

11-3714

To Be Argued By:
DAVID X. SULLIVAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-3714

UNITED STATES OF AMERICA,
Appellee,

-vs-

JOSEPH CASSETTI, JAMES CANAVAN,
STERLING MAZZA, PHILIP NEGRON,
GARY EICHENSEHR,
Defendants,

CHEYNE MAZZA,
Defendant-Appellant.

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 (Vanessa L. Bryant, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on August 31, 2011. Government's Supplemental Appendix ("GSA__") 409. On September 8, 2011 the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) GSA410. This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a).

**Statement of Issues
Presented for Review**

- I. Whether the district court abused its discretion in denying the defendant a reduction for acceptance of responsibility when he continued to operate his marijuana conspiracy while in pre-trial detention, pleaded guilty on the morning of jury selection, and failed to completely and truthfully admit the conduct underlying the offense of conviction.

- II. When calculating the defendant's criminal history category, whether the district court properly assigned the defendant one criminal history point for a prior state court conviction when the state subsequently de-criminalized the conduct for which he had been convicted.

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The defendant pled guilty to one count of conspiracy to possess with the intent to distribute 1,000 or more marijuana plants, and requested an evidentiary hearing to contest various sentencing enhancements. In this appeal, the defendant claims that the district court erred by denying him a reduction for acceptance of re-

sponsibility and by assigning him one criminal history point for a prior state court conviction.

As set forth below, the defendant's claims lack merit. First, the district court properly declined to reduce the defendant's offense level for acceptance of responsibility because the defendant continued his criminal conduct during pre-trial detention, obstructed justice while incarcerated, and contested that he was a leader of the marijuana conspiracy, thereby failing to completely and truthfully admit the conduct underlying his offense of conviction. Second, the district court properly followed governing law when it assigned the defendant one criminal history point for his prior conviction. The district court's judgment should be affirmed.

Statement of the Case

On March 2, 2010, a federal grand jury returned an indictment against Cheyne Mazza and three others (Joseph Cassetti, James Canavan, and Sterling Mazza), charging them with one count of conspiracy to manufacture and possess with intent to distribute 1,000 or more marijuana plants, in violation of 21 U.S.C. §§ 841 and 846. GSA1, GSA401.

On June 1, 2010, the grand jury returned a superseding indictment that restated the conspiracy charge (count one) and added additional defendants (Philip Negron and Gary Eichensehr) and charges. GSA403. With respect to the de-

defendant-appellant, Cheyne Mazza, the new counts charged him with possession with the intent to distribute 1,000 or more marijuana plants, in violation of 21 U.S.C. § 841(b)(1)(A), possession with the intent to distribute a substance containing a detectable amount of marijuana, in violation of 21 U.S.C. § 841(b)(1)(D), conspiracy to structure financial transactions to evade federal reporting requirements, in violation of 31 U.S.C. § 5324, and structuring financial transactions to evade federal reporting requirements, in violation of 31 U.S.C. § 5324. GSA5-14.

On May 18, 2011, the day of jury selection, Cheyne Mazza pleaded guilty to count one of the superseding indictment. GSA407.

On August 29, 2011, the district court (Vanessa L. Bryant, J.) sentenced the defendant to a period of incarceration of 168 months, to be followed by 5 years of supervised release, a \$50,000 fine, and a \$100 special assessment. GSA409; Appendix (“A__”) 1-2.

Judgment entered August 31, 2011, GSA409, and the defendant filed a timely notice of appeal on September 8, 2011, GSA410.

The defendant is currently serving the sentence imposed by the district court.

**Statement of Facts and Proceedings
Relevant to this Appeal**

A. The offense conduct¹

1. The Massachusetts grow operation

On July 28, 2008, Massachusetts State Police responded to a fire emergency at a home in Sandisfield, Massachusetts. Pre-Sentence Report (“PSR”) ¶ 7. When first responders were eventually able to gain access to the home, they discovered an elaborate indoor marijuana grow operation consisting of approximately 286 marijuana plants, grow equipment, and a surveillance system. PSR ¶ 7. The subsequent criminal investigation implicated Cheyne Mazza as a participant in the marijuana grow operation at that house. PSR ¶ 7.

2. The Connecticut grow operations

Four months later, acting on an anonymous tip, Drug Enforcement Administration and local law enforcement agents executed state search and seizure warrants at three locations owned

¹ The facts are taken largely from the Pre-Sentence Report’s recitation of facts, which the district court adopted at sentencing. GSA342. Although the defendant objected to the facts in the Pre-Sentence Report that suggested he was a leader of the conspiracy, the district court overruled his objection. GSA342. The defendant does not pursue this issue on appeal.

by Joseph Cassetti and his family: 63 Root Avenue and 72 Root Avenue in Ansonia, Connecticut, and 21 Pawnee Road in Oxford, Connecticut. PSR ¶ 8. Law enforcement discovered sophisticated indoor marijuana grow operations at each of these locations and seized a total of 1,477 marijuana plants at various stages of growth. PSR ¶ 8. As set forth below, the evidence tied Cheyne Mazza to each of the three marijuana grow operations.

a. 72 Root Avenue

When the officers executed the search warrant at 72 Root Avenue, they found and seized 672 marijuana plants, grow lights and other tools for the grow operation. PSR ¶ 9. In addition, the officers found Joseph Cassetti, Cheyne Mazza and Paul Mazza (Cheyne’s cousin) leaving the indoor marijuana grow operation located in the attic of that house. PSR ¶ 9.

In a post-arrest statement, Joseph Cassetti implicated Cheyne Mazza as the person primarily responsible for the marijuana grow operation. PSR ¶ 10. Cassetti said that he met Mazza in August 2008 and that Mazza had explained that Cassetti could make money without risk by allowing Mazza to use his home for a marijuana grow operation. PSR ¶ 10. Mazza asked Cassetti to pay the electric bill for the house, but he provided everything else for the grow operation—lamps, electrical ballasts, foil wrap, fertilizer,

soil, and marijuana plants. PSR ¶ 10. Cassetti also identified James Canavan as Mazza's partner in the grow operation. PSR ¶ 10.

b. 63 Root Avenue

James Canavan lived with Sterling Mazza (Cheyne's sister) in the third-floor apartment at 63 Root Avenue, a building owned by Cassetti. PSR ¶ 11. The search of Canavan's apartment resulted in the seizure of 318 marijuana plants, twelve high-intensity 1000 watt grow lights, four twenty-pound carbon dioxide cylinders and other items associated with the growing and packaging of marijuana for sale and distribution. PSR ¶ 11.

The evidence tied Cheyne Mazza to the grow operation at 63 Root Avenue. First, the electric bill for Canavan's apartment was in Sterling Mazza's name, even though she had moved out of the apartment two months earlier. PSR ¶ 12. Records of electricity usage in that apartment reflected usage that far exceeded the usage from the other apartments in the building (2,286 kilowatt hours per month, as compared to 390 and 169 kilowatt hours for the other two apartments). PSR ¶ 12. A receipt for the payment of the electric bill for this apartment was found in Cheyne Mazza's car. PSR ¶ 12. In addition, cooperating witnesses confirmed that Sterling Mazza and James Canavan lived in the third-floor apartment while the indoor grow was in

operation, and maintained the grow at the direction of Cheyne Mazza. PSR ¶ 12.

c. 21 Pawnee Road

Cheyne Mazza rented a two-bedroom cottage at 21 Pawnee Road in Oxford from Lillian Cassetti, Joseph's mother. PSR ¶ 13. Mazza used the property to establish an indoor marijuana grow operation. PSR ¶ 13. A search of the cottage revealed an indoor marijuana grow operation—with 487 marijuana plants—similar to those located at 63 and 72 Root Avenue, consisting of the same type of equipment necessary to grow the marijuana plants that completely occupied the premises. PSR ¶ 13.

