

12-206(L)

To Be Argued By:
ROBERT M. SPECTOR

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 12-206(L),
12-208(CON)
12-259(CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

WILSON A. PENA, aka Wilson A. Pena-Villafana,
aka Twin, WILLIAM YOSEL PENA, aka Twin,
(For continuation of Caption, See Inside Cover)

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

BRIEF FOR THE UNITED STATES OF AMERICA

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Defendants,

LUT MUHAMMAD, aka Luke Muhammed, aka Lut Billie, aka Lut Mohammad, OKEIBA SADIO, aka keys, KEVIN SIMS, aka Ghost,

Defendants-Appellants.

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Statement of Jurisdiction

This is a consolidated appeal from judgments entered in the United States District Court for the District of Connecticut (Alvin W. Thompson, C.J.), which had subject matter jurisdiction over these criminal cases under 18 U.S.C. § 3231.

On August 10, 2011, the defendant-appellant Kevin Sims, changed his plea to guilty as to Count One of the second superseding indictment, which charged him with conspiracy to distribute five grams or more of cocaine base. KSA9, KSA16-KSA17.¹ On January 10, 2012, the district court sentenced Sims to a term of incarceration of 120 months and a term of supervised release of five years. KSA424-KSA425. Judgment entered on January 13, 2012. KSA12. Sims filed a timely notice of appeal on January 17, 2012 pursuant to Fed. R. App. P. 4(b), KSA427, and this Court has appellate jurisdiction over Sims's challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

On September 7, 2011, the defendant-appellant Lut Muhammad, changed his plea to guilty as to all eleven counts against him in the

¹ The Appendix filed by Kevin Sims will be referred to as "KSA" with the page number; the Appendix filed by Okeiba Sadio will be referred to as "OSA" with the page number; and the Appendix filed by Lut Muhammad will be referred to as "LMA" with the page number.

second superseding indictment, the most serious of which charged him with conspiracy to distribute fifty grams or more of cocaine base. LMA12, LMA21-LMA26. On January 10, 2012, the district court sentenced Muhammad to a total effective term of 240 months' incarceration and 8 years' supervised release. LMA298-LMA300. Judgment entered on January 13, 2012. LMA18. Muhammad filed a timely notice of appeal on January 17, 2012 pursuant to Fed. R. App. P. 4(b), LMA301, and this Court has appellate jurisdiction over Muhammad's challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

On December 13, 2010, a jury found the defendant-appellant Okeiba Sadio guilty of Counts One and Twelve of the second superseding indictment, which charged him with conspiracy to distribute fifty grams or more of cocaine base and possession with intent to distribute fifty grams or more of cocaine base. OSA19, OSA34-OSA36, OSA40. The jury specifically found that Sadio's participation in the narcotics conspiracy involved fifty grams or more of cocaine base, but did not involve any quantity of powder cocaine. OSA67. On January 6, 2012, the district court sentenced Sadio to a term of incarceration of 240 months and a term of supervised release of eight years. OSA42-OSA43. Judgment entered on January 13, 2012. OSA28. Sadio filed a timely notice of appeal on January 13, 2012 pursuant to Fed. R. App. P. 4(b), OSA45, and this Court has

appellate jurisdiction over Sadio's challenge to his judgment of conviction pursuant to 28 U.S.C. § 1291.

Statement of the Issues Presented for Review²

1. Whether the district court clearly erred in finding that Sims's attributable crack cocaine quantity was between 112 to 196 grams and abused its discretion in imposing a sentence at the bottom of the resulting guideline range?
2. Whether the district court plainly erred in sentencing Muhammad based on a drug quantity that was not the subject of a stipulation or a jury finding and whether the court clearly erred in finding that Muhammad's attributable crack cocaine quantity was between 2.8 and 8.4 kilograms?
3. Whether the district court erred in concluding that the search warrant for Sadio's residence was supported by probable cause?
4. Whether there was sufficient evidence to support Sadio's convictions and, in particular, to show that he had become a member of the charged conspiracy and that he had intended to sell the 94 grams of crack seized from his bedroom nightstand?

² Sims and Muhammad each raised two separate sentencing issues, and the government has addressed both issues in one section for each defendant.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 12-206(L)
12-208(CON)
12-259(CON)

UNITED STATES OF AMERICA,

Appellee,

-vs-

LUT MUHAMMAD, aka Luke Muhammed, aka
Lut Billie, aka Lut Mohammad, OKEIBA
SADIO, aka keys, KEVIN SIMS, aka Ghost,

Defendants-Appellants,

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

In 2009, twin brothers William and Wilson Pena ran a lucrative crack cocaine drug distribution operation out of their apartments in the Bronx, New York, regularly supplying a significant number of wholesale crack distributors

from Stamford, Connecticut and the surrounding area, including co-defendants Lut Muhammad and Okeiba Sadio, who, in turn, sold smaller quantities to street level crack dealers such as Kevin Sims. Muhammad and Sadio each regularly traveled to New York, purchased quantities of crack cocaine of as much as 150 grams at a time, and redistributed the crack in smaller quantities (ranging from \$20 bags to multi-ounce quantities) to a regular Stamford customer base. Sims was one of Muhammad's typical customers; he purchased multi-gram quantities from Muhammad several times each week and redistributed the crack in \$20 bags to his own customers.

In December 2009, after the government conducted a three-month long wiretap investigation, Sims, Muhammad, Sadio and 21 others were charged in two separate indictments with a variety of narcotics offenses. During the takedown, the government obtained and a search warrant at Sadio's residence, which resulted in the seizure of approximately 94 grams of crack cocaine and \$2,300 in cash from his bedroom. Sims pleaded guilty to one count of conspiracy to possess with the intent to distribute five grams of cocaine base; Muhammad pleaded guilty to a variety of crack cocaine offenses, the most serious of which was conspiracy to distribute fifty grams or more of crack; and, Sadio was found guilty, after trial, of conspiracy to distribute fifty grams

or more of cocaine base and possession with intent to distribute fifty grams or more of cocaine base.

The district court sentenced Sims to 120 months' incarceration, Muhammad to 240 months' incarceration, and Sadio to 240 months' incarceration. Because Sims and Muhammad each challenged the government's allegations as to the quantity of crack cocaine that they distributed during the charged conspiracy, the court held evidentiary hearings in advance of each of their sentencing. Based on the evidence presented at these hearings, which included the testimony of cooperating witnesses, lab reports detailing the seizure of various quantities of crack cocaine and intercepted wiretap calls, the court concluded that Sims had purchased and redistributed between 112 and 196 grams of crack cocaine and that Muhammad had purchased and redistributed between 2.8 and 8.4 kilograms of crack cocaine.

On appeal, Sims and Muhammad, both of whom received incarceration terms at or near the bottom of their respective guideline ranges, challenge the court's sentencing decisions. Sims claims that the district court clearly erred in concluding that his attributable crack quantity exceeded 112 grams and that its ultimate sentence was procedurally and substantively unreasonable because it failed to give adequate consideration to his alleged mental illness and drug

dependency. Muhammad likewise claims that the district court clearly erred in its quantity finding, but also argues, for the first time on appeal, that any finding as to quantity should have been made by a jury. Sadio, on the other hand, does not challenge his sentence. Instead, he argues that the district court erred in denying his motion to suppress because the search warrant for his residence was not supported by probable cause. In addition, he argues that the jury's verdict should be overturned because there was insufficient evidence to show that he and the Pena brothers had entered into a conspiratorial relationship and because the government had failed to show that he had intended to sell the crack cocaine seized from his bedroom.

For the reasons that follow, none of these claims has merit.

Statement of the Case

On July 9, 2009, a federal grand jury returned a second superseding indictment against Sims, Muhammad, Sadio and the two other remaining co-defendants charging Sims in Count One with conspiracy to possess with the intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846, and charging Sadio and Muhammad in Count One with conspiracy to possess with the intent to distribute fifty grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1),

841(b)(1)(A) and 846. KSA15-KSA17. The second superseding indictment also charged Sadio in Count Twelve with possession with the intent to distribute fifty grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A), and Muhammad in Counts Four, Seven, Eight, Nine, Ten and Eleven with distribution and/or possession with the intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), and in Counts Two, Three, Five and Six with distribution of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). KSA17-KSA21.

On August 10, 2011, Sims, changed his plea to guilty as to Count One. KSA9, KSA16-KSA17. On November 18, 2011 and December 22, 2011, the district court held an evidentiary hearing to determine the quantity of cocaine base attributable to Sims's offense conduct. KSA90, KSA223. On January 10, 2012, after concluding that the evidence presented at the hearing established a cocaine base quantity of between 112 and 196 grams, the district court sentenced Sims to a guideline-term of incarceration of 120 months and a term of supervised release of five years. KSA424-KSA425. Judgment entered on January 13, 2012. KSA12. Sims filed a timely notice of appeal on January 17, 2012, KSA427, and is currently serving his federal sentence.

On September 7, 2011, Muhammad, changed his plea to guilty as to all eleven counts against him in the second superseding indictment. LMA12, LMA21-LMA26. On January 4, 2012, the district court held an evidentiary hearing to determine the quantity of cocaine base attributable to Muhammad's offense conduct. LMA88. On January 10, 2012, after concluding that the evidence presented at the hearing established a cocaine base quantity of between 2.8 and 8.4 kilograms, the district court sentenced Muhammad to a guideline-term of incarceration of 240 months and a term of supervised release of eight years. LMA298-LMA300. Judgment entered on January 13, 2012. LMA18. Muhammad filed a timely notice of appeal on January 17, 2012, LMA301, and is currently serving his sentence.

On November 15, 2010, Sadio filed a motion to suppress the evidence seized from his residence and vehicle at the time of his arrest. OSA16 (docket entry). On November 24, 2010, the district court issued a written ruling denying the motion. OSA62-OSA64. On December 13, 2010, a jury found Sadio guilty of Counts One and Twelve. OSA19, OSA34-OSA36, OSA40. On June 22, 2011, Sadio filed a motion for judgment of acquittal. OSA22. On January 6, 2012, the district court issued a written ruling denying the motion for judgment of acquittal, OSA65, and sentenced Sadio to a guideline-term of incarceration of 240 months and a term of supervised re-

lease of eight years. OSA42-OSA43. Judgment entered on January 13, 2012. OSA28. Sadio filed a timely notice of appeal on January 13, 2012, OSA45, and is currently serving his sentence.

Statement of Facts³

Beginning in June 2009, the Stamford Police Narcotics and Organized Crime (“NOC”) Unit began using a known and reliable cooperating witness (“CW-1”) to make several controlled purchases of cocaine base (“crack cocaine”) from an individual identified as Lut Muhammad. LMPSR ¶ 8. CW-1 engaged in controlled purchases of crack cocaine from Muhammad on June 10, 2009, June 11, 2009, June 18, 2009, June 23, 2009, July 2, 2009, July 9, 2009, July 30, 2009, August 17, 2009, and September 21, 2009 for quantities ranging between just under 2 grams and just over 14 grams of crack cocaine. LMPSR ¶ 8. In total, CW-1 purchased approximately 65.6 of crack cocaine from Muhammad over the course of these nine controlled purchases. LMPSR ¶ 8.

On August 28, 2009, based in part on the controlled purchases, United States District Judge

³ The facts here are taken almost exclusively from the Pre-Sentence Reports for Sadio (referred to as “OSPSR”), Muhammad (referred to as “LMPSR”) and Sims (referred to as “KSPSR”).

Mark R. Kravitz signed an order authorizing the interception of wire communications occurring on Muhammad's cellular telephone. LMPSR ¶ 9. Intercepted calls, surveillance, and seized narcotics confirmed that Muhammad was the source of supply of crack cocaine for a relatively large customer base in and around Stamford. LMPSR ¶ 9. During the course of the wiretap interceptions, it became apparent that Muhammad traveled to the Bronx, New York and made regular purchases of multi-ounce quantities of crack cocaine from co-defendants William and Wilson Pena, who are twin brothers, their partner Kerlin Jose Hernandez-Evangelista, and their runner Tommy Garcia. LMPSR ¶ 9. Muhammad then resold the crack cocaine in smaller quantities to a customer base comprised of at least eighteen different identified individuals. LMPSR ¶ 9. Muhammad dealt only in crack cocaine, and in quantities ranging from as little as \$20 bags to ounces, depending on the customer. LMPSR ¶ 9. From August through November 2009, Muhammad drove to the Bronx to purchase crack from the Pena organization over two dozen times, spending between \$2,200 and \$5,000 per trip and purchasing crack cocaine at prices range between \$35 and \$38 per gram. LMPSR ¶ 16.

For example, on September 16, 2009, Muhammad contacted the Pena brothers and ordered the "same thing. . . . three," a reference to

\$3000 worth of crack cocaine. LMPSR ¶ 10. Surveillance units later saw Muhammad's blue Nissan Pathfinder arrive in the Bronx and Hernandez get in the car. LMPSR ¶ 10. After Muhammad looped the block, Hernandez got out of the vehicle and left. LMPSR ¶ 10. A short time later, surveillance units observed Muhammad walk into the common laundry room at his apartment building in Stamford, Connecticut. LMPSR ¶ 11. The laundry room door faces the outside of the building and was propped open. LMPSR ¶ 11. The police watched as Muhammad climbed on top of a washing machine briefly, and then left the laundry room. LMPSR ¶ 11. Shortly thereafter, a DEA agent entered the laundry room, saw a hole in the ceiling above the washing machine that Muhammad had climbed on, reached into the hole and retrieved 55 grams of crack cocaine wrapped in a plastic baggie. LMPSR ¶ 11. When he realized that his stash was missing, Muhammad speculated that the "po-po" (police) or the "alphabet boys" (federal agents) had taken it and eventually replaced his cell phone to avoid detection. LMPSR ¶ 12.

Sims was one of Muhammad's customers. Between September 24, 2009 and October 31, 2009, he was intercepted over Muhammad's cellular telephone arranging to buy crack cocaine fourteen separate times. KSPSR ¶ 19. He typically paid Muhammad about \$50 per gram for crack and generally purchased between one and

five grams of crack at a time. KSPSR ¶¶ 20-25. During two of these purchases, law enforcement officers conducted surveillance in conjunction with the intercepted telephone calls and observed Sims meet with Muhammad to purchase crack. KSPSR ¶¶ 21-22.

On September 25, 2009, Judge Kravitz signed an order authorizing a wiretap of a cell phone used by the Pena brothers and Hernandez, but they would soon replace that phone. LMPSR ¶ 13. On October 6, 2009, after intercepting telephone calls and text messages revealing that co-defendants Max Antoine and James Hill were going to the Bronx from Stamford to purchase 100 grams of crack, officers conducting surveillance in the Bronx observed Antoine meeting with Garcia (the Penas' runner). LMPSR ¶ 14. A traffic stop of Antoine's vehicle confirmed that he and Hill had purchased 100 grams of crack and were transporting it back to Connecticut. LMPSR ¶ 14. This seizure caused the Penas to drop their cell phone to avoid getting arrested themselves. LMPSR ¶ 15.

The wiretap investigation ended on December 2, 2009 with the arrests of the Penas and Garcia in the Bronx. LMPSR ¶ 19. Wiretap interceptions, along with physical surveillance, revealed that the Pena brothers ran their drug operation primarily out their Bronx apartments at 3217 Hull Avenue and 117 West 197th Street. LMPSR ¶ 18. William Pena, Wilson Pena and

Hernandez, who remains a fugitive, each had an equal supervisory role and participated in the daily running of the drug operation. LMPSR ¶ 18. They serviced a customer base of approximately fifteen wholesale drug distributors from Fairfield County, Connecticut, as well as additional customers from New York. LMPSR ¶ 18. In conjunction with the arrests on December 2, 2009, officers seized approximately 737 grams of powder cocaine, 1774 grams of crack cocaine and approximately \$41,000 in cash from their various residences. LMPSR ¶ 20. When Muhammad was arrested at his residence, officers seized approximately \$4,358 from a dresser in his bedroom. LMPSR ¶ 20.

Like Muhammad, Sadio also traveled to the Bronx to purchase wholesale quantities of crack cocaine from the Penas and resell it in smaller quantities to customers in Stamford. OSPSR ¶ 20. Between September 30, 2009 and November 28, 2009, Sadio traveled to the Bronx eleven times to purchase quantities of crack cocaine from the Pena organization ranging in quantities between ten grams and as much as 143 grams. OSPSR ¶ 20. On six of these trips, officers conducted surveillance and observed Sadio meet with William, Wilson, Hernandez or Garcia after having intercepted telephone calls indicating that they were about to engage in a narcotics transaction. OSPSR ¶ 20.

