06-0216-cr(L)

To Be Argued By:
JAMES K. FILAN, JR.

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 06-0216-cr (L)
06-1899-cr (CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

OSCAR GONZALEZ, HUGO JORGE,
Defendants,

JESUS CONTRERAS, ADOLFO PAULINO,
Defendant-Appellants.

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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

STATUTES

RULES

GUIDELINES

STATEMENT OF JURISDICTION

The district court (Christopher F. Droney, U.S. District Judge) had subject matter jurisdiction under 18 U.S.C. § 3231. The district court sentenced Paulino on April 6, 2006 (JA10, 12), and a final judgment entered on April 20, 2006 (JA12, 159-61). Paulino filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on April 13, 2006. (JA12, 162). The district court sentenced Contreras on January 4, 2006 (GA17), and a final judgment entered on January 12, 2006 (GA17). Contreras filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on January 12, 2006. (GA17, 238). 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

1. Whether the district court reasonably declined to award Paulino a reduction for mitigating role under U.S.S.G. § 3B1.2.

2. Whether the district court reasonably considered the various factors set forth in 18 U.S.C. § 3553(a) in imposing on Paulino a within-Guidelines sentence.

3. Whether the district court abused its discretion by declining to strike Contreras's challenges for cause or for refusing to empanel a new jury.

4. Whether the district court properly considered acquitted conduct in sentencing Contreras.

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Preliminary Statement

Defendants-appellants Adolfo Paulino and Jesus Contreras were part of a large-scale drug-trafficking organization that conspired to possess hundreds of pounds of cocaine that it planned to distribute in the Greater New

York City area. Paulino and two co-defendants entered guilty pleas before the district court (Christopher F. Droney, U.S.D.J.). At the time of sentencing, the court determined that Paulino was eligible for a safety-valve reduction in his sentence but was not entitled to a minor role adjustment under U.S.S.G. § 3B1.2. The court sentenced Paulino on April 6, 2006, to 108 months of imprisonment and five years of supervised release.

On appeal, Paulino raises two issues. First, he claims that the court's refusal to award him a reduction for mitigating role made the sentence procedurally unreasonable; that is, that the court improperly calculated the sentencing guidelines. Second, he contends that the sentence was substantively unreasonable. For the reasons that follow, his claims should be rejected, and the judgment should be affirmed.

Another defendant, Jesus Contreras, was convicted after a jury trial. The jury found that Contreras had conspired to distribute and distributed cocaine but also found that the Government failed to prove beyond a reasonable doubt that Contreras knew that the transaction involved five kilograms or more of cocaine. At sentencing, the court found by a preponderance of the evidence that Contreras had known that the transaction involved 120 kilograms of cocaine. The district court sentenced Contreras on January 4, 2006, to 78 months of imprisonment and three years of supervised release.

In his appeal, Contreras raises two issues. First, he claims that the court denied his due process rights to a fair

and impartial jury by failing to strike certain jurors who had heard comments made by a prospective juror who was not selected to sit on the jury. Second, he claims that the court improperly found, by a preponderance of the evidence, that he was responsible for 120 kilograms of cocaine after the jury found that the Government had failed to prove that same fact beyond a reasonable doubt.

Statement of the Case

On December 18, 2002, a grand jury in the District of Connecticut returned an indictment against four defendants involved with the importation and distribution of 120 kilograms of cocaine in the Connecticut and Greater New York area.[1] (JA4). A superseding indictment which named a previously unidentified John Doe (Contreras) was returned by the same grand jury on June 18, 2003. (JA13-14). Count One charged Adolfo Paulino, Oscar Gonzalez, Jesus Contreras and Hugo Jorge with unlawfully conspiring to possess with intent to distribute five kilograms or more of cocaine, in violation

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[1] Paulino filed a joint appendix. Contreras and the Government have each prepared appendices. References are as follows:

Joint Appendix ("JA ___.")

Contreras Appendix ("CA ___.")

Government Appendix ("GA ___.")

Paulino Presentence Report ("PSR ¶___.")

of 21 U.S.C. § 846 and 21 U.S.C. § 841(a)(1) and (b)(1)(A). (JA13). Count Two charged Paulino and Contreras with possessing with intent to distribute five kilograms or more of cocaine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A). (JA14).

On December 4, 2003, Paulino entered a guilty plea to Count One of the Superseding Indictment and Count One of an Information charging him with possession of narcotics with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A). (JA7; GA20).

On October 20, 2005, the court began a sentencing hearing that continued on April 6, 2006, at which time the court imposed a 108-month term of imprisonment and a five-year term of supervised release. (JA10, 12, 138-43). Judgment entered on April 20, 2006. (JA12, 159-61). On April 13, 2006, Paulino filed a timely notice of appeal. (JA12, 162).

On May 19, 2004, a jury was selected for the Contreras trial on Counts One and Two of the Superseding Indictment. (GA11-12). Trial commenced on June 14, 2004 and, on June 21, 2004, Contreras was convicted on both counts. (GA12). On January 4, 2006, Contreras was sentenced to 78 months in prison and a three year term of supervised release. (GA17). Judgment entered on January 12, 2006 (GA17; 18; 234; 237).[2] A timely notice of appeal was filed on January 6, 2006. (GA238).

[2] An amended judgment was entered on July 7, 2006 correcting a typographical error in the original judgment. (GA237).

STATEMENT OF FACTS

A. Overview of the Investigation

The facts in this case are largely undisputed. During Paulino's sentencing, in the absence of objection from the parties, (JA99-101), the district court adopted the factual statements in the Presentence Report (JA128). Those findings, in conjunction with other undisputed facts, reveal the following:

During the late Summer and early Fall of 2001, a 220-kilogram shipment of cocaine was intercepted by law enforcement in Central America. PSR ¶7. After the cocaine was intercepted, Drug Enforcement Administration ("DEA") agents acting in an undercover capacity made arrangements to deliver a portion of this cocaine to the ultimate purchasers. PSR ¶¶7-8.

On October 16, 2001, as part of the conspiracy, members of the drug trafficking organization including, among others, Carlos Aquino, Oscar Gonzalez and Hugo Jorge, traveled from New York City to Norwalk, Connecticut, to deliver a "load" car, that is, the car into which the undercover DEA agent agreed to place 120 kilograms of cocaine. PSR ¶10. The load car was driven by Jorge and Gonzalez was a passenger. *Id*. Aquino traveled to Connecticut in another automobile with at least two other conspirators. PSR ¶11. The transaction was being conducted on behalf of Oswaldo Vargas, a/k/a "Chibo," the apparent head of the drug trafficking organization in the New York area. (JA154).

After extensive discussions between Gonzalez, Jorge and other co-conspirators and the undercover agent, Gonzalez and Jorge agreed to leave the load car overnight in Connecticut so that DEA agents could place the cocaine in the car. PSR ¶¶10-12. Arrangements were made for other members of the drug trafficking organization to pick up the car containing 120 kilograms of cocaine on October 17, 2001. PSR ¶¶12, 14-15.

On the evening of October 16, 2001, after the load car had been turned over to the undercover agent, DEA agents installed a court-authorized "kill switch" in the car. PSR ¶13. The purpose of the kill switch was to allow the agents to remotely disable the car after the drug traffickers picked up the cocaine-packed car. PSR ¶¶13, 16. The agents also loaded ten kilograms of cocaine into the car, along with fake packages designed to appear to be an additional 110 kilograms. (JA79; CA69).

On October 17, 2001, members of the drug trafficking organization, including Paulino, had consensually monitored telephone conversations with undercover agents regarding the time, place and manner in which the load car and its contents would be retrieved. (JA148-51). An unindicted co-conspirator explained in a consensually monitored telephone conversation that two people, later identified as Paulino and Contreras, would be sent to pick up the load car at an agreed-upon location. *Id.* Paulino explained what he and Contreras would be wearing at the time the car would be picked up. *Id.*

On October 17, 2001, agents videotaped Paulino and Contreras for an extended period of time waiting at the pickup location. PSR ¶¶14-16. The undercover agent then drove the load car to the pickup location where he met with Paulino and Contreras and gave the keys to the load car to Paulino. PSR ¶14. At the time the load car was transferred, the undercover agent told Paulino and Contreras that if they were going to check the merchandise in the trunk they should do it elsewhere. (JA49). In addition to being videotaped, this meeting was also audiotaped. In that conversation, it was mentioned that 120 kilograms of cocaine were in the car's trunk. (JA45; PSR ¶22).

