06-5655-cr(L)

To Be Argued By:
ALINA P. REYNOLDS

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 06-5655-cr(L)
07-1931-cr(CON)

UNITED STATES OF AMERICA,

Appellee,

-vs-

FRANK ESTRADA, EDWARD ESTRADA, ISAIAS SOLER, NELSON CARRASQUILLO, BILLIE GOMEZ,

(For continuation of Caption, See Inside Cover)

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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Defendants.

RICARDO ROSARIO, FELIX DEJESUS,

Defendants-Appellants.

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Statement of Jurisdiction

The district court (Stefan R. Underhill, J.) had subject matter jurisdiction over these criminal proceedings under 18 U.S.C. § 3231.

On September 4, 2002, the district court sentenced defendant Felix DeJesus to 360 months' imprisonment; judgment entered September 11, 2002. Joint Appendix ("JA") 181-82, 288. On April 30, 2007, on remand from this Court, the district court entered an order denying DeJesus's motion for resentencing pursuant to its finding that it would not have imposed a nontrivially different sentence under an advisory Sentencing Guidelines regime. JA244, 374-75. This order entered on May 1, 2007, and DeJesus filed a timely notice of appeal on May 4, 2007. JA244, 376. On September 27, 2002, the district court sentenced defendant Ricardo Rosario to a term of 240 months' imprisonment; judgment entered October 4, 2002. JA186-87. On November 30, 2006, pursuant to a remand from this Court, the district court determined that Rosario was not entitled to safety valve relief and that it would not have imposed a different sentence under an advisory Sentencing Guidelines regime. JA241. This order was entered on December 1, 2006, and Rosario filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on December 5, 2006. JA241.

This Court has appellate jurisdiction over the district court's entry of final judgment under 28 U.S.C. § 1291 and over the defendants' sentencing challenges under 18 U.S.C. § 3742(a).

Statement of Issues Presented for Review

Claims of Felix DeJesus

I. Whether the defendant's sentence was substantively and procedurally reasonable when the district court noted that it had considered all of the defendant's arguments and expressly stated that it had considered the factors in 18 U.S.C. § 3553(a) and identified the specific factors in that section that impacted the sentence it imposed.

Claims of Ricardo Rosario

I. Whether the district court properly found that the defendant was not eligible for safety valve relief under U.S.S.G. § 5C1.2 based on its findings that:

   a. the defendant possessed a gun in connection with the offense, and

   b. the defendant had accumulated three criminal history points.

II. Whether the defendant's sentence was substantively reasonable.

United States Court of Appeals

. FOR THE SECOND CIRCUIT

Docket Nos. 06-5655-cr(L)
07-1931-cr(CON)

UNITED STATES OF AMERICA,

Appellee,

-vs-

RICARDO ROSARIO, FELIX DEJESUS,

Defendants-Appellants.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Defendants-appellants Felix DeJesus and Ricardo Rosario were trusted, high ranking members of the Estrada narcotics trafficking organization which was responsible for the distribution of multi-kilogram quantities of heroin and crack-cocaine primarily in Bridgeport, Connecticut. A jury convicted them on drug trafficking charges, and the district court sentenced DeJesus to 360 months' imprisonment and Rosario to 240 months' imprisonment.

On remands pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), the district court declined to resentence both defendants, and with respect to Rosario, found him ineligible for "safety valve" relief under U.S.S.G. §§ 2D1.1(b)(6) and 5C1.2 (2002).

DeJesus claims that his 360-month sentence was substantively and procedurally unreasonable. He claims that the district court erred by failing to consider a departure based upon the cumulative effects of the overlapping Guidelines adjustments for role in the offense and drug quantity. He further argues that a consideration of his personal history and characteristics, along with other factors relevant under 18 U.S.C. § 3553(a), demonstrates that his 360-month sentence was unreasonably long.

Rosario claims that the district court erred in declining to award him relief under the Sentencing Guidelines safety valve provision because the court erroneously found that he had possessed a firearm in connection with the offense, and that he had acquired more than one criminal history point at the time of sentencing.

The district court carefully considered the defendants' arguments and properly imposed reasonable sentences. As described more completely below, the defendants' claims on appeal should be rejected.

Statement of the Case

On June 20, 2001, a federal grand jury in Connecticut returned a Third Superseding Indictment against numerous defendants alleged to be involved in drug trafficking activity primarily in and around Bridgeport, Connecticut, including among others the defendants-appellants Felix DeJesus and Ricardo Rosario. *See* Joint Appendix ("JA") 103.[1] Count Twelve of the Third Superseding Indictment charged DeJesus and Rosario with unlawfully conspiring to possess with intent to distribute 1000 grams or more of heroin, in violation of 21 U.S.C. § 846. Count Thirteen of the Third Superseding Indictment charged DeJesus and Rosario with unlawfully conspiring to possess with intent to distribute 50 grams or more of cocaine base ("crack"), in violation of 21 U.S.C. § 846. JA266-68.

Jury selection for the trial of DeJesus, Rosario and several co-defendants began on February 7, 2002. JA157. On March 4, 2002, the government began presentation of its trial evidence, JA160, and the trial continued to March 27, when the district court gave final instructions to the jury, JA164. On April 2, 2002, the jury rendered verdicts of guilty on Counts Twelve and Thirteen against DeJesus. The jury convicted Rosario on Count Twelve and

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[1] Hereinafter, all references to the Joint Appendix filed by defendant DeJesus are designated "JA" followed by the relevant page number(s). References to the Appendix of defendant Rosario are designated "A." References to the PreSentence Reports are designated "PSR" followed by the relevant paragraph number.

acquitted him on Count Thirteen. JA166, 276-77, 280, 284, 286.

On September 4, 2002, the district court (Stefan R. Underhill, J.) sentenced DeJesus to a term of 360 months' imprisonment on each count of conviction, to be served concurrently, to be followed by a term of ten years' supervised release. JA181-82, 288. On September 27, 2002, the district court sentenced defendant Rosario to a term of 240 months' imprisonment, to be followed by a term of ten years' supervised release. JA186-87. On appeal, this Court affirmed the convictions, but remanded for proceedings pursuant to *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), and with respect to defendant Rosario, for further findings on his eligibility for relief under the "safety valve" provision of U.S.S.G. §§ 2D1.1(b)(6) and 5C1.2.[2] *United States v. Estrada*, 430 F.3d 606 (2d Cir. 2005), *cert. denied*, 547 U.S. 1048 (2006); *United States v. DeJesus*, 160 F.App'x 15 (2d Cir. 2005).

On April 30, 2007, the district court determined that it would not have sentenced DeJesus to a nontrivially different sentence under an advisory Guidelines regime. JA244, 374-75. DeJesus filed a timely notice of appeal on May 4, 2007. JA244, 376-77. On November 30, 2006, the district court determined that Rosario was ineligible for safety valve relief, and that the court would not have

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[2] The 2000 Sentencing Guidelines were used at the original sentencing and accordingly are cited herein. The safety valve provision at issue here has been moved to § 2D1.1(b)(9).

imposed a nontrivially different sentence under an advisory Guidelines regime. A159, 163-66, JA 241. Rosario filed a timely notice of appeal on December 5, 2006. A170, JA241.

Both defendants are serving their federal sentences.

Statement of Facts

A. The offense conduct

Frank Estrada, a.k.a. "The Terminator," and his criminal associates began running a violent drug trafficking organization within the city of Bridgeport, Connecticut in the late 1980's. Beginning in or about 1995 and upon his release from state prison, Estrada expanded his narcotics trafficking organization and distributed large, wholesale quantities of heroin and cocaine base throughout Bridgeport, New Haven, and Meriden, Connecticut for street-level distribution. Both Felix DeJesus and Ricardo Rosario grew up in the P.T. Barnum housing project, which became one of the Estrada organization's main retail outlets for heroin and cocaine base.

As described below, the government presented extensive evidence at trial to show broad-ranging participation by DeJesus and Rosario in the drug trafficking conspiracies charged in the Indictment.

In January of 2002, Frank Estrada pleaded guilty to fourteen federal charges related to his drug trafficking

organization and entered into a cooperation agreement with the government. Tr. 03/15/02 at 174-77. In connection with his cooperation agreement, he testified at numerous federal trials and proceedings in the District of Connecticut. In March of 2002, he testified against DeJesus, Rosario and their co-defendants at trial. His testimony detailed how his organization worked, who the members were, and the type and quantities of narcotics distributed.

Estrada testified that in the early stages of his organization, his "main thing was selling heroin," but that he later merged his organization with Hector Gonzalez's crack-cocaine organization in order to maximize profits. Tr. 03/15/02 at 77-78.

Estrada testified that he met Ricardo Rosario through William Rodriguez, one of his main lieutenants, and a couple of months later Rosario began working at the heroin packaging sessions. Tr. 03/14/02 at 266; Tr. 03/18/02 at 221. Estrada explained that some of the heroin packaging sessions took place at Rosario's mother's apartment in the P.T. Barnum housing complex. Tr. 03/14/02 at 267. Estrada saw Rosario in possession of firearms, and on one occasion, Rosario showed Estrada one of the firearms he had purchased. Tr. 03/14/02 at 268. Eventually Estrada used Rosario to organize and supervise the heroin packaging sessions. Tr. 03/14/02 at 269-70; Tr. 03/15/02 at 126; Rosario PSR ¶ 23.

