

# 11-5305

*To Be Argued By:*  
ROBERT M. SPECTOR

---

---

**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 11-5305**

UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

LUIS JOEL SOTO-SOLIVAN, AUREA CASIANO,  
EGARDO DIAZ, aka Galdy, CARMELO RONDON  
FELICIANO, aka Panzon, MOISES FIGUEROA,

(For continuation of Caption, See Inside Cover)

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

---

---

**BRIEF FOR THE UNITED STATES OF AMERICA**

---

---

DAVID B. FEIN  
*United States Attorney*  
*District of Connecticut*

ROBERT M. SPECTOR  
*Assistant United States Attorney*  
SANDRA S. GLOVER  
*Assistant United States Attorney (of counsel)*

aka Indio, JOEL GUZMAN, ANDRES HERNANDEZ, aka Andy, aka El Pelu, SAMUEL MARTINEZ, aka Sammy, aka El Muelo, MARCOS RIVAS, aka El Negro, SHIRLEY RIVERA aka Sheila, ANGEL SANTIAGO, aka Mambro, HECTOR SANTIAGO, aka Pito, JOSE SANTIAGO, aka Neylom, ANGEL SOTO, WILMARY, TORRES, WINDY TORRES, JIMMY VALENTIN, BANGER VERGARA, aka Valdil, aka Bangel,

*Defendants,*

DOMINGO GUZMAN, aka Mingo,

*Defendant-Appellant.*

## Table of Contents

Table of Authorities .....	iv
Statement of Jurisdiction .....	viii
Statement of Issues Presented for Review .....	ix
Preliminary Statement .....	1
Statement of the Case .....	3
Statement of Facts and Proceedings	
Relevant to this Appeal .....	5
A. Factual basis .....	5
1. The initial investigation into Soto-Sullivan .....	5
2. The investigation expands to this defendant .....	7
3. The delivery of drugs from Puerto Rico to Massachusetts and Connecticut .....	9
4. The defendant's arrest .....	13
B. Guilty plea .....	13
C. The Pre-Sentence Report .....	17
D. The first sentencing hearing .....	18
E. The direct appeal .....	21

F. The second sentencing.....	23
Summary of Argument .....	38
Argument.....	41
I. The district court properly applied a four-level enhancement based on the defendant’s aggra- vated role in the offense.....	41
A. Governing law and standard of review ..	41
B. Discussion .....	45
1. The district court did not commit plain error in failing to set forth sufficiently specific factual findings on role .....	45
2. The district court’s decision to apply a four-level role enhancement was proper .....	47
II. The district court did not violate the “law of the case doctrine” by attributing a different quantity of narcotics to the defendant on remand.....	51
A. Governing law and standard of review .....	52
1. Law of the case doctrine.....	52
2. Waiver .....	53
B. Discussion .....	54

III. The district court’s 196-month, below-guidelines sentence was substantively reasonable .....	57
A. Governing legal principles .....	57
B. Discussion .....	60
Conclusion .....	64
Certification per Fed. R. App. P. 32(a)(7)(C)	
Addendum	

## Table of Authorities

Pursuant to “Blue Book” rule 10.7, the Government’s citation of cases does not include “certiorari denied” dispositions that are more than two years old.

### Cases

<i>United States v. Atehorvta</i> , 69 F.3d 679 (2d Cir. 1995) .....	54
<i>United States v. Batista</i> , 684 F.3d 333 (2d Cir. 2012) .....	50
<i>United States v. Beaulieu</i> , 959 F.2d 375 (2d Cir. 1992) .....	42
<i>United States v. Booker</i> , 543 U.S. 220 (2005).....	58
<i>United States v. Brown</i> , 623 F.3d 104 (2d Cir. 2010) .....	53
<i>United States v. Bryce</i> , 287 F.3d 249 (2d Cir. 2002) .....	52
<i>United States v. Cavera</i> , 550 F.3d 180 (2d Cir. 2008) .....	44, 45, 58, 59
<i>United States v. Cotton</i> , 535 U.S. 625 (2002).....	44
<i>United States v. Fernandez</i> , 443 F.3d 19 (2d Cir. 2006) .....	59

<i>Gall v. United States</i> , 552 U.S. 586 (2007).....	58
<i>United States v. Hertular</i> , 562 F.3d 433 (2d Cir. 2009) .....	53
<i>United States v. Jass</i> , 569 F.3d 47 (2d Cir. 2009) .....	44, 50
<i>United States v. Johnson</i> , 378 F.3d 230 (2d Cir. 2004) .....	54
<i>United States v. Molina</i> , 356 F.3d 269 (2d Cir. 2004) .....	<i>passim</i>
<i>United States v. Olano</i> , 507 U.S. 725 (1993).....	44, 53
<i>United States v. Paccione</i> , 202 F.3d 622 (2d Cir. 2000) .....	42
<i>United States v. Polouizzi</i> , 564 F.3d 142 (2d Cir. 2009) .....	53
<i>United States v. Quinones</i> , 511 F.3d 289 (2d Cir. 2007) .....	53
<i>United States v. Quintieri</i> , 306 F.3d 1217 (2d Cir. 2002) .....	51, 52
<i>United States v. Rigas</i> , 490 F.3d 208 (2d Cir. 2007) .....	58

<i>United States v. Tenzer</i> , 213 F.3d 34 (2d Cir. 2000) .....	52
<i>United States v. Thompson</i> , 76 F.3d 442 (2d Cir. 1996) .....	43
<i>United States v. Uccio</i> , 940 F.2d 753 (2d Cir. 1991) .....	52
<i>United States v. Ware</i> , 577 F.3d 442 (2d Cir. 2009) .....	21, 22, 43
<i>United States v. Williams</i> , 399 F.3d 450 (2d Cir. 2005) .....	44
<i>United States v. Yu-Leung</i> , 51 F.3d 1116 (2d Cir. 1995) .....	53

### Statutes

18 U.S.C. § 3231 .....	iii
18 U.S.C. § 3553 .....	<i>passim</i>
18 U.S.C. § 3742 .....	iii
21 U.S.C. § 841 .....	3
21 U.S.C. § 851 .....	14

### Rules

Fed. R. App. P. 4 .....	iii
-------------------------	-----

Fed. R. Crim. P. 52.....45

**Guidelines**

U.S.S.G. § 3B1.1.....*passim*

### **Statement of Jurisdiction**

The district court had subject matter jurisdiction over this criminal prosecution under 18 U.S.C. § 3231. Judgment entered December 12, 2011. Joint Appendix (“JA”) 13. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on December 21, 2011, JA13, and this Court has appellate jurisdiction over the defendant’s challenge to his sentence under 18 U.S.C. § 3742(a).

**Statement of the Issues  
Presented for Review**

- I. Did the district court commit any procedural error in imposing a four-level role enhancement under U.S.S.G. § 3B1.1?
  
- II. Did the district court violate the law of the case doctrine by concluding that the quantity of cocaine involved in this offense was between fifteen and fifty kilograms?
  
- III. Was the defendant's 196-month sentence, which was over three years below the bottom of the guideline range found by the court, substantively reasonable?

# United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-5305

---

UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

DOMINGO GUZMAN, also known as Mingo,  
*Defendant-Appellant.*

---

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

---

**BRIEF FOR THE UNITED STATES OF AMERICA**

---

## **Preliminary Statement**

From January 2006 through June 20, 2006, the defendant, Domingo Guzman, ran a drug trafficking operation based in Bridgeport, Connecticut and supplied powder cocaine, crack cocaine and heroin to various distributors in Connecticut, Massachusetts, New Hampshire, and Pennsylvania. He relied on several people to help him manage the enterprise, including his girlfriend, Shirley Rivera, who collected drug proceeds for him on a regular basis from his var-

ious customers, co-defendant Edgardo Diaz, who maintained a stash house for him, and several others who signed for and received packages containing kilograms of cocaine sent from Puerto Rico.

The defendant pleaded guilty to one count of conspiracy to distribute five kilograms or more of cocaine. At the original sentencing, the district court found that the appropriate guideline incarceration range was 188-235 months and imposed a sentence of 220 months' incarceration. The defendant appealed and, after the government agreed that a remand was appropriate to allow the district court to make more specific findings regarding the defendant's aggravating role in the offense, this Court vacated the sentence and remanded the case back to the district court to conduct a full re-sentencing and address all disputed factual issues without limitation.

At the second sentencing hearing, the district court made specific findings that a four-level role enhancement was appropriate and that the defendant had participated in the distribution of between 15 and 50 kilograms of cocaine, resulting in a guideline range of 235-292 months' incarceration. The court then departed downward based on the defendant's post-arrest rehabilitation and imposed a term of 196 months' incarceration.

In this second appeal, the defendant makes three claims, two of which are very similar to the

claims he raised in his first appeal: (1) the district court committed a procedural error in applying a four-level role enhancement both because its factual findings were not sufficiently specific and because the factual record did not support a finding that the defendant was a leader or organizer; (2) the district court violated the law of the case doctrine by concluding that the quantity of cocaine involved in the offense was higher than it had found at the original sentencing; and (3) the below-guideline sentence was substantively unreasonable. For the reasons that follow, the district court did not commit any error in its sentencing determination, and its sentence in this case should be affirmed.

