a panel of this Court has ordered full briefing on this issue in another case currently under consideration. *See United States v. Bush*, No. 10-4156, Order (2d Cir. (continued...)

Although this Court has not addressed this specific argument, others courts have. *See*, *e.g.*, *United States v. Douglas*, 644 F.3d 39, 42-44 (1st Cir. 2011) (holding that the FSA applies in post-November 1, 2010 sentencings); *United States v. Dixon*, 648 F.3d 195, 203 (3d Cir. 2011) (holding that the FSA applies to all post-August 3, 2010 sentencings); *United States v. Fisher*, 635 F.3d 336, 338 (7th Cir. 2011) (holding that the FSA does not apply in sentencings for preenactment offenses); *United States v. Sidney*, 648 F.3d 904, 910 (8th Cir. 2011) (holding that the FSA only applies to post-enactment offenders); *United States v. Tickles*, Nos. 10-30852 and 10-31085 (5th Cir. Oct. 19, 2011) (rejecting Government's position that the FSA is retroactive as to any sentencings occurring after August 3, 2010).

In light of these differing court decisions, the Attorney General of the United States recently undertook a full reconsideration of the temporal reach of the FSA and concluded that the Government's former analysis was incomplete. As the Supreme Court has explained, the general savings statute carries only the force of a law, and its demand of an express statement must yield to the clear intent of a subsequent Congress. If a repealing law shows

---

[2] (...continued)
Sept.14, 2011). GA72.

Congress's clear intent to extinguish existing liability under a repealed penalty scheme, that intent must prevail even absent an express statement to that effect. *See Great N. Ry. v. United States*, 208 U.S. 452, 465 (1907).

The Attorney General has concluded that the best reading of Congress's intent, considered in light of the structure and purpose of the FSA and applicable legal principles, is that Congress intended that the new statutory penalties would apply to all federal sentencings that take place on or after the FSA's August 3, 2010 effective date. That reading is most consistent with the FSA's stated purpose: "To restore fairness to Federal cocaine sentencing." FSA, Pub. L. No. 111-220, 124 Stat. at 2372. It also ensures that the law applicable in post-enactment sentencings will be consistent with the conforming amendments that Congress directed the Sentencing Commission to implement on an emergency basis. Given that Congress explicitly sought to restore fairness to cocaine sentencing, and repudiated the 100-to-1 ratio as unprincipled and unjust, there is no compelling reason Congress would want judges to continue to impose new sentences that are not fair over the next five years, while the statute of limitations runs.[3]

---

[3] In *Hill v. United States*, 417 Fed. Appx. 560 (7th Cir. April 7, 2011), *petition for cert. filed*, No. 11-5721 (July 1, 2011), the Government filed a brief acquiescing in review by the United States Supreme Court of the Seventh Circuit's decision to apply the FSA only to offenders who engage in criminal conduct after the statute's August 3, 2010 enactment.

The government now changes its position and agrees with the defendant that the FSA should apply retroactively to his case because he was sentenced after the FSA's enactment. Application of the FSA's new penalties, however, would have no impact on the sentence in this case. The district court imposed a 360-month sentence and, in doing so, explicitly stated that it was applying the 18 to 1 ratio enacted by the FSA, which lowered the base offense level from 38 to 36 and which resulted in a guideline range of 360 months to life. Although the district court declined to apply the reduced mandatory minimum penalties under FSA, it's decision to sentence the defendant well above the pre-FSA 240 mandatory minimum sentence was appropriate under 18 U.S.C. § 3553(a) and shows that, even had the court applied the FSA penalties, the result would have been the same. Thus, even if this Court determines that the FSA should apply to defendants sentenced after August 3, 2010, it would be entirely unnecessary to remand this particular case for re-sentencing because the district court explicitly stated its reasons for not imposing a lower, non-Guideline sentence, and imposed a sentence well-above both the old and new mandatory minimum sentence. *See Jass*, 569 F.3d at 57-58 (finding that procedural error was harmless where "record indicates clearly" that the district court would have "imposed the same sentence in any event").

