10-774(L)

To Be Argued By:
HAROLD H. CHEN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 10-774(L), 10-1762(CON), 10-2080(CON), 10-2127(CON), 10-2590(CON)

UNITED STATES OF AMERICA,

Appellee,

-vs-

ADRIAN RIVERA, aka Heff, GEORGE SANCHEZ, aka Little G, aka Georgie, EDDIE PAGAN, JOEL SOTO, aka Joe Crack, JOSE BATISTA, aka Gordo,

Defendants-Appellants.

(For continuation of Caption, See Inside Cover)

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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DAVID B. FEIN
United States Attorney
District of Connecticut

HAROLD H. CHEN
SANDRA S. GLOVER
Assistant United States Attorneys

JOSE LUIS SANCHEZ, aka Luisito, aka Lou, JONATHAN BANKS, aka Capone, ABNER TORRES, LASHAWN RUFF, aka Shawny Rock, TERRENCE BROWN, aka Fugi, JERRY SANTIAGO, VINCENT VARELA, VIC, NELSON ALBALADEJO, aka Peelback, TERRENCE WILLIAMS, aka Big T, VICTOR ROBERSON, aka Cool V, JASON RIVERA, JUAN ORTIZ, aka Nano, ANGEL RIVERA, aka Ange, GREGORY CRUZ, aka June, JOSEPH CARRERO, ANTHONY ARMSTEAD, aka Most, RUBEN CRUZ aka Rube, JAVIER HERNANDEZ, aka Javi, CARLTON WATSON, aka Carton, ALLEN NAVARRO, RICHARD NAU, MONSERRATE VIDRO, aka June, MIGUEL RIVERA, NESTOR ESTRELLA, aka Papadin, aka Papo,

Defendants.

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Statement of Jurisdiction

The district court (Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. On May 28, 2010, Sanchez filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). Sanchez Appendix ("AA") 22, 221. On June 7, 2010, judgment entered for Sanchez. AA22, 218-220. On June 25, 2010, Soto filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). Government Appendix ("GA") 22, 151-52. On June 29, 2010, judgment entered for Soto. GA21, 148-50. This Court has appellate jurisdiction for both sentencing appeals pursuant to 18 U.S.C. § 3742(a).

Statement of Issues Presented for Review

I. George Sanchez

Whether a sentence of 330 months of incarceration, which was 30 months below the bottom of the advisory Guideline range of 360 months to life imprisonment, was substantively and procedurally reasonable in light of the sentencing factors set forth at 18 U.S.C. § 3553(a).

II. Joel Soto

Whether the district court clearly erred in finding that at least 50 kilograms of cocaine were reasonably foreseeable to Soto when it was undisputed that he actively participated in the drug conspiracy for at least two years and five months, and when the trial evidence demonstrated that the conspiracy distributed at least one kilogram of cocaine per week during this period.

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UNITED STATES OF AMERICA,
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ADRIAN RIVERA, aka Heff, GEORGE SANCHEZ, aka Little G, aka Georgie, EDDIE PAGAN, JOEL SOTO, aka Joe Crack, JOSE BATISTA, aka Gordo,
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[1] The Court dismissed the appeals of Adrian Rivera and Eddie Pagan on April 27, 2011, and December 7, 2010, respectively. The government has filed a separate memorandum in response to the *Anders* motion filed by counsel for Jose Batista.

Preliminary Statement

From January 1, 2002, to February 4, 2009, George Sanchez led a prolific drug-trafficking organization responsible for distributing at least one kilogram, and as much as six kilograms, of cocaine per week in Bridgeport, Connecticut. One of his closest associates in the drug conspiracy was Joel Soto, who was involved with Sanchez in receiving and obtaining kilograms of cocaine, converting some of it into crack cocaine, and packaging the narcotics for street sale.

On February 4, 2009, Sanchez, Soto, and 27 other individuals were arrested and charged with various violations of the federal narcotics laws. In September 2009, Sanchez and Soto were the lone defendants to proceed to trial. On the fourth day of evidence in the government's case-in-chief, Sanchez elected to plead guilty, without a written plea agreement, to conspiracy to possess with intent to distribute, and to distribute, five kilograms or more of cocaine and 50 grams or more of crack cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. Soto proceeded to verdict and was found guilty of the same charges. At sentencing, the district court sentenced Sanchez and Soto to sentences of incarceration of 330 months and 228 months, respectively. Both of these sentences were substantially below the bottom of the advisory Guideline ranges for Sanchez and Soto.

In these sentencing appeals, Sanchez claims that the 360-month sentence was procedurally and substantively

unreasonable. Soto claims that the district court erred by incorrectly finding that at least 50 kilograms of cocaine were reasonably foreseeable to him. As discussed below, these claims are without merit because the district court correctly calculated the applicable Guideline ranges, appropriately considered the relevant § 3553(a) factors, and made proper findings on Sanchez's and Soto's attributable drug quantities based on the trial record. Accordingly, both sentences should be affirmed.

Statement of the Case

On January 29, 2009, a Connecticut grand jury returned an indictment charging Sanchez, Soto, and 27 other individuals with various narcotics-trafficking violations. AA4, 24-33. On February 26, 2009, the same grand jury returned a superseding indictment charging the same individuals with various narcotics-trafficking and firearms violations. AA5, 34-48.

On July 29, 2009, the same grand jury returned a second superseding indictment against the seventeen defendants remaining in the case. AA12, 49-62. In Counts One and Two, Sanchez and Soto were charged with conspiracy to possess with intent to distribute, and to distribute, five kilograms or more of cocaine and 50 grams or more of crack cocaine, respectively, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. AA50-53.

On September 22, 2009, the government commenced its case-in-chief against Sanchez and Soto. AA18. On September 25, 2009, Sanchez elected to plead guilty,

without a written plea agreement, to conspiracy to possess with intent to distribute five kilograms or more of cocaine (Count One) and 50 grams or more of crack cocaine (Count Two), in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. AA18-19, 96-97.

On October 1, 2009, a jury found Soto guilty of conspiracy to possess with intent to distribute five kilograms or more of cocaine (Count One) and 50 grams or more of crack cocaine (Count Two), in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. GA18, 145-46.

On May 26, 2010, the district court sentenced Sanchez to 330 months of imprisonment. AA22, 212. On May 28, 2010, Sanchez filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). AA22, 221. On June 7, 2010, judgment entered for Sanchez. AA22, 218-220.

On June 23, 2010, the district court sentenced Soto to 228 months of imprisonment. GA21, 148-50, Soto Appendix ("OA") 81. On June 25, 2010, Soto filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). GA22, 151-52. On June 29, 2010, judgment entered for Soto. GA21, 1148-50.

Both Sanchez and Soto are currently serving the terms of imprisonment imposed by the district court.

Statement of Facts and Proceedings Relevant to this Appeal

From January 1, 2002, to February 4, 2009, George Sanchez led a large-scale narcotics trafficking organization in Bridgeport, Connecticut, to possess with intent to distribute, and to distribute, large quantities of cocaine and cocaine base. Sanchez Presentence Report ("A-PSR") ¶19; Soto Presentence Report ("O-PSR") ¶8. The evidence demonstrated that the organization's most prolific years were from 2003 to 2006 when Sanchez and his co-conspirators were receiving a steady supply of cocaine from Puerto Rico. A-PSR ¶20; O-PSR ¶9. From 2003 to 2006, the quantity of cocaine trafficked by the drug conspiracy ranged from at least two kilograms to as much as four to five kilograms weekly. A-PSR ¶20; O-PSR ¶9. These kilograms of cocaine were usually shipped by U.S. Mail, or a private parcel service, and were secreted in packages containing clothes, electronic equipment, and other materials designed to hide the presence of cocaine. A-PSR ¶20; O-PSR ¶9.

