11-2282

To Be Argued By:
H. GORDON HALL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-2282

UNITED STATES OF AMERICA,
Appellee,

-vs-

ALEXIS DELOSSANTOS, aka John Doe, aka Lexi, aka Alexis,
Defendant-Appellant,

LEO BAEZ, HECTOR RAMIREZ,
Defendants.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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Statement of Jurisdiction

The district court (Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on May 26, 2011. Joint Appendix 13 ("JA__"), JA129. On June 2, 2011, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA13, JA132. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Statement of Issue Presented for Review

When applying a two-level Guideline enhancement for obstruction of justice, did the district court clearly err in finding that the defendant left the country to avoid sentencing when he fled to the Dominican Republic days before sentencing and remained there for nearly four years?

United States Court of Appeals

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
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-vs-

ALEXIS DELOSSANTOS, aka John Doe, aka Lexi, aka Alexis,
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LEO BAEZ, HECTOR RAMIREZ,
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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

On September 12, 2006, federal agents watched as Alexis Delossantos facilitated a three-kilogram cocaine transaction at a rest stop off Interstate 95 in Milford, Connecticut. Thereafter, Delossantos was indicted on cocaine conspiracy and possession charges, and released on

a bond over the government's objection. He pleaded guilty to the charges, and on the eve of sentencing, he fled to the Dominican Republic where he remained for nearly four years until he was located, extradited and returned to the United States to face sentencing.

Delossantos appeals to challenge the sentence imposed by the district court. Specifically, Delossantos contends that the district court erred in increasing his Guideline offense level by two levels for obstruction of justice based on his flight to avoid sentencing. The record fully supports this enhancement, however, and in any event, any error in assessment of the obstruction enhancement was harmless. The sentence and conviction should be affirmed.

Statement of the Case

On September 28, 2006, Alexis Delossantos was indicted with two other individuals on charges of conspiracy to possess with intent to distribute 500 grams or more of cocaine and possession with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 841 and 846. JA4. Over the government's objection, Delossantos was released on a bond with conditions. JA5.

On March 21, 2007, Delossantos pleaded guilty to both counts of the indictment. JA9. He was allowed to remain at liberty on conditions, including a condition that he not leave the State

of Connecticut except upon approval of the U.S. Attorney, and only under the supervision of federal agents and for the purpose of cooperating with them in investigative matters. JA9; Government Appendix 19-24 ("GA__"). The court set sentencing for June 14, 2007. JA9. On June 1, 2007, the district court continued sentencing, *sua sponte*, to July 10, 2007. JA9.

On July 2, 2007, defense counsel moved to continue the sentencing, JA8-9, and the court granted the motion the next day, setting sentencing for September 18, 2007. JA10. On July 19, 2007, the Office of Probation filed a violation report alleging that Delossantos had absconded and requesting a warrant for his arrest. JA10; GA53-54. An arrest warrant for Delossantos issued. JA10.

Delossantos was subsequently located in the Dominican Republic, and an extradition warrant was sought and obtained. GA57. He was arrested in the Dominican Republic and returned to the United States in custody. GA57. On March 15, 2011, shortly after his arrival in the United States, he was arrested on his outstanding warrant. JA11.

On May 23, 2011, the district court (Janet C. Hall, J.) sentenced the defendant to 60 months' imprisonment on each count of conviction, to be served concurrently, to be followed by 4 years' concurrent terms of supervised release on each count. JA12-13, JA129.

On June 2, 2011, the defendant filed a timely notice of appeal. JA13. JA132.

Delossantos is currently serving the sentence imposed by the district court.

Statement of Facts and Proceedings Relevant to this Appeal

A. The offense conduct and plea

On September 12, 2006, a cooperating witness working with federal agents arranged to meet Delossantos so Delossantos could provide the witness with one or more kilograms of cocaine at a price of $23,000 per kilogram. Pre-Sentence Report ("PSR") ¶¶ 9-10; JA47. Later that day, agents watched as Delossantos met with the witness at a rest stop off Interstate 95 in Milford, Connecticut. PSR ¶¶ 11-15; JA47. At that time, Delossantos met with several other individuals and transferred three kilograms of cocaine into the vehicle operated by the witness. PSR ¶15-17; JA47-48. When the cooperating witness met with Delossantos a week later to complete payment for the cocaine, Delossantos was arrested on a criminal complaint charging him with a cocaine distribution conspiracy. JA4, JA48; PSR ¶ 19.

On September 28, 2006, Delossantos and two other individuals were indicted on the cocaine conspiracy and possession charges in the indictment in this case. JA4.

