14-3812

To Be Argued By:
ANTHONY E. KAPLAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 14-3812

UNITED STATES OF AMERICA,

Appellee,

-vs-

DONALD OGMAN, aka Manny-O, aka Main, KENNETH STURDIVANT, aka Slay, DERRICK BROCK, aka Easy, ROMELL BROWN, aka Rell,

(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,

LAMONT REED, aka L-Wop,

Defendant-Appellant.

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Statement of Jurisdiction

The United States District Court for the District of Connecticut (Warren W. Eginton, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on September 5, 2014. Government Appendix ("GA_") 17, GA113-15. On September 10, 2014, the district court granted the defendant's motion to extend his time to file a notice of appeal. GA17. On October 3, 2014, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). GA17, GA116. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Statement of Issues Presented for Review

I. Whether the sentence imposed by the district court was procedurally reasonable:

   a. Where the district court fully considered the defendant's role in the offense conduct?

   b. Where the district court declined to vary from the crack cocaine-powder cocaine ratio set forth in the guidelines?

   c. Where the district court calculated the defendant's criminal history score based on the information in the Pre-Sentence Report?

   d. Where there was no evidence or basis to suggest that the defendant was not competent to be sentenced?

   e. Where the defendant waived any challenge to the drug quantity finding?

II. Whether the 110-month sentence, at the bottom of the guidelines range, was substantively reasonable given the defendant's conduct in the case involving more than 200 grams of crack cocaine and the defendant's lengthy and serious criminal history?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 14-3812

UNITED STATES OF AMERICA,
Appellee,

-vs-

LAMONT REED, aka L-Wop,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Lamont Reed admitted to his involvement in in a drug distribution operation led by a gang leader in New Haven. In conjunction with this operation, Reed was responsible for the distribution of, conservatively, 203 grams of crack cocaine. Reed had a lengthy criminal record, which started in 1998 and included convictions for assault on a police officer, weapons possession, narcotics dealing, and violation of probation. For

these convictions, he served substantial periods of time in prison without deterring him from engaging in further criminal activity. In addition, while awaiting sentencing on this case, Reed circulated, both inside and outside of prison, a letter from his attorney which identified an incarcerated cooperating witness.

After considering the parties' filings including the defendant's requests for a downward departure and non-guideline sentence, and hearing from the attorneys and the defendant himself, the district court sentenced Reed to the bottom of the advisory guideline range at 110 months. That sentence was neither procedurally nor substantively unreasonable. Accordingly, the judgment of the district court should be affirmed.

Statement of the Case

On March 28, 2012, Reed was arrested on a complaint charging him with conspiracy to possess with intent to distribute 280 grams or more of a mixture or substance containing a detectable amount of cocaine base, in violation of Title 21, United States Code, Sections 846 and 841(b)(1)(A)(iii). GA3 (Doc. 1). On April 9, 2012, an indictment was returned charging Reed and seventeen others with conspiracy to possess with intent to distribute 280 grams or more of a mixture or substance containing a detectable amount of cocaine base/crack cocaine, in viola-

tion of Title 21, United States Code, Sections 846 and 841(b)(1)(A)(iii). GA3, GA56-58.

On November 7, 2013, Reed pled guilty before United States Magistrate Judge Holly B. Fitzsimmons, pursuant to a written plea agreement, to the lesser-include offense of conspiracy to possess with intent to distribute 28 grams or more of a mixture or substance containing a detectable amount of cocaine base/crack cocaine, in violation of Title 21, United States Code, Sections 846 and 841(b)(1)(B)(iii). GA14, GA63-68. Magistrate Judge Fitzsimmons issued Findings and Recommendations that the guilty plea should be accepted by the district court. GA14.

On September 4, 2014, the district court (Eginton, J.), accepted the proposed guilty plea, GA21-22, and after hearing argument from counsel and the defendant, sentenced Reed principally to 110 months' incarceration, followed by four years of supervised release. GA17, GA53-54.

The court granted Reed's motion to extend the time to file his notice of appeal, GA17, and Reed thereafter filed a timely notice of appeal on October 3, 2014. GA17, GA116.

Reed is currently serving his term of imprisonment.

A. The offense conduct[1]

The case arose out a joint Federal, State and Local law enforcement investigation of a gang in New Haven known as the Grape Street Crips, with particular focus on its leader, Donald Ogman. PSR ¶¶ 6-7. Using a number of techniques, including controlled buys from Ogman and approximately two months of wiretaps of wire and electronic communications over a telephone Ogman used to communicate with his coconspirators, PSR ¶ 12, the investigation revealed the following:

Ogman was a mid-level supplier of cocaine base to members and associates of the Grape Street Crips gang. He purchased redistribution quantities of cocaine and cocaine base from sources of supply in Connecticut and New York. PSR ¶ 10. Ogman converted the cocaine into cocaine base and then redistributed the cocaine base in quantities ranging from eight-balls (3.5 grams) to ounces, to various individuals in New

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[1] At sentencing, Reed did not object to the factual statements set forth in the Presentence Report ("PSR"). *See* GA23-24. Accordingly, the court adopted the PSR. GA24. The offense conduct set forth in the text therefore draws heavily on the PSR which, together with the Addenda, is included as part of the Government's Sealed Appendix ("GSA__"). The PSR is referenced by paragraph number, but the Addenda to the PSR, which have no paragraph numbers, are referenced by page numbers in the GSA.

Haven and surrounding communities. PSR ¶ 10. Additionally, the investigation revealed that members of the Grape Street Crips had access to firearms, and had used them in the commission of crimes such as violent assault and homicide, and further were willing to sell firearms to other drug distributors. PSR ¶ 10.

Appellant Lamont Reed was a central figure in Ogman's drug distribution network. Reed and Ogman pooled their money together several times per week to purchase wholesale quantities of cocaine from whichever source of supply was available at the lowest price per gram. PSR ¶ 15. Ogman then converted the powder cocaine into cocaine base for his and Reed's distribution. Several intercepted conversations helped establish Reed's role in the conspiracy:

- On January 20, 2012, Ogman texted Reed and stated, "I found a new loop 33," meaning a new source of supply, or "loop," who would charge $33 per gram, and Reed responded, "Make sure u talk too me when u get a chance. Need that right now[.]" PSR ¶ 15.
- On February 5, 2012, Ogman and Reed were intercepted discussing the difficulty in acquiring reasonably priced cocaine. During the conversation, Ogman asked about the supplier to another member of the conspiracy, Rommel Brown. Ogman explained "Everybody trying to get their

numbers up. Everybody trying to do extra points [make a profit]. Know what I'm saying? Ain't gone work right now." Ogman continued to explain that Brown was charging $42 per gram, which was on the low end. Ogman stated "If you ain't payin' that, you ain't gettin' no yay [cocaine]." PSR ¶ 16

- On February 27, 2012, Ogman was intercepted telling Reed, that he was "puttin' it together right now...that other shit that . . . know what I mean? That I had on the side." Reed responded, "I need you asap too." A few minutes later, Reed called Ogman and stated, "Yo whatever you do, don't kill it." This call reflected that Ogman was in the process of converting the cocaine they had purchased together into cocaine base, and that Reed was concerned Ogman would not do it properly. PSR ¶ 17.
- On March 2, 2012, Ogman was intercepted asking Reed, "Yeah, you clear right?" With this question, Ogman was asking whether Reed needed to be resupplied with cocaine base. When Reed responded affirmatively, Ogman told him that he was in front of Reed's apartment, where Ogman picked up money to purchase more cocaine. A few hours later, Reed asked, "It's a beautiful thing?" to which

Ogman replied, "Nah, um, I had um, I'm still waitin' on him [the source of supply] to bring the other half. Yeah, I did one half though [converted the half obtained into cocaine base] . . . Waitin' on him. But yeah. It's the same shit." PSR ¶ 18.