Sanchez directed and paid his co-conspirators, including co-defendants Joel Soto, Vincent Varela, Nestor Estrella, Jonathan Banks, Terrence Brown, and others for receiving and signing for these cocaine shipments. A-PSR ¶20; O-PSR ¶9. Once these packages were received, the recipient would notify Sanchez because he was the sole person allowed to open the box containing the cocaine. A-PSR ¶20; O-PSR ¶9. Sanchez, Soto, and their associates would then meet in various locations around Bridgeport to convert some of the cocaine into crack cocaine, and to

weigh and package the narcotics for street sale. A-PSR ¶21; O-PSR ¶9.

In late 2006, the drug conspiracy was dealt a setback when Sanchez's principal cocaine supplier in Puerto Rico was convicted and incarcerated. A-PSR ¶22; O-PSR ¶10. As a result, between 2007 and 2009, Sanchez cultivated other suppliers to make up for the lost volume in cocaine shipments. During this period from 2007 to 2009, the drug conspiracy led by Sanchez was distributing approximately one to three kilograms per week. A-PSR ¶23; O-PSR ¶11.

The evidence adduced at Sanchez's and Soto's trial corroborated that the drug conspiracy was distributing two kilograms of cocaine and as much as five or six kilograms per week from 2003 to 2006, compared to one to three kilograms per week from 2007 to 2009. For example, Varela testified that one to two kilograms of cocaine were being delivered from Puerto Rico to the drug conspiracy in Bridgeport, once or twice every week. GA54-55. Cooperating witness Michael Jackson testified that until his arrest in late November 2006, he would personally purchase a kilogram of cocaine from Sanchez for $22,000.00 on a weekly basis. GA88. Jackson also testified that, in 2006, Sanchez was supplying Soto with 500 grams of cocaine at a time. GA89-90. Similarly, under cross-examination by Soto's attorney, Jonathan Banks confirmed that Sanchez was selling five to six kilograms of cocaine per week during 2005 through 2006. GA141-42. In addition, Banks testified that while he was in Puerto Rico with Sanchez in 2006, Banks witnessed the packing of two kilograms in an amplifier box for shipment to

Bridgeport. GA109-10. These drug-trafficking activities were corroborated by the Title III wiretap. GA136-38; A-PSR ¶19; O-PSR ¶8. Moreover, in their plea agreements, co-defendants Varela, Estrella, Banks, and Brown all stipulated in their plea agreements that they were responsible for distributing at least 50 kilograms or more of cocaine as relevant conduct pursuant to U.S.S.G. § 1B1.3. GA156 (Varela); GA164 (Estrella); GA172 (Banks); GA179 (Brown).

The trial evidence further showed that Sanchez had possessed a firearm in connection with running the drug conspiracy. GA100-03. Moreover, the evidence demonstrated that Sanchez was the undisputed leader of the drug conspiracy who directed its operations, coordinated the shipments of cocaine from Puerto Rico to Bridgeport, directed the production of crack cocaine, collected drug proceeds, and set the resale price for the cocaine. GA81-83.

In addition, the trial evidence corroborated Soto's role as one of Sanchez's closest associates who was actively involved in the drug conspiracy, except for approximately seventeen total months when he was incarcerated between June 2003 to September 2003; June 2004 to November 2004; and December 2006 to June 2007. O-PSR ¶¶51, 52, 54. As did Varela, Banks, Estrella, and Brown, Soto received kilogram-sized shipments of cocaine for Sanchez, including a shipment in 2008 of two kilograms at Soto's home on Cleveland Street in Bridgeport. GA69-71. In addition, on June 20, 2008, the Drug Enforcement Administration ("DEA") effected a controlled delivery of

a DHL package, which had previously contained two kilograms of cocaine, originating from Puerto Rico to 400 Atlantic Street in Bridgeport, Connecticut. GA26-33. When the package was delivered, Soto and Varela were present at that address to accept delivery, whereas Sanchez had left moments earlier. GA34-40. The DEA detained and questioned Soto and Varela, but eventually released them. *Id*.

In addition, Varela testified that he had traveled to Massachusetts with Sanchez and Soto in the summer of 2007 when they obtained three kilograms of cocaine from a supplier. GA75-80, 84. Furthermore, Banks testified that on at least three to four separate occasions, he had witnessed Sanchez provide Soto with approximately $20,000.00 in cash, so Soto could purchase kilograms of cocaine from a supplier in Waterbury, Connecticut. GA123-28.

Finally, when Soto was arrested on February 4, 2009, he was in possession of $1,940.00 in cash; a digital scale used to weigh narcotics; baking soda used to convert powder cocaine into crack cocaine; and acetone used to re-compress cocaine in a process known as "re-rocking." O-PSR ¶13. With the exception of $258.75 in legitimate earnings in 2004, Soto had no other evidence of legal income. *Id*.

Summary of Argument

I. The district court did not act unreasonably when it sentenced Sanchez to 330 months of incarceration, which was 30 months below the low end of the advisory Guideline sentence range of 360 months to life imprisonment. As a threshold matter, the court's sentence was procedurally reasonable because it correctly calculated the applicable Guideline ranges, appropriately considered the relevant § 3553(a) factors, and made proper findings on the relevant sentencing enhancements, including Sanchez's attributable drug quantity, based on the trial record. Moreover, the sentence was substantively reasonable because Sanchez had led, for more than seven continuous years, a drug-trafficking organization that distributed more than 150 kilograms of cocaine. This Court should decline Sanchez's invitation to revisit his sentence and substitute its judgment for that of the district court, which heard voluminous evidence from his trial and sentenced 27 co-defendants.

II. The district court did not clearly err in finding that Soto was responsible for conspiring to distribute at least 50 kilograms of cocaine. At sentencing, Soto conceded that he was involved in the drug-trafficking organization for approximately two years and five months (*i.e.*, 124 weeks) between January 1, 2006, and February 4, 2009. Based on this concession, the trial evidence established that the drug-trafficking organization was distributing at least one to three kilograms of cocaine each week during this time period. The trial evidence further established that Soto was actively involved in receiving shipments of

cocaine, personally purchasing kilogram-sized quantities of cocaine with money provided by Sanchez, converting the cocaine into crack cocaine, and packaging the drugs for street sale. Accordingly, the district court correctly found that at least 50 kilograms of cocaine were reasonably foreseeable to Soto as relevant conduct pursuant to U.S.S.G. § 1B1.3.

Argument

I. The district court's 330-month sentence for Sanchez was procedurally and substantively reasonable.

A. Relevant facts

1. Guilty Plea, the PSR, and the Stipulation Regarding His Guideline Calculation

On September 25, 2009, on the fourth day of evidence in the case-in-chief, Sanchez elected to plead guilty to conspiracy to possess with intent to distribute five kilograms or more of cocaine (Count One) and 50 grams or more of crack cocaine (Count Two), in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. AA18-19, 96-97. However, because Sanchez pleaded guilty without a written plea agreement, he and the government initially disagreed about every significant aspect of his Guideline calculation, including his base offense level, his attributable drug quantity, the applicability of enhancements for use of a dangerous weapon and leadership role, the reduction for acceptance of

responsibility, and an enhancement for obstruction of justice. A-PSR, 2d Addendum dated May 17, 2010.