### **Statement of the Case**

On June 29, 2006, a federal grand jury sitting in Hartford returned an Indictment against the defendant and others charging him in Counts One and Two with conspiring to possess with the intent to distribute and to distribute five kilograms or more of powder cocaine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846, in Count Three with conspiring to possess with the intent to distribute one hundred grams or more of heroin, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846, and in Count Eight distribution of 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A). JA14-JA24. The defendant changed

his plea to guilty as to Count Two of the Indictment on November 15, 2007. JA36.

On October 8, 2008, the district court (Peter C. Dorsey, J.) sentenced the defendant to a term of 220 months' incarceration, followed by a term of five years' supervised release. JA99.

The defendant appealed, and the parties ultimately agreed to a remand for a full re-sentencing. JA105. On May 12, 2011, this Court remanded the case to the district court for a full re-sentencing. JA119-JA120. On December 1, 2011, the district court (the late Peter C. Dorsey, J.) sentenced the defendant to 196 months' incarceration. JA222. Judgment entered on December 12, 2011, JA223-JA225, and the defendant filed a timely notice of appeal on December 21, 2012. JA226. The defendant has been in federal custody since his arrest in this case on June 20, 2007 and is currently serving his federal sentence.

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

**A. Factual basis**

**1. The initial investigation into  
Soto-Solivan**

Had the case against the defendant gone to trial, the government would have presented the following facts, which were set forth almost verbatim in the government's original sentencing memorandum (JA50-JA56), the government's supplemental sentencing memorandum (JA161-JA167), and the PSR (sealed appendix):

In approximately January 2006, a cooperating witness ("CW-1") supplied information to the DEA Task Force regarding a drug trafficking organization ("DTO") run by Luis Joel Soto-Solivan. CW-1 stated that he/she had known Soto-Solivan for approximately 15 years and that he/she knew him to possess and distribute wholesale quantities of heroin and cocaine. According to CW-1, Soto-Solivan was a source of supply for those narcotics to persons in, but not limited to, several cities in Connecticut, as well as areas in Massachusetts and Pennsylvania. CW-1 also stated that Soto-Solivan had a heroin/cocaine source of supply in Puerto Rico. According to CW-1, for a period of six months prior to February, 2006, Soto-Solivan had been supplying CW-1 with approximately 100 grams of heroin every five days. *See* PSR ¶ 8; JA50.

Starting in January 2006, the DEA Task Force used CW-1 to engage in numerous controlled purchases of narcotics from Soto-Solivan, all of which occurred under DEA direction and supervision. On January 26, 2006, under DEA surveillance, CW-1 contacted Soto-Solivan via cellular telephone and arranged to pay him \$6,000 in DEA funds for 100 grams of heroin that Soto-Solivan had previously supplied CW-1 before CW-1 had started cooperating with the DEA Task Force.

On February 11, 2006, CW-1 purchased approximately 70 grams of heroin from Soto-Solivan.

On February 22, 2006, Soto-Solivan arranged for CW-1 to meet this defendant, Domingo Guzman, and pay him \$4,600 in DEA funds for the previously supplied 70 grams of heroin.

On March 1, 2006, CW-1 purchased approximately 107 grams of heroin from co-defendant Hector Santiago, acting on behalf of Soto-Solivan, who was in Puerto Rico at the time.

On March 17, 2006, after the DEA had seized approximately one kilogram of cocaine as a result of a separate investigation, CW-1, who had not been privy to the kilogram seizure, reported to the DEA that Soto-Solivan had contacted CW-1 on March 16 and stated that police had seized a kilogram of cocaine that had belonged to him the night before (March 15).

On March 28, 2006, CW-1 purchased approximately 84 grams of cocaine base from Guzman in exchange for \$2250 in pre-recorded DEA funds.

On April 27, 2006, CW-1 purchased 50 grams of heroin from Soto-Solivan, and on May 4, 2006, CW-1 purchased another 50 grams of heroin from Soto-Solivan. See PSR ¶ 9; JA50-JA51.

The government began intercepting wire communications over two different cellular telephones used by Soto-Solivan on April 11, 2006, and all interceptions ceased on June 8, 2006. Based on the intercepted telephone calls, it was apparent that Soto-Solivan was operating a DTO that was responsible for distributing kilogram quantities of powder cocaine and hundred gram quantities of heroin in Connecticut, Pennsylvania, Rhode Island, New York, New Hampshire, Massachusetts and elsewhere. See PSR ¶ 10; JA51-JA52.

## **2. The investigation expands to Guzman**

Wire interceptions also revealed that Guzman operated his own DTO in the Bridgeport area and had his own customer base. At times, he was provided with cocaine and heroin by Soto-Solivan, and at times, he supplied Soto-Solivan with cocaine and heroin. In addition, at times, the defendant discussed referring large-scale customers from out-of-state to Soto-Solivan.

For example, on April 14, 2006, at approximately 6:50 p.m., the defendant told Soto-Solivan that “Linda” and her boyfriend, both from New Hampshire, had given him a check for some quantity of cocaine. He told Soto-Solivan that he had advised Linda that he would “hook her up,” but that the price was fixed for now. He said that he sold the “whole thing” (kilogram of cocaine) for “a quarter” (\$25,000). Linda told the defendant that she was willing to buy the “whole thing” (kilogram of cocaine) next time if it was of good quality. The defendant told Soto-Solvian that he would “hook him up with Linda,” but that he wanted “three bucks” (\$3,000) for himself. Soto-Solivan agreed. The defendant said that he would give Soto-Solivan “two two (\$22,000) . . .” and that it would be good if Linda would be able to take “four, five, six or something like that” (kilograms of cocaine). According to the defendant, Linda and her boyfriend were very impressed with his product. *See* PSR ¶ 11; JA52.

The government also intercepted wire communications over one of the defendant’s cellular telephones from May 18, 2006 through June 19, 2006. The defendant used at least five different cellular telephones and changed them often to avoid interception. One of those cellular telephones was primarily utilized to contact individuals in Puerto Rico. The wiretap investigation targeted this particular cellular telephone and

did not target the other telephones that the defendant used to contact his many customers. For this reason, the government gathered significant evidence against the defendant, his suppliers (co-defendant Carmen Rondon-Feliciano and others identified only by first name and not charged), various individuals he used to help him operate his DTO (co-defendants Shirley Rivera, Joel Guzman, and Edgardo Diaz), and various individuals to whom he sold large, wholesale quantities of cocaine and heroin (Marcos Rivas in Pennsylvania and Banger Vergara in Massachusetts), but did not gather evidence as to the defendant's retail customers in Bridgeport. *See* PSR ¶ 12; JA53.

### **3. The delivery of drugs from Puerto Rico to Massachusetts and Connecticut**

Various individuals in Puerto Rico, including co-defendant Rondon-Feliciano, supplied the defendant and Soto-Solivan with quantities of cocaine and heroin. Initial intercepted communications indicated that the narcotics were flown into the country, but they did not reveal the exact method of transport. *See* PSR ¶ 13; JA53.

In May 2006, however, intercepted communications revealed that the suppliers were using the Express Mail service provided by the United States Postal Service to transport the narcotics. Based on these communications, DEA special agents and inspectors with the United States

Postal Service were able to intercept, search and seize two packages. One of the packages was sent by Feliciano to Soto-Solivan to the name "Angel Santiago" and at the address "25B Pleasant View, Fall River, Massachusetts." That package contained approximately two kilograms of powder cocaine and 250 grams of a cutting agent for cocaine. One of the suspected kilograms of cocaine was imprinted with the insignia "JJJ," and the other was imprinted with the insignia "R2." The other package was sent by an unidentified individual in Puerto Rico to Guzman at 19 Seeley Street, Bridgeport, Connecticut. That package was intercepted on June 15, 2006 and was found to contain approximately two kilograms of cocaine. Both kilograms appeared to be imprinted with the insignia "LUX." The kilograms of cocaine sent to Soto-Solivan in Fall River on June 1, 2006 had a purity of 90%, and the kilograms of cocaine sent to this defendant in Bridgeport on June 15, 2006 had a purity of 78%. Based on the high purity of the cocaine and the insignia imprinted on the kilograms, it appeared that the cocaine was shipped from a source country, through Puerto Rico, to Massachusetts and Connecticut. *See* PSR ¶ 13; JA53-JA54.

Using information contained on both seized packages, the United States Postal Service was able to identify other, similar packages that had been sent to Soto-Solivan and the defendant in

Fall River and Bridgeport from February 2006 through June 2006. Specifically, on February 9, 2006, April 4, 2006, and May 3, 2006, packages weighing 1 pound 9 ounces, 4 pounds 5 ounces, and 3 pounds 7 ounces, respectively, were sent from Bayamon, Puerto Rico to “Luis Soto” at 275 County Street, Apartment 3, in Fall River. Physical surveillance confirmed that Soto-Solivan lived at the 275 County Street address. Signature cards for those deliveries showed that Luis Soto signed for the packages. *See* PSR ¶ 15; JA54-JA55.

On February 21, 2006, April 20, 2006, May 10, 2006, and May 31, 2006, packages weighing 3 pounds 11 ounces, 5 pounds 11 ounces, 4 pounds 4 ounces, and just over 6 pounds, respectively, were sent from Bayamon and Toa Baja Puerto Rico, to various individuals, including “Angel Santiago” and “Felix Martinez” at 7D Pleasant View, Fall River. Signature cards for those deliveries showed that “Felix Martinez,” “W Torres” and a “Windy Tavares” signed for some of those deliveries. JA55.

