06-1330-cr(L)

To Be Argued By:
JAMES R. SMART

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 06-1330-cr (L)
06-2647-cr (CON), 06-3271-cr (CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

HECTOR GONZALEZ, MICHAEL HILLIARD,
EDWARD ESTRADA, also known as French Fry,
Defendants-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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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

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STATEMENT OF JURISDICTION

The district court (Stefan R. Underhill, J.) had subject matter jurisdiction over the proceedings against all three defendants under 18 U.S.C. § 3231.

Resentencing hearings on remand were held on March 13, 2006, as to Hector Gonzalez. GA1541. Final judgment on the resentencing of Gonzalez entered on March 15, 2006, GA1571, and he filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on that same date. GA1575.

Resentencing proceedings on remand as to Edward Estrada were held on June 26, 2006. GA1625. Final judgment on remand against Edward Estrada entered on June 27, 2006, GA1683, and Estrada filed a timely notice of appeal on July 5, 2006. GA1687. Pursuant to Fed. R. Cr. P. 36, and in response to a motion of the government dated July 7, 2006, GA1689, the district court on July 17, 2006, entered an amended judgment, adding a statement of reasons for the non-Guidelines sentence imposed on Edward Estrada. GA1693.

A final ruling declining to resentence Michael Hilliard on remand entered on May 12, 2006. GA1971. Hilliard filed a timely notice of appeal on May 25, 2006. GA1959.

This Court has appellate jurisdiction over the challenges to appellants' sentences pursuant to 18 U.S.C. § 3742(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Claims of Hector Gonzalez

1. Whether the district court properly applied a four-level enhancement in Gonzalez's advisory Guidelines calculation under U.S.S.G. § 3B1.1(a), where the court adopted findings, based on credible evidence, that Gonzalez was an organizer or leader of an extensive criminal activity.

2. Whether the district court properly applied a two-level advisory Guidelines enhancement under U.S.S.G. § 2D1.1(b)(1), where the court adopted findings, based on credible evidence, concerning the possession of a firearm in connection with Gonzalez's offense.

3. Whether the district court violated the defendant's plea agreement by adopting under a narcotics quantity attribution of more than 1,000 grams of heroin, which is the threshold quantity for the statutory offense to which Gonzalez plead guilty, 21 U.S.C. §§ 846, 841(b)(1)(A).

4. Whether the Court need address the district court's decision not to award Gonzalez a third level decrease for acceptance of responsibility under U.S.S.G. § 3E1.1(b)(2), where the determination would leave his advisory Guidelines range unchanged.
5. Whether the district court gave proper consideration to the sentencing factors of 18 U.S.C. § 3553(a).

6. Whether the 309-month term of imprisonment imposed on Gonzalez at resentencing was reasonable under all the relevant circumstances.

Claims of Edward Estrada

1. Whether a jury finding was necessary to support the district court's advisory Guidelines determinations, and whether the court properly used a preponderance standard of proof in rendering those determinations.

2. Whether the district court properly increased Edward Estrada's advisory Guidelines offense level by three levels under U.S.S.G. § 3B1.1(b), where the court adopted findings, based on credible evidence, that defendant was a supervisor or manager in the drug trafficking organization.

3. Whether the district court properly increased Edward Estrada's advisory Guidelines offense level by two levels under U.S.S.G. § 3B1.4, where the court adopted findings, based on credible evidence, that the use of a minor was reasonably foreseeable to defendant.

4. Whether the district court properly determined that Edward Estrada's base offense level under U.S.S.G. § 2D1.1(c)(1) should be 38, where the court adopted findings, based on credible evidence, that the distribution by the organization of more than 30 kilograms of heroin was foreseeable to defendant and within the scope of his agreement.

5. Whether the district court's below-Guidelines sentence of 420-months' imprisonment was reasonable under all the relevant circumstances.

Claims of Michael Hilliard

1. Whether the district court failed to properly consider the relevant statutory factors in 18 U.S.C. § 3553(a) in sentencing Hilliard or failed to give sufficient weight to certain personal circumstances relied upon by defendant.

2. Whether the district court's below-Guidelines sentence of 330-months' imprisonment was reasonable under all the relevant circumstances.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 06-1330-cr (L)
06-2647-cr (CON), 06-3271-cr (CON)

UNITED STATES OF AMERICA,

Appellee,

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HECTOR GONZALEZ, MICHAEL HILLIARD,
EDWARD ESTRADA, also known as French Fry,

Defendants-Appellants.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This consolidated appeal concerns the sentences imposed by the district court on defendants Hector Gonzalez, Edward Estrada and Michael Hilliard. Each defendant had been charged in the Third Superseding Indictment, returned in June 2001, with unlawfully conspiring to distribute 1,000 grams or more of heroin

from 1991 until May 2001, in violation of 21 U.S.C. §§ 846 & 841(b)(1)(A). Gonzalez plead guilty to this charge on June 18, 2003. Edward Estrada was convicted by a jury on April 2, 2002 after a month-long trial. Hilliard plead guilty on February 28, 2002. Numerous other defendants were also convicted after multiple trials or entry of guilty pleas.

Following their convictions, Gonzalez, Edward Estrada and Hilliard were sentenced by the district court, and each appealed his sentence to this Court. This Court thereafter remanded each matter pursuant to *United States v. Booker*, 543 U.S. 220 (2005), and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). (In Hilliard's case, the Court also summarily affirmed the district court's Guidelines calculations before remand.) On March 13, 2006, and on June 26, 2006, the district court presided over resentencing hearings regarding Gonzalez and Edward Estrada, respectively, and each defendant again appealed his sentence. On May 12, 2006, the district court denied Hilliard's request for resentencing. He, too, appealed a second time.

On the instant appeal, defendants challenge various aspects of their sentences. For the reasons that follow, each of the defendants' claims should be rejected, and the sentences should be affirmed.

Statement of the Case

On June 20, 2001, a federal grand jury in the District of Connecticut returned a Third Superseding Indictment against numerous defendants alleged to be involved with drug trafficking activity in Bridgeport, Connecticut, including, among others, the defendant-appellants Hector "Junebug" Gonzalez, Michael "Mizzy" Hilliard, and Edward "French Fry" or "Fry" Estrada. GA0115-0144.[1] Count Twelve charged each of these defendants with unlawfully conspiring to distribute 1,000 grams or more of heroin from 1991 until May 2001, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A).

All three defendants were convicted on Count Twelve. On February 28, 2002, Hilliard entered a guilty plea. GA1703. On April 2, 2002, a jury returned a guilty verdict against Edward Estrada. GA0032. On June 18, 2003, Gonzalez entered a guilty plea. GA1349.

On December 3, 2003, the district court held a sentencing hearing regarding Gonzalez, imposing a 396-month term of imprisonment, with credit to be awarded for time served on a related case in the Eastern District of New York. GA1527. Gonzalez appealed, but on August 16, 2005, before briefing was complete, the government's motion for a remand pursuant to *Booker*, 543 U.S. 220,

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[1] References are as follows:

Government's Appendix. . . . . "GA___."

Government's Sealed Appendix. . . . . ."GSA___."

and *Crosby*, 397 F.3d 103, was granted. The Court also ordered the district court to consider Gonzalez's claim that he should have received a downward departure or adjustment, as opposed to "credit," for the sentence in the related Eastern District of New York case. GA1539.

On March 13, 2006, the district court presided over a resentencing hearing regarding Gonzalez. The sentencing court determined that it would be appropriate to sentence Gonzalez to essentially the same sentence, even under the now-advisory Guidelines, except that the sentence should be reduced by 87 months to give Gonzalez credit for the 87-month term of imprisonment imposed as part of his sentence in the Eastern District of New York. GA1601-03. The district court therefore resentenced Gonzalez to 309 months' imprisonment, consecutive to the sentence imposed in the Eastern District of New York, and imposed a 5-year term of supervised release. GA1571. Final judgment on remand as to Gonzalez entered on March 15, 2006. *Id.* On that same date, Gonzalez filed a timely notice of appeal. GA1575. Gonzalez – like the other two defendants in this consolidated appeal – is presently serving his sentence.

On September 9, 2002, the district court held the initial sentencing hearing regarding Edward Estrada. The district court sentenced Estrada to a term of life imprisonment, GA1615-16, and Estrada appealed. GA1617. On July 5, 2005, this Court granted the government's motion for a *Crosby* remand. GA1623. On June 26, 2006, the district court resentenced Estrada, lowering his term of imprisonment from life to 420 months. GA1683. Final

judgment on remand against Edward Estrada entered on June 27, 2006, *id.*, and Estrada filed a timely notice of appeal on July 5, 2006. GA1687. Pursuant to Fed. R. Crim. P. 36, and in response to a motion of the government dated July 7, 2006, GA1689, the district court on July 12, 2006, entered an amended judgment, adding a statement of reasons for the non-Guidelines sentence imposed on Edward Estrada. GA1693.

On December 16, 2003, Hilliard was sentenced by the district court to a term of imprisonment of 330 months. GA1909. This Court affirmed his sentence by summary order, but withheld the mandate pending the decision of the United States Supreme Court in *Booker*. GA1955, 1957; *United States. v. Estrada*, 116 Fed.Appx. 325, 2004 WL 2757401 (2d Cir. Dec. 3, 2004). On April 5, 2005, the Court remanded the case to the district court pursuant to *Crosby*, GA1921, and on May 12, 2006, the district court entered a final order denying the defendant's request for resentencing. GA1971. Hilliard filed a timely notice of appeal on May 25, 2006. GA1959.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

At the time of both the original sentencings in 2002-2003, and the resentencing proceedings in 2006, the district court was deeply familiar with the facts and circumstances of the large-scale narcotics conspiracy in which all three defendants participated. Over the course of several trials, and in numerous plea colloquies and sentencing proceedings, the court heard extensive

evidence showing, among other things, the roles played by the members of the drug trafficking conspiracy, and the nature and extent of that conspiracy.

A. The Beginning of the Estrada Narcotics Distribution Operation

For much of the 1990s and into 2001, Frank "Big Dog" or "Terminator" Estrada presided over a massive drug dealing organization. The Estrada organization operated primarily in the P.T. Barnum housing project in Bridgeport, but eventually had offshoots on Noble Avenue in Bridgeport, and in New Haven and Meriden, Connecticut. GA0147-51; 0161, 0181-84, 0202-05, 0207-10; GA0321-24; GA0358-62; GA0410-15.

By the late 1980s Frank Estrada, together with his brother Edward "French Fry" or "Fry" Estrada and others, had organized a narcotics distribution organization known as the "Terminators" at the P.T. Barnum housing project. GA1157-63; GSA045, 055-56. On August 6, 1989, the brothers shot Damon Edwards seven times in an incident related to a drug organization rivalry at the project. GSA055-56. They were imprisoned until September 1995. *Id.*

While in prison, Frank and Edward remained identified as members of the "Terminators." GA0731-35. Frank Estrada arranged for heroin to be smuggled into Connecticut prison facilities, and he formed further criminal associations with, among others, William "Billy the Kid" or "Gomez" Rodriguez, Jose Lugo and Eddie

"Tan" Mercado. GA0162-78, 0191-94; GA0420. Edward Estrada participated in the smuggling scheme, and assisted with communications among the group's members. GA0803; GA0736-40. While Lugo was in prison with Frank and Edward Estrada in the early 1990s, Frank Estrada told Lugo of his plans upon release to re-establish himself as a large scale heroin trafficker in the P.T. Barnum housing project. GA0178-79.

B. Frank Estrada's Release from Prison, the Merger with the Narcotics Organization of Defendant Gonzalez, and the Leadership Roles of Gonzalez, Edward Estrada, Michael Hilliard and Others

Soon after Frank Estrada was released from prison in September 1995, he returned to the P.T. Barnum housing project. By December 1995, he had reinitiated a heroin and crack cocaine distribution operation. GA0812-16, 0826-27, 0829. His chief lieutenants at this early phase included Eddie Mercado, one of the individuals he had met while in the Connecticut State Prison system, GA0179-0190; GA0417-19, as well as William Rodriguez, and Frank's brother, Edward Estrada. GA0837-42, 0846-47, 0852-56, 0859.

Initially, Estrada's "main thing was selling heroin," but soon he merged his organization with that of defendant Hector "June Bug" Gonzalez, which focused on distributing crack-cocaine, in order to maximize profits. GA1181-85. Gonzalez and Estrada became partners, and they shared profits 50/50. *Id.*

Members of Gonzalez's organization included numerous individuals who would become important players in the combined operation, such as Ricardo Rosario, Felix and Charles DeJesus, Makene Jacobs, Pablito Cotto, and Rosario "Sato" Cotto. Some of these individuals had worked a long time for Gonzalez, including Makene Jacobs, Charles "Chino" DeJesus, Felix "Dino" DeJesus, and Eddie Lawhorn. GA0416-18. Gonzalez separately recruited others into the organization, after the merger, including Jermaine Jenkins. GA0428-29. According to Jose Lugo, who lived with Frank Estrada and worked closely with him in P.T. Barnum during 1997, Gonzalez was a trusted, high-ranking member of the organization, whose duties including supervising the top lieutenants and making sure they did their jobs. GA1334; GA1342.4; GA0699; *see also* GA0212-18.

Operation of the drug trafficking organization depended on numerous of these "lieutenants" who, in turn, supervised "runners" or street-level dealers, primarily within the housing project. GA0229. Important lieutenants included appellants Hector Gonzalez and Edward Estrada, as well as Daniel Herredia, Eddie Mercado, Ricardo Rosario, Isaias Soler, William Rodriguez, Charles DeJesus, Felix DeJesus, and Jermaine Jenkins. *See* GA0224-33; GA0340-49; GA0420-23, 0430; GA0741; *see also* GA0846-47; GA0920-21, 0923-29, 0934-37.

The lieutenants would obtain heroin that had been packaged for retail distribution by the organization, which they would distribute to their respective street-level dealers

for retail sale. GA0229. They would then be responsible for remitting the proceeds to Estrada, or to another lieutenant who would turn them over to Estrada. *Id.*; GA0464-65; GA0414-18; GA0741-54; GA0847.

The organization held regular heroin bagging sessions, supervised by high-level conspirators such as appellants Hilliard and Gonzalez, and attended by many other co-conspirators, including appellant Edward Estrada. Approximately 190 to 200 bricks would be produced from a kilogram of heroin at these bagging sessions, as described further below. *See* GA0229-31; GA0338; GA0505-08; GA0596-98; GA1278; GA0619-26.

An individual bag of approximately .04-.05 grams of heroin ordinarily sold on the street for $10. The baggies were collected in "bundles" of ten, and ten bundles made up a "brick" or "G pack" of heroin, worth $1,000 for street-level sale. For the sale of a brick, the "runner" would generally keep from $100-200, with the remainder of the proceeds going back to Frank Estrada. GA0231-32; GA0339, 0383-84; GA0540.

Edward Estrada was incarcerated on state drug charges from December 1996 until March 1999, GSA057-058, but the evidence showed that his leadership role in the organization continued during and after his incarceration. GSA057-58. For example, Estrada began recruiting Joseph Butler into the organization while they were incarcerated together. GA0914-19.

After Butler was released from prison, Edward Estrada hired Butler to accompany him to various narcotics retail territories at P.T. Barnum and Marina Village housing projects and Noble Avenue to collect drug sale proceeds. Butler, who was given firearms by Edward to carry during these trips, continued to accompany Edward Estrada virtually every day for at least four months. GA0916-21, 0923-29, 0934-37. Eventually, Edward arranged for Butler to sell heroin for the organization at Noble and Ogden Avenues, where Butler continued to see Edward Estrada meeting with Nelson Carrasquillo, the lieutenant in charge of that territory. GA0938-42.

In the summer of 1999, Edward had also recruited Carrasquillo, who already had a number of people working for him in a separate marijuana distribution operation on Noble Avenue. GA1260-61, 1270-71. After recruiting him to sell heroin for the Estrada organization, Edward continued to supervise him, meeting regularly to provide him with drugs and collect proceeds, and providing him protection, until approximately March 2000, when Edward was sidelined due to his heroin addiction. GA1037; GA1260-61, 1269-70, 1303, 1309-11. On one occasion, when Carrasquillo was having trouble with a competing drug dealer, Carrasquillo sought help from Edward and Frank Estrada, who promised to take care of the problem. Edward reported that he and his brother had threatened the competitor, who gave Carrasquillo no more trouble after that. GA1268-70.

Cooperating witness Jermaine Jenkins, who had served as a lieutenant in the Estrada organization,

confirmed Edward Estrada's role when he testified that Edward regularly collected drug proceeds from him. Edward often skimmed money from the proceeds, generating friction between Jenkins and Frank Estrada. GA0482-85. Edward would sometimes also take or demand heroin for his own use. *See, e.g.*, GA1286-87.

C. Drug Bagging Sessions and Drug Quantities

The heroin sold by the Estrada organization was prepared for sale at "bagging sessions." During these sessions, wholesale quantities of uncut heroin obtained by Frank Estrada from New York was cut, ground into powder, spooned into glassine "fold" baggies, taped for sale, and then sometimes stamped with distinct brand names. *See, e.g.*, GA0152.2-52.3; GA0313; GA0366; GA0445-46; GA0530-32; GA0617-23; GA0241-80.

Frank Estrada arranged these sessions regularly, in various apartments and other locations in Bridgeport beginning in or about early 1996, and continuing through November of 2000. GA0752; GA1171-72. Sessions were held one to two times per week. *See, e.g.*, GA0245; GA0703; GA0863, 0872, 0878, 0881.1. They typically involved numerous workers and were supervised by Frank Estrada, Hector Gonzalez or trusted lieutenants in the organization, such as appellant Michael Hilliard, as well as Felix DeJesus, Ricardo Rosario, Isaias Soler, and others. GA0759-64, 0768-70; GA0249-50; GA619-29. Guns, which were routinely carried by members of the organization, were ordinarily present and visible during

bagging sessions. *See, e.g.*, GA0341-42; GA0473-76; GA0567-69; GA0622-29; GA0897-98; GA0247-51, 0268-69; GA0641-43; GA0650, 0691-92. Gonzalez, Edward Estrada, Michael Hilliard and other lieutenants typically carried guns at these sessions. GA0852-55; GA0626-27.

Ample testimony established that approximately a kilogram of heroin was bagged during the course of a typical bagging session, enough to fill a "small garbage bag" and up to 200 bricks or $200,000 in value. GA0309; GA0367; GA0555-56; GA0628-29; GA1278.[2] After the bagging sessions, highly ranked members of the organization, including Gonzalez, would hand out the packaged drugs to the other lieutenants, as they brought money to pay for their previous supplies. GA0769-71. Heroin packaged at these sessions would be distributed to not only the lieutenants selling in Bridgeport, but also to those selling elsewhere, such as Daniel "D-Nice" Herredia, who sold in New Haven. GA0769-70; GA0286-87, 0295-99. William Rodriguez noted that Hilliard, among others, was a regular participant in the bagging sessions. GA0859-61. He also observed that Edward Estrada attended the early sessions, prior to his

[2] Lugo testified that during his participation in the conspiracy, prior to his cessation of drug dealing in October 1997, GA0301.1, the organization held weekly bagging sessions where approximately 16 to 18 ounces of heroin were ground and packaged for distribution. GA0250-0253. An ounce is equal to 28.35 grams, and so sixteen ounces (one pound) is equal to 453.6 grams.

incarceration in December 1996. GA0838-40, 0842, 0847, 0853, 0856, 0859

The testimony of numerous other witnesses confirmed the immense amounts of heroin handled by the conspiracy, and the involvement of the various defendants in regard to those quantities. For example, Carrasquillo stated that when he joined the conspiracy in the summer of 1999, the organization held bagging sessions throughout the summer on a weekly basis and at least one kilogram of heroin was packaged at each session. These kilogram quantity sessions continued in the late summer through the fall of 1999. GA0556; GA1275-78, 1283, 1288. The sessions took place on a weekly and sometimes twice-weekly basis between December 1999 and March 2000. GA1305. Edward Estrada attended these sessions. GA1286-87.

Carrasquillo was Estrada's chief lieutenant at the operation at Noble and Ogden Avenues in Bridgeport. During the summer of 2000, he would turn over to Estrada approximately $32,500 from the sale of fifty bricks of heroin every two days, from this sales territory alone. GA0569-70, 0584-85. Joseph Butler, who accompanied Edward Estrada in collecting proceeds from various retail outlets, GA0916, 0919, 0923-28, testified that proceeds from the Noble and Ogden operation were often remitted to Edward Estrada. GA1037, 1093. Carrasquillo testified that he was supervised by Edward from summer of 1999 until mid-March 2000, during which time he would sell approximately four bricks a day. GA1280-81, 1302-03.