On May 26, 2010, shortly before sentencing, the government and Sanchez filed a detailed joint stipulation regarding his Guideline calculation. AA151. The joint stipulation stated that Sanchez's base offense level was 36 under U.S.S.G. § 2D1.1(c)(2) predicated on an attributable drug quantity of 50 to 150 kilograms of cocaine. *Id*. The joint stipulation further stated that the parties agreed to a two-level enhancement for the use of a dangerous weapon under U.S.S.G. § 2D1.1(b)(1); a four-level enhancement for Sanchez's leadership role in a criminal activity that involved five or more participants under U.S.S.G. § 3B1.1(a); and a two-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a). *Id*. In addition, the government agreed not to pursue an enhancement for obstruction of justice under U.S.S.G. § 3C1.1(a). *Id*. Finally, Sanchez reserved his right to argue that a Criminal History Category ("CHC") V over-represented his criminal history. AA152. By virtue of this stipulation, the parties effectively agreed that Sanchez's adjusted offense level was 40.

2. Sentencing

On May 26, 2010, the district court held Sanchez's sentencing hearing. As a threshold matter, the court asked Sanchez whether he had reviewed the PSR and the second addendum, and had discussed them with counsel. AA156. Sanchez responded in the affirmative. *Id*. The district court then confirmed with government and defense counsel that

under the joint stipulation, AA151-52, Sanchez's adjusted offense level was 40 predicated on a base offense level of 36 under U.S.S.G. § 2D1.1(c)(2) for 50 to 150 kilograms of cocaine, AA157, plus a two-level enhancement for the use of a dangerous weapon under U.S.S.G. § 2D1.1(b)(1) and four-level enhancement for leadership role in a criminal activity that involved five or more participants under U.S.S.G. § 3B1.1(a); and minus a two-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a), AA157-58. Both parties confirmed that the district court's statement of the adjusted offense level was correct. AA158.

The district court then told the parties that it "ha[d] a serious question about the quantity stipulation." AA162. The court further stated:

> I listened to . . . testimony from people about receiving kilogram packages[.] I'm aware of a[n] interception [from] Puerto Rico of a two kilogram package. I have testimony from multiple people that these things happened every week. If we assume that Mr. Sanchez took some time off in the seven or eight years he was engaged in the conspiracy, it would take a year and a half to three years conservatively at one to two kilograms a week to get to over 150 [kilograms].

AA162. Notwithstanding the joint stipulation, the court noted its "obligation to make a finding based on the evidence in front of me, based on the testimony I heard at trial, based on evidence I heard in connection with other

Presentence Reports and sentencings and based upon the government's earlier submissions in the memorandum before me that refresh my memo[ry] about trial testimony and other evidence I'm aware of." AA162-63. Nevertheless, the court further stated: "I will in effect depart back down to the range you folks have agreed to in light of your agreement. The effect upon Mr. Sanchez will not change his guideline calculation as he understood coming in here today. I don't see how I can make a finding of less than 150 kilograms in this case . . . ." AA163.

At this point, both government and defense counsel asked the district court to give effect to the joint stipulation. AA163-64. Nevertheless, after recognizing that "[w]e're at a sentencing hearing where the burden of proof is lower and where I can rely upon evidence that would otherwise not be admissible," AA164, the court found that "the quantity here involving . . . Mr. Sanchez over this period of time is . . . in excess of 150 kilograms of powder cocaine," AA165. The court proceeded to find a base offense level of 38 plus a two-level enhancement for Sanchez's use of a firearm, *id*., and a four-level leadership role enhancement because "there were more than five [people] who worked with and for Sanchez." *Id*. The court further found that he should receive a two-level reduction for acceptance of responsibility because he was "not contesting issues that . . . are supported by the record." *Id*. In sum, the court found that this calculation "results in a guideline range of 42 and the criminal history is [V] which makes the guideline range 360 to life." But "to effectuate the agreement of the parties to reflect the lower quantity that the parties stipulated to," the court then

departed pursuant to *United States v. Fernandez*, 877 F.2d 1138 (2d Cir. 1989), to find an adjusted offense level of 40. AA166. With a CHC V, the court found the advisory Guideline range remained 360 months to life imprisonment. AA166.

At this point in the sentencing, Sanchez moved for a downward departure pursuant to *United States v. Mishoe*, 241 F.3d 214 (2d Cir. 2001), arguing that his criminal history was over-represented, even though a reduction from CHC V to CHC IV would have no effect on the ultimate Guideline range. AA166-68. Over the government's objection, the court granted the *Mishoe* departure. With a CHC IV and an adjusted offense level of 40, Sanchez's advisory Guideline range remained 360 months to life imprisonment.

In his sentencing remarks, Sanchez's attorney asked the court to discount the testimony of the government's cooperating witnesses, and to consider that Sanchez was not wealthy when he was arrested in 2009. AA173-76. Sanchez's attorney further asked the court to consider his client's lack of involvement in committing acts of violence, and to credit his status as a good family man. AA177-79. In asking for a sentence within the advisory Guideline range, the government stressed Sanchez's longevity as a major drug trafficker who bore ultimate responsibility for leading an organization that put large amounts of narcotics into the community for more than seven years. AA197-99.

In imposing sentence, the district court reaffirmed that the Guideline range was 360 months to life imprisonment, but that this range was "only one factor" that it had to consider. AA204. The district court then discussed the factors that would weigh in her sentencing decision pursuant to 18 U.S.C. § 3553(a), including the need to avoid unwarranted disparities among co-defendants, *id*.; to provide just punishment for the offense conduct, AA205; to deter Sanchez from committing crimes in the future, AA206-07; to provide appropriate education and treatment, AA207; and to consider the nature and circumstances of the offense as well as Sanchez's history and characteristics, *id*.

The district court began its analysis by finding that the nature and characteristics of Sanchez's offense were "very serious" because he had "engaged in the distribution of drugs in large quantities over a long period time with lots of people." AA207. The court further recognized that there "27, 28, 29 people in this case and I found and I believe you were a leader." AA208. Next, the court found that Sanchez's offense conduct had a corrosive effect on the community: "Drug dealing . . . we seem unable to stop it as a society. I think it is going to kill our society. It ruins inner cities. It destroys neighborhoods. It creates conditions for violence, leads to violence." *Id*. In conclusion, the court found that Sanchez, by distributing "really large quantities [of narcotics] for a very long period of time, [had] poisoned the streets of Bridgeport and the lives of many, many people." AA209.

Next, in considering Sanchez's history and characteristics, the district court acknowledged his respectful nature and intelligence, AA209-10, his lack of a legitimate work history, AA210, and that he was a "giving person" with the benefit of supportive family members and friends. The court then imposed its sentence of 330 months of incarceration, ten years of supervised release, and a special assessment of $200.00. AA212. The court further explained that this was a non-Guideline sentence below the advisory range of 360 months to life imprisonment. AA215. The court commented that the "30-year sentence struck me as longer than necessary to accomplish the purposes of sentencing, "[p]articularly in light of [the] lack of prior incarcerations, the lack of recent convictions, and . . . Sanchez's age upon release [from the instant sentence]." AA216. The court further found that the sentence was imposed "relative to other defendants in the case even when taking account the different roles and nature and circumstances." *Id*.

B. Governing law and standard of review

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the United States Sentencing Guidelines, as written, violate the Sixth Amendment principles articulated in *Blakely v. Washington*, 542 U.S. 296 (2004). *See Booker*, 543 U.S. at 243. The Court determined that a mandatory system in which a sentence is increased based on factual findings by a judge violates the right to trial by jury. *See id.* at 245. As a remedy, the Court severed and excised the statutory provision making the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), thus

declaring the Guidelines "effectively advisory." *Booker*, 543 U.S. at 245.

After the Supreme Court's holding in *Booker* rendered the Sentencing Guidelines advisory rather than mandatory, a sentencing judge is required to "(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence." *See United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005). "[T]he excision of the mandatory aspect of the Guidelines does not mean that the Guidelines have been discarded." *Crosby*, 397 F.3d at 111. "[I]t would be a mistake to think that, after *Booker/Fanfan*, district judges may return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum." *Id.* at 113-14.