Following his arrest, Delossantos was released on conditions over the objection of the government. JA5 (order setting conditions of release); GA19. In particular, Delossantos was ordered not to travel outside Connecticut and his wife was appointed third-party custodian. JA5; GA53.

On March 21, 2007, Delossantos appeared before the district court and pleaded guilty to counts one and two of the indictment, charging him with conspiracy to possess with intent to distribute 500 grams or more of cocaine and the possession with intent to distribute 500 grams or more of cocaine. JA9. At the time of his plea, Delossantos entered into a written plea agreement which was supplemented by a cooperation agreement. GA3-16, GA45-46.[1] During the proceedings, the court continued Delossantos on release under the existing conditions to facilitate his cooperation. GA19-24. With the concurrence of defense and government counsel, the court added the condition that Delossantos could travel outside Connecticut for the purpose of cooperating with federal agents, but only under their supervision and with the prior approval of the U.S. Attorney's Office. GA19-24.

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[1] The government has included in its Appendix the full transcript of the plea hearing, as several pages of that transcript are missing from the Joint Appendix.

B. Delossantos's flight to the Dominican Republic

At the conclusion of the plea hearing, the court set sentencing for June 14, 2007. JA9, JA57. The judge advised Delossantos as follows:

> You are ordered to appear in this courtroom on that date . . . . If you fail to appear, the court would consider you are a fugitive and a warrant would issue for your arrest. When the marshals found you, which I'm certain they would, you would face further penalties for having violated my order.

JA57. Delossantos stated that he understood this instruction. JA57.

On June 1, 2007, the court, *sua sponte*, rescheduled sentencing for July 10, 2007. JA9. One month later, on July 2, 2007, defense counsel moved the court to continue the sentencing to a date after September 15, 2007, JA9-10, JA63, and the court granted the motion the next day, setting sentencing for September 18, 2007, JA10.

On July 19, 2007, the United States Probation Office filed a violation report for Delossantos, requesting a warrant for his arrest. JA10; GA53-54. The report stated that Delossantos had last reported to Probation in person on April 12, 2007, that he had reported by telephone on April 26, 2007, and that the last time Probation heard from him was in a telephone report on

June 26, 2007. GA53. On July 5, when the Probation Officer had not heard from Delossantos, he contacted the DEA case agent. After investigation, the case agent told the Probation Officer that Delossantos's wife, the third-party custodian, did not know where Delossantos was and in fact, had reported him missing on July 3, 2007. GA53. Follow-up with government counsel and defense counsel led the Probation Officer to conclude that, although Delossantos had called his attorney, he had provided no information as to his then-current location or residence, his whereabouts were unknown, and he had absconded. GA53. (Indeed, defense counsel subsequently confirmed that Delossantos fled the jurisdiction at the beginning of July 2007. JA76.) On the basis of this report, the district court issued a warrant for Delossantos's arrest. JA10.

Years later, Delossantos was located in the Dominican Republic, and a formal extradition request was presented to that country in March 2010. GA57. On February 13, 2011, Delossantos was arrested in the Dominican Republic and subsequently extradited to the United States. GA57. On March 15, 2011, following his arrival in the United States, he was arrested on the warrant issued by the district court and was detained pending sentencing. JA11.

C. The sentencing proceedings

In preparation for sentencing, the Probation Office prepared a supplement to the PSR. The PSR, as amended, recommended a base offense level of 28 and a two-level "safety valve" reduction under 18 U.S.C. § 3553(f) and U.S.S.G. § 5C1.2. In addition, in light of the defendant's flight to avoid sentencing in 2007, the PSR recommended a two-level enhancement for obstruction of justice under U.S.S.G. § 3C1.1, and no reduction for acceptance of responsibility, resulting in a total offense level of 28. Second Addendum to the PSR. With a criminal history category I, the PSR recommended a sentencing range of 78 to 97 months. PSR ¶¶ 33-34, Second Addendum to the PSR; JA118.

On May 23, 2011, Delossantos appeared for sentencing before the district court, Hon. Janet C. Hall, U.S.D.J. JA12. The defense objected to the obstruction enhancement and the absence of a reduction for acceptance of responsibility. JA69-70. The court heard argument on both points.

Defense counsel urged the court not to impose an obstruction enhancement because Delossantos fled Connecticut and the United States, not to avoid sentencing, which he said Delossantos knew was scheduled for July 10, JA79, but because he feared for his safety due to his efforts to cooperate with law enforcement. JA70-71. He asserted that Delossantos had raised his fears

with federal agents before he fled, and again after he arrived in the Dominican Republic. JA75-76. Counsel further stated that after Delossantos's arrival in the Dominican Republic, he "just got comfortable," "thought everybody forgot about him," and decided that he "didn't want to come back." JA76.