The defendant argues that, if the applicable mandatory minimum penalty had been lower, the district court might have fashioned a lower sentence. *See* Def.'s Brief at 42. But nowhere in the record did the district court indicate that if felt constrained by the pre-FSA mandatory

minimum sentence. To the contrary, the district court's comments demonstrated a clear intent to sentence the defendant within the applicable range of 360 months to life and no where near the statutory mandatory minimum. As the court explained, "[T]he sentence that will serve the need of specific deterrence, best constitute a sentence that reflects just punishment and the serious nature of this defendant's conduct in view of his history and characteristics is a sentence in the Guideline range." A288. "A 360-month sentence is a very long sentence and I think the bottom of the range would be sufficient to accomplish those purposes." A288. There is simply no room for doubt about the district court's intentions in this case; nothing in the record suggests that the district court intended to sentence the defendant to anything other than the 30-year term that it imposed.

IV. The district court properly increased the mandatory minimum sentence to 240 months based upon the defendant's prior felony drug conviction.

Finally, the defendant claims in a *pro-se* letter brief that the district court failed to conduct a proper analysis of his prior felony drug conviction and, therefore, improperly applied a mandatory minimum 20-year sentence pursuant to 21 U.S.C. §§ 841(b)(1)(A) and 851. *See Pro Se* Brief at 2. Specifically, the defendant claims that the district court improperly found that his 1997 conviction for possession of narcotics qualified as a prior felony drug offense because it failed to apply the modified categorical approach. *Id.* The defendant is mistaken. In fact, the

district court did apply the modified categorical approach and, in doing so, concluded that the defendant's conviction for possession of narcotics qualified as a prior felony drug conviction.

A. Relevant facts

The relevant facts are set forth above in the "Statement of Facts."

B. Governing Law and Standard of Review

Pursuant to the penalty provisions set forth in 21 U.S.C. § 841(b)(1), enhanced penalties – including increased mandatory minimum and maximum terms of imprisonment – apply if the offense of conviction was committed after the defendant sustained a conviction for a "felony drug offense." Under the applicable definitions section of the Controlled Substances Act ("CSA"), the term "felony drug offense" has the following meaning:

> The term "felony drug offense" means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

21 U.S.C. § 802(44). Each category of substance included in the definition is itself a defined category of substance under the CSA. *See* 21 U.S.C. §§ 802(17) (defining

narcotic drug), 802(16) (defining marihuana), 802(41) (defining anabolic steroid), 802(9) (defining depressant or stimulant substance). These categories of substance are controlled in various places within the federal Schedules of Controlled Substances. *See*, *e.g.*, 21 C.F.R. § 1308.12 (listing as Schedule II controlled substances "opium" and "opiate," substances specifically identified in the definition of "narcotic drug" in the CSA).

In light of the Sixth Amendment concerns discussed in *Shepard v. United States*, 544 U.S. 13, 24-26 (2005), the categorical and modified categorical approaches developed by courts for analyzing sentencing enhancements under the Armed Career Criminal Act and the Sentencing Guidelines should be employed in determining whether a prior conviction constitutes a predicate offense for second offender enhancements under 21 U.S.C. §§ 841(b)(1) and 851. Courts start with a "categorical approach" in determining whether a prior conviction qualifies as a predicate offense, looking first to the "fact of conviction" and "the statutory definition of the prior offense of conviction rather than to the underlying facts of that offense." *United States v. Folkes*, 622 F.3d 152, 157 (2d Cir. 2010) (per curiam). However, when the state statute criminalizes both conduct included in the relevant federal statute and conduct not covered by the federal statute, courts conduct a second inquiry, using a "modified" categorical approach to examine certain sources beyond the mere fact of conviction. *See Taylor v. United States*, 495 U.S. 575, 602 (1990) (where trial has taken place, court may look to documents such as indictment, information and jury instructions); *see also*

United States v. Savage, 542 F.3d 959, 964 (2d Cir. 2008). In cases that are resolved short of trial, to prove that the prior conviction qualifies as a predicate offense, the Government may rely upon court documents such as "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or . . . some comparable judicial record of this information." *Shepard*, 544 U.S. at 26; *see also Savage*, 542 F.3d at 966.

