05-1841-cr

To Be Argued By:
MARK D. RUBINO

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United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 05-1841-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

JAVIER ECHEVERRI, also known as El Mono,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

This is an appeal from a judgment entered in the District of Connecticut (Underhill, J.) following the defendant's guilty plea to the charge of conspiring to possess with intent to distribute one kilogram or more of heroin. The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction over the defendant's challenge to the sentence pursuant to 18 U.S.C. § 3742.

STATEMENT OF ISSUE PRESENTED

1. Did the district court clearly err in attributing one kilogram of heroin to the defendant for purposes of calculating his base offense level pursuant to U.S.S.G. § 2D1.1(c)(4)?

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Preliminary Statement

Defendant Javier Echeverri pleaded guilty to a one-count indictment charging him with conspiracy to possess with intent to distribute one kilogram or more of heroin. In a post-*Booker* sentencing, the district court (Stefan R. Underhill, J.) determined that the quantity of heroin attributable to the defendant was one kilogram -- that is, the amount of heroin which he agreed to sell to his buyers, and the amount which they undertook to re-sell with his

knowledge and participation. The district court then sentenced the defendant to 97 months of imprisonment.

On appeal, the defendant argues that the district court erred in its determination that one kilogram of heroin was attributable to him. He maintains that although he agreed to sell a kilogram of heroin, the amount which was actually delivered to the initial buyers weighed only 975 grams. The defendant claims that his sentence should have been based on this lower amount. For the reasons that follow, the defendant's contention is meritless, and this Court should affirm the defendant's sentence.

Statement of the Case

On May 29, 2003, the defendant was arrested in Miami, Florida, and charged by criminal complaint with conspiring to possess with intent to distribute one kilogram or more of heroin, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)(i). On June 11, 2003, the defendant was indicted by a federal grand jury in Connecticut on that same charge. Defendant's Appendix ("DA") DA 3. The case was assigned to the Honorable Stefan R. Underhill, in the United States District Court for the District of Connecticut.

In advance of trial, the defendant provided notice to the government that he intended to pursue a duress defense at trial. DA 6. The government filed a motion to preclude the defendant from advancing this defense and requested a hearing on the matter. *Id.* Thereafter, on May 28, 2004, the district court held a hearing on the government's motion, and ruled that, because the defendant's proposed

defense would fail as a matter of law, the court would not permit the defendant to pursue such a defense at trial. DA 8-9. As a result, on June 10, 2004, the defendant entered a conditional guilty plea to the sole count in the indictment, reserving his right to appeal the court's ruling with regard to his duress defense. DA 9.

On March 31, 2005, the district court sentenced the defendant principally to 97 months of imprisonment, and entered judgment. DA 28-29. Judgment entered on April 7, 2005. DA 11. On April 8, 2005, the defendant filed a timely notice of appeal. DA 30. The defendant is presently serving his sentence.

Statement of Facts

A. The Offense Conduct

On May 5, 2003, a cooperating witness ("CW1") agreed to meet with Miguel Nunez and Gary Baez, who were individuals CW1 knew to be drug traffickers, for the purpose of making a controlled purchase of one kilogram of heroin. Government Appendix ("GA") 17.[1] The meeting, which took place at a Dunkin' Donuts on East Avenue, in Norwalk, Connecticut, was recorded and surveilled by law enforcement officers. *Id.* After CW1 gave the agents the pre-determined signal that the heroin was actually in the Honda Accord, agents arrested Nunez and Baez. *Id.* In a search incident to arrest, agents seized

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[1] These background facts, which are largely undisputed by the defendant, are set forth in the Government's Position on Sentencing, appended at GA 17-21.

a large package of suspected heroin under the passenger seat, GA 149, and a second smaller plastic bag of suspected heroin from the center console area of the vehicle. GA 150. Both substances field-tested positive for the presence of heroin. GA 149, 150. The substances were later analyzed by the DEA lab. The net weight of the substance in the larger package was 999.4 grams of heroin. GA 149. The smaller bag contained 2.2 net grams of heroin. GA 150.

Immediately following their arrest, Nunez and Baez agreed to cooperate with the DEA, and both provided detailed post-arrest statements. DA 15, 20. According to Nunez, during the week before his arrest, he was contacted by a Colombian male known as "Mono," later identified as defendant Javier Echeverri. DA 16. Nunez stated that the defendant resided in Miami, Florida, but that he had met the defendant while he was in New York a few months earlier through another narcotics associate named "Lucas." *Id.* According to Nunez, the defendant contacted him in an attempt to locate Lucas, but Nunez had not seen Lucas for a while. *Id.* Nunez stated that he and the defendant had a series of telephone calls regarding the sale of one kilogram of heroin. *Id.* Eventually, Nunez agreed to purchase one kilogram of heroin from Mono for $58,000. *Id.*

Nunez stated that the defendant instructed him to pick up the kilogram of heroin from a Colombian woman in New York named "Vanessa." DA 16. According to Nunez, he and Baez picked up the kilogram from Vanessa on Friday May 2, 2003, at a computer store located at 82nd and Roosevelt Avenues, in Queens, New York. *Id.* Nunez

stated that the heroin was concealed in an orange juice container, and that he and Baez provided $10,000 in cash to Vanessa as partial payment for the heroin. *Id.*

Nunez and Baez stated that after picking up the heroin from Vanessa, they weighed the heroin and determined that the actual weight was 975 grams. DA 16, 21. Because the deal with CW1 was for one kilogram of cocaine, Nunez and Baez added 150 grams of "cut" to the heroin. DA 21. Baez stated that the heroin weighed 1,125 grams once he added the "cut." *Id.* According to Baez, the heroin was stored at his home in New York until delivery to CW1. *Id.* Baez consented to a search of his apartment where the remaining heroin was stored.[2]

At the time of his arrest, Nunez stated that, since they received the heroin, the defendant and Vanessa had called numerous times to find out when they were going to receive the balance of the money. DA 17. Nunez further stated that the defendant had indicated that, if the first deal worked out well, the defendant had cocaine and more heroin available. *Id.*

After their arrest and under the direction of the DEA, Nunez and Baez made consensual recordings of certain conversations with both Vanessa and the defendant

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[2] Baez told the agents that there would be less than 125 grams in his apartment because that is where the sample (the 2.2 grams seized from the center console of his vehicle) that Baez had given to CW1 had come from. DA 21. The precise quantity of heroin later seized from the apartment was not made part of the sentencing hearing.

regarding payment for the heroin. *See* Summary of calls set forth in the Government's Position on Sentencing, GA 19-20, and the Presentence Investigation Report ("PSR," submitted under seal with this Court) 3, ¶ 9.[3] Agents directed Nunez and Baez to tell defendant that they gave the heroin to a customer in Boston and that they were waiting for payment from that customer. GA 18-19.