One of the government's other principal cooperating witnesses, William Rodriguez, a.k.a. "Billy Gomez,"

testified that he joined the Estrada organization in 1996, and that he was one of Frank Estrada's first supervisors. Rodriguez testified that Rosario joined the Estrada organization early in its life when Rodriguez employed him as a "runner" (street-level seller). Tr. 03/14/02 at 262-63, 266. Rodriguez introduced Rosario to the organization, and Rosario began attending bagging sessions in early 1996 where he worked "spooning" heroin into small glassine bags for street level distribution. Tr. 03/07/02 at 77-78, 80, 135; Rosario PSR ¶ 23. According to Rodriguez, Felix DeJesus also joined the organization early on and became a trusted member who participated in heroin packaging sessions along with Rosario and other members of the organization approximately two or three times a month. Tr. 03/07/02 at 77-79; DeJesus PSR ¶¶ 8, 9. Rodriguez explained that he and Estrada carried firearms at the sessions. Tr. 03/07/02 at 81; DeJesus PSR ¶ 12. Rodriguez further described how Rosario and several other members of the organization also participated in the cooking and preparation of crack-cocaine. Tr. 03/07/02 at 131-33.

Rosario continued to regularly attend heroin packaging sessions through late 1996 and early 1997. Tr. 03/07/02 at 93, 95, 135. Several of the sessions which Rosario participated in at that time took place at one of the organization's stash locations located at 80 Granfield Avenue in Bridgeport. Tr. 03/07/02 at 95.

Rodriguez explained that in early 1997 he was arrested by the Bridgeport Police, and that he cooperated with the police by providing the location of the stash apartment

located at 80 Granfield Avenue. Tr. 03/07/02 at 96. Former Bridgeport Police Detective Richard DeRiso testified that based upon the information provided by Rodriguez, he obtained a state search warrant for the location where on March 7, 1997, the police seized, among other things, a kilogram of crack cocaine, firearms, and narcotics packaging materials. Tr. 03/04/02 at 151-52, 156-72.

Another cooperating witness, Nelson Carrasquillo, testified that in January of 1999, he became involved with Frank Estrada's sister, and several months later they began living together at an apartment in Bridgeport. Tr. 03/20/02 at 95, 100. Carrasquillo first became aware of the heroin packaging sessions in May of 1999 when he walked in on a session taking place at the apartment he shared with Carmen Estrada. Tr. 03/20/02 at 103, 105. He identified Ricardo Rosario as one of the people participating in the session. Tr. 03/20/02 at 105. Heroin packaging sessions took place at Carrasquillo's apartment in Bridgeport throughout the summer of 1999. According to Carrasquillo, Rosario was a regular member of the heroin packaging sessions. Rosario was the "fastest one" at spooning the heroin into the individual baggies, and he taught Carrasquillo how to "spoon." Tr. 03/20/02 at 128-31. Carrasquillo testified that at least one kilogram of heroin was packaged at each session and sessions were held on a weekly basis. Tr. 03/20/02 at 127, 130.

Carrasquillo explained that heroin packaging sessions also took place in the late summer through the fall of 1999. He explained that the heroin and all the packaging

materials were usually set up before the session workers arrived at the location, but that on a couple of occasions he observed Rosario arrive at the session location with a bag containing the heroin. Tr. 03/20/02 at 139-40. Carrasquillo testified that he observed Rosario at the sessions that took place in the late summer or early fall of 1999. He testified that at those sessions Carmen Estrada kept her 9 millimeter firearm on the table with the heroin. Tr. 03/20/02 at 136.

In 1997, Jermaine Jenkins, another cooperating witness who testified at trial, became a lieutenant in the Estrada organization. Tr. 03/15/02 at 97; Tr. 03/21/02 at 89. He testified that Rosario also worked as a lieutenant at the time. Tr. 03/21/02 at 89, 152. The lieutenants were responsible for obtaining large quantities of heroin and crack cocaine which had been packaged for street-level distribution. Tr. 03/07/02 at 72; 03/21/02 at 81, 89-91, 137.

In or about 1997, Jermaine Jenkins was placed in control of the organization's crack distribution activities. Tr. 03/21/02 at 93. When Jenkins was unable to sell the crack fast enough, Frank Estrada employed Isaias Soler, Ricardo Rosario, Michael Hilliard, and Charles and Felix DeJesus to flood the market with kilograms of cheaper crack-cocaine. Tr. 03/21/02 at 94-95. Felix DeJesus and Charles DeJesus regularly sold crack-cocaine in P.T. Barnum for the Estrada organization, and Jenkins observed Felix DeJesus regularly handing out packages of crack-cocaine for street-level distribution. Tr. 03/21/02 at 95-96, 101; DeJesus PSR ¶ 15.

Testimony at trial established that beginning in approximately 1996, Felix DeJesus was a trusted lieutenant who was close to Frank Estrada. DeJesus PSR ¶¶ 8, 9. According to cooperating witness Hector Cruz, in the mid-1990's he was purchasing crack cocaine in P.T. Barnum when he observed Felix DeJesus and Frank Estrada together. While he was buying the narcotics, Cruz observed Estrada drop DeJesus off with packages of crack which DeJesus passed out to street sellers. Tr. 03/12/02 at 202-04. The close relationship between DeJesus and Estrada was corroborated by testimony from Special Agent Mark Kelling of the Drug Enforcement Administration in Miami. He testified that he stopped DeJesus who was traveling in the company of Frank Estrada on March 4, 1998, and questioned the pair on the basis of indications that they were engaged in narcotics trafficking activity. Tr. 03/15/02 at 8-10. As a result of this encounter, DEA agents in Miami recovered over $14,000 from DeJesus and Frank Estrada. Tr. 03/15/02 at 17.

In addition to his testimony about DeJesus, Hector Cruz also provided testimony about Ricardo Rosario. He testified that after spending some time in jail, he started hanging out in P.T. Barnum and saw Ricardo Rosario handing out bundles of "Hawaiian Punch" heroin to street sellers and collecting money. Tr. 03/12/02 at 212-13; Rosario PSR ¶ 23. ("Hawaiian Punch" was one of the many brand names of heroin distributed by the Estrada organization. Tr. 03/07/02 at 90; 03/15/02 at 89-90.)

Shortly thereafter, Cruz began selling narcotics and was arrested again. Members of the FBI Task Force

approached him and, at the direction and under the supervision of law enforcement officers, he began making controlled purchases of narcotics on the East Side of Bridgeport and in P.T. Barnum. Tr. 03/12/02 at 222-25. On March 29, 2000, Cruz made a controlled purchase of heroin from Ricardo Rosario and his brother, Benito Rosario, inside an apartment in P.T. Barnum. Tr. 03/12/02 at 226, 228-30.

While he was making the controlled purchase, Cruz observed the Rosario brothers packaging heroin for street-level distribution inside their apartment. Tr. 03/12/02 at 228-29. That day, Cruz purchased $800 worth of heroin from the Rosario brothers, and he turned it over to law enforcement officers. Tr. 03/12/02 at 230-31; Rosario PSR ¶ 24. Latent fingerprints matching those of Ricardo Rosario were ultimately found on one of the packages of heroin which Cruz purchased from the Rosario brothers. Tr. 03/18/02 at 273-74, 275-76, 279; Rosario PSR ¶ 24.

Evidence at trial further established that members of the organization, including Ricardo Rosario and Felix DeJesus, regularly carried firearms during and in relation to the narcotics trafficking activity. Tr. 03/15/02 at 80; DeJesus PSR ¶ 12. This testimony was corroborated by Bridgeport Police Detective Juan Gonzalez who testified that on February 5, 1997, during the course of executing an arrest warrant for Felix DeJesus, he recovered a semi-automatic handgun and a quantity of "Set it Off" brand heroin from the defendant's jacket inside his Alice Street

apartment. Tr. 03/12/02 at 79, 82-84, 86, 119; Tr. 03/15/02 at 89-90; DeJesus PSR ¶ 12.

B. Felix DeJesus: Sentencing and subsequent proceedings

DeJesus was charged in Count Twelve of the Third Superseding Indictment with conspiring to possess with intent to distribute in excess of 1000 grams of heroin, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846, and in Count Thirteen with conspiring to possess with intent to distribute in excess of 50 grams of crack, also in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846. JA103, 266-68. On April 2, 2002, after a month-long jury trial, DeJesus was convicted of both Counts Twelve and Thirteen. JA166, 276-77, 284.

DeJesus's Guidelines were calculated in the PSR, which the district court adopted as its findings, as follows:

Drug Quantity (1,000 grams or more of Heroin and 50 grams or more of cocaine base) (§ 2D1.1(c)(1))..	+38
Use of Firearm in Connection with Offense (§ 2D1.1(b)(1))..	+2
Leadership Role (§ 3B1.1(b)).	+3
Use of Minor (§ 3B1.4).	+2
	45

DeJesus PSR ¶¶ 32-41; JA 354-55.

At sentencing, the district court granted DeJesus's motion for a downward departure based upon his extraordinary pre-arrest rehabilitation, and departed from the applicable Guidelines offense level 43 to level 42.[3] JA353-54. This departure resulted in a Guidelines range of 360 months to life. The district court imposed a sentence at the bottom of this lower range, and sentenced DeJesus to 360 months' imprisonment on each count, to be served concurrently, and to be followed by a 10-year term of supervised release. JA288, 362-64.

DeJesus appealed, and this Court affirmed his conviction but remanded for further proceedings pursuant to *Crosby*. *Estrada*, 430 F.3d 606; *DeJesus*, 160 F.App'x 15.

On April 30, 2007, the district court determined that it would not have sentenced DeJesus to a nontrivially different sentence under an advisory Guidelines regime. JA244, 374-75. DeJesus filed a timely notice of appeal on May 4, 2007. JA244, 376-77.