- On March 4, 2012, Ogman again prepared cocaine base which he provided to Reed. In a phone call, Reed asked Ogman, "You said you about to come through?" Ogman told Reed to go to his apartment. Reed asked, "Oh, you got that?" to which Ogman responded, "Yeah, done." Reed subsequently asked Ogman "You started it already? I'm about to come through," and Ogman responded, "Been did that shit this morning." In this call, Reed confirmed that Ogman had already processed the cocaine into cocaine base that morning. Later in the day, Ogman called Reed and asked him if he wanted to "test the water" (*i.e.*, judge the quality of the cocaine base). Reed responded that someone had told him it was not right, and that Ogman had put "too much on it," meaning he had decreased the purity too much. Ogman protested that one of his testers rated the cocaine base an eight out of ten, and that another stated it was "fire." PSR ¶ 19.
- On March 6, 2012, Reed sent Ogman a text message which stated, "Done. If u

> have some left bring it too me[.]" In this text, Reed told Ogman that he had sold all of the cocaine base in his possession, and asked Ogman to provide him with more. PSR ¶ 20.

Based on these calls and other information, Reed's relevant and readily foreseeable conduct involved at least 28 grams of cocaine base. PSR ¶ 21. In fact, there was credible information that Ogman provided Reed with, on average, 50 grams of crack cocaine per meeting, which Reed would then re-package into "eight-ball" quantities and re-sell. PSR ¶ 21. In sum, based on intercepted phone calls and information from cooperating witnesses, Reed was responsible for at least 203 grams of cocaine base. PSR ¶ 21.

B. The change of plea

On November 7, 2013, pursuant to a written plea agreement, Reed pleaded guilty to conspiracy to possess with intent to distribute 28 grams or more of a substance or mixture containing a detectable amount of cocaine base/crack cocaine, in violation of Title 21, United State Code, Sections 846 and 841(b)(1)(B)(iii). GA14, GA63-68.

C. The presentence report

On April 25, 2014, the United States Probation Office disclosed the PSR. *See* GA15. The Probation Office calculated a total offense level of 27, using a base offense level of 30 under the

2013 version of U.S.S.G. § 2D1.1(c)(5), and subtracting three levels for acceptance of responsibility under U.S.S.G. § 3E1.1. PSR ¶¶ 27-28, 35-37. *See also* PSR ¶ 21 (chart reflecting sample of calls involving specific quantities of narcotics).

The Probation Office further determined that Reed fell in Criminal History Category VI with 17 criminal history points. PSR ¶ 46. Those points were calculated based on Reed's prior convictions:

- Carrying a dangerous weapon; sentence of 30 months' incarceration imposed on September 2, 1999. PSR ¶ 40 (3 points).
- Failure to appear in the first degree; sentence of 30 months' concurrent incarceration imposed on September 2, 1999. PSR ¶ 41 (3 points).
- Possession with intent to sell; sentence of 5 years' incarceration, with 1 year to serve, and 3 years' probation, imposed on November 29, 2001. Probation was revoked on July 21, 2003, and Reed was sentenced to 4 years' incarceration. PSR ¶ 42 (3 points).
- Assault on an officer, Possession of narcotics with intent to sell, and Carrying a dangerous weapon; sentence of 10 years' incarceration, 5 years to serve imposed on July 21, 2003. PSR ¶ 43 (3 points).

- Possession with intent to sell; sentence of 10 years' incarceration, 4 years to serve, to be followed by 3 years' probation, imposed on October 26, 2009. PSR ¶ 44 (3 points).

In addition, because Reed committed the instant offense while subject to parole supervision, the Probation Office added 2 criminal history points under U.S.S.G. § 4A1.1(d), yielding a total of 17 criminal history points. PSR ¶¶ 45-46.

With a total offense level of 27 and a Criminal History Category VI, Reed's advisory guidelines range was 130-162 months of imprisonment, four to five years of supervised release, and a fine of $12,500 to $5,000,000. *See* PSR ¶¶ 87, 89, and 93.

The Probation Office noted as potential bases for departures (1) the disparity in the treatment of cocaine base and cocaine offenses under the guidelines (citing *Kimbrough v. United States*, 552 U.S. 85 (2007)), PSR ¶ 100, and (2) the Sentencing Commission's recently proposed two-level reduction in the drug quantity table which, if applied to the defendant, would yield a sentencing range of 110 to 137 months, PSR ¶ 101.

In the Addendum to the PSR, the Probation Office noted that Reed did not object to the drug quantity calculation (*i.e.*, 203 grams of crack cocaine) set out in the first disclosure of the PSR.

See GSA27; GSA30 (letter from defense counsel). Reed's position on this issue was incorporated into paragraph 22 of the PSR. The Addendum also responded to Reed's objections to his criminal history calculation. Specifically, Reed argued that he should be placed in Criminal History Category V, as opposed to VI, because two of his convictions sustained on the same date (listed in PSR ¶¶ 40-41) should not have been scored separately, and because a third conviction (in ¶ 42) was too old to be counted. GSA30-31. The Probation Office responded, in the Addendum, that (1) because there was an intervening arrest, the criminal history points in ¶¶ 40-41 were scored correctly, and (2) the conviction in ¶ 42 was not too old to be counted because it included a sentence for revocation of probation. GSA27-28.

A Second Addendum to the PSR addressed the government's information that Reed had been circulating, both on the street and within the correctional system, the first page of a letter from his counsel (marked "Attorney Client Privilege") which had identified and highlighted, the name of an individual cooperating with the government. GSA32-33. That letter, which was attached to the Second Addendum, had been provided to the cooperating witness from another inmate at a facility where the cooperating witness had been housed. *See* GSA34, GSA35. The Second Addendum noted that this conduct could have an impact on the defendant's guidelines,

and in particular, it could justify an enhancement for obstruction of justice pursuant to U.S.S.G. § 3C1.1 and denial of credit for acceptance of responsibility under U.S.S.G. § 3E1.1. GSA32.

The Third Addendum followed up on whether Reed's offense level should be increased for obstruction of justice and whether he should be denied acceptance of responsibility. GSA35. That Addendum attached transcripts excerpting prison calls in which Reed discussed his circulation of the letter. GSA38-49. Ultimately, the Probation Office agreed with the government's position to not seek an obstruction enhancement or deny the defendant a three-level reduction for acceptance of responsibility. GSA36. However, as noted in the Addendum, the government urged the court to consider Reed's conduct in deciding where within the relevant range to place the defendant or whether a non-guideline sentence in excess of that range was warranted. GSA36.

D. The defendant's sentencing memorandum

Reed's counsel filed a Sentencing Memorandum on his client's behalf. GA69-100. The defendant agreed with a base offense level calculated using 203 grams of cocaine base which, with the November 1, 2014 amendment to the guidelines, would be level 28. GA70. With a

three-level reduction for acceptance of responsibility, the guideline range was 110-137 months. GA70.

