07-0337-cr(L)

To Be Argued By:
ALINA P. REYNOLDS

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 07-0337-cr(L),
07-2538-cr(CON), 07-2611-cr(CON)

UNITED STATES OF AMERICA,

Appellee,

-vs-

LONNIE JONES, AARON HARRIS, LUKE JONES,

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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NORA R. DANNEHY
Acting United States Attorney
District of Connecticut

ALINA P. REYNOLDS
WILLIAM J. NARDINI
Assistant United States Attorneys

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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 (Alan H. Nevas, J.) had subject matter jurisdiction over these criminal proceedings under 18 U.S.C. § 3231.

Following a jury trial, the district court sentenced Aaron Harris to a lifetime term of imprisonment on April 5, 2001. Government Appendix ("GA") 228, 916-17. This Court affirmed his conviction and sentence by summary order dated October 5, 2004. *United States v. Lewis,* 111 Fed. Appx. 52 (2d Cir. 2004), *cert. denied,* 125 S. Ct. 1355 (2005). After the Supreme Court issued its decision in *United States v. Booker*, 543 U.S. 220 (2005), the case was remanded for further sentencing proceedings. On May 30, 2007, the district court resentenced Harris to life in prison pursuant to *United States v. Fagans*, 406 F.3d 138 (2d Cir. 2005). Harris Appendix ("HA") 51-56, 409. An amended judgment entered on June 11, 2007. HA 49, 51-56. Harris filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on May 30, 2007. HA 49, 419.

On January 7, 2004, the district court sentenced Luke Jones, to four concurrent life sentences and two concurrent ten-year sentences. GA 342, 914. On June 5, 2007, on remand from this Court, the district court entered an order denying Jones's motion for resentencing. Luke Jones Appendix ("LKA") 2-5. This order entered on June 5, 2007, and the defendant filed a timely notice of appeal on June 14, 2007. LKA 1.

On December 10, 2001, the district court sentenced Lonnie Jones to a term of life imprisonment. GA 281, 902. On January 11, 2007, on remand from this Court, the district court determined that it would have imposed a sentence other than life had the Guidelines not been mandatory at the time of the defendant's initial sentencing hearing. The district court then resentenced Jones to a non-Guidelines, 324-month term of imprisonment. Lonnie Jones Appendix ("LNA") 159, 220-21. Judgment entered on January 29, 2007. GA 32, LNA 220-21. Lonnie Jones had previously filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on January 22, 2007. LNA 218-19.

This Court has appellate jurisdiction over the district court's final decision denying Aaron Harris's recusal motion under 28 U.S.C. § 1291, and over the defendants' sentencing appeals under 18 U.S.C. § 3742(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

Claims of Aaron Harris

I. Whether Judge Nevas abused his discretion when he denied Harris's recusal motion, premised entirely on three comments made by the judge during hearings involving co-defendants, based on information the judge had learned from court proceedings.

II. Whether Harris's sentence was substantively and procedurally reasonable given that the district court determined that, alternatively, it would have imposed a life sentence (1) under the drug Guidelines, (2) as a non-Guidelines sentence under the sentencing factors set forth at 18 U.S.C. § 3553(a), and (3) by reference to the murder Guidelines, based on evidence presented at trials of co-defendants that Harris participated in the murder of rival drug dealer Kevin Guiles.

Claims of Luke Jones

III. Whether Luke Jones's sentence was reasonable, where the district court noted that it had considered all of the defendant's arguments; expressly stated that it had considered the factors in 18 U.S.C. § 3553(a); and explained that it attributed significant weight to the defendant's leadership role

in a violent, large-scale drug organization, as well as his personal commission of two murders.

Claims of Lonnie Jones

IV. Whether Lonnie Jones's sentence was reasonable.

a. Whether a remand pursuant to *United States v. Regalado* is unnecessary, where the quantities of heroin and crack that the district court found attributable to Lonnie Jones were so high that they would still trigger the highest base offense level of 38 under the newly amended version of U.S.S.G. § 2D1.1, and the heroin findings make the crack:powder ratio irrelevant.

b. Whether the 324-month sentence imposed on a *Crosby* remand was reasonable, where the district court articulated numerous reasons for imposing that sentence which was significantly less than the lifetime term of imprisonment indicated by the Guidelines.

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Preliminary Statement

Defendant-appellant Aaron Harris was one of the founding members and leaders of an extensive drug trafficking enterprise responsible for the distribution of multi-kilogram quantities of heroin and crack cocaine in Bridgeport, Connecticut. Defendant Lonnie Jones was Harris's most trusted lieutenant who, among other things, oversaw the day-to-day operations of one of Harris's most

lucrative retail drug-distribution outlets in the P.T. Barnum housing complex. Defendant Luke Jones, in close association with his nephew Lonnie Jones and Harris, was the leader of his own extensive drug-dealing organization that used violence and intimidation to hold sway for years over P.T. Barnum. After separate jury trials before Senior U.S. District Judge Alan H. Nevas, Harris and Lonnie Jones were each convicted of drug trafficking charges and sentenced to life in prison. A jury convicted Luke Jones of numerous counts including racketeering, racketeering conspiracy, drug conspiracy, conspiracy to commit murder in aid of racketeering, and firearms offenses. The jury acquitted Jones of one death-eligible murder charge, and the judge granted a post-verdict motion of acquittal on the other death-eligible murder charge. As a result of these convictions, the court sentenced Luke Jones to life in prison.

All the sentences were remanded in the wake of *United States v. Booker*, 543 U.S. 220 (2005). After declining a motion to recuse by Harris, the district court conducted a re-sentencing hearing pursuant to *United States v. Fagans*, 406 F.3d 138 (2d Cir. 2005), and again sentenced Harris to life in prison. Pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), the district court declined to re-sentence Luke Jones. With respect to Lonnie Jones, the court determined that a non-Guidelines sentence of 324 months imprisonment, instead of life, was appropriate in light of the sentencing factors set forth at 18 U.S.C. § 3553(a).

Harris claims that the denial of his recusal motion was an abuse of discretion. With regard to his re-sentencing, Harris claims that the district court unreasonably determined that, alternatively, it would have imposed a life sentence either (1) under the applicable drug Guidelines, (2) as a non-Guidelines sentence, or (3) by reference to the murder Guidelines based on evidence presented at the trial of co-defendants that Harris participated in the murder of rival drug dealer Kevin Guiles.

Luke Jones claims that the district court's adherence to the life sentences previously imposed on the racketeering, racketeering conspiracy and drug trafficking conspiracy convictions was substantively and procedurally unreasonable. Despite never having raised these issues at sentencing, on a first appeal that was heard on the merits, or in his *Crosby* remand proceedings, he now claims for the first time that the district court erred in its original Guidelines calculations and factual findings.

Lonnie Jones claims that he is entitled to a remand to the district court, and a two-level reduction of his applicable Guidelines offense level based upon the recent amendment to the crack cocaine Guidelines. He further claims that the district court's determination to reduce his sentence from a Guidelines sentence of life to a non-Guidelines sentence of 324 months was unreasonable, and that he deserved an even lower sentence.

The district court carefully considered the defendants' arguments and imposed reasonable sentences. As described more completely below, the defendants' claims

on appeal should be rejected, and the judgments should be affirmed in all respects.

Statement of the Case

A. The grand jury indicts Aaron Harris, Luke Jones, and Lonnie Jones for firearms and drug offenses under the First and Second Superseding Indictments

On February 3, 2000, a federal grand jury in Connecticut returned a First Superseding Indictment against Aaron Harris, Luke Jones, Lonnie Jones, and numerous other defendants who were involved in drug trafficking in Bridgeport, Connecticut.[1] As relevant here, Count 2 charged Luke Jones alone with being a convicted felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Count 4 charged Lonnie Jones with possessing a firearm with an obliterated serial number, in violation of 18 U.S.C. § 922(k). GA 95-98. The case was assigned to the Hon. Alan H. Nevas, Senior U.S. District Judge.

On November 7, 2000, the grand jury returned a Second Superseding Indictment charging the defendants and others in Count 1 with conspiring (from January 1997 to February 24, 2000) to distribute one kilogram or more

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[1] Count 1 charged all three defendants with unlawfully conspiring to distribute heroin, cocaine, and cocaine base, in violation of 21 U.S.C. § 846. GA 95-96.

of heroin, five kilograms or more of cocaine, and 50 grams or more of cocaine base. GA 99-101.

The district court severed the trials of certain of the defendants.

B. Aaron Harris's trial and sentencing

The district court scheduled jury selection on November 8, 2000, for the trial of Aaron Harris, and co-defendants Kenneth Richardson, Rasheen Lewis, and John Foster on the conspiracy charge set forth in Count 1 of the Second Superseding Indictment.[2] On November 13, 2000, the government began presenting its trial evidence. On December 4, 2000, the jury found those four defendants guilty. HA 14-15, 17.

On April 5, 2001, the district court sentenced Harris to life in prison. GA 228, HA 19. On April 16, 2001, Harris filed a timely notice of appeal. HA 20. On October 5, 2004, this Court affirmed Harris's judgment and sentence, but ordered a remand, on the government's motion, in the immediate wake of *Crosby*. *See generally United States v. Lewis,* 386 F.3d 475 (2d Cir. 2004), *opinion supplemented*

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[2] A fifth defendant, Craig Baldwin, was acquitted. Baldwin later pleaded guilty to Count 3 of the Seventh Superseding Indictment which charged him with conspiring to possess with intent to distribute in excess of 50 grams of crack on the East Side of Bridgeport. He was sentenced on March 5, 2007, to ten years in prison.

by United States v. Lewis, 111 Fed. Appx. 52 (2d Cir. 2004), *cert. denied,* 125 S. Ct. 1355 (2005).

C. Lonnie Jones's plea, trial, and sentencing

On September 11, 2000, Lonnie Jones pleaded guilty to firearm possession as charged in Count 4 of the First Superseding Indictment, but he elected to proceed to trial on the drug conspiracy charge in the Second Superseding Indictment. GA 99. He was initially scheduled to begin trial with Harris and the other four co-defendants in November 2000, but his counsel was disqualified just before jury selection. GA 18. As a result, his trial was postponed pending the appointment of new counsel. His trial began on July 17, 2001, and the jury returned a guilty verdict on July 25, 2001. GA 20, 22-23.

On December 10, 2001, the district court sentenced Lonnie Jones to life in prison on the drug conspiracy charge and a concurrent term of five years on the firearms charge. GA 280, 902. On December 14, 2001, he filed a timely notice of appeal. GA 24. On August 23, 2004, this Court affirmed the judgment and sentence of the district court, but withheld its mandate. *See United States v. Jones,* 381 F.3d 14 (2d Cir. 2004), *opinion supplemented by United States v. Jones*, 108 Fed. Appx. 19 (2d Cir. 2004), *cert. denied,* 125 S.Ct. 916 (2005). On March 11, 2005, this Court ordered a *Crosby* remand. GA 861.

D. Luke Jones's plea, trial, and sentencing

Luke Jones's criminal charges proceeded along two tracks.

The first track, which is not the subject of the present appeal, involved the firearm offense charged in Count 2 of the First Superseding Indictment. On September 22, 2000, he pleaded guilty to that charge. GA 51. On October 24, 2001, the court sentenced him to 120 months in prison, to be followed by three years of supervised release. GA 59, 909-10. On October 31, 2001, Luke Jones filed a timely notice of appeal with respect to the firearms conviction and sentence. On October 5, 2004, this Court affirmed the judgment and sentence, but withheld its mandate pending a remand pursuant to *United States v. Crosby,* 397 F.3d 103 (2d Cir. 2005). *See United States v. Lewis,* 386 F.3d 475 (2d Cir. 2004), *opinion supplemented by United States v. Lewis,* 111 Fed. Appx. 52 (2d Cir. 2004), *cert. denied,* 125 S. Ct. 1355 (2005).

The second track, which gives rise to the present appeal, involved a number of other charges stemming from drug trafficking and violence. On December 20, 2001, a federal grand jury returned a multiple-count Fifth Superseding Indictment, charging Luke Jones with, *inter alia*, racketeering (Count 1), racketeering conspiracy (Count 2), two conspiracies to possess with intent to distribute heroin, cocaine, and crack cocaine (Count 5 – superseding the previously charged drug conspiracy, and Count 6 – adding a new drug conspiracy), murder of Monteneal Lawrence as a violent crime in aid of

racketeering ("VCAR") (Count 16), using a firearm in relation to Monteneal Lawrence's VCAR murder (Count 17), conspiracy to murder Lawson Day in aid of racketeering (Count 18), conspiracy to murder Anthony Scott in aid of racketeering (Count 21), murder of Anthony Scott in aid of racketeering (Count 22), and using a firearm in relation to Anthony Scott's murder (Count 23). The racketeering charge in Count 1 of the Fifth Superseding Indictment listed a total of seventeen predicate racketeering acts, five of which involved Luke Jones. GA 102-23.

On August 8, 2002, the grand jury returned a Sixth Superseding Indictment charging Luke Jones with committing a murder in aid of racketeering, involving the death of Monteneal Lawrence (Count 1), and charging Luke Jones, Leonard Jones and Lance Jones with the murder of Anthony Scott in aid of racketeering (Count 2). GA 157. These two counts superseded Counts 16 and 22 of the Fifth Superseding Indictment, which had charged the defendant with the VCAR murders of Lawrence and Scott.

On August 22, 2002, the government filed an amended notice of intent to seek a death sentence if the jury convicted Luke Jones of either murder.

The Fifth and Sixth Superseding Indictments were consolidated for a trial in Bridgeport before Judge Nevas from October 10 through October 30, 2003. GA 79, 84. On October 27, 2003, at the close of the government's case-in-chief, Luke Jones moved for a judgment of

acquittal, pursuant to Fed. R. Crim. P. 29, *inter alia* on the counts relating to the murder of Monteneal Lawrence (Count 1 of the Sixth Superseding Indictment, and Count 17 of the Fifth Superseding Indictment). The district court reserved decision. GA 82.

On October 30, 2003, the trial jury returned guilty verdicts against Luke Jones on Counts 1, 2, 5, 6, 17, 18, 21 of the Fifth Superseding Indictment, and Count 1 of the Sixth Superseding Indictment. As to Count 1 of the Fifth Superseding Indictment (RICO), the jury found the following racketeering acts proven: 1-C (Middle Court drug conspiracy), 1-D (D-Top drug conspiracy), 8 (murder of Monteneal Lawrence), 9 (conspiracy to murder Foundation members), 10-A (conspiracy to murder Lawson Day), 11-A (conspiracy to murder Anthony Scott). It acquitted Luke Jones on two charges relating to the Scott murder: the VCAR murder count (Count 2 of the Sixth Superseding Indictment) and a related firearms offense (Count 23 of the Fifth Superseding Indictment), and found the related racketeering act (11-B) not proven. GA 84.

On November 3, 2003, the district court granted the Rule 29 motion with respect to the two charges related to the Lawrence murder: Count 1 of the Sixth Superseding Indictment, and the related firearms charge in Count 17 of the Fifth Superseding Indictment. On November 19, 2003, the district court issued a 31-page ruling setting forth its reasons. *See United States v. Jones*, 291 F. Supp.2d 78 (D. Conn. 2003). The court found that although it was convinced that Luke Jones had committed the murder in question, *id.* at 93 n.10, there was insufficient evidence

that he had done so in furtherance of the racketeering enterprise, *id*. at 87-91.

On January 7, 2004, the district court sentenced Luke Jones to concurrent life sentences on Counts 1, 2, 5, and 6 (RICO, RICO conspiracy, and the two drug conspiracy charges), and two concurrent ten-year sentences on Counts 18 and 21 (VCAR murder conspiracy). GA 342, 914-15.

On January 15, 2004, Luke Jones filed a timely notice of appeal. On appeal this Court affirmed his convictions, but ordered a *Crosby* remand. *United States v. Jones*, 482 F.3d 60 (2d Cir. 2006), *cert. denied,* 127 S. Ct. 1306 (2007).