C. Ricardo Rosario: Sentencing and subsequent proceedings

Rosario was charged in Count Twelve of the Third Superseding Indictment with conspiring to possess with intent to distribute in excess of 1000 grams of heroin, in

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[3] Under Sentencing Guidelines Chapter 5, Part A, application note 2, an adjusted offense level of more than 43 is treated as an offense level 43. *See* DeJesus PSR ¶ 41.

violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846, and in Count Thirteen with conspiring to possess with intent to distribute in excess of 50 grams of crack, also in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846. JA103, 266-68. On April 2, 2002, after a month-long jury trial, Rosario was convicted of Count Twelve and acquitted of Count Thirteen. JA166, 280, 286.

At sentencing on September 27, 2002, the district court found that Rosario's base offense level was 36. GA44. Although the government and the Probation Department agreed that the defendant faced a three-level upward adjustment to his base offense level based upon his supervisory role in the organization, the district court found that a role adjustment was not warranted. GA47. The district court also declined to adjust Rosario's sentence for use of a minor, A81, but added the two-point firearms enhancement, GA55, and ultimately found a Guidelines offense level of 38, resulting in a Guidelines range of 235 to 293 months. GA61. Rosario urged the district court to grant him "safety valve" relief pursuant to U.S.S.G. § 2D1.1(b)(6). The district court, however, declined to award the defendant safety valve relief. GA58-59. The district court sentenced Rosario principally to a term of 240 months' imprisonment. JA186-87.

This Court affirmed Rosario's conviction, but remanded the case to the district court for further proceedings pursuant to *Crosby*, and for further findings with respect to Rosario's eligibility for "safety valve" relief under § 2D1.1(b)(6). *Estrada*, 430 F.3d 606; *DeJesus*, 160 F.App'x 15.

On November 30, 2006, the district court held a hearing and determined that it would not have imposed a nontrivially different sentence under an advisory Guidelines regime. A163-66. The district court further found that because the defendant possessed firearms in connection with the offense of conviction, and because his prior juvenile conviction resulted in three criminal history points, he was ineligible for safety valve relief. A123-25, 140-41, 159.

Summary of Argument

Felix DeJesus

I. Felix DeJesus's sentence was both substantively and procedurally reasonable. DeJesus contends that his sentence was substantively unreasonable in light of several arguments he raised before the district court on the application of the factors under 18 U.S.C. § 3553(a). In other words, DeJesus asks this Court to substitute its judgment about the proper application of those factors for that of the district court, a task this Court has repeatedly declined to undertake.

But even if this Court were to undertake this task, it would conclude that DeJesus's sentence was reasonable. *First*, DeJesus argues that he should have received a lower sentence to account for the "cumulative effects" of overlapping Sentencing Guidelines adjustments for drug quantity and role in the offense. The two adjustments he cites, however, were not "substantially overlapping" adjustments because they were triggered by separate

conduct and thus there was no basis for a lower sentence on this ground. *Second*, DeJesus argues that his sentence should have been lower because his brother and co-defendant's sentence was lower, but because the evidence against the two brothers was different, their sentences were properly different. *Third*, there is no basis for concluding that the district court failed to consider DeJesus's personal history and characteristics in light of the district court's grant of his motion for downward departure based on extraordinary pre-arrest rehabilitation and in light of the district court's comments at sentencing expressly citing his personal history and characteristics. *Fourth*, DeJesus argues that his sentence was greater than necessary to serve the purposes of punishment, but the district court expressly considered the purposes of punishment in its decision. On this record, there is no basis for this Court to second-guess the district court's assessment of those purposes.

DeJesus also argues that his sentence was procedurally unreasonable because the district court failed to consider his argument for a lower sentence based on his "cumulative effects" argument. This argument fails because the district court complied with all applicable procedural requirements for a *Crosby* remand and expressly stated that it had considered all of the defendant's arguments before it entered its order stating it would not have imposed a different sentence under an advisory Guidelines regime.

Ricardo Rosario

I. The district court properly found that Ricardo Rosario was ineligible for safety valve relief under U.S.S.G. § 5C1.2. To qualify for a two-level offense level reduction under that provision, the defendant must meet five criteria, including as relevant here, the following: (1) the defendant must not possess a gun in connection with the offense, and (2) the defendant must not have more than one criminal history point. The district court properly found that Rosario failed to meet both of these criteria.

The district court did not clearly err in finding that the defendant possessed a gun in connection with the offense. The court relied on testimony from trial indicating that the defendant possessed at least two firearms, at least one of which he held for the leader of the drug conspiracy. Although the defendant points to allegedly conflicting testimony in the record, the district court found that testimony either irrelevant or not credible.

The district court also properly calculated three criminal history points as arising from the defendant's prior juvenile conviction. The defendant argues that his juvenile conviction should have been excluded under § 4A1.2(c)(1) because it is less serious than the offenses listed in that section. As the district court properly found, however, his conviction for using a motor vehicle without permission was more serious than the minor offenses listed in § 4A1.2(c)(1). The defendant's alternative argument for exclusion – that his conviction should be excluded as an "expunged" conviction under § 4A1.2(j) – is raised for

the first time on appeal and is meritless in any event: the defendant's conviction was not expunged.

Finally, the district court did not clearly err when it found that the defendant was on probation for his juvenile conviction when he committed the instant offense. The district court made detailed factual findings to support the conclusion that Rosario committed the instant offense while on probation. The defendant cites conflicting evidence (largely his own self-serving statement), but the district court's decision to disregard this evidence was not clearly erroneous.

II. In the alternative, the defendant's sentence was substantively reasonable. On remand, the district court made clear that it had imposed a sentence that it considered "fair[]" and "just[]" in light of the § 3553(a) factors.

Argument

Claims of Felix DeJesus

I. DeJesus's sentence was substantively and procedurally reasonable.

A. Relevant facts

During DeJesus's original sentencing proceedings on September 4, 2002, the district court adopted the PSR's Guidelines calculation, including a total offense level of 43, a criminal history category ("CHC") III, and Guideline

range of life imprisonment. JA305, 319, 354-55; DeJesus PSR ¶¶ 41, 48; JA355. DeJesus moved for a downward departure based upon his claim of extraordinary pre-arrest rehabilitation. JA319-53. The district court granted the defendant's motion and departed one level to offense level 42, and imposed a sentence of 360 months of incarceration – the low end of the applicable and Guidelines range – to be followed by ten years of supervised release. JA353-54, 362-64. In imposing sentence, the district court noted that it had considered, among other things, the § 3553(a) factors, the seriousness of the offense conduct, the need to punish the defendant, the need for incapacitation and deterrence, and the potential for rehabilitation. JA360-62.

On remand pursuant to *Crosby*, the district court invited briefing from the parties. JA371. In his submission, DeJesus argued that a materially shorter sentence was warranted to account for, *inter alia*, the history and characteristics of the defendant, the purposes of punishment, the impact of "overlapping enhancements" on his Guidelines calculation, and the need to avoid unwarranted sentencing disparities.

In a two-page written ruling dated April 30, 2007, the district court rejected DeJesus's claims. The court explained that in reaching its decision, it had considered the parties' briefing, the PSR, and the original sentencing transcript. JA374. Based on this record, the court found that re-sentencing was unnecessary and that this decision was based on "two principal facts":

> First, at the initial sentencing, I was able to depart from the Sentencing Guidelines incarceration range. This meant that the mandatory nature of the Sentencing Guidelines did not prevent me from imposing the sentence of incarceration that I believed was appropriate, taking into account all of the information I had available to me about DeJesus. Second, having decided to depart, I weighed the factors set forth in 18 U.S.C. § 3553(a) when deciding upon the sentence imposed. The facts I relied upon at the initial sentencing remain pertinent under an advisory Sentencing Guidelines scheme: a long record of prior convictions, a history of violence, a supervisory role in "one of the worst drug conspiracies" Bridgeport has ever seen, the need for punishment commensurate with the seriousness of the crime, and the impact of the crime on the community. At the same time, I was able to consider mitigating factors that formed the basis for the downward departure. These are the same facts that would have led me to impose a sentence not trivially different than 360 months' imprisonment had I been able to sentence DeJesus under an advisory Sentencing Guideline scheme in September 2002.

JA374-75.

B. Governing law and standard of review

After the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), which rendered the

Sentencing Guidelines advisory rather than mandatory, a sentence satisfies the Sixth Amendment if the sentencing judge "(1) calculates the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) considers the calculated Guidelines range, along with other § 3553 factors; and (3) imposes a reasonable sentence." *United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir.), *cert. denied*, 127 S. Ct. (2006); *Crosby*, 397 F.3d at 113.

This Court reviews a sentence for reasonableness. *See Rita v. United States*, 127 S. Ct. 2456, 2459 (2007); *Fernandez*, 443 F.3d at 26-27. Similarly, this Court reviews a sentence for reasonableness "even after a District Court declines to resentence pursuant to *Crosby*." *United States v. Williams*, 475 F.3d 468, 474 (2d Cir. 2007).

The Court has generally divided reasonableness review into procedural and substantive reasonableness. For a sentence to be procedurally reasonable, the Court must review whether the sentencing court identified the Guidelines range based upon found facts, treated the Guidelines as advisory, and considered the other § 3553(a) factors. *United States v. Cavera*, No. 05-4591-cr(L), 2007 WL 1628799, *2 (2d Cir. June 6, 2007). Substantive reasonableness is contingent upon the length of the sentence in light of the case's facts. *Id.* at *2.

The reasonableness standard is deferential and focuses "primarily on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18

U.S.C. § 3553(a)." *United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005). This Court does not substitute its judgment for that of the district court. "Rather, the standard is akin to review for abuse of discretion." *Fernandez*, 443 F.3d at 27. This Court has noted that "in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Id.*; *see also Rita*, 127 S. Ct. at 2462-65 (courts of appeals may apply presumption of reasonableness to a sentence within the applicable Sentencing Guidelines range).