On May 5, 2003, Nunez had a consensually recorded conversation with defendant, wherein Nunez stated that he did not have the money for the heroin. GA 6-16. The defendant was surprised that Nunez did not collect any money from the customer yet and encouraged Nunez at least to come up with $2,000 to $3,000 to wire transfer to the defendant's people to hold them over for a period of time. GA 8, 12. Nunez told the defendant that he did not have it right now, but that he would call when he had the money. GA 13.

On May 10, 2003, Nunez and Baez had a three-way consensually recorded conversation with the defendant. GA 19. During the conversation, Nunez and Baez advised the defendant that they were staying in Boston until the customer paid them the money for the one kilogram of heroin. *Id.* The defendant, who stated that he was in New

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[3] Because the transcripts are lengthy and it is not disputed that the defendant participated in these conversations, all of the transcripts have not been included in the government's appendix. The transcript of the conversation occurring on May 5, 2003, is included in the appendix to provide the Court a sample of what Judge Underhill reviewed in advance of sentencing. GA 6-16.

York at that moment, expressed his concern for the delay and asked if they had been in "an accident," which, according to Nunez and Baez, was code for being arrested. *Id.* The defendant encouraged Nunez and Baez to "try to pressure" the customer for the money and to call him back later. *Id.*

On May 12, 2003, Nunez had a consensually recorded conversation with the defendant, who stated that he was back in Miami. GA 19. The defendant told Nunez to simply "take the work back" if Nunez was still having trouble collecting the money. *Id.* According to Nunez, the term "take the work back" meant to take the heroin back. *Id.* Nunez told defendant that taking back the "work" was not possible at that time. *Id.*

After May 12, 2003, the DEA recorded a series of telephone conversations between the defendant, a Colombian associate named Jose Luis, and an undercover agent (UC) posing as the recipient of the heroin in Boston. GA 19. All of these conversations involved the collection of the outstanding balance. *Id.*

On May 29, 2003, the defendant was arrested in Miami, Florida. GA 21. Defendant consented to an interview by agents from the DEA and executed a waiver of rights form. *Id.* Defendant stated that his nickname is "Mono," and that he opened a clothing store in Colombia with a friend named "Luis," but that the clothing store had financial difficulties. *Id.* Defendant stated that he agreed to broker the one kilogram of heroin as a favor to Luis since he needed money, and that he (the defendant) expected to be paid $2,000 for his assistance. *Id.*

Defendant further stated that he was being held responsible for the entire amount of the outstanding balance for the kilogram, which was $48,000. *Id.*; PSR 3, ¶ 10.

On June 11, 2003, a federal grand jury in Connecticut returned a one-count indictment charging the defendant with conspiracy to possess with intent to distribute one kilogram or more of heroin, in violation of 21 U.S.C. §§ 846 and 841(a)(1).

B. The Duress Defense Hearing

On January 21, 2004, the defendant provided notice to the government that he intended to pursue a duress defense at trial. On January 22, 2004, the government filed a motion to preclude this defense on the ground that the defendant could not establish the elements of this affirmative defense as a matter of law

On May 28, 2004, the district court conducted a hearing on this issue. At the hearing, the defendant testified to certain facts which he claimed supported a duress defense. At the conclusion of the hearing, the district court ruled that, because the defense would fail as a matter of law, the defendant was precluded from pursuing such a defense at trial. *See* Docket Report, DA 8-9.

C. The Guilty Plea

On June 10, 2004, the defendant entered a conditional guilty plea to Count One of the Indictment charging him

with conspiracy to possess with intent to distribute one kilogram or more of heroin. At that time, the defendant executed a plea agreement with the government in which he reserved his right to appeal the district court's ruling barring him from pursuing a duress defense at trial. GA 1-5.[4]

In the plea agreement, the defendant acknowledged that the offense involved one kilogram or more of heroin. Indeed, the agreement specifically detailed the elements of the offense as follows: "(1) that a conspiracy to possess with intent to distribute one kilogram or more of heroin existed; and (2) that the defendant knowingly and willingly agreed to participate in the conspiracy." GA 1-2. The defendant also acknowledged that the offense carried a mandatory minimum penalty of ten years of imprisonment, which penalty is triggered by the one-kilogram quantity. GA 2.

During the change of plea hearing, the defendant conceded that the quantity of heroin involved in the conspiracy was one kilogram. After reviewing the terms of the plea agreement, the district court inquired of the defendant whether he was pleading guilty because he was in fact guilty and for no other reason. GA 110. After the defendant and his counsel made certain statements bearing on the failed duress defense, the court inquired further:

> THE COURT: Well, my question is simply whether, Mr. Echeverri, you committed the conduct

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[4] The defendant has chosen not to advance his duress claim in this appeal.

that is set forth in the indictment, meaning did you conspire to possess with intent to distribute a kilogram or more of heroin?

THE INTERPRETER: Yes, your honor.[5]

GA 111.

