11-2154(L)

To Be Argued By:
ROBERT M. SPECTOR

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-2154(L)

UNITED STATES OF AMERICA,
Appellee,

-vs-

RONNIE WASHINGTON, aka Gotti,
LARRY DEVORE, aka L.D.,
Defendants-Appellants,

(For continuation of Caption, See Inside Cover)

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

BRIEF FOR THE UNITED STATES OF AMERICA

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Defendants.

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Statement of Jurisdiction

The district court (Ellen Bree Burns, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. Judgment entered on May 20, 2011. Appendix ("A")121-A122. On May 25, 2011, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A124. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Statement of the Issue Presented for Review[1]

Whether the district court abused its discretion and imposed a substantively unreasonable sentence in determining that a twenty-year term of prison, which was slightly lower than the career offender guideline range, was sufficient but not greater than necessary to reflect the purposes of a criminal sanction.

[1] The appeal involving co-defendant Larry Devore (11-3758) was consolidated with this appeal. On May 29, 2012, the government filed a motion to dismiss the Devore appeal based on the appeal waiver contained in his written plea agreement.

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Preliminary Statement

From January 2010 through October 2010, Joseph Jackson ran a lucrative crack cocaine drug distribution operation in the Newhallville neighborhood of Hamden and New Haven, Connecticut. The defendant, Ronnie Washington, was a regular customer of this operation who purchased crack cocaine at wholesale prices, repackaged it into street-level quantities and sold

it for profit to approximately thirty different individuals.

In November 2010, the defendant and thirty-six others were charged in a twenty-count indictment with a variety of narcotics offense. The defendant pleaded guilty to one count of conspiracy to possess with the intent to distribute twenty-eight grams of cocaine base. Prior to the entry of the guilty plea, the Government filed a second offender notice under 21 U.S.C. § 851, which indicated that the defendant faced enhanced penalties, including an incarceration term of no less than 120 months, based on the allegation that he had sustained at least one prior felony drug offense in state court. Moreover, the Pre-Sentence Report ("PSR") found that the defendant was a career offender and faced a guideline incarceration range of 262-327 months.

At sentencing, the defendant conceded that he was a second offender, challenged his status as a career offender, and asked for a sentence of 120 months' incarceration. The government maintained that the defendant was a career offender, asked for a sentence in excess of the 120-137 month Chapter Two guideline range and deferred to the district court on the issue of whether a sentence within the career offender guideline range was warranted. The district court concluded that the defendant was a career offender, rejected his request for a sentence of 120

months and imposed a non-guideline incarceration term of 240 months.

On appeal, the defendant claims that this sentence was substantively unreasonable. He argues that the district court abused its discretion in failing to abide by the parties' plea agreement, in refusing to give him credit for attempting to cooperate, in imposing a sentence well above the term recommended by the Government and in concluding that he was a career offender.

This appeal should be dismissed. The incarceration term, which was twenty-two months below the guideline range, reflected the serious nature of the offense conduct and the defendant's extensive criminal record, which included four prior sale of narcotics convictions and repeated violations of pre-trial and post-conviction, court-ordered supervision. The defendant's reliance on the plea agreement is misplaced because the agreement did not bind the court or the parties to any guideline range or incarceration term and specifically stated that the defendant could be sentenced as a career offender. In addition, his request for a consideration based on his alleged provision of information to the government has no merit because it is undisputed that the defendant was unwilling to cooperate and did not provide assistance to law enforcement officers, and there is no evidence in the record that his acceptance of responsibility here was any differ-

ent from the typical defendant who receives a reduction under U.S.S.G. § 3E1.1. Finally, his challenge to his status as a career offender lacks merit because he has two qualifying, adult convictions for controlled substance offenses which count separately under U.S.S.G. §§ 4A1.2 and 4B1.1.

Statement of the Case

On November 10, 2010, a federal grand jury returned an indictment against the defendant and others charging him in Count Two with conspiracy to possess with the intent to distribute 28 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846, and in Count Nineteen with use of a telephone to facilitate a narcotics trafficking felony, in violation of 21 U.S.C. § 843(b). A31-A43. On March 1, 2011, the defendant changed his plea to guilty as to Count Two of the indictment. A11-A22. On May 19, 2011, the district court (Ellen Bree Burns, J.) sentenced the defendant to 240 months' imprisonment and 96 months' supervised release. A121. Judgment entered on May 20, 2011. A9, A121-A123. The defendant filed a timely notice of appeal on May 25, 2011. A124. The defendant has been incarcerated in federal custody since November 22, 2010 and is currently serving his sentence. *See* PSR ¶ 2.

