

# 11-5183

*To Be Argued By:*  
ERIC J. GLOVER

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**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 11-5183**

UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

SYED A. BABAR, aka Ali, Aka Asad,  
*Defendant-Appellant.*

(For continuation of Caption, See Inside Cover)

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

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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*Defendants.*

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## **Statement of Jurisdiction**

This is an appeal from the judgment entered in the United States District Court for the District of Connecticut (Alvin W. Thompson, J.). The district court had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on November 29, 2011. Appendix (“A”)279; A172-A174. On December 6, 2011, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A1, A279. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291(a).

## **Statement of Issues Presented for Review**

I. Did the district court commit plain error by adopting the Pre-Sentence Report's recommendation for a four-level role enhancement where Babar indicated he had no objection to any of the factual findings in the PSR or to the role enhancement?

II. Did the district court have the authority to grant Babar a third point for acceptance of responsibility where the government did not move for it based on Babar's failure to plead guilty at a sufficiently early stage of the case?

III. Is the district court's decision not to grant a departure for substantially overlapping enhancements reviewable by this Court? Even if it is, did the district court abuse its discretion in not granting the departure?

IV. Was the district court's guidelines sentence of 120 months of imprisonment so disproportionate to Babar's co-defendants or so severe in length that it was substantively unreasonable?

# United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-5183

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UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

SYED A. BABAR, aka Ali, aka Asad,  
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ON APPEAL FROM THE UNITED STATES DISTRICT  
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**BRIEF FOR THE UNITED STATES OF AMERICA**

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## **Preliminary Statement**

Syed Babar was the leader of a multi-million dollar mortgage fraud ring. In February 2011, he pled guilty to all counts pending against him without a plea agreement. Babar pled guilty not long before the scheduled March 2011 start of a lengthy trial against him and six other co-defendants, a trial for which the government had already substantially prepared due to the document-intensive nature of the case.

At sentencing, the district court adopted the factual findings of the PSR and its recommended

sentencing guidelines range of 108 to 135 months, with no objection from Babar. After considering the factors set for in section 3553(a), the court sentenced Babar to 120 months of imprisonment.

In this court, Babar makes four primary arguments in attacking his sentence. First, Babar claims that the district court did not make factual findings necessary to justify a leadership enhancement. But the district court adopted the PSR's factual findings with no objection from Babar, and those findings were clearly sufficient to justify the enhancement.

Second, Babar claims that the district court erred in not granting him a third point for acceptance of responsibility under § 3E1.1(b). But the government did not move for a third-point reduction due to the late date of Babar's guilty plea.

Third, Babar claims that the district court erred in not departing downward for substantially overlapping enhancements. But this Court has held that such a decision is not reviewable on appeal, and in any event the district court did not abuse its discretion in denying the departure.

Finally, Babar claims that his sentence was substantively unreasonable and disproportionate to the sentences imposed on his co-defendants. To the contrary, the district court's sentence of

120 months was within the sentencing guidelines range and clearly justified given Babar's conduct and his leading role in the fraud.

### **Statement of the Case**

On July 29, 2010, a federal grand jury returned a Second Superseding Indictment against Babar charging him with one count of conspiracy, in violation of 18 U.S.C. § 371; eight counts of wire fraud, in violation of 18 U.S.C. § 1343; one count of mail fraud, in violation of 18 U.S.C. § 1341; and four counts of making false statements, in violation of 18 U.S.C. § 1001. A203.

Babar pleaded not guilty to the charges, and jury selection was scheduled for March 14, 2011. A208, A228. On February 1, 2011, Babar, without entering into a plea agreement, changed his pleas to guilty to all fourteen counts charged against him in the Second Superseding Indictment. A17; A81-A84.

On November 28, 2011, the district court sentenced Babar principally to 120 months of imprisonment. A164-65, A172. On November 29, 2011, judgment entered. A172, A279. On December 6, 2011, Babar filed a timely notice of appeal. A1-A3.

Babar is currently serving his prison sentence.

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

### **A. The offense conduct**

From 2006 to 2010, Babar served as the ring leader of a mortgage fraud ring that obtained millions of dollars in residential real estate loans through the use of sham sales contracts, false loan applications and fraudulent property appraisals. PSR ¶ 9-20.<sup>1</sup> The scheme involved nearly 30 properties in Connecticut, most of which ended up in foreclosure. Babar's conduct, and that of his co-defendants, resulted in a loss of over \$4 million to various private lenders and to the Federal Housing Administration ("FHA"), which insured many of the loans that were fraudulently obtained. PSR ¶ 9.

Babar and others working with him recruited individuals to serve as "straw" or nominal purchasers of residential real estate, who were paid thousands of dollars to act as the purported buyer of the property. PSR ¶ 10; A67. At Babar's direction, the straw buyer would enter into a written sales contract with the seller of the property for a price above the actual (and un-

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<sup>1</sup> Because Babar pleaded guilty before trial, the government is relying largely on the facts set forth in the PSR, which were undisputed and which the district court adopted without objection. A140.

written) sales price negotiated between Babar and the seller. PSR ¶¶ 10, 18; A67.

Babar would arrange for the straw buyer to apply for a mortgage based on the written contract price. PSR ¶ 18. Through the use of fraudulent documents, including the written sales contract, the appraisal, and the HUD-1 settlement statement, the lender would be deceived into believing that the written sales price was the actual sales price and extend a loan for that purchase price. PSR ¶ 18. The difference between the written contract price on which the loan was based and the unwritten actual sales price constituted part of the fraud proceeds that Babar and his co-conspirators would reap from the scheme. PSR ¶ 18. The seller would also profit by selling a property in extreme disrepair to the straw buyer for more than the property would have sold for in the market. PSR ¶ 18.

The contract sales prices, and the amount of the loans fraudulently obtained to purchase the properties, were justified by fraudulent appraisals secured by Babar through co-defendant Thomas Gallagher, a real estate appraiser. PSR ¶ 12; A66. Gallagher would routinely misrepresent the physical state of the properties, and would sometimes include altered photographs in his appraisals. PSR ¶ 12. Babar paid Gallagher thousands of dollars per property, often in cash, for issuing the fraudulent appraisals, which was far more than the basic appraisal fee of about

\$375 that was disclosed in the appraisal report. PSR ¶ 12.