Government counsel countered that, while Delossantos had contacted federal agents about security concerns before he fled, he had assured the agents that his fears were not a serious problem for him. JA87.

When the defendant spoke, he explained that he did not leave the jurisdiction to avoid sentencing. Indeed, he claimed—as he had also claimed in a letter he wrote to the court—that he did not even know about his June 14 sentencing date, much less the rescheduled July 10 date. JA106; GA55-56. The court reminded Delossantos that he had been advised of the June 14 date by the court at the time he entered his guilty plea. JA108. Then, in open court, Delossantos told the court that he knew of the June 14 date, but not the date to which the sentencing was thereafter continued, July 10. JA112. The court reminded him that if he had been told not to come to court on June 14, he would also have been told that the new date was July 10. JA112-13.

The court considered and discussed on the record the representations and arguments of counsel and a number of the authorities cited in

the papers and at argument. JA97-99. After this consideration, the court made the following factual findings: that Delossantos fled before the sentencing; that he neither returned voluntarily to the District of Connecticut nor effectively contacted law enforcement in Connecticut after he fled; and that he became comfortable in the Dominican Republic and stayed there. JA99.

The court concluded that it did not need to resolve whether Delossantos was in fact afraid for his safety when he fled, but deemed his assertions that he attempted to contact U.S. Government representatives shortly after arriving in the Dominican Republic "incredible." JA100. The court found that, whether or not he feared for his safety, he left the United States to avoid being sentenced; that he fled to the Dominican Republic and remained there comfortably for over four years; and that this conduct constituted obstruction of justice for the purpose of the Guideline enhancement. JA100-101. The court also explained that it found nothing extraordinary in the record to support a reduction for acceptance of responsibility in the face of the obstruction finding. JA102.

With these findings, the court calculated the guidelines as recommended in the PSR, resulting in a range of 78 to 97 months' imprisonment. JA96, JA102. The court reviewed and considered the factors set forth in 18 U.S.C. § 3553(a). JA118-22. The court cited its guideline calcula-

tion, JA118, the seriousness of the offense committed by Delossantos, the need to deter him from committing offenses in the future, the need to protect society from him for a period, JA119, the need of Delossantos for educational and vocational opportunities, and the need to avoid sentencing disparities, JA120.

In particular, the court considered the need to instill in Delossantos respect for the law, in light of his flight to avoid sentencing, JA120, and his personal history and characteristics, JA121. In this latter regard, the court noted that Delossantos had "very little criminal history," JA121, and that, as a "beloved family man," he had attained legal resident status in the United States. JA122.

Having considered these matters, the court decided to impose a non-guideline sentence. The court afforded Delossantos "some credit" for cooperation he had provided to the government prior to his flight. JA122. The court then factored in what it described as his obstructive conduct:

> If for some reason I'm mistaken in having found obstruction under the guideline definition, I want to state that among the history and characteristics of the defendant that I'm considering are the facts that facing sentencing for the first substantial sentence he would have ever served substantial meaning lengthy, he

chose to in effect say to this court I don't need to be sentenced. I'm going to go live my life somewhere else and just forget about me. We didn't forget about you, Mr. Delossantos, and today is the day that I get to sentence you. Whether or not what you did amounted to obstruction in a guideline sentence, I want it to be clear on the record that this sentence I'm about to impose clearly reflects in my mind, the conduct which involved facing a substantial imprisonment sentence, whether fearful or not, choosing to absent yourself not from the jurisdiction but also this country, then remaining outside the reach of this county in your homeland for four to five years and failing to ever contact except as you claim in the short period after you first [f]led, make any effort to reach out to the government, to the lawyer, to the agents, to the prosecutor, over four plus period of time and the fact that you are here today only through the efforts of the government, in particular the U.S. Marshal service in locating you and the government preparing the proper paperwork to get the Dominican Republic to return you to Connecticut for the crime that you committed in the state in the district. I say whether or not that constitutes obstruction or not, the court believes it is part of your

> history and characteristics that I must consider and I am considering . . . .

JA123-24.

On this record, the court then imposed a non-guideline sentence of 60 months of imprisonment, followed by four years of supervised release and a $100 special assessment, on each of the two counts of conviction, to be served concurrently. JA124-26.

This appeal followed.

Summary of Argument

The district court correctly applied the guideline enhancement for obstruction of justice under U.S.S.G. § 3C1.1 based on its finding that Delossantos intentionally fled the District of Connecticut and the United States in order to avoid being sentenced.