Officers arrested Sadio on December 3, 2009 at his residence at 199 West Broad Street, Stamford. OSPSR ¶ 23. At the time of his arrest, Sadio, after being read his rights, lied to the police and said that he had about 20 grams of fake crack cocaine in his bedroom. OSPSR ¶ 23. The police executed state search warrants for his residence and an Acura he had been observed driving to the Bronx and seized 90.7 grams of crack cocaine located on a plate in a night stand near his bed, 3.0 grams of crack cocaine (packaged in three small baggies) and a small quantity of marijuana located on top of the same night stand, \$2,321 in cash located in the pockets of men's clothing in his bedroom, and a digital scale on the front seat of one of his cars. OSPSR ¶ 23.

Summary of Argument

1. Sims's challenge to the procedural and substantive reasonableness of his sentence has no merit. The district court's factual finding that Sims had distributed in excess of 112 grams was well supported both by witness testimony and intercepted telephone calls. This evidence showed that Sims purchased one, two and five gram quantities of crack cocaine from two different sources of supply several times each week for a five-month period from July 2009 through November 2009 and then redistributed the crack in smaller quantities to his customers. Moreover, in imposing a sentence at the bottom of the guideline range, the court gave proper consider-

ation to Sims's alleged mitigating factors of mental illness and drug dependency, but determined that the seriousness of the offense conduct, his extensive and violent criminal record, his repeated commission of crimes while on court supervision and his documented malingering during the BOP competency evaluation all demanded a sentence of no less than ten years.

2. Muhammad's challenge to his 240-month guideline sentence fails both because the case law uniformly contradicts his suggestion that the district court is not supposed to make factual findings as to the quantity of crack cocaine involved in his offense, and because the evidence submitted at sentencing overwhelmingly established that, during the course of the charged conspiracy, he had purchased and redistributed in excess of 2.8 kilograms of crack cocaine. Here, the district court was required to determine a base offense level and, in doing so, properly conducted an evidentiary hearing to make factual findings, under a preponderance of the evidence standard, as to the quantity of crack cocaine triggering the Guidelines calculation. At that hearing, one of Muhammad's crack suppliers testified and detailed how often he and his brother sold crack to him, the prices they charged, and the quantities they sold him. This testimony, as corroborated by the intercepted telephone calls, physical surveillance and toll records, showed that, during the course of the

conspiracy, Muhammad had redistributed close to four kilograms of cocaine base.

3. The search warrant affidavit for Sadio's residence, when read in context and considered in light of the well-settled "flexible, common-sense standard" under *Illinois v. Gates*, established probable cause that narcotics would be found in his residence. On three occasions in October and November 2009, law enforcement officers, after intercepting calls indicating that Sadio was planning to purchase crack from the Penas, observed Sadio travel to the Bronx, meet with someone from the Pena organization, and return immediately to his residence in Stamford. Indeed, three days before the warrant was signed, officers intercepted calls between Sadio and the Penas in which Sadio ordered 140 grams of crack and powder cocaine from them, watched as he arrived in the Bronx and met with the William Pena, and saw him return to his residence in Stamford immediately after the transaction.

4. Sadio's arguments on appeal challenging the sufficiency of the evidence to support his convictions amount to nothing more than a repeat of the arguments he made to the jury. He claims that his involvement with the Penas was akin to a buyer-seller relationship, as opposed to a conspiratorial partnership, and that he never intended to sell the crack cocaine seized from his apartment on the day of his arrest. But the evidence at trial clearly established that Sadio was

a regular customer of the Penas who had known them for several years, had a standardized way of doing business with them, paid a set price for his crack, serviced a customer base that depended on his supply of high-quality narcotics, and even vouched for other of their customers. In short, the evidence showed that Sadio and the Penas were involved in a long-term business relationship, the success of which depended on the Penas supplying high quality crack at a reasonable price and Sadio re-selling that product quickly and at a profit so that he could return and purchase more. In addition, the trial evidence established that Sadio intended to sell the 93.7 grams of crack seized from his night stand, given that the typical use-quantity of crack is .1 grams, the officers seized no evidence suggested that Sadio was a crack user, the separate packaging of the crack showed that it was for re-sale, the officers seized a digital scale from Sadio's car and over \$2,300 in cash from his bedroom, Sadio had no real reported income for the past several years, and Sadio lied to the officers when they asked him if he had any narcotics in his bedroom.

Argument

- I. **The district court did not clearly err in concluding that Sims’s reasonably foreseeable quantity of crack cocaine was in excess of 112 grams, and its 120-month sentence was substantively reasonable.**

A. Relevant facts

On August 10, 2011, Sims pleaded guilty to Count One of the second superseding indictment which charged him with conspiracy to possess with the intent to distribute five grams or more of cocaine base. KSA9. At the start of the hearing, the district court took up the issue of competency, having previously concluded that Sims was not competent to stand trial and having ordered him transferred to the Bureau of Prisons (“BOP”) for the purpose of possible restoration to competency. KSA25. Though defense counsel did not agree with all aspects of the BOP competency report, he did agree that Sims was able to understand the proceedings, able to assist in his defense, was fully competent to proceed and fully prepared to enter a knowing and voluntary guilty plea. KSA27, KSA32. The court ordered that the BOP certificate of competency be filed, KSA38, and then, based on this certificate and the separate BOP competency report, as well as Sims’s answers during the plea canvass, concluded that Sims was indeed competent to enter a guilty plea. KSA51-KSA55, KSA75, KSA77.

Sims pleaded guilty without entering into a plea agreement with the government. In reviewing the nature of the charge and the statutory penalties, the government indicated that, although the offense conduct pre-dated the Fair Sentencing Act of 2010 (“FSA”), it was taking the position that the FSA’s lower penalties applied to him, so that he faced a maximum term of incarceration of twenty years, and no mandatory minimum term, under 21 U.S.C. § 841(b)(1)(C). KSA46-KSA47. And although Sims agreed that there was “a clear factual basis . . . for the plea to enter” and admitted that he had purchased crack cocaine from Muhammad and redistributed it to others, he disagreed with the government’s position as to the quantity of crack cocaine involved in the offense and informed the court that “quantity is an open issue here.” KSA74.

The PSR attributed between 28 and 112 grams of crack cocaine to Sims, for a base offense level of 26. KSPSR ¶ 32. After a two-level reduction for acceptance of responsibility, the total offense level was 24. KSPSR ¶¶ 38-39. The PSR concluded that, because the parties had selected a jury in September 2010 and because the government had prepared extensively for trial and thus would not be filing a motion seeking an additional one level reduction for acceptance, Sims was only entitled to a two-level reduction under U.S.S.G. § 3E1.1. KSPSR ¶ 38. The PSR also

calculated that Sims had accumulated 20 criminal history points and thus qualified for Criminal History Category VI. KSPSR ¶ 51. Specifically, Sims accumulated criminal history points as a result of convictions for third degree assault (1997), threatening (1997), first degree failure to appear (1997), threatening (2000), possession of narcotics with intent to sell (2001), second degree kidnapping (2003), first degree burglary (2003), third degree assault (2003), second degree threatening (2003), evading injury (2006) and possession of narcotics (2008). KSPSR ¶¶ 41-50. In addition, Sims received two criminal history points for having committed this offense while on state probation. KSPSR ¶ 51. At a total offense level of 24 and a Criminal History Category VI, Sims faced a guideline incarceration range of 100-125 months, KSPSR ¶ 90, which would later increase to 120-150 months based on the court's quantity finding.

On November 18, 2011 and December 22, 2011, the district court held an evidentiary hearing to consider what quantity of cocaine base should be attributed to Sims. At this hearing, the court considered the testimony of co-defendant Emmanuel Tyson, and Lieutenant Christopher Baker from the Stamford Police Department. The government also presented dozens of recorded phone calls, telephone toll records, and laboratory results from narcotics

bought from co-defendant Muhammad in controlled purchases.⁴

Tyson testified that, during the time period of the charged conspiracy, he was selling crack cocaine and generally was supplied by the Pena brothers in the Bronx. KSA112. He purchased crack cocaine from them in 50 and 100 gram quantities at a price that ranged between \$35 and \$38 per gram. KSA113. He then repackaged it in smaller baggies and sold it “wholesale” to a customer base of between eight and ten individuals. KSA114, KSA122. As he explained, “Like double-ups. Spend \$100 with me and I give you enough to make \$200.” KSA114. He sold approximately two to two and a half grams of crack cocaine for \$100, which could then be broken down further by the purchaser into twelve \$20 bags, resulting in a profit of about \$140. KSA114-KSA115. Since he was purchasing crack at a price of between \$35 and \$38 per gram and selling it at a price of about \$50 per gram, he was making a profit of between \$12 and \$15 per gram and was selling between 100 and 150 grams per week. KSA115. Even though it would have been more profitable to distribute the crack in \$20 bags, “there was more

⁴ With the consent of defense counsel, the government offered as exhibits the written transcripts of the intercepted wiretap calls, instead of the audio recordings themselves. KSA201. These transcripts are included in the government’s Appendix.

risk associated with selling them as 20s.” KSA116. On occasion, Tyson also purchased crack from Muhammad, but Muhammad generally charged him between \$38 and \$40 per gram. KSA119.

Sims was one of Tyson’s customers. The two had known each other for about fifteen years, had grown up in the same neighborhood together and had been narcotics associates for about five years prior to the arrests in this case. KSA123, KSA165. Starting in the summer of 2009, right after Sims was released from prison, he began again to purchase crack from Tyson. KSA123. He purchased one and two gram quantities of crack cocaine two to three times each week from July 2009 through November 2009, for a total of approximately 80 grams of crack cocaine during this time period (four grams each week, for 20 weeks). KSA124-KSA125, KSA155-KSA156. Sims, like Tyson’s other customers, was paying \$50 for six bags of crack (one gram) and \$100 for twelve bags of crack (two grams) and was able to double his money by reselling these bags for \$20 each. KSA124-KSA125. Sims used Tyson as an alternative source of supply and Muhammad as his main source of supply because Muhammad “would give him more or give him credit and would look out for him more than I would.” KSA125. But when Muhammad was not available, Sims would call Tyson. KSA126. And if Tyson’s crack was not very good, Sims would tell

him that his customers were complaining about it. KSA127. Though Tyson changed his cellular telephone frequently, toll records from October 2009 for one of his phones confirmed frequent contact with Sims's cellular telephone. KSA191; Government's Appendix ("GA")1-GA2.

Sims's primary source of supply was Muhammad, who generally charged his customers \$50 per gram for crack cocaine. KSA177. Like Tyson, Muhammad was purchasing, on average, quantities ranging between 80 and 120 grams from the Pena brothers at a price of between \$36 and \$38 per gram. KSA181. Muhammad would re-sell the crack cocaine in quantities ranging between \$20 bags and multiple ounces at a time. KSA181.

According to the intercepted telephone calls, Sims bought crack cocaine from Muhammad on a regular basis in October and November 2009. GA3-GA74. Sims typically ordered crack cocaine in terms of the amount of cash he wanted to spend. He spent as little as \$100 (two grams), GA50, and as much as \$260 (five grams), GA36, during this time period. Specifically, he bought five grams on October 15, GA21 (ordering \$250), just under five grams on each of October 21, GA29 (ordering \$230), and October 23, GA34 (ordering "same thing") and five grams on October 25, GA36 (ordering \$260). In total, he engaged in approximately fourteen transactions in the time period between September 24, 2009 and

November 2, 2009, buying from Muhammad about two or three times each week. GA3-GA74. If he was purchasing, as a conservative estimate, approximately ten grams of crack cocaine from Muhammad on a weekly basis, he purchased a total of at least 80 grams of crack cocaine from Muhammad in October and November 2009.

At the conclusion of the hearing, the government argued that the quantity of cocaine base attributable to Sims was greater than 112 grams, but less than 196 grams. KSA262. It estimated that, based on Tyson's testimony, he sold a total of about 80 grams of crack cocaine to Sims from July to November 2009 (an average of four grams per week, for five months). KSA263. It then estimated, based on the intercepted calls, that Muhammad sold Sims about ten grams of crack per week in October and November 2009, for a total of 80 grams during that two-month period. KSA269. As the government explained, "When I did the version of the offense conduct without the benefit of the hearing and everyone's testimony, I was satisfied to stay within the 28 to 112-gram quantity. But I certainly think the Court has heard enough from these two witnesses and exhibits that the Court would be able to make a finding that it's between 112 and 196 grams when you combine what he was doing with Lut Muhammad and what he was doing with Emmanuel Tyson." KSA271.

Sims argued that the quantity of cocaine base attributable to him fell within the range of 16.8 to 22.4 grams. KSA274-KSA275. He maintained that Tyson's hearing testimony was false and that, in fact, Tyson had only sold Sims about eight to nine grams of crack cocaine, in total. KSA284. He also claimed the government had misread the intercepted calls and that Muhammad was only selling him one-gram quantities at a time. KSA297. Finally, he argued that he was a crack addict who used "approximately a third of the quantity" that he purchased from Muhammad. KSA299. On that issue, the government countered that there was no evidence at all in this case that Sims was using crack cocaine during the time period of the charged conspiracy and that Tyson's testimony, as corroborated by the intercepted calls, indicated that he was selling it, not using it. KSA303-KSA304 ("These are business-related calls. These are not calls about somebody trying to get a couple of bags of crack to use. This is somebody trying to make a living.").

At the start of the sentencing hearing on January 10, 2012, the district court addressed, first, the disputed issue of whether Sims was entitled to a third point for acceptance of responsibility. KSA364. The government made clear that its motivation for refusing the third point "had nothing to do with the Fatico hearing at all." KSA371. Instead, "the decision not to file

that third point was because we went to jury selection. We prepared extensively for trial. We prepped witnesses extensively.” KSA371. Still, the government deferred to the court’s discretion and indicated it would file the motion if the court thought Sims was entitled to the extra reduction. KSA365-KSA366. The court concluded that Sims was not entitled to the third point and that “it would be inappropriate for the government to file” the motion asking for the third point. KSA367, KSA374 (“Having prepared for trial myself and gone through jury selection, it doesn’t seem to be a situation to me where the . . . motion would be made pursuant to 3E1.1(b).”).

Next, the court confirmed that the parties had read and reviewed the PSR, and that, other than the quantity determination, Sims had no objections to it. KSA375-KSA376. The court reviewed the PSR’s guideline calculation and confirmed that, according to the PSR, the total offense level was 24, the Criminal History Category was VI and the resulting incarceration range was 100-125 months. KSA377. The parties also agreed that the new, lower statutory penalties under the FSA applied, so that Sims, despite having pleaded guilty to an offense governed by the old version of 21 U.S.C. § 841(b)(1)(B), would be sentenced under 21 U.S.C. § 841(b)(1)(C) and would not be subject to a mandatory minimum. KSA383.

At that point, the court resolved the factual dispute as to quantity, as follows:

The evidence presented by the government at the hearing established by a preponderance of the evidence that the defendant was directly responsible for conspiring to possess with the intent to distribute more than 112 grams of cocaine base. At the hearing evidence was presented with respect to the defendant's purchases from Emmanuel Tyson and the defendant's purchases from Lut Muhammad. . . . Looking at the evidence presented with respect to the defendant's purchases from Tyson and Muhammad, the Court has made a reasonably conservative approximation.

Tyson sold crack cocaine to the defendant each week, approximately two or three times per week from July 2009 through December 2, 2009. The Court found Tyson credible and concluded that he knew his business well and was able to explain how it operated clearly. Thus, the Court has used the five-month period of July 2009 through November 2009 and converted five months into 20 weeks. . . . Tyson stated that each time he made a sale to the defendant, he sold 1 to 2 grams. Using the lowest numbers in each range, which would be unreasonably

conservative, would yield 40 grams (i.e., two sales a week with 1 gram per sale for 20 weeks). If one substitutes 2 grams for 1 gram per sale, the result would be 80 grams. If one uses three sales per week at 1 gram per sale for 20 weeks, the result is 60 grams. If one substitutes 2 grams per sale for 1 gram per sale, the result is 120 grams. Thus, the lowest number of grams for the 20 weeks would be 40 grams and the highest number of grams for the 20 weeks would be 120 grams and the average would be 80 grams. If one averaged all four numbers . . . , the result would be 75 grams. Therefore, the Court will use a range of 75 to 80 grams.

The Court notes that when Tyson was asked to give an overall estimate as to how many times he sold crack cocaine to the defendant during the entire period, he estimated 25 to 50 times. The Court finds more reliable an estimate that is based on looking at a weekly basis rather than looking over a much longer period of time because that is more consistent with the framework in which the relationship between Tyson and the defendant existed. But if the Court were to use a methodology similar to the methodology used for two to three sales per week, . . . the

result would be 62.5 grams. However, the Court finds this method less reliable than using Tyson's recollection of the number of sales per week.

