11-2390(L)

To Be Argued By:
ROBERT M. SPECTOR

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 11-2390(L),
11-4448(CON), 11-4456(CON),
11-4863(CON), 11-5204(CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

GAVIN HAMMETT, aka G, aka Silk, ANDRE MESSAM, aka Dre, TERRENCE MCNICHOL, aka Peanut, MICHAEL HAMMETT, aka Tyree, CHARLES HANDY, aka Paco, aka Chumley,
Defendants-Appellants,

(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.

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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 April 12, 2011, a jury found the defendant-appellant Charles Handy guilty of Counts Two, Three and Five of the superseding indictment, which charged him with conspiracy to distribute fifty grams or more of cocaine base, possession with intent to distribute five grams or more of cocaine base and possession with intent to distribute cocaine base. GA11, GA19-GA20.[1] On November 28, 2011, the district court sentenced Handy to a term of incarceration of 150 months and a term of supervised release of eight years. GA14. Judgment entered on November 30, 2011. GA14. Handy filed a timely notice of appeal on December 12, 2011, pursuant to Fed. R. App. P. 4(b), GA15, and this Court has appellate jurisdiction over Handy's challenge to his judgment of conviction pursuant to 28 U.S.C. § 1291.

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[1] The Appendix filed by Gavin Hammett will be referred to as "GHA" with the page number, and the Appendix filed by Charles Handy will be referred to as "CHA" with the page number. The government has filed a separate appendix, which will be referred to as "GA" with the page number.

On December 7, 2010, the defendant-appellant Gavin Hammett, changed his plea to guilty as to Count One of the indictment, which charged him with conspiracy to distribute five hundred grams or more of cocaine. GHA6-GHA7, GHA22. On October 13, 2011, the district court sentenced Hammett to a term of incarceration of 240 months and a term of supervised release of eight years. GHA163-GHA165. Judgment entered on October 17, 2011. GHA10-GHA11. Hammett filed a timely notice of appeal on October 18, 2011 pursuant to Fed. R. App. P. 4(b), GHA170, and this Court has appellate jurisdiction over Hammett's challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

Statement of the Issues Presented for Review[2]

1. Whether the district court clearly erred in denying Handy's motion to suppress evidence seized at the time of his arrest based on its factual finding that the evidence seized was in plain view and was within Handy's wing-span?
2. Whether the district court's rulings on Handy's *ex parte* motions for the provision of funds to hire a defense expert are reviewable and, if so, whether they constituted an abuse of discretion?
3. Whether there was sufficient evidence to support Handy's conspiracy conviction and, in particular, to show that he had become a member of the charged conspiracy and that he had intended to sell crack cocaine?

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[2] These appeals are consolidated with three other appeals: *United States v. Messam*, 11-2390; *United States v. McNichol*, 11-4448, and *United States v. Michael Hammett*, 11-4863. In *Messam* and *McNichol*, the defendants waived their appeal rights, defense counsel submitted *Anders* briefs, and the government has filed motions to dismiss the appeals. In *Michael Hammett*, the defendant waived his appeal rights, defense counsel submitted a merits brief, and the government has submitted a motion to dismiss the appeal based on the appeal waiver.

4. Whether the district court's 240-month sentence for Hammett, which was 52 months below the guideline range, was substantively unreasonable?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 11-2390(L), 11-4448(CON), 11-4456(CON), 11-4863(CON), 11-5204(CON)

UNITED STATES OF AMERICA,

Appellee,

-vs-

GAVIN HAMMETT, aka G, aka Silk, ANDRE MESSAM, aka Dre, TERRENCE MCNICHOL, aka Peanut, MICHAEL HAMMETT, aka Tyree, CHARLES HANDY, aka Paco, aka Chumley,

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 2010, Gavin Hammett ran a lucrative drug distribution operation out of several different residences in Norwalk and Stamford, Connecticut, regularly supplying a significant number of wholesale powder and crack cocaine dis-

tributers from Norwalk, Stamford, and the surrounding area, including co-defendant Charles Handy, who, in turn, sold smaller quantities to street level crack dealers in Stamford. Hammett relied on his friends and family members to run his operation, using them to store large quantities of cocaine and cash, to deliver drugs to his customers, and to travel to New York to pick up cocaine and deliver proceeds to his source. In three months, he purchased and resold five kilograms of powder cocaine and two kilograms of crack cocaine. Handy purchased crack approximately 35 times from Hammett in quantities ranging between 28 and 40 grams, so that, in that same three-month period, he purchased and redistributed almost one kilogram of crack. Handy was one of Hammett's most prolific and reliable customers.

In June 2010, after the government conducted a two-month long wiretap investigation, Hammett, Handy and sixteen others were charged in one indictment with a variety of narcotics offenses. Hammett pleaded guilty to one count of conspiracy to possess with the intent to distribute five hundred grams of cocaine, and Handy was found guilty, after trial, of one count of conspiracy to distribute fifty grams of cocaine base and two counts of possession with intent to distribute cocaine base. The district court, after concluding that Hammett was a career offender and noting that he had already served 105

months in prison for a prior federal cocaine trafficking conviction, sentenced him to 240 months' incarceration. The court sentenced Handy to 150 months' incarceration.

On appeal, Handy argues that (1) the district court erred in denying his motion to suppress crack cocaine and a digital scale seized from him at the time of his arrest because they were in plain view and within his wingspan; (2) the district court erred in denying his counsel funding to hire an expert witness; and (3) the jury's guilty verdict as to the conspiracy count should be overturned because there was insufficient evidence to show that he and Hammett had entered into a conspiratorial relationship and because the government failed to show that he had intended to sell crack. Hammett does not challenge his conviction. Instead, he claims that his sentence, which was 52 months below the guideline range, was too high and constituted an abuse of the district court's discretion.

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

Statement of the Case

On June 16, 2010, a federal grand jury returned an indictment against Hammett, Handy and sixteen other co-defendants. GHA13. The indictment charged Hammett in Count One with conspiracy to possess with the intent to distribute five hundred grams or more of co-

caine, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846, in Count Two 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)(A) and 846, and in Counts Four through Eight with distribution of cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). GHA13-GHA18. The indictment charged Handy in Count Two 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 in Count Nine with possession with 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). GHA15-GHA16, GHA18-GHA19.

On December 7, 2010, Hammett changed his plea to guilty as to Count One. GHA22-GHA30. On October 13, 2011, the district court sentenced Hammett to a non-guideline-term of incarceration of 240 months and a term of supervised release of eight years. GHA10, GHA163-GHA165. Judgment entered on October 17, 2011. GHA11. Hammett filed a timely notice of appeal on October 18, 2011, GHA11, GHA170, and is currently serving his sentence.

On February 16, 2011, the same grand jury returned a superseding indictment against Handy and the three other remaining co-defendants. GA18. In the superseding indict-

ment, Handy was charged in Count Two with conspiring to possess with the intent to distribute fifty grams or more of cocaine base, in Count Three with possession with the intent to distribute five grams or more of cocaine base, and in Count Five with possession with the intent to distribute cocaine base. GA19-GA20. On March 1, 2011, Handy filed a motion to suppress the evidence seized from him at the time of his arrest. GA22-GA26. On April 4, 2011, the district court held an evidentiary hearing on the motion, CHA16, and on April 5, 2011, the court issued an oral ruling denying the motion. CHA1-CHA15.[3] On April 11, 2011, the district court denied Handy's motion for judgment of acquittal, GA559, and, on April 12, 2011, a jury found Handy guilty of Counts Two, Three and Five. GA11. On November 28, 2011, the district court sentenced Handy to a term of incarceration of 150 months and a term of supervised release of eight years. GA14. Judgment entered on November 30, 2011. GA14. Handy filed a timely notice of appeal on December 12, 2011, GA15, and is currently serving his sentence.

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[3] Although the government has cited directly to Handy's appendix, this appendix is not sequentially numbered, and there are large gaps between the page numbers for several of the documents included in it.

Statement of Facts

Of the eighteen defendants charged in this case, Handy was the only one to proceed to trial. At trial, the government relied on the testimony of several DEA agents and local police officers, an employee from the Connecticut Department of Labor and co-defendant Massiel Vargas, as well as approximately 75 recorded telephone calls, a majority of which involved Handy as a participant. Government Exhibits ("Exs.") 101-112, 117-125, 127-130, 135-139, 141-143, 145-147, 149-153, 156, 156B, 156D, 156F, 158-160, 181, 183, 183B, 196, 198-205, 207-210, 212-219, 224-225 (wiretap recordings). The government also submitted numerous text messages stored on Handy's cell phone (Exs. 226, 228-233), a video showing him and a co-defendant when they went to Hammett's apartment to purchase cocaine from him (Ex. 19), the crack cocaine that Handy purchased during that meeting (Ex. 1), and the crack cocaine and digital scale seized from Handy on the morning of his arrest (Exs. 5 and 7). Based on this evidence, the jury reasonably could have found the following facts:

Beginning in January 2010, the DEA began using a known and reliable cooperating witness ("CW-1") to make several controlled purchases of powder cocaine from Hammett. GA88. CW-1 purchased powder cocaine from Hammett during transactions on March 1, March 10, March

24, and April 8, in quantities ranging between 15 grams and 50 grams. GA89-GA90,

On April 23, 2010, based in part on these controlled purchases, the government received authorization to conduct a wiretap investigation as to two cellular telephones used by Hammett. GA93. The wiretap lasted almost two months. GA95-GA96, GA116. Intercepted calls, surveillance, and seized narcotics confirmed that Hammett was overseeing a structured organization operating primarily in Norwalk, Connecticut, which was distributing large quantities of crack cocaine and powder cocaine. Hammett employed several individuals who sold drugs, maintained stash houses, and even made deliveries to his source in New York on his behalf, including his girlfriend and co-defendant Massiel Vargas, his stepfather, his nephew and several of his close friends. GA113-GA114, GA127, GA221, GA238-GA239, GA290-GA292.