The record demonstrates that the district court's factual findings supporting the obstruction enhancement were not clearly erroneous. At sentencing, Delossantos tried to argue that he did not know about his various sentencing dates, but his own words and actions demonstrated otherwise. Accordingly, the district court properly found that Delossantos knew that his sentencing was originally scheduled for June 14, and that he also knew that that date was continued to July 10.

Delossantos now argues that even if he knew about the July 10 date, he did not leave to avoid sentencing because he believed that date was going to be continued to a date in September. But even if this were true, Delossantos did not appear for sentencing in September and, in fact, made no contact with anyone—his lawyer, law enforcement, the Probation Office, or the prosecutor—to discuss his September sentencing. Instead, he remained in the Dominican Republic for nearly four years thereby avoiding being sentenced to a substantial prison term for the first time in his life.

Moreover, the court's finding that Delossantos fled to avoid sentencing was not clearly erroneous. Facing a substantial prison term, Delossantos left the jurisdiction without notifying anyone and made no attempt to contact anyone (much less inquire about his sentencing) after he left. He remained in the Dominican Republic living a comfortable life for nearly four years and only returned when he was found and extradited. Even if, as Delossantos claims, he left in part because he was in fear for his life—a claim about which the district court expressed great skepticism—this does not undermine the court's conclusion. As this Court has repeatedly held, a defendant's intentional failure to appear for a judicial proceeding constitutes obstruction, regardless of any additional purpose behind the defendant's conduct.

Finally, even if the district court erred in assessing the obstruction enhancement, any such error was harmless. The district court expressly stated that it would have imposed the same sentence even if the obstruction enhancement was improper under the Guidelines. In other words, the defendant's conduct in absconding, and not the obstruction enhancement under the guidelines, played the decisive role in the court's determination of his sentence.

Argument

I. When imposing a Guideline enhancement for obstruction of justice, the district court did not clearly err in finding that the defendant intentionally fled Connecticut to avoid sentencing.

A. Governing law and standard of review

1. 18 U.S.C. § 3553(a)

After the Supreme Court's holding in *United States v. Booker*, 543 U.S. 220 (2005) 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 calculated Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence."

See United States v. Fernandez, 443 F.3d 19, 26 (2d Cir. 2006).

This Court reviews a sentence for reasonableness. *See Rita v. United States*, 551 U.S. 338, 341 (2007); *Booker*, 543 U.S. at 260-62. In this context, reasonableness has both procedural and substantive dimensions, although the defendant here does not challenge the substantive reasonableness of his sentence. *See United States v. Watkins*, 667 F.3d 254, 260 (2d Cir. 2012).

A district court commits procedural error when it "'(1) fails to calculate the Guidelines range; (2) is mistaken in the Guidelines calculation; (3) treats the Guidelines as mandatory; (4) does not give proper consideration to the § 3553(a) factors; (5) makes clearly erroneous factual findings; (6) does not adequately explain the sentence imposed; or (7) deviates from the Guidelines range without explanation.'" *Id.* (quoting *United States v. Conca*, 635 F.3d 55, 62 (2d Cir. 2011)).

Consideration of the guidelines range requires a sentencing court to calculate the range and put the calculation on the record. *See Fernandez*, 443 F.3d at 29. This Court "review[s] the sentencing court's interpretation of the Sentencing Guidelines *de novo*, but review[s] its related findings of fact only for clear error." *United States v. Potes-Castillo*, 638 F.3d 106, 108 (2d Cir. 2011); *see also Watkins*, 667 F.3d at 261.

2. U.S.S.G. § 3C1.1

U.S.S.G. § 3C1.1[2] provides as follows:

> If (1) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction, and (2) the obstructive conduct related to (A) the defendant's offense of conviction and any relevant conduct; or (B) a closely related offense, increase the offense level by **2** levels.

This enhancement "is to be imposed only if the obstruction, or attempted obstruction, was 'willful[].'" *United States v. Khedr*, 343 F.3d 96, 102 (2d Cir. 2003) (quoting § 3C1.1). Accordingly, "the district court must make a finding that the defendant had a 'specific intent to obstruct justice.'" *United States v. Carty*, 264 F.3d 191, 194 (2d Cir. 2001) (per curiam); *United States v. Hernandez,* 83 F.3d 582, 585 (2d Cir. 1996). In determining whether this intent exists, the court may "rely on circumstantial evidence and on all reasonable inferences" which flow from it. *See United States v. Cassiliano*, 137 F.3d 742, 747

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[2] In 2011, the Sentencing Commission made stylistic changes to U.S.S.G. § 3C1.1. *See* United States Sentencing Commission, Appendix C, Amendment 758. Because the changes were non-substantive, the most recent version is included here.