Jose Lugo, a trusted Estrada lieutenant, witnessed as Estrada regularly received up to $30,000 from his lieutenants. GA0212-0216. Once the money was counted, Estrada would direct Hector Gonzalez to provide the lieutenants with more narcotics, including amounts of up to $30,000 worth of heroin at one time. GA0217-18; GA0313-14.

According to one lieutenant, Jermaine Jenkins, during the course of his participation in the organization in 1997 and 1998, "kilos and kilos and kilos of crack cocaine [and] . . . kilos and kilos and kilos of heroin" and "tens of thousands of dollars, hundreds of thousands of dollars" . . . and "more than a million dollars" passed through his hands. GA0510-11. Jenkins further testified to having six to ten dealers working for him at P.T. Barnum and selling $200-300,000 worth of heroin per week. GA0444-45.

One cooperating witness, Ismael Padilla, testified that he sold heroin at P.T. Barnum for the Estrada organization from 1996 to 1997 under the direction of appellant Hector Gonzalez and William Rodriguez. GA0337-40, 0348. After going to jail for a period of time, he returned in December 1998. From that time until his re-arrest in July 1999, he was a lieutenant in charge of supplying runners with heroin and collecting their money. GA0348-52, 0369. In 1998 and 1999, he and his workers alone sold between three to five bricks of heroin a day, and there were other lieutenants and sellers working at the same time. GA0806.

Testimony from law enforcement witnesses confirmed the very large volume of narcotics packaged by the operation. Bridgeport Police Detective Richard DeRiso (retired) testified that as a result of information provided by William Rodriguez on or about March 7, 1997, he obtained a Connecticut Superior Court search and seizure warrant for an apartment at 80 Granfield Avenue in Bridgeport. In that apartment, the police found evidence of a massive narcotics packaging operation, including boxes containing hundreds of empty glassine envelopes commonly used to package heroin, two handguns, large quantities of crack cocaine and heroin, four coffee grinders used to grind heroin, and packaging materials, stamps, and boxes marked with drug brand names. GA0152.4-52.24.

D. Possession and Use of Firearms

Many members of the organization – including defendants Hector Gonzalez, Edward Estrada, and Michael Hilliard, as well as others – regularly carried firearms during and in relation to the narcotics trafficking activity of the organization. GA0852-55; GA0247-51, 0268-70; GA0622-29; GA0641-43; GA0650, 0692,0704; GA0342 ; GA0474-76; GA0567-68; GA1185, 1186.

The organization's interest in having firearms in connection with its distribution activities was known even beyond the organization. People would regularly go to the P.T. Barnum housing project to sell guns to Frank Estrada or his lieutenants. GA0692.

Guns were tools of the trade, used to protect the drug dealing operation. *See, e.g.*, GA0300-0301, 0304; GA0268-70; GA0641-43; GA0650, 0692. Frank was typically armed, and made his gun visible to others. *See, e.g.,* GA0650, 0692; GA0641-43. For example, Jermaine Jenkins testified that when he was working for a competing drug organization in P.T. Barnum in early 1997, William Rodriguez and another associate, in the company of Gonzalez, threatened Jenkins with guns. GA0425-27. According to Jose Lugo, when Frank Estrada suspected that William Rodriguez was responsible for the police raid at the 80 Granfield Avenue stash location, he organized an armed search for Rodriguez. GA0747-49. He recruited Hector Gonzalez, Jose Lugo and Felix DeJesus to join the hunt. Estrada and DeJesus were clearly armed. *Id.; see also* GA0268-70, GA0650. Lugo also described an occasion when he was summoned into an apartment at P.T. Barnum where Frank and a number of other members of the organization had "a bunch of guns on the table," which they were loading, while Frank explained that they were going to "straighten out" a matter with a rival narcotics trafficking group. GA0692.

As noted, Frank and other high ranking members of the organization – including Gonzalez, Edward Estrada and Hilliard – frequently carried guns in connection with the heroin bagging sessions. *See, e.g.*, GA0854-55; GA0342; GA0474-76; GA0567-68; GA0622-29; GA0889, 0897-0902; GA0247-51; GA0641-0643. For example, William Rodriguez specifically testified that Gonzalez and Edward Estrada, among others, were present at bagging sessions with guns in their possession. GA0854-55. Carrasquillo

testified that Carmen Estrada kept her 9 millimeter handgun on the table with the heroin at the bagging sessions he attended in the summer and fall of 1999, GA1284, and he saw Edward Estrada at some of these sessions. GA1287. Viviana Jimenez attended a heroin bagging session in early 1998 supervised by Michael Hilliard, Felix DeJesus, and Isaias Soler. GA0889, 0990, 0902. At one point during the session someone unexpectedly knocked on the door. Hilliard, DeJesus and Soler rushed the door with their guns drawn, and Hilliard instructed the workers to duck because he was going to shoot if they discovered a stranger at the door. Ultimately, they discovered it was Frank Estrada. GA0626-29.

Edward Estrada provided Butler with a firearm when Butler accompanied him to various narcotics retail outlets to collect money. GA0934-35. Butler and Carrasquillo also saw Edward carry a pistol on other occasions. GA1026-28, 1136; GA1287.

E. Gonzalez's Cocaine Base Offense in the Eastern District of New York

On June 4, 1997, Gonzalez, acting in concert with Frank Estrada, went to New York to purchase narcotics for resale in Connecticut. GA0788-94; GA1323-32; GA0662-64. Gonzalez was arrested by agents of the Drug Enforcement Administration.

A few weeks after his arrest, Gonzalez returned to the Estrada organization's headquarters in the P.T. Barnum housing project. At first he refrained from selling

narcotics, but later resumed his duties. GA0668-69; GA0793-94. Gonzalez was thereafter indicted in the Eastern District of New York on cocaine conspiracy charges. GA1335-37. He subsequently plead guilty and surrendered to federal authorities in connection with his sentence in the Eastern District of New York. He has been in custody since that time. GA1331-41.

F. The Organization's Use of Minors

Nelson Carrasquillo, who was recruited and supervised by Edward Estrada, identified Christopher Hopkins as a lieutenant employed by Carrasquillo to supervise drug sales near the corner of Noble Avenue and Ogden Street from mid-1999 until 2000. GA0581, 0584. On at least one occasion, during Carrasquillo's vacation, Hopkins reported directly to Edward Estrada for an entire week. GA1307. It is undisputed that Hopkins was under age 18 during the commission of the offense. D. Br. (E. Estrada), 23. Carrasquillo himself was only 20 years old at the time he testified in this matter in March 2002. GA1239.

A number of minors were also employed by the organization at the P.T. Barnum housing project, including Glenda and Viviana Jimenez. GA0459, 0462, 0465, 0501; GA0602, 0608, 0618. According to Lugo, the organization also employed an individual he knew solely as "Arnold" to distribute narcotics in the P.T. Barnum housing project. GA0228, 0232. Frank Estrada also identified this individual as working with the organization in P.T. Barnum from 1997 and into 1999. GA1165-68; GA1224-26. "Arnold" was identified and known as Arnold

Rodriguez, date of birth September 17, 1982. GSA054. It is undisputed that Arnold was a minor during the offense conduct. D. Br. (E. Estrada), 23.

G. Proceedings Concerning Defendant-Appellants

On June 20, 2001, a federal grand jury in the District of Connecticut returned a Third Superseding Indictment against numerous members of the narcotics conspiracy, including Gonzalez, Edward Estrada and Hilliard. GA0115-44. Count Twelve charged each of them with unlawfully conspiring to distribute 1,000 grams or more of heroin from 1991 until May 2001, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A). Count Thirteen charged Gonzalez and others with conspiring to distribute 50 grams or more of cocaine base in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A). All three defendant-appellants were eventually convicted on Count Twelve.

1. Proceedings Concerning Gonzalez

On June 18, 2003, Gonzalez entered a guilty plea to Count Twelve. GA1385-86. On December 3, 2003, the district court sentenced Gonzalez to a 396-month term of imprisonment, with credit to be awarded for time served on his related case in the Eastern District of New York. GA1527-28. Gonzalez appealed, GA1529-30, but while the appeal was pending, the government sought a remand pursuant to *Booker*, 543 U.S. 220, and *Crosby*, 397 F.3d 103. This Court granted the remand on August 16, 2005, but also ordered the district court to consider Gonzalez's

claim that he should have received a downward departure or adjustment, as opposed to "credit," for the sentence in the New York case. GA1539-40.

On March 13, 2006, the district court presided over a resentencing hearing regarding Gonzalez. GA1527. The sentencing court determined that it would be appropriate to sentence Gonzalez to essentially the same total effective sentence, even under the now-advisory Guidelines. The court, however, decided to reduce the sentence by 87 months to give effect to its original intention that Gonzalez receive credit for the 87-month term of imprisonment imposed in the New York case. GA1565-67. The district court therefore resentenced him to 309 months' imprisonment, consecutive to the sentence imposed in the New York case. GA1571-74. Final judgment on remand entered on March 15, 2006. *Id.*

2. Proceedings Concerning Estrada

On April 2, 2002, after a month-long trial, a jury returned a guilty verdict against Edward Estrada on the heroin conspiracy charge in Count Twelve. GA0032. On September 9, 2002, the district court sentenced Estrada principally to a term of life imprisonment. GA1615-16. Edward Estrada appealed, GA1617, and on July 5, 2005, this Court granted the government's motion for a *Crosby* remand. GA1623-24.

On June 26, 2006, the district court resentenced Estrada, lowering his term of imprisonment from life to 420 months. GA1683-86. Final judgment on remand

entered on June 27, 2006. *Id.* Estrada filed a notice of appeal on June 5, 2006. GA1687-88. Pursuant to Fed. R. Crim. P. 36, and in response to a motion of the government dated July 7, 2006, GA1689-92, the district court on July 12, 2006, entered an amended judgment, adding a statement of reasons for the non-Guidelines sentence. GA1693-96.

3. Proceedings Concerning Hilliard

On February 28, 2002, Hilliard plead guilty to Count Twelve. GA1747-48. On December 16, 2003, he was sentenced by the district court, principally to a term of imprisonment of 330 months. GA1909-10. On appeal, this Court affirmed his sentence by summary order on December 3, 2004, but withheld the mandate pending the decision of the United States Supreme Court in *Booker*. GA1955, 1957; *Estrada*, 116 Fed.Appx. at 325, 2004 WL at 2757401. On April 5, 2005, the Court remanded the case to the district court to consider resentencing pursuant to *Crosby*. GA1921.

On May 12, 2006, the district court entered a final order denying Hilliard's request for resentencing. GA1971-72. Hilliard filed a timely notice of appeal on May 25, 2006. GA1959-60.

SUMMARY OF ARGUMENT

Claims of Hector Gonzalez

1. The district court's finding that Gonzalez was an organizer or leader of an extensive criminal activity, warranting a four-level enhancement under advisory Sentencing Guideline § 3B1.1(a), was well supported by credible evidence. That evidence showed that Gonzalez merged his established crack distribution organization with Frank Estrada's heroin distribution organization in 1996 and served thereafter as Frank Estrada's partner, sharing profits evenly with Frank Estrada. The evidence also established that Gonzalez recruited other members into the merged organization, supervised heroin packing sessions, and, among other things, played an active role in drug acquisitions.

2. The district court properly assigned Gonzalez a two-level enhancement for possession of a firearm in connection with the offense in its advisory Guidelines calculation under § 2D1.1(b)(1). The court's determination was supported by evidence that Gonzalez attended heroin bagging sessions personally armed with a pistol, and by overwhelming evidence of use and carrying of firearms by other members of the conspiracy.

3. The district court properly determined that more than 30 kilograms of heroin was attributable to Gonzalez under § 2D1.1(c)(1), without violating defendant's plea agreement. The only reasonable expectation that Gonzalez could have had on the basis of the plea agreement was that

the district court would determine the applicable narcotics quantity, and that it would be at least (but likely more than) 1,000 grams of heroin – the bottom, threshold quantity for the statutory offense that the grand jury charged and to which Gonzalez plead guilty (21 U.S.C. §§ 846, 841(b)(1)(A)). The plea agreement contains no Guidelines stipulation regarding drug quantity, but it does contain an integration clause, precluding any reliance on any purported implicit understanding between the parties. The plea agreement, moreover, affirmatively states that Guidelines determinations would be made by the Court, and explicitly refers to "1,000 grams *or more* of heroin." GA1343 (emphasis added). Gonzalez, who was represented by counsel, received instructions from the district court at his plea that the court would determine his sentence, and expressly admitted on the record that the quantity issue remained open for sentencing because no agreement had been reached, could not reasonably have expected an entitlement to a quantity determination at the very bottom of the statutory range, as he now claims.

4. The Court need not address whether Gonzalez deserved a third level decrease for acceptance of responsibility under U.S.S.G. § 3E1.1(b)(2), because the determination would leave his advisory Guidelines range of 360 months to life imprisonment unchanged. Under these circumstances, even if there were error in the district court's calculations regarding the third level for acceptance of responsibility, it would be harmless.

5. The district court gave proper consideration to the sentencing factors under 18 U.S.C. § 3553(a). The court

gave explicit consideration on the record to all of the relevant statutory factors. In any event, Judge Underhill is entitled to the "presum[ption] . . . that a sentencing judge has faithfully discharged h[is] duty to consider the statutory factors," because there is no "record evidence suggesting otherwise." *Crosby*, 397 F.3d at 113.

6. The district court imposed a reasonable sentence on Gonzalez. Gonzalez's total effective sentence of 396 months (which the court lowered to 309 months to account for the sentence imposed in a related case) fell conservatively below the top of the Guideline range (life in prison) established for all defendants who play a leadership role in a massive drug conspiracy that involves over 30 kilograms of heroin and extensive use of firearms in furtherance of its offense, and who fail to candidly acknowledge their criminal history after their plea of guilty.

Claims of Edward Estrada

1. No jury finding was necessary to support the district court's advisory Guidelines calculations, and the court properly applied a preponderance standard of proof in making them. Given that Edward Estrada was sentenced to a term of imprisonment within the statutory range established by the provisions that he violated, his claims regarding the purported need for a jury finding or an elevated standard of proof are foreclosed by the repeated decisions of this Court.

2. The district court properly increased Edward Estrada's advisory Guidelines offense level under U.S.S.G. § 3B1.1(b) for his role as a supervisor or manager in the offense. The court's finding was well supported by evidence of his control over and organization of others, including testimony that he recruited multiple conspirators into the organization, supervised, armed and protected them, and served as a top lieutenant who collected large amounts of money from and distributed drugs to others, including other lieutenants, for significant periods of time.

3. The district court properly increased Edward Estrada's advisory Guidelines offense level under U.S.S.G. § 3B1.4 for use of a minor. Notwithstanding defendant's claim, this enhancement applies where the defendant "was not directly involved with recruiting a minor, and did not have actual knowledge that such individual was a minor, but who nonetheless had general authority over the activities in furtherance of the conspiracy." *United States v. Lewis*, 386 F.3d 475, 479 (2d Cir. 2004), *cert. denied*, 543 U.S. 1170 (2005). Moreover, the district court's conclusion that Edward Estrada could have reasonably foreseen that co-conspirators were using minors was not clearly erroneous.

4. The district court did not commit clear error when it determined drug quantity under U.S.S.G. § 2D1.1(c)(1). Contrary to defendant's assertion, the court rendered more than adequate findings on this issue, expressly addressing whether 30 kilograms or more of heroin was both "reasonably foreseeable to Edward

Estrada [and] . . . within the scope of his agreement," GA1647. Moreover, the court reasonably relied on the credible trial testimony of numerous witnesses in conservatively estimating that a quantity of 30 kilograms or more of heroin was attributable to Edward Estrada. The evidence established, among other things, that Edward Estrada was a founder and active leader of the narcotics operation in many different capacities throughout virtually its entire existence. As the district court found, his high-level, long-term participation implies not only that he could reasonably foresee all the distribution activities of the entire organization, but also that he agreed to their full scope.

5. The sentence imposed on Edward Estrada was not unreasonable. The district court correctly calculated his advisory Guidelines range of life imprisonment, and then gave proper consideration to the statutory factors in § 3553(a) in selecting a specific sentence. In light of the fact that the defendant had a long, violent criminal history, refused to accept responsibility for his crime, and was responsible for the distribution of well over 30 kilograms of heroin, bearing illegal firearms, and employing minors in "probably the most serious drug conspiracy to hit the City of Bridgeport ever, [which] sold huge amounts, huge, huge amounts of drugs. . . . [and] ruined untold numbers of lives," GA1669, defendant's below-Guidelines sentence of 420 months' imprisonment cannot be deemed unreasonable.

Claims of Michael Hilliard

1. The district court's decision not to resentence Hilliard should be affirmed. There was neither procedural unreasonableness nor substantive unreasonableness in Hilliard's sentencing. The district court explicitly weighed the relevant statutory factors in 18 U.S.C. § 3553(a). Indeed, the district court carefully addressed each of the specific considerations relied upon by Hilliard on appeal – his emotional circumstances, his pre-arrest rehabilitation efforts and his sense of duress. It even lowered his sentence by departing downward on the basis of their combined significance. In any event, the claim that the district court failed to give sufficient weight to such considerations is foreclosed by the rule that "[t]he 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 [the Court's] review, as long as the sentence ultimately imposed is reasonable in light of all the circumstances presented." *United States v. Fernandez*, 443 F.3d 19, 32 (2d Cir.), *cert. denied*, 127 S. Ct. 192 (2006).

Defendant does not dispute that he served as an armed supervisor of numerous heroin bagging sessions over a lengthy period of time in a massive and violent narcotics trafficking operation, to whom the distribution of well over 30 kilograms of heroin can be attributed. Nor does he challenge the fact that he had a lengthy, violent criminal history. Under these circumstances, Hilliard's below-Guidelines sentence of 330 months cannot be deemed unreasonable.

ARGUMENT

I. GOVERNING LAW AND STANDARD OF REVIEW APPLICABLE TO ALL CLAIMS

The following legal framework is applicable to all of the defendants' claims. Further authorities applicable to specific issues will be discussed below.

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 Booker*, 543 U.S. at 258; *see also Crosby*, 397 F.3d at 110-18. 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 considerations:

> (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 [in the Sentencing Guidelines];

(5) any pertinent policy statement [issued by the Sentencing Commission];

(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.

18 U.S.C. § 3553(a).

In *Crosby*, this Court explained that, in light of *Booker*, district courts should now engage in a three-step sentencing procedure. First, the district 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 district court should consider whether a departure from that Guidelines range is appropriate. *Id.* at 112. 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 to instead simply 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 ed.)). 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 Section 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), *cert. denied*, 126 S. Ct. 2915 (2006).

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 district 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*." *United States v. Selioutsky*, 409 F.3d 114, 118 (2d Cir. 2005); *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). The Court will remand where a miscalculation of the Guidelines is of sufficient magnitude to have the potential to "'appreciabl[y] influence' the ultimate sentence." *Canova*, 412 F.3d at 356 (quoting *Rubinstein*, 403 F.3d at 98).

In making its factual determinations regarding Guidelines issues, a sentencing court may rely upon all of the facts known to the court about the offense of conviction including facts that it learns through proceedings involving other defendants. *United States v. Tracy*, 12 F.3d 1186, 1203 (2d Cir. 1993) (citing *United States v. Carmona*, 873 F.2d 569, 574 (2d Cir. 1989)

(sentencing court is entitled to rely on any type of information known to it including testimony from a trial in which the person to be sentenced was neither a defendant nor represented by counsel)); *United States v. Martinez*, 413 F.3d 239, 243-44 (2d Cir. 2005) (post-*Booker*, district court may continue to consider hearsay testimony at sentencing), *cert. denied*, 126 S. Ct. 1086 (2006).

Factual determinations underlying Guidelines determinations under *Booker* are considered under a clear error standard of review. *Selioutsky*, 409 F.3d at 119. Issues of law are reviewed *de novo*, and mixed questions of law and fact are reviewed under either a *de novo* or clear error standard of review, depending on whether the issue is predominantly legal or factual. *Id.* (citing *United States v. Vasquez*, 389 F.3d 65, 75 (2d Cir. 2004), and *Rubenstein*, 403 F.3d at 99). A district court's exercise of discretion, such as a decision to grant an upward or downward Guidelines departure, is reviewed for abuse of discretion. *Selioutsky*, 409 F.3d at 119.