On March 9, 2006 and April 24, 2006, packages weighing 6 pounds 2 ounces, and 6 pounds 8 ounces, respectively, were sent from Bayamon, Puerto Rico to Jose Santiago at 25B Pleasant View, Fall River, Massachusetts. Signature cards for those deliveries showed that “Jose Santiago” signed for those packages. JA55.

On March 14, 2006, April 6, 2006 and May 10, 2006, packages weighing 3 pounds 9 ounces, 3 pounds 15 ounces and 5 pounds 6 ounces, respectively, were sent from Puerto Rico to 19 Seeley Street, Bridgeport, Connecticut. The first package was sent to a “J. Lopez,” and the second and third packages were (like the June 15th package) were sent to a “Noel Lopez.” *See* PSR ¶ 16; JA55.

On April 6, 2006 and June 6, 2006, packages weighing 5 pounds 7 ounces, and 3 pounds 11 ounces, respectively, were sent from Puerto Rico to 355 Chamberlain Avenue, Bridgeport, Connecticut. Both packages were sent to “Sheila Rivera,” the defendant’s girlfriend, but Sheila’s sister, Jennifer Rivera, signed for them. *See* PSR ¶ 16; JA55-JA56.

Finally, on March 24, 2006 and April 12, 2006, packages were sent to Sheila Rivera at 117 Holly Street, which was the defendant’s previous address. Sheila signed for the March 24th package and subsequently confirmed that, at that time, she knew that the package contained narcotics. The signature line for the April 12, 2006 package, which weighed 4 pounds 7 ounces, was illegible. *See* PSR ¶ 16; JA56.

One pound is equivalent to approximately 500 grams. The June 1, 2006 package, which contained approximately 2 kilograms of cocaine and 250 grams of a cutting agent commonly used for cocaine, weighed just over six pounds. The

June 15, 2006 intercepted package containing the two kilograms of cocaine weighed over five pounds. *See* PSR ¶ 13; JA56.

#### **4. The defendant's arrest**

The defendant was arrested on June 20, 2006. At the time of his arrest, a federal search warrant was executed at his residence at 355 Chamberlain Avenue, in Bridgeport. The execution of that warrant revealed approximately \$56,000 in cash in the defendant's bedroom, all of which was forfeited as drug proceeds. JA56.

#### **B. Guilty plea**

The defendant pleaded guilty to Count Two of the Indictment on November 15, 2007. JA36. At the time of the guilty plea, the defendant entered into a written plea agreement. JA25. In connection with the guilty plea, the government agreed not to file a second offender notice under 21 U.S.C. § 851, which would have doubled the ten-year mandatory minimum term applicable to the defendant's count of conviction. JA26. The defendant agreed to forfeit \$55,980 in United States currency and a tan Ford Excursion. JA26. Although the agreement contained a detailed guideline stipulation, the parties crossed out that stipulation at the time of the guilty plea. JA28-JA29. In addition, the parties both reserved their respective appeal rights. JA29. The government agreed to move to dismiss Counts One, Three and Eight of the Indictment because

the conduct underlying those counts was taken into account in the written factual stipulation entered into by the parties. JA32.

This factual stipulation provided as follows:

From in or about January, 2006 through in or about June 20, 2006, the defendant conspired together with others, including, co-defendants Luis Joel Soto-Solivan, Carmelo Rondon-Feliciano, a.k.a. "Panzon," Shirley Rivera, Joel Guzman, Marcos Rivas, a.k.a. "El Negro," Aurea Casiano, Edgardo Diaz, a.k.a. "Galdy," and Banger Vergara, a.k.a. "Valdil," to possess with the intent to distribute, and also to distribute, various quantities of powder cocaine. During this same time period, the defendant also conspired with others, including Luis Joel Soto-Solivan and Carmelo Rondon-Feliciano, to possess with the intent to distribute and to distribute one hundred grams or more of heroin.

During this time period, this defendant, Domingo Guzman, a.k.a. "Mingo," purchased quantities of cocaine and heroin from various suppliers from Puerto Rico, including co-defendant Carmelo Rondon-Feliciano. The defendant operated a drug trafficking operation based in Bridgeport, Connecticut and supplied narcotics to various distributors in Connecticut, Massa-

chusetts, New Hampshire, and Pennsylvania. Specifically, he supplied quantities of narcotics for redistribution to various individuals known and unknown, some of whom are named as defendants in the Indictment, including Banger Vergara in Holyoke, Massachusetts, Marcos Rivas in Pennsylvania, Luis Joel Soto-Solivan in Fall River, Massachusetts, and Joel Guzman in Bridgeport, Connecticut. As to Joel Guzman, who is the defendant's cousin, the defendant regularly supplied him with quantities of powder cocaine, which Joel Guzman then redistributed to customers in the Bridgeport area. In addition, the defendant advised Joel Guzman that he was receiving kilogram quantities of powder cocaine from Puerto Rico. As to co-defendant Shirley Rivera, she helped the defendant operate his drug trafficking enterprise by knowingly collecting drug proceeds for him on a regular basis from his various customers, including Luis Joel Soto-Solivan. As to co-defendant Edgardo Diaz, he helped the defendant in the daily operation of his drug trafficking enterprise by maintaining a stash house for the defendant at 19 Seeley Street in Bridgeport. On March 28, 2006, the defendant sold approximately three ounces of cocaine base to a DEA cooperating witness in exchange for \$2250 in pre-recorded DEA funds.

One method that Carmelo Rondon-Feliciano and other suppliers in Puerto Rico used to transport controlled substances for re-distribution from Puerto Rico to the continental United States was to send the controlled substances using the Express Mail service provided by the United States Postal Service. From February, 2006 through June 20, 2006, Carmelo Rondon-Feliciano and other suppliers in Puerto Rico sent numerous Express Mail packages containing controlled substances to Luis Joel Soto-Solivan at three different addresses in Fall River, Massachusetts, and to this defendant, at different addresses in Bridgeport, Connecticut. Specifically, from February, 2006 through June, 2006, the defendant received approximately 19 packages of narcotics from Puerto Rico at 19 Seeley Street and 355 Chamberlain Avenue, both in Bridgeport, Connecticut.

On June 1, 2006 and June 15, 2006, law enforcement officers with the Drug Enforcement Administration and the United States Postal Inspection Service intercepted and seized two of these Express mail packages. The June 1, 2006 package was sent to Luis Joel Soto-Solivan at 25B Pleasant View, Fall River, Massachusetts, and the June 15, 2006 package was sent to

this defendant at 19 Seeley Street, Bridgeport, Connecticut. The June 1, 2006 package contained two separately-wrapped kilograms of cocaine, and approximately 250 grams of a non-narcotic, cutting agent commonly used as a diluent with cocaine. The June 15, 2006 package contained two separately-wrapped kilograms of cocaine.

JA34-JA35.

### **C. The Pre-Sentence Report**

The Pre-Sentence Report (“PSR”) found that the base offense level, under Chapter Two of the Sentencing Guidelines, was 34 by virtue of the quantity of powder cocaine and heroin attributable to the defendant’s conduct. *See* PSR ¶ 24. The PSR also added four levels to his base offense level because it found that he was a leader of criminal activity involving five or more participants. *See* PSR ¶ 26. After a three-level reduction for acceptance of responsibility the PSR found that the defendant’s adjusted offense level was 35. *See* PSR ¶¶ 30-31. The PSR also concluded that the defendant had accumulated seven criminal history points by virtue of his prior convictions, two criminal history points because he was on state probation at the time of this offense and one criminal history point because he committed the instant offense within two years of being released from incarceration. *See* PSR ¶ 39. At a Criminal History Category V, the re-

sulting guideline incarceration range was 262-327 months. *See* PSR ¶ 75.

A third addendum to the PSR addressed the “disagreement between the parties with respect to the drug quantity involved in the defendant’s relevant and readily foreseeable conduct.” PSR, Third Addendum. In that addendum, the probation officer listed each of the packages sent from Puerto Rico to Bridgeport and from Puerto Rico to Massachusetts. It also summarized the facts underlying the various controlled purchases involving the defendant. Finally, it reviewed various intercepted telephone calls which revealed the quantities of cocaine and heroin being purchased and distributed by the defendant. The addendum concluded that, based on the packages sent from Puerto Rico alone, the reasonably foreseeable quantity of cocaine attributable to the defendant’s conduct was 33.7 kilograms. *See* PSR, Third Addendum.

#### **D. The first sentencing hearing**

On October 8, 2008, the district court conducted the first sentencing hearing in this case. JA90. At the start of the sentencing hearing, the district court summarized the various disputed issues in the PSR and its preliminary resolution of those issues so that the parties could address their comments accordingly. JA90-JA96.

First, the court gave “Mr. Guzman the benefit of the doubt and drop[ped] him to a Category

IV.” JA90. Second, the court detailed the evidence as to quantity and concluded that “if he’s not in the 15 to 50 kilogram range, but is more properly put in the 5 to 15, he’s very much close to 15 than he is to 5, which would suggest that maybe the appropriate thing to do is to . . . give him the benefit of the doubt . . . .” JA90. Third, the court imposed a four-level role enhancement. JA91-JA92. The court then commented that the defendant was “a drug dealer of very considerable significance, and therefore, if I drop him down to a Category 33, and a Level History IV, the range of 188 to 235 months would prompt me to use the higher end of that range . . . .” JA90-JA91.

