06-5320-cr

To Be Argued By:
PAUL A. MURPHY

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-5320-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

DARIO PUERTA,
Respondent-Appellee.

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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KEVIN J. O'CONNOR
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District of Connecticut

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STATEMENT OF JURISDICTION

The district court (Stefan R. Underhill, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. On November 2, 2006, the district court entered its order on the remand from this Court, and on November 9, 2006, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). This Court has appellate jurisdiction pursuant to 18 U.S.C. § 3742(a).

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Whether the Sixth Amendment prohibits a district court from making factual findings at sentencing concerning a defendant's role in the offense of conviction where the result of those factual findings would not increase the statutory maximum penalty, but would instead simply preclude a defendant from obtaining a reduction in the applicable mandatory minimum sentence.

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FOR THE SECOND CIRCUIT

Docket No. 06-5320-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

DARIO PUERTA,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This is a sentencing appeal. On August 1, 2002, the defendant, Dario Puerta, pled guilty to Count One of the First Superseding Indictment charging him with conspiracy to possess with intent to distribute and to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. § 846. The plea agreement listed the penalties applicable to the offense of conviction, including that it carried a 10-year mandatory minimum prison sentence, and the defendant admitted at his plea hearing

that he had conspired to distribute 10 kilograms of cocaine, further supporting the 10-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A). At sentencing, the defendant ultimately stipulated to being a "manager" or "supervisor" under U.S.S.G. § 3B1.1(b). One consequence was that such a determination precluded him from eligibility for safety-valve relief from the mandatory minimum sentence, pursuant to 18 U.S.C. § 3553(f).

The defendant now seeks relief from the 10-year mandatory minimum sentence which he agreed to in his plea agreement. His only argument is that the Sixth Amendment to the Constitution prohibited the district court from making factual findings on the issue of his role as a "manager" or "supervisor." This claim fails, though, because this Court has already held that judicial factfinding that denies the defendant eligibility for the safety valve does not violate the Sixth Amendment.

Statement of the Case

On November 7, 2001, the defendant was charged in a superseding indictment with three counts of cocaine trafficking, in violation of 21 U.S.C. §§ 846, 841(a)(1) and 18 U.S.C. § 2. Government's Appendix ("GA __.") 1-3. The case was assigned to the Honorable Stefan R. Underhill, United States District Judge for the United States District Court, District of Connecticut. On August 1, 2002, the defendant pled guilty to Count One of the First Superseding Indictment charging him with conspiracy to possess with intent to distribute more than

five kilograms of cocaine, in violation of 21 U.S.C. § 846. Joint Appendix ("JA __.") 6.

On March 20, 2003, the district court sentenced the defendant principally to 121 months in prison. GA 11. The judgment was entered on March 25, 2003. JA 8. The defendant filed a timely notice of appeal on March 27, 2003. JA 8.

On appeal in this Court's docket number 03-1293-cr, defense counsel filed a motion to be relieved pursuant to *Anders v. California*, 386 U.S. 738 (1967), on the ground that there were no non-frivolous issues for appeal, and, in turn, the government filed a motion for summary affirmance. On July 19, 2004, the defendant filed a pro se response to counsel's *Anders* motion. On August 6, 2004, this Court granted defense counsel's motion to be relieved pursuant to *Anders* and the government's motion for summary affirmance.

On October 18, 2004, the defendant acting pro se filed a motion to recall the mandate, citing *Blakely v. Washington*, 542 U.S. 296 (2004), and the fact that the Supreme Court had recently heard arguments in the case that would ultimately result in the decision *United States v. Booker*, 543 U.S. 220 (2005). On November 2, 2004, this Court granted the defendant's motion to recall the mandate.

