05-3928-cr

To Be Argued By:
MICHAEL E. RUNOWICZ

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-3928-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

DEAN SIMS,
Defendant-Appellant.

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
United States Attorney
District of Connecticut

MICHAEL E. RUNOWICZ
Assistant United States Attorney
MICHAEL J. GUSTAFSON
Assistant United States Attorney (of counsel)

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Statement of Jurisdiction

The district court (Janet C. Hall, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. Judgment entered on June 20, 2005. (D. App. 10). The defendant filed a timely notice of appeal on June 27, 2005, (D. App. 16), pursuant to Fed. R. App. P. 4(c). Accordingly, this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

Statement of Issues Presented for Review

1. Whether the district court clearly erred in sentencing the defendant to the statutorily mandated minimum term of incarceration given the defendant's admission that he conspired to distribute 50 grams or more of cocaine base.

2. Whether the defendant's sentencing counsel was constitutionally ineffective for successfully urging the district court to impose the minimum sentence allowed by law.

3. Whether the district court erred in sentencing the defendant to the statutorily mandated minimum term of incarceration where the court in the first instance continued the defendant's sentencing hearing to allow him a second opportunity to seek the benefits of a safety-valve proffer and then, at the reconvened sentencing hearing, confirmed that the defendant would not avail himself of another safety-valve proffer.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-3928-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

DEAN SIMS,

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. The defendant, Dean Sims, pleaded guilty to Count One of a superseding indictment that charged him with conspiring to distribute controlled substances, including 50 grams or more of cocaine base ("crack cocaine"), in violation of 21 U.S.C. § 846. During his guilty plea, the defendant admitted to participating in a drug conspiracy and to distributing more than 50 grams of cocaine base. The district court adjourned the defendant's initial sentencing when issues

concerning acceptance of responsibility and safety-valve eligibility arose. Ultimately, when the court reconvened the sentencing hearing and ascertained that the defendant had accepted responsibility but did not want to avail himself of the safety-valve, it imposed the most lenient sentence permitted by law – the statutorily mandated minimum term of incarceration of 120 months.

On appeal, Sims ignores his admissions to the court concerning his relevant drug quantity in the conspiracy and instead posits that Judge Hall erred by failing to ascertain how much of his involvement with crack cocaine involved personal consumption. The defendant extends this theme to also argue that his attorney was constitutionally ineffective at sentencing by failing to argue that the defendant's drug quantity was partially comprised of personal use amounts and, therefore, did not require imposition of the mandatory minimum sentence. Finally, the defendant claims that the district court clearly erred by neglecting to determine whether he qualified for safety-valve treatment notwithstanding his clear assertion to the district court at the reconvened sentencing hearing that he did not want to avail himself of the safety-valve

opportunity.[1] For the reasons that follow, this Court should affirm the district court's sentence.

Statement of the Case

Dean Sims was one of fourteen defendants charged in a twelve-count indictment filed at New Haven, Connecticut on June 15, 2004. *See* Appendix for Appellant Dean Sims ("D. App") at 2 (docket entry 87). In Count One the grand jury charged that Sims conspired with ten others, including Anson McPhail, Tracey Ray, and James Harris, to possess with intent to distribute and to distribute 500 grams or more of a mixture and substance containing a detectable amount of cocaine, and 50 grams or more of a mixture and substance containing a detectable amount of cocaine base or "crack" cocaine, in violation of Title 21, United States Code, Section 846.

On December 20, 2004, the defendant pleaded guilty to Count One pursuant to a written plea agreement before

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[1] In addition to these three claims, the defendant in Point 4 of his brief adopts the arguments raised by his co-appellants. Co-appellant Chas Glenn's appeal was dismissed by this Court on March 2, 2007, and no motion for reinstatement of the appeal has been filed. Co-appellant Kenneth Ford's motion to withdraw his appeal was granted by this Court on March 6, 2006. Co-appellant Anson McPhail filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), to which the government responded on May 9, 2007. No decision has been issued. As there are no arguments raised by the co-appellants that pertain to the defendant, the government offers no further response to Point 4 in this brief.

United States Magistrate Judge Holly B. Fitzsimmons. (D. App. 17-67). At the conclusion of the guilty plea, the court scheduled sentencing for March 11, 2005, before United States District Judge Janet C. Hall. (D. App. 66).

On March 11, 2005, Judge Hall continued sentencing to June 15, 2005. On that date Judge Hall conducted a sentencing hearing and sentenced the defendant principally to 120 months of imprisonment to be followed by a five year term of supervised release. (D. App. 10; 68-89).

