05-5213-cr

To Be Argued By:
WILLIAM J. NARDINI

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 05-5213-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

ROCKY SAMAS,

Defendant-Appellant.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on September 29, 2005. A12 (docket entry).[1] On September 22, 2005, the defendant filed a timely notice of appeal. A11 (docket entry); A38 (notice). This Court has appellate jurisdiction over the defendant's challenge to his sentence pursuant to 18 U.S.C. § 3742(a).

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[1] References to the record are as follows:

Appendix filed by defendant with merits brief: "A __."

Appendix filed with *Anders* brief: "Anders App. __."

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the defendant affirmatively waived any challenge to his 240-month mandatory minimum sentence by signing a written plea agreement that called for that mandatory penalty, and repeatedly confirming in open court his understanding that he faced such a penalty?

    a. Alternatively, whether the district court plainly erred in failing to declare unconstitutional the mandatory minimum sentences applicable to cocaine-base offenses under 21 U.S.C. § 841, where this Court has consistently rejected equal-protection challenges to those penalties?

    b. Alternatively, whether the district court plainly erred in failing to impose a sentence below the 240-month statutory minimum applicable to Count Four, on the novel theory that the parsimony clause of § 3553(a) overrides the mandatory nature of the minimum sentences set forth in 21 U.S.C. § 841?

2. Whether plain-error review bars a limited remand for the district court to reconsider, pursuant to *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008) (per curiam), the 151-month sentences imposed on Counts Two, Three, and Five, because they run concurrently to a 240-month minimum sentence on Count Four and thus a remand could not change the total effective sentence.

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Preliminary Statement

This is a sentencing appeal by the defendant Rocky Samas, who sold cocaine base to a cooperating witness three times in the span of a week in January 2004. After agents executed a search warrant of two residences and found more drugs and cash, Samas ultimately pleaded guilty to four counts of possessing cocaine base with intent to distribute it. He received the statutory minimum sentence of 20 years on Count Four, which was dictated by his prior drug convictions and the fact that the offense

involved over 50 grams of cocaine base. On the other three counts, which involved smaller drug amounts, he received concurrent terms of 151 months, in line with the guidelines range applicable to those offenses, each of which entailed a lower ten-year mandatory minimum sentence.

On appeal, the defendant challenges his sentence on three grounds, none of which was raised below. First, he argues that the mandatory minimum sentences listed in 21 U.S.C. § 841 violate constitutional equal protection principles, because the same penalties are triggered by lower quantities of cocaine base than powder cocaine. This argument is squarely foreclosed by circuit precedent. Second, he claims that the statutory minimum sentences established by § 841 are nullified by the parsimony clause of 18 U.S.C. § 3553. This argument runs afoul of the bedrock principle of statutory interpretation that laws should not be read in ways that render portions of them superfluous. In any event, Samas waived both of these claims when he signed a plea agreement that acknowledged the applicability of the 20-year mandatory minimum, and when he repeatedly confirmed in open court that such a minimum applied in his case.

The defendant also argues that he deserves a limited remand pursuant to *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008) (per curiam), since the sentences on three of his counts of conviction were imposed by reference to the quantity-based cocaine-base guidelines in U.S.S.G. § 2D1.1. No remand is appropriate here, however, because the defendant would still face a valid 240-month sentence on Count Four and the defendant

accordingly cannot satisfy the third or fourth prongs of plain-error review.

For all these reasons, this Court should affirm the sentence imposed by the district court.

Statement of the Case

On January 14, 2004, a federal grand jury returned an indictment charging the defendant with Count One, alleging conspiracy to possess with intent to distribute 5 kilograms or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) and 846; Counts Two and Three, each alleging possession with intent to distribute and distribution of 5 grams or more of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B); Count Four, alleging possession with intent to distribute and distribution of 50 grams or more of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A); and Count Five, alleging possession with intent to distribute and distribution of 500 grams or more of cocaine and 5 grams or more of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(B). A6 (docket entry); A14-18.

The case was assigned to United States District Judge Janet C. Hall, sitting in Bridgeport, Connecticut. On November 8, 2004, the defendant entered a plea of guilty to Counts Two, Three, Four, and Five of the indictment. Anders App. 89-142.

On September 21, 2005, the district court sentenced the defendant to the mandatory minimum term of

imprisonment of 240 months for Count Four, and to terms of imprisonment of 151 months for Counts Two, Three, and Five, all to run concurrently. The district court imposed supervised release periods of ten years for Count Four and eight years for Counts Two, Three, and Five, all to run concurrently. The district court also imposed a special assessment of $100 for each count of conviction, for a total of $400. A35-37; Anders App. 162-63.

Judgment entered on September 29, 2005. A12 (docket entry).

On September 22, 2005, the defendant filed a timely notice of appeal. A11 (docket entry); A38 (notice).

On August 30, 2007, the defendant's counsel on appeal moved to withdraw pursuant to *Anders v. California*, 386 U.S. 738 (1967). On October 16, 2007, the Government filed a cross-motion for summary affirmance. By order dated December 5, 2007, this Court deferred consideration of those two motions and requested the filing of a supplemental brief by defense counsel.

On March 19, 2008, after the Supreme Court decided *Kimbrough v. United States*, 128 S. Ct. 558 (2007), defense counsel moved to withdraw his *Anders* brief and instead to file a merits brief. The Court granted that motion on March 25, 2008. On April 25, 2008, defense counsel filed a merits brief challenging the defendant's sentence.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. Samas sells cocaine base three times to a cooperating witness, and police seize drugs and cash during two related searches.

In early January 2004, police officers in Norwalk, Connecticut, received information from a cooperating witness that Rocky Samas was selling large amounts of cocaine base in the greater Norwalk area. PSR ¶ 7. Officers arranged for the witness to make a series of controlled purchases of narcotics from Samas over the next several days. PSR ¶ 8-10.

On January 6, the witness telephoned Samas and arranged to meet at Samas's home at 8 Auburn Street in Norwalk. PSR ¶ 8. Surveillance officers watched as the witness entered Samas's home. *Id.* Samas took a plastic bag from a nightstand and gave the witness 13.5 grams of cocaine base. *Id.*; Anders App. 146-48.

The following day, the witness returned to Samas's home to buy more cocaine base. PSR ¶ 9. Inside, the witness saw Samas go to a closet and retrieve a small scale. *Id.* The substance weighed more than they had agreed upon, so Samas broke off a chunk and re-weighed it to ensure he had the right amount. *Id.* In the living room, the witness saw a water cooler filled with U.S. currency ranging from five- to hundred-dollar bills. *Id.* This time, the defendant sold 27.3 grams of cocaine base. *Id.*; Anders App. 146-48.

On January 8, the witness again met Samas, and this time bought 54.6 grams of cocaine base. PSR ¶ 10; Anders App. 146-48.