E. The district court completes the sentencing remands

Aaron Harris. While Harris's case was pending on remand before the district court, this Court decided *United States v. Fagans*, 406 F.3d 138 (2d Cir. 2005), which held that a defendant who had preserved a Sixth Amendment challenge to mandatory application of the Guidelines was entitled to a full resentencing. Because Harris had raised an *Apprendi* claim during his original sentencing, the district court agreed with the parties that a full resentencing was now required. HA 137-38, 176, 273 n.1.

On May 30, 2007, after denying a recusal motion filed by Harris, the district court conducted a resentencing hearing at which the defendant was present, represented by counsel, and afforded an opportunity to be heard. HA 303-

415. After hearing extensive argument from both the defense and the government, the court adopted the factual findings in a revised PSR that had been prepared for the resentencing. PSR ¶¶ 4-45; Second Addendum to PSR, ¶¶ 2-55, 67; HA 405.

The court then offered three independent reasons for re-imposing a life sentence. First, the court agreed with the PSR that Harris had participated in the murder of a rival drug dealer named Kevin Guiles. The district court recalculated the defendant's offense level by applying the cross-reference in U.S.S.G. § 2D1.1(d)(1) to the murder Guidelines, U.S.S.G. § 2A1.1, which yielded a Guidelines range of life in prison. HA 405. Second, the court found there was no error in the original Guidelines calculation in the first PSR, which had determined that Harris was responsible for large drug quantities that also called for the maximum offense level under the Guidelines. HA 406, 408. Third, the court held that even if its Guidelines calculations were incorrect, it still would have imposed the same sentence as a non-Guidelines matter. HA 408. The court reiterated these reasons in great detail in a written addendum to the judgment. HA 54-56. Judgment entered on June 11, 2007. HA 49, 51-56. A timely notice of appeal had already been filed on the day that sentence was orally imposed. HA 49, 419.

Lonnie Jones. On January 11, 2007, the district court determined that the lifetime term of imprisonment it had initially imposed upon Lonnie Jones was greater than necessary for a defendant with no prior criminal record, and therefore resentenced him to a non-Guidelines

sentence of 324 months on the drug conspiracy conviction, with 60 months to run concurrently on the firearms offense. LNA 220-21. Judgment entered on January 29, 2007. GA 32. The defendant had previously filed a timely notice of appeal on January 22, 2007. LNA 218, GA 32.

Luke Jones. On the *Crosby* remands, the district court separately considered the 120-month sentence imposed for the firearms offense to which Luke Jones had pleaded guilty, and the life sentence imposed for the offenses of which he was convicted at trial. By order filed July 1, 2005, the district court determined that Luke Jones should not be resentenced on the firearms conviction. GA 89. On June 5, 2007, the district court likewise adhered to the life sentence on the remaining charges. LKA 2-5. That order entered on June 7, 2007. GA 93. The defendant filed a timely notice of appeal from this latter sentence on June 15, 2007. LKA 1, GA 93. The present appeal by Luke Jones stems solely from this latter decision – namely, the district court's adherence to life sentences on the offenses of which he was convicted at trial.

All three defendants are serving their sentences.[3]

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[3] Still pending in the district court against Harris are the charges contained in a Seventh Superseding Indictment returned on October 17, 2003. GA 166-99. The Seventh Superseding Indictment deletes certain defendants who had previously been convicted as well as counts that had previously been resolved. The Seventh Superseding Indictment alleges RICO, RICO conspiracy, narcotics trafficking, and VCAR (continued...)

[3] (...continued)
offenses. Specifically, with regard to defendant Harris, it alleges:

> Harris, Powell, Baldwin, and Walker were members of a racketeering enterprise and conspired to violate RICO (Counts 1 and 2)
>
> Harris, Powell, Baldwin, and Walker conspired to distribute narcotics at various locations (Count 1, Racketeering Act 1; Counts 3 through 6);
>
> Harris and Powell conspired to murder and attempted to murder Jermaine Jenkins (Count 1, Racketeering Act 2);
>
> Harris, Powell, Baldwin, and Walker conspired to murder members of a rival drug trafficking crew, including Kevin Guiles, Kendall Willis, and Brian Matthews, known as the Terrace Crew (Count 1, Racketeering Act 3);
>
> Harris and Powell murdered Kevin Guiles (Count 1, Racketeering Act 4-A; Count 7);
>
> Harris and Powell conspired to murder Brian Matthews (Count 1, Racketeering Act 4-B; Count 8);
>
> Harris and Powell attempted to murder Kendall Willis (Count 1, Racketeering Act 4-C);
>
> Harris and Powell conspired to launder drug trafficking proceeds (Count 13).

GA 166-99.

Statement of Facts

A. The offense conduct

The government presented extensive evidence at the drug conspiracy trial of Aaron Harris in 2000, the drug conspiracy trial of Lonnie Jones in 2001, and the racketeering and murder trial of Luke Jones in 2003, to establish their broad-ranging participation and leadership in a violent narcotics trafficking organization that operated primarily in the P.T. Barnum housing complex in Bridgeport, Connecticut. The evidence principally included the testimony of cooperating witnesses as well as law enforcement officers who conducted surveillance, forensic testing, searches, and seizures. Because Judge Nevas presided over all of these trials (plus others), and was entitled to consider such largely overlapping evidence at the three defendants' sentencings, the following non-exhaustive summary draws on evidence presented at a number of the related trials.

1. The defendants run a large-scale drug conspiracy in the "Middle Court" area of the P.T. Barnum housing project in Bridgeport

There was extensive testimony about how Harris, Lonnie Jones, and Luke Jones were leaders of a large-scale drug operation in the P.T. Barnum complex. For example, cooperating witnesses Eugene Rhodes and David Nunley testified that they were lieutenants for the organization, which did business primarily in the "Middle Court" area of the P.T. Barnum housing project. GA 495, 500, 514-515,

610, 618, 695, 696, 699-700. According to them and cooperating witness Glenda Jimenez, Aaron Harris supplied the drugs to the Middle Court, and Luke Jones, Lyle Jones, Jr. (a.k.a. "Speedy"), and Lonnie Jones were responsible for overseeing the day-to-day operations. GA 604-06, 611, 616-17, 697, 700-01.

Typically, the lieutenants would obtain heroin and cocaine base from Lyle Jones, Jr., Lonnie Jones, or Kenneth Richardson. The lieutenants would then distribute the narcotics to street-level sellers who would typically be drug abusers who were looking to make a few dollars and support their drug habit. GA 496, 502, 511-12, 611-15. The lieutenants, who were often armed and wore bullet-proof vests, would observe the street-level dealers and make sure that rival drug dealers did not sell within the area. GA 504-08, 523-26, 618-22, 703-05, 709. They were also responsible for making sure that the street dealers always had access to narcotics for sale. At various times during the street dealers' eight-hour shifts, the lieutenants were responsible for gathering drug trafficking proceeds, which they would in turn pass on to Lonnie, Lyle or Luke Jones. GA 500-501, 616, 701-02. According to Rhodes, Nunley, and James Earl Jones (one of the people employed as a lookout and drug seller), members of the gang often wore bullet-proof vests and carried handguns in connection with their drug trafficking. GA 492-94, 504-09, 523-26, 618-22, 703-05, 708, 710-12.

Eugene Rhodes and David Nunley learned that the Joneses were being supplied by Lonnie Jones's old school friend, Aaron Harris, who also distributed the same brand

names of heroin and cocaine base in another part of Bridgeport. GA 498-99. The heroin was distributed under the brand name "Most Wanted" and packaged in clear plastic envelopes with conspicuous red bulldogs on the outside. Crack was packaged in plastic bags bearing "Batman" or "Superman" symbols. GA 497-99, 503, 513 519-20, 603, 614-15, 693-94, 707.

2. Harris and Lonnie Jones buy narcotics from Bronx-based supplier Manuel Hinojosa

A cooperating witness, Manuel Hinojosa, testified that in about the fall of 1997, he met Aaron Harris in New York City. GA 571-72, 657. Hinojosa described himself as a wholesale heroin and cocaine supplier from the Dominican Republic with a number of employees who worked on his behalf distributing heroin and cocaine to other drug traffickers. GA 568-70, 653-55. Hinojosa described Aaron Harris as a regular customer. GA 573-74, 659-60. Some time during the fall of 1998, Hinojosa delivered a kilogram of cocaine to Harris in Connecticut. Harris took Hinojosa to someone's apartment and told the occupants to leave. Harris proceeded to convert over 100 grams of cocaine hydrochloride into crack cocaine on the stove in the apartment. GA 592-93, 683-84.

Early in their relationship, Hinojosa expressed some skepticism about Harris, stating that he was afraid that Harris might be an undercover officer. GA 588-89, 679-80. Harris agreed to prove to Hinojosa that he was not. Harris and Hinojosa traveled to Connecticut, where Harris drove him around Bridgeport showing him his drug blocks.

GA 589, 592, 680-82. In particular, Hinojosa remembered a red brick housing project near exit 25 off Interstate 95 in Bridgeport. GA 590-91, 681. While Hinojosa was unable to name the housing project, he provided directions that lead to the P.T. Barnum housing project. GA 576, 681.

Hinojosa recalled that in about June 1998, Harris brought a Pontiac automobile to Hinojosa in order for Hinojosa to fix a hidden compartment that was in the car. GA 586. After Harris left, Hinojosa found in the compartment ten bundles of heroin and a loaded handgun. He left the car for repairs with another person and gave the firearm and narcotics back to Harris. GA 586-88.

In 1998, Harris began obtaining more and more narcotics from Hinojosa. GA 574-75, 594, 660, 667. Harris often traveled in the company of others to New York to obtain narcotics. Hinojosa identified Lonnie Jones as Harris's most frequent companion. He also identified Craig Baldwin, Rasheen Lewis and Kenneth Richardson as individuals who were often in the company of Harris when he obtained heroin and/or cocaine. On a number of occasions, Harris would arrange for Lonnie Jones, Lewis or Richardson to travel to New York to pick up narcotics on his behalf. GA 595-96, 658, 661-64.

On September 24, 1998, Harris sent "his cousin" or "primo" (Kenneth Richardson) to New York to obtain over 400 grams of heroin from Hinojosa. GA 578, 668. On that occasion, Hinojosa was the subject of an investigation by an interagency drug task force. GA 596-97, 608, 623-24, 647. Members of the task force saw Richardson arrive

in the vicinity of Hinojosa's home driving a burgundy Chevy Lumina. Richardson met with Hinojosa, who testified at the trial that he gave Richardson 400 grams of heroin as ordered by Harris. GA 578-79, 669-70. Surveillance officers, including New York City Police Detective Thomas Grimes, saw Richardson leave Hinojosa's apartment building and enter the Lumina. GA 549-50, 625-26, 648. Richardson drove toward Detective Grimes, who parked his van in the street to block traffic. Another police car blocked Richardson from the back. The police activated their lights and sirens behind Richardson. In response, Richardson used his vehicle to push another car out of the way and drove around it towards Grimes's vehicle. Richardson used his car to ram into Grimes's van, throwing him from the vehicle. GA 551-53, 626-30, 649-50.

New York City police officers chased Richardson around the block, where they discovered the Lumina abandoned next to an alley leading back to Hinojosa's street. GA 554, 630-31. One of the officers searched the alley and found a package containing over 400 grams of heroin. GA 632-34, 651-52. At trial, Hinojosa identified a photograph of the package containing the heroin as the package that he had given to Richardson.

On October 8, 1998, Manuel Hinojosa's narcotics processing factory in the Bronx was the subject of a search warrant. GA 555-57, 580, 635-36. Hinojosa was arrested in a room with a large quantity of heroin and heroin-processing supplies. GA 558, 637-38. Hinojosa agreed to cooperate with the officers in the investigation of others.

GA 581, 689, 672. He volunteered that one of his best customers, who turned out to be Aaron Harris, was coming from Connecticut to see him that very evening to buy a kilogram of heroin. GA 581-82, 639-40. At the direction of the police, Hinojosa placed a call to Harris's pager number. In response, Hinojosa received an incoming call from Harris which was consensually monitored and recorded. GA 559-61, 640, 672. In substance, Harris agreed that he was on his way. GA 583, 672.

Later that evening, Hinojosa was placed inside his van in the passenger seat, and Hinojosa's van was driven by an undercover detective to the designated meeting place on the Pelham Parkway in the Bronx. Detective Grimes and another police officer crouched down behind the front passenger seats. (Tr. GA 560, 640-41. At approximately 11:30 p.m., Aaron Harris arrived in the vicinity of Hinojosa's parked van. Lonnie Jones was riding with Harris in a black Ford Expedition. GA 563, 584, 642-44, 674. In response to Hinojosa's directions, Harris drove the car down the block and parked. The police moved in and arrested Harris and Lonnie Jones for attempted possession of a controlled substance. Harris's vehicle was searched incident to the arrests. GA 564-65, 645-46. The officers found more than $44,000 in cash in a blue duffel bag and also Fleet Bank money orders. GA 566-67, 646.

Harris and Hinojosa resumed their drug trafficking relationship after their October 1998 arrests. Harris and his associates continued to obtain large, wholesale quantities of cocaine and heroin from Hinojosa. GA 44, 675. In January 1999, Harris arranged to purchase a

kilogram of cocaine from Hinojosa. Harris provided the money to one of Hinojosa's workers. The money was stolen, however, and Hinojosa was not able to deliver the narcotics to Harris. GA 675-76. This resulted in Hinojosa's giving Harris a van as collateral while Hinojosa tried to collect the money from the people he suspected of stealing his money. GA 676. Hinojosa was later arrested and charged for his part in a scheme to kidnap a member of the group that had stolen Harris's drug money. As a consequence of that arrest, Hinojosa was ordered held without bond by a federal court in New York, and he thereafter began cooperating against his associates and Aaron Harris and his associates. GA 677-78. Overall, Hinojosa estimated that he sold more than 5 kilograms of heroin and approximately 20 kilograms of cocaine to Harris and his associates. GA 597-98, 683-84.

3. Bridgeport police officers seize evidence of drug trafficking and violence relating to Harris, Luke Jones, and Lonnie Jones

On about April 9, 1999, Officer William Bailey of the Bridgeport Police Department discovered an abandoned Nissan Maxima in the P.T. Barnum complex. GA 685. Inside the car, officers seized the following evidence: a bullet-proof vest, a black ski mask, approximately 50 grams of "Superman" crack cocaine, and miscellaneous items (documents and pictures) belonging to Lyle and Lonnie Jones. GA 514-18, 686-91.

On September 14, 1999, at approximately 10:00 p.m., Bridgeport Police Officer Kevin Gilleran was on patrol in

the P.T. Barnum complex with his partner Officer Ruffin when they saw an individual later identified as an unindicted co-conspirator making a hand-to-hand exchange of narcotics for cash. Afterwards, the subject placed a clear plastic bag containing what appeared to be narcotics packaging materials under a stairwell at the project. GA 600-02.

On November 6, 1999, Luke Jones, Lance Jones and Lonnie Jones were stopped while riding together in a Toyota Camry driven by Luke Jones at the P.T. Barnum project. Four loaded semi-automatic handguns were seized from the car. GA 527-38. Clips containing additional ammunition were also seized from the pockets of Luke and Lonnie Jones. GA 530, 537. Each of them was wearing a bullet-proof vest. GA 528, 531, 537. This incident led to the firearms charge against Luke Jones and Lonnie Jones to which they each entered guilty pleas.

4. The defendants use violence to promote their drug trafficking in the P.T. Barnum housing project

Violence was a hallmark of the drug conspiracy centered in the Middle Court of the P.T. Barnum housing project, and was employed in a conspicuous manner to establish, protect and propagate its narcotics trafficking activities.

Cooperating witness Jermaine "Fats" Jenkins, a lieutenant for a rival drug trafficking organization, may have been one of the Middle Court's first shooting victims.