(2d Cir. 1998). "The facts necessary to support an obstruction of justice enhancement need to be proven only by a preponderance of the evidence." *Carty*, 264 F.3d at 194 (citing *Cassiliano*, 137 F.3d at 747).

Applying these principles, this Court has held that the § 3C1.1 enhancement for obstruction "applies where a defendant willfully fails to appear for a judicial proceeding." *See United States v. Feldman*, 647 F.3d 450, 464 (2d Cir. 2011); *see also Carty*, 264 F.3d at 194-96; U.S.S.G. § 3C1.1, Application Note 4(E). In particular, this Court has upheld application of the enhancement where the defendant fled to and remained in a foreign country to avoid a judicial proceeding. *See Feldman*, 647 F.3d at 464-65 (enhancement applied where defendant fled to and remained in the Philippines for 27 months, impeding investigation and prosecution). Indeed, this Court has repeatedly described a defendant's "willful avoidance of a required judicial proceeding such as sentencing" as "inherently obstructive of justice." *Carty*, 264 F.3d at 195 (citing cases).

"[This Court] appl[ies] a mixed standard of review to obstruction-of-justice enhancements in sentencing." *United States v. Bliss*, 430 F.3d 640, 646 (2d Cir. 2005) (citing *United States v. Ayers*, 416 F.3d 131, 133 (2d Cir. 2005) (per curiam)). The Court "reviews for clear error 'the sentencing court's findings as to what acts were performed, what was said, what the speaker meant

by [his] words, and how a listener would reasonably interpret those words.'" *Id.* (quoting *Cassiliano*, 137 F.3d at 745). "'[A] ruling that the established facts constitute obstruction or attempted obstruction under the Guidelines . . . is a matter of legal interpretation and is to be reviewed *de novo*, giving 'due deference to the district court's application of the guidelines to the facts.'" *Id.* (quoting *Cassiliano*, 137 F.3d at 745).

The "clearly erroneous" standard of review is a deferential standard of review. "[W]hen a trial judge's finding is based on his decision to credit the testimony of one of two witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson v. Bessemer City,* 470 U.S. 564, 575 (1985). "Where there are two permissible views of the evidence, the [court]'s choice between them cannot be clearly erroneous." *Id.* at 574.

B. Discussion

There is no dispute between the parties as to the applicable legal standard in this case. Both sides agree that a Guideline enhancement for obstruction of justice may apply where it is established that the defendant willfully failed to appear for sentencing, *see* Defendant's Brief at 21, and this is the law. *See Feldman*, 647 F.3d at 464. Indeed, this Court has repeatedly held that

fleeing from and remaining without the jurisdiction to avoid a judicial proceeding may be the basis for an obstruction enhancement, without more. *See, e.g., Feldman*, 647 F.3d at 464-65 (flight to and remaining in Philippines during investigation sufficient to support obstruction enhancement); *Carty*, 264 F.3d at 194-96 (fleeing to and remaining in the Dominican Republic to avoid sentencing sufficient to support obstruction enhancement); *United States v. Reed*, 88 F.3d 174, 179-81 (2d Cir. 1996); *United States v. Aponte*, 31 F.3d 86 (2d Cir. 1994) (holding that enhancement applies if defendant "intended to fail to appear at a judicial proceeding, regardless of his reason for desiring to flee"); *United States v. Keats*, 937 F.2d 58, 67-68 (2d Cir. 1991).

The issue before this Court, rather, is whether the district court clearly erred in finding that Delossantos fled to the Dominican Republic and remained there in order to avoid sentencing. As demonstrated below, the record fully supports the court's conclusions: Delossantos knew of his scheduled sentencing, and he left the country to avoid sentencing and incarceration.

1. Delossantos knew that he was scheduled to be sentenced.

The record reflects that Delossantos knew he was scheduled to be sentenced on July 10, 2007. At the time of Delossantos's plea, the court set sentencing for June 14, 2007. JA57. On June 1,

2007, however, the court continued the sentencing to July 10 *sua sponte*. JA9. According to defense counsel, Delossantos disappeared on the weekend of June 30, JA76, and on July 2, Delossantos left the United States. JA113. *See also* GA53 (reporting that Delossantos's wife reported him missing on July 3). On that same day, defense counsel moved the court to continue the sentencing date until September, which the court did, setting sentencing for September 18, 2007.[3] JA9-10.

Defense counsel did not argue that his client was unaware of the original sentencing date. He also virtually conceded that Delossantos was aware of the July 10 date. While he had no specific recollection of telling Delossantos about the new date, he indicated, "I'm sure he knew about July 10." JA79. Later in the hearing, he added, "Again, can I say that I recall, I don't. If I got a notice from the court, that sentencing date was moved, he would certainly have known about that." JA116.