Later in the hearing, the government proffered its evidence to establish a factual basis for the guilty plea. As for the quantity element, the government stated that the defendant had conspired with others, including Nunez and Baez, to distribute heroin and that the agreement was for one kilogram. GA 115-16. The government further proffered that the net weight of the heroin delivered to CW1 was 999.4 grams, but that additional heroin was seized from Baez's apartment which came from the same quantity of heroin, yielding a combined weight in excess of 1000 grams. GA 117. When asked by the court if he disagreed with anything the government stated on the record, the defendant continued to make reference to his duress defense, when he was then cut off by his counsel. *Id*. The defendant's counsel then stated that the defendant took issue with portion of the government's proffer that the defendant was actually introduced by Lucas to Nunez and Baez as a drug trafficker. GA 118. Judge Underhill then asked the defendant to tell the court in his own words what he did that made him guilty. *Id*. When the defendant reiterated much of the same facts relating to his alleged

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[5] The defendant used the services of a Spanish interpreter during the proceeding. He has not claimed that the interpretation was flawed in any way.

duress defense, the court then asked defense counsel to make a proffer to see if the defendant might agree with it. GA 119-122.

Defense counsel proffered the following facts:

> MR. SULLIVAN: Your Honor, thank you for the opportunity. I'm going to state what I believe to be the facts as Mr. Echeverri would set them forth.
>
> A person in Col[o]mbia by the name of Luis made it clear that this was what he wanted done, that he wanted to have Mr. Echeverri up and move a kilo of heroin once Mr. Echeverri succumbs to the pressure, and he was asked, did Mr. Echeverri know anybody who could move, quote unquote, 'work.' Mr. Echeverri said yes, thinking in his mind Miguel who he had met in New York and who seemed to be a drug involved individual, might be willing or able to do this. Mr. Echeverri called Miguel, inquired into whether Miguel was interested. Miguel said yes. Mr. Echeverri then communicated with Luis in Col[o]mbia and told him he had arranged with someone in New York to move a kilo of heroin.
>
> Mr. Echeverri was then told by Luis in Colombia that he should have Miguel communicate with this person by the name of Vanessa and Mr. Echeverri was given Vanessa's name and telephone number. Mr. Echeverri provided Vanessa's name and telephone number

to Miguel understanding that what he was doing was putting these two people together for the purpose of transporting a kilo of heroin. And I believe he would say that was the end of his involvement until, as it now turns out, he sees that the transport was intercepted, Miguel seemed to disappear for three days, and then as I understand it, Agent Laconne was on the phone with the cooperators calling Mr. Echeverri, communicating with him about this seemingly lost shipment.

And there are now then recordings of Mr. Echeverri's efforts to straighten out the problem; the problem being a kilo of heroin has been turned over to somebody who hasn't paid for it. And I think the court has seen in our motion for permission to use the duress defense excerpts of wiretap transcripts where he's speaking to the agents and explaining what his concerns are.

I think that is a fair statement of the essential details of his conspiratorial acts as it relates to this charge.

THE COURT: Mr. Echeverri?

THE INTERPRETER: That's right, Your Honor.

THE COURT: So you agree with what your lawyer just said you did?
THE INTERPRETER: Yes. Yes, Your Honor.

GA 122-24. The court then found that the plea of guilty was knowing and voluntary and supported by an independent basis in fact containing each of the essential elements of the offense, and adjudged the defendant guilty. GA 125.

D. The Presentence Investigation

Following the plea proceeding, the United States Probation Office conducted its presentence investigation and prepared a presentence report ("PSR").[5] The probation officer summarized his findings as follows:

> The CW (Nunez) reported to DEA agents that Lucas stated that El Mono was a heroin and cocaine supplier who resides in Miami. The CW informed DEA agents that the defendant stated that he could supply heroin to them (Nunez and Baez). The CW informed law enforcement officials that when El Mono was unable to get in contact with Lucas, he agreed to sell the CW one kilogram of heroin for $58,000.

PSR 3, ¶ 6. As a result, the probation officer determined the defendant's base offense level to be 32 under U.S.S.G. § 2D1.1(c)(4) since the offense involved at least one kilogram but less than three kilograms of heroin. PSR 4, ¶ 14. The PSR awarded the defendant a two-level reduction under U.S.S.G. § 3E1.1(a) for acceptance of responsibility, bringing his total offense level to 30. PSR 4, ¶¶ 20-21.

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[5] The probation officer used the November 5, 2003, version of the Sentencing Guidelines.

After the PSR was filed, defendant participated in a series of "safety valve" interviews with the government in an attempt to earn a reduction under U.S.S.G. § 5C1.2. Although the defendant initially remained steadfast in his claim that he had been coerced into participating in the drug deal, he eventually admitted that he was not coerced at all and that he had lied about that fact. Specifically, defendant stated that he received what he perceived to be a threat not to cooperate with the government from the heroin suppliers *after* he had been arrested. In fact, the defendant admitted that he had intended to broker another kilogram of heroin to further assist in paying off his debt to the drug traffickers. GA 56.

Thereafter, the government filed a supplemental sentencing memorandum seeking a two-level adjustment for obstruction of justice under U.S.S.G. § 3C1.1 on the ground that the defendant lied to the court during his testimony in the duress hearing. The government further indicated that it had no objection to the defendant receiving credit for the "safety valve" under U.S.S.G. § 5C1.2 since the defendant eventually provided a complete and truthful statement regarding his participation in the offense conduct.

E. The Sentencing Hearing

At sentencing, defendant argued that his base offense level should be 30 since the quantity of heroin that Nunez and Baez picked up from Vanessa was 975 grams, not 1000 grams. The defendant argued that his participation in the offense was completed at the time Vanessa delivered the heroin to Nunez and Baez, and that the acts of Nunez and Baez adding "cut" to the heroin in an attempt to sell a whole kilogram were not reasonably foreseeable to him. GA 38-40. The district court rejected the argument, finding that the object of the conspiracy was the delivery of one kilogram of heroin to CW1, and that it was reasonably foreseeable to the defendant that Nunez and Baez would do what was necessary to sell one kilogram to the ultimate buyer. GA 63. As a result, the court set the base offense level at 32. GA 64.

The defendant further argued that he should receive three points for acceptance of responsibility, notwithstanding the government's position that he should receive only two points. GA 65-66. The court denied the third point for two reasons. First, the court found that it could not award the third point because the conspiracy continued beyond the effective date of the amendment to U.S.S.G. § 3E1.1, which conditioned the district court's ability to award the third point upon a government motion. GA 67. Second, the court stated that, given the defendant's obstruction of justice, the court did not believe the third point was appropriate. GA 67-68.