During the course of the wiretap, it became apparent that Hammett made regular purchases of quantities of powder cocaine, ranging from 200 grams to 400 grams, from a Bronx-based source-of-supply later identified as co-defendant Jose Luis Alvarado. GA205, GA208. Hammett then converted some of the cocaine into crack cocaine, broke both the powder and crack cocaine down into smaller quantities, and resold it to a wide customer base comprised of dozens of individuals. GA222-GA223, GA335. He dealt in

quantities ranging from as little as individual baggies to ounces, depending on the customer. GA223. Typically, Hammett paid about $35 per gram for powder cocaine. GA205. He then re-sold the cocaine as both powder cocaine and crack cocaine for $50 per gram, so that the purchase and re-sale of one 400 gram quantity netted him about $5,500 profit. GA222-GA223, GA242. Vargas estimated that she was collecting about $2,000 per day from selling cocaine for Hammett. GA252. She acknowledged having stored tens of thousands of dollars in drug proceeds in her apartment for Hammett. GA330-GA331. Though she was involved in the daily running of the business, she did not know the price Hammett paid for cocaine. GA222, GA338.

Most of Hammett's customers purchased powder cocaine, but he did have two regular crack customers, Handy and co-defendant Darryl Files. GA234. Hammett would cook the powder cocaine into crack cocaine for these customers, often using Vargas's Norwalk apartment to do so. GA234. Handy and Files were Hammett's two largest-volume customers. GA247.

From late April 2010 to mid-June 2010, Handy purchased crack cocaine from Hammett on about 35 separate occasions. He typically bought 28 grams at a time and referred to this quantity over the phone as "food," "a double cheeseburger," "a plate," "28th street," or simply by the number "28." Exs. 101, 104, 105, 106,

119, 122, 123, 129, 135, 141, 147. Following a purchase on May 10, 2010 in which co-defendant Frank Green had arranged with Hammett for him to purchase a small quantity of powder cocaine and for Handy to purchase 28 grams of crack cocaine, the DEA, after observing Handy and Green arrive at Vargas's apartment together and leave in the same car minutes later, directed local police officers to stop Handy's car. GA134-GA139, GA356; Ex. 19 (video surveillance of Green and Handy arriving at, and leaving, Vargas's apartment); Ex. 111 (recorded call between Green and Hammett). During the stop, the police found in two separate pockets of Green's pants a baggie containing 26.9 grams of crack cocaine and a baggie containing 3.9 grams of powder cocaine. GA363-GA365; Ex. 1 (crack); Ex. 2 (powder cocaine); Joint Ex. 2 (stipulation regarding the chemical makeup of the seized narcotics). Shortly before the traffic stop, Vargas had observed the men arrive at her apartment and purchase narcotics from Hammett, with Green buying powder cocaine and Handy buying crack cocaine. GA245, GA299-GA300.

Despite the traffic stop, Handy continued dealing with Hammett, buying crack from him again on May 14 and either every day or every other day through the conclusion of the wiretap. Exs. 117-125, 127-130, 135-139, 141-143, 145-147. In fact, by June 2010, he started ordering

forty grams of crack at a time, referring to that quantity as "forty," or "the forty-forty club." Exs. 149, 150, 152.

Vargas confirmed that Hammett regularly converted ounce quantities of powder cocaine to crack cocaine and sold it to Handy for an average price of $50 per gram. GA236. Handy and Hammett were good friends, and Handy was a trusted associate of Hammett's. GA234. Vargas herself witnessed Handy purchase ounce quantities of crack cocaine from Hammett at least once per week, but said that Hammett sometimes served customers on his own without asking her for help. GA242-GA243.

Handy broke down the crack cocaine he purchased from Hammett into smaller quantities and sold them to customers in Stamford. For example, during the week ending May 30, 2010 and the week ending June 12, 2010, the Stamford police used a confidential informant to purchase $50 worth of crack cocaine from Handy. GA421-GA429, GA526-GA532. The purchases occurred near Handy's residence at 21 Sherman Street in Stamford and were observed by the officers supervising the informant. GA421-GA429. Officers also observed Handy engage in a hand-to-hand narcotics transaction with an apparent drug customer on May 20, 2010, not far from his Sherman Street residence, shortly after he had arranged to purchase crack from

Hammett and had driven to Norwalk to meet with him. GA386-GA394.

At the time of his arrest on June 17, 2010, Handy was found in the apartment of a female friend at 18 High Street in Stamford. GA408-GA409. He was seated on a bed and was in the process of counting money when the police entered the room. GA409. The officers seized $1,496 in cash from him, along with a red vinyl bag that was open and was next to him on the bed. GA409-GA411. The bag contained two cellular telephones, 3.7 grams of crack cocaine and a digital scale. GA412-GA414.

A search warrant on one of the cellular telephones revealed several stored text messages between Handy and his narcotics customers. GA169. On June 1, 2010, at 9:57 p.m., Handy sent a text: "The same thing." GA170, Ex. 229. Handy received a response, "Yep, 180 tho." GA170, Ex. 228. At 10:02 p.m., Handy replied, "I got you." GA170, Ex. 228. On June 2, prior to 6:08 p.m., Handy had received a text: "I need 2 cd." GA171, Ex. 226. At 6:08 p.m., Handy replied, "I got you." GA171, Ex. 226. On June 16, at 5:43 p.m., Handy received a text: "I need one g not 4o oun." GA172, Ex. 230.

A Connecticut Department of Labor check revealed that Handy did not report any wages in 2008 and 2010, and reported wages of $108 in 2009 and $1,662 in 2007. GA505-GA506.

In his case, Handy presented one stipulation and testimony from one witness. According to the stipulation, Handy received a financial aid package from the University of Phoenix in July 2009 which included a check to him for $2,754.75 for educational expenses. GA584. Eventually, after enrolling in four courses (one of which he failed and one of which he did not complete), he received notice in February 2010 that his student loans had been canceled. GA584-GA585. And Charlene Hall testified that she was dating Handy in June 2010, saw him about five days each week, and observed him cut hair in the neighborhood "for a fee." GA583.

Summary of Argument

1. The district court's denial of Handy's motion to suppress was based on its decision to credit the testimony of the arresting officer and discredit Handy's testimony. According to the officer, Handy was in the process of counting almost $1,500 in cash when the police arrived and arrested him. He had a red bag sitting wide open and next to him, with a digital scale clearly visible sticking out of the bag. The items in the bag were properly seized either under the plain view doctrine or as part of a proper search incident to arrest. Handy's testimony that the bag was closed and was nowhere near him on the bed was simply not believable, and the dis-

trict court, as fact finder, did not clearly err in choosing not to believe it.

2. Handy's challenge to the district court's resolution of his various motions to incur expenses to pay a forensic narcotics expert fails for several reasons. First, according to defense counsel's representations below and contrary to his claim on appeal, Handy did retain a drug expert, incurred $2,300 in expenses, and received the benefit of that expert's extensive review of the discovery material. After hearing the expert's opinion, it was defense counsel himself who determined that the expert could be of no value to him. Second, to the extent it is now challenged, the district court's fee determination was administrative, and this Court lacks jurisdiction to review it. Third, the district court's apparent decision to authorize the expense of $2,300 for 9.5 hours of work by the defense expert, which was near the expense limit authorized by statute, did not constitute an abuse of discretion. Handy is simply wrong in his assertion that the government's drug expert provided damning testimony which he needed to rebut with his own expert. The government's expert simply explained the prices and quantities in which cocaine is sold and the various tools of the drug trade. Handy had no trouble cross-examining the expert and presenting his own defense that he was a drug user and did not conspire with Hammett to sell drugs.

3. The government presented sufficient evidence to support the jury's guilty verdict on the conspiracy count. As shown by the intercepted calls, Handy and Hammett were engaged in a very profitable business relationship in which Handy purchased 28 and 40 gram quantities from Hammett several times each week for $50 per gram and resold it in smaller quantities to his customers in Stamford for about $100 per gram. Handy was one of Hammett's most prolific customers, and Hammett's success certainly depended, at least in part, on Handy's success. Based on the intercepted calls alone, Handy purchased almost one kilogram of crack from Hammett during the course of the wiretap. These calls were corroborated by Vargas, who observed and aided many of the transactions, as well as the physical surveillance and crack seizures confirming that the transactions occurred. Handy's claim that he was a user, not a dealer, was rebutted by the government's evidence that, on at least three occasions during the wiretap, he sold small quantities of crack to customers in Stamford, that he was found counting almost $1,500 in cash and holding some crack and a digital scale when he was arrested, and that his cell phone contained several text messages between him and his customers.

4. The district court's 240-month sentence of Hammett was substantively reasonable. It reflected a downward departure of 52 months

from the bottom of the advisory range of 292-365 months. In fashioning this sentence, the district court emphasized the serious nature of the offense conduct, which involved Hammett's leadership of a large-scale, profitable drug-trafficking organization that was responsible for distributing five kilograms of cocaine and two kilograms of crack cocaine in Norwalk and Stamford. In running this drug ring, Hammett used multiple family members and friends, several of whom were elderly and all of whom were addicted to drugs, to distribute, package, and store his narcotics. And although the court elected to grant a departure from the Guideline range, the 240-month sentence reflected the court's reasoned judgment that Hammett's recidivist nature and his extensive criminal record, which included at least six felony drug convictions and a 105-month federal term of incarceration, required a substantial sentence.

