

# 11-3719

*To Be Argued By:*  
CHRISTOPHER M. MATTEI

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**United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**Docket No. 11-3719**

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UNITED STATES OF AMERICA,  
*Appellee,*

-vs-

GREGORY RUSSELL, also known as “G”,  
*Defendant-Appellant.*

—  
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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## Statement of Jurisdiction

This is an appeal from a judgment entered on September 7, 2011 in the District of Connecticut (Christopher F. Droney, J.) after the defendant was convicted at trial of one count of unlawful possession of a firearm by a convicted felon, one count of possession with intent to distribute cocaine base (“crack cocaine”) and one count of possession of a firearm in furtherance of a drug trafficking crime. A(III)113.<sup>3</sup> The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on September 12, 2011, and this Court has appellate jurisdiction over the defendant’s challenge to his conviction and sentence, pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

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<sup>3</sup> The defendant has filed an appendix in four, separately paginated volumes, the last of which contains the Pre-Sentence Report and has been sealed. The government will cite to each volume of this appendix using “A,” the volume number and the page number. The defendant has also filed a supplemental appendix with his supplemental brief, and the government will cite to this appendix using “SA” and the page number. The government will cite to its own appendix using “GA” and the page number.

**Statement of Issues  
Presented for Review**

- I. Did the district court commit any procedural error in imposing a two-level role enhancement under U.S.S.G. § 3B1.1 and, if so, was this error harmful in light of the court's statement that its 120-month sentence was equally justified as a non-guideline sentence in light of the factors set forth at 18 U.S.C. § 3553(a)?
  
- II. Did the district court abuse its discretion in finding that the testimony of a law enforcement witness on re-direct examination was truthful and, therefore, was not the basis for a new trial due to groundless allegations of government misconduct?

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**BRIEF FOR THE UNITED STATES OF AMERICA**

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## **Preliminary Statement**

On the morning of July 24, 2009, the defendant, Gregory Russell, recruited his friend, Noelle Candido, to drive him from Stamford, Connecticut to New York City so that he could purchase crack cocaine to bring back to Stamford and sell to others. Later that evening, after Candido had driven the defendant back to Stamford from the Bronx, the defendant directed

her to drive him to various locations in Stamford so that he could sell the crack he had purchased. Two Stamford police officers who knew that the defendant was wanted on a parole violation warrant approached him and tried to arrest him as he returned to Candido's car after a drug transaction. The defendant got out of the vehicle and withdrew a loaded and chambered .40 caliber semi-automatic pistol from his waistband. Candido, who was seated in the driver's seat, and Officer Christopher Broems, who was facing the defendant, saw the defendant pull out the gun. Officer Christopher Petrizzi, who was behind the defendant, struck him with a taser as he saw him reaching into his waistband, which caused the defendant to drop the gun and stumble to the curb where he discarded several baggies of crack cocaine.

A jury convicted the defendant of possession with intent to distribute crack cocaine, possession of a firearm in furtherance of a drug trafficking crime and possession of a firearm by a conviction felon. The district court imposed a 120-month incarceration term, which it characterized both as a guideline sentence and the sentence it would have imposed under 18 U.S.C. § 3553(a) regardless of the guideline calculation.

In this appeal, the defendant claims in his opening brief ("Opening Br.") that the district court committed a harmful procedural error by

applying a two-level role enhancement under U.S.S.G. § 3B1.1(c). He claims in a supplemental brief (“Supp. Br.”) that he is entitled to a new trial because the government presented false testimony through one of its law enforcement witnesses. For the reasons set forth below, both of these claims lack merit.

### **Statement of the Case**

On December 1, 2009, a federal grand jury in New Haven returned a three-count Indictment against the defendant, charging him in Count One, with unlawful possession of a firearm by a convicted felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2); in Count Two, with possession with intent to distribute cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(C); and, in Count Three, with possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1)(A)(I). A(I)3; A(III)106-A(III)109. On March 3, 2010, a jury returned guilty verdicts on Counts One, Two and Three of the Indictment. A(I)10.

On June 6, 2011, the defendant filed a *pro se* “Motion to Dismiss for Government Misconduct,” in which he argued that the government had intentionally elicited false testimony at trial. A(I)16; GA3. On July 29, 2011, the government filed a memorandum in opposition. A(I)16.

On August 31, 2011, the defendant appeared for sentencing. A(I)17. Before imposing sentence,

the district court denied the defendant's Motion to Dismiss for Government Misconduct. A(III)32-A(III)33. The district court then sentenced the defendant to concurrent terms of 60 months' imprisonment on Counts One and Two, and a consecutive term of 60 months' imprisonment on Count Three, for a total effective term of 120 months. A(III)67. The court also imposed a total term of supervised release of three years. A(III)67.

Judgment entered on September 7, 2011, and the defendant filed a timely notice of appeal on September 12, 2011. A(I)17-A(I)18. He is currently serving his federal sentence.

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

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

Based on the evidence presented by the government at trial, the jury reasonably could have found the following facts:<sup>3</sup>

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<sup>3</sup> At trial, during its case-in-chief, the government presented the testimony of one cooperating witness (Noelle Candido), one civilian witness (Sonia Kahn), several law enforcement witnesses (including Stamford police officers Christopher Broems, Christopher Petrizzi, Adrian Novia and Douglas Dieso), and two forensic examiners (Kevin Parisi and Eric Carita), as well as various physical exhibits (including the firearm and narcotics seized from the

On May 15, 2009, the defendant was released by the Connecticut Department of Corrections to the custody of the Connecticut Board of Pardons and Paroles. A(II)62. On July 9, 2009, the defendant's parole officer alerted the Stamford Police Department that the defendant had violated his parole and that a remand to custody order had been issued authorizing the defendant's arrest. A(IV)4.

On the morning of July 24, 2009, Noelle Candido called the defendant to ask him what his plans were for the day. A(I)184. Candido had known the defendant as a social acquaintance for several years. A(I)181-A(I)182. During the phone call, the defendant advised Candido that he wanted to go "up top," which Candido understood to mean that the defendant wanted to go to New York City to purchase drugs. A(I)184. The defendant asked Candido for a ride to New York City for that purpose, and she agreed. A(I)184. Candido then drove her vehicle to a Super 8 Motel located in Stamford, where she picked up the defendant. A(I)184. The defendant asked Candido to drive him to the Amsterdam Hotel, also located in Stamford. A(I)185. Candido agreed. A(I)185.