In April of 1995, he was employed by a drug trafficking group that was operating within the P.T. Barnum housing project when Quinne Powell, Aaron Harris, and other early members of the organization including Lonnie Jones were trying to establish their presence in the housing project. Luke Jones, whose family was originally from the housing project, sponsored the new group's ability to sell drugs there. GA 826. When Jenkins, who was originally from P.T. Barnum, challenged their right to sell drugs in there, Powell, Harris, and other gunmen who were not from the housing project shot him in the back in broad daylight. GA 827-28. Jenkins survived and was later hunted and shot at. GA 829-33. From its very inception, members of the Middle Court drug trafficking conspiracy employed outrageous and conspicuous acts of violence to secure their presence in the housing project and to create and enhance their reputation for violence in order to further their drug trafficking activities.

Some time afterwards, in or about 1998, Jenkins, Luke Jones, Eddie "Fatboy" Lawhorn, and Aaron Harris met on "the drive," a road that bisects the housing project. During the conversation, Harris recounted in front of Jenkins in a "cocky manner" the incidents in which Jenkins was shot at, and admitted his participation. GA 833. After Harris walked away, Luke Jones stated that if Harris had said something like that to him, he would have killed him. GA 834, 844.

Members of the Middle Court committed public acts of violence in retaliation for acts of disrespect: Willie Nunley shot Charles Williams for unauthorized sales of narcotics

in the Middle Court, GA 838; Luke Jones beat a man named "Bookie" for selling fake drugs, GA 839-40; and Luke Jones threatened Terry Rice with a gun for robbing one of his workers, GA 841-43.

Cooperating witness Kevin "Kong" Jackson was a lieutenant working directly beneath Luke Jones in the Middle Court from April 1998 until his incarceration in December 1998. GA 746, 755. Although he stopped selling Luke Jones's "No Limit" brand heroin in late August 1998, he remained in the Middle Court area. GA 759. On at least one occasion after Jackson stopped selling heroin, Luke Jones gave him a gun to use during the Middle Court's running conflict with members and associates of "The Foundation," a rival drug trafficking organization operating within the housing project. GA 759.

Other members of the Middle Court drug conspiracy also engaged in other conspicuous acts of violence. For example, on August 2, 1998, Leslie Morris, an employee of the Middle Court, acting in concert with co-defendant Willie Nunley, murdered Kenneth Porter a.k.a. "Inky" in front of numerous witnesses in broad daylight. GA 748-51.

On July 13, 1999, Bridgeport Police Lieutenant Christopher Lamaine stopped Luke Jones in a motor vehicle after observing him act in a manner consistent with a person carrying a firearm. GA 718-21. The officer discovered that Luke Jones was wearing a bullet-proof vest, and recovered a loaded Smith and Wesson magazine

containing 21 rounds of ammunition. GA 721-22. During the car stop, Luke Jones became irate, yelling at Lamaine, "You ain't shit. You're not searching me. You're a fucking punk. You got to learn, motherfucker." GA 723. Rival drug trafficker and cooperating witness Frank Estrada testified that Luke Jones vowed to murder Lamaine as a result of his aggressive enforcement of the law, but Estrada talked him out of it in favor of using the political influence of his brother, Lyle "Hassan" Jones, a local community activist. GA 847-50. Officers and supervisors of the Bridgeport Police Department's West Side Precinct, including Lamaine and Fitzgerald, who were responsible for patrolling the housing project, were reassigned to other posts after Lyle Jones led protests against the police. Cooperating witness and former Estrada lieutenant Eddie Lawhorn also recounted Luke Jones's stated intention to murder Officer Lamaine; how Luke Jones lay in wait to murder a witness in connection with a pending Connecticut State murder charge, GA 781-82, 791-92; and Luke Jones's stated intention to murder a Connecticut Superior Court Judge whose rulings displeased him, GA 793-94.

5. Luke Jones murders Monteneal Lawrence for disrespecting him and his girlfriend in the P.T. Barnum housing project

At Luke Jones's trial, the jury heard the following evidence. On the afternoon of November 28, 1999, an out-of-towner named Monteneal Lawrence was visiting the apartment of friends Veneer Holmes and Jeremy Thomas in Building 5 of P.T. Barnum. Lawrence, who was drunk,

made advances to Luke Jones's girlfriend, Shontae "Tae Tae" Fewell, while they were riding in a car driven by Thomas. She rejected his advances, the two exchanged mutual insults, but Thomas insisted that they shake hands and apologize. GA 738. Despite the apparent reconciliation, Shontae Fewell marched into Holmes's and Thomas's apartment, declaring that Lawrence did not know who he was messing with. GA 737-38, 741. She stormed out as Thomas and Lawrence walked back into the apartment. GA 741. Lawrence sat at the kitchen table downstairs, where several people – including children – mostly from the P.T. Barnum project, had gotten together. GA 741-42.

Upstairs in the apartment, Thomas told Holmes about the argument in the car, and they were concerned for Lawrence's safety in light of who Shontae's boyfriend was. GA 738-39, 743-44. Thus, they discussed getting Lawrence out of the apartment as quickly as possible because they "didn't want any problem." GA 739, 743-44.

They were too late. A few minutes after Shontae Fewell stormed out of the apartment, Luke Jones came back to the party, accompanied by Kevin Jackson (who had previously sold drugs for Luke Jones) and Jamall Fewell (Shontae Fewell's brother, GA 756, who had also sold drugs for Luke Jones, GA 747). Luke Jones confronted Lawrence, who was sitting the kitchen table, and asked, "Who disrespected my girl," to which Lawrence replied, "Yeah, I did." GA 752. Luke Jones grabbed Lawrence by the arm and ordered him to come outside. Lawrence refused, snatched his arm away, and

fell back into his chair. The defendant forced him to his feet again. Lawrence again refused to go with the defendant, and held the defendant's arm, to stop him from pulling. GA 753. Luke Jones then pulled out a gun and shot Lawrence in the neck, severing his spinal cord, and then again in the belly. After Lawrence fell to the floor, Jamall Fewell kicked him in head, saying "Talk shit now." GA 754. Thomas and Holmes testified that they came downstairs after hearing the shots. Holmes began "cussing and yelling and asking a lot of questions," at which point the defendant "turned around and kind of looked at me and says, 'sorry.'" GA 740. As Jackson and Luke Jones drove away after the shooting, Jones gave Jackson the gun to hide. GA 757-58.

Although the jury found Luke Jones guilty of murdering Lawrence, the district court granted a post-trial judgment of acquittal on this sole remaining death-eligible count. Although the court was convinced that the defendant had committed the murder, 291 F. Supp.2d at 93 n.10, it concluded that he had not committed the crime "for the purpose of maintaining and increasing his position in the enterprise," as required to establish murder in aid of racketeering in violation of 18 U.S.C. § 1959(a)(1), 278 F. Supp.2d at 87-91. Although the Government objected to that ruling before the district court, it did not appeal that decision to this Court.

6. Luke Jones participates in another drug trafficking conspiracy, in the "D-Top" area of the P.T. Barnum housing project

The entrance to the P.T. Barnum housing project came to be known as "The Top," and later as "D-Top." The sales of heroin and crack cocaine in this area were controlled by Luke Jones and his brother, Leonard Jones, a.k.a. "X." GA725, 734-36, 780, 783-87, 795, 822, 831, 835-37, 846. While the D-Top drug conspiracy operated in a manner very similar to the Middle Court drug conspiracy, Leonard Jones maintained day-to-day supervision of the workers. Although there was occasional overlap in personnel, GA 853, in contrast to the Middle Court drug conspiracy, D-Top employed a different set of workers and supervisors, used different packaging for its crack cocaine, including the "Red Devil" brand, and distributed "Iceberg" brand heroin. GA 725, 734-36, 787, 804-05, 822, 835, 853. Further, Luke Jones's role in the D-Top conspiracy was different from his role in the Middle Court. For example, with respect to D-Top, he served primarily as a source of supply who would regularly obtain high quality cocaine from Frank Estrada for conversion into crack cocaine for distribution by Lonnie and Lyle Jones in the Middle Court, and for his brother Leonard Jones for distribution at D-Top. GA 845-46, 852.

7. Luke Jones and others murder Anthony Scott

The murder of Anthony Scott, alias "A.K.," arose out of a narcotics-related dispute between him and Leonard Jones. In 1998, Anthony Scott and Robert Dobson, a.k.a.

"Little Rob," began selling crack cocaine packaged in plastic bags, or "slabs," with little red symbols on the outside which looked very similar to Leonard Jones's Red Devil brand crack. GA 805-07, 822-23, 854. This caused friction between Leonard Jones and Scott. GA 808-10.

In the summer of 1999, Markie Thergood, one of Leonard Jones's workers, encountered Leonard Jones in the housing project talking to two of his associates. Thergood joined the conversation and learned that Leonard had just had a dispute with Scott over selling the same kind of slabs in D-Top. GA 808-09. Leonard had told his associates not to worry about it, and that "his people" were going to handle it. GA 811.

In the early morning hours of June 9, 1999, Leonard Jones was shot in the face while driving his car near the intersection of State Street and Fairfield Avenue in Bridgeport. GA 796-800. He survived and was admitted to the hospital. The Bridgeport Police Department was unable to solve this attempted murder, in part because Leonard Jones told investigating officers that he had no idea who had shot him or why. GA 801-03. In contrast, when Thergood visited him in the hospital, Leonard Jones informed him that Anthony Scott had shot him in the face, and that he was sure that Scott was the one who had done it. GA 812, 815. Thergood offered to help exact revenge, but Leonard Jones said that he wanted his "people" – meaning "his family, his brothers," including Luke and Lance Jones – to take care of the problem. GA 813-14. Leonard Jones directed Thergood to go see his (Leonard's)

"people." In response, Thergood later discussed the matter with Luke Jones. GA 816-21.

Eddie Lawhorn, one of the lieutenants employed by Frank Estrada, and a close personal friend of Luke Jones, was often in the area of D-Top. One day after Leonard Jones had returned to D-Top, Lawhorn was present when Luke Jones and Lance Jones approached Leonard Jones and they had a conversation. Lawhorn was unable to hear most of the conversation, but was able to hear Leonard Jones say to Luke and Lance that they should make sure that they get the right guy. As Luke and Lance walked away, Lawhorn heard the defendant state that he was tired of playing games with these "kids" – an apparent reference to members of the Foundation. GA 788-90.

Ricky Irby, an erstwhile street-level drug seller for the Jones organization, testified that on the night of June 26, 1999, he was sitting near some steps of Building 13 in P.T. Barnum. Irby saw Luke Jones, another individual identified herein as "gunman number 2," and Lance Jones sitting on top of a car that was parked in front of Building 17. GA 855. Irby also later saw Scott in the stairwell area of Building 14. GA 856. Irby heard someone from the vicinity of where the Joneses were sitting call out "A.K." – Anthony Scott's nickname – and Scott began walking in their direction. Irby observed Luke, Lance, and gunman number 2 raise their hands with firearms pointed in Scott's direction. He saw that all three had their guns drawn, but only Luke and gunman number 2 actually fired their guns. GA 857-58. After the shots were fired, Irby watched Lance Jones walk over to Scott's dead body, and stand

over it as if to make sure that he was dead. All three gunmen walked away from the scene towards the rear of Building 15. GA 858-59.

Markie Thergood also testified about witnessing the events of that night. Thergood was in the area of Building 13 when he saw Anthony Scott walking down the stairs of Building 14, having a conversation with Maurice Maurie. GA 824. At approximately the same time, Thergood saw Luke Jones, Lance Jones and other members of the drug trafficking group sitting on a car in front of Building 17. GA 825. Just prior to the shots being fired, Thergood heard Maurice Maurie "souping up" (encouraging) Scott to go over to where Luke Jones was and confront him. GA 824. Thergood stated that Scott, who was armed with a firearm, went over towards the Joneses and words were exchanged. Thergood watched Luke Jones shoot Scott dead, but because of the configuration of the buildings, was unable to see Lance Jones or the other gunman. GA 825a-25c.

8. Harris is involved in a dispute with a rival drug group known as the Terrace Crew and participates in the fatal shooting of Kevin Guiles

In 1995, Aaron Harris became involved in a dispute with rival drug dealers who sold crack and heroin in the Trumbull Village housing project (also known as the "Terrace") in the north end of Bridgeport. GA 384-90. Members of the Terrace drug crew were angry that Harris was dating a girl who lived in the area that the crew

controlled. PSR Second Addendum, ¶ 34. In addition, Harris was trying to expand his drug operation into their housing project. *Id.* ¶¶ 34, 51.

On October 30, 1995, Lacy Hansome, a member of the Terrace crew and his associates, including Brian Matthews, Kevin Guiles, and Kendall Willis, confronted Harris at a mini-market in the Trumbull Village area and assaulted him. GA 384-404. As Harris left the area, he vowed to kill the members of the Terrace crew. The dispute led to a running gun battle between members of the two crews, through the streets of Bridgeport into Trumbull, Connecticut. GA 443-79, 480-90. As a result, Kevin Guiles was murdered and Kendall Willis was shot, but survived.

The evidence at Powell and Walker's trial included cooperating witnesses, civilian witnesses who resided in Trumbull Gardens and observed the events of October 22, 1996, non-resident witnesses who observed portions of the car chase and shoot-out which occurred that day, and police officers who responded to the scene. The story they told was this: On October 22, 1996, Harris was driving through the Terrace in a white Mercedes Benz. Guiles and his associates pulled up behind Harris in a black Saab and shot at Harris's car. Later that day, Harris returned to the Terrace in a blue Lumina with Powell in order to retaliate against the Terrace crew.[4] Harris was driving the Lumina,

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[4] As reported in Harris's PSR, Powell arrived on the scene armed with an assault rifle, and Harris began to walk (continued...)

and Powell appeared to be in the front passenger seat. GA 66-67, 432-34. Harris and Powell drove up behind Guiles, Matthews, and Willis who were in the black Saab. GA 433, 436. A shoot-out between the two cars ensued. Matthews was shooting at the Lumina from out of the sunroof of the Saab and then jumped out of the Saab before it left the Terrace. GA 410-12. Guiles was driving the Saab, and Willis was in the front passenger seat. GA 411. The gun battle ended in Trumbull when the black Saab crashed and flipped over. GA 441. Guiles was found dead at the scene as a result of a gunshot wound, and Willis was taken to a local hospital where he was treated and released for a gunshot wound to the buttocks area. GA 384-404, 406-16, 418-41.

9. Luke Jones and others conspire to murder members of a rival drug trafficking group known as "The Foundation"

Witnesses testified that some time around the summer of 1998, Eddie Pagan, the leader of a rival drug trafficking group known as "the Foundation," was in the process of beating someone up near the Middle Court. GA 760-61. Lyle Jones, Jr., intervened and knocked Pagan out with a single punch. GA 762. Thereafter, an open gang war ensued between members of the Middle Court drug trafficking organization and the Foundation. The war was characterized by repeated and random shoot-outs between

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[4] (...continued)
around the area, stating that "no one is selling drugs out here any more." PSR Second Addendum, ¶ 43.

members of the two groups. GA 763-79. Luke Jones and his criminal associates protected themselves by wearing bullet-proof vests and carrying firearms including handguns and long guns such as assault rifles. GA 726-30. Members of the Middle Court had a standing agreement to shoot anyone from the Foundation who had the temerity to come through the Middle Court, and gunfights were common.[5] GA 731-33.

B. Aaron Harris is sentenced to life in prison, and the district court re-imposes that life sentence on remand

On April 5, 2001, the district court sentenced Harris to life in prison. GA 228, 916. This term of imprisonment was premised on the district court's calculation of a final offense level of 48, well in excess of the maximum offense level of 43 that yields a Guidelines range of life in prison. The court calculated Harris's offense level as follows:

> Drug quantity (more than 1.5 kg of cocaine base) U.S.S.G. § 2D1.1(c)(1). 38

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[5] On April 24, 2003, in a trial presided over by Senior Judge Peter C. Dorsey, a jury found that co-defendants Lyle T. Jones, Jr., Leonard T. Jones, Lance T. Jones, and Willie Nunley guilty for, *inter alia*, their participation in this racketeering act, conspiracy to murder members of the Foundation. Co-defendant Leslie Morris was also convicted in this trial. Appeals from those convictions are pending before this Court. *See United States v. Jones et al.*, No. 03-1276-cr.