Reed argued that the court should depart under *Kimbrough* based on a recalculation of the guidelines under a 1:1 ratio to reach a range of 60-63 months, and then sentence the defendant to the mandatory minimum 60 months' incarceration. GA70. Reed also argued that the court should consider that he was not a target of the investigation or a Grape Street Crips member, that he had minimal involvement in the offense conduct, that the conduct did not involve violence, that he was not observed engaging in hand-to-hand transactions or involved in any controlled purchases, and that he was not found in possession of drugs or paraphernalia. GA71. In addition, Reed claimed that he did not make substantial profits from the drug trade, but rather sold drugs to support his family, and that the court should consider his acceptance of responsibility. GA72. Finally, Reed argued that his earliest convictions should not be counted because they were "stale or near stale." GA73-74, GA80.

E. The government's sentencing memorandum

The government responded that it did not object to a two-level downward departure in anticipation of the contemplated changes to the

guidelines, which would yield an advisory guideline range of 110-137 months' incarceration. GA102. However, the government urged the court to sentence Reed within the advisory guideline range. GA101.

In connection with the request for a guidelines sentence, the government asked the court to calculate the guidelines based on the crack-powder ratio established by the Commission and to not exercise its discretion, under *Kimbrough*, to depart from that ratio. GA106. Addressing Reed's other arguments, the government noted that while Reed was not a member of the Grape Street Crips, he was, nonetheless, a substantial player in Ogman's drug operation and had been identified as a central—if not the primary—redistributor of Ogman's crack in the Hill area of New Haven. GA104, GA107-08. The government also detailed Reed's substantial and serious criminal record, GA108-110, noting that despite having received substantial prison sentences, he had returned to criminal activity, GA110.

F. The sentencing

Reed appeared for sentencing on September 4, 2014. GA19. The court began by placing him under oath, GA20, and ensuring that he was satisfied with his attorney and was not under the influence of any drugs or alcoholic beverages, GA21. Without objection, the court accepted the recommendation from the magistrate judge that

it accept the guilty plea. GA21-22; *see also* GA31-32.

After confirming that defense counsel had reviewed the PSR with his client, GA22, the court confirmed that it would be departing, without objection, two-levels to take into account the contemplated change to the drug quantity table, thus yielding an advisory guideline range of 110 to 137 months. GA22. The court next overruled the defendant's objections to the calculation of his criminal history category, agreeing with the Probation Office's resolution on those issues. GA23. With that said, and with the defendant's assent, the court accepted the PSR without further change. GA23-24; *see also* GSA51 (Statement of Reasons).

Defense counsel argued that while he agreed that the amount of crack which was reasonably foreseeable was 203 grams, the evidence supporting that quantity was from telephone conversations. GA25-26. He noted that Reed was not a member of the Grape Street Crips, and that the sentences of other defendants who were members of the gang were less than the 110 months which was the bottom of Reed's guideline range. GA26-28. Counsel argued further that the court should apply a 1:1 crack:powder ratio, and that the court should consider Reed's recent personal history which, according to counsel, demonstrated that Reed had turned his life around. GA28-30.

The court acknowledged Reed's recent efforts but also noted that Reed had a significant criminal history, and that even though he had served significant terms of imprisonment, these sentences did not deter him from further criminal conduct. GA30-31.

The government urged the court to retain the 18:1 ratio established by the Guidelines which the court had used in calculating the guidelines for Reed's co-defendants sentenced up to that time. GA32. In response, the court stated that it would employ the 18:1 ratio to ensure uniform treatment of the defendants in the case and that it intended to ensure that the defendant was sentenced based on the factors in 18 U.S.C. § 3553. GA32-33.

The government observed that under § 3553, along with the guidelines, the court should consider the nature and circumstances of the offense, which were serious. GA33. The government disputed Reed's characterization of his role in the offense as a minor player, noting that Reed pooled his money with the Crips leader, Ogman, to purchase wholesale quantities of cocaine from the cheapest available source. GA33. Further, although Reed had suggested that he was not a target of the investigation, the government noted that Reed was named in the Title III orders and applications. GA34.

The court agreed with the government that the offense was serious. GA34. The court also

noted, again, the serious nature of the defendant's criminal record, which included firearms offenses and injury to a police officer. GA34. Indeed, the court agreed that the defendant's unremitting criminal conduct was "how we're getting to the 110 months." GA36.

With respect to the history and characteristics of the defendant, the government noted the defendant's serious criminal history. GA34. While acknowledging that Reed had obtained certificates while in prison, the government also noted that he only managed to remain at liberty for a short time following release before being reincarcerated on parole violations and/or new charges. GA35-36.

The government then discussed Reed having circulated a letter from his counsel disclosing the identity of a cooperating witness. GA36-40. As the government explained, Reed had stated his desire to "expose the cooperator to the world," GA38, and had told an individual on a recorded call to "make copies [of the letter] and give extras to everyone," GA37. The government noted that, once it learned that Reed was circulating the letter, it had been compelled to take steps to ensure the cooperating witness's safety. GA38. While the government elected not to seek an obstruction enhancement under the Sentencing Guidelines and maintained its recommendation that the defendant be accorded credit under the guidelines for acceptance of responsibility, it

asked the court to consider the conduct in connection with its consideration of the other § 3553(a) factors. GA38-39.

Accordingly, the government asked the court to sentence Reed at the top of the applicable guideline range. GA40.

Reed personally addressed the court. GA43-48. He began by seeking to explain his distribution of his attorney's letter with the witness's identity disclosed. According to Reed, he was merely advising his family of what the witness "was doing, [because] I didn't want to be labeled as a snitch." GA44. With respect to his involvement in the conspiracy to distribute drugs, he stated that he "accept[ed] . . . responsibility for my part, participation in this conspiracy. I did wrong. But—I did wrong and I feel like—and I'm willing to accept my punishment for what I've done." GA44.

That having been said, Reed claimed that he was not responsible for 203 grams of cocaine base, saying that he admitted to that quantity rather than face a hearing at which the cooperating witness would testify and he would risk losing credit for acceptance of responsibility. GA44-46. Reed subsequently clarified, however, that he was not seeking to withdraw his plea or the amount stipulation because 203 grams of crack was reasonably foreseeable to him. GA47-49.

Reed said that he was not a "big-time" drug dealer and that he sold drugs "to help out at home." GA46. He admitted that it was "a stupid decision." GA47. Reed said that, while he had a history of selling drugs, at age 35, he had changed that pattern and was "ready to get this over with. I don't want to keep going through this. I'm just tired." GA47.[2]

Given the defendant's comments regarding the drug quantity, and his attorney, the court asked the parties to confirm that Reed was not seeking to withdraw his guilty plea, challenge quantity, or obtain new counsel. GA49. Reed clarified that he was not seeking a new attorney but had been merely pointing out if he had made a substantial amount of money selling drugs, he would have been able to afford counsel. GA50. He stated that he "love[ed his] lawyer and. . . love what he did for me." GA50.

With respect to quantity, the government noted that it could prove the 203-gram quantity,

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[2] Reed stated that "I got a history of selling drugs, go home, selling drugs. But I changed that pattern. Soon I came home this time, I put my butt in school to do better because I want to do better. I don't want to keep going through this. I'm tired of this, my family need me, I need—I'm tired of this. I'm taking other people medicine to get through my days in jail. I'm 35 years old. I'm ready to get this over with. I don't want to keep going through this. I'm just tired." GA46-47.

regardless of foreseeability, but that it did not believe that the defendant was seeking to withdraw his plea or void the quantity stipulation. GA50-51. Reed confirmed to the court that he was prepared to proceed with sentencing on the basis of 203 grams of crack. GA51.