On June 20, 2005, the district court entered judgment. (D. App. 7; 10-11) (docket entry 452). The defendant, who was incarcerated, addressed a notice of his intent to appeal to the clerk's office on or about June 20, 2005; the notice was processed in the prison on June 27, 2005, and received in the clerk's office and docketed on July 8, 2005. (D. App. 7) (docket entry 463); (D. App. 16).

The defendant is presently serving his sentence of incarceration.

Statement of Facts and Proceedings Relevant to this Appeal

A. The guilty plea

On December 20, 2004, the defendant pleaded guilty to Count One before Magistrate Judge Fitzsimmons. During the hearing, Magistrate Judge Fitzsimmons advised the defendant that the maximum sentence for Count One was life imprisonment and that there was a mandatory

minimum term of imprisonment of ten years. (D. App. 43-44). The defendant was also advised of the elements of the offense, which were that two or more people entered into an agreement with the intent to distribute cocaine or cocaine base, that the defendant knowingly joined the agreement, and that the amount of cocaine base involved in the conspiracy exceeded 50 grams. (D. App. 54). The defendant advised the court that he understood the charge and, moreover, had been given ample time to discuss it with his attorney. (D. App. 54).

The government then summarized its evidence. (D. App. 55-57). In this regard, government counsel explained that during a wiretap investigation of a drug distribution organization in Ansonia, Connecticut, the defendant was intercepted as he participated in several telephone calls with co-defendant Anson McPhail, a leading drug dealer in Ansonia. During one of these telephone calls, intercepted on the first day of the wiretap, the defendant ordered a half-ounce of cocaine base from McPhail. (D. App. 57). McPhail immediately contacted another co-defendant, James Harris, and gave him Sims' telephone number for the purpose of contacting Sims and completing the half-ounce transaction. (D. App. 57). Telephone toll records confirm that Harris then called the defendant as directed. (D. App. 57-58). A short while later federal agents intercepted Sims as he advised McPhail that he had money to pay McPhail for a prior drug deal. McPhail instructed the defendant to give the funds to Harris. (D. App. 58).

As the investigation continued, another conspirator and co-defendant, Tracy Ray, was intercepted as he used the defendant's telephone to call McPhail and order three eight-balls of cocaine base that he intended to "bust ... down with Dean." (D. App. 58). The government explained that based on the investigation, including information from cooperating witnesses, Ray and the defendant were long-time associates in the drug distribution trade. (D. App. 59). Finally, the prosecution explained that based on the totality of the government's evidence, which included intercepted telephone conversations and information provided by cooperating witnesses, the government would show that the defendant, through his own conduct and activities, "was involved in the acquisition and distribution of at least 81 grams of cocaine base." (D. App. 59).

The defendant then confirmed that he agreed with the government's summary of the facts in the case:

THE COURT: All right. Mr. Sims, do you agree with Mr. Runowicz' summary of what you did?

DEFENDANT: Yes, ma'am.

THE COURT: Do you have a disagreement with any significant fact that he stated?

DEFENDANT: No, ma'am.

(D. App. 59). The Magistrate Judge then particularized the inquiry:

THE COURT:	Well, let me ask you specifically, Mr. Sims. Between June 2003, and February 24th of 2004, was there an agreement to distribute crack, or cocaine base, involving you and Mr. McPhail, or --
DEFENDANT:	Yes, ma'am, I made a –
THE COURT:	-- one of the --
DEFENDANT:	I made a call, yes, ma'am. I made a call around that time, I believe.
THE COURT:	All right.
DEFENDANT:	Yes, ma'am.
THE COURT:	And the purpose of the call was to obtain drugs to distribute?
DEFENDANT:	Yes, ma'am.
THE COURT:	All right.
DEFENDANT:	(Inaudible.)

THE COURT: *And during that period of time, did you distribute more than 50 grams of crack?*

DEFENDANT: *Yes, yes, ma'am, yes.*

(D. App. 59-60) (emphasis added).

When the Magistrate sought to confirm that the defendant acted intentionally, the defendant stated that he was "getting high most of the time." (D. App. 60). In this vein, Sims told the court that he used and distributed crack cocaine. (D. App. 61). The court then immediately confirmed that Sims understood "the distinction . . . between using yourself, and giving it to other people." The defendant assured Magistrate Judge Fitzsimmons that he comprehended the distinction. (D. App. 61).

The court concluded the change of plea hearing by determining that based on the statements made by the defendant under oath, and statements by both attorneys, the defendant was competent to plead guilty and that there was a factual basis for the defendant's plea. (D. App. 63). The court ordered that a presentence report be prepared, (D. App. 64), and then scheduled sentencing for March 11, 2005. (D. App. 64-65, 66).

