04-1723-cr

To Be Argued By:
H. GORDON HALL

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-1723-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

JOSE COSME, JOSE RAMOS, JUAN CANDELARIO, EMMANUEL V. LINARES,
Defendants,

JUAN BERROA-NUNEZ, also known as Emeliano Baldomar,
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

H. GORDON HALL
Assistant United States Attorney
WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

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STATEMENT OF JURISDICTION

The district court (Alvin W. Thompson, J.) had subject matter jurisdiction over this criminal prosecution under 18 U.S.C. § 3231. Judgment entered on March 25, 2004. On March 30, 2004, 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 appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the defendant's guilty plea is valid, where the record establishes that it was knowingly and voluntarily entered?

2. Whether the case should be remanded for the limited purposes outlined in *United States v. Crosby*?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-1723-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

JOSE COSME, JOSE RAMOS, JUAN CANDELARIO, EMMANUEL V. LINARES,

Defendants,

JUAN BERROA-NUNEZ, also known as Emeliano Baldomar,

Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

The defendant-appellant Juan Berroa-Nunez was a member of a drug conspiracy operating in the New Haven

and New York metropolitan areas during 2000 and 2001. On February 28, 2001, based on telephone calls intercepted pursuant to orders of the district court and other information obtained during the investigation, surveillance was established on the defendant and, later that day, he was arrested in possession of two kilograms of cocaine which were secreted in a hidden compartment in the vehicle he was operating. He was later indicted based on this incident and related conduct. On October 21, 2003, pursuant to a written plea agreement, the defendant entered a plea of guilty to Count One of a Superseding Indictment in which he was charged with conspiracy to possess with intent to distribute and to distribute 500 grams or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 846. The plea agreement did not contain a stipulation as to the defendant's offense conduct or to an appropriate narcotics attribution.

The district court (Alvin W. Thompson, J.) sentenced the defendant, principally, to a term of imprisonment of 130 months, to run concurrent to a term of imprisonment which had been imposed in New York for conduct related to the offense of conviction. The defendant is currently in custody.

On appeal, the defendant claims that (1) his guilty plea was not knowing and voluntary on the basis that, at the time of his guilty plea, he was unaware of the sentence he potentially faced; and (2) the sentence imposed by the district court was unreasonable. The defendant also asserts that this case should be remanded to the district court for sentencing purposes in accordance with *United*

States v. Crosby, 397 F.3d 103 (2d Cir. 2005). For the reasons that follow, this Court should reject each of the claims as to the plea and sentence, except that it should remand the case to the district court to determine whether it would have imposed a non-trivially different sentence had it understood the Guidelines to be advisory and, if so, for re-sentencing.[1]

Statement of the Case

On September 19, 2001, a federal grand jury sitting in Connecticut returned a sixteen-count Indictment against five conspirators, including two counts against the defendant, Juan Berroa-Nunez.[2] Joint Appendix 11 to 17.[3] The case was assigned to United States District Judge Alvin W. Thompson.

On July 16, 2002, a federal grand jury sitting in Connecticut returned a nineteen-count Superseding

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[1] By motion dated June 5, 2006, the Government moved this Court to remand the case to the district court pursuant to *Crosby*, and to summarily reject his challenge to the guilty plea. The motion was denied.

[2] Until he entered his guilty plea, the defendant maintained that he was a U.S. citizen named Emeliano Baldomar. Accordingly, he was originally charged under that name. At the plea, he advised the court that he is a national of the Dominican Republic named Juan Berroa-Nunez.

[3] References to the Joint Appendix will hereinafter be styled "A __."

Indictment against the same five individuals, which included two counts against the defendant. A 18 to 25.

On October 31, 2003, the defendant withdrew his previously entered pleas of not guilty and entered a plea of guilty to Count One of the Superseding Indictment, pursuant to a written plea agreement. A 52 to 58.

On March 22, 2004, the district court sentenced the defendant to a term of imprisonment of 130 months, followed by 10 years of supervised release. The prison term was to be served concurrent to a prison term previously imposed on the defendant by the New York County Supreme Court for conduct related to the offense of conviction in Connecticut. A 9. On the Government's motion, the district court dismissed the original Indictment and the remaining count against the defendant. *Id*.

On March 30, 2004, the defendant filed a timely notice of appeal. A 224. The defendant is currently serving his sentence.[4]

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[4] During the pendency of this appeal, this Court dismissed the case two times for defendant's failure to adhere to the scheduling order (August 2, 2004; May 31, 2005), and after each dismissal reinstated the appeal. In addition, the defendant thereafter moved for three extensions of time within which to file his brief (December 20, 2005; February 22, 2006; April 26, 2006), each of which was granted. Finally, after receiving defendant's brief, the Government moved for a limited *Crosby* remand (June 6, 2006), which motion was denied (August 4, 2006).