3. Mazza's indictment and continued criminal conduct

Mazza was arrested and detained on state drug charges in December, 2009. PSR ¶¶ 5, 16. On March 2, 2010, a federal grand jury indicted him on one count of conspiracy to possess with the intent to distribute 1,000 or more marijuana plants, GSA401, and on June 1, 2010, the grand jury returned a superseding indictment adding additional drug and structuring charges, GSA403. On June 9, 2010, Mazza was transferred to the federal Donald W. Wyatt Detention Facility in Rhode Island. PSR ¶ 5.

While detained in both state and federal facilities, Mazza continued to engage in criminal ac-

tivity. For example, he contacted various co-conspirators (by mail or phone), and in the course of these contacts, “repeatedly threatened witnesses and instructed individuals not to make statements, not to testify before the grand jury, and to lie.” GSA313. In addition, he contacted his sister (and co-defendant), Sterling Mazza, and instructed her in the continuation of his marijuana conspiracy while he was incarcerated. GSA313. At one point, he also told his sister to leave the jurisdiction to evade arrest. GSA313. Mazza’s communications with his sister led to the execution of a search warrant in January, 2010 at the defendant’s father’s home, during which law enforcement seized two pounds of marijuana, \$11,700 in cash, and drug paraphernalia. PSR ¶¶ 5, 18.

B. The guilty plea and *Fatico* hearing

On May 18, 2011, as jury selection was about to begin, the defendant pleaded guilty to count one of the superseding indictment charging him with conspiracy to manufacture and possess with the intent to distribute 1,000 or more marijuana plants in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(vii) and 846. GSA407. At the time of his plea, the defendant entered into a plea agreement. GSA15-24.

In the plea agreement, the parties included a partial guidelines stipulation. The government notified the defendant that it would not recom-

mend that he receive any offense level reductions for acceptance of responsibility because he had not promptly and affirmatively accepted responsibility for the offense. GSA17. Specifically, the government outlined its view that “the defendant ha[s] not terminated or withdrawn from criminal conduct or associations and has attempted to obstruct or impede the administration of justice . . . during his pretrial detention.” GSA17. The parties agreed that the base offense level for the defendant’s offense, calculated based on drug quantity, was 26, and that he fell within criminal history category II. GSA18. The parties disagreed, however, about the applicability of certain guidelines enhancements, including, as relevant here, an enhancement for the defendant’s role in the offense and for obstruction of justice. GSA18.

On July 25, 2011, the Probation Department filed the final PSR in preparation for sentencing. In the PSR, using the 2010 guidelines manual, the Probation Department found a base offense level of 26 under U.S.S.G. § 2D1.1(c)(7), and increased that by 2 levels for maintaining a premises for the purpose of manufacturing a controlled substance under § 2D1.1(b)(12), by 2 levels for being the leader of a conspiracy who engaged in witness tampering under § 2D1.1(b)(14)(D), by 4 levels for being the leader of a conspiracy that involved 5 or more participants under § 3B1.1, and by 2 levels for obstruc-

tion of justice under § 3C1.1. PSR ¶¶ 25-31. The Probation Department recommended against reducing the defendant's offense level for acceptance of responsibility, noting that "he did not willfully withdraw from criminal conduct, as he was caught on tape directing his sister to advise witnesses to remain silent." PSR ¶ 32. Finally, the Probation Department concluded that the defendant had two criminal history points, one each for two prior Connecticut convictions for possession of marijuana. PSR ¶¶ 34-37.

At the defendant's request, the district court held a *Fatico* hearing on July 28, 2011, to resolve the facts supporting the disputed guidelines issues. GSA408; see *United States v. Fatico*, 603 F.2d 1053, 1057 n.9 (2d Cir. 1979). At the *Fatico* hearing, the government offered the testimony of six witnesses, several letters that the defendant wrote during his pretrial detention and a number of his recorded prison telephone calls:

- Joseph Cassetti described how he was recruited by the defendant to use his residential properties to manufacture marijuana. GSA152-55. He further described how the defendant arranged for the installation of appropriate electrical service for the grow and provided all of the growing equipment. GSA155-57, GSA158-59. Cassetti further testified that Mazza instructed him on how to grow marijuana. GSA161-62.

- James Canavan testified that the defendant provided the marijuana plants and equipment that were used to start the marijuana grows located at 63 and 72 Root Avenue. GSA181-82, GSA186-87. According to Canavan, Mazza also provided the money for the electric bills at these grow locations, GSA184, and provided written instructions on the care of the plants, GSA187-88. He further testified that he had visited the defendant's marijuana grow located in Massachusetts several times. GSA190.
- Paul Mazza, the defendant's cousin, testified about the defendant's history as a drug dealer and his proprietary role in the marijuana grows located in Connecticut and Massachusetts. GSA36-37, GSA39-43.
- Amy Danaher, the defendant's girlfriend, testified that the marijuana located at the marijuana grows in Connecticut and Massachusetts belonged to the defendant. GSA75-76, GSA78, GSA80.
- Dulcidio Echevarria, the defendant's longtime friend, testified that the defendant paid him to wire the electricity at the marijuana grow locations in Connecticut and Massachusetts. GSA55, GSA57, GSA61-65.
- Sterling Mazza, the defendant's sister, testified about the defendant's interest in the various marijuana grows, and, by extension,

about his leadership role in the conspiracy. She testified, for example, that the defendant provided the marijuana plants for the 63 Root Avenue grow, and that he would decide when the plants needed to be trimmed. GSA95, GSA103. She also testified that the defendant rented the Pawnee Road grow location, and that the Massachusetts grow belonged to him. GSA108, GSA109. In addition, Sterling testified that Mazza sent her to California in October, 2009 with \$10,000 cash to purchase marijuana. GSA121. She also testified that during a one-month period, she deposited into local banks \$20,000-25,000 that the defendant had given her to purchase marijuana. GSA122.

Sterling also testified about the defendant's activities and communications during his pre-trial detention. For example, Sterling testified that after the defendant was arrested and incarcerated, he continued to instruct her as to how to operate his marijuana distribution operation. GSA113, GSA125-26. And in fact, a state search warrant based on intercepts of these instructions resulted in the discovery of approximately two pounds of marijuana and \$11,700 in cash from Sterling's home. GSA 124. Sterling testified that the marijuana and the money were the defendant's and that she was disposing of it as he

had directed through his prison communications. GSA124.

Further, Sterling admitted that on a phone call with her brother while he was incarcerated, he had instructed her to place a third-party call to Doris Grabowski, who had been subpoenaed to testify before the grand jury. GSA116-17. Sterling testified that the defendant told Grabowski, “[n]ot to say anything.” GSA116-17.

- The defendant’s letters, written while he was incarcerated, demonstrated his continued criminal activities. For example, in some letters, the defendant attempted to threaten or intimidate other people. GSA133-34, GSA136, GSA277-80. In other letters, the defendant attempted to continue his drug operation while incarcerated. GSA133-36, GSA278-80. In one instance, for example, the defendant instructed Sterling Mazza to buy twenty phones and distribute them. GSA138, GSA281. In another letter, the defendant told Sterling Mazza to “leave town” to avoid “trouble” and travel to California to “make clones” and sell them on the “bud trade.” GSA139, GSA282. Further, the defendant instructed Stephanie Grabowski “to lie,” if required to testify again. GSA140, GSA282.