Argument

I. The district court did not clearly err in concluding that the narcotics and scale that Handy possessed at the time of his arrest were properly seized either under the plain view doctrine or as a proper search incident to arrest.

Handy claims that the search of a bag he was holding at the time of his arrest, which contained almost 4 grams of crack and a scale, vio-

lated his Fourth Amendment rights. *See* Handy Br. at 25. This claim has no merit. As the district court properly concluded, when the officers observed the bag, it was open and its contents were in plain view. Moreover, the bag itself was located right next to Handy on the same bed where he was sitting and, therefore, was properly searched incident to arrest.

A. Relevant facts

On April 4, 2011, the district court held an evidentiary hearing to address, *inter alia*, the motion to suppress the items seized from Handy at the time of his arrest. At the hearing, the government presented the testimony of Stamford police officer Richard Gasparino, and the defendant himself testified.

According to officer Gasparino, on June 17, 2010, he was the arresting officer for Handy. CHA26. He had a federal arrest warrant for Handy and a state search warrant for Handy's 21 Sherman Street residence, but when the police arrived at the residence that morning, Handy was not there. CHA26-CHA27. Based on information from a confidential informant, the police then went to 18 High Street in Stamford, believing they would find Handy there. CHA27. When they arrived, they saw Handy's car parked outside. CHA27. The landlord for the building confirmed that Handy was staying in Apartment 201. CHA27.

A woman, later identified as Melody Thompson, opened the front door to the apartment as the officers were about to knock. CHA28. Officer Gasparino heard a male voice coming from a bedroom near the front door and immediately walked into that room. CHA28. He saw Handy sitting on the bed, counting a large amount of cash. CHA28. Officer Gasparino recognized Handy from "past interactions." CHA28. Handy had a "stunned" expression and slowly put down the money (which was later counted, confirmed to be $1,496 and seized). CHA28.

Officer Gasparino also saw a red bag sitting to the left of Handy, "[r]ight next to where he put down the U.S. currency." CHA30. As the officer explained, "Handy was sitting on the bed and this bag was right to the left of [him] on the bed and it was opened." CHA31. The bag was within Handy's reach, and officer Gasparino, without touching or moving the bag, could see a "digital scale sticking out of it." CHA31. At that point, he moved the scale and "saw a clear plastic baggy . . . which contained a white rock-like substance." CHA32. Officer Gasparino seized the scale as evidence because "it's usually common for subjects who are selling narcotics to have a digital scale on their person or in their residence or vehicle in order to make drug transactions so they could weigh out the narcotics before they sell them." CHA33. Gasparino testified that a scale is "something that would

typically be seized as evidence during an arrest" of a drug dealer, and its simple possession could support an additional charge. CHA46. After seizing the scale, he saw the clear plastic baggie containing suspected crack, two cell phones and a photo identification. CHA33.

Officer Gasparino made clear that he arrested Handy as soon as he saw him and recognized him and that the arrest occurred prior to the search of the bag. CHA34.

After the arrest and search, the officers spoke with Ms. Thompson, and she provided written consent to search her entire apartment. CHA34-CHA35.

Handy testified that, when he was arrested, he was sitting at the foot of the bed, and the red bag was sitting at the top of the bed, near the headboard. CHA83-CHA84. He also said that the bag was not open. CHA84. According to Handy, when the police came into the bedroom, they immediately grabbed him and handcuffed him, and then took the bag, unzipped it and looked inside it. CHA85. On cross-examination, Handy tried to explain the cash he was counting by claiming it was money he earned cutting hair and from a Pell grant awarded to him to take college classes. CHA89-CHA90. He claimed he had a drug problem, regularly used crack and powder cocaine, and bought the cocaine with money he earned from cutting hair (charging five dollars per haircut). CHA90, CHA95-

CHA97. He also claimed that he only purchased powder cocaine from Hammett and that he converted it to crack cocaine himself. CHA103.

At the conclusion of the hearing, the government asked the court to credit the testimony of officer Gasparino and deny the motion to suppress. The two disputed issues were "the location of the bag and . . . whether it was opened." CHA109. The government argued,

> Officer Gasparino was straightforward with his testimony. . . . [H]e made it very clear that the bag was open and that the bag was, I believe he said, within 12 inches of where Mr. Handy was seated. . . . [T]he facts that Mr. Gasparino testified to make more sense, frankly, than Mr. Handy's testimony, because what we do know from his testimony is that he was sitting on the bed counting $1,500 in cash. Everything else that related to drugs, being in possession of narcotics, was in that bag: Scale, two cell phones and the crack cocaine. So I think it's a reasonable inference that . . . essentially he was caught in the middle of counting drug proceeds.

CHA109-CHA110.

In response, defense counsel maintained that the officers should have obtained a search war-

rant to search the bag. CHA116. The bag was not within his wingspan because it was located across the bed from where he was sitting and, by the time the officer reached the bag, Handy was already in handcuffs and could not have accessed its contents. CHA117.

On April 5, 2011, the district court denied the motion to suppress in an oral ruling. The court credited the testimony of Officer Gasperino that "the red bag was right next to the defendant on the bed at the time the officer entered the bedroom . . . . that the bag was open, that the digital scale was sticking out of the bag in plain view and that he recognized the scale as evidence of a crime and properly seized it." CHA7. The court also pointed out that, according to Officer Gasperino, "once he seized the scale, the other items in the bag came into plain view, specifically the knotted plastic bag containing the crack cocaine and the two cell phones." CHA7-CHA8.

The court specifically "declined" to credit Handy's testimony that "the bag was not right next to him on the bed" and "was closed" so that "the officer had to unzip the bag to see inside."

The court concluded, "The scale was properly seized because it was in plain view and it was immediately recognized as evidence of crime, and once the officer rightfully took possession of the scale, the other items came into plain view and the likewise were immediately recognized

as evidence and thus were properly seized under the plain view exception." CHA8.

In the alternative, the court concluded that "the bag was properly seized and searched incident to the arrest[.]" CHA8. The court found,

> The bag was right next to the defendant on the bed and it was seized and searched contemporaneously with his arrest. There was virtually no delay and this was not a generalized search. . . . The man was seated on the bed counting a large amount of cash and the bag was right next to him. I think that this brings the case within the scope of the Chimel exception.

CHA8-CHA9.

And the court further concluded that the motion could probably be denied under the inevitable discovery doctrine, since the owner of the apartment had given her consent to search it. But, although the court found that the "consent was validly obtained without coercion," it was "somewhat uncomfortable relying on this exception not having heard from her and recognizing that the consent was obtained only after the bag was obtained by the police and its contents were seized by the police." CHA9.

B. Governing law and standard of review

1. Plain view seizure

Under the plain view doctrine, "if police are lawfully in a position from which they view an object, if its incriminating character is immediately apparent, and if the officers have a lawful right of access to the object, they may seize it without a warrant." *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993)); *see also United States v. Miller*, 430 F.3d 93, 102 (2d Cir. 2005) (holding that the "plain view" doctrine applied to a shotgun seized from an open closet during a protective sweep that an officer completed while serving an order of protection"). "It is important to distinguish plain view . . . to justify *seizure* of an object, from an officer's mere observation of an item left in plain view. Whereas the latter generally involves no Fourth Amendment search, . . . the former generally does implicate the Amendment's limitations upon seizures of personal propery." *Horton v. California*, 496 U.S. 128, 134 n.5 (1990) (internal quotation marks and citation omitted; emphasis in original). "If an article is already in plain view, neither its observation nor its seizure would involve any invasion of privacy. . . . A seizure of the article, however, would obviously invade the owner's possessory interest." *Id.* at 133-134.

2. Search incident to arrest

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332, 339 (2009) (internal quotation marks omitted). "Among the exceptions to the warrant requirement is a search incident to a lawful arrest." *Id.* "The exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Id.*

Under *Chimel v. California*, 395 U.S. 752 (1969), "the police may conduct a search of the arrestee's person and the area within his immediate control - construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence, . . . i.e., the grab area." *United States v. Gandia*, 424 F.2d 255, 261 (2d Cir. 2005) (internal quotation marks and citation omitted). "The justification for the search incident to arrest considered in *Chimel* was the threat posed by the arrestee." *Id.* (internal quotation marks omitted); *see also United States v. Hernandez*, 941 F.2d 133, 137 (2d Cir. 1991). "[I]n determining whether or not an area is within the arrestee's immediate control, *Chimel* . . . ('construing that phrase to mean the area from within which he might gain possession of a weapon or destructi-

ble evidence'), we consider not only the arrestee's location, but also the nature of any restraints that have been imposed upon the person." *United States v. Blue*, 78 F.3d 56, 60 (2d Cir. 1996) (internal quotation marks omitted). "Where the item to be searched is not within reasonable reach of the person arrested, the rationale for application of this exception is absent." *United States v. Perea*, 986 F2d 633, 643 (2d Cir. 1993).

3. Standard of review

"When evaluating a district court's [denial] of a motion to suppress evidence," this Court reviews the district court's "findings of fact for clear error, considering them in the light most favorable to the government,"[4] *United States v. Julius*, 610 F.3d 60, 64 (2d Cir. 2010), and reviews questions of law and mixed questions of law and fact *de novo*, *id.*; *United States v. Lucky*, 569 F.3d 101, 105-106 (2d Cir. 2009). "A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm

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[4] There is some disagreement in the Second Circuit as to whether the facts should be viewed in the light most favorable to the government, or in the light most favorable to the prevailing party. *See United States v. Wilson*, 699 F.3d 235, 242 n.3 (2d Cir. 2012) (citing cases on both sides of the issue). Here, that distinction does not matter.

conviction that a mistake has been committed.'" *United States v. Bailey*, 652 F.3d 197, 203 (2d Cir. 2011) (quoting *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985)).