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. The Superseding Indictment

On July 16, 2002, a federal grand jury sitting in Connecticut returned a nineteen-count Superseding Indictment. A 18 to 25. Count One of the Superseding Indictment charged that between June 2000 and November 27, 2001, the defendant conspired with four other co-defendants to possess with intent to distribute and to distribute 500 grams or more of a mixture and substance containing a detectable amount of cocaine in violation of 21 U.S.C. § 846. A 18. Count Twelve of the Superseding Indictment charged that on February 28, 2001, the defendant and a co-conspirator possessed with intent to distribute 500 grams or more of a mixture and substance containing a detectable amount of cocaine in violation of 21 U.S.C. § 841(a)(1). A 22. The other counts of the Superseding Indictment charged the other four co-conspirators with specific acts of possession and distribution of illegal narcotics. A 19 to 25.

B. The Plea Agreement

On October 31, 2003, the defendant pled guilty – pursuant to a written plea agreement – to Count One of the Superseding Indictment charging him with conspiracy to possess with intent to distribute and to distribute 500 grams or more of a mixture and substance containing a detectable amount of cocaine. The written plea agreement set forth the fact that the defendant faced a maximum

sentence of forty years of imprisonment, a mandatory minimum term of five years of imprisonment, and a $2 million fine, as well as a term of supervised release of 4 years to life. A 53.

In the plea agreement, the parties agreed that the Sentencing Guidelines applied in the case, and that the district court would be required to consider them in fashioning the sentence it would ultimately impose. The parties agreed that the relevant Guidelines determinations would be made by the court, with input from the parties and the Office of Probation. A 53.

In the agreement, the Government expressly reserved its decision as to whether to recommend or move for a downward adjustment for the defendant's acceptance of responsibility pursuant to U.S.S.G. § 3E1.1, and its right to provide information to the court regarding the imposition of an appropriate sentence. In addition, the parties reserved their appellate rights. A 54.

The defendant acknowledged in the agreement that he might have had the right to require that a grand jury and a trial jury find facts which could determine whether the court could apply a mandatory minimum sentence or a sentence within a range permitted by a higher maximum sentence resulting from a finding of such facts, and he waived any such right. A 54.

The written plea agreement further provided that the defendant waived his right to a trial; acknowledged his guilt of the offense to which he would offer a plea, and the

voluntariness of the plea; and stated that the defendant's guilty plea, if accepted by the court, would satisfy the defendant's federal criminal liability in the District of Connecticut as to this matter. A 54 to 56.

C. The Rule 11 Hearing

On October 31, 2003, the defendant appeared before U.S. Magistrate Judge Donna F. Martinez for the purpose of entering his plea of guilty. As the first order of business, the Magistrate Judge advised the defendant of his right to offer his plea to a district judge, which he acknowledged, and then secured the defendant's written consent to offer the plea to the Magistrate Judge. A 62 to 64. The court then placed the defendant under oath and canvassed him about his health and the extent to which he was able to comprehend the proceedings. A 66 to 68. The defendant indicated that his mind was clear, A 67, and that he understood the proceedings. A 68. The court then asked the defendant whether he understood the charge against him and whether he had an opportunity to discuss it with his lawyer to his satisfaction, and he indicated that he had. *Id.* Next, the court advised the defendant in detail of his right to trial and other attendant rights, and the defendant confirmed that he was aware of them and understood them. A 69 to 71.

Turning then to the plea agreement, the court asked the defendant whether he understood and had signed the written plea agreement. The defendant responded affirmatively to both questions. A 72. At that point, the court directed Government counsel to summarize the

written plea agreement, which he did. In particular, Government counsel recited provisions in the agreement which stated that the penalty applicable upon conviction would include a mandatory minimum sentence of five years in prison and up to forty years of incarceration; that the defendant acknowledged the applicability of the Sentencing Guidelines; that if the court calculated those Guidelines differently from the way he anticipated, he would not be able to withdraw his plea; and that he waived any right to a jury determination of the quantity of drugs involved in the conspiracy. A 73 to 74.