B. The presentence report

The presentence report,[2] as utilized by the district court for this sentencing, contained a section detailing defendant's offense conduct. Included within this section of the presentence report, the probation officer provided information from three confidential sources, designated CS1, CS2, and CS3, who stated that they had been involved in repeated drug transactions with the defendant concerning quantities of cocaine base from eight-ball size amounts (approximately 3.5 grams) up to ounce quantities (28 grams). (P.S.R. ¶ 16).

The probation officer then determined that the base offense level for the defendant was 34 due to the quantity of cocaine base involved. (P.S.R. ¶ 20). With a three level reduction for acceptance of responsibility (P.S.R. ¶ 26), the probation officer determined that defendant's total offense level to be 31. (P.S.R. ¶ 27). The probation officer, listing the defendant's criminal history, concluded that the defendant had one criminal history point, which placed him in criminal history category I. (P.S.R. ¶ 33). Based on a total offense level of 31, coupled with a criminal history category of I, and the effect of the statutory mandatory minimum of 120 months, the report determined the defendant's guideline imprisonment range to be 120 to 135 months. (P.S.R. ¶ 68).

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[2] The presentence report ("P.S.R.") has been filed in a separate sealed appendix. All citations to the report will be to the paragraphs of that report.

C. The sentencing hearing

The sentencing hearing scheduled for March 11, 2005, did not go forward and the matter was rescheduled for June 15, 2005. (D. App. 7) (docket entry 356).

On June 15, 2005, Judge Hall reconvened the sentencing hearing and promptly explored whether the defendant had elected to pursue the benefits of the safety-valve:

> I have a recollection of [defense counsel] saying that he hadn't really had a chance . . . to focus Mr. Sims on the issue [of safety-valve] and, therefore, . . . he thought it might yield a different result if he were to apply his years of experience. I'm told by the probation officer there has been no further proffer. Should I take that to mean we're ready to proceed to sentencing and the opportunity has been provided and . . . for whatever reason[,] the defendant . . . doesn't wish to attempt to qualify for safety valve[.] [O]r is there some other impediment?

(D. App. 69-70). Defense counsel advised the court that there was no other impediment, and although he had spoken to his client at length about the possibility of another proffer and explained how the mandatory minimum component of the statute would be favorably affected with a successful safety-valve proffer, Sims "declined that opportunity so therefore, we're prepared to go forward [with sentencing]." (D. App. 70).

Judge Hall did not drop the matter, however. Instead, she explained that she had adjourned the March 11, 2005, sentencing hearing to resolve whether the defendant had accepted responsibility and to be certain that the defendant had an ample opportunity to consult with counsel and consider whether he wished to provide a safety-valve proffer. (D. App. 70-71). The Judge then put the matter directly to the defendant:

> *So you have considered it. You feel you understand what's at issue.* Obviously I must sentence you to a mandatory minimum sentence here today unless you qualify for safety valve[,] which currently you do not.... The fact of the matter is that you have a mandatory minimum and so your guideline range with acceptance ends up [at] 120 to 135 months even though your guideline range is below 120. I have no authority to give you a lesser sentence. I can give you more than 120. I can tell you I'm not inclined to do that. I think 120 is an awfully long sentence. But I can't give you less because of the fact of this mandatory minimum that's in the statute. I'm not allowed to do it. If I did it, I would be violating my oath of office and Attorney Runowitz would get me reversed faster than I can get off the bench. *I want it clear to you currently as the situation stands, the sentence is the mandatory minimum of ten years. Were you to qualify for safety valve[,] that allows me to ignore the mandatory minimum and then you would also get a reduction from the guidelines.* You're still talking about likely a significant guideline range,

> but it is certainly below 120[.] I don't know if you could qualify *but I just want to be certain that you understand you have that opportunity*.

(D. App. 72-73) (emphasis added). With this complete explanation before him, the defendant replied, "Yes, ma'am." (D. App. 73).

After being advised by both the government (D. App. 74) and the defendant (D. App. 75) that neither party had any objections to the presentence report, the court determined the defendant's offense level to be 31 with a criminal history category I, which resulted in an advisory Guidelines range of 108 to 135 months. (D. App. 77). However, given the operation of the mandatory minimum, the court recognized that the lower end of the range was 120 months of imprisonment. The defendant did not object to this calculation. (D. App. 77).

Acknowledging that the Guidelines were only one of the factors to be considered under 18 U.S.C. § 3553(a), Judge Hall then solicited defense counsel's view as to an appropriate sentence. (D. App. 78). Counsel urged the court to sentence Sims to no more than the mandatory minimum, noting that the defendant had battled drug addiction for much of his life and that his participation in the drug conspiracy was marked by repeatedly purchasing drugs – some of which he consumed and some of which he distributed. (D. App. 78-79). Counsel further argued that the defendant had redeeming qualities as indicated by the family members present in the court to offer support. (D. App. 79).