On August 5, 2005, this Court ordered that this matter be remanded to the district court for further proceedings in light of the Supreme Court's decision in *Booker* and this Court's decision in *United States v. Crosby*, 397 F.3d 103

(2d Cir. 2005). GA 92. The mandate issued on December 28, 2005. GA 92. On November 1, 2006, the district court decided that it would not resentence the defendant pursuant to *Crosby*. JA 12-13. On November 9, 2006, the defendant filed a notice of appeal from the district court's decision on the *Crosby* remand. JA 10. The defendant is presently serving his sentence.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. The Offense Conduct and Plea

This case involved a cocaine distribution conspiracy among the defendant and several others, including Jaime Mendez, Johnny Diez, and David Taborda. The record reflects that in October 2000, the defendant supplied about 10 kilograms of cocaine to co-conspirator Johnny Diez, who then sold it on credit to an individual named Diego Arboleda. Arboleda arranged to sell the cocaine to another individual, who, in turn, gave it to Taborda and Mendez to sell. Presentence Report ¶¶ 8-11 ("PSR ¶ __.").

The conspiracy unraveled when Taborda and Mendez were stopped on October 26, 2000, by a Massachusetts state trooper while transporting the 10 kilograms of cocaine. PSR ¶¶ 12-16. During the course of the traffic stop, the trooper discovered the narcotics and arrested Taborda and Mendez. PSR ¶¶15-16.

The other co-conspirators became concerned because of their view that the cocaine ultimately belonged to Colombian cartel dealers. Puerta eventually was advised

that Taborda and Mendez had been arrested and the cocaine had been seized. He thereafter led efforts among the co-conspirators to investigate the circumstances of the cocaine seizure from Taborda and Mendez, as well as to ensure that the cartel members were paid the outstanding debt for the cocaine and to apportion the loss among the co-conspirators. PSR ¶¶ 17-37.[1]

On August 1, 2002, the defendant pled guilty to Count One of the First Superseding Indictment charging him with conspiracy to possess with intent to distribute and distribute more than five kilograms of cocaine, a Schedule II controlled substance, in violation of 21 U.S.C. § 846. JA 6. The plea agreement listed the penalties applicable to the offense of conviction, including the fact that it carried a 10-year mandatory minimum prison sentence under 21 U.S.C. § 841(b)(1)(A). GA 4-5. The defendant further acknowledged at the plea colloquy his understanding that the offense to which he was pleading guilty carried a 10-year mandatory minimum sentence. GA 20. He also admitted at the plea colloquy that the conspiracy involved more than five kilograms of cocaine, GA 40, and agreed that in fact it involved 10 kilograms of cocaine. GA 37-40.[2]

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[1] At sentencing, the district court struck the last sentence of paragraph 20 of the PSR. GA 53.

[2] The defendant's plea agreement submitted to the district court also contained a stipulation that a total of 10 kilograms of cocaine were attributable to him for purposes of sentencing. GA 6. At the plea colloquy, defense counsel clarified that the agreement should have read that the defendant

(continued...)

B. The Sentencing

The PSR calculated the defendant's total offense level to be 33, which included a four-level upward adjustment under U.S.S.G. § 3B1.1(a). PSR ¶¶ 46, 51. Section 3B1.1(a) of the Sentencing Guidelines applies where a defendant acted as an "organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive." U.S.S.G. § 3B1.1(a). As a result, the PSR calculated the guideline imprisonment range to be 135 to 168 months. PSR ¶ 68. The enhancement under U.S.S.G. § 3B1.1 made the defendant ineligible for relief under the so-called safety valve provisions of Title 18, United States Code, Section 3553(f). *See* 18 U.S.C. § 3553(f)(4).

The principal issue at sentencing was whether the defendant's guideline range should be enhanced for his role in the offense. The district court focused on the defendant's conduct after the cocaine was seized in reviewing whether he was subject to a role enhancement, noting "specifically [the] efforts to collect on the money owed." GA 62. The district court pointed out that the defendant was "instructing those further down the line

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[2] (...continued)
stipulated that no more than 10 kilograms were attributable to him for sentencing. GA 31. Nevertheless, as noted above, the defendant admitted that the quantity was more than five kilograms – which is the quantity that triggered the mandatory minimum – and further agreed that the conspiracy involved 10 kilograms.

what to do; specifically Mr. [Arboleda],"[3] and pointed out paragraph 29 of the PSR, adding:

> Puerta told [Arboleda] he wanted him to go to Colombia to discuss the problem. Puerta instructed [Arboleda] to take the indictment – that is the arrest report to Colombia, so forth and so forth.