With respect to Lut Muhammad, the evidence produced at the hearing established that the defendant purchased crack cocaine from Lut Muhammad two to three times per week, which translates to eight to 12 times per month. Using the months of October and November, that results in 16 to 24 purchases. The calls played at the hearing show that the amounts per purchase range from 2 grams to 5 grams. The calls played at the hearing also show that roughly two-thirds of the sales were more or less 5 grams – that is, some slightly more and some slightly less and some at five grams – and that one-third of the sales were 2 grams.

Using 16 purchases at 2 grams would result in a total of 32 grams, and using 24 purchases at 2 grams would result in 48 grams. Using 16 purchases at 5 grams would result in 80 grams and using 24 purchases at 5 grams would result in 120 grams. The average of these four numbers would be 70 grams. Another way of looking at the numbers, which yields substantially the same result, is to use as

the average for the two months 20 purchases and assume seven purchases at 2 grams . . . and 12 purchases at 5 grams, which results in 74 grams Thus, the Court will use a range of 70-74 grams with respect to the purchases from Lut Muhammad.

Thus, combining the purchases from Tyson with the purchases from Muhammad results in a range of 145-154 grams.

KSA377-KSA381.

The court then revised paragraph 32 of the PSR to reflect a crack quantity of at least 112 grams and less than 196 grams, increasing the base offense level to 28 and the guideline incarceration range to 120-150 months. KSA381-KSA382. “With these modifications and findings, and there being no objections to the other factual statements contained in the [PSR],” the court adopted the statements in the report as its findings of fact. KSA382.

Sims argued “that a significant downward departure and/or non-guidelines sentence [was] warranted.” KSA329. Specifically, he asked for a sentence of time served, followed by “one to two years of inpatient treatment at a residential facility, and a lengthy period of supervised release that would encompass both his time in residential treatment and then several years after he completes such a program.” KSA325. In support

of this argument, he claimed that his own drug addiction and serious mental illness were serious contributing factors to his offense conduct. KSA311. He characterized himself as “a low level drug dealer and addict.” KSA312. He said he was a minor player and “street dealer” who was at the “bottom” tier of the conspiracy. KSA314, KSA316 (“He had no address, no car, and no cash – nothing other than a prepaid mobile phone. Entering into a conspiracy to sell crack was . . . simply a way to access the drugs that he wanted to use himself.”). With no evidence to back the statement other than his own self-reporting, he claimed he “used at least half of the crack cocaine he received from his sources,” KSA318, and argued that the guideline range was artificially high because it included these personal use quantities. KSA321. He also argued that a lower sentence was warranted based on the fact that he “has suffered from serious mental illness for his entire life.” KSA322 (“[H]e has been identified at various points as suffering from adjustment disorder, mood disorder, major depression, and drug and alcohol addiction.”). Finally, he asked the court to employ a 1 to 1 ratio for crack and powder cocaine penalties. KSA326-KSA329.

The government asked for a sentence of 120 months’ incarceration, at the bottom of the guideline range. In doing so, the government emphasized the seriousness of the offense, stat-

ing, “By no means was the defendant a large-scale . . . crack distributor, and . . . his conduct was less serious than the conduct of those co-defendants who were regularly traveling to the Bronx to purchase hundred gram quantities of crack cocaine at a time. The defendant was, however, a drug dealer who was profiting from the sale of crack cocaine and who was regularly selling drugs in the Stamford community.” KSA360. It also emphasized Sims’s “significant and serious criminal record,” including his history of violence, having been convicted in separate cases of threatening, assault, kidnapping and burglary, his two prior felony narcotics convictions, and his repeated violations of state probation. KSA360-KSA361. The government was concerned about Sims’s risk of recidivism, as evidenced by the fact that he had committed the instant offense so soon after being released from prison and that, when he was referred to the BOP for a competency examination, having been found incompetent by a local psychiatrist, the BOP doctor concluded that he was malingering his symptoms to manipulate the process. KSA405-KSA406.

Prior to imposing sentence, the district court reviewed the factors it had to consider under § 3553(a) and the information it had considered in making its sentencing determination, which included the PSR, the sentencing memoranda, the various intercepted calls involving Sims and

both mental health reports done in connection with Sims's competency examination. KSA408-KSA409. After discussing the various purposes of a criminal sanction, the court explained, "In your case I have concluded that the single most important purpose that needs to be served is to deter you from committing an offense in the future" KSA411. The court acknowledged defense counsel's suggestion of residential mental health treatment, but found that this approach was not appropriate because "I just cannot become comfortable that you would take advantage of those opportunities. . . . Based on what I've come to learn about you – and that's what I have to base it on – I think there's a very, very small chance that they would work in your case." KSA411. The court found the BOP's competency report very insightful and noted that, unlike the first competency report, which was based solely on self-reporting by Sims, this report was based on a constant observation of Sims over a long period of time. KSA412-KSA413.

In addition, based on its review of the intercepted wiretap calls, the court questioned the extent of Sims's mental health and drug abuse problems. KSA413. The court stated, "And I thought that you came across on the transcripts as somebody who had gotten out of jail, you wanted to make money and you were going to do it by selling drugs." KSA413. The court discounted Sims's self-reported drug use: "The evi-

dence as to that is vague and generalized. I went back and I looked at what's in the record in terms of the exhibits that were put in. And I have to say that based on my lack of confidence in your self-reporting, I had some uneasiness even about whether I was going to rely on . . . those records . . .” KSA414.

The same was true regarding his mental health issues. The court explained:

In terms of the mental health issues, it appears to me you have some. I don't know exactly what they are other than what's reflected in the report from the Bureau of Prisons, which is Axis I, depressive disorder, malingering and poly substance abuse; Axis II, no diagnosis; and Axis III, hypertension. And beyond that, I'm not prepared to make any conclusion that you have mental health issues, or that they were a significant contributor to the commission of your offense, or that they are factors – or that it is a mitigation – a factor that mitigates in your case.

KSA414-KSA415.

Ultimately, the court's main concern was recidivism. As it articulated:

The one thing that does come through when I read your criminal history and I look at the transcripts of the recordings,

which I have now read several times, is that I think the primary consideration and concern in your case is recidivism. And I'm going to give you a 10-year sentence, not because it is the bottom of the range, but because I want to convey to you that you present, in this Court at least, the profile of somebody that Congress had in mind when they came up with the concept of a mandatory minimum of 10 years. So even if the bottom of your range was 110 months or 100 months, I would be giving you 120 months today.

KSA415.

B. Governing law and standard of review

1. Determining attributable quantity

A district court is expected to “begin all sentencing proceedings by correctly calculating the applicable Guidelines range,” and to use that range as “the starting point and the initial benchmark” for its decision. *Gall v. United States*, 552 U.S. 38, 49 (2007). Under the Sentencing Guidelines, the court must begin by determining the defendant’s “base offense level,” U.S.S.G. § 1B1.1, which is determined based on:

(A) all acts and omissions committed, aided, abetted, counseled, commanded,

induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity .

...

U.S.S.G. § 1B1.3(a)(1).

In a drug case, this Guideline requires a determination of the quantity of drugs attributable to the defendant, and in the case of a drug conspiracy, the quantity reasonably foreseeable to him. *United States v. Jones*, 531 F.3d 163, 174-75 (2d Cir. 2008); *United States v. Payne*, 591 F.3d 46, 70 (2d Cir. 2010). “The quantity of drugs attributable to a defendant is a question of fact” that the government must prove by a preponderance of the evidence. *Jones*, 531 F.3d at 175.

The Guidelines provide that “[w]here there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance.” U.S.S.G. § 2D1.1, comment. (n.12); see also *Jones*, 531 F.3d at 175. All transactions entered into by a defendant’s coconspirators may

be attributable to him, if they were known to him or reasonably foreseeable by him. *See United States v. Miller*, 116 F.3d 641, 684 (2d Cir. 1997) (citing U.S.S.G. § 1B1.3, comment. (n.1)); *United States v. Podlog*, 35 F.3d 699, 706 (2d Cir. 1994). “In deciding quantity involved, any appropriate evidence may be considered, or, in other words, a sentencing court may rely on any information it knows about.” *United States v. Jones*, 30 F.3d 276, 286 (2d Cir. 1994) (citations omitted).

2. Reviewing a sentence for reasonableness

Under 18 U.S.C. § 3553(a), in determining an incarceration term, a sentencing court should consider: (1) “the nature and circumstances of the offense and history and characteristics of the defendant”; (2) the need for the sentence to serve various goals of the criminal justice system, including (a) “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment,” (b) to accomplish specific and general deterrence, (c) to protect the public from the defendant, and (d) “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”; (3) the kinds of sentences available; (4) the sentencing range set forth in the guidelines; (5) policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentenc-

ing disparities; and (7) the need to provide restitution to victims. *Id.*

Following *United States v. Booker*, 543 U.S. 220 (2005), appellate courts are to review sentences for reasonableness, which amounts to review for “abuse of discretion.” *Gall*, 552 U.S. at 591; *United States v. Cavera*, 550 F.3d 180, 187 (2d Cir. 2008) (*en banc*). This reasonableness review consists of two components: procedural and substantive review. *Cavera*, 550 F.3d at 189.

Substantive review is exceedingly deferential. The Second Circuit has stated it will “set aside a district court’s substantive determination only in exceptional cases where the trial court’s decision ‘cannot be located within the range of permissible decisions.’” *Id.* (quoting *United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007)). This review is conducted based on the totality of the circumstances. *Id.* at 190. Reviewing courts must look to the individual factors relied on by the sentencing court to determine whether these factors can “bear the weight assigned to [them].” *Id.* at 191. However, in making this determination, appellate courts must remain appropriately deferential to the institutional competence of trial courts in matters of sentencing. *Id.* Finally, this Court neither presumes that a sentence within the Guidelines range is reasonable nor that a sentence outside this range is unreasonable, but may take the degree of variance from the Guidelines into account when assessing substantive

reasonableness. *Id.* at 190. This system is intended to achieve the Supreme Court’s insistence on “individualized” sentencing, *see Gall*, 552 U.S. at 50; *Cavera*, 550 F.3d at 191, while also ensuring that sentences remain “within the range of permissible decisions,” *Cavera*, 550 F.3d at 191.

In the end, this Court’s substantive review of a sentence is extremely deferential. *See Rigas*, 583 F.3d at 122. This Court recently likened its substantive review to “the consideration of a motion for a new criminal jury trial, which should be granted only when the jury’s verdict was ‘manifestly unjust,’ and to the determination of intentional torts by state actors, which should be found only if the alleged tort ‘shocks the conscience.’” *United States v. Dorvee*, 616 F.3d 174, 183 (2d Cir. 2010) (quoting *Rigas*, 583 F.3d at 122-23). On review, this Court will set aside only “those outlier sentences that reflect actual abuse of a district court’s considerable sentencing discretion.” *Jones*, 531 F.3d at 174.

This deference is appropriate, however, only when a reviewing court determines that the sentencing court has complied with the procedural requirements of the Sentencing Reform Act. *Id.* at 190. Sentencing courts commit procedural error if they fail to calculate the Guidelines range, erroneously calculate the Guidelines range, treat the Guidelines as mandatory, fail to consider the factors required by statute, rest their sentences

on clearly erroneous findings of fact, or fail to adequately explain the sentences imposed. *Id.*

These requirements, however, should not become “formulaic or ritualized burdens.” *Id.* at 193. This Court thus presumes that a district court has “faithfully discharged [its] duty to consider the statutory factors” in the absence of evidence in the record to the contrary. *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006). Moreover, the level of explanation required for a sentencing court’s conclusion depends on the context. A “brief statement of reasons” is sufficient where the parties have only advanced simple arguments, while a lengthier explanation may be required when the parties’ arguments are more complex. *Cavera*, 550 F.3d at 193. Finally, the reason-giving requirement is more pronounced the more the sentencing court departs from the Guidelines or imposes unusual requirements. *Id.* This procedural review, however, 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.*

C. Discussion

1. The district court did not clearly err in attributing a quantity of 112 to 196 grams of crack cocaine to Sims.

Sims argues on appeal, as he did below, that he was responsible for a lower quantity of crack cocaine than the district court attributed to him. His argument amounts to a simple attack on Tyson's credibility. He claims that the district court should not have credited Tyson's testimony because it was inconsistent with pre-hearing statements he made to the government regarding the number of times he sold crack to Sims and because Tyson was a "long-time drug abuser" with "an extensive criminal record[.]" Sims's Br. at 18. This argument has no merit.

His attack on Tyson's testimony amounts to a claim that Tyson was not credible, and it was solely within the factfinder's province to address and reject that argument. *See United States v. Yousef*, 327 F.3d 56, 124 (2d Cir. 2003) (stating that "credibility determinations are the province of the trial judges, and should not be overruled on appeal unless clearly erroneous."). The district court explicitly found that Tyson telling the truth and decided to credit his testimony as to how often he sold crack cocaine to Sims and how much he sold each time.

This issue was the subject of much discussion during the evidentiary hearing. Tyson was asked repeatedly about the frequency with which he dealt with Sims and was quite emphatic about the fact that he had been selling to him since approximately July 2009, sold to him through November 2009 and dealt with him between two and three times each week. KSA154-KSA156. The district court found this testimony to be credible. Tyson was asked about his previous statements to law enforcement officers that he had only sold crack cocaine to Sims about nine times and explained that this answer was not accurate and either reflected a shorter period of time than the July to November 2009 time period or was a result of his misunderstanding of a question asked by the officers. KSA160-KSA161, KSA164-KSA166.

Sims claims that Tyson's testimony was "riddled with uncertainty and inconsistencies." Sims's Br. at 15. In making this claim, Sims quotes generously from select portions of Tyson's cross-examination to try to suggest that Tyson's answers were confusing. *See id.* at 15-18. Though defense counsel might have tried to confuse Tyson through manipulative and self-serving questions on cross, Tyson remained steadfast in his testimony that he had sold crack to Sims two or three times each week for a five-month period. Thus, there is absolutely no truth to the assertion on appeal that Tyson gave "wild-

ly varying estimates as to the number of times he sold crack cocaine to the appellant from the summer 2009 through November 2009.” Sims’s Br. at 18. Using his prior inconsistent statement to law enforcement officers, defense counsel tried to suggest that Tyson’s estimates were inconsistent; however, Tyson explained to the court’s satisfaction that his prior estimate was wrong, must have been the result of either his misunderstanding of the question put to him or the officers’ misunderstanding of his answer and, in any case, was not an accurate estimate of the number of times that he sold crack to Sims during the five-month period. KSA160-KSA161, KSA164-KSA166. Moreover, it is well-settled that “where there are two permissible views of the evidence, the factfinder’s choice between them cannot be clearly erroneous.” *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985).⁵

⁵ Though Sims does not appear to repeat this argument on appeal, before the district court he suggested that he had purchased about one-third of the crack for his own personal use and that the court should subtract this amount from the total. The district court properly rejected this argument because there was no evidence that Sims had purchased any crack for personal use; all of the evidence established that he had purchased all of the crack to redistribute it. Moreover, in a conspiracy case, even personal use amounts should be counted in the total quantity. See *United States v. Wyss*, 147 F.3d 631, 632 (7th

Finally, to the extent that the district court erred in relying on Tyson’s testimony or in placing too much weight on his estimation of the number of times he sold to Sims, this error was completely harmless. *United States v. Jass*, 569 F.3d 47, 68 (2d Cir. 2009) (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.”) (quoting *Cavera*, 550 F.3d at 197). On appeal, Sims does not challenge the district court’s factual findings as to his purchases from Muhammad. Based on this evidence alone, Sims purchased and redistributed well in excess of 28 grams of crack cocaine, which would have resulted in the 100-125 month guideline range initially set out in the PSR. KSA380-KSA381. In explaining its sentence, the district court explicitly stated that it viewed Sims as someone deserving of a ten-year sentence and would have imposed that sentence even if the bottom of the guideline range was 100 months instead of 120 months. KSA415. Thus, even had the district court agreed with

Cir. 1998); *see also United States v. Williams*, 247 F.3d 353, 358 (2d Cir. 2001) (noting that personal use quantities, while they should not count in a straight distribution case, would count in a conspiracy case).

Sims's argument and discounted Tyson's testimony, it still would have imposed the same sentence.

2. The district court properly rejected Sims's request for leniency based on drug dependency and mental illness.

Sims also claims that the district court committed a procedural and substantive error by failing to consider as mitigating factors his drug dependency and mental illness. *See* Sims's Br. at 21. He argues that these factors were "his motivation for committing his offense" and therefore warranted a below-Guideline sentence. *Id.*

First, Sims is simply wrong that the district court procedurally erred by not considering these two mitigating factors. As discussed above, the district court gave ample consideration to Sims's history of substance abuse and mental illness. It reviewed the PSR, which extensively and thoroughly detailed his substance abuse and mental health history (PSR ¶¶ 63-85); it reviewed the various submissions by Sims's counsel, which included prison records addressing these two issues; and it reviewed the two mental health competency evaluations, one performed by a local psychiatrist and one performed by a BOP psychiatrist. In articulating the ten-year sentence, the district court explained why it had re-

jected these arguments and, in doing so, revealed how carefully it had considered both mitigating factors.