Babar would also work with a mortgage broker, in many instances co-defendant Nathan Russo, in connection with the preparation of a false loan application for the straw buyer. PSR ¶ 11; A66, A68. The false information would include fraudulent representations about the buyer's employment, income, assets and liabilities. PSR ¶ 11; A68. The loan applications would be supported by fraudulent documentation, including false earning statements and bank records. PSR ¶ 11. The loan application would also falsely represent that the buyer intended to occupy the property as the buyer's primary residence, when in most instances the buyer had not even seen the property and had no intention of living at the property. PSR ¶ 11.

Babar also orchestrated and directed the way in which the fraud proceeds were extracted from the real estate closing. PSR ¶ 20. On certain transactions, Babar would receive the fraudulent proceeds from the seller himself or herself. At closing, the seller would be paid the purported sale price of the property, and then afterwards provide Babar with the difference between the purported sales price in the documents and the unwritten actual price for which the seller agreed to sell the property to Babar. For instance, Babar agreed with co-defendant Wendy Werner to buy three houses from her (using a

straw buyer) at the fraudulently inflated total price of about \$800,000. PSR ¶ 19. After the closing, Werner paid Babar \$283,000, which she concealed from her closing lawyer and the lenders making the loans on the three properties. PSR ¶ 19.

In other instances, Babar would use a fictitious construction company to siphon off the fraudulent proceeds from the closing. Babar directed an individual named Jomell Thomas to open a bank account for a fictitious construction company called “Sheda Telle Construction, LLC.” PSR ¶ 19; A68. The purpose of the company and the bank account was to divert fraud proceeds to it and, in some cases, to justify falsely the artificially inflated sales price of a house based on renovations purportedly made to the property. PSR ¶ 20; A67-A68. In the period between March 2007 and October 2009, \$977,979 in fraud proceeds was deposited into the account, and \$977,648 was withdrawn. PSR ¶ 20.

After the closing, these fraud proceeds would be sent to the Sheda Telle account by wire from the bank account of the law offices of David Avigdor, which is where co-defendant Morris Olmer, a former lawyer, would conduct the closings. PSR ¶ 17; A66. While Babar used some other lawyers to close transactions early in the scheme, once he started using Olmer for closings he never used any other lawyer because Olmer did whatever Babar wanted and never asked any

questions. PSR ¶ 17. Babar paid Olmer, as he did others, for his assistance with the fraudulent scheme. PSR ¶ 17.

### **B. The change of plea**

Babar was charged in a Second Superseding Indictment on July 29, 2010. A203-A204. He had been arrested on the initial Indictment on May 10, 2010. A196. After granting many continuances, the district court ultimately scheduled jury selection for March 14, 2011. A228.

On February 1, 2011, over eight-and-a-half months after his arrest and the month before jury selection and trial, Babar changed his plea to guilty on all fourteen counts charged against him in the Second Superseding Indictment. A17; A81-A84. Babar acknowledged his guilt on Counts One through Fourteen and agreed with the government's recitation of the facts of the offense. A62-A79. There was no plea agreement.

### **C. The sentencing**

In addition to setting forth findings on the offense conduct, PSR ¶¶ 9-20, the PSR calculated Babar's total offense level as 31, which yielded a sentencing guidelines range of 108 to 135 months of imprisonment. PSR ¶¶ 35, 62. The PSR found the base offense level under U.S.S.G. § 2B1.1(a)(1) to be 7. PSR ¶ 26. It found the loss to be more than \$2.5 million under § 2B1.1(b)(1)(J), resulting in an 18-level increase.

PSR ¶ 27. Two levels were added under § 2B1.1(b)(2)(A)(I) because there were more than ten victims. PSR ¶ 28. Two levels were added under § 2B1.1(b)(9)(C) for use of sophisticated means. PSR ¶ 29.

The PSR also increased Babar's offense level by four levels for his role in the offense as a leader and organizer of criminal activity involving five or more participants under § 3B1.1(a). PSR ¶ 30. The PSR recited the underlying facts of Babar's leadership and organizational role in the scheme, and set forth by name the many witting individuals that he recruited, directed and worked with throughout the scheme. PSR ¶¶ 9-20.

Babar's adjusted offense level was 33. PSR ¶ 33. With a two level reduction for acceptance of responsibility, Babar's total offense level was 31. PSR ¶¶ 34-35. A level 31 resulted in a sentencing guidelines range of 108 to 135 months of imprisonment. PSR ¶ 62.

Babar agreed to the factual findings set forth in the PSR and did not object to any aspect of its sentencing guideline calculation. In particular, he did not object to the enhancement for role in the offense, and he did not object to fact that the offense level was not reduced by a third point for acceptance of responsibility.

In his sentencing memorandum, Babar did not ask that his offense level be reduced by the

third point for acceptance. Indeed, he acknowledged that the “Government has emphatically stated that it is not required to file a motion with the Court pursuant to § 3E1.1(b) recommending that the Court reduce defendant’s adjusted offense level by an additional point.” A112. Babar did not ask for the so-called third point or object to it not being given, but rather asked the Court to provide the adjustment “by way of a variance or departure from [the] advisory guidelines range based on his prompt and complete acceptance of responsibility in this case.” A112.

Rather than objecting to the sentencing guidelines calculations or to any of the underlying facts in the PSR, Babar argued in his sentencing memorandum that the recommended sentencing guidelines range of 108 to 135 months in the PSR was “harsher than the sentences received by all the other co-defendants” and created a “sentencing disparity” with “co-defendants who had significant roles during the conspiracy.” A122.

Babar also argued in his sentencing memorandum that a downward departure was necessary to mitigate the allegedly cumulative effects of overlapping sentencing enhancements, pursuant to *United States v. Lauersen*, 348 F.3d 329 (2d Cir. 2003), and *United States v. Jackson*, 346 F.3d 22 (2d Cir. 2003). A130-32. The government opposed this departure in its sentencing memo-

randum. Babar did not expressly argue the issue at the sentencing hearing. A142-A144.

The district court held a sentencing hearing on November 28, 2011. A134. The court confirmed with counsel for the government and counsel for the defendant that there were no objections to the PSR. A139. The court then adopted the factual statements contained in the PSR as its findings of fact. A139-A140. It also set forth the applicable sentencing guidelines range, stating that Babar faced a term of imprisonment in the range of 108 to 135 months. A142. Babar did not object to these guidelines calculations or to the resulting guidelines range.