GA 68.

In this regard, the district court also noted:

> [I]t's not simply that he was trying to collect the money, it's that he was – because he paid it off, he was directing others who were also potentially responsible for the money. He was telling [Arboleda] what to do, he was making arrangements and instructing people in the language of the PSR.

GA 72.

The district court also noted, in reference to a meeting among the co-conspirators after the arrests of Taborda and Mendez, that "as far as I can tell, he [the defendant] was directing the effort to get the meeting in Rhode Island to try and put this on the Osorios and get the money collected." GA 71.

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[3] The sentencing transcript spells this individual's name as "Ashlata."

Eventually, defense counsel suggested as an alternative that, if anything, his client was at most a "manager" or "supervisor," not an "organizer" or "leader," and therefore would be subject to only a three-level role enhancement under U.S.S.G. § 3B1.1(b), rather than a four-level enhancement under U.S.S.G. § 3B1.1(a). GA 79-80. Defense counsel then consulted with the government's counsel and with the defendant and put on the record that the parties had reached an agreement that a three-level upward adjustment was appropriate under U.S.S.G. § 3B1.1(b) on the ground that the defendant was a manager or supervisor. GA 81. Specifically, defense counsel advised the Court that "the defendant will concede that he is a manager or a supervisor and I think the government would be satisfied with the three level enhancement as opposed to the four." GA 81. The district court accepted that compromise, noting that "I was about to come to that conclusion anyway, reading some additional cases, so I'm glad you got there on your own." GA 81.

As a result, the court calculated the total offense level to be 32, with a Criminal History Category I, resulting in a guideline range of 121 to 151 months imprisonment. GA 81-82. Defense counsel thereafter abandoned any argument that the court should downwardly depart from the bottom of the guideline range, 121 months, to the statutory minimum 120 months. GA 85. The court ultimately sentenced the defendant to 121 months in prison to be followed by four years of supervised release, along with a $100 mandatory special assessment. GA 87-88.

C. The *Crosby* Remand

On remand, the defendant requested that the district court revisit its prior factual findings on the issue of the role adjustment under U.S.S.G. § 3B1.1. The district court ultimately concluded that it would not have sentenced the defendant to a materially different sentence if the Sentencing Guidelines had been advisory at the time of sentencing. JA 12-13. It noted that it had accepted the parties' stipulation at sentencing that the defendant was a manager or supervisor within the meaning of U.S.S.G. § 3B1.1(b), making him ineligible for safety-valve relief. JA 12. The district court also noted that it had relied on the other factors in 18 U.S.C. § 3553(a) in reaching its sentence, and those very factors would have led it to impose a sentence "not trivially different" than the 121-month sentence imposed even if the Guidelines had not been mandatory at the time of sentencing. JA 13.

SUMMARY OF ARGUMENT

The district court's factfinding about the defendant's role in the offense did not violate the defendant's Sixth Amendment jury trial right. The one case on which the defendant relies, *Cunningham v. California*, 127 S. Ct. 856 (2007), does not forbid all judicial factfinding at sentencing, as the defendant suggests. Moreover, this Court has already held post-*Booker* that the Sixth Amendment is not violated when a district court finds facts at sentencing by a preponderance of evidence resulting in a defendant's ineligibility for safety-valve relief from the statutory mandatory minimum sentence. Nothing in *Cunningham* changes that result.