After that meeting, Contreras drove Paulino to the load car where Paulino got in and drove out of the parking lot onto Route 1/Connecticut Avenue in Norwalk. Contreras followed in his car. PSR ¶¶15-16. At the first traffic light at which the load car stopped, agents activated the kill switch, thereby disabling it. PSR ¶16. When the load car was first disabled Contreras used his car to push it out of the intersection. *Id.* Minutes later, uniformed members of the Norwalk Police Department, who were acting at the direction of the DEA, approached the load car pretending to make a routine check on a stalled car. *Id.* Paulino got out of the car and spoke with the Norwalk police officers. *Id.*

Contreras drove away on Connecticut Avenue and turned into the parking lot of a Kentucky Fried Chicken approximately ½ mile from where the load car was disabled. PSR ¶16. Contreras then got out of his car and

walked to the trunk, which he opened, took out a shirt and changed his clothing. Contreras then walked away from his car through the back lot of a business and onto Connecticut Avenue in the direction of the stalled load car. An agent observed Contreras walk close to the intersection where the load car was stalled, look over a rise in the highway and then walk back to his car.

Contreras got back into his car and drove up Connecticut Avenue and parked across the street from the stalled car. Contreras briefly entered a store and then returned to his car. Contreras then drove up Connecticut Avenue and drove slowly past the stalled load car. PSR ¶16. Shortly thereafter, a towing company removed the load car. Paulino then walked south on Connecticut Avenue where he was observed talking on a cellular telephone and meeting with Contreras. Afterward, Contreras drove his car onto Interstate 95 and traveled southbound. PSR ¶16.

The day after the load car broke down, Chibo made arrangements for a tow truck to travel to Connecticut to pick up the car. (JA155, 157). The tow truck operator picked Paulino up and the two traveled to Connecticut to pick up the load car, but they were unable to do so. (JA155).

Although the transaction charged in the indictment ended in October 2001, the investigation into the persons involved continued. PSR ¶17. In May 2003, an arrest warrant for Paulino was executed in New York. At the time of his arrest Paulino consented to a search of his

apartment and law enforcement agents found in a locked hall closet approximately 557 grams of cocaine that Paulino admitted belonged to him. PSR ¶20. That seizure formed the basis for Count One of the Information, which charged that Paulino possessed with intent to distribute the cocaine seized from his apartment.

Contreras was arrested in Puerto Rico on October 29, 2003. (GA5). He was presented in federal court in Connecticut on November 24, 2003 and detained pending trial on December 23, 2003. (GA5-6).

B. The Indictment

On June 18, 2003, a grand jury returned a Superseding Indictment. Count One charged Paulino, Gonzalez, Contreras and Jorge with unlawfully conspiring to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. § 846 and 21 U.S.C. § 841(a)(1) and (b)(1)(A). (JA13). Count Two charged Paulino and Contreras with possessing with intent to distribute five kilograms or more of cocaine in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A). (JA 14). The case was assigned to Judge Droney.

C. Paulino's Guilty Plea

On December 4, 2003, Paulino entered a guilty plea to Count One of the Superseding Indictment and Count One of an Information charging him with possessing with intent to distribute a detectable amount of cocaine in violation of 21 U.S.C. § 841(a)(1). (JA7; GA20).

D. Imposition of Paulino's Sentence

At Paulino's sentencing hearings on October 20, 2005, and April 6, 2006, the court primarily addressed two issues: Paulino's eligibility for the safety-valve provisions of U.S.S.G. § 5C1.2, and his request for a mitigating role reduction under U.S.S.G. § 3B1.2.[3]

The court first found, over the Government's objection, that Paulino was safety-valve eligible. Based on that finding, which is not challenged on appeal, the court reduced Paulino's base offense level by two points under U.S.S.G. § 2E1.1(b)(6). (JA124). Thus, after safety-valve

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[3] The PSR found that the transaction in this case involved 120 kilograms of cocaine. Paulino had no Criminal History points, which placed him in Criminal History Category I. PSR ¶33. The Drug Quantity Table, Section 2D1.1 of the guidelines, placed him at Level 36, for at least 50 kilograms but less than 150 kilograms of cocaine. PSR ¶25. The PSR gave Paulino two levels for acceptance of responsibility, PSR ¶31, and Paulino claimed that because he could have received three levels using the Guidelines in affect at the time of his conduct, 2002, the 2002 Guidelines should apply. As the use of the 2002 Guidelines did not effect any other aspect of the sentencing, the Government did not object to their use and the award of three levels for acceptance of responsibility. (JA100-102). Thus, while the PSR calculates Paulino's Sentencing Guidelines range as Criminal History Category I, Offense Level 34, with a resulting range of 151 to 188 months, the actual Adjusted Offense Level based on the additional point for acceptance is Level 33, with a resulting range of 135 to 168 months. It is from this point that the district court would calculate the final Guidelines.

but prior to any mitigating role reduction, the court reduced Paulino's base offense level from 33 to 31 and his resulting Guideline range from 135 to 168 months to 108 to 135 months. (JA130).

The court then denied Paulino's motion for a mitigating role reduction. It held as follows:

> As to the argument that Mr. Paulino should receive a mitigating role adjustment, the Court does not find that such an adjustment is warranted. I have analyzed Mr. Paulino's relationship to the other participants, the importance of his actions to the success of the venture, and his awareness of the nature and scope of the criminal enterprise. Mr. Paulino was not a minimal participant in this scheme, defined in the guidelines as a person who is plainly among the least culpable of those involved in the conduct of a group. Neither was Mr. Paulino a minor participant, a defendant who is less culpable than most other participants.
>
> Firstly, Mr. Paulino was not less culpable than most of his co-defendants in the charged conspiracy, Messrs. Gonzalez, Jorge, and Contreras. While, Mr. Paulino may have been less culpable than some other uncharged co-conspirators in this drug operation, that fact is insufficient to warrant a minor role reduction as [Mr.] Paulino was also not substantially less culpable than the average drug courier participant

> in a similar scheme. And I'm quoting from *United States v. Carpenter*, a Second Circuit opinion from 2001.
>
> Mr. Paulino was responsible for making arrangements with the undercover agent to pick up the cocaine and spoke to him a number of times. He was responsible for picking up Jesus Contreras to participate in the drug pick-up. He drove the load car himself. He directed Mr. Contreras' actions. And later returned to Connecticut with a tow truck in an attempt to pick up the load car after it was disabled.
>
> The Court denies Mr. Paulino's request for a mitigating role adjustment and will not order any amendments to the PSR on that basis.

(JA124-25).

The court then imposed a 108-month term of imprisonment, to be followed by a five-year term of supervised release. (JA10, 12, 138-143). Paulino filed a timely notice of appeal on April 13, 2006. (JA12, 162).

E. Contreras's Trial and Sentencing

On May 19, 2004, a jury was selected for the Contreras trial on Counts One and Two of the Superseding Indictment. (GA10). Trial commenced on June 14, 2004 and, on June 21, 2004, Contreras was convicted on both counts. (GA12). On January 4, 2006, Contreras was

sentenced to 78 months in prison and a three year term of supervised release. (GA229-32). He filed a timely notice of appeal on January 12, 2006. (GA238).

SUMMARY OF ARGUMENT

I. The district court properly determined that Paulino was not entitled to a reduction for mitigating role. The court considered numerous factors, including Paulino's relationship to the other participants in the charged conspiracy, his importance to the venture, and his awareness of the scope and nature of the conspiracy. Relying on these comparisons, as well as Paulino's own actions, the court correctly found that he was not a minor player. Accordingly, the sentence was procedurally correct.

II. The sentence imposed on Paulino, at the bottom of the already reduced Guidelines range, also was substantively correct. In imposing sentence, the court considered all of the factors set forth in 18 U.S.C. § 3553(a). The court imposed a sentence that reflected the nature and circumstances of the offense, the need for specific and general deterrence, and the need for punishment and the protection of society from further crime. Accordingly, the sentence should be affirmed.

III. At the start of Contreras's trial, the court's decision not to strike certain jurors for cause or dismiss the entire panel was not an abuse of discretion. The court made effective, thorough and successful efforts to protect

the integrity of the jury panel and thus protect Contreras's right to a fair trial before an impartial jury.