The court also noted that Babar faced a two-to three-year term of supervised release; a fine in the range of \$15,000 to \$150,000; restitution in the amount of \$4,749,024.76; and a mandatory special assessment of \$1400. A142.

The government confirmed that it would not be moving for a reduction of an additional point and provided its reasons:

The plea was approximately a month before the start of a complex [and] lengthy trial and it did not save the government significant resources with respect to the preparation of Mr. Babar's trial because we had been preparing long before he entered that plea of guilty. It was unclear until the day it actually occurred whether

that was ever going to happen. And until it actually happened, we were dubious that it would happen. It did not end up saving us resources, in our view, for a motion pursuant to 3[E]1.1.

A138. Counsel for Babar did not challenge this assertion or request a decrease in his offense level by an additional point pursuant to § 3E1.1(b).

The court addressed the acceptance issue when it imposed sentence. A163. It stated that “this is a case where the two points should be given just as a matter of policy because it would have been a much more difficult trial.” A163. The court went on to say that “even if the government had suggested the third point for acceptance of responsibility, I’m not sure I would have awarded it because it is very difficult to sit here and really see how you have accepted responsibility, particularly in comparison to some of the other people in this case who came in and admitted what they have done wrong.” A163.

After hearing from defense counsel and government’s counsel, and from Babar and members of his family, the court described the factors that would weigh in its sentencing decision under 18 U.S.C. §3553(a), including the nature and circumstances of the offense and the history and characteristics of the defendant, A159; the need for the sentence imposed to serve the various

purposes of a criminal sentence, A159; the kinds of sentences available, A159; the sentencing range established for a defendant with Babar's criminal history, A159; any pertinent policy statement, A159; the need to avoid unwarranted sentence disparities, A160; and the need to provide restitution. A160.

The court stated that it had taken each of those factors into account. A160. The court set forth the materials it reviewed in arriving at the sentence, including the PSR, the sentencing memoranda, and letters submitted on Babar's behalf, A160; the cases of Babar's co-defendants and other related cases, remarks of counsel, and Babar's statement regarding sentencing, as well as the remarks of the Babar's father and his wife. A160. The court noted that it presided over the trial where it heard from numerous other people involved in the scheme, and that it had taken the guilty pleas from other people who did not go to trial who were also involved in the scheme. A160.

Regarding the need for the sentence to serve the various purposes of a criminal sentence, the court specifically acknowledged that the sentence "should be sufficient but not greater than necessary to serve these purposes." A161. The court then detailed the factors it would consider in this regard, including the need for the sentence imposed to provide just punishment for the offense; whether there is a need to protect the

public from further crimes committed by Babar, the need for the sentence to afford adequate deterrence to criminal conduct, the need for the sentence to reflect the serious nature of the offense and to promote respect for the law, the need for the sentence to serve the goal of rehabilitation. A161.

The court stated that, in Babar's case, it was "most aware of the need for the sentence imposed to constitute just punishment for the offense and the need to deter others from committing the offense committed by you." A160-A161.

The court noted that Babar's counsel had advanced several reasons why the court should "impose a non-guidelines sentence." A162. The court set forth some of the reasons offered by defense counsel, including the involvement of other people in the scheme beyond Babar:

[Defense counsel] has pointed . . . to the other people who were involved in the scheme, highlight those individuals who are culpable among themselves. In some instance[s], for example, Mr. Olmer, because he had done some things before he got involved in the scheme, and Ms. Werner, because she had engaged in comparable conduct, but there are also other people who were involved in the scheme who first got involved in the scheme through Mr. Thomas and then you, and I think some of

these people had to have it explained to them how this would be okay. So the way I look at it, especially having seen some of these people testify at trial, you have a trail of people who have been involved with you, some of whom were less admirable in terms of their prior conduct and some of whom were quite admirable in terms of their prior conduct.

A162-63. After addressing acceptance of responsibility and the history and characteristics of the defendant (A163-A164), the court conveyed its focus in sentencing Babar:

I'm really looking primarily at the other defendants I've already sentenced, some other defendants I have not sentence[d] but whose conduct I have in mind, and I'm comparing your culpability to theirs. And I'm also looking at your role in bringing into the scheme people who really had to be persuaded that was okay. And I think a sentence of 120 months is a good approximation for an evaluation of your conduct as opposed to these other folks that were already sentenced and some of the other people I have not sentenced but whose presentence reports I did review.

A164. The court noted that its sentence was a guidelines sentence. A164; A172 (noting same in

Judgment). Babar is currently serving his sentence.

### **Summary of Argument**

I. The district court made sufficient factual findings to justify a four-level enhancement for leadership under U.S.S.G. § 3B1.1(a). There was no error, much less plain error, in the district court's application of the leadership adjustment. The district court expressly adopted the factual statements in the PSR as its factual findings, and those findings clearly support a role adjustment for Babar given his leadership of the fraud scheme. Since Babar failed to object to the role enhancement at all, or to the district court's factual findings in support of it, the district court could not have been expected to have done more than to adopt the factual findings in the PSR and the guideline calculation set forth therein.

II. The district court did not err, much less plainly so, in agreeing to reduce Babar's adjusted offense level by two levels, rather than three, for acceptance of responsibility under U.S.S.G. § 3E1.1. Under that section, a defendant is entitled to an additional point reduction for acceptance of responsibility if the government files a motion requesting it. As set out in § 3E1.1(b), such a motion should be made if the defendant provides timely notice of his intention to plead guilty, thereby permitting the government to avoid preparing for trial and to conserve its

prosecutorial resources. Here, the government declined to file this motion because Babar pled guilty over eight-and-a-half months after indictment and the month before trial. Accordingly, he was not entitled to a third-point reduction, and the district court had no authority to give it.

III. The district court's decision not to downwardly depart for substantially overlapping enhancements pursuant to this Court's decision in *United States v. Lauersen*, 348 F.3d 329 (2d Cir. 2003), is not reviewable given the district court's clear understanding that it had the authority to depart and chose not to do so. In any event, even if reviewable, the district court clearly did not abuse its discretion in not granting a departure for overlapping enhancements because each of the enhancements at issue were justified by the way in which Babar chose to run his fraudulent scheme.