C. Discussion

At the suppression hearing, the district court had to resolve a factual dispute between two entirely different versions of events. Officer Gasparino testified that he observed the digital scale in plain view, sticking out of the red bag, which was wide open and sitting within about 12 inches of where Handy was sitting on the bed. Handy testified that the bag was closed, that the scale could not be seen in plain view, and that the bag was on the opposite side of the bed from where he was sitting. The court, as fact finder, was called upon to make a credibility determination. It chose to credit Officer Gasparino's testimony and to discredit Handy's testimony. In doing so, it specifically found that the red bag was sitting open on the bed right next to where Handy was sitting and that the digital scale, which was, on its face, evidence of a crime, was in plain view. As a result, the bag and its contents were properly seized both under the plain view doctrine and as a lawful search incident to Handy's arrest.

On appeal, Handy raises two "narrow" issues: "The first is a factual issue as to the location of the bag, proof of ownership of the bag

and the location of the bag." Handy's Br. at 22. "The second is legal as to whether the scale could be considered an item related to criminal activity or 'evidence of a crime.'" *Id.*

Handy is correct in his argument that, had the district court credited his testimony, it would have been more difficult to justify the seizure of the red bag and its contents under either the plain view doctrine or as a lawful search incident to arrest. But the court did not credit Handy's testimony and, indeed, specifically discredited it. *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."). This decision was well-supported by the record and certainly did not constitute clear error. On cross examination, many of Handy's answers were evasive and did not comport with other objective evidence. For example, he insisted that he had obtained the $1,500 in cash through a Pell grant and by cutting hair (charging five dollars per haircut). CHA88-CHA94. He admitted to possessing both powder and crack cocaine, but claimed he was using it, not selling it. CHA96. He stated that he had converted powder cocaine to crack cocaine that previous evening, in the same apartment, though he could offer no explanation for how this occurred without Ms. Thompson's knowledge and why there was no objective evi-

dence of it. CHA103-CHA104. In contrast, Officer Gasparino never wavered from his testimony that, when he entered Handy's bedroom only moments after going into the apartment, he caught him with a "stunned" expression on his face and in the middle of counting almost $1,500 in cash, with an open red bag next to him that contained a scale, almost four grams of crack and two cell phones. In short, the trial court did not clearly err in crediting Officer Gasparino's testimony.

Handy's second argument is likewise contradicted by specific evidence. Officer Gasparino testified without challenge that digital scales are tools of the narcotics trade that are used by drug dealers to weigh and sell drugs. CHA46. He even stated that the possession of a scale, on its own, as a tool of the drug trade was chargeable as a separate offense. CHA46. Thus, even though digital scales undoubtedly have legitimate uses and "can be found in any kitchen," Handy's Br. at 23, they are also well-established tools of the narcotics trade, and their "incriminating character" is certainly "immediately apparent" to any officer, especially in the context of the execution of a federal arrest warrant for a narcotics trafficker. *See United States v. Perez*, 144 F.3d 204, 208 (2d Cir. 1998) (noting that a scale is a tool of the drug trade); *United States v. Wiener*, 534 F.2d 15, 18 (2d Cir. 1976) ("Experience . . . has taught that substantial dealers in

narcotics keep firearms on their premises as tools of the trade almost to the same extent as they keep scales, glassine bags, cutting equipment and other narcotics equipment.”).

In the end, Handy’s attack on the district court’s ruling amounts to a rehash of his arguments below, in which he challenges the credibility of the arresting officer and offers an alternative explanation of what might have occurred in that bedroom at the time of his arrest. But the district court considered and rejected these arguments, specifically discrediting Handy’s suggestion that the bag was closed and was not located right next to him on the bed. Moreover, on appeal, Handy does not seriously contest the court’s alternative finding that the seizure of the bag and its contents was lawful as a search incident to arrest. The officers arrested Handy prior to searching the bag and seizing its contents, and the bag itself, under any version of events presented at the suppression hearing, was sitting on the very same bed where Handy was seated at the time of his arrest.

The district court properly denied Handy’s motion to suppress the evidence seized from him at the time of his arrest, and this Court should affirm that decision.

II. Handy did retain the services of, and receive extensive assistance from, his own drug expert, and the district court's retroactive fee determination is an administrative decision that is not reviewable, and, nevertheless, did not constitute an abuse of discretion

Handy claims, for the first time on appeal, that the district court erred in denying, without prejudice, his various motions for funds to hire a defense expert on drug dealing. Because these motions were filed *ex parte*, and Handy never challenged the district court's rulings before now, the government was not aware, until the appeal, of the underlying substance of the motions.

Handy's claim fails. First, as defense counsel explicitly acknowledged to the district court, he did, in fact, retain a drug expert for 9.5 hours, incur significant expenses and receive help from the expert in reviewing the government's discovery and preparing his defense. As defense counsel himself admitted below, the expert did not testify at trial because the opinion he provided after reviewing the discovery material was of no value to Handy. Second, given that the district court did authorize defense counsel to retain the drug expert and incur $2,300 in expenses, his argument here amounts, at most, to a challenge to the court's fee determination, which is an administrative decision that is not

reviewable. Third, given the marginal value of the government's own drug expert and the fact that the district court permitted Handy to incur almost the maximum expense authorized by statute, even if the fee determination were appealable, it did not constitute an abuse of discretion.

A. Relevant facts

On March 14, 2011, Handy filed an *ex parte* motion for permission to incur $3,500 in expenses to hire Mr. David Leff, "a forensic narcotic expert" who would testify "as a narcotic expert witness, in which he could assist in drug identification, drug usage and effects, the methodology of drug trafficking, and potentially assist in a defense that Mr. Handy was a user and not a dealer." CHA131. On March 21, 2011, the district court denied this motion without prejudice to renewal. GA721. The court ordered, "Any renewal of this motion must include Mr. Leff's hourly rate for expert work and the number of hours for which authorization is requested." GA721.

On April 5, 2011, the court conducted an *ex parte* telephone conference with defense counsel which was on the record. GA722. The court wanted to address defense counsel's "second motion to incur expenses for an expert." GA723. In that motion, which was dated April 4, 2011, Handy stated that he needed Mr. Leff to help him "verify" the government's evidence and

cross examine the government's experts. CHA135. In particular, Handy stated that, "[b]ased upon conversations with previous drug addicts, clients and research, [he] strongly believes that the government witnesses have testified incorrectly in the amount of drugs that an addict consumes." CHA135. He advised that Leff's hourly rate for out-of-court time was $250, and his hourly rate for in-court time was $350. CHA136.

Defense counsel advised the court that "circumstances have changed since I filed that motion." GA723. He explained that the expert "took the initiative and did some work before being fully approved." GA723. The expert told defense counsel

> that he could be of no value to me after reviewing the evidence either in helping me with the case or in testifying, and I think he's put about $1,500 worth of work into it. And what he told me is if he could get the $1,500, that would be great, or if he's just stuck getting the $500, which we're allowed to do without authorization, he would just have to take that.
>
> But he did review the discovery and basically said that he could not be of any assistance.

> And there was a significant – there were about 225 phone calls that he reviewed as well as some other discovery, but the key discovery was the 225 phone calls between Mr. Handy and Mr. Hammett who is the pretty well the main conspirator or the main player in this case.

GA723-GA724.

In response, the court stated, "With regard to payment for the services rendered, if you prepare and submit an appropriate voucher in due course, I'll certainly take a look at it and we'll see how it turns out. . . . But for now I will deny your second motion as moot. . . . [w]ithout prejudice to your submission of that voucher in due course." GA724. Defense counsel replied, "Yes. That would make sense. . . . And I may not get to submit that voucher until after the trial." GA724. On April 18, 2011, the court denied this second motion as moot and without prejudice. CHA139. The court stated, "Any such renewal should comply with the oral ruling made during the April 5, 2011 *ex parte* telephone conference regarding this motion." CHA139.

On April 11, 2011, which was the third day of trial, Special Agent Eileen Dinnan testified for the government as an expert in crack cocaine trafficking. CHA151.[5] She was the only expert

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[5] Handy states in his brief that the government did not disclose its expert witness until March 21, 2011.

witness called by the government. After reviewing her qualifications, she testified about various aspects of cocaine distribution. She described the difference between a drug user and a drug seller, in terms of the quantity of narcotics typically purchased by each, their appearance, and their standard of living. CHA158-CHA159. She talked about the pricing structure for the crack and powder cocaine trade and how prices are impacted, depending on the quantity sold and where it was purchased. CHA164-CHA168. She discussed the various quantities in which cocaine is sold. CHA164-CHA168. She described the packaging material used for cocaine. CHA169. And she testified about the chemical makeup of crack and powder cocaine. CHA171-CHA172. She described the various roles individuals play within a drug trafficking organization. CHA174. Finally, she explained what tools of the trade she would expect to find when executing search warrants for the residences of crack cocaine dealers and for crack cocaine users. CHA175-CHA178. At no

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See Handy Br. at 29. In fact, in its initial discovery letter, mailed on June 30, 2010, the government disclosed that it would call as a witness "a DEA or FBI Special Agent who has not yet been identified to testify concerning the nature and methodology of street drug distribution, including the organization and structure of drug trafficking operations, common practices, and the utility of certain items to further the drug operation." GA718.

time did she testify about the amount of drugs that an addict consumes.