The court then addressed the defendant and reviewed for him the applicable potential penalties and the workings of the Guidelines, all of which the defendant indicated he understood. A 77 to 80. On this topic, the court then engaged the defendant in the following colloquy:

> The Court: In other words, although your lawyer might have advised you of his opinion as to what the guidelines probably will be, his prediction might be wrong. Do you understand?
>
> The Defendant: Yes.
>
> The Court: If it turns out that the guideline range is higher than you anticipated, the mere fact that you expected to be sentenced pursuant to a lower guideline range will not be a basis for withdrawing your guilty plea or overturning your sentence. Do you understand?

The Defendant: Yes.

The Court: Similarly, no one will be able to determine whether it will be appropriate to depart from the applicable guideline range until the presentence report has been fully reviewed by all concerned. Do you understand that?

The Defendant: Yes.

The Court: Your lawyer might have advised you that you're likely to get a downward departure or that there'll be no upward departure, but his opinion could be wrong. Do you understand?

The Defendant: Yes.

The Court: If you plan to move for a downward departure on some basis and your motion is denied, the mere fact that you expected to get a downward departure will not be a basis for withdrawing your guilty plea or overturning your sentence. Do you understand?

The Defendant: Yes.

The Court: Likewise, if you do not expect to get an upward departure but the sentencing judge decides to depart upward, his decision to depart upward will not be a basis for withdrawing your plea or overturning your sentence. Do you understand?

The Defendant: Yes.

A 80 to 81.

The court then directed Government counsel to summarize the evidence which would have been presented had there been a trial. Among other details in the summary, Government counsel referred to seizures of over 6 kilograms of cocaine base and cocaine from a co-conspirator who was indicted separately; undercover purchases of five ounces of cocaine base and several ounces of powder cocaine from codefendants; the seizure of over a kilogram of cocaine from a codefendant; the seizure of two kilograms of cocaine from the defendant; and the court-authorized interception of numerous drug-related calls among the defendants. A 85 to 87. When the court asked the defendant if he agreed with everything the prosecutor said, the defendant replied, "Yes." A 87.

Thereafter, the defendant was put to plea. After the plea was offered by the defendant, the court found that he was aware of the maximum possible sentence and the other potential consequences of his guilty plea, and that the plea was knowing and voluntary. A 89.

D. The Sentencing Hearing

On December 29, 2003, the defendant filed objections to several particulars of the Pre-Sentence Report. Specifically, he argued that he should be held responsible only for the two kilograms of cocaine he was arrested with, rather than the five to fifteen kilograms

recommended by Probation, yielding a base offense level of 28 pursuant to U.S.S.G. § 2D1.1(c)(6) instead of 32 pursuant to U.S.S.G. § 2D1.1(c)(4), that he should be afforded a two-level reduction for complying with the "safety valve" pursuant to 18 U.S.C. § 3553(f) and U.S.S.G. §§ 2D1.1(b)(7) and 5C1.2(a), that he should be afforded a two-level reduction for his role in the offense as a minor participant pursuant to U.S.S.G. § 3B1.2(b), and that he should be afforded a three-point reduction for acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(a) and (b). A 98 to 99.

On March 19, 2004, the defendant filed his memorandum in aid of sentencing, in which he made the same points set forth in his earlier objections to the Pre-Sentence Report. A 105 to 115.

On March 22, 2004, the defendant came before the district court, Alvin W. Thompson, J., for sentencing. At the outset of the hearing, Government counsel advised the court that the Government had filed no objections to the Pre-Sentence Report when it was disclosed but, because of events which transpired after the disclosure, the Government wished to object to the Pre-Sentence Report recommendations that the defendant be afforded relief under the "safety valve" pursuant to 18 U.S.C. §3553(f) and U.S.S.G. §§ 2D1.1(b)(7) and 5C1.2(a), and that the defendant be afforded a third-point reduction for

acceptance of responsibility pursuant to U.S.S.G. § 3E1.1(b).[5] A 130.

With respect to the quantity issue, the Government called Mario Fermin as a witness. The witness testified that he had entered a plea of guilty to federal cocaine conspiracy charges in Connecticut, and that in 2001 he participated in such a conspiracy. A 138. He stated that an associate of his in the narcotics-trafficking activity was Jose Cosme,[6] A 139, and that the defendant was an associate of Cosme during that activity. *Id.* The witness stated that he was present several times at a New York restaurant with Cosme, the defendant, "Vaelo," and "Busso," two other Cosme associates.[7] A 140 to 141. The witness testified that he learned from Cosme that the defendant transported money or drugs for Cosme, using Cosme's vehicle. A 141 to 142. He also stated that based on information provided to him by Cosme and his own

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[5] With regard to this latter reduction, the Government took the position that the offense conduct took place before April 30, 2003, the effective date of the amendment to § 3E1.1 which required a motion from the Government for the third point to be awarded. Accordingly, the Government took the position that such a motion was not a prerequisite to the court granting the third-point reduction. A 130.