After hearing from the government, Judge Hall concluded that a sentence greater than 120 months was unwarranted; she accordingly imposed the statutorily mandated minimum term of incarceration of 120 months to be followed by five years of supervised release. (D. App. 85-86).

Summary of Argument

1. The district court did not clearly err in sentencing the defendant to the minimum sentence mandated by 21 U.S.C. § 841(b). The defendant expressly agreed with the government's summary of his offense conduct, including that his participation in the drug conspiracy involved the acquisition and distribution of at least 81 grams of cocaine base. The defendant, moreover, admitted to conspiring with others to distribute cocaine base and that the quantity involved more than 50 grams of cocaine base. When the United States Probation Officer determined that the defendant's relevant drug quantity involved 371 grams of cocaine base, the defendant did not object. The sentencing judge was entitled to rely on these admissions. Furthermore, the defendant misplaces reliance on *United States v. Williams*, 247 F.3d 353 (2d Cir. 2001), for two reasons. First, *Williams* plainly distinguishes between substantive distribution offenses and conspiracy offenses. Second, in *Williams*, the defendant vigorously contested drug quantity whereas in the case at bar, the defendant admitted to distributing more than 50 grams of crack cocaine.

2. Defense counsel did not ineffectively represent his client at sentencing. It is frivolous to suggest that counsel should have sought a sentence of less than 120 months of imprisonment given that the defendant in several instances admitted to distributing a quantity of cocaine base sufficient to trigger the mandatory minimum contemplated by 21 U.S.C. § 841(b).

3. The defendant did not qualify for the safety-valve because he had not truthfully provided to the government all information and evidence he had concerning the offenses that were part of the same course of conduct that led to his conviction. It is undisputed that the district court postponed the defendant's sentencing when it was clear he had not satisfied U.S.S.G. § 5C1.2(a)(5) of the safety-valve provisions. Following a three month adjournment, the district court made three separate inquiries of Sims and his attorney concerning the defendant's decision to refrain from a safety-valve proffer. In each instance the defense assured the district court that although the defendant understood his options, he was knowingly electing to not seek the safety-valve. Although it is the defendant's burden to demonstrate entitlement to safety-valve, here Sims simply advised the court that he was not interested. Under these circumstances, it was not clear error for the district court to impose the statutory mandatory minimum sentence.

Argument

I. The district court did not clearly err when it imposed the mandatory minimum term of imprisonment following the defendant's admission to distributing more than 50 grams of cocaine base

A. Relevant facts

On December 20, 2004, the defendant pleaded guilty to Count One of the superseding indictment, which charged that he conspired with others to, among other things, distribute 50 grams or more of cocaine base. As part of the proceeding, the government summarized some of the evidence against the defendant. Specifically, the prosecutor: (1) described several intercepted telephone conversations between the defendant and a coconspirator, Anson McPhail, during which the defendant ordered quantities of cocaine base and advised McPhail that he now had money owed to McPhail from prior drug transactions (D. App. 57-58); (2) outlined intercepted telephone conversations between McPhail and another coconspirator, Tracy Ray, who used the defendant's telephone to order crack cocaine from McPhail for the express purpose of "bust[ing] it down with [the defendant]." (D. App. 58); (3) identified Tracy Ray as a long-time associate of the defendant in the drug distribution trade; and (4) noted that cooperating witnesses were prepared to testify that the defendant was personally "involved in the acquisition and distribution of at least 81 grams of cocaine base." (D. App. 59).

The defendant promptly told the Magistrate Judge that he agreed with the government's representations. (D. App. 59). When the court specifically asked whether there was "an agreement to distribute crack, or cocaine base, involving you and Mr. McPhail[,]" the defendant answered "yes." (D. App. 59-60) A moment later, the defendant responded affirmatively when the court inquired if during the time charged in the superseding indictment he "distribute[d] more than 50 grams of crack?" (D. App. 60).

Thereafter, the defendant did not object to the probations officer's determination that his relevant conduct involved approximately 371grams of cocaine base. (D. App. 75; P.S.R. ¶¶ 16 & 20).

B. Governing law and standard of review

For a defendant convicted of a federal drug trafficking offense to be sentenced to a statutorily mandated minimum term of incarceration, the requisite drug quantity (here, 50 grams of cocaine base) must either be found by a jury beyond a reasonable doubt or admitted to by the defendant. *United States v. Gonzalez*, 420 F.3d 111, 125 (2d Cir. 2005).