After the government presented its evidence, the defendant testified at the hearing. GSA205.

On direct examination, the defendant denied providing marijuana plants that were used to start the marijuana grows. *See* GSA207 (“We started putting the seeds together and we started growing the pot and then we started moving the plants.”). He also denied providing the equipment used to start the marijuana grows. GSA208 (“We all purchased the equipment. Joe ordered stuff on line. I bought stuff from the store. Jimmy bought stuff from the store. We all took turns going and buying equipment.”). The defendant denied renting 21 Pawnee Road in Oxford from Lillian Cassetti. He claimed that Joseph Cassetti was using him as a “front man.” GSA214. When asked during direct examination if he was an “organizer or leader or a manager of these grows” the defendant denied it. GSA216 (“No, it’s not true. . . . It was all a partnership.”).

In response to the recorded prison three-way telephone conversations between the defendant, Sterling Mazza, and Doris Grabowski, the defendant denied trying to obstruct justice and influence the testimony of Doris Grabowski, who had been subpoenaed to testify before the grand jury: “I was just—I was upset because I didn’t know where Stephanie [Grabowski] was, I didn’t know if something happened to her. I think they got confused with the phone conversation.” GSA220.

In response to other recorded telephone calls and prison correspondence, the defendant denied

threatening potential witnesses: “I was just a little upset about what was going on and I was taking all the blame for that stuff.” GSA222.

Despite all of his denials, the defendant testified that he took responsibility for the marijuana grows. GSA223. The defendant further testified that his motivation for the *Fatico* hearing was to show that he was not the leader of the conspiracy. GSA223 (“I just wanted people to understand that I’m not the leader of this conspiracy. I was just the same as everybody else.”).

On August 1, 2011, the district court issued a ruling rejecting all of the defendant’s challenges to the disputed guidelines enhancements. GSA310-13. The court found first, by clear and convincing evidence, that “Cheyne Mazza was the leader of a marijuana cultivation and distribution conspiracy involving at least five individuals and operating three separate locations, qualifying him for a two level increase in his base offense level pursuant to U.S.S.G. § 2D1.1(b)(12), and a four level upward adjustment in his base offense level pursuant to U.S.S.G. § 3B1.1.” GSA311. The district court noted that he “orchestrated the activities” of more than five other people, “resulting in the construction and operation of marijuana cultivation and distribution operations at three premises.” GSA311. Specifically, he obtained three rental units to serve as grow locations, arranged for the installation of the required electrical ser-

vice to support the grows, provided the equipment, plants, and instructions for cultivating the plants, and had a “cadre of dealers to sell the marijuana” GSA311-12. In the course of this ruling, the court specifically rejected the defendant’s testimony that there was no leader of the conspiracy as “def[ying] logic” and being directly contrary to the evidence. GSA312.

The district court next found that the defendant had “engaged in witness intim[id]ation, tampering with or destroying evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense,” and thus, that he qualified for a two-level increase in his base offense level under U.S.S.G. § 2D1.1(b)(14)(D). GSA312. In support of this conclusion, the court pointed to the defendant’s phone and mail communications from prison, in which he “repeatedly threatened witnesses and instructed individuals not to make statements, not to testify before the grand jury, and to lie.” GSA312-13.

Finally, the district court concluded that the defendant’s conduct warranted a two-level increase for obstruction of justice under U.S.S.G. § 3C1.1. GSA313. The court based this enhancement on its finding that the defendant instructed his sister, “who assisted him in continuing his illegal activities while he was incarcerated and through whom he communicated intim-

idating statements to witnesses, to leave the jurisdiction to evade arrest.” GSA313.

C. The sentencing

On August 29, 2011, the district court sentenced the defendant. GSA409. The court began the proceeding by adopting the factual findings of the PSR, GSA342, and announcing that in response to the defendant’s objection, it would use the 2009 guidelines manual instead of the 2010 manual,² GSA341. After these preliminary points, the court heard from the government on an appropriate sentence. GSA343-58.

Next, defense counsel spoke on behalf of the defendant. Defense counsel re-stated the defendant’s objection to the four-point enhancement for role in the offense, GSA358-62, and argued that his offense level should not be enhanced for witness tampering because his efforts to influence witnesses were not successful, GSA362. In addition, he argued that the defendant should be given the two-level reduction for

² By using the 2009 manual, the court did not apply two enhancements recommended by the Probation Department that were introduced in the 2010 manual: the two-level increase for a leader who engaged in witness tampering, U.S.S.G. § 2D1.1(b)(14)(D), and the two-level increase for a defendant who maintained a premises for the purpose of manufacturing a controlled substance, U.S.S.G. § 2D1.1(b)(12).

acceptance of responsibility because his delayed guilty plea only arose due to a “good faith issue” about the number of marijuana plants at issue in the case. GSA362-64. Next, counsel argued that the court should depart horizontally from criminal history category II to I because at least one of the defendant’s prior convictions was for an offense that the State of Connecticut had subsequently decriminalized. GSA364-65. In the alternative, counsel asked for a downward departure in criminal history categories under *United States v. Mishoe*, 241 F.3d 214 (2d Cir. 2001), because the defendant had never served any time in jail for his previous convictions. GSA365. Finally, counsel discussed several factors about the defendant (including his age, his marijuana addiction, his impending prosecutions in New York and Massachusetts, and his young daughter) that warranted a sentence at the 10-year mandatory minimum term. GSA365-69.

After hearing from counsel, the court heard from the defendant, who apologized for his conduct, GSA369, GSA373, and from the defendant’s parents, GSA370-73. Finally, counsel for the government responded to the statements made on behalf of the defendant. GSA373-80.

On this record, the court began its sentencing comments by identifying the factors that it considered in sentencing. The court considered, for example, the seriousness of the offense conduct, the history and characteristics of the defendant,

and the need to impose a sentence that promotes respect for the law, provides punishment for the offense, and provides both general and specific deterrence. GSA381-85. On this last point, the court emphasized that given the defendant's conduct in obstructing justice while incarcerated, the need to specifically deter the defendant, and to protect the public from further crimes by the defendant, were significant factors in its sentencing decision. GSA385-86.

Next, the court concluded that the defendant had not accepted responsibility for his offense conduct. The court noted that the defendant did not plead guilty until the last minute, and did so just to avoid a longer sentence. GSA386-87. The court further noted that by pleading guilty so late, the government was required to prepare for trial, notwithstanding his plea. GSA387. In addition, the court noted the defendant had objected to the role enhancement at the *Fatico* hearing, when the evidence demonstrated that “[i]t was totally and completely frivolous . . . for [the defendant] to contest that he was the leader of this conspiracy, and the fact that he did so indicates that he failed to fully and completely disclose the facts and circumstances surrounding the commission of the offense of conviction” GSA387-88. Finally, the court observed that the defendant had failed to submit a timely and accurate financial statement to the Probation Department. GSA388-90.

The court's ruling to deny credit for acceptance of responsibility, when incorporated with its decision from the *Fatico* hearing, its decision to use the 2009 manual, and its conclusion that the defendant's criminal history was "not overstated," GSA381, resulted in a total recommended guidelines range of 135-168 months' imprisonment. See GSA392-93.