With these questions resolved, the court calculated the sentencing guidelines range to be 110 to 137 months' incarceration, based on a total offense level of 25 and a Criminal History Category VI. GA53. The court noted that it had already ruled that it was going to maintain the 18:1 powder to crack ratio. GA53.

The court stated that for the reasons advanced by defense counsel, it was not going to follow the government's request for a top-of-the-guidelines sentence, but, rather, was going to sentence Reed to the bottom of the applicable guideline range to 110 months' incarceration, followed by four years of supervision. GA53.

In its Statement of Reasons, the court stated that it was imposing a non-guideline sentence which took into account the anticipated change to the drug sentencing table. *See* GSA52. In its statement justifying the sentence, the court stated that the sentence was "appropriate in light of all the 18 U.S.C. 3553(a) factors and given the need to protect society, and to achieve adequate specific and general deterrence." GSA52.

Summary of Argument

I. The district court did not commit procedural error:

a. The court understood that it was obligated to consider the sentencing factors outlined in 18 U.S.C. § 3553(a), and fully considered those factors. Reed argues, nevertheless, that the court failed to consider that he played a "minor" role in the offense conduct. As a factual matter, this argument is misplaced: Reed was a significant partner in Ogman's drug distribution network and played a key role in distributing large quantities of crack cocaine in New Haven. Moreover, the district court stated that it considered Reed's arguments, and thus there is no basis for finding that the court failed to consider Reed's role in the offense, especially where this Court presumes, in the absence of record evidence to the contrary, that the district court discharged its duty to consider all § 3553(a) factors.

b. The district court understood that it had the discretion to reject the crack to powder cocaine ratio set by the Sentencing Commission in the guidelines. However, the court elected to not exercise its discretion to reject the Commission's ratio because it wanted to sentence all the defendants in this large drug case based on the same ratio. This discretionary decision was fully proper.

c. The district court properly calculated Reed's criminal history points. *First*, Reed's 1999 sentences for carrying a dangerous weapon and for failure to appear were properly scored separately because the offenses were separated by an intervening arrest. *Second*, Reed's 2001 conviction was not too old to count for criminal history purposes. Because Reed's probation was revoked for that conviction, his original term of imprisonment was added to his revocation term, yielding a 5-year term of imprisonment. Further, Reed was released from prison on this conviction within 15 years of the offense conduct in this case.

d. The district court did not err by failing to order a competency hearing before sentencing. There was no evidence that Reed was incompetent at sentencing, and his lone comment that he had taken other prisoner's medications does not undermine the conclusion that, on the day of sentencing, Reed was competent to be sentenced.

e. Finally, because Reed repeatedly acknowledged that he was not challenging the quantity stipulation reflected in the PSR, he waived any challenge to that quantity and should not be heard to challenge it on appeal.

II. The sentence imposed by the court was substantively reasonable. The court properly considered the seriousness of the offense involving a conspiracy to distribute over 200 grams of

crack cocaine in New Haven. In addition, the sentence properly reflected Reed's unremitting and serious criminal record, including prior convictions (and lengthy sentences) for assaulting a police officer, possessing firearms, and selling drugs. Finally, a sentence of 110 months was reasonable given Reed's conduct, while awaiting sentencing, in circulating—both inside and outside the prison system—a letter from his attorney which named a cooperating witness.

Argument

I. The district court did not commit procedural error when it sentenced the defendant.

A. Governing law and standard of review

1. Sentencing law generally

On appeal, a district court's sentencing decisions are reviewed for reasonableness under a deferential abuse-of-discretion standard. *See Gall v. United States*, 552 U.S. 38, 46 (2007); *United States v. Watkins*, 667 F.3d 254, 260 (2d Cir. 2012). Reasonableness review "encompasses two components: procedural review and substantive review." *Watkins*, 667 F.3d at 260 (internal quotation marks omitted); *see also United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc).

Procedural review centers "on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a)." *United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005). A sentence is procedurally unreasonable if the district court "fails to calculate (or improperly calculates) the Sentencing Guidelines range, treats the Sentencing Guidelines as mandatory, fails to consider the § 3553(a) factors, selects a sentence based on clearly erroneous facts, or fails adequately to explain the chosen sentence." *United States v. Robinson*, 702 F.3d 22, 38 (2d Cir. 2012).

2. Statement of reasons

Once a district court makes its determination as to the particular sentence to be imposed, it must "state in open court the reasons for its imposition of the particular sentence . . . ." 18 U.S.C. § 3553(c). This requirement is intended "(1) to inform the defendant of the reasons for his sentence, (2) to permit meaningful appellate review, (3) to enable the public to learn why defendant received a particular sentence, and (4) to guide probation officers and prison officials in developing a program to meet defendant's needs." *United States v. Molina*, 356 F.3d 269, 277 (2d Cir. 2004). Further, "[b]y articulating reasons, even if brief, the sentencing judge not only assures reviewing courts (and the public) that the sentencing process is a reasoned process

but also helps that process evolve." *Rita v. United States*, 551 U.S. 338, 357 (2007).

The Supreme Court has emphasized that a district court's statement of reasons need not be exhaustive, particularized, or uniform: "The appropriateness of brevity or length, conciseness or detail, when to write, what to say, depends upon circumstances. Sometimes a judicial opinion responds to every argument; sometimes it does not . . . . The law leaves much, in this respect, to the judge's own professional judgment." *Id.* at 356. To satisfy his burden under Section 3553(c), "[t]he sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties' arguments and has a reasoned basis for exercising his own legal decision-making authority." *Id.*

In limited circumstances, a district court is required to state its reasoning with greater specificity. So if the court imposes a sentence outside the applicable Guidelines range, it must state orally the specific reason for the variance and memorialize that reason on the statement of reasons form. 18 U.S.C. § 3553(c)(2). However, "section 3553(c)(2) does not require that a district court refer specifically to every factor in section 3553(a). A statement of the specific reason for the imposition of a sentence different from that recommended [by the Guidelines] suffices." *United States v. Goffi*, 446 F.3d 319, 321 (2d Cir. 2006) (internal quotation marks omit-

ted). Nor does Section 3553(c)(2) require great detail so long as the court's oral statement is sufficient to provide the defendant with "'a platform upon which to build an argument that [his] sentence is unreasonable.'" *United States v. Fuller*, 426 F.3d 556, 566 (2d Cir. 2005) (quoting *United States v. Lewis*, 424 F.3d 239, 249 (2d Cir. 2005) (brackets in original)).

B. Discussion

Reed's counseled Brief ("Brief") and his *pro se* brief (*Pro Se* Brief") make several arguments in support of his claim that the district court committed procedural error when it sentenced Reed. As explained below, all of these arguments lack merit.

1. The district court considered the nature and circumstances of the offense and did not err in declining to reduce the sentence based on Reed's claim that he played a minor role in the offense.

First, Reed argues that the district court erred in not considering the nature and circumstances of the offense. Brief at 15-19. Specifically, he contends that the court "failed to consider the significance of Mr. Reed's minimal role in the offense when imposing his sentence." Brief at 15.