ARGUMENT

I. THE DISTRICT COURT DID NOT VIOLATE THE DEFENDANT'S SIXTH AMENDMENT JURY TRIAL RIGHT WHEN IT MADE FACTUAL FINDINGS CONCERNING THE DEFENDANT'S ROLE IN THE OFFENSE

The defendant's only argument on appeal is that the procedure the district court followed on the *Crosby* remand was improper. The defendant's brief does not explain what procedure the district court should have followed. The essence of his argument, though, is that the district court violated his Sixth Amendment right to a trial by jury when it found facts by a preponderance of yhe evidence that made him ineligible for safety-valve relief from the mandatory minimum sentence. He claims that this violated the holding in the Supreme Court's decision in *Cunningham v. California*, 127 S. Ct. 856 (2007). The argument is meritless and ignores controlling Second Circuit law in *United States v. Holguin*, 436 F.3d 111 (2d Cir.), *cert. denied*, 126 S. Ct. 2367 (2006).

A. Relevant Facts

The defendant pled guilty to a charge of conspiracy to possess with intent to distribute and distribute more than five kilograms of cocaine, a Schedule II controlled substance, in violation of 21 U.S.C. § 846. The plea agreement listed the penalties applicable to the offense of conviction, including the fact that it carried a 10-year mandatory minimum prison sentence under 21 U.S.C. § 841(b)(1)(A). GA4-5. The defendant acknowledged at

the plea colloquy his understanding that the offense to which he was pleading guilty carried a 10-year mandatory minimum sentence. GA 20. He also admitted at the plea colloquy that the conspiracy involved more than five kilograms of cocaine, GA 40, and agreed that in fact it involved 10 kilograms of cocaine, GA 37-40.

As a result of his plea to a cocaine trafficking conspiracy involving more than five kilograms of cocaine, he was automatically subject to a 10-year statutory mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A). Moreover, at sentencing, the defendant stipulated, through counsel, that he was a manager or supervisor under U.S.S.G. 3B1.1(b). GA 81. The district court accepted this stipulation. GA 81. As a result of the finding that the defendant was a manager or supervisor, the defendant was ineligible for relief from the 10-year mandatory minimum under the safety valve. *See* 18 U.S.C. § 3553(f)(4).

B. Governing Law

1. *Cunningham v. California*

In *Cunningham*, the Supreme Court struck down California's determinate sentencing law ("DSL"). The DSL established a sentencing system whereby three terms of imprisonment were set for crimes: a lower term sentence, a middle term, and an upper term. A sentencing court was required to sentence a defendant to the middle term, unless the court found by a preponderance of evidence certain aggravating or mitigating circumstances, permitting either the upper or lower term sentence,

respectively. 127 S. Ct. at 861-62. The Supreme Court noted that the "circumstances" justifying application of the upper term of imprisonment were "facts." *Id.* at 862. Its examination of California's sentencing scheme led it to conclude that a sentencing court was "direct[ed] to start with the middle term, and to move from that term only when the court itself finds and places on the record facts – whether related to the offense or the offender – beyond the elements of the charged offense." *Id*.

The Supreme Court concluded that this scheme violated the Sixth Amendment jury trial right because it permitted a court to increase the maximum sentence prescribed by a jury's verdict or a defendant's admissions on the basis of facts found by a preponderance of evidence by a judge. *Id*. at 870-71. In striking down the law, the Supreme Court traced its recent Sixth Amendment jurisprudence. *See id.* at 864-65 (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); *Blakely v. Washington*, 542 U.S. 296 (2004); *United States v. Booker*, 543 U.S. 220 (2005)). The Court quoted from the *Blakely* case, where it held:

> Our precedents make clear . . . that the "statutory maximum" for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant* . . . .

Id. at 865 (quoting *Blakely*, 542 U.S. at 303 (emphasis in original)).

The Supreme Court ultimately found that the statutory maximum under the DSL, for *Apprendi* purposes, was the middle term required to be imposed absent further findings of fact by the sentencing court. *Id.* at 868. Because the upper term could be imposed only when a sentencing judge found additional facts beyond those inherent in the jury's verdict or the defendant's guilty plea, the sentencing scheme violated the Sixth Amendment. *See id*. The Supreme Court went on to reject the argument that the discretion built into the DSL made it similar to the now-advisory nature of the U.S. Sentencing Guidelines after *Booker*. It held that the DSL afforded no such discretion, but instead required the sentencing court to impose the middle term unless it found facts justifying the upper or lower term. *Id*. at 870. "Factfinding to elevate a sentence from [the middle term] to [the upper term], our decisions make plain, falls within the province of the jury employing a beyond-a-reasonable-doubt standard, not the bailiwick of a judge determining where the preponderance of the evidence lies." *Id*.