In ultimately imposing the 220 month incarceration term, the court reviewed and denied the defendant’s various requests for downward departures. JA91. The court explained that it was troubled by the fact that the defendant’s prior two drug felony convictions did not encourage him to “comport yourself with what the community expects.” JA98. It also stated that the sentence here would have a real, negative impact on the defendant’s children and that the defendant had “failed in [his] responsibilities due them.” JA98.

The court went on to analyze the factors under 18 U.S.C. § 3553(a) and explain the justification for its sentencing decision. It stated:

But on the other hand, obliged, as I am, to consider the guidelines, in order to fulfill the requirements of 3553(a), to reflect the seriousness of the offense, to provide a deterrence to you, which your involvement with the courts in the past has not prompted to a significant degree at all, to insulate the community from further criminal activity, which I would hope wouldn't be necessary, but I can't be assured of that, from what has happened in the past . . .

I do think that given the range of 188 to 235 months, having in mind that if you legitimately should be regarded as in the 5 to 15 kilogram category, an upper level of the range is appropriate because of your prior history, and because of the fact that more likely, it was 15 kilograms that were involved, than it was five.

So therefore, my sense of what is fair and appropriate to accomplish those purposes, and reasonable under the circumstance[s], having in mind that you should get . . . credit for the two years and four months that you have been detained, . . . . Giving consideration to the fact that you have entered in a plea, it is a judgment and the sentence of the Court that the defendant will be committed to the custody of the Attorney General for 220 months,

which represents some credit towards the upper level of the guideline range but, at the same time, closer to the upper level of the range than the lower end. All is reflective of the factual situation, as I've discussed it.

JA99.

### **E. The direct appeal**

On direct appeal, the defendant claimed, among other things, that the district court's factual findings with respect to the defendant's role in the offense were not sufficiently specific so as to allow for meaningful appellate review. JA113; *United States v. Ware*, 577 F.3d 442, 452 (2d Cir. 2009) ("Before imposing a role adjustment, the sentencing court must make specific findings as to why a particular subsection of § 3B1.1 adjustment applies."); *United States v. Molina*, 356 F.3d 269, 274 (2d Cir. 2004) ("[A] lack of specificity devoid of any statement of reasons does not permit meaningful appellate review of the enhancement the district court imposed.").

In response, the government filed an opposition brief claiming that the plain error standard of review applied, that the district court's factual findings were sufficiently specific, and that any error did not affect the defendant's substantial rights. JA113-JA114. In particular, the government maintained, that, even if the sentencing court erred in imposing a four-level role en-

hancement, a remand was not required because the court would have imposed the same sentence in any event. JA114. It argued that the district court “had in mind its targeted sentence when it resolved these issues by saying that it thought a range of 188-235 was reasonable and reflected the § 3553(a) factors.” JA114.

Prior to oral argument, the parties filed a stipulation in which they agreed that a remand for a full re-sentencing hearing was appropriate. JA105. Because the district court’s findings “on role, quantity and criminal history were intertwined and specifically tied to achieving [the] targeted range” of 188-235 months, the parties maintained that a full re-sentencing was necessary to allow them to address “all of the disputed factual issues, without limitation to any one issue[.]” JA114. Moreover, the parties argued that a full re-sentencing would allow the district court “to make more specific factual findings on these issues so as to allow for more meaningful appellate review.” JA114. The parties made clear that “this remand will not limit the factual issues which may be considered by the district court” and that they “will be able to address any and all disputed factual issues.” JA105.

On May 12, 2011, this Court granted the government’s motion for remand. JA119-JA120. The Court agreed that “remand is warranted because the district court did not make sufficient factual findings to support its application of a

four-level leadership enhancement . . . .” JA120 (citing *Ware* and *Molina*). As to the resentencing, the Court explained, “[T]he district court is free to reconsider any disputed factual issues it deems appropriate, and is not limited to reconsideration of Guzman’s role in the offense.” JA120.

#### **F. The second sentencing**

Both parties submitted additional sentencing memoranda in advance of the second sentencing hearing. The defendant filed a memorandum asking that the court conclude that the guideline range was 151-188 months’ incarceration, based on an adjusted offense level of 32 and a Criminal History Category III. JA121.

As to quantity, the defendant relied on the district court’s prior finding that the amount of cocaine involved in the offense was between five and fifteen kilograms. JA130. He argued that the court should adhere to that ruling and, although he would later explicitly abandon the argument, he went so far as to insist that the court was bound by its earlier ruling under the law of the case doctrine, because “there has been no intervening ruling on the issue by the Second Circuit.” JA131.

As to role, the defendant maintained that he was not a supervisor or a leader and that no role enhancement was appropriate. JA135. He claimed that “the record does not show any hier-

archy in [the defendant's] operation, recruitment of subordinates, or sharing in the profits among the co-conspirators." JA135.

As to criminal history, the defendant maintained that four of his ten criminal history points should not count, so that he should only fall into Criminal History Category III. JA130.

Finally, the defendant argued that he should receive a sentence below the 151-188 month range based on his personal characteristics. JA140-JA141.

The government asked the district court to impose the same 220 month sentence it had previously imposed. JA179. The government argued:

The Court had very specific reasons for deciding on that sentence, and those reasons were specifically tied to the § 3553(a) factors. This case has not been remanded because the Court's original sentence was improper or unreasonable. It was remanded to provide the Court with the opportunity to make more specific findings as to role and, if necessary, to reconsider any other relevant factual findings. In the Government's view, the Court gave substantial consideration to all of the defendant's arguments for a lower sentence and, in a well-reasoned decision, explained its justification for concluding that a sentence

of 220 months' incarceration represented a proper balancing of the § 3553(a) factors and was, indeed, a sentence that was sufficient, but not greater than necessary, to serve the purposes of a criminal sanction.

JA179.

As to quantity, the government maintained that the factual statements contained in the PSR, along with the factual stipulation attached to the plea agreement, established a foreseeable quantity of at least fifteen kilograms of cocaine. JA182. In response to the defendant's argument regarding the law of the case doctrine, the government maintained that the district court had previously found that the defendant was likely responsible for more than fifteen kilograms of powder cocaine, so that the doctrine should not bind the court to a lower quantity. JA183. The government also pointed out that, if the doctrine prohibited reconsideration of the quantity finding, "the purpose of the remand itself would be undermined." JA183. In agreeing to a remand, the parties specifically stated that the court would be able to revisit all disputed factual issues and would not be bound by prior rulings on these issues. JA183.

As to role, the government supported the PSR's conclusion that a four-level enhancement was appropriate. JA185. It summarized the pertinent facts as follows:

To operate his drug enterprise, the defendant arranged for narcotics suppliers in Puerto Rico to send him narcotics through the United States mail. To facilitate his receipt of these packages, the defendant enlisted the help of various co-defendants and uncharged individuals, including his wife, Sheila Rivera, and her sister, Jennifer Rivera, both of whom were listed as the addressees on packages of cocaine sent from Puerto Rico, and both of whom agreed to sign for those packages to facilitate the defendant's receipt of the narcotics. He received 19 such packages during the course of the conspiracy, and this was the way in which he obtained the vast quantities of cocaine and heroin that he later resold. In addition, the defendant used co-defendant Edgardo Diaz to run errands for him and help manage the stash house at 19 Seeley Street, and relied on both Aurea Casiano and Moises Figueroa to transport drug proceeds back to his supplier back in Puerto Rico. He also used his wife Sheila to collect drug proceeds from his local Bridgeport customers. Finally, although it is unclear what role Joel Guzman played in the conspiracy, he certainly seemed to be subservient to this defendant, and, on June 15, 2006, after the Government seized one of the Express Mail packages, he appeared to agree, at

the defendant's demand, to return cocaine to the defendant so that he could sell it to a different customer.

JA186 (page 28 of the government's supplemental sentencing memorandum, which was subsequently adopted as the district court's factual findings).

As to the criminal history category, the government noted that the parties were in agreement that the defendant accumulated four points based on his prior Connecticut convictions for sale of narcotics, second degree larceny and operating a motor vehicle without a license, and two additional points for committing the offense while on probation. JA187. The parties also agreed that, under the revised guidelines, the defendant no longer received a criminal history point for committing the offense within two years of having been released from prison. JA187. And, although there was a disagreement regarding the PSR's conclusion that the defendant should receive three criminal history points from his 1997 narcotics distribution conviction out of Puerto Rico, the government viewed this disagreement as immaterial because the defendant only challenged the PSR's factual statement that he served five years in jail stemming from the conviction, and did not challenge the conviction itself. JA187. The government pointed out that the amount of jail time served by the defendant on this conviction was immaterial be-

cause he would still receive at least one point for it, so that he would fall into Criminal History Category IV with seven points. JA187.

The re-sentencing occurred on December 1, 2011. At the start of the hearing, the court questioned the parties about the mandate and, specifically, as to whether it required only a re-consideration of the role issue or a full re-sentencing. JA198. In the court's view, if the only dispute on appeal related to the sufficiency of the factual findings on the role enhancement, the remand should only be for the purpose of addressing those findings. JA199. Both parties were in agreement that the mandate contemplated a full re-sentencing in which all disputed issues could be addressed again, including the issues of role, quantity and criminal history. JA198-JA200. As defense counsel stated, "I am constrained to agree with [the government] that under the terms of the remand, we are here for a full re-sentencing." JA200. He further agreed that "what the Court is to do here is to determine the quantity on which the sentence should be based[] in calculating the guidelines, that the criminal history should be revisited, and that the role in the offense . . . should be redetermined." JA202. The district court remained skeptical that the mandate was so broad, but reluctantly agreed to go forward with a full re-sentencing hearing. JA202.