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defendant), and several intercepted telephone calls and police dispatch recordings.

Upon arriving at the Amsterdam Hotel, the defendant asked Candido for her driver's license, which he used to book a hotel room. A(I)185-A(I)186, A(I)286. When Candido asked the defendant whether he had used her license to book a room, the defendant lied, telling her that he had not. A(I)185. After booking the room, the defendant and Candido drove to a gas station on Stamford's west side where the defendant paid cash to put gasoline in Candido's car. A(I)186.

The defendant and Candido then got on the highway, traveling south toward New York City. A(I)186. Candido observed the defendant holding a wad of cash that was one to two inches thick. A(I)187-A(I)188. During the ride, the defendant spoke multiple times on the phone with an individual he referred to as Papi, who provided him with directions. A(I)186-A(I)187. Candido and the defendant exited the highway at Webster Avenue in the Bronx, where the defendant paid cash to have the interior and exterior of Candido's car cleaned. A(I)188. Before the car was cleaned, Candido removed her belongings from the center console. A(I)188. She did not observe any crack cocaine in the center console, and she did not subsequently put any crack cocaine in that area. A(I)202, A(I)214.

Candido and the defendant then drove toward Grand Concourse. The defendant did not seem to know where he was going. A(I)189. After receiving directions from an individual over the

phone, he directed Candido to drive back to the vicinity of Webster Avenue. A(I)189. Candido parked the car, and the defendant got out of the car carrying the wad of cash. A(I)189. He walked out of Candido's sight and was gone for 20 to 30 minutes. A(I)189-A(I)190. Candido waited for the defendant. A(I)190. When the defendant returned to the vehicle, Candido observed that the wad of cash was smaller. A(I)190. She then drove the defendant back to Stamford. A(I)190.

Upon arriving in Stamford, Candido and the defendant went to a laundromat. A(I)190. The defendant purchased detergent and a box of non-ziplock, plastic sandwich baggies at a nearby bodega. A(I)191. They then returned to the laundromat, and the defendant asked Candido for the keys to her vehicle. A(I)191. She gave the defendant the keys, and he went outside. A(I)191. Shortly thereafter, Candido went outside and observed the defendant sitting in her car and holding a quantity of crack cocaine that was "a little bit smaller than a tennis ball." A(I)192. The defendant asked Candido if he could put the crack into her purse, and Candido agreed. A(I)193.

After finishing their laundry, Candido drove the defendant to the Amsterdam Hotel, where she again observed the defendant in possession of the crack cocaine. A(I)193. The defendant had removed the crack from her purse, used a razor

blade to cut it into smaller pieces, and then wrapped it in the plastic baggies purchased earlier that day. A(I)194, A(I)217. Candido left the hotel to take a shower at her uncle's house in the Shippan section of Stamford. A(I)195.

Later that evening, Candido picked the defendant up at the Amsterdam Hotel. A(I)195. The defendant asked her to drive him to the south end of Stamford.<sup>4</sup> A(I)195. While driving, Candido observed on the defendant's lap a single baggie that contained 10 to 15 smaller baggies, each of which appeared to contain crack cocaine. A(I)196. After a stop at an "after hours spot," the defendant directed Candido to a housing complex on Ludlow Street and told her to park her car in a particular location. A(I)196. The defendant got out of the car and met with an individual, who was later identified as Malcolm Carpenter. A(I)196. As the defendant stepped out of the vehicle, Candido observed him put the baggies of crack cocaine into his back pocket. A(I)196. The defendant and Carpenter met outside the car for approximately 10 to 15 minutes, and then they both got into the car. A(I)197.

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<sup>4</sup> Prior to going to the south end of Stamford, Candido and the defendant picked up Candido's friend in Tarrytown, New York and dropped her off in Stamford. A(I)195.

The defendant instructed Candido to drive down Woodland Avenue. A(I)197. When they arrived at Woodland Avenue, the defendant told Candido to park her car at the intersection of Woodland Avenue and Atlantic Street. A(I)197. He then got out of the car and told Candido to wait for him. A(I)198.

Candido stayed in the car with Carpenter, who was seated in the back seat. A(I)198. The defendant walked back down Woodland Avenue and was gone for approximately 20 minutes. A(I)198. When he returned, the defendant was accompanied by an individual known to Candido as Lenny. A(I)198. The defendant did not stop at the car, but walked with Lenny past the car and up Atlantic Street. A(I)199.

Approximately 20 minutes after the defendant passed Candido's car, Stamford police officer Adrian Novia observed the defendant emerge alone from the driveway located at 752 Atlantic Street and walk back toward Candido's vehicle. A(I)128, A(I)151-A(I)153. The defendant entered Candido's vehicle and sat in the front passenger seat. A(I)130.

At that point, Stamford police officers approached the car and attempted to arrest the defendant on the parole warrant. A(I)62. Officer Christopher Petrizzi opened the passenger door, ordered the defendant to exit the vehicle, and grabbed the defendant's right arm. A(I)63. The defendant refused to comply and began to look

around nervously. A(I)64. After several additional commands, the defendant suddenly and quickly got out of the car. A(I)64. He spun away from Officer Petrizzi and was facing Officer Christopher Broems, who had positioned himself at the driver's door. A(I)66.

Officer Petrizzi, who was standing behind the defendant, observed him reach into the front area of his waistband. A(I)66. Believing that he was reaching for a weapon, Officer Petrizzi deployed his taser. A(I)66. He then observed the defendant begin to withdraw his right hand from his front waist band area and heard the sound of "metal hitting metal." A(I)67. Based on his experience, Officer Petrizzi knew the sound to be that of a gun hitting metal. A(I)67. The defendant turned toward Officer Petrizzi, stumbled and fell to the ground. A(I)67-A(I)68.

As the defendant spun away from Officer Petrizzi, Officer Broems had a clear view of the defendant through the driver's side window and observed him reach into his waistband with his right hand and withdraw a large, black handgun. A(II)14-A(II)15. He then heard the sound of metal hitting metal and, like Officer Petrizzi, recognized the sound to be that of a gun striking metal. A(II)16.

Candido also saw the defendant withdraw a firearm and attempt to discard it as he got out of her car. A(I)200-A(I)201.