The court concluded by emphasizing additional factors that influenced its sentencing decision, including the defendant's uncharged conduct, the length of the conspiracy, the defendant's conduct in obstructing justice, and the fact that he was a leader of the marijuana conspiracy. GSA393-95. On this record, the court sentenced Mazza to 168 months' imprisonment (the top of the guidelines range), to be followed by 5 years of supervised release. GSA395. The court further ordered Mazza to pay a \$50,000 fine and a \$100 special assessment. GSA395.

Summary of Argument

I. The district court properly denied the defendant a two-level reduction for acceptance of responsibility. Although the defendant pleaded guilty before trial, his guilty plea did not come until the day of jury selection, and the district court properly questioned whether it was motivated by acceptance of responsibility or merely by a desire to reduce his sentencing exposure. Moreover, the defendant frivolously contested

facts relating to his offense of conviction at a *Fatico* hearing, thus demonstrating that he had not fully and truthfully admitted the conduct underlying his offense of conviction.

The defendant's counter-arguments lack merit. *First*, the district court properly considered the untimely nature of the defendant's plea as one factor in its decision to deny him credit for acceptance of responsibility. *Second*, the district court did not deny the defendant acceptance merely for requesting a *Fatico* hearing; rather, the court cited his conduct in the *Fatico* hearing in frivolously contesting facts relating to his role in the conspiracy as evidence that he had not truthfully admitted his role in the offense conduct. *Finally*, the defendant was not required to admit any facts beyond the conduct underlying his offense of conviction to qualify for acceptance of responsibility.

II. The district court properly assigned the defendant one criminal history point for his 2008 marijuana possession conviction. The fact that Connecticut subsequently de-criminalized the possession of small amounts of marijuana does not change this conclusion. Under federal law, the fact that the State now treats marijuana possession as a "violation" is irrelevant; the relevant point is that it still falls within the definition of a "prior sentence" under the guidelines. Moreover, even if the State's characterization of

the offense somehow controlled, the relevant characterization would be the one at the time of the defendant's conviction, not the new characterization after a subsequent change in the law.

Finally, the fact that the district court departed downward in a co-defendant's case does not establish that the court erred in denying Mazza's request for a downward departure. The court's refusal to depart downward is unreviewable on appeal. But even if this Court could consider such a challenge, it would be reviewed for plain error because the defendant never argued that he was entitled to a departure because his co-defendant received an analogous departure. And the defendant had made no attempt to show that the court's decision in this regard was plain error.

Argument

I. The district court did not abuse its discretion by declining to grant a two-level offense level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a).

A. Relevant facts

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

B. Governing law and standard of review

1. Sentencing law generally

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 244. As a remedy, the Court severed and excised the statutory provision making the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), thus declaring the Guidelines “effectively advisory.” *Booker*, 543 U.S. at 245.

After *Booker*, at sentencing, a district court must begin by calculating the applicable Guidelines range. See *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc). “The Guidelines provide the ‘starting point and the initial benchmark’ for sentencing, and district courts must ‘remain cognizant of them throughout the sentencing process.’” *Id.* (internal citations omitted) (quoting *Gall v. United States*, 552 U.S. 38, 49, 50 & n.6 (2007)). Consideration of the guideline range requires a sentencing court to calculate the range and put the calcula-

tion on the record. *See United States v. Fernandez*, 443 F.3d 19, 29 (2d Cir. 2006).

After giving both parties an opportunity to be heard, the district court should then consider all of the factors under 18 U.S.C. § 3553(a). 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 Rita v. United States*, 551 U.S. 338, 356-59 (2007) (affirming sentence despite district judge’s brief statement of reasons in refusing downward departure that the guideline range was “not inappropriate”). There is no “rigorous requirement of specific articulation by the sentencing judge.” *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005). 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. *Id.*; *see also United States v. Goffi*, 446 F.3d 319, 321 (2d Cir. 2006).

This Court “presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the [§ 3553(a)] factors.” *Fernandez*, 443 F.3d at 30. “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 misper-

ception 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). Furthermore, a judge need not address every “specific argument bearing on the implementation of those factors” in order to execute the required consideration. *See Fernandez*, 443 F.3d at 29.

On appeal, a district court’s sentencing decision is reviewed for reasonableness. *See Booker*, 543 U.S. at 260-62. Although reasonableness has both procedural and substantive dimensions, *see Cavera*, 550 F.3d at 189-90, in this appeal, the defendant raises only a procedural challenge to his sentence.

As relevant here, “[a] district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory.” *Id.* at 190 (citations omitted). A district court also commits procedural error “if it does not consider the § 3553(a) factors, or rests its sentence on a clearly erroneous finding of fact.” *Id.* Finally, a district court “errs if it fails adequately to explain its chosen sentence, and must include ‘an explanation for any deviation from the Guidelines range.’” *Id.* (quoting *Gall*, 552 U.S. at 51).

2. Acceptance of responsibility

Section 3E1.1 of the Sentencing Guidelines provides that a defendant may receive a two-level reduction to the applicable offense level where the defendant “clearly demonstrate[s] acceptance of responsibility for his offense.”³ U.S.S.G. § 3E1.1(a); see *United States v. Volpe*, 224 F.3d 72, 75 (2d Cir. 2000). The burden is on the defendant to establish that he deserves a reduction under this provision. See generally *United States v. Smith*, 174 F.3d 52, 55-56 (2d Cir. 1999) (holding that the party who seeks to take advantage of an adjustment in the guidelines bears the burden of proof; dealing with safety-valve provision of U.S.S.G. § 5C1.2).

“Because the ‘sentencing judge is in a unique position to evaluate a defendant’s acceptance of responsibility,’ his determination is given great deference on review.” *United States v. Savoca*, 596 F.3d 154, 159 (2d Cir. 2010) (quoting U.S.S.G. § 3E1.1, comment (n.5)); see also *United States v. Reyes*, 9 F.3d 275, 280 (2d Cir. 1993) (“[T]he sentencing judge is unquestionably in a better position to assess contrition and candor than is an appellate court.”) (internal quotation marks omitted). “Whether there has been an acceptance of responsibility is a fact-question and the circuit court will not reverse the district

³ Unless otherwise noted, all references are to the 2009 sentencing guidelines manual.

court's finding on this issue unless it is 'without foundation.'" *United States v. Giwah*, 84 F.3d 109, 112 (2d Cir. 1996) (quoting *United States v. Harris*, 13 F.3d 555, 557 (2d Cir. 1994)); see *United States v. Brennan*, 395 F.3d 59, 75 (2d Cir. 2005); *United States v. Hirsch*, 239 F.3d 221, 226 (2d Cir. 2001); *Volpe*, 224 F.3d at 75. This Court reviews factual determinations concerning a defendant's acceptance of responsibility under the clearly erroneous standard. See *United States v. Champion*, 234 F.3d 106, 110-11 (2d Cir. 2000) (per curiam).

"The Guidelines make clear that a guilty plea does not entitle the defendant to an acceptance reduction and that the defendant must prove to the court that he or she has accepted responsibility." *Giwah*, 84 F.3d at 113; see *Hirsch*, 239 F.3d at 226. "Merely pleading guilty to an offense does not ensure the application of the reduction." *Savoca*, 596 F.3d at 159; see U.S.S.G. § 3E1.1, comment (n.3) ("A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right."). Moreover, a district court may deny credit for acceptance of responsibility if, for example, the defendant "has engaged in continued criminal conduct that bespeaks 'a lack of sincere remorse.'" *United States v. Defeo*, 36 F.3d 272, 277 (2d Cir. 1994) (quoting *United States v. Cooper*, 912 F.2d 344, 346 (9th Cir. 1990)).