Statement of Facts

A. The offense conduct

Had the case against the defendant gone to trial, the Government would have presented the following facts, which were set forth almost verbatim in the Government's sentencing memorandum (A72-A76) and the PSR[1] (sealed appendix):

During the early months of 2009, the police identified the emergence of a violent local street gang operating in Newhallville, which is a neighborhood straddling the New Haven and Hamden city lines. The members of this gang referred to themselves as the R2 Black Flag Crips ("R2"). Members and associates of R2 controlled drug distribution activity in Newhallville through intimidation and armed violence. The New Haven and Hamden police departments, with help from the Drug Enforcement Administration and the Federal Bureau of Investigation, initiated an investigation into R2 to identify the members and dismantle the gang. *See* PSR ¶¶ 6-7, 9.

In November 2009, in an effort to gain information about R2, law enforcement officers conducted a series of controlled purchases in Newhallville and, through these purchases, learned

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[1]The Government will cite the PSR directly.

that an individual identified as Joseph Jackson was operating an extensive drug distribution enterprise in which he acquired kilogram quantities of powder cocaine, converted it to crack cocaine and sold it in 3.5 gram or "eight-ball" quantities to drug dealers largely selling in the Newhallville neighborhood. *See* PSR ¶¶ 9, 11. After conducting a five-month wiretap investigation, officers arrested Jackson and thirty-six of his associates and seized hundreds of grams of crack and powder cocaine, over $50,000 in cash and seven firearms. *See* PSR ¶¶ 8, 16-17.

This defendant was a regular customer of Jackson's drug trafficking operation. *See* PSR ¶ 28. Starting in June 2010, he was intercepted over the target telephones, on average, several times each week and typically purchased one or two eight balls of crack cocaine at a time. *See* PSR ¶ 28. Officers identified him during physical surveillance of crack transactions on September 30, 2010 and October 11, 2010. *See* PSR ¶ 29.

When the defendant was arrested on November 20, 2010, officers found him hiding in a bedroom closet inside his girlfriend's apartment. *See* PSR ¶ 31. As the defendant walked out of the closet with his hands in the air, he stated, "Yo, I ain't even got a gun on me." *See* PSR ¶ 31. After obtaining consent, the police searched the closet and discovered, inside a handbag, what was later identified as a facsimile pistol loaded with six

rounds of real Remington .380 caliber ammunition. *See* PSR ¶ 31. The defendant's girlfriend said she did not own the pistol, that she did not have any firearms in the residence and that she did not know how the gun had gotten into her bag in the closet. *See* PSR ¶ 31. She also explained that the defendant did not live with her, but had been there that day visiting her and her baby. *See* PSR ¶ 31.

The defendant provided a Mirandized, post-arrest statement in which he admitted to having purchased crack cocaine from Jackson for many years. *See* PSR ¶ 32. The defendant said that he always purchased two to three eight balls of crack cocaine at a time, that he repackaged it into smaller quantities for redistribution and that he had about thirty customers whom he supplied on a daily basis. *See* PSR ¶ 32.

B. The guilty plea

The defendant pleaded guilty to Count Two of the indictment on March 1, 2011. At the time of the guilty plea, the defendant entered into a written plea agreement. A44-A51. As part of the plea agreement, the government indicated that it was filing a second offender notice under 21 U.S.C. § 851 based on one of the defendant's prior drug felony convictions, increasing the maximum incarceration term to life in prison, the mandatory minimum incarceration term to ten years, and the mandatory minimum super-

vised release term to eight years. A44-A45. The government had filed the notice on February 23, 2011 and had listed four separate Connecticut sale of narcotics convictions from 2003 and 1999 and potential qualifiers to trigger the enhanced penalties under 21 U.S.C. § 841(b). A52-A53. The defendant waived his right to challenge the second offender notice in the plea agreement, which provided, "The defendant further acknowledges, and does not challenge, that he has a prior conviction for a felony drug offense." A49.

The defendant also stipulated that the quantity of crack cocaine involved in his offense was greater than 112 grams, but not greater than 196 grams, so that the base offense level under the Chapter Two of the Sentencing Guidelines was 28. A45-A46. The Government agreed to recommend a three-level reduction for acceptance of responsibility, reducing in an adjusted offense level of 25. A46. The parties agreed that the defendant fell into Criminal History Category VI, so that his guideline incarceration range was 120-137 months. A46. The parties indicated that a two-level enhancement could apply under U.S.S.G. § 2D1.1(b)(1) for the defendant's alleged possession of a firearm in connection with the offense and reserved their rights to address that enhancement at sentencing. A46.

In addition, the parties recognized that the defendant could be a career offender. The agreement stated, "It also appears that the de-

fendant may be a career offender under U.S.S.G. § 4B1.1 based on his multiple prior felony convictions for sale of narcotics. If he is a career offender, his adjusted offense level will increase to 34. The defendant reserves his rights to challenge any determination that he is a career offender." A47.