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.), *cert. denied*, 127 S. Ct. 192 (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.").[3]

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

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[3] The Supreme Court has recently agreed to consider whether a presumption of reasonableness applies to within-Guidelines sentences, and, if so, whether that presumption justifies such a sentence where there has not been an explicit analysis of the factors set forth in 18 U.S.C. § 3553(a), *Rita v. United States*, 127 S. Ct. 551 (2006) (granting certiorari), and whether a sentence substantially varying from the Guidelines must be justified by extraordinary circumstances. *Claiborne v. United States*, 127 S. Ct. 551 (2006) (same).

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).

II. HECTOR GONZALEZ'S CLAIMS LACK MERIT

A. Additional Facts Relevant to Gonzalez's Claims

1. Gonzalez's Plea Agreement and Guilty Plea

On June 18, 2003, Gonzalez executed a plea agreement whereby he agreed to plead guilty to Count Twelve of the Third Superseding Indictment, which charged him with conspiring to distribute heroin during the period from 1991 through May 2001, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A). Although the parties agreed that Gonzalez should receive credit for the 87-month term of imprisonment imposed in his Eastern District of New York case, GA1344-45, there was no agreement on any particular quantity of narcotics attributable to Gonzalez or any particular Guidelines base offense level – beyond the agreement that the amount was 1,000 grams of heroin or more. To the contrary, the agreement provided that "[t]he defendant expressly understands that the Sentencing Guideline determinations will be made by the Court, based upon input from the defendant, the government, and the United States Probation Officer who prepares the

presentence investigation report." GA1344. The agreement specifically provided "that no other promises, agreements, or conditions have been entered into other than those set forth in this plea agreement, and none will be entered into unless set forth in writing, signed by all the parties." GA1346-47. Throughout plea discussions, the government consistently represented to counsel that in the government's view Gonzalez's base offense level would be 38. *See* GA1411, 1441-45

During the plea proceedings on June 18, 2003, the district court advised Gonzalez that by pleading guilty, "you're going to be giving up your right to have a jury decide questions that pertain to your punishment, including the quantity of drugs involved. . . . I'll be deciding rather than the jury . . . ." GA1361. The court also advised Gonzalez about the application of the sentencing Guidelines, noting that one of the "most important factors" in the court's guideline's calculations (along with Gonzalez's criminal history) would be "the seriousness of the offense, and in this case that would depend in large part on the quantity of narcotics associated with your involvement." GA1375-76. The court further advised Gonzalez "that any prediction [counsel] may have made about how [Gonzalez] may be sentenced under the guidelines is not binding upon [the court]." Defense counsel assured the court that Gonzalez understood that the court was not bound by any predictions made by counsel regarding application of the Guidelines. GA1376.

During the change of plea, Gonzalez allocuted to conspiring to possess with intent to distribute a thousand grams or more of heroin. GA1385. Gonzalez indicated that he had no material disagreements with the government's description of his offense conduct. GA1384. The government's description noted, among other things, that

> [Gonzalez] formed a narcotics distribution partnership with Frank Estrada in or around June of 1996 . . . .
>
> [Gonzalez] was actively working with Estrada and others to consolidate their operations and expand the sources of supply of that network . . . . [,] work[ing] to expand the heroin suppliers beyond whom he and Estrada had previously used. . . .
>
> [Gonzalez] and Estrada throughout the Summer of '96 and into 1997 had a flourishing narcotics trafficking operation at P.T. Barnum . . . . [and] the defendant was an established narcotics trafficker [who] had a number of workers, stash houses, narcotics locations outside the housing complex and contacts with suppliers in New York. . . .
>
> [Gonzalez], who before his partnership with Estrada had concentrated mostly on selling cocaine and crack cocaine, merged his organization with Estrada's and both [Gonzalez]'s and Estrada's street level workers were selling large quantities of

> heroin and crack cocaine and . . . [Gonzalez] and Estrada were splitting the profits 50/50.
>
> [Gonzalez] and Estrada sold wholesale amounts of heroin to numerous narcotics dealers in the Bridgeport area.
>
> [A]fter [Gonzalez] was arrested in 1997 in New York on the cocaine charges that were previously discussed, he was released on bond and . . . . continued to participate in the partnership with Estrada until he was imprisoned as a result of the New York conviction in 1998.

GA1380-83.

2. Gonzalez's Failure To Accept Responsibility for the Offense

During the presentence investigation of the Probation Officer assigned to this case, Gonzalez failed to acknowledge certain prior convictions. GA1469-93, GA1498-99. Gonzalez had been convicted in Connecticut Superior Court in November 1988 of impeding a search and possession of drug paraphernalia, for which he was given a one-year jail term, execution suspended, and a one-year term of probation. GSA015-17, as amended, GA1469-71. Nevertheless, evidently on the basis of a technical mistake in Gonzalez's criminal history report regarding the location of the prior offense, Gonzalez maintained that he had no such criminal history. For example, in his sentencing memorandum, Gonzalez

maintained that he "should have a criminal history score of one point, not two." GA1403. He asserted as to the "alleged conviction, which involved impeding a search and possession of drug paraphernalia" that "Mr. Gonzalez did not perpetrate this crime." According to Gonzalez, because the Presentence Report supposedly failed "to presumptively establish the defendant's conviction for this alleged crime . . . Mr. Gonzalez' criminal history category should be reduced from II to a I." GA1403-04. Similarly, at his change of plea, Gonzalez represented to the court, through counsel, that "the only conviction he's aware of is the one arising out of the New York case which is related conduct . . . ." GA1378.

Gonzalez only acknowledged his Connecticut convictions at sentencing, when Judge Underhill indicated that he had been convinced beyond a reasonable doubt that Gonzalez had sustained them. GA1469-71. By that time, the probation officer had expended considerable time and energy investigating the issue. *Id*. The court would eventually find that "there has certainly been substantial work required of the U.S. Attorney and the court as a result of positions taken by Mr. Gonzalez in connection with sentencing." *Id*.

3. Gonzalez's Presentence Report

The Presentence Report proposed the following offense level calculation:

Base Offense Level	
§ 2D1.1(c)(1)	38

Increase for Possession of a Firearm § 2D1.1(b)(1)	+2
Organizer/Leader Enhancement § 3B1.1(a)	+4
Adjustment for Obstruction of Justice § 3C1.1	+2
Adjusted Offense Level (Subtotal)	46
Total Offense Level § 5, App. Note 2	43

GSA014-15.

The PSR determined that Gonzalez had a total of 2 criminal history points. GSA015-17. On the basis of those points, it categorized him as Criminal History Category II. *Id.* The intersection of criminal history category of II and a total offense level of 43 yielded a Guideline imprisonment range of life imprisonment. GSA015.

The PSR found that the Estrada organization bought, packaged and sold "a conservative estimate of 26 kilograms of heroin per year."[4] GSA008-09. It noted that,

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[4] All factual information from the Gonzalez PSR discussed in this brief comes from portions of the Gonzalez PSR adopted by the district court as the findings of fact for the (continued...)

due to their narcotics activity, "[a]t one point it is estimated that [Frank] Estrada and Gonzalez each had approximately $500,000 to $600,000 cash notwithstanding any accounts or inventory." *Id.* In paragraphs not challenged by Gonzalez, it found that heroin bagging sessions of the organization "would last 8 to 14 hours and would normally end with a plastic lawn leaf sized garbage bag full of packaged heroin. . . . Spooners had to make sure that they got 450 bags of heroin out of each pile. There were usually between 20 and 28 piles at each session. This suggests that a minimum of 900 grams of heroin was packaged during each session, though it is likely that each session involved one kilogram. . . . [A]pproximately one kilogram of heroin was bagged every two weeks from 1996 until December 2000." GSA008-09. The report stated that "[t]he testimony of several cooperating codefendants consistently identify [Gonzalez] as being present at 'bagging sessions,' and armed with a firearm." GSA012. The PSR found that Gonzalez was active in the Estrada operation from 1996 through 1998. *Id.*

The PSR recommended a four-level enhancement for Gonzalez's role in the offense, finding that Gonzalez was "a leader of the criminal activity that involved five or more participants and was extensively involved in the organization's criminal activity . . . ." GSA014. It noted not only that "Gonzalez and Estrada split the profit for their narcotics sales 50/50," but also that "Gonzalez

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[4] (...continued)
sentencing. GA1472.

accompanied Estrada on many business venture meetings and . . . took an active role in the discussions and negotiations." GSA006. The PSR found that Gonzalez "encouraged Estrada to seek additional sources of narcotics, which led to an increase in distribution," that "[e]ventually, Estrada began to purchase kilograms of heroin and cocaine from multiple sources," and that "the introduction of cocaine to the narcotics operation was the result of Gonzalez' interest in selling the drug." *Id.* It found that Gonzalez was frequently seen distributing drugs to street dealers and returning money from the street sales to Estrada. GSA007.

The Gonzalez PSR further described the duties of Hector Gonzalez as "includ[ing] the following: hiding narcotics once they were bagged from a session, hand[ing] out narcotics to street level dealers, collect[ing] money from street level dealers, return[ing] a portion of the money collected to Frankie Estrada, supervis[ing] the street sellers to ensure that there was always someone selling Estrada's product, ensur[ing] no other 'crew' was selling in the 'Estrada area' of P.T. Barnum, be[ing] aware of police presence, and advis[ing] Frankie Estrada of any problems." GSA012. The report found that "Mr. Gonzalez was described as Estrada's 'partner,' as well as a 'lieutenant' . . . ." GSA012-013.

In addition to the facts regarding Gonzalez's own possession of firearms in relation to the offense conduct, the Gonzalez PSR reported that gun violence "was a hallmark of the Estrada organization," GSA010, and recorded various acts of gun violence by members of the

organization, *id.* The report also found that "[f]irearms were frequently present at the bagging sessions." GSA009. In addition to Gonzalez, GSA012, it identified his partner Frank Estrada, and various lieutenants, including Isaias Soler and Michael Hilliard, as people who carried firearms at these sessions. GSA009.

4. The Initial Sentencing of Gonzalez on December 3, 2003, His Appeal and Remand

At Gonzalez's initial sentencing on December 3, 2003, the district court adopted the factual statements of the PSR, as its findings of fact in regard to the sentencing. GA1455-72.[5]

Gonzalez argued that he should receive credit for the 87-month sentence he was serving in the Eastern District of New York on his related cocaine trafficking conviction. Gonzalez asserted that he was entitled to this credit on the basis of the plea agreement, which included a provision whereby the government agreed to such a credit. GA1344-45; GA1500-04. The court agreed. *Id.*

With respect to quantity – in contrast to his argument in the instant appeal – Gonzalez did not argue that he had bargained for any particular quantity in the formation of

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[5] The district court made a few slight revisions to the findings of the PSR. GA1455-72. However, as noted, the factual information from the PSR discussed herein is unaffected by those revisions.

the plea agreement or that the agreement entitled him to any particular level. To the contrary, he clarified, through counsel, that "the Government did not make any promises about what quantities would, would not be included. Those issues were all open, and the defendant never relied on any representations and no promises were made. These issues were always left open, Your Honor, so I want to make that clear." GA1502.

Gonzalez offered two arguments on quantity. First, he argued that the court should not factor any involvement with cocaine or cocaine base into the base offense level, because he had already been punished for his involvement with cocaine. GA1500-04. Second, he argued that the quantity of drugs attributable to him should be reduced because he was incarcerated, and no longer involved in the conspiracy, as of May 1998. *Id.* These facts, according to Gonzalez, entitled him to a base offense level of 32.

Judge Underhill rejected Gonzalez's arguments on quantity. He concluded that a base offense level of 38 was warranted on the basis of "overwhelming" evidence that during the period of Gonzalez's involvement from 1996 through May 1998, the organization distributed more than 30 kilograms of heroin. The court also concluded that a base offense level of 38 could be justified on the grounds that the organization distributed more than one-and-a-half kilograms of crack cocaine, which the court considered as relevant conduct. The court held that level 38 was appropriate on the basis of "either one of [the drugs] by itself." GA1500, 1504.

Gonzalez also contended that he should not be subjected to a firearms enhancement under § 2D1.1(b)(1). He claimed that there was insufficient evidence of his personal possession of a gun and that attributing to him the possession of a gun by a co-conspirator, even if foreseeable, would be unfair given the penalty to which it would expose Gonzalez. GA1504-06. The court rejected these arguments and concluded that a firearms enhancement was appropriate because there was evidence that Gonzalez, and people in the organization close to him, possessed guns. GA1506. Judge Underhill concluded that "it's frankly inconceivable to me . . . that it was not foreseeable to Mr. Gonzalez that weapons were not only possessed but actually used to further the aims of the conspiracy that he joined." *Id.*

Gonzalez also challenged the imposition of a four-level adjustment for role in the offense. He claimed that he was subordinate to Mr. Estrada, and therefore should receive only a three-level enhancement as a mere supervisor. GA1506-10, GA1397-1399. The court concluded that a four-level enhancement was appropriate, reasoning that "we have perhaps the largest drug organization in Bridgeport history dealing literally millions of dollars and scores of kilograms of heroin and cocaine, and we have a person who is, if not a coequal, at the top, very, very close to the top of this organization." GA1507. He explained further that "Mr. Gonzalez was in fact an organizer or leader of a criminal activity that involved five or more participants and certainly was very extensive. . . . [T]he evidence clearly shows [that Mr. Gonzalez] was an organiz[er] or a leader of that criminal activity and, in fact,

many of the people who have been described as lieutenants were subordinate to Mr. Gonzalez." GA1509.

Although Gonzalez failed to acknowledge his 1988 Connecticut conviction during the presentence investigation, the court declined to impose an enhancement for obstruction of justice (as urged by the government and the probation office), but also declined to award him the full three points for acceptance of responsibility. The court concluded that although it was not sufficiently clear that the defendant provided materially false information to the probation officer, his lack of candor and failure to make a full disclosure, on account of his unfortunate pursuit of "a very technical legal point," had caused substantial, unnecessary work for the court and the government. GA1488, 1498-99.

With criminal history category II and a total offense level of 42, Gonzalez's Guidelines sentencing range was 360 months to life. Judge Underhill imposed a sentence within that Guidelines range: 396 months, from which Gonzalez was intended to receive credit for the sentence imposed in the Eastern District of New York case. GA1520; GA1527.

Judge Underhill explained the sentence in terms of the four purposes of sentencing. First, he explained that the sentence reflected the very serious nature of the crime – the scope of the conspiracy, the huge amount of drugs distributed, the violence of the co-conspirators in maintaining their operation, and the effect of the drugs on the purchasers and their families – and the need for a

significant punishment. In addition, Judge Underhill explained that the sentence would incapacitate Gonzalez and provide general deterrence. Further, the judge indicated that Gonzalez's sentence would offer a chance at rehabilitation to the extent that Gonzalez could "take advantage of the opportunities the [he is] given while [he is] incarcerated." GA1521.

Judge Underhill explained further that he was tempted to sentence Gonzalez at the top of his Guidelines range, to life imprisonment, in light of not only the seriousness of the offense, but also the fact that a number of coconspirators, who "worked under [Gonzalez], have been sentenced to life for their role in this conspiracy." GA1520. He explained that Gonzalez's role in the conspiracy and the seriousness of the offense pushed him to impose a sentence in excess of the 360-month floor of the Guidelines range. GA1521. On the other hand, Judge Underhill stated that consideration of Gonzalez's response to his incarceration had persuaded him not to impose a sentence higher than 396 months' incarceration. GA1520-21.

Gonzalez appealed his sentence, but before briefing was completed, on August 16, 2005, this Court granted the government's motion for a remand in light of *Booker* and *Crosby*. GA1539-40.

5. Gonzalez's Resentencing on Remand and Appeal

On March 13, 2006, the district court presided over a resentencing hearing. Gonzalez raised several arguments. First, he sought an 87-month decrease in his sentence, and an order that it was to be served consecutive to the term of imprisonment imposed in the related New York case, on the grounds that the Bureau of Prisons had failed to give him credit for that sentence as Judge Underhill had recommended. GA1549-50, 1567. The district court agreed to restructure Gonzalez's sentence as requested. *Id.*

Gonzalez incorporated by reference his claims from the original 2003 sentencing. GA1544-45, 1547. He specifically reasserted his argument that cocaine or crack cocaine should not be considered in determining the base offense level, in light of the sentence previously imposed on the cocaine charge in the Eastern District of New York and the government's agreement that he should receive credit for that sentence. GA1548-49, 1554-55.

The district court agreed not to consider cocaine or crack cocaine in any respect in calculating the base offense level, and ordered the PSR amended to reflect that decision. GA1545-46, 1548-49. The court noted that its initial base offense determination of level 38 had been based on both 30 kilograms or more of heroin and 1.5 kilograms or more of crack cocaine, either of which independently supported that level. GA1545-1546. The court concluded that the base offense level should remain

38 on the basis of the 30 kilograms of heroin attributable to Gonzalez, with no consideration of any involvement he had with cocaine. GA1545-46, 1548-49, 1555-56.

Gonzalez also claimed for the first time that the plea agreement entitled him to a finding that his offense conduct involved only one kilogram of heroin, and therefore his base offense level should supposedly be 32. GA1556-60. Judge Underhill rejected the argument. GA1559. He indicated that he was "very surprised" by it, because "this drug conspiracy was one of the most prolific in the history of Bridgeport [in connection with which] a number of people have been sentenced to life because of the huge quantities of drugs involved." *Id.* He also noted that there was "no stipulation in either the plea agreement or in the way the plea was taken concerning the quantity attributable to Mr. Gonzalez," only a reference to the statutory floor of at least one kilogram of heroin. *Id.*

Gonzalez also reasserted his arguments regarding the court's imposition in the Guidelines calculation of a firearms enhancement and the leadership enhancement, as well as the court's denial of a third level decrease for acceptance of responsibility. GA1561-62. The district court stood by its earlier decisions on these points. GA1547, 1565.[6]

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[6] On the denial of the third level for acceptance of responsibility, under U.S.S.G. § 3E1.1(b), the court noted an additional basis for its decision: because the government had not moved for that decrease, the third level could not be (continued...)

Judge Underhill stated that he had considered the factors required by 18 U.S.C. § 3553(a), including Gonzalez's background and character, the circumstances of the offense, the purposes of sentencing including punishment, deterrence, rehabilitation, and incapacitation, the sentencing Guidelines, the arguments raised by the parties, and the instructions of the Court of Appeals. He explained that his reasoning was essentially the same as the rationale he explained at the initial sentencing. GA1565-66. He told Gonzalez that he had considered "everything I know about you," GA1565, and he incorporated by reference his determinations from Gonzalez's original sentencing. GA1547.

The judge specifically cited the following considerations as factors that influenced his choice of sentence:

> the seriousness of this drug conspiracy, the harm that was done to persons who were the purchasers of this product, the fact that this was a violent drug organization, the fact that [Gonzalez] had a significant role in that operation, that [Gonzalez was] a leader of that operation, the fact that firearms were used and the fact obviously that this was a very widespread and unfortunately successful conspiracy that lasted for a number of years, and that included a huge amount of illegal drugs * * *

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[6] (...continued)
awarded under the Guidelines. GA1562, 1564-65.

> * [and] that [Gonzalez is] doing the right things in prison . . . .

Id.

The district court also made clear its understanding that it had authority "to impose a nonguideline sentence [anywhere] within the statutory range of ten years to life imprisonment." GA1564-1565. However, the judge determined that the sentence would be effectively the same sentence he had intended to impose in the original sentencing, but restructured its execution by subtracting 87 months and running it consecutive to the term imposed in the New York case, to account for term of imprisonment imposed therein (as opposed to the original recommendation that Gonzalez be credited for that time). GA1565-66. The district court therefore resentenced Gonzalez to a within-Guidelines sentence of 309 months' imprisonment, consecutive to the sentence imposed in the Eastern District of New York, and imposed a 5-year term of supervised release.[7] GA1567.

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[7] The district court's downward adjustment to account for the sentence imposed in the related New York case was justified under U.S.S.G. § 5G1.3, although the court did not cite that provision. There is no indication in the judgment or the sentencing transcript or judgment that Judge Underhill sought to impose a non-Guidelines sentence below the advisory Guidelines range.