Moreover, as found by the district court, Delossantos's own words and actions confirmed

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[3] While the record is not clear on this point, it does not appear that defense counsel knew of Delossantos's whereabouts when the motion was filed. *See* JA90, GA53. Accordingly, an inference is available that this was among the reasons the motion for continuance was filed, notwithstanding the verbiage in the motion.

that he was aware of both the original sentencing date and the July 10 date, despite his efforts to claim that he was not aware of either date.

With respect to the June 14 date, on March 21, 2007 after accepting Delossantos's guilty pleas, the court addressed Delossantos directly and told him that sentencing was set for June 14 and that he would be considered a fugitive—and suffer further penalties—if he did not appear on that date. GA51. Delossantos replied that he understood. GA51. Nonetheless, prior to his ultimate sentencing, in 2011, Delossantos sent a letter to the court in which he denied that he ever knew about the June 14 date. GA55.

At sentencing, Delossantos was initially noncommittal about whether he knew about the June 14 date: "And then I see also that I was supposed to be sentenced on June 14. I don't know why I wasn't brought before your Honor." JA106. In response, the court observed that, having told Delossantos directly that he was due in court on June 14, and Delossantos having then failed to appear at the courthouse on June 14, someone must have told him that the June 14 sentencing had been continued. JA108. When the court then read to him from the plea transcript the portion of the colloquy in which she directed him to appear on June 14, Delossantos responded by contradicting his earlier letter to the court: "Yes. I didn't say I didn't know the date." JA111-12. When the court then inquired

why he did not appear on June 14, he said, "I don't know. I wasn't brought," JA112, despite the fact that he was not in custody at the time. In short, by the end of the hearing, Delossantos was no longer claiming that he did not know about the June 14 sentencing date.

With respect to the July 10 sentencing date, the record—including Delossantos's words and actions—demonstrated that he knew of that date. Delossantos claimed that his attorney did not advise him of the July 10 date. JA106, JA112. Once again, however, the court confronted Delossantos with the fact that he did not appear on June 14, and noted,

> The only explanation can be, Mr. Delossantos, is you were told by Attorney Mastronardi the sentencing was continued and the sentencings are never continued except to another date and time. And your obligation to appear continued.
>
> * * *
>
> Your attorney has represented that if he receives a notice of a continued sentencing, he advises his client because otherwise you would have shown up on June 14. I can't draw any other inference than that, Mr. Delossantos.

JA112-14. Delossantos then responded that he was aware of the June 14 date, but "I wasn't told anything else, no." JA114.

At that point, the court concluded that Delossantos was aware of the new date of July 10:

> Then I don't understand why he didn't come on June 14. . . . Now it is conceivable that a lawyer would tell his client don't come on the day the judge ordered you to come and not say another word. Not give you a new date. I can't say that would never happen but I have to say that I'm dealing with Attorney Mastronardi. He's an experienced lawyer. He knows how things work in federal court. I just can't make the conclusion that you did not know your continued sentencing date based solely upon your assertion that you knew you had to be here on the 14th of June. You didn't come on the 14th of June.

JA114-15.

In sum, the record before the court established that Delossantos knew that he was scheduled for sentencing on June 14 and that that date was continued to July 10. His claim that he did not know about the original June 14 date was incredible and thus abandoned as soon as he realized the court did not believe him. Similarly, Delossantos's claim that was not told of the rescheduled July 10 date was belied by common sense, by his attorney's explanation of his standard practice with respect to rescheduled sentencing dates, and by his own failure to appear for the June 14 date. As the court reasonably

pointed out several times, if Delossantos knew of the June 14 date and did not appear on that date, he must have been advised that the sentencing had been continued; and if he was advised of the continuance, he must have known of the new July 10 date. *See, e.g.,* JA112. Accordingly, the suggestion of Delossantos on appeal that he may not have had knowledge that he had been ordered to appear on July 10, *see* Defendant's Brief at 17, is contravened by the record and by common sense.

Delossantos claims also that, at the time he left, even if he knew that there was a date set in July, he believed that his sentencing was being continued from that date to sometime in September. *See, e.g.*, Defendant's Brief at 25. In other words, according to Delossantos, when he left the jurisdiction, he knew that his attorney was seeking a continuance and thus there was no firm sentencing date. Therefore, according to Delossantos, any suggestion that he fled to avoid sentencing is erroneous.

As a preliminary matter, this argument rests on a speculative and implausible reading of the record. A more logical construction of events is that his attorney asked for the sentencing to be continued from July 10 because, as of the last weekend in June, he did not know where his client was. *See* JA76, JA90. Moreover, this argument undermines Delossantos's repeated

claim at sentencing that he did not know about the July 10 sentencing date.