In *United States v. Vasquez*, 389 F.3d 65, 74 (2d Cir. 2004), this Court explained that when reviewing a district court's ultimate application of the Guidelines to the facts, it takes an "either/or approach," under which the Court reviews "determinations that primarily involve issues of law" *de novo* and reviews "determinations that primarily

involve issues of fact" for clear error. *Id*. The quantity of drugs attributable to a defendant for sentencing purposes "is a question of fact for the district court, subject to a clearly erroneous standard of review." *United States v. Hazut*, 140 F.3d 187, 190 (2d Cir. 1998); *accord United States v. Richards*, 302 F.3d 58, 68 (2d Cir. 2002); *United States v. McLean*, 287 F.3d 127, 133 (2d Cir. 2002); *United States v. Prince*, 110 F.3d 921, 924 (2d Cir. 1997).[3]

C. Discussion

In this appeal the defendant submits that the district court committed clear error when it sentenced him to the statutory mandatory minimum without first determining the quantity of drugs he consumed personally as opposed the quantity he distributed.

In making this argument, the defendant blithely ignores three instances in the record where it was established that he distributed more than 50 grams of crack cocaine. First, at his change of plea hearing, Sims accepted the government's very specific estimate that he distributed at least 81 grams of cocaine base during the life of the

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[3] This Court has held that "even after *Booker's* excision of § 3742(e), it is appropriate to maintain a clear error standard of review for appellate challenges to judicial fact-finding at sentencing." *United States v. Garcia*, 413 F.3d 201, 221 (2d Cir. 2005); *see also United States v. Selioutsky*, 409 F.3d 114, 119 (2d Cir. 2005) (recognizing that, after excision of § 3742(e), court continues to review issues of fact for clear error).

conspiracy. Second, Sims affirmatively *admitted* distributing more than 50 grams of cocaine base in response to a direct question posed by the Magistrate. (D. App. 59-60). Third, Sims did not object to the probation officer's determination than he was involved in a conspiracy to distribute more than 50 grams of crack cocaine. (D. App. 75; P.S.R. ¶¶ 16 & 20).

In *Gonzalez*, 420 F.3d at 125, this Court held that a defendant could not be sentenced to increased penalty ranges for aggravated drug offenses "unless a jury found *or the defendant himself admitted* the specified quantity element." (Emphasis added). Once that threshold quantity has been found, either by the jury or by the defendant's admission, it is well settled that district courts are bound by the statutory minimum and maximum sentences that attach to such quantity determinations. *See United States v. Vaughn*, 430 F.3d 518, 526-27 (2d Cir. 2005) (holding that although district court may sentence on the basis of acquitted conduct it has found by a preponderance, the district court must adhere to the statutory maxima and minima authorized by the jury's finding of quantity), *cert. denied*, 547 U.S. 1060 (2006)

To support his claim that the district court erred by not determining personal level of consumption of cocaine base, the defendant relies on *United States v. Williams*, 247 F.3d 353 (2d Cir. 2001), for the proposition that quantities of drugs intended for personal use are not to be counted when calculating drug quantities for sentencing purposes under 21 U.S.C. § 841. *Williams* is legally and factually distinguishable from this case, however.

In *Williams*, the defendant had been convicted after trial of one count of possession of cocaine base with the intent to distribute and three counts relating to his illegal possession of a firearm. *Id*. at 355. On re-sentencing after one of the weapons convictions had been vacated, the defendant, who never admitted to the quantity of drugs he possessed with the intent to distribute, argued that the amount of drugs possessed for personal consumption should be excluded from the sentencing computation. The trial court disagreed and sentenced him on the full amount of drugs possessed. In vacating the defendant's twenty year mandatory minimum sentence, this Court held that it was error for the sentencing judge to rely on the jury's verdict of guilty to establish that Williams had intended to distribute more than 50 grams of cocaine base since the jury had been instructed that the government did not have to prove a specific quantity so long as the government proved that Williams had possessed the drug with the intent to distribute it. *Id*. at 359. In addition, the *Williams* Court concluded that where "there is no conspiracy at issue, the act of setting aside narcotics for personal consumption is not only not a *part of* a scheme or plan to distribute these drugs, it is actually *exclusive* of any plan to distribute them." *Id*. at 358 (emphasis in original).