At that point, the court confirmed that it had received and reviewed the PSR, as well as the parties' supplemental sentencing memoranda, which included a reply memorandum filed by the defendant which argued that the court, in imposing sentence, should not treat him similarly as his co-defendant Soto-Solivan, who received a 262-month incarceration term. JA202. In referencing the reply memorandum, the court assured the defendant that, other than factoring in how the seriousness of the offense was reflected in the "sentence imposed on Mr. Soto-Solivan, . . . the sentence imposed on him was of no significance to me in the determination of . . . the sentence imposed on Mr. Guzman. . . . I will impose a sentence reflective of the seriousness of the misconduct involved in Mr. Guzman's case by virtue of his plea and the plea agreement, but beyond that, there's no interrelationship at all." JA202-JA203.

The court then addressed the defendant, confirmed that he had read the PSR, and asked if he had any objections to the factual statements contained therein. JA203. The defendant indicated that, other than the issue of quantity, he had no objections to the facts contained in the PSR and did not think any additional information needed to be added to it. JA203.

The court addressed the government with the same questions, and the government suggested two changes. First, the government asked that

the recency point from the criminal history section be removed (PSR ¶ 39). JA203. Second, the government asked that the 1997 conviction out of Puerto Rico for sale of narcotics, which had initially received three points in the PSR, but then received no points at the first sentencing, receive at least one point (PSR ¶35). JA204. The defendant agreed to both changes. As a result, he had seven criminal history points and fell into Criminal History Category IV. JA204. The government then indicated that the only two remaining disputed issues related to quantity (PSR ¶ 24) and role (PSR ¶ 26).<sup>1</sup> JA205.

The court then heard from the parties on both of these issues. The government argued that the quantity of fifteen to fifty kilograms of cocaine was established most directly through the factual stipulation entered into by the parties at the time of the guilty plea, in which the parties “set forth the number of packages received by this drug trafficking organization, which we estimate to be 19.” JA205. Based primarily on the seizure of two additional packages from Puerto Rico, each of which contained two kilograms of and cocaine, and intercepted wiretap calls, each of

---

<sup>1</sup> Although the government asked the court several times to adopt the factual findings contained in the PSR, except for the paragraphs addressing these two disputed issues, the court indicated it would “deal with that motion as soon as we conclude the hearing.” JA205.

these nineteen packages contained one or two kilograms of cocaine. JA205. “So in the Government’s view, the 15 to 50 is most directly satisfied through that evidence about the packages, which is part of the stipulation.” JA205. Although the defendant tried to suggest that some of these packages did not contain narcotics, the government reminded the defendant and the court that, at the time of the guilty plea, the defendant had stipulated that he had received approximately 19 packages containing narcotics. JA208.

The court concluded that, based on the factual stipulation, the quantity of cocaine attributable to the defendant was greater than 15 kilograms:

Now, whether it’s 18 or 16, I don’t know, and I’m not going to find a specific amount attributable to him based upon that approximately 19 figure, but what I am predisposed to agreeing with [the government], is that by agreeing that what he got was approximately – or what was received in Bridgeport, which was approximately 19, it was within the close range of 19, sufficient to justify a finding that it was more than 15, and therefore justify a finding that what was involved was between 15 and 50.

JA209, JA213 (“It might have been 16, might have been 20.”).<sup>2</sup>

At no point during the hearing did the defendant suggest that the court was bound by its prior quantity finding of five to fifteen kilograms. JA212-JA214. Instead, in objecting to this finding, defense counsel stated, “I also agree with [the government] to the extent that he alluded to what the court had done the last time around, three years ago, which is to say, you know, maybe the best way to split this baby is to say maybe it was 5 to 15, maybe it was 15 to 50, but give him the benefit of the doubt, call it 5 to 15, and he’s at the higher end of that range. I don’t think that’s an unreasonable way to do it, either.” JA213.

---

<sup>2</sup> As the parties continued to argue the quantity issue, the government pointed out that the equivalent of at least another three kilograms of powder cocaine was attributable to the defendant as a result of his participation in controlled purchases of large quantities of heroin and crack cocaine. JA210. The government also reminded the court that Soto-Solivan and the defendant were working together and, therefore, should be held responsible for the quantities of cocaine and heroin possessed and sold by both. JA210-JA211. Finally, the government relied on the fact that agents seized four kilograms of cocaine in June 2006 and \$56,000 in cash from the defendant’s residence to argue that the total quantity of cocaine attributable to the defendant exceeded 15 kilograms. JA212.

Next the court addressed the defendant's argument that his criminal history category of IV substantially overstated the seriousness of his criminal past. After hearing argument from both sides, the court refused to depart on this basis. In particular, the court held, "Well, I'm going to find that the four convictions and the disposition of them is not such that I can say that his criminal history is totally without foundation, as far as the criteria that underlies the Guidelines calculation of his criminal history." JA216.

Finally, the court confronted the role enhancement. The government characterized the issue as centering, not around the number of participants, which was clearly in excess of five, but rather on the question of whether the defendant was an organizer or leader, deserving of a four-level enhancement, or a manager or supervisor, warranting only a three-level enhancement. JA216. In explaining the defendant's supervisory role, the government listed several examples. First, the defendant asked and directed people to sign for packages of narcotics sent from Puerto Rico. JA216. Second, he directed another individual to manage his stash house and run errands for him. JA216. Third, he had his girlfriend collect drug proceeds for him. JA216. Fourth, he used other people to pick up and deliver the drug proceeds to his source of supply in Puerto Rico. JA216. "So the-

se are the sort of general areas. He had somebody supervise his stash house. He had people signing for his packages, and he had people paying for the drugs he received, and collecting money from his customers.” JA216. The evidence established that the defendant was the leader of the operation in Bridgeport. JA216.

In questioning the defendant about the issue, the court first confirmed that there was no dispute that the number of individuals involved in the conspiracy was greater than five. JA217. It then ruled that, based on the facts set forth in the PSR regarding the organization and functioning of the conspiracy, the individuals involved who “had roles and performed and acted so as to further the purposes of the conspiracy, were actually subjected to the leadership of the [defendant]. . . . sufficient to bring them within . . . the full level of supervision that would justify” application of the four-level enhancement. JA217. Defense counsel “note[d]” his objection to this finding, but said no more. JA217.

But the government, having already agreed to a remand once because the factual findings on role were not sufficiently specific, stated, “I want to make sure if the defendant wants more specific findings on role, now would be the time to ask.” JA217. The court stated that it was relying on the factual findings contained in the PSR and that it did not “know what more can be said.” JA217. The government asked the court also to

adopt the factual statements contained in its sentencing memorandum regarding role. JA217. The government explained, “And the reason I’m asking for this is I just want to make sure – to me there’s the legal issue that the defendant certainly can challenge on appeal, but I just want to make sure that on the facts, we’re all on the same page as to what facts the Court is relying on, and I believe that those are the facts on page 28 of my sentencing memo.” JA217. The court agreed and adopted the factual statements contained on page 28 of the government’s sentencing memo, which are also set forth above. JA217.

At that point, defense counsel argued that the court had not given “a sufficient factual explanation for the four-level enhancement” and had failed to analyze the factors listed in the commentary of the guideline section that addressed aggravating role. JA218.

Before the court could respond, the government inquired, through the court, whether the defendant was, in fact, conceding that at least a three level enhancement was appropriate for role. JA218. The government explained:

[I]f the Court does a full four-level enhancement, the guideline range jumps to . . . 235 to 292 months. The Government has asked for a 220-month sentence, which is the sentence the Court originally imposed. If the Court imposes three-level

role enhancement, we're back to a level of 200 and, I believe 10 to 262 months, which clearly, 220 falls within. And so the reason I raise it is because we might be arguing over something that – it becomes moot or academic if the Court, at the end of the day, decides to abide by its original sentence.

JA218.

In response, the court attempted to clarify its ruling on the role enhancement:

Well, it seems to me that while Mr. Guzman's relationship to the people that were among the five or more that carried out various chores, that he did not have a direct supervisory relationship to their actual functions carried out by people that were subject to his role, but rather, it was a matter of arranging for the performance of the various aspects of the conspiracy that he undertook with respect to those who were subject to his supervision, but he, in effect, I find, arranged to have and perform work, chores, purposes in their work in relation to the functioning of the conspiracy, that suggested that he did not actually, on a day-to-day basis, supervise their function, but rather that he had a role in their coming to perform the conduct that they did, that furthered the purposes

of the conspiracy, and then he left them to their own – to themselves.

JA218.

The government then confirmed, and the court agreed, that the guideline range was 235-293 months' incarceration based on an adjusted offense level of 35 and a Criminal History Category IV. JA219. It asked the court to impose the same 220 months sentence it had previously imposed, and the defendant asked for a sentence below the range. JA219. Although the defendant did not ask for a specific term, he did reference his sentencing memorandum in which he had asked the court to lower the guideline range to 151 to 188 months. JA221. The defendant relied primarily on his efforts at post-arrest rehabilitation and presented the court with various certificates showing the courses and programs he had attended since his first sentencing in 2008. JA220.