Finally, even if Delossantos's current argument is correct (*i.e.*, that he knew about the July 10 date but also knew this date was likely to be continued again until some time in September), it does not help Delossantos. He knew he was going to have to appear for sentencing in September, and yet he fled the jurisdiction. And despite his claimed belief that he was to be sentenced in September, he made no effort to appear for that sentencing. Rather, he remained at an unknown location in the Dominican Republic, beyond contact with his attorney and beyond the reach of the court, for years.

In sum, the record reflects that Delossantos knew he had an obligation to appear for sentencing—whether in June, July or September. Thus, the court's finding that he left Connecticut and then the United States at a time when he was aware of his rapidly approaching sentencing date was not clearly erroneous, but rather was fully supported by the record.

In response, Delossantos points to cases for the proposition that an obstruction enhancement is improper when a defendant is unaware of a court date. Delossantos Br. at 23-24. The cases do not bear the weight Delossantos puts on them. In *United States v. Peters*, for example, the Eighth Circuit held that an obstruction enhancement was improper based on a defendant's

failure to appear for a revocation hearing. 394 F.3d 1103, 1104-1106 (8th Cir. 2005). There, the defendant received very little notice of the hearing, and immediately upon learning of the hearing, contacted her attorney who assured her that he would seek a continuance. *Id.* at 1104. After receiving this assurance, the defendant returned to her home and voluntarily appeared at the rescheduled hearing two days later. *Id.* at 1104-1105. Here, by contrast, the defendant had full and timely notice of his scheduled sentencing date, and although he *might* have thought that his sentencing was going to be rescheduled to a later date, he made no effort to appear for sentencing at that time. The Ninth Circuit's decision in *United States v. Stites*, 56 F.3d 1020 (9th Cir. 1995) is similarly unhelpful because in that case the defendant fled the jurisdiction before he was indicted; unlike this case, he was under no court order to appear anywhere. *Id.* at 1022, 1026. Finally, in *United States v. Sykes*, 144 F.3d 564 (8th Cir. 1998), the Eighth Circuit held that a district court properly declined to impose an obstruction enhancement on a defendant who fled to Saudi Arabia and lived for five years after he had begun cooperating with the government. *Id.* at 565. Although the Court did not fully explain the basis for its decision, the facts as reported are distinguishable. There, unlike here, there was no court-ordered obligation that the defendant absconded from.

In conclusion, the district court properly found that Delossantos left Connecticut and the United States knowing that he faced sentencing in the near future.

2. Delossantos fled to avoid being sentenced.

The court found not only that Delossantos was aware that he had an obligation to appear for sentencing on July 10, 2007, *see* JA79, but also that Delossantos fled Connecticut and the United States for the purpose of avoiding being sentenced. JA100-101.

This finding, too, was fully supported by the record. As a result of his plea, Delossantos—who had served almost no time in prison in the past, JA88—faced a substantial prison term, even assuming he got a break for cooperating with the authorities, JA72-73. With prison in his future, Delossantos left Connecticut, and then the United States, on the eve of sentencing without notifying his wife, who was his third-party custodian, the Office of Probation, the U.S. Attorney's Office, GA53, or his attorney, JA90. Delossantos's failure to notify his attorney, or anyone else, before he left Connecticut, and his post-flight failure to remain in contact with his attorney, or anyone else, strongly support the court's conclusion that Delossantos left with the intent to avoid sentencing, and thereby to obstruct justice. JA100. *See Reed*, 88 F.3d at 180 (upholding

obstruction enhancement in part because the defendant left his known address, failed to notify anyone of his new address, and failed to inquire about a new sentencing date). Moreover, after fleeing to the Dominican Republic, Delossantos "remained there comfortably" for a period of years. JA101; *see Carty*, 264 F.3d at 195 (upholding obstruction enhancement for a defendant who "fled to and remained in the Dominican Republic in order to avoid sentencing"). Finally, of course, Delossantos did not return to the United States to be sentenced until he was arrested on an extradition warrant in the Dominican Republic and brought before the district court.

Delossantos claims that he fled the jurisdiction not because he wanted to avoid sentencing, but rather because he feared for his life as a result of some cooperation he had provided to the government while his case was pending. *See* Defendant's Brief at 18. Even if true, this claim is insufficient to defeat the obstruction finding in light of Delossantos's demonstrated underlying purpose of avoiding sentencing. *See Reed*, 88 F.3d at 178 ("[C]ertain conduct, such as intentionally failing to appear as required at judicial proceedings, is so inherently obstructive of the administration of justice that it is sufficient that the defendant willfully engaged in the underlying conduct, regardless of any additional purpose.").