IV. The court's use of what amounted to acquitted conduct to establish Contreras's Sentencing Guidelines range was in accordance with established precedent and did not violate Contreras's due process rights.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN DENYING PAULINO'S MOTION FOR A MITIGATING ROLE REDUCTION

A. Relevant Facts

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

B. Governing Law and Standard of Review

"Section 3B1.2 of the Sentencing Guidelines provides for a four-level downward adjustment if the defendant was a 'minimal participant' in criminal activity, and a two-level downward adjustment where the defendant was a 'minor participant.'" *United States v. Carpenter*, 252 F.3d 230, 234 (2d Cir. 2001). A minimal role reduction will apply to a defendant who is "plainly among the least culpable of those involved in the conduct of a group." U.S.S.G. § 3B1.2, comment. (n.1). Indications of a minimal role include a defendant's "lack of knowledge or understanding of the scope and structure of the enterprise

and of the activities of others." *Id*. "The Guidelines make clear that the 'minimal role' adjustment should be used 'infrequently.' *Id*. § 3B1.2, comment. (n.2)." *Carpenter*, 252 F.3d at 234.

"In comparison, a 'minor role' adjustment applies to 'any participant who is less culpable than most other participants, but whose role could not be described as minimal." U.S.S.G. § 3B1.2, comment. (n.3)." *Id*. at 234-35. This Court has stated time and again that "[a] reduction [pursuant to U.S.S.G. § 3B1.2] will not be available simply because the defendant played a lesser role than his co-conspirators; to be eligible for a reduction, the defendant's conduct must be 'minor' or 'minimal' as compared to the average participant in such a crime." *Id.* at 235 (internal citations omitted). Thus, simply because a defendant played a lesser role in his offense "vis-a-vis the role of his co-conspirators is insufficient, in and of itself, to justify a [mitigating role] reduction." *Id*.

Applications of Sentencing Guidelines provisions that hinge on a district court's factual determinations are reviewed for clear error. *See United States v. Fuller*, 426 F.3d 556, 562 (2d Cir. 2005). The interpretation of a Sentencing Guideline, however, is generally a question of law subject to *de novo* review. *See United States v. Sloley*, 464 F.3d 355, 358 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1900 (2007). In the end, a district court's decision involving primarily an issue of fact will be reviewed for clear error, and a district court's decision involving primarily an issue of law will be reviewed *de novo*.

United States v. Selioutsky, 409 F.3d 114, 119 (2d Cir. 2005).

Thus, this Court reviews *de novo* "the district court's legal conclusion as to whether the circumstances constitute 'minimal' or 'minor' participation . . . and review[s] factual findings underlying the district court's application of the Sentencing Guidelines for clear error." *Carpenter*, 252 F.3d at 234 (internal citations omitted); *see also United States v. Napoli*, 179 F.3d 1, 6 (2d Cir. 1999); *United States v. Zagari*, 111 F.3d 307, 323 (2d Cir. 1997). "In applying these standards, [this Court is] mindful that '[a] sentencing court's assessment of the defendant's role in criminal activity is highly fact-specific and depends upon the nature of the defendant's relationship to other participants, the importance of the defendant's actions to the success of the venture, and the defendant's awareness of the nature and scope of the criminal enterprise.'" *Carpenter*, 252 F.3d at 234 (quoting *United States v. Shonubi*, 998 F.2d 84, 90 (2d Cir. 1993)).

C. Discussion

As noted above, in determining whether the sentencing court's conclusion was correct, two comparisons must be made: a comparison of Paulino's conduct with that of the average participant in a similar crime nationwide and a comparison of his conduct with that of co-conspirators in the offense, whether charged or uncharged. *See, e.g.*, *Carpenter*, 252 F.3d at 235.

Comparing the evidence of Paulino's involvement with persons in similar conspiracies around the country, it is clear that his role was not minor. Indeed, what Paulino basically is claiming is that he was nothing more than a low-level, poorly paid "courier" or "buffer" between Chibo and other members of the organization.

Many courts have looked at the actions of couriers and have determined that they are not entitled to minor role adjustments. *See, e.g.*, *United States v. Garcia*, 920 F.2d 153, 155 (2d Cir. 1990) ("While in certain cases and on particular facts, a district court might conclude that a defendant courier was substantially less culpable than the average participant and thus make a downward adjustment pursuant to § 3B1.2, this conclusion is by no means mandated.") (internal quotation marks omitted). "A defendant's courier status does not entitle him automatically to the benefit of the minor and minimal role adjustments. Nor do limited finances prove that a defendant was a minor or minimal participant. A sentencing court is not bound to accept defendant's self-serving characterizations of his role in an offense. It is not defendant's exact role or status in the criminal activity that necessarily decides this question; rather, it is an assessment of defendant's culpability in the context of all the circumstances." *United States v. Shonubi*, 998 F.2d 84, 90 (2d Cir. 1993) (internal citations omitted); *see also United States v. Ravelo*, 370 F.3d 266, 270 (2d Cir. 2004) ("Ravelo's contention that he was only following orders does not require a contrary conclusion. Perhaps it indicates that Ravelo did not conceive the crime, but it does not show that he was 'substantially less culpable than

the average participant.'") (quoting *United States v. Jeffers*, 329 F.3d 94, 103 (2d Cir. 2003)).

"The culpability of a defendant courier must depend necessarily on such factors as the nature of the defendant's relationship to other participants, the importance of the defendant's actions to the success of the venture, and the defendant's awareness of the nature and scope of the criminal enterprise." *Garcia*, 920 F.2d at 155. Looking at all these circumstances, Paulino's role cannot be described as minor.

First, Paulino was entrusted with picking up 120 kilograms (264 pounds) of cocaine. This is not a street-corner sale case. This is a large operation, and Paulino played a critical role in the venture. Indeed, he made arrangements to pick up an incredible amount of cocaine. (JA124-25). He recruited a driver to assist in the enterprise. (JA125). He spoke with the undercover agent to set up the meeting and to make sure that everything was going to work out. *Id*. These are not the actions of an unknowing drug courier or "patsy."

Next, Paulino made "heat runs" to make sure that there was no surveillance. He and Contreras also staked out the T.J. Maxx parking lot. (JA141, 149). After conferring with the undercover agent and making arrangements to meet, Paulino walked back and forth many times, looking for the person delivering the load car. (JA149). These are not the actions of a person who does not know what is going on or is simply going to pick up "something" for another person, i.e., a courier. Indeed, although Paulino

has claimed that he originally undertook his mission to Connecticut with only a vague understanding that he was doing something wrong, he eventually admitted that, by the time he picked up the load car, he believed that it contained 120 kilograms of cocaine. (JA45; PSR ¶22). These are the actions of a person who knew what was happening and what he needed to do to make the venture a success. He was intimately involved in the original effort to pick up the drugs and the subsequent efforts to retrieve the car. He knew the organization and he knew its leader. He was much more involved than would be a courier in an average case.

Comparing Paulino to others in the conspiracy, he no doubt was more important to the transaction than were Jesus Contreras, Oscar Gonzalez and Hugo Jorge, who were involved on only one date. And while Jorge and Gonzalez cooperated, Contreras, who went to trial, only received a two-point minor role reduction. Contreras did not have telephone conversations with the undercover officer. He did not make the arrangements for the pick up. He did not go back the following day for the car. Paulino did all of those things. (JA141). Therefore, comparing Paulino to people involved in similar crimes nationwide and to his co-conspirators, he clearly is not entitled to a minor role reduction.

Next, in arguing for a mitigating role reduction, Paulino claims that the court, which sat through the trial of Contreras, made several erroneous factual findings which led to it improperly deny Paulino's request for a role reduction. This claim is also meritless.

First, Paulino claims that he knew nothing of the particulars of the transaction and had no voice in what was taking place. The evidence refutes that. As the court properly found, Paulino was responsible for making the arrangements with the undercover agent to pick up the cocaine and, contrary to his claim, Paulino spoke with the undercover agent at least twice. (JA125, 141). As noted above, and as the court found, (JA125), on October 17, 2001, Paulino had consensually monitored telephone conversations with undercover agents regarding the time, place and manner in which the load car and its contents would be retrieved. Paulino discussed (1) whom he was with; (2) what they would be wearing; (3) that he was with someone other than who was there the previous day, thereby demonstrating knowledge of the scope of the activity; (4) that everything was calm, indicating that there was no known police presence. (JA125, 148-51). In addition, Paulino admitted he was aware that the load car contained 120 kilograms of cocaine. PSR ¶22.

Second, Paulino claims that he is entitled to a mitigating role reduction "because he did nothing more than follow Chibo's orders to go to Connecticut and pick up a car for him." Def. Br. at 7. The same findings the court made, set forth above, apply to this determination as well. In addition, Paulino drove the load car himself – that is, he did not entrust it to anyone else – and Paulino went back to New York, explained to Chibo what had happened, and returned to Connecticut the next day in an attempt to pick up the disabled car. This demonstrates a level of trust that is simply out of step for someone who describes himself as an unknowing "patsy."