There are many factors that a court may consider in deciding whether to grant a reduction for acceptance of responsibility. For example, the commentary to U.S.S.G. § 3E1.1 identifies several non-exclusive factors that a court may consider, including, as relevant here, whether the defendant “[t]ruthfully admit[ed] the conduct comprising the offense(s) of conviction,” and the “timeliness of the defendant’s conduct in manifesting the acceptance of responsibility.” U.S.S.G. § 3E1.1, comment (n.1(a) & n.1(h)). On this last point, the commentary further emphasizes that “[t]he timeliness of the defendant’s acceptance of responsibility is a consideration under both subsections [of § 3E1.1], and is context specific.” U.S.S.G. § 3E1.1, comment (n.6).

The commentary to § 3E1.1 further provides that “[c]onduct resulting in an enhancement under § 3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct.” U.S.S.G. § 3E1.1, comment (n.4). “There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply.” *Id.*; see *Savoca*, 596 F.3d at 159 (“Except in extraordinary cases, the application of an enhancement for obstruction of justice ordinarily indicates that the defendant has not accepted responsibility to warrant a reduction in his guidelines calculation.”). In this regard, this Court has recognized that “it

is rare that a defendant should be granted a reduction in offense level for acceptance of responsibility when the court has deemed it appropriate to increase her offense level for obstruction of justice.” *Defeo*, 36 F.3d at 277 (denying acceptance reduction because defendant continued to use drugs while on release, failed to report to probation office, and tried to cheat on drug test).

This Court has held on numerous occasions that a defendant’s acts of obstruction justify a district court in denying credit for acceptance of responsibility. *See Savoca*, 596 F.3d at 159 (defendant’s perjury in the closely related case of his brother in which the defendant falsely testified that a third party, not his brother, had assisted him, supported an obstruction enhancement and the denial of credit for acceptance of responsibility); *Giwah*, 84 F.3d at 112-13 (defendant’s perjury during evidentiary hearing and his bail jumping justified obstruction enhancement and denial of credit for acceptance of responsibility); *United States v. Malki*, 609 F.3d 503, 511-12 (2d Cir. 2010) (“The validity of the obstruction enhancement adequately supports the District Court’s decision not to accord [the defendant] a reduction in the adjusted offense level for acceptance of responsibility despite his guilty pleas.”); *Champion*, 234 F.3d at 110-11 (defendant’s false statements at time of arrest, submission of perjured affidavit and subornation of perjury, combined with the defendant’s con-

viction after trial, provided adequate basis to deny acceptance credit); *United States v. Case*, 180 F.3d 464, 468 (2d Cir. 1999) (per curiam) (affirming imposition of obstruction enhancement and denial of acceptance adjustment absent extraordinary circumstances).

C. Discussion

1. The district court’s refusal to award the defendant credit for acceptance of responsibility under U.S.S.G. § 3E1.1(a) was well-founded.

The district court properly denied the defendant a two-point reduction in his offense level for acceptance of responsibility under § 3E1.1(a). The court concluded that the defendant’s guilty plea—entered on the morning of jury selection—was untimely, and that it was motivated not by an acceptance of responsibility for the offense conduct, but rather by a desire to reduce his sentencing exposure. GSA386-87. Further, the court explained that the defendant had not “fully and truthfully” disclosed the facts and circumstances of his offense conduct, as demonstrated by his frivolous assertion at the *Fatico* hearing that he was not a leader of the marijuana conspiracy despite all of the evidence to the contrary. GSA387-88. As further evidence that the defendant had not truthfully disclosed the facts related to his offense conduct, the court noted that the defend-

ant had failed to cooperate with the Probation Department in submitting a truthful financial statement. GSA388-90.

The factors cited by the district court are all proper considerations supporting the denial of credit for acceptance of responsibility. See U.S.S.G. § 3E.1.1, comment (nn. 1(a), 1(h), 6) (noting that court may consider timeliness of plea and whether defendant truthfully and fully admitted the conduct of his offense of conviction in deciding whether to grant credit for acceptance of responsibility); see also *United States v. McLeod*, 251 F.3d 78, 82 (2d Cir. 2001) (court properly denied credit for acceptance of responsibility to a defendant who falsely denied relevant conduct at sentencing); *United States v. Reyes*, 9 F.3d 275, 280 (2d Cir. 1993) (“The district court may deny a reduction under § 3E1.1 of the Guidelines based on a credibility determination that the defendant has not accepted responsibility for the offense of conviction.”); *United States v. Rivera*, 96 F.3d 41, 43-44 (2d Cir. 1996) (upholding denial of acceptance credit where the district judge “did not perceive a credible indication of Rivera’s clear demonstration of his entitlement to a reduction”). And “[b]ecause the sentencing judge is in a unique position to evaluate a defendant’s acceptance of responsibility, [her] determination is given great deference on review.” *Savoca*, 596 F.3d at 159.

Indeed, this Court has repeatedly upheld the denial of acceptance of responsibility credit in analogous cases. In *United States v. Zhuang*, 270 F.3d 107, 110 (2d Cir. 2001) (per curiam), for example, this Court upheld the denial of a downward adjustment because, in part, the defendant continued to insist that he was a mere middle man, rather than the lead actor, in a hostage-taking offense. Similarly, in *United States v. Brennan*, 395 F.3d 59, 75 (2d Cir. 2005), this Court upheld the denial of a downward adjustment for acceptance because the defendant “repeatedly sought to minimize or conceal the extent of his guilt by grossly misstating the facts” in his statements and submissions to the district court. Here, as in *Zhuang* and *Brennan*, although the defendant admitted his guilt, he continued to minimize his role in the conspiracy all the way through sentencing. On this record, then, the district court properly denied the defendant credit for acceptance of responsibility.

Furthermore, additional factors in the record, although not expressly mentioned by the district court in connection with its ruling on acceptance, supported the denial of credit for acceptance of responsibility. *First*, the evidence showed that the defendant continued to direct operations of his marijuana conspiracy even after he was incarcerated on drug charges. *See* GSA313, GSA385. This evidence demonstrated that he did not voluntarily “terminat[e] or withdrawal from

criminal conduct or associations.” § 3E1.1, comment (n.1(b)).

Second, the defendant’s “astounding” conduct in obstructing justice while in pre-trial incarceration, *see* GSA385, which warranted an enhancement for obstruction of justice, *see* GSA313, and which enhancement is uncontested on appeal, provided independent support for the court’s decision to deny the defendant credit for acceptance of responsibility. The commentary expressly provides that conduct resulting in an enhancement for obstruction of justice under § 3C1.1 will ordinarily indicate that “the defendant has not accepted responsibility for his criminal conduct.” § 3E1.1, comment (n.4). *See Champion*, 234 F.3d at 110 (upholding denial of acceptance of responsibility credit for defendant who received enhancement for obstruction of justice).

Although the guidelines commentary notes that there may be “extraordinary cases” in which a defendant is entitled to adjustments for both obstruction of justice *and* acceptance of responsibility, § 3E1.1, comment (n.4), the defendant makes no attempt to explain why his case is extraordinary. *See Smith*, 174 F.3d at 55-56 (the party seeking to take advantage of an adjustment in the guidelines bears the burden of proving entitlement to the adjustment). And for good reason, because this is not an extraordinary case. This is not a case where the obstructive

conduct was isolated or where the defendant took full responsibility for his obstructive conduct. Indeed, it is not even a case where the defendant took full responsibility for his offense of conviction. *See United States v. Honken*, 184 F.3d 961, 968 (8th Cir. 1999) (holding that court should consider the totality of the circumstances in deciding whether case was “extraordinary,” including degree of acceptance of responsibility, whether the obstruction was isolated incident, and whether the defendant took responsibility for his obstructive conduct). In sum, this is not an extraordinary case and thus the court properly denied the defendant credit for acceptance of responsibility.