The court concluded, no doubt to Sims's frustration, that his history of substance abuse and his mental health problems were not factors which had motivated his sale of crack cocaine here. In reaching this conclusion, the court explained that, based on Tyson's testimony and the intercepted telephone calls, it appeared that Sims purchased crack cocaine, not for his own personal use, but to sell and reap a profit. KSA413. Moreover, the court was certainly influenced by the fact that the BOP evaluation had concluded that Sims had malingered and feigned his incompetence. KSA414-KSA415. The court explicitly stated that it could not trust Sims's own self-reporting based on this diagnosis. KSA414. Thus, Sims's procedural argument fails.

Of course, a district court need not specifically respond to all arguments made by a defendant at sentencing. This Court has "never required a District Court to make specific responses to points argued by counsel in connection with sentencing." *United States v. Bonilla*, 618 F.3d 102, 111 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1698 (2011). "The District Court must satisfy us only that it has considered the party's arguments and has articulated a reasonable basis for exercising its decision-making authority." *Id.* (citing *Cav-*

era). Here, of course, the district court did respond specifically to defense counsel's arguments for leniency and rejected them.

In addition, the court's decision to impose a sentence at the bottom of the guideline range was not substantively unreasonable. As the court explained, there were several aggravating factors in this case. The offense conduct was serious and involved the regular purchase and redistribution of crack cocaine over a five-month period. Sims had an extensive and violent criminal record which included prior convictions for assault, threatening, burglary and kidnapping. He had two prior felony narcotics convictions. And he committed the instant offense after having very recently been released from incarceration on his most recent narcotics conviction. Indeed, he can be overheard on an intercepted telephone call from September 24, 2009 asking Muhammad to help him get his narcotics operation started again. GA4-GA10.

Moreover, one of the very factors that Sims relied on as mitigating only underscored the value of specific deterrence in this case. Though he certainly suffered from some mental illness and no doubt benefited from medication to treat this illness, he was not crippled by the debilitating effects of such an illness, as he and his counsel appeared to claim to the first psychiatrist who examined him for competency. In fact, as the BOP psychiatrist discovered, Sims was feign-

ing his symptoms. PSR ¶ 82 (explaining how BOP discovered that Sims was “attempting to feign memory impairments”). He was pretending to be incompetent, perhaps as a tactic to delay trial. Eventually he was confronted with this reality and, as a result, stopped pretending to be incompetent. This malingering was certainly a legitimate factor for the court to consider in weighing the value of the mitigating factors proffered by Sims, especially since many of the facts necessary to make these arguments were based on self-reported information.

Thus, the court’s 120-month, bottom-of-the-Guidelines sentence was procedurally and substantively reasonable, reflected a proper balancing of the § 3553(a) factors and resulted from the district court’s firm and well-founded belief that Sims presented a very high risk of recidivism.

II. The district court did not plainly err in sentencing Muhammad based on a drug quantity that was not the subject of a stipulation or a jury finding and did not clearly err in finding that he distributed between 2.8 and 8.4 kilograms of crack.

A. Relevant facts

Muhammad pleaded guilty to Counts One through Eleven of the second superseding indictment on September 7, 2010. LMA12. At the time of the guilty plea, Muhammad entered into a written plea agreement. LMA29-LMA36. As part of the plea agreement, the government indicated that it was filing a second offender notice under 21 U.S.C. § 851 based on one of Muhammad's prior drug felony convictions, increasing the total effective statutory penalties to a maximum of life in prison, a mandatory minimum of twenty years in prison, and a supervised release term of at least ten years and as much as life. LMA30-LMA31. The government had filed the notice on August 4, 2010, LMA10, and, in the plea agreement, Muhammad reserved his right to challenge it by filing a written response under 21 U.S.C. § 851(c). LMA31. During the plea canvass, the district court discussed Muhammad's rights and responsibilities under the second offender statute. LMA45-LMA46, LMA84-LMA85.

The plea agreement contained no factual stipulation or guideline stipulation other than the government's representation that it would recommend a full three-level reduction for acceptance of responsibility. LMA32, LMA54. And both sides reserved their respective rights to appeal the sentence. LMA33.

The PSR calculated that Muhammad had 20 criminal history points and thus qualified for Criminal History Category VI. LMPSR ¶ 46 and LMPSR, Second Addendum. Specifically, Muhammad accumulated criminal history points as a result of convictions for sale of narcotics (1995), possession of marijuana (2002), sale of illegal drugs (2002), third degree assault (2002), failure to appear (2002), possession of narcotics (2006), and sale of narcotics (2010). LMPSR ¶¶ 37-45 and LMPSR, Second Addendum. In addition, Muhammad received two criminal history points for having committed this offense while on state probation. LMPSR ¶ 46. The PSR also ultimately found that Muhammad's conduct involved between 2.8 and 8.4 kilograms of cocaine base, resulting in a base offense level of 36. LMPSR, Second Addendum. With a three level reduction for acceptance of responsibility, the total offense level became 33. At a total offense level of 33 and a Criminal History Category VI, Muhammad faced a guideline incarceration range of 235-293 months. LMPSR, Second Addendum.

On January 4, 2012, the district court held an evidentiary hearing to determine the quantity of crack cocaine that Muhammad distributed during the course of the charged conspiracy. At the outset, the court tried to summarize the nature of the factual dispute. LMA90. It explained that the PSR had calculated a quantity for the time period of the conspiracy prior to the start of the August 28, 2009 wiretap and for the time period after the start of the wiretap. LMA90-LMA91. In making this calculation, the PSR had assumed that Muhammad was paying \$36 per gram for crack cocaine from the Pena brothers and used that price to figure out how much Muhammad was buying when he was intercepted over the wiretap ordering crack in thousand dollar increments. LMA91. In his PSR interview, Muhammad had insisted that he was paying more per gram for crack so that the quantity he was purchasing per \$1000 was lower than the government had asserted. LMA91.

The government clarified that, based on the intercepted wiretap calls, it would establish that Muhammad distributed approximately 2,749 grams of crack cocaine from about August 29, 2009 through the end of November 2009. LMA93. The government explained:

The defendant pled guilty to the conspiracy going from June to December. So the calls basically only cover half the time of the conspiracy. And like I said,

the government believes we can get over 2.7 kilos just on the calls. We will hear evidence about the ongoing dealings between the defendant and Mr. Pena's organization, starting from when the defendant was released from prison in the middle of May.

LMA94.

In response, defense counsel stated that he did not disagree with the government's assessment of the quantity of crack cocaine distributed by Muhammad during the wiretap, but disagreed with the government's suggestion that he should be held responsible for any quantity sold prior to the wiretap. As he explained,

You know, just going through the calls that appear on the exhibit list that the government provided me and going through the transcripts, I mean, I come up with about 2,702 in terms of grams from August through the end, which is December. So we're a few grams off. And I suppose the battle ground is: What do you do with the stuff before August 28th? That's going to be more of an extrapolation, I suppose. . . . Just in terms of the phone calls, I think the government and the defense are fairly close in terms of the amount of grams.

LMA95.

At that point, the government presented the testimony of William Pena and Lieutenant Chris Baker, as well as several exhibits, including almost 60 recorded wiretap calls, and telephone toll records. Pena testified about his own background in drug dealing and about the drug trafficking operation he and his brother ran in the Bronx during the summer of 2009. LMA103-LMA109. He explained that, on a monthly basis, they would purchase approximately three kilograms of powder cocaine at an average price \$28,000 and \$29,000 per kilogram. LMA109. They would then convert most of the powder to crack cocaine and resell it at a price of between \$35 and \$38 per gram. LMA110. The customers who purchased larger quantities paid a lower price. LMA110. They had a total of between 30 and 35 customers who purchased quantities ranging between 5 and 300 grams at a time. LMA111.

Pena identified Muhammad as his most profitable and prolific customer. LMA112. He had been a customer of theirs since 2004 or 2005 and was a regular customer from the spring of 2009 through his arrest in December 2009. LMA113.

Starting in May and June 2009, Muhammad purchased approximately 40 and 50 grams of crack at a time from the Pena brothers and saw them every four or five days. LMA114. Indeed, telephone toll records showed 484 contacts between Muhammad's telephone and the Penas's

telephone between June 12, 2009 and August 28, 2009, the date the wiretap began. Government's Exs. 56-58; LMA204. Gradually, Muhammad increased the amount of crack he was buying so that, by the time they were arrested, he was purchasing 140 to 150 grams at a time. LMA115.

According to the intercepted telephone calls, which Pena explained, Muhammad traveled to the Bronx 30 times between August 29, 2009 and November 29, 2009 to purchase crack cocaine from the Pena brothers. GA75-GA178⁶; LMA96, LMA116-LMA161. Law enforcement officers conducted surveillance on eight of these occasions, and, during one of those instances, followed Muhammad to his stash location, where they eventually seized approximately 55 grams of crack that he had just purchased from the Penas. LMA199, LMA200-LMA201.

The dates and quantities of Muhammad's purchases are as follows:

- August 29 - 58 grams, GA76-GA77;
- August 31 - 63 grams, GA79;
- September 3 – 81 grams, GA81;
- September 5 – 81 grams, GA82;
- September 9 – 81 grams, GA85;

⁶ Although the government played the audio recording of many of the record telephone calls during the hearing, with defense counsel's consent, it offered as evidence only the transcripts of the calls, which are included in the government's Appendix.

September 11 – 81 grams, GA87;
September 16 – 81 grams, GA91;
September 18 - 27 grams, GA93;
September 25 - 54 grams, GA99, GA102;
September 29 - 64 grams, GA107;
October 2 - 100 grams, GA109, GA111;
October 3 - 81 grams, GA114;
October 10 - 90 grams, GA122, GA124;
October 15 - 80 grams, GA126;
October 18 - 86 grams, GA129;
October 23 - 83 grams, GA132;
October 26 - 100 grams, GA134;
October 31 - 83 grams, GA139, GA141;
November 2 - 92 grams, GA147, GA149;
November 5 - 100 grams, GA151;
November 8 - 108 grams, GA153, GA157;
November 11 - 117 grams, GA159;
November 14 - 114 grams, GA161;
November 17 - 125 grams, GA163;
November 19 - 130 grams, GA165;
November 21 - 139 grams, GA167;
November 25 - 139 grams, GA169, GA171;
November 27 - 143 grams, GA172;
November 29 - 65 grams,⁷ GA175-GA176.

For these transactions, Muhammad typically ordered the crack by telling the Penas the amount of money he wanted to spend. For ex-

⁷ On November 29, Muhammad returned 55 grams because he was unhappy with the quality, was provided a new 55 grams, and then purchased an additional 65 grams, GA175-GA176.

ample, on September 11, 2009, Muhammad called the Penas and said, "Put it in for three," meaning that he wanted \$3,000 worth of crack. LMA120-LMA121; GA87. On October 26, 2009, Muhammad ordered "35," meaning that he wanted \$3,500 worth of crack, and, in response, Wilson Pena said that he would give him "100" grams of crack and Muhammad would owe "100" dollars. LMA143; GA134. And on November 19, 2009, Muhammad called and ordered "47," meaning that he wanted \$4,700 worth of crack cocaine. LMA155; GA165.

Therefore, from August 29 until November 29, the defendant purchased a total of 2,746 grams of cocaine base from the Penas. GA178 (chart of transactions); LMA116-LMA161. He paid from \$35 to \$38 per gram, depending on the amount he was buying during that transaction. If he purchased more than \$3,000 worth of crack, the price per gram dropped from \$37 to \$36. LMA141. When he started purchasing \$5,000 worth of crack in late November 2009, the price dropped to \$35 per gram. LMA157; GA171. Muhammad then resold the crack cocaine for \$50 per gram. LMA196.

Muhammad was arrested on December 3, 2009. LMA203. At the time, officers seized approximately \$4,300 in cash from his bedroom dresser. LMA203.

At the conclusion of the evidentiary hearing, the government argued that Muhammad was re-

sponsible for distributing in excess of 2.8 kilograms of crack, based on the quantity that he distributed during the wiretap investigation (2,749 grams), the quantity distributed prior to the wiretap investigation from June through August 2009, and the quantity equivalent of the \$4,300 in cash seized at the time of his arrest. LMA217-LMA218. In response, Muhammad claimed that the quantity was “2,702 grams.” LMA218. In essence, Muhammad discounted entirely the evidence showing that he had been purchasing crack from the Penas since June 2009 and focused instead solely on the post-wiretap conduct. LMA218. As to the cash seized, Muhammad claimed it “could be monies that were earned” legitimately. LMA220.

Sentencing occurred on January 10, 2012. At the start of the hearing, the district court confirmed, and the parties agreed, that the new FSA penalties would apply so that, based on Muhammad’s most serious conviction of conspiracy to distribute fifty grams or more of crack, and with the filing of the second offender notice, he faced a mandatory minimum penalty of ten years, not twenty years, under 21 U.S.C. § 841(b)(1)(B). LMA249, LMA270. The court also addressed and overruled Muhammad’s objection to the second offender notice. LMA250-LMA257, LMA269.

After confirming that Muhammad had no corrections or objections to the PSR other than

“those arising out of the quantity calculation . . . and those arising out of the Section 851 notice[.]” LMA262, the court made its findings as to quantity and concluded that “the government has established by a preponderance of the evidence that well over 2.8 kilograms of cocaine base should be attributed” to Muhammad. LMA264.

The court referenced Government’s Exhibit 60, which was attached as an addendum to the PSR and “contains the government’s contentions as to why the total amount of cocaine base attributable to the defendant should be 3,910 grams.” LMA265; GA178. This exhibit “reflects two components” of the 3,910 gram figure. LMA265. “One component is based on the testimony of William Pena with respect to the periods May 15 to August 28, 2009, and from November 30th to December 2nd, 2009.” LMA265; GA178-GA179. The court agreed “with the total of 1,164 grams for those two periods,” finding “that the government has established through Pena’s testimony that from May 15 to August 28, the defendant purchased 1,040 grams[.]” and that “with respect to the time period from November 30 to December 2nd, based on the cash the defendant possessed at the time of his arrest and his pattern of purchases and the purchase price then in effect, that 124 grams should be attributed to the defendant.” LMA265-LMA266. The court specifically rejected Muhammad’s argument that, for the “period May 15 to August

28[,] the quantity should be 65 grams[,]” which was simply the amount of crack purchased from Muhammad by the cooperating witness during this time frame. LMA266. The court found Pena’s testimony to be credible and noted that Pena had explained what Muhammad’s pattern was during this time frame. LMA266. Moreover, as to the \$4,300 seized from Muhammad, “looking at the evidence that was put into the record and drawing reasonable inferences based on that evidence, the most reasonable conclusion was that this money was being used for the purposes of drug transactions.” LMA267.

As to the “second component of the 3,910 grams,” which is “the 2,746 grams that the government contends has been proven to be attributable to the defendant based on the calls that were placed into evidence at the evidentiary hearing,” the court agreed “with the government’s calculation except with respect to the calls on October 2nd and 3rd, 2009.” The court explained, “The government has attributed a total of 181 grams to those two calls, and the Court concludes that a total of 100 grams only should be attributed to those two calls[,]” resulting in a total of “2,665 grams” for the second component. LMA267-LMA268.

Thus, the court concluded “that the quantity attributable to the defendant is 3,829 grams, which is in the range of at least 2.8 kilograms,

but less than 8.4 kilograms of cocaine base.” LMA268.

After adopting the factual findings contained in the PSR and reviewing both the statutory penalties and the guideline calculation, LMA269-LMA271, the court entertained argument from both parties as to the appropriate sentence. Muhammad asked for a non-guideline sentence of 120 months’ incarceration. LMA272. He relied on his difficult childhood, the fact that he grew up without a father, and the fact that his mother exposed him to drug abuse at a very young age. LMA272-LMA273. He also discussed his drug addiction, his pursuit of drug treatment, and the various legitimate jobs he held. LMA273-LMA274. In response, the government emphasized the seriousness of the offense conduct and Muhammad’s extensive criminal record, which included five prior felony drug convictions and repeated criminal conduct either while on court supervision or soon after being released from prison. LMA282-LMA284. It argued, “[T]he defendant has not been deterred by lengthy prison sentences for selling drugs, he has not been deterred by being on probation or pa[role], he has not been deterred by the possibility of law enforcement, he has not been deterred by any of this. It all took a back seat to his primary goal to make more and more money by selling greater and greater quantities of crack.” LMA285.