The court was well aware of Paulino's role in this offense, having analyzed it in depth, and the facts supporting it. Its factual decisions were not clearly erroneous and its legal conclusions were entirely appropriate. Therefore, nothing about the court's sentence was procedurally unreasonable.

II. THE 108-MONTH WITHIN-GUIDELINES SENTENCE IMPOSED ON PAULINO BY THE DISTRICT COURT WAS REASONABLE

A. Relevant Facts

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

B. Governing Law and Standard of Review

The Sentencing Guidelines are no longer mandatory, but rather represent one factor a district court must consider in imposing a reasonable sentence in accordance with Section 3553(a). *See United States v. Booker*, 543 U.S. 220, 258 (2005); *see also United States v. Crosby*, 397 F.3d 103, 110-18 (2d Cir. 2005). Section 3553(a) provides that the sentencing "court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection," and then sets forth seven specific factors to be considered such as the nature and circumstances of the offense, the history and characteristics of the defendant, the need for the sentence to serve the various purposes of punishment,

the sentencing guidelines, and the need to avoid unwarranted sentencing disparities. 18 U.S.C. § 3553(a).

In *Crosby*, this Court explained that, in light of *Booker*, courts should now engage in a three-step sentencing procedure. First, the court must determine the applicable Guidelines range, and in so doing, "the sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence." *Crosby*, 397 F.3d at 112. Second, the court should consider whether a departure from that Guidelines range is appropriate. *Id.* Third, the court must consider the Guidelines range, "along with all of the factors listed in section 3553(a)," and determine the sentence to impose. *Id.* at 112-13. The fact that the Sentencing Guidelines are no longer mandatory does not reduce them to "a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge." *Id.* at 113. A failure to consider the Guidelines range and instead simply to select a sentence without such consideration is error. *Id.* at 115.

In *Booker*, the Supreme Court ruled that Courts of Appeals should review post-*Booker* sentences for reasonableness. *See Booker*, 543 U.S. at 261 (discussing the "practical standard of review already familiar to appellate courts: review for 'unreasonable[ness]'") (quoting 18 U.S.C. § 3742(e)(3) (1994)). In *Crosby*, this Court articulated two dimensions to this reasonableness review. First, the Court will assess procedural reasonableness – whether the sentencing court complied

with *Booker* by (1) treating the Guidelines as advisory, (2) considering "the applicable Guidelines range (or arguably applicable ranges)" based on the facts found by the court, and (3) considering "the other factors listed in section 3553(a)." *Crosby*, 397 F.3d at 115. Second, the Court will review sentences for their substantive reasonableness – that is, whether the length of the sentence is reasonable in light of the applicable Guidelines range and the other factors set forth in § 3553(a). *Id.* at 114.

As this Court has held, "'reasonableness' is inherently a concept of flexible meaning, generally lacking precise boundaries." *Id.* at 115. The "brevity or length of a sentence can exceed the bounds of 'reasonableness,'" although this Court has observed that it "anticipate[s] encountering such circumstances infrequently." *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005).

An evaluation of whether the length of the sentence is reasonable will necessarily "focus . . . 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); *see Booker*, 543 U.S. at 261 (holding that factors in § 3553(a) serve as guides for appellate courts in determining if a sentence is unreasonable). As the Eighth Circuit has observed, a sentence "may be unreasonable if [it] fails to consider a relevant factor that should have received significant weight, gives significant weight to an improper or irrelevant factor, or considers only appropriate factors but nevertheless commits a clear error of judgment by arriving at a sentence that lies outside the limited range of choice

dictated by the facts of the case." *United States v. Haack*, 403 F.3d 997, 1004 (8th Cir.), *cert. denied*, 126 S. Ct. 276 (2005).

To fulfill its duty to consider the Guidelines, the court will "normally require determination of the applicable Guidelines range." *Id.* at 1002. "An error in determining the applicable Guideline range . . . would be the type of procedural error that could render a sentence unreasonable under *Booker*." *Selioutsky*, 409 F.3d at 118; *cf. United States v. Rubenstein*, 403 F.3d 93, 98-99 (2d Cir.) (declining to express opinion on whether an incorrectly calculated Guidelines sentence could nonetheless be reasonable), *cert. denied*, 126 S. Ct. 388 (2005).

Although this Court has declined to adopt a formal presumption that a within-Guidelines 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." *United States v. Fernandez*, 443 F.3d 19, 27 (2d Cir. 2006); *see also 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.").

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). In assessing the reasonableness of a particular sentence imposed,

> [a] reviewing court should exhibit restraint, not micromanagement. In addition to their familiarity with the record, including the presentence report, district judges have discussed sentencing with a probation officer and gained an impression of a defendant from the entirety of the proceedings, including the defendant's opportunity for sentencing allocution. The appellate court proceeds only with the record.

United States v. Fairclough, 439 F.3d 76, 79-80 (2d Cir.) (per curiam) (quoting *Fleming*, 397 F.3d at 100) (alteration omitted), *cert. denied*, 126 S. Ct. 2915 (2006).[4]

[4] On February 20, 2007, the Supreme Court heard argument in two cases involving the contours of reasonableness review. *See Claiborne v. United States*, 127 S. Ct. 551 (2006), and *Rita v. United States*, 127 S. Ct 551 (2006). On June 4, 2007, after being advised that Mr. Claiborne had died, the Supreme Court issued an opinion in *Claiborne* vacating the Eighth Circuit's decision as moot.

C. Discussion

According to Paulino, the court's sentence of 108 months was substantively unreasonable in light of his role in the operation, his history and characteristics, and the fact that he was given a sentence that was significantly higher than that of his co-defendants. This claim is meritless.

As an initial matter, Paulino's attempt to argue that his sentence was unreasonable based on his limited role in the operation is untenable in light of the court's clearly articulated analysis of his role in deciding whether to grant a role reduction and the court's finding concerning "the importance of [Paulino's] actions to the success of the venture." (JA124). Clearly, Paulino's role was critical to the success of the operation and he was sentenced in accordance with his role, taking all other factors into consideration.

Those factors include the sentences of his co-conspirators. Paulino, for instance, argues that he unfairly received a higher sentence than Oscar Gonzalez. Even assuming *arguendo* that Gonzalez was more culpable than Paulino, Paulino completely discounts the fact that Gonzalez cooperated with the Government and was prepared to testify on behalf of the Government. While Paulino buries in a footnote the understatement that Gonzalez "did *attempt* to provide substantial assistance to the government," Def. Br. at 13 n.3 (emphasis added), he ignores that Gonzalez did more than simply "attempt" to do so; he actually provided very important assistance for

which he was given proper credit at the time of his sentencing. Thus, Paulino is comparing apples and oranges. Paulino did not cooperate. Gonzalez did. *United States v. Hernandez-Fierros*, 453 F.3d 309, 313-14 (6th Cir. 2006) ("Sentencing disparities can exist for many valid reasons, including giving lower sentences to individuals that cooperate with investigations."). "[A] sentencing *difference* is not a forbidden "disparity" if it is justified by legitimate considerations, such as rewards for cooperation. . . . [A] sentencing difference based on one culprit's assistance to the prosecution is legally appropriate." *United States v. Boscarino*, 437 F.3d 634, 638 (7th Cir. 2006), *petn for cert. filed*, 74 U.S.L.W. 3629 (Apr. 27, 2006).

The same is true for Hugo Jorge, who actually testified at Contreras's trial. He cooperated and provided substantial assistance. Paulino did not. Unfortunately for Paulino, that did make a difference in his sentence.

Further, it is unclear to the Government how Paulino can state that Carlos Aquino was not prosecuted in this case and "went unpunished for his actions." Def. Br. at 13. Aquino pleaded guilty to conspiracy for his role in this operation. *See* Dkt No. 3:04CR00153 (CFD). He cooperated with the Government. He testified openly at a public trial in which he admitted his role in this offense and was cross-examined on his plea agreement and cooperation agreement two years prior to the filing of Paulino's brief. Since that time, Aquino, taking into account his cooperation, was sentenced to 68 months in

prison. Again, Paulino is not making accurate comparisons.