2. The defendant’s counter-arguments are unfounded.

The defendant challenges the district court’s decision to deny him credit for acceptance of responsibility with three arguments. He argues as follows: (1) the court should not have considered the un-timeliness of his plea because timeliness is only relevant to the third point for acceptance under § 3E1.1(b), (2) the court could not use his request for a *Fatico* hearing as a basis for denying acceptance, and (3) he cannot be denied acceptance for refusing to admit to conduct underlying charges that were subsequently dismissed by the government. As explained below, these arguments fail on the law and the facts.

First, the district court was entitled to consider the timeliness of the defendant’s plea as a factor supporting its decision to deny him credit for acceptance of responsibility under § 3E1.1(a). Indeed, the guidelines themselves expressly note that a district court may consider the timeliness of a defendant’s plea when deciding whether to grant credit for acceptance of responsibility under *both* § 3E1.1(a) and § 3E1.1(b): “The timeliness of the defendant’s acceptance of responsibility is a consideration under both subsections, and is context specific.” § 3E1.1, comment (n.6). To be sure, the main focus for awarding the third point under subsection (b) is the timeliness of the defendant’s demonstration of acceptance, *see United States v. Kumar*, 617 F.3d 612, 636-37 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 2931 (2011), but as the guidelines commentary makes clear, timeliness is also relevant to the award of the two-point reduction under subsection (a).

This Court’s decision in *Kumar* is not to the contrary.⁴ As relevant here, in *Kumar*, this

⁴ The defendant also cites a district court case from the Southern District of New York for the proposition that district courts there “ordinarily” grant defendants who plead guilty the two point reduction under § 3E1.1(a). *See* Defendant’s Br. at 15 (quoting *United States v. Briceno*, No. 01cr943 (LTS), 2003 WL 22025870 at *6 (S.D.N.Y. Aug. 29, 2003)). This unremarkable proposition, which is undoubtedly true for the District of Connecticut as well, says

Court reversed the district court’s decision denying a two-level acceptance-of-responsibility reduction when the district court’s sole reasoning for that denial was that the defendant’s plea—entered two weeks before trial—was untimely. 617 F.3d at 636. This Court acknowledged that in a different case, the lateness of a defendant’s plea could be considered against him, but found that on the facts of the case before it, the untimeliness considered alone was insufficient to warrant denying the defendant acceptance of responsibility credit. *Id.* at 637. This was especially true given that the defendant in that case appeared to “fully accept responsibility both prior to and during sentencing.” *Id.*

The Court’s decision in *Kumar* does not control the instant case. As a preliminary matter, *Kumar* did not establish a bright-line rule that timeliness is irrelevant to the analysis of acceptance of responsibility under subsection (a); the decision merely held that, on the facts of that case, the district court erred in denying acceptance based *solely* on the alleged untimeliness of the defendant’s plea. Moreover, the *Kumar* Court suggested that untimeliness could be considered under different factual scenarios, in-

nothing about the ordinary practice for cases involving a defendant who obstructed justice while incarcerated and who continued to minimize his role in the offense through sentencing.

cluding a scenario, such as here, where the defendant pleads guilty “on the morning of trial.” *Id.* at 638. In any event, *Kumar* is distinguishable on its facts. The defendant in *Kumar* had “fully accept[ed] responsibility” for his conduct, while in this case, by contrast, the defendant continued to minimize his role in his offense of conviction through sentencing. Finally, unlike in *Kumar*, the district court here did not rely *solely* on the timeliness of the defendant’s plea; rather the court also noted that the defendant had failed to fully and truthfully admit his role in the offense conduct, a factor that the *Kumar* Court identified as the “paramount factor in determining eligibility for § 3E1.1 credit. . . .” *Id.* at 637 (internal citations omitted). In sum, even though the district court in *Kumar* erred in relying solely on the defendant’s lack of a timely plea, the district court here properly considered the untimeliness of the defendant’s plea as one factor supporting its decision.

Second, the district court properly relied on the defendant’s conduct in connection with the *Fatico* hearing as a basis for denying him a reduction for acceptance of responsibility. As a preliminary matter, while it is true that the government may not invoke a defendant’s request for a *Fatico* hearing as a justification for refusing to move for the third acceptance point, *see United States v. Lee*, 653 F.3d 170, 173-75 (2d Cir. 2011), this restriction is based on the specific

language in subsection (b) that limits the government's discretion on refusing to move for the third acceptance point. It has no applicability to the separate decision at issue here, namely, the district court's decision to award the first two points for acceptance of responsibility under subsection (a).

In any event, the district court here did not deny acceptance because the defendant required the government to prepare for and defend a *Fatico* hearing. Rather, the court denied acceptance because the defendant's arguments at the *Fatico* hearing—in which he “frivolously” denied his role as the leader in the conspiracy⁵—demonstrated that he had not fully and truthfully admitted the conduct underlying his offense of conviction. *See* GSA387-88. This was a fully proper consideration for the court and thus was not error.

⁵ The defendant suggests that he delayed pleading guilty and requested the *Fatico* hearing because he had a “good faith” dispute about the drug quantity at issue in this case. *See* Defendant's Br. at 18-20. Regardless of whether the defendant's “good faith” dispute on drug quantity contributed to his untimely plea, it played no role in the *Fatico* hearing. The only contested issues at that hearing were related to the guidelines enhancements for role in the offense and obstruction of justice; drug quantity was not at issue. *See* GSA310-13 (district court's ruling on the contested issues).

Third and finally, the government agrees that the defendant should not be denied acceptance of responsibility credit if he refuses to admit relevant conduct. See *United States v. Oliveras*, 905 F.2d 623 (2d Cir. 1990); § 3E1.1, comment (n.1(a)) (“Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a).”). Of course, nothing of the sort happened here. Tellingly, the defendant fails to identify any relevant conduct or facts relating to crimes beyond the offense of conviction that he was required to admit. In other words, although he states the principle of law, he does not explain why it is relevant to this case, because he cannot. The district court denied him acceptance of responsibility because he failed to truthfully admit his role in the conspiracy that was his offense of conviction. The court did not ask him to admit any more.

In sum, the district court properly concluded, based on its assessment of the record in this case and the defendant’s conduct from beginning to end, that he had failed to demonstrate acceptance of responsibility for his offense. This finding is fully supported by the record, and accordingly, subject to deference.

II. The district court properly assigned the defendant one criminal history point for a 2008 marijuana possession conviction even though Connecticut subsequently de-criminalized the conduct for which he was convicted.

A. Relevant facts

In the PSR, the Probation Department identified two prior convictions in the defendant's record, both for possession of marijuana. Specifically, the defendant was convicted in March 2006 for possession of marijuana of more than four ounces, in violation of Conn. Gen. Stat. § 21a-279(b). PSR ¶ 35. He was fined \$500 for this offense. PSR ¶ 35. In 2008, the defendant was convicted of possession of less than four ounces of marijuana, in violation of Conn. Gen. Stat. § 21a-279(c); he was fined \$300 for this offense. PSR ¶ 36. The PSR assigned the defendant one criminal history point for each conviction, placing him in criminal history category II. PSR ¶¶ 35-37.