On January 9, FBI agents and police officers searched the first-floor apartment and basement of 8 Auburn Street in Norwalk, where Samas lived with his girlfriend. PSR ¶ 11. The search uncovered, among other things, $5,920 in U.S. currency stuffed in a brown knit sock; 28.6 grams of cocaine base; 949.9 grams of powder cocaine; and a small black digital scale. *Id.*; Anders App. 146-48. Samas was arrested, waived his *Miranda* rights, and admitted that the cocaine base and powder cocaine found at 8 Auburn Street belonged to him. PSR ¶ 12. He told the officers that he had bought the cocaine from a Dominican man in New York City, and that he had purchased five kilograms of cocaine from that person since November 2002. *Id.*

On February 6, 2004, in connection with the Samas investigation, agents searched Apartment A-1 at 45 Monroe Street in Bridgeport, Connecticut, the home of Roger Robinson. PSR ¶ 13. Agents found, among other things, a black canvas briefcase containing two plastic bags, each containing U.S. currency bundled in rubber bands; and three .40 caliber pistols together with magazines. *Id.* Robinson said that he had been holding the guns for Samas, and the money for Samas and Samas's twin brother, Ricky. PSR ¶ 14. Only a few days after Samas's arrest on January 9, 2004, Robinson had been given a backpack that contained the three pistols. PSR ¶ 15. He was asked to hold the guns, and was told that they belonged to Samas. *Id.*

B. Samas pleads guilty to four drug counts, based on the three sales and the drug seizure.

The defendant eventually pleaded guilty to four counts in an indictment, which charged him with possessing narcotics with intent to distribute them. Three of the counts corresponded to the three January drug sales, and the fourth count related to the drugs found in the defendant's possession on the day of the search. A15-16 (indictment). Pursuant to a written plea agreement, the Government agreed to dismiss Count One, which had alleged an overarching drug conspiracy. A28. This promise was conditioned upon the defendant's agreement to arrange for the delivery to the FBI of three additional guns that he had bought in September 2003. A28. The defendant also agreed to forfeit a number of items, including $38,010 in cash that had been seized during the search of Robinson's apartment, plus an additional $35,000 in cash that had been retrieved from that apartment at his direction, and which had been transferred to an attorney. A32.

The defendant's change of plea hearing was held over two days, November 4 and 8, 2004. During the November 4 hearing, it was anticipated that the defendant would plead guilty to only Count Four of the indictment. Anders App. 56-57. The defendant acknowledged that such a plea entailed a mandatory minimum term of 20 years and a maximum of life in prison. Anders App. 54-55. After the Government set forth the elements to be proven for a conviction on Count Four and the facts supporting the conviction, the defendant objected to the Government's

assertion that he had made a statement to an FBI agent admitting that he distributed cocaine base. Anders App. 70-71. In response to the court's inquiry, the defendant agreed that he had in fact sold approximately 54 grams of cocaine base to someone on January 8, 2004. Anders App. 71. However, the court noted that the stipulation of offense conduct contained in the plea agreement included a statement that the defendant had made an admission to an FBI agent regarding his possession with intent to distribute and distribution of certain quantities of cocaine base, Anders App. 37, and expressed concern that the defendant would not be able to sign the agreement because of this. Anders App. 72. The court then granted a defense request for a continuance, and scheduled the next hearing for November 8, 2004. Anders App. 72-73.

When the change of plea hearing resumed on November 8, the prosecutor informed the court that he had conferred with defense counsel in the interim and had revised the plea agreement to omit the language about the defendant implicating himself. Anders App. 91. The parties had further changed the plea agreement such that the defendant was now pleading guilty to Counts Two, Three, Four, and Five of the indictment. *Id.* There was no longer any agreement between the parties regarding the applicable sentencing range. *Id.*

The district court confirmed again that the defendant understood he faced a "mandatory minimum of 20 years and a maximum of life imprisonment" on Count Four. Anders App. 98; *see also id.* at 95. The defendant also acknowledged that he faced ten years to life in prison on

Counts Two, Three, and Five. Anders App. 99. After extensively canvassing the defendant about his rights, the district court accepted his guilty plea. Anders App. 139.

C. Absent objection, the district court imposes a total effective sentence of 240 months, based on the 20-year mandatory minimum applicable to Count Four.

In anticipation of sentencing, the Probation Office prepared a Presentence Report ("PSR"), the final version of which has been submitted under seal in this Court. After laying out the offense conduct, the PSR recommended setting the defendant's offense level at 32 pursuant to the following calculations: The PSR aggregated the total quantity of drugs involved the offense – more than 65 grams of cocaine base, 1,300 kilograms of marijuana, and 5 kilograms of powder cocaine – to yield a base offense level of 32 under U.S.S.G. § 2D1.1(c)(1). PSR ¶ 20. The PSR then added two levels for possessing a firearm in connection with the offense, pursuant to § 2D1.1(b)(1). PSR ¶ 21. The PSR deducted two levels for acceptance of responsibility pursuant to § 3E1.1(a). PSR ¶ 26.

According to the PSR, the defendant fell within criminal history category IV. He had amassed five criminal history points based on prior convictions for reckless endangerment, illegal firing of a firearm, possession of narcotics, and sale of narcotics. PSR ¶¶ 28-33. An additional two points were added because the defendant committed the present offense while on probation, and another point was added because he

committed this crime less than two years after his release from prison. PSR ¶ 33.

The PSR reiterated that the defendant faced mandatory minimum sentences of 20 years on Count Four, and 10 years each on Counts Two, Three, and Five. PSR ¶ 50.

At a sentencing hearing on September 21, 2005, the defendant raised no objection to the mandatory minimum 20-year sentence he faced. At the outset, the district court confirmed that the defendant had reviewed the PSR and had had an opportunity to discuss it with counsel. Anders App. 145. The district court ordered that the PSR be amended to reflect precise drug quantities provided by the probation officer. Specifically, the PSR would state that the defendant gave the witness 13.5 grams of cocaine base on January 6 (Count Two), 27.3 grams of cocaine base on January 7 (Count Three), and 54.6 grams of cocaine base on January 8 (Count Four). Anders App. 146-47 (amending PSR ¶¶ 8-10). Further, agents seized 949.9 grams of powder cocaine plus 28.6 grams of cocaine base on January 9. *Id.* (amending PSR ¶ 11). Both defense counsel and the prosecutor indicated that they did not object to the facts, as amended, in the PSR. Anders App. 148.

The court proceeded to adopt the PSR's guideline analysis, with the exception that the Government now moved to grant the defendant a third point for acceptance of responsibility under U.S.S.G. § 3E1.1. That yielded a total offense level of 31. Anders App. 152. Coupled with a criminal history category IV, the defendant faced a

guidelines range of 151-188 months. Anders App. 153. Because the defendant's conviction on Count Four had a statutory minimum sentence of 20 years, the defendant's guidelines range for that count became 240 months. *Id.* With one exception not relevant here,[2] defense counsel concurred in these calculations. Anders App. 153. Moreover, in compliance with 21 U.S.C. § 851(b), the district court confirmed that the defendant did not deny either of the prior convictions listed in the second-offender notices filed by the Government, which triggered the enhanced penalties under § 841(b)(1). Anders App. 156.