Paulino next argues that he had no knowledge of the amount of drugs involved and that the drug quantity drove his sentence calculation. Yet, at a minimum, Paulino concedes that he picked up the load car. He admitted as much during the sentencing hearing. (JA49). Thus, assuming for the sake of argument that Paulino believed that there were 120 kilograms in the trunk only when he met the undercover agent to make the exchange on October 17, 2001, he is still responsible for that full amount because, as he admitted, the next day he went back to Connecticut to retrieve the load car for Chibo believing that there were 120 kilograms in it. The conspiracy was continuing at that point. In sum, 120 kilograms of cocaine drove Paulino's sentence (before safety valve) and, by his own admission, he had knowledge of that amount during the conspiracy.

Finally, Paulino claims that the sentencing court failed to take into account his history and characteristics, primarily the fact that this was a first offense and that because of his age he has a low chance of recidivism. The district court clearly took those factors into consideration at multiple points.

First, Paulino argued his criminal history and age at the time of sentencing. (JA126-27, 132-33). And the district court went into great detail regarding what it considered in imposing sentence, (JA138-41), and even made specific mention of the defendant's lack of a prior record (JA141).

Because the defendant is simply challenging the weight that the court ascribed to these facts, his claim is essentially unreviewable. *Fernandez*, 443 F.3d at 32 ("The weight to be afforded any given argument made pursuant to one of the § 3553(a) factors is a matter firmly committed to the discretion of the sentencing judge and is beyond our review, as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented."). Moreover, it is worth noting that the Sentencing Guidelines advise that age is not generally an appropriate factor to consider when calculating a defendant's sentence. *See* U.S.S.G. § 5H1.1. While that guidance is certainly no longer binding on sentencing courts after *Booker*, the fact that Judge Droney acted consistently with that advice simply underscores the reasonableness of his sentence. *See Fernandez*, 443 F.3d at 27 (holding that vast majority of within-Guidelines sentences will likely be reasonable); *see also United States v. Bullion*, 466 F.3d 574, 576 (7th Cir. 2006) (argument that age *per se* is a mitigating factor "is unlikely to persuade any judge"); *United States v. Wurzinger*, 467 F.3d 649 (7th Cir. 2006) (sentence below guidelines range based on age requires "very good explanation").

Second, it cannot be lost on this Court that Paulino was given over two years less than his otherwise applicable guidelines range based on his eligibility for safety valve. Clearly, his criminal history was taken into account, and Judge Droney acted reasonably in declining to give that factor additional value. In seeking additional leniency for a characteristic that he shares with most others in criminal history I, Paulino is essentially asking the Court to give

him more favorable treatment than other similarly situated offenders. That would run counter to Congress's goal of avoiding "unwarranted sentence disparities among defendants *with similar records* who have been found guilty of similar conduct." 18 U.S.C. § 3553(a)(6) (emphasis added). *Cf. United States v. Sherpa*, 265 F.3d 144, 149 (2d Cir. 2001) ("The lower limit of the range for Criminal History Category I is set for a first offender with the lowest risk of recidivism. Therefore, a departure below the lower limit of the Guidelines range for Criminal History Category I on the basis of the adequacy of criminal history cannot be appropriate.").

In sum, the court took all appropriate factors into consideration in sentencing Paulino. The court explained those at length. Clearly, he was aware of what factors must be considered in sentencing him and that sentence was reasonable. *See Fernandez*, 443 F.3d at 21; *see also Rattoballi*, 452 F.3d at 127.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO DISMISS CERTAIN JURORS OR THE ENTIRE JURY

A. Relevant Facts

On May 19, 2004, a panel of twelve jurors and four alternates were selected to serve on the trial jury. On June 4, 2004, the court received a letter from a juror, K.W., who was selected as an alternate. That letter provided in pertinent part as follows:

While sitting in the juror box during questioning on May 19th, a fellow prospective juror whispered to the prospective juror behind me that he was going to refuse to state his name and place of occupation in front of the court because he worked as a correctional officer at a prison, he recognized the defendant as a "drug kingpin," and he knew that the defendant had "people in the inside" who would "get him" if he was involved in prosecuting him. This was said very shortly before the jurors were selected, and I and the woman he told this to were shocked (since we'd been instructed not to speak about it), and I didn't know what to do. This prospective juror was dismissed shortly thereafter, after speaking with you at sidebar. These statements got me thinking about the case and my safety. I do not want to be involved in a case involving a cocaine dealer and a Colombian drug cartel. This scares me and I don't want any part of it. I have had nightmares about it and agonized over it, and felt that I had to write to express my feelings to you. Because of my fears, I do not believe that I would be an impartial juror on this case. Additionally, after hearing this prospective juror who works in the prison system comment that he knows the defendant is a "drug kingpin," I am inclined to think that the defendant is guilty. I know that I should have stood up in court and voiced my concerns, but I found it to be an extremely intimidating atmosphere, especially having to speak with a microphone in open court, with the defendant staring at us and being privy to

> everything we told you, so I did not. I do not want to "shirk" my duties as a citizen, but I also don't want to be responsible for putting a Dominican cocaine dealer behind bars and thinking and worrying about that for the rest of my life. I believe that these complicated feelings would interfere with my ability to be an impartial and fair juror.
>
> I realize that this would put the court in a difficult position, since I have already been selected, and I apologize, but I must respectfully ask to be dismissed from serving as a juror on this case. I would also like to ask what the legal ramifications would be for me if I do not appear for jury duty on June 14th as summoned. Please advise.

(GA21).

As a result of this letter, the court summoned the juror and the parties for an on the record conference in Chambers. During that conference, the court discussed the matter with the parties and then questioned the juror about who else may have heard the prospective juror's comments. (GA22-39). Then, after again informing the court that she could not be an impartial juror, K.W. was excused from the panel. (GA35, 39).

On June 14, 2004, the day trial was to begin, the court summoned two other jurors into Chambers, separately. The first, D.B., stated that she heard the corrections official state that he wasn't going to let the defendant's

"cronies" get to him. (GA68). She also said that another juror, T.V., overheard the comment. (GA71). The district court canvassed D.B. as follows:

> Q. Okay. And how about your continuing as a juror in this case now? You overheard this corrections officer say this, you talked about it with a couple other jurors. I think you heard me during jury selection talk about how important the presumption of innocence is for every defendant?
>
> A. Right, correct.
>
> Q. And these kinds of comments are inappropriate and, you know, certainly jurors should not feel that way if they're going to be fair and impartial jurors.
>
> A. Right.
>
> Q. How do you feel about your ability to continue as a juror in this case?
>
> A. Honestly, I'm confident with my judgment in that I could listen to information and make my own judgment call. So that's his opinion and that's fine. He was dismissed. He's not part of this trial. He's not on the jury. I don't feel that it reflects upon me. I'm an adult, I'm mature, and I'm intelligent. I don't have to listen to other peoples opinions in order to

make my own decision. So it didn't have any bearing on me. But she and I spoke about it because I thought he was rude, to be honest with you, and I thought it was inappropriate. And I thought he was actually trying to do it so that he could be dismissed immediately, to be honest with you.

Q. Would you let those comments, that comment by him or your discussions with the other jurors, affect your duties and obligations as a juror in this case?

A. No. I mean, if I did think that I probably would have come to you sooner or that day. I honestly don't think that it will or it could.

Q. Are you sure about that?

A. I'm positive about that.

* * *

Q. . . . Can you assure me that you would base your deliberations in this case exclusively on the evidence that you hear at trial?

A. Yes.

Q. And would you adhere to the presumption of innocence that the defendant enjoys in this case?

A. Yes.

Q. And would you hold the government to its burden of proving beyond a reasonable doubt his guilt before you would convict him?

A. Yes.

Q. And the comment that you related to me could be interpreted as intimidation, in other words, that somehow the defendant's friends would do something to the corrections officer or to somebody else. I'm not sure that's how you took it, but some might interpret it that way. And I wanted to ask you whether you feel intimidated at all by hearing that comment or by thinking about it?

A. If you put it in terms of intimidation, I guess, but not to the point where I would not find someone either guilty or not guilty because of it.

Q. Why do you say it could be intimidating?

A. Because you're using the term intimidation. I understand how you could see how it would intimidating to me, but as the person hearing it it was not intimidating to me and I did not interpret it as intimidation. But I can

understand why you would see that it could be intimidation.

Q. Would you feel intimidated in any way about your obligations as a juror in this case?

A. No. If I did, I think I would have spoken up and communicated that to you.

(GA73-74, 76-77).