As to their respective rights to argue for incarceration terms outside the guideline range, the defendant reserved his right to seek a departure or a non-guideline sentence, and the government reserved its right "to object and seek whatever sentence it deems appropriate." A47. Moreover, the agreement stated, in several different sections, that the district court was not bound at all by the parties' agreement, their stipulation as to quantity, or their guideline calculations. A45, A46, A47.

Finally, the defendant waived his right to appeal or collaterally attack any sentence that did not exceed 137 months' incarceration, and the Government agreed to dismiss Count Nineteen of the indictment after sentencing. A47-A48, A50.

C. The sentencing hearing

The PSR found that the defendant's base offense level, under Chapter Two of the November 1, 2010 version of the Sentencing Guidelines, was 28 because the defendant was involved in

distributing more than 112 grams, but less than 196 grams, of crack cocaine. *See* PSR ¶ 38. With a three-level reduction for acceptance of responsibility, the PSR placed the defendant at an adjusted offense level of 25. *See* PSR ¶¶ 45-46. The second addendum to the PSR concluded that the defendant was a career offender based on two separate convictions in 1999 for conspiracy to sell narcotics and possession with intent to sell narcotics. *See* PSR, 2nd Addendum. As such, the defendant's adjusted offense level increased from 25 to 34. *See* PSR, 2nd Addendum.

The PSR placed the defendant into Criminal History Category VI both because he had accumulated sixteen criminal history points from prior convictions and because of his status as a career offender. *See* PSR ¶ 56; PSR, 2nd Addendum. Specifically, the defendant had been convicted of conspiracy to sell narcotics and possession with intent to sell narcotics in 1999 and been sentenced to concurrent terms of six years' incarceration, execution suspended after three years, and three years of probation. *See* PSR ¶¶ 48, 50. In 2000, while on probation from his 1999 convictions, he was convicted of breach of peace and sentenced to ninety days in prison. *See* PSR ¶ 51. In 2002, the defendant was convicted of possession of marijuana and sentenced to sixty days in jail, and in 2003, he was convicted, in two separate cases, of sale of narcotics. *See* PSR ¶¶ 52-54. As to the first sale conviction,

in March 2003, he received a seven year suspended sentence. *See* PSR ¶ 53. As to the second sale conviction in October 2003, he received a 42 month incarceration term, with three years of special parole. *See* PSR ¶ 54. His probation was later revoked in connection with the March 2003 sale conviction, and he received a one-year concurrent jail term. *See* PSR ¶ 53. Finally, in March 2007, the defendant was convicted of possession of marijuana and sentenced to pay a fine. *See* PSR ¶ 55.

At a Criminal History Category VI and an adjusted offense level of 34, the defendant faced a guideline incarceration range of 262-327 months. *See* PSR, 2nd Addendum.

On May 9, 2011, the defendant filed a sentencing memo in which he asked for a sentence at the bottom of the Chapter Two guideline range of 110-137 months. A55. He argued that he should not qualify as a second offender because his two 2003 sale of narcotics convictions were made pursuant to the *Alford*[2] doctrine, and his two 1999 sale of narcotics convictions, although not *Alford* pleas, occurred before the defendant turned eighteen years old. A64-A65, A68. In addition, he maintained that he should not receive a firearms enhancement because, according to him, the firearm found in the closet where he was hiding on the day of his arrest did

[2] *North Carolina v. Alford*, 400 U.S. 25 (1970).

not belong to him. A60. In this same vein, he argued that, although he had been selling crack cocaine, he was not a violent person and was never a member of any gang. A59-A60. He also argued that the 18 to 1 ratio for crack and powder cocaine penalties was unfair and asked the court to sentence him under the powder cocaine penalties. A62-A63. Finally, he urged the court to give him a lower sentence based on the fact that, although "he did not want to 'snitch' on his friends, due to his loyalty to them," "immediately upon being arrested, [he] agreed to speak with the authorities and volunteered information to them regarding his involvement in this crime." A67.

The defendant filed his sentencing memorandum before the government and the probation office received the court transcripts for his two 1999 sale of narcotics convictions and before the issuance of the Second Addendum to the PSR, wherein the PSR concluded that he was a career offender. A77. As a result, in that memorandum, the defendant did not address whether he was a career offender. A77.

On May 12, 2011, the government filed its sentencing memorandum. A71. Relying on the court transcripts for the 1999 sale of narcotics convictions, both of which were attached as exhibits (A11-A30), the government argued that

the defendant was both a second offender and a career offender.[3] A77-A84.

As to the possession with intent to sell narcotics conviction that arose from the September 25, 1998 arrest and is listed in paragraph 48 of the PSR, the factual basis by the state prosecutor indicated that the police had observed the defendant engaging in hand-to-hand narcotics transactions and then discard to the ground an object which was later revealed to contain eight baggies of cocaine. A12-A13. The state court then asked the defendant if, after having been involved in "hand to hand sales," he "dropped eight bags of cocaine," and the defendant replied, "Yes, sir." A18-A19.