After scanning the area around where the defendant had fallen, Officer Petrizzi turned back to the curb area and located an Iberia, Model S&W, .40 caliber pistol wrapped in a green bandana. A(I)69-A(I)70. The firearm was found next to a sewer grate beneath the front, passenger door. A(I)70. The firearm was loaded with eight rounds of hollow point ammunition, one of which was chambered, and the safety mechanism was off. A(I)76, A(I)84. The green bandana in which the firearm was wrapped was tested and found to contain a DNA mixture, in which the defendant was included as a contributor. A(I)166-A(I)167. The expected frequency of an individual in the African-American or Caucasian populations other than the defendant who could also be a contributor to the DNA mixture was 1 in 220,000. A(I)169.

While the defendant was being subdued, he discarded ten baggies of crack cocaine on the sidewalk. A(I)72; Gov.'t Ex. 31. The baggies contained a total of 1.12 grams of crack. Gov.'t Ex. 31. During a subsequent search of the vehicle, officers recovered two more baggies: one baggie containing 0.84 grams of crack, which was seized from between the front passenger seat and center console, Gov.'t Ex. 33, and another baggie containing 2.47 grams of crack, which was located in the center console. Gov.'t Ex. 34. Officers also seized \$754 in cash from the defendant's person and a keycard to a room

at the Amsterdam Hotel. A(I)134. The defendant, Candido and Carpenter were arrested and charged with various offenses. A(II)48.

On October 23, 2009, the defendant was released from state custody on bond. A(II)63. On October 25, 2009, he was intercepted during an ongoing wiretap investigation speaking with an identified fellow drug dealer. A(II)74; Gov.'t Ex. 46. During the telephone call, the defendant described the circumstances surrounding his July 25, 2009 arrest as follows:

. . . Cause, right before I went to go get back in the car, the niggers just ran up behind me. Freeze mother fucker, don't you move. Don't move. Then the nigger had the taser gun on me. So, I'm like damn, mother fucker chill. Cause, now, I don't got nowhere to bust. I tried to drop that shit in the sewer. Then he hit me with that motherfucker. You know what I mean? I dropped nigger. I ain't gonna front. That shit hurt, nigger, know what I'm saying? Whatever, so he found that shit.

Gov.'t Ex. 46.

### **B. Sentencing**

The Pre-Sentence Report ("PSR") found that the applicable total offense level, under Chapter Two of the Sentencing Guidelines, was 16.

A(IV)29. The PSR did not include a two-level role enhancement in its calculation and instead expressly left open that issue for the district court's resolution. A(IV)30. The PSR calculated that the defendant had accumulated 13 criminal history points, placing him in Criminal History Category VI. A(IV)29. The guideline term of imprisonment was 46 to 57 months with respect to the convictions on Counts One and Two. A(IV)30. Under U.S.S.G. § 2K2.4, the PSR determined that the defendant's conviction on Count Three resulted in a mandatory 60-month guideline term of imprisonment, which was then added to the base guideline range, resulting in final guideline range of 106 to 117 months' imprisonment. A(IV)30.

On July 26, 2011, the district court heard evidence and argument on various unresolved matters concerning the calculation of the defendant's guideline range. First, the government presented the expert testimony of a special agent of the Drug Enforcement Administration to establish that, based on the facts presented at trial, the relevant quantity of crack cocaine attributable to the defendant exceeded 28 grams. A(II)269-A(II)270.

Next, the government argued that the defendant should receive a two-level role enhancement under U.S.S.G. § 3B1.1 because, throughout July 24, 2009 and the early morning of July 25, 2009, the defendant exercised a

significant degree of control over Candido to carry out his drug trafficking activities. A(III)6. Specifically, the government cited evidence that the defendant (1) recruited Candido to drive him to the Bronx to purchase crack; (2) used her license to book a hotel room where he later packaged crack cocaine; (3) had Candido wait for him at a specific location in the Bronx while he purchased drugs; (4) asked Candido to stash his crack cocaine in her purse; (5) compensated her by paying for her gas and car wash; and (5) directed her to drive him to various locations where he apparently engaged in drug transactions. A(III)6-A(III)9. The defendant objected to the enhancement, arguing that he did not exercise any control over Candido, but merely requested a series of favors from her as a friend. A(III)10-A(III)11. The district court asked the parties to file proposed findings of fact concerning the defendant's role in the offense, and took the matter under advisement. A(III)21-A(III)22. On July 29, 2011, the government filed its proposed findings of fact, and, on August 2, 2011, the defendant filed his proposed findings of fact. A(III)28.

On August 31, 2011, the parties appeared for sentencing. A(III)26. After listing the materials it had reviewed in advance of sentencing, the district court addressed the disputed issues relating to the calculation of the defendant's guideline range. A(III)28. First, the court

concluded, over the government's objection, that the amount of cocaine base involved in the offense did not exceed 28 grams, but was the 4.43 grams seized from the defendant and Candido's vehicle. A(III)39.

The court then ruled on the role enhancement as follows:

I'm ready to rule on the role in the offense issue then.

The Government argues that two levels should be added to the defendant's base offense level under Section 3B1.1(c) because Mr. Russell was an organizer, leader, manager or a supervisor in the criminal activity of July 24th and 25th, 2009. Application Note 2 to this section states that: "To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager or supervisor of one or more other participants."

Application Note 1 defines a participant as "a person who is criminally responsible for the commission of the offense but need not have been convicted."

The Court finds that [Noelle] Candido was also a participant in the offense. She was also arrested the night of July 25, 2009 and charged with narcotics offenses.

She drove Mr. Russell to the Bronx so he could buy drugs, facilitated his purchase in preparation of crack cocaine for sale, concealed the crack cocaine by hiding it in her purse and then drove Mr. Russell around Stamford so he could conduct various activities related to the sales by him of the crack cocaine.

“A defendant may properly be considered a manager or supervisor if he exercised some degree of control over others involved in the commission of the offense.” That’s from *United States v. Burgos*, 324 F.3d 88 at page 92, a Second Circuit opinion from 2003 quoting *United States v. Blount* at 291 F.3d 201, page 217, a Second Circuit decision from 2002. “It is enough to manage or supervise a single other participant.” That’s from *United States v. Al-Sadawi* 432 F.3d 419 at page 427, the 2nd Circuit decision from 2005.