Based upon these findings, the district court calculated the defendant's base offense level to be 32. GA 70. The

court added two points for obstruction of justice, subtracted two points for acceptance of responsibility, and subtracted two additional points for the "safety valve." *Id.* This resulted in a total offense level of 30. GA 75. With a criminal history category of I, the defendant's sentencing guidelines range was 97 to 121 months. *Id.* The court sentenced defendant to 97 months of imprisonment, which was permissibly below the otherwise applicable mandatory minimum 120 months, in light of the "safety valve" provisions of 18 U.S.C. § 3553(f). GA 79.

SUMMARY OF ARGUMENT

I. The district court did not clearly err in attributing to the defendant one kilogram of heroin. The district court's determination was based not only on the conclusions of the pre-sentence report but also on the fact that the defendant intended to broker the sale of one kilogram of heroin and that all of the negotiations between the relevant parties were for the purchase of one kilogram of heroin. The district court made specific findings that the scope of the conspiracy involved the delivery of one kilogram of heroin to a buyer beyond Nunez and Baez, and that the acts of Nunez and Baez, in adding "cut" to bring the total amount of drugs to more than one kilogram, were reasonably foreseeable to the defendant. Accordingly, the district court's findings were sufficient to permit appellate review and consistent with this Court's requirement of particularized findings set forth in *United States v. Studley*, 47 F.3d 569 (2d Cir. 1995), and they were fully supported by the record.

ARGUMENT

I. THE DISTRICT COURT DID NOT CLEARLY ERR IN ATTRIBUTING ONE KILOGRAM OF HEROIN TO THE DEFENDANT

A. Relevant Facts

The statement of facts section of this brief sets forth the facts pertinent to this appeal issue.

B. Governing Law and Standard of Review

In *United States v. Booker*, 125 S. Ct. 738 (2005), the Supreme Court held that the Sentencing Reform Act of 1984 was unconstitutional to the extent it required district courts to impose sentences in conformity with the United States Sentencing Guidelines, which entail judicial factfinding by a preponderance of the evidence. In order to remedy this constitutional infirmity, the Court excised certain portions of the federal sentencing statutes which rendered the Guidelines mandatory, namely 18 U.S.C. §§ 3553(b)(1) and 3742(e). Henceforth, the Court said, sentencing courts should still consider the range applicable to a particular defendant under the Guidelines, but treat that range as advisory rather than binding.

The Supreme Court recognized in *Booker* that by excising § 3742(e), it had eliminated the statutory provision which had set forth the standard of appellate review for sentencing decisions. The Court nevertheless determined that implicit in the remaining sentencing scheme was a requirement that appellate courts review

sentences for "reasonableness" in light of the factors outlined in 18 U.S.C. § 3553(a). *See Booker*, 125 S. Ct. at 765. This Court has explained that "reasonableness" in the context of review of sentences is a flexible concept. *See United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005). The "appellate function in this context should exhibit restraint, not micro-management." *Id.*

When reviewing a sentence for reasonableness, a number of considerations may come into play. The length of the sentence imposed is one consideration. *See United States v. Crosby*, 397 F.3d 103, 114 (2d Cir. 2005). Procedural errors may also render a sentence unreasonable. For example, it is unreasonable (because it would violate the Sixth Amendment) to apply the Guidelines in a mandatory manner. *Id.* at 114. Likewise, the improper calculation of a sentencing guideline enhancement may render a sentence unreasonable, at least where that enhancement had an "appreciable influence" on the sentence imposed by the district court. *See United States v. Rubenstein*, 403 F.3d 93, 98-99 (2d Cir.) (vacating and remanding pre-*Booker* sentence, and reviewing enhancement determinations because such decisions "may have an appreciable influence even under the discretionary sentencing regime that will govern the re-sentencing"; "express[ing] no opinion as to whether an incorrectly calculated Guidelines sentence could nonetheless be reasonable"), *cert. denied*, 126 S. Ct. 388 (2005); *United States v. Selioutsky*, 409 F.3d 114, 119 (2d Cir. 2005) ("An error in determining the applicable Guideline range" may render ultimate sentence unreasonable under *Booker*). In some circumstances, a district court need not resolve every close Guidelines

question definitively. For example, such resolution is not required "where either of two Guidelines ranges, whether or not adjacent, is applicable, but the sentencing judge, having complied with section 3553(a), makes a decision to impose a non-Guidelines sentence, regardless of which of the two ranges applies." *Crosby*, 397 F.3d at 112. Nevertheless, "even under the discretionary regime recognized in Booker . . . a significant error in the calculation or construction of the Guidelines may preclude affirmance." *United States v. Canova*, 412 F.3d 331, 335 (2d Cir. 2005).

This Court gives "due deference" to the district court's application of the Guidelines to the facts of the case. *United States v. Jackson*, 346 F.3d 22, 24 (2d Cir. 2003), *vacated on other grounds sub nom. Lauersen v. United States,* 125 S.Ct. 1109 (2005). What is meant by "due deference" depends on the nature of the question presented. *Koon v. United States*, 518 U.S. 81, 98 (1996); *United States v. Vasquez*, 389 F.3d 65, 68 (2d Cir. 2004). When a sentencing court's application of a guideline to facts primarily involves an issue of fact, the district court's determination will be reviewed only for clear error. *Vasquez*, 389 F.3d at 75; *Selioutsky*, 409 F.3d at 119; *United States v. Garcia,* 413 F.3d 201, 222 (2d Cir. 2005). If the question is primarily an issue of law, then *de novo* review is warranted. *Id*.

In a drug case, the Sentencing Guidelines require the sentencing court to determine what quantity of narcotics is attributable to a defendant. To making such a finding, the district court considers two categories of criminal conduct. First, a defendant is responsible for his own criminal acts,

more specifically, "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant." U.S.S.G. § 1B1.3(a)(1)(A). Second, if the defendant is involved in criminal activity with others, the defendant may also have responsibility for some of the acts of his confederates, that is, "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." U.S.S.G. § 1B1.3(a)(1)(B).