As to the conspiracy to sell narcotics conviction that arose from the October 14, 1998 arrest and is listed in paragraph 49 of the PSR, the factual basis by the state prosecutor indicated that the police had observed the defendant and another individual engaging in hand-to-hand drug transactions wherein the defendant was di-

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[3] The government conceded that, because it had not yet received court transcripts for the guilty pleas giving rise to the 2003 sale of narcotics convictions and could not otherwise establish that these convictions qualified as prior felony drug offenses under 21 U.S.C. § 851 or controlled substance offenses under U.S.S.G. § 4B1.2, it could not rely on these convictions to establish the defendant's status as a second offender or a career offender. A81, A83.

recting customers to the other individual, who would then retrieve narcotics from a nearby drainpipe which was later found to contain 21 baggies of cocaine. A13. The state court asked the defendant, "Now understand that the state is saying the following, that on October 14th, 98, in the area of 173 English Street, you and Mr. White were engaging in hand to hand transactions, you were acting as a steerer for Mr. White. As a result of a police intervention, 21 bags of cocaine were found, so you were charged with conspiracy to sell narcotics. Is that true, sir?" A18. The defendant replied, "Yes, sir." A18.

The government argued that either 1999 conviction could serve as the basis for the second offender designation because each conviction resulted from a straight guilty plea that did not involve reliance on the *Alford* doctrine, and each plea canvass included a direct admission by the defendant as to the quantity and type of controlled substance possessed.[4] A82. The government further argued that both convictions quali-

[4] As the government pointed out in its sentencing memorandum, "categorical reliance on a conviction under Conn. Gen. Stat. § 21a-277(a) [as a qualifier for establishing the existence of a prior felony drug offense] is precluded because of the abstract theoretical possibility that [the defendant] might have been convicted of conduct relating to [two substances listed on the Connecticut schedules of controlled substances, but not on the federal schedules]." A81.

fied as controlled substance offenses under U.S.S.G. § 4B1.1 because neither conviction suffered from the problems articulated in *United States v. Savage*, 542 F.3d 959, 965 (2d Cir. 2008). A83-A84. In each case, the defendant explicitly admitted to conduct involving either the sale of cocaine or the conspiracy to sell cocaine. A84. Thus, the defendant was properly categorized as a career offender. A84.

As to the two-level firearms enhancement, the government pointed out that "there can be no dispute that the facsimile firearm seized from the close in which the defendant was hiding just before his arrest qualifies as a dangerous weapon under § 2D1.1(b)(1)" and acknowledged that "[t]he only dispute appears to be whether the defendant constructively possessed that item just before his arrest." A86. Because "the defendant's status as a career offender render[ed] this issue moot," the government asked the court not to resolve the dispute. A86.

Finally, the government analyzed the facts of the case in light of the factors set forth under 18 U.S.C. § 3553(a), asked the court to imposed a sentence above the Chapter Two range of 120-137 months, and deferred to the court on the issue of whether a sentence within the 262-327 month guideline range was appropriate. A87-A90. In taking this position, the government emphasized the serious nature of the offense conduct and explained that the defendant was a

regular customer of the Jackson drug distribution operation who purchased crack cocaine in bulk and re-sold it for profit to a customer base of approximately thirty individuals. A88. It also pointed out that the defendant had four prior convictions for engaging in the exact same conduct, and despite having received escalating jail sentences of 36 months in 1999 and 42 months in 2003, had become even more deeply involved in drug dealing. A88. Lastly, the government emphasized the fact that the defendant had repeatedly engaged in criminal conduct while on some form of pre-trial or post-conviction supervision. A88-A89. He committed his first sale offense while on probation for a youthful offender conviction; he committed his second sale offense while on pre-trial release from his first sale offense; he committed his third sale offense within a year of having absconded from parole and within months of having violated his probation on the second sale offense; he committed his fourth sale offense only four months after having been placed on probation from the third sale offense; and he violated his term of special parole ordered in connection with the fourth sale offense. A89. Indeed, he engaged in the criminal conduct in this case within a year of being released from prison on this last violation and within months of being discharged from parole. A90. Since 1998, the defendant violated terms of court-ordered supervision on six separate occasions. A90.