As an initial matter, the claim as to role was not based on an argument that he was entitled

to a role reduction under U.S.S.G. § 3B1.2. In particular, Reed's objection to the PSR did not claim a reduction under U.S.S.G. § 3B1.2, GSA30-31, and his Sentencing Memorandum similarly did not claim that such a reduction was warranted, GA70.

Rather, Reed argues that the district court failed to consider his role in the offense when evaluating the nature and circumstances of the offense under § 3553(a). Reed argues that the court should have considered that he was not a gang member or the target of the investigation, and that his participation was limited to telephone calls. According to Reed, the court should have considered that, to the extent he dealt drugs, it was merely to make money to support himself and his family for basic needs. In other words, according to Reed, his role was minimal. *See*, *e.g.*, GA25-26, GA71-72.

This substantive claim is belied by the factual record before the sentencing court. While Reed may not have been a member of the Grape Street Crips gang, he was far from minimally involved with Ogman in the drug distribution operation. And he *was* a target of the investigation: he was named as a violator and interceptee in the application to continue to intercept wire and electronic communications over Ogman's telephone. GA107; *see also* GA108 n.4 (discussing surveillance of a meeting between Ogman

and Reed after Ogman told Reed that he had two "eight balls" (3.5 grams of crack)).

According to the uncontroverted description of the offense conduct, Reed was one of Ogman's "partners" who pooled his money with Ogman's "to purchase wholesale quantities of cocaine." PSR ¶ 13. Reed and Ogman met several times a week to arrange to purchase cocaine which Ogman then converted into crack so that Ogman and Reed could distribute the crack. PSR ¶ 15. Intercepted conversations corroborated the purchase, PSR ¶ 16, the conversion of cocaine into crack by Ogman, PSR ¶ 17, and the fact that Ogman supplied the cooked crack cocaine to Reed, PSR ¶¶ 19-20. It is hardly in the vein of a minor role that Ogman provided Reed with, on average, 50 grams of crack per meeting. PSR ¶ 21. Thus, Reed's attempt to characterize his role in the offense as "minor" was misplaced, and the district court did not err in declining to credit it.

In any event, the court did not ignore Reed's arguments. Reed raised his "minor role" argument, among others, at sentencing, and the court explained that it chose a sentence at the bottom of the guidelines range—and rejected the government's request for a higher sentence—"for the reasons" set forth by Reed's counsel. GA53. Further, the court acknowledged that, of the co-defendants sentenced at that point, none had been sentenced to terms close to 110 months.

GA28. However, as the court also noted, the reason why Reed's guidelines range was so high was because of his criminal record. GA30-31. As the court observed, Reed was appropriately placed in Criminal History Category VI, having served fairly long state sentences only to return to drug dealing as soon as he was released. GA30-31. The court further observed that it viewed Reed's record as a significant factor under 18 U.S.C. § 3553. GA31.

While the court may not have explicitly addressed the minor role argument in its discussion of the § 3553(a) factors, this Court does not require district judges to explicitly discuss each factor when imposing sentence. *See United States v. Crosby* 397 F.3d 103, 113 (2d Cir. 2005) ("[W]e will no more require 'robotic incantations' by district judges than we did when the guidelines were mandatory."). Indeed, this Court will "presume, in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the statutory factors." *United States Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006). Although Reed may disagree with the balance struck by the district court, as *Fernandez* further recognized, the "weight to be afforded any given argument made pursuant to one of the Section 3553(a) factors is a matter firmly committed to the discretion of the sentencing judge . . . and is beyond [this Court's] review, as long as the sentence ulti-

mately imposed is reasonable in light of all the circumstances presented." *Id.* at 32.

Accordingly, Reed's claim that he played a "minor role" is not supported by the record and it was not error for the district court to reject it in this case.

2. The district court did not abuse its discretion in declining to reject the crack guidelines under *Kimbrough*.

Citing *Kimbrough v. United States*, 552 U.S. 85 (2007), Reed argues that the district court "failed to consider the gross disparities between sentences for offenses involving crack cocaine and powder cocaine when imposing Mr. Reed's sentence." Brief at 21. Reed's claim is without merit.

Reed argued in his Sentencing Memorandum, and as part of his sentencing presentation, that the court should use a 1:1 powder cocaine to crack cocaine ratio in determining his sentence. GA29, GA70, GA75-76. By contrast, the government asked the court use the 18:1 ratio both because it had used that ratio in sentencing other defendants in this case,[3] and in consideration of

[3] Up to that point in time, the court employed the ratio set forth in the guidelines. GA106. The government notes that at the subsequent sentencing of two codefendants (Kenneth Sturdivant and Jarod Aaron), the court stated that it intended to employ the

the nature and extent of the drug conspiracy and the defendant's particular history and characteristics. GA32, GA106.

The court specifically addressed Reed's argument on the appropriate ratio. The judge explained that while he agreed with Reed's argument philosophically, he declined to adopt it in this case because he wanted to use a uniform and consistent approach in sentencing co-defendants in this case. In short, the court followed the 18:1 ratio to avoid unwarranted disparities among defendants under 18 U.S.C. § 3553(a)). GA32-33. This was not an abuse of discretion.

"*Kimbrough* stands for the proposition that the sentencing court *has discretion* to deviate from the Guidelines-recommended range based on the court's disagreement with the policy judgments evinced in a particular guideline." *United State v. Carr*, 557 F.3d 93, 106 (2d Cir. 2009) (emphasis added). In *Kimbrough*, the Supreme Court held that "it would not be an abuse of discretion for a district court to conclude when sentencing a particular defendant that the crack/powder disparity yields a sentence 'greater

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1:1 ratio, although in both of those cases the guidelines were trumped by statutory mandatory minimum terms. The court returned to the 18:1 ratio when it sentenced Donald Ogman.

than necessary' to achieve § 3553(a)'s purposes, even in a mine-run case." 552 U.S. at 110. Subsequently, in *United States v. Regalado,* 518 F.3d 143, 149 (2d Cir. 2008), which involved a direct appeal from a pre-*Kimbrough* sentence, and "[w]here [the] defendant ha[d] not preserved the argument that the sentencing range for the crack cocaine offense fails to serve the objectives of sentencing under § 3553(a)," this Court held that a remand was required "to give the district court an opportunity to indicate whether it would have imposed a non-Guidelines sentence knowing that it had discretion to deviate from the Guidelines to serve those objectives."

However, nothing in *Kimbrough requires* that a district court vary from the guidelines in any particular case or suggests that it would be an abuse of discretion for a court to decline to do so. All that is required is that the court understands that it has discretion to impose a non-guideline sentence on that basis.

Here, after considering the arguments for and against a non-guideline sentence based on the crack to powder ratio, the court elected to use the guidelines ratio of 18:1 (instead of the 1:1 ratio urged by Reed) to reflect the factors outlined in 18 U.S.C. § 3553(a), including the need for a uniform approach at sentencing. GA32-33. This was not improper, much less procedural error, in the sentencing. Although Reed would certainly have preferred that the court make a different

choice, he points to no legal error in the court's discretionary judgment.