B. The District Court Properly Assigned Gonzalez a Four-level Increase for Leadership Role in Its Advisory Guidelines Calculation

1. Governing Law

Section 3B1.1(a) of the Guidelines directs a sentencing court to increase a defendant's base offense level by four points if he was an "organizer or leader of a criminal activity" and the criminal activity involved "five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a). Section 3B1.1(b), which defendant maintains was the appropriate role enhancement provision, assigns a three-level enhancement if defendant was a "manager or supervisor (but not an organizer or leader)."

The Application Notes to the Guidelines expressly state that "[t]here can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy." U.S.S.G. § 3B1.1, App. Note 4. The Application Notes add that "[i]n distinguishing a leadership and organizational role from one of mere management or supervision, titles . . . are not controlling." *Id.*

The Application Notes further direct the courts to consider, in selecting between "leadership or organizational role" and "mere management or supervision," certain factors, including:

> the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others.

U.S.S.G. § 3B1.1, App. Note 4.

For the enhancement to apply, it is not necessary to establish that defendant personally organized or led five or more participants. It is necessary only to establish that he led or organized at least one other individual in a criminal activity that involved five or more participants. *United States v. Zichettello*, 208 F.3d 72, 107 (2d Cir. 2000); U.S.S.G. § 3B1.1, App. Note 2.

When considering whether or not to apply a sentencing enhancement for role in the offense, the district court must make specific findings of fact. *See United States v. Molina,* 356 F.3d 269, 275 (2d Cir. 2004). The district court "satisfies its obligation to make the requisite specific factual findings when it explicitly adopts the factual findings set forth in the presentence report." *Id.* at 275-276.

2. Discussion

The district court properly assigned Gonzalez a four-level enhancement under § 3B1.1(a) as an organizer or

leader. The court specifically found that "Mr. Gonzalez was in fact an organizer or leader of a criminal activity that involved five or more participants and certainly was very extensive. . . . Mr. Gonzalez, the evidence certainly shows, was an organiz[er] or a leader of that criminal activity and, in fact, many of the people who have been described as lieutenants were subordinate to Mr. Gonzalez." GA1509. He explained his rationale further: "Here we have perhaps the largest drug organization in Bridgeport history dealing literally millions of dollars and scores of kilograms of heroin and cocaine, and we have a person [Gonzalez] who is, if not a coequal, at the top, very, very close to the top of this organization." GA1507. These findings, which were incorporated into the resentencing on remand, GA1547, clearly establish the applicability of the four-level enhancement.

The enhancement is further supported by certain findings of the Gonzalez PSR, which were adopted by the district court as its factual findings for both the initial sentencing and the resentencing on remand. GA1472; GA1547. For example, the PSR details Gonzalez's role as co-founder of the organization and his partnership with Estrada. The PSR finds that Gonzalez had an established drug distribution organization of his own, with "a number of workers, stash houses, narcotics locations outside of the housing complex, and contacts with suppliers in New York." GSA006. He merged his pre-existing organization with Estrada's in 1996, GSA006, and, after the merger, according to the PSR, Gonzalez and Estrada became partners, splitting the profits of the merged organization 50/50. *Id.* These findings, alone, would

support the court's determination that a four-level enhancement applies.

Other findings of the PSR support the organizer/leader enhancement. The PSR states that "Gonzalez accompanied Estrada on many business venture meetings and . . . took an *active role in the discussions and negotiations*." GSA006 (emphasis added). It also states that "Estrada and Gonzalez each had approximately $500,000 to $600,000 cash . . . notwithstanding any accounts or inventory," at one point, as a result of their narcotics business. *Id.*

Even the passage of the PSR quoted by defendant on this point makes clear that Gonzalez's role within the organization was that of an organizer or leader. Specifically, it states that his functions included:

> hiding narcotics once they were bagged from a session, hand[ing] out narcotics to street level dealers, collect[ing] money from street level dealers, return[ing] a portion of the money collected to Frankie Estrada, supervis[ing] the street sellers to ensure that there was always someone selling Estrada's product, ensur[ing] no other 'crew' was selling in the 'Estrada area' of P.T. Barnum, be[ing] aware of police presence, and advis[ing] Frankie Estrada of any problems.

GSA012. This description highlights Gonzalez's high degree of responsibility within the organization, the high degree of control and authority he exercised over others,

and the integral role he played in planning, organizing and executing its criminal activities. In light of these findings, categorizing Gonzalez as an "organizer or leader" under U.S.S.G. § 3B1.1(a) was amply warranted. *See* U.S.S.G. § 3B1.1, App. Note 4.

These findings were well supported by evidence, and not clearly erroneous. For example, at the trial of co-defendants, Frank Estrada testified that shortly after his release from prison in late 1995, he merged his narcotics distribution organization in P.T. Barnum housing project, which had focused on heroin, with the organization of Hector Gonzalez, which had focused on distributing crack cocaine. GA1181-85. Frank Estrada testified that after the merger he and Gonzalez were partners, splitting profits between them equally. GA1184. Testimony established that Gonzalez's organization had been in existence for a number of years, and that through the merger, Gonzalez brought numerous important lieutenants to the Estrada organization, including Makene Jacobs, Charles DeJesus, and Felix DeJesus. GA0416-18. Testimony also established that Gonzalez separately recruited Jenkins into the organization. GA0428-29.

Jose Lugo, who lived with Frank Estrada and worked closely with him in P.T. Barnum during 1997, GA0212-16, described Gonzalez as a trusted, high-ranking member of the Estrada organization. GA1334. He stated that one of Gonzalez's jobs was to supervise the top lieutenants to make sure they did their jobs. *Id.*; GA1342.4; GA0699. Lugo further testified that Gonzalez would supervise the heroin packaging sessions, GA0759-64, 0768-70;

GA0249-50, and hand out the packaged narcotics to the lieutenants as they brought money to pay for narcotics earlier provided to them. GA0769-70. According to William Rodriguez, Gonzalez was armed at these sessions. GA0852-55. Other testimony established that Gonzalez handed out tens of thousands of dollars' worth of narcotics at one time. GA0217-18, GA0313-14.

Lugo also identified Gonzalez as one of the three lieutenants Frank Estrada asked to join him in an armed hunt for William Rodriguez when Estrada suspected that Rodriguez's information had led to the police raid on the Granfield Avenue stash house in spring 1997. GA1198-1200; GA0268-70; GA0650. Moreover, Lugo testified that Gonzalez handled acquisition of narcotics in New York City on behalf of the organization. GA0788-94. This was confirmed by Gonzalez's arrest in the Eastern District of New York when he tried to acquire a large volume of cocaine. *Id.*; GA1323-32.

Finally, the fact that Frank Estrada ultimately had a superior position in the organization and may have been known as the "leader" while Gonzalez was known as a "lieutenant," is irrelevant. As the Application Notes make clear, "there can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy," and "titles . . . are not controlling." U.S.S.G. § 3B1.1, App. Note 4; *see United States v. Si Lu Tian*, 339 F.3d 143, 157 (2d Cir. 2003); *United States v. Billops*, 43 F.3d 281, 287 (7th Cir. 1994) ("a leadership role is not limited to one person per organization"). There was no error in the district court's Guidelines calculation

regarding Gonzalez's leadership role under U.S.S.G. § 3B1.1(a).

C. The District Court Properly Assigned Gonzalez a Two-level Firearms Enhancement

1. Governing Law

Section 2D1.1(b)(1) of the Sentencing Guidelines provides that in connection with narcotics trafficking offenses, "[i]f a dangerous weapon (including a firearm) was possessed, increase by 2 levels." Application Note 3 to Section 2D1.1 instructs that "[t]he enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, *unless it is clearly improbable that the weapon was connected with the offense*." (emphasis added). *See United States v. Smith*, 215 F.3d 237, 241 (2d Cir. 2000). It is well-established that the enhancement applies even when the defendant did not personally possess a weapon and had no personal knowledge of its presence, "as long as the possession of firearms by the others involved in the offense was reasonably foreseeable to the defendant." *Id.* at 240 (citing *United States v. Soto*, 959 F.2d 1181, 1186-87 (2d Cir. 1992)).

"The sentencing court's finding that a firearm was possessed in connection with a drug offense for purposes of § 2D1.1 will not be overturned unless it is clearly

erroneous." *United States v. Stevens,* 985 F.2d 1175, 1188 (2d Cir. 1993).

2. Discussion

The district court's finding that Gonzalez possessed a firearm in connection with the offense was anything but clearly erroneous. In adopting the PSR, the court found that Gonzalez was present at heroin bagging sessions and personally armed with a firearm. GSA012. This fact was well supported by evidence from the trials, including the unequivocal testimony of William Rodriguez that he saw Gonzalez carrying a firearm at bagging sessions. GA0852-55.

Moreover, it cannot seriously be disputed that the possession and use of firearms by others was reasonably foreseeable to Gonzalez, as the district court found. As the PSR makes clear, the possession and use of firearms within the organization was widespread and played an integral part in the establishment of the organization and its ongoing operations. *See, e.g.*, GSA006-07 (police raid on apartment rented by Estrada and Gonzalez led to seizure of narcotics, weapons and paraphernalia); GSA009 (firearms frequently present at the bagging sessions; police raid on another apartment where bagging sessions held led to seizure of handgun in co-conspirator's coat); GSA010-11 (gun violence "was a hallmark of the Estrada organization," describing multiple violent acts by organization member William Rodriguez).

These findings were amply supported by the evidence. Testimony clearly established that Frank Estrada himself was routinely armed, and made his gun visible to others. *See, e.g.*, GA0650, 0692; GA0641-43. Numerous witnesses testified to the open possession and use of guns by Gonzalez and other members of the conspiracy, particularly at bagging sessions. *See, e.g.*, GA0341-42; GA0473-76; GA0567-69; GA0622-29; GA0888-89; GA0247-51, 0268-70; GA0641-43; GA0650, 0691-92; GA0852-55. Evidence established that Frank Estrada frequently bought firearms from people at P.T. Barnum. GA0692. Indeed, there was testimony that people would actually go to the housing project offering to sell guns to Frank Estrada or his lieutenants, indicating that possession and use of guns by the organization was well known even beyond its members. GA0692. Because Gonzalez held a leadership position in that organization, worked closely with Frank Estrada and closely supervised other lieutenants – including supervision of the bagging sessions – as discussed above, *see supra*, the possession and use of firearms by others in furtherance of the offense was reasonably foreseeable to him. *Cf. United States v. Crespo*, 834 F.2d 267, 271 (2d Cir. 1987) ("firearms are as much tools of the trade as are the commonly recognized articles of narcotics paraphernalia"); *United States v. Torres*, 901 F.2d 205, 235 (2d Cir. 1989).

Furthermore, there was explicit evidence that guns were actively used by the leadership of the organization in Gonzalez's company. For example, Jose Lugo testified repeatedly about such an incident, describing Frank Estrada's armed hunt for Rodriguez that Frank Estrada

organized when he suspected that Rodriguez was cooperating with police. Lugo saw guns in the possession of Frank Estrada and Felix DeJesus. Significantly, he identified Gonzalez as one of the four individuals who participated in the hunt. GA0268-70; GA0747-49. Similarly, according to Jenkins, when he was working for a competing drug organization in P.T. Barnum in early 1997, Rodriguez and another associate, in the company of Gonzalez, brandished guns directly at Jenkins following a gunfight. GA0425-27.

As Judge Underhill stated, "there was overwhelming evidence that persons close to [Gonzalez] . . . not only possessed weapons but used them." GA1506. His statement that "it's frankly inconceivable to me . . . .that it was not foreseeable to Mr. Gonzalez that weapons were not only possessed but actually used to further the aims of the conspiracy that he joined," is well supported. *Id.* This evidence, alone, fully supports the district court's Guidelines determination on this point. *See, e.g., Smith*, 215 F.3d at 240. The district court correctly applied the two-level firearms enhancement under U.S.S.G. § 2D1.1(b)(1).

D. The District Court Properly Calculated Gonzalez's Base Offense Level

Gonzalez argues that his plea agreement to a charge involving "1,000 grams or more of heroin," in conjunction with the agreement to credit him for the sentence imposed in the New York cocaine trafficking case gave rise to an implicit understanding that his sentence would be

calculated on the basis of 1,000 grams of heroin, and no more. He suggests that the court's calculation of his base offense level improperly ignored his reasonable expectations that only 1,000 grams of heroin, and no crack cocaine, would be attributed to him. Gonzalez's arguments fail.

1. Governing Law

This Court has "long interpreted plea agreements under principles of contract law." *In re Altro*, 180 F.3d 372, 375 (2d Cir. 1999). The Court "determine[s] whether a plea agreement has been breached by looking to the reasonable understanding of the parties." *Id.* In light of "the fact that, unlike ordinary contracts, plea agreements call for defendants to waive fundamental constitutional rights, and in an awareness that the Government generally drafts the agreement and enjoys significant advantages in bargaining power," the Court "resolve[s] any ambiguities against the Government." *Id.* In accordance with these principles, "'[a] sentence imposed pursuant to a plea agreement must follow the reasonable understandings and expectations of the defendant with respect to the bargained-for sentence.'" *United States v. Lenoci*, 377 F.3d 246, 258 (2d Cir. 2004) (quoting *United States v. Palladino*, 347 F.3d 29, 33 (2d Cir. 2003)).

However, the Court does not "require the Government to anticipate and expressly disavow every potential term that a defendant might believe to be implicit in such an agreement." *Altro*, 180 F.3d at 376. Particularly where the agreement incorporates an integration clause

disclaiming any other promises, a defendant may not rely on "implicit understandings" to establish a breach. *Lenoci*, 377 F.3d at 258 (quoting *Altro,* 180 F.3d at 376). Courts will not adopt interpretations that require "revis[ion of] the plea agreement [nor] strain to find that the government assumed an obligation . . . where it never expressly did so." *United States v. Matchopatow*, 259 F.3d 847, 852 (7th Cir. 2001).

2. Discussion

Here the only reasonable expectation that Gonzalez could have had was that the district court would determine the applicable quantity, and that it would be at least (but likely more than) 1,000 grams of heroin – the threshold quantity for the statutory offense charged by the grand jury and to which Gonzalez plead guilty. First, the plea agreement contains no Guidelines stipulation regarding drug quantity or any comparable provision by which the government committed to a sentencing calculation based on any particular amount or type of narcotic. *See* GA1343-1348. Moreover, the plea agreement states "[t]he defendant acknowledges that no other promises, agreements or conditions have been entered into other than those set forth in this plea agreement, and none will be entered into unless set forth in writing by all the parties." GA1346. "[W]here – as here – the Government incorporates into the plea agreement an integration clause expressly disavowing the existence of any understandings other than those set forth in the plea agreement, a defendant may not rely on a purported implicit understanding in order to demonstrate that the

Government is in breach." *Altro,* 180 F.3d at 376; *Lenoci*, 377 F.3d at 258 (same).

Furthermore, the language of the plea agreement affirmatively leaves open the question of defendant's sentence. It states clearly that "defendant expressly understands that the Sentencing Guideline determinations will be made by the Court . . ." GA1344. Even more explicitly, insofar as the plea agreement references any narcotics quantity, it refers clearly to "1,000 grams *or more* of heroin." GA1343 (emphasis added). To construe this language as an entitlement to a determination of quantity at the level of 1,000 grams of heroin, and *no more*, as Gonzalez attempts, is to interpret a phrase as its opposite. *Cf. United States v. Shimoda*, 334 F.3d 846, 848, 850 (9th Cir. 2003) (summarily dismissing defendant's claim that the district court should have calculated his sentence based on the "500 grams" stated in the indictment, in part because "[t]he indictment charges, and he pleaded guilty to, possession with intent to distribute '500 grams or more of a mixture or substance containing a detectable amount of cocaine'"); *United States v. King*, 62 F.3d 891, 895 (7th Cir. 1995) ("[n]o reasonable person could construe the language [of the plea agreement] leaving the decision to the 'sole discretion' of the prosecution as a binding promise to make a substantial assistance motion").

To expect an entitlement to a base offense level of 32 based on a plea to a Section 841(b)(1)(A) offense involving "1,000 grams or more of heroin" is particularly unreasonable in light of the applicable legal framework.

The indictment undeniably charged Gonzalez with a threshold drug quantity ("1,000 grams of heroin or more") that triggered a statutory imprisonment range of not less than 10 years and up to lifetime imprisonment. GA0115-44 (charging Gonzalez with a violation of 21 U.S.C. §§ 846 and 841(b)(1)(A). It is well-established that, once such a charged threshold quantity has been admitted by the defendant through a plea or found by a jury beyond a reasonable doubt, the sentencing court determines by a preponderance of the evidence the precise quantity, corresponding base offense level and overall Guidelines range, within the parameters set by the statute. *See, e.g.*, *United States v. Vaughn*, 430 F.3d 518, 526-28 (2d Cir. 2005) (noting the continuity of this framework pre-*Booker* and post-*Booker*, with the exception that the Guidelines must now be considered advisory), *cert. denied*, 126 S. Ct. 1665 (2006); *United States v. Thomas*, 274 F.3d 655, 663-64 (2d Cir. 2001).

With this clear legal framework in place, "coupled with the fact of [Gonzalez's] representation by competent counsel," *Fama v. United States*, 901 F.2d 1175, 1178 (2d Cir. 1990), Gonzalez could not reasonably have expected that upon entering his guilty plea, his sentencing determination would be locked-in at the bottom of the statutory range. Such an expectation would be particularly absurd when the very language of the indictment, the plea agreement and the statute refer plainly to "1,000 grams *or more* of heroin." GA0121-22; GA1343; 21 U.S.C. § 841(b)(1)(A)(emphasis added). *Cf. Lenoci*, 377 F.3d at 258 (in light of the underlying legal framework, defendant "likely realized and, in any event, should have realized,"

that the plea agreement allowed the government to argue in the manner to which defendant now objects).

In addition, "the statements made by the court, [Gonzalez] and his counsel," at the proceedings below, "belie any claim of misunderstanding on this score." *Fama*, 901 F.2d at 1178. At his plea, Judge Underhill instructed Gonzalez that in pleading guilty to Count Twelve, he exposed himself to a potential term of imprisonment between "a maximum of life in prison [and] a minimum of ten years," that his sentence within this range would be influenced by the court's Guidelines determinations, including "the quantity of narcotics associated with [his] involvement," and that any understanding he may have had regarding application of the Guidelines would not bind the court. GA1374-76; *see also* GA1361-62. Gonzalez indicated that he understood each of these points. *Id.*[8] Moreover, through counsel, Gonzalez admitted that no agreement had been reached regarding what quantities would be used in calculating his sentence and that the quantity issue remained open for the district court's determination. Counsel stated:

> just to make the record clear[,] . . . . *the government did not make any promises about what quantities would, would not be included. Those issues were all open, and Gonzalez never relied on any representations and no promises were made. These*

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[8] Gonzalez also allocuted at his plea to having participated in a very high volume heroin distribution operation. GA1380-83.

issues were always left open, Your Honor, so I want to make that clear.

GA1502 (emphasis added). *See also* GA1544 (incorporating remarks into record for resentencing). Moreover, the government had consistently represented to the defense that in the government's view Gonzalez's base offense level would be 38. GA1441-45. In sum, the record overwhelmingly shows that Gonzalez, in fact, understood that he potentially faced a Guidelines calculation based on more than 1,000 grams of heroin. *See Gammarano v. United States*, 732 F.2d 273, 276 (2d. Cir. 1984) (examining the statements of the defendant, his counsel and the court to determine defendant's "reasonable expectation under the plea agreement").

Finally, Gonzalez's claim that the district court improperly considered cocaine base quantities in determining his base offense level is misguided. Even assuming *arguendo* that the district court was obligated not to consider crack cocaine in its determination of relevant conduct on account of the Eastern District of New York case,[9] the court complied with this obligation. At the original sentencing, Judge Underhill explained that the

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[9] We note that *Booker* has not changed the well-established rule that even conduct on which defendant has been acquitted may be considered as relevant conduct for sentencing purposes. *See, e.g., Vaughn,* 430 F.3d at 526-27. Moreover, there is no double counting problem here insofar as defendant received full credit for the term of imprisonment imposed in the New York cocaine case.

base offense level of 38 was warranted solely on the basis of the quantity of heroin involved, irrespective of any quantities of cocaine or cocaine base. GA1504. Moreover, Gonzalez raised no objection to the facts set forth in the PSR regarding heroin quantities, upon which the district court relied in finding that the offense involved 30 kilograms or more of heroin.[10] GA1548-49, 1555-56.

Gonzalez's arguments regarding the quantity determination fail. The district court calculated Gonzalez's base offense level without violating the plea agreement and in full accordance with the Guidelines.