Addressing the court with respect to an appropriate sentence, defense counsel "recognize[d] the parameters in which we operate," and left "it to the court's discretion in handing down the sentence." Anders App. 157. The court repeated that the mandatory minimum had left it with little discretion, and the defendant confirmed that he comprehended this:

> So to my understanding I'm looking at 20 years so I'm 34 so I will be 54.

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[2] Defense counsel had unsuccessfully urged the court not to enhance the defendant's offense level by two points for gun possession, because the defendant had arranged to surrender three illegal guns to the Government. Anders App. 149-51. The defense acknowledged the difficulty of its argument, given its factual stipulation in the plea agreement that the defendant had possessed firearms in connection with his drug trafficking activities. A31.

Anders App. 159. The Government pointed out that although it could have filed a two-time second-offender notice, which would have exposed the defendant to a mandatory term of life imprisonment under 21 U.S.C. § 841(b), it had exercised its discretion not to do so. *Id.* The Government explained that although the defendant's guilt would have been easy to prove, other factors had been taken into consideration in the charging decision. Anders App. 158. The most significant consideration in this regard was the defendant's effort to get three additional guns off the street. *Id.*

The district court proceeded to sentence the defendant principally to 240 months on Count Four, to run concurrently with 151-month sentences on Counts Two, Three, and Five. Anders App. 162. At the end of the hearing, the court inquired, "Anything further," but there was no response, and the hearing adjourned. Anders App. 166.

This appeal followed.

SUMMARY OF ARGUMENT

1. The defendant affirmatively waived any challenge to the 20-year mandatory minimum applicable to Count Four by signing a written plea agreement that unambiguously acknowledged the applicability of that penalty, and repeatedly confirming in open court his understanding that he faced that penalty. Such a waiver forecloses an appellate challenge to the statutory minimum sentence on that count.

Alternatively, the district court did not plainly err in failing, *sua sponte*, to declare unconstitutional the mandatory minimum sentences applicable to cocaine-base offenses under 21 U.S.C. § 841. This Court has consistently rejected equal-protection challenges to the differential penalties that Congress has selected for various drugs in § 841, and the Supreme Court's recent decision in *Kimbrough* neither overruled nor cast doubt on those precedents. Accordingly, there was no error at all. Certainly, given the absence of any precedent of the Supreme Court or this Court holding that these penalties are unconstitutional, the defendant cannot show that any hypothetical error is "plain" in the sense of "clear" or "obvious" at the time of appellate consideration.

Likewise, even if the defendant had not waived his challenge to the 20-year mandatory minimum sentence, the district court did not plainly err in failing, *sua sponte*, to conclude that the parsimony clause of § 3553(a) overrides the mandatory nature of the minimum sentences set forth in 21 U.S.C. § 841. One of the most fundamental rules of statutory interpretation is that laws must be construed to give effect to all of their terms, and not to render any of their provisions superfluous. Courts have always read § 3553(a) and § 841(b) in harmony. By instructing judges to impose a sentence that is sufficient, but not greater than necessary, to achieve the purposes of sentencing, § 3553(a) authorizes them to select any appropriate sentence within the minimum and maximum fixed by statute. Anything less than the congressionally mandated minimum is, by definition, insufficient to achieve the

purposes of sentencing, which include consideration of the "available" sentences, 18 U.S.C. § 3553(a)(3).

2. Under plain-error review, the defendant is not entitled to a limited remand for the district court to reconsider, pursuant to *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008) (per curiam), the 151-month sentences imposed on Counts Two, Three, and Five. Those shorter sentences run concurrently to the 20-year minimum sentence on Count Four, and so a remand on these three counts could not reduce the total effective sentence. This Court has repeatedly held that a defendant cannot carry his burden of establishing prejudice from a claimed sentencing error on one count where, as here, the overall sentence would remain unchanged due to a valid concurrent term of imprisonment on a separate count.

ARGUMENT

I. The defendant waived any challenge to the 20-year minimum sentence on Count Four, or in the alternative the district court did not plainly err in imposing that sentence.

A. Governing law and standard of review

This Court ordinarily engages in *de novo* review of "challenges to the meaning and constitutionality of statutes . . . ." *United States v. Cullen*, 499 F.3d 157, 162 (2d Cir. 2007). A different standard, however, applies where a defendant has procedurally defaulted a claim of error before the district court.

On the one hand, a defendant may – by inaction or omission – forfeit a legal claim, for example, by simply failing to lodge an objection at the appropriate time in the district court. Where a defendant has forfeited a legal claim, this Court engages in "plain error" review pursuant to Fed. R. Crim. P. 52(b). "For there to be 'plain error,' there must be (1) an error that (2) is 'plain' and (3) 'affect[s] substantial rights'; if these elements are satisfied, then the court may correct the error, but only if (4) the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Miller*, 263 F.3d 1, 4 (2d Cir. 2001) (quoting *Johnson v. United States*, 520 U.S. 461, 467 (1997)); *see also United States v. Cotton*, 535 U.S. 625, 631-32 (2002) (outlining "plain error" factors).

On the other hand, a defendant may do more than merely forfeit a claim of error. A defendant may – through his words, his conduct, or by operation of law – waive a claim, so that this Court will altogether decline to adjudicate that claim of error on appeal. *See United States v. Olano*, 507 U.S. 725, 733 (1993)*; United States v. Quinones*, 511 F.3d 289, 320-21 (2d Cir. 2007); *United States v. Wellington*, 417 F.3d 284, 289-90 (2d Cir. 2005); *United States v. Nelson*, 277 F.3d 164, 204 (2d Cir. 2002); *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995).

B. Discussion

1. The defendant affirmatively waived any challenge to the 20-year mandatory minimum applicable to Count Four by signing a written plea agreement that unambiguously acknowledged the applicability of that penalty, and repeatedly confirming in open court his understanding that he faced that penalty.

The Eighth Circuit has had occasion to hold that "a defendant who explicitly and voluntarily exposes himself to a specific sentence may not challenge that punishment on appeal." *United States v. Womack*, 985 F.2d 395, 400 (8th Cir. 1993) (internal quotation marks omitted). For example, in *United States v. Cook*, 447 F.3d 1127, 1128 (8th Cir. 2006), a defendant who had pled guilty to a violation of 21 U.S.C. § 841(b)(1)(A) challenged – for the first time on appeal – the applicability of the 20-year

mandatory minimum penalty. The Eighth Circuit held that the defendant had waived his "right to contest his sentence on the basis of the § 841(b)(1)(A) enhancement" by freely entering into a plea agreement that called for that penalty. *Id.* ("At the time of the plea, Cook did not object to the prior crime but stated he understood the plea agreement and was entering his plea freely and voluntarily with the knowledge his mandatory minimum sentence would be twenty years."); *see also United States v. Nguyen*, 46 F.3d 781, 783 (8th Cir. 1995) (same); *United States v. Durham*, 963 F.2d 185, 187 (8th Cir. 1992) ("[Defendant] waived any objection to the twenty-five-year sentence by agreeing that it was the minimum sentence mandated by the statutes, and by accepting the benefit of the plea agreement.").