3. The district court properly calculated Reed's criminal history score.

Reed's *pro se* brief argues that the district court erred when it calculated his criminal history score. *Pro Se* Brief at 1-4. In particular, he contends that two convictions—his 1999 convictions for carrying a dangerous weapon and failure to appear—were separately counted when they should have been treated as a single offense. He also claims that his 2001 conviction was too old to score. According to Reed, the combination of these errors moved him from Criminal History Category V to Criminal History Category VI. *Pro Se* Brief at 1-4. As explained below, Reed's arguments lack merit.

First, the district court properly rejected Reed's argument that his 1999 convictions (listed in PSR ¶¶ 40-41) should have been "scored" as one conviction because the sentences were imposed on the same day. Under U.S.S.G. § 4A1.2(a)(2), "[p]rior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (*i.e.*, the defendant was arrested for the first offense prior to committing the second offense)." *See, e.g.*, *United States v. Banks*, 776 F.3d 87, 89 n.3 (2d Cir. 2015) (per curiam); *United States v. Wilson*, 41 F.3d 1403, 1404-04

(10th Cir. 1994) (under prior guideline, failure to appear treated as separate conviction from underling offense, warranting criminal history point); *United States v. Dilone*, 544 Fed. Appx. 103, 107 (3d Cir. 2013) (under current guideline, sentences for criminal weapons possession and bail jumping are counted separately because separated by intervening arrest).

Here, as reflected in the PSR, Reed's 1999 sentences for carrying a dangerous weapon and for failure to appear were imposed for offenses that were separated by an intervening arrest. Paragraph 40 of the PSR recites that Reed was arrested on May 25, 1998 for carrying a dangerous weapon. He subsequently failed to appear in court on that charge on November 20, 1998 and was arrested for failure to appear.[4] PSR ¶ 41. Thus, because Reed was arrested on the weapons charge prior to committing or being charged with the failure to appear offense, the two subsequent convictions are separate sentences under § 4A1.2(a)(2). The mere fact that the sentences were imposed on the same day is beside the point; under the guideline, that fact is only

[4] The PSR states that the precise date of Reed's arrest for the failure to appear charge is unknown, but it also reflects that Reed was admitted to custody on March 16, 1999 and remained in custody until February 16, 2000. PSR ¶ 40. One reasonable inference from these facts is that Reed was arrested on March 16, 1999 for failure to appear.

relevant "[i]f there is no intervening arrest . . . ." U.S.S.G. § 4A1.2(a)(2).

Second, the court properly rejected Reed's argument that his 2001 conviction for possession with intent to sell was too old to count in his criminal history calculation. As shown in the PSR, for this conviction, Reed was sentenced to 5 years' imprisonment, 1 year to serve, to be followed by 3 years' probation. PSR ¶ 42. Reed's probation was subsequently revoked, however, and he was sentenced to 4 years' incarceration on July 21, 2003. PSR ¶ 42. As the court found, Reed's probation violation—and the subsequent revocation of his probation—affected the scoring of this conviction.

Section 4A1.2(k) provides the rules for calculating the term of imprisonment when, as here, there was a revocation of probation. That section provides that "[i]n the case of a prior revocation of probation, . . . add the original term of imprisonment to any term of imprisonment imposed upon revocation. The resulting total is used to compute the criminal history points for U.S.S.G. § 4A1.1(a), (b), or (c), as applicable." U.S.S.G. § 4A1.2(k)(1).

Accordingly, here, the unsuspended portion of Reed's original sentence, *i.e.*, one year of imprisonment, was appropriately added to the revocation sentence, *i.e.*, four years of imprisonment, resulting in a five-year sentence of incarceration.

And under U.S.S.G. § 4A1.1(a), this five-year sentence yielded three criminal history points.

Furthermore, this sentence was not too old to count for criminal history purposes. Section 4A1.2(k)(2) provides that the "[r]evocation of probation . . . may affect the time period under which certain sentences are counted as provided in § 4A1.2(d)(2) and (e). For the purposes of determining the applicable time period, use the following: (A) in the case of an adult term of imprisonment totaling more than one year and one month, the date of last release from incarceration on such sentence (*see* § 4A1.2(e)(1))[.]" Because, as noted above, the conviction was scored under U.S.S.G. § 4A1.1(a), the 15-year time limitation is applicable, as opposed to the ten-year time period referenced by the defendant at page 3 of his Pro Se Brief. Reed was released from custody on his probation revocation sentence on November 24, 2006, *see* PSR ¶ 43, which was well within 15 years of the earliest date of relevant conduct charged in count one of the indictment, *i.e.*, January 2012.[5] Accordingly, the district court did not err in calculating Reed's criminal history category.

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[5] Even if the relevant date is the date that Reed was released from custody on his original conviction, that date (April 16, 2002), was still within 15 years of the offense conduct in this case. *See* PSR ¶ 42.

4. There was no evidence that Reed was not competent to be sentenced.

Reed's *pro se* brief argues that the district court did not address his comment to the court at sentencing that he was "tired" and "taking other people's medicine to get through my days in jail." From this failure, he suggests that the court failed to determine whether he was competent to be sentenced. *Pro Se* Brief at 4-7. Reed's argument is without merit.

It is clear that due process "'prohibits the criminal prosecution of a defendant who is not competent to stand trial.'" *United States v. Quintieri*, 306 F.3d 1217, 1232 (2d Cir. 2002) (quoting *Medina v. California*, 505 U.S. 437, 439 (1992)). "A defendant is not competent, and the criminal proceeding against him may not progress, when his 'mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense.'" *United States v. Kerr*, 752 F.3d 206, 215 (2d Cir.) (quoting *Drope v. Missouri*, 420 U.S. 162, 171 (1975)), *cert. denied*, 135 S. Ct. 388 (2014). The right not to be prosecuted while incompetent "spans the duration of a criminal proceeding" and, therefore, courts "'*must always be alert* to circumstances'" suggesting a lack of competence. *United States v. Arenburg*, 605 F.3d 164, 168 (2d Cir. 2010) (per curiam) (quoting *Drope*, 420 U.S. at 181) (emphasis in original).

Title 18, United States Code Section 4241 requires a district court, upon its own motion if necessary, to hold a competency hearing where "there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to asset properly in his defense." 18 U.S.C. § 4241(a). What constitutes "'reasonable cause' is a highly particularized assessment that varies in each case," *Kerr*, 752 F.3d at 216 (quoting statute, but other internal quotations omitted). Of significance to a court's determination of competency are its own observations of the defendant's demeanor during the proceedings. *See id.* ("[W]e discern no unusual circumstances that should have given the district court pause before accepting Kerr's plea."); *Quintieri*, 306 F.3d at 1233.

This Court has held that the district court's determination of competency based on its direct observations of the defendant is entitled to deference. *United States v. Kirsh,* 54 F.3d 1062, 1070 (2d Cir. 1995). The decision whether to hold a competency hearing is entrusted to the discretion of the district court. *See Kerr*, 752 F.3d at 216; *Arenburg*, 605 F.3d at 169.

In the instant case, neither Reed nor his attorney made any claim below that he was unable to assist his attorney at his sentencing or was

otherwise not competent to be sentenced. And while Reed baldly stated that he took fellow inmates' medications to "get through [his] days at jail," GA46-47, he did not claim that he was under the influence on the day of sentencing. Indeed, Reed specifically denied that he was under the influence of drugs or alcohol at sentencing. In particular, before proceeding to sentencing, the district court placed Reed under oath, GA20, and then inquired:

The Court: You are Lamont Reed?

The Defendant: Yes.