The court then imposed its sentence. It explained the various factors it had to consider under § 3553(a), as well as the information it had reviewed in making its decision. LMA286-LMA287. It discussed the various purposes of a criminal sanction, explaining that “the sentence should be sufficient but not greater than necessary to serve these purposes.” LMA288. It advised Muhammad, “In your case I am most aware of the need to impose a sentence that constitutes just punishment as I explained that concept, and the need to deter you from committing further crimes.” LMA288. Although the court recognized that Muhammad was “starting to evolve in terms of how you would be conducting yourself in society[,] . . . when I looked at the rest of the picture here, I really have to conclude that if in fact you are starting to evolve in that direction, it’s a situation where we really have too little, too late.” LMA289.

Turning to the specific influencing factors, the court first noted Muhammad’s “20 criminal history points,” which included several prior drug felony convictions. LMA289. The court pointed out that Muhammad had already received lengthy terms of incarceration in state court, putting him on notice that any future drug dealing would have very serious consequences. LMA290. As to Muhammad’s childhood, the court stated, “I read the Presentence Report and I think [defense counsel] accurately described

the unfortunate circumstances in which you grew up. But the fact of the matter is that that meant that you had a very up close and personal knowledge of the harm that's caused by your activities of selling drugs to people." LMA290-LMA291.

Ultimately, the court explained its sentence as follows:

I think it does appear that you have the ability to be a caring and productive individual, but so far you've been good to those people who are close to you. You have a good home life. That's very commendable. But that's not enough. You have responsibilities to society at large as well. . . .

Your counsel mentioned that 10 years is a life-altering sentence. I think for most people, any sentence is a life-altering sentence, but 10 years is a particularly life-altering sentence, I will agree. But there are other life-altering sentences that are also handed out which are more than 10 years, and the question is, which life-altering sentence is most appropriate in your case? And I'm considering other defendants who've engaged in similar conduct, not only in this case but in all the cases in which I've imposed sentences, and I think a sentence that's sub-

stantially longer than 10 years is appropriate in your case.

And as I look at all of the factors here, and in particular the list of reasons why your history is a serious one in terms of your criminal history, and the absence of mitigating circumstances, I conclude that you are most comparable to the people who get a 20-year sentence. So that is the sentence I will impose. And that will constitute my explanation for picking a particular point in the Guidelines Range.

LMA291-LMA292.

B. Governing law and standard of review

1. Proving drug quantity

In the FSA, which became law on August 3, 2010, Congress reduced the disparity in penalties imposed upon offenders who dealt in powder cocaine and those who dealt in crack cocaine. The previous statutory scheme “imposed, for example, the same 5–year minimum term upon (1) an offender convicted of possessing with intent to distribute 500 grams of powder cocaine as upon (2) an offender convicted of possessing 5 grams of crack.” *Dorsey v. United States*, 132 S. Ct. 2321, 2326 (2012). In the FSA, Congress reduced that disparity from 100–to–1 to 18–to–1. *Id.* More specifically, the FSA increased the

crack threshold for the five-year mandatory minimum sentence from 5 grams to 28 grams, and it increased the crack threshold for the ten-year mandatory minimum sentence from 50 grams to 280 grams. *See* 21 U.S.C. § 841(b)(1) (Aug. 3, 2010).

Any crack defendant who committed his offense and was sentenced for that offense prior to the FSA's enactment cannot benefit from application of the new law. *See United States v. Acoff*, 634 F.3d 200, 202 (2d Cir. 2011) (per curiam); *United States v. Baptist*, 646 F.3d 1225, 1229 (9th Cir. 2011) (joining "every other circuit court to have considered this question" in holding that the FSA does not "apply to defendants who have been sentenced prior to the August 3, 2010 date of the Act's enactment"). The FSA's more lenient mandatory minimums do apply retroactively to any crack defendant who committed his offense prior to the FSA's passage, but who was not sentenced until after the FSA became law. *See Dorsey*, 132 S. Ct. at 2330, 2332; *see also United States v. Highsmith*, 688 F. 3d 74, 77 (2d Cir. 2012) (per curiam).

This Court has held, "Because mandatory minimums operate in tandem with increased maximums in § 841(b)(1)(A) and (b)(1)(B) to create sentencing ranges that raise the limit of the possible federal sentences, drug quantities must be deemed an element for all purposes relevant to the application of these increased ranges."

United States v. Gonzalez, 420 F. 3d 111, 129 (2d Cir. 2005) (internal citations omitted); *see also Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that facts which increase a statutory maximum penalty must be treated as an element of the offense and proven to a jury). As a result, drug quantities must be alleged in an indictment. *See United States v. Cordoba-Murgas*, 422 F.3d 65, 66 (2d Cir. 2005) (holding that “admission of quantity in a plea allocution does not constitute a waiver of the required elements of an indictment.”). Where a grand jury indicts a defendant for violating 21 U.S.C. § 841(a) without specifying a drug quantity, that defendant must be sentenced in accordance with the penalties set forth in 21 U.S.C. § 841(b)(1)(C), even if he admits to quantities that qualify for the other, more severe penalties. *See id.* at 66, 69.

Under *Booker* and its progeny, however, a sentencing court retains the authority “to find facts relevant to sentencing by a preponderance of the evidence” standard. *See United States v. Garcia*, 413 F.3d 201, 220 n. 15 (2d Cir. 2005). “[W]ith the mandatory use of the Guidelines excised, the traditional authority of a sentencing judge to find all facts relevant to sentencing will encounter no Sixth Amendment objection.” *United States v. Crosby*, 397 F.3d 103, 112 (2d Cir. 2005). “Consistent with that obligation, district courts may find facts relevant to sentencing by a preponderance of the evidence, even where the

jury acquitted the defendant of that conduct, as long as the judge does not impose (1) a sentence in the belief that the Guidelines are mandatory, (2) a sentence that exceeds the statutory maximum authorized by the jury verdict, or (3) a mandatory minimum sentence under § 841(b) not authorized by the verdict.” *United States v. Vaughn*, 430 F.3d 518, 527 (2d Cir. 2005). Thus, for example, where a jury acquits a defendant of a § 841(b)(1)(B) offense, but convicts him of a § 841(b)(1)(C) offense, a district court acts properly as long as it sentences the defendant “within the statutory range authorized by the jury verdict and within the Guidelines range determined in accordance with facts the court found by a preponderance of the evidence.” *Id.* at 528. “[T]he Supreme Court made clear in *Booker* that when a judge sentences a defendant within the statutory range authorized by the jury verdict and uses advisory Guidelines to calculate that sentence, there is no Sixth Amendment violation.” *Id.*; see also *United States v. Florez*, 447 F.3d 145, 156 (2d Cir. 2006) (upholding district court’s quantity finding even though it was higher than jury’s specific quantity finding).

As a result, in a drug conspiracy case, the district court, using the preponderance of the evidence standard, must make a determination of the quantity of drugs reasonably foreseeable to the defendant. See *Jones*, 531 F.3d at 174-75; *Payne*, 591 F.3d at 70. “Because a district

court's determination of drug quantity is a finding of fact, [this Court's] review is limited to clear error." *Jones*, 531 F.3d at 176.

2. Plain error review

A defendant may – by inaction or omission – forfeit a legal claim, for example, by simply failing to lodge an objection at the appropriate time in the district court. Where a defendant has forfeited a legal claim, this Court engages in “plain error” review pursuant to Fed. R. Crim. P. 52(b). Applying this standard, “an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an ‘error’; (2) the error is ‘clear or obvious, rather than subject to reasonable dispute’; (3) the error ‘affected the appellant’s substantial rights, which in the ordinary case means’ it ‘affected the outcome of the district court proceedings’; and (4) ‘the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.’” *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)); see also *Johnson v. United States*, 520 U.S. 461, 467 (1997); *United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *United States v. Deandrade*, 600 F.3d 115, 119 (2d Cir. 2010).

To “affect substantial rights,” an error must have been prejudicial and affected the outcome of the district court proceedings. *United States v.*

Olano, 507 U.S. 725, 734 (1993). 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, “[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice.” *Id.*

This Court has made clear that “plain error” review “is a very stringent standard requiring a serious injustice or a conviction in a manner inconsistent with fairness and integrity of judicial proceedings.” *United States v. Walsh*, 194 F.3d 37, 53 (2d Cir. 1999) (internal quotation marks omitted). Indeed, “[t]he error must be so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant’s failure to object.” *United States v. Plitman*, 194 F.3d 59, 63 (2d Cir. 1999) (internal quotation marks omitted).

C. Discussion

1. The district court did not plainly err in determining Muhammad’s quantity under the preponderance of the evidence standard.

Muhammad argues for the first time on appeal that “[t]he district court erred procedurally in sentencing [him] based upon drug quantities neither voluntarily pleaded nor proved to a jury.” Muhammad’s Br. at 13. Citing this Court’s

decision in *Gonzalez*, 420 F.3d 111, he claims that “[d]rug quantities specified under 21 U.S.C. § 841 are elements that must be pleaded or proved to a jury where the quantity of the contraband is used to support a conviction on an aggravated drug offense.” Muhammad’s Br. at 13-14. Muhammad argues that his “sentence cannot be sustained[]” under *Gonzalez*.

Muhammad’s reliance on *Gonzalez* is misplaced. In *Gonzalez*, the Court simply explained that a sentencing court could not impose enhanced *statutory* penalties based on drug quantity unless such quantity was treated like an element of the offense and either proven to a jury or agreed upon at a guilty plea. *See id.* at 124-25. Here, Muhammad’s 240-month sentence was not imposed pursuant to any statutory mandatory minimum; it was imposed as a Guideline sentence and resulted from the court’s proper calculation of the Guidelines range. As this Court explained in *Vaughn*, in the post-*Booker* era, a sentencing court must make drug quantity findings under a preponderance of the evidence standard to determine the base offense level for any drug distribution offense under U.S.S.G. § 2D1.1. *See id.*, 430 F.3d at 527. The court here did exactly that. It did not err, much less plainly err.

Moreover, to the extent that Muhammad is claiming that the court erred by applying the FSA’s amended statutory penalties under 21 U.S.C. § 841(b)(1)(B) instead of those under

§ 841(b)(1)(C), *see* Muhammad’s Br. at 16-17, his argument fails for several reasons. First, the amended version of § 841(b)(1)(B) sets a threshold of 28 grams of crack cocaine, and it is undisputed that Muhammad pleaded guilty to distributing in excess of 50 grams of crack cocaine. When Muhammad agreed to the government’s concession at sentencing that the higher penalties under § 841(b)(1)(A) would not apply because the charged quantity did not exceed 280 grams of crack, he absolutely conceded that the lower penalties under § 841(b)(1)(B) applied because the charged quantity did exceed 28 grams.

Second, the application of § 841(b)(1)(B) here had no impact on the incarceration term imposed. The 240-month sentence was twice the mandatory minimum and significantly below *both* the maximum term of life under § 841(b)(1)(B) and the maximum term of thirty years under § 841(b)(1)(C).

Third, Muhammad is simply incorrect when he alleges that he “pled guilty under the wrong statutory provisions” and “under the terms of an oppressive statutory scheme no longer in force at the time of his plea.” Muhammad’s Br. at 17-18. There is no dispute that Muhammad’s offense conduct occurred between June and December 2009 and thus was governed, not by the FSA, but by the old version of 21 U.S.C. § 841. *See United States v. Diaz*, 627 F.3d 930, 931 (2d Cir. 2010) (*per curiam*). Indeed, had Muhammad

been sentenced prior to August 3, 2010, he would have been subjected to the old penalties. *Id.* Thus, he pleaded guilty to a properly charged offense and reaped the benefit of lower statutory penalties only by virtue of how long it took him to resolve his case.

Finally, any suggestion by Muhammad that his plea was involuntary or that there was an inadequate factual basis to support it, *see* Muhammad's Br. at 18, should be considered in conjunction with his total failure to raise the issue before now. At no time did Muhammad ever move to withdraw his guilty plea or suggest to the district court that it was unknowing or involuntary. Indeed, had Muhammad been permitted to withdraw his plea, the government would have been able to seek a superseding indictment from the grand jury which alleged the proper FSA quantity of 280 grams, thereby subjecting him to a 240-month mandatory minimum sentence and the potential for a higher guideline range, with no reduction for acceptance of responsibility. Instead, Muhammad opted to go forward with sentencing, fully understanding that, unlike some of his co-defendants who had been sentenced prior to August 3, 2010, he would benefit from the FSA's lower penalties. Even now, Muhammad raises this challenge in the context of an argument that his sentence was procedurally unreasonable, not in the context of a challenge to the voluntariness of his plea.

Thus, the sentencing court did not err, much less plainly err, in calculating Muhammad's base offense level based on its own findings as to quantity and without treating quantity as an element of the offense for Guidelines purposes. Moreover, given that the ultimate sentence here fell well within the statutory incarceration terms that would have applied even under the most lenient FSA penalty provision, any error did not impact Muhammad's substantial rights or undermine the integrity of the judicial proceedings.

2. The district court did not clearly err in determining that Muhammad distributed in excess of 2.8 kilograms of crack.

Next, Muhammad argues that “[t]he district court lacked a sufficient evidentiary basis for its factual conclusion that Mr. Muhammad purchased in excess of 2.8 kilograms of cocaine during the course of the conspiracy.” Muhammad's Br. at 19. He does not attack the district court's factual finding that he distributed approximately 2,665 grams of crack during the course of the wiretap investigation from August through November 2009. Instead, he challenges the government's evidence of his conduct between May and August 2009, claiming that the “live testimony of Mr. Pena” was “too vague to support any finding regarding the quantity purchased by Mr. Muhammad[]” during this time frame. *See id.* at 21-22. Thus, according to Muhammad's

argument, the “district court clearly erred in attributing 1,040 grams to Mr. Muhammad” for this period. *See id.* at 23. In addition, he argues that “the district court erred in attributing 124 grams of cocaine based on the amount of cash seized in Mr. Muhammad’s apartment[]” because “Mr. Muhammad and his girlfriend both had jobs at the time of seizure, which provides a plausible explanation for the presence of cash seized at the time of his arrest.” *Id.* at 23-24. These arguments fail.

The district court acted well within its discretion in crediting Pena’s testimony regarding how often he and his brother sold crack to Muhammad and how much crack they sold Muhammad. And Pena specifically testified that, starting in May 2009 and continuing steadily through his arrest in December 2009, they met with Muhammad every four or five days and sold him wholesale quantities of crack cocaine. Pena estimated that, in the beginning, they sold Muhammad 40 and 50 grams at a time, and that quantity steadily rose to 150 grams by December 2009. LMA114. Telephone toll records showed 484 contacts between Muhammad’s telephone and the Penas’s telephone between June 12, 2009 and August 28, 2009, the date the wiretap began. Gov.’t Exs. 56-58; LMA204. In addition, the wiretap calls themselves revealed that, between August 29, 2009 and the end of November 2009, which is about a 12-week period of time,

Muhammad purchased crack from the Penas on 30 separate occasions, corroborating William Pena's estimate that they sold to him every four to five days. GA75-GA177. The wiretap calls also showed that, as time went on, Muhammad slowly increased the amount of crack that he was buying from the Penas.

The district court's factual finding as to the \$4,300 in cash found in Muhammad's bedroom was also well supported by the evidence. According to the testimony and exhibits presented, Muhammad was a prolific crack dealer who, by December 2009, was purchasing as much as 150 grams of crack at a time every four or five days and selling it at a profit of about \$15 per gram. In addition, according to intercepted wiretap calls and Pena himself, on November 29, 2009, just four days prior to his arrest, Muhammad purchased 65 grams of crack from the Penas and traded in another 55 grams that Muhammad insisted was poor quality, so that he came back to Stamford with 120 grams of crack to sell. LMA160; GA175-GA176. Although Muhammad, through counsel, suggested that the \$4,300 seized from his bedroom could have come from legitimate employment, he did not submit any evidence to support this contention. As a result, the district court reasonably concluded, based on the evidence presented, that the cash was drug proceeds and would be used to purchase more crack cocaine. According to the price that Mu-

hammad was paying for crack at the time, \$4,300 would have purchased 124 grams of crack, as the district court properly found. See *Jones*, 531 F.3d at 177 (upholding district court’s conclusion that \$883 seized from defendant’s stash apartment converted to 27.75 grams of crack based on price government’s informant had paid for crack).