[6] Cosme is the lead defendant in the Superseding Indictment in which the defendant was charged.

[7] "Vaelo" and "Busso" are aliases used by two other defendants charged with the defendant in the Superseding Indictment, and are recited in its caption. A 18.

direct observations, he knew that the defendant had transported one kilogram of cocaine for Cosme on one occasion and three kilograms of cocaine on another, within weeks of his arrest for possession of two other kilograms of cocaine. A 143 to 146. While he indicated on cross-examination, A 163, and on re-direct examination, A 170 to 171, that the quantities may have been one kilogram and two kilograms instead of one and three, the witness never wavered from his contention that the defendant had transported a total of at least three kilograms for Cosme. A 183. The witness also testified that the witness had transported money for Cosme, and as an example described transporting $400,000 from New York to Waterbury on each of two occasions.

After the witness was excused, the parties were heard on the "safety valve" issue. The Government recommended that relief be denied on the basis that, at a proffer, the defendant had insisted that his only involvement in the charged conspiracy was his possession of two kilograms of cocaine on the day of his arrest, and that information was not credible. A 186. The defendant at that point stood by his proffer. A 187.

Following argument and a recess, the court overruled the defendant's objection to the drug quantity of at least five kilograms recommended by the Office of Probation and the Government, crediting the testimony of Mario Fermin and extrapolating from summaries of telephone calls intercepted pursuant to orders of the district court which were marked in evidence for the evidentiary portion of the sentencing hearing. A 200 to 201.

Based on the same evidence and on another exhibit, a driver's license in the name of Jorge Morales which had been used by the defendant, the court concluded that the defendant had not qualified for the "safety valve" in that he had not "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." A 202.

With regard to role in the offense, the court concluded that a downward adjustment was not warranted. The court noted that the burden of establishing the basis for a role reduction was on the defendant, he had relied principally on his proffer information to meet that burden, and the court did not credit the defendant's version of events in light of Fermin's testimony and other matters in the record. A 202 to 203.

Relying on the same evidence and citing the requirement in Application Note 1(a) to U.S.S.G. § 3E1.1 that to determine the defendant's eligibility for credit for acceptance of responsibility, the court should consider whether the defendant has truthfully admitted the conduct comprising the offense of conviction and truthfully admitted or not falsely denied any additional relevant conduct, the court denied any adjustment for acceptance of responsibility. A 203 to 204.

Based on its rulings, the court calculated the defendant's Guidelines as follows: base offense level 32; no adjustments for role in the offense, "safety valve," or acceptance of responsibility; total offense level 32,

Criminal History Category I; range of 121 to 151 months, fine of $17,500 to $2 million. A 204.

The court then recited the penalties as a maximum of forty years of incarceration with a mandatory minimum prison term of five years, four years to life of supervised release, and a fine of up to $2 million. A 205. The parties agreed that the court had correctly stated the statutorily applicable penalties, and the Probation Officer agreed that the court had correctly stated the applicable Guideline calculation. A 206.

The district court explained to the defendant the factors it was required to consider in fashioning an appropriate sentence, summarizing the factors set forth in 18 U.S.C. § 3553(a). A 212 to 215. In doing so, the court advised the defendant that it considered the need for just punishment and the interest in general deterrence to be the factors it found to be the most significant in the defendant's case. A 214.

The court then imposed a sentence of 130 months of incarceration, to be served concurrently with a prison term which had previously been imposed by the New York County Supreme Court for related conduct. In imposing a sentence in the middle of the Guideline range, the court told the defendant that it found the defendant's lack of a criminal record and his guilty plea to be mitigating factors, but that the court also had to consider that the defendant's conduct required an evidentiary hearing, and that his conduct would have been misleading to the Government, had it accepted the defendant's version of events. A 215.

The court then imposed a ten-year term of supervised release, and declined to impose a fine. A 215 to 218.