Mr. Russell recruited and then exercised control over Ms. Candido during the events of July 24th and 25th, 2009. Although it was Ms. Candido who initially called Mr. Russell to see what he was doing on July 24th, he asked her to drive him to the Bronx to go “up top,” that is to buy drugs, and she agreed.

Mr. Russell used Ms. Candido's identification to check into the Amsterdam Hotel. He told her where to drive to in the Bronx and to wait for him while he bought drugs. It was obvious to Ms. Candido that she was facilitating his acquisition of crack cocaine in New York. She then saw Mr. Russell package the crack for street sale in the hotel. Once back in Stamford, Mr. Russell asked Ms. Candido to stash crack cocaine in her purse. That night he directed Ms. Candido to drive to various locations in the south end of Stamford where he appears to have engaged in drug transactions.

Ms. Candido essentially acted as Mr. Russell's driver on July 24th, 2009, and in the early morning of July 25th, 2009. She also received benefits from Mr. Russell in exchange for her assistance to him, including Mr. Russell's purchasing gas for her car and paying for the detailing of her car that day.

This evidence establishes that Mr. Russell exercised control over Ms. Candido. *See United States v. Munoz*, [268 Fed. Appx. 46 (2d Cir. Mar. 4, 2008)], a Second Circuit opinion from 2008, affirming a two level increase under 3B1.1(c) when there was ample

evidence at trial that the defendant exercised control over another participant who acted as his driver.

The Court finds two levels should be added to the defendant's offense level under 3B1.1(c) as a result.

A(III)41-A(III)44.

Having calculated the relevant quantity of cocaine base and applied the two-level role enhancement, the district court arrived at a total offense level of 18. A(III)50. Because the defendant was in Criminal History Category VI, his resulting guideline range was 57 to 71 months' imprisonment. A(III)50. The court then added to that range the 60-month consecutive sentence required for Count Three, to arrive at a sentencing range of 117 to 131 months' imprisonment. A(III)50.

After hearing the remarks of counsel and the defendant, the district court imposed sentence. A(III)63. In doing so, the court reviewed the factors set forth at 18 U.S.C. § 3553(a) and stated that it had considered these factors in fashioning an appropriate sentence. A(III)63-A(III)64. The court then observed that the defendant "was an experienced drug dealer who intended to sell a significant amount of crack cocaine" and described him as "a dangerous dealer with a handgun loaded with hollow point ammunition, a chambered round and the safety

off.” A(III)66-A(III)67. The court also described the defendant’s criminal history as “extensive,” pointed out that he had “convictions for firearms, escape, evading responsibility, selling drugs and others,” and noted that he “had only been on state parole for two months” at the time of his offense. A(III)67. These aggravating factors notwithstanding, the court noted that the defendant was “highly intelligent” and suggested that he could use that intelligence to rehabilitate himself. A(III)67.

After weighing these factors, the court concluded that a sentence within the advisory guideline range was appropriate and imposed a total effective sentence of 120 months’ imprisonment and three years’ supervised release. A(III)66-A(III)67. In imposing sentencing, the court recognized that it had the authority to depart from the guideline range, but declined to exercise that authority. A(III)66. The court also noted that it would have imposed the same 120-month sentence regardless of the guideline range, as a reflection of the § 3553(a) factors. A(III)66.

### **Summary of Argument**

1. The district court properly calculated the guideline range and imposed a reasonable sentence in light of the § 3553(a) factors. In particular, the district court properly applied a two-level role enhancement based on its finding that the defendant had exercised control over a

co-conspirator, Candido, by (1) recruiting her to drive him to New York to purchase drugs; (2) using her license to secure a hotel room where he later packaged his drugs; (3) directing her to a location in the Bronx where he purchased crack cocaine; (4) asking her to stash his crack cocaine in her purse; and (5) directing her to drive him to various locations in Stamford where he engaged in drug transactions with his customers. But if the district court erred in calculating the defendant's guideline range, this error was harmless because the district court properly assessed the sentencing factors set forth at 18 U.S.C. § 3553(a) and stated that it would have imposed the same sentence even if the defendant had been in a different guideline range.

2. The district court properly denied any post-trial relief based on its finding that Officer Christopher Broems had testified truthfully on redirect examination when he disputed defense counsel's characterization of his grand jury testimony. On direct examination, Broems had testified that he had seen the defendant withdraw a firearm from his waistband, but had not seen the defendant holding the bandana in which the firearm had been wrapped. On cross-examination, defense counsel sought to impeach him by suggesting that he had testified before the grand jury that he had seen a bandana when the defendant withdrew the firearm. Officer

Broems disputed defense counsel's characterization of his grand jury testimony and, on redirect examination, testified that he had not previously testified that he had seen a bandana when the defendant withdrew the firearm. The district court properly concluded that Officer Broems's testimony on re-direct examination was true, that he had not informed the grand jury that he had personally observed the defendant holding a firearm with a bandana and that his grand jury testimony concerning the bandana, when read in context, was not based on his personal observations, but was based on inferences he drew from viewing a post-arrest photograph depicting the firearm wrapped in the bandana. Moreover, even assuming *arguendo* that Officer Broems's characterization of his grand jury testimony was not accurate, there is absolutely no reasonable likelihood that this testimony had any effect on the jury's verdict, where there was ample direct evidence that the defendant committed the offenses charged in the Indictment.

## Argument

### **I. The district court properly applied a two-level role enhancement under U.S.S.G. § 3B1.1(c), and any error was harmless.**

#### **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**

After the Supreme Court's holding in *United States v. Booker*, 543 U.S. 220 (2005), rendered the Sentencing Guidelines advisory rather than mandatory, a sentencing judge is required to: “(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence.” See *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005).

A sentencing court commits procedural error if it fails to calculate the guideline range, erroneously calculates the guideline range, treats the Sentencing Guidelines as mandatory, fails to consider the factors required by 18 U.S.C. § 3553(a), rests its sentence on clearly

erroneous findings of fact, or fails to adequately explain the sentences imposed. *See United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008). These requirements, however, should not become “formulaic or ritualized burdens.” *Id.*, 550 F.3d at 193. 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.” *Id.* Although, 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, 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).

The adjustment for a defendant’s aggravating role in an offense is governed by U.S.S.G. § 3B1.1. 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). 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).

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).