Use of a firearm in connection with the offense
U.S.S.G. § 2D1.1(b)(1). . . . . +2

Leadership role
U.S.S.G. § 3B1.1(a). . . . . +4

Use of a minor
U.S.S.G. § 3B1.4. . . . . +2

Obstruction of Justice (perjury)
U.S.S.G. § 3C1.1. . . . . +2

48

PSR ¶ 50-58, GA 203-11.

On October 5, 2004, this Court affirmed Harris's conviction and sentence but withheld its mandate pending the Supreme Court's decision in *Booker*. *United States v. Lewis,* 386 F.3d 475 (2d Cir. 2004), *opinion supplemented by United States v. Lewis,* 111 Fed. Appx. 52 (2d Cir. 2004), *cert. denied,* 125 S. Ct. 1355 (2005). On March 11, 2005, this Court remanded the case on the Government's motion, in light of *United States v. Booker*, 543 U.S. 220 (2005), and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). HA 58. While the case was pending on remand, this Court decided *United States v. Fagans*, 406 F.3d 138 (2d Cir. 2005), and the district court agreed with the parties that Harris was entitled to a resentencing in light of *Fagans*. HA 137-38, 176, 273 n.1.

On December 8, 2006, while the remand was pending, Harris filed a motion seeking recusal of Judge Nevas

pursuant to 28 U.S.C. §§ 455(a), 455(b)(1), and 144. As discussed *infra* in Point I, Judge Nevas denied the motion in a written ruling. HA 272-85.

On June 11, 2007, the district court resentenced the defendant and reimposed a lifetime term of imprisonment. As discussed in more detail *infra* in Point II, the district court offered three independent reasons for that sentence. First, the court found by a preponderance of the evidence that Harris had participated in the murder of rival drug dealer Kevin Guiles. A cross-reference to the murder Guidelines yielded an advisory range of life in prison, which the court found appropriate. HA 54-55, 405, 408. Second, the court found that even if the Guidelines range were driven by drug quantity as at the original sentencing, a life sentence was still appropriate. HA 55-56, 406, 408. Third, the court held that even if its Guidelines calculations were incorrect, it still would have imposed a life sentence as a non-Guidelines matter. HA 56, 408.

C. Luke Jones is sentenced to life in prison, and the district court adheres to that sentence after a *Crosby* remand

At Luke Jones's initial sentencing hearing on January 7, 2004, the district court adopted the findings of the Presentence Report ("PSR"), GA 333, which placed his offenses into four groups with corresponding offense levels, as follows:

Group 1: Drug conspiracies **44**
Count 1 (RICO: Acts 1-C and 1-D)

Count 2 (RICO conspiracy)
Counts 5 and 6 (narcotics conspiracy)

Group 2: Conspiracy to murder Foundation members **32**
Count 1 (RICO: Act 9)
Count 2 (RICO conspiracy)

Group 3: Murder of Lawson Day **40**
Count 1 (RICO: Act 10-A)
Count 2 (RICO conspiracy)
Count 18 (VCAR murder conspiracy)

Group 4: Murder of Anthony Scott **47**
Count 1 (RICO: Act 11-A)
Count 2 (RICO conspiracy)
Count 21 (Scott VCAR murder conspiracy)

When aggregated, these calculations resulted in the highest total offense level possible under the Guidelines, a level 43. PSR 32; *see* U.S.S.G. Chapter 5, Part A, app. note 2. This yielded a Guidelines range of life in prison. PSR ¶ 191, GA 333.

After hearing from Luke Jones, the Government, and the family of murder victim Anthony Scott, the district court imposed life sentences on Counts 1, 2, 5 and 6 (RICO, RICO conspiracy, and the two drug conspiracies), and ten-year sentences on Counts 18 and 21 (VCAR murder conspiracy of Scott and Day), all to run concurrently. The judge explained that notwithstanding his view that the Sentencing Guidelines are often harsher

than necessary, a life sentence in this case was "well deserved." GA 340. The judge observed that the evidence of the defendant's drug dealing was "overwhelming," that he had "absolutely no doubt" that the defendant had murdered Anthony Scott despite the jury's acquittal on the substantive murder count, and that his murder of Monteneal Lawrence was a chillingly "cold-blooded murder of an innocent man." GA 340-41. The court concluded:

> Mr. Jones, you don't deserve to live among civilized people. You should be locked away in a cage for the rest of your life, never to breathe free air again.
>
> . . . . [T]he Court will recommend to the Bureau of Prisons that you be confined to the most maximum facility available within the Bureau of Prisons, and if that includes the prison in Colorado that's – was built into the side of a mountain so that nobody could ever get out, that's a good place for you, inside a mountain.

GA 342-43.

As described more fully *infra* at pages 78-79 and 86-87, this Court affirmed Luke Jones's conviction, and ordered a *Crosby* remand with respect to his sentence. GA 865-901. After reviewing the parties' submissions, the district court issued a written order denying resentencing. LKA 2-5.

D. Lonnie Jones is initially sentenced to life in prison, and later resentenced to 324 months

The PSR calculated Lonnie Jones's offense level on the drug conspiracy as follows:

Drug quantity (more than 1.5 kg of cocaine base) U.S.S.G. § 2D1.1(c)(1).	38
Use of a firearm in connection with the offense U.S.S.G. § 2D1.1(b)(1).	+2
Leadership role U.S.S.G. § 3B1.1(a).	+3
Use of a minor U.S.S.G. § 3B1.4.	+2
	45

PSR ¶ 46-55, GA 277-80. Under the sentencing table of the Guidelines Manual, the maximum possible offense level is 43, yielding a Guidelines range of life in prison.

On December 10, 2001, the district court sentenced Lonnie Jones to life on the drug conspiracy conviction and 60 months to run concurrently on the firearms offense. GA 281.

On January 11, 2007, following a *Crosby* remand from this Court, GA 861, the district court determined that it would have imposed a nontrivially different sentence

under an advisory Guidelines regime. LNA 212, 220-21. Accordingly, it ordered Lonnie Jones to serve a non-Guidelines sentence of 324 months on the drug conviction, to be served concurrently to a 60-month term of imprisonment on the firearms conviction. LNA 215, 220-21. Further detail is provided *infra* at 88-90.

SUMMARY OF ARGUMENT

Claims of Aaron Harris

I. The district court did not abuse its discretion by denying Harris's motion for recusal based on comments the court made about Harris in the course of judicial proceedings involving three of his co-defendants, mainly to the effect that Harris was a violent person who did not deserve to be free. These comments occurred only after the court had presided over trials that saw the conviction of Harris and other co-defendants, based on evidence that they ran a violent, large-scale drug organization in Bridgeport. There is no dispute that the judge's comments were based entirely on information that he had learned during judicial proceedings, not from extrajudicial sources. Accordingly, recusal would have been appropriate only if they demonstrated a "deep-seated antagonism" toward Harris. That high threshold was not met here. Viewed in context, the district court's comments were entirely appropriate. Each comment was relevant to the hearing at which it was made – including the bond hearing of one co-defendant, and the sentencing hearings of two other co-defendants. Because the comments do not cast any doubt

on the district court's impartiality, the recusal motion was properly denied.

II. Harris's sentence was both substantively and procedurally reasonable. The district court properly held that a life sentence was appropriate for three independently sufficient reasons.

First, a life sentence was consistent with the applicable drug Guidelines, based on the massive quantities of heroin and crack cocaine for which Harris was responsible. These quantities were so large that even under the amended crack Guidelines, coupled with the additional 10 points of enhancements to which he was subject, Harris's offense level would still be well above the maximum offense level of 43, resulting in an advisory Guidelines range of life in prison. Moreover, becaues the heroin quantity would dictate this high offense level, the crack:powder ratio is irrelevant, and a remand pursuant to *United States v. Regalado*, ___ F.3d ___, 2008 WL 577158, *4 (2d Cir. Mar. 4, 2008) (per curiam), is unwarranted. Affirmance would be appropriate on this ground alone.

Second, the court did not abuse its discretion in deciding, in the alternative, that a life term would be appropriate as a non-Guidelines sentence, in light of § 3553(a). Among other things, the court found that a life sentence would serve the goal of just punishment, and it would reflect the seriousness of the offense and Harris's lack of respect for the law. As with the first reason, this finding alone dictates affirmance.

Third, the court did not err by calculating Harris's Guidelines range, in the alternative, by reference to the murder Guidelines based on the testimony of numerous witnesses at a co-defendant's trial that Harris had participated in the murder of a drug rival, Kevin Guiles. As with the drug Guidelines, the cross-reference to the murder Guidelines coupled with the applicable enhancements resulted in an offense level well above 43 and an advisory range of life in prison. Because this was a *Fagans* resentencing, the court was permitted to consider newly available evidence of relevant conduct. Moreover, the district court did not abuse its discretion by declining to order a *Fatico* hearing *sua sponte*, because it had heard lengthy testimony about the Guiles murder during the Powell/Walker trial, and because Harris could have submitted contradictory evidence at sentencing.

Claims of Luke Jones

III. Judge Nevas did not abuse his discretion by declining to resentence Luke Jones during the *Crosby* remand. In adhering to a life sentence, Judge Nevas relied primarily on his findings that the defendant had murdered two victims – Anthony Scott and Monteneal Lawrence – and had been the leader of a violent, large-scale drug trafficking organization. Those were wholly appropriate considerations under § 3553(a). Luke Jones's brief now claims that the district court made improper findings of fact and misapplied the Guidelines, which drove his advisory Guidelines range of life in prison. But because he failed to raise these claims at his original sentencing, in his first appeal (which was decided on the merits), or in his

Crosby remand, he is precluded by the law-of-the-case doctrine from raising such claims for the first time now.

IV. The life sentence imposed on Luke Jones was substantively reasonable. The defendant essentially asks this Court to substitute its judgment about the proper application of the various sentencing factors for that of the district court, a task this Court has repeatedly declined to undertake. But even if this Court were to undertake this task, it would conclude that Luke Jones's sentence was reasonable. The district court carefully considered all of the evidence, including the murders of Monteneal Lawrence and Anthony Scott, the advisory Guidelines range, and the § 3553(a) sentencing factors before imposing sentence. It cannot be unreasonable to sentence such a murderer and drug kingpin to life in prison.

Claims of Lonnie Jones

V. Lonnie Jones is not entitled to a remand to consider departing based on the crack:powder ratio in U.S.S.G. § 2D1.1, pursuant to *United States v. Regalado*, or the recently amended crack guidelines. At the original sentencing, Judge Nevas found the defendant responsible for enormous drug quantities, such as 40.5 kilograms of crack cocaine and over 140 kilograms of heroin. Given such massive quantities, Lonnie Jones would still be subject to a base offense level of 38 pursuant to the amended version of U.S.S.G. § 2D1.1(c), and additional enhancements would still put his total offense level well above the maximum level of 43 – yielding an advisory range of life in prison. Moreover, the crack:powder ratio

is irrelevant because the heroin quantities alone would push his offense level to the highest possible.

VI. The 324-month sentence imposed by Judge Nevas on the *Crosby* remand – which was considerably below the life sentence originally imposed – was both procedurally and substantively reasonable. The district court complied with all of the procedural requirements for a *Crosby* remand and expressly stated that it had considered all of the defendant's arguments, the relevant Guidelines, and the § 3553(a) factors. Because the defendant's claim boils down to a disagreement with the weight that Judge Nevas ascribed to the mix of sentencing factors, his claim on appeal fails.

ARGUMENT

Claims of Aaron Harris

I. The district court did not abuse its discretion when it denied Harris's recusal motion

A. Relevant facts

On December 4, 2000, after a month-long jury trial, Harris was convicted of conspiring to possess with intent to distribute in excess of 1 kilogram of heroin, 5 kilograms of cocaine and 50 grams of cocaine base ("crack"), in violation of 21 U.S.C. §§ 841(a)(1) and 846. On April 5, 2001, the district court sentenced Harris to a Guidelines sentence of life imprisonment. On October 5, 2004, this Court affirmed Harris' conviction but withheld its mandate pending the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). The case was eventually remanded, and Judge Nevas set the case down for resentencing.

On December 8, 2006, pending resentencing, Harris filed a motion seeking recusal of Judge Nevas pursuant to 28 U.S.C. §§ 455(a), 455(b)(1) and 144. HA 198-209. Harris claimed that comments Judge Nevas made during various proceedings in the case called into question his impartiality. Specifically, Harris complained of three instances of alleged improper comments by Judge Nevas during (1) co-defendant Rayon Barnes's bond review hearing on May 2, 2002; (2) co-defendant Lonnie Jones's sentencing hearing on December 10, 2001; and (3) co-

defendant Quinne Powell's sentencing hearing on December 21, 2005.

The 2002 Bond Review Hearing for Co-Defendant Rayon Barnes. On May 2, 2002, Judge Nevas presided over a bond review hearing for co-defendant Rayon Barnes, who sought review of a magistrate judge's detention order. Accordingly, pursuant to 18 U.S.C. § 3142(g)(3)(A), the court was required to consider any and all information regarding Barnes's "history and characteristics." 18 U.S.C. §§ 3142(a), (g)(3). To that end, the government proffered that Barnes and Harris were close associates who had traveled to Florida together. In that context – and long after Judge Nevas has completed trials in 2000 an 2001 involving both Harris and Lonnie Jones – the Court commented, "Aaron Harris is a violent person who doesn't deserve to be a free person. He's violent. He's dangerous, and this man (referring to Barnes) travels to Florida with him?" GA 303.

The 2001 Sentencing Hearing for Co-Defendant Lonnie Jones. At a sentencing hearing for Lonnie Jones held on December 10, 2001, Judge Nevas noted that he was "constricted by the guidelines" and had "no options," and so he sentenced Jones to life in prison. GA 280. At the conclusion of the hearing, the court noted that "[t]here's a way out, you know that way out, and think about it." GA 283.[6]

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[6] As noted above, on remand from this Court, the district court imposed a non-Guidelines sentence of 324 months in (continued...)

The 2005 Sentencing Hearing for Co-Defendant Quinne Powell. At co-defendant Quinne Powell's sentencing hearing on December 21, 2005, the district court commented that "Aaron Harris is a violent, violent person, responsible for a number of murders, and he was your pal . . . ." GA 377.

On April 18, 2007, the district court held a hearing on the defendant's recusal motion. HA 235-71. On April 26, 2007, the district court denied the motion, finding that "[b]ecause Harris does not contend that the court's alleged bias stems from an extrajudicial source, the court is only obligated to recuse itself if it concludes that its comments indicate 'deep-seated . . . antagonism that would make fair judgment impossible.'" HA 278 (quoting *Liteky v. United States,* 510 U.S. 540, 555 (1994)). "Contrary to Harris's claims, the court finds that none of its statements reveal such antagonism, and thus, none constitute a sufficient basis for recusal under §§ 455(a), 455(b)(1), or 144." HA 278. The district court explained:

> The comments made at Barnes's bond revocation hearing and Powell's sentencing hearing do not warrant recusal because they were based entirely on evidence the court heard while presiding over case-related proceedings. Initially, at Harris's trial under the second superseding indictment, the court learned through cooperating witness testimony that Harris was a founding member and leader of a

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[6] (...continued)
prison.

> drug-trafficking organization that employed firearms, bullet-proof vests, and hollow-point bullets to maintain control over its territory through force and intimidation. Then, at Harris's April 2001 sentencing, the government proffered evidence of Harris's involvement in the murders of three rival drug-gang members. Finally, following Harris's original sentencing, the court presided over the trial of Harris's co-defendants, Powell and Damon Walker ("Walker"), on the charges contained in the seventh superseding indictment. At that trial, the court heard the evidence implicating Harris in the murder of Kevin Guiles, the conspiracy to murder Brian Matthews, and the conspiracy to murder members of the "Terrace Crew," a rival gang.