Thus, in the context of drug offenses, the Guidelines make clear that the defendant "is accountable for all quantities of contraband with which he was directly involved." U.S.S.G. § 1B1.3 Applic. Note 2. *See also United States v. Diaz*, 176 F.3d 52, 120 (2d Cir. 1999) ("A defendant who is a party to [a drug] conspiracy is accountable for the quantities of narcotics in which he had a direct, personal involvement.") (internal quotation marks and citation omitted).

In addition, "in the case of a jointly undertaken criminal activity," a defendant is accountable for "all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook." U.S.S.G. § 1B1.3 Applic. Note 2. The district court needs to find that both prongs of this test are satisfied in order to sentence a defendant based on jointly undertaken criminal activity. *See United States v. Martinez-Rios*, 143 F.3d 662, 677 (2d Cir. 1998) ("[T]he District Court must make particularized findings as to both (i) the scope of the criminal activity agreed upon by the defendant, and (ii) whether the activity in question was foreseeable by the defendant."); *United States v.*

Hernandez-Santiago, 92 F.3d 97, 100 (2d Cir. 1996) (applying the legal standard to a drug conspiracy); *United States v. Studley*, 47 F.3d 569, 574 (2d Cir. 1995) ("We have previously held that in order for a district court to sentence a defendant on the basis of criminal activity conducted by a coconspirator, a district court must make a particularized finding as to whether the activity was foreseeable to the defendant. . . . We now find that the Guidelines also require the district court to make a particularized finding of the scope of the criminal activity agreed upon by the defendant."). To make these specific findings, the district court may consider "any explicit agreement or implicit agreement fairly inferred from the conduct of the defendant and others." *Id.* at 574 (quoting U.S.S.G. § 1B1.3 Applic. Note 2 (1993)). This Court has upheld sentences that have attributed foreseeable criminal conduct to defendants, focusing on the scope of their involvement in a jointly undertaken activity. *See United States v. Germosen*, 139 F.3d 120 (2d Cir. 1998) (affirming the sentence of a travel agent whom the district court held responsible for losses beyond his own sales); *Martinez-Rios*, 143 F.3d at 677-78 (affirming the attribution of larger loss amounts based on the interdependent nature of the use of fraudulent accounts).

The government bears the burden of proving drug quantity by a preponderance of evidence. *United States v. Powell,* 404 F.3d 678, 681 (2d Cir. 2005); *United States v. Desimone*, 119 F.3d 217, 228 (2d Cir. 1997); *United States v. Moore*, 54 F.3d 92, 102 (2d Cir. 1995) ("A district court's estimation of drug quantity is an issue of fact that need be established only by a preponderance of the evidence."). *See also Garcia*, 413 F.3d at 220 n.15 (re-

affirming preponderance standard for sentencing issues in wake of *Booker*); *Crosby*, 397 F.3d at 112 (applicable guidelines range is normally to be determined in same manner as before *Booker/Fanfan*). "In approximating the quantity of drugs attributable to a defendant, any appropriate evidence may be considered, 'or, in other words, a sentencing court may rely on any information it knows about.'" *United States v. Prince*, 110 F.3d 921, 925 (2d Cir. 1997) (quoting *United States v. Jones*, 30 F.3d 276, 286 (2d Cir. 1994)). Although the government carries the burden of proving attributable drug quantities, "'when a defendant asserts that he is not responsible for the entire range of misconduct attributable to the conspiracy of which he was a member, the Guidelines place on him the burden of establishing the lack of knowledge and lack of foreseeability.'" *Martinez-Rios*, 143 F.3d at 677 (quoting *United States v. Negron*, 967 F.2d 68, 72 (2d Cir. 1992)).

Because "'[t]he quantity of drugs attributable to a defendant at the time of sentencing is a question of fact for the district court, [such a finding is] subject to a clearly erroneous standard of review.'" *United States v. Moreno*, 181 F.3d 206, 213 (2d Cir. 1999) (quoting *United States v. Hazut*, 140 F.3d 187, 190 (2d Cir. 1998)). Moreover, in determining drug quantity, the application of a sentencing guideline to the facts will be reviewed under the clearly erroneous standard when the sentencing court's determination was "primarily one of fact." *Vasquez*, 389 F.3d at 75.

A district court's findings are sufficient as long as they allow for adequate appellate review. *United States v.*

Thompson, 76 F.3d 442, 457 (2d Cir. 1996). For example, it is well settled that the district court can satisfy the findings requirement by adopting the recommendations set forth in a presentence report. *See United States v. Martin*, 157 F.3d 46, 49 (2d Cir. 1998) ("While the district court could have been more explicit, it plainly intended to adopt the PSR's findings on relevant conduct."); *Desimone*, 119 F.3d at 228 ("The required findings must be sufficient to permit appellate review, a standard that may be satisfied by the sentencing court's adoption of the factual findings in the presentence report."); *Prince*, 110 F.3d at 924 (same); *Thompson*, 76 F.3d at 456 ("It is sufficient for these purposes if the court indicates, either at the sentencing hearing or in the written judgment, that it is adopting the recommendations in the PSR.").

C. Discussion

1. The District Court's Attribution of One Kilogram of Heroin to the Defendant Was Not Clearly Erroneous.

In the present case, Judge Underhill thoroughly considered all of the relevant facts in determining the quantity of heroin attributable to the defendant. First, the district court adopted the factual findings contained in the PSR, including the following: (1) that Nunez negotiated with the defendant to purchase one kilogram of heroin for $58,000; (2) that the defendant instructed Nunez to contact Vanessa in New York to make arrangements to pick up the kilogram of heroin; (3) that Nunez and Baez delivered the heroin to CW1 in Norwalk, Connecticut; and (4) that the defendant participated in a series of consensually recorded

telephone calls pertaining to the collection of the unpaid balance, which was $48,000 from a buyer further down the distribution chain from Nunez and Baez. PSR 3.