As in *Cook*, the defendant here knowingly entered into a written plea agreement that called for a 20-year mandatory minimum penalty. A24. He acknowledged that he had read that agreement, discussed it with his attorney, and understood it. A137. The defendant repeatedly acknowledged that he faced a 20-year minimum sentence both during the plea hearings, A54-55, A63, A97-98, and at sentencing, A159. Having "explicitly and voluntarily expose[d] himself" to a 20-year minimum sentence, the defendant should not now be permitted to challenge that sentence. *Cook*, 447 F.3d at 1128.

The Eighth Circuit's approach is consistent with this Court's enforcement of plea agreements more generally. The Court has "noted the dangers of piecemeal non-enforcement of plea agreements," in the contexts of

enforcing factual stipulations as well as appellate waivers. *United States v. Granik*, 386 F.3d 404, 412 (2d Cir. 2004). Both defendants and the Government benefit from the enforceability of plea agreements. "If defendants are not held to their factual stipulations, therefore, the government has no reason to make concessions in exchange for them." *Id.* at 412-13. In this case, it was made clear that in exchange for the defendant's plea to an offense bearing a 20-year minimum sentence, the Government had forgone the filing of a two-time second-offender notice pursuant to § 851, which would have elevated the mandatory minimum sentence to life imprisonment. A103-06, A159. Moreover, pursuant to the plea agreement, the Government agreed to drop Count One, which charged the overarching drug conspiracy, and agreed not to file additional firearms charges related to guns that the defendant was turning over. To ignore the defendant's concession about the applicability of the mandatory minimum sentences would be to ignore the "mutuality of plea agreements." *Granik*, 386 F.3d at 412; *see also United States v. Brumer*, No. 07-0715-cr(L), 2008 WL 2345120, at *1-2 (2d Cir. June 10, 2008) (per curiam) (holding that when defendant breaches plea agreement, government is entitled to choose between specific performance or being relieved of its obligations under agreement); *United States v. Bradbury,* 189 F.3d 200, 208 n.4 (2d Cir. 1999) (rejecting defendant's claim that his base offense level under the Guidelines should be calculated as if his conspiracy involved no drugs at all, where defendant had signed plea agreement acknowledging that conspiracy involved 378 pounds of marijuana); *United States v. Delgado*, 288 F.3d 49, 56-57

(1st Cir. 2002) (holding that defendant's concession in plea agreement that there was no basis for downward departure constituted waiver of this claim on appeal); *cf. United States v. Martinez*, 122 F.3d 421, 422-23 (7th Cir. 1997) (holding that factual stipulations in plea agreement are binding unless defendant validly withdraws from agreement).[3]

Even if the defendant had not waived his right to challenge the 240-month mandatory minimum sentence, his claims on that score would still fail. For the reasons that follow, the district court did not plainly err in failing, *sua sponte*, to declare the § 841 penalties unconstitutional. Nor did the court plainly error in failing to concoct the novel theory that the parsimony clause of § 3553(a) somehow trumps the mandatory nature of the penalties established in § 841.

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[3] Samas's plea agreement contained no appeal waiver, and so the Government does not rely on the line of cases that enforce such provisions. Nevertheless, as explained in the text, a defendant can waive a claim (without specifying a forum) by stipulating to a result in a plea agreement, just as he can waive a forum (without specifying particular claims) by entering into an appellate waiver.

2. Alternatively, the district court did not plainly err in failing to declare unconstitutional the mandatory minimum sentences applicable to cocaine-base offenses under 21 U.S.C. § 841, where this Court has consistently rejected equal-protection challenges to those penalties.

This Court has repeatedly and authoritatively rejected claims that the statutory minimum penalties set forth in § 841(b) for cocaine-base offenses violate constitutional equal protection principles. Recent developments have not undermined those precedents, which could be revisited only by this Court sitting en banc.

The Court first turned away an equal-protection challenge to the crack/powder penalties in *United States v. Stevens*, 19 F.3d 93, 96-97 (2d Cir. 1994). In that case, the defendant pointed out that under the graduated schedule of penalties in the Guidelines for drug offenses, the penalties imposed for a given quantity of crack cocaine were the same as those imposed for a quantity of powder cocaine that was 100 times greater. This ratio, the Court observed, was "derived directly from" the schedule of mandatory minimum penalties triggered by specified drug quantities in 21 U.S.C. § 841. Because "African-Americans constitute a higher proportion of crack offenders than powder cocaine offenders," the defendant contended that this penalty ladder violated "the equal protection component of the Fifth Amendment's Due Process Clause." 19 F.3d at 96.

Because the defendant had not alleged that either Congress or the Sentencing Commission acted with discriminatory intent, the Court asked "whether the challenged sentencing scheme has a rational basis, that is, whether it is rationally related to a legitimate governmental purpose." *Id.* Congress had precisely such a "valid reason for mandating harsher penalties for crack as opposed to powder cocaine: the greater accessibility and addictiveness of crack." *Id.* at 97 (citing *United States v. Haynes*, 985 F.2d 65, 70 (2d Cir. 1993) (holding that disparate impact of crack penalties on African-Americans did not justify downward departure)). In reaching this conclusion, this Court joined every other circuit to have ruled on the issue. *Id.* The Court has subsequently re-affirmed this holding, *see, e.g., United States v. Then*, 56 F.3d 464, 464 (2d Cir. 1995), and expanded it to reject claims of intentional racial discrimination, *United States v. Moore*, 54 F.3d 92, 96-99 (2d Cir. 1995).[4]

Even in the wake of *Booker* and *Kimbrough*, this Court has continued to adhere to *Stevens*. Thus, in *United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008) (per curiam)

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[4] Although the defendant cites Judge Calabresi's speculation, in his *Then* concurrence, that the "constitutional status" of the crack:powder ratio might change over time, 56 F.3d at 467-68, only an *en banc* court is authorized to overrule binding circuit precedent such as *Stevens.* In any event, as Judge Calabresi pointed out, "[t]oo many issues of line drawing make [it] hazardous" "for courts to step in and say that what was rational in the past has been made irrational by the passage of time, change of circumstances, or the availability of new knowledge." *Id.* at 468.

(discussed in greater detail below, in Part I.B.3), this Court relied expressly on *Stevens* to turn away an identical constitutional challenge to the Guidelines-based crack:powder ratio. *Id.* at 149 n.3 ("In addition, Regalado's (unpreserved) due process challenge to the 100-to-1 powder to crack cocaine ratio underlying his sentence is without merit as we have repeatedly rejected similar constitutional challenges. *See, e.g., United States v. Stevens*, 19 F.3d 93, 97 (2d Cir. 1994).").