Muhammad relies heavily on this Court’s summary order in *United States v. Martinez*, 133 Fed. Appx. 762 (2d Cir. May 13, 2005) (unpublished decision). In *Martinez*, the Court overturned the district court’s quantity finding as to a defendant whose drug conspiracy conviction “stemmed from his involvement in a business of reconfiguring automobiles with hidden traps that facilitated the concealment of contraband.” *Id.* at 763. The court had relied on evidence that the defendant knew the quantity of cocaine transported in three of his traps to calculate how much cocaine was transported in six other traps he built. See *id.* at 765 (“Admitting that the ‘testimony did not indicate how much cocaine was involved in most of these instances,’ the district court concluded that [the defendant] was responsible for more than 150 kilograms of cocaine by averaging the three known quantities attributable to [him] - 19, 16, and 20 kilograms - and multiplying by nine, the number of traps [he] built.”). This Court reasoned, “The average quantity of cocaine seized or unloaded from the

three cars is not ‘specific evidence’ of the quantity of cocaine actually transported in the nine traps built by [the defendant].” *Id.*

The facts of *Martinez* are entirely distinguishable from the facts here. In this case, the district court did not speculate or extrapolate to calculate Muhammad’s quantity. Instead, it simply relied on the credible testimony by one of Muhammad’s suppliers which estimated the amount of crack that his organization sold to Muhammad during the course of the conspiracy. This testimony was very specific and was corroborated by several other objective pieces of evidence, including toll records, controlled purchases from Muhammad and the wiretap calls themselves.

In the end, the entirety of Muhammad’s challenge before the district court and here on appeal amounts to a claim that he sold approximately 2,770 grams of crack cocaine, instead of 2,800 grams. LMA220. After all, he readily admitted before the district court that the wiretap calls had established his involvement in the purchase and redistribution of just over 2,700 grams. LMA218. He also admitted that he had sold the cooperating witness a total of 65 grams of cocaine base over the course of all of the controlled purchases. LMA218. He then inexplicably claims that the district court clearly erred in attributing an additional 35 grams to him based on Pena’s testimony regarding his purchases be-

tween May and August 2009 and the cash seized at the time of his arrest. This claim is contradicted by the overwhelming evidence of Muhammad's drug trafficking activities from May to August 2009. It was certainly reasonable for the district court to conclude that Muhammad, who had purchased significant quantities of crack from the Penas during the course of the wiretap investigation and sold crack cocaine to a government informant several times in June, July and August 2009, had been purchasing crack cocaine from the Penas during those few months leading up to the start of the wiretap.

III. The district court properly concluded that there was probable cause to support the issuance of the search warrant for Sadio's residence.

Sadio claims that the affidavit in support of the search warrant for his residence did not establish "that drugs [he] purchased in the Bronx would be found in his Connecticut home." Sadio's Br. at 22. He argues, "The mere fact that [he] purchased drugs and subsequently, at some point, arrived home, could not without more constitute probable cause that drugs would be found on his premises, particularly when police searched his home nearly a week after the drug purchases." *Id.*

This argument has no merit. As set forth in the affidavit, officers observed Sadio purchasing

drugs from the Pena brothers in the Bronx on October 28, 2009, November 2, 2009 and November 27, 2009 and, in each instance, observed him return from the Bronx to his home in Stamford less than one hour later. When the facts set forth in the affidavit are viewed in their entirety, and not in isolation, they establish probable cause to believe that narcotics would be found in Sadio's residence.

A. Relevant facts

On November 30, 2009, a judge of the Connecticut Superior Court issued search warrants for Sadio's residence at 199 West Broad Street and his silver Acura bearing Connecticut registration 440-WFV. OSA52, OSA59. Both warrants were based on an affidavit executed by Stamford Police Officers Brett Stoebel and Douglas Deiso. OSA47-OSA49, OSA54-OSA56. The affidavit informed the issuing judge of, *inter alia*, the following facts:

(1) from June through September 2009, the officers used a cooperating witness to purchase crack cocaine from Muhammad on ten different occasions; OSA47, ¶ 3,

(2) on August 28, 2009, the federal district court authorized a wiretap over a cellular telephone used by Muhammad; OSA47, ¶ 4,

(3) wire interceptions confirmed that Muhammad was supplied by a Bronx-based distributor identified as William Pena-Villafana and his associates, and officers initiated two court-authorized wire-taps for cellular telephones used by Pena; OSA47, ¶ 4,

(4) on September 16, 2009, law enforcement officers seized 58 grams of crack cocaine from a stash location used by Muhammad after intercepted telephone calls and surveillance revealed that Muhammad had traveled to the Bronx to purchase crack cocaine from Pena's drug trafficking organization; OSA47, ¶ 5,

(5) on October 28, 2009, intercepted telephone calls over the Pena telephone revealed that several individuals were making arrangements to come to the Bronx to purchase crack cocaine from the Pena organization; OSA47-OSA48, ¶ 7,

(6) physical surveillance on October 28, 2009, at approximately at 6:35 p.m. observed Okeiba Sadio meet with Wilson Pena inside Sadio's tan Acura, bearing registration 440-WFV, on 207th Street in the Bronx, near Pena's suspected stash location at 3217 Hull Avenue, and then return to Sadio's residence at 199 West Broad Street; OSA48, ¶ 10,

(7) Sadio left 207th Street at 6:37 p.m. and returned to his residence at 7:32 p.m.; OSA48, ¶ 12.

(8) the officers believed that, on October 28, 2009, Sadio “made arrangements to purchase crack cocaine from the Bronx based distributor and then transported the narcotics back to his residence located at #199 West Broad Street, Stamford, CT”; OSA48, ¶ 13,

(9) on November 2, 2009, Sadio was intercepted over six different phone calls making arrangement to purchase 80 grams of crack cocaine from Wilson Pena for \$3,000; OSA48, ¶ 14,

(10) on November 2, 2009, at approximately 4:20 p.m., after the intercepted calls between Sadio and Wilson Pena, law enforcement officers observed Wilson Pena get into Sadio’s Acura near the 3217 Hull Avenue address, stay inside the vehicle for a short time, and then get out of the vehicle and walk back to his own vehicle, which was parked on Hull Avenue; OSA48, ¶ 15,

(11) on November 2, 2009, at approximately 5:05 p.m., law enforcement officers observed Sadio arrive back and enter his residence at 199 West Broad Street, Stamford; OSA48, ¶ 16,

(12) the officers believed that, on November 2, 2009, Sadio “made arrangements to purchase . . . 80 grams of crack cocaine from the Bronx based distributor and then transported the narcotics back to his residence located at #199 West Broad Street, Stamford, CT”; OSA49, ¶ 17,

(13) on November 27, 2009, Sadio was intercepted over six different phone calls making arrangements to purchase 135 grams of crack cocaine and 5 grams of powder cocaine; OSA49, ¶ 18,

(14) on November 27, 2009, at approximately 3:35 p.m., law enforcement officers observed Sadio arrive at William Pena’s residence at 117 West 197th Street in a silver Acura bearing Connecticut registration 440-WFV, get out of the vehicle, enter the 117 West 197th Street building, stay for a short time, and leave the area about ten minutes later; OSA49, ¶¶ 19-20, and

(15) on November 27, 2009, at approximately 4:23 p.m., law enforcement officers observed Sadio arrive at the 199 West Broad Street residence in the same Acura and enter the rear of the residence; OSA49, ¶ 21.

When law enforcement officers executed the state search warrants on December 3, 2009, in conjunction with Sadio's arrest, they seized a total of 93.7 grams of crack cocaine, a small quantity of marijuana and \$2321 in cash from his bedroom, and a digital scale from the front seat of the Acura. OSPSR ¶ 23.

On November 15, 2010, Sadio filed a motion to suppress the evidence seized from his residence at the time of his arrest. OSA16 (docket entry). He made several arguments, including the argument he raises on appeal, *i.e.*, that the warrant affidavit lacked probable cause because there was not a sufficient nexus between the drugs purchased in the Bronx and Sadio's Stamford residence. GA183-GA189.

On November 24, 2010, the district court issued a written decision denying the motion to suppress. OSA62-OSA64. As to the argument he continues to press on appeal, the court concluded that there was a sufficient nexus "between the alleged crime and the residence and the vehicle." OSA62. The court explained,

[T]he search warrant affidavit states that, on multiple occasions after the defendant's conversations were intercepted by law enforcement officers, the defendant traveled to the Bronx in the silver Acura, was observed in the vehicle with or at the residence of one of the Pena brothers in the Bronx, and then was ob-

served returning to the Stamford residence.

OSA62-OSA63.

B. Governing law

1. Reviewing probable cause determination

To establish probable cause for a search warrant, a magistrate judge must determine, based on “facts and any reasonable inferences to be derived from them,” that a crime was committed and that there is probable cause to believe that evidence of that crime is located at the residence. *United States v. Travisano*, 724 F.2d 341, 345 (2d Cir. 1983). Probable cause is a practical, nontechnical concept that turns on the assessment of probabilities in specific factual contexts. *United States v. Clark*, 638 F.3d 89, 94 (2d Cir. 2011). The applicable standard is that there is a “fair probability that the premises will yield the objects specified in the search warrant.” *Travisano*, 724 F.2d at 346 (citing *Illinois v. Gates*, 462 U.S. 213 (1983)).

The standard used by a court must not be “so stringent, technical or grudging as to discourage the use of search warrants.” *Id.* (citing *United States v. Ventresca*, 380 U.S. 102, 108 (1965)). As the Supreme Court concluded in *Gates*, “Probable cause deals with probabilities. These are not technical; they are the factual and prac-

tical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” *Gates*, 462 U.S. at 241 (internal quotations omitted). An affidavit in support of a search warrant is not required to prove that contraband exists at a residence. Rather, it must only establish probable cause, which is “a flexible, common-sense standard.” *Gates*, 462 U.S. at 239.

Circumstantial evidence linking a drug-dealer to a specific residence is, by itself, sufficient to establish probable cause to support a search warrant. *See Velardi v. Walsh*, 40 F.3d 569, 574 (2d Cir. 1994). “A showing of nexus does not require direct evidence and may be based on reasonable inference from the facts presented based on common sense and experience.” *United States v. Singh*, 390 F.3d 168, 182 (2d Cir. 2004) (internal quotations omitted). If there is an “articulable connection” between a residence and a car known to have been used for the purposes of committing a crime, the residence and its occupants are “remove[d from] . . . the category of innocent householders whose privacy the Fourth Amendment protects.” *Travisano*, 724 F.2d at 346.

“In assessing the proof of probable cause, the government’s affidavit in support of the search warrant must be read as a whole, and construed realistically.” *United States v. Salameh*, 152 F.3d 88, 113 (2d Cir. 1998). A court reviewing

the issuance of a search warrant “accord[s] ‘great deference’ to a judge’s determination that probable cause exists[] and . . . resolve[s] any doubt about the existence of probable cause in favor of upholding the warrant.” *Id.*; *United States v. Martin*, 157 F.3d 46, 52 (2d Cir. 1998). The court’s “duty is ‘simply to ensure that the magistrate had a substantial basis for . . . conclud[ing]’ that probable cause existed.” *Salameh*, 152 F.3d at 113 (quoting *Gates*, 462 U.S. at 238-39). “[T]he resolution of doubtful cases . . . should be largely determined by the preference to be accorded to warrants.” *Martin*, 157 F.3d at 52 (internal quotation marks omitted). “A reviewing court should not interpret supporting affidavits in a hypertechnical, rather than a commonsense manner.” *Id.* (internal quotation marks omitted). Once a magistrate has determined that probable cause to search a residence exists, that finding is entitled to “substantial deference.” *Travisano*, 724 F.2d at 345. Any “doubts [about the sufficiency of probable cause to search a residence] should be resolved in favor of upholding the warrant.” *Travisano*, 724 F.2d at 345 (citing *United States v. Zucco*, 694 F.2d 44, 46 (2d Cir. 1982)).

2. Good faith exception

“[T]he good faith exception to the exclusionary rule allows the admission of evidence, despite the absence of probable cause, ‘when an officer acting with objective good faith has ob-

tained a search warrant from a judge or magistrate and acted within its scope.” *United States v. Smith*, 9 F.3d 1007, 1015 (2d Cir. 1993) (quoting *United States v. Leon*, 468 U.S. 897, 920 (1984)). “The Supreme Court held in *Leon* that the exclusionary rule barring illegally obtained evidence from the courtroom does not apply to evidence seized in ‘objectively reasonable reliance on’ a warrant issued by a detached and neutral magistrate, even where the warrant is subsequently deemed invalid.” *United States v. Jasorka*, 153 F.3d 58, 60 (2d Cir. 1998) (quoting *Leon*, 468 U.S. at 922 n.23). “The test of objective good faith is ‘whether a reasonably well trained officer would have known that the search was illegal despite the magistrate’s authorization.’” *United States v. Moore*, 968 F.2d 216, 222 (2d Cir. 1992). “The exception, however, will not apply when, *inter alia*, the warrant application ‘is so lacking in indicia of probable cause as to render reliance upon it unreasonable.’” *Smith*, 9 F.3d at 1015 (internal quotation marks omitted).

C. Discussion

A plain reading of the search warrant affidavit establishes that, after being intercepted arranging to purchase crack and powder cocaine from the Pena brothers, Sadio was observed both arriving at specific locations in the Bronx to pick up the crack cocaine and immediately returning to his residence in Stamford. The affidavit sets

forth the exact times when the police observed Sadio arrive in the Bronx, meet with one of the Pena brothers and return to his home in Stamford. On each of the three occasions listed in the affidavit, Sadio went to the Bronx after being intercepted on multiple telephone calls arranging a narcotics purchase with the Penas, met with one of the Penas in the Bronx, and returned home with the narcotics. The most recent of these trips occurred on November 27th, only three days prior to the issuance of the warrant. These facts establish, at least under the probable cause standard, that Sadio was purchasing large quantities of crack in the Bronx and returning with the narcotics to his Stamford residence.⁸

Sadio's arguments on appeal amount to pure speculation. First, he faults the police officers for failing to allege in the affidavit that drug dealers typically store narcotics in their homes. *See Sadio's Br. at 22.* Although this type of generic statement may certainly be helpful in a particular case, it is not required boilerplate for every search warrant authorizing the search of a drug dealer's residence and is certainly not necessary to the issuing judge's determination that probable cause existed here. In this case, as set

⁸ On appeal, Sadio appears to limit his challenge to the search of his residence and does not challenge the seizure of the scale from his car. *See Sadio's Br. at 22.*

forth above, there was sufficient information contained in the warrant affidavit to establish probable cause that narcotics would be located in Sadio's residence and his vehicle based on the first-hand observation of Sadio making arrangements to purchase large quantities of crack from his source in the Bronx, traveling to meet with this source, and immediately returning home after the transaction.

Second, Sadio faults the officers for failing to follow him from the Bronx "to establish that he came directly home after his drug purchases" and failing to watch "his Connecticut home to establish that any drug sales were taking place there." Sadio's Br. at 22. Again, although the investigative techniques suggested by Sadio certainly could have been helpful (though they also would have jeopardized the investigation had Sadio detected the surveillance), they were not necessary to a finding of probable cause. Based on when the officers observed Sadio depart the Bronx and when they observed him arrive at his residence on each of the three occasions listed in the affidavit, it was reasonable to infer that he drove straight from the Bronx back to his residence. Moreover, the warrant issued, not based on probable cause that Sadio was selling narcotics *from* his residence, but based on probable cause that he was storing narcotics *in* his residence, so that the surveillance of him meeting with the Penas in the Bronx and then arriving

back at his residence shortly thereafter mattered much more than any surveillance of him potentially selling narcotics out of his residence.

Third, Sadio maintains that he could have stopped at some point during each of his three trips back from the Bronx. *See* Sadio's Br. at 22-23. He argues: "[O]n October 28 and November 2, a woman was in the car with [him] when he arrived in the Bronx to purchase drugs . . . but she was not with him when he later arrived home in Connecticut – or at least the affidavit made no mention of her arriving there with him. This means [he] must have made a stop between the Bronx and Connecticut, and it is possible that he left both the woman and the drugs at that unknown location." Sadio's Br. at 26. This contention amounts to pure conjecture. The affidavit is absolutely silent as to whether the woman in Sadio's vehicle returned to his residence with him on October 28 and November 2, so no inference can be drawn whatsoever as to her presence or absence. Instead, the affidavit details, quite specifically, the times when Sadio left the Bronx and arrived home, allowing for the very reasonable inference that he drove directly home after meeting with the Penas.

On October 28, Sadio departed the Bronx at 6:37 p.m. and arrived at his residence at 7:32 p.m.; on November 2, Sadio departed the Bronx at 4:20 p.m. and arrived at his residence at 5:05 p.m.; and on November 27, Sadio departed the

Bronx at 3:45 p.m. and arrived at his residence at 4:23 p.m. OSA48-OSA49, ¶¶ 12, 15-16, 19-21. Sadio thus traveled approximately 25 miles from the Bronx to Stamford in 55 minutes, 45 minutes, and 38 minutes, respectively. Based on this information, the issuing judge reasonably inferred that Sadio returned from purchasing drugs in the Bronx directly to his Stamford residence. This circumstantial evidence alone is enough to establish a sufficient nexus. *See Velardi*, 40 F.3d at 574.