The holding in *Williams* is inapposite for two reasons. First, the offenses of conviction are different – a detail the defendant glosses over in this appeal but a fact emphasized by the Court in *Williams*. The defendant in *Williams* was convicted of possession with the intent to distribute in violation of 21 U.S.C. § 841, whereas in the case at bar, Sims was convicted of conspiracy in violation of 21

U.S.C. § 846. This distinction was critical to the court in *Williams*, which recognized that sentencing courts need not distinguish between cocaine intended for distribution and cocaine intended for personal use where a defendant has been convicted of a conspiracy offense. *Id*. at 357-358 (cases involving drug conspiracies are "inapposite to the one before us, which . . . involves only possession with intent to distribute, and not conspiracy."). To make its point, the *Williams* Court quoted with approval the Seventh Circuit's decision in *United States v. Wyss*, 147 F.3d 631, 632 (7th Cir. 1998):

> The case would be different . . . if the charge were conspiracy rather than possession[.] Suppose that X sells Y a kilogram of cocaine in circumstances that make Y a conspirator with X and not merely a buyer from him. The amount of drugs involved in the conspiracy is unaffected by the use that Y makes of the drugs. It makes no difference whether he sells the entire amount and buys drugs for his personal consumption on the open market with the proceeds or keeps a portion of the drugs to consume personally as compensation for his participation in the conspiracy.

Williams, 247 F.3d at 358. This holding is consistent with a number of other circuit courts that have addressed the issue. *See*, *e.g*., *United States v. Page*, 232 F.3d 536, 542 (6th Cir. 2000) (drugs obtained for personal use properly included in determining quantity defendant knew was distributed by the conspiracy); *United States v. Asch*, 207 F.3d 1238, 1244 (10th Cir. 2000) (where member of

conspiracy handles drugs both for distribution and personal use, entire amount of drugs is relevant for guidelines calculations); *United States v. Behler*, 100 F.3d 632, 637 (8th Cir. 1996) (drug quantities purchased for personal use by a member of a conspiracy are included in determining total drug quantity); *United States v. Antonietti*, 86 F.3d 206, 209-10 (11th Cir. 1996) (marijuana intended for personal use properly included in determining offense level for conspiracy conviction); *United States v. Snoot*, 60 F.3d 394, 395-96 (7th Cir. 1995); *United States v. Innamorati*, 996 F.2d 456, 492 (1st Cir. 1993).

Second, *Williams* is inapposite because in that case the jury did not determine the quantity of drugs involved in the offense. Or, as the Court aptly observed, "there is nothing in the record that would permit this court to affirm Judge Glasser's conclusion as to the quantity of cocaine that Williams intended to distribute." 247 F.3d at 359. By contrast, in the matter at hand, the defendant told the court that although he used drugs, he admitted to distributing more than 50 grams of cocaine base. (D. App. 60). Similarly, whereas the defendant in *Williams* contested drug quantity, in this case Sims affirmatively acknowledged the government's assertion that he distributed at least 81 grams of cocaine base. (D. App. 59). Additionally, unlike the defendant in *Williams*, this defendant did not object to the Guidelines calculation contained in the presentence report – even though the probation officer conservatively calculated the defendant's relevant conduct to be 371 grams of cocaine base. (D. App. 75; P.S.R. ¶ 16).

Accordingly, given the defendant's unambiguous admissions on drug quantity, coupled with the defendant's misplaced reliance on *Williams*, Judge Hall did not err – let alone commit clear error – when she reluctantly concluded that the mandated minimum term of 120 months of imprisonment applied to this case.

II. Trial counsel was not ineffective at sentencing for failing to ask the sentencing court to determine the amount of drugs the defendant personally consumed as opposed to having distributed given the defendant's admission that he had distributed more than 50 grams of cocaine base

A. Relevant facts

The facts pertinent to the consideration of this issue are set forth in the Statement of Facts above.

B. Governing law and standard of review

To prove ineffective assistance of trial counsel, a defendant must show both that his counsel's representation was unreasonable under prevailing norms, *i.e.*, that it fell below an objective standard of reasonableness, *Strickland v. Washington*, 477 U.S. 668, 688 (1984), and "affirmatively prove prejudice" arising from counsel's alleged deficient representation. *Id*. at 693.

A defendant bears a heavy burden of showing "both (1) that counsel's performance was so unreasonable under prevailing professional norms that counsel was not

functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment, and (2) that counsel's ineffectiveness prejudiced the defendant such that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *United States v. Cohen*, 427 F.3d 164, 167 (2d Cir. 2005) (quoting *United States v. Gaskin*, 364 F.3d 438, 468 (2d Cir. 2004).

C. Discussion

As a second basis for reversal of his sentence, the defendant asserts that he received ineffective assistance of counsel at his sentencing because his attorney did not argue that some of the cocaine base involved in the case should have been attributed to the defendant's personal use and, had he done so, the defendant's sentence would have been lower. (D. Brief at 16).