SUMMARY OF ARGUMENT

I. The defendant's claim that his guilty plea was not knowing and voluntary because he "did not fully understand the consequences of his guilty plea," Def. Br. 18, and because he was "[u]naware of the potential sentencing consequences," *id.*, is wholly without support in the record. The plea agreement, which the defendant swore he read, understood and signed, accurately set forth the potential penalties. During the plea colloquy, the defendant was repeatedly advised of the potential penalties, and he repeatedly swore that he understood them. The plea agreement, including the portion which set forth the potential penalties, was accurately summarized by the Government, and the defendant swore that he understood them. The offense conduct, which involved multiple-kilogram quantities of cocaine base and cocaine, was summarized by the Government, and the defendant swore that he agreed with all of it. Moreover, the court advised the defendant at the time of his plea that, even if he had a mistaken impression as to the sentence which would likely be imposed by the court, this would not be a basis for withdrawing his plea or overturning his sentence, and the defendant swore that he understood this. The record contains nothing which even remotely supports the defendant's claim that his plea was not knowing and voluntary. In fact, the record conclusively establishes that it was.

II. The record establishes that, in fashioning the defendant's sentence, the district court made factual findings which are supported by the record, correctly calculated a Sentencing Guideline range for the defendant, considered the statutorily applicable factors, and imposed a sentence within the Guideline range which was specifically tailored to the defendant's case and which is just, appropriate, and reasonable. Nevertheless, because the court imposed sentence before *United States v. Booker*, 543 U.S. 220 (2005), a limited *Crosby* remand is appropriate.

ARGUMENT

I. THE DEFENDANT'S GUILTY PLEA WAS KNOWING AND VOLUNTARY

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

1. The Knowing and Voluntary Requirement for Guilty Pleas

In determining the validity of a guilty plea, "[a]ll that is required to show that a guilty plea is valid is that the plea was 'voluntarily and understandingly entered.'" *Boykin v. Alabama*, 395 U.S. 238, 244 (1969).

To ensure that a guilty plea is made voluntarily and intelligently, Rule 11 of the Federal Rules of Criminal Procedure requires that the court inform the defendant on the record of "the nature of the charges against him and of the consequences of the plea." *United States v. Perdomo*, 927 F.2d 111, 116 (2d Cir. 1991); *see also McCarthy v. United States*, 394 U.S. 459, 464 (1969). Rule 11 further provides that prior to accepting a plea of guilty, the court must determine that the plea is voluntary and not induced by force, threats or promises apart from a plea agreement. *See* Fed. R. Crim. P. 11(b)(2). The court also must ascertain that a factual basis exists for the plea of guilty. *See* Fed. R. Crim. P. 11(b)(3).

Guilty pleas are valid and enforceable when they are knowingly and voluntarily made under the law applicable at the time that the plea is entered. *See Brady v. United States*, 397 U.S. 742, 757 (1970) ("a voluntary plea of guilty intelligently made in the light of the then applicable law does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise"); *see also United States v. Ruiz*, 536 U.S. 622, 630 (2002) ("[T]he Constitution, in respect to a defendant's awareness of relevant circumstances, does not require complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of constitutional rights, despite various forms of misapprehension under which a defendant might labor"; one potential misapprehension is the defendant's "fail[ure] to anticipate a change in the law regarding relevant punishments") (internal citations and quotation marks omitted).

2. The Plain Error Standard of Review

Where, as here, a defendant challenges the validity of his guilty plea for the first time on appeal, this Court reviews the court's acceptance of the guilty plea only for plain error. *See* Fed. R. Crim. P. 52(b); *United States v. Dominguez Benitez*, 542 U.S. 74, 123 S. Ct. 2333, 2338 (2004) (citing *United States v. Vonn*, 535 U.S. 55, 63 (2002)) (defendant who seeks reversal of conviction after guilty plea on ground that district court violated Rule 11 must establish plain error); *United States v. Vaval*, 404 F.3d 144, 151 (2d Cir. 2005) (where appellant fails to object to Rule 11 violation, Court reviews for plain error); *United States v. Barnes*, 244 F.3d 331, 333 (2d Cir. 2001) (per curiam) (where defendant "did not argue the point to the district court, we review the trial judge's acceptance of the plea for plain error").

The defendant bears the burden of establishing plain error. *See Vaval*, 404 F.3d at 151 (citing *Vonn*, 535 U.S. at 59). To establish plain error, the defendant must demonstrate (1) an error, (2) that is plain, and (3) that affects substantial rights. *Vaval*, 404 F.3d at 151 (citing *United States v. Olano*, 507 U.S. 725, 732 (1993)). "If an error meets these initial tests, the Court engages in a fourth consideration: whether or not to exercise its discretion to correct the error. The plain error should be corrected only if it 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *United States v. Doe*, 297 F.3d 76, 82 (2d Cir. 2002) (citing *Johnson v. United States*, 520 U.S. 461, 466-67 (1997)).