E. The Court Need Not Address Whether Gonzalez Deserved a Third Level for Acceptance of Responsibility

Gonzalez argues that he should have received a third level reduction for acceptance of responsibility under § 3E1.1(b)(2), but this Court need not address this issue, because "guideline disputes that would not have affected the ultimate sentence need not be adjudicated on appeal."

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[10] Gonzalez raised no objection to the PSR's factual findings regarding the quantity of drugs bagged by the Estrada organization, Gonzalez's involvement in bagging sessions, or the time-frame of his involvement. GSA0008-10, and GA1463-68. These findings were adopted by the court, GA1472, and relied upon in its determination of drug quantities. GA1504; GA1547 (incorporating at resentencing the findings from initial sentencing).

United States v. Shuster, 331 F.3d 294, 296 (2d Cir. 2003).[11]

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[11] At the sentencing on remand, the district court denied Gonzalez the third level for acceptance of responsibility in part because the government had not filed a motion for a third level reduction under U.S.S.G. § 3E1.1(b). GA1562. This reliance was misplaced. The PROTECT Act, Public Law 108-21, Section 401(g), amended U.S.S.G. § 3E1.1(b), by inserting the requirement of a formal motion by the government before a third level reduction may be granted, effective April 30, 2003. However, insofar as the offense conduct in this case preceded that amendment, the court should not have applied it to the defendant. *See United States v. Borer*, 412 F.3d 987, 990-91 (8th Cir. 2005) (declining to retroactively apply the motion requirement, on the basis of the Ex Post Facto Clause and U.S.S.G. § 3E1.1(b)).

Prior to this amendment, this Court had held that "granting the additional one-level decrease in Section 3E1.1(b) [under the November 1, 2002 version of the Guidelines] is not discretionary where defendant satisfies the guideline's criteria." *United States v. Rood*, 281 F.3d 353, 357 (2d Cir. 2002). However, the Court has not specifically addressed whether the district court may deny a third level to a defendant on the grounds that defendant's lack of candor, after timely agreeing to plead guilty, has created unnecessary work for the court and the government. The language of the provision suggests the propriety of a denial of the third level reduction under such circumstances. *See* U.S.S.G. § 3E1.1(b)(2) (November 1, 2002) (defendant qualifies for third level reduction only where his timely notification of intention to enter guilty plea "permit[s] the government to avoid preparing for trial and *permits the court to allocate its resources efficiently*" (continued...)

Had the district court agreed with Gonzalez and awarded him the additional one level adjustment under U.S.S.G. § 3E1.1(b)(2), his advisory Guidelines range would have remained unchanged. His total offense level would have decreased from 42 to 41. With a Criminal History Category of II, which is not disputed, Gonzalez's advisory Guidelines range would have remained 360 months to life imprisonment. Using this very same range, the district court determined that a total effective sentence of 396 months (before reduction to account for sentence in related New York case, *see* U.S.S.G. § 5G1.3(b)) was appropriate.

Under these circumstances, any error in the district court's calculations regarding the third level for acceptance of responsibility under U.S.S.G. § 3E1.1(b)(2) was harmless. *See, e.g.*, *United States v. Ramos*, 71 F.3d 1150, 1158 n.27 (5th Cir. 1995) (had the district court agreed with defendant's Guidelines argument, it would produce the same Guidelines range and thus any error would have been harmless); *cf. Lenoci*, 377 F.3d at 256-57 (any error in the court's grouping analysis was harmless because "[e]ven if the court should have grouped the two

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[11] (...continued)
(emphasis added)). However, the Fifth Circuit has addressed the issue, ruling to the contrary. *United States v. Tello*, 9 F.3d 1119, 1123-28 (5th Cir. 1993) (defendant's lie to probation officer regarding his criminal history after timely pleading guilty did not constitute basis for denial of additional one-level decrease after two point decrease for acceptance awarded under U.S.S.G. § 3E1.1(a)).

counts in this case, Lenoci's offense level would have been the same," thus having no effect on his sentencing).

Consequently, there is no need for the Court to adjudicate this issue. *See, e.g., Lenoci*, 377 F.3d at 256; *Shuster*, 331 F.3d at 296-97 (district court's application of a departure eliminated need for Court of Appeals to adjudicate Guidelines dispute); *United States v. Bermingham*, 855 F.2d 925, 934-35 (2d Cir. 1988) (where a sentence falls within two overlapping ranges, the "reviewing court . . . need not select between the two arguably applicable guideline ranges if it is satisfied that the same sentence would have been imposed under either guideline range").

F. The District Court Gave Proper Consideration to the Sentencing Factors Under 18 U.S.C. § 3553(a)

1. Governing Law

Under *Booker*, *Crosby* and the related decisions of this Court, the sentencing court must calculate and consider the applicable range under the Guidelines, and then consider that range, in conjunction with the other factors set forth in Section 3553(a), in determining the sentence to impose. *See, e.g., Crosby*, 397 F.3d at 112-13. This Court "will not conclude that a district judge shirked her obligation to consider the § 3553(a) factors simply because she did not discuss each one individually . . . ." *Fernandez*, 443 F.3d at 30. "[N]o specific verbal formulations should be prescribed to demonstrate the adequate discharge of the

duty to 'consider' matters relevant to sentencing." *Fleming*, 397 F.3d at 100. "As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable [under the Guidelines], and nothing in the record indicates misunderstanding about such materials or misperception of their relevance, [this Court] will accept that the requisite consideration has occurred." *Id.*

2. Discussion

The record clearly reflects that the district court, having first determined the applicable Guidelines range, then considered that range in conjunction with the other Section 3553(a) factors in imposing a final sentence.[12] The court stated explicitly that it was considering the circumstances of the offense and Gonzalez's background

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[12] To the extent that Gonzalez is claiming that the district court improperly failed to give "specific attention" to individual enhancements at the sentencing on remand, *see, e.g.,* D. Br., 29, his argument is in error. The court gave the parties the opportunity to raise any new arguments they wished, gave defendant a renewed opportunity to address the court, and proceeded to give new consideration to certain issues, such as drug quantity. GA1554-62. Under these circumstances, the court's incorporation of its earlier analysis by reference, GA1547, was perfectly appropriate. *Cf. United States v. Barresi*, 361 F.3d 666, 674 (2d Cir. 2004) (statements made by court at original sentencing hearing, incorporated by reference at sentencing on remand, were found "sufficient to discharge the district court's obligation to make clear on the record how it determined the extent of the departure imposed").

and character. GA1565-66; *see* 18 U.S.C. § 3553(a)(1). It stated that it was considering the purposes of sentencing, including punishment, deterrence, rehabilitation, and incapacitation. GA1565-66; *see* 18 U.S.C. § 3553(a)(2). It stated that it was considering the Sentencing Guidelines, 18 U.S.C. § 3553(a)(4), as well as the arguments raised by the parties and the instructions of the Court of Appeals. GA1565-66. Judge Underhill noted in particular that his sentence was influenced by:

> the seriousness of this drug conspiracy, the harm that was done to persons who were the purchasers of this product, the fact that this was a violent drug organization, the fact that [Gonzalez] had a significant role in that operation, that [Gonzalez was] a leader of that operation, the fact that firearms were used and the fact obviously that this was a very widespread and unfortunately successful conspiracy that lasted for a number of years, and that included a huge amount of illegal drugs * * * * [and, on the other hand,] that [Gonzalez is] doing the right things in prison . . . .

Id. Moreover, Judge Underhill incorporated his decisions and remarks at the initial sentencing, GA1547, where he had explained the sentence in greater detail. For example, there he had described the consideration he had given to the severe sentences imposed on other defendants in this case. He also gave further emphasis to his consideration of the seriousness of the offense, the need for incapacitation, the need to discourage others from committing comparable

offenses, and the prospect of Gonzalez's sentence facilitating his rehabilitation. GA1519.

Judge Underhill was not required to utter "robotic incantations" to demonstrate that he had properly considered the requisite factors. *Crosby*, 397 F.3d at 113. This Court "presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the statutory factors." *Crosby*, 397 F.3d at 113. On this record, there is no basis for rebutting that presumption.

G. The District Court Imposed a Reasonable Sentence

The sentence imposed on Gonzalez was reasonable. The district court calculated the correct Guidelines imprisonment range,[13] treated the Guidelines range as advisory, *see* GA1565, correctly construed the plea agreement, properly considered the Section 3553(a) factors, and ultimately imposed a within-Guidelines sentence, explaining in detail the reasons for its sentence.

The sentence in this case is squarely within the "overwhelming majority of cases" in which the Guidelines sentence "fall[s] comfortably within the broad range of

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[13] As discussed above, if there were any error in the court's refusal to award an additional one-level decrease for acceptance of responsibility under U.S.S.G. § 3E1.1(b)(2), it would be immaterial due to the applicability of the very same Guidelines range.

sentences that would be reasonable in the particular circumstances." *Fernandez*, 443 F.3d at 27. Gonzalez's sentence of 309 months for the offense of conviction, and the total effective sentence of 396 months, fell conservatively below the top of the Guideline range (life imprisonment) established for all defendants who play a leadership role in a massive drug conspiracy that involves over 30 kilograms of heroin and extensive use of firearms in furtherance of its offense. Examination of "the record as a whole" clearly establishes that the district court did not exceed the bounds of its discretion in sentencing Gonzalez. *Id.* at 28. Accordingly, Gonzalez's claims on appeal should be rejected.

III. EDWARD ESTRADA'S CLAIMS FAIL

A. Relevant Facts Concerning Edward Estrada

1. Edward Estrada's Presentence Report

After a month-long jury trial in March 2002, the jury returned a guilty verdict against Edward Estrada on Count Twelve. The PSR proposed the following offense level calculation:

Base Offense Level § 2D1.1(c)(1)	38
Increase for Possession of a Firearm § 2D1.1(b)(1)	+2
Manager/Supervisor Enhancement § 3B1.1(b)	+3
Adjustment for Use of a Minor § 3B1.4	+2
Adjusted Offense Level (Subtotal)	45
Total Offense Level Chapter 5, Part A, App. Note 2	43

GSA053-54.

The PSR determined that Edward Estrada had a total of 14 criminal history points, placing him in Criminal History Category VI. This calculation was based in part on defendant's five prior felony convictions, including a 1990 conviction for First Degree Assault, based on his and Frank Estrada's shooting a rival drug dealer seven times, and two 1993 convictions for possession of a weapon while incarcerated. GSA054-58. The report noted that, on the basis of two of these three convictions, the defendant qualified as a career offender under U.S.S.G. § 4B1.1, which placed him automatically in Criminal History Category VI. GSA058. With a total offense level of 43 and Criminal History Category VI, the PSR concluded that Edward Estrada's Guidelines imprisonment range was life. GSA064.

Among the relevant facts reported by the PSR were these: Edward Estrada was among the original members of the Terminators drug operation in the P.T. Barnum housing project in the late 1980s, GSA045-46; the defendant collected proceeds from lieutenants and oversaw the sales areas at both P.T. Barnum and Ogden and Noble Avenues during a portion of the period from March 1999 through December 2000, GSA053, as amended at sentencing, GA1586,1600; he was involved in the conspiracy from September 1995 until December 1996, and from March 1999 until December 2000, *id.,* (Edward was imprisoned on state narcotics charges from December 1996 until March 1999, GSA057-58); he supervised Carrasquillo's heroin sales operation at Noble and Ogden Avenues, which employed a minor, GSA050-51, 054; and he recruited Joseph Butler into the narcotics

distribution operation, and used him as an armed assistant in delivering narcotics to, and collecting money from, Estrada lieutenants, GSA051-052; and the organization typically held heroin bagging sessions one to two times a week and packaged approximately one kilogram of heroin per session. GSA046-47.

2. Edward Estrada's Initial Sentencing

At the initial sentencing of Edward Estrada on September 9, 2002, he raised legal challenges to certain Guidelines enhancements proposed by the PSR. Specifically, defendant challenged the three-level enhancement for his role in the offense pursuant to U.S.S.G. § 3B1.1(b), and the two-level enhancement for use of a minor under § 3B1.4. Defendant expressly disavowed any challenge to the quantity determination or the base offense level of 38. GA1588. Defendant also conceded that the firearms enhancement was applicable, and that the PSR had correctly calculated his criminal history. GA1589.

With respect to his role in the offense, the defendant argued that a three point enhancement should not apply because he was not typically referred to as a "lieutenant" and because his role in the operation was the product of his relationship with his brother, Frank Estrada, and the tolerance that others showed him because of their fear of Frank. GA1594. Significantly, his attorney conceded that Carrasquillo's testimony about the defendant's supplying heroin to, and picking up proceeds from, the operation at Noble and Ogden Avenues from 1999 through March

2000 "if believed, would support a finding of a managerial role." GA1593. Not surprisingly, the district court applied the three-level role enhancement under U.S.S.G. § 3B1.1(b). The court relied on the fact that Edward Estrada had recruited both Butler and Carrasquillo, and had collected funds from and supplied large quantities of drugs to the lieutenants on behalf of the organization. GA1597.

Estrada argued that he should not be held accountable for the organization's use of minors because he was not personally involved in using them. GA1598-99. The court rejected that argument. It ruled that the § 3B1.4 enhancement should apply because Carrasquillo's use of a minor (Christopher Hopkins) as his lieutenant was reasonably foreseeable. The court relied on the fact that Edward Estrada, as the supervisor of the Noble and Ogden operation, was above and within the direct chain of command over the minor. GA1599-1600.

The district court consequently adopted the Guidelines calculations proposed by the PSR. GA1601. After giving defendant's counsel an opportunity to argue for a one-level downward departure on the grounds of Edward Estrada's drug addiction, and giving defendant an opportunity to address the court, Judge Underhill imposed a lifetime term of imprisonment. GA1599-1609, 1612. Judge Underhill explained his sentence at some length. Among other things, he stated that he had considered the required statutory factors, that he viewed the offense as very serious, insofar as it was a very lengthy conspiracy and had a detrimental impact on the lives of many people, and

that there was a need for serious punishment to deter others from following his path. GA1609-11. The court denied defendant's request for a downward departure, holding that there was a long period of time, specifically from December 1999 to February or March 2000, when he was "actively involved in this organization at a high level, handing out large quantities of drugs, receiving large amounts of cash proceeds from the sale of those drugs, without any apparent inability to function within that organization." GA1611.

3. Edward Estrada's Resentencing on Remand and Appeal

Estrada appealed, and on July 5, 2005, this Court granted the government's motion for a remand for further consideration in light of *Booker* and *Crosby*. GA1623-24.

On June 26, 2006, the district court presided over a resentencing hearing. GA1625. The district court invited the parties to raise any challenges to the factual findings underlying the court's conclusions at the initial sentencing. GA1634. Counsel adopted the defendant's challenges from the previous proceeding, and articulated a new challenge to the findings concerning drug quantity. GA1634, 1645. Notwithstanding his previous agreement to the attribution of 30 kilograms or more of heroin, GA1588, defendant now argued that the drug quantity was excessive. GA1645-46. According to Estrada, he should not be held responsible for any of the drug dealing in New Haven or Meriden or for drugs distributed during times he

was in prison. GA1645-46. Significantly, he offered no alternative narcotics quantity determination.

The court rejected this argument. Judge Underhill identified the issue as whether trafficking in 30 kilograms or more of heroin was "reasonably foreseeable to Mr. Estrada as being within the scope of his agreement," GA1647, and issued an express finding that it was:

> [B]ased upon the trial record . . . it's easy for me to find by a preponderance of the evidence that the quantity here is 30 kilograms of heroin or more. Given the scope of this conspiracy in selling large quantities both within the P.T. Barnum housing project and at the corners of Noble and Ogden, the Noble and Ogden operation was essentially supervised by Mr. Estrada and he collected the proceeds from that, that block for a relatively significant period of time . . . as set forth in paragraph 35 of the PSR. Mr. Estrada's involvement in the upper levels of the conspiracy, I think it's fair to say, gave him access to an understanding of the scope of the full conspiracy and I have really no difficulty in reaching a finding that he's, he was certainly well aware and that it was reasonably foreseeable to him that the quantity of heroin distributed by this conspiracy is well in excess of 30 kilograms.

GA1649.

The court adopted the factual statements of the PSR and its other findings from the initial sentencing. *Id*. The court then invited the parties to raise any legal arguments in response to the PSR.

The defendant argued that his base offense level should be 32 because the jury found him responsible for only one kilogram of heroin. GA1650-51. The court rejected that argument as a matter of law, noting that once the jury found the threshold quantity necessary to trigger the statutory imprisonment range of ten years to life, determinations regarding advisory Guidelines calculations are for the court to make, by a preponderance of the evidence. GA1654.

The court adopted the Guideline calculation as set forth in the original PSR. GA1655. As noted, the PSR came to a total offense level of 43 and a criminal history category of VI, at which point the Guidelines advise life in prison. GA1655-56. Judge Underhill made clear his understanding that the Guidelines are not mandatory. *See* GA1656.

Edward Estrada moved for a downward departure and a non-Guideline sentence, seeking a sentence below life in prison, on the grounds of his drug addiction and post-offense rehabilitation. GA1657-59. The government opposed that request, noting that in 2005, defendant had refused to testify before a grand jury investigating a murder in aid of racketeering perpetrated by Eddie

Mercado, another member of the Estrada organization.[14] Edward Estrada had persisted in this refusal despite a grant of immunity and a contempt finding by the district court. GSA085. In addition, the government pointed out that Edward Estrada had been found in possession of heroin by prison authorities in April 2003. *Id.*

The district court granted Edward Estrada a non-Guidelines sentence, imposing a term of imprisonment of 420 months. In explaining the sentence, the judge stated that he had "considered each of the factors set forth in 18 U.S.C. Section 3553(a)," and that "much of what [he] said last time applies here as well." GA1668. He explained further that his sentence was influenced by numerous specific factors.

First, the court focused on the seriousness of the offense, describing the Estrada operation as "probably the most serious drug conspiracy to hit the City of Bridgeport ever, [which] sold huge amounts, huge, huge amounts of drugs. . . . The quantities of heroin along were huge. . . . [T]his kind of conduct deserves very severe punishment . . . ." GA1669-70. Second, Judge Underhill stated that the sentence was intended to deter similar conduct by others. Third, the judge stated that the sentence was designed to incapacitate Edward Estrada because he is "not somebody we want on the street right now, quite frankly, and for some time to come." GA1670-71. Fourth, Judge

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[14] Mercado was subsequently convicted of that VICAR murder after trial in *United States v. Mercado*, No. 3:04CR166(SRU).

Underhill stated that the goal of rehabilitation was relatively less important in this matter, in light of the seriousness of defendant's conduct. *Id*. The judge also considered factors weighing in defendant's favor, including his view that defendant's use of a minor was indirect and that his leadership position was due to some extent to the fact that Frank Estrada was his brother. "As a result," the judge stated, "you have gotten some points . . . whose value in increasing your guideline calculation is greater than warranted based upon the conduct that underlies those points." GA1673.

The sentencing court stated that it was very aware of the factors under 3553(a), and had taken each into account:

> Obviously I'm very aware of [the statutory factors] and take into account each of those factors: Your personal history, the history of convictions, the history of your conduct in this conspiracy, the nature of the offense, the purposes of sentencing, the guidelines, et cetera, et cetera. All of that is being factored into the sentence and, as I said, the sentence that I'm going to impose I think factors each of those effects while at the same time recognizing that fundamentally my goal here is to impose a sentence sufficient but not greater than necessary to meet the purposes of sentencing.

GA1674.

B. No Jury Finding Was Necessary to Support the District Court's Guidelines Determinations, and a Preponderance Standard of Proof Was Properly Applied in the Court's Guidelines Calculations

On appeal Edward Estrada attacks his sentence on the grounds that, post-*Booker*, the Guidelines determinations regarding narcotics quantity and base offense level under U.S.S.G. § 2D1.1, as well as enhancements for role in the offense under U.S.S.G. § 3B1.1 and for use of a minor under U.S.S.G. § 3B1.4, must supposedly be determined by a jury, and proven beyond a reasonable doubt. D. Br. 5-8, 20. With respect to narcotics quantity he seems to claim in the alternative that the district court's findings needed to be based on clear and convincing evidence rather than the preponderance standard of proof. D. Br. 12-14. These arguments are entirely lacking in merit.