In addition, the government proffered evidence demonstrating that at all times relevant to the heroin transaction, the defendant intended to distribute one kilogram of heroin, he set the price based upon one kilogram of heroin, and he believed that he did in fact distribute one kilogram of heroin. GA 51, 54. The government proffered that the agreement between the defendant and Nunez contemplated that Nunez would not pay for most of the cost of the kilogram until after it was delivered to the buyer and payment was received from that buyer. GA 62.

The court was further advised that the record was devoid of any indication that the defendant and Nunez changed the deal to be 975 grams. GA 55. In fact, the government proffered that the defendant conceded in his "safety valve" statement that not only did he intend to distribute one kilogram, but that he intended to broker another kilogram to further pay down his debt. GA 56.

Lastly, the government proffered facts demonstrating that the defendant continued to play an active role in the conspiracy as it pertained to collection of the unpaid balance. GA 19-20, 62.

In sum, the district court was presented with overwhelming evidence that the agreement between the defendant and Nunez contemplated the delivery of one kilogram of heroin, the negotiated price was consistent

with the price of one kilogram of heroin, the defendant did not expect full payment until after Nunez had sold the heroin to another person, and Nunez continued to play an active role in the collection of the balance of the money owed. Based upon these facts, there was more than ample evidence for the court to find that a conspiracy existed, that Nunez, Baez, and the defendant were members of the conspiracy, that the object of the conspiracy was the delivery of one kilogram of heroin to CW1, and that the acts of Nunez and Baez in taking the steps necessary to ensure that the heroin weighed 1000 grams were reasonably foreseeable to the defendant. Accordingly, the district court's findings were not clearly erroneous.[6]

Moreover, the court made adequate drug quantity findings to satisfy this Court's two-step test for jointly undertaken activity established in *Studley*, 47 F.3d at 574, and *Hernandez-Santiago*, 92 F.3d at 99. The court found that the agreement contemplated the sale of one kilogram of heroin to CW1, and that the acts of Nunez and Baez in

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[6] For the same reasons, the fact that Nunez and Baez were slightly off in their calculations and the heroin actually weighed 999.4 grams when it was weighed by the DEA lab is of no moment given the conspiracy charge in this case. In any event, this is not an argument that the defendant made at sentencing because he would then have had to concede that the acts of Nunez and Baez in re-mixing the heroin to create a quantity well in excess of 1000 grams (given the 2.2 grams seized from the center console of Baez's vehicle and the additional heroin left at home) were reasonably foreseeable to him.

doing what was necessary to sell one kilogram to the ultimate buyer were reasonably foreseeable to the defendant. GA 63. These findings are fully supported by the record and are certainly not clearly erroneous. *Desimone*, 119 F.3d at 228.

2. The Defendant's Arguments Are Without Merit.

The defendant makes three arguments on appeal. First, the defendant argues that, under U.S.S.G. § 2D1.1 Application Note 12, he should have been held accountable only for the 975 grams which he arranged to be delivered to Nunez and Baez. Second, the defendant asserts that the court erred in determining that the acts of Nunez and Baez were reasonably foreseeable to him. Lastly, the defendant maintains that the court erred in applying a relaxed fact-finding standard under *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). Each of these arguments is without merit.

The defendant's first argument is based upon a flawed reading of Application Note 12. Defendant relies exclusively on the following portion of this application note:

> In an offense involving the agreement to sell a controlled substance, the agreed-upon quantity of a controlled substances shall be used to determine the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. For example, a defendant agrees to sell 500 grams of cocaine, the transaction is

> completed by the delivery of the controlled substance - actually 480 grams of cocaine, and no further delivery is scheduled. In this example, the amount delivered more accurately reflects the scale of the offense.

U.S.S.G. § 2D1.1 Applic. Note 12.

The defendant does not contest the fact that he intended to broker one kilogram of heroin.[7] Rather, he maintains

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[7] During the change of plea hearing, the defendant conceded on multiple occasions that the quantity of heroin involved in the conspiracy was one kilogram. GA 113, 117. Since quantity is an element of this offense, and the defendant admitted that element during the change of plea hearing, he cannot now challenge the proof of that element. *See Hayle v. United States*, 815 F.2d 879, 881 (2d Cir. 1987) ("It is well settled that a defendant's plea of guilty admits all of the elements of a formal criminal charge.").

At sentencing, when the defendant challenged the quantity of heroin attributable to him, the district court asked defense counsel if it was the defendant's position that he should withdraw his guilty plea because he was not guilty to conspiring to possess with intent to distribute one kilogram or more of heroin, defense counsel stated "No." GA 43. Defense counsel stated that, at the time of the change of plea, he was not aware of the post-arrest statements of Nunez and Baez indicating that the heroin weighed 975 grams when they received it from Vanessa. GA 44. Defense counsel further stated that had he known of that fact, the defendant would still have pleaded guilty to the one kilogram conspiracy, but that defense counsel would have brought Application Note 12 of (continued...)

that, under this application note, he should receive the benefit of the fortuitous delivery of only 975 grams from Vanessa to Nunez, despite his admitted intent to sell one kilogram. *See* Appellant's Brief at 9.

First, the defendant is erroneously reading the above-cited portions of Application Note 12 in isolation. Following the 480-gram example, the note further provides that "[i]f, however, the defendant establishes that the defendant did not intend to provide or purchase, or was not reasonably capable of providing or purchasing, the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled substance that the defendant establishes that the defendant did not intend to provide or purchase or was not reasonably capable of providing or purchasing." U.S.S.G. § 2D1.1 Applic. Note 12. This provision appropriately focuses a sentencing court's attention on the central question under § 2D1.1: What quantity of drugs did the defendant *intend to provide*?