The court then brought in the third juror, T.V. T.V. stated that she did not hear the comment directly from the corrections officer but that D.B. had told her about it. (GA79). T.V. stated that D.B. said "that one of the corrections officer had said that [the defendant] was a drug lord or drug king, something along those lines. I don't remember which phrase she used." (GA80). The following exchange ensued:

Q. And were you going to bring this to my attention today?

A. Well, I wasn't sure if I needed to or not. I kind of talked to my husband about it. I didn't tell him what was said. I said somebody made a comment and I don't know whether I should say anything. He says, well, do you think it will make a difference in how you look at the man. And I said, well, I don't think so, because I feel like it's a rumor, you know what I mean, and I feel like they

probably didn't really have anything to back it up with. People just talk and say things. So then I thought, well, if I can keep it separate, I guess I won't need to say anything . . .

Q. . . . So that I'm very concerned about whether you would be able to presume the defendant in this case innocent still as your obligation to do so as a juror. Would you be able to do that?

A. I mean, I thought about it over the week, because it did bother me because she said it. And I don't think that it would change how I would look at him. I don't believe I would simply because, like I said, I felt like it was a rumor when she said it. I didn't feel like there was any concrete evidence to, you know, to back that up. I just felt like it was talk.

Q. Well, this defendant, as any defendant, is entitled to have his case determined solely on the evidence that's presented to you at the trial, not have a juror's decision-making process affected by anything else. Can you assure me that that's the case with you?

A. I really believe that it wouldn't influence me. I really do.

Q. And would you hold the Government still to proving its case beyond a reasonable doubt before you would vote to convicted him?

A. Yes, definitely.

Q. And are you sure you can be fair and impartial to the defendant in this case?

A. I really believe that I can. Like I said, I had thought about it over the weeks in between and, I mean, our whole lives we listen to people talk about other people and I, you know, my father always said don't believe anything you hear and only half of what you see. So I've always tried to not listen to rumors and I really believe I won't consider that when I listen to his case.

(GA81-83).

The court inquired whether the juror had conversations about the comment with any others, and upon receiving assurances that she had not (GA83), continued as follows:

Q. . . . At the beginning of our discussion you had said that something that along the lines of it would be hard for you to go to lunch and talk about this.

A. No, I said I didn't want to go to lunch because I was afraid that they would talk.

Q. Bring up the subject again?

A. Yeah. Because you had already instructed us not to talk about it and I was surprised that they were talking about it outside, in the hallway, and I thought – because they had talked about going to lunch and I thought I'm not going to go to lunch with them. So I brought a book and I'm just going to stay because I didn't want to be –

Q. So it would be [D.B.] and this other person who might have overheard the comment while you were present, right, these are the people you're talking about?

A. Yes.

Q. Now, one of the things you have to do as a juror, though, is once I tell you to begin deliberations, you've got to openly and candidly talk about the case with the other members of the jury. Would you be able to do that in light of this issue about the wanting to avoid lunch with [D.B.] and the other person?

A. I don't think it's a personal thing. I don't dislike them or anything. I'm just saying that I don't want to – I didn't want to overhear that comment and I don't want – and I don't want to overhear any other comments. I didn't

want to put myself in that position where if they were going to discuss these things that I would be present. And so that's why I made that decision.

Q. So would you be able to be a good juror in the sense of being able to candidly discuss the evidence with the other jurors during your deliberations?

A. I don't see why not.

(GA86-87).

After this exchange the court decided to dismiss D.B. and keep T.V. on the jury. The court stated as follows:

Well, I find [D.B.] is unable to perform her duties and responsibilities as a juror and she is discharged. I'm not convinced she would follow my instructions as to her juror obligations. In particular, the nature of the comment she related to [T.V.] was different than she recounted to me. That is, [T.V.] said the comment was that the corrections officer had said the defendant was a drug czar and [D.B.] said something different to me. And I am convinced of [T.V.'s] honesty and credibility.

Accordingly, [D.B.] is discharged as a juror from this case.

> As to [T.V.], I am convinced she would properly discharge her duties as a juror. I found her to be very honest and determined to be a fair and impartial juror and to not allow her hearing the statement by [D.B.] to affect her obligations as a juror in any way. I understand how prejudicial this type of comment could be, but [T.V.]'s demeanor and responses to my questions have convinced me she would disregard it entirely and perform her juror obligations appropriately.

(GA98).

After resolving issues with these three jurors, the court next inquired whether, during jury selection, any jury member had heard any comments made about the defendant from a prospective juror. (GA110). Beyond those already questioned, only one juror, B.J., responded affirmatively. (GA110-11). The court questioned B.J. in chambers as follows:

> Q. And what was the comment that you heard?
>
> A. There was a man sitting behind me that I believe may have worked in one of the prisons or something, Department of Corrections, I'm not sure exactly. And I just heard him say to himself or to whoever was listening that he didn't – something to the effect he didn't want to serve on the jury because they would be after him.

Q. And his job was what?

A. I don't know. I don't know. He just said – and I can't really remember the exact words. Said something to the effect of – I assumed he meant that the man whose case this is about was – I took it as he was in that prison and he didn't want – he didn't want to be on the jury because he felt that there would be retaliation against him.

Q. So he was a prison guard then?

A. I don't know what he did, but he worked in the prison.

(GA113-14).

The court asked whether B.J. had spoken with other jurors about the comment, and she responded negatively. (GA115). She indicated that she had heard one juror state that she was afraid to be on the jury if the comment were true and that the juror might have been D.B. (GA114). The court continued its canvass:

Q. And why didn't you bring that to my attention today when you first came in that you heard that comment?

A. Because I just looked at it as a comment that somebody made. I don't know who the gentleman was that made it. I assume that in

any case there's people that feel that way. And, I mean, any case that you're in you could feel that way. So I really didn't – I really didn't think about it too much. But when you asked the question, I had heard the comment so I wanted to make sure that you knew.

Q. What about the effect on you? Basically you've told me two things: One is that you've heard this man make a comment about the retaliation issue, and then you heard another prospective juror, probably [D.B.], say that she was afraid. So we've got really two things that you heard, right?

A. Right. She was afraid because of what this gentleman said.

Q. And is the fact that you've heard these two comments affecting you as a juror in any way in this case?

A. No.

Q. Would you hold it against the defendant in any way?

A. No.

Q. Are you sure about that?

A. Yes. I assume that if – I mean, I have to say I thought about it when I went home. I didn't completely dismiss what they said, but I'm intelligent enough to know that these cases go on all the time and that we're safe and there's – I mean, we don't even know what the case is yet.

Q. Now, one of your obligations as a juror is to decide the case solely on the evidence that's presented at trial. Would you be able to do that still, even though you heard these comments?

A. Yes.

Q. You're sure about that?

A. Yes.

Q. And another part of the law is that you're to presume the defendant in any case innocent, including this case, Mr. Contreras, he's entitled to the presumption of innocence. Would you be able to follow that law?

A. Yes.

Q. You're sure about that?

A. Yes, I am.

Q. Another part of the law is that the government has the burden of establishing the guilt of any defendant beyond a reasonable doubt. Would you be able to follow that instruction?

A. Yes.

* * *

Q. . . . And what about the other jurors today, have you talked about this at all?

A. Not at all.

Q. And tell me why, again, that you didn't bring it to my attention this morning?

A. I just didn't feel that it had any affect on me and that, you know, when you think about it, I don't know, any case that you were on there's probably people that feel that way. And I looked at it as this man works in a prison. I don't know, he probably sees things from a different, you know, like a different point of view working in a prison. I just didn't look at it as having any affect on me, any affect on how I would think of things, because I don't want to make a judgment of the man, but he seemed like he was kind of, I don't know, very biased against prison.

Q. The Corrections Officer was?

A. You know, very, not bitter, but something along those lines.

Q. I'm trying to figure out its affect on you too. I think I told you at jury selection both sides in this case, but particularly the defendant, is entitled to a fair trial with a jury deciding the case purely on the evidence that's presented at trial. He's entitled to the presumption of innocence and the government's required to prove his guilt beyond a reasonable doubt. Would the fact that you heard these two comments affect your juror obligations in any way?

A. I really don't believe so.

Q. Are you sure of that?

A. I am. Like I said, you know, I thought about it. I think had I felt that it would, I would have come forward earlier. But I wasn't even going to mention it to anybody that I had heard it because –

Q. It had no affect on you? You weren't going to mention it because it didn't affect you, is that what you're saying?

A. No, it didn't affect me. I took it – like I said, the gentleman who said it kind of mumbled it

in a – I can't explain it, but whether it was sarcastic or do you know what I mean, it is just – for all I know he could have been doing it because he didn't want to be on the jury to begin with.

Q. So can you completely disregard those statements?

A. I can.

Q. You're sure about that?

A. Yes.

(GA115-19).