“A defendant may properly be considered a manager or supervisor if he ‘exercise[d] some degree of control over others involved in the commission of the offense.’” *United States v. Burgos*, 324 F.3d 88, 92 (2d Cir. 2003) (quoting *United States v. Blount*, 291 F.3d 201, 217 (2d Cir. 2002)). Moreover, to be eligible for this enhancement, “[i]t is enough to manage or supervise a single other participant” *See Burgos*, 324 F.3d at 92. In fact, a two-level enhancement under § 3B1.1(c) is justified when the defendant merely recruits another participant in criminal activity. *See United States v. Al Sadawi*, 432 F.3d 419, 427 (2d Cir. 2005) (“the two-point role enhancement would have been justified upon Al-Sadawi’s recruitment of his father alone”).

“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 at 276.

In evaluating a decision to impose a role enhancement under § 3B1.1, it is “well established” that this Court gives “due deference” to the district court and reviews its factual findings for “clear error.” *United States*

*v. Huerta*, 371 F.3d 88 (2d Cir. 2004) (citing 18 U.S.C. § 3742(e)).

### **C. Discussion**

Based on the all the evidence presented at trial, the district court properly applied the two-level role enhancement, having concluded that the defendant exercised control over Candido in connection with his drug trafficking activities. In reaching this conclusion, the district court determined that, the defendant “recruited and then exercised control over Ms. Candido during the events of July 24th and 25th, 2009” by (1) “ask[ing] her to drive him to the Bronx to . . . buy drugs,” (2) “us[ing] Ms. Candido’s identification to check into the Amsterdam Hotel,” (3) directing her “where to drive to in the Bronx and to wait for him while he bought drugs,” (4) “ask[ing] Ms. Candido to stash crack cocaine in her purse,” (5) “direct[ing] Ms. Candido to drive to various locations . . . where he appears to have engaged in drug dealing,” and (6) giving “benefits [to Candido] in exchange for her assistance to him.” A(III)43. The defendant challenges the district court findings of fact as clearly erroneous, and argues that the district court’s findings do not support the application of the role enhancement under § 3B1.1.

First, the defendant challenges the court’s finding that the defendant recruited Candido, arguing instead that she volunteered to assist

him. *See* Opening Br. at 14. The defendant's description of Candido's testimony on this point is not accurate. Candido testified that, during a phone call, the defendant told her that "he wanted to go up top." According to Candido, the defendant asked her to drive him to New York. A(I)184. The fact that the Candido agreed does not undermine the district court's finding that the defendant recruited her; it simply demonstrates that the defendant recruited her successfully. Nor does it matter that the defendant and Candido had a friendship that pre-dated the drug conspiracy. Although Candido may have been more willing to assist the defendant's drug activities in light of their friendship, this does not change the fact that the defendant directed and supervised her activities on July 24, 2009 and July 25, 2009.

Second, the defendant suggests that Candido was not a member of a drug conspiracy with him and, therefore, he did not control her action in furtherance of that activity. The defendant is wrong. Candido's testimony clearly establishes that she agreed to (1) drive the defendant to New York knowing that he intended to purchase drugs, A(I)184, (2) wait for him while he purchased drugs, A(I)190, and (3) drive him back to Stamford so he could sell drugs to his customers. A(I)190. She also agreed to stash the defendant's crack cocaine in her purse and to drive him to various apparent drug transactions

in Stamford. A(I)192, A(I)196-A(I)199. Ultimately, she was arrested and charged in a narcotics conspiracy with the defendant. A(I)201. The fact that Candido previously sold drugs on her own behalf, as the defendant highlights, is immaterial to the question of whether she also assisted the defendant's drug trafficking at his direction in this case. Indeed, her prior drug dealing experience only bolsters the government's argument that she certainly knew what she was doing when she was assisting the defendant here. Likewise, the defendant's argument that the defendant and Candido were not in a hierarchical relationship is contrary to the evidence, which demonstrated that, at least on July 24, 2009 and July 25, 2009, Candido was serving as the defendant's driver, was assisting him in his narcotics dealing and was following his orders.

The defendant contends that the district court improperly relied on evidence that he "used Ms. Candido's identification to check into the Amsterdam Hotel." A(III)43. The defendant does not directly challenge the district court's finding that he used Candido's license, but argues instead that the court improperly inferred from this fact that the defendant exercised control over Candido. The defendant contends that the defendant did not instruct Candido to give him her license and did not tell her what he intended to do with it. The

defendant is correct, but the fact that he manipulated Candido into giving him her license is not at all inconsistent with the district court's well-founded conclusion that the defendant exercised a substantial degree of control over her in furtherance of his own drug activities and that he exploited this relationship to his own benefit. After all, regardless of what he told her, the defendant certainly used her license to rent a hotel room which he then used to package narcotics.

The defendant likewise challenges the district court's finding that "Ms. Candido received benefits from Mr. Russell in exchange for her assistance to him." A(III)43. This finding was supported by Candido's testimony that, while *en route* to New York City, the defendant purchased gasoline for her car and paid to have her car washed and detailed. A(I)188. The defendant does not contest that he did these things, but argues that the court should not have considered them as evidence of the defendant's supervision of Candido. Essentially, the defendant argues that it was unreasonable for the district court to infer that the defendant compensated Candido in exchange for her assistance. But that is not an accurate description of the district court's decision. The court did not conclude that the defendant supervised Candido based on the fact that he paid for gas in her car and paid to have it cleaned. The court simply cited this treatment

as one of many factors that supported its characterization of their relationship. Even the defendant acknowledges that his compensation of Candido could reasonably be interpreted in several ways. See Opening Br. 16. The court's interpretation was certainly reasonable.

Ultimately, the defendant's assertion that he "respectfully disagrees with the district court's findings" is unavailing. Opening Br. 13. The defendant fails to point to any evidence demonstrating that the district court's findings were clearly erroneous. In fact, ample evidence supported each of the district court's findings and its resulting conclusion that "the defendant exercised control" over Candido "as his driver." A(III)44. Having properly found that the defendant persuaded Candido to drive him to purchase crack cocaine in the Bronx, to drive him back to Stamford, to hide his crack cocaine in her purse, and to drive him to meet with his various drug customers, the district court properly applied a two-level enhancement under § 3B1.1. See *Burgos*, 324 F.3d at 92 ("[i]t is enough to manage or supervise a single other participant"); *Al Sadawi*, 432 F.3d at 427 ("the two-point role enhancement would have been justified upon Al-Sadawi's recruitment of his father alone").