Interpreting Application Note 12, this Court stated that, in determining the "agreed-upon quantity" or the "amount delivered" in a conspiracy case, "'Quantity' and 'amount'

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[7] (...continued)
U.S.S.G. § 2D1.1 to the court's attention. *Id.* While the government disputes defense counsel's representation as to when the government provided him copies of the post-arrest statements of Nunez and Baez, the fact remains that the defendant never asked to withdraw his plea and never wavered in his concession that he was part of a conspiracy that involved one kilogram of heroin.

are not purely mathematical calculations, but rather also embody the concept of the amount of illegal drugs a defendant *intended* to produce." *United States v. Hazut*, 140 F.3d 187, 191 (2d Cir. 1998) (defendant intended to distribute ecstasy even though substance when tested proved to be salt and caffeine). This Court further explained that Application Note 12 imposes upon the defendant the burden to come forward with some evidence to establish that he lacked the intent and ability to produce the contested amount. *Martinez-Rios*, 143 F.3d at 677; *Hazut*, 140 F.3d at 192.

The defendant's interpretation of Application Note 12 is also based upon a faulty premise that, any time an agreement to deliver a certain quantity of drugs is followed by an actual delivery, the agreed-upon quantity always becomes inapplicable. Plainly, such a constrained reading of this note would be completely at odds with fundamental principles of conspiracy law, which is aimed at punishing unlawful agreements, whether or not they are successful. *United States v. Labat*, 905 F.2d 18, 21 (2d Cir. 1990) (essence of a conspiracy is the agreement, not the commission of the offense that is its objective); *United States v. Rubin*, 844 F.2d 979, 983 (2d Cir. 1988) (fundamental element of conspiracy is unlawful agreement); s*ee also United States v. Gomes*, 177 F.3d 76, 85 (1st Cir. 1999) (refusing to apply 480-gram example in Note 12 in every agreement followed by a delivery, since it would produce unfair result whereby defendant who

delivers less than the amount promised automatically gets a lower sentence than the one who delivers nothing).[8]

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[8] The Ninth Circuit's ruling in *United States v. Felix*, 87 F.3d 1057, 1058 (9th Cir. 2001), is not to the contrary. In *Felix*, the defendants were arrested after trying unsuccessfully to peddle five packages of cocaine to undercover FBI agents. Although the court's opinion states that "[e]ach package was supposed to contain a kilo of cocaine," *id* at 1058, the defendants were charged with, and convicted of, conspiring to distribute "approximately five kilos" of cocaine, and of substantively possessing with intent to distribute 4,643 grams" of cocaine. *Id.* at 1059. The Ninth Circuit held that under Application Note 12, the defendants' offense level should have been calculated by reference to "amount of cocaine actually seized (4,643 grams)" because that amount "more accurately reflects the scale of the offense than the promised five kilograms." *Id.* at 1059-60.

Although the court's opinion in *Felix* does not give a complete picture of the facts at issue in that case, the situation there appears to be distinguishable from the present case. In *Felix*, the court focused on the fact that "the precise cocaine under negotiation was present and . . . all of the conspirators were ready to sell the cocaine." *Id.* at 1059. In other words, even though the defendants had purported to bring five kilograms along with them, it appears that the defendants had never entered into any agreement with the agents to sell a specific quantity of cocaine. Unlike the present case (in which the defendant agreed to sell a specified quantity, i.e., one kilo), in *Felix* there was never any agreement, and the defendants' intentions with respect to quantity could only be meaningfully measured by weighing the drugs that they had brought along with them.

In interpreting Application Note 1 of U.S.S.G. § 2D1.4, which was the predecessor to Application Note 12 of U.S.S.G. § 2D1.1,[9] this Court consistently held that the negotiated amount of narcotics defined the conspiracy. *See United States v. Tejada*, 956 F.2d 1256, 1264 (2d Cir. 1992) (agreed-upon amount in uncompleted distribution controls where no evidence of "puffing"); *United States v. Adames*, 901 F.2d 11, 12 (2d Cir. 1990) (offense level of a defendant attempting to purchase narcotics from undercover agents is properly calculated according to the amount negotiated, not the lesser amount actually delivered). *See also United States v. Alvarez-Cardenas*, 902 F.2d 734, 736 (9th Cir. 1990) (negotiated amount of 500 grams of cocaine defined scope of conspiracy, and "[t]he fact that a little less [487.56 grams] is distributed does not affect the computation").

In this case, the government presented compelling evidence that the defendant intended to produce one kilogram of cocaine, and the defendant admitted that fact in his guilty plea hearing. Unlike the example set forth in the application note where the hypothetical seller decided to deliver less than promised, in this case, all of the parties

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[9] On November 1, 1992, the Sentencing Commission deleted Section 2D1.4 and transferred much of the commentary, including the relevant portions of Application Note 1, to Application Note 12 of Section 2D1.1. Application Note 1 to § 2D1.4 provided, in relevant part, that "[i]f the defendant is convicted of an offense involving negotiation to traffic in a controlled substance, the weight under negotiation in an uncompleted distribution shall be used to calculate the applicable amount."

to this transaction intended either to sell or buy one kilogram of heroin, and the price was set accordingly. Likewise, there is no evidence in this case that the defendant or Vanessa decided to change the quantity or the price at the last minute.

The burden of production then shifted to the defendant to produce some evidence that he either did not intend to provide one kilogram or that he was not reasonably capable of providing one kilogram. As stated earlier, defendant never challenged the fact that he intended to provide one kilogram and, therefore, presented no evidence to the contrary.

Likewise, the record is devoid of any evidence that the defendant was not reasonably capable of providing one kilogram. Indeed, there is no evidence in the record explaining why the heroin weighed only 975 grams when Nunez and Baez weighed it.[10] Moreover, defendant admitted in his "safety valve" statement that he intended to provide a second kilogram if the first deal was successful.[11] This fact belies any suggestion that the defendant was not capable of providing one kilogram. Thus, in light of all of this evidence, the intended amount

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[10] There are several possibilities, including differently calibrated scales or an attempt by the defendant and his supplier to rip off Nunez and Baez.

[11] The defendant did not have a cooperation agreement with the government and, therefore, his admission that he had hoped to distribute additional drugs can be used to determine his guidelines range under U.S.S.G. § 1B1.8, Application Note 1.

of 1000 grams governs since the lesser amount of 975 grams does not "more accurately reflect[] the scale of the offense."