In the final paragraph of its sentencing memorandum, the government drew the court's attention to one of the defendant's prior state court sentencings:

> A review of the state court transcript from the defendant's sentencing in 1999 is instructive. At the time, the defendant was 18 years old, and he was asking the state court judge to impose a sentence that would not include any jail time. In support of that request, the defendant himself said, "I'm sorry for . . . selling drugs, but I stopped selling drugs now, I got over it. I just want one more chance. Can I have one more chance out in the streets?" Ex. B at 4. In response, the state court judge said, "Well, apparently, Mr. Washington, you were convicted in February and put on probation for narcotics charges. . . . But then I note, I believe it was September, you were arrested for charges regarding narcotics and while that case was pending you went out and got another narcotics charge. I can't ignore it. I'm not ignoring it." Ex. B at 4. The defendant has put this Court in a similarly difficult situation. It is true that he had a very difficult childhood, as discussed well and at length in the PSR. His criminal history, however, demonstrates that he presents a very high risk of recidivism. It also shows that, despite

> prior lengthy state sentences and numerous instances where terms of court supervision were imposed instead of longer terms of incarceration, the defendant has continued to sell crack cocaine and has become even more deeply involved in the narcotics trade.

A90.

The defendant appeared before the district court for sentencing on May 19, 2011. The court began this proceeding by asking the defendant if he had read the PSR and discussed it with his attorney. The defendant indicated that he had done so and that his attorney had answered all of his questions about the report. A95. The defendant also stated that he had no corrections to the PSR. A95. The court subsequently adopted the factual findings set forth in the PSR and specifically found that the defendant was a career offender and faced a guideline incarceration range of 262-327 months. A106-A107.

Defense counsel addressed the court and specifically requested a sentence of 120 months' incarceration. A96. In making this request, she conceded that the defendant was a second offender, but asked that he not be treated as a career offender. A96. She also relied on the defendant's difficult childhood, the fact that he grew up in foster care without regularly seeing his mother, father or brother, and the circumstances of him living on the streets of New Haven since

the age of fifteen. A96. Defense counsel explained, "Ever since Ronnie was a teenager he made money the only way he knew how, which was selling drugs. He did that to support himself, and then later to support his longtime girlfriend and his children." A96. She characterized the defendant as someone who has always used and sold drugs, as evidenced by the fact that almost of his prior convictions involved drugs. A97.

The district court interrupted defense counsel's discussion of the defendant's criminal history to ask about a 2000 breach of peace conviction: "Isn't that breach of peace an assault on a woman?" A97. Defense counsel replied, "It was an argument with a woman." A97. The court said that the defendant had "[p]unched [the woman] in the face and thrown [her] on the ground." A97. Defense counsel stated, "I believe that's what the woman said. I don't think there was enough evidence to get him on that, which is why he got breach of peace." A97.

At that point, defense counsel discussed the career offender designation. Although she conceded that the defendant was a second offender, she relied on the fact that the defendant "was technically still a minor at the time he committed and pleaded guilty to the[] [1999] crimes" to argue "that he should not be classified as a career offender." A98. Defense counsel stated, "He was still a minor, and although he was treated

as an adult by the state courts, this Court should take that in consideration and sentence [him] to his agreed-upon range of 120 to 137 months." A98. Later in the proceeding, defense counsel again argued that, although the defendant was a second offender, he should not be considered a career offender because "he was a minor at the time and that these two cases . . . were treated together for sentencing and when he pled." A112.

In support of her request for a sentence of 120 months, defense counsel relied upon several factors, including the disparity between crack and powder cocaine penalties, the defendant's addiction to drugs, and the fact that the defendant was facing his first federal conviction and a sentence far in excess of any previous sentence. A100. Defense counsel argued, "When compared to his co-defendants, [the defendant] is . . . a minimal player . . . [who] wasn't involved in any gang activities, didn't have any guns[,] . . . [and] sold drugs to support himself." A101.

The defendant chose not to address the court, but his father, Ronald Evans, his friend, Jasmine Rodriguez, and his girlfriend, Tamika Williams, all spoke to the court on his behalf, discussed his character and praised him as a good father and friend. A102-A106.

Next, the government addressed the court. At the outset, the government made clear its position that, as a "reflection of [the defendant's up-

bringing] and the information that's in the PSR about the difficulties he had as a child[,]" it was deferring to the court "on whether to sentence [the defendant] in that range of 262 to 327 months," but was asking for an incarceration term "above the Chapter Two range[.]" A107. The government explained that the defendant should not be treated similarly to other defendants in the same Chapter Two range because his career offender status and his criminal history make him different from other defendants who have engaged in similar conduct. A107-A108. The government argued, "When you look at his criminal record, . . . it's deeply troubling on many levels. . . . [T]here is, I don't think, a point at which he was under supervision when he wasn't committing other crimes." A108. The government stated, "When you look at his record and you look at the number of chances that he had been given, at some point there has to be a statement that, 'Enough is enough,' yet the fact that he has to have been indicted in the federal court is a shame, when you look at the way the state court treated him, because they didn't treat him lightly." A109. In making this point, the government referred the court to the state sentencing transcript from 1999, wherein his father had again spoken on his behalf and pleaded with the judge to give the defendant probation. A109. The state judge refused because, even back in 1999, the defendant had violated his probation several times. A109. The government main-

tained that, from 1999 "up to this offense," the defendant "was either in jail or he was out of jail committing other offenses." A110.