Finally, Sadio suggests that, because the police observed Muhammad stashing his narcotics in a public laundry room, “it would be more likely [that] a person would keep illicit drugs at some location where they are accessible, but not in their home.” Sadio’s Br. at 26. Again, this suggestion has no grounding in any factual statement contained in the affidavit. At no point does the affidavit make any statement regarding where a drug dealer might be more likely to store narcotics. Instead, the affidavit, after detailing Sadio’s movements and phone calls on October 28, November 2 and November 27, asserted that he was storing the narcotics in his residence.

A search warrant is drafted in the “midst and haste of a criminal investigation” and so should be read “practically and in a commonsense fashion.” *Travisano*, 724 F.2d at 346 (quoting *Ventresca*, 380 U.S. at 108). An affidavit in support

of a search warrant is not required to prove that contraband exists at a residence. Rather, it must only establish probable cause, which is “a flexible, common-sense standard.” *Gates*, 462 U.S. at 239.

Even if this Court disagreed with the district court’s conclusion that the warrant affidavit established probable cause, it should still uphold the denial of the motion to suppress under the good faith exception. As outlined above, the search warrant contained detailed descriptions of intercepted phone calls, along with physical surveillance, which demonstrated that, on three different occasions in October and November 2009, Sadio traveled to the Bronx, purchased crack cocaine from his source of supply, and returned to his residence. The residence was clearly described in the search warrant, and the list of items to be seized fell squarely within the categories of evidence that would be considered the fruits and instrumentalities of drug dealing. There is no reason to suggest that officers who executed the search warrant acted in anything, but objective good faith in executing the search warrants.

Sadio argues, as he must, “that the affidavit in support of the warrant is ‘so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable.’” Sadio’s Br. at 28. He refers to the affidavit as “bare-bones” and claims it was “based on unsubstantiated

conclusions” in that “it stated only that [he] bought drugs and arrived home[.]” *Id.* at 28-29. He mischaracterizes the affidavit, however. As detailed above, the affidavit sets forth three specific occasions in October and November 2009 when Sadio called the Penas, arranged to purchase significant quantities of crack cocaine, traveled to the Bronx, met with the Penas for what appeared to be narcotics transactions, and returned immediately home to his Stamford residence with the narcotics. The most recent transaction occurred only three days prior to the issuance of the warrant and involved Sadio arriving back at his residence a mere 38 minutes after having purchased 140 grams of crack and powder cocaine from the Penas. It was certainly reasonable for the officers to have relied on the issuance of the warrant, as it was supported by facts indicating that Sadio was bringing the crack he bought in the Bronx back to his residence.

IV. The evidence was sufficient to support the jury’s guilty verdicts for Sadio on both the conspiracy and substantive counts.

Sadio also argues that the jury’s verdict should be overturned because there was insufficient evidence to establish his membership in the charged narcotics conspiracy and because there was insufficient evidence that he intended to distribute the 93.7 grams of crack cocaine

seized from his bedroom at the time of his arrest. Neither argument has merit.

A. Relevant facts

Of the twenty defendants charged in this case, Sadio was the only one to proceed to trial.⁹ Trial commenced on December 6, 2010. OSA18. To prove the charges in Counts One and Twelve of the second superseding indictment, the government relied on the testimony of several DEA agents and local police officers, a DEA chemist, an employee from the Connecticut Department of Labor and co-defendants William Pena and Wilson Pena. OSA111, OSA215, OS269, OSA408, OS422, OSA453, OSA460, OSA474, OSA483, OSA494, OSA513, OSA530, OSA622, OSA668, OSA678, OSA689. In addition, the government submitted approximately 50 recorded telephone calls, 37 of which involved Sadio as a participant. Government Exhibits (“Exs.”) 101A-137A, 188A-193A, 210A-213A, 233A, 235A, 240A (wiretap recordings). Finally, the government presented physical evidence, including narcotics and narcotics paraphernalia seized from Sadio’s bedroom on the morning of his arrest. Exs. 2 (90.7 grams of crack), 2A (3.0 grams of crack packaged in small baggies), 3 (digital

⁹ Sims had originally been slated to go to trial with Sadio, but his trial was postponed when the district court concluded, on the eve of trial, that he was not competent to go forward. KSA6.

scale with white residue), 4 (marijuana) and 4A-4I (photographs of seized items).

Based on this evidence, the government established that, in 2009, the Pena brothers, along with their partner, Kerlin Hernandez-Evangelista, and their subordinate, Tommy Garcia, operated an extensive drug operation in the Bronx primarily out of their apartments at 3217 Hull Avenue and 117 197th Street. OSA283-OSA287, OSA542-OSA543. They serviced a large customer base, many of whom traveled from Stamford and the surrounding towns to purchase crack and powder cocaine from them. OSA290-OSA292. In particular, they serviced about fifteen different wholesale customers from the Stamford area. OSA290-OSA291, OSA618. They sold cocaine in quantities ranging from as little as five grams and as much as 250 grams at a time, charging, on average, prices range from \$35 to \$37 per gram depending on the quantity purchased. OSA290-OSA292, OSA550. They did not sell to drug users or in individual baggies of cocaine because did not want to deal with “[t]oo much movement, traffic” and preferred to sell in larger quantities. OSA293, OSA550-OSA551.

The Penas typically purchased cocaine in kilogram quantities at an average price of \$29,000 per kilogram and bought about three kilograms each month. OSA287. They bought it in powder form and either cooked it into crack themselves

or paid someone else to do it. OSA288-OSA289, OSA548-OSA549. In cooking 1,000 grams of powder, they typically increased its volume and ended up with between 1,150 and 1,200 grams of crack. OSA289, OSA550. Indeed, at the time of their arrests on December 2, 2009, they had stored in William's 197th street apartment over 737 grams of powder, 1774 grams of crack and \$14,870 in drug proceeds. Exs. 6A, 6B, 7A, 7B (seized crack and powder cocaine), 15E,15F (photographs of seized cash), 62-65 (lab reports for seized cocaine), OSA520-OSA528.

The Pena brothers had known Sadio for several years prior to their arrests in this case and had been selling crack cocaine to him during that time period, typically in quantities ranging from ten to twenty grams at a time, but increasing significantly by November 2009. OSA293-OSA294, OSA553-OSA554. Between September 30, 2009 and November 28, 2009, which is roughly how long the wiretap on the Penas' cellular telephones lasted, Sadio traveled to the Bronx eleven different times to purchase crack and powder cocaine from the Pena organization. The dates and quantities of Sadio's purchases are as follows:

1. September 30 - 10 grams of crack cocaine, Exs. 101A, 102A, OSA299;
2. October 2 - 15 grams of crack, 5 grams of powder cocaine, Exs. 103A, 104A, 105A, OSA300;

3. October 6 - 20 grams of crack cocaine, Exs. 106A, 107A, OSA302;
4. October 22 - 10 grams of crack cocaine, Exs. 108A, 109A, OSA306;
5. October 24 - 28 grams of crack cocaine, Exs. 110A, 111A, 112A, OSA310;
6. October 28 - 23 grams of crack cocaine and 5 grams of powder cocaine, Exs. 113A, 114A, 115A, 116A, OSA564-OSA565;
7. October 30 - 50 grams of crack cocaine, Exs. 117A, 118A, 119A, 119C, 120A, OSA566;
8. November 2 - 80 grams of crack cocaine, Exs. 121A, 122A, 123A, 124A, OSA569;
9. November 10 - 143 grams of crack cocaine and 7 grams of powder cocaine, Exs. 125A, 126A, 127A, OSA573-OSA575, OSA594;
10. November 18 - 10 grams of powder cocaine, Exs. 128A, 129A, OSA313;
11. November 27 - 135 grams of crack cocaine and 5 grams of powder cocaine, Exs. 131A, 132A, 133A, 134A, 135A, OSA314-OSA315.

Law enforcement officers conducted surveillance on six of these occasions (October 22, October 24, October 28, October 30, November 2 and November 27) and observed Sadio meet with William, Wilson, Hernandez or Garcia after intercepting telephone calls indicating that they were about to engage in a narcotics transaction. OSA413-OSA414 (October 22), OSA463-OSA469 (October 24), OSA469-OSA471, OSA476-OSA481 (October 28), OSA436-OSA440 (October 30), OSA440-OSA445 (November 2), OSA486-OSA492 (November 27). They captured four of these surveillances on video. Exs. 21, 21A, 22 and 23 (videos from October 22, October 24, November 2 and November 27).

In total, Sadio purchased well over five hundred grams of crack cocaine during this time period, in quantities ranging from ten grams to over one 140 grams. By the end of the wiretap, he was one of the Penas' most prolific customers. OSA620-OSA621. Though he typically purchased the cocaine in bulk, for the October 30 transaction, he specifically asked Wilson Pena to break up the 50 grams of crack into two packages, one containing ten grams and one containing 40 grams. OSA566-OSA567.

Sadio was a regular, reliable customer of the Penas who engaged in standardized transactions for large quantities of crack cocaine and who always had enough money to purchase whatever quantity he ordered. OSA294. In fact, one time,

Sadio even lent the Penas \$3,000 so that they had enough money to purchase cocaine from their source. OSA295.¹⁰

On several occasions, Sadio discussed with the Penas the quality of the crack and the fact that his customers liked or disliked it. Indeed, as to the November 27 transaction, Sadio was not happy with the quality of the crack cocaine that he purchased so, on November 28, he called William Pena, said that they needed to meet, and advised that he did not want to talk about it over the telephone. Exs. 136A, 137A, OSA316-OSA316. He then traveled to William's 197th street apartment, and the two met. OSA316. He told William that "the people" did not like the crack cocaine and that they were complaining, referring to his customers. OSA317. William took back the crack that he had sold to Sadio the previous day and replaced it with better quality crack because Sadio "was bringing me money, a lot of money." OSA317-OSA319. And, according to Wilson, Sadio would sometimes either complain or compliment the crack that he was purchasing, saying either that he was getting complaints ("They're not liking it, they're not feeling it"), or that his customers liked it ("They're lovin' me. . . . this is fire"). OSA555, OSA620.

¹⁰ Wilson even testified that there were times when he and Sadio smoked marijuana together. OSA553.

Sadio even vouched for another customer to the Penas. OSA402-OSA403. William had never dealt with co-defendant Vincent Brown before and asked Sadio if he knew him. Sadio said that he knew Brown well and that he was trustworthy; based on this endorsement, William started selling crack to Brown. OSA403.

Sadio was arrested on December 3, 2009 at his residence at 199 West Broad Street, Stamford. OSA684. He was sleeping in his bedroom with his girlfriend when the police entered at approximately 5:45 a.m. OSA684, OSA687. At the time of his arrest, he was read his *Miranda* rights. After the interviewing agent “told Mr. Sadio that we knew about the twins and that the twins had been arrested, I could see the blood drain from his face. And he started licking his lips, . . . [a]nd he leaned, almost collapsed onto a center kitchen island and started asking for water.” OSA164. After getting him a glass of water, the agent “asked him if he would tell me now before we started searching if there were any drugs in the house. And he told me yes, that he had about 20 grams of crack in his bedroom but said it was fake.” OSA164. Sadio refused to answer any other questions and “had kind of a glazed look in his eyes and was just kind of staring into space.” OSA164.

The police also executed state search warrants as to Sadio’s residence and one of the two Acuras he had been observed driving in October

2009 and November 2009. OSA692. They seized 90.7 grams of crack cocaine located on a plate in a night stand near his bed, 3.0 grams of crack cocaine (packaged in three small baggies) and a small quantity of marijuana located on top of the same night stand, \$2,321 in cash located in the pockets of men's clothing in Sadio's bedroom, and a digital scale (that had no batteries and white residue on it) located on the front seat of one of the Acuras. Exs. 2, 2A, 3, 4A-4I, 60 (lab report), OSA167-OSA172, OSA698-OSA707. The officers found no "evidence of drug use such as tools for ingestion or crack pipes[.]" OSA714.

According to the DEA drug expert who testified, the typical crack user purchases it in \$10 baggies, each weighing .1 grams, so that he or she is paying \$100 per gram, whereas a typical street-level crack dealer purchases it in bulk, generally in ounce, half-ounce and quarter ounce quantities, and pays about \$50 per gram for it. OSA225-OSA226. For a crack distributor, the typical tools of the trade are scales, packaging material, large quantities of cash, firearms and quantities of "a few ounces, 50 grams, 100 grams, something like that." OSA236-OSA237. For a crack user, the typical tools of the trade are "some type of smoking pipe," "steel wool which they use to filter while they're smoking," "[b]utane torches," very little cash, and very small quantities of "a gram or less." OSA237-OSA238. "A user or addict will generally pur-

chase what they can use right then or what they're going to use in the very near future.” OSA238.

Finally, Connecticut Department of Labor records revealed that, for the past 18 quarters prior to trial, Sadio had reported income of just over \$800, from one quarter in 2007 and one quarter in 2008. OSA672-OSA673.

Sadio called his parents as witnesses and tried to suggest, through them, that they supported him, gave him the \$2,321 in cash seized from his bedroom, and provided him with enough money to purchase large quantities of crack cocaine from the Pena brothers. OSA732-OSA734, OSA740-OSA743, OSA778-OSA779. In fact, his parents acknowledged giving him small amounts of cash, but nowhere near the money necessary to purchase the large quantities of crack that he was obtaining from New York. OSA737-OSA739, OSA744-OSA745.

On December 13, 2010, the jury convicted Sadio of the charges in both Counts One and Twelve of the second superseding indictment. OSA19, OSA34-OSA36, OSA40. On June 22, 2011, Sadio filed a motion for judgment of acquittal. OSA22.

On January 6, 2012, the district court issued a written ruling denying Sadio's motion for judgment of acquittal. OSA65. As the court explained, “The defendant argue[d], as he did at

trial that the government's evidence did not show he participated in a drug conspiracy, rather only that he had a buyer-seller relationship with his sources of supply for crack cocaine." OSA67. The court rejected this argument and explained that, according to the government's evidence, Sadio was a regular and reliable customer of the Pena brothers "who consistently engaged in transactions for large quantities of crack cocaine and always had enough money to purchase whatever quantity he ordered." OSA68. Also, on "several occasions," Sadio talked about the quality of the crack cocaine and the fact that his customers either liked or disliked it. OSA68. And on one occasion, Sadio "was permitted to return a substantial quantity of crack cocaine because it was of poor quality and [Sadio's] customers did not like it." OSA68. In addition, Sadio vouched "for another drug dealer in Stamford . . . who was looking to start making crack cocaine purchases from the same sources of supply." OSA68.

The court rejected Sadio's buyer-seller argument, pointing out that this "rule does not protect either the seller or buyer from a charge they conspired together to transfer drugs if the evidence supports a finding that they shared a conspiratorial purpose to advance other transfers, whether by the seller or by the buyer." OSA69 (quoting *United States v. Parker*, 554 F.3d 230, 235 (2d Cir. 2009)). The court noted that "the ev-

idence introduced by the government at trial showed that the defendant's source of supply took back crack cocaine the defendant had purchased because the defendant's customers had not liked it, demonstrating that the defendant and his co-conspirators were engaged in a cooperative enterprise, rather than an arms-length relationship." OSA69. Moreover, "the evidence showed planning among the co-conspirators to deal in wholesale quantities of drugs obviously not intended for personal use." OSA70.

As to his challenge to the conviction on the substantive count, the court found that the jury

could have found that the government had met its burden [on intent to distribute] based on evidence that the weight of the substance was 93.7 grams, together with expert testimony that the typical use-quantity of crack cocaine was .1 gram[s]; evidence as to the cost of the substance, together with evidence that the defendant had only \$800 in reported wages since 2007; evidence that the substance was seized together with over \$2,300 in cash; evidence with respect to the digital scale with white residue on it found in the defendant's car; the way in which the crack was packaged; the absence of any paraphernalia associated with the use of crack cocaine; and the defendant's untruthful post-arrest state-

ment to law enforcement officers that they would only find about 20 grams of fake crack cocaine in his bedroom.

OSA70-OSA71.

B. Standard of review and governing law

1. Standard of review

A defendant challenging the sufficiency of the evidence bears a “heavy burden.” *United States v. Mercado*, 573 F.3d 138, 140 (2d Cir. 2009) (internal quotation marks omitted). This Court will affirm “if ‘after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’” *United States v. Ionia Management S.A.*, 555 F.3d 303, 309 (2d Cir. 2009) (per curiam) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). All permissible inferences must be drawn in the government’s favor. *See United States v. Guadagna*, 183 F.3d 122, 129 (2d Cir. 1999). “Under this stern standard, a court . . . may not usurp the role of the jury by substituting its own determination of the weight of the evidence and the reasonable inferences to be drawn for that of the jury.” *United States v. MacPherson*, 424 F.3d 183, 187 (2d Cir. 2005) (citations and internal quotation marks omitted). “[I]t is the task of the jury, not the court, to choose among competing inferences that can be

drawn from the evidence.” *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003). The evidence must be viewed in conjunction, not in isolation; and its weight and the credibility of the witnesses is a matter for argument to the jury, not a ground for legal reversal. *See United States v. Best*, 219 F.3d 192, 200 (2d Cir. 2000).