IV. The district court's sentence was substantively reasonable, and was not grossly disproportionate to Babar's co-defendants' sentences. The 120 month sentence was squarely within the guidelines range of 108 to 135 months and was well-supported by the court's reasoning for its sentence. Babar created and led the fraud scheme in every facet of its operation, from recruiting participants, to orchestrating the false documentation for the transactions, to directing the flow of the fraud proceeds in a scheme involving more than \$10 million in residential real

estate loans and more than \$4 million in losses. Babar was more culpable than any other defendant involved in the scheme, and the district court recognized as much in sentencing Babar and his co-defendants. The court's sentence was one that fell "comfortably within the broad range of sentences that would be reasonable" when sentencing a defendant like Babar.

## **Argument**

### **I. The district court made sufficient factual findings to support a leadership enhancement under the Guidelines.**

#### **A. Relevant facts**

The relevant facts are set forth above in the Statement of Facts and Proceedings Relevant to this Appeal.

#### **B. 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 United States v. Molina*, 356 F.3d 269, 274 (2d Cir. 2004).

“Before imposing a role adjustment, the sentencing court must make specific findings as to why a particular subsection of § 3B1.1 adjustment applies.” *United States v. Ware*, 577 F.3d 442, 452 (2d Cir. 2009); *see also Molina*, 356 F.3d at 275. “A district court satisfies its obligation to make the requisite specific factual findings when it explicitly adopts the factual findings set forth in the presentence report.” *Molina*, 356 F.3d at 276.

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 Cavera*, 550 F.3d at 190, but when this Court “identif[ies] procedural error in a sentence, [and] the record indicates clearly that ‘the district court would have imposed the same sentence’ in any event, the error may be deemed harmless, avoiding the need to vacate the sentence and to remand the case for resentencing.” *United States v. Jass*, 569 F.3d 47, 68 (2d Cir. 2009) (quoting *Cavera*, 550 F.3d at 197).

### **C. Discussion**

Babar did not object to the role enhancement in the district court, and he did not object to the

district court's supposed failure to make specific findings in support of the role enhancement. See Babar Br. at 18-19 (conceding same). Accordingly, as even Babar agrees, his claim in this Court must be reviewed under the plain error standard. Babar Br. at 19; see *Molina*, 356 F.3d at 277 (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"). But there was no error, plain or otherwise, in connection with role enhancement.

The district court expressly adopted the factual statements in the PSR as its findings of fact, which is all the district court is required to do (particularly where, as here, no objection is made to the adjustment at issue). A144. "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.

Moreover, the factual findings in the PSR clearly support the adjustment for a leadership role by Babar. PSR ¶¶ 9-20. Babar's claim that the PSR is "bereft" of a factual basis for the adjustment is baseless. Babar Br. at 18. As set forth above in the Statement of Facts and Proceedings Relevant to this Appeal, the PSR enumerates at least 12 knowing participants in the scheme, and so the requirement that the "criminal activity . . . involve[d] five or more participants or was otherwise extensive" was clearly

met. *See* U.S.S.G. § 3B1.1(a); PSR ¶¶ 9-20 (discussing Babar, Depa, Nicolas, Martineau, Russo, Gallagher, Perkins, Nawaz, Olmer, Asmar, Werner and Thomas, all of whom were convicted at trial or pled guilty).

The PSR makes clear that Babar was also a leader and organizer of the criminal activity. He orchestrated the scheme in its every facet, and he directed and led individuals in it at every level. Babar recruited and paid the straw buyers. PSR ¶ 10. He provided the false information to the mortgage broker to put on the straw buyers' loan applications. PSR ¶ 11. He arranged for the appraiser to issue fraudulent appraisals, and paid the appraiser cash to do so. PSR ¶ 12. He instructed individuals working with him on how to lie to the lenders when needed. PSR ¶ 16.

Babar chose the lawyers who would conduct the closings, ultimately settling on Olmer because "he did whatever Babar wanted." PSR ¶ 17. He negotiated with the sellers for every property in the scheme, and was involved in receiving the fraudulent proceeds. PSR ¶ 18 ("Asmar would agree to a price with ring leader, Syed Babar, for his various properties."); PSR ¶ 19 ("Werner concealed the fact that she was paying Babar \$283,000 from her lawyer, Ramona DeSalvo, and concealed it from the lender making the loan."). Babar directed Jomell Thomas to open a bank account for a fictitious company, Sheda Telle, through which about \$1

million of pure fraudulent proceeds flowed. PSR ¶ 20.

In imposing sentence, the district court emphasized Babar's very high relative culpability vis-à-vis his co-defendants and his role in bringing others into the scheme:

I'm really looking primarily at the other defendants I've already sentenced, some other defendants I have not sentence[d] but whose conduct I have in mind, and I'm comparing your culpability to theirs. And *I'm also looking at your role in bringing into the scheme people who really had to be persuaded that was okay.* And I think a sentence of 120 months is a good approximation for an evaluation of your conduct as opposed to these other folks that were already sentenced and some of the other people I have not sentenced but whose presentence reports I did review.

A164 (emphasis added).

In short, the factual findings of the PSR, expressly adopted by the district court, show the hallmarks of a leader and organizer in the criminal scheme at the heart of this case. See U.S.S.G. § 3B1.1, comment. (n.4) (stating that 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”). The district court did not err, much less plainly so, in adopting those findings and increasing his offense level by four levels as a result.

**II. The district court had no authority to give Babar an additional point for acceptance of responsibility, and correctly reduced his offense level by two levels.**

**A. Relevant facts**

The relevant facts are set forth above in the Statement of Facts and Proceedings Relevant to this Appeal.

**B. Governing law and standard of review**

Section 3E1.1 of the Sentencing Guidelines allows for up to a three-point reduction of a defendant’s offense level upon a demonstration of acceptance of responsibility. Under subsection (a), the first two points are awarded at the discretion of the court. *See* § 3E1.1(a) (“If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.”). To qualify for the third point, however, the defendant must have first qualified

for the two-point reduction under § 3E1.1(a), have an original offense level of 16 or greater, and, most significantly, the government must file a motion

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 . . . .