The government also emphasized the seriousness of the offense conduct: "The [d]efendant had a customer base of between 20 and 30 people that he would sell crack to on a daily basis. That's very troubling conduct on its own." A109. Moreover, as the government stated, "[T]he troubling part is the conduct doesn't get lighter, it seems to get more serious, and more serious, and more serious. So this conduct is clearly the most serious offense conduct that he's been engaged in, in the entire period of his life[.]" A110.

In sum, the government argued that "this case really is . . . about specifically deterring [the defendant] from doing this again." As the government articulated, "There are other ways to make money. We work with felons every day. Probation works with people every day that have records as bad or worse than [the defendant], . . . and it is difficult, but there are a lot of other opportunities, and if we're going to do anything to improve the quality of the neighborhoods in Newhallville, we're going to need people like [the defendant] to mentor others and say, 'No, this is not the way to make money.'" A110-A111.

In response to the argument about the disparity between crack and powder cocaine penalties, the government pointed out that, because the de-

fendant is a career offender, the guideline range is not really driven by drug quantity. A111-A112. As the government argued, "So even if this were a powder cocaine case, [the defendant would] still be facing a sentence of no less than 15 years and 8 months. So the one-to-one ratio doesn't really matter or work in this case. It really is a case very much about serious criminal conduct, and about a very, very serious criminal record." A112.

In imposing sentencing, the district court first reiterated its finding that the defendant was a career offender and that the court "had to sentence him with that in mind." A113. The court also again noted that the guideline incarceration range was 262-327 months. A113.

Next, the court reviewed information from the PSR that it deemed relevant. It stated, "This Presentence Report indicates to me the tragic circumstances of [the defendant's] life." A113. It confirmed with the defendant that he had been selling drugs since the age of fifteen and that "with respect to your state offenses, you never made it on probation. . . . You were violated, I think, every time." A113. In addition, the court explained,

> I understand your concern about your children, but so far [you] haven't been a role model for them, and I have no reason to think that if I were to be extremely lenient, you would be now. Those children

> should not have been exposed to the kind of things that you were engaged in . . . .

A113. The court was also troubled by the defendant's heavy marijuana consumption, which was described in the PSR as involving as much as 100 "blunts" of marijuana per day, *see* PSR ¶ 81. A113. The court stated that, given the defendant's extensive use of marijuana, it was a fair inference that his children "saw [him] using it." A113.

In the end, the court imposed an incarceration term below the guideline range and sentenced the defendant as follows:

> Taking into consideration what I think is a sad situation you had found yourself in, I think a sentence which would incarcerate you for 240 months is appropriate. That's below the . . . minimum of the career offender guidelines, because I think that circumstances in your life deserve that kind of consideration, but I don't believe I can go below that, and also, in consideration of your record and what you've done here. So you are committed to the custody of the Bureau of Prisons for [a] period of 240 months, and you're placed on supervised release for [a] period of eight years.

A115.

Summary of Argument

The defendant argues that his 240-month sentence was substantively unreasonable because it was much higher than the guideline range he agreed to in his plea agreement, it exceeded the incarceration term recommended by the government, it was based on his improper classification as a career offender, and it did not take into account his alleged attempt to cooperate with the government. None of these claims has merit.

The district court correctly concluded that the defendant's two, separate 1999 convictions for sale of narcotics qualified him as a career offender, and the defendant's written plea agreement specifically contemplated this possibility. In fact, the agreement, which was not a binding plea agreement under Rule 11(c)(1)(C), put the defendant on notice that he could be sentenced as a career offender, and gave the government and the defendant complete freedom to argue for whatever sentence they deemed appropriate. Moreover, the incarceration term did not exceed the government's recommendation, which specifically sought a sentence in excess of the Chapter Two range and deferred to the district court as to whether a sentence within the range was appropriate. And there is no dispute that the defendant did not cooperate with the government and, therefore, was not entitled to a reduction in his sentence for substantial assistance.

The sentence in this case was substantively reasonable. It reflected the very serious nature of the offense conduct, which involved the defendant's daily sale of crack cocaine, in significant quantities, to a large customer base in New Haven. It also reflected both the defendant's status as a career offender and his extensive criminal record. Prior to this case, he had sustained four separate convictions for sale of narcotics, and violated the terms of his pre-trial or post-conviction supervision at least six times. Despite ever increasing terms of state incarceration and many attempts to rehabilitate the defendant through suspended sentences and probationary terms, he has become a recidivist and a repeat offender who continues to get more and more deeply involved in the narcotics trade.