After hearing from counsel, the court determined that B.J. would remain on the jury, holding that

[a]s to [B.J.], I'm convinced she could properly discharge her duties as a juror. I found her to be very determined to be a fair and impartial juror and to not allowing her hearing the two statements to affect her obligations as a juror in any way. Again, I understand how prejudicial these types of comments can be, but her demeanor and responses to my questions have convinced me she would disregard them entirely and perform her juror obligations appropriately and, thus, she'll remain on the jury.

(GA122).

While the court was resolving all of the issues with respect to specific jurors, the defendant argued that the entire jury panel should be dismissed. (GA27-28, 91, 95-96, 124). The court rejected this argument, deciding instead to speak with the individual jurors first (GA28-29, 96), and then addressing the entire panel to determine whether any other jurors should be canvassed individually. (GA96, 110-11). No other jurors, besides the four the court canvassed individually, indicated that they had heard anything. (GA111).

After canvassing the individual jurors and addressing the panel as a whole, the court discussed the matter with the parties as follows and then issued its ruling:

> THE COURT: Since I have you in here, I wanted to discuss the situation as to the balance of the jury. As you all noticed, the only person who raised his or her hand was [B.J.]. So my inclination is to make a finding that the balance of the jury can proceed in the case, but before I did that I wanted to see your views on that. Mr. O'Reilly.
>
> MR. O'REILLY: Other than to reiterate my previous objections, your Honor, and I just stand on that.

* * *

THE COURT: I'll make a finding that the remaining jurors have not heard or been affected by the statements and will discharge their duties appropriately. So what I thought we'd do is go back into court, bring the jury back in, and then I still need to remind them of the presumption of innocence and the burden on the government. I haven't done that yet because of the affirmative response. Then send them back into the jury room, but take up a list of topics before we get started. All right?

(GA124).

B. Governing Law and Standard of Review

This Court and the Supreme Court have long held that "[a] criminal defendant is guaranteed a trial 'by an impartial jury.'" *United States v. Torres*, 128 F.3d 38, 42 (2d Cir. 1997) (quoting U.S. Const. amend. VI). As this Court explained in *Torres*,

> One touchstone of a fair trial is an impartial trier of fact – "a jury capable and willing to decide the case solely on the evidence before it." *McDonough*

> *Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (citation omitted). But "[i]mpartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula." *United States v. Wood*, 299 U.S. 123, 145-46 (1936). It follows that 'in each case a broad discretion and duty reside in the court to see that the jury as finally selected is subject to no solid basis of objection on the score of impartiality . . . .' *Frazier v. United States*, 335 U.S. 497, 511 (1948). Accordingly, the presiding trial judge has the authority and responsibility, either *sua sponte* or upon counsel's motion, to dismiss prospective jurors for cause.

128 F.3d at 42-43.

A court must inquire into whether potential jurors are capable of applying the law impartially, and has considerable discretion in this questioning. *Id.* at 43-44. "But once the proper questions have been asked at voir dire, the trial court, when impaneling a jury, has . . . broad discretion in its rulings on challenges therefor. *Id.* at 44 (internal quotations omitted). *See also United States v. Stewart*, 433 F.3d 273, 304 (2d Cir. 2006) ("Its determination is reviewed for abuse of discretion and, in that regard, we have noted that '[t]here are few aspects of a jury trial where we would be less inclined to disturb a trial judge's exercise of discretion, absent clear abuse, than

in ruling on challenges for cause in the empanelling of a jury.'") (quoting *United States v. Greer*, 285 F.3d 158, 172 (2d Cir. 2002)).

C. Discussion

Here, there can be no doubt that the court did not abuse its discretion in determining which jurors had to be excused for cause, which did not, and that the entire panel need not be dismissed. Indeed, the court's canvass of the jurors was extraordinarily detailed and thorough. In each case the court asked the jurors numerous questions, assessed each juror's demeanor and credibility, and made reasoned decisions about each juror's ability to serve on the jury.

As to K.W., the court found that she could not, based on her letter and her statements in Chambers on the record, be a fair and impartial juror. (GA37-39). K.W. was excused. (GA39).

D.B. was likewise excused, but not because she gave responses indicating that she would not be able to serve impartially. Indeed under questioning from the court, D.B. stated that she would not let the comments she heard affect her as a juror (GA73), that she would base her decisions on the evidence presented (GA73, 76), and that she would afford the defendant the presumption of innocence and require the government to prove guilt beyond a reasonable doubt before convicting the defendant (GA76). Nevertheless, the district judge dismissed her as a juror based on his assessment of her credibility and his

assessment of whether she would be capable of following his instructions. (GA98). Specifically, the court noted that the story she had told the court differed from the story she told T.V., and that he credited T.V.'s version. (GA98). Based on this conclusion about D.B.'s credibility before the court, the court properly questioned whether she would be capable of following the court's instructions and discharged her from the jury. (GA98).

With respect to T.V., the court again conducted a thorough canvass. The court asked whether she would be capable of presuming the defendant innocent (GA81-82), whether she could decide the case based on the evidence presented at trial (GA82), whether she could hold the Government to proving its case beyond a reasonable doubt (GA82), whether she could be fair and impartial to the defendant (GA82-83), and whether she would be capable of candidly discussing the case with all of the other jurors (GA86-87). T.V. answered all of these questions affirmatively. (GA81-87).

The district court considered T.V.'s responses, and its assessment of her demeanor, and concluded that she could serve as a fair and impartial juror. The court explained that "[a]s to [T.V.], I am convinced she would properly discharge her duties as a juror. I found her to be very honest and determined to be a fair and impartial juror and to not allow her hearing the statement by [D.B.] to affect her obligations as a juror in any way. I understand how prejudicial this type of comment could be, but [T.V.'s] demeanor and responses to my questions have convinced

me she would disregard it entirely and perform her juror obligations appropriately." (GA98).

Having resolved the issues with respect to these three jurors, the court took the further step of inquiring of the whole jury whether anyone else had heard comments – whether positive or negative – about the defendant during jury selection. (GA110). When another juror indicated that she had heard comments about the defendant, the court immediately conducted a thorough canvass of that juror, B.J. (GA115-19). After inquiring about the comments that she had heard (GA113-14), the court asked B.J. whether those comments would affect her as a juror (GA116), whether she could decide the case based solely on the evidence presented at trial (GA116), whether she could afford the defendant the presumption of innocence (GA117), and whether she could hold the Government to proving guilt beyond a reasonable doubt (GA117). Having received appropriate responses to these questions, the court concluded that B.J. would remain on the jury. (GA122). According to the trial judge, B.J.'s responses and demeanor convinced him that she would not let the comments affect her obligations as a juror. (GA122). The court specifically found that she was "very determined to be a fair and impartial juror." (GA122).

On this record, it can hardly be said that the court abused its discretion in its rulings on the various jurors. The court took great pains to ensure that the potentially affected jurors could discharge their obligations and duties fairly and impartially, viewing each juror's demeanor and credibility individually and making appropriate

determinations in each instance. Moreover, the court inquired of the entire panel to determine whether any other jurors heard the relevant comments, and upon learning of an additionally affected juror, immediately addressed the issue with respect to that juror. The court more than fulfilled its obligation to inquire about potential biases in the jury and to remove those jurors who could not serve as fair and impartial jurors.

In addition, the court took great pains to explain to each juror, and the entire panel, its obligations to be fair and impartial, to judge the case only on the evidence presented, and to hold the Government to its burden of proof. (GA125). As this Court has long held, "[a]bsent evidence to the contrary, [this Court] presumes that jurors remain true to their oath and conscientiously observe the instructions and admonitions of the court." *United States v. Rosario*, 111 F.3d 293, 300 (2d Cir. 1997) (internal quotation marks and citation omitted) (affirming district court's ruling that juror was not biased).

The court's decision in this case is supported by this Court's decision in *United States v. Colabella*, 448 F.2d 1299, 1301-1302 (2d Cir. 1971). In that case, just as here, comments during jury selection were later challenged on appeal. There, a prospective juror announced that he had prejudged the case already and was promptly excused. After this statement, other prospective jurors, who already had been at least temporarily seated for the case, began stating that they too had prejudged the case, causing the district court to note that "it is catching." *Id.* at 1301. Later, more prospective jurors announced that they were

biased and were excused. *Id.* at 1302. In response to this sequence of events, the district court asked the jurors as follows:

> Irrespective of whether I have inquired about this or not, is there any reason because of your past experience or your connections or anything you have heard this morning why you cannot decide this case fairly and impartially? I hear no response.