Generally, this Court has expressed a "baseline aversion to resolving ineffectiveness claims on direct review." *United States v. Williams*, 205 F.3d 23, 35 (2d Cir. 2000), even where the defendant has new counsel on appeal. *United States v. Khedr*, 343 F.3d 96, 99-100 (2d Cir. 2003). When faced with a claim of ineffective assistance of counsel on direct appeal, this Court may decline to hear the claim, preferring the defendant to raise the issue pursuant to a writ of habeas corpus under 28 U.S.C. § 2255, may remand the claim to the district court for any necessary fact finding, or may decide the claim on the record before the Court. *United States v. Morris*, 350 F.3d 32, 39 (2d Cir. 2003). This Court can decide an

ineffective assistance claim first raised on direct appeal when "its resolution is 'beyond any doubt' or to do so would be in the interest of justice." *United States v. Matos*, 905 F.2d 30, 32 (2d Cir. 1990) (quoting *United States v. Aulet*, 618 F.2d 182, 186 (2d Cir. 1980)).

In this appeal the question of whether counsel performance at sentencing was so unreasonable under prevailing professional norms that he essentially did not function as the 'counsel' guaranteed the defendant by the Sixth Amendment is readily answered in the negative and can be resolved at this juncture. As a threshold matter, the government has explained why the drug usage/drug distribution distinction does not apply to this case on either a legal or factual basis. *See supra*, Argument I. By extension, the defendant's ineffective assistance argument is equally untenable, especially when analyzed under *Strickland*.

Sims pleaded guilty to conspiring with others to possess with intent to distribute and distribute controlled substances and, during his plea, admitted that he had distributed more than 50 grams of cocaine base. (D. App. 60). As discussed *supra*, in Argument I, Sims' admission to the court that he distributed more than 50 grams of cocaine base, his agreement with the prosecutor that he distributed "at least 81 grams of cocaine base" and his subsequent acceptance of the factual findings contained in the presentence report combined to form an overwhelming factual record that no defense attorney could reasonably expect to challenge. At sentencing, the defendant's counsel, who was present when the defendant

pleaded guilty and admitted distributing more than 50 grams of cocaine base, clearly recognized that the record justified imposition of the statutorily mandated minimum. Accordingly, he successfully urged the court to impose the most lenient sentence under the circumstances. (D. App. 79). This does not constitute ineffective assistance of counsel.

Stated differently, it is plain that the defendant received effective assistance of counsel. Sentencing counsel did all that he could do given the harsh reality that his client stood convicted of a conspiracy drug offense that required the imposition of a mandatory minimum sentence. Counsel discussed with the defendant how the statutory minium mandatory would affect the sentencing options of the district court and the possibility of a safety-valve proffer and the attendant benefits. (D. App. 70). Faced with the defendant's admission to *distributing* 50-plus grams of cocaine base, cognizant that the offense of conviction involved a conspiracy, and aware that acceptance of responsibility was an open issue, defense counsel prudently did not attempt to draw the parties into a debate as to what quantity of drugs the defendant consumed personally.

The failure to raise an otherwise futile objection does not make counsel ineffective. *United States v. Cohen*, 427 F.3d 164, 170 (2d Cir. 2005). Instead, sentencing counsel argued forcefully all the necessary factors to convince the district court to impose the most lenient sentence possible. Certainly, counsel was not deficient in these efforts, and he certainly did not fall below an objective standard of

reasonableness by failing to ask the district court to quantify defendant's personal use cocaine base.

Accordingly, since the record of this case clearly demonstrates that defense counsel's representation of defendant at sentencing did not fall below an objective standard of reasonableness, Sims' claim that he received ineffective assistance of counsel must fail.

III. Notwithstanding the district court's willingness to allow the defendant to seek and obtain a safety-valve reduction in his sentence, the defendant clearly stated on the record his election to not pursue this option

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the Statement of Facts above.

B. Governing law and standard of review

To obtain safety-valve relief, a defendant must, among other things, truthfully provide to the government all information and evidence he has concerning the offenses that were part of the same course of conduct that led to his conviction. 18 U.S.C. § 3553(f). A defendant seeking the benefit of a safety-valve reduction below a mandatory minimum bears the burden of proving that he has met all five of the criteria listed in 18 U.S.C. § 3553(f). *United States v. Holguin*, 436 F.3d 111, 119 (2d Cir. 2006). This Court has explained that "[i]n order to award a safety-

valve deduction, the District Court must find that an offender has proved, by a preponderance of the evidence, satisfaction of all five safety-valve criteria." *United States v. Nuzzo*, 385 F.3d 109, 117-18 (2d Cir. 2004); *see also United States v. Tang*, 214 F.3d 365, 371 (2d Cir. 2000) ("A defendant bears the burden of proving that he has met all five safety valve criteria."); *United States v. Conde*, 178 F.3d 616, 620 (2d Cir. 1999) ("The defendant has the burden of proving that he meets all of the criteria of the safety-valve provisions."); *id*. at 621 (the burden is on the defendant to prove that he has satisfied all of the safety-valve reduction criteria"); *United States v. Ortiz*, 136 F.3d 882, 883 (2d Cir. 1997) (per curiam) ("Appellant had the burden of proving that he met all five criteria of the safety valve provisions.").