Conn. Gen. Stat. § 21a-279(a) makes it a felony offense to engage in conduct with respect to "any narcotic substance," which is a category of substance on Connecticut's Controlled Substances Schedules. *Id.* The primary question with respect to the categorical analysis in this matter is whether this category at the time of defendant's conviction included substances not covered by the categories of federally controlled substances enumerated in the definition of felony drug offense at 21 U.S.C. § 802(44). The answer, in short, is that at the time of the defendant's conviction, Conn. Gen. Stat. § 21a-279(a) was over-inclusive in relation to 21 U.S.C. § 802(44). In other words, Connecticut law criminalized conduct relating to substances that were not covered by federal law. This was so because in May 1986, in an effort to conform its controlled substance schedules to federal law, the State of Connecticut listed on its Controlled Substance Schedule I two obscure chemicals, thenylfentanyl and benzylfentanyl, which it categorized as "narcotic substances," but these substances have not been controlled as narcotics under federal law since November

29, 1986, when DEA's temporary, emergency scheduling of them expired as a matter of law.[4]

A district court's decision involving primarily an issue of fact will be reviewed for clear error, and a district court's decision involving primarily an issue of law will be reviewed *de novo*. *See United States v. Vasquez*, 389 F.3d 65, 75-76 (2d Cir. 2004).

C. Discussion

The district court properly applied the modified categorical approach in its determination of whether the defendant's 1997 possession of narcotics conviction qualified as a prior felony drug offense under 21 U.S.C.

---

[4] In 1985, the DEA added these two chemicals (and others) on a temporary, emergency basis to the federal Schedule of Controlled Substances – and those additions were published in the Federal Register. In May 1986, the Connecticut legislature added all of the newly scheduled chemicals to its own list, to ensure that state and federal law tracked each other. Based on later federal testing, however, it was determined that these two drugs were not pharmacologically active, and so on November 29, 1986, their emergency listing was allowed to expire. That expiration was not flagged in the Federal Register or the Code of Federal Regulations, and so Connecticut never removed these two chemicals from their own listings. Consequently, categorical reliance on a conviction under Conn. Gen. Stat. § 21a-279(a) is precluded because of the abstract theoretical possibility that a defendant might have been convicted of conduct relating to thenylfentanyl and benzylfentanyl.

§§ 841(b)(1)(A) and 851. In *Shepard*, the Supreme Court explained that district courts were permitted to consider facts contained in the transcript of a plea colloquy to the extent that "the factual basis for the plea was confirmed by the defendant" or there are "explicit factual finding[s] by the trial judge to which the defendant assented." *Id.,* 544 U.S. at 16, 26-27. Here, the district court reviewed the transcript of the October 20, 1997 plea colloquy for the possession of narcotics conviction and found that the defendant had confirmed that the particular drug involved in the offense was cocaine.

In particular, during his factual basis, the state prosecutor had expressly stated five separate times that the defendant had possessed cocaine. A86-A87. Then, on two separate occasions, the state court had referred the defendant to the remarks made by the prosecutor and asked whether he agreed with the prosecutor's summary of the facts. A86-A87. The state court then found that the defendant's guilty plea was "knowingly and voluntarily made with the assistance of competent counsel" and that there was a factual basis for the plea. A87. It accepted the plea and ordered that a "finding of guilty may enter." A87.

The transcript clearly establishes that the defendant assented to the prosecutor's claims and confirmed that cocaine was the particular narcotic involved in the prior felony drug conviction. *See Savage*, 542 F.3d at 964. Thus, the district court properly found that the defendant's prior state court conviction for possession of narcotics under Conn. Gen. Stat. § 21a-279(a) satisfied the requirements of a "prior conviction for a felony drug

offense" under § 841(b)(1)(A), and properly concluded that he was subjected to the enhanced mandatory minimum sentence of 240 months' imprisonment.

Conclusion

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

Dated: October 25, 2011

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

ALINA P. REYNOLDS
ASSISTANT U.S. ATTORNEY

Robert M. Spector
Assistant United States Attorney (of counsel)

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 13,859 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

Alina Reynolds

ALINA P. REYNOLDS
ASSISTANT U.S. ATTORNEY

ADDENDUM

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.

21 U.S.C. § 841 (effective August 3, 2010)

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--
(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance

. . .

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
(1)(A) In the case of a violation of subsection (a) of this section involving--

. . .

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

. . .

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person

shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

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

. . .

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

. . .

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person

sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein

21 U.S.C. § 841 (2009)

a) Unlawful acts
Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--
(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;
. . .
(b) Penalties
Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
(1)(A) In the case of a violation of subsection (a) of this section involving--
. . .
(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;
. . .
such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person

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

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

. . .

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

. . .

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any

person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.