§ 3E1.1(b). Application Note 6 to § 3E1.1 further explains that “[b]ecause 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.” U.S.S.G. § 3E1.1, comment. (n.6) (emphasis added). *See also United States v. Hargrett*, 156 F.3d 447, 452 (2d Cir. 1998) (section 3E1.1(b) “does not mandate an automatic reduction in the offense level for those who plead guilty; instead, it allows a reduction for those who actually conserve prosecutorial resources”).

In *United States v. Sloley*, 464 F.3d 355, 359 (2d Cir. 2006), this Court interpreted the language, purpose, and history of § 3E1.1(b) to hold that “subject to . . . narrow limitations . . . a gov-

ernment motion is a necessary prerequisite to the additional one-level decrease under Guidelines § 3E1.1(b).” *Id.*; *see also United States v. Moreno-Trevino*, 432 F.3d 1181, 1185-86 (10th Cir. 2005) (third point for acceptance of responsibility only available upon government’s motion); *United States v. Wattree*, 431 F.3d 618, 623-24 (8th Cir. 2005) (same); *United States v. Smith*, 429 F.3d 620, 628 (6th Cir. 2005) (same). A prosecutor’s discretion on the filing of such a motion is subject “to the same limits to which a prosecutor’s discretion under [U.S.S.G.] § 5K1.1 is subject. That is, in all cases, a prosecutor cannot refuse to move on the basis of an unconstitutional motive, such as a defendant’s race or religion.” *Sloley*, 464 F.3d at 360 (citations omitted). “Moreover, when the terms of a plea agreement leave the discretion to file [an acceptance-of-responsibility] motion solely in the hands of the government,” just as with a substantial-assistance motion, this Court’s “review of the government’s decision is more searching.” *Id.* In those cases, this Court “may review the plea agreement to see if the government has made its determination in good faith.” *Id.* at 361 (citations and quotations omitted); *see also United States v. Leonard*, 50 F.3d 1152, 1157 (2d Cir. 1995) (“[A] court may review the government’s treatment of a plea agreement . . . only to determine whether it has acted in ‘good faith.’”).

This Court reviews a district court's interpretation of the Sentencing Guidelines *de novo*, and reviews the district court's findings of fact for clear error. *See United States v. Rubenstein*, 403 F.3d 93, 99 (2d Cir. 2005); *United States v. Fiore*, 381 F.3d 89, 92 (2d Cir. 2004). When a district court's application of the Guidelines to the facts is reviewed, this Court takes an "either/or approach," under which the Court reviews "determinations that primarily involve issues of law" *de novo* and reviews "determinations that primarily involve issues of fact" for clear error. *United States v. Vasquez*, 389 F.3d 65, 74 (2d Cir. 2004); *see also United States v. Selioutsky*, 409 F.3d 114, 119 (2d Cir. 2005) (court "review[s] issues of law *de novo*, issues of fact under the clearly erroneous standard, [and] mixed questions of law and fact either *de novo* or under the clearly erroneous standard depending on whether the question is predominantly legal or factual") (citations omitted).

Moreover, as set forth above in part I.B, where a defendant fails to object contemporaneously to the claimed error, this Court reviews the issue for plain error. *See Fed. R. Crim. P. 52(b)*.

### **C. Discussion**

This Court should review Babar's claim for plain error only. Babar failed to object to the guidelines calculations in any respect, and spe-

cifically failed to object to the district court's decision to reduce his offense level by two points for acceptance of responsibility, rather than three levels under § 3E1.1(b). To be sure, he asked the district court to grant a variance to make up for the fact that the government did not move for the additional point. But he did not ask the court to give him the third point, and he did not challenge the government's decision not to file a motion for the third point or its reasoning behind its decision not to file the motion. A112 (acknowledging that the "Government has emphatically stated that it is not required to file a motion with the [c]ourt pursuant to § 3E1.1(b) recommending that the [c]ourt reduce defendant's adjusted offense level by an additional point," and asking the court to provide not the third point but its functional equivalent "by way of a variance or departure from [the] advisory guidelines range based on his prompt and complete acceptance of responsibility in this case"). Accordingly, Babar's claim in this Court should be reviewed for plain error.

The district court did not err, much less plainly err, in reducing Babar's offense level by two points, instead of three, under § 3E1.1(b), because it did not have the authority to give him the third point absent a government motion. Because the government did not file a motion requesting the third point, Babar was not eligible to receive it. *See Sloley*, 464 F.3d at 359 ("[A]

government motion is a necessary prerequisite to the additional one-level decrease” under this section.); *see also United States v. Lee*, 653 F.3d 170, 173 (2d Cir. 2011) (same).

The government was well within its discretion to decline to move for the third acceptance-of-responsibility point. Babar’s case had been pending since his arrest on May 12, 2010 on a sealed April 2010 indictment. A196. On February 1, 2011, the month before the scheduled March 2011 trial, Babar pled guilty. A17; A81-A84; A228. This Court and other appellate courts have routinely affirmed district courts that have refused to grant the third point when the plea “did not come sufficiently early in the proceedings to allow the court or the government to avoid the burdens of litigating the case.” *United States v. Rogers*, 129 F.3d 76, 80-81 (2d Cir. 1997) (upholding denial of third point when the defendant challenged search, thereby forcing government to prepare for “suppression hearing [that] was the main proceeding in th[e] case”); *United States v. Thompson*, 60 F.3d 514, 517 (8th Cir. 1995) (denying third point when defendant did not notify government of intention to plead guilty until Friday before start of scheduled trial, at which time the government had “essentially already completed its preparation for trial”); *United States v. Robinson*, 14 F.3d 1200, 1203 (7th Cir. 1994) (guilty plea filed four

days before trial did not entitle defendant to third point).

Here, in the context of a complex mortgage fraud case involving hundreds of exhibits and scores of consensual recordings, Babar's guilty plea over eight-and-a-half months after indictment, and about six weeks before the start of evidence, was not sufficiently timely to spare the government significant trial preparation. The government explained as much to the district court at the sentencing hearing, and Babar did not challenge the government's position or its underlying basis. A138 ("The plea was approximately a month before the start of a complex [and] lengthy trial and it did not save the government significant resources with respect to the preparation of Mr. Babar's trial because we had been preparing long before he entered that plea of guilty."). Application Note 6 to Section 3E1.1 makes clear that the timeliness of a plea in relation to getting the third point is dependent on the context of the case:

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 en-

ter 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.