The Court has also expressed skepticism that *Kimbrough* undermined the holding of *Stevens* with respect to the mandatory minimum sentences established by § 841. Thus, in *United States v. Lee*, 523 F.3d 104, 106 (2d Cir. 2008), a defendant argued that her sentence of 120 months – which was at the mandatory minimum applicable to her crack-cocaine offense – was unconstitutional because of the "adverse racial impact" of the crack:powder ratio. *Id.* The Court ultimately dismissed the appeal because the defendant's claim was covered by a valid appeal waiver in the plea agreement. *Id.* But before doing so, the Court noted that it had previously rejected an "equal-protection challenge to the powder cocaine-crack cocaine disparity embodied in an Act of Congress." *Id.* Commenting on the defendant's argument that the Supreme Court's decision in *Kimbrough* had changed the "legal landscape" since *Stevens*, the Court observed that "[i]t is not apparent to us that the principles set forth in *Kimbrough* have any application to mandatory minimum sentences imposed by statute." 523 F.3d at 106.

This Court was correct when it suggested that nothing in *Kimbrough* has any application to statutory minimum sentences. For one thing, *Kimbrough* is simply the latest in a series of cases holding, in light of the Sixth Amendment, that the statutory *maximum* sentence to which a defendant may be lawfully exposed is dictated by facts found by a jury beyond a reasonable doubt or admitted by the defendant himself. *See, e.g., United States v. Booker*, 543 U.S. 220, 231 (2005). These Sixth Amendment principles do not apply to statutory *minimum* sentences, like the ones at issue here. *Harris v. United States*, 536 U.S. 545, 560-68 (2002).

Second, *Kimbrough* nowhere suggested that the 100:1 powder:crack ratio was irrational. It merely reviewed some of the conflicting data on the relative harmfulness of powder and crack cocaine by way of background, 128 S. Ct. at 566-69, and held that § 3553(a) gives sentencing judges the discretion to decide for themselves whether to adhere to the ratio selected by the Sentencing Commission, 128 S. Ct. at 574-75. In no way did the *Kimbrough* Court undertake to evaluate the competing evidence regarding the societal harms caused by different drugs, or to determine any equivalences between specified quantities of heroin, marijuana, powder cocaine, crack cocaine, or any other drugs.[5] The Court likewise offered no opinion

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[5] For example, although the Court noted in passing the Sentencing Commission's conclusion that "crack is associated with 'significantly less trafficking-related violence . . . than previously assumed,'" 128 S. Ct. at 568, the Court did not (continued...)

about the rationality or desirability of the crack:powder ratios that the Sentencing Commission had recently adopted in the amended drug quantity table of U.S.S.G. § 2D1.1, which now range from 1:25 to 1:80. 128 S. Ct. at 573. The fact that there is an ongoing debate that involves the political branches and the Sentencing Commission about the proper equivalencies among different drugs hardly demonstrates the "irrationality" of the ratios that Congress chose when it enacted § 841. It would be highly unusual, to say the least, for an appellate court to make such a dramatic pronouncement without the slightest factual record having been developed below.

In short, *Kimbrough* has not overruled, much less undermined, this Court's consistent holdings in *Stevens*, *Then*, *Moore*, and *Regalado* that the schedule of penalties in § 841 does not violate equal protection principles. "[A] prior decision of a panel of this court binds all subsequent panels 'absent a change in law by higher authority or by way of an in banc proceeding' . . . ." *Mendez v. Mukasey*, 525 F.3d 216, 221 (2d Cir. 2008) (quoting *United States v. Snow*, 462 F.3d 55, 65 n.11 (2d Cir. 2006) (quoting, in turn, *United States v. King*, 276 F.3d 109, 112 (2d Cir.

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[5] (...continued)
review the Commission's recent statistic showing that crack offenders are twice as likely as powder offenders to have a weapon involved in their offense. U.S. SENTENCING COMMISSION, 2007 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 106 (Table 39, Weapon Involvement of Drug Offenders for Each Drug Type, Fiscal Year 2007) (29.8% of crack offenders v. 14.4% of powder offenders).

2002)), *cert. denied*, 127 S. Ct. 1022 (2007)); *see also Union of Needletrades, Indus. & Textile Employees v. INS*, 336 F.3d 200, 210 (2d Cir. 2003) (recognizing authority to revisit prior panel's decision only if "there has been an intervening Supreme Court decision that casts doubt on our controlling precedent," such as a decision that overrules a different, but similar, circuit precedent). These precedents therefore dictate that the defendant's equal-protection claim be rejected on the merits.

In any event, the defendant certainly cannot demonstrate that any error was "plain," in the sense of being clear or obvious at the time of appellate consideration. *Olano*, 507 U.S. at 734. The Government is aware of no cases, and the defense has cited none, holding that a district court "plainly erred" in failing to *sua sponte* ignore an undisturbed line of binding precedents from this Court, where the only claim on appeal is that a recent Supreme Court decision has made that line of cases ripe for reconsideration. *See United States v. Whab*, 355 F.3d 155, 158 (2d Cir. 2004) (noting that "[w]ithout a prior decision from this court or the Supreme Court mandating the jury instruction that [defendant], for the first time on appeal, says should have been given, we could not find any such error to be plain, if error it was") (quoting *United States v. Weintraub*, 273 F.3d 139, 152 (2d Cir. 2001)).

3. Alternatively, the district court did not plainly err in failing to impose a sentence below the 240-month statutory minimum applicable to Count Four, because the parsimony clause of § 3553(a) does not override the mandatory nature of the minimum sentences set forth in 21 U.S.C. § 841.

The defendant also raises, for the first time on appeal, the novel argument that the so-called "parsimony clause" of 18 U.S.C. § 3553(a) which generally governs sentencing nullifies the mandatory minimum sentences established by 21 U.S.C. § 841.

The argument runs along these lines: § 3553(a) requires a court to impose a sentence that is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing laid out in § 3553(a)(2). This mandate supposedly conflicts with the penalty provisions of the Controlled Substances Act, 21 U.S.C. § 841, which establish minimum penalties in similarly mandatory language. For example, 21 U.S.C. § 841(b)(1)(A) provides that defendants like Samas "*shall* be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment." (Emphasis added.) The defendant argues that this purported conflict must be resolved in favor of § 3553(a) for two reasons. First, § 3551(a)(1) is claimed to assert the pre-eminence of § 3553 by stating that "[e]xcept as otherwise specifically provided, a defendant . . . shall be sentenced in accordance with the provisions of this chapter . . . ." which includes

§ 3553. Second, the minimum prison terms listed in § 841(b) are said to subordinate themselves to § 3553(a) because – unlike other provisions in § 841(b) dealing with probation and supervised release – they do not contain trumping language such as "notwithstanding any other provision of law." *See* Def. Br. 20-28.