Cunningham does not prohibit all judicial factfinding at sentencing. It is instead a straightforward application of the principles set forth in *Apprendi* and its progeny to a state sentencing system. Indeed, in rejecting an argument that *Cunningham* prohibited all judicial factfinding at sentencing, the Seventh Circuit recently held that because *Booker* made the Guidelines advisory, it cured any potential Sixth Amendment problem, and therefore *Cunningham* "has no effect on post-*Booker* federal practice." *United States v. Roti*, 484 F.3d 934, 937 (7th Cir. 2007) (noting that sentencing judges may make factual findings that affect sentences "provided that the

sentence is constrained by the maximum set by statute for each crime").

Further, since *Cunningham* was decided, the Supreme Court has made it explicit that district courts may make factual findings by a preponderance of the evidence at sentencing, provided they do not increase the maximum penalty. *See Rita v. United States*, 127 S. Ct. 2456 (2007). In *Rita*, the Court held:

> This Court's Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence. Nor do they prohibit the sentencing judge from taking account of the Sentencing Commission's factual findings or recommended sentences. . . .
>
> The Sixth Amendment question, the Court has said, is whether the law *forbids* a judge to increase a defendant's sentence *unless* the judge finds facts that the jury did not find (and the offender did not concede).

Id. at 2465-66 (emphasis in original) (citations omitted) (citing *Cunningham*, *Booker*, *Blakely*, *Ring*, and *Apprendi*)).

2. *United States v. Holguin*

In *United States v. Holguin*, 436 F.3d 111 (2d Cir.), *cert. denied*, 126 S. Ct. 2367 (2006), this Court addressed and rejected the very argument raised here. *Holguin* was

decided after *Booker*, and held that a district court does not violate a defendant's Sixth Amendment jury trial right when it finds facts by a preponderance of the evidence making a defendant ineligible for safety-valve relief from an otherwise applicable mandatory minimum sentence. *See id*. at 117-19.

In *Holguin*, the defendant was sentenced to the mandatory minimum 60 months in prison for possession with intent to distribute 500 grams or more of cocaine. *Id*. at 113. Like here, the defendant in *Holguin* claimed that the district court violated his Sixth Amendment rights when it determined by a preponderance of the evidence that he was a "supervisor" in the offense of conviction, and therefore was ineligible for safety-valve relief. *Id*. at 113-14. This Court quickly dispatched this argument, holding as follows:

> [J]udicial fact-finding as to whether a defendant was a supervisor or leader (and thus barred from or entitled to safety valve relief) does not permit a higher maximum sentence to be imposed; the only effect of the judicial fact-finding is either to *reduce* a defendant's sentencing range or to leave the sentencing range alone, not to *increase* it. As the government correctly maintains, Holguin turns § 3553(f) on its head by "converting the eligibility criteria for a sentence *reduction* into elements of the offense which *increase* his maximum sentence." The statute does not require a district court to make affirmative findings on the safety valve before applying the mandatory minimum sentence in 21 U.S.C. § 841(b)(1)(B). Rather, the

> mandatory minimum applies whenever the quantity of cocaine involves 500 grams or more. *See* 21 U.S.C. § 841(b)(1)(B). There is no doubt in this case that the drug quantity triggering the five-year mandatory minimum and forty-year maximum of subsection 841(b)(1)(B) was proved beyond a reasonable doubt by the guilty plea. Therefore, the applicable statutory sentencing range based on Holguin's admissions was five to forty years. The District Court's factual finding that he was a supervisor did not alter this range by substituting a higher maximum for the one otherwise applicable to the case.

Id. at 117-18 (footnote omitted).