U.S.S.G. § 3E1.1, comment. (n. 6). Here, Babar did not enter his guilty plea “at a sufficiently early point in the process so that the government [could] avoid preparing for trial.” *Id.* Rather, given the volume of evidence and the complexity of the case, the government was forced to begin trial preparation in earnest long before his guilty plea. Contrary to Babar’s argument, that trial was *his* trial, not that of his co-defendants. The preparation for trying Babar as part of his co-defendant’s case was substantial, and Babar’s guilty plea was not sufficiently timely to avoid that preparation.

Notwithstanding Babar’s claim that the government’s reasoning behind not moving for the third point was “unlawful,” he has presented no record evidence demonstrating that the government refused to move for the third point in bad faith. As discussed above, the government’s decision to withhold the third point was based on the government’s assessment that Babar failed to timely notify it of his intention to plead guilty. See § 3E1.1(b). In other words, “[t]he record shows that the prosecutor was honestly dissatisfied . . . with [the defendant’s] acceptance of responsibility.” *Sloley*, 464 F.3d at 361 (citation

omitted). There is no record evidence to the contrary.

To the extent that Babar's claim is that the district court should have given him a non-guidelines variance to make up for the additional point, the district court was well within its discretion in refusing to do so. As the district court stated at sentencing, notwithstanding the fact that it did give Babar his two-level reduction for acceptance of responsibility, it was not impressed with Babar's acceptance of responsibility. A163. It was within the court's prerogative to take that assessment into account when making a discretionary decision on whether to grant a variance.

Finally, even if Babar had received the additional point, his guidelines range would have been 97 to 121 months (level 30), rather than 108 to 135 months (level 31), and the district court's sentence of 120 months was still within that sentencing guidelines range. *See Jass*, 569 F.3d at 68 (quoting *Cavera*, 550 F.3d at 197) (stating that 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").

**III. The district court correctly refused to depart for overlapping enhancements, and there is no review of that decision in this Court.**

**A. Relevant facts**

The relevant facts are set forth above in the Statement of Facts and Proceedings Relevant to this Appeal.

**B. Governing law and standard of review**

This Court has held that “that the cumulation of . . . substantially overlapping enhancements, when imposed upon a defendant whose adjusted offense level translates to a high sentencing range, presents a circumstance that is present ‘to a degree’ not adequately considered by the Commission.” *United States v. Lauersen*, 348 F.3d 329, 344 (2d Cir. 2003) (quoting 18 U.S.C. § 3553(b)(1)). In *Lauersen*, this Court found that a 13-level loss enhancement (for an intended loss amount of \$4.9 million) and a 4-level enhancement for defendant’s conduct having affected a financial institution and having derived more than \$1,000,000 gross receipts were both “significantly trigger[ed]” by “large amount of money involved in the fraud” and therefore were “substantially overlapping.” 348 F.3d at 343-44. *See also United States v. Jackson*, 346 F.3d 22, 26 (2d Cir. 2003) (finding that a 10-level loss en-

hancement, sophisticated means, more than minimal planning, and a 4-level increase for defendant's leadership role was "little more than different ways of characterizing closely related aspects of Jackson's fraudulent scheme").

The same panel that decided *Lauersen* explained on rehearing that "not many combinations of enhancements will be substantially overlapping." *United States v. Lauersen*, 362 F.3d 160, 167 (2d. Cir. 2004), *vacated on other grounds*, 125 S. Ct. 1109 (2005).

Any downward departure based on "substantially overlapping enhancements" is entirely discretionary. *See Lauersen*, 362 F.3d at 167 (stating that "the decision whether to depart, and the extent of the departure, if made at all, remain within the discretion of the sentencing judge"); *United States v. Kilkenny*, 493 F.3d 122, 131 (2d Cir. 2007) (noting that although there was substantial overlap between 20-level enhancement for amount of loss over \$7,000,000 and having derived more than \$1,000,000 from a financial institution, such a departure is entirely discretionary and finding district court well within its discretion in denying departure).

This Court has explained that "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, its decision is normally not appealable.”); *United States v. Desena*, 260 F.3d 150, 159 (2d Cir. 2001).

A narrow exception to this general rule exists “when a sentencing court misapprehended the scope of its authority to depart or the sentence was otherwise illegal.” *Stinson*, 465 F.3d at 114 (quotation marks and citation omitted). Absent “clear evidence of a substantial risk that the judge misapprehended the scope of his departure authority,” however, this Court presumes that the judge understood the scope of his authority. *Id.*; see also *United States v. Sero*, 520 F.3d 187, 193 (2d Cir. 2008) (per curiam) (noting that the “presumption that a district court understands its authority to depart may be overcome only” in a “rare situation”) (quotation marks and citation omitted). Such a substantial risk may arise “where the available ground for departure was not obvious and the sentencing judge’s remarks made it unclear whether he was aware of his options.” *United States v. Silleg*, 311 F.3d 557, 561 (2d Cir. 2002) (quotation marks and citation omitted).

In addressing motions for downward departures, this Court “does not require that district

judges by robotic incantations state ‘for the record’ or otherwise that they are aware of this or that arguable authority to depart but that they have consciously elected not to exercise it.” *United States v. Diaz*, 176 F.3d 52, 122 (2d Cir. 1999) (quotation marks and citation omitted); *see also United States v. Margiotti*, 85 F.3d 100, 103 (2d Cir. 1996) (per curiam) (“Sentencing is rigid and mechanistic enough as it is without the creation of rules that treat judges as automatons.”).

### C. Discussion

The district court’s decision not to depart on the basis of overlapping enhancements is not reviewable in this Court. The experienced district court was well aware that it had the legal authority to depart on the basis of overlapping enhancements under *Laurersen* and clearly decided that no such departure was warranted here. Indeed, the district court expressly stated at the sentencing hearing that counsel “has advanced several reasons for why I should depart in determining the guidelines range and impose a non-guidelines sentence,” A162, yet expressly imposed a guidelines sentence. A164. Where, as here, the district court fully apprehended its authority to depart, its decision not to “downwardly depart is generally not appealable.” *Stinson*, 465 F.3d at 114.

In any event, the district court correctly denied the overlapping enhancements departure.