HA 278-80.

Likewise, the court held that its comment at Powell's 2005 sentencing hearing demonstrated no bias because they were based on information learned during judicial proceedings, and were wholly proper when viewed in context:

> [T]he court's comments were made in connection with its required consideration of the factors enumerated in 18 U.S.C. § 3553(a), including "the nature and circumstances of the offense and the history and characteristics of the defendant." In that regard, the court was entitled to rely on the evidence admitted at Powell's trial regarding Harris to the

> extent that it reflected on Powell. Indeed, at this point, the court had heard evidence implicating Harris in murders, attempts to murder, and a conspiracy to murder, and therefore, the court's comments were based on an extensive record, and as such, do not demonstrate bias.

HA 281.

The court also rejected the claim that its comments at Lonnie Jones's sentencing evinced any judicial bias. "Taken in context, the court's comment to Jones was merely an expression of the court's frustration with Jones's life sentence that was required by the then-mandatory U.S. Sentencing Guidelines." HA 282. "While Harris claims that the statement could be seen as an attempt to induce Jones to cooperate against Harris, nothing in the court's statement, which came at the end of the sentencing proceeding after the government's colloquy, indicates that the court wished Jones to specifically cooperate against Harris. Indeed, at the time, Jones could have cooperated against a number of defendants including his own family members." HA 283.

B. Governing law and standard of review

Section 144 of Title 28 provides that "[w]henever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein . . . ."

Section 455(a) provides that a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Under this section, "recusal is not limited to cases of actual bias; rather, the statute requires that a judge recuse himself whenever an objective, informed observer could reasonably question the judge's impartiality, regardless of whether he is actually partial or biased." *United States v. Bayless,* 201 F.3d 116, 126 (2d Cir. 2000). Put another way, "would an objective, disinterested observer fully informed of the underlying facts, entertain significant doubt that justice would be done absent recusal?" *United States v. Lovaglia*, 954 F.2d 811, 815 (2d Cir. 1992). "Litigants are entitled to an unbiased judge; not to a judge of their choosing." *SEC v. Drexel Burnham Lambert, Inc.*, 861 F.2d 1307, 1321 (2d Cir. 1988). Indeed, "[j]udges are not disqualified from trying defendants of whom, through prior judicial proceedings, they have acquired a low view." *In re Cooper*, 821 F.2d 833, 844 (1st Cir. 1987).

The Supreme Court has explained that "judicial rulings alone almost never constitute a valid basis for a bias or partiality motion." *Liteky v. United States*, 510 U.S. 540, 555 (1994). Furthermore, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of *prior proceedings*, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* (emphasis added); *see also United States v. Bernstein*, 533 F.2d 775, 785 (2d Cir. 1976). "[W]hat a judge learns in his judicial capacity – whether by way of guilty pleas of codefendants

or alleged coconspirators, or by way of pretrial proceedings, or both – is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification." *Id.; see also United States v. Colon*, 961 F.2d 41, 44 (2d Cir. 1992) (§ 455 mandates recusal only where judge has personal bias, meaning "prejudice based on 'extrajudicial' matters, and earlier adverse rulings, without more, do not provide a reasonable basis for questioning a judge's impartiality") (citing *Schiff v. United States*, 919 F.2d 830, 834 (2d Cir. 1990)).

The denial of a motion for recusal is reviewed for abuse of discretion. *United States v. Giordano*, 442 F.3d 30, 48 (2d Cir. 2006).

C. Discussion

Judge Nevas did not abuse his discretion when he denied Harris's recusal motion. The court properly found that the comments it had made during case-related proceedings failed to show a bias against Harris. HA 278. Judge Nevas made all of the comments that form the basis of the defendant's claim during proceedings involving co-defendants in the case, and well after the defendant had been tried, convicted and sentenced for his role as the leader of a violent narcotics trafficking organization. Judge Nevas presided over numerous trials and countless other proceedings in connection with this case, including bond review hearings, suppression hearings, and sentencing hearings. Not least of these was the month-long May 2005 trial of Harris' co-defendants, Quinne

Powell and Damon Walker, who were tried on the RICO and VCAR charges contained in the Seventh Superseding Indictment.[7] Central to those proceedings were the nature of the conduct charged, and the particular role of each defendant before the court at each proceeding. Because Harris was a leader of the drug enterprise charged, his conduct and his associations were necessarily the subject of most of the proceedings in this case. As Judge Nevas found during Harris's resentencing, based on the evidence presented at Harris's trial, there was "no doubt in [his] mind" that Harris was "the number one man. He was the boss of the organization." HA 362. The Government will examine each of the challenged statements in turn.

The Barnes hearing. There was nothing improper, much less biased, about Judge Nevas's observation at Barnes's detention hearing that "Aaron Harris is a violent person who doesn't deserve to be a free person. He's violent. He's dangerous, and this man [referring to Barnes] travels to Florida with him?" GA 303. Harris claims that these comments demonstrate the judge's bias against him because the evidence of violence the district court had heard about him was merely "generic violence

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[7] Powell and Walker were found guilty of numerous counts, including RICO, RICO conspiracy, various drug conspiracies, obstruction of justice/witness tampering, and money laundering conspiracy. Powell is serving a life sentence, and Walker is serving a 25-year term. The convictions and sentences were affirmed on appeal. *See United States v. Walker and Powell*, 2008 WL 190451 (2d Cir. Jan. 23, 2008) (summary order).

associated with the drug association . . . ." Harris Br. 18. He further claims that there had been no "concrete showing" that he had been involved in violent activities. *Id.* His claim is entirely without merit.

It was firmly established at Harris's month-long trial and at his sentencing that he was a leader and founding member of one of the most prolific and violent drug trafficking organizations to have operated in Bridgeport, Connecticut. Harris's trial was replete with evidence of the violent nature of the organization. For example, cooperating witnesses testified that Harris and members of his organization wore bullet-proof vests and carried firearms. GA 429, 492-94, 524-26. Cooperating witness Manual Hinojosa (Harris's New York supplier) testified that he found a firearm inside a hidden compartment in one of Harris's vehicles. GA 586-88. A search warrant executed at Harris's home on the day of his arrest resulted in the seizure of a receipt for two bullet-proof vests, a device for detecting electronic transmitting devices (known as a "kel" detector), and a night vision scope. Numerous firearms and bullet-proof vests recovered from members of the organization were introduced as evidence at trial.

Moreover, it was entirely appropriate for the district court to comment on Barnes's decision to associate with violent associates such as Harris at a detention hearing of a co-defendant. The district court, in determining dangerousness and whether to detain or release Barnes, was required to make findings concerning Barnes's character and judgement. *See* 18 U.S.C. §§ 3142(a),

(g)(3). The fact that Barnes and Harris had been close associates, were friendly, and had traveled together prior to their arrest on the federal charges was directly relevant to the court's determination. That the district court expressed its opinion about Harris in weighing that information at Barnes's bond hearing was entirely appropriate, and falls far short of demonstrating bias of such a degree that the district court would be unable to carry out its duty to ensure fair proceedings. *See Liteky*, 510 U.S. at 555 ("judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge").

The Lonnie Jones sentencing. Nor was there anything improper or biased about the district court's comments at Lonnie Jones's sentencing. Frustrated that the Guidelines "constricted" the court and left "no options" but to impose a life sentence, GA 280, the court reminded Lonnie Jones that "[t]here's a way out, you know that way out, and think about it." GA 283. It is clear from context that the district court was simply pointing out that Jones could avoid a Guidelines-mandated life sentence by cooperating with law enforcement authorities.[8]

There was nothing about the district court's statements that were directed specifically at Harris. Since Lonnie Jones was clearly in a position to provide information about many participants in criminal activities at the P.T.

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[8] As noted *supra* the Court later resentenced Lonnie Jones to a non-Guidelines sentence of 324 months.

Barnum housing project, there is no basis for inferring that the court must have been referring to Harris in particular, as opposed to other members of the Jones family who were involved in the drug gang. Nor is the defendant accurate when he claims that the court's comments "followed on the heels of the Government's comments" about Harris, requiring such a speculative inference. Harris Br. 20. To the contrary, there was a recess after government counsel's comments, before the district court imposed sentence. GA 277. After that recess, the district court calculated the applicable Guidelines and stated, "I said to your father earlier this morning that if there were no guidelines and I wasn't constricted by the guidelines, that I would not sentence you to life, and I repeat that, I would not, but that's not the case. I am constricted by the guidelines and I have no options." GA 280. Only after imposing a life sentence that it clearly felt constrained to adopt, did the court remind Lonnie Jones of the one option to mitigate such a sentence.

The Quinne Powell sentencing. The defendant further claims that when the district court commented that "Aaron Harris is a violent, violent person, responsible for a number of murders, and he was your pal," it showed a "predisposition to see him convicted of the violent crimes he stood accused of in the Seventh Superseding Indictment." Harris Br. 14. Although the district court used strong language in expressing its opinion of Harris, it did so in the context of sentencing Quinne Powell, Harris's partner in crime. The district court was obligated to consider numerous factors in arriving at an appropriate sentence for Powell, including "the nature and

circumstances of the offense and the history and characteristics of the defendant." 18 U.S.C. § 3553(a)(1). It was entirely appropriate for the district court to consider, and comment on, evidence that had been introduced at Powell's trial about co-conspirators such as Harris.

Absent from the district court's comments is any suggestion whatsoever about what the outcome of Harris's eventual trial should be, or that a trial jury should some day find Harris guilty. In this regard, Harris's claims mirror those rejected in *United States v. Wilson*, 77 F.3d 105, 110-11 (5th Cir. 1996). In that case, Wilson's drug trafficking case had been severed from that of his co-defendants, whose trial proceeded first. At the sentencing of the co-defendants, the district court commented that "Mike Wilson's primary responsibility was in the cocaine and cocaine base end." *Id.* at 110. The district court denied Wilson's recusal motion, which claimed that these comments – based on evidence heard at the first trial – showed that the district court had "predetermined" his guilt. *Wilson*, 77 F.3d at 110. The Fifth Circuit affirmed, noting that "[o]pinions formed during the prior proceedings do not constitute a basis for statutory recusal unless the opinion displays a deep-seated favoritism or antagonism that would make fair judgment impossible." *Id.* at 111 (citing *Liteky*, 510 U.S. 540). As in *Wilson*, the district court's comments here that Harris was a "violent person," who was "responsible for a number of murders," were based entirely on evidence presented at trial proceedings involving his co-defendants. They manifest no "deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky*, 510 U.S. at 555; *see*

also United States v. Bernstein, 533 F.2d 775, 785 (2d Cir. 1976) ("The rule of law, without belaboring the point, is that what a judge learns in his judicial capacity whether by way of guilty pleas of codefendants or alleged coconspirators, or by way of pretrial proceedings, or both is a proper basis for judicial observations, and the use of such information is not the kind of matter that results in disqualification.").[9]

II. The district court's decision to resentence Aaron Harris to life in prison was reasonable

A. Relevant facts

On April 5, 2001, the district court sentenced Harris to a term of life imprisonment. On October 5, 2004, this Court affirmed Harris's sentence, but withheld the mandate pending the Supreme Court's decision in *Booker*. *See United States v. Lewis,* 386 F.3d 475 (2d Cir. 2004), *opinion supplemented by United States v. Lewis,* 111 Fed. Appx. 52 (2d Cir. 2004), *cert. denied,* 125 S. Ct. 1355

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[9] By contrast, in *United States v. Antar,* 53 F.3d 568, 573 (3d Cir. 1995), the Third Circuit found the district court's statement at sentencing that "[m]y object in this case from day one has always been to get back to the public that which was taken from it as a result of the fraudulent activities of this defendant and others" was improper, reversed the convictions and remanded the case for a new trial before a different district court judge. Unlike the comments made by Judge Nevas in the instant case, the district court in *Antar* literally referred to its desire, from the beginning of the case, for a conviction so that it could order restitution and make the victims whole again.

(2005). Shortly after *Booker* was decided and this Court issued its opinion in *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), the Government moved for a limited remand. HA 58. At first, it appeared that Harris would be eligible only for a *Crosby* remand, whereby the district court would be obliged to first consider whether, based only on the circumstances that existed at the time of the original sentencing, it would have imposed a nontrivially different sentence. While the case was pending on remand, however, this Court decided *United States v. Fagans*, 406 F.3d 138 (2d Cir. 2005), which held that a defendant who had preserved a Sixth Amendment claim was essentially entitled to skip the first stage of the *Crosby* analysis, and to move directly to a resentencing. At his original sentencing, Harris had raised an *Apprendi* claim. Accordingly, the district court agreed with the parties that Harris was entitled to a resentencing in light of *Fagans*. HA 137-38, 176, 273 n.1.

From the outset of the proceedings on remand, Harris was on notice of the Government's position that the district court should consider all of the information that had been presented over the course of six trials to date. HA 60. At an initial hearing on remand on June 30, 2005, the court had alerted the defense to the potential applicability of *United States v. Bryce*, 287 F.3d 249 (2d Cir. 2002), under which a court may consider newly available evidence at resentencing. HA 110, 117-19.

On June 11, 2007, the district court, relying on *Bryce,* considered additional evidence of Harris's participation in the murder of a rival drug dealer named Kevin Guiles.

The court found by a preponderance of the evidence that Harris was responsible for the murder. Accordingly, the court adopted the revised Guidelines calculation set forth in the Second Addendum to the PSR. HA 405-06; PSR ¶¶ 68-76. Pursuant to U.S.S.G. § 2D1.1(d)(1), the district court cross-referenced § 2A1.1, which applies to murder, and assigned Harris a base offense level of 43. PSR ¶ 69, HA 405. Four levels were added pursuant to U.S.S.G. § 3B1.1(a) because of the defendant's leadership role. Pursuant to U.S.S.G. § 3C1.1, two levels were added for obstruction of justice based upon Harris's perjurious trial testimony. PSR ¶ 71, 73, HA 405-06.[10] The total adjusted offense level was 49, which was capped at level 43, yielding an advisory Guidelines range of life in prison. HA 406. Consistent with this range, the court chose to re-impose a term of life imprisonment. HA 54-55, 409.

The district court also determined, in the alternative, that it would have re-imposed a life sentence based upon the drug Guidelines calculated at Harris's initial sentencing hearing. HA 55-56, 406, 408; PSR ¶ 50-58.

Finally, the district court determined that even if it were "incorrect in the guideline sentence which it is about to impose, the Court would have imposed a non-guideline sentence, considering all the factors in 3553(a)." HA 55, 408. The court emphasized that it "places great emphasis and weight on the seriousness of the offense, the just

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[10] In the prior appeal, this Court affirmed the enhancement of Harris's sentence based on his leadership role. *Lewis,* 111 Fed. Appx. at 55-56.

punishment, lack of respect for the law, as well as all the other factors in 3553(a)." HA 55, 408.

B. Governing law and standard of review

1. Appellate review of sentences

The federal Sentencing Guidelines embrace "truth in sentencing" principles of punishment, such that a defendant is liable not just for conduct that forms the basis for his offense of conviction but for all other "relevant conduct." *See* U.S.S.G. § 1B1.3. It is well established that "relevant conduct" need not have been charged or proven to a jury. Indeed, because of the distinction between the beyond-a-reasonable-doubt standard used by a trial jury and the preponderance-of-evidence standard used by a sentencing judge, acquitted conduct may constitute "relevant conduct" for which a defendant may be held liable at sentencing. *See United States v. Watts*, 519 U.S. 148, 154-57 (1997) (per curiam); *United States v. Vaughn*, 430 F.3d 518, 525-27 (2d Cir. 2005) (confirming vitality of *Watts* in the wake of *Booker*), *cert. denied*, 126 S. Ct. 1665 (2006); *see also United States v. Cordoba-Murgas*, 233 F.3d 704, 708-10 (2d Cir. 2000) (defendant's drug sentence enhanced by relevant conduct involving drug-related murder prior to murder conviction).