As discussed below, rather than press for the safety-valve at his sentencing hearing, the defendant affirmatively told the district court that he did not want to pursue the matter. Because Sims did not lodge a timely objection to the safety-valve, his claim is reviewable only for plain error. *See* Fed. Rule Cr. Proc. Rule 52(b); *United States v. McLean*, 287 F.3d 127, 135 (2d Cir. 2002).

A trilogy of decisions by the Supreme Court interpreting Rule 52(b) has established a four-part plain error standard. *See United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Olano*, 507 U.S. 725, 732 (1993). Under plain error review, before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that was "plain" (which is "synonymous with

‘clear’ or equivalently ‘obvious’”), *see Olano*, 507 U.S. at 734; and (3) that affected the defendant’s substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *Johnson*, 520 U.S. at 466-67.

C. Discussion

The defendant asserts that the district court erred by remaining silent and not creating a record for appellate review concerning his eligibility for safety-valve relief. This claim fails factually because the district court, rather than remain silent, amply created a record that shows it was the defendant’s clear choice – in the wake of two opportunities – to not seek the safety-valve. The defendant’s claim fails legally too, for the defendant ignores that it is a defendant’s obligation to show that he qualifies for safety-valve consideration. These defects are addressed in turn.

First, a review of the sentencing transcript reveals that contrary to Sims’ argument on appeal, Judge Hall left no ambiguity as to whether the defendant was entitled to the safety-valve.

After the district court noted it had continued the sentencing hearing in order to give the defendant an opportunity to qualify for safety-valve consideration, sentencing counsel advised the court that he had conferred with his client about submitting to a safety-valve proffer

and the defendant had declined to do so. (D. App 70). The district court, obviously concerned about the defendant's decision, stated that one of the reasons for having postponed the sentencing was because there "appeared to be a possibility that Mr. Sims wished to attempt to demonstrate to the court that he was entitled to safety valve." (D. App. 71). Judge Hall then noted that "the message I'm getting is that Mr. Sims does not want to do so." (D. App. 71). To ensure that she had correctly gauged the defendant's position, Judge Hall directly asked Sims if what counsel had said was correct. The defendant replied "yes." (D. App. 72). After explaining to the defendant that she had no authority to impose a sentence below the statutory minimum unless he were to qualify for the safety valve, Judge Hall yet again endeavored to ascertain that the defendant understood that the safety valve presented an opportunity for him to be sentenced to less than 120 months of imprisonment. The defendant again indicated that he understood. (D. App. 72-72). The defendant then proceeded to be sentenced.

Against this backdrop, the government respectfully submits that the district court created an appropriate record for appellate review, one which clearly establishes that the defendant did not qualify for safety-valve consideration because he had declined – on the record and in response to the court's thorough canvass – the opportunity to have a proffer session.

Second, the defendant made no claim at his sentencing hearing that he had met any of the safety-valve requirements and was, therefore, eligible for safety-valve

relief. To the contrary, by his consistent rejection of the district court's overtures to consider doing a safety-valve proffer, and his decision to forego such a session despite the court's concerned urging, he waived any claim that he was eligible for a reduced sentence below the statutory mandatory minimum. By defendant's rejection of the opportunity to undergo a safety-valve proffer and by his silence at the sentencing hearing about any possible qualification for the safety valve, the defendant did not place the applicability of safety-valve relief at issue. Since he raised no issue and no claim of eligibility, there were no disputed issues for the district court to resolve. He cannot now claim the district court committed reversible error by failing to address and resolve what is best characterized as a non-issue.

Accordingly, in absence of any claim by the defendant at his sentencing hearing that he was entitled to safety-valve relief, and considering his failure to demonstrate in any fashion that he had met the qualifications for such relief, the district court, knowing that the defendant had rejected the opportunity for a safety-valve proffer, did not commit error by imposing the mandatory minimum sentence of 120 months of imprisonment.

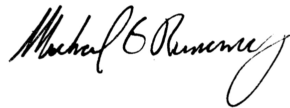
Conclusion

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

Dated: January 25, 2008

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

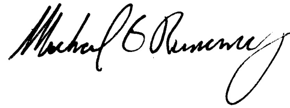


MICHAEL E. RUNOWICZ
ASSISTANT U.S. ATTORNEY

Michael J. Gustafson
Assistant United States Attorney (of counsel)

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

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 6,979 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



MICHAEL E. RUNOWICZ
ASSISTANT U.S. ATTORNEY

ADDENDUM

21 U.S.C. § 846

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

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);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

* * *

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.

* * *

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.