The flaw in the defendant's argument, of course, is that there is no conflict between § 3553(a) and the mandatory minimum sentences listed in § 841. Section 3553(a)(1)'s requirement that a court impose a sentence that is "sufficient, but not greater than necessary, to comply with the purposes" of sentencing is fully consistent with the notion that Congress can and may determine, as to particular categories of crimes, ceilings and floors for sentences. Selection of a statutory minimum sentence reflects a congressional determination that anything below that level would not be "sufficient" punishment. Conversely, fixing a statutory maximum reflects a legislative decision that anything above that level would be "greater than necessary." Moreover, the defendant's attempt to conjure up a false conflict with § 3553 collides with the fundamental interpretive canon that "courts should disfavor interpretations of statutes that render language superfluous." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992); *see also Tablie v. Gonzales*, 471 F.3d 60, 64 (2d Cir. 2006) ("We are . . . obliged to give effect, if possible, to every clause and word

of a statute, and to render none superfluous.") (internal quotation marks omitted).[6]

Although this Court has not yet had occasion to consider the precise argument raised by the defendant, every other circuit to consider directly analogous claims has rejected them. *See, e.g., United States v. Franklin*, 499 F.3d 578, 583-86 (6th Cir. 2007) (reversing where judge failed to impose fully consecutive minimum punishment in compliance with § 924(c); endorsing prior unpublished circuit decisions that rejected attempts to invoke § 3553(a) as authority to impose sentences below the mandatory minimums in 21 U.S.C. § 841(b)); *United States v. Roberson*, 474 F.3d 432, 434 (7th Cir. 2007) (reversing judge's failure to impose statutorily mandated consecutive sentence on 18 U.S.C. § 924(c) count; explaining that the judge "is of course entitled to her view, but she is not entitled to override Congress's contrary view"); *United States v. Gregg*, 451 F.3d 930, 937 (8th Cir. 2006) (upholding district court's imposition of mandatory minimum consecutive 120-month sentence on § 924(c) count; holding that § 3553(a) does not confer discretion to impose sentence below statutory minimum prescribed by

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[6] Given the absence of any conflict, no significance can be ascribed to the fact that § 841 contains no language that carves it out from the application of § 3553(a). *Cf. United States v. Mueller*, 463 F.3d 887, 890-91 (9th Cir. 2006) (holding that 18 U.S.C. § 3561 does not authorize sentence of probation where offense specifies mandatory minimum prison term, irrespective of whether statute defining offense contains preclusion language such as "notwithstanding any other provision of law"), *cert. denied*, 127 S. Ct. 2098 (2007).

§ 924(c)); *United States v. Shelton*, 400 F.3d 1325, 1333 n.10 (11th Cir. 2005) (remanding sentence imposed under pre-*Booker* mandatory Guidelines system, but emphasizing that "that the district court was, and still is, bound by the statutory minimums"). As the Seventh Circuit has explained, "[r]ecidivist provisions do set floors, and judges must implement the legislative decision whether or not they deem the defendant's criminal record serious enough; the point of such statutes is to limit judicial discretion rather than appeal to the court's sense of justice." *United States v. Cannon*, 429 F.3d 1158, 1160 (7th Cir. 2005).[7]

The same result is dictated by this Court's post-*Booker* decisions, which continue to recognize the binding nature of statutory minimum sentences. For example, in *United States v. Sharpley*, 399 F.3d 123, 127 (2d Cir. 2005), the Court held that "*Booker* makes the Guidelines advisory in nature, leaving sentences to the district court's discretion, guided by the Guidelines and the other factors of § 3553(a), *and bounded by any applicable statutory minimum and maximum*." (Emphasis added). Sharpley had been convicted of sexual exploitation charges, and he was sentenced to the mandatory minimum of 15 years fixed by his statute of conviction, 18 U.S.C. § 2251(d). Even

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[7] The only decision to the contrary that the Government has been able to locate is *United States v. Grant*, 524 F. Supp.2d 1204 (C.D. Cal. 2007) (holding that imposition of mandatory minimum sentence to "peripheral offender" violated Due Process Clause). A Government appeal in that case has been fully briefed, but not yet argued. *See United States v. Grant*, No. 07-50086 (9th Cir.).

though Sharpley had been sentenced before *Booker* was decided, this Court held that a *Crosby* remand was unwarranted because the existence of a statutory minimum sentence precluded any reduction in Sharpley's sentence. 399 F.3d at 127. "This is a prototypical example of harmless error. Sharpley cannot obtain any improvement in his sentence in resentencing, and we therefore see no reason to remand to the district court." *Id.* As *Sharpley* makes clear, then, statutory minimum sentences are no less binding after *Booker* than they were before. Indeed, after *Booker*, both the Supreme Court and this Court have continued to enforce mandatory minimum sentences embodied in § 841[8] as well as other statutes such as 18 U.S.C. § 924(e) (armed career criminal act),[9] 18 U.S.C.

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[8] *United States v. Pressley*, 469 F.3d 63, 65-67 (2d Cir. 2006) (per curiam) (holding that district court must consider aggregate drug quantity that was admittedly involved in drug conspiracy when determining which "mandatory minimum" sentence applies), *cert. denied*, 127 S. Ct. 1859 (2007); *United States v. Holguin*, 436 F.3d 111, 117-19 (2d Cir.) (upholding constitutionality of judicial factfinding on safety-valve criteria in connection with mandatory minimum sentences of § 841(b)), *cert. denied*, 547 U.S. 1185 (2006).

[9] The Supreme Court has repeatedly decided cases, in the wake of *Booker*, about how to determine whether a defendant's prior conviction renders him an armed career criminal subject to an enhanced sentence applicable to recidivists. *See, e.g., Begay v. United States*, 128 S. Ct. 1581 (2008); *James v. United States*, 127 S. Ct. 1586 (2007); *Shepard v. United States*, 544 U.S. 13 (2005). The Court would have had no (continued...)

§ 2422(b) (enticement of minor),[10] and 18 U.S.C. § 2252A (child pornography).[11]

Not only would the defendant's interpretation of § 3553(a) undermine all of those decisions, but it would also render superfluous those carefully circumscribed provisions in the U.S. Code and the Federal Rules which sometimes authorize a sentence below the prescribed minimum: 18 U.S.C. § 3553(e) (for substantial assistance, upon motion of the Government); 18 U.S.C. § 3553(f) (safety valve for certain drug offenses); and Fed. R. Crim. P. 35(b) (substantial assistance provided after sentencing).[12] This Court effectively said as much in

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[9] (...continued)
reason to decide these cases if § 3553(a) permitted a district court to disregard the mandatory nature of the minimum sentences listed in § 924(e).

[10] *United States v. Gagliardi*, 506 F.3d 140, 148-49 (2d Cir. 2007) (rejecting claim of sentencing manipulation).

[11] *United States v. Stearns*, 479 F.3d 175, 178 (2d Cir. 2007) (per curiam) (affirming imposition of only partially concurrent 10-year mandatory minimum).