Even if the district court erred in its guideline analysis, however, any error was harmless because the court conducted a clear analysis of

the § 3553(a) sentencing factors and concluded, based on that analysis, that a sentence of 120 months' incarceration was necessary to accomplish the objectives of a criminal sentence under § 3553(a). See *United States v. Jass*, 569 F.3d 47, 68 (2d Cir. 2009) (“Where we identify procedural error in a sentence, but 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.”); see also *United States v. Batista*, 684 F.3d 333, 346 (2d Cir. 2012) (holding that any error in application of role enhancement was harmless because “[t]he record clearly indicates that the role enhancement had no effect on [the defendant’s] sentence.”).

In particular, the district court reviewed each of the factors that a sentencing court is required to consider under 18 U.S.C. § 3553(a), and stated that it “ha[d] considered all those factors. . . . [and] taken into account the need for this sentence to serve the various purposes of a criminal sentence.” A(III)64. In arriving at its sentence, the district court took particular note of (1) the fact that “the defendant was an experienced drug dealer who intended to sell a significant amount of crack cocaine”; (2) the defendant’s “extensive prior record;” and (3) the fact that the defendant was armed with a fully-

loaded semi-automatic handgun that was ready to fire. A(III)66-67. In light of all these factors, the district court expressly stated that it would have imposed the same sentence “were [it] to impose a non-guideline sentence.” A(III)66.

**II. The district court properly found that the government did not elicit false testimony from one of its law enforcement witnesses.**

**A. Relevant facts**

Officer Christopher Broems, a Task Force Officer with the Bureau of Alcohol, Tobacco, Firearms and Explosives, was one of the officers who apprehended and arrested the defendant. SA4-SA5; A(II)6. On December 1, 2009, Officer Broems testified as a summary witness and the only witness before the federal grand jury that returned the indictment in this case. SA1-SA45. In particular, Officer Broems testified about the investigation and the arrest of the defendant, including, *inter alia*, his observations, the observations of his fellow law enforcement officers, the statements of other witnesses, the seizure of physical evidence, the results of laboratory analysis, and an expert’s examination of the seized firearm. SA33. In essence, Officer Broems summarized all of the facts underlying the charges against the defendant.

As to his own personal observations of the defendant, Officer Broems gave the following testimony:

Q. Let me stop you right there. Did you see him start reaching in his waistband?

A. Yes. I had a clear bird's eye view at that point.

Q. Okay. And based on your training and your experience, did you have a belief as to what he would be reaching for?

A. He was reaching for a weapon.

Q. Okay. And do you know if Officer Petrizzi saw that.

A. Well, I know he saw that because before I could speak on it and tell him what I was thinking, he actually tasered him. So, as he's reaching for the gun, he's got his hand on the gun. As he's pulling he tasers him. With that, Mr. Russell - because the reaction of the taser, it goes like that (indicating), and the gun drops - pulls his arm up and the gun drops to the ground.

Q. Did you see the gun in Mr. Russell's hand?

A. Yes.

Q. And that was as the taser was . . .

A. Being deployed, yes.

Q. . . . being deployed. And did the force of the taser then cause Mr. Russell to drop the gun?

A. He dropped the gun and he fell to the ground himself, sir.

SA20-SA21.

At that point, Officer Broems stopped describing his own personal observations and resumed summarizing the evidence against the defendant:

Q. Okay. Showing you what I've marked as Grand Jury Exhibit 5, can you tell the Grand Jury what's depicted there?<sup>5</sup>

A. Yes. That's the Iberia firearm that Russell was holding in his hand with a green bandana.

Q. As he was holding it, it was actually - - describe how he was holding it in the bandana?

A. Well, just around the grip. They do that so there's no DNA or prints left on the gun.

Q. Okay.

A. It's common practice.

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<sup>5</sup> This exhibit is a photograph depicting the seized firearm and the green bandana, A(III)33, and is included in the government's Appendix.

Q. Did he also drop the bandana?

A. Everything.

SA21-SA22. Officer Broems was not asked whether he personally saw the defendant holding a bandana around the firearm the bandana.

At trial, Officer Broems testified that he observed the defendant withdraw a firearm from his waistband immediately before Officer Petrizzi struck him with the taser. A(II)15-A(II)16. He also described the fact that, after the defendant dropped the firearm, "Officer Petrizzi notified me that he had a weapon with a green bandana wrapped around it." A(II)17. In particular, Officer Broems testified on direct examination as follows:

Q. And as Mr. Russell turned his back to Officer Petrizzi and was facing you, what did you see?

A. I heard Officer Petrizzi say let me see your hands, let me see your hands. I observed Gregory Russell pull out a black gun from his waistband.

A(II)15. With respect to whether he observed the bandana at the moment the defendant withdrew the firearm, Officer Broems testified as follows:

Q. In addition to seeing Mr. Russell pull the firearm out of his waistband, did you observe any bandana at that point?

A. No, I did not.

A(II)46.

On cross-examination, defense counsel attempted to impeach Officer Broems by suggesting that, contrary to his trial testimony, he had informed the grand jury that he had indeed observed the bandana when the defendant withdrew the firearm. Specifically, defense counsel questioned Officer Broems as follows:

Q. So it's fair to say that when you saw -- if you did see a gun in Mr. Russell's hand, it was a bare gun and no bandana?

A. I saw a gun in his hand. I did not see a bandana, yes.

Q. Thank you. And do you remember if you ever gave contrary testimony on that point with regard to the bandana? Do you remember testifying before a Grand Jury in this case in December of 2009?

A. Yes.

Q. Do you remember what you told the Grand Jury about a bandana and a gun?

A. No, I don't remember it.

Q. Do you remember -- if I show you this, will this refresh your recollection?

A. If that's what it is, yes, sir.

Q. Your Honor, I'm showing the witness Grand Jury testimony pages 20 and 21 from December 1, 2009. Just take a look at the bottom of 20 and top of 21 actually.

A. Yes, sir.

Q. So you told the Grand Jury that you'd seen the handgun and the bandana, right? The bandana was with the handgun?

A. I wouldn't take that answer as that.

Q. I'm just trying to understand. So it's still your testimony you hadn't seen a bandana at that point in time.

A. That's correct.

A(II)93.