Effective July 1, 2011, Connecticut reduced the penalties for possession of small amounts of marijuana (under one-half ounce) to a civil fine. *See* Conn. Gen. Stat. § 21a-279a; § 53a-24 ("Every offense which is not a 'crime' is a 'violation'. Conviction of a violation shall not give rise to any disability or legal disadvantage based on conviction of a criminal offense."); § 53a-27 ("An

offense, for which the only sentence authorized is a fine, is a violation unless expressly designated an infraction.”).

In response to this change in Connecticut law, the defendant filed a sentencing memo in which he argued, in one sentence, that he should not receive any criminal history points for his marijuana convictions because “the charges that he pled guilty may now be de-criminalized.” At sentencing, the defendant’s argument changed slightly. He appeared to limit his argument to his second marijuana conviction and to frame his argument as a request for a downward departure because the conduct was de-criminalized. *See* GSA364-65.

The district court rejected the defendant’s argument with the conclusion that the defendant’s criminal history calculation was “not overstated.” GSA381.

B. Governing law and standard of review

As set forth above, in every sentencing, the district court must properly calculate the defendant’s guidelines range. *See* Part I.B.1. The guideline range derives from the defendant’s total offense level and criminal history category.

In determining a defendant’s criminal history category under the Sentencing Guidelines, the district court must calculate, *inter alia*, the

number of “points” for the defendant’s prior sentences. Section 4A1.1 of the Sentencing Guidelines sets forth the rules governing the calculation of criminal history points. As relevant here, under subsection (c), one criminal point (up to a maximum of four points) is added for each prior sentence that did not involve a sentence of imprisonment of at least 60 days. *See* U.S.S.G. § 4A1.1(c). The guidelines further provide that “[t]he term ‘prior sentence’ means any sentence previously imposed upon the adjudication of guilt, whether by guilty plea, trial, or plea of *nolo contendere*, for conduct not part of the instant offense.” U.S.S.G. § 4A1.2(a)(1).

“A sentencing court’s legal application of the Guidelines is reviewed *de novo*, while the court’s underlying factual findings with respect to sentencing . . . are reviewed for clear error.” *United States v. Cossey*, 632 F.3d 82, 86 (2d Cir. 2011) (per curiam).

C. Discussion

There is no dispute that before Connecticut changed its law, the Probation Department properly assigned one criminal history point to each of the defendant’s prior marijuana possession convictions. Each conviction resulted in a “prior sentence” of less than 60 days’ imprisonment. *See* U.S.S.G. §§ 4A1.1(c), 4A1.2(a)(1).

The defendant argues, however, that because Connecticut subsequently changed its law to “de-

criminalize” the possession of small amounts of marijuana, his 2008 conviction should not be assigned any points. The defendant does *not* argue that his conviction has been expunged, or that Connecticut has in any other way made its change in the law retroactive to “eliminate” his prior conviction. *See, e.g.*, U.S.S.G. § 4A1.2(j) (“Sentences for expunged convictions are not counted, but may be considered under § 4A1.3 (Adequacy of Criminal History Category).”). He argues, rather, that because the conduct underlying his 2008 conviction would not be a criminal offense if he engaged in that conduct today, his 2008 conviction should not generate any criminal history points.

The defendant cites no legal authority for his argument that his 2008 conviction should not count in his criminal history calculation, and for good reason. As the Eighth Circuit explained, “[h]ow a state views an offense does not determine how the United States Sentencing Guidelines view that offense.” *United States v. Lenfesty*, 923 F.2d 1293, 1299-1300 (8th Cir. 1991); *United States v. Driskell*, 277 F.3d 150, 154 (2d Cir. 2002) (“We hold that a district court, in calculating a defendant’s criminal history pursuant to U.S.S.G. §§ 4A1.1 and 4A1.2(d) should look to the substance of the past conviction rather than the statutory term affixed to it by a state court.”).

Under federal law, the fact that Connecticut considers possession of small amounts of marijuana a “violation” is irrelevant. The Eighth Circuit considered a similar argument in *United States v. Jenkins*. In that case, the defendant argued that his convictions for marijuana possession should not be included in his criminal history calculation because they were “merely infractions under Nebraska law.” 979 F.2d 797, 979 (8th Cir. 1993). The Eighth Circuit rejected this argument, noting that the defendant’s convictions fell within the definition of a “prior sentence” under the guidelines and thus were properly counted in his criminal history calculation. *Id.*

Moreover, even if the State’s characterization of the defendant’s offense somehow controlled, it is not clear that the State’s new characterization—as opposed to the characterization in place when the defendant committed his offense—should govern. The Supreme Court considered an analogous question in *McNeill v. United States*, 131 S. Ct. 2218 (2011). In that case, the defendant argued that his prior state drug offenses were not “serious drug offenses” under the Armed Career Criminal Act (“ACCA”) because the state had subsequently lowered the statutory maximum sentences for those drug offenses. The Supreme Court rejected this argument and held that when determining whether a prior conviction is a “serious drug offense” under

the ACCA, the court should look to the sentence applicable at the time of the previous conviction. *Id.* at 2220.

Although the *McNeill* decision did not address the calculation of criminal history points under the sentencing guidelines, the reasoning suggests that the same result should apply here. The Court noted that the ACCA requires a sentencing court to determine whether a “previous conviction” was for a serious drug offense, and reasoned that “[t]he only way to answer this backward-looking question is to consult the law that applied at the time of that conviction.” *Id.* at 2222. The Court also concluded that reading the ACCA to focus on the law at the time of the prior conviction would avoid “absurd results that would follow from consulting current state law to define a previous offense.” *Id.* at 2223. The Court explained the absurdity thus:

It cannot be correct that subsequent changes in state law can erase an earlier conviction for ACCA purposes. A defendant’s history of criminal activity—and the culpability and dangerousness that such history demonstrates—does not cease to exist when a State reformulates its criminal statutes in a way that prevents precise translation of the old conviction into the new statutes. Congress based ACCA’s sentencing enhancement on prior convictions and could not have expected courts to treat

those convictions as if they had simply disappeared. To the contrary, Congress has expressly directed that a prior violent felony conviction remains a “conviction” unless it has been “expunged, or set aside or [the] person has been pardoned or has had civil rights restored.” 18 U.S.C. § 921(a)(20).

Id. at 2223. Finally, the Court noted that to read the statute to focus on the current state law (as opposed to the law at the time of conviction) would make the applicability of the ACCA depend on the timing of the federal sentencing proceeding, a result that could lead to dramatically disparate sentences for similar conduct. *Id.* at 2223-24.

The considerations that guided the *McNeill* Court guide the analysis here. In this case, as in *McNeill*, the guidelines require consideration of a defendant’s “prior sentence” (defined to mean a “sentence previously imposed”) and thus to answer this “backward-looking question,” the court should look to the law applicable at the time of the prior sentence. Similarly, to allow subsequent changes in state law to govern here would lead to the absurd result that the defendant’s prior conviction would effectively disappear, even though the guidelines, like the ACCA, have indicated that a conviction remains a conviction unless it has been expunged. *See* § 4A1.2(d). And finally, to allow subsequent changes in the law

to govern in this context would lead to disparate sentences depending on the timing of the federal sentencing proceeding. Thus, for the reasons given in *McNeill*, subsequent changes in Connecticut law should not govern the analysis of the defendant's prior marijuana possession conviction.