This Court noted in *Holguin* that its holding was consistent with the Supreme Court's plurality opinion in *Harris v. United States*, 536 U.S. 545 (2002), upholding the constitutionality of mandatory minimum sentences with respect to the Sixth Amendment. *See Holguin*, 436 F.3d at 118-19. The plurality opinion in *Harris* found that there would be no Sixth Amendment bar even where the sentencing court made the factual findings which triggered the application of a mandatory minimum sentence in the first instance, provided they do not increase the statutory maximum. *See Harris*, 536 U.S. at 568-69.

Judicial factfinding that increases only the mandatory minimum, but not the statutory maximum sentence, "fit[s] within the *Harris* paradigm." *Holguin*, 436 F.3d at 119 (citing *United States v. Estrada*, 428 F.3d 387 (2d Cir. 2005) (upholding judicial factfinding about a defendant's

prior felony drug convictions that resulted in a mandatory minimum sentence of life in prison), *cert. denied*, 546 U.S. 1223 and 546 U.S. 1224 (2006)). Likewise, "judicial fact-finding that confirms an already-applicable mandatory minimum is constitutional under *Harris*." *Id.*; *see also United States v. Jimenez*, 451 F.3d 97, 103-04 (2d Cir. 2006) (holding post-*Booker* that the Sixth Amendment does not require proof to a jury beyond a reasonable doubt that a defendant is ineligible for safety-valve relief); *United States v. Barrero*, 425 F.3d 154, 158 (2d Cir. 2005) (holding post-*Booker* that there is "no constitutional bar to a legislative instruction to a judge to sentence the defendant to such a mandatory minimum where, as here, the defendant is ineligible for safety valve relief based on the court's finding that he had more than one criminal history point"); *United States v. Snype*, 441 F.3d 119, 149 (2d Cir.) (holding post-*Booker* that no Sixth Amendment violation occurs with respect to facts relevant to 18 U.S.C. § 3559(c)(3)(A), because it "can be analogized to a safety valve or affirmative defense"), *cert. denied*, 127 S. Ct. 285 (2006).

Other circuits agree that the Sixth Amendment does not prohibit a district court from making factual findings at sentencing which result in a defendant's being ineligible for safety-valve relief. *See United States v. Bermudez*, 407 F.3d 536, 544-45 (1st Cir.) (rejecting a post-*Booker* claim that judicial factfinding unconstitutionally prevented the defendant from obtaining a lower sentence under safety valve or for substantial assistance), *cert. denied*, 546 U.S. 921 (2005); *United States v. Payton*, 405 F.3d 1168, 1173 (10th Cir. 2005) ("Nothing in *Booker's* holding or reasoning suggests that judicial fact-finding to determine

whether a *lower* sentence than the mandatory minimum is warranted implicates a defendant's Sixth Amendment rights."); *United States v. Poyato*, 454 F.3d 1295, 1299 (11th Cir. 2006) (district court constitutionally permitted to make findings of fact concerning the five prerequisites for safety-valve relief).

C. Discussion

Here, the defendant pled guilty to a charge that he conspired to possess with intent to distribute and to distribute more than five kilograms of cocaine. GA 11. He admitted to a drug quantity of more than five kilograms at the plea proceeding, and indeed agreed that the specific amount attributable to him was 10 kilograms. GA 37-40. He further acknowledged that his plea triggered the mandatory minimum sentence of 10 years. GA 20. As such, his plea alone established the applicable sentence as being 10 years to life.[4] *See* 21 U.S.C. §§ 846, 841(b)(1)(A).

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[4] During the plea colloquy, the district court referenced that it would find facts concerning drug quantity. GA 32-33. This was irrelevant to the applicability of the mandatory minimum, though, because the defendant pled guilty to a charge of conspiracy involving more than five kilograms of cocaine, expressly admitting that the crime involved more than five kilograms. GA 37-40. Thus, the application of the mandatory minimum was consistent with the Sixth Amendment. *See United States v. Gonzalez*, 420 F.3d 111, 133-34 (2d Cir. 2005) (drug quantity in § 841 cases is element of the crime that must be supported by jury findings or admissions by the defendant).