Consideration of the Guideline range requires a sentencing court to calculate the range and put the calculation on the record. *See Fernandez*, 443 F.3d at 29. The requirement that the district court consider the section 3553(a) factors, however, does not require the judge to precisely identify the factors on the record or address specific arguments about how the factors should be implemented. *Id.*; *Rita v. United States*, 551 U.S. 338, 356-59 (2007) (affirming a brief statement of reasons by a district judge who refused downward departure in which judge noted that the sentencing range was "not

inappropriate"). There is no "rigorous requirement of specific articulation by the sentencing judge." *Crosby*, 397 F.3d at 113. "As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, [this Court] will accept that the requisite consideration has occurred." *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005).

On appeal, a district court's sentencing decision is reviewed for reasonableness. *See Booker*, 543 U.S. at 260-62. The Supreme Court has reaffirmed that the reasonableness standard for sentencing challenges is essentially an abuse-of-discretion standard. *See Gall v. United States*, 552 U.S. 38, 46 (2007). In this context, reasonableness has both procedural and substantive dimensions. *See United States v. Avello-Alvarez*, 430 F.3d 543, 545 (2d Cir. 2005) (citing *Crosby*, 397 F.3d at 114-15). "A district court commits procedural error where it fails to calculate the Guidelines range (unless omission of the calculation is justified), makes a mistake in its Guidelines calculation, or treats the Guidelines as mandatory." *See United States v. Cavera*, 550 F.3d 180, 190 (2d Cir. 2008) (en banc) (citations omitted), *cert. denied*, 129 S. Ct. 2735 (2009). A district court also commits procedural error "if it does not consider the § 3553(a) factors, or rests its sentence on a clearly erroneous finding of fact." *Id*. Finally, a district court "errs if it fails adequately to explain its chosen sentence, and must include 'an explanation for any deviation from the Guidelines range.'" *Id*. (quoting *Gall*, 552 U.S. at 51). A

district court need not specifically respond to all arguments made by a defendant at sentencing. *See United States v. Bonilla*, 618 F.3d 102, 111 (2d Cir. 2010) ("[W]e never have required a District Court to make specific responses to points argued by counsel in connection with sentencing . . . ."), *cert. denied*, 131 S. Ct. 1698 (2011).

Further, the Court has recognized that "[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge 'exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.'" *Fernandez*, 443 F.3d at 27 (citations omitted). A sentence is substantively unreasonable only in the "rare case" where the sentence would "damage the administration of justice because the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *United States v. Rigas*, 583 F.3d 108, 123 (2d Cir. 2009), *cert. denied*, 131 S. Ct. 140 (2010). Although this Court has declined to adopt a formal presumption that a within-Guideline sentence is reasonable, it has "recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Fernandez*, 443 F.3d at 27; *see also Rita*, 551 U.S. at 347-51 (holding that courts of appeals may apply presumption of reasonableness to a sentence within the applicable Sentencing Guidelines

range); *United States v. Rattoballi*, 452 F.3d 127, 133 (2d Cir. 2006) ("In calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.").

C. Discussion

1. Sanchez's sentence was procedurally reasonable.

As a threshold matter, the district court complied with all of this Court's procedural dictates when sentencing Sanchez. First, the court asked him whether he had reviewed the PSR and the second addendum, and had discussed them with counsel. AA156. Sanchez responded in the affirmative. *Id*. Second, the court made a finding that the base offense level was 38 predicated on an attributable quantity of more than 150 kilograms of powder cocaine. AA165. Third, the court calculated the advisory Guideline range as 360 months to life imprisonment based on a two-level enhancement for use of a firearm, a four-level leadership role enhancement, a two-level reduction for acceptance of responsibility, and a CHC IV. AA165-73. Fourth, the court effected a downward departure pursuant to *United States v. Fernandez*, 877 F.2d 1138 (2d Cir. 1989), to give effect to the 50-150 kilogram drug quantity provided for in the joint stipulation, but nevertheless yielding the same advisory Guideline range of 360 months to life imprisonment. AA166. Fifth, the court permitted Sanchez to speak on his behalf. AA186. Finally, the court imposed its non-

Guideline sentence of 330 months of imprisonment and provided detailed reasons for its sentence, with particular emphasis on "the range the guidelines suggest and also the nature and circumstance[s] of . . . [the] offense." AA204-11.

Unmoved by this solid factual record, Sanchez contends that the court's sentence was procedurally unreasonable for three reasons. First, Sanchez complains that the court failed to adhere to the negotiated drug quantity and base offense level in the parties' joint stipulation, thereby incorrectly finding that more than 150 kilograms of cocaine were reasonably foreseeable to him. Second, Sanchez asserts that, when fashioning sentence, the court did not sufficiently consider the § 3553(a) factors, including his claim that certain defendants in other federal drug cases prosecuted in Connecticut "were more culpable, violent and dangerous than Mr. Sanchez ever was." Sanchez Brf. 18. Third, for both claims, Sanchez contends that the court inadequately explained its reasoning. None of these claims has any merit.

a. Drug Quantity

First, the court's finding on Sanchez's attributable drug quantity was not only factually supported, but was also the product of thorough analysis by the court. Stated differently, the court's drug-quantity finding was not clearly erroneous. Prior to sentencing, the government and Sanchez had filed a joint stipulation in which the parties agreed that Sanchez's base offense level was 36 under U.S.S.G. § 2D1.1(c)(2) based on an attributable drug

quantity of 50 to 150 kilograms of cocaine. AA151. Both parties, including the government, asked the court to give effect to this stipulation. AA163-64. However, as the court correctly recognized, its obligation to find the appropriate drug quantity overrode the parties' joint stipulation. AA162 (court's statement that "I have an obligation to make a finding based on the evidence in front of me, based on the testimony I heard at trial, based on evidence I heard in connection with other Presentence Reports"); *cf.* U.S.S.G. § 6B1.4(d) (Policy Statement) ("The court is not bound by the stipulation, but may with the aid of the presentence report, determine the facts relevant to sentencing."); U.S.S.G. § 6B1.4 (Commentary) ("[T]he court cannot rely exclusively upon stipulations in ascertaining the factors relevant to the determination of sentence. Rather, in determining the factual basis for the sentence, the court will consider the stipulation, together with the results of the presentence investigation, and any other relevant information."); *United States v. Granik*, 386 F.3d 404, 411 (2d Cir. 2004) ("Although a stipulation as to the amount of loss in a plea agreement that is knowing and voluntary will generally govern the resolution of that issue, . . . the stipulation does not bind the sentencing court, and that court must find the loss amount as a fact at sentencing.").

Pursuant to this obligation, the court proceeded to find that Sanchez's attributable drug quantity was more than 150 kilograms of cocaine due to his leadership of, and participation in, the drug conspiracy from January 1, 2002, to February 4, 2009. AA163 ("I don't see how I can make a finding of less than 150 kilograms in this case . . . .").