Handy never objected to her qualifications or her testimony. CHA163. Instead, on cross examination, he asked her several questions in an effort to support his buyer-seller defense. He asked her whether an individual might buy a larger quantity of drugs simply to obtain a better price and to reduce the risk that comes from engaging in multiple purchases. CHA182. He also asked her to distinguish between drug dealers who sell for profit and those who sell to support their own drug habit. CHA185. In addition, he tried to suggest that some of the tools of the trade typically associated with a dealer could also be associated with a user. CHA190-CHA193.

On May 24, 2011, over a month after the jury returned its guilty verdicts, Handy filed a third motion to incur expenses. CHA140. In this motion, he asked for $1,500 to pay Mr. Leff and represented that the expert was "able to significantly assist the undersigned by reviewing some of the discovery, eliminating some strategy options for the defense." CHA141. Attached to this motion, Handy submitted an $800 bill from the expert for services rendered in reviewing discovery materials, consulting with defense counsel, and preparing an internal case outline. CHA142. According to an email submitted by defense counsel as part of the Appendix, on July

5, 2011, the court asked defense counsel to refile the motion to incur expenses and "briefly detail the work actually performed" by the expert so that the court could authorize the correct payment. CHA147.

On July 22, 2011, defense counsel submitted one final motion to incur expenses, which was almost identical to the May 24, 2011 motion, except that it specified a new amount of money due the expert. CHA148. According to the motion, Mr. Leff had submitted a bill for $2,300 for a total of 9.5 hours of work. CHA149. Defense counsel represented that the expert had "significantly" assisted him by reviewing transcripts of wiretap calls, numerous lab and investigatory reports, photographs and video surveillance evidence. CHA149. Defense counsel also indicated that only $1,500 of the $2,300 bill remained, as $800 has already been paid. CHA149. On September 23, 2011, the district court denied this motion as moot. GA13.

B. Governing law

Under 18 U.S.C. § 3006A, the district court "shall place in operation a plan for furnishing representation for any person financially unable to obtain adequate representation . . . ." *Id.* In addition to governing the right to appointed counsel, this statute allows for an indigent defendant to hire an investigator or other expert. In particular, it provides:

(e) Services Other Than Counsel.

(1) Upon Request. Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

(2) Without Prior Request.

(A) Counsel appointed under this section may obtain, subject to later review, investigative, expert, and other services without prior authorization if necessary for adequate representation. Except as provided in subparagraph (B) of this paragraph, the total cost of services obtained without prior authorization may not exceed $800 and expenses reasonably incurred.

(B) The court, or the United States magistrate (if the services were rendered in a case disposed of entirely before the United States magistrate), may, in the

> interest of justice, and upon the finding that timely procurement of necessary services could not await prior authorization, approve payment for such services after they have been obtained, even if the cost of such services exceeds $800.
>
> (3) Maximum Amounts. Compensation to be paid to a person for services rendered by him to a person under this subsection, or to be paid to an organization for services rendered by an employee thereof, shall not exceed $2,400, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court, or by the United States magistrate if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active circuit judge.

18 U.S.C. § 3006A(e).

"A district court may authorize the expenditure of funds . . . under the CJA only when 'necessary for adequate representation.'" *United States v. Bah*, 574 F.3d 106, 118 (2d Cir. 2009) (quoting 18 U.S.C. § 3006A(e)(1)). A district

court's decision to deny public funds to hire an expert is reviewed for an abuse of discretion. *See United States v. Sanchez*, 912 F.2d 18, 21-23 (2d Cir. 1990). The review of such a decision, however, is limited to a determination "that impact[s] a defendant's trial, sentence, or collateral challenge to a conviction or sentence." *United States v. Bloomer*, 150 F.3d 146, 149 (2d Cir. 1998).

Otherwise, this Court does not have jurisdiction to review a fee determination under § 3006A(e). *See id.* at 148. Such determinations are not appealable orders. *Id.* "[F]ee determinations concerning services already rendered are administrative, rather than judicial, determinations." *Id.* "Section 3006A does not provide for governmental involvement in the appointment of an expert, by way of notice or otherwise; applications for appointment of an expert are *ex parte* and nonadversarial." *Id.* This Court does not have jurisdiction "over these fee determinations because" they are "purely administrative decisions" and not "appealable final orders." *Id.* Indeed, the statute itself "does not explicitly provide for appellate review of fee determinations." *Id.*

C. Discussion

Handy's claim on appeal fails first and foremost because, contrary to the representations in his brief, he did indeed retain the services of an expert under § 3006A(e). As the transcript from

the April 5, 2011 telephone conference demonstrates, Handy's counsel, without court authorization, had Mr. Leff conduct an extensive review of all of the discovery material in the case, including about 225 wiretap calls. Based on this review, Mr. Leff advised defense counsel that his opinion would be of no value to Handy at trial. Thus, a plain reading of the April 5 transcript shows that no action by the district court prevented Handy from retaining a drug expert. He did retain an expert, and that expert did provide him with extensive help (at a cost of $2,300). Unfortunately, based on the substantial evidence against Handy, that expert's ultimate opinion did not support Handy's defense.

Handy's challenge also fails because the district court's various rulings on his motions to incur expenses were administrative decisions regarding retroactive fee determinations that are not reviewable. Just as in *Bloomer*, Handy was not deprived of the expert's assistance, and the last two payment requests were for services "already rendered." *Bloomer*, 150 F.3d at 149. Thus, this Court does not have jurisdiction to consider a challenge to the district court's resolution of the fee question.

And even if this Court chose to review the district court's various administrative determinations on the merits, it should affirm because these decisions did not constitute an abuse of discretion. In the only motion he filed in ad-

vance of trial, Handy sought permission to incur $3,500 in expert fees for the sole purpose of hiring an expert to help him with his defense that he was not guilty because he was a user of narcotics, not a dealer. In this motion, he did not explain why this particular expert was necessary, how the expenditure of such excessive fees was warranted and, most importantly, why the expert services were of an "unusual character or duration" to justify an expense in excess of $2,400. Putting aside the plain fact that the court did not deny this motion on its merits and instead simply asked defense counsel to provide information about the expert's fees, it is difficult to understand how any error by the district court in rejecting this initial request for funding could have been harmful.

Handy's sole argument on appeal appears to be that he needed his own drug expert to discredit the government's expert. He relies on *United States v. Durant*, 545 F.2d 823 (2d Cir. 1976), to suggest that a defense expert was absolutely necessary since the government's case was circumstantial and largely based on its own expert testimony. There are several problems with this argument. First, the government's case was not circumstantial, and its expert's testimony was only marginally helpful; the government's case was based on approximately 75 intercepted wiretap calls, testimony from a cooperating co-defendant, two different crack sei-

zures from Handy, two controlled purchases from Handy, almost $1,500 and a digital scale seized from Handy at the time of his arrest, several text messages with Handy's drug customers stored on his cell phone, and several instances when the police either observed Handy selling crack to a customer or purchasing crack from Hammett. Second, Handy did retain an expert, used him for 9.5 hours and incurred $2,300 in expenses; any limitation in his value was due to the fact that his opinion did not support Handy's defense. Third, the facts underlying *Durant* are wholly inapposite to the facts here; in *Durant*, the court refused to grant the defendant funding to hire his own fingerprint expert where the government's key evidence was a partial latent fingerprint that was in poor condition. Here, Handy retained an expert and incurred $2,300 in expenses for assistance from that expert in analyzing discovery and helping to present his buyer/seller defense. As a result, this claim lacks merit and does not support any request for relief.

III. The evidence was sufficient to support the jury's guilty verdict for Handy on the conspiracy count.

Lastly, Handy claims that the evidence offered by the government was insufficient to show that he joined in a conspiracy with Ham-

mett to sell crack cocaine. *See* Handy Br. at 32.[6] This argument has no merit.

A. Relevant facts

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

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 Man-*

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[6] Handy does not argue that there was insufficient evidence to support the jury's verdict on the substantive charges in Counts Three and Five. Instead, he attacks the conspiracy count based on his arguments that he never joined in the conspiracy and that he never intended to distribute drugs. *See* Handy's Br. at 35-39. At the conclusion of his brief, Handy states that, since "[a]ll the counts were tried together[,] . . . if one argument is successful, like dominos, all the other counts must fail." *Id.* at 40. But he never articulates a separate attack on the substantive counts.

agement 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. Huezo*, 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 ul-

timate 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: (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).

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 conspirators "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.

C. Discussion

The government presented sufficient evidence to support Handy's conviction on the conspiracy count. In particular, the government established that Handy regularly purchased 28 and 40 gram quantities of crack cocaine from Hammett for approximately $50 per gram, and then re-distributed it in smaller quantities to customers in Stamford.

Handy's argument on appeal reads like a closing argument to a jury. He does not explain in what way the government's evidence failed to establish each element of the conspiracy charge.

Instead, he simply attacks the credibility of the government's only cooperating witness, Massiel Vargas, and suggests that the jury's verdict should be overturned because it relied on this testimony. But the jury, as fact finder, was entitled to credit or discredit Vargas's testimony, and that credibility determination is solely within the jury's purview to make. *See Best*, 219 F.3d at 200.

Moreover, much of Vargas's testimony was specifically corroborated by the intercepted calls between her and Hammett and between Handy and Hammett, the physical surveillance confirming that Handy was meeting with Hammett to purchase crack and was then meeting with his customers to re-sell crack, and the various narcotics seizures. Handy was repeatedly intercepted ordering either 28 grams or 40 grams of crack from Hammett, and seizures from Green on May 10, 2010 and Files on May 23, 2010 confirmed that Hammett was supplying these quantities of crack to his only two crack customers. In addition, when Handy was arrested, the police found him in possession of almost 4 grams of crack, $1,500 in cash and a digital scale. In short, Vargas's testimony that she regularly observed Hammett cook crack cocaine for Handy and sell Handy the crack in 28-gram increments at a price of $50 per gram did not stand alone by any means. It went side-by-side with the intercepted calls showing that Handy

and Hammett regularly negotiated these crack transactions and that Hammett often directed Vargas to help him provide the crack to Handy, as well as physical surveillance and seizures confirming that the transactions themselves actually occurred.