The Court: You are represented by Attorney Bansley. Are you satisfied with his representation of you?

The Defendant: Yes.

The Court: He's filed very good papers in your behalf in this matter. Did you partake of any drugs or alcoholic beverages today?

The Defendant: No.

The Court: I'll find you free of the influence. You understand you're before me for sentencing on violation of laws of the United States?

The Defendant: Yes.

GA21.

The district court was entitled to rely on Reed's sworn statement that he did not take any drugs or alcohol that day. *Cf. United States v.*

Hernandez, 242 F.3d 110, 112 (2d Cir. 2001) (per curiam) (district court entitled to rely on sworn answers to questions posed in plea proceeding).

This is especially true here, given the other record evidence before the court. The defendant's statement to the court made clear that he understood the arguments made for and against his positions, and fully understood what was going on. GA43-48. Further, the defendant's lengthy statement to the court, GA43-48, responses to his counsel's inquiries, GA48-49, and responses to the court's questions on whether he was content with his attorney's representation of him and not seeking to repudiate the quantity stipulation, GA50-51, were responsive and coherent. They make clear that the defendant understood the proceedings and was appropriately responding. Indeed, in response to the court's question of him as to whether he was prepared to be sentenced, Reed replied, "[y]es, your Honor." GA51.

On this record, the district court did not commit procedural error when it sentenced Reed without *sua sponte* ordering a competency hearing.

5. Reed waived any challenge to the quantity of crack attributable to him.

Finally, Reed argues that he is not responsible for the quantity of crack cocaine to which he

stipulated. *Pro Se* Brief at 7-11. Reed waived any challenge to the quantity stipulation by repeatedly and affirmatively agreeing to that quantity below.

The PSR concluded that Reed was responsible for at least 203 grams of cocaine base. PSR ¶ 21. Reed's counsel submitted a letter to the Probation Office noting that Reed did not contest that quantity determination, *see* GSA30, and the PSR was revised to reflect that agreement. *See* PSR ¶ 22 ("Mr. Reed has advised that he does not object to the conclusion that his relevant conduct involved 203 grams of cocaine base."). Then, in his Sentencing Memorandum, Reed stated that he "has agreed not to challenge the 203 grams outlined in the Pre-Sentence Report." GA70. And although at sentencing, Reed first stated that he was not responsible for 203 grams of cocaine base, GA44-45, his attorney clarified that what the defendant

> is trying to say . . . was he wasn't this big time drug dealer that everyone's making him out to be.
>
> Certainly, there's a reasonable foreseeability with what's going on, but Mr. Reed wasn't in the streets, he wasn't doing the hand-to-hands; but because of the certain conversations he was having on the phone, and that's where all the investigation was, and all the evidence was from Mr. Reed was on the phone. And certainly the rea-

> sonable foreseeability comes in with that aspect.
>
> So I don't think that—I think Mr. Reed is becoming emotional about this because he wasn't making all that money out there that makes it sound like, because of these high gram amounts.
>
> And I think you would agree with me, correct, Mr. Reed?

GA48-49. The defendant answered, "Yes." GA49. Later he confirmed again that he did not mean to challenge to 203-gram quantity but, rather, "[i]t was just me expressing that I'm not just a big time drug dealer as the government making me seem to be." GA50.

"[I]f a defendant fails to challenge factual matters contained in the presentence report at the time of sentencing, the defendant waives the right to contest them on appeal." *United States v. Rizzo*, 349 F.3d 94, 99 (2d Cir. 2003); *see also United States v. Riggi,* 410 Fed. Appx. 388, 390 (2d Cir. 2011) (where defendant did not challenge quantity calculation and corresponding offense level in trial court, defendant waived his right to challenge that finding on appeal). Moreover, where "a claim has been waived through explicit abandonment, rather than forfeited through failure to object, plain error review is not available." *United States v. Jackson,* 346 F.3d 22, 24 (2d Cir. 2003). That is, "plain error

review is available only for issues 'not intentionally relinquished or abandoned.'" *Id.* (quoting *United States v. Gore,* 154 F.3d 34, 41 (2d Cir.1998)).

The record is clear that Reed intentionally abandoned any challenge to the drug quantity calculation contained in the PSR. Reed repeatedly reaffirmed that he was responsible for a quantity of 203 grams of crack cocaine as reflected in the PSR (¶ 22), and in his sentencing memorandum. GA70. And, while his remarks at sentencing could have been construed to mean that he was questioning that stipulation, Reed ultimately acknowledged the quantity calculation, stating that he did not want that quantity to constitute an admission that he was a big-time drug dealer. GA48-50. And, when explicitly asked whether he wished to proceed to sentencing on the basis of 203 grams of crack cocaine, Reed stated that he did. GA51.

Moreover, there is no doubt that Reed's decision to forgo a challenge to the quantity calculation was a strategic choice on his part. The 203-gram quantity was an extremely conservative estimate given the "credible information that . . . Mr. Ogman provided Mr. Reed with, on average, 50 grams of crack cocaine per meeting, which Mr. Reed would then re-package into 'eight ball' quantities and re-sell." PSR ¶ 21. Further, as noted in the letter from counsel the defendant was circulating, defense counsel recognized that

if Reed proceeded to a quantity hearing, the "government would prove over 280 grams, significantly affecting your guideline range." GSA34. Defense counsel recognized that this evidence would come from telephone calls and from a witness who, by "all accounts . . . is credible." GSA34.

In short, Reed made a strategic decision to stipulate to 203 grams of crack cocaine and thus avoid a quantity hearing that risked a significantly higher drug quantity finding. He should be held to that decision now.

II. The district court imposed a substantively reasonable sentence in view of the seriousness of Reed's offense conduct, the length and seriousness of his criminal record, and the need for the sentence to impose just punishment and provide for specific and general deterrence.

A. Governing law and standard of review

After reviewing a sentence for procedural reasonableness, this Court also undertakes a review of the substantive reasonable of a sentence. *See Cavera*, 550 F.3d at 189; *see also Gall v. United States*, 552 U.S. 38, 51 (2007).

"[W]hen conducting substantive review, [this Court] take[s] into account the totality of the circumstances, giving due deference to the sentenc-

ing judge's exercise of discretion, and bearing in mind the institutional advantages of the district court." *Cavera*, 550 F.3d at 190. Indeed, this Court's "review of a sentence for substantive reasonableness is particularly deferential" in part because of "a district court's unique fact-finding position, which allows it to hear evidence, make credibility determinations, and interact directly with the defendant (and, often, with his victims), thereby gaining insights not always conveyed by a cold record." *United States v. Broxmeyer*, 699 F.3d 265, 289 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 2786 (2013).

"The particular weight to be afforded aggravating and mitigating factors is a matter firmly committed to the discretion of the sentencing judge." *Id.* (internal quotation marks omitted). In reviewing for substantive reasonableness, this Court therefore "do[es] not consider what weight we would ourselves have given a particular factor," but instead "consider[s] whether the factor, as explained by the district court, can bear the weight assigned it under the totality of the circumstances in the case." *Cavera*, 550 F.3d at 191. Put another way, "if the ultimate sentence is reasonable and the sentencing judge did not commit procedural error in imposing that sentence, we will not second guess the weight (or lack thereof) that the judge accorded to a given factor or to a specific argument made pursuant to that factor." *United States v. Pope*, 554 F.3d

240, 246-47 (2d Cir. 2009) (internal quotation marks and modifications omitted).