The court explained that, at trial, it had heard "testimony from people about receiving kilogram packages" of cocaine being sent from Puerto Rico to Sanchez in Bridgeport, as well as "testimony from multiple people that these things happened every week." AA162. The court further noted that even if it were to "assume that Mr. Sanchez took some time off in the seven or eight years he was engaged in the conspiracy, it would take [only] a year and a half to three years conservatively at one to two kilograms a week to get to over 150 [kilograms]." *Id*. The ample evidence from trial, including the testimony of Sanchez's co-conspirators, fully supported the court's conclusion. *See*, *e.g.*, GA54-55 (testimony of Vincent Varela testified that one to two kilograms of cocaine were delivered to Sanchez once or twice each week); GA88 (testimony of Michael Jackson that until his arrest in late November 2006, he would purchase a kilogram of cocaine from Sanchez each week); GA141-42 (testimony of Jonathan Banks that Sanchez was selling five to six kilograms of cocaine per week in 2005 and 2006); GA31-36 (testimony that two kilograms from Puerto Rico were sent to Sanchez for delivery in Bridgeport on June 20, 2008). Thus, because the trial evidence substantiated the court's finding, the court did not commit procedural error in determining Sanchez's attributable drug quantity and the concomitant base offense level of 38.

After finding the base offense level was 38, the court complied with this Court's requirement that it calculate the correct Guideline range. The court added a two-level enhancement for use of a firearm and a four-level leadership enhancement per the terms of the stipulation,

but also subtracted a two-level reduction for acceptance of responsibility. AA165. Consequently, the court found that this calculation "results in a guideline range of 42 and the criminal history is V which makes the guideline range 360 to life." AA166. However,"to effectuate the agreement of the parties to reflect the lower quantity that the parties stipulated to," the court then granted a downward departure pursuant to *United States v. Fernandez*, 877 F.2d 1138 (2d Cir. 1989), to give effect to an adjusted offense level of 40 per the terms of the joint stipulation. *Id*.[2] In short, the court committed no error in computing Sanchez's Guideline calculation.

Moreover, by effecting the downward departure pursuant to *Fernandez*, any error purportedly flowing from this drug quantity finding would have been harmless because the Guideline range was identical under both circumstances, thereby having no impact on Sanchez's sentence. *See United States v. Jass*, 569 F.3d 47, 68 (2d Cir. 2009) (quoting *Cavera*, 550 F.3d at 197), *cert. denied*, 130 S. Ct. 1149 (2010), and *cert. denied*, 130 S. Ct. 1149 (2010).

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[2] Notably, Sanchez does not challenge the court's grant for his motion for a downward departure pursuant to *United States v. Mishoe*, 241 F.3d 214 (2d Cir. 2001), that his criminal history was over-represented, which reduced his criminal history category from V to IV, even though there was no effect on the actual Guideline range. AA169-73.

b. Section 3553(a) factors

Although Sanchez claims that the court did not adequately consider the § 3553(a) factors when fashioning the sentence, the court's expansive, detailed findings undermine this claim. After computing the applicable Guideline range, the district court affirmed that the advisory Guideline range of 360 months to life imprisonment was "only one factor" that it would consider. AA204. The court then discussed the main factors to be weighed in its sentencing calculus pursuant to 18 U.S.C. § 3553(a), including the need to avoid unwarranted disparities among co-defendants, *id*.; to provide just punishment for the offense conduct, AA205; to deter Sanchez from committing crimes in the future, AA206-07; to provide him with appropriate education and treatment, AA207; and to consider the nature and circumstances of the offense as well as his history and characteristics, *id*.

The district court began its analysis by finding that the nature and circumstances of Sanchez's offense were "very serious" because he had "engaged in the distribution of drugs in large quantities over a long period time with lots of people." AA207. The court further recognized that there were "27, 28, 29 people in this case and I found and I believe you were a leader." AA208. The court noted that Sanchez was a skilled drug trafficker who had eluded law enforcement for more than seven continuous years. AA178 ("[H]e didn't get arrested from '02 to '09. I never had many defendants who dealt drugs who didn't get caught . . . at some point. It's a long period of time.").

Next, the court found that Sanchez's offense conduct had a corrosive impact on the community: "Drug dealing . . . we seem unable to stop it as a society. I think it is going to kill our society. It ruins inner cities. It destroys neighborhoods. It creates conditions for violence, leads to violence." *Id*. In sum, the court found that Sanchez, by distributing "really large quantities [of narcotics] for a very long period of time, [had] poisoned the streets of Bridgeport and the lives of many, many people." AA209.

In examining Sanchez's history and characteristics, the court acknowledged his respectful nature and intelligence, but found that he had used these abilities for an illegal purpose. AA209-10 ("You struck me when I spoke with you . . . as a very intelligent person. Looking at what you are charged with and pled guilty to, I believe you are. There's no way that you stay on the streets of Bridgeport that long and don't get arrested . . . for dealing drugs."). The court further noted his lack of a legitimate work history because he had operated as a drug trafficker for such a long time. AA210. On the positive side, the court characterized Sanchez as a "giving person" with the benefit of supportive family members and friends. AA210-11.

Stating that the most important factors were the advisory Guideline range as well as the nature and circumstances of the offense, AA211, the court imposed a sentence of 330 months of incarceration, ten years of supervised release, and a special assessment of $200.00. AA212. The court further explained that this was a non-Guideline sentence below the advisory range of 360

months to life imprisonment because the "30-year sentence struck me as longer than necessary to accomplish the purposes of sentencing[,] [p]articularly in light of [the] lack of prior incarcerations, the lack of recent convictions, and . . . Sanchez's age upon release [from the instant sentence]." AA216. The court further found that the sentence was made "relative to other defendants in the case even when taking account the different roles and nature and circumstances." *Id*.

Notwithstanding the completeness of the court's findings, Sanchez complains that the court did not adequately consider his argument that he should have been sentenced less harshly than other federal drug defendants because he was not involved in committing acts of violence. AA182-83. The court, however, fully considered this argument and factored it into the ultimate sentence. Despite recognizing that this "argument [was] well taken that there's an absence of violence on behalf [of] Mr. Sanchez," AA183, the court continued that there are "other characteristics involved in the case" because "[t]he question is what is an appropriate sentence." *Id*.

Moreover, at Sanchez's behest, the court did consider the sentences recently imposed by other district judges in Connecticut for similarly situated defendants who had been recently prosecuted in federal court. AA193-96. In response to the court's queries, the government stated that that a sentence within the advisory Guideline range would be consistent with sentences imposed by the other district judges for similar offense conduct because Sanchez led a long-running drug conspiracy responsible for distributing

large amounts of cocaine. *See* AA189-93, 195-96 (government's statements, among others, that Alex Luna (05CR58) received a 30-year sentence for distributing 50-150 kilograms of cocaine, and that Jorge Morales (06CR272) received a 28-year sentence for a "straight drug conspiracy case").

Similarly, the court further asked the government to compare Sanchez's relative culpability with that of his co-defendants, including Soto, Jose Luis Sanchez, and Eddie Pagan. AA187. The government informed the court that these three co-defendants, unlike Sanchez, neither served as the leader of the high-volume drug conspiracy nor participated continuously in the conspiracy from start to finish. AA191-93. Thus, there is no legitimate basis for Sanchez's claim that the court failed to consider his sentence in relation to his co-defendants or other similarly situated defendants in other Connecticut drug cases.

c. Explanation of Reasons

To the extent Sanchez asserts that the district court erred by inadequately explaining its reasoning for rejecting these claims, this argument is foreclosed by the established law of this Court. The sentencing judge is not required to precisely identify the factors on the record or address specific arguments about how the factors should be implemented. *Fernandez*, 443 F.3d at 29; *Rita*, 551 U.S. at 356-59 (affirming a brief statement of reasons by a district judge who refused downward departure in which judge noted that the sentencing range was "not inappropriate"). There is no "rigorous requirement of specific articulation

by the sentencing judge." *Crosby*, 397 F.3d at 113. Rather, "[a]s long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance," this Court "will accept that the requisite consideration has occurred." *Fleming*, 397 F.3d at 100.