The amount of loss, the role enhancement, the number of victims and the fact that the crime was carried out through sophisticated means were all triggered by the facts underlying the scheme that Babar put in motion. For instance, the 18-level loss enhancement shows the magnitude of the crime in dollar terms, but does not reflect the specific and individualized role that Babar played in the offense, namely, as the leader and organizer of all facets of the scheme. The role enhancement is based on Babar's position within the criminal organization and his managerial duties and responsibilities. As the First Circuit has stated:

To be sure, there is an overlap between "scope" and "role." It stands to reason that the majordomo of a scheme, having set the stage, probably will be saddled with more "relevant conduct" than a bit player. That overlap, however, does not mean that adjusting for a leadership role necessarily portends double counting in a case where the amount of loss influences the offense level. The two enhancements do not march in lockstep and, moreover, serve different purposes in the sentencing calculus.

*United States v. Lilly*, 13 F.3d 15, 18-19 (1st Cir. 1994).

Similarly, the district court correctly rejected Babar's claim that there was any double count-

ing here for the amount of loss and the enhancement for sophisticated means. Each individual transaction involved extensive fraudulent documentation, required the involvement of multiple co-conspirators, and the use of shell companies and/or complex banking transactions. Thus, the sophisticated means enhancement would have appropriately applied to even a single one of the real estate deals in this conspiracy. The enhancement does not relate directly to the fact there were a large number of transactions – the primary factor driving up the loss amount. Accordingly, the district court was correct to reject Babar’s claim of double counting as to loss and sophisticated means.

Moreover, the district court correctly rejected Babar’s argument that the loss amount enhancement was substantially overlapping with the enhancement for more than ten victims. While the fact that a loss amount of more than \$2.5 million but not more than \$7 million may generally be related to having more than ten victims, it is certainly not the case that such a loss amount always or even usually includes that many victims. Here, the fact that there were many victims was the result of the way in which the scheme was undertaken, not the amount of the loss. Babar would arrange for multiple but separate lenders to be used for a single straw buyer in order to keep each lender in the dark about the straw buyer’s other contemporaneous

loan applications, thus increasing the number of victims subjected to his mortgage fraud scheme.

Babar is correct that the effect of the enhancements in this case significantly increased his guidelines range. But he was properly subjected to multiple enhancements because of the way he chose to commit his fraud – by initiating, orchestrating and directing an extensive scheme (role in the offense), doing it repeatedly and continuously over a number of years and thereby obtaining millions of dollars in fraudulent loans (loss), doing so through different lenders in order to keep the lenders in the dark about his fraud (more than ten victims), and by executing it time and again using a shell company and other sophisticated ways to avoid detection along the way (sophisticated means).

**IV. The district court’s sentence was not substantively unreasonable and was not grossly disproportionate to the sentences of Babar’s co-defendants.**

**A. Relevant facts**

The relevant facts are set forth above in the Statement of Facts and Proceedings Relevant to this Appeal.

## B. Governing law and standard of review

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court declared the United States Sentencing Guidelines “effectively advisory.” *Id.* at 245. After *Booker*, a sentencing judge is required to “(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the calculated Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence.” *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005).

On appeal, a district court’s sentencing decision is reviewed for reasonableness. *See Booker*, 543 U.S. at 260-62. The Supreme Court has explained that the reasonableness standard requires review of sentencing challenges under an abuse of discretion standard. *See Gall v. United States*, 552 U.S. 38, 46 (2007); *see also United States v. Watkins*, 667 F.3d 254, 260 (2d Cir. 2012) (“We are constrained to review sentences for reasonableness, and we do so under a deferential abuse-of-discretion standard.”) (quotation marks and citation omitted). “It is by now familiar doctrine that this form of appellate scrutiny encompasses two components: procedural review and substantive review.” *Watkins*, 667 F.3d at 260 (quotation marks and citation omitted).

“A district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory.” *Cavera*, 550 F.3d at 190 (citations omitted). A district court also commits procedural error “if it does not consider the § 3553(a) factors, or rests its sentence on a clearly erroneous finding of fact.” *Id.* Finally, a district court “errs if it fails adequately to explain its chosen sentence, and must include ‘an explanation for any deviation from the Guidelines range.’” *Id.* (quoting *Gall*, 552 U.S. at 51).

With respect to appellate review of a sentence for substantive reasonableness, this Court has recognized that “[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge ‘exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.’” *Fernandez*, 443 F.3d at 27 (citations omitted). A sentence is substantively unreasonable only in the “rare case” where the sentence would “damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or

otherwise unsupportable as a matter of law.” *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009).

Although this Court has declined to adopt a formal presumption that a within-Guideline sentence is reasonable, it has “recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances.” *Fernandez*, 443 F.3d at 27; *see also Rita v. United States*, 551 U.S. 338, 347-51 (2007) (holding that courts of appeals may apply presumption of reasonableness to a sentence within the applicable Sentencing Guidelines range); *United States v. Rattoballi*, 452 F.3d 127, 133 (2d Cir. 2006) (“In calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.”), *abrogated in part on other grounds by Kimbrough v. United States*, 552 U.S. 85, 108 (2007). This Court will set aside only those “outlier sentences that reflect actual abuse of a district court’s considerable sentencing discretion.” *United States v. Jones*, 531 F.3d 163, 174 (2d Cir. 2008).

### **C. Discussion**

Babar claims that the district court's sentence of 120 months – a sentence within the sentencing guidelines range – was substantively unreasonable (Babar Br. at 27) and grossly disproportionate to the sentences of his co-defendants (Babar Br. at 24-25). Babar is wrong on both counts.

The district court rightfully sentenced Babar to 120 months in prison for his role in creating and overseeing a wide-ranging mortgage fraud scheme. Babar led the multi-million dollar mortgage fraud ring, and he had a deep and extensive role in every single transaction at issue in this case.

Babar recruited straw buyers, found witting sellers, and orchestrated and directed the creation and flow of fictitious documentation and information that was needed to obtain the fraudulent residential real estate loans. In addition to recruiting buyers and sellers into the scheme, Babar recruited and worked closely with a mortgage broker, a former lawyer who conducted the closings, an appraiser and others to orchestrate the scheme. Babar also directed and oversaw the distribution of the fraud proceeds – which flowed from the bank account of a fictitious construction company set up at his direction -- after a loan for a property had been fraudulently obtained and the closing had taken place.