After the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which rendered the Sentencing Guidelines advisory rather than mandatory, a sentence satisfies the Sixth Amendment if the sentencing judge "(1) calculates the relevant Guidelines range,

including any applicable departure under the Guidelines system; (2) considers the calculated Guidelines range, along with other § 3553 factors; and (3) imposes a reasonable sentence." *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir.), *cert. denied*, 127 S. Ct. (2006); *Crosby*, 397 F.3d at 113. Even on a *Fagans* remand, judicial fact-finding is required to calculate a defendant's Guidelines range. *United States v. Singletary*, 458 F.3d 72, 79-80 (2d Cir.), *cert. denied*, 127 S.Ct. 616 (2006). "The Guidelines remain a robust component of federal sentencing law, and judicial fact-finding in the calculation of the appropriate advisory Guidelines range is a necessary part of the sentencing process, even when, as in this case, the sentencing judge concludes that a non-Guidelines sentence is appropriate." *Id.* at 80.

When a criminal defendant is resentenced after remand, "[t]his Court has consistently held that a court's duty is always to sentence the defendant as he stands before the court on the day of sentencing." *United States v. Bryson*, 229 F.3d 425, 426 (2d Cir. 2000) (despite remand order instructing district court to sentence defendant at Offense Level of 31, district court retained authority to downwardly depart at resentencing on basis of "a rehabilitation that might occur between our decision and the resentencing"). Indeed, after a sentence is vacated, the district court is "*required* to resentence [the defendant] in light of the circumstances as they [stand] at the time of his resentencing." *Werber v. United States*, 149 F.3d 172, 178 (2d Cir. 1998) (emphasis added). Even where the appellate court remands a case with specific resentencing instructions, such a mandate does "not preclude a

departure based on intervening circumstances." *Bryson*, 229 F.3d at 426.

This Court reviews a sentence for reasonableness. *See Rita v. United States*, 127 S. Ct. 2456, 2459 (2007); *Fernandez*, 443 F.3d at 26-27. Similarly, this Court reviews a sentence for reasonableness "even after a District Court declines to resentence pursuant to *Crosby*." *United States v. Williams*, 475 F.3d 468, 474 (2d Cir. 2007). Reasonableness review has both a procedural and a substantive component. The Supreme Court has explained that in both respects, reasonableness review is the familiar abuse-of-discretion standard. *Gall v. United States,* 128 S.Ct. 586, 597 (2007). 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." *Fernandez*, 443 F.3d at 27. That is because, when a district court agrees with the Sentencing Commission that a sentence within the advisory Guidelines range is appropriate for a particular defendant, "[t]hat double determination significantly increases the likelihood that the sentence is a reasonable one." *Rita*, 127 S. Ct. at 2463.

2. Review of sentences involving crack cocaine offenders in light of amendments to U.S.S.G. § 2D1.1, *United States v. Kimbrough*, and *United States v. Regalado*

On November 1, 2007, the Sentencing Commission amended the cocaine base Guidelines set forth in U.S.S.G. § 2D1.1(c). The amendment in question is Amendment 706, effective November 1, 2007, which reduced the base offense level for most crack cocaine offenses.[11] In Amendment 706, the Commission generally reduced by two levels the offense levels applicable to crack cocaine offenses. The Commission reasoned that, putting aside its stated criticism of the 100:1 ratio applied by Congress to powder cocaine and crack cocaine offenses in setting statutory minimum penalties, the Commission could respect those mandatory penalties while still reducing the offense levels for crack offenses. *See* U.S.S.G., Supplement to App. C, Amend. 706. Previously, the Commission had set the crack offense levels in § 2D1.1 above the range which included the mandatory minimum sentence. Under the amendment, the Commission has set the offense levels so that the resulting Guidelines range includes the mandatory minimum penalty triggered by that amount, and then set corresponding offense levels for quantities that fall below, between, or above quantities that trigger statutory mandatory minimum penalties.

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[11] Amendment 706 was further amended in the technical and conforming amendments set forth in Amendment 711, also effective November 1, 2007.

The final result of the amendment is a reduction of two levels for each of the ranges set in the Guidelines for crack offenses. At the high end, § 2D1.1(c)(1) previously applied offense level 38 to any quantity of crack of 1.5 kilograms or more. That offense level now applies to a quantity of 4.5 kilograms or more, *see* § 2D1.1(c)(1) (2007); a quantity of at least 1.5 kilograms but less than 4.5 kilograms falls in offense level 36, *see* § 2D1.1(c)(2) (2007). A defendant whose Guidelines range would have been lower under the revised version of § 2D1.1 may seek a sentence reduction by motion to the district court under 18 U.S.C. § 3582(c).

Separately, in *Kimbrough v. United States,* 128 S. Ct. 558 (2007) the Supreme Court held that "the cocaine Guidelines, like all other Guidelines, are advisory only," *id.* at 564, and that the sentencing court "may consider the disparity between the Guidelines' treatment of crack and powder cocaine offenses" in sentencing a crack offender. *Id.* Pursuant to *Kimbrough*, and in light of this Circuit's earlier tendency to discourage deviation from the crack Guidelines, this Court has recently held that in cases where a defendant was sentenced based on the crack Guidelines, a remand may be appropriate to determine whether the district court would have imposed a lower sentence "had it been aware (or fully aware) of its discretion to deviate from the crack cocaine [Guidelines] ranges." *United States v. Regalado*, ___ F.3d ___, 2008 WL 577158, *4 (2d Cir. Mar. 4, 2008) (per curiam).

C. Discussion

The district court's sentence was reasonable for at least three independent reasons. First, it fell within the Guidelines range that would have been dictated by the vast quantities of drugs for which Harris was responsible. Second, the district court properly found that it would have been appropriate even as a non-Guidelines matter. Third, the district court properly calculated Harris's Guidelines range by reference to a finding that Harris had participated in the murder of rival drug dealer Kevin Guiles, based on evidence the court had received in a trial involving Harris's co-defendants.

1. Harris faced a Guidelines range of life in prison even if his base offense level had been driven by drug quantity

The district court reasonably found that a life sentence was appropriate even if Harris's Guidelines range had been calculated by reference to the quantity of drugs for which he was responsible under U.S.S.G. § 2D1.1. As the probation officer pointed out during one of the resentencing hearings, the district court had adopted the factual findings of the original PSR, which included a finding that the supplier had sold "over five kilograms of heroin and approximately 20 kilograms of cocaine to Harris and his associates." HA 129, PSR ¶ 21. The district court specifically adopted paragraphs 4 through 21 of the PSR, finding that the facts set forth in those paragraphs had been proven at trial. GA 203.

Significantly, the district court found that Harris and members of his organization were responsible for the distribution of over 40 kilograms of crack cocaine and over 140 kilograms of heroin during the three-year period charged in the indictment. GA 203-04. Based upon a seizure of 540 plastic bags of "Batman" crack cocaine and 300 plastic bags of red "Bulldog" heroin, the district court found it was

> reasonable that a single shift was responsible for the annual distribution of not less than four and half kilograms of crack cocaine, and this estimate is based upon the following calculation: Rounding down to 15 grams and multiplying by 300 days, which is conservative because it allows for two months of nonoperation, yields 4.5 kilograms of crack cocaine. Assuming that the same amount was distributed by the other two shifts yields an estimate of not less than 13.5 kilograms of crack cocaine per year, or a total of 40.5 kilograms of crack cocaine within the three year period charged in the indictment.
>
> Rounding down to 52 grams of heroin and multiplying by 300 days yields a conservative estimate of 15.6 kilograms of heroin distributed by one shift per year, or 46.8 kilograms of heroin distributed by the organization per year.

> Accordingly, approximately 140.4 kilograms of heroin were distributed by the organization within the three-year period charged in the indictment.

GA 205-06.

Even under the newly amended version of § 2D1.1(c), adopted in 2007, such enormous quantities of narcotics still put Harris's offense level literally off the charts – at level 48, well above the maximum offense level of 43 contained in the sentencing table.[12] Because Judge Nevas expressly stated that he would have imposed a life sentence if Harris's Guidelines were driven by drug quantity, HA 55-56, 408, his sentence is substantively reasonable on that ground alone. *See Rita*, 127 S. Ct. at 2463 (holding that sentences within Guidelines ranges are more likely reasonable); *Fernandez*, 443 F.3d at 27

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[12] The amendments require a quantity of 4.5 kilograms or more of crack cocaine for a level 38. *Compare* U.S.S.G. § 2D1.1(c)(1) (2007) (yielding base offense level 38 for more than 4.5 kg of crack cocaine) *with* U.S.S.G. § 2D1.1(c)(1) (2000) (yielding base offense level 38 for more than 1.5 kg of crack cocaine). Where, as here, the relevant quantities are nearly ten times the amount needed to qualify for the maximum base offense level, the amendments do not reduce the applicable base offense level. Accordingly, Harris is ineligible for a sentence reduction under 18 U.S.C. § 3582(c).

Harris's offense level was increased by 10 additional points for various enhancements, none of which have been challenged on appeal, yielding a total offense level of 48.

(holding that "in the overwhelming majority of cases," a Guidelines sentence will be reasonable).

Although this Court has recently held in *United States v. Regalado*, ___ F.3d ___, 2008 WL 577158, *4 (2d Cir. Mar. 4, 2008) (per curiam), that a remand may be necessary in cases where a defendant was sentenced based on the crack cocaine guidelines, such a remand is unwarranted here. *Regalado* was premised on the notion that district courts might have been discouraged by pre-*Kimbrough* precedents not to depart or vary based on a disagreement about the ratio between crack and powder cocaine quantities embodied in the Guidelines. In the present case, however, Harris would have faced the same advisory Guidelines range for crack cocaine *or heroin*. Accordingly, Harris is not in the same situation as the defendant in *Regalado*, as to whom the district judge might have (erroneously) felt precluded from imposing a lower sentence based on a policy disagreement with the crack:powder ratios embodied in U.S.S.G. § 2D1.1. Harris has not challenged Judge Nevas's findings about heroin quantity, and so he is not entitled to a *Regalado* remand.

In short, because Harris's advisory Guidelines range would have remained life in prison based on massive quantities of both crack cocaine and heroin, affirmance would be warranted on Judge Nevas's decision that the drug Guidelines were appropriate in this case.

2. The district court did not abuse its discretion in concluding, in the alternative, that a life sentence would be appropriate as a non-Guidelines matter

In the alternative, the district court also held that it would have imposed a life sentence even if its Guidelines calculations were incorrect. HA 56, 408. In this regard, the court explained that it was placing "great emphasis and weight on the seriousness of the offense, the just punishment, lack of respect for the law, as well as all the other factors in 3553(a)." HA 408. In conformity with its obligations under 18 U.S.C. § 3553(c), the court offered extensive reasons for its sentence.

The court spoke at length about how Harris's lack of a criminal record was indicative not of a law-abiding past, but rather of his success in shunting criminal liability to his underlings in the drug organization. HA 406-08.

> During the period from 1992, when he graduated from high school, to the date of his arrest, he basically never worked, but had a very, very excessive lifestyle in which he traveled extensively, drove luxury cars, owned guns, body armor, and had virtually no verifiable income during this period, which would suggest to the Court that because of his involvement in this extensive drug-dealing operation, he delegated to subordinates, all of the heavy lifting, as it were. . . . He had a network of street sellers, block lieutenants and

> others, who essentially did his dirty work, but he never got his hands dirty.

HA 407. As the court observed, Harris "essentially insulated himself from the people who were in the street selling the drugs." HA 408.

In a written addendum to the judgment, the court reiterated the reasons it had listed in open court. Again, it explained that it had settled on the necessity of a life sentence "after considering all of the factors in 18 U.S.C. § 3553(a), with a strong emphasis on the need for the sentence to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment as required under 18 U.S.C. § 3553(a)(2)(A)." The court further explained that "[i]n light of this defendant's history of using violence in furtherance of his drug trafficking activities this factor is keenly important as is the need to protect the public from further crimes of the defendant, as required under 18 U.S.C. § 3553(a)(2)(C)." GA 55-56.

The district court's explicit invocation of several § 3553(a) factors, and its linking them to particular factors present in this case, was more than sufficient to demonstrate the reasonableness of this sentence, even if it had been outside some hypothetically lower Guidelines range. In that respect, the court's explanations were just as sufficient as those upheld by this Court in *United States v. Fairclough*, 439 F.3d 76 (2d Cir. 2006), where the district court imposed a 48-month non-Guidelines sentence, which was 21 months above the high end of the advisory

Guidelines range. In that case, the sentencing court commented on the defendant's "relatively uninterrupted string of criminal activity and arrests," his lack of "respect for the law," and the fact that he had sold a gun to "somebody that he suspected was about to do bad with it." *Id.* at 80; *see also United States v. Eric Jones*, 460 F.3d 191, 195-96 (2d Cir. 2006) (affirming non-Guidelines sentence below the advisory range, where judge had "the sense" that the defendant could do better and had a "gut feeling" about the defendant).

3. In the alternative, the district court properly considered evidence that had been presented over the course of a related trial that Harris was responsible for the murder of Kevin Guiles

Because Judge Nevas properly held that Harris's life sentence was independently justified by the drug guidelines or as a non-Guidelines sentence, this Court need not decide the question of whether the district court properly considered evidence of the Guiles murder. If the Court were to reach that question, however, it should affirm because Judge Nevas acted well within his discretion in considering evidence he learned while presiding over the related trials of Harris's co-defendants.

First, it was procedurally reasonable for the district court to consider evidence of crimes for which Harris had been charged but not yet tried. As Harris correctly points out, he still faces pending charges in the Seventh Superseding Indictment stemming from the murder of

Kevin Guiles. Harris Br. 30. Harris acknowledges now, as he did below, that it is appropriate for a sentencing judge to consider any relevant conduct, including acquitted conduct. But, he claims that unlike in *Bryce* and *Watts*, where the district court properly considered acquitted conduct, the district court improperly considered the evidence of his involvement in a charged murder for which he has not stood trial at all.

Harris's efforts to distinguish *Watts* are unavailing. This Court has held "that, after *Booker*, district courts' authority to determine sentencing factors by a preponderance of the evidence endures and does not violate the Due Process Clause of the Fifth Amendment." *United States v. Vaughn*, 430 F.3d 518, 525 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 1665 (2006). Such findings occur, most typically, with respect to "relevant conduct" within the scope of U.S.S.G. § 1B1.3 of which the defendant has never been charged, much less convicted. In *Watts*, the Supreme Court simply held that this baseline proposition – that sentencing courts may make sentencing decisions by a preponderance of the evidence – applies even if the defendant has been tried and acquitted.

There are a few reasons that underlie that rule. First, Congress has provided that there shall be no limitations on the information that a sentencing court may consider. *See* 18 U.S.C. § 3661; *Watts*, 519 U.S. at 154-57. Second, there is no logical inconsistency between a judge finding that a fact has been proven by a preponderance of the evidence (for sentencing purposes), and a jury finding that a fact has not been so proven beyond a reasonable doubt

(for guilt purposes). *See Watts*, 519 U.S. at 155-56; *Vaughan*, 430 F.3d at 527. Third, there is no double jeopardy issue when a defendant's sentence on a count of conviction is influenced by evidence underlying an acquitted count. Contrary to the defendant's argument, Harris Br. at 34 (complaining that he was never "given notice that the crime for which he was to be punished was murder rather than a narcotics conspiracy"), he is not being punished for the crime of murder when the district court considers a murder as relevant conduct. Instead, the defendant is being punished for the count of conviction (here, drug conspiracy), in a way that accounts for the defendant's criminal history. *See Watts*, 519 U.S. at 154-55; *Vaughn*, 430 F.3d at 526 (confirming ongoing vitality of *Watts*). The upshot of *Watts* is that a district court has authority to make factual findings at sentencing independently of a jury. *See also, e.g., United States v. Gonzalez*, 407 F.3d 118, 125 (2d Cir. 2005) (stating that sentencing courts retain authority "to resolve disputed facts by a preponderance of the evidence when arriving at a Guidelines sentence").