Notably, the record below is bereft of a contemporaneous objection from Sanchez to support his present claim that the court inadequately explained its reasons for the sentence. This Court reviews for plain error where, as here, a defendant fails to preserve an objection to the procedural reasonableness of a sentence. *See United States v. Verkhoglyad*, 516 F.3d 122, 128 (2d Cir. 2008); *United States v. Villafuerte*, 502 F.3d 204, 208 (2d Cir. 2007). To show plain error, a defendant must demonstrate "(1) error (2) that is plain and (3) affects substantial rights." *Villafuerte*, 502 F.3d at 209. Even then, the Court will exercise its discretion to correct the error "only if the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings." *Id.* (internal quotation marks omitted). Here, because the defendant's challenge to the procedural reasonableness of the sentence is unpreserved, *see Verkhoglyad*, 516 F.3d at 128, there is simply no such error, plain or otherwise, that caused fundamental unfairness in Sanchez's sentencing.

In sum, the sentencing record reveals that the district court complied with this Court's procedural dictates when imposing Sanchez's sentence. The court made the requisite

findings based on the trial record, correctly calculated the Guidelines range, and treated the Guidelines as advisory. *See Cavera*, 550 F.3d at 190. The court considered all of the § 3553(a) factors thoroughly and fully explained why it elected to impose a non-Guideline sentence on Sanchez below the bottom of the advisory range of 360 months to life imprisonment. In short, Sanchez's sentence was procedurally reasonable.

2. Sanchez's sentence was substantively reasonable.

Next, Sanchez claims that the 330-month sentence, which is thirty months lower than the bottom of the advisory Guideline range of 360 months to life imprisonment, is substantively unreasonable. In support of this contention, Sanchez recycles the same basic arguments used to challenge the sentence as procedurally unreasonable, primarily the purported absence of a factual basis to support the court's findings on the attributable drug quantity and the enhancement for leadership role. Sanchez further faults the court for relying on the testimony of cooperating defendants in making its findings.

None of these claims has merit. As discussed at length, *supra*, the court had a solid factual basis for making findings on the attributable drug quantity and the leadership-role enhancement. In fact, Sanchez stipulated that he was the leader of the drug conspiracy, thereby removing that issue from dispute. AA151. *See, e.g., United States v. Kang*, 225 F.3d 260, 262 (2d Cir. 2000) (finding

that "there was no need for the district court to state its findings separately from its ruling" when facts sentencing enhancement were "not disputed"). Moreover, in making such findings, particularly with respect to the attributable drug quantity, it is well within the court's purview to credit the statements of cooperating witness who testify under oath, as Varela, Jackson, Estrella, and Banks did at trial. *See*, *e.g.*, *United States v. Beverly*, 5 F.3d 633, 642 (2d Cir. 1993) (upholding sentencing finding and explaining that "factual findings based on the testimony of witnesses [are] entitled to special deference" because "assessing the credibility of witnesses is distinctly the province of the district court"). *Cf. United States v. Florez*, 447 F.3d 145, 155 (2d Cir. 1990) (holding that testimony of a single accomplice is sufficient to sustain a conviction so long as the "testimony is not incredible on its face and is capable of establishing guilt beyond a reasonable doubt").

Moreover, the court's 330-month, below-Guideline sentence was warranted in light of the seriousness and longevity of Sanchez's criminal conduct for more than seven continuous years. As the court recognized, Sanchez was "engaged in the distribution of drugs in large quantities over a long period time with lots of people," AA207, and "[had] poisoned the streets of Bridgeport and the lives of many, many people." AA209. As the court also found, Sanchez could have surpassed the threshold of 150 kilograms of cocaine – the highest quantity of cocaine provided for in U.S.S.G. § 2D1.1(c) – based on his involvement in the drug conspiracy within 18 months alone. AA162.

In sum, while the 330-month sentence of incarceration is certainly substantial, it nevertheless remains thirty months less than the bottom of the advisory Guideline range of 360 months of imprisonment, thereby "fall[ing] comfortably within the broad range of sentences that would be reasonable in the[se] particular circumstances." *Fernandez*, 443 F.3d at 27. Thus, this is not a case where "the sentence imposed was shockingly high, shockingly low, or otherwise unsupportable as a matter of law." *Rigas*, 583 F.3d at 123. Accordingly, because the court sensibly applied the § 3553(a) factors, Sanchez's sentence is substantively reasonable.

II. The district court's finding of the drug quantity attributable to Soto was not clearly erroneous.

A. Relevant facts

1. Guilty Verdict and the PSR

On October 1, 2009, a jury found Soto guilty of conspiracy to possess with intent to distribute five kilograms or more of cocaine (Count One) and 50 grams or more of crack cocaine (Count Two), in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. GA18, 143-44.

Soto's PSR established a CHC VI and a base offense level of 38 predicated on more than 4.5 kilograms of crack cocaine. O-PSR ¶¶14, 20. The PSR also noted that the evidence indicated that Soto had possessed with intent to distribute, and distributed, an attributable quantity of 50

and 150 kilograms of cocaine. *Id*. The PSR further reasoned that even if only one-eighth of each kilogram of cocaine (*i.e.*, 125 grams) was converted to crack, the threshold amount of 4.5 kilograms of crack cocaine would be easily met. *Id*. ¶20. With a CHC VI and a base offense level of 38, Soto's advisory Guideline range was 360 months to life imprisonment. *Id*. ¶60. The PSR also noted that Soto had been incarcerated for three separate periods of time between 2002 and 2009: June 3, 2002, to September 2, 2003 (*i.e.*, 15 months); June 8, 2004, to November 22, 2004 (*i.e.*, 5.5 months); and December 20, 2006, to June 22, 2007 (*i.e.*, 6 months). *Id*. ¶¶51, 52, 54.

2. Sentencing and the quantity dispute

In his sentencing memorandum, Soto objected for the first time to the PSR's findings. First, Soto contended that his base offense level should be 32 predicated on an attributable drug quantity of 5 to 15 kilograms of powder cocaine. OA11. Second, Soto objected that he should be considered a CHC IV instead of CHC VI. *Id*.

In a supplemental sentencing memorandum, the government responded that if the Guideline calculation were based solely on powder cocaine instead of crack cocaine as argued by Soto, his base offense level should be 36, not 32, under U.S.S.G. § 2D1.1(c)(2), because 50 to 150 kilograms of cocaine were reasonably foreseeable to him. GA147. The government further stated that a base offense level of 36 predicated entirely on powder cocaine, rather than crack cocaine, would be consistent with the

joint stipulation filed by the government before Sanchez's sentencing. *Id*.

At the sentencing hearing, the district court began by noting "its obligation to seek to impose a fair and just sentence on Mr. Soto . . . [and] consider all the factors that Congress has identified as necessary to be considered and weighed." OA17. The court then asked Soto whether he had reviewed the PSR and addendum, and discussed it with his counsel. *Id*. Soto responded in the affirmative. *Id*.

The court then entertained argument on what should be Soto's attributable drug quantity. Through counsel, Soto contended that contrary to the PSR, he had been involved in the drug conspiracy for only three years beginning in January 1, 2006, to February 4, 2009, and that he had been incarcerated for seven of those months. OA19. Based on this premise, Soto asserted that his attributable quantity should only be the ten to twelve kilograms of cocaine which the trial evidence substantiated he had personally distributed during this limited time period. OA21, 41.

In contrast, the government argued that Soto was involved in the conspiracy as early as January 2005, if not as early as 2003, and that he was actively and continuously involved in distributing cocaine with Sanchez and their co-conspirators except for his periods of incarceration. OA26-27. Equally important, the government countered that the pertinent inquiry was not the drug quantity that Soto had personally distributed, but the drug quantity that was reasonably foreseeable to him based on his involvement in the conspiracy. *Id*. The government further argued, as it

did at the Sanchez sentencing, that the minimum amount of cocaine transacted by the conspiracy on a weekly basis between January 1, 2002, until February 4, 2009, was one kilogram, and that between 2003 and 2006, the trial evidence corroborated that the conspiracy was distributing as much as five to six kilograms on a weekly basis. OA27.