Moreover, the court did not err when it determined that the acts of Nunez and Baez were reasonably foreseeable to the defendant. As stated above, in the case of a "jointly undertaken criminal activity," a defendant is accountable for "all reasonably foreseeable quantities of contraband that were within the scope of the criminal activity that he jointly undertook." U.S.S.G. § 1B1.3 Applic. Note 2. In this regard, the district court properly found that the scope of the agreement included the delivery of one kilogram of heroin to CW1 and that the acts of Nunez and Baez in re-mixing the heroin to attempt to sell one kilogram to CW1 were reasonably foreseeable to the defendant.

The defendant argues that his role was limited to putting a buyer and seller together, and, therefore, he did not know or have reason to know that Nunez and Baez would take the action they did. Appellant's Brief at 20. This position is completely at odds with the undisputed facts of the case.

At sentencing, the government proffered that the defendant contacted Nunez to see if Nunez could sell the kilogram, and that after Nunez checked around and confirmed that he could in fact sell a kilogram of heroin, Nunez then agreed to receive the kilogram from the defendant. GA 60. The defendant took some issue with the sequence by virtue of his proffer that he knew Nunez to be in the drug business and that he knew Nunez would have a customer for the heroin. GA 62. In either case, it

is not disputed that the defendant knew that Nunez was going to sell the heroin to someone else. Indeed, the transaction was structured in a way to accommodate that fact since Nunez and Baez were only required to make a $10,000 down payment, with the balance to be paid after delivery to Nunez's customer when Nunez would be paid by his customer. And, immediately after Nunez and Baez delivered the heroin to CW1, the defendant made multiple telephone calls to Nunez in an obvious attempt to see if the deal went smoothly. GA 62. Thereafter, while Nunez and Baez were cooperating with the government, the defendant continued to engage Nunez and Baez over the telephone to collect the outstanding balance. Based upon this evidence, it is clear that the defendant knew that Nunez intended to sell the heroin to another person, and that the defendant intended to play, and did play, an active role in the transaction through Nunez's delivery of the heroin to that other person, CW1. Thus, the court correctly found that the scope of the conspiracy included the delivery of the heroin to CW1.

As for the second prong in this analysis, the district court correctly found that the acts of Nunez and Baez were reasonably foreseeable to the defendant. At sentencing, it was uncontested that the agreement was for one kilogram of heroin. Nunez and Baez were being charged $58,000, the cost of a kilogram, by the defendant and his Colombian suppliers, and they intended to sell the kilogram to CW1 at a higher price to be able to pay the defendant and make a profit. However, in order to complete the transaction, Nunez and Baez were forced to add a small amount of "cut" to the heroin. In the course of doing so, the substance weighed 1,125 grams.

Since each individual involved in every stage of the transaction was expecting to either sell or purchase one kilogram of heroin, it is hardly surprising that one person in the chain of events would take some action to ensure that the deal was conducted properly and that everyone got the benefit of their bargain. It was upon this reasoning that Judge Underhill based his finding that the acts of Nunez and Baez were reasonably foreseeable to the defendant. The court's finding is logical and based upon sound reasoning. It is not clearly erroneous.

Lastly, the defendant maintains that the court erred in applying a relaxed fact-finding standard under *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). Specifically, defendant argues that the court erred by not making a specific guidelines determination on the issue of quantity under the preponderance of the evidence standard. Appellant's Brief at 19, GA 63. Defendant argues that the court made its quantity determination under some lesser standard of proof.

Plainly, the court made specific factual findings in determining the quantity of heroin attributable to the defendant. Virtually the entire sentencing hearing was dedicated to addressing the scope of the conspiracy and which co-conspirator acts were reasonably foreseeable to the defendant. GA 37-62. At the conclusion of that discussion, the court made very specific findings that the scope of the conspiracy included the delivery of one kilogram of heroin to CW1, and that the acts of Nunez and Baez were reasonably foreseeable to the defendant. GA 63. The court then adopted the findings in the PSR which set the base offense level at 32, which is the applicable

offense level for one to three kilograms of heroin. GA 70. After calculating the total offense level to be 30 and the guidelines range to be 97 to 121 months, the court sentenced the defendant to the low end of the range, 97 months. *Id.*

In its reference to *Crosby*, it appears that the district court intended to make an alternative finding that, even if the court incorrectly determined the guidelines range, the court was of the view that 97 months was nonetheless a reasonable sentence based upon the factors set forth in 18 U.S.C. § 3553(a). *See Crosby*, 397 F.3d at 112. However, the court did not fully articulate this alternative finding as a basis for the sentence it imposed. Consequently, the government is not advancing this as an alternative basis for affirmance. That said, the district court's failure to fully set forth an alternative basis for affirmance provides no basis for overturning the sentence in this case.

CONCLUSION

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

Dated: November 2, 2005

Respectfully submitted,

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

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 9,177 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

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Addendum

Title 21, United States Code, Sections 841(a)(1) and (b)(1)(A)(i) [Relevant Portions]

(a) Unlawful acts

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

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

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

(b) Penalties

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

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

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

. . . . .

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine

not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person

sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

. . . .

21 U.S.C. § 846. Attempt and conspiracy

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

U.S.S.G. § 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy [Relevant Portions] (2001)

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

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

(2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C),

or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if the defendant receives an adjustment under § 3B1.2 (Mitigating Role), the base offense level under this subsection shall be not more than level 30.

(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) At least 1 KG but less than 3 KG of Heroin (or the equivalent amount of other Schedule I or II Opiates);	Level 32

. . . . .

Application Notes

12. In an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine

the offense level unless the sale is completed and the amount delivered more accurately reflects the scale of the offense. For example, a defendant agrees to sell 500 grams of cocaine, the transaction is completed by the delivery of the controlled substance--actually 480 grams of cocaine, and no further delivery is scheduled. In this example, the amount delivered more accurately reflects the scale of the offense. In contrast, in a reverse sting, the agreed-upon quantity of the controlled substance would more accurately reflect the scale of the offense because the amount actually delivered is controlled by the government, not by the defendant. If, however, the defendant establishes that he or she did not intend to provide, or was not reasonable capable of providing, the agreed-upon quantity of the controlled substance that the defendant establishes that he or she did not intend to provide or was not capable of providing.