On re-direct examination, the government elicited the following testimony from Officer Broems concerning the bandana:

Q. And then do you remember, Officer Broems, you were shown some Grand Jury testimony?

A. I have it.

Q. And I think the first question about it was whether you testified that you saw a

bandana when Mr. Russell pulled out the gun, right?

A. Yes.

Q. And now I'm going to show you, you have it in front of you, you got page 20 and 21?

A. Yes.

Q. Did you testify in front of the Grand Jury that you saw a bandana when Mr. Russell pulled that gun out?

A. No, I did not.

Q. Is that because you didn't see one?

A. I didn't see one.

A(II)108. The defendant did not object to the foregoing exchange. On re-cross examination, defense counsel did not revisit the subject of Officer Broems's grand jury testimony. A(II)110-A(II)111.

In advance of sentencing, the defendant filed two *pro se* motions to dismiss the Indictment, claiming that (1) Officer Broems testified falsely before the grand jury that he saw the defendant holding a firearm wrapped in a bandana, and (2) the government knowingly elicited false testimony at trial when it asked Officer Broems whether he had testified before the grand jury that he had personally observed the defendant

holding a bandana. A(III)32; GA1-GA42.<sup>6</sup> The government filed a written memorandum in opposition to the defendant's motions in which it argued that Officer Broems testified truthfully before the grand jury and at trial. A(III)17. In particular, the government argued that Officer Broems testified truthfully a trial when he stated that he did not tell the grand jury that he had personally observed the defendant holding a bandana when he withdrew a firearm. GA52.

At sentencing, the district court invited oral argument on the defendant's motions. Both parties declined to present argument, and the district court then ruled from the bench as follows:

I'm ready to rule on it then. Since the Court's ruling on May 18, 2011, which has a docket entry number of 128, denying several of defendant Gregory Russell's post-trial motions, Mr. Russell has filed a Motion to Dismiss for Government Misconduct which has a docket entry of 135, and a Motion to Dismiss the Indictment which has a docket entry number 137.

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<sup>6</sup> In this appeal, the defendant advances only the latter claim, i.e., that the district erred in denying him post-trial relief based on his allegation that the government intentionally elicited false testimony during Officer Broems's re-direct examination.

In his motions to dismiss, Mr. Russell makes two arguments challenging his convictions and asking this Court to dismiss his indictment.

First, Mr. Russell argues that Officer Christopher Broems gave false testimony before the Grand Jury when he testified that Mr. Russell was holding a firearm wrapped in a bandana. Mr. Russell contends that Officer Broems' Grand Jury testimony was false because he gave contradictory testimony at trial.

Second, Mr. Russell argues that at trial the Government knowingly and improperly elicited this false Grand Jury testimony on redirect examination of Mr. Broems.

The Court finds that Officer Broems' testimony before the Grand Jury was not false. The close review of the Grand Jury transcript reveals that Officer Broems did not testify that he personally saw Mr. Russell holding the firearm wrapped in a bandana. Instead, Officer Broems testified as a summary witness about the items pictured in Grand Jury Exhibit Number 5, a photograph of the firearm and bandana. Officer Broems then inferred from the photograph and the fact that the bandana was wrapped around the firearm when Officer Petrizzi seized

it, that Mr. Russell must have held the bandana around the firearm. Officer Broems, however, did not testify that he saw Mr. Russell holding a firearm wrapped in a bandana. Thus, Officer Broems' Grand Jury testimony is consistent with his trial testimony in which he testified that he only saw the firearm in Mr. Russell's hand and not a bandana.

The Court finds that Mr. Russell's claims in those two motions to dismiss are without merit. For these reasons, the motions, docket number 135 and docket number 137, are denied.

A(III)32-A(III)33.

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

"[T]he [Supreme] Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Drake v. Portuondo*, 553 F.3d 230, 241 (2d Cir. 2009) (citing *United States v. Agurs*, 427 U.S. 97, 103 (1976)). A defendant raising such a claim must demonstrate as an initial step that the witness' testimony actually was false. *See United States v. Moore*, 54 F.3d 92, 99 (2d Cir. 1995); *United*

*States v. White*, 972 F.2d 16, 20 (2d Cir. 1992). That is, a showing that the witness' testimony was merely "misleading rather than demonstrably false" is insufficient. *United States v. Petrillo*, 237 F.3d 119, 123 (2d Cir. 2000). If the defendant satisfies that threshold question and the government knew or should have known of the perjured testimony, a new trial is appropriate where there is "any reasonable likelihood" that the false testimony influenced the jury's verdict. *See United States v. Wallach*, 935, F.2d 445, 456 (2d Cir. 1991).

A district court's denial of a post-verdict motion for a new trial based on alleged perjury will not be overturned absent a showing that the district court abused its discretion.<sup>7</sup> *See Moore*, 54 F.3d at 99 (affirming district court's denial of a motion for new trial based on introduction of purported perjurious testimony). A district court "abuses its discretion when its decision rests on an error of law or a clearly erroneous factual

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<sup>7</sup> The defendant styled his *pro se* motion in the district court as a motion to dismiss the indictment, but, in this appeal, he seeks a new trial, which is the appropriate remedy for the alleged knowing use of perjured testimony. Although the defendant requested the wrong relief below, the government does not ask this Court to review the defendant's claim here for plain error because the defendant preserved the issue below in his *pro se* motion, even though he did not identify correctly the remedy.

finding, or when its decision . . . cannot be located within the range of permissible decisions.” *United States v. Gonzalez*, 647 F.3d 41, 57 (2d Cir. 2011).

### **C. Discussion**

The defendant argues in his Supplemental Brief that the government knowingly elicited false testimony on re-direct examination by asking Officer Broems to clarify whether he had testified in front of the grand jury that he saw “a bandana when Mr. Russell pulled that gun out.” A(II)108. Officer Broems answered that he did not testify to that effect. A(II)108. The district court agreed, and properly concluded that Officer Broems’s characterization of his grand jury testimony was not false at all.<sup>8</sup>

It is undisputed that Officer Broems was called as a summary witness before the grand jury, *i.e.*, a witness who is permitted to provide information to the grand jury about which he does not have personal knowledge. In that capacity, Officer Broems was asked to describe

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<sup>8</sup> In his Opening Brief, the defendant apparently agreed with the government and the district court on this point when he wrote that Officer Broems testified before the grand jury that he *did not* see the defendant holding a bandana when he pulled out the gun. *See* Opening Br. at 3-4 (citing the portion of the trial transcript in which Officer Broems discussed his grand jury testimony).

items pictured in Grand Jury Exhibit 5. SA21-SA22; GA62. In response, he stated: “Yes. That’s the Iberia firearm that Russell was holding in his hand with a green bandana.” SA21-SA22.