Consideration of the Guidelines range requires a sentencing court to calculate the range and put the calculation on the record. *Fernandez*, 443 F.3d at 29. The requirement that the district court consider the § 3553(a) factors, however, does not require the judge to precisely identify the factors on the record or address specific arguments about how the factors should be implemented. *Id.*; *Rita*, 127 S. Ct. at 2468-69 (affirming a brief statement of reasons by a district judge who refused downward departure; judge noted that the sentencing range was "not inappropriate"). There is no "rigorous requirement of specific articulation by the sentencing judge." *Crosby*, 397 F.3d at 113. Indeed, a court's reasoning can be inferred from what the judge did in the context of what was argued by the parties and contained in the PSR. *See United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005) ("As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception

about their relevance, we will accept that the requisite consideration has occurred."). Thus, this Court "presume[s], in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the statutory factors [under § 3553(a)]." *Fernandez*, 443 F.3d at 30.

This Court further presumes that a sentencing judge considers all arguments presented, unless the record clearly suggests otherwise. *See United States v. Carter,* 489 F.3d 528, 540-41 (2d Cir. 2007), *pet'n for cert. filed,* No. 07-6441 (Sept. 06, 2007); *Fernandez*, 443 F.3d at 29-30. This presumption is particularly applicable when the judge emphasizes that all submissions have been heard and the § 3553 factors have been considered. *See United States v. Banks*, 464 F.3d 184, 190 (2d Cir. 2006) ("[T]here is no requirement that the court mention the required [§ 3553(a)] factors, much less explain how each factor affected the court's decision. In the absence of contrary indications, courts are generally presumed to know the laws that govern their decisions and to have followed them."), *pet'n for cert. filed*, No. 07-5969 (July 27, 2007); *Fernandez,* 443 F.3d at 29-30 ("We will not conclude that a district judge shirked her obligation to consider the § 3553(a) factors simply because she did not discuss each one individually or did not expressly parse or address every argument related to those factors that the defendant advanced.").

C. Discussion

DeJesus claims that his sentence was both substantively and procedurally unreasonable. DeJesus's claims fail because the district court complied with the procedural requirements of *Crosby* and *Fernandez*, and the sentence it ultimately imposed – at the bottom of the Guidelines range – was substantively reasonable.

1. DeJesus's sentence was substantively reasonable.

DeJesus argues that his sentence was substantively unreasonable in light of the factors set forth in 18 U.S.C. § 3553(a). In support of this argument, as he did below, DeJesus points to the alleged cumulative effects of overlapping Guidelines adjustments, the shorter sentence imposed on his brother, his personal history and characteristics, and the purposes of punishment. DeJesus Br. at 14-20. DeJesus's argument, in effect, asks this Court to re-weigh the evidence before the district court at sentencing. But as this Court has repeatedly emphasized, "[r]easonableness review does not entail the substitution of [the appellate court's] judgment for that of the sentencing judge." *Fernandez*, 443 F.3d at 27. When reviewing a sentence for reasonableness, the court "should exhibit restraint, not micromanagement." *Fleming*, 397 F.3d at 100. In other words, the defendant "merely renews the arguments he advanced below . . . and asks [this Court] to substitute [its] judgment for that of the District Court, *which, of course, [it] cannot do*." *United States v. Kane*,

452 F.3d 140, 145 (2d Cir. 2006) (per curiam) (emphasis supplied).

Reviewing the district court's analysis of the § 3553(a) factors, it is clear that the district court did not exceed the bounds of its discretion, and properly considered those factors as required by *Fernandez*. Indeed, the district court expressly identified several of the § 3553(a) factors in its original sentencing decision, and reiterated those factors in its ruling on remand. JA360-62, 374-75. Because the defendant is essentially challenging nothing more than the particular weight that the district court ascribed to the various factors at issue, his challenge is to a "matter firmly committed to the discretion of the sentencing judge and is beyond [this Court's] review." *Fernandez*, 443 F.3d at 32.

Even if this Court were to re-examine the particular weight that the district court assigned to the various factors at play here, it should conclude that the sentence imposed by the district court was reasonable.

First, for example, DeJesus claims that the Guidelines adjustment he received for his supervisory role in the Estrada narcotics trafficking organization, along with the quantity of narcotics attributable to him based on his lengthy and high-level participation in the organization, "resulted in a two-fold enhancement under the Guidelines," and warranted a lower sentence in light of those "cumulative effects." DeJesus Br. at 15-16, 20.

In *United States v. Lauersen*, 362 F.3d 160, 164 (2d Cir. 2004), *judgment vacated and remanded in light of Booker*, 543 U.S. 1097 (2005), this Court recognized a sentencing court's authority to depart from the applicable Guideline range "when the addition of *substantially overlapping enhancements* results in a significant increase in the sentencing range minimum (as it does at the higher end of the sentencing table)." The defendant in *Lauersen* was convicted of health care fraud for submitting false claims to insurance companies. *Id.* at 161. The defendant's base offense level was a level 6, and 13 levels were added for the amount of loss, 2 levels for more than minimal planning, 4 levels for leadership role, 2 levels for abuse of position of trust, and 2 levels for obstruction of justice. *Id.* In addition, this Court found the sentencing court erred by failing to increase the defendant's offense level by an additional 4 levels because the fraud had affected a financial institution and the defendant had derived more than a million dollars in gross receipts. *Id.* at 161-62. That additional 4-level upward adjustment to the defendant's offense level resulted in the addition of 4 years to the bottom of the defendant's applicable Guidelines range. *Id*. at 162.

This Court noted that the additional 4-level enhancement "substantially overlapped" with the 13-level loss enhancement because "'the large amount of money involved in the fraud significantly triggers both of them.'" *Id*. (quoting *United States v. Lauersen*, 348 F.3d 329, 344 (2d Cir. 2003)). Furthermore, the 4-level adjustment increased his sentencing range more than it would have if his adjusted offense level had not placed him at the high

end of the sentencing table. *Id.* Under these circumstances, this Court upheld a sentencing court's authority to depart to account for these cumulative effects. *Id.* at 164.

As a preliminary matter, the *Lauersen* Court noted that the Sentencing Commission's decision to "impose more punishment for the same enhancement upon defendants with higher adjusted offense levels than upon those with lower adjusted offense levels" makes sense in the context of the precise adjustments that DeJesus challenges in this case, i.e., drug quantity and leadership enhancements: "[T]he . . . enhancement for [leadership role] should result in a larger increment of punishment for a defendant who is the leader of an organization selling large quantities of narcotics than for a defendant who is the leader of an organization selling small quantities of narcotics." *Id.* at 163 n.6.

But putting aside this language from *Lauersen*, DeJesus's argument still fails on the facts. DeJesus's sentencing adjustments for drug quantity and leadership role were not "substantially overlapping" because they were not triggered by the same conduct. DeJesus's drug quantity determination was based upon factors such as the length of his participation in the organization and the types of transactions he engaged in, rather than just his supervisory role. *See* DeJesus PSR ¶¶ 8-12, 24, 33.

Similarly, the three levels added to DeJesus's offense level as a result of his role as a supervisor was triggered, not by the attributable drug quantity, but by his actions as

a trusted, high-ranking member of the organization. DeJesus was one of Estrada's most trusted lieutenants who even traveled to Miami with Estrada carrying large quantities of U.S. currency. Tr. 03/15/02 at 8-10, 17. He made sure that drugs were passed out to the street-level dealers and that money was collected on a regular basis. Tr. 03/21/02 at 95-96, 101; DeJesus PSR ¶15.

Because the Guidelines adjustments for drug quantity and leadership role were triggered by separate conduct, a departure for cumulative effects under *Lauersen*, or a non-Guidelines sentence on the same basis, was not warranted.

Second, DeJesus argues that his sentence was substantively unreasonable because his co-defendant and brother, who was convicted of the same charges, was sentenced to only 340 months' imprisonment. DeJesus Br. at 16-18. The 20-month difference in sentences, however, reflects the district court's careful consideration of the relevant sentencing factors as to each defendant, including information about their respective roles in the offense conduct.

As the district court was fully aware, although the evidence against the DeJesus brothers was similar, it was not identical and included evidence about criminal transactions involving Felix, but not Charles, DeJesus. For example, Bridgeport Police Detective Juan Gonzalez testified that on February 5, 1997, during the course of executing an arrest warrant for Felix DeJesus, he recovered a semi-automatic handgun and a quantity of "Set it Off" brand heroin from the defendant's jacket

inside his Alice Street apartment. Tr. 03/12/02 at 79, 82-84, 86, 119; Tr. 03/15/02 at 89-90. Similarly, evidence demonstrated that Felix DeJesus was a high-ranking and trusted member of the Estrada organization. Special Agent Mark Kelling testified that he stopped Felix DeJesus and Frank Estrada in Miami on March 4, 1998, and as a result of this encounter, the DEA recovered over $14,000 from the pair. Tr. 03/15/02 at 8-10, 17.

As these two examples illustrate, Felix and Charles DeJesus played different roles in the Estrada narcotics organization. Those different roles, along with consideration of the other § 3553(a) factors, support the district court's discretionary decision to sentence them to different terms of imprisonment.

Third, DeJesus argues that the district court's sentence was substantively unreasonable because it failed to adequately take into account the "history and characteristics of the defendant." DeJesus Br. at 18. The record reflects, however, that the district court was fully aware of the defendant's background and personal history and indeed accounted for that history in the sentence.