C. Discussion

The defendant's sole claim with respect to the knowingness and voluntariness of his guilty plea is that, although he entered a plea to a drug conspiracy charge, because he was arrested with only two kilograms of cocaine, he was entitled to rely on two kilograms of cocaine as the ceiling for the drug quantity on which he would be sentenced. The argument continues that, because the district court, the Office of Probation and the Government "blind-sided" the defendant by arriving at a higher quantity attribution, his plea was necessarily neither knowing nor voluntary.[8] Def. Br. 17 to 18. The defendant's claim is supported by neither the record nor the law.

First, the record of the plea demonstrates that the defendant was fully aware of the penalties he faced. At the plea hearing, the court asked the defendant if he had read and understood the charge to which he intended to offer a guilty plea, and the defendant replied in the affirmative. A 68. There was a written plea agreement which outlined the charge, drug conspiracy, and the

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[8] The defendant does not appear to be raising a claim that his guilty plea was neither knowing nor voluntary because of a subsequent change in the law, specifically *United States v. Booker*, 543 U.S. 220 (2005). In any event, if he had raised such a claim, it would be without merit. *See United States v. Roque*, 421 F.3d 118, 119 (2d Cir. 2005) (guilty plea not unintelligent, involuntary or otherwise illegal based solely on changes in federal law effected by *Booker*).

elements of the offense. A. 52. At the Rule 11 proceeding, the court asked Government counsel to summarize the plea agreement and, in doing so, Government counsel recited the nature of the charge, its statutory citation, and its elements. A 72 to 73. The court then asked the defendant, who had been placed under oath, whether the agreement as summarized by Government counsel reflected his understanding of his agreement with the Government, and the defendant replied that it did. A 76. Thereafter, the court directed the Government to summarize the elements of the charge to which the defendant was to offer a plea, and Government counsel again did so. A 82. With respect to potential penalties, the written plea agreement set forth the statutorily applicable penalties, A 53; Government counsel recited the penalties as directed by the court, A 73 and 82; and the court recited the penalties for the defendant, A 77 to 78. At each juncture, the defendant swore that he understood the penalties as Government counsel and the court outlined them. A 76 and 78.

The defendant was equally aware of how the Sentencing Guidelines would affect his sentence. With specific reference to penalties which the defendant might face within those provided by statute, the plea agreement contained an acknowledgment by the defendant that the Sentencing Guidelines would apply to his case, that the district court would determine the application of the Guidelines to his case, and that the defendant would be unable to withdraw his guilty plea if the court's calculations turned out to be different from those anticipated by the defendant. A 53 to 54. In the

agreement, the defendant also acknowledged that he might have a right to have a jury make certain factual determinations which could effect his sentence, and he expressly waived any such right. A 54. At the Rule 11 proceeding, Government counsel summarized these provisions of the plea agreement, A 73 and 74, and the defendant acknowledged under oath that the recitation accurately summarized his understanding of the agreement he made. A 76. The court directly addressed the defendant about the workings of the Sentencing Guidelines, A 78 to 81, and emphasized that the defendant's understanding of what sentence would ultimately be imposed by the court would be irrelevant to the validity of the plea and sentence. A 80 to 81 (reprinted *supra* pages 8-10).

On this record, it is clear that the court and the Government did everything possible to ensure that the defendant understood the nature of the charge against him and the consequences of a guilty plea to that charge.

Second, the record likewise demonstrates that the defendant's plea was voluntary, and not induced by force, threats or promises apart from a plea agreement. *See* Fed. R. Crim. P. 11(b)(2). Here, the court canvassed the defendant on his ability to understand the Rule 11 proceeding, and on the voluntariness of his intention to offer a guilty plea. A 66 to 68. After explaining to the defendant his right to a trial and associated rights, and receiving from the defendant an acknowledgment that the defendant understood them, A 69 to 71, the court asked the defendant whether any secret promises, threats,

coercion or force were factors in his decision to plead guilty, and the defendant replied in the negative. A 76 to 77.