1. Governing Law

This Court has repeatedly reaffirmed in the wake of *Booker* that sentencing factors may be determined by a district court, as opposed to a jury, and need only be proven by a preponderance of the evidence when a court calculates a defendant's advisory Guidelines range. *See, e.g., Vaughn*, 430 F.3d at 525-28 ("We reiterate 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."), *cert. denied*, 126 S. Ct. 1665 (2006); *United States v. Florez*, 447 F.3d 145, 156 (2d Cir.)

(noting that "'[j]udicial authority to find facts relevant to sentencing by a preponderance of the evidence survives *Booker.*'") (quoting *United States v. Garcia*, 413 F.3d 201, 220 n.15 (2005)), *cert. denied*, 127 S. Ct. 600 (2006); *United States v. Gonzalez,* 407 F.3d 118, 125 (2d Cir. 2005). These rules apply with respect to narcotics quantity determinations in sentencings under Sections 841 and 846, as with other sentencing factors, where – as here – the quantity does not trigger a mandatory minimum or a change in the statutory sentencing range. *See, e.g.*, *Vaughn*, 430 F.3d at 525-28; *Florez*, 447 F.3d at 156. As this Court explained in *Vaughn*, "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." 430 F.3d at 527.

2. Discussion

Here, Edward Estrada's sentence of 420 months was within the statutory range authorized by his conviction, by a jury, beyond a reasonable doubt, on a charge of violating 21 U.S.C. §§ 846 and 841(b)(1)(A), which sets a mandatory minimum penalty of 10 years' imprisonment and a maximum of life. Moreover, the district court clearly understood that the Guidelines are not mandatory. *See* GA1656. Accordingly, the district court's determination of the facts relevant to the advisory

Guidelines calculation, including drug quantity, by a preponderance of the evidence, was perfectly appropriate.[15]

C. The District Court's Advisory Guidelines Calculations Were Proper

1. The District Court Properly Increased Edward Estrada's Guidelines Offense Level Under U.S.S.G. § 3B1.1(b) for His Role in the Offense

Edward Estrada contends that the district court improperly categorized him as a manager or supervisor under U.S.S.G. § 3B1.1(b), leading to an undue three-level increase in his offense level. Estrada's argument fails.

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[15] As noted, Edward Estrada makes an alternative claim – that the court needed to make drug quantity determinations by clear and convincing evidence rather than by a preponderance. This assertion is defeated by the holdings of *Vaughn*, *Florez*, and related cases, as described above. Edward Estrada relies principally on language in *United States v. Shonubi*, 103 F.3d 1085, 1089 (2d Cir. 1997), suggesting that more demanding standard of proof might be appropriate in certain cases, but in *United States v. Cordoba-Murgas*, 233 F.3d 704, 708 (2d Cir. 2000), this Court made clear that those statements in *Shonubi* were *dicta*, and in fact reversed a district court's decision to apply a higher standard in reliance on *Shonubi*. *Cordoba-Murgas*, 233 F.3d at 708.

a. Governing Law

Guidelines § 3B1.1 provides for a three-level enhancement "[i]f the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants and was otherwise extensive." U.S.S.G. § 3B1.1(b). To qualify for this adjustment "the defendant must have been the . . . manager, or supervisor of one or more other participants." *Id.*, App. Note 2.

This Court has consistently held that a defendant can qualify for the enhancement where he has "exercised some control over others involved in the commission of the offense or . . . [has] been responsible for organizing others for the purpose of carrying out the crime. . . . It is irrelevant that [the defendant] may have undertaken these supervisory activities at someone else's behest; what is dispositive is that he took a management role in the criminal scheme." *United States v. Leonard*, 37 F.3d 32, 38 (2d Cir. 1994) (internal citations and quotation marks omitted); *see also United States v. Blount*, 291 F.3d 201, 217 (2d Cir. 2002); *Ellerby v. United States*, 187 F.3d 257, 259 (2d Cir. 1998).

When considering whether or not to apply a sentencing enhancement for role in the offense, the district court must make specific findings of fact. *See Molina,* 356 F.3d at 275. The district court "satisfies its obligation to make the requisite specific factual findings when it explicitly adopts the factual findings set forth in the presentence report."

Id. at 275-76 (citing *United States v. Eyman,* 313 F.3d 741, 745 (2d Cir. 2002)).

b. Discussion

The district court's decision that Edward Estrada qualified for a three-level adjustment under Section 3B1.1(b) was clearly proper. The court made specific, well-supported findings that amply justified that determination:

> Mr. Estrada did recruit both Joseph Butler and Nelson Carrasquillo. He collected funds for the organization, along with Joseph Butler. He provided drugs to and collected monies from Nelson Carrasquillo who was running the Noble and Ogden drug block. . . . [T]here is a good deal of testimony of his active role in collecting monies, distributing large quantities of drugs and otherwise acting as a supervisor or manager of one or more of the participants in this large and complex drug organization. Accordingly, I conclude that a 3B1.1(b) three-level adjustment applies.

GA1597. These findings, originally rendered at the September 2002 sentencing and adopted at the 2006 resentencing, GA1649, clearly support application of the enhancement.

Moreover, the findings articulated by the judge were bolstered by the factual statements of the PSR, which were adopted by the court as factual findings for sentencing.

GA1649. For example, the PSR found that the defendant had recruited Joseph Butler into the narcotics distribution operation and used him as an armed assistant in delivering narcotics to, and collecting money from, Estrada lieutenants, GSA051-52; that Frank Estrada gave the defendant the job of collecting proceeds from lieutenants overseeing sales at both P.T. Barnum and Ogden and Noble Avenues during a portion of the period from March 1999 through December 2000, GSA053 (as amended at 9/9/02 sentencing, GA1586, 1600); and that the defendant supervised Carrasquillo's heroin sales operation at Noble and Ogden Avenues. GSA050-51.

Furthermore, both the findings of the judge during the sentencing and the findings of the PSR were amply supported by evidence presented at the trials of defendant and various co-defendants:

- William Rodriguez testified that Edward Estrada was one of the organization's core lieutenants in 1996, responsible for distributing narcotics to street sellers and collecting proceeds, as well as serving as an armed participant in bagging sessions and selling narcotics. GA0838-40, 0846-47, 0852-55, 0859.

- Joseph Butler testified that Edward Estrada recruited him to the drug distribution organization while they were in jail together, GA0914-16, that upon Butler's release from prison in 1999, he accompanied the defendant to various narcotics retail outlets to collect money from lieutenants, and

that the defendant armed Butler with a gun for this work. GA0916-19, 0923-28, 0934-37.

- Nelson Carrasquillo testified that the defendant recruited him in the summer of 1999 to operate a heroin sales territory, GA1260-61, 1270-71, and that the defendant thereafter supervised the operation, protecting him and meeting with him regularly to provide drugs and collect proceeds, until approximately March 2000. GA1037; GA1260-61, 1269-70, 1303, 1309-11. GA1268-70.

- Jermaine Jenkins testified that Edward Estrada collected drug proceeds that Jenkins owed to Frank Estrada on account of sales by Jenkins' crew. GA0482-84.

Edward Estrada's recruitment and close supervision of either Butler or Carrasquillo provide the basis for application of the three-point enhancement under Section 3B1.1(b). A defendant need only "have been . . . the manager or supervisor of one . . . other participant." App. Note 2. Moreover, in light of his conduct with respect to either one of these individuals, the defendant "exercise[d] some degree of control over others involved in the commission of the offense . . . or play[ed] a significant role in the decision to recruit or to supervise lower-level participants," making the enhancement appropriate. *Ellerby*, 187 F.3d at 259 (internal quotation marks

omitted).[16] Indeed, at the initial sentencing, Edward Estrada's own attorney conceded that Carrasquillo's testimony, standing alone, "would support a finding of a managerial role." GA1593.[17] The fact that the defendant also collected proceeds from other lieutenants and provided them with narcotics further supports the finding. *Blount*, 291 F.3d at 217 (fact that defendant was "in charge of distributing bundles of cocaine packages to the street sellers and collecting proceeds of their sales" tended to support § 3B1.1(b) adjustment).

Defendant's novel claim that he served as a manager or supervisor for too short a time to trigger a role in the offense enhancement is unpersuasive. He cites no authority suggesting that application of the enhancement depends on how long the defendant served as a supervisor or manager, and we are aware of none. In any event, the evidence belies the claim that he served in such a role for a short time. For example, Rodriguez's testimony established that Estrada served as a supervisor from the reestablishment of the organization in early 1996 through late 1996. GA0838-42, 0847, 0853-56, 0859.

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[16] Defendant does not contest the fact that the Estrada narcotics organization "involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(b). Indeed, more than 15 codefendants have been found guilty and sentenced.

[17] Counsel added that Carrasquillo's testimony would only support the enhancement "if believed." GA1593. However, she has given no reason to conclude that Judge Underhill's crediting of this testimony in his factual finding constituted clear error.

Carrasquillo's and Butler's testimony indicate he continued to serve as a supervisor or manager from at least June 1999 through March 2000. GA0916-19, 0923-28, 0934-37; GA1260-61, 1269-70, 1303, 1309-11. This evidence, alone, establishes that he served as a supervisor or manager for more than a year-and-a-half.

The claim that he was allowed to serve as a manager or supervisor merely because Frank Estrada was his brother, and not because of innate respect from his underlings, is also unavailing. The way he got the job is irrelevant; "what is dispositive is that he took a management role in the criminal scheme." *Leonard*, 37 F.3d at 38 (internal citations and quotation marks omitted); *see also, e.g., United States v. Palomo*, 998 F.2d 253, 257-58 (5th Cir. 1993) (district court properly rejected defendant's claim that his role had been improperly enhanced under § 3B1.1(b) on account of his closeness to his father, who was the organizer of the drug conspiracy, where defendant had recruited a coconspirator, met with drug transporters, participated in shipping drugs, and traveled to Mexico to pay a bribe).

Finally, his claim that the enhancement is improper because he did not profit from the offense is similarly unsuccessful. Notwithstanding defendant's suggestion, there is no requirement that the government show that a defendant has profited from the offense. While "the claimed right to a larger share of the fruits of the crime" may be one factor that might "distinguish[] a leadership and organizational role from one of mere management or supervision," App. Note 4, status as a manager or

supervisor does not require any showing regarding profit. While the Background Commentary does mention a link between profit and role in the offense, it does so merely as an explanation for the structure of the provision, not as a requirement. *See* Background Commentary. In any event, the evidence established that defendant did in fact profit from his role in the organization. Not only did he take heroin for his own use, *see, e.g.*, GA1286-87, as defense counsel admitted, Edward Estrada had possession of a Lexus automobile and a Rolex watch provided to him by Frank Estrada. GA1591.

2. The District Court Properly Increased the Defendant's Guidelines Offense Level Under U.S.S.G. § 3B1.4 for Use of a Minor

Edward Estrada argues that a § 3B1.4 enhancement should not apply because he did not personally employ any minors and the district court erroneously found the use of minors by others to be reasonably foreseeable. Estrada's arguments lack merit.

Defendant's primary claim is rooted on a misunderstanding of the law. The § 3B1.4 enhancement applies where the defendant is "the leader of a conspiracy who was not directly involved with recruiting a minor, and did not have actual knowledge that such individual was a minor, but who nonetheless had general authority over the activities in furtherance of the conspiracy." *United States v. Lewis*, 386 F.3d 475, 479 (2d Cir. 2004), *cert. denied*, 543 U.S. 1170 (2005). "It is not necessary for the

government to show that a defendant had actual knowledge that the person undertaking criminal activity was a minor." *Id.* All that is necessary is to show that the defendant "could have *reasonably foreseen* that minors would be used by others in their conspiracy. *See* § 1B1.3(a)(1)(B)." *Id.* at 480 (emphasis in original). Defendant's claim that the enhancement should not apply because he did not personally use any minors in his offense fails as a matter of law.

Defendant's claim that the district court erred in its determination that the use of minors by others was reasonably foreseeable also fails. He asserts that the court's foreseeability finding was wrong insofar as he was purportedly not a "manager or supervisor" under Section 3B1.1(b). This argument fails for at least two reasons. First, the court's categorization of Edward Estrada as a "manager or supervisor" is correct, as explained above.

More importantly, the district court's finding of reasonable foreseeability was not clearly erroneous. *See Lewis*, 386 F.3d at 480 (district court's determination that use of a minor by co-conspirators was foreseeable subject to clear error review). The district court held that Nelson Carrasquillo's use of a minor as his lieutenant (Christopher Hopkins) was reasonably foreseeable to Edward Estrada, because Edward, as the supervisor of Carrasquillo, was directly above and within the supervisory chain of command over the minor. GA1599-60 (finding incorporated into sentencing on remand, GA1649). This finding is not clearly erroneous.

Trial evidence established that after the defendant recruited Carrasquillo's Noble Avenue sales operation into the Estrada organization, GA1260-61, 1270-71, the defendant continued to protect, supply drugs to, receive drug proceeds from and otherwise supervise Carrasquillo. GA1037; GA1260-61, 1270, 1303. Carrasquillo, in turn, employed Christopher Hopkins as his chief lieutenant. GA0581, 0584. Indeed, Carrasquillo testified that during one week, he went on vacation, leaving Hopkins in charge of his sales territory, "so [Hopkins] was down with Edward Estrada for that whole week." GA1307. It is undisputed that Hopkins was under 18 years old while serving in this capacity. D. Br., 23. Under these circumstances, as the court found, the defendant could reasonably have foreseen that a minor was being or would be employed, particularly insofar as Carrasquillo was barely more than a minor himself during the offense conduct. He was only 20 at the time he testified before the district court in March 2002. GA1239.

The enhancement, moreover, was further justified because minors such as the Jimenez sisters were employed at the P.T. Barnum housing project. GA0459, 0462, 0465, 0501; GA0602, 0608, 0618. The organization also employed Arnold Rodriguez, who Edward Estrada concedes was a minor, D. Br., 23, to distribute narcotics in the P.T. Barnum housing project from 1997 into 1999. GA0228, 0232; GA1165-68; GA1224-26; GSA054. Edward's responsibilities as a supervisor or manager of the organization included delivering drugs and picking up narcotics proceeds from lieutenants in the P.T. Barnum housing project. *See, e.g.*, GA0923, 0928-29, 0931. Thus,

it would be proper to conclude that the organization's use of minors was reasonably foreseeable to Edward.

Given the relevant evidence, the district court did not clearly err in determining that the use of minors by coconspirators was reasonably foreseeable to Edward Estrada.

3. The District Court Properly Determined the Defendant's Base Offense Level

Edward Estrada raises numerous challenges to the district court's determination of the quantity of narcotics attributable to him for calculating his base offense level. All of his claims are meritless.

a. Governing Law

The quantity of drugs attributable to a defendant for sentencing purposes "is a question of fact for the district court, subject to a clearly erroneous standard of review." *United States v. Hazut*, 140 F.3d 187, 190 (2d Cir. 1998); *accord United States v. Richards*, 302 F.3d 58, 68 (2d Cir. 2002). This Court has held that "even after *Booker's* excision of § 3742(e), it is appropriate to maintain a clear error standard of review for appellate challenges to judicial fact-finding at sentencing." *Garcia*, 413 F.3d at 222 (reviewing drug quantity determinations); *see also Selioutsky*, 409 F.3d at 119 (recognizing that post-*Booker*, court continues to review issues of fact for clear error).

The Guidelines make clear that a defendant is accountable under Section 2D1.1(c) not only "for all quantities of contraband with which he was directly involved," U.S.S.G. § 1B1.3, App. Note 2; but also, "in the case of a jointly undertaken criminal activity," "all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook." *Id.* In assessing whether the criminal actions of others were within the scope of a defendant's agreement, "any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others" may be considered. *United States v. Studley*, 47 F.3d 569, 575 (2d Cir. 1995) (quoting U.S.S.G. § 1B1.3, App. Note 2).

The government must prove the amount of narcotics involved by a preponderance of the evidence. *See United States v. Powell,* 404 F.3d 678, 681 (2d Cir. 2005); *see also Vaughn*, 430 F.3d at 525. "However, 'when a defendant asserts that he is not responsible for the entire range of misconduct attributable to the conspiracy of which he was a member, the Guidelines place on him the burden of establishing the lack of knowledge and lack of foreseeability.'" *United States v. Martinez-Rios*, 143 F.3d 662, 677 (2d Cir. 1998) (quoting *United States v. Negron*, 967 F.2d 68, 72 (2d Cir. 1992)). "In approximating the quantity of drugs attributable to a defendant, any appropriate evidence may be considered, 'or, in other words, a sentencing court may rely on any information it knows about.'" *United States v. Prince*, 110 F.3d 921, 925 (2d Cir. 1997) (quoting *United States v. Jones,* 30 F.3d 276, 286 (2d Cir. 1994)).

b. Discussion

The district court did not commit clear error in its drug quantity determinations. The court reasonably relied on the trial testimony of witnesses it had seen and heard first hand, in conservatively estimating that a quantity of 30 kilograms or more of heroin was attributable to Edward Estrada.

Contrary to defendant's assertion, the court rendered more than adequate findings on this issue. Guidelines calculations based on jointly undertaken criminal activity require findings as to both the foreseeability of the coconspirator's criminal activity and whether it was within the scope of the defendant's agreement. *Studley*, 47 F.3d at 574. Consistent with this standard, the district court expressly addressed whether 30 kilograms or more of heroin was both "reasonably foreseeable to Edward Estrada [and] . . . within the scope of his agreement," GA1647, and it explained its finding with more than adequate specificity:

> [B]ased upon the trial record . . . it's easy for me to find by a preponderance of the evidence that the quantity here is 30 kilograms of heroin or more. Given the scope of this conspiracy in selling large quantities both within the P.T. Barnum housing project and at the corners of Noble and Ogden, the Noble and Ogden operation was essentially supervised by Mr. Estrada and he collected the proceeds from that, that block for a relatively significant period of time . . . as set forth in

> paragraph 35 of the PSR. Mr. Estrada's involvement in the upper levels of the conspiracy, I think it's fair to say, gave him access to an understanding of the scope of the full conspiracy, and I have really no difficulty in reaching a finding that he's, he was certainly well aware and that it was reasonably foreseeable to him that the quantity of heroin distributed by this conspiracy [wa]s well in excess of 30 kilograms.

GA1648-49. The foregoing constitutes adequate findings on the issues of both foreseeability and scope of agreement. *See, e.g., United States v. Germosen*, 139 F.3d 120, 129-30 (2d Cir. 1998) (district court's findings that defendant played more than a narrow, limited role in the conspiracy provided sufficient support for attribution to him of entire loss caused by scheme as a whole).

In any event, the court's findings were bolstered by the specific factual statements in Edward Estrada's PSR, which the district court adopted at sentencing. GA1649. The PSR noted, for example, that Edward Estrada was active in the conspiracy during the periods he was free from incarceration, that is, from September 1995 until December 1996, and from March 1999 until December 2000, GSA053, 057-58; that the organization handled approximately a kilogram per bagging session, which were held approximately one to two times per week, GSA046-47; that Edward collected proceeds from lieutenants overseeing the sales areas in Bridgeport during a portion of the period from March 1999 through December 2000, GSA053, as amended, GA1586, 1600; and that he was one

of the founding members of the Estrada distribution operation. GSA054-56. The report concluded that given the volume of heroin the organization was handling and the period of time that the defendant was involved, "well in excess of 30 kilograms of heroin" should be attributed to him. *Id. See United States v. Desimone*, 119 F.3d 217, 228 (2d Cir. 1997) (findings requirements can be satisfied by adoption of the factual findings in the PSR). In sum, the district court made more than adequate factual findings to support its drug quantity determination.[18]

Moreover, the defendant's suggestion that the district court's quantity determinations were not supported by

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[18] *Studley* and *United States v. Hernandez-Santiago*, 92 F.3d 97 (2d Cir. 1996) are not to the contrary. In *Studley*, the limited findings of the district court and the limited evidence in the record indicated that the defendant "had no interest in the success of the operation as a whole, and took no steps to further the operation beyond executing" his one narrow role, which was prescribed by others on the basis of specific instructions. 47 F.3d at 576. In short, Studley was a "pawn." *Germosen,* 139 F.3d at 130 (distinguishing *Studley*). In contrast, here the findings and the evidence reveal that Edward Estrada was a long-time leader of the drug distribution organization, throughout virtually its entire existence and facilitated its work in many capacities. In *Hernandez-Santiago,* the district court made drug quantity determinations based on an erroneous legal standard, and thus this Court remanded for resentencing. 92 F.3d at 100. Here, by contrast, the district correct applied the correct standard, properly articulating both the foreseeability and the scope of the agreement prongs. GA1647. *Hernandez-Santiago*, thus, bears no resemblance to this matter.

evidence in the record is entirely incorrect. In fact, the court's findings are amply supported. Several witnesses testified at length about Edward Estrada's role in the organization. For example, testimony by cooperating witnesses established that he self-identified as a "Terminator" while in prison in the early 1990s and that he was actively involved in drug smuggling on behalf of the organization while in prison. GA0803; GA0733, 0738-40.