At sentencing, and over the government's objection, the district court granted DeJesus's motion for a downward departure based on his pre-arrest rehabilitation, thus reducing his Guidelines range from a life sentence to 360 months to life. JA354-55. The district court's comments on this departure dispel any notion that the district court failed to account for DeJesus's personal characteristics:

> rehabilitation efforts can be extraordinary either in degree or in kind . . . . What is extraordinary, it seems to me, is that this defendant who was so heavily involved in the biggest drug conspiracy in Bridgeport history probably, that he was someone who acted as a violent individual and that he was at such a high level of this organization, could step back and make a change in his life, and that it seems to me is extraordinary in the degree rather than in the kind of efforts that he's made and, accordingly, I believe that the standards for a downward departure here have been met.

JA353-54. Furthermore, at sentencing, the district court expressly stated that he considered the § 3553(a) factors, JA360, and on the *Crosby* remand, expressly identified factors unique to the defendant's history and characteristics – including mitigating factors – as relevant to his sentencing decision, JA375.

On this record, and in light of the district court's departure expressly based on the defendant's personal history and characteristics, there is no basis for concluding that his sentence was substantively unreasonable for failing to account for those factors.

Fourth, DeJesus argues that his sentence was "greater than necessary to achieve the purposes of sentencing, namely retribution, deterrence, incapacitation and rehabilitation." DeJesus Br. at 19. Although DeJesus claims that his sentence was "unreasonably long," DeJesus

Br. at 20, the district court's decision reflects a carefully considered departure and weighing of all of the relevant sentencing factors, including the purposes of punishment.

At sentencing, the district court expressly identified several purposes of punishment as directly impacting his decision on the appropriate sentence. For example, the district court considered the need for a sentence to incapacitate, JA361; to generate specific and general deterrence; JA361; to reflect the seriousness of the offense, JA360; and to allow for rehabilitation, JA361-62. *See also* JA374-75 (on *Crosby* remand, describing purposes of punishment as factors court considered in determining punishment). Although DeJesus disagrees with the district court's assessment that 360 months in prison was necessary to serve these goals, it is the district court's assessment, not the defendant's, that controls.

In sum, DeJesus's sentence was substantively reasonable. The district court granted DeJesus a departure and ultimately sentenced him at the bottom of the Guidelines range to 360 months' imprisonment. As described above, this sentence reflected the district court's careful consideration of all the relevant sentencing factors under the Guidelines and § 3553(a). Although DeJesus would have given some factors more weight than others, and would have weighed them differently than the district court did, this Court should decline DeJesus's invitation to substitute its judgment for that of the district court. *See Fernandez*, 443 F.3d at 27; *Kane*, 452 F.3d at 145; *Fleming*, 397 F.3d at 100. Furthermore, this case falls squarely within the "overwhelming majority of cases,"

where "a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances." *Fernandez*, 443 F.3d at 27.

2. DeJesus's sentence was procedurally reasonable.

DeJesus argues that his sentence was procedurally unreasonable because the district court failed to consider the cumulative effect of the substantially overlapping adjustments for his role in the offense and drug quantity. DeJesus Br. at 20. As discussed, *supra*, there was no factual basis for a departure or non-Guidelines sentence on this basis, but the defendant's argument fails nonetheless.

The district court complied with all applicable procedural requirements on *Crosby* remand. In the court's decision on remand, the court stated that before arriving at its conclusion, it "reviewed the parties' briefing, the Presentence Report, and the transcript of the sentencing hearing on September 4, 2002." JA374. After consideration of all of these sentencing aids, the district court properly concluded that a re-sentencing was not necessary. *Id.* In so holding, the court set forth particular and individualized reasons why it would have sentenced DeJesus to the same sentence it previously did. JA374-75. Because this process – including the district court's decision not to hold a new sentencing hearing – was not only fair but also consistent with this Court's guidance in *Crosby*, DeJesus's sentence should be upheld. *See Crosby*, 397 F.3d at 117; *see also United States v. Fairclough*, 439 F.3d 76, 80 (2d Cir.) (the reasonableness

inquiry "will 'focus primarily on the sentencing court's compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a)'") (quoting *Canova*, 412 F.3d at 350), *cert. denied*, 126 S. Ct. 2915 (2006).

Furthermore, DeJesus offers no reason to believe that the district court failed to consider his claim for a lower sentence based on his "cumulative effects" argument. He presented this argument in his papers to the district court, and the district court stated that it had considered those materials. JA374. This Court does not require a sentencing judge to expressly identify each of the § 3553(a) sentencing factors or the arguments made on those factors. "As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception of their relevance, [this Court] will accept that the requisite consideration has occurred." *Fleming*, 397 F.3d at 100; *see also Fernandez*, 443 F.3d at 30 ("[W]e presume, in the absence of record evidence suggesting otherwise, that a sentencing judge has faithfully discharged her duty to consider the statutory factors.").

Claims of Ricardo Rosario

I. The district court properly found that Rosario was ineligible for safety valve relief.

In Rosario's original sentencing proceeding, the district court found his total offense level to be 38 and placed him

in criminal history category II. GA60-61. The district court departed downward to criminal history category I based on his finding that category II overstated the seriousness of Rosario's criminal history. GA57. The district court denied, however, Rosario's request for a two-point offense level reduction under § 2D1.1(b)(6), GA58-59, and thus with an offense level of 38 and a criminal history category of I, determined that his Guidelines range was 235 to 293 months, GA61. The district court sentenced Rosario to 240 months of incarceration. JA187.

In his initial appeal, Rosario argued, *inter alia*, that he was entitled to a two-level reduction in his offense level under the safety valve provision of U.S.S.G. § 2D1.1(b)(6). (Relief under this provision would have produced a Guidelines range of 188 to 235 months.) This Court ultimately affirmed his conviction, but remanded to the district court for further factual findings on Rosario's eligibility for relief under § 2D1.1(b)(6), and for further proceedings pursuant to *Crosby*. *See DeJesus*, 160 F.App'x at 19-20.

At a hearing on November 30, 2006, the district court determined that it would not have imposed a nontrivially different sentence under an advisory Sentencing Guidelines regime, A163-66, and made findings to support its conclusion that Rosario was ineligible for safety valve relief. Specifically, the district court found that Rosario possessed a firearm in connection with the offense of conviction, A159, and that his prior juvenile conviction resulted in three criminal history points, A123-25, 140-41. Based on these findings, the district court concluded that

Rosario was ineligible for safety valve relief. A159; JA241.

On appeal, Rosario does not challenge the reasonableness of his sentence, but merely challenges the district court's ruling on his request for safety valve relief. As explained more completely below, the district court properly found that Rosario was ineligible for safety valve relief. Moreover, although the district court found that Rosario failed to satisfy two of the criteria for safety valve relief, his failure to satisfy either criterion standing alone is sufficient to deny him relief under the safety valve.

A. The district court did not clearly err in finding that Rosario possessed a firearm in connection with the offense.

1. Relevant facts

At the November 30, 2006, hearing, Judge Underhill conducted a thorough review of the relevant trial testimony concerning Rosario's possession of a firearm. The court considered the testimony of William Rodriguez to the effect that he had not seen Rosario with a gun at the heroin-bagging sessions they attended. As noted by the court, Rodriguez responded to the question, "Did you ever see Ricardo Rosario with a firearm at a session?" with a flat "No." A141-42. The court also considered the testimony of co-defendant Amelia Pererra, who claimed to have seen Rosario with a gun at some of the sessions. A142-144, 146. Judge Underhill, who had presided at

trial, did not find Pererra's testimony credible, however, and did not rely on it in his holding. A159.

The district court did, however, credit Frank Estrada's testimony that he had seen Rosario in possession of a firearm. A159. Specifically, the court quoted the following portions of Estrada's testimony at trial:

> Q: And when did you become aware that Ricardo Rosario had firearms?
> A: He showed it to me when he bought it.
> Q: What kind did he get?
> A: A Glock 9mm.
> Q: Did he have any other firearms?
> A: He had one of my revolvers in his house too.
> Q: What calibre of revolver was that?
> A: I think it was a 41 Magnum.
>
> . . .
>
> Q: And he [Rosario] wasn't carrying a gun, was he?
> A: He had a gun.
> Q: He had a gun? Where did he keep it?
> A: In his house.
> Q: How many times were you at his house?
> A: A lot.
> Q: Where in his house did he keep it?
> A: In the wall.

. . .

Q: So you saw him carrying this gun?
A: Yeah, he had a gun on him a couple times.

. . .

Q: So he showed you this gun, right?
A: Yeah.

A144-45. The court explicitly found Estrada's testimony to be credible on this point. A151, 159.

Finally, the court considered the testimony in Rosario's personal statement, submitted for the purpose of the sentencing hearing, that he had never purchased, owned or carried any guns for himself, Frank Estrada, or anyone else, and that he saw guns at the bagging sessions only rarely. A145-46. Having noted earlier the fact that the statement was composed at a time when safety valve concerns were of obvious significance, the court did not rely on Rosario's statement. A138, 141, 159.

In a discussion of whether the defendant's gun possession was "in connection" with the present offense, the court drew "the obvious inference here, [that] Mr. Rosario is taking Mr. Estrada's gun, it's preventing Mr. Estrada from having to be seen or be caught with a gun and, yet, he's got a gun available to him whenever he needs it." A148. Later, the court noted that Estrada "gave [Rosario] the gun almost surely because it was a tool of the trade. He wanted the gun available . . . ." A153.

Based on this record, the court concluded as follows:

> I find that Mr. Rosario did possess a weapon in connection with the offense of conviction. Specifically he possessed both a 41 Magnum that belonged to Mr. Estrada, as well as a Glock 9mm that Mr. Rosario had himself purchased, and, accordingly, the second prong of the five prong test in 5c1.2 has not been met.