Second, to the extent that Harris is complaining that he has not yet had a chance to test the Government's evidence on the Guiles murder at trial on the Seventh Superseding Indictment, his argument is misplaced. Regardless of whether there is a trial lurking in the future on the Guiles matter, Judge Nevas was obliged to sentence him after his drug trafficking trial. As part of that analysis, the sentencing court was required to consider, *inter alia*, the "history and characteristics of the defendant" pursuant to 18 U.S.C. § 3553(a)(1). Harris's "history" undoubtedly

includes any murders he may have committed. To the extent that Harris wished to challenge the Government's evidence on the Guiles murder, he had an opportunity to do so during his sentencing hearing – whether by pointing to perceived shortcomings in the Government's evidence, submitting contrary evidence, or requesting an evidentiary hearing pursuant to *United States v. Fatico*, 579 F.2d 707, 711 (2d Cir. 1978). He took none of those steps, and instead stood on the inflexible position that the pendency of the Seventh Superseding Indictment put the Guiles murder out of bounds, and that adversarial testing of that evidence could come only during that future trial.

There is no support for such a position. Due process requires that a defendant have an opportunity to challenge the accuracy of information relied on by a district court when imposing sentence. *See United States v. Berndt*, 127 F.3d 251, 257 (2d Cir. 1997) (collecting cases). Likewise, the sentencing guidelines provide that the parties must be given an "adequate opportunity to present information to the court." Section 6A1.3(a). The Court, however, has broad discretion to determine how to resolve sentencing disputes. *Berndt*, 127 F.3d at 257-58. This discretion "is 'largely unlimited either as to the kind of information [the court] may consider, or the source from which it may come.'" *United States v. Carmona*, 873 F.2d 569, 574 (2d Cir. 1989) (quoting *United States v. Tucker*, 404 U.S. 443, 446 (1972)); *see* 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate

sentence."). Due process requires only that the Court "assure itself that the information upon which it relies when fixing sentence is reliable and accurate." *United States v. Prescott*, 920 F.2d 139, 143 (2d Cir. 1990) (citing *United States v. Pugliese*, 805 F.2d 1117, 1122 (2d Cir. 1986)).

Thus, at sentencing, a defendant has no absolute right to present witnesses, to receive a full-blown hearing, or to any other specific sentencing process – even if hearsay evidence is the primary basis for determining the sentence. *See Prescott*, 920 F.2d at 143-44. The Confrontation Clause does not apply at sentencing, and cross-examination is not required at such proceedings. *See United States v. Martinez*, 413 F.3d 239, 242-44 (2d Cir. 2005). That is why hearsay information may be used at sentencing. *See, e.g., Fatico*, 579 F.2d at 711; *United States v. Carmona*, 873 F.2d 569, 574 (2d Cir. 1989). When such evidence is used, of course, due process requires the evidence to be "sufficiently corroborated by other evidence." *Fatico*, 579 F.2d at 713; *see Prescott*, 920 F.2d at 145. In essence, due process requires the Court to determine that the procedure used at sentencing is "sufficient to guard against an erroneous deprivation of [the defendant's] liberty interest or whether more stringent procedures [are] feasible and necessary." *Id.* at 144.

This Court has long held that "[a] district court has broad discretion to consider any information relevant to sentencing, *including information adduced at a trial at which the defendant was not present*." *United States v. Rios*, 893 F.2d 479, 481 (2d Cir. 1990) (per curiam)

(emphasis added) (upholding sentencing determination that defendant held leadership role within drug organization, based on testimony of co-defendants at separate trial). This Court has explained that

> [t]he question of what process is due in sentencing is separate and distinct from the question of whether due process is required. . . . A district judge, in his discretion, may direct that a trial-type evidentiary hearing take place. Short of this, however, a defendant may challenge pre-sentence information by offering written submissions, directing argument to the court or cross-examining witnesses. . . . Which of these procedures is the most appropriate in a particular case can be determined by applying the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). Four factors should be considered: (1) the nature of the individual interest, (2) the risk of error associated with the present procedures, (3) the value of additional procedural safeguards, and (4) the government's interest in avoiding undue fiscal or administrative burdens. *Id.* at 335.

United States v. Romano, 825 F.2d 725, 728-29 (2d Cir. 1987) (citations omitted); *see also Pugliese*, 805 F.2d at 1122-23 (holding that sentencing judge was entitled to consider information contained in transcripts of *Fatico* hearing before different judge).

In *Romano*, the Court held that a sentencing judge had properly considered evidence presented at a trial involving

co-defendants. The Court explained that although the defendant had a strong interest in his sentence, the government's "competing interest in avoiding undue fiscal burdens, the risk of error inherent in present procedures and the incremental value of additional safeguards. . . . cut heavily against [his] claimed right to a hearing." 825 F.2d at 729. The "risk of error" in relying on trial evidence was "minimal," the Court held, because it had been "developed in the context of an adversarial proceeding subject to the rules of evidence." *Id.* The incremental value of additional procedural safeguards would have been low, partly because cross-examination of the government's witnesses would have been "repetitive" of what was done at the trial. *Id.* (also noting that a portion of the government's evidence consisted of audiotapes that would not have been subject to cross-examination). Finally, the Court held that the "administrative and fiscal burdens" of "multiple and duplicative 'trials'" were "obvious," and that public resources "should not be more heavily taxed" when so little is to be gained. *Id.* at 730. Moreover, the Court pointed out that the defendant had an opportunity to direct argument to the sentencing court regarding perceived inaccuracies in the presentence report, and that the defendant had been placed on notice of all relevant information that could be used against him at sentencing. *Id.; see also United States v. Guang*, 511 F.3d 110, 122 (2d Cir. 2007) (upholding sentencing judge's findings that certain sentencing enhancements were appropriate without holding a *Fatico* hearing, where district court "had heard extensive trial testimony, had observed the demeanor of the witnesses and assessed their credibility over a two-week trial," and had reviewed parties' submissions;

and where defendants had notice of proposed enhancements and supporting evidence, and had opportunity to dispute that evidence).

As in *Romano,* the district court did not abuse its discretion by relying on information that had been presented in a related trial, where there is no dispute that Harris was on clear notice that the court was considering such information during the *Fagans* remand. The risk of error was low, because the evidence had already been tested in an adversarial proceeding where the rules of evidence had been applied. *See Romano*, 825 F.2d at 729. Likewise, cross-examination of the government's witnesses would have been largely repetitive; because the co-defendants were charged with RICO conspiracy – for which they could be held liable based on the reasonably foreseeable racketeering acts of their fellow enterprise members[13] – they had every incentive at that trial to attack Harris's involvement in the Guiles murder. Finally, there would be unwarranted administrative costs if the district court had been required to conduct a "duplicative 'trial'" on the Guiles murder, after having already had an opportunity to assess the demeanor and credibility of the witnesses involved. *Id.* at 730. Had the defendant wished to proffer any perceived shortcomings in that evidence, he was free to do so. Having failed to make such an effort in

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[13] *See, e.g., United States v. Zicchettello*, 208 F.3d 72, 99 (2d Cir. 2000) (citing *Salinas v. United States*, 522 U.S. 52, 63-64 (1997)); *United States v. Shyrock*, 342 F.3d 948, 987 (9th Cir. 2003) (citing *Pinkerton v. United States*, 328 U.S. 640 (1946)).

the district court, he cannot now be heard to complain.

Third, Judge Nevas properly treated the murder as relevant conduct. When considering whether offenses form a "common scheme or plan" for purposes of U.S.S.G. § 1B1.3(a)(2), it may be sufficient for the offenses to be linked by "at least one common factor" such as common accomplices, purposes, or similar *modus operandi*. *See* § 1B1.3, app. note 9(A). Judge Nevas heard extensive evidence at the Powell/Walker trial showing that Harris was part of a large racketeering enterprise with them as well as the Jones family, operating in various areas of Bridgeport including P.T. Barnum. It was no stretch to conclude that the series of running gun battles in a turf war between the Terrace drug crew and Harris's drug crew, culminating in the murder of Guiles, was relevant to the overarching racketeering conspiracy.

Claims of Luke Jones

III. Luke Jones' sentence was substantively and procedurally reasonable

A. Relevant facts

On January 7, 2004, the district court sentenced Luke Jones to four concurrent life sentences and two concurrent ten-year sentences. GA 914. The defendant appealed his conviction and sentences. By published opinion, this Court affirmed the convictions and, on consent of the Government, remanded the case pursuant to *Crosby* "to consider whether the sentence imposed on Jones would have been nontrivially different if, at the time of

sentencing, the Guidelines had been advisory." *United States v. Jones*, 482 F.3d 60 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1306 (2007). On June 5, 2007, on remand from this Court, the district court entered an order denying Jones's motion for resentencing, confirming that it would have imposed a life sentence under an advisory Guidelines regime. *United States v. Jones*, 2007 WL 1670141; Luke Jones Appendix ("LKA") 2-5. Luke Jones filed a timely notice of appeal on June 14, 2007. LKA 1.

Specifically, the district court determined after "considering the advisory nature of the Sentencing Guidelines and the factors listed in 18 U.S.C. § 3553(a), it would have imposed the same sentence as the sentence it originally imposed, that is, life imprisonment on counts 1, 2, 5 and 6 and ten years on counts 18 and 21." LKA 3. The district court went on to find that "even if the court imposed a nonguidelines sentence, such a sentence would not have been materially different from the sentence the court already imposed because of the extensive evidence of Jones's leadership role in a violent drug-trafficking organization and his involvement in two murders." LKA 3-4.

B. Governing law and standard of review

The law governing sentencing can be found *supra* at 59-61.

C. Discussion

Jones claims that his sentence was both substantively

and procedurally unreasonable. Jones' claims fail because the district court complied with the procedural requirements of *Crosby* and *Fernandez,* and the sentence it ultimately imposed – driven by the murder Guidelines – was substantively reasonable.

1. Luke Jones is precluded from challenging, for the first time on his second appeal, the district court's factual findings and Guidelines calculations

Jones claims that his sentence was unreasonable because the district court "relied on multiple erroneous findings of fact and incorrect calculations of the sentencing guidelines." Luke Jones Br. at 10. This argument – raised for the first time on this appeal – comes years too late. If the defendant had any objections to the district court's findings, they should have been raised before Judge Nevas at the original sentencing. He failed to so. If the defendant wanted this Court to review those findings – and even then, they would have been reviewable only for plain error – he should have asked for such relief in his original appeal. Instead, he raised only a single challenge to his sentence: a *Booker* claim that the district court erred by mandatorily applying the Guidelines. When Judge Nevas considered his request for resentencing on remand, Luke Jones received all the relief he asked for in his initial appeal. He should not now be permitted to start the appellate process from scratch.

a. The district court complied with the instructions in the mandate to perform a *Crosby* analysis

This Court's opinion of June 30 2006, remanded the case "in order to allow the district court to consider whether the sentence imposed on Jones would have been nontrivially different if, at the time of sentencing, the Guidelines had been advisory." GA 900. The district court complied with the mandate.

In its written ruling, the district court demonstrated a proper understanding of the mandate: "to determine whether it would have 'imposed a materially different sentence, under the circumstances existing at the time of the original sentence, if the judge had discharged his or her obligations under the post-Booker/Fanfan regime and counsel had availed themselves of their new opportunities to present relevant considerations . . . .'" LKA 2 (quoting *Crosby*, 397 F.3d at 117). This approach is completely consistent with this Court's holding in *Crosby*. Nothing in that decision requires – or indeed, permits – a district court to revisit contested factual issues as to which the district court had already made findings of fact and as to which the appellate court remained silent. *See United States v. Pineiro*, 470 F.3d 200, 206 (5th Cir. 2006) ("By recalculating Pineiro's guideline range, the district court exceeded the scope of our mandate. Under the limits of our mandate in *Pineiro II*, the district court was only to resentence Pineiro under an advisory guideline regime, not recalculate his total offense level; that had never been addressed or vacated on appeal. "); *see also United States*

v. James, 2008 WL 681331, at *1 (2d Cir. Mar. 11, 2008) (summary order) ("Having only sought (and received) a remand based on *Booker* in his first appeal, [defendant] has not preserved any claim of error relating to the district court's calculation of the Guidelines themselves.").

Indeed, even if the district court had granted a resentencing, it would have been inappropriate to re-open any previously litigated Guidelines issues. Instructive in this regard is this Court's decision in *Fagans*, which outlines the type of resentencing to which a defendant would be entitled if he can get past the threshold inquiry of *Crosby* – namely, if the district court finds that it would have imposed a nontrivially different sentence in light of the advisory nature of the Guidelines. *Fagans* was concerned largely with preserved claims of error relating to the calculation of the Guidelines in a firearms prosecution. After affirming the district court's Guidelines determinations, the *Fagans* court remanded the case for resentencing on the defendant's principal claim of error – the compulsory application of the Guidelines. *Fagans*, 406 F.3d at 142. The *Fagans* court did *not* remand for reconsideration of any findings of fact, and there is no suggestion in the opinion that the remand in any way invited the parties or the district court to engage in an open-ended review of the district court's previous Guidelines determinations which, in any event, had been affirmed by the Court.

b. The law-of-the-case doctrine precludes Luke Jones from re-litigating Guidelines claims that he failed to raise in his first appeal

As relevant here, the law-of-the-case doctrine "requires a trial court to follow an appellate court's previous ruling on an issue in the same case. This is the so-called 'mandate rule.'" *United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002) (citation omitted). "The mandate rule 'compels compliance on remand with the dictates of the superior court and foreclose relitigation of issues expressly or impliedly decided by the appellate court.'" *United States v. Bryce*, 287 F.3d 249, 253 (2d Cir. 2002) (quoting *United States v. Zvi*, 242 F.3d 89, 95 (2d Cir. 2001) (quoting, in turn, *United States v. Bell*, 5 F.3d 64, 66 (4th Cir. 1993))) (emphasis deleted).[14]

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[14] Not at issue here is a related branch of the law-of-the-case doctrine. "The second and more flexible branch is implicated when a court reconsiders its own ruling on an issue in the absence of an intervening ruling on the issue by a higher court. It holds 'that when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case,' unless 'cogent' and 'compelling' reasons militate otherwise.'" *Quintieri*, 306 F.3d at 1225 (quoting *United States v. Uccio*, 940 F.2d 753, 757 (2d Cir. 1991), and *United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000)) (citations omitted) (emphasis added). "The major grounds justifying reconsideration are an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *Tenzer*, 213

(continued...)

In the context of *Crosby* remands, this Court has held that "the law of the case doctrine ordinarily will bar a defendant from renewing challenges to rulings made by the sentencing court that were adjudicated by this Court – or that could have been adjudicated by us had the defendant made them – during the initial appeal that led to the *Crosby* remand." *United States v. Williams*, 475 F.3d 468, 475 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 881 (2008). The reason why further reconsideration of the district court's factual findings and Guidelines calculations would be inappropriate, the Government submits, lies with the concept of finality, which is the core concept animating the law-of-the-case doctrine. As this Court has explained:

> Very high among the interests in our jurisprudential system is that of finality of judgments. It has become almost a commonplace to say that litigation must end somewhere, and we reiterate our firm belief that courts should not encourage the reopening of final judgments or

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[14] (...continued)
F.3d at 39 (citations and internal quotation marks omitted). "[T]his branch of the doctrine, while it informs the court's discretion, 'does not limit the tribunal's power.'" *United States v. Uccio*, 940 F.2d 753, 758 (2d Cir. 1991) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)). A court may therefore revisit an earlier, unreviewed, decision of its own so long as it has a valid reason for doing so, and provides the opposing party "sufficient notice and an opportunity to be heard." *Uccio*, 940 F.2d at 759 (finding that district court's realization that it had relied on faulty legal interpretation of a sentencing guideline was valid reason for revisiting earlier ruling).

> casually permit the relitigation of litigated issues out of a friendliness to claims of unfortunate failures to put in one's best case.