Rodriguez testified that the defendant was an important founding member of the organization who served as a lieutenant while the organization was reestablishing itself at P.T. Barnum in 1996. GA0838-40, 0842, 0847, 0853-56, 0859. Rodriguez further testified that during this early period, the defendant attended bagging sessions, carried a gun, distributed narcotics to street sellers, collected sales proceeds, and supported sales of both crack and heroin. GA0838-42, 0846-47, 0859; GA0812-16, 0826-27, 0829.

Butler testified that Edward Estrada remained active in the organization during his second incarceration (December 1996 - March 1999), when he recruited Butler to work for the organization. GA0914-16. Furthermore, testimony showed that after the defendant was released from prison in 1999, he quickly returned to an active, high-level leadership role in the organization, responsible for collecting sales proceeds from several retail narcotics outlets. GA0916-21, 0923-29, 0934-37.

Finally, testimony by Carrasquillo confirmed that Edward Estrada continued to serve the organization in a high-level capacity through the summer of 1999, until at least mid-March 2000. Carrasquillo stated that the defendant recruited him to the organization and supervised him, protected him, and met with him regularly to provide drugs and collect sales proceeds. GA1260-61, 1270-71; GA1037; GA1260-61, 1269-70, 1303, 1309-11, 1314-15, 1320-21.

Defendant's assertions to the contrary notwithstanding, *see* D. Br. at 16, the evidence makes clear that Edward Estrada was a participant at narcotics packaging sessions. For example, Rodriguez testified that Estrada was an armed participant at bagging sessions throughout 1996. *See* GA0852-55 (February - May 1996); GA0859 (end of 1996); GA0852-55. Additional testimony established Edward Estrada's attendance at sessions later in the conspiracy, as well. *See, e.g.*, GA1286-87 (sessions from mid-1999 to 2000).

In sum, this evidence establishes that Edward Estrada was consistently involved with the organization at a high level from its inception until at least March 2000. He was a founder and active leader in many different capacities throughout virtually its entire existence. This multifaceted, high-level, long-term conduct implies not only that he could reasonably foresee all the distribution activities of the entire organization, but also that he agreed to their full scope for the duration of this time. *See* U.S.S.G. § 1B1.3, App. Note 2 ("any . . . implicit agreement fairly inferred from the conduct of the

defendant and others" may be considered in assessing whether the criminal actions of others were within the scope of defendant's agreement). *Compare Studley*, 47 F.3d at 576 (actions of codefendants could not be found to be within defendant's scope of agreement because he merely played a small role, at the instruction of others, and "had no interest in the success of the operation as a whole, and took no steps to further the operation beyond executing sales"), *with Germosen*, 139 F.3d at 129-30 (defendant's broad scope of agreement, which made him accountable for entire loss amount, established on the bases of his role in conceiving scheme and playing a central part at one point in executing it).

The evidence concerning the narcotics quantities handled by the organization during the relevant time period unquestionably put the total amount of heroin attributable to defendant well over the 30 kilogram threshold, even if the periods of defendant's incarceration are ignored. During the period from 1990 through March 2000, defendant was not incarcerated from September 1995 through December 1996, and again from March 1999 through March 2000 – totaling approximately 110 weeks. Ample evidence supported the PSR's finding that sessions were typically held at least once every week and a kilogram per session was bagged up by the organization. *See, e.g.*, GA0309; GA0367; GA0555-56; GA0628; GA1275-78, 1283, 1288. Given this evidence, defendant would be properly held accountable for at least 110

kilograms of heroin.[19] There can be no serious suggestion of clear error in the district court's quantity determination.

Estrada's remaining challenges to the district court's quantity determinations are similarly meritless. First, the evidence makes clear that there was no error in failing to separate out the New Haven and Meriden quantities, as defendant now claims. Testimony established that the quantities destined for sale in New Haven and Meriden were packaged and set aside for the out-of-town lieutenants at the Bridgeport packaging sessions that Edward Estrada attended, and thus it was proper to attribute those quantities to him. GA0286-87, 0295-99; GA0769-70. On these facts, defendant cannot carry his burden of establishing "the lack of knowledge and lack of foreseeability" that attend his effort to avoid responsibility "for the entire range of misconduct attributable to the conspiracy of which he was a member." *Martinez-Rios*, 143 F.3d at 677.

Similarly, Edward Estrada's claim that the district court improperly attributed to him quantities handled by

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[19] Even if one disregards the other evidence and accepts for the duration of the conspiracy the low end of the 16 -18 ounce per session estimate offered by Jose Lugo based on his involvement in 1997, GA0250-53, Edward Estrada would be accountable for approximately 50 kilograms of heroin – still well over the 30 kilogram threshold. (Sixteen ounces equals .4536 kilograms, given the conversion ration of one ounce to 28.35 grams; that amount, multiplied by 110 weeks, equals 49.896 kilograms.)

the organization during periods when he was "a liability to the organization" due to his heroin addiction, D. Br. 19, is also unavailing. While Edward Estrada may have had a long-standing addiction, and while that addiction may have played a role in his eventual marginalization, that addiction is simply beside the point in assessing the district court's drug attribution determination. Moreover, the evidence summarized above clearly establishes all requisites for attribution to him of 30 kilograms of more of heroin, notwithstanding his addiction: He remained active in the organization until at least March 2000 (with the possible exception of the periods during which he was incarcerated), *see, e.g.*, GA1037; GA1260-61, 1269-70, 1303, 1309-11;[20] he embraced the goals of the conspiracy in their entirety, which involved the distribution of far more than 30 kilograms of heroin; and it was reasonable for Edward Estrada to foresee distribution of that amount of heroin. To the extent his addiction became an incapacitating problem, the evidence establishes that it became so after March 2000. GA1303, 1309-11, 1314-15, 1320-21. As explained above, even assuming his participation ceased in March 2000, the amount properly attributed to him remains well over 30 kilograms. There was thus no clear error in the attribution to him of 30 kilograms or more of heroin.

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[20] Moreover, the district court found that, despite his addiction, Edward Estrada remained "actively involved in this organization at a high level . . . without any apparent inability to function within that organization," until March 2000. GA1611

Finally, defendant's assertion that the district court improperly counted quantities distributed in a separate conspiracy involving Edward Estrada and Joe Butler suffers from similar problems. The analysis above makes clear that the attribution to Edward Estrada of 30 kilograms or more of heroin on account of his participation in the conspiracy for which he was convicted was well founded, irrespective of any amounts he may have distributed in a separate conspiracy. Indeed, given the nature of defendant's separate conspiracy claim, improper counting seems to be a logical impossibility. The claim seems to hinge on the assertion that Edward had a separate source of supply for himself and Joe Butler, outside the Estrada organization. D. Br. 25. (Otherwise, the amounts would legitimately be counted as part of the same conspiracy.) Accordingly, insofar as the principal basis for the court's quantity determination was the evidence regarding the quantities involved in the supply stream of the Estrada organization, specifically the bagging sessions, improper counting of the amounts in the separate conspiracy could not have happened.

D. The District Court Imposed a Reasonable Sentence

Edward Estrada's final claim is that his sentence of 420 months' imprisonment is unreasonably lengthy under *Booker* and *Crosby*. Defendant, essentially reasserting his misguided claim about the alleged need for drug quantity to be determined by the jury, claims that his sentence is unreasonable because it supposedly is more than he would have received had he been held accountable for the 1,000 grams of heroin supposedly found by the jury. This claim need detain the Court no further. He also claims that the 420 month sentence is unreasonable because the district court supposedly believed it will ultimately become a "life sentence" given Edward Estrada's health issues. Judge Underhill's own words refute this claim. In imposing the sentence, the judge explicitly stated, "I have no idea how long you're going to live and I have no idea if you're going to get out and enjoy some freedom or not." GA1671-72.

Aside from these claims, defendant offers no other support for his claim that the 420 month sentence was unreasonably lengthy. Under *Booker*, *Crosby* and the related decisions of this Court, the sentencing court must calculate and consider the applicable range under the Guidelines, and then consider that range, in conjunction with the other factors set forth in Section 3553(a), in determining the sentence to impose. *See, e.g., Crosby*, 397 F.3d at 112-113. The district court fulfilled these obligations.

Notwithstanding Edward Estrada's claims, the district court properly performed the advisory Guidelines calculations, correctly determining his advisory Guidelines range of life imprisonment. It then gave proper consideration to the statutory factors in § 3553(a):

> My job fundamentally under the statute is to come up with a sentence that is sufficient but not greater than necessary to meet the purposes of sentencing and to meet the various factors that I have to consider under the statute and that's what I've tried to do. . . . Obviously I'm very aware of them [the Section 3553(a) factors]: Your personal history, the history of convictions, the history of your conduct in this conspiracy, the nature of the offense, the purposes of sentencing, the guidelines, et cetera....

GA1673-74. The court elaborated on its view that Edward Estrada's offense was a serious one, "deserving very severe punishment," GA1670. The court noted that the conspiracy was "probably the most serious drug conspiracy to hit the City of Bridgeport ever, [which] sold huge amounts, huge, huge amounts of drugs. . . . [and] ruined untold numbers of lives." GA1669. The court stated that the sentence needed to be severe, both to serve as a deterrent to others and to incapacitate Edward Estrada. GA1670-71. The court concluded by stating that for the reasons given, it would impose a nonguideline sentence of 420 months' imprisonment. *Id.* Given the court's careful consideration of the statutory factors, and in light of its correct determinations under the Sentencing Guidelines

range, which it undeniably viewed as advisory, there can be no meritorious claim of procedural unreasonableness.

There can also be no legitimate claim of substantive unreasonableness. As noted above, although this Court has declined to establish any presumption that a Guidelines sentence is reasonable, it "recognize[s] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Fernandez*, 443 F.3d at 27. Here, Edward Estrada's sentence was well below the Guideline range established for all defendants who play a supervisory role, employ minors and possess guns in a massive drug conspiracy that involves over 30 kilograms of heroin, and who fail to accept responsibility for their crime. Examination "of the record as a whole" clearly establishes that the district court did not exceed the bounds of its discretion. *Fernandez*, 443 F.3d at 28.

Accordingly, Edward Estrada's claims on appeal should be rejected.

III. HILLIARD'S CLAIMS FAIL

A. Proceedings Concerning Michael Hilliard

1. Hilliard's Plea Agreement and Guilty Plea

On March 1, 2002, Michael Hilliard entered a guilty plea to Count Twelve of the Third Superseding

Indictment. GA0115-44. Hilliard entered into a plea agreement, which contained no stipulations or conditions concerning offense conduct or Guidelines calculations. GA1697-1702.

2. Hilliard's Presentence Report

The United States Probation Office prepared a PSR which recommended the following Guidelines calculation:

Base Offense Level § 2D1.1(c)(1))	38
Increase for Possession of a Firearm § 2D1.1(b)(1)	+2
Adjustment for Role in the Offense § 3B1.1(b)	+3
Adjusted Offense Level (Subtotal)	43
Adjustment for Acceptance of Responsibility § 3E1.1(a)	-2
Total Offense Level	41

GSA094.

The PSR reported that Hilliard had sustained numerous state convictions between 1988 and 1994, including convictions for possession of a stolen firearm, interfering with a search, first degree assault, third degree assault,

interfering with an officer, and two convictions for failure to appear. On the basis of the 16 points warranted by his prior convictions, and a further two point awarded because Hilliard began the instant offense less than two years after his June 1995 release from prison, the PSR assigned him 18 criminal history points, placing him in criminal history category VI. GSA094-96. The intersection of offense level of 41 and criminal history category VI yielded a Guidelines imprisonment range of 360 months to life imprisonment. GSA102.

The PSR also included information related to the offense conduct. It stated that Hilliard, along with Edward and Frank Estrada, were members of the Terminators drug distribution operation in the P.T. Barnum housing complex at its inception in the late 1980s, GSA089-90, and that Hilliard was in and out of the operation during the period from 1997 through 1999. It reported that numerous cooperating witnesses identified Hilliard as an armed participant in heroin bagging sessions, and that Frank Estrada eventually entrusted Hilliard with organizing and supervising the packing sessions. GSA093. It also stated that "it has been established that there was at least one session a week in which a kilogram of heroin would be packaged for sale." *Id.* The PSR also reviewed additional facts set forth also in the Edward Estrada and Hector Gonzalez PSR's, as described above.

The Hilliard PSR also examined his personal background. The PSR noted that Hilliard, the father of ten children by five different women, GSA099, lost one of his sons, in a tragic hit-and-run accident while defendant was

in pretrial detention on the instant case. GSA100. The PSR stated that Hilliard had reported becoming depressed after the death of his son, but having no other psychological problems at any other time in his life. GSA101. The PSR stated that defendant's brother had been murdered in 1988, when defendant was 23, shortly after defendant was arrested and convicted in state court for possession of a stolen firearm. GSA098, 104. The report noted that defendant had been employed as a full-time maintenance worker at a golf course from the end of 1999 until his arrest in December 2000. GSA101. The PSR recommended that there were no factors or combination of factors that would warrant a departure from the Guidelines. GSA103.

3. The December 15, 2003 Sentencing

On December 15, 2003, the district court sentenced Hilliard. The court stated that before sentencing, it had reviewed the PSR, the parties' memoranda, and the letters on behalf of Hilliard, as well as trial transcripts and certain FBI reports regarding interviews of various witnesses. GA1791. With a few minor changes, the court adopted the factual statements of the PSR as findings of fact for the sentencing. GA1850.

Hilliard argued that he should not be held responsible for 30 kilograms or more of heroin, but the district court rejected this challenge. GA1798-1825. After lengthy argument and consideration, the court ruled that:

> [T]here is more than sufficient record evidence that Mr. Hilliard's personal involvement here with the bagging sessions exceeds 30 kilograms of heroin and, in the alternative, that the scope of his agreement here[,] which was to participate in the bagging and to supervise the bagging of heroin essentially from the . . . Spring of '97 through the Fall of '99[,] not consistently but over much of that period of time, includes well in excess of 100 kilograms of heroin and that it was reasonably foreseeable to him as part of that agreement . . . .

GA1825. The court imposed a base offense level of 38, concluding that "it's not a close question that Mr. Hilliard is to be charged with 30 kilograms of heroin." *Id.*

The court also rejected Hilliard's challenge to the PSR's recommendation for a three-level role enhancement pursuant to U.S.S.G. § 3B1.1(b). Judge Underhill concluded that "the preponderance of the evidence favors the government's position that Mr. Hilliard did in fact act as supervisor at bagging sessions." GA1835-36.

The court awarded Hilliard a three-level downward adjustment for acceptance of responsibility under U.S.S.G. § 3E1.1, bringing his total offense level to 40. *Id.*, 68. With an uncontested criminal history category of VI, the court found that defendant's Guidelines imprisonment range was 360 months to life. GA1857.

Hilliard asked for downward departures on numerous grounds. First, pursuant to U.S.S.G. § 4A1.3, he sought a

downward departure in his criminal history category from VI to V on the ground that category VI over-represented his criminal history. The district court disagreed, declining to downwardly depart on this basis. GA1899.

Second, he sought a downward departure pursuant to U.S.S.G. § 5K2.0 and 18 U.S.C. § 3553(b) for extraordinary pre-arrest rehabilitation. He argued that his withdrawal from the conspiracy in late 1999, a year before his arrest, his becoming a full time employee at a golf course, his promotion in that job, and his alleged initiation of volunteer work in certain programs to keep young people off the street, justified a downward departure on these grounds. Judge Underhill commented that although it was unclear from the evidence of his voluntary activities whether he had engaged in those activities during or after his participation in the conspiracy, Hilliard's withdrawal from the conspiracy and obtaining employment was noteworthy. GA1901-02. However, on balance, the district court held that his pre-arrest rehabilitation was not sufficiently extraordinary, on its own, to warrant the departure sought. *Id.*

Third, Hilliard requested a downward departure for extraordinary emotional circumstances pursuant to U.S.S.G. § 5K2.0. He claimed that such a departure was warranted on the grounds of the emotional scars left by childhood abuse by his father, his brother's murder in 1988, and the hit-and-run death of his son in 2001. He supported his request with a report by a psychiatrist, who evaluated Hilliard and concluded that these events had contributed to a depressive disorder "with anti-social and

impulsive features." GA1782-84. The district court rejected Hilliard's request, finding that defendant's emotional circumstances were not "extraordinary," and that there was no connection between those circumstances and Hilliard's commission of the offense. GA1899-1900.

Fourth, Hilliard requested a downward departure under U.S.S.G. § 5K2.12 on the ground that he committed the offense as a result of coercion or duress. He asserted that he had been forced to work at bagging sessions as the result of coercion after he caused approximately $10,000 in damage to the car of Frank Estrada, who had a reputation for violence. GA1784. Judge Underhill rejected this request on the grounds that Hilliard had not established a direct threat by Frank Estrada, and defendant's generalized fear based on Estrada's acts of violence toward others did not warrant departure. GA1900-01.

In the alternative, Hilliard argued that he deserved a downward departure on the basis of a combination of all of the above grounds pursuant to U.S.S.G. § 5K2.0. GA1785-88. Judge Underhill agreed, holding:

> Based on my understanding of what Mr. Hilliard did in late '99 to break away from this group, to get himself a meaningful job, to do that work well, to work more with his children and other children, in combination with a sense that he was pressured into continuing some of this activity and that he had some emotional baggage to deal with, I believe that a very slightly downward departure under 5K2.0

> recognizing these combination of factors, is appropriate in this case.

GA1902. Based on that downward departure, the district court imposed a prison sentence below the 360 month-to-life range called for by the Guidelines. Specifically, Judge Underhill sentenced Hilliard to 330 months' incarceration. *Id.*

Judge Underhill explained that his sentencing decision was influenced, on the one hand, by aspects of Hilliard's background and the circumstances of the offense, such as the fact that Hilliard had a long record of convictions, including convictions for violent crimes, and that he participated as a supervisor for a long time in a very extensive and dangerous narcotics operation. Judge Underhill stated that "[a]ll those things would have pushed you up somewhere, most likely somewhere north of 360 [months] under the guideline range," in the absence of a downward departure. GA1903. On the other hand, Judge Underhill stated that he had balanced these considerations against defendant's efforts at rehabilitation, emotional circumstances and sense of duress, which supported the downward departure. GA1904. Judge Underhill stated that although he recognized that Hilliard "had more than [his] share of troubles in [his] life, I have to think about a number of things." Specifically, Judge Underhill referenced the nature and severity of the offense and the need to deter others, stating,

> [T]he punishment that you receive has to be commensurate with the crime that you committed,

> and I've got to hand [down] a sentence that deters others from doing what you did, and you did some very bad things over an extended period of time and you hurt a lot of people, because a lot of people were using drugs which result in broken homes and so forth[,] as a result of the Estrada organization.

GA1904. Judge Underhill concluded by stating that the defendant should take advantage of his incarceration "to improve [him]self and . . . to help others along the way." GA1905.

4. Hilliard's Initial Sentencing Appeal and Remand

Hilliard filed a notice of appeal the day that judgment entered, December 15, 2003. GA1911. On appeal, he challenged the sentence imposed by the district court, in particular the Guidelines calculations and certain findings of fact with respect to the quantity of narcotics attributed to him pursuant to U.S.S.G. § 2D1.1(c)(1), and the three-level role in the offense enhancement under U.S.S.G. § 3B1.1(b)). GA1923-54. This Court affirmed the challenged findings and conclusions by summary order, withholding its mandate pending the Supreme Court's decision in *Booker*. *Estrada*, 116 Fed.Appx. at 325, 2004 WL at 2757401; GA1955. On April 5, 2005, the Court remanded the case to the district court to consider resentencing pursuant to *Crosby*. GA1921.