Argument

I. The district court did not abuse its discretion in sentencing the defendant to 240 months' incarceration.

A. Relevant facts

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

B. Governing law and standard of review

1. Reviewing a sentence for reasonableness

Under 18 U.S.C. § 3553(a), in determining an incarceration term, a sentencing court should consider: (1) "the nature and circumstances of the offense and history and characteristics of the defendant"; (2) the need for the sentence to serve various goals of the criminal justice system, including (a) "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment," (b) to accomplish specific and general deterrence, (c) to protect the public from 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 sentencing range set forth in the guidelines; (5) policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to victims. *Id.*

Following *United States v. Booker*, 543 U.S. 220 (2005), appellate courts are to review sentences for reasonableness, which amounts to review for "abuse of discretion." *Gall v. United States*, 552 U.S. 586, 591 (2007); *United States v. Cavera*, 550 F.3d 180, 187 (2008) (en banc). This reasonableness review consists of two compo-

nents: procedural and substantive review. *Cavera*, 550 F.3d at 189.

Substantive review is exceedingly deferential. The Second Circuit has stated it will "set aside a district court's substantive determination only in exceptional cases where the trial court's decision 'cannot be located within the range of permissible decisions.'" *Id.* (quoting *United States v. Rigas*, 490 F.3d 208, 238 (2d Cir. 2007)). This review is conducted based on the totality of the circumstances. *Cavera*, 550 F.3d at 190. Reviewing courts must look to the individual factors relied on by the sentencing court to determine whether these factors can "bear the weight assigned to [them]." *Id.* at 191. However, in making this determination, appellate courts must remain appropriately deferential to the institutional competence of trial courts in matters of sentencing. *Id.* Finally, the Second Circuit neither presumes that a sentence within the Guidelines range is reasonable nor that a sentence outside this range is unreasonable, but may take the degree of variance from the Guidelines into account when assessing substantive reasonableness. *Id.* at 190. This system is intended to achieve the Supreme Court's insistence on "individualized" sentencing, *see Gall*, 552 U.S. at 50; *Cavera*, 550 F.3d at 191, while also ensuring that sentences remain "within the range of permissible decisions," *Cavera*, 550 F.3d at 191.

This deference is appropriate, however, only when a reviewing court determines that the sentencing court has complied with the procedural requirements of the Sentencing Reform Act. *Cavera*, 550 F.3d at 190. Sentencing courts commit procedural error if they fail to calculate the Guidelines range, erroneously calculate the Guidelines range, treat the Guidelines as mandatory, fail to consider the factors required by statute, rest their sentences on clearly erroneous findings of fact, or fail to adequately explain the sentences imposed. *Cavera*, 550 F.3d at 190. These requirements, however, should not become "formulaic or ritualized burdens." *Cavera*, 550 F.3d at 193. The Second Circuit thus presumes that a district court has "faithfully discharged [its] duty to consider the statutory factors" in the absence of evidence in the record to the contrary. *United States v. Fernandez*, 443 F.3d 19, 30 (2d Cir. 2006). Moreover, the level of explanation required for a sentencing court's conclusion depends on the context. A "brief statement of reasons" is sufficient where the parties have only advanced simple arguments, while a lengthier explanation may be required when the parties' arguments are more complex. *Cavera*, 550 F.3d at 193. Finally, the reason-giving requirement is more pronounced the more the sentencing court departs from the Guidelines or imposes unusual requirements. *Id.* This procedural review, however, must maintain the required level of deference to sentencing courts'

decisions and is only intended to ensure that "the sentence resulted from the reasoned exercise of discretion." *Id.*

2. Career offender designation

Under U.S.S.G. § 4B1.1, "[a] defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." *Id.*

"'Prior felony conviction'" means a prior adult federal or state conviction for an offense punishable by death or imprisonment for a term exceeding one year, regardless of whether such offense is specifically designated as a felony and regardless of the actual sentence imposed." U.S.S.G. § 4B1.2, comment. (n.1). "A conviction for an offense committed at age eighteen or older is an adult conviction." *Id.* "A conviction for an offense committed prior to age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted (e.g., a federal conviction for an offense committed prior to the defendant's eighteenth birthday is an adult conviction if the defendant was expressly proceeded against as an adult)." *Id.*

U.S.S.G. § 4A1.2 addresses when prior felony convictions are counted separately and when they are counted together. "Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense)." U.S.S.G. § 4A1.2(a)(2). "If there is no intervening arrest, prior sentences are counted separately unless (A) the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day." *Id.* "Count any prior sentence covered by (A) or (B) as a single sentence." *Id.*

"A career offender's criminal history category in every case under this subsection shall be Category VI." U.S.S.G. § 4B1.1(b). Where the offense of conviction exposes the defendant to a maximum penalty of life, the base offense level will be 37. *See id.*