Id.

On appeal, the defendant argued that the voir dire created a risk that he was tried before a prejudiced jury and that the district judge's "rebuke" of one prospective witness could have dissuaded other prospective jurors from revealing their prejudices. In rejecting the defendant's claim, this Court held that

> we cannot see what else the able trial judge could have done to be as certain as humans can that he had finally selected twelve unbiased jurors. In this connection we note his final invitation to all twelve after the luncheon recess for any comment, even at that late period in the selection process, which would reveal any prejudice or bias. That no juror responded to this query, which was sufficiently removed in time from the morning colloquy to give the jurors ample time for rational reflection, indicates clearly to us that the jurors believed they were devoid of prejudice.

Id. at 1302-03.

Here, as in *Colabella*, the court took great pains to canvass each juror about potential prejudices and to remove those jurors whom it determined, based on their demeanor, credibility, and responses, could not be fair and impartial. *See, e.g.*, *United States v. Towne*, 870 F.2d 880, 885 (2d Cir. 1989) (rejecting claim that court erred in refusing to excuse a juror for cause because the juror was subsequently removed through a peremptory challenge and thus the jury ultimately selected was fair and impartial). Furthermore, as in *Colabella*, the court followed up its individual questioning with a question to the entire panel to ensure that each juror was given the opportunity to reveal any prejudices. Thus, as in *Colabella*, the court's decisions should be upheld.

In response, the defendant relies on *United States v. Hockridge*, 573 F.2d 752, 756 (2d Cir. 1978), but far from helping the defendant, it supports the court's actions in this case. In *Hockridge*, on the fifth day of an eight-week trial, a juror reported to the court that "several other jurors had remarked that the defendants were guilty." *Id.* The district court interviewed each juror individually *in camera*. Six of the jurors "reported that someone had made a passing reference, in jest, to the subject of the defendants' guilt." *Id.* During questioning by the court, each juror stated that "he or she would not form any opinion of guilt or innocence until all the evidence was presented. Each further recognized the necessity of not talking about the case." *Id.* On the basis of this

questioning, the trial judge found that the jurors were not prejudiced and continued the trial. *Id.*

This Court upheld the district court's decision, noting that the district court, faced with the threat of bias, properly conducted *in camera* interviews with the jurors to question them about potential prejudices. *Id.* As this Court explained, "[i]f one juror had been contaminated, the district judge's prompt action could have contained any spread of the taint." *Id. See also id.* (citing cases in which a district court's prompt actions protected the defendant's right to an impartial jury). Furthermore, this Court expressly upheld the district court's decision to continue with the original jury finding that "it was not an abuse of discretion to continue the trial upon concluding that the jurors were not prejudiced, a determination which the district judge was in the best position to make." *Id.*

Here, as in *Hockridge*, the court promptly canvassed the relevant members of the jury when faced with allegations that certain jurors might have been prejudiced by comments overheard during jury selection. The court conducted a careful canvas of the relevant jurors, and as in *Hockridge*, found that the trial should move forward, although with two jurors excused. As the *Hockridge* Court recognized, the district court is in the best position to make these decisions, and thus the decisions here should be upheld.

IV. THE DISTRICT COURT PROPERLY CONSIDERED ACQUITTED CONDUCT IN SENTENCING CONTRERAS

A. Relevant Facts

As noted above, Contreras was convicted after a jury trial. The jury found that the Government had proven beyond a reasonable doubt that Contreras had both conspired to distribute (Count One) and distributed (Count Two) cocaine. (CA178). The jury also found, however, that the Government had failed to prove beyond a reasonable doubt that Contreras had conspired to distribute and had distributed five kilograms or more of cocaine. Accordingly, the jury found only that Contreras had conspired to distribute and had distributed only a detectable amount of cocaine. (CA178).

At sentencing, Contreras argued that because the jury found that the Government failed to prove beyond a reasonable doubt an amount of cocaine equal to or exceeding five kilograms, the sentencing court was bound by that finding. (GA195-99). The district court rejected that claim, finding that the jury's verdict did not preclude it from making a quantity finding based upon a preponderance of the evidence. (GA207-10).

The district court proceeded to sentence Contreras to 78 months in prison and three years of supervised release.

B. Governing Law and Standard of Review

In *United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 1665 (2006), this Court squarely addressed two issues raised in this case. First, this Court held "that, after *Booker*, district courts' authority to determine sentencing factors by a preponderance of the evidence endures and does not violate the Due Process Clause of the Fifth Amendment." *Id.* at 525.

Second, this Court held that the Supreme Court's decision in *United States v. Watts*, 519 U.S. 148, 157 (1997), survived *Booker* and thus that a district court could sentence a defendant based on acquitted conduct. Specifically, the *Vaughn* Court stated that the case "squarely presents the question whether, after *Booker*, a district court may sentence a defendant taking into account acquitted conduct. We hold that it may." *Id.* As the Court explained, "district courts may find facts relevant to sentencing by a preponderance of the evidence, even where the jury acquitted the defendant of that conduct, as long as the judge does not impose (1) a sentence in the belief that the Guidelines are mandatory, (2) a sentence that exceeds the statutory maximum authorized by the jury verdict, or (3) a mandatory minimum sentence under § 841(b) not authorized by the verdict." *Id*. at 527.

C. Discussion

This case is controlled by *Vaughn*. In that case, this Court unequivocally held that post-*Booker*, district courts may find sentencing facts by a preponderance of the evidence and may sentence a defendant on the basis of acquitted conduct. *Vaughn*, 430 F.3d at 525-27. Those two holdings resolve Contreras's claims in this case.

Furthermore, the facts of *Vaughn* are directly analogous to the facts of this case. In *Vaughn*, the defendants were charged with distributing at least 100 kilograms of marijuana in violation of 21 U.S.C. § 841(b)(1)(B). The jury convicted the defendants and found, in a special interrogatory, that the Government had proved beyond a reasonable doubt that the defendants' conduct involved between 50 and 100 kilograms of marijuana. 430 F.3d at 520-21. At sentencing, the district court found, by a preponderance of the evidence, that the defendants' conduct involved 544 kilograms of marijuana and sentenced them in accordance with 21 U.S.C. § 841(b)(1)(C), which sets no mandatory minimum but establishes a statutory maximum term of imprisonment of twenty years. 430 F.3d at 521.

On appeal, the defendants argued that the district judge had to find sentencing facts beyond a reasonable doubt, but this Court rejected that argument holding that a district court's "authority to determine sentencing factors by a preponderance of the evidence . . . does not violate the Due Process Clause of the Fifth Amendment." *Id.* at 525.

Furthermore, this Court rejected the defendants' argument that the district court could not sentence them based on drug quantities that exceeded the quantity found by the jury (i.e., 100 kilograms of marijuana):

> In the instant case, the information charged [the defendants] with, and the jury acquitted them of, a violation of § 841(b)(1)(B). As a result, the jury acquitted [the defendants] of conduct that would have exposed them to a statutory sentencing range of five to forty years' imprisonment. The jury convicted [the defendants], however, of conduct that exposed them to a statutory sentencing range of zero to twenty years' incarceration under § 841(b)(1)(C). The district court sentenced [the defendants] within the statutory range authorized by the jury verdict and within the Guidelines range determined in accordance with the facts the court found by a preponderance of the evidence.

Id. at 527.

Here, as in *Vaughn*, Contreras was charged with, and the jury acquitted him, of a violation of § 841(b)(1)(A). Thus, Contreras was acquitted of conduct that would have exposed him to a statutory sentencing range of 10 years to life imprisonment. The jury's verdict, however, subjected him to a statutory sentencing range of 0-20 years under § 841(b)(1)(C). *See* GA209 (district court acknowledging that jury verdict restricted sentencing range to 0-20 years). The district court sentenced Contreras within that range, finding by a preponderance of the evidence that he was

responsible for 120 kilograms of cocaine and sentencing him to 78 months' imprisonment. Contreras's sentence was fully proper under *Vaughn*. (GA224-29).

CONCLUSION

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

Dated: June 8, 2007

Respectfully submitted,

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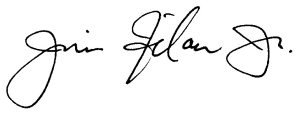
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

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 13,904 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.



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ADDENDUM

Title 18, United States Code, Section 3553

(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.

U.S.S.G. § 3B1.2. Mitigating Role

Based on the defendant's role in the offense, decrease the offense level as follows:

(a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.

(b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b), decrease by 3 levels.