In many of his attacks on Vargas, Handy mischaracterizes her testimony. For example, he claims that she lied when she testified about cooking crack cocaine and selling it to Handy on May 10, 2010, the day that the police stopped him and Green and seized almost 27 grams of crack from Green. *See* Handy's Br. at 38. But Vargas did not testify that she cooked powder into crack for Handy; she testified that Hammett did it. GA235. Moreover, because defense counsel did not cross examine her as to how long it took for Hammett to cook 28 grams, there was absolutely no evidence to undercut her version of events from May 10. In fact, Vargas testified that Hammett generally took between ten and twenty minutes to convert powder cocaine to crack, and the DEA case agent testified that it could take as little as 10 to 15 minutes to make crack. GA207, GA237.

He also attacks her testimony that Handy was one of Hammett's most prolific customers by claiming that he only accounted for about two percent of Hammett's drug business. *See* Handy's Br. at 39. Again, because defense counsel failed to cross examine Vargas on this

point, there is no basis now to suggest that Vargas was lying because she misrepresented Handy's relative value as a large-scale crack customer. The largely undisputed evidence revealed that, in less than three months, Handy purchased crack from Hammett on 35 separate occasions, totaling almost one kilogram, which would mean that, during that time, Handy provided Hammett with about $50,000, certainly corroborating Vargas's characterization of him.

In addition, Handy maintains that "[t]here was no actual evidence presented that [he] sold to anyone." Handy's Br. at 39. But this argument ignores significant portions of the evidence. The government presented testimony regarding three hand-to-hand crack transactions between Handy and his customers which occurred in May and June 2010, at or near the time he was purchasing crack from Hammett. Two of these transactions involved a police informant. In addition, the government submitted several text messages from Handy's cell phone between him and his customers. Also, in many of the intercepted calls, Handy makes reference to his customers and his drug business while talking with Hammett.

Finally, Handy appears to argue, as he did below, that his relationship with Hammett was akin to a mere "buyer-seller." Handy Br. at 35-36. But Handy fails "to appreciate how limited is the application of the buyer-seller exception."

United States v. Parker, 554 F.3d 230, 236 (2d Cir. 2009). 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 Handy and Hammett. In particular, the government established that both men were highly motivated to make money by selling as much crack as possible. Handy and Hammett 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 . . . .").

In particular, the evidence presented at trial was sufficient to support a finding that Handy was in an ongoing relationship with Hammett, marked by a common interest in promoting resales by Handy to third parties. As was the case in both *Parker* and *United States v. Hawkins*, 547 F.3d 66 (2d Cir. 2008), 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.

Handy's buyer/seller defense failed to persuade the jury because it ignored significant pieces of evidence establishing his knowing and voluntary participation in the drug conspiracy. First, as to the length of time in which Handy dealt with Hammett, the two were transacting together on a regular basis during the entire course of the wiretap investigation, from March through June 2010. GA236. Second, Handy and Hammett shared a common goal in the conspiracy, which was to earn money by selling as much crack as possible, and Handy was one of Hammett's most prolific customers. GA247. Third, Hammett considered Handy such a valuable customer that he chastised Vargas once for turning Handy away and not selling to him. GA293-GA294; Ex. 208. Fourth, Handy depend-

ed on Hammett to supply him with high quality crack cocaine on very short notice. Exs. 141, 143, 146, 159; Joint Ex. 2; GA499. Fifth, based on the intercepted calls, Handy and Hammett certainly shared an understanding that Handy would be redistributing the crack that he purchased from Hammett. Exs. 117. 120, 139, 145. Sixth, the two men had an established price and method of payment. Seventh, Handy engaged in standardized transactions with Hammett, always purchasing either 28 grams or 40 grams of crack from him. Finally, Hammett trusted Handy, as demonstrated by the fact that Hammett met him at several different stash locations that he used and that he often cooked the powder into crack cocaine right in front of Handy. Ex. 137 (Hammett refers to Handy as his "family" and asks Vargas to let him sit alone in her apartment to wait for Hammett).

In the end, the repeated and frequent sales between Handy and Hammett between March 2010 and June 2010, along with the testimony that the two were good friends, shared a profitable business relationship, trusted each other and viewed each other as reliable partners showed the sort of "prolonged cooperation between the parties" and "standardized dealings" that characterize a conspiratorial relationship. *See Hawkins*, 547 F.3d at 74 (citing *United States v. Hicks*, 368 F.3d 801, 805 (7th Cir. 2004)).

IV. The district court's 240-month sentence was substantively reasonable.

A. Relevant facts

1. The plea agreement

On December 7, 2010, Hammett pleaded guilty to conspiring to possess with intent to distribute, and to distribute, five hundred grams or more of cocaine in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(B). GHA22. Prior to his guilty plea, the government filed a second-offender information, which increased his maximum statutory incarceration term to life and his mandatory minimum term to ten years. GHA6, GHA23.

In the plea agreement, the government and Hammett stipulated that his attributable drug quantity was five kilograms of cocaine and two kilograms of crack cocaine. GHA25. But the parties disagreed as to the guideline calculation. GHA24. Based on the agreed-upon quantity, the government placed Hammett at a base offense level of 34. GHA24. In contrast, Hammett reserved his right to argue for a 1:1 crack cocaine/powder cocaine ratio, resulting in a base offense level of 32. GHA25. The parties also disagreed about the criminal history category; the government thought Hammett fell into Category V, and defense counsel thought he fell into Category IV. GHA25. Thus, under Chapter Two of the Guidelines, the government calculat-

ed a range of 168-210 months' incarceration, and Hammett calculated a range of 121-151 months' incarceration. GHA25.

The parties also disagreed about the applicability of the career offender enhancement under U.S.S.G. § 4B1.1. GHA25. The government reserved its right to argue that Hammett qualified as a career offender, so that his Guideline range increased to 262-327 months' incarceration, and Hammett reserved his right to argue that the career offender range was "not deserving of judicial deference in general" and should not be followed. GHA25. Finally, Hammett reserved his right to seek a downward departure or non-Guideline sentence, whereas the government reserved its right to object and seek whatever sentence it deemed appropriate. GHA25. Hammett waived his right to appeal any sentence that did not exceed, *inter alia*, 192 months' incarceration. GHA26.

2. The pre-sentence report

The PSR agreed with the government's view that Hammett's base offense level was 34 based on the quantity of cocaine and cocaine base distributed by him. GHA210-GHA211. It further determined that, under U.S.S.G. § 3B1.1(a), Hammett should receive a four-level adjustment as the leader/organizer of criminal activity that involved five or more participants. GHA211. With a three-level reduction for acceptance of responsibility, the PSR calculated Hammett's

total offense level as 35. GHA211, GHA216. The Second Addendum to the PSR further concluded that Hammett qualified as a career offender, which increased his Criminal History Category from a V to a VI under U.S.S.G. § 4B1.1(b), resulting in a Guideline incarceration range of 292-365 months. GHA227-GHA228.

3. The sentencing memoranda

Hammett submitted a sentencing memorandum in which he asked the district court to impose a 15-year sentence premised on three core arguments. First, he requested that the court use a 1:1 crack cocaine/powder cocaine ratio when calculating his advisory Guideline range, which would lower the total offense level from 35 to 33. GHA42-GHA49. Second, he urged the court to depart horizontally from Category VI down to a Category IV, which would yield a lesser range of 188-235 months of imprisonment. GHA31. Third, he asked the court to reject the career offender range of 292-365 months as both "massively bloated" and greater than necessary to comply with the purposes embodied in section 3553(a). GHA31, GHA35-GHA42. In particular, Hammett asserted that the career offender range was inappropriate because he should not be considered a drug kingpin who had been "repeatedly convicted of selling large quantities of drugs and [had] reap[ed] extremely large profits." GHA31.

In contrast, the government sought a sentence within the range of 262-327 months of imprisonment specified in the plea agreement. The government's principal argument was that the evidence corroborated Hammett's stature as a prolific, recidivist narcotics trafficker who had at least six felony drug convictions spanning from 1987 to 1997, and who had served a 105-month custodial sentence for a 1997 federal drug distribution conviction. GHA61, GHA63, GHA68-GHA69. The government further emphasized his role as "the linchpin and leader" of a large-scale, profitable drug-trafficking organization. GHA67. In fact, the evidence revealed that Hammett had directed nearly every aspect of the drug ring, including the procurement of narcotics from the source of supply in New York. GHA68. The government also pointed out that Hammett had used as co-conspirators several family members and friends, some of whom were elderly and all of whom were addicted to drugs, to store, package, and distribute narcotics for his drug-trafficking organization. GHA62, GHA67-69.