The district court's factfinding on the defendant's role in the offense did not *increase* the maximum sentence for the crime of conviction. It did not even trigger the mandatory minimum sentence – that was inherent in the defendant's guilty plea. Instead, it merely determined whether the defendant was eligible for a *reduction* in the mandatory minimum sentence. This is precisely the situation this Court faced in *Holguin*, where it held that such judicial factfinding that does not increase the maximum penalty, but simply precludes a reduction in the already-applicable minimum sentence is constitutional. *See Holguin*, 436 F.3d at 118-19.

And although the Supreme Court decided *Cunningham* after this Court's decision in *Holguin*, nothing in *Cunningham* changes the fundamental underpinnings of *Holguin*. The Supreme Court confirmed as much in *Rita*, which was decided after *Cunningham* and reiterated that judicial factfinding at sentencing violates the Sixth Amendment only if it increases the applicable statutory maximum penalty established by the jury's verdict or the defendant's guilty plea. *See Rita*, 127 S. Ct. at 2465-66. This was not the result of the district court's findings here, so there was no Sixth Amendment violation.[5]

In the end, because 18 U.S.C. § 3553(f)(4), which precludes safety-valve relief where a defendant is

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[5] Although unnecessary to the final decision, it should not go unnoticed that the factual finding about which the defendant now complains was the product of his own stipulation at sentencing. *See* GA 81.

adjudged to be a manager or supervisor, is constitutional, *see Holguin*, 436 F.3d at 118-19, a district court is not at liberty to treat it as merely advisory. *See Barrero*, 425 F.3d at 157-58 (holding that because § 3553(f)(1) is constitutional, a district court may not treat it as merely advisory). Accordingly, the district court did not commit constitutional error when, as part of the *Crosby* remand, it adhered to its prior conclusion that the defendant was subject to a 10-year mandatory minimum sentence.

CONCLUSION

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

Dated: August 24, 2007

Respectfully submitted,

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ADDENDUM

18 U.S.C. § 3553

* * *

(f) Limitation on applicability of statutory minimums in certain cases.-- Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that--

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a

continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

21 U.S.C. § 841

(a) Unlawful acts

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

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

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

(b) Penalties

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

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

* * *

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

* * *

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at

least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

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U.S.S.G. § 3B1.1. 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.

Commentary

Application Notes:

1. A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted. A person who is not criminally responsible for the commission of the offense (e.g., an undercover law enforcement officer) is not a participant.

2. To qualify for an adjustment under this section, the defendant must have been the organizer, leader, manager, or supervisor of one or more other participants. An upward departure may be warranted, however, in the case of a defendant who did not organize, lead, manage, or

supervise another participant, but who nevertheless exercised management responsibility over the property, assets, or activities of a criminal organization.

3. In assessing whether an organization is "otherwise extensive," all persons involved during the course of the entire offense are to be considered. Thus, a fraud that involved only three participants but used the unknowing services of many outsiders could be considered extensive.

4. In distinguishing a leadership and organizational role from one of mere management or supervision, titles such as "kingpin" or "boss" are not controlling. Factors the court should consider include the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others. There can, of course, be more than one person who qualifies as a leader or organizer of a criminal association or conspiracy. This adjustment does not apply to a defendant who merely suggests committing the offense.

Background: This section provides a range of adjustments to increase the offense level based upon the size of a criminal organization (i.e., the number of participants in the offense) and the degree to which the defendant was responsible for committing the offense. This adjustment is included primarily because of concerns about relative responsibility. However, it is also likely that persons who exercise a supervisory or managerial role in

the commission of an offense tend to profit more from it and present a greater danger to the public and/or are more likely to recidivate. The Commission's intent is that this adjustment should increase with both the size of the organization and the degree of the defendant's responsibility.

In relatively small criminal enterprises that are not otherwise to be considered as extensive in scope or in planning or preparation, the distinction between organization and leadership, and that of management or supervision, is of less significance than in larger enterprises that tend to have clearly delineated divisions of responsibility. This is reflected in the inclusiveness of §3B1.1(c).