The court found that based on the trial evidence, at least 50 kilograms of cocaine were reasonably foreseeable to Soto as relevant conduct pursuant to U.S.S.G. § 1B1.3. OA51. The court further found that this quantity was "a very conservative conclusion as to the quantity of cocaine reasonably attributed [to Soto]," and was "supported by . . . a preponderance of the evidence." *Id*.

In making its finding, the court stated that the court's obligation was to find "[w]hat quantity was reasonably foreseeable to [Soto] in connection with the conspiracy." OA48. For purposes of this finding, the court accepted Soto's dubious premise that he was involved in the drug conspiracy for only two years and five months (*i.e.*, approximately 124 weeks). OA29-30, 49. Nevertheless, the court recognized that "[a]ll the evidence [the court] heard at trial would support . . . a very conservative inference that in the latter half of the conspiracy," Sanchez, Soto, and their co-conspirators were distributing "at least one kilogram . . . a week," and that Soto himself was personally involved in distributing two to three kilograms a week at times. OA29. Thus, the court found that because Soto participated for at least 124 weeks in a conspiracy that was distributing at one kilogram per week,

his attributable quantity was well within the 50 to 150 kilogram range. OA29-30.

As further factual support for this finding, the court relied on three different sets of evidence adduced at trial. First, the court cited the trial testimony substantiating Soto's involvement in receiving the kilogram-sized shipments of cocaine for Sanchez and Soto's awareness that his co-conspirators were doing likewise. OA50 (finding that it "is reasonable to conclude if [Soto] signed for one delivery, he's aware that Mr. Sanchez is getting other deliveries"). Second, the court found that, on several occasions, Soto had traveled to Waterbury, Connecticut, and Massachusetts with large amounts of money, provided by Sanchez, to purchase cocaine for the conspiracy. OA50-51. Third, the court found that in addition to purchasing cocaine and receiving shipments of cocaine for Sanchez, Soto was actively involved in converting the cocaine into crack cocaine and packaging the drugs for street sale during this time period. OA51. Accordingly, the court concluded that "50 kilograms of powder cocaine is a very conservative conclusion as to the quantity of cocaine reasonably attribut[able] to Mr. Soto" because he had "received, converted, packaged, [and] redistributed" large quantities of cocaine with Sanchez for at least 124 weeks during a drug conspiracy that spanned more than seven years. OA51.

In light of this finding, the court found Soto's base offense level to be 36. OA52. With a CHC V, the court stated that Soto's Guideline range was 292 to 365 months of imprisonment. OA54, 73. Ultimately, the court imposed

a non-Guideline sentence of 228 months of imprisonment in order to reflect its view that a CHC V over-represented Soto's criminal history. OA80-81.

B. Governing law and standard of review

1. Quantity guidelines

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

> (A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity . . . .

U.S.S.G. § 1B1.3(a)(1).

In a drug case, this Guideline requires a determination of the quantity of drugs attributable to the defendant, and in the case of a drug conspiracy, the quantity reasonably foreseeable to him. *United States v. Jones*, 531 F.3d 163, 174-75 (2d Cir. 2008); *United States v. Payne*, 591 F.3d 46, 70 (2d Cir.), *cert. denied*, 131 S. Ct. 74 (2010). "The quantity of drugs attributable to a defendant is a question of fact" that the government must prove by a preponderance of the evidence. *Jones*, 531 F.3d at 175. This Court will sustain such a finding as long as the "the evidence – direct or circumstantial – supports a district court's preponderance determination as to drug quantity." *Id*. "[A] sentencing court may rely on any information it knows about, including evidence that would not be admissible at trial, as long as it is relying on specific evidence – *e.g.*, drug records, admissions or live testimony." *United States v. McLean*, 287 F.3d 127, 133 (2d Cir. 2002) (internal citations and quotation marks omitted) (citing, *inter alia*, U.S.S.G. § 6A1.3)

The Guidelines provide that, in a drug case,

> [w]here there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance. In making this determination, the court may consider, for example, the price generally obtained for the controlled substance, financial or other records, [and] similar transactions in controlled substances by the defendant . . . .

U.S.S.G. § 2D1.1, Application Note 12. *See also Jones*, 531 F.3d at 175.

Quantity estimates must be based on "specific evidence." *United States v. Shonubi*, 103 F.3d 1085, 1087 (2d Cir. 1997). The "specific evidence" requirement, however, does not establish a higher standard of proof than a preponderance of the evidence. *United States v. Cordoba-Murgas*, 233 F.3d 704, 708 (2d Cir. 2000); *see also Jones*, 531 F.3d at 176. Moreover, in approximating quantity in a drug case, "the court has broad discretion to consider all relevant information." *United States v. Blount*, 291 F.3d 201, 215-16 (2d Cir. 2002).

In exercising this broad discretion, courts have considered a wide variety of information in estimating drug quantity. *See United States v. Richards*, 302 F.3d 58, 70 (2d Cir. 2002) (amount of drugs received by defendant and foreseeable amounts received by co-conspirators); *Blount*, 291 F.3d at 215-16 (cooperating witness testimony regarding amounts of drugs purchased and sold over time); *McLean*, 287 F.3d at 133 (amount of drugs seized from defendant and from co-conspirators, and statements regarding drug quantity from buyers); *United States v. Cousineau*, 929 F.2d 64, 67 (2d Cir. 1991) (determination of quantity based on testimony of witnesses as to actual purchases from defendant); *United States v. Vazzano*, 906 F.2d 879, 884 (2d Cir. 1990) (quantity based on amount of cocaine defendant told informant he had sold and amount he told informant he possessed).

Moreover, "the quantity of drugs attributed to a defendant need not be foreseeable to him when he personally participates, in a direct way, in a jointly undertaken drug transaction." *United States v. Chalarca*, 95 F.3d 239, 243 (2d Cir. 1996) (finding that defendant should be responsible for entire drug quantity when she participated directly in drug conspiracy); *see United States v. Diaz*, 176 F.3d 52, 119-20 (2d Cir. 1999) (holding defendant responsible for drug quantity due to direct participation in running drug block even after he was incarcerated).

Even in the absence of evidence demonstrating that a defendant directly participates in jointly undertaken illegal conduct, "[i]t is well established that a district court may consider the relevant conduct of co-conspirators when sentencing a defendant." *United States v. Johnson*, 378 F.3d. 230, 238 (2d Cir. 2004). "A defendant convicted for a 'jointly undertaken criminal activity' such as . . . [a] drug trafficking conspiracy, may be held responsible for 'all reasonably foreseeable acts' of others in furtherance of the conspiracy," *United States v. Snow*, 462 F.3d 55, 72 (2d Cir. 2006) (quoting U.S.S.G. § 1B1.3(a)(1)(B)), provided that the court makes particularized findings that the acts committed are within the scope of the defendant's agreement with his co-conspirators and that the acts of the co-conspirators are reasonably foreseeable to the defendant, *United States v. Studley*, 47 F.3d 569, 574 (2d Cir. 1995); *see also Snow*, 462 F.3d at 72 ("The defendant need not have actual knowledge of the exact quantity of narcotics involved in the entire conspiracy; rather, it is sufficient if he could reasonably have foreseen the quantity

involved."). The ultimate question is "whether the conspiracy-wide quantity was within the scope of the criminal activity" to which the defendant agreed, and "whether the activity in question was foreseeable to the defendant." *Id.*

2. Standard of review

As discussed *supra*, a district court must begin sentencing by calculating the applicable Guideline range. *See Cavera*, 550 F.3d at 189. "The Guidelines provide the 'starting point and the initial benchmark' for sentencing, and district courts must 'remain cognizant of them throughout the sentencing process.'" *Id.* (internal citations omitted) (quoting *Gall*, 552 U.S. at 49, 50 & n.6). After giving both parties an opportunity to be heard, the district court should then consider all of the factors under 18 U.S.C. § 3553(a). *See Gall*, 552 U.S. at 49-50. This Court "presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the [§ 3553(a)] factors." *Fernandez*, 443 F.3d at 30.