4. The sentencing hearing

At sentencing, the district court calculated two different Guideline ranges. First, as calculated in the Second Addendum to the PSR, the court made a finding that Hammett's range as a career offender was 292-365 months. GHA84-GHA85, GHA129. Second, the court calculated

an alternative Guideline range based on Hammett's attributable drug quantity and criminal history, without reference to U.S.S.G. § 4B1.1. Under this calculation, the court placed Hammett in Criminal History Category V and then used a 1:1 ratio, rather than the standard 18:1 ratio, to calculate the two kilograms of crack cocaine attributable to him under the terms of the plea agreement. GHA87-GHA88, GHA129. When adding these two kilograms to the five kilograms of powder cocaine, the court arrived at a drug quantity of seven kilograms of powder cocaine and a base offense level of 32. GHA24, GHA88-GHA89, GHA129, GHA155-GHA156. After adding four levels for a role enhancement and subtracting three levels for acceptance of responsibility, Hammett's alternative Guideline range was 210-262 months' incarceration. GHA89, GHA129, GHA227.

In his sentencing remarks, Hammett argued that a 15-year sentence would satisfy the purposes of section 3553(a). First, he emphasized his positive attributes and mitigating circumstances, including his employment history, nonviolent nature, problems with substance abuse, efforts to address his drug addiction, and a stint with the U.S. Navy. GHA138-GHA139. Second, Hammett contended that a 15-year sentence was sufficient to punish him, to deter him from returning to criminal behavior after completion of his sentence, and to promote respect for the

law. GHA140. Hammett stressed that the career offender designation was a poor fit for him because he was not a kingpin who had amassed large profits from the drug trade. GHA141-GHA142. In a brief oral statement to the court, Hammett personally expressed remorse for his offense, his recognition about the harmful "effects of drugs," and his goal to "seek some higher learning and learn to try to continue [his] life." GHA143-GHA144.

In contrast, consistent with the range specified in the plea agreement, the government asked for a sentence of between 262-327 months. GHA25, GHA147. In seeking this substantial sentence, the government argued that Hammett, as the undisputed leader of the drug-trafficking organization, "was ultimately responsible for the distribution of large amounts of cocaine and crack cocaine in Norwalk and Stamford," and that his significant attributable quantity involved five kilograms of cocaine and two kilograms of crack cocaine. GHA145. The government also asked the court to consider the manner in which Hammett operated the drug-trafficking organization by enlisting friends and family, several of whom were elderly and addicted to drugs, to serve as co-conspirators in running the drug-trafficking organization. GHA146. The government further focused on Hammett's extensive criminal history, which included at least six prior felony drug convictions

as well as the 105-month custodial sentence of imprisonment imposed in 1997 by a federal judge in South Carolina. GHA145-GHA146. Finally, the government noted the need for Hammett's sentence to be "substantially higher" than his co-defendants to reflect his leadership of the drug ring and to prevent unwarranted sentencing disparities. GHA148.

In its opening remarks, the district court recognized its obligation under section 3553(a) and enumerated the statutory factors it was required to consider. GHA150-GHA151. Similarly, the court articulated its obligation under the parsimony clause "to consider what sentence is sufficient to serve these [statutory] purposes . . . without being too harsh." GHA151.

The court then began its analysis by discussing several mitigating factors. The court referred to Hammett as "an intelligent person with a strong work ethic" who "enjoy[ed] family support." GHA151-GHA152. The court found that he had come from a "disadvantaged background" and had once "made efforts to get away from this life of drugs," including a stint in the navy. GHA152. The court also stated that with one minor exception, Hammett had "no history of gun violence in [his] background," GHA152, and that the drug-trafficking ring he led was not a "violent drug cartel." GHA153. In particular, the court described Hammett's co-conspirators as "people who themselves are not

violent, people who are older, people who have drug problems, people who . . . are family and friends." GHA153. The court further noted that Hammett was 46 years old, and that his family members would "feel the pain of your unfortunate plight and your absence." GHA153.

On the other hand, the court told Hammett that his "offense [was] extremely serious and there's no getting around it. You used your intelligence and your work ethic in a manner that was extremely harmful." GHA153. The court emphasized that he had been "responsible for poisoning [the] community with large amounts of powder and crack cocaine." GHA153. The court described his offense conduct as "extremely serious" and "extremely harmful" because illegal drugs had "devastating consequences of illegal drugs on people's lives." GHA153-GHA154. In particular, the court found that Hammett had used his "intelligence and . . . work ethic in a manner" that damaged the community as a whole. GHA153.

Next, the court discussed Hammett's extensive criminal history, which included at least six prior felony drug-distribution convictions, especially the 1997 federal conviction from the District of South Carolina for possession with intent to distribute cocaine. GHA213-G216. The court noted that Hammett, who had served 105 months in federal prison for this conviction, had previously come "within close range of being

sentenced as a Career Offender . . . [and] being sentenced to more than 15 years of prison." GHA154. The court further observed with disapproval that, despite serving this long sentence, Hammett still chose to return to the same conduct of trafficking narcotics for profit after release from custody: "You served that time and it wasn't sufficient to deter you from engaging in . . . [e]ven more serious criminal conduct . . . . That's the harsh reality of this [case]." GHA154-GHA155. The court also found that Hammett was well aware of the consequences of continuing his criminal lifestyle:

> When you undertook to organize and operate this significant drug trafficking organization, you must have realized that if you got caught, you were going to look at a very, very long sentence. You must have known. You're an intelligent person. You've been through the system. You'd faced 210 months back in '97. You must have known what you were risking and you went ahead.

GHA155.

The court then granted the defendant's motion for downward departure, and departed from the 292-365 month advisory range. GHA155, GHA163. In explaining its rationale, the court disagreed with the government that Hammett was "the quintessential career offender" because he had no history of violence and his

drug problem was a contributing factor to his criminal conduct. GHA155. The court further recognized that a sentence at the bottom of the range of 292-365 months was nearly three times longer than Hammett's longest prior custodial sentence of 105 months. GHA163.

In rejecting the higher Guideline range, the court adopted its alternative incarceration range of 210-262 months because it was based on Hammett's actual criminal history and attributable drug quantity. GHA156. By using the 1:1 crack cocaine/powder cocaine ratio, the court explained, "It's as if the other drug you sold was powder cocaine, not crack cocaine[.] . . . [T]his is the Guideline range that applies based on your own criminal history without regard to the Career Offender Guideline." GHA156.

Using this alternative range as a guide, the court decided that Hammett should be sentenced to 240 months' incarceration. GHA156. The court characterized the sentence as "very, very long," which was "by any standard a harsh sentence." GHA156. Nevertheless, the court specifically found that the sentence was not "harsher than necessary [when] considering" all of the section 3553(a) factors. GHA156-GHA157. The court specifically rejected Hammett's request for a 15-year sentence because "15 years, although a severe sentence, in the context of this case, given your criminal history,

depreciates the seriousness of the offense." GHA154.

B. Governing law and standard of review

Under 18 U.S.C. § 3553(a), in determining an incarceration term, a sentencing court should consider: (1) "the nature and circumstances of the offense and history and characteristics of the defendant"; (2) the need for the sentence to serve various goals of the criminal justice system, including (a) "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment," (b) to accomplish specific and general deterrence, (c) to protect the public from the defendant, and (d) "to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner"; (3) the kinds of sentences available; (4) the sentencing range set forth in the guidelines; (5) policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to victims. *Id.*

Following *United States v. Booker*, 543 U.S. 220 (2005), appellate courts are to review sentences for reasonableness, which amounts to review for "abuse of discretion." *Gall v. United States*, 552 U.S. 586, 591 (2007); *United States v. Cavera*, 550 F.3d 180, 187 (2008) (en banc). This reasonableness review consists of two com-

ponents: procedural and substantive review. *Cavera*, 550 F.3d at 189.

Substantive review is exceedingly deferential. This Court has stated it will "set aside a district court's substantive determination only in exceptional cases where the trial court's decision 'cannot be located within the range of permissible decisions.'" *Id.* (quoting *United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007)). This review is conducted based on the totality of the circumstances. *Cavera*, 550 F.3d at 190. Reviewing courts must look to the individual factors relied on by the sentencing court to determine whether these factors can "bear the weight assigned to [them]." *Id.* at 191. However, in making this determination, appellate courts must remain appropriately deferential to the institutional competence of trial courts in matters of sentencing. *Id.* Finally, this Court neither presumes that a sentence within the Guidelines range is reasonable nor that a sentence outside this range is unreasonable, but may take the degree of variance from the Guidelines into account when assessing substantive reasonableness. *Id.* at 190. This 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.

This deference is appropriate, however, only when a reviewing court determines that the sentencing court has complied with the procedural requirements of the Sentencing Reform Act. *Cavera*, 550 F.3d at 190. Sentencing courts commit procedural error if they fail to calculate the 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. *Cavera*, 550 F.3d at 190. These requirements, however, should not become "formulaic or ritualized burdens." *Cavera*, 550 F.3d 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

The 240-month sentence in this case was substantively reasonable. It reflected the serious nature of the offense conduct, which involved Hammett's leadership of a large-scale, profitable drug trafficking organization that was responsible for distributing five kilograms of cocaine and two kilograms of crack cocaine in Norwalk and Stamford, Connecticut. In running this drug ring, Hammett used multiple family members and friends, several of whom were elderly and all of whom were addicted to drugs, to distribute, package, and store his narcotics. Moreover, although the court elected to depart from the career offender Guideline range, the 240-month sentence nonetheless reflected the defendant's recidivist nature and his extensive criminal record, which included at least six felony drug convictions and a 105-month term of incarceration for a 1997 federal drug distribution conviction.

But despite receiving a substantial downward departure of 52 months from the bottom of the advisory range of 292-365 months, Hammett challenges his sentence as substantively unrea-

sonable.[7] In essence, he asks this Court to reweigh the nature and circumstances of the offense, as well as his personal history and circumstances, through the prism of the § 3553(a) factors. He further urges this Court to grant him a larger downward departure than the district court did.