In any event, Delossantos's claim that he absconded solely out of fear is belied by the record. While the record shows that he contacted his attorney before he left to express concerns for his safety, JA112, he was thereafter contacted by federal agents on the subject, and left them with the impression that he was comfortable with the situation as it stood, rejecting any actions on their part. JA87. Moreover, the court rejected as "incredible" Delossantos's claim that immediately after he arrived in the Dominican Republic he tried to contact federal agents to address his safety concerns. JA100.

Ultimately, although the court expressed skepticism that Delossantos fled out of fear, the court concluded that that, even if did fear for his safety, his overarching motivation was to avoid sentencing. JA100. As support for this conclusion, the court noted that if his only motivation was fear, he would have contacted someone—his attorney, the U.S. Attorney's Office, or law enforcement, for example—instead of leaving the country. JA101. The fact that he left the country and remained in the Dominican Republic with his alternate family for years until he was apprehended and forcibly returned to the United States further supported this finding. JA101.

In sum, the district court's finding that Delosantos fled Connecticut to avoid sentencing was not clearly erroneous. Accordingly, the district court properly enhanced Delossantos's guideline

calculation by two levels for obstruction of justice.

3. Any error in the obstruction enhancement was harmless.

Even if the district court erred in applying the two-level obstruction enhancement under § 3C1.1, any such error was harmless, as demonstrated by the court's express statements at sentencing.

The district court spent the greater part of Delossantos's sentencing hearing considering the propriety of an obstruction enhancement in the guidelines calculation. JA65, *ff*. After concluding that the obstruction enhancement applied, the court explained that even if it were wrong about the guidelines issue, the same facts that it had considered for the guidelines enhancement would support the same sentence imposed as a non-guideline sentence:

> If for some reason I'm mistaken in having found obstruction under the guideline definition, I want to state that among the history and characteristics of the defendant that I'm considering are the facts that facing sentencing for the first substantial sentence he would have ever served substantial meaning lengthy, he chose to in effect say to this court I don't need to be sentenced. I'm going to live my life somewhere else and just forget about

> me. We didn't forget about you, Mr. Delossantos, and today is the day that I get to sentence you. Whether or not what you did amounted to obstruction in a guideline sentence, I want it to be clear on the record that this sentence I'm about to impose clearly reflects in my mind, the conduct which involved facing a substantial imprisonment sentence, whether fearful or not, choosing to absent yourself not from the jurisdiction but also this country, then remaining outside the reach of this county in your homeland for four to five years and failing to ever contact except as you claim in the short period after you first [f]led, make any effort to reach out to the government, to the lawyer, to the agents, to the prosecutor, over four-plus period of time and the fact that you are here today only through the efforts of the government, in particular the U.S. Marshal service in locating you and the government preparing the proper paperwork to get the Dominican Republic to return you to Connecticut for the crime that you committed in the state in the district. I say whether or not that constitutes obstruction or not, the court believes it is part of your history and characteristics that I must consider and I am considering . . . .

JA123-24.

Having considered the facts it found on the obstruction issue as part of the history and circumstances of Delossantos, the court correctly included these matters in its consideration of an appropriate sentence under all of the statutorily required circumstances. JA118-22. Based on all of those considerations, the court imposed a sentence of incarceration of 60 months. JA124. This was eighteen months below the bottom of the Guideline range as calculated with the obstruction enhancement, JA102, and three months below the range without the enhancement, *see* U.S.S.G. Sentencing Table.

Here, the district court's comments unambiguously demonstrate that even if the obstruction enhancement was imposed in error, any error was harmless because the sentence would have been the same. *See United States v. Jass*, 569 F.3d 47, 68 (2d Cir. 2009) (finding that a guidelines error was harmless because the district court stated unambiguously that it would have imposed the same sentence if the guidelines calculation did not include the disputed enhancement). Thus, although a district court may not immunize potential sentencing errors from review by mere rote "incantation" that the sentence would have been the same regardless of any errors, *see Feldman*, 647 F.3d at 460, where, as here, the district court identified a disputed enhancement and stated unambiguously that it would impose the same sentence regardless of

the resolution of that dispute, any error in the application of that enhancement was harmless. *See id.* at 459 ("[I]f a district court errors in calculating a defendant's Guidelines sentencing range, this Court cannot assume, without *unambiguous indication to the contrary*, that the sentence would be the same absent the error.").

Conclusion

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

Dated: April 20, 2012

Respectfully submitted,

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Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 7,248 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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