Finally, although the defendant's argument is not entirely clear, he appears to suggest that the court should have "departed" to criminal history category I because it granted an analogous departure based on a similar conviction to his co-defendant, James Canavan.⁶ See Defendant's Br. at 22, 25. To the extent the defendant is challenging the district court's refusal to depart downward in his case, that claim is foreclosed on appeal. "[A] refusal to downwardly depart is generally not appealable." *United States v. Stinson*, 465 F.3d 113, 114 (2d Cir. 2006) (per curiam) (quotation marks and citation omitted); see also *United States v. Valdez*, 426 F.3d 178, 184 (2d Cir. 2005); *United States v. Ekhtator*, 17 F.3d 53, 55 (2d Cir. 1994) ("When a district has discretion to depart from the sentencing range prescribed by the Guidelines and has declined to exercise that discretion in favor of a departure,

⁶ For the Court's convenience, the government has included the transcript from James Canavan's sentencing in its appendix. See GSA314. The Court may take judicial notice of this transcript. See, *Young v. Selsky*, 41 F.3d 47, 50-51 (2d Cir. 1994).

its decision is normally not appealable.”); *United States v. Desena*, 260 F.3d 150, 159 (2d Cir. 2001). The defendant makes no argument that his case falls within the narrow exception to this rule, see *Stinson*, 465 F.3d at 114 (court may review a refusal to depart downward when a sentencing court “misapprehended the scope of its authority to depart or the sentence was otherwise illegal”), and thus he has waived any argument to that effect on appeal. See *Nolasco v. Holder*, 637 F.3d 159, 161 (2d Cir. 2011) (per curiam).

But even if the Court could review the district court’s refusal to depart downward, that decision would be reviewed for plain error because the defendant never argued to the district court that he was entitled to a departure because a co-defendant had received a similar departure. When, as here, a defendant fails to object to an alleged procedural sentencing error and that sentencing issue is “not particularly novel or complex,” this Court reviews for plain error. *United States v. Villafuerte*, 502 F.3d 204, 208 (2d Cir. 2007); *United States v. Verkhoglyad*, 516 F.3d 122, 128 (2d Cir. 2008); *Wagner-Dano*, 679 F.3d at 89.

Under plain error review, “an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an ‘error’; (2) the error is ‘clear or obvious, rather than subject to reasonable

dispute’; (3) the error ‘affected the appellant’s substantial rights, which in the ordinary case means’ it ‘affected the outcome of the district court proceedings’; and (4) ‘the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)); see also *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *United States v. Wagner-Dano*, 679 F.3d 83, 94 (2d Cir. 2012). “[T]he burden of establishing entitlement to relief for plain error is on the defendant claiming it” *Wagner-Dano*, 679 F.3d at 94 (quoting *United States v. Dominguez Benitez*, 542 U.S. 74, 82 (2004)).

The defendant has not even attempted to meet these standards here. The guidelines authorize a sentencing court to depart downward based on the overstatement of criminal history, § 4A1.3, but that authority is committed to the sound discretion of the court. The defendant identifies no authority that requires a court to exercise that discretion in favor of one defendant merely because the court previously exercised discretion in favor of another defendant.

Moreover, the defendant cannot show that any error in this regard affected his substantial rights or affected the fairness, integrity or public reputation of judicial proceedings. As a prelimi-

nary matter, even with respect to the merits of the respective motions before the court, the defendants were not similarly situated. Mazza asked for a departure based solely on the fact that the State had subsequently de-criminalized his conduct. GSA365. Canavan, by contrast, asked for a downward departure based on the fact that the conduct had been decriminalized, *and* on the uncontested fact that he had taken “the hit on” that conviction at Mazza’s direction. *See* GSA323. When the court granted Canavan’s motion, it noted both its experience with the Litchfield courts and the “offenses of conviction.” *See* GSA331.

And even putting aside the merits of their respective motions for downward departures, Mazza and Canavan were not similarly situated defendants. Mazza pleaded guilty on the day of trial, but continued to minimize his role in the marijuana conspiracy through sentencing. Further, he continued his criminal activity while incarcerated awaiting trial. Canavan, by contrast, pleaded guilty sufficiently early to earn acceptance credit, and further, cooperated with authorities with sufficient success to earn a 5K motion from the government. GSA319. Indeed, at Canavan’s sentencing, the court commended him for the exemplary candor of his testimony” GSA322.

In sum, the district court properly assigned one criminal history point to the defendant’s

2008 marijuana possession conviction. The fact that Canavan received a downward departure in his criminal history category does not, by itself, demonstrate that the court erred in Mazza's sentencing.

Conclusion

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

Dated: August 10, 2012

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

A handwritten signature in black ink that reads "David X. Sullivan". The signature is written in a cursive style with a large, looped "D" at the beginning.

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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 10,665 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

A handwritten signature in black ink, reading "David X. Sullivan". The signature is written in a cursive style with a large initial "D".

DAVID X. SULLIVAN
ASSISTANT U.S. ATTORNEY

Addendum

§ 3E1.1. Acceptance of Responsibility

- (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by **2** levels.

- (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level **16** or greater, and upon motion of the government stating that the defendant has assisted authorities in the investigation or prosecution of his own misconduct by timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently, decrease the offense level by **1** additional level.

Commentary

Application Notes:

1. *In determining whether a defendant qualifies under subsection (a), appropriate considera-*

tions include, but are not limited to, the following:

- (a) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under §1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility;*
- (b) voluntary termination or withdrawal from criminal conduct or associations;*
- (c) voluntary payment of restitution prior to adjudication of guilt;*
- (d) voluntary surrender to authorities promptly after commission of the offense;*

- (e) *voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;*
 - (f) *voluntary resignation from the office or position held during the commission of the offense;*
 - (g) *post-offense rehabilitative efforts (e.g., counseling or drug treatment); and*
 - (h) *the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.*
2. *This adjustment is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse. Conviction by trial, however, does not automatically preclude a defendant from consideration for such a reduction. In rare situations a defendant may clearly demonstrate an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial. This may occur, for example, where a defendant goes to trial to assert and preserve issues that do not relate to factual guilt (e.g., to make a constitutional*

challenge to a statute or a challenge to the applicability of a statute to his conduct). In each such instance, however, a determination that a defendant has accepted responsibility will be based primarily upon pre-trial statements and conduct.

- 3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct comprising the offense of conviction, and truthfully admitting or not falsely any additional relevant conduct for which he is accountable under §1B1.3 (Relevant Conduct) (see Application Note 1(a)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.*
- 4. Conduct resulting in an enhancement under § 3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§3C1.1 and 3E1.1 may apply.*

5. *The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.*

6. *Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking the steps set forth in subsection (b). The timeliness of the defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b) will occur particularly early in the case. For example, to qualify under subsection (b), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.*

Because the Government is in the best position to determine whether the defendant has assisted authorities in a manner that avoids preparing for trial, an adjustment under subsection (b) may only be granted upon a formal motion by the Government at the time of sentencing. See section 401(g)(2)(B) of Public Law 108–21.

§4A1.1. Criminal History Category

The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Part A.

...

(c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this item.

...

Commentary

Application Notes:

...

3. *§4A1.1(c). One point is added for each prior sentence not counted under §4A1.1(a) or (b). A maximum of four points may be counted under this item. The term “prior sentence” is defined at §4A1.2(a).*

...

**§4A1.2. Definitions and Instructions for
Computing Criminal History**

(a) Prior Sentence

- (1) The term “prior sentence” means any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere, for conduct not part of the instant offense.

...

Background: Prior sentences, not otherwise excluded, are to be counted in the criminal history score, including uncounseled misdemeanor sentences where imprisonment was not imposed.