The court imposed a 196-month sentence as a “reflection of the several things that [defense counsel] brought to my attention, the skills that [the defendant] has developed within a trade, his work program participation, his trade program participation, his education pursuit, his effort at rehabilitation, his completion of the 40-hour program, and his intent to pursue the matter with the 500-hour program when he is eligible . . . .” JA221-JA222.

On April 30, 2012, the Probation Office issued a fourth addendum to the PSR to reflect the factual findings that the district court made during the second sentencing hearing. According to this addendum, the court concluded that the defendant was involved in a conspiracy to distribute between fifteen and fifty kilograms of cocaine, resulting in a base offense level of 34; he was an organizer of a conspiracy involving five or more persons, resulting in a four-level role enhancement; and he had accumulated seven criminal history points, placing him in Criminal History Category IV. *See* PSR, Fourth Addendum. As a result, he faced a guideline range of 235 to 293 months. The court's 196-month sentence reflected a downward departure for the defendant's post-arrest rehabilitation. *See* PSR, Fourth Addendum.

### **Summary of Argument**

The defendant first claims that the district court erred in applying a four-level role enhancement both because it failed to make the requisite factual findings and because the enhancement itself was not warranted. A plain reading of the sentencing transcript, however, reveals that the district court specifically adopted the government's proposed facts regarding the role enhancement and, in doing so, certainly provided this Court with ample opportunity to review the reasoning behind the decision. Moreover, these factual findings establish that the de-

defendant had a leadership role within a conspiracy involving more than five people; the defendant operated a lucrative and extensive cocaine and heroin trafficking enterprise in Bridgeport and, used his girlfriend and her sister to sign for and receive packages containing kilograms of cocaine, used his girlfriend to collect drug proceeds from his customers, used another associate to manage one of the defendant's stash houses, used different individuals to transport drug proceeds to his supplier in Puerto Rico and ordered his own cousin to return cocaine to him after law enforcement officers had seized two kilograms of cocaine from the defendant. This conduct is certainly sufficient to establish by a preponderance of the evidence that a four-level enhancement is appropriate.

The defendant next claims that the district court violated the law of the case doctrine in making a factual finding as to quantity that was different from the finding that it made during the first sentencing. First and foremost, defense counsel expressly waived any claim that the district court was bound by its prior ruling when he advised the court that this Court's mandate contemplated a full re-sentencing to address all disputed issues, including quantity. Second, the law of the case doctrine has no application here, where this Court remanded the case for a full re-sentencing hearing with the express instruction that the district court would address all disputed

issues, including quantity. As a result, the district court was not bound by its previous sentencing on any disputed issue. Indeed, although the court decided during the first sentencing that a downward departure was not appropriate and imposed a sentence in the middle of the range, it changed its mind at the second sentencing hearing and departed downward to a term that was almost three years below the range.

Finally, the defendant claims that his 196-month sentence was substantively unreasonable. This sentence, which was 39 months below the guideline incarceration range and 24 months below the court's original sentence, primarily and appropriately reflected the seriousness of the offense conduct and the defendant's criminal history. The defendant had multiple prior drug felony convictions and was serving a term of state probation on a sale of narcotics conviction when he became the leader of a lucrative and extensive drug trafficking operation in Bridgeport that involved the importation and redistribution of kilogram quantities of powder cocaine and hundred gram quantities of heroin to customers throughout the Northeast.

## Argument

### **I. The district court properly applied a four-level enhancement based on the defendant's aggravated role in the offense.**

The defendant makes two claims with respect to the court's role enhancement. First, he claims, for the first time on appeal, that the court failed to set forth specific factual findings to justify the enhancement. Second, he claims that the court made an incorrect legal conclusion when it found that the facts put forth by the government, which were not disputed, justified the application of a four level role enhancement. Both of these claims lack merit.

#### **A. Governing law and standard of review**

Under U.S.S.G. § 3B1.1, a defendant may receive an upward adjustment in his adjusted offense level if he played an aggravated role in the offense. Where a defendant is "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive," the adjusted offense level increases by four levels. *See id.*, § 3B1.1(a). Where the defendant is "a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive," the adjusted offense level increases by three levels. *See id.*, § 3B1.1(b). Where the defendant is

“an organizer, leader, manager or supervisor in any criminal activity [involving more than one participant],” the adjusted offense level increases by two levels. *See id.*, § 3B1.1(c). “In assessing whether a criminal activity “involved five or more participants,” only knowing participants are included.” *United States v. Paccione*, 202 F.3d 622, 624 (2d Cir. 2000). “By contrast, in assessing whether a criminal activity is ‘otherwise extensive,’ unknowing participants in the scheme may be included as well.” *Id.*

In distinguishing between an organizer and a mere manager, the district court should consider “the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.” U.S.S.G. § 3B1.1, comment. (n.4). “Whether a defendant is considered a leader depends upon the degree of discretion exercised by him, the nature and degree of his participation in planning or organizing the offense, and the degree of control and authority exercised over the other members of the conspiracy.” *United States v. Beaulieu*, 959 F.2d 375, 379-80 (2d Cir. 1992). The government must prove by a preponderance of the evidence

that a defendant qualifies for a role enhancement. *See Molina*, 356 F.3d at 274.

“Before imposing a role adjustment, the sentencing court must make specific findings as to why a particular subsection of § 3B1.1 adjustment applies.” *Ware*, 577 F.3d at 442; *see also Molina*, 356 F.3d at 275. “A district court satisfies its obligation to make the requisite specific factual findings when it explicitly adopts the factual findings set forth in the presentence report.” *Molina*, 356 F.3d at 276. If there are disputed facts, the district court must make factual findings for appellate review. *See United States v. Thompson*, 76 F.3d 442, 456 (2d Cir. 1996). “[A] lack of specificity devoid of any statement of reasons does not permit meaningful appellate review of the enhancement the district court imposed.” *Molina*, 356 F.3d at 276 (faulting district court for granting two-level role enhancement with absolutely no explanation or discussion).

To the extent that the district court errs in not stating, with sufficient specificity, its reasons for the role enhancement, this Court must determine whether the error was harmless. *See Molina*, 356 F.3d at 277. Moreover, where a defendant fails to “object at the time to the lack of specificity in the district court’s factual findings, [this Court] review[s] this issue for plain error.” *Id.*; *see also Ware*, 577 F.3d at 452. Pursuant to Fed. R. Crim. P. 52(b), plain error review permits this Court to grant relief only where (1)

there is error, (2) the error is plain, (3) the error affects substantial rights, and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Williams*, 399 F.3d 450, 454 (2d Cir. 2005) (citing *United States v. Cotton*, 535 U.S. 625, 631-32 (2002), and *United States v. Olano*, 507 U.S. 725, 731-32 (1993)).

To “affect substantial rights,” an error must have been prejudicial and affected the outcome of the district court proceedings. *Olano*, 507 U.S. at 734. This language used in plain error review is the same as that used for harmless error review of preserved claims, with one important distinction: In plain error review, it is the defendant rather than the government who bears the burden of persuasion with respect to prejudice. *Id.*

This same prejudice standard applies in the sentencing context. In some cases, a “significant procedural error,” may require a remand to allow the district court to correct its mistake or explain its decision, *see United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008), but when this Court “identif[ies] procedural error in a sentence, [and] the record indicates clearly that ‘the district court would have imposed the same sentence’ in any event, the error may be deemed harmless, avoiding the need to vacate the sentence and to remand the case for resentencing.”

*United States v. Jass*, 569 F.3d 47, 68 (2d Cir. 2009) (quoting *Cavera*, 550 F.3d at 197).

## **B. Discussion**

### **1. The district court did not commit plain error in failing to set forth sufficiently specific factual findings on role.**

The defendant claims, like he did in the first appeal, that the district court did not set out specific factual findings to support its four-level role enhancement. He did not raise this claim below and, therefore, must show plain error to achieve a remand. He cannot do so.

There was no error, and, to the extent that there was error, it was not plain. After the district court first ruled that a four-level role enhancement was warranted by the facts set forth in the PSR, the government (not the defendant) asked that the court make more specific factual findings so that the record was clear for review. In particular, the government, having already agreed to a remand once because the factual findings on role were not sufficiently specific, stated, “I want to make sure if the defendant wants more specific findings on role, now would be the time to ask.” JA217. But the defendant remained silent.

The court then clarified that it was relying on the factual findings contained in the PSR and

that it did not “know what more can be said.” JA217. Still, the government asked the court also to adopt the factual statements contained in its sentencing memorandum regarding role. The government explained, “And the reason I’m asking for this is I just want to make sure – to me there’s the legal issue that the defendant certainly can challenge on appeal, but I just want to make sure that on the facts, we’re all on the same page as to what facts the Court is relying on, and I believe that those are the facts on page 28 of my sentencing memo.” JA217. The court agreed and adopted the factual statements contained on page 28 of the government’s sentencing memo. JA217. So there can be no confusion as to what facts the district court relied on in applying the enhancement. *See Molina*, 356 F.3d at 276 (“A district court satisfies its obligation to make the requisite specific factual findings when it explicitly adopts the factual findings set forth in the presentence report.”).

Even if the defendant can establish plain error by virtue of the court’s failure to be specific enough on the role issue, he cannot show how this error affected his “substantial rights” or “the fairness, integrity, or public reputation of judicial proceedings.” *Molina*, 356 F.3d at 277 (internal quotation marks omitted). As this Court has explained, “[i]f the defendant does not object and there is evidence to sustain the enhancement, the error is not reversible under the plain

error standard.” *Id.* (internal quotation marks omitted). In this case, the defendant did not object to the extent of the court’s factual findings, and as set forth below, the government presented ample evidence to justify the enhancement.