And, in fact, that exhibit did depict the firearm that was wrapped with a bandana and recovered adjacent to the defendant moments after he was subdued by Officer Petrizzi. A(III)33; A(I)73-74; GA62. Officer Broems merely described the items in the photograph based on his knowledge of the circumstances surrounding the defendant’s arrest.

He was then asked to describe the manner in which the defendant was holding the firearm and the bandana. SA22. He responded to that question by inferring from the photograph and the manner in which the bandana was wrapped around the gun when it was seized, that the defendant had held the bandana around the grip of the gun. His inference was entirely proper, given all of the evidence and his own experience.

In sum, at no point during his grand jury testimony did Officer Broems testify that he had direct, personal knowledge that the defendant was holding a bandana when he pulled the gun out of his waistband. Indeed, on cross-examination, when defense counsel confronted Officer Broems with his grand jury testimony and suggested that he had testified in that manner, Officer Broems correctly responded that defense counsel was misconstruing his grand

jury testimony. A(II)93. And defense counsel did mischaracterize the grand jury testimony. He suggested that Officer Broems had testified that he had “seen” the handgun and the bandana together, when, in fact, he had merely described a photograph depicting the bandana and handgun together, and then inferred, from that photograph, the manner in which the defendant had held both items. On redirect examination, the government dispelled defense counsel’s mischaracterization by asking plainly, “Did you testify in front of the grand jury that you saw a bandana when Mr. Russell pulled that gun out?” Officer Broems accurately responded, “No, I did not.”

In rejecting the defendant’s claim that Officer Broems committed perjury on re-direct examination when he answered, “No, I did not,” the district court correctly noted that “a close review of the grand jury transcript reveals that Officer Broems did not testify that he personally saw Mr. Russell holding the firearm wrapped in a bandana.” A(III)32. Rather, Officer Broems was testifying as a “summary witness” about a photograph depicting the gun and the bandana. As the court held, “Broems, inferred from the photograph and the fact that the bandana was wrapped around the firearm when Officer Petrizzi seized it, that Mr. Russell must have held the bandana around the firearm.” A(III)33. But “Officer Broems did not testify that he saw

Mr. Russell holding a firearm wrapped in a bandana.” A(III)33. Thus, his grand jury testimony was consistent with his trial testimony. A(III)33. It is evident, then, that the government did not engage in misconduct at all because the testimony the defendant attacks in this appeal was truthful.

The defendant makes no mention of the district court’s ruling and offers nothing more than the bald conclusion that Officer Broems “blatantly lied” to the jury. *See* Supp. Br. at 8. That is, the defendant simply assumes, without any textual analysis, that Officer Broems’s testimony on redirect examination was false. The defendant fails to address the critical distinction between Officer Broems’s summary testimony before the grand jury, where he inferred that the bandana had been wrapped around the gun, and his trial testimony, where he truthfully acknowledged, as an eyewitness to the crime, that he had not personally seen the bandana when the defendant pulled out the gun. As the district court correctly noted, this testimony is not inconsistent, and the defendant’s unsupported insistence to the contrary is unavailing.

Because the district court found that Officer Broems’s trial testimony was consistent with his grand jury testimony, it did not reach the issue of whether there was a reasonable likelihood that the testimony influenced the jury’s verdict.

Even assuming that Officer Broems's characterization of his grand jury testimony was false and that the government knew it was false, there is no reasonable likelihood that this minor piece of testimony affected the jury's verdict. See *Wallach*, 935 F.2d at 445, 456 (new trial appropriate where there is "any reasonable likelihood" that the false testimony influenced the jury's verdict).

In essence, Officer Broems disputed defense counsel's characterization of his grand jury testimony. If, as the defendant argues, this testimony was false, he could have exposed this fact on re-cross examination. He elected not to do so. More importantly, whether or not Officer Broems observed a bandana is beside the point, where he gave consistent testimony on direct and cross-examination that he actually saw the defendant possess a firearm. A(II)15; A(II)93-96. The defendant was not convicted of possessing a bandana; he was convicted of possessing a firearm.

The defendant suggests that, because Officer Broems was the only law enforcement witness to testify that he saw the defendant holding the gun, his credibility on whether he also saw a bandana was central to the jury's assessment of his testimony. The defendant, however, ignores the bulk of the evidence establishing that he possessed a firearm. Candido testified that the defendant was holding a gun as Officer Petrizzi

was attempting to remove him from the car, and that the defendant dropped the gun when he got out of the car. A(I)200. Officer Petrizzi testified that, as the defendant's back was turned to him, he saw the defendant appear to reach into his waistband and then withdraw his arm from the waistband. A(I)66-A(I)67. Both Officer Petrizzi and Officer Broems testified that, immediately after Officer Petrizzi deployed his taser, they heard the sound of a firearm hitting metal. A(I)67; A(II)16-A(II)17.

Moreover, the firearm and bandana were recovered adjacent to a metal grate that the defendant had been standing over before he was tased. A(I)70. The defendant was included as a contributor to a DNA profile that was recovered from the bandana, which was wrapped around the firearm. A(I)169. The defendant, who was in possession of a large amount of cash and crack cocaine, had a motive to arm himself. Finally, months after his arrest, the defendant was recorded admitting to an associate that, during the course of his arrest, he had tried to drop the firearm in a sewer. *See* Gov.'t Ex. 46.

In sum, even if Officer Broems's characterization of his grand jury testimony was false, which it was not, that characterization did not affect the jury's verdict, which was amply supported by overwhelming evidence. *See Wallach*, 935 F.2d at 445, 456 (new trial appropriate where there is "any reasonable

likelihood” that the false testimony influenced the jury’s verdict).

**Conclusion**

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

Dated: November 13, 2012

Respectfully submitted,

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DISTRICT OF CONNECTICUT

A handwritten signature in cursive script, appearing to read "Christopher M. Mattei".

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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 10,181 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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CHRISTOPHER M. MATTEI  
ASSISTANT U.S. ATTORNEY

## **Addendum**

### **U.S.S.G. § 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.