A159.

2. Governing law and standard of review

Guidelines Section 2D1.1(b)(6) awards a two-level offense level reduction to defendants whose specific offense characteristics and criminal history score fall within the parameters of Guidelines Section 5C1.2. Section 5C1.2(a) and (b) require that in order to be eligible for this two-level "safety valve" adjustment, the defendant must be subject to a statutory mandatory minimum 5-year term of imprisonment and his offense level must be at least 17. In addition, the following specific criteria must be met: (1) the defendant may not have more than 1 criminal history point; (2) he may not have used violence or credible threats of violence or possessed a firearm in connection with the offense of conviction; (3) the offense did not result in death or serious bodily injury to any person; (4) the defendant does not receive an upward adjustment for his role in the offense and was not engaged in a continuing criminal enterprise; and (5) not later than the time of the sentencing hearing, the defendant must

truthfully provide the government with all information and evidence he has concerning the offense. U.S.S.G. § 5C1.2. *See also* 18 U.S.C. § 3553(f) (setting forth statutory safety valve provision).

A defendant seeking "safety valve" relief bears the burden of proving that he meets each of the factors. *See United States v. Jimenez*, 451 F.3d 97, 101-02 (2d Cir. 2006); *United States v. Reynoso*, 239 F.3d 143, 146 (2d Cir. 2000); *United States v. DeJesus*, 219 F.3d 117, 122 (2d Cir. 2000) (per curiam).

In construing § 5C1.2(a)(2), requiring that "the defendant did not . . . possess a firearm or other dangerous weapon . . . in connection with the offense," this Court has held that a firearm or dangerous weapon was possessed "in connection with the offense" under § 5C1.2 if it "served some purpose with respect to the offense" or facilitated or had the potential to facilitate the offense. *DeJesus*, 219 F.3d at 122 (citations and internal quotation marks omitted). A defendant's possession of a firearm at a location where drugs was stored is sufficient to warrant a denial of "safety valve" relief. *United States v. Herrera*, 446 F.3d 283, 287-88 (2d Cir. 2006) (constructive possession of firearms at stash houses where the defendant exercised dominion and control over firearms at those locations sufficient to deny safety valve relief).

This Court reviews a district court's factual findings at sentencing for clear error. *See United States v. Rattoballi*, 452 F.3d 127, 132 (2d Cir. 2006) ("After *Booker*, we still review a district court's interpretation of the Sentencing

Guidelines *de novo* and evaluate its findings of fact under the clearly erroneous standard.") (citing *United States v. Selioutsky*, 409 F.3d 114, 199 (2d Cir. 2005)); *United States v. Aleskerova*, 300 F.3d 286, 298 (2d Cir. 2002); *see also United States v. Milkintas*, 470 F.3d 1339, 1343 (11th Cir. 2006) ("'When reviewing a district court's safety-valve decision, we review for clear error a district court's factual determinations, . . . [and] *de novo* the court's legal interpretation of the statutes and sentencing guidelines.'") (quoting *United States v. Poyato*, 454 F.3d 1295, 1297 (11th Cir. 2006)).

Under the "clear error" standard of review, the Court must affirm the finding of the district court unless it is "left with the definite and firm conviction that a mistake has been committed." *United States v. Reilly*, 76 F.3d 1271, 1276 (2d Cir. 1996) (quoting *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948)). "So long as the 'district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.'" *Id.* (quoting *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985)).

3. Discussion

The district court did not commit clear error in concluding that the defendant failed to carry his burden to show that he "did not . . . possess a firearm or other dangerous weapon . . . in connection with the offense." U.S.S.G. § 5C1.2(a)(2). This finding alone is sufficient to

disqualify the defendant from safety valve relief.

As described above, the district court's conclusion was based on a careful weighing of the relative credibility of the relevant testimony, including Mel Pereira's, Frank Estrada's, and Rosario's. In response, Rosario points to trial testimony by various co-conspirators to the effect that Rosario did not possess a gun at bagging sessions. Rosario Br. at 14. Even if he did not possess a weapon at bagging sessions, however, this is irrelevant to the district court's finding that he possessed at least two firearms not at the bagging sessions but in his home: "Mr. Rosario's involvement here is not strictly limited to the sessions. The fact that people didn't see him with a gun at the sessions doesn't mean he didn't possess a firearm. There is direct evidence that he did possess a firearm, two firearms in fact." A156.

Alternatively, Rosario suggests that his possession of a firearm was not "in connection with the offense." Rosario Br. at 15-16. This argument is unavailing in light of the evidence at trial that he held a weapon for Frank Estrada's use, and in light of the district court's finding that he possessed a weapon in his home, a location where drugs were sold from. *See* A155-56; *Herrera*, 446 F.3d at 287-88 (possession of weapon at location where drugs sold is sufficient to deny eligibility for safety valve).

Finally, Rosario argues that the district court committed clear error in choosing to credit the testimony of drug lord Frank Estrada, who had previously conspired to deceive authorities about his own involvement in various crimes

and whose testimony concerning the quantities of narcotics handled by some co-conspirators was rejected in part by a jury. Rosario Br. at 14-16, 19-20. Instead, Rosario argues that the court should have relied on his own statement, submitted just prior to sentencing, that he "never purchased, owned or carried any guns for myself, for Frank Estrada, or for anyone else." A145-46. In support, Rosario emphasizes Judge Underhill's decision at sentencing to deny a two-level enhancement for obstruction of justice because he found Rosario's recitation of his involvement in the charged crime to be "largely credible and accurate." This neglects the fact that the court, despite being reminded repeatedly of this assessment at resentencing, nevertheless found Rosario's statement to be unreliable on two specific points: his possession of a firearm and the timing of his joining the Estrada organization. A138, 140-41, 145-46, 159. It also neglects the district court's explicit statement that he found Estrada credible on Rosario's gun possession because he had been explicit about the make and caliber of the firearm that Rosario held for him. A151. *See* A159 ("I do find the testimony of Frank Estrada on this point to be credible . . . .").

Judge Underhill heard extensive testimony from both Estrada and Rosario, including Rosario's own assertions of innocence, which were rejected by the jury that convicted him. It was well within the court's discretion to find that Frank Estrada's explicit and detailed trial testimony concerning Rosario's possession of a firearm was more reliable than Rosario's own self-serving, eleventh-hour testimony to the contrary, and to find therefore that

Rosario failed to carry his burden to show that he did not possess a firearm in connection with the narcotics offense. Accordingly, Rosario was properly denied safety valve relief under the second prong of U.S.S.G.§ 5C1.2.

B. The district properly determined that Rosario had three criminal history points arising from his prior conviction for use of a motor vehicle without the owner's permission.

1. Relevant facts

Rosario was arrested at age 15 on March 12, 1996, and later convicted in Connecticut Juvenile Court of Use of a Motor Vehicle Without the Owner's Permission. He was sentenced on June 17, 1996, to six months' probation for this offense. Rosario PSR ¶ 39. No further information regarding the prior conviction was available to the United State Probation Office, nor was any provided by the defendant at trial or sentencing. He was arrested in connection with the present narcotics conspiracy on December 7, 2000. Rosario PSR at 1.

At the hearing on remand from this Court, the district court found that this juvenile conviction counted as a conviction in Rosario's criminal history under U.S.S.G. § 4A1.2(d)(2)(B), A124-25, and added two additional points for this conviction under § 4A1.1(d) based on its finding that Rosario committed the instant offense while serving his sentence of probation for his juvenile conviction, A140-41. With respect to this last point, the district court made detailed findings:

> I find that Mr. Rosario was engaged with the Estrada organization during the period within six months after his conviction for use of a motor vehicle without the owner's permission. That is, in the latter half of 1996, at a minimum, he was engaged in the activities of the so-called sessions where heroin was ground up and bagged up and that that finding is based not only on the explicit testimony of William Rodriguez and Frank Estrada, but also on the general sense that I have that the finding is consistent with the timing of Mr. Gomez', that is Mr. Rodriguez's, arrest in March of '97; the fact that there was significant evidence that Mr. Rosario was involved with Mr. Gomez prior to his arrest in March of '97; that Mr. Rosario met Mr. Estrada in 1996 and became involved a couple of months thereafter; that it's consistent with timing of Mr. Rodriguez dating Mr. Rosario's sister; and the references in Mr. Rosario's personal statement to the contrary are made at a time when the importance of the issue was obvious. . . . And, accordingly, I simply find that the testimony of Mr. Rodriguez and Mr. Estrada is more credible on this point because they had no understanding that it was important for any reason for them to be placing Mr. Rosario within the organization at any particular date and, to the contrary, Mr. Rosario clearly understood the significance of making sure that he was not involved before early 1997.

A140-41.