Third, the record also establishes that a factual basis exists for the plea of guilty. *See* Fed. R. Crim. P. 11(b)(3). (Indeed, the defendant does not contend to the contrary.) During the Rule 11 proceeding, the court directed Government counsel to summarize the evidence which the Government would offer in the event of a trial. Among other details in the summary, Government counsel referred to seizures of over 6 kilograms of cocaine base and cocaine from a co-conspirator who was indicted separately; undercover purchases of five ounces of cocaine base and several ounces of powder cocaine from codefendants; the seizure of over a kilogram of cocaine from a codefendant; the seizure of two kilograms of cocaine from the defendant; and the court-authorized interception of numerous drug-related calls among the defendants, including the defendant on appeal. A 85 to 87. When the court asked the defendant if he agreed with everything the prosecutor said, the defendant replied, "Yes." A 87. When the court asked the defendant what he had done that made him guilty of the charge to which he proposed to plead, the defendant replied that he had agreed to transport two kilograms of cocaine, and was stopped with the cocaine by police. A 83.

Fourth, another infirmity in the defendant's claim is that he has not demonstrated, or even argued, as he must, "a reasonable probability that but for the [alleged] error[s],

he would not have entered the guilty plea." *Dominguez Benitez*, 123 S. Ct. at 2340.

It is well established that the defendant has the burden of proving by a reasonable probability that, but for the claimed Rule 11 violation, he would not have pled guilty. *See Vaval*, 404 F.3d at 151 (citing *Vonn*, 535 U.S. at 59). In addition, the defendant must make this showing based on the record, not on unsupported assertions. *See United States v. Westcott*, 159 F.3d 107, 113 (2d Cir. 1998) (whether an error prejudiced the defendant "must be resolved on the basis of the record, not on the basis of speculative assumptions about the defendant's state of mind") (citation and quotation marks omitted). In the instant case, the defendant has not met this burden.

The defendant has not identified facts in the record indicating that he would not have pled guilty if he had known that he could be sentenced based on drug quantities greater than the two kilograms which were seized from him. If anything, there is ample evidence in the record establishing that the Government had a very strong case and that the defendant and his counsel determined that entering into a plea agreement was the best strategy. *See, e.g.*, A 77. *See also Dominguez Benitez,* 124 S. Ct. at 2341 (in assessing whether defendant would have pled guilty even if he had he known of Rule 11 error, appellate courts may consider the strength of the government's case and any possible defenses that appear from the record). In sum, the defendant has not claimed, let alone established, that, but for his claimed misapprehension of the penalties he faced, he would not have entered the guilty plea. *See*

Vaval, 404 F.3d at 151 (quoting *Dominguez Benitez*, 124 S. Ct. at 2340).

Here, the defendant has wholly failed to make out an error, plain or otherwise, or that any of his rights were affected at all. The fourth consideration, whether any error found should be corrected, simply does not arise.

II. A LIMITED *CROSBY* REMAND IS APPROPRIATE

The Sentencing Guidelines no longer play a mandatory role in sentencing, although they nevertheless continue to play a critical role in trying to achieve the "basic aim" that Congress tried to meet in enacting the Sentencing Reform Act, namely, "ensuring similar sentences for those who have committed similar crimes in similar ways." *Booker*, 543 U.S. at 252. In furtherance of that goal, judges are required to "consider the Guidelines 'sentencing range established for . . . the applicable category of offense committed by the applicable category of defendants,' § 3553(a)(4), the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims, §§ 3553(a)(1), (3), (5)-(7) (main ed. and Supp. 2004)." *Id.* at 259-60; *see also id.* at 264 ("The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing.").

Where, in a case such as the instant one, in which the district court imposed sentence before *Booker* clarified the law, and the court did so under the mistaken impression

that the Sentencing Guidelines were mandatory rather than advisory, a limited remand is appropriate so the district court may determine whether it would have imposed a nontrivially different sentence had it understood the Guidelines to be advisory. *See United States v. Crosby*, 397 F.3d 103, 118 (2d Cir. 2005).

In the present case, the defendant was sentenced on March 22, 2004, before the Supreme Court announced its decision in *Booker*. A review of the transcript of the sentencing hearing, A 123 to 220, and the defendant's sentencing memorandum, A 105 to 114, discloses that he did not claim that the district court would err by applying the Sentencing Guidelines in a mandatory fashion, nor did he make an argument under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), contesting the applicable standard of proof or the identity of the factfinder. In light of *Booker* and *Crosby*, it is now clear that the district court committed error by treating the U.S. Sentencing Guidelines regime as mandatory at sentencing. In order to determine whether such error was plain error for purposes of Fed. R. Crim. P. 52(b), this case should be remanded to the district court in conformity with this Court's instructions in *Crosby*, for the limited purposes outlined in that opinion.[9]

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[9] The defendant makes two additional claims regarding the sentencing proceeding which are not subsumed into the *Crosby* analysis. Specifically, he claims that the district court (1) failed to apply a preponderance-of-the-evidence standard in finding facts, and (2) erred in considering uncorroborated (continued...)