[12] The defendant is correct that neither § 3553(e) nor § 3553(f) specifies that they constitute the exclusive methods for imposing a sentence below a statutory minimum. Def. Br. at 26. Nevertheless, this Court has uniformly held that a district court may impose such a sentence only pursuant to a specific grant of authority – namely, for substantial assistance or under the safety-valve. *See United States v. Medley*, 313 (continued...)

United States v. Richardson, 521 F.3d 149, 159 (2d Cir. 2008), where it held that in the context of a § 3553(e) motion, "both the decision to depart and the maximum permissible extent of this departure below the statutory minimum may be based only on substantial assistance to the government and on no other mitigating considerations." The other factors listed in § 3553(a) may be considered only insofar as they inform the decision "whether to grant the full extent of the departure permitted by § 3553(e)." *Richardson*, 521 F.3d at 159. Because this Court has held that § 3553(a) does not authorize a district court to select a sentence below what can be justified by reference to a defendant's substantial assistance under § 3553(e), then *a fortiori* § 3553(a) cannot independently authorize a court to dip below a statutory minimum sentence. *See also Melendez v. United States*, 518 U.S.

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[12] (...continued)
F.3d 745, 749-50 (2d Cir. 2002) (reversing sentence that was below mandatory minimum).

The defendant cites *United States v. Dorsey*, 166 F.3d 558 (3d Cir. 1999), for the proposition that courts may devise additional methods for imposing sentences that are less than a statutory minimum. Def. Br. 26. *Dorsey* did not, however, involve a statutory minimum sentence. In that case, the Third Circuit held simply that a sentencing judge is authorized by 18 U.S.C. § 3584(b), when imposing a federal sentence to run concurrently with a previously commenced state sentence, to credit the defendant with time already served on that state sentence. *Dorsey* did not authorize a judge to reduce the overall term of federal imprisonment; it simply permitted the federal judge to recognize that a portion of that sentence had already been served. 166 F.3d at 563.

120 (1996) ("we agree with the Government that nothing in § 3553(e) suggests that a district court has *power* to impose a sentence below the statutory minimum to reflect a defendant's cooperation when the Government has not authorized such a sentence" through an appropriate motion triggering that authority, as distinct from a motion pursuant to U.S.S.G. § 5K1.1) (emphasis added).

Along those same lines, the defendant's position is also at odds with this Court's decision in *United States v. Jimenez*, 451 F.3d 97, 102 (2d Cir. 2006), which held that even after *Booker*, a defendant bears the burden of proving his eligibility for the safety valve provisions of § 3553(f). Again, if § 3553(a) independently authorized a district judge to hand down a sentence below the statutory minimum, then the safety valve would be a superfluity. *See also Holguin*, 436 F.3d at 117-19 (rejecting Sixth Amendment challenge to judicial factfinding as to role in the offense under safety valve); *see also United States v. Barrero*, 425 F.3d 154, 156-57 (2d Cir. 2005) (holding that eligibility criteria of § 3553(f) are not "advisory" in the wake of *Booker*).

II. Plain-error review bars a limited remand for the district court to reconsider, pursuant to *Regalado*, the 151-month sentences imposed on Counts Two, Three, and Five, because they run concurrently to a 240-month minimum sentence on Count Four and thus any reductions would not change the total effective sentence.

A. Governing Law

Because Samas did not object to the sentences imposed on Counts Two, Three, and Five – much less argue that they were defective in light of the disparate punishments that the Guidelines accord to offenses involving powder cocaine and cocaine base – his claim is reviewable only for plain error. *See* Fed. R. Crim. P. 52(b); *United States v. Regalado*, 518 F.3d 143, 147 (2d Cir. 2008) (per curiam). In *Regalado*, this Court faced a sentencing appeal brought by a defendant who had been sentenced under the crack-quantity guidelines prior to the Supreme Court's decision in *Kimbrough v. United States*, 128 S. Ct. 558 (2007), which held that district courts may impose non-Guidelines sentences based on a conclusion that the purposes of sentencing outlined in § 3553(a) are not served by the penalties provided in the Guidelines for crack offenses, compared to those provided for other drug crimes. In light of *Kimbrough*, this Court held that "[w]here a defendant has not preserved the argument that the sentencing range for the crack cocaine offense fails to serve the objectives of sentencing under § 3553(a), we will remand to give the district court an opportunity to indicate whether it would have imposed a non-Guidelines sentence

knowing that it had discretion to deviate from the Guidelines to serve those objectives." *Regalado*, 518 F.3d at 149. The procedure on remand is roughly analogous to the remedy outlined in *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), for sentences that were imposed pursuant to a mandatory Guidelines regime before the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005).

This Court's decision in *Regalado* implements Rule 52(b)'s plain-error standard of review, for which the Supreme Court has outlined four components. *See United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Olano*, 507 U.S. 725, 732 (1993). Under plain error review, before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that was "plain" (which is "synonymous with 'clear' or equivalently 'obvious'"), *see Olano*, 507 U.S. at 734; and (3) that affected the defendant's substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *Johnson*, 520 U.S. at 466-67. In *Regalado*, the Court concluded that a remand to the sentencing court was the best way to assess the third and fourth prongs, where that court did not fully appreciate the extent of its discretion to deviate from the crack Guidelines. 518 F.3d at 148. In this regard, the key question was whether the district court, now fully apprised of its discretion by virtue of *Kimbrough*, would have

"mitigate[d] the sentencing range" called for by the crack Guidelines. 518 F.3d at 149.

B. Discussion

The defendant is not entitled to a *Regalado* remand to revisit his 151-month sentences on Counts Two, Three, and Five. Even if the district court were to reconsider its sentences on those three counts, Samas would still face a valid, concurrent 240-month sentence on Count Four. Because his total effective sentence would remain unchanged, any hypothetical *Kimbrough* error cannot have affected his substantial rights. Accordingly, he cannot satisfy the third or fourth prongs of plain-error analysis, and a *Regalado* remand would be futile.

This case is on all fours with *United States v. Rivera*, 282 F.3d 74 (2d Cir. 2000) (per curiam). In that case, the defendant had been convicted and sentenced to life imprisonment on three counts, including (1) illegally possessing drugs, 21 U.S.C. § 841, (2) participating in a continuing criminal enterprise ("CCE"), 21 U.S.C. § 848, and (3) possessing a firearm in connection with a drug offense, 18 U.S.C. § 924(c). The defendant challenged his sentence on the grounds that the district court's findings about the quantity of drugs involved in the narcotics offense violated the Sixth Amendment, in light of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Court rejected this contention, because the statutory maximum on the CCE count was life in prison, and so any judicial factfinding had not increased the maximum punishment to which the defendant was exposed. 282 F.3d at 76-77. The

Court also rejected any claimed defects in the sentences on the drug and gun counts as "certainly harmless." *Id.* at 77. "Because [the defendant] could properly be sentenced to life imprisonment on the CCE count, a concurrent sentence on other counts is irrelevant to the time he will serve in prison, and we can think of no collateral consequences from such erroneous concurrent sentences that would justify vacating them." *Id.* at 77-78; *see also United States v. Friedman*, 300 F.3d 111, 128 (2d Cir. 2002) ("Because we have held that there is no basis to disturb his life sentence on [other] counts, however, his *Apprendi* claim related to his conviction for narcotics conspiracy is foreclosed by [*Rivera*].").