This Court does "not presume that a Guidelines-range sentence is reasonable." *Cavera*, 550 F.3d at 190. But it "recognize[s] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Fernandez*, 443 F.3d at 27.

Ultimately, this Court "will not substitute our own judgment for the district court's on the question of what is sufficient to meet [the 18 U.S.C.] § 3553(a) considerations in any particular case. We will instead 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." *United States v. Norman*, 776 F.3d 67, 86 (2d Cir.) (internal quotation marks, citations, and modifications omitted), *cert. denied*, 2015 WL 1607367 (May 18, 2015). In other words, a sentence is substantively unreasonable only in the "proverbial 'rare case'" where the sentence "damage[s] the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009).

B. Discussion

While acknowledging that this Court's review of the substantive reasonableness of a sentence is "highly deferential," Reed argues that "[a]ny sentence higher than the 60 month mandatory minimum sentence was substantively unreasonable." Brief at 24. His arguments in support of this claim largely restate his allegations of procedural error (*i.e.*, that the sentence did not sufficiently reflect his minor role in the offense and reflected the unjust crack to powder ratio). Brief at 25. Further, he claims that the 110-month sentence was unreasonable because it was based exclusively on his criminal history. Brief at 25.

Contrary to Reed's arguments, the sentence imposed was substantively reasonable. First, as the court recognized, the offense of conspiring to possess with intent to distribute crack cocaine—with a quantity of at least 203 grams—is a serious offense. GA34. Although Reed was not himself a member of the Grape Street Crips, he was a close associate of Donald Ogman, the leader of that gang (which, as acknowledged by defense counsel and the district court, was a "bad bunch," GA26), and "was a substantial player in Mr. Ogman's drug operation." GA33. The evidence—including wiretapped communications and information from a cooperator, PSR ¶¶ 15-20; GSA34—made clear that Reed was a "partner" with Ogman and regularly pooled money to purchase cocaine for cooking and re-distribution

as crack cocaine in New Haven. PSR ¶¶ 13-20. Ogman provided Reed, on average, 50 grams of crack cocaine per meeting, which Reed would then re-package into "eight-ball" quantities and re-sell. PSR ¶ 21. Given this conduct, a significant sentence was warranted.

Further, a sentence of 110 months, which was at the bottom of the applicable guideline range, was not unreasonable given the defendant's history and characteristics, and the need of the sentence "to protect society, and to achieve adequate specific and general deterrence." GSA52.

In this connection, the court appropriately focused on Reed's significant and lengthy criminal history. Reed's first adult conviction was for carrying a dangerous weapon, for which he was sentenced to 30 months in jail in September 1999; that case arose out of a car stop in which he pointed a firearm at the officers who stopped him. PSR ¶ 40. He was discharged from parole on September 12, 2001. PSR ¶ 40.

Approximately one month after being discharged from parole, Reed was arrested for possession of crack with intent to distribute following the recovery of crack, money and other evidence during the execution of a search warrant of a residence and car associated with him. Reed pled guilty and was sentence to five years' incarceration with one year to serve and three years' probation. PSR ¶ 42 He was ultimately dis-

charged from transitional supervision in October 11, 2002. PSR ¶ 42.

Less than six months later, Reed was arrested for assaulting a police office by pushing him down stairs, carrying a firearm, and possession of narcotics with intent to sell. PSR ¶ 43. Reed pled guilty to these charges and was sentenced to 10 years' incarceration with five years to serve, and a five year conditional discharge. PSR ¶ 43. He was discharged from parole in April 2008. PSR ¶ 43.

Approximately seven months later, Reed sold an informant crack and was arrested about a month later on a warrant charging him with possession of narcotics. He was sentenced to ten years' incarceration, with four years to serve, and three years of probation. PSR ¶ 44. He was discharged from a halfway house in September 2011 and began his parole the following month. PSR ¶ 44. Within three months, Reed was intercepted over court-authorized electronic surveillance engaging in drug deals with the New Haven leader of the Grape Street Crips. PSR ¶ 44.

This serious and unremitting course of criminal activity was appropriately of paramount concern to the district court, who Congress has instructed to consider the history and characteristics of the defendant and the need of the sentence to protect society from further crimes by the defendant and provide adequate deterrence. *See* 18 U.S.C. § 3553(a)(1), (2)(B), and (2)(C). Of

particular concern to the court was that "in addition to firearms, [Reed's criminal record included] injury to a police officer. He fell down the stairs. I think that's a serious part of the record." GA34. As the court observed, despite serving "reasonably long" state sentences, "he literally went back out on the street." GA31. Thus, the record fully supported the court's concern about the likelihood of recidivism. *See United States v. Cossey*, 632 F.3d 82 (2d Cir. 2011) (per curiam) (propensity to reoffend is a proper consideration as long as it is supported by record).

Moreover, the court was free to give little credit to Reed's claim that he had turned his life around. Indeed the record showed that far from turning over a new leaf, Reed—while awaiting sentencing in this matter—had attempted to circulate as widely as possible the identity of a cooperating witness. In particular, Reed circulated both inside and outside of prison the first page of a confidential letter sent to him by his attorney which provided the identity of a cooperating witness. Reed's stated purpose in doing so was to "expose [the cooperator] to the world." GSA43.

Once the government learned of the existence of the letter circulating in the prison system, it was compelled to take steps to ensure the witness's safety. GA38, GSA35. At sentencing, Reed did not deny having circulated the letter, saying that he was upset with the cooperating witness for circulating that Reed was a "snitch." GA44.

While it considered doing so,[6] the government did not press a claim that Reed should receive an enhancement for obstruction of justice or that he should be denied credit for acceptance of responsibility under the Sentencing Guidelines. GA38-39. However, it urged the court to consider this conduct in assessing, *inter alia*, Reed's characteristics, and whether he needed to be deterred from future criminal activity. GA39. The court acknowledged the need to consider this conduct in determining the appropriate sentence, GA43, and this conduct provided additional justification for the 110-month sentence.

In sum, given the offense conduct, Reed's lengthy criminal history, and Reed's pre-sentencing circulation of a cooperator's name, this is far from a rare case where the 110-month sentence, at the bottom of the guidelines range, "exceed[ed] the bounds of reasonableness." *See United States v. Verkhoglyad*, 516 F.3d 122, 134 (2d Cir. 2008). Accordingly, the sentence was substantively reasonable and should be affirmed.

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[6] Had the government pressed for and prevailed on an obstruction enhancement and denial of credit for acceptance of responsibility, Reed's advisory guideline range would have been 160 to 210 months.

Conclusion

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

Dated: June 2, 2015

Respectfully submitted,

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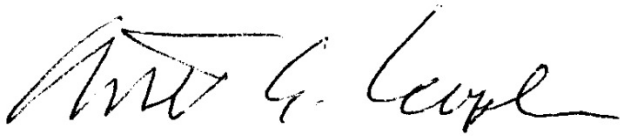
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



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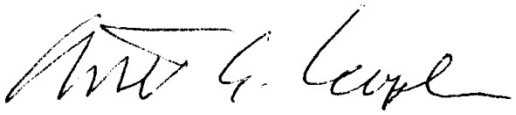
Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief complies with the 14,000 word limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, in that the brief is calculated by the word processing program to contain approximately 11,137 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.



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