5. The District Court's Decision Not to Resentence Hilliard

On May 26, 2005, Hilliard moved the district court for resentencing. GA1961. Hilliard urged the district court to resentence him primarily on grounds of "the severe physical and emotional abuse inflicted on the defendant and his brother by his father, throughout their childhood [and] the severe depression that the defendant suffers from his own overwhelming family ties and circumstances." GA1967. Hilliard argued that although these factors had not been sufficient "to meet the permissible departures allowable under 5K2.0 of the sentencing guidelines . . . . Hilliard's emotional and psychiatric condition can now be considered under *Booker* and 18 U.S.C. § 3553(a) in re-sentencing the defendant." *Id.*

On May 12, 2006, the district court denied Hilliard's request for resentencing. Judge Underhill stated that it had "reviewed the parties' briefing, the Presentence Report, and the transcript of the sentencing hearing on December 15, 2003. GA1971. Based on that review, Judge Underhill stated, "I have decided that I would not have sentenced Hilliard to a non-trivially different sentence had the Sentencing Guidelines been advisory at the time of his initial sentencing." *Id.*

The district court relied upon two facts: (1) that it had been able to downwardly depart at the first sentencing, allowing imposition of a sentence believed to be appropriate, notwithstanding the then-mandatory nature of the Guidelines; and (2) that, having decided to depart, it

had "weighed the factors set forth in 18 U.S.C. § 3553(a) when deciding upon the sentence imposed." GA1971-72. Specifically, the district court noted, it had determined the appropriate sentence at the initial sentencing on the basis of "the nature and circumstances of the offense, the characteristics of the defendant, the purposes of sentencing, and the Sentencing Guideline range. *See* Sentencing Tr. at 111-16 (Dec. 15, 2003)." GA1972. The court explained that the factors it had relied upon in determining the sentence in the first instance would remain determinative under an advisory Guidelines framework: "a long record of prior convictions, a history of violence, a supervisory role in 'a very extensive and dangerous group selling drugs in Bridgeport for a long time,' [GA1902] the need for punishment commensurate with the seriousness of the crime, and the impact of the crime on the community[,] *[id.]*, [as well as the] mitigating factors that together formed the basis for the downward departure. [*Id.*]." GA1972. The district court concluded that in light of these same facts, it would not have imposed a non-trivially different sentence had the Guidelines not been mandatory in December 2003. GA1972.

On May 25, 2006, Hilliard filed a notice of appeal. He now challenges the district court's decision on appeal.

B. The District Court's Decision Not to Resentence Hilliard Should be Affirmed

On appeal Hilliard asserts that the district court erred in sentencing him by failing to properly consider the grounds raised in his downward departure requests as

potential bases for non-Guidelines adjustments. He specifically relies on his emotional circumstances, his pre-arrest rehabilitation efforts, and his sense of duress. He claims that although these considerations were insufficient to warrant independent downward departures at the December 15, 2003 sentencing, after *Booker*, each should have received consideration as a mitigating factor under 18 U.S.C. § 3553(a), leading to further reductions in his sentence. In the absence of such consideration, Hilliard asserts, his sentence was unreasonable. Hilliard's argument fails.

1. Governing Law

While it is rare for a defendant to appeal a below-Guidelines sentence for reasonableness, this Court has held that the standard of review in those situations is the same as for the appeal of a within-Guidelines sentence. *United States v. Kane*, 452 F.3d 140, 144-45 (2d Cir. 2006). Thus, such sentences are subject to review based on the established, deferential standard for reasonableness review. That standard involves the now-familiar two-prong examination: First, the Court will assess procedural reasonableness – whether the sentencing court considered "the applicable Guidelines range (or arguably applicable ranges)" based on the facts found by the court, viewed the Guidelines as advisory, and considered "the other factors listed in section 3553(a)," *Crosby*, 397 F.3d at 115; and, second, the Court will review sentences for their substantive reasonableness – that is, whether the district court exceeded the broad limits of its discretion in setting the length of the sentence, in light of the applicable

Guidelines range and the other factors set forth in Section 3553(a). *Id.* at 114; *see also United States v. Ministro-Tapia*, 470 F.3d 137, 141 (2d Cir. 2006) ("'Reasonableness 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.'" (quoting *Fernandez*, 443 F.3d at 27)).

In *Kane*, the defendant appealed for reasonableness the imposition of a sentence six months below the Guidelines range, and this Court stated that in order to determine whether the sentence was reasonable, it was required 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.'" *Id*. at 144-45 (quoting *Fernandez*, 443 F.3d at 27). The defendant must therefore, do more than merely rehash the same arguments made below because the Court of Appeals cannot overturn the district court's sentence without a clear showing of unreasonableness. *Id*. at 145 ("[The defendant] merely renews the arguments he advanced below – his age, poor health, and history of good works – and asks us to substitute our judgment for that of the District Court, *which, of course, we cannot do*." (emphasis supplied)).

2. Discussion

a. Hilliard Has No Viable Claim of Procedural Unreasonableness

Hilliard's argument fails as a claim of either procedural or substantive unreasonableness. First, in terms of procedural reasonableness, Hilliard does not claim that there was any error in the district court's Guidelines calculations or findings of fact. Nor does Hilliard claim that the district court erred by failing to view the Guidelines as advisory. Such a claim would be doomed, given the language of the district court's May 12, 2006 ruling denying defendant's request for resentencing. GA1971-72 (explicitly recognizing that *Booker* rendered the Guidelines advisory, and concluding that it would have imposed the same sentence even under an advisory Guidelines framework).

The only claim of procedural unreasonableness that Hilliard appears to make is that the district court failed to properly consider the Section 3553(a) factors in his sentencing. This claim is without merit.

In response to defendant's motion for resentencing, the district court stated explicitly that it "weighed the factors set forth in 18 U.S.C. § 3553(a) when deciding upon the sentence imposed[,] . . . . consider[ing] the nature and circumstances of the offense, the characteristics of the defendant, the purposes of sentencing, and the Sentencing Guideline range. *See* Sentencing Tr. at 111-16 (Dec. 15,

2003))." GA1972. A review of the December 15, 2003 sentencing transcript bears out this point.

For example, the court clearly gave ample consideration to Subsection 3553(a)(1), which requires the court to consider "the nature and circumstances of the offense and the history and characteristics of the defendant." Indeed, the court expressly took into consideration the very aspects of defendant's "history and characteristics" relied upon in this appeal, stating that it had lowered Hilliard's sentence on account of "what Mr. Hilliard did in late '99 to break away from this group, to get himself a meaningful job, to do that work well, to work more with his children and other children," as well as Mr. Hilliard's "sense that he was pressured into continuing some of this activity and that he had some emotional baggage to deal with." GA1902. The court stated further that it had to balance these mitigating personal circumstances against other aspects of defendant's personal circumstances and the nature and circumstances of the offense, explaining that the sentence also took account of the fact that Hilliard "ha[s] a long record. [He] ha[s] prior convictions. [He's] got a history of violence in [his] record. [He] w[as] associated as a senior, at least a supervisory person in a very extensive and dangerous group selling drugs in Bridgeport for a long time." GA1903. In light of the record, there can be no serious claim that the district court failed to consider this statutory sentencing factor.

The court also gave explicit consideration to the purposes of the sentencing, including accounting for the

seriousness of the offense and providing just punishment for it, ensuring adequate deterrence, protecting the public from further crimes of the defendant and providing defendant with training or treatment, as required by Subsection 3553(a)(2). The court stated that "the punishment that [Hilliard] receive[s] has to be commensurate with the crime that [he] committed, and I've got to hand [down] a sentence that deters others from doing what [he] did." GA1904. The court went on: "[He] did some very bad things over an extended period of time and . . . hurt a lot of people, because a lot of people were using drugs[,] which result in broken homes and so forth[,] as a result of the Estrada organization." *Id.* It also gave consideration to the issue of protecting the public, GA1899, and the "use [of defendant's time in prison] . . . to improve [him]self." GA1905-06

Furthermore, the district court gave careful consideration to the Guidelines, as required by Subsection 3553(a)(4), and to the pertinent policy statements of the Sentencing commission, as required by Subsection 3553(a)(5). *See, e.g.*, GA1903 (considering where in the Guidelines range of 360 months to life the defendant would be sentenced but for the mitigating circumstances underlying the downward departure).

The record simply leaves no mistake: the sentencing court properly considered the statutory factors, notwithstanding defendant's claim to the contrary. In any event, the court was not required to utter "robotic incantations" to demonstrate that he had properly considered the requisite factors. *Crosby*, 397 F.3d at 113.

The district court is entitled to the presumption articulated by this Court that "'[a]s long as the judge is aware of both the statutory requirements and the sentencing range . . . and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, we will accept that the requisite consideration has occurred.'" *Fernandez*, 443 F.3d at 29-30 (quoting *Fleming*, 397 F.3d at 100) (emphasis omitted). There can simply be no legitimate claim that te court failed to give due consideration to the statutory factors.

Moreover, to the extent that the defendant claims that the district court gave insufficient weight to his emotional circumstances, rehabilitation efforts, and sense of duress, his claim remains without merit. Such a claim is foreclosed by the rule that "[t]he 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." *Fernandez*, 443 F.3d at 32; *see also id.* at 30 ("we will not conclude that a district judge shirked her obligation to consider the § 3553(a) factors simply because she did not discuss each one individually or did not expressly parse or address every argument relating to those factors that the defendant advanced").

In short, given the district court's clear consideration of the statutory sentencing factors, there is no viable claim of procedural unreasonableness.

b. The Sentence Was Substantively Reasonable

Hilliard's appeal also fails as a challenge to the substantive reasonableness of his sentence. He asserts, essentially, that his sentence is unreasonably long in light of his efforts at rehabilitation, his emotional circumstances, and his sense of duress. Thus, he effectively asks this Court to re-weigh the information already balanced by the sentencing court. However, as this Court has repeatedly emphasized, "[r]easonableness review does not entail the substitution of [the appellate court's] judgment for that of the sentencing judge." *Fernandez*, 443 F.3d at 27. When reviewing a sentence for reasonableness, the court "should exhibit restraint, not micromanagement." *Fleming*, 397 F.3d at 100. A defendant must do more than reiterate its claims for favorable treatment in light of certain considerations because the Court "cannot" "substitute [its] judgment for that of the District Court." *Kane*, 452 F.3d at 145.

In any event, the district court's judgment was sound. In imposing sentence, the court "had to think about a number of things" in addition to the mitigating personal circumstances urged by defendant. GA1904. For example, it had to weigh the fact that Hilliard served as an armed supervisor of many large volume heroin bagging sessions during a lengthy period, eventually being selected to supervise those sessions. GSA093. The court also had to weigh Hilliard's many previous convictions, which included convictions for violent offenses, and his high rate of recidivism. GSA094-96.

The government respectfully submits that under all the relevant circumstances, Hilliard's sentence of 330 months' imprisonment is reasonable. Notably, the Sentencing Guidelines recommend that a defendant with such characteristics and under such circumstances should be sentenced to 360 months to life imprisonment. Although this Court has declined to establish any presumption that a Guidelines sentence is reasonable, it "recognize[s] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Fernandez*, 443 F.3d at 27. The fact that the defendant here received a term of imprisonment approximately ten percent below the bottom of the range envisioned by the advisory Guidelines emphasizes the reasonable, conservative sentence given to Hilliard.

Examination "of the record as a whole" establishes that the sentencing court did not exceed its discretion. *Fernandez*, at 28. Hilliard's claims on appeal should be rejected.

CONCLUSION

For the foregoing reasons, the sentences imposed by the district court on defendants Edward Estrada, Hilliard, and Gonzalez should be affirmed.

Dated: January 17, 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 is calculated by the word processing program to contain approximately 29, 314 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules. The Government is filing herewith a motion for permission to submit an oversized brief.

JAMES R. SMART
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ADDENDUM

Title 18, United States Code, §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.

Title 21, United States Code, §841. Prohibited Acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving--

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

* * * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or

both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

Title 21, United States Code, §846. Attempt and Conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

UNITED STATES SENTENCING GUIDELINES

U.S.S.G. §1B1.3 Relevant Conduct (Factors that Determine the Guideline Range) (2005 Edition)

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specifies more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

> (1)(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, that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense;
>
> * * * *

Application Notes:

* * * *

2. A "jointly undertaken criminal activity" is a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy.

In the case of a jointly undertaken criminal activity, subsection (a)(1)(B) provides that a defendant is accountable for the conduct (acts and omissions) of others that was both:

(i) in furtherance of the jointly undertaken criminal activity; and

(ii) reasonably foreseeable in connection with that criminal activity.

Because a count may be worded broadly and include the conduct of many participants over a period of time, the scope of the criminal activity jointly undertaken by the defendant (the "jointly undertaken criminal activity") is not necessarily the same as the scope of the entire conspiracy, and hence relevant conduct is not necessarily the same for every participant. In order to determine the defendant's accountability for the conduct of others under subsection (a)(1)(B), the court must first determine the scope of the criminal activity the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's

agreement). The conduct of others that was both in furtherance of, and reasonably foreseeable in connection with, the criminal activity jointly undertaken by the defendant is relevant conduct under this provision. The conduct of others that was not in furtherance of the criminal activity jointly undertaken by the defendant, or was not reasonably foreseeable in connection with that criminal activity, is not relevant conduct under this provision.

In determining the scope of the criminal activity that the particular defendant agreed to jointly undertake (i.e., the scope of the specific conduct and objectives embraced by the defendant's agreement), the court may consider any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others.

* * * *

With respect to offenses involving contraband (including controlled substances), the defendant is accountable for all quantities of contraband with which he was directly involved and, in the case of a jointly undertaken criminal activity, all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook.

* * * *

U.S.S.G. §2D1.1 Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy (2005 Edition)

(a) Base Offense Level (Apply the greatest):

(1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) The offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under § 3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level 32, decrease by 2 levels; (ii) level 34 or level 36, decrease by 3 levels; or (iii) level 38, decrease by 4 levels.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by 2 levels.

* * * *

Application Notes:

* * * *

3. Definitions of "firearm" and "dangerous weapon" are found in the Commentary to § 1B1.1 (Application Instructions). The enhancement for weapon possession reflects the increased danger of violence when drug traffickers possess weapons. The adjustment should be applied if the weapon was present, unless it is clearly improbable that the weapon was connected with the offense. For example, the enhancement would not be applied if the defendant, arrested at his residence, had an unloaded hunting rifle in the closet. The enhancement also applies to offenses that are referenced to § 2D1.1; see §§ 2D1.2(a)(1) and (2), 2D1.5(a)(1), 2D1.6, 2D1.7(b)(1), 2D1.8, 2D1.11(c)(1), 2D1.12(b)(1), and 2D2.1(b)(1).

U.S.S.G. §3B1.1 Aggravating Role (2005 Edition)

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

(a) If the defendant was an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive, increase by 4 levels.

(b) If the defendant was a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive, increase by 3 levels.

(c) If the defendant was an organizer, leader, manager, or supervisor in any criminal activity other than described in (a) or (b), increase by 2 levels.

Application Notes:

* * * *

2. To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.

4. In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the

commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.

Background: This section provides a range of adjustments to increase the offense level based upon the size of a criminal organization (i.e., the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise a supervisory or managerial role in the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate. The Commission's intent is that this adjustment should increase with both the size of the organization and the degree of the defendant's responsibility.

In relatively small criminal enterprises that are not otherwise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises that tend to have clearly delineated divisions

of responsibility. This is reflected in the inclusiveness of § 3B1.1(c).

U.S.S.G. §3B1.4 Using a Minor to Commit a Crime (2005 Edition)

If the defendant used or attempted to use a person less than eighteen years of age to commit the offense or assist in avoiding detection of, or apprehension for, the offense, increase by 2 levels.

Application Notes:

1. "Used or attempted to use" includes directing, commanding, encouraging, intimidating, counseling, training, procuring, recruiting, or soliciting.

* * * *

3. If the defendant used or attempted to use more than one person less than eighteen years of age, an upward departure may be warranted.

U.S.S.G. §3E1.1 Acceptance of Responsibility (2002 Edition)

(a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.

(b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:

(1) timely providing complete information to the government concerning his own involvement in the offense; or

(2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently,

decrease by 1 additional level.

Application Notes:

1. In determining whether a defendant qualifies under subsection (a), appropriate considerations include, but are not limited to, the following:

(a) truthfully admitting the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under § 1B1.3 (Relevant Conduct). Note that a defendant is not required to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction under subsection (a). A defendant may remain silent in

respect to relevant conduct beyond the offense of conviction without affecting his ability to obtain a reduction under this subsection. However, a defendant who falsely denies, or frivolously contests, relevant conduct that the court determines to be true has acted in a manner inconsistent with acceptance of responsibility;

(b) voluntary termination or withdrawal from criminal conduct or associations;

(c) voluntary payment of restitution prior to adjudication of guilt;

(d) voluntary surrender to authorities promptly after commission of the offense;

(e) voluntary assistance to authorities in the recovery of the fruits and instrumentalities of the offense;

(f) voluntary resignation from the office or position held during the commission of the offense;

(g) post-offense rehabilitative efforts (e.g., counseling or drug treatment); and

(h) the timeliness of the defendant's conduct in manifesting the acceptance of responsibility.

* * * *

3. Entry of a plea of guilty prior to the commencement of trial combined with truthfully admitting the conduct

comprising the offense of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which he is accountable under § 1B1.3 (Relevant Conduct) (see Application Note 1(a)), will constitute significant evidence of acceptance of responsibility for the purposes of subsection (a). However, this evidence may be outweighed by conduct of the defendant that is inconsistent with such acceptance of responsibility. A defendant who enters a guilty plea is not entitled to an adjustment under this section as a matter of right.

4. Conduct resulting in an enhancement under § 3C1.1 (Obstructing or Impeding the Administration of Justice) ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct. There may, however, be extraordinary cases in which adjustments under both §§ 3C1.1 and 3E1.1 may apply.

5. The sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review.

6. Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease in offense level for a defendant at offense level 16 or greater prior to the operation of subsection (a) who both qualifies for a decrease under subsection (a) and who has assisted authorities in the investigation or prosecution of his own misconduct by taking one or both of the steps set forth in subsection (b). The timeliness of the

defendant's acceptance of responsibility is a consideration under both subsections, and is context specific. In general, the conduct qualifying for a decrease in offense level under subsection (b)(1) or (2) will occur particularly early in the case. For example, to qualify under subsection (b)(2), the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently.

Background: The reduction of offense level provided by this section recognizes legitimate societal interests. For several reasons, a defendant who clearly demonstrates acceptance of responsibility for his offense by taking, in a timely fashion, one or more of the actions listed above (or some equivalent action) is appropriately given a lower offense level than a defendant who has not demonstrated acceptance of responsibility.

Subsection (a) provides a 2-level decrease in offense level. Subsection (b) provides an additional 1-level decrease for a defendant at offense level 16 or greater prior to operation of subsection (a) who both qualifies for a decrease under subsection (a) and has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the steps specified in subsection (b). Such a defendant has accepted responsibility in a way that ensures the certainty of his just punishment in a timely manner, thereby appropriately meriting an additional reduction. Subsection (b) does not apply, however, to a defendant whose offense level is level 15 or lower prior to

application of subsection (a). At offense level 15 or lower, the reduction in the guideline range provided by a 2-level decrease in offense level under subsection (a) (which is a greater proportional reduction in the guideline range than at higher offense levels due to the structure of the Sentencing Table) is adequate for the court to take into account the factors set forth in subsection (b) within the applicable guideline range.

U.S.S.G. §5G1.3 Imposition of a Sentence on a Defendant Subject to an Undischarged Term of Imprisonment (2005 Edition)

(b) If subsection (a) does not apply, and a term of imprisonment resulted from another offense that is relevant conduct to the instant offense of conviction under the provisions of subsections (a)(1), (a)(2), or (a)(3) of § 1B1.3 (Relevant Conduct) and that was the basis for an increase in the offense level for the instant offense under Chapter Two (Offense Conduct) or Chapter Three (Adjustments), the sentence for the instant offense shall be imposed as follows:

> (1) the court shall adjust the sentence for any period of imprisonment already served on the undischarged term of imprisonment if the court determines that such period of imprisonment will not be credited to the federal sentence by the Bureau of Prisons; and

(2) the sentence for the instant offense shall be imposed to run concurrently to the remainder of the undischarged term of imprisonment.

(c) (Policy Statement) In any other case involving an undischarged term of imprisonment, the sentence for the instant offense may be imposed to run concurrently, partially concurrently, or consecutively to the prior undischarged term of imprisonment to achieve a reasonable punishment for the instant offense.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Gonzalez

Docket Number: 06-1330-cr(L)

I, Natasha R. Monell, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 1/17/2007) and found to be VIRUS FREE.

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Dated: January 17, 2007