**2. The district court’s decision to apply a four-level role enhancement was proper.**

The role enhancement here was appropriate because, based on the undisputed facts, which were contained in the PSR, the written stipulation attached to the plea agreement, and the government’s supplemental sentencing memorandum (which the district court adopted), the defendant was the leader of an extensive drug enterprise operating in Bridgeport, Connecticut. According to the facts adopted by the district court:

To operate his drug enterprise, the defendant arranged for narcotics suppliers in Puerto Rico to send him narcotics through the United States mail. To facilitate his receipt of these packages, the defendant enlisted the help of various co-defendants and uncharged individuals, including his wife, Sheila Rivera, and her sister, Jennifer Rivera, both of whom were listed as the addressees on packages of cocaine sent from Puerto Rico, and both of whom agreed to sign for those packages to facili-

tate the defendant's receipt of the narcotics. He received 19 such packages during the course of the conspiracy, and this was the way in which he obtained the vast quantities of cocaine and heroin that he later resold. In addition, the defendant used co-defendant Edgardo Diaz to run errands for him and help manage the stash house at 19 Seeley Street, and relied on both Aurea Casiano and Moises Figueroa to transport drug proceeds back to his supplier back in Puerto Rico. He also used his wife Sheila to collect drug proceeds from his local Bridgeport customers. Finally, although it is unclear what role Joel Guzman played in the conspiracy, he certainly seemed to be subservient to this defendant, and, on June 15, 2006, after the Government seized one of the Express Mail packages, he appeared to agree, at the defendant's demand, to return cocaine to the defendant so that he could sell it to a different customer.

JA186 (page 28 of the government's supplemental sentencing memorandum).

There is no dispute that the defendant's conspiracy involved more than five participants. The defendant conceded this fact below and does not challenge it on appeal. As a result, the only issue is whether the defendant was an organizer/leader, warranting a four-level increase, or

simply a manager/supervisor, warranting a three-level increase.<sup>3</sup>

Whether a defendant is considered an organizer or a manager depends on, *inter alia*, the degree of control he exercises over the day-to-day affairs of the operation, his authority over others, the extent of his discretion and participation, his decision-making power and whether he recruited accomplices. See U.S.S.G. § 3B1.1, comment. (n.4). Here, the defendant controlled the day-to-day affairs of his operation; he had authority over others; he exercised decision-making power within his business; and he recruited accomplices to help him. As stated above, the defendant was in charge of a lucrative narcotics distribution enterprise which operated out of his home in Bridgeport and distributed massive quantities of narcotics in the Northeast. To conduct his business, he treated others as subservient and directed them to perform key tasks, such as collecting drug proceeds from his customers (Rivera), maintaining a location to store narcotics (Diaz), receiving packages of narcotics

---

<sup>3</sup> Although the defendant now argues that only a two-level role enhancement was appropriate, see Def.'s Br. at 29 and 44, he has always agreed that the conspiracy involved more than five participants and has always maintained that the issue for the district court to resolve was whether the defendant's role was more akin to a leader/organizer or a manager/supervisor.

from Puerto Rico (Rivera and her sister), and delivering drug proceeds to his source in Puerto Rico (Figueroa and Casiano). Thus, the defendant was properly characterized as a leader. *See, e.g., United States v. Batista*, No. 10-3284(L), slip op. at 17-18, 684 F.3d 333 (2d Cir. June 29, 2012) (holding that four-level enhancement was appropriate for narcotics supplier who, although he “did not did not direct the activities of the distribution ring by issuing orders to its lower-ranked members,” he did “influence” management decisions and affect “the distribution ring as a whole.”).

Even if this Court concludes, as a matter of law, that a four-level role enhancement was not warranted, a remand is not required because the record reflects that the court would have imposed the same sentence in any event. *See Batista*, 684 F.3d 333, slip. op. at 18-19; *Jass*, 569 F.3d at 68. In this case, there is no dispute that, at a minimum, a three-level role enhancement was appropriate, which would have resulted in a guideline range of 210-262 months, instead of 235-292 months. In the face of several disputed issues, including quantity, role and criminal history, the district court clearly had in mind its targeted sentence when it determined that 196 months reflected a proper balancing of the § 3553(a) factors. Thus, even if the district court erred in its application of the role enhancement, this error was harmless in light of the court’s

other comments and findings during the sentencing hearing about its weighing of the § 3553(a) factors which show that it contemplated imposing an incarceration term of 196 months. Indeed, at the first sentencing hearing, the court repeatedly expressed its view that a guideline range of 188 to 235 months reflected an appropriate balancing of the § 3553(a) factors. JA90-JA91, JA93, JA99. Both sentences fell within this range, revealing how relatively insignificant to the court the difference was between a three-level and a four-level role enhancement.

**II. The district court did not violate the “law of the case doctrine” by attributing a different quantity of narcotics to the defendant on remand.**

The defendant argues that the district court was bound by its ruling, at the first sentencing, that the attributable quantity of cocaine, for purposes of the guideline calculation, was five to fifteen kilograms. *See* Def.’s Br. at 40. He claims that there was no intervening ruling on the issue by this Court, nor was there a change in controlling law or the presentation of new evidence. *See id.* at 41. Although the defendant did not raise this issue at all at the sentencing proceeding itself, he did make the argument in his supplemental sentencing memorandum filed in anticipation of the re-sentencing. JA131.

## A. Governing law and standard of review

### 1. Law of the case doctrine

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

“The second and more flexible branch [of this doctrine] is implicated when a court reconsiders its own ruling on an issue in the absence of an intervening ruling on the issue by a higher court.” *Quintieri*, 306 F.3d at 1225. “It holds that when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case, unless cogent and compelling reasons militate otherwise.” *Id.* (internal quotation marks omitted). “The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.” *United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000) (citations and internal quotation marks omit-

ted). “[T]his branch of the doctrine, while it informs the court’s discretion, does not limit the tribunal’s power.” *United States v. Uccio*, 940 F.2d 753, 758 (2d Cir. 1991) (internal quotation marks omitted). A court may therefore revisit an earlier, unreviewed, decision of its own so long as it has a valid reason for doing so, and provides the opposing party “sufficient notice and an opportunity to be heard.” *Uccio*, 940 F.2d at 759.

Still, “the law of the case doctrine does not rigidly bind a court to its former decisions, but is only addressed to its good sense.” *United States v. Brown*, 623 F.3d 104, 111 (2d Cir. 2010) (internal quotation marks omitted). “[L]aw of the case does not limit the tribunal’s power.” *Id.* (internal quotation marks omitted).

## 2. Waiver

A defendant may – through his words, his conduct, or by operation of law – waive a claim, so that this Court will altogether decline to adjudicate that claim of error on appeal. *See Olano*, 507 U.S. at 733; *United States v. Polouizzi*, 564 F.3d 142, 153 (2d Cir. 2009); *United States v. Hertular*, 562 F.3d 433, 444 (2d Cir. 2009); *United States v. Quinones*, 511 F.3d 289, 320-21 (2d Cir. 2007); *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995). “Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is

the intentional relinquishment or abandonment of a known right.” *Olano*, 507 U.S. at 733 (internal quotation marks omitted).

## **B. Discussion**

The defendant has explicitly waived this argument. The stipulation for a remand stated, “The parties further agree that the district court’s resolution of the disputed role enhancement issue was intertwined with its resolution of other disputed factual issues, including the factual issue of what quantity of narcotics was attributable to the defendant’s offense conduct.” JA105. As a result, the parties sought, and this Court granted, a remand for a full re-sentencing in which all disputed factual issues could be addressed anew by the district court. In fact, the very purpose of the parties’ stipulation for remand, and the government’s accompanying motion for remand, was to explain to this Court why a full remand was necessary, versus a remand only for the purpose of addressing the disputed issue of role. As the parties represented in their stipulation, the district court’s guideline calculation was akin to a “knot” that was “undone,” so that any remand for a reconsideration of the issue of role should include a reconsideration of every disputed issue, including quantity and criminal history. *Cf. United States v. Atehorvta*, 69 F.3d 679, 685-86 (2d Cir. 1995) (“When a defendant challenges convictions on particular counts that are inextricably tied to

other counts in determining the sentencing range under the guidelines, the defendant assumes the risk of undoing the intricate knot of calculations should he succeed. Once this knot is undone, the district court must sentence the defendant *de novo* and, if a more severe sentence results, vindictiveness will not be presumed.”). The district court raised this very question at the start of the re-sentencing hearing, and both parties were uniform in their response that the court had to conduct a full re-sentencing hearing and address each disputed issue anew. JA198-JA201; *United States v. Johnson*, 378 F.3d 230, 240 (2d Cir. 2004) (noting that “[t]he general mandate rule can be avoided” where “we explicitly instruct the district court to resentence *de novo*.”).