2. Governing law and standard of review

As described, *supra*, a criminal defendant may obtain safety valve relief only if he carries his burden to show that he satisfies all five criteria under § 5C1.2, including that he has no more than one criminal history point. In determining whether a defendant satisfies this first requirement, the court calculates the number of criminal history points according to § 4A1.1 before application of § 4A1.3(b) (Departures Based on Inadequacy of Criminal History Category).

a. Section 4A1.1

Under § 4A1.1(c), one point is added to a defendant's criminal history score for each prior sentence that does not include imprisonment for at least sixty days. Application Note 3 to this section provides that "[a]n adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if imposed within five years of the defendant's commencement of the current offense." *See also* § 4A1.2(d) (providing that for offenses committed prior to age eighteen, one point is added "for each adult or juvenile sentence imposed within five years of the defendant's commencement of the instant offense"). Furthermore, as relevant to this case, § 4A1.1(d) provides for the addition of two points "if the defendant committed the instant offense while under any criminal justice sentence, including probation . . . ."

b. Section 4A1.2(c)

The Guidelines provide further guidance on sentences to be counted or excluded in § 4A1.2(c). Section 4A1.2(c)(1) states that certain misdemeanors, and "offenses similar to them, by whatever name they are known," are counted only if the sentence was at least one year of probation or thirty days of imprisonment or the prior offense was similar to the instant one. As this Court explained in *United States v. Martinez-Santos*, 184 F.3d 196 (2d Cir. 1999), this section directs sentencing courts to count prior misdemeanor convictions unless three conditions are met: "(1) the sentence imposed was less than a term of probation of one year or a term of imprisonment of 30 days; (2) the prior offense and the instant offense are not 'similar;' and (3) the prior offense is one of those listed in § 4A1.2(c)(1) (frequently referred to hereafter as 'Listed Offenses') or is 'similar' to them." *Id.* at 199 (footnotes omitted). The Listed Offenses include offenses such as careless or reckless driving, driving without a license or with a revoked or suspended license, insufficient funds check, resisting arrest, and trespassing. Section 4A1.2(c)(2) enumerates offenses that, along with "offenses similar to them," are never counted, including juvenile status offenses and truancy, loitering, and minor traffic infractions (e.g., speeding).

In determining the similarity of a prior offense to those listed in § 4A1.2(c), this Court applies a multi-factor test. Under this test, a sentencing court should evaluate the following factors:

> (1) the similarity of the offense elements; (2) the comparative punishments imposed for the offenses; (3) the perceived seriousness of the unlisted offense, as indicated by the level of punishment; (4) the level of culpability associated with the unlisted offense; and (5) the degree to which the commission of the unlisted offense indicates a likelihood of recurring criminal conduct. . . . A district court also may consider any other factor that it reasonably finds relevant in comparing the prior and Listed Offenses, keeping in mind that the goal of the inquiry is to determine whether the unlisted offense under scrutiny is categorically more serious than the Listed Offenses to which it is being compared.

United States v. Sanders, 205 F.3d 549, 552 (2d Cir. 2000) (internal quotations omitted). "[W]e . . . look to the actual conduct involved and the actual penalty imposed – rather than to the range of possible conduct or the range of possible punishments – when determining whether a prior offense is 'similar' to a Listed Offense." *Id.* at 553.

c. Section 4A1.2(j)

Guidelines § 4A1.2(j) provides that sentences for expunged convictions are not counted in criminal history calculations. Although the Guidelines do not define "expunged" convictions, Application Note 10 clarifies that prior convictions that have merely been "set aside . . . for reasons unrelated to innocence or errors of law, *e.g.*, in order to restore civil rights or to remove the stigma

associated with a criminal conviction . . . *are* to be counted" (emphasis added). Connecticut General Statutes § 46b-147 restricts the use of certain juvenile convictions in subsequent criminal actions: "The disposition of any child under the provisions of this chapter . . . and all orders therein, shall be inadmissible as evidence in any criminal proceedings against such child."

d. Standard of review

"After *Booker*, we still review a district court's interpretation of the Sentencing Guidelines *de novo* and evaluate its findings of fact under the clearly erroneous standard." *Rattoballi*, 452 F.3d at 132 (citing *Selioutsky*, 409 F.3d at 199).

When a defendant raises an argument for the first time on appeal, this Court can reverse only if there is (1) an error (2) that is plain (3) which affected the substantial rights of the defendant (4) and seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *See* Fed. R. Crim. P. 52(b); *United States v. Johnson*, 520 U.S. 461, 466-67 (1997); *United States v. Olano,* 507 U.S. 725, 732-36 (1993).

Error is "[d]eviation from a legal rule" that has not been waived. *Olano,* 507 U.S. at 732-33. That error must be "'clear' or, equivalently, obvious . . . under current law." *Id*. at 734 (internal citations omitted). An error is generally not "plain" under Rule 52(b) unless there is binding precedent of this Court or the Supreme Court, except "in the rare case" where it is "so egregious and

obvious as to make the trial judge and prosecutor derelict in permitting it, despite defendant's failure to object." *United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004) (internal quotation marks and citations omitted). The error must have affected substantial rights, that is, "must have been prejudicial . . . having affected the outcome of the district court proceedings." *Id.* When those three conditions are met, an appellate court may exercise its discretion to correct the error "but only if the error seriously affect[ed] the fairness, integrity or public reputation of [the] judicial proceedings." *Johnson*, 520 U.S. at 466-67 (internal quotation marks and citations omitted).[4]

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[4] There is language in some cases suggesting that a relaxed plain error standard may be appropriate in certain circumstances when the claimed error arises in a sentencing context. *See, e.g.*, *United States v. Sofsky*, 287 F.3d 122, 125 (2d Cir. 2002); *United States v. Simmons,* 343 F.3d 72, 80 (2d Cir. 2003). Even if there is some vitality to the cited language in *Sofsky* and *Simmons*, those cases turned on the conjunction of *two* factors: (1) that the error have occurred at sentencing, and (2) that it involved the imposition of a condition of supervised release as to which the defendant had not received the requisite advance notice. *Sofsky*, 287 F.3d at 125-26 ("*Both* because the alleged error relates only to sentencing *and because Sofsky lacked prior notice*, we will entertain his challenge without insisting on strict compliance with the rigorous standards of Rule 52(b).") (emphasis added); *see also Simmons*, 343 F.3d at 80 ("Both [of the *Sofsky*] justifications are present in this case."). Furthermore, this Court has expressly held that plain error analysis must be applied "with Rule 52(b)'s full (continued...)

3. Discussion

Rosario challenges the district court's conclusion that his juvenile conviction produced three criminal history points and thus rendered him ineligible for safety valve relief. Specifically, he argues (1) that his conviction should have been excluded under § 4A1.2(c)(1), (2) that his conviction should have been excluded under the expunged convictions provision of § 4A1.2(j), and (3) that he did not commit the instant offense while on probation for his juvenile conviction and thus the conviction should not have generated an additional two criminal history points under § 4A1.1(d). Rosario Br. at 9-14.

a. Rosario's juvenile conviction was properly included in his criminal history calculation.

Under *Martinez-Santos*, Rosario's prior conviction for using a motor vehicle without permission was properly included in his criminal history calculation because, as the

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[4] (...continued)
rigor" where the decision below did not "surprise" the appellant, *United States v. Gordon*, 291 F.3d 181, 191 (2d Cir. 2002), and that there is no basis for excusing a lack of objection when – as here – a case was remanded for careful reconsideration of a sentencing issue, *see United States v. Villafuerte*, No. 06-1292-cr, 2007 WL 2737691, *3 (2d Cir. Sept. 21, 2007) (citing *United States v. Baez*, 944 F.2d 88, 90 (2d Cir. 1991)).

district court found, that offense is not similar to the listed offenses in § 4A1.2(c)(1). As the district court noted, the offenses listed in that section are relatively minor offenses, such as careless driving or driving without a license. A118, 123-25. Furthermore, the authorized punishment for the offense – one year in prison – demonstrates that this is a serious offense.

Rosario disagrees with this assessment, arguing that his conviction is less serious than trespass, for example. Rosario Br. at 11. Rosario's argument ignores one of the central tenets of this Court's decision in *Sanders*, namely that the focus of the inquiry should be on the actual conduct involved in the defendant's conviction. 205 F.3d at 553. Here, however, the court had no specific information about the conduct underlying Rosario's prior conviction. In other words, even though Rosario bore the burden of proving that he was eligible for safety valve relief, *see Jimenez*, 451 F.3d at 101-02, he failed to submit any information about his offense to demonstrate his eligibility for this relief. Thus, while he argues that use of a motor vehicle without permission is a relatively minor offense, it is possible to imagine fact patterns that would not be relatively minor. In the absence of some showing by Rosario that his offense *was in fact* relatively minor, there is no basis for concluding that use of a motor vehicle without permission is *categorically* less serious than (or similar to) the listed offenses.

Because Rosario failed to meet his burden to show that his juvenile conviction should be excluded, the district

court properly counted this conviction in his criminal history.

b. Rosario's conviction was not expunged.

For the first time on appeal, Rosario argues that his juvenile conviction was expunged and thus should have been excluded from his criminal history calculation under § 4A1.2(j). Because this issue was never raised below, it is reviewed for plain error, but regardless of the standard of review, this argument is meritless.

This Court encountered a similarly flawed contention in *United States v. Matthews*, in which a defendant argued that a district court had erred by including his New York "youthful offender adjudication" in determining his criminal history. 205 F.3d 544, 545 (2d Cir. 2000). The Court held that the lower court had properly counted the youthful offender adjudication for several reasons. First, unlike a parallel Vermont statute providing that juvenile proceedings should be considered never to have occurred, that all references to the action should be deleted, and that anyone asked for information should indicate that no record exists, the New York youthful offender statute did not prevent information about such convictions from being "made available to the New York State division of parole and probation department for use in carrying out their duties." *Id.* at 546. Second, the New York statute did not call for "expungement," although many other provisions of the New York code did. *Id.* at 547. Third, New York courts had "confirmed the youthful offender statute's narrow and specific purpose." *Id.* at 548.