A district court's determination of drug quantity is a finding of fact subject only to clear-error review. *See Jones*, 531 F.3d at 176; *United States v. Markle*, 628 F.3d 58, 63 (2d Cir. 2010). "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 conviction that a mistake has been made." *Id.* (quoting *United States v. Guang*, 511 F.3d 110, 122 (2d Cir. 2007)).

C. Discussion

Soto contends that the district court incorrectly determined his Guideline range to be 292-365 months because it erroneously found that Soto was responsible for distributing at least 50 kilograms of cocaine. Soto further asserts that the court, in making this quantity determination, failed to rely upon specific evidence and to support its finding that Soto participated in the drug conspiracy led by Sanchez. These claims have no merit. The district court carefully reviewed the trial record and concluded, based on a preponderance of the evidence, that Soto was responsible for the distribution of *at least* 50 kilograms of cocaine.

The Guidelines provide that where "the amount [of drugs] seized does not reflect the scale of the offense," a district court may approximate the quantity for which a particular defendant is responsible. U.S.S.G. § 2D1.1 Application Note 12; *Jones*, 531 F.3d at 175. Here, the record reflects the district court's studied determination that at least 50 kilograms of cocaine were reasonably attributable to Soto based on his active participation in the drug conspiracy. As it did at the Sanchez sentencing, the district court stated that the relevant inquiry was "[w]hat quantity was reasonably foreseeable to [Soto] in connection with the conspiracy." OA48. Moreover, to be as conservative as possible, the court accepted Soto's questionable premise that he was involved in the drug conspiracy for only two years and five months (i.e.,

approximately 124 weeks).[3] OA29-30, 49. Based on the evidence adduced at Sanchez's and Soto's trial, the court found that "[a]ll the evidence [the court] heard at trial would support . . .a very conservative inference that in the latter half of the conspiracy [from late 2006 onward]," Sanchez, Soto, and their co-conspirators were distributing "at least one kilogram . . . a week," and that Soto himself was personally involved in distributing two to three kilograms a week during that time period. OA29. In light of Soto's participation for at least 124 weeks at one kilogram per week, the court reasonably found that his attributable quantity was well within the 50 to 150 kilogram range. OA29-30.

The trial evidence wholly supports the court's finding. First, there was ample evidence that Soto was involved in receiving and obtaining kilogram-sized quantities of cocaine for Sanchez. OA50 (court's finding that it "is reasonable to conclude if [Soto] signed for one delivery, he's aware that Mr. Sanchez is getting other deliveries"). As did co-defendants Varela, Banks, Estrella, and Brown, Soto received kilogram-sized shipments of cocaine on Sanchez's behalf, including a shipment in 2008 of two kilograms at Soto's home on Cleveland Street in Bridgeport, GA69-71, and a planned shipment on June 20, 2008, of another two kilograms of cocaine at 400 Atlantic Street in Bridgeport, GA26-31. This evidence corroborated that the drug conspiracy was transacting, at a minimum,

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[3] The government had argued that Soto had been involved in the drug conspiracy since at least January 2005, if not earlier. OA26-27.

one kilogram of cocaine per week between January 1, 2006, and February 4, 2009. A-PSR ¶¶20, 22, 23; O-PSR ¶¶9, 11.

Second, the court found that, on several occasions, Soto had traveled to Waterbury, Connecticut, and Massachusetts with large amounts of money, provided by Sanchez, to purchase kilograms of cocaine for the conspiracy. OA50-51. Varela testified at trial that he had traveled with Sanchez and Soto in the summer of 2007 to obtain three kilograms of cocaine from a supplier in Massachusetts. GA77-82, 84. Furthermore, Banks testified that on at least three to four separate occasions, he had witnessed Sanchez personally provide Soto with approximately $20,000.00 in cash, so Soto could purchase kilograms of cocaine from a supplier in Waterbury, Connecticut. GA123-28. This testimony further substantiated the benchmark amount of at least one kilogram of cocaine transacted per week between 2006 and 2009.

Third, the court found that in addition to purchasing cocaine and receiving shipments of cocaine for Sanchez, Soto was actively involved in converting the cocaine into crack cocaine and packaging the drugs for street sale during this time period. OA51; GA63-71 (testimony of Varela describing Soto's involvement in processing and packaging drugs for drug conspiracy). Soto's involvement in the drug conspiracy was further substantiated when officers seized the following items from his home when he was arrested on February 4, 2009: $1,940.00 in cash; a digital scale used to weigh narcotics; baking soda used to

convert powder cocaine into crack cocaine; and acetone used to re-compress cocaine in a process known as "re-rocking." O-PSR ¶13.

Notably, in their plea agreements, four of Sanchez's and Soto's close associates in the drug conspiracy (Varela, Estrella, Banks, and Brown) all stipulated in their plea agreements that they were responsible for distributing at least 50 kilograms or more of cocaine as relevant conduct pursuant to U.S.S.G. § 1B1.3. GA156 (Varela); GA164 (Estrella); GA172 (Banks); GA179 Brown).

While Soto contends that drug quantities which he did not personally transact should not be attributed to him, that argument is foreclosed by the established conspiracy law of this Court. A participant in a drug conspiracy is responsible for the quantity that is "reasonably foreseeable" as part of the conspiracy. *See, e.g.*, *Payne*, 591 F.3d at 70. Similarly, "[t]he defendant need not have actual knowledge of the exact quantity of narcotics involved in the entire conspiracy; rather, it is sufficient if he could reasonably have foreseen the quantity involved." *Snow*, 462 F.3d at 72. Here, as discussed *supra*, Soto actively participated with Sanchez, Varela, Banks, and others in committing illegal acts that formed the core of the drug conspiracy, such as receiving and obtaining kilograms of cocaine, converting cocaine into crack cocaine, and packaging the narcotics for street sale. The government wiretap further established a relationship of trust between Sanchez and Soto. GA136-38.

In sum, as demonstrated above, the district court applied the standard articulated in *Payne* and *Snow* carefully and thoroughly, and identified specific evidence to support its admittedly *conservative* estimate of the drug quantity attributable to Soto due to his participation in the drug conspiracy. Accordingly, it was not clearly erroneous for the court to conclude, by a preponderance of the evidence, that 50 kilograms of cocaine were reasonably foreseeable to Soto.

Conclusion

For the foregoing reasons, the district court's sentences of Sanchez and Soto should be affirmed.

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Respectfully submitted,

DAVID B. FEIN
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

HAROLD H. CHEN
ASSISTANT U.S. ATTORNEY

SANDRA S. GLOVER
Assistant United States Attorney (of counsel)

CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,130 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

HAROLD H. CHEN
ASSISTANT U.S. ATTORNEY

ADDENDUM

18 U.S.C. § 3553. Imposition of a sentence

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

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

(2) the need for the sentence imposed--

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

(B) to afford adequate deterrence to criminal conduct;

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

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

(3) the kinds of sentences available;

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

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

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

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

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

(5) any pertinent policy statement--

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

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

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

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

* * *