The defendant characterizes the government’s argument on the law of the case doctrine as an “equitable” one and now maintains, for the first time, that, if the government wanted to re-litigate the issue of quantity, it should have expressly reserved that right by negotiating an appellate stipulation which included “the waiver of an argument under the law of the case doctrine” as part of its agreement to a remand. *See* Def.’s Br. at 42. He even goes so far as to quote the district court’s comments at the start of the sentencing hearing in which the court stated that the “only thing that needs to be addressed here” is the role enhancement. *See id.*

But, at the second sentencing hearing, the defendant expressly disagreed with these comments and advised the court:

I am constrained to agree with [the government] that under the terms of the remand, we are here for a full re-sentencing. I'm not necessarily thrilled about that because there are aspects of Your Honor's sentence that I quite like. I like the Level 32. I like the finding that it was 5 to 15 kilograms . . . . But I have to agree with the [g]overnment that . . . the mandate is for a full re-sentencing. . . . [Q]uite frankly, [the government's] position all along was, to me, "If you want me to move for a remand, we're going to have a remand for full re-sentencing," and I therefore consented to that.

JA200-JA201.

The defendant's argument on appeal directly conflicts with his position below. Thus, he has expressly waived any claim that the district court was bound by its prior quantity finding. Moreover, the remand was explicit, ordered a full re-sentencing and contemplated that the district court would revisit all disputed issues of fact. JA120 ("[A]t resentencing, the district court is free to reconsider any disputed factual issues it seems appropriate, and is not limited to reconsideration of Guzman's role in the of-

fense.”). As a result, even on its merits, this claim fails.

### **III. The district court’s 196-month, below-guidelines sentence was substantively reasonable**

Finally, the defendant argues that his sentence was substantively unreasonable. In making this argument, the defendant does not attack the court’s application of the § 3553(a) factors, but instead narrowly focuses on the guideline calculation itself, repeating the same arguments he made above to suggest that the ultimate sentence was too high because it was based on an incorrect guideline calculation. *See* Def.’s Br. at 46-48.

#### **A. Governing legal principles**

Under 18 U.S.C. § 3553(a), in determining an incarceration term, a sentencing court should consider: (1) “the nature and circumstances of the offense and history and characteristics of the defendant”; (2) the need for the sentence to serve various goals of the criminal justice system, including (a) “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment,” (b) to accomplish specific and general deterrence, (c) to protect the public from the defendant, and (d) “to provide the defendant with needed educational or vocational training, medical care, or other correctional

treatment in the most effective manner”; (3) the kinds of sentences available; (4) the sentencing range set forth in the guidelines; (5) policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to victims. *Id.*

Following *United States v. Booker*, 543 U.S. 220 (2005), appellate courts are to review sentences for reasonableness, which amounts to review for “abuse of discretion.” *Gall v. United States*, 552 U.S. 586, 591 (2007); *Cavera*, 550 F.3d at 187. This reasonableness review consists of two components: procedural and substantive review. *Cavera*, 550 F.3d at 189.

Substantive review is exceedingly deferential. This Court has stated it will “set aside a district court’s substantive determination only in exceptional cases where the trial court’s decision ‘cannot be located within the range of permissible decisions.’” *Id.* (quoting *United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007)). This review is conducted based on the totality of the circumstances. *Cavera*, 550 F.3d at 190. Reviewing courts must look to the individual factors relied on by the sentencing court to determine whether these factors can “bear the weight assigned to [them].” *Id.* at 191. However, in making this determination, appellate courts must remain appropriately deferential to the institutional competence of trial courts in matters of sentencing.

*Id.* Finally, this Court neither presumes that a sentence within the guidelines range is reasonable nor that a sentence outside this range is unreasonable, but may take the degree of variance from the guidelines into account when assessing substantive reasonableness. *Id.* at 190.

This deference is appropriate, however, only when a reviewing court determines that the sentencing court has complied with the procedural requirements of the Sentencing Reform Act. *Cavera*, 550 F.3d at 190. Sentencing courts commit procedural error if they fail to calculate the guideline range, erroneously calculate the guidelines range, treat the guidelines as mandatory, fail to consider the factors required by statute, rest their sentences on clearly erroneous findings of fact, or fail to adequately explain the sentences imposed. *Id.* These requirements, however, should not become “formulaic or ritualized burdens.” *Id.* at 193. This Court thus presumes that a district court has “faithfully discharged [its] duty to consider the statutory factors” in the absence of evidence in the record to the contrary. *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006). This procedural review must maintain the required level of deference to sentencing courts’ decisions and is only intended to ensure that the sentence resulted from the reasoned exercise of discretion.” *Cavera*, 550 F.3d at 193.

## **B. Discussion**

The defendant's 196-month sentence was reasonable and reflects the factors set forth in § 3553(a). A lengthy sentence in this case was necessary to account for the seriousness of the offense, to protect the community from further criminal conduct by the defendant, and to deter the defendant from engaging in future criminal conduct. These were the very factors which motivated the court to impose the 220-month sentence initially. JA99. At that time, the court specifically indicated that it was concerned about the defendant's prior felony convictions for distributing narcotics and thought that a lengthy sentence was necessary to reflect the fact that the defendant had not stopped dealing drugs as a result of prior state sentences for the same conduct. JA98.

As to the seriousness of the offense, the defendant was responsible for operating an extensive drug enterprise in Bridgeport which involved his purchase and redistribution of enormous quantities of heroin and powder cocaine to various customers throughout the Northeast. JA34. He was obtaining these narcotics through the United States mail directly from Puerto Rico and was using other individuals to sign for and receive the packages for him. JA34-JA35. Based on the intercepted telephone conversations, which were quite explicit, it was apparent that the defendant often engaged in the sale of large

quantities of narcotics, and, in doing so, was making a great deal of money, as evidenced by the \$56,000 in cash seized from his residence at the time of his arrest. JA163, JA167.

As to the issues of specific deterrence and protection of the community, the defendant posed a serious risk of recidivism. First, although he had figured out that law enforcement authorities had seized both the June 1st and June 15th packages, he did not stop dealing drugs or terminate his participation in the conspiracy and instead was motivated to be more careful and come up with new ways of countering law enforcement surveillance. Indeed, after the June 15th seizure, the defendant tried to come up with new ideas for shipping the cocaine to Connecticut from Puerto Rico to avoid detection. JA190.

Second, the defendant had already sustained multiple felony convictions, two of which were for narcotics trafficking, and had committed crimes repeatedly while under some form of court supervision. In 1997, he was convicted of sale of narcotics and sentenced to five years' incarceration, execution suspended. His probation was revoked in 2000. In 2003, he was convicted of second degree larceny, and in 2003, he was again convicted of sale of narcotics and sentenced to five years' incarceration, execution suspended after one year. *See* PSR ¶¶ 35-37. Had the probation officer obtained more infor-

mation about the defendant's 1997 conviction out of Puerto Rico, he likely would have concluded that the defendant was a career offender under U.S.S.G. § 4B1.1. The defendant's prior narcotics convictions did nothing to convince him to refrain from dealing drugs. To the contrary, since his release from prison in 2004, and while still on probation from his 2003 sale of narcotics conviction, the defendant grew his drug business substantially.

Still, the district court was persuaded to impose a sentence that was 39 months below the bottom of the guideline range and 24 months below the original 220-month sentence. In weighing the § 3553(a) factors, the court was influenced by the defendant's post-arrest efforts at rehabilitation. In particular, the court noted the defendant's participation in educational and employment training programs, as well as his commitment to treat his drug addiction. JA222.

The defendant argues that his sentence was substantively unreasonable because it was based on procedural errors. Specifically, he argues that the court erred in finding that the defendant was involved in the distribution of between fifteen and fifty kilograms of cocaine and that he held a leadership role within his organization. As discussed above, however, the court made no procedural errors at sentencing. Moreover, even had the defendant prevailed in his arguments on quantity and role, his guideline range would

simply have reduced to 168 to 210 months, a range which encompasses the ultimate 196-month sentence.<sup>4</sup>

Also, his argument here seems to be premised on the assumption that the district court's ultimate sentencing determination was tied to the guideline range. But that was not the case. During the first sentencing hearing, the district court repeatedly indicated that a range of 188 to 235 months appropriately reflected a balancing of the § 3553(a) factors. During the second sentencing hearing, despite the fact that the court found the guideline range to be significantly higher, the court still imposed a lower sentence, showing that other § 3553(a) factors clearly had more weight. In the end, the 196-month sentence fell below the advisory guideline range, was not excessively high or low and reflected a sensible application of the § 3553(a) factors.

---

<sup>4</sup> Although the defendant suggests on appeal that only a two-level role enhancement was appropriate, *see* Def.'s Br. at 29, 44, a plain reading of U.S.S.G. § 3B1.1 shows that, because the defendant's narcotics organization involved more than five participants, he must receive either a three-level enhancement as a supervisor, or a four-level enhancement as an organizer. *See* U.S.S.G. § 3B1.1.

## Conclusion

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

Dated: August 2, 2012

Respectfully submitted,

DAVID B. FEIN  
UNITED STATES ATTORNEY  
DISTRICT OF CONNECTICUT

A handwritten signature in black ink, reading "Robert M. Spector". The signature is written in a cursive style with a prominent "R" and "S".

ROBERT M. SPECTOR  
ASSISTANT U.S. ATTORNEY

Sandra S. Glover  
Assistant United States Attorney (of counsel)

**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 13,561 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

A handwritten signature in black ink that reads "Robert M. Spector". The signature is written in a cursive style with a prominent initial "R" and "M".

ROBERT M. SPECTOR  
ASSISTANT U.S. ATTORNEY

## **Addendum**

**§3B1.1. Aggravating Role**

Based on the defendant's role in the offense, increase the offense level as follows:

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by **4** levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by **3** levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by **2** levels.