The established law of this Court, however, precludes such review where, as here, the district court has granted a downward departure at sentencing, and the defendant seeks to challenge the extent of that departure. *See United States v. Hargrett*, 156 F.3d 447, 450 (2d Cir. 1998) (holding that court lacks jurisdiction "to review a district court's refusal to grant a downward departure *or the extent of any downward departure that is granted*") (emphasis added); *United States v. Lucas*, 17 F.3d 596, 599 (2d Cir. 1994) (finding that "[a] defendant cannot generally appeal the extent of a departure made pursuant to U.S.S.G. § 5K1.1"); *cf. United States v. Stinson*, 465 F.3d 113, 114 (2d Cir. 2006) (per curiam) (refusal to downwardly depart from Guideline range is generally not appealable). Thus, as a matter of law, Hammett is precluded from challenging the extent of the district court's departure from the advisory range of 292-365 months of imprisonment.

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[7] Hammett has made no allegation that his sentencing suffered from procedural irregularities.

Notwithstanding this bar, Hammett contends that his sentence of 240 months was substantively unreasonable because a lesser sentence of 180 months would have been sufficient to achieve the purposes set forth in section 3553(a). Stated differently, Hammett asks this Court to revisit the district court's balancing of the section 3553(a) factors, even though this Court has consistently held that it will not substitute its own judgment for that of the sentencing court. *See United States v. Kane*, 452 F.3d 140, 144-45 (2d Cir. 2006) (*per curiam*); *Cavera*, 550 F.3d at 189 (finding that the district court's substantive determination will be set aside "only in exceptional cases"). Rather, this Court has held that a sentence is substantively unreasonable only in the "rare case" where the sentence would "damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *United States v. Rigas*, 583 F.3d 103, 123 (2d Cir. 2009) (*Rigas II*).

Hammett contends that the nature and circumstances of his offense, as well as his history and characteristics, are inconsistent with a sentence of 240 months. *See* Hammett Br. at 19-21. The record, however, discloses that this sentence was the product of the court's comprehensive, if not exhaustive, analysis of Hammett's offense conduct, criminal history, and personal characteristics in concert with the section

3553(a) factors. In fashioning its sentence, the district court emphasized the seriousness of Hammett's offense of large-scale narcotics distribution and the escalating nature of his criminal behavior over the years. The cornerstone of the court's analysis was its finding that Hammett was "responsible for poisoning [the] community with large amounts of powder and crack cocaine." GHA153. This criminal conduct was "extremely serious" and "extremely harmful" because the court, in its judicial capacity, had witnessed the "devastating consequences of illegal drugs on people's lives." GHA153-GHA154. In the court's eyes, the fact that Hammett had used his "intelligence and . . . work ethic in a manner" which damaged the community further exacerbated the nature and circumstances of his offense. GHA153. In short, the record discloses that the district court appropriately put great weight on the seriousness of Hammett's criminal conduct.

Next, the district court emphasized the primacy of Hammett's extensive criminal history, which included at least six prior felony drug-distribution convictions and a 105-month term of incarceration for his 1997 federal drug-distribution conviction. GHA213-GHA216. The court noted that when Hammett was sentenced for the 1997 conviction in the District of South Carolina, he had already come "within close range of being sentenced as a Career Offender

. . . [and] being sentenced to more than 15 years of prison." GHA154. Undeterred by this hefty prison sentence, however, Hammett chose to return to the same life of trafficking narcotics for profit after his release from custody, which the court termed "the harsh reality of this [case]." GHA154-GHA155. Accordingly, based on this pattern of escalating criminal conduct, the court found that Hammett was well aware that severe consequences would follow if he continued his criminal lifestyle: "When you undertook to organize and operate this significant drug trafficking organization, you must have realized that if you got caught, you were going to look at a very, very long sentence . . . . You must have known what you were risking and you went ahead." GHA155.

Juxtaposed to these findings of Hammett's offense conduct and criminal history, the district court showed appropriate balance by considering several of Hammett's positive personal characteristics. The court referred to him as "an intelligent person with a strong work ethic" who "enjoy[ed] family support," GHA151-G152, noted that he came from a "disadvantaged background" and had once "made efforts to get away from this life of drugs," including a stint in the navy, GHA152, and stated that he had "no history of gun violence in [his] background,"GHA152, and that the drug-trafficking ring he led was not a "violent drug cartel."

GHA153. These findings based on his "positive personal attributes" contributed to the court's decision to grant the downward departure. GHA163.

But in the final analysis, the court could not ignore the seriousness of the offense conduct, Hammett's leadership role in directing the drug-trafficking organization, his extensive criminal history, and his resumption of large-scale drug trafficking after having served a 105-month federal sentence. The court recognized that its 240-month sentence was "a very, very long sentence," which was "by any standard a harsh sentence," GHA156, but was not "harsher than necessary [when] considering" all of the section 3553(a) factors. GHA156-GHA157. Thus, the court specifically rejected Hammett's request for a 180-month sentence because "a sentence of 15 years, although a severe sentence, *in the context of this case, given your criminal history, depreciates the seriousness of the offense*." GHA 154 (emphasis added). In short, as the record demonstrates from the court's diligent weighing of the section 3553(a) factors, this sentence was not shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *Rigas II*, 583 F.3d at 123.

Despite this solid record and the court's detailed findings, Hammett asserts that the 240-month sentence violated the parsimony clause. He contends that the district court "overvalued

the seriousness of the offense and undervalued . . . [his] positive attributes," his advanced age upon completion of his sentence, and his own history of substance abuse. *See* Hammett Br. at 22. This argument presupposes that a reviewing court may second-guess a sentencing court's calculus of the section 3553(a) factors after the fact. This Court, however, has consistently held that "the weight given to any single [section 3553(a)] factor 'is a matter firmly committed to the discretion of the sentencing judge and is beyond our review.'" *United States v. Capanelli*, 479 F.3d 163, 165 (2d Cir. 2007) (per curiam) (quoting *United States v. Fernandez*, 443 F.3d 19, 32 (2d Cir. 2006); *see also United States v. Fairclough*, 439 F.3d 76, 79-80 (2d Cir. 2006) (finding that a reviewing court "should exhibit restraint, not micromanagement"). Accordingly, this contention fails as a matter of law.

In a similar vein, Hammett contends that the district court erred by not adequately explaining why a 15-year sentence, as opposed to a 20-year sentence, would have been insufficient to accomplish the other section 3553(a) objectives of general deterrence, his incapacitation, the treatment of his substance abuse, the consideration of the various kinds of sentences available to the court, and the need to avoid unwanted sentencing disparities. *See* Hammett Br. at 21-30. But as discussed above, the record fully

substantiates that the 240-month sentence was the product of the court's extensive, detailed consideration of the section 3553(a) factors, particularly the nature and seriousness of the offense conduct, his criminal history, and his personal characteristics. The district court even specifically addressed Hammett's request for a sentence of 15 years, which the court rejected because it devalued his extensive criminal history and "depreciated the seriousness of the offense." GHA 154.

Just as important, this Court has held that a sentencing court is not required to discuss each section 3553(a) factor individually or to "expressly parse or address every argument relating to those factors that the defendant advanced." *Fernandez*, 443 F.3d at 30. Rather, this Court "presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged [the] duty to consider the statutory factors." *Id.* Here, there is no evidence to suggest that the district court did not faithfully discharge this duty. Much to the contrary, the ample record shows that the district court fairly and conscientiously applied the section 3553(a) factors when sentencing Hammett. Accordingly, this Court should decline his invitation to require the district court to "expressly parse or address every argument" raised by him at sentencing. *Id.*

In sum, because the district court sensibly and thoroughly applied the § 3553(a) factors to Hammett and its sentence was well "within the range of [its] permissible decisions," *Cavera*, 550 F.3d at 189, the 240-month sentence was substantively reasonable.

Conclusion

For the foregoing reasons, the judgments of conviction for Handy and Hammett should be affirmed.

Dated: January 18, 2013

Respectfully submitted,

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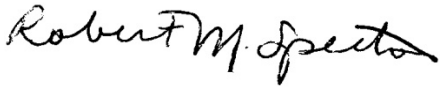

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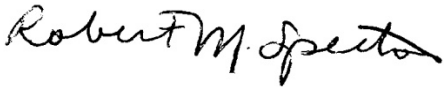
Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief is calculated by the word processing program to contain approximately 16,797 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification. On January 17, 2013, the government filed an unopposed motion for leave to submit an oversized brief of no more than 17,000 words.



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ADDENDUM

§ 3006A. Adequate representation of defendants

* * *

(e) Services other than counsel.

(1) Upon request.--Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court, or the United States magistrate judge if the services are required in connection with a matter over which he has jurisdiction, shall authorize counsel to obtain the services.

(2) Without prior request.--(A) Counsel appointed under this section may obtain, subject to later review, investigative, expert, and other services without prior authorization if necessary for adequate representation. Except as provided in subparagraph (B) of this paragraph, the total cost of services obtained without prior authorization may not exceed $800 and expenses reasonably incurred.

(B) The court, or the United States magistrate judge (if the services were rendered in a case disposed of entirely before the United States magistrate judge), may, in the interest of jus-

tice, and upon the finding that timely procurement of necessary services could not await prior authorization, approve payment for such services after they have been obtained, even if the cost of such services exceeds $800.

(3) Maximum amounts.--Compensation to be paid to a person for services rendered by him to a person under this subsection, or to be paid to an organization for services rendered by an employee thereof, shall not exceed $2,400, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court, or by the United States magistrate judge if the services were rendered in connection with a case disposed of entirely before him, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the chief judge of the circuit. The chief judge of the circuit may delegate such approval authority to an active or senior circuit judge.

* * *