In determining whether a prior felony conviction constitutes a controlled substance offense, this Court, in *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008), analyzed when it is appropriate to apply the modified categorical approach instead of the categorical approach and held that a conviction under Conn. Gen. Stat. § 21a-277(b) was not categorically a conviction for a "controlled substance offense" as that term is defined by § 4B1.2(b). *See id.* at 960. "The term 'con-

trolled substance offense' means an offense under . . . state law . . . that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of a controlled substance . . . with intent to manufacture, import, export, distribute or dispense." U.S.S.G. § 4B1.2(b). A controlled substance offense "include[s] the offenses of aiding and abetting, conspiring, and attempting to commit such offenses." *Id.* comment. (n.1). A "sale" under Connecticut law, however, includes "a mere offer to sell drugs," and "a mere offer to sell, absent possession, does not fit within the Guidelines' definition of a controlled substance offense." *Savage*, 542 F.3d at 965 (internal quotation marks and citation omitted). Although *Savage* involved a conviction under Conn. Gen. Stat. § 21a-277(b), whereas the convictions at issue in this matter were pursuant to Conn. Gen. Stat. § 21a-277(a), the two provisions are substantively identical for present purposes, insofar as both incorporate the same definition of "sale." *See Savage*, 542 F.3d at 965 (quoting definition of "sale" at Conn. Gen. Stat. § 21a-240(50): "'Sale' is any form of delivery[,] which includes barter, exchange or gift, or *offer therefor*." (emphasis in opinion; internal quotation marks omitted)).

Accordingly, the *Savage* Court held that a prior conviction that resulted from a guilty plea to "sale" of a controlled substance under § 21a-277(b) does not qualify as a conviction for a con-

trolled substance offense under the guidelines unless the sentencing court determines that the defendant necessarily pled guilty to exchanging drugs for money. *Id.* at 967. For the purposes of determining whether a defendant's plea necessarily rested on the elements of a "controlled substance offense," as that predicate offense is defined in the guidelines, a sentencing court must apply the modified categorical approach and, in doing so, is limited to "the terms of the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant [in the prior case] in which the factual basis for the plea was confirmed by the defendant, or some other comparable judicial record of [that] information." *Shepard v. United States*, 544 U.S. 13, 26 (2005) (relying on *Taylor v. United States*, 495 U.S. 575, 602 (1990)); *see Savage*, 542 F.3d at 966.

3. Plain error review

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). Applying this standard, "an appellate court may, in its discretion, correct an error not raised at trial only where the appellant demonstrates that (1) there is an 'error'; (2) the error is 'clear or obvious, rather than subject to reasonable dispute';

(3) the error 'affected the appellant's substantial rights, which in the ordinary case means' it 'affected the outcome of the district court proceedings'; and (4) 'the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *United States v. Marcus*, 130 S. Ct. 2159, 2164 (2010) (quoting *Puckett v. United States*, 556 U.S. 129, 135 (2009)); *see also Johnson v. United States*, 520 U.S. 461, 467 (1997); *United States v. Cotton*, 535 U.S. 625, 631-32 (2002); *United States v. Deandrade*, 600 F.3d 115, 119 (2d Cir. 2010).

To "affect substantial rights," an error must have been prejudicial and affected the outcome of the district court proceedings. *United States v. Olano*, 507 U.S. 725, 734 (1993). This language used in plain error review is the same as that used for harmless error review of preserved claims, with one important distinction: In plain error review, "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id.*

This Court has made clear that "plain error" review "is a very stringent standard requiring a serious injustice or a conviction in a manner inconsistent with fairness and integrity of judicial proceedings." *United States v. Walsh*, 194 F.3d 37, 53 (2d Cir. 1999) (internal quotation marks omitted). Indeed, "[t]he error must be so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the

defendant's failure to object." *United States v. Plitman*, 194 F.3d 59, 63 (2d Cir. 1999) (internal quotation marks omitted).

C. Discussion

In this case, the parties entered into a very specific written plea agreement, under which the defendant agreed that he was a second offender, that his Chapter Two guideline incarceration range was 120-137 months, and that he faced the possibility that the district court would conclude he was a career offender and increase his total offense level from 25 to 34. A46, A49. In addition, both sides explicitly reserved their rights to ask for terms of incarceration outside of the guideline range. A46. This was not a binding plea agreement under Rule 11(c)(1)(C). The agreement was between the parties and had absolutely no binding effect whatsoever on the district court. Prior to sentencing, the PSR concluded, as forecast by the plea agreement, that the defendant was a career offender and, therefore, faced a guideline range of 262-327 months. The defendant asked the district court to sentence him to the mandatory minimum incarceration term of 120 months; the government asked the court to impose a sentence in excess of 137