The Connecticut law cited by Rosario in support of his argument that his conviction was "expunged" is quite similar to the New York law in several relevant respects. First, § 46b-147 does not require the destruction of the record of a juvenile disposition; it merely prevents the introduction of the record in subsequent criminal proceedings.[5] The statute thus sets aside a juvenile disposition for certain purposes *instead* of expunging it. Second, § 46b-147 does not use the word "expunge," although several other Connecticut statutes do. *See, e.g.*, Conn. Gen. Stat. § 5-240 (unmerged reprimands of state employees "shall be expunged after twelve months"); § 17a-101k (reports of unsubstantiated findings regarding abused or neglected children "shall be expunged by the commissioner five years from the completion date of the investigation").

On these facts, it was not plain error for the district court to fail to exclude Rosario's conviction as an expunged conviction.

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[5] Although Connecticut General Statutes § 46b-146 allows a child found delinquent to request that all police and court records regarding his disposition be destroyed after two to four years in the absence of further criminal proceedings, this destruction is not automatic and does not appear to have been requested by the defendant.

c. The district court did not clearly err in awarding Rosario two additional criminal history points because his participation in the present offense began while he was on probation for a prior conviction.

As quoted above, the district court found substantial evidence that Rosario began his criminal activity in the instant offense while still on probation for his juvenile conviction, i.e., within six months of his conviction in June 1996. *See* A140-41. Rosario argues that this finding was clearly erroneous but his arguments miss the mark.

Rosario argues that the district court committed clear error by disregarding his assertion in the personal statement submitted for sentencing that he did not become involved with Mr. Estrada until the beginning of 1997. Although the district court relied on that personal statement as "largely credible and accurate" when deciding not to apply an obstruction of justice enhancement, with regard to the safety valve questions presently under dispute, the court was skeptical of Rosario's self-serving claims that he did not own a gun and only become involved with the narcotics conspiracy in 1997. As the district court found, Rosario's statement on the timing of his offense conduct was inconsistent with the testimony of several witnesses, A134, and was made at a time when he had the incentive to ensure that his offense conduct did not begin until after 1997, A141. This determination of reliability is obviously well within the trial court's

discretion, and the decision to credit part of the statement and disbelieve others in no way constitutes abuse of discretion.

Rosario also criticizes this trial testimony relied upon by the district court as "general" and "non-specific" in an attempt to undermine the district court's findings on this point. On the contrary, the court below relied on both very specific statements of timing made by witnesses at trial and general considerations taken from the testimony as a whole. For example, the district court relied on testimony by William Rodriguez that Rosario attended bagging sessions between February and May 1996, *see* A129 (quoting trial testimony), and on testimony from Estrada that Rosario was involved in the organization by at least March 1997, *see* A130 (quoting Estrada testimony).

The court also directed Rosario to "more general evidence in support of the testimony I just read." A133. It elaborated:

> [T]here is what I would call substantial evidence to suggest that Mr. Rosario became involved. There is also, by the way, significant evidence from a number of witnesses that Mr. Rosario worked for Mr. Gomez, which means there's substantial evidence that Mr. Rosario was involved, at the latest, March of 1997 [when Mr. Gomez was arrested and ceased his activities with the Estrada organization]. Now, obviously March of 1997 is not within six months of June 17th, '96. But it is, one, inconsistent with Mr. Rosario's statement and,

> two, it puts him in the organization, at the latest, early March 1997. And there's a fair amount of testimony, as I recall it generally, that Mr. Rosario had by that point attained a relatively secure position within the organization. So you're getting fairly close to December 17th, 1996 on what I'll call general or, you know, *widely corroborated evidence*.

A133-34 (emphasis added).

Furthermore, the district court found Rodriguez's and Estrada's specific testimony more credible on this point than Rosario's self-serving personal statement because Rodriguez and Estrada made their statements about Rosario's involvement when they "had no understanding that it was important for them to be placing Mr. Rosario within the organization at any particular date . . . ." A141. By contrast, when Rosario authored his personal statement, he "clearly understood the significance of making sure that he was not involved before early 1997." A141.

In sum, the district court relied on considerable evidence to support its finding that Rosario committed the instant offense while on probation, and that finding was not clearly erroneous. Accordingly, the resulting addition of two points to Rosario's criminal history score rendered Rosario ineligible for safety valve relief.

II. In the alternative, Rosario's sentence was substantively reasonable.

Even if this Court were to conclude that the district court erroneously found Rosario ineligible for safety valve relief, any error was harmless in light of the record in this case and the district court's comments on remand from this Court.

The 240-month sentence imposed by the district court, which was near the bottom of the guideline range that the district judge determined should apply, was eminently reasonable in light of the factors set out in 18 U.S.C. § 3553(a). For instance, it balanced the serious nature of this felony narcotics conviction involving a conspiracy to distribute substantial amounts of heroin with the characteristics of the defendant, taking into account his level of involvement in the crime, his minimal criminal history, his youth, and his accomplishments in high school. The sentence further reflected the need to promote respect for the law, to render appropriate punishment, to deter other criminal conduct, and to protect society. *See* A164-65.

The difference between the Guidelines range with and without the safety valve adjustment is modest; the ranges are adjacent, so that the sentence imposed is outside the lower range by only six months. Furthermore, the entirety of both ranges (that is, 188-293 months) must certainly have been well within the district court's contemplation during the *Crosby* remand, when it knew it had the discretion to impose a non-Guidelines sentence. At the

hearing on remand, the court stated emphatically that it had reached the appropriate sentence, in part by giving Rosario the benefit the doubt on some departures in order to ensure that the then-mandatory Guidelines range included the just sentence:

> [A]t the initial sentencing I was able to depart from the sentencing guidelines and, frankly, I gave Mr. Rosario the benefit of the doubt on certain guideline enhancement questions. The result of the combination of those two facts is that I was able to sentence Mr. Rosario to a sentence that I believe fairly and justly accounts for all the factors set for in 18 USC, Section 3553(a).
>
> Second, having decided to depart, I was able to weigh the factors and did weigh the factors that 18 USC Section 3553(a) requires me to weigh. . . . Having considered [those factors], I was able to reach a sentence that I believe was fair and equitable under all the circumstances. I considered the nature of the criminal activity, the substantial amount of drugs sold by this organization, the impact of the crime on the community, Mr. Rosario's role in it. I also considered the fact that he had been active in sports at school, that he had not had a prior criminal record before this, before this crime, and taking all of that into account, arrived at a sentence that was substantially below the sentence that Mr. Rosario faced at the time. Specifically, in the government's view Mr. Rosario faced a mandatory life sentence under the

sentencing guidelines at that time.

> And not only did he not receive a mandatory life sentence or even close to a life sentence, he received one of the shorter sentences for persons who were actively involved in this conspiracy for a significant period of time.

A164-65. On this record, regardless of which of the adjacent guidelines ranges the district court might have applied, the imposed "sentence was well considered and would obviously be retained if an opportunity for reconsideration were afforded." *Fleming*, 397 F.3d at 101. Because application of the safety valve would not have appreciably influenced the sentence, any possible error is harmless and the sentence should be affirmed.

Conclusion

For the foregoing reasons, this Court should affirm the sentence of the district court, as to both defendants, in all respects.

Dated: October 4, 2007

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 13,932 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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ADDENDUM

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

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

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

(2) the need for the sentence imposed –

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

(B) to afford adequate deterrence to criminal conduct;

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

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

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range

established for –

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

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

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

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

(5) any pertinent policy statement –

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

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

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

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

*****

(f) Limitation on applicability of statutory minimums in certain cases:

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

recommendation, that –

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

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

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

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

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

U.S.S.G. §4A1.2 (2002) Definitions and Instructions for Computing Criminal History

*****

(c) Sentences Counted and Excluded

Sentence for all felony offense are counted. Sentenced for misdemeanor or petty offense are counted, except as follows:

(1) Sentences for the following prior offenses and offenses similar to them, by whatever name they are known, are counted only if (A) the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days, or (B) the prior offense was similar to an instant offense:

Careless or reckless driving
Contempt of court
Disorderly conduct of disturbing the peace
Driving without a license or with a revoked or suspended license
False information to a police officer
Fish and game violations
Gambling
Hindering or failure to obey a police officer
Insufficient funds check
Leaving the scene of an accident
Local ordinance violations (excluding local ordinance violations that are also criminal offenses under state law)

Non-support
Prostitution
Resisting arrest
Trespassing.

*****

(j) Expunged Convictions

Sentences for expunged convictions are not counted, but may be considered under § 4A1.3 (Adequacy of Criminal History Category).

*****

Application Note 10: Convictions Set Aside or Defendant Pardoned. A number of jurisdictions have various procedures pursuant to which previous convictions may be set aside or the defendant may be pardoned for reasons unrelated to innocence or errors of law, e.g., in order to restore civil rights or to remove the stigma associated with a criminal conviction. Sentences resulting from such convictions are to be counted. However, expunged convictions are not counted. § 4A1.2(j).

U.S.S.G. § 5C1.2 (2002). Limitation on Applicability of Statutory Minimum Sentences in Certain Cases

(a) Except as provided in subsection (b), in the case of an offense under 21 U.S.C. § 841, § 844, § 846, § 960, or § 963, the court shall impose a sentence in accordance with the applicable guidelines without regard to any

statutory minimum sentence, if the court finds that the defendant meets the criteria in 18 U.S.C. § 3553(f)(1)-(5) set forth verbatim below:

> (1) The defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;
>
> (2) The defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;
>
> (3) The offense did not result in death or serious bodily injury to any person;
>
> (4) The defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and
>
> (5) Not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this

requirement.

(b) In the case of a defendant (1) who meets the criteria set forth in subsection (a); and (2) for whom the statutorily required minimum sentence is at least five years, the offense level applicable from Chapters Two (Offense Conduct) and Three (Adjustments) shall be not less than level 17.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Rosario

Docket Number: 06-5655-cr(L)

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 10/4/2007) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: October 4, 2007