“[T]he law draws no distinction between direct and circumstantial evidence,” and “[a] verdict of guilty may be based entirely on circumstantial evidence as long as the inferences of culpability . . . are reasonable.” *MacPherson*, 424 F.3d at 190. Indeed, “jurors are entitled, and routinely encouraged, to rely on their common sense and experience in drawing inferences.” *United States v. Huevo*, 546 F.3d 174, 182 (2d Cir. 2008). Because there is rarely direct evidence of a person’s state of mind, “the mens rea elements of knowledge and intent can often be proved through circumstantial evidence and the reasonable inferences drawn therefrom.” *MacPherson*, 424 F.3d at 189; *see also United States v. Crowley*, 318 F.3d 401, 409 (2d Cir. 2003). In particular, “the existence of a conspiracy and a given defendant’s participation in it with the requisite knowledge and criminal intent may be established through circumstantial evidence.” *United States v. Chavez*, 549 F.3d 119, 125 (2d Cir. 2008) (internal quotation marks omitted).

“The possibility that inferences consistent with innocence as well as with guilt might be

drawn from circumstantial evidence is of no matter . . . because it is the task of the jury, not the court, to choose among competing inferences.” *MacPherson*, 424 F.3d at 190 (internal quotation marks omitted). The evidence must be viewed “in its totality, not in isolation, and the government need not negate every theory of innocence.” *United States v. Lee*, 549 F.3d 84, 92 (2d Cir. 2008) (internal quotation marks omitted).

In short, this Court may not disturb a conviction on grounds of legal insufficiency absent a showing that “no rational trier of fact could have found each essential element of the crime beyond a reasonable doubt.” *United States v. Walsh*, 194 F.3d 37, 51 (2d Cir. 1999). “The ultimate question is not whether *we believe* the evidence adduced at trial established defendant’s guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find*.” *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998) (emphasis in original).

“In cases of conspiracy, deference to the jury’s findings is especially important because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon’s scalpel.” *United States v. Snow*, 462 F.3d 55, 68 (2d Cir. 2006) (internal quotation marks omitted). While the government must show that a defendant acted purposefully

to further a conspiracy, this Court has emphasized that “[w]here the existence of a conspiracy has been proved, evidence sufficient to link another defendant with it need not be overwhelming and it may be circumstantial in nature.” *United States v. Desena*, 260 F.3d 150, 154 (2d Cir. 2001) (internal citation omitted).

2. Elements of a drug conspiracy offense

In every drug conspiracy case, the government must prove two essential elements by direct or circumstantial evidence: (1) that the conspiracy alleged in the indictment existed; and (2) that the defendant knowingly joined or participated in it. *See United States v. Story*, 891 F.2d 988, 992 (2d Cir. 1989); *see also Snow*, 462 F.3d at 68; *United States v. Richards*, 302 F.3d 58, 69 (2d Cir. 2002) (“A conviction for conspiracy must be upheld if there was evidence from which the jury could reasonably have inferred that the defendant knew of the conspiracy . . . and that he associat[ed] himself with the venture in some fashion, participat[ed] in it . . . or [sought] by his action to make it succeed.”) (internal quotation marks omitted).

To prove the first element and establish that a conspiracy existed, the government must show that there was an unlawful agreement between at least two persons. *See United States v. Rea*, 958 F.2d 1206, 1214 (2d Cir. 1992). The con-

spirators “need not have agreed on the details of the conspiracy, so long as they agreed on the essential nature of the plan.” *United States v. Geibel*, 369 F.3d 682, 689 (2d Cir. 2004) (internal quotation marks omitted). The agreement need not be an explicit one, as “proof of a tacit understanding will suffice.” *Rea*, 958 F.2d at 1214. The co-conspirators’ “goals need not be congruent, so long as they are not at cross-purposes.” *Id.*

To prove the defendant’s membership in the conspiracy, the government must show that the defendant “knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it.” *Snow*, 462 F.3d at 68 (internal quotation marks omitted). This requires proof of the defendant’s “purposeful behavior aimed at furthering the goals of the conspiracy.” *Chavez*, 549 F.3d at 125 (internal quotation marks omitted). The defendant need not have known all of the details of the conspiracy “so long as [she] knew its general nature and extent.” *Id.* (internal quotation marks omitted). The evidence of a defendant’s participation in a conspiracy should be considered in the context of surrounding circumstances, including the actions of co-conspirators and others because “[a] seemingly innocent act . . . may justify an inference of complicity.” *United States v. Calabro*, 449 F.2d 885, 890 (2d Cir. 1971). Finally, “[t]he size of a defendant’s role does not determine whether that person may be convicted of conspiracy

charges. Rather, what is important is whether the defendant willfully participated in the activities of the conspiracy with knowledge of its illegal ends.” *United States v. Vanwort*, 887 F.2d 375, 386 (2d Cir. 1989).

While “mere presence . . . or association with conspirators” is insufficient to prove membership in a conspiracy, a reasonable jury may convict based on “evidence tending to show that the defendant was present at a crime scene under circumstances that logically support an inference of association with the criminal venture.” *Snow*, 462 F.3d at 68 (internal quotation marks omitted).

Moreover, if “there be knowledge by the individual defendant that he is a participant in a general plan designed to place narcotics in the hands of ultimate users, the courts have held that such persons may be deemed to be regarded as accredited members of the conspiracy.” *United States v. Rich*, 262 F.2d 415, 418 (2d Cir. 1959); *see also United States v. Sureff*, 15 F.3d 225, 230 (2d Cir. 1994) (finding defendants who did not know each other to be members of single conspiracy since they had reason to know they were part of larger drug distribution operation).

This Court, however, has overturned conspiracy convictions where the government presented insufficient evidence from which the jury reasonably could have inferred that the defendant had knowledge of the conspiracy charged. *See*

e.g. *United States v. Santos*, 541 F.3d 63, 71 (2d Cir. 2008); *United States v. Torres*, 604 F.3d 58 (2d Cir. 2010). Similarly, where the evidence establishes the defendant’s knowledge of the conspiracy, but is insufficient for the jury reasonably to have inferred that the defendant intended to join it, reversal is appropriate. *See Santos*, 541 F.3d at 71.

3. Proving intent to distribute

“Title 21 of the United States Code provides, *inter alia*, that it is ‘unlawful for any person knowingly or intentionally’ to ‘distribute’ or to ‘possess with intent to . . . distribute . . . a controlled substance[.]” *Torres*, 604 F.3d at 65-66 (emphasis removed). “To prove intent, . . . the government must show knowledge, for knowledge is the foundation of intent.” *Id.* at 66 (internal quotation marks omitted). “Proof of such intent need not have been direct. The law has long recognized that criminal intent may be proved by circumstantial evidence alone.” *United States v. Heras*, 609 F.3d 101, 106 (2d Cir. 2010). Although “possession of a small quantity of drugs standing alone is insufficient to prove an intent to distribute[,] . . . any amount of drugs, however small, will support a conviction when there is additional evidence of intent to distribute.” *United States v. Martinez*, 54 F.3d 1040, 1043 (2d Cir. 1995) (affirming jury’s rejection of defendant’s personal-use defense). And “a jury

can reasonably infer an intent to distribute ‘solely from possession of a large quantity of drugs.’” *Id.* at 1045 (Calabresi, concurring) (quoting *United States v. Brown*, 921 F.2d 785, 792 (8th Cir. 1990)).

In proving that a defendant intended to distribute narcotics, the government can show that narcotics were packaged for street sale, that narcotics were stored with drug paraphernalia such as scales, baggies, and cutting agents, or that no items associated with the use of narcotics were located. *See United States v. Gamble*, 388 F.3d 74, 77 (2d Cir. 2004); *see also United States v. Wallace*, 532 F.3d 126, 131 (2d Cir. 2008) (noting that “tools of the trade” or materials for packaging cocaine could “sustain an inference” that defendant intended to distribute). “Possession of equipment to weigh, cut and package drugs is highly probative of a purpose to distribute.” *Martinez*, 54 F.3d at 1043 (internal quotation marks omitted). But the government need not prove “beyond a reasonable doubt the subsidiary fact that [the defendant] did not use drugs.” *Id.*

C. Discussion

Sadio makes two principle sufficiency arguments. First, he claims that his relationship with the Penas was akin to a buyer-seller and that he “had no explicit or implicit agreement with the Penas to join them in distributing crack cocaine[.]” Sadio’s Br. at 29. He states that he

“did not work for the Penas, was not involved in the running of, and did not share profits from, their drug organization.” *Id.* Second, he claims that there was insufficient evidence to establish that he possessed the crack seized from his bedroom with the intent to distribute it. *See id.* at 30. These claims have no merit; the jury’s verdict was well-supported by the evidence.

1. Sadio was a member of the conspiracy

Sadio argues here, as he did to the jury, that the evidence did not show that he participated in a drug conspiracy, only that he had a buyer-seller relationship with the Penas. This argument failed to persuade the jury and ignores significant pieces of evidence establishing Sadio’s knowing and voluntary participation in the charged conspiracy.

At trial, the government established that, over a two-month period in late 2009, Sadio traveled to the Bronx from Stamford eleven times to purchase quantities of crack cocaine ranging between ten grams to over 140 grams and totaling well over five hundred grams. It was reasonable for the jury to conclude, based on these quantities alone, that Sadio purchased crack from the Penas with the intent to redistribute it in Stamford.

Moreover, the Penas testified and explained that Sadio was a regular, reliable customer who

engaged in standardized transactions for large quantities of crack, who always had enough money to purchase whatever quantity he ordered, and who, by the end of November 2009, had become one of their most prolific customers. The success of the Penas' operation certainly depended on Sadio's success. In fact, on one occasion, Sadio even lent William money toward the purchase of a kilogram of cocaine, and on another occasion, Sadio vouched for a new customer, helping the Penas establish another profitable business relationship. And if Sadio was unable to resell the Penas' product quickly, he and the Penas would lose money so that, when he returned to the Bronx on November 28 complaining about the quality of the 135 grams of crack he had purchased the previous day, William did not hesitate to replace it for free and with no questions asked.

All of this evidence established that Sadio was a knowing and voluntary participant in the crack cocaine conspiracy. Sadio argues, as he did below, that his relationship with the Penas was akin to a mere "buyer-seller." But Sadio fails "to appreciate how limited is the application of the buyer-seller exception." *Parker*, 554 F.3d at 236. As this Court has stated, "the [buyer-seller] rule does not protect either the seller or buyer from a charge they conspired together to transfer drugs if the evidence supports a finding that they shared a conspiratorial purpose to advance other

transfers, whether by the seller or by the buyer.” *Id.* at 235. The government produced substantial evidence of such a common interest between Sadio and the Penas.

For example, the evidence that the Penas took back crack cocaine that Sadio had purchased because his customers had not liked it showed that they had an interest in helping Sadio resell the crack cocaine to third parties. William Pena said as much during his testimony, explaining that Sadio made them a lot of money and that it was in their collective best interest that he be able to re-sell the crack he purchased. OSA317-OSA319. Sadio and the Penas were engaged in a cooperative enterprise involving mutual accommodation, rather than in an arm’s-length relationship. *See Parker*, 554 F.3d at 239 (noting that “[a]ll three appellants purchased with such frequency and in such quantity from the selling group to support a finding that each of them depended on it as a source of supply and thus had a stake in the group’s success in selling to others . . .”).

Also, the fact that Sadio had vouched for another potential customer is evidence of the mutuality of interest that existed between him and his sources of supply. *See id.* (noting that defendant “introduced one of his intermediaries . . . to the selling group as a customer . . .”).

And the repeated and frequent sales between Sadio and the Penas between September 2009

and November 2009, along with the testimony that they had known each other and had been transacting in crack cocaine together for several years showed the sort of “prolonged cooperation between the parties” and “standardized dealings” that characterize a conspiratorial relationship. See *United States v. Hawkins*, 547 F.3d 66, 74 (2d Cir. 2008) (citing *United States v. Hicks*, 368 F.3d 801, 805 (7th Cir. 2004)).

The evidence presented at trial was sufficient to support a finding that Sadio was in an ongoing relationship with the members of the charged crack cocaine conspiracy, marked by common interests in promoting both resales by Sadio to third parties and sales by the conspirators to new customers. As was the case in both *Parker* and *Hawkins*, here there was evidence from which the jury could have inferred:

(a) that the sellers shared with the buyers an interest and a stake in the buyers’ intention to resell the drugs, and (b) that the buyers shared with their sellers an intention to be a continuing part of, and to further, the sellers’ drug selling operation. The evidence was sufficient in each case to show that the sellers and buyers had joined in a cooperative venture, in which both buyers and sellers had a stake in additional transfers of drugs beyond the transfers from the original seller to the original buyer.

Parker, 554 F.3d at 238. A rational trier of fact thus could easily have concluded that Sadio was a knowing participant in the conspiracy.

2. Sadio intended to distribute the crack seized from his bedroom

Sadio also argues that there was insufficient evidence to support the jury's guilty verdict as to Count Twelve. *See* Sadio's Br. at 40. He does not challenge the finding that he possessed crack cocaine on December 3, 2009, the date of his federal arrest. Instead, he claims that, because "not a single witness . . . ever saw [him] sell any drugs," because "[t]here was no testimony of any unusually high volume of foot traffic to and from [his] house," and because "the search of [his] bedroom on the day of his arrest did not uncover the usual indicia of drug dealing that was listed in the search warrant," *Id.* at 40-41, the government failed to establish that he had intended to distribute the over 90 grams of crack seized from his nightstand. He argues, in essence, that the "approximately 90 grams[] was consistent with personal use in light of the defense argument that Mr. Sadio had the smarts to purchase, for his own use, somewhat larger than typical user quantities because it was cheaper, better quality, and resulted in less exposure than multiple street purchases." *Id.* at 42. This argument had no sway with the jury, and is totally unpersuasive.

It was reasonable for the jury to conclude that Sadio possessed the seized crack cocaine with the intent to distribute it based on a number of factors, including (1) the weight of the substance (93.7 grams) along with the expert testimony that the typical use-quantity of crack cocaine was .1 grams ; (2) the cost of the substance along with the fact that Sadio had only \$800 in reported wages since 2007; (3) the fact that the substance was seized along with over \$2,300 in cash; (4) the seizure of a digital scale with white residue on it from Sadio's car; (5) the way in which the seized crack cocaine was packaged; (6) the absence of any drug paraphernalia associated with the use of crack cocaine; and (7) Sadio's own untruthful, post-arrest statement to the police that they would only find about twenty grams of fake crack cocaine in his bedroom. See *Wallace*, 532 F.3d at 131 (noting that "tools of the trade" or materials for packaging cocaine could "sustain an inference" that defendant intended to distribute). This evidence was plainly sufficient for a rational trier of fact to conclude that Sadio possessed the seized crack cocaine with the intent to distribute it.

Sadio's suggestion that 90 grams of crack is somehow consistent with personal use contradicts the expert's testimony that the typical user ingests about .1 grams of crack at a time. His suggestion that the narcotics paraphernalia seized on the day of his arrest is inconsistent

with drug distribution likewise ignores the expert's explanation that, whereas one would expect to find crack pipes in the home of a crack user, a crack dealer would likely possess tools such as a scale, packaging material, a large amount of cash and a significant quantity of narcotics, all items seized from Sadio. And the claim that no officer observed Sadio actually engage in drug dealing is simply irrelevant. A jury is entitled to consider circumstantial evidence to establish an intent to distribute, *see Heras*, 609 F.3d at 106, and the evidence seized from Sadio's bedroom and car certainly provided such evidence. Indeed, not only was the quantity of crack cocaine seized substantial and thus, evidence of distribution, its packaging alone was significant, in that Sadio had separated three grams from the 94 grams, and placed it in a small baggies so that it could be re-sold.

Thus, the jury's verdict on Count Twelve was supported by overwhelming evidence that Sadio possessed the 93.7 grams of crack cocaine seized from his nightstand with a specific intent to distribute it.

Conclusion

For the foregoing reasons, the judgments of conviction for Sims, Muhammad and Sadio should be affirmed.

Dated: November 30, 2012

Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

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

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

This is to certify that the foregoing brief is calculated by the word processing program to contain approximately 26,021 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification. On November 30, 2012, this Court granted the government's motion for leave to submit an oversized brief of no more than 28,000 words.

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

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