Since *Rivera* was decided, this Court has reiterated the principle that "an erroneous sentence on one count of a multiple-count conviction does not affect substantial rights where the total term of imprisonment remains unaffected . . . ." *United States v. Outen*, 286 F.3d 622, 640 (2d Cir. 2002). In *Outen*, the Court applied this rule even under its so-called "modified plain error" analysis, which is arguably triggered when there has been a change of law between sentencing and appeal.[13] Moreover, the

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[13] Under the third ("substantial rights") prong of the plain-error standard, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *United States v. Olano*, 507 U.S. 725, 734 (1993). This Court has held that in cases where the error sought to be noticed arises from an intervening judicial decision, the burden shifts to the Government to prove the absence of prejudice to the defendant. *See United States v. Viola*, 35 F.3d 37, 42 (2d Cir.

(continued...)

Court enforced the rule in *Outen* even though that case involved an error that was at least nominally more serious than the one presented here. In *Outen*, the defendant had been convicted of two drug possession counts and one drug conspiracy count. The district court sentenced him to 60 months for each of the possession counts and 110 months for the conspiracy count. 286 F.3d at 639. The

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[13] (...continued)
1994); *United States v. Ballistrea*, 101 F.3d 827, 835 (2d Cir. 1996).

Viola's modified plain error standard is, we submit, inconsistent with *Olano*'s facially unqualified allocation of the burden of persuasion in all cases involving a forfeited error. *Viola*'s reasoning, moreover, has been effectively superseded by the Supreme Court's later decision in *Johnson v. United States*, 520 U.S. 461 (1997). *Johnson* involved an intervening change in law on appeal, and the Supreme Court emphasized that *Olano*'s standards – including the requirement that the defendant prove prejudice – apply in those circumstances. This Court has acknowledged that *Johnson* "has called into doubt the continuing viability of the modified plain-error approach," *United States v. Stewart*, 433 F.3d 273, 294 n.5 (2d Cir. 2006), but has not yet had occasion to definitively resolve the issue. *See, e.g., United States v. Kaplan*, 490 F.3d 110, 124 & n.6 (2d Cir. 2007); *United States v. Williams*, 399 F.3d 450, 457 n.7 (2d Cir. 2005) (citing *United States v. Thomas*, 274 F.3d 655, 668 n.15 (2d Cir. 2001) (en banc)) (assuming, for purposes of pending appeal, that "the burden to show that an error, arising from an intervening change in law, affected substantial rights remains with the defendant"). No other court of appeals has adopted a modified burden-shifting approach before or after *Johnson*.

Court concluded that the conspiracy count carried a 60-month statutory maximum, and that the 110-month sentence therefore violated the Sixth Amendment. Nevertheless, resentencing was not warranted because his sentences would have been stacked to achieve the same overall punishment. *Id.* at 639-40. *See also United States v. McLean*, 287 F.3d 127, 135-37 (2d Cir. 2002) (declining to remand or modify judgment where defendant failed to preserve *Apprendi* claim that sentence on each individual count exceed statutory maximum, because total effective sentence could have been imposed by running shorter sentences on each count consecutively); *United States v. Blount*, 291 F.3d 201, 213-14 (2d Cir. 2002) (same); *United States v. Feola*, 275 F.3d 216, 219-20 & n.1 (2d Cir. 2001) (per curiam).[14]

Most recently, this Court applied these principles in *United States v. Quinones*, 511 F.3d 289 (2d Cir. 2007), where it decided not to grant a *Crosby* remand on several counts of conviction because the defendants faced a valid life sentence pursuant to 21 U.S.C. § 848. *See* 511 F.3d at 323 n.24 (applying plain-error analysis). "[A]ny resentencing on those counts would not change the fact

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[14] In light of *Booker*, a district court would no longer be required to run sentences consecutively to achieve the total punishment dictated by the Guidelines. Although this portion of *Outen* and related cases has been superseded, the Government cites these cases for the independent, and undisturbed, proposition that a sentencing error is not reversible "plain error" if it would not affect the validity of an equal or longer concurrent sentence on a separate count.

that defendants will spend the rest of their lives imprisoned" on the remaining count. *Id.* The result in *Quinones* followed *a fortiori* from cases like *Outen*. In *Outen*, the Court affirmed notwithstanding an error that indisputably increased the sentence on one count of conviction. In *Quinones*, the Court affirmed notwithstanding a different error (mandatory application of the guidelines) which may or may not have had an impact on the sentence for a count of conviction. Here, the defendant's case is weaker still, because he can point only to a possible error (the district court *may* have underestimated the scope of its discretion to vary from the Guidelines), with only a possible impact on certain counts of conviction (if the district court would have imposed lower sentences on Counts Two, Three, and Five). In light of the unbroken line of cases from *Rivera* through *Outen* and *Quinones*, Samas cannot satisfy all the requisites of plain-error review. Accordingly, a *Regalado* remand is inappropriate, and his sentence should be affirmed in all respects.

CONCLUSION

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

Dated: June 24, 2008

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 10,014 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. § 3551. Authorized sentences

(a) In general.--Except as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute, including sections 13 and 1153 of this title, other than an Act of Congress applicable exclusively in the District of Columbia or the Uniform Code of Military Justice, shall be sentenced in accordance with the provisions of this chapter so as to achieve the purposes set forth in subparagraphs (A) through (D) of section 3553(a)(2) to the extent that they are applicable in light of all the circumstances of the case.

(b) Individuals.--An individual found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to--

(1) a term of probation as authorized by subchapter B;

(2) a fine as authorized by subchapter C; or

(3) a term of imprisonment as authorized by subchapter D. A sentence to pay a fine may be imposed in addition to any other sentence. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

(c) Organizations.--An organization found guilty of an offense shall be sentenced, in accordance with the provisions of section 3553, to--

(1) a term of probation as authorized by subchapter B; or

(2) a fine as authorized by subchapter C.

A sentence to pay a fine may be imposed in addition to a sentence to probation. A sanction authorized by section 3554, 3555, or 3556 may be imposed in addition to the sentence required by this subsection.

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, 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.

* * *

(e) Limited authority to impose a sentence below a statutory minimum.--Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

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

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

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

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

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

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

21 U.S.C. § 841. Prohibited acts A

(a) Unlawful acts

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

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

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

(b) Penalties

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

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

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

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

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine,

ecgonine, and derivatives of ecgonine or their salts have been removed;

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

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

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

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

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of

any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance

shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

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

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

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

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

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

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

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance

containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or

more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall

be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the

absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

* * *

21 U.S.C. § 851. Proceedings to establish prior convictions

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if

sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

Fed. R. Crim. P. Rule 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.