Babar was extraordinarily careful throughout the scheme not to leave his name on documents associated with any part of the scheme. He had Jomell Thomas put his name on the Sheda Telle bank account. He had straw buyers put their names on loan applications. He had Thomas Gallagher create the fraudulent appraisals. He had buyers and sellers put their names on closing documents and land records. He had lawyers certify the settlement statements and execute the wiring of money derived from the loan proceeds. He used many people, some witting and some unwitting, to do all of these things and more for him to further the scheme. But he would not and did not allow his name to be used in connection with anything for a simple reason – he expected other people to take the fall if they got caught, and to the extent that they did not, he confidently expected to be protected through a lack of documentation to connect him with the scheme.

Given Babar’s conduct, the district court’s guidelines sentence of 120 months was one that fell “comfortably within the broad range of sentences that would be reasonable” when sentencing a defendant like Babar, who perpetrated – and indeed initiated and led -- a multi-million dollar mortgage fraud. *Fernandez*, 443 F.3d at 27. Surely the district court did not “exceed[] the bounds of allowable discretion” in sentencing Babar to this guidelines sentence, which was

closer to the low end of the guidelines (108 months) than the high end (135 months). *Id.* Nor is this the “rare case” where the sentence “dam- age[s] the administration of justice because the sentence imposed was shockingly high . . . or otherwise unsupportable as a matter of law.” *Ri- gas*, 583 F.3d at 123. This guidelines sentence was clearly not “shockingly high” for the ring leader of a \$4 million-plus mortgage fraud scheme.

The district court was also correct in sentenc- ing Babar more than others in the scheme in light of each defendant’s respective culpability. Far from grossly disproportionate, as Babar claims, Babar’s sentence reflects the considered and rational approach the district court brought to bear on sentencing all of the participants in the fraudulent scheme. The district court not on- ly was well aware of the sentences of Babar’s co- defendants when sentencing Babar, but empha- sized that the guidelines sentence that the court was imposing was based primarily on Babar’s place among all the defendants sentenced, or to be sentenced, by the district court:

I’m really looking primarily at the other defendants I’ve already sentenced, some other defendants I have not sentence[d] but whose conduct I have in mind, and I’m comparing your culpability to theirs. And I’m also looking at your role in bringing in- to the scheme people who really had to be

persuaded that was okay. And I think a sentence of 120 months is a good approximation for an evaluation of your conduct as opposed to these other folks that were already sentenced and some of the other people I have not sentenced but whose presentence reports I did review.

A164.

The district court appropriately gave Babar the longest sentence among his co-defendants, but did so deliberately and deliberatively in light of the fact that Babar was the most culpable among them. The next highest sentence, 90 months, was imposed on Rab Nawaz. *See United States v. Nawaz*, 3:10cr93(AWT). Nawaz was a seller of several properties to straw buyers. He also allowed Babar to use his home address for a fictitious company used as a fake employer for straw buyers. Nawaz endeavored to obstruct justice after Babar's arrest by attending Babar's detention hearing to learn about the government's evidence and later instructing a witness based on what he learned at the hearing to lie to government investigators. PSR ¶ 15. Babar appropriately received a longer sentence than Nawaz given that, unlike Babar, Nawaz was not the organizational force behind the scheme and was not involved in every facet of the scheme the way Babar was.

Former lawyer Morris Olmer and real estate appraiser Thomas Gallagher received the next highest sentences, 60 months each. *See United States v. Gallagher*, No. 11-2562, 2012 WL 1352689 (2d Cir. April 19, 2012) (affirming Gallagher’s sentence); *United States v. Olmer*, 3:10cr93(AWT).). While both men played important roles in the conspiracy – Olmer conducted the closing of the fraudulent property sales and Gallagher issued fraudulent real estate appraisals – neither of them was involved in every aspect of the scheme the way Babar was, much less acting as the leader in every aspect, as Babar did. Indeed, Babar employed both of them in his scheme and paid both of them to commit fraud for his own ends.

Similarly, Marshall Asmar and Wendy Werner, who were sentenced to 52 and 48 months of imprisonment, respectively, sold properties they owned as part of the scheme. *See United States v. Asmar*, 3:10cr93(AWT); *United States v. Werner*, 3:10cr93(AWT). Each was involved in only a handful of the approximately 30 properties involved in the overall scheme, unlike Babar, who was involved in every one. Likewise, Nathan Russo, the mortgage broker who received a 30-month sentence, was not involved in all or even most of the properties involved in Babar’s scheme. *See United States v. Russo*, 3:10cr93(AWT).

Suffice it to say that the district court's imposition of a guidelines sentence of 120 months of imprisonment for Babar was appropriate given Babar's crimes, and the district court's reasons for imposing that sentence were sound and should be affirmed in light of this Court's deferential review of a district court's sentence, particularly a sentence falling within the agreed-upon sentencing guidelines range.<sup>2</sup>

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<sup>2</sup> The defendant also asked for a remand to address a clerical error in the Statement of Reasons. Babar Br. at 27. The district court has corrected that error, so that any need to remand the case to correct the error is now moot.

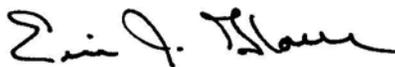
## Conclusion

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

Dated: August 20, 2012

Respectfully submitted,

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

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 10,669 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

A handwritten signature in black ink, appearing to read "Eric J. Glover". The signature is fluid and cursive, with a prominent initial "E" and a long, sweeping underline.

ERIC J. GLOVER  
ASSISTANT U.S. ATTORNEY

## **Addendum**

**§ 3553. Imposition of a sentence**

**(a) Factors to be considered in imposing a sentence.**--The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider --

**(1)** the nature and circumstances of the offense and the history and characteristics of the defendant;

**(2)** the need for the sentence imposed --

**(A)** to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

**(B)** to afford adequate deterrence to criminal conduct;

**(C)** to protect the public from further crimes of the defendant; and

**(D)** to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

**(3)** the kinds of sentences available;

**(4)** the kinds of sentence and the sentencing range established for --

**(A)** the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines --

**(i)** issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

**(ii)** that, except as provided in section 3742 (g), are in effect on the date the defendant is sentenced; or

**(B)** in the case of a violation of probation, or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742 (g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

\* \* \*

**(c) Statement of reasons for imposing a sentence.** The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence —

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a

sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

### **§ 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.