[9] (...continued)
"hearsay" testimony from a witness at the sentencing hearing. While this Court need not reach these claims at this time due to the application of *Crosby*, the Government offers the following observations.

First, while the district court did not utter the phrase "preponderance-of-the-evidence" at the sentencing, the record establishes that the court credited the testimony of the witness called by the Government, A 201, and based its findings of fact on this testimony. *Id.* The preponderance standard had been long established at the time of this sentencing. *See United States v. Cordoba-Murgas*, 233 F.3d 704, 708 (2d Cir. 2000) (holding that preponderance standard *must* be applied when calculating an offense level). The only reasonable reading of the district court's findings is that the court was, in fact, applying that generally applicable standard. *See generally United States v. Florez*, 447 F.3d 145, 156 (2d Cir. 2006) (collecting cases, discussing how preponderance standard "'survives *Booker'*") (quoting *United States v. Garcia*, 413 F.3d 201, 220 n.15 (2d Cir. 2005)). Given that a district court is not obliged to make "robotic incantations" at sentencing, *United States v. Fernandez*, 443 F.3d 19, 29-30 (2d Cir. 2006) (quoting *Crosby*, 397 F.3d at 113), *pet'n for cert. filed*, 75 U.S.L.W. 3034 (June 30, 2006), it would be beyond formalistic to fault the district court for failing to announce that it was applying the same standard of proof that always applies at sentencing.

With respect to the testimony itself, it is clear that hearsay is admissible at sentencing. *See United States v. Martinez*, 413 F.3d 239, 242 (2d Cir. 2005) (citing *United States v. Orozco-Prada*, 732 F.2d 1076, 1085 (2d Cir. 1984) (use of hearsay at (continued...)

[9] (...continued)
sentencing does not offend the due process or confrontation clause, and is permissible)). Here, it is not clear that the Government was offering hearsay at all. For one thing, the testimony (which was credited by the court) established that the statements offered were made by a coconspirator of the defendant during and in furtherance of the conspiracy. *See* Fed. R. Evid. 801(d)(2)(E). Moreover, some of the statements to which Fermin testified were commands which he overheard Cosme make to the defendant. Commands are not hearsay. *See United States v. Bellomo*, 176 F.3d 580, 586 (2d Cir. 1999).

Moreover, contrary to the suggestion of the defendant at Def. Br. 23, the testimony of the witness was not uncorroborated. Rather, it was corroborated in part and indirectly by physical exhibits which were before the district court: transcripts of telephone calls intercepted pursuant to orders of the district court and a driver's license in the name of "Jorge Morales," which was in the defendant's possession when he was arrested. A. 201 to 202.

In any event, uncorroborated accomplice testimony is sufficient to support a finding of fact at sentencing. *See United States v. Lee*, 818 F.2d 1052, 1057-58 (2d Cir. 1987) (citing *Caminetti v. United States*, 242 U.S. 470, 495 (1917) and *United States v. Bermudez*, 526 F.2d 89, 99 (2d Cir. 1975)); *see also Florez*, 447 F.3d at 155 ("a federal conviction may be supported 'by the uncorroborated testimony' of even a single accomplice witness 'if that testimony is not incredible on its face and is capable of establishing guilt beyond a reasonable doubt.'") (citing *United States v. Parker*, 903 F.2d 91, 97 (2d Cir. 1990)).

CONCLUSION

For the reasons set forth above, the defendant's conviction should be affirmed; further, this Court should order a limited remand pursuant to *Crosby* so the district court can determine whether to resentence the defendant in light of *Booker* and *Crosby*.

Dated: September 1, 2006

Respectfully submitted,

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

H. GORDON HALL
ASSISTANT U.S. ATTORNEY

William J. Nardini
Assistant United States Attorney (of counsel)

ADDENDUM

Fed. R. Crim. P. 11

(a) Entering a Plea.

(1) In General. A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) Conditional Plea. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) Nolo Contendere Plea. Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) Failure to Enter a Plea. If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform

the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel--and if necessary have the court appoint counsel--at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) the court's obligation to apply the Sentencing Guidelines, and the court's discretion to depart from those guidelines under some circumstances; and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) Ensuring That a Plea Is Voluntary. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) Plea Agreement Procedure.

(1) In General. An attorney for the government and the defendant's attorney, or the defendant when

proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) Rejecting a Plea Agreement. If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give

the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any

related statement is governed by Federal Rule of Evidence 410.

(g) Recording the Proceedings. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.