United States v. Cirami, 563 F.2d 26, 33 (2d Cir. 1977). The *Cirami* court went on to find that the systemic interest in finality in the case at hand was outweighed by one party's presentation of compelling, newly available evidence – a traditional exception to the mandate rule. The point here is that a given issue should not be defaulted initially at sentencing before a district court, again defaulted both on appeal and on remand, and yet still remain open to relitigation on a second appeal.

At his initial sentencing hearing on January 7, 2004, Luke Jones did not challenge the factual findings made by Judge Nevas. Nor did he contest his stratospheric Guidelines calculations, which were largely driven by the district court's factual findings – based entirely on trial testimony – that he had cold-bloodedly murdered Anthony Scott and Monteneal Lawrence. Likewise, in his original appeal, Luke Jones did not claim error as to any of these issues, but merely sought and received a remand based on *Crosby*. In his *Crosby* remand proceedings, he filed a six-page letter in support of his request for resentencing, which outlined what he believed to be the equities in favor of a sentence less than life imprisonment, but he again did not contest the Guidelines calculations. Because he could have raised these issues earlier, but chose not to do so, the law-of-the-case doctrine precludes him from raising them now. *See Williams*, 475 F.3d at 475-76 (noting that party may not relitigate issue that "was ripe for review at the

time of an initial appeal") (internal quotation marks omitted).

2. The life sentence imposed on Luke Jones was reasonable

By challenging the reasonableness of his sentence, Jones, in effect, asks this Court to re-weigh the evidence before the district court at sentencing. But 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. In other words, the defendant "merely renews the arguments he advanced below . . . and asks [this Court] to substitute [its] judgment for that of the District Court, *which, of course, [it] cannot do*." *United States v. Kane*, 452 F.3d 140, 145 (2d Cir. 2006) (per curiam) (emphasis added).

The district court in this case carefully considered all the evidence in the case, the applicable Sentencing Guidelines, and the relevant § 3553(a) factors before imposing sentence. Judge Nevas made it abundantly clear that the most significant factors in his analysis were "the extensive evidence of Jones's leadership in a violent drug-trafficking organization and his involvement in two murders." LKA 4. In his order denying *Crosby* resentencing, Judge Nevas pointed to the "hundreds, if not thousands, of people, including young children, young teenagers who were started on the road to drug addiction

by narcotics that [Luke Jones] was responsible for distributing." *Id.* The court further stated that although the jury acquitted Luke Jones of the racketeering charge of murdering Anthony Scott, "there is absolutely no doubt in the Court's mind, that you were guilty of that murder." *Id.* The court had even harsher words with respect to the murder of Monteneal Lawrence:

> As to Montaneal Lawrence – the murder of Montaneal Lawrence, I venture to say that this Court never presided at a trial – has never presided at a trial and heard evidence of such a cold-blooded murder of an innocent victim, as was your murder of Montaneal Lawrence, and what was Montaneal Lawrence's crime? He got drunk . . . and solely on the word of your girlfriend, [Shontae Fewell] who told you that Mr. Lawrence spoke disrespectfully to her, you shot and killed him in cold blood with witnesses all around, including small children, and then, after you murdered him in cold blood, you walked out the door, down the stairs, turned around and said, "Sorry," and continued outside. That was your sole expression of remorse for the cold-blooded murder of an innocent man . . . .

LKA 5. When a defendant has committed two murders and led a violent, large-scale drug organization, it cannot be unreasonable to agree with the Sentencing Commission that a life sentence is appropriate. Luke Jones's sentence should be affirmed.

Claims of Lonnie Jones

IV. The 324-month sentence imposed by the district court on Lonnie Jones should be affirmed as reasonable

A. Relevant facts

On July 25, 2001, Lonnie Jones was convicted after a week-long jury trial of conspiring to possess with intent to distribute in excess of 1000 grams of heroin, 50 grams of crack cocaine and 5,000 grams of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846. The evidence at trial established that between 1997 and 2000, Lonnie Jones was Aaron Harris's most trusted associate responsible for, among other things, overseeing the organization's lucrative retail drug distribution outlet located in the Middle Court area of the P.T. Barnum housing complex. As a manager or supervisor of the Middle Court area, Lonnie Jones was responsible for ensuring that the lieutenants passed out narcotics to the street-level dealers and collected the drug proceeds. Jones was Harris's most frequent companion to New York City where he and Harris met with their drug source of supply. He was even arrested on one occasion with Harris by New York City police officers who seized $44,000 from his car. GA 644-46. Other physical evidence included firearms, ammunition, and a bullet-proof vest seized from Lonnie Jones as a result of a November 1999 arrest at the P.T. Barnum housing complex. GA 262.

On December 10, 2001, the court sentenced Lonnie Jones to life in prison. Based upon the evidence presented at his trial and the earlier trial of co-defendant Aaron Harris, the district court made the following findings of fact with regard to the quantity of narcotics attributable to Lonnie Jones as a result of his participation in the conspiracy:

> The evidence at trial was that the organization ran three shifts a day, seven days a week. Based upon the seizure of Willie Nunley's narcotics, the calculation that a single shift was responsible for the annual distribution of not less than 4.5 kilograms of crack cocaine is found by the Court to be a reasonable calculation, and the Court so finds, and assuming that the same amount was distributed by the other two shifts, that yields an estimate of not less than 13.5 kilograms of crack per year, or a total of 40.5 kilograms of crack cocaine within the three-year period charged in the indictment, and if you round it down to 52 grams of the heroin, and you multiply it by 300 days, that yields a conservative estimate of 15.6 kilograms of heroin distributed by one shift per year, or 46.8 kilograms of heroin distributed by the organization per year, and 140.4 kilograms of heroin, and the Court so finds, were distributed by the organization within the three-year period charged in the indictment.

GA 279. The district court also adopted the findings of fact and Guidelines calculations set forth in ¶ 34 of Lonnie Jones's PSR regarding drug quantities, GA 278, and

imposed a Guidelines sentence of life imprisonment. GA 281.

The district court went on to indicate its dissatisfaction with the then-mandatory Sentencing Guidelines: "I said to your father earlier this morning that if there were no sentencing guidelines and I wasn't constricted by the guidelines, that I would not sentence you to life, and I repeat that, I would not, but that's not the case. I am constricted by the guidelines and I have no options." GA 280.

On a *Crosby* remand from this Court, the district court granted Lonnie Jones's motion for resentencing, and on January 11, 2007, held a resentencing hearing. In calculating the applicable Sentencing Guidelines, the district court relied on the findings it had previously made at the initial sentencing hearing and stated, "the Court will make a finding that the total offense level is 43 and the guideline calculation would call for life imprisonment . . . ." LNA 163. Specifically, the district court, adopting the Guidelines calculations set forth in the PSR, found a base offense level of 38 (1.5 kilograms or more of crack cocaine), plus an additional seven levels for various enhancements that increased his offense level to 45 (which was then capped at 43). PSR at ¶ 47-50; *see* U.S.S.G. § 2D1.1(a)(c). After considering the applicable Guidelines and the parties' submissions, the court sentenced Lonnie Jones principally to a non-Guidelines sentence of 324 months on the narcotics trafficking conspiracy, to run concurrently with a 60-month sentence on the firearms possession charge. LNA 215.

B. Governing law and standard of review

The law regarding review of sentences involving crack cocaine – including the recent amendments to U.S.S.G. § 2D1.1, the Supreme Court's decision in *Kimbrough*, and this Court's decision in *Regalado*, is set forth *supra* at 62-63.

As set forth more fully above, this Court reviews sentences for reasonableness, which equates to abuse-of-discretion review. *See supra* at 59-61. 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 appeal of a within-guidelines sentence. *See United States v. Kane*, 452 F.3d 140 (2d Cir. 2006) (per curiam). In *Kane*, the defendant challenged the reasonableness 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.").

C. Discussion

1. There is no reason to remand this case in light of *Kimbrough* or the newly amended crack guidelines, because the enormous quantities of crack and heroin attributed to Lonnie Jones would still trigger the same offense level and make the crack:powder ratio irrelevant

Lonnie Jones requests a remand to the district court and claims that he is entitled to a two-level reduction of his base offense level, from 38 to 36, pursuant to the Sentencing Commission's amendment to the crack Guidelines. Lonnie Jones Br. at 15, 17. As set forth in greater detail below, a remand is not necessary in this case because the base offense level would not be affected by the amendment, and his heroin quantities make the crack:powder ratio irrelevant.

At the high end, § 2D1.1(c) previously applied offense level 38 to any quantity of crack of 1.5 kilograms or more. That offense level now applies to a quantity of 4.5 kilograms or more; a quantity of at least 1.5 kilograms but less than 4.5 kilograms falls in offense level 36. In this case, the quantity of crack attributable to Lonnie Jones is well over the 4.5 kilograms required to establish a base offense level of 38. At the initial sentencing hearing in this case, the district court made very clear findings of fact concerning the quantity of crack cocaine attributable to Lonnie Jones, GA 278-79, and it later re-affirmed those findings at the resentencing hearing, LNA 207. (Indeed, there was no challenge to the Guidelines calculation at the

resentencing hearing. LNA 162.) The district court found that Lonnie Jones was responsible for a total of 40.5 kilograms of crack cocaine – ten times the quantity now necessary to establish a base offense level of 38.

In addition, the district court found that the defendant was responsible for the distribution of 140.4 kilograms of heroin. This quantity places the defendant at a level 38 as well. *See* U.S.S.G. § 2D1.1(c)(1). Under any calculation of the Guidelines – whether under the crack Amendment or under the heroin quantity, the quantities are so high that the resulting base offense level remains at a level 38. Thus, because the district court's Guidelines calculation would not change and the defendant would remain at a base offense level 38, a remand is unnecessary. (Indeed, he would be ineligible for a § 3582(c) sentence reduction for that same reason.) And for the same reasons set forth *supra* at 64-67 with respect to Aaron Harris, the attribution of such enormous heroin quantities to Lonnie Jones make the crack:powder ratio irrelevant to this case. Accordingly, neither *Kimbrough* nor *Regalado* warrant yet another remand in this case.

2. The district court fully considered all the relevant § 3553(a) factors, and the 324-month sentence is accordingly reasonable

The defendant's claim that the district court failed to adequately consider the § 3553(a) factors is equally without merit. Lonnie Jones Br. at 24. After careful consideration of the Guidelines and the relevant § 3553(a) sentencing factors, the district court determined that a non-

Guidelines sentence of 324 months imprisonment was appropriate. The court spent a considerable amount of time explaining the reasons for imposing that sentence.

First, the court explained that it was considering the need to avoid unwarranted sentencing disparities among comparable defendants. LNA 212. In that regard, the court observed that Lonnie Jones was the only defendant who received a life sentence, despite having no criminal history and never having been charged with acts of violence. *Id.* The court remained troubled by the fact that on the night he was arrested, he was in a car with his two uncles, "dressed in black, wearing body armor, with four guns in the car," on his way to someone's house. LNA 212-13. Still, the court felt that Lonnie Jones was unlike his uncle Luke Jones – who "is a violent, bad person," and "who clearly deserved a life sentence." LNA 215. This comparative assessment of Lonnie Jones's involvement in violence satisfied the court's obligation to consider § 3553(a)(6).

Second, the court considered Lonnie Jones's role in the conspiracy, which fulfilled the court's obligation to consider "the nature and circumstances of the offense." 18 U.S.C. § 3553(a)(1). The court noted that he needed to be punished for his "leadership role," even though it was not "at the top of this conspiracy." LNA 213. The court considered the fact that Lonnie Jones had not been in the conspiracy from its inception, but also noted that he eventually made a choice to join the group as a drug dealer when he saw how his family members were "driving fancy cars and living the high lifestyle." LNA 213.

Third, the court favorably considered the fact that Lonnie Jones had pleaded guilty to the firearms charge, but had not received any credit for accepting responsibility. LNA 214. This comported with the court's obligation to consider the "history and characteristics of the defendant," in line with 18 U.S.C. § 3553(a)(1).

Fourth, the court emphasized the need for the sentence to achieve specific deterrence, consistent with 18 U.S.C. § 3553(a)(2)(B). The court found that a life sentence was greater than necessary, and that 324 months would be sufficient "to further the goal of specific deterrence." LNA 214.

In sum, Lonnie Jones's sentence was substantively reasonable. The district court imposed a non-Guidelines sentence that reflected careful consideration of the Guidelines and all of the relevant sentencing factors under § 3553(a). Although the defendant would have given some factors more weight than others, and would have liked a more lenient sentence than the district court imposed, this Court should decline the defendant's invitation to substitute its judgment for that of the district court. *See Gall*, 128 S.Ct. at 597-98 (holding that sentencing court deserves significant deference, given its "superior position to find facts and judge their import under § 3553(a) in the individual case"); *Kane*, 452 F.3d at 155; *Fernandez,* 443 F. 3d at 27; *Fleming*, 397 F.3d at 100; *see also Williams*, 475 F.3d at 478 (affirming reasonableness of sentence after *Crosby* remand, in part because "the sentence imposed was well below the statutory maximum of life imprisonment that Williams

faced for the heroin trafficking conspiracy, and also well below the sentence he could have faced had the District Court chosen to run the sentences on his multiple counts of conviction consecutively rather than concurrently").

CONCLUSION

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

Dated: April 11, 2008

Respectfully submitted,

NORA R. DANNEHY
ACTING U.S. ATTORNEY
DISTRICT OF CONNECTICUT

ALINA P. REYNOLDS
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
ASSISTANT U.S. ATTORNEY

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

This is to certify that this brief is calculated by the word processing program to contain approximately 23,615 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, not to exceed 25,000 words, which is less than the combined length of the three briefs filed by the defendants-appellants, and considerably less than the combined limit of 42,000 words to which the Government would be subject if it had responded individually to each of the defendants' briefs.

Alina Reynolds

ALINA P. REYNOLDS
ASSISTANT U.S. ATTORNEY

ADDENDUM

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

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

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

(2) the need for the sentence imposed –

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

(B) to afford adequate deterrence to criminal conduct;

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

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

(3) the kinds of sentences available;

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

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

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

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

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

the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement–

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

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

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

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

. . . .

(c) Statement of reasons for imposing a sentence. The court, at the time of sentencing, shall state in open court the reasons for its imposition of the particular sentence, and, if the sentence –

(1) is of the kind, and within the range, described in subsection (a)(4) and that range exceeds 24 months, the reason for imposing a sentence at a particular point within the range; or

(2) is not of the kind, or is outside the range, described in subsection (a)(4), the specific reason for the imposition of a sentence different from that described, which reasons must also be stated with specificity in the written order of judgment and commitment, except to the extent that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relies upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court shall state that such statements were so received and that it relied upon the content of such statements.

If the court does not order restitution, or orders only partial restitution, the court shall include in the statement the reason therefor. The court shall provide a transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment, to the Probation System and to the

Sentencing Commission, and, if the sentence includes a term of imprisonment, to the Bureau of Prisons.

. . . .

28 U.S.C. § 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceedings.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term as which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel or record stating that it is made in good faith.

28 U.S.C. § 455. Disqualification of justice, judge, or magistrate judge

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonable be questioned.

(b) He shall also disqualify himself in the following circumstances:

> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.
>
> . . . .

U.S.S.G. § 2D1.1 (2007) Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy.

(a) Base offense level (Apply the greatest):

. . . .

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c) . . . .

. . . .

(b) Specific Offense Characteristics

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

. . . .

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*

Base Offense Level

(1) ● 30 KG or more of Heroin;
Level 38
● 150 KG or more of Cocaine;
● 4.5 KG or more of Cocaine Base;
. . . .

U.S.S.G. § 3B1.1 (2007) Aggravating Role

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.

U.S.S.G. § 3B1.4 (2007) Using a Minor To Commit a Crime

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.

U.S.S.G. § 3C1.1 (2007) Obstructing or Impeding the Administration of Justice

If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense or conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by **2** levels.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Jones

Docket Number: 07-0337-cr(L)

I, Louis Bracco, 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 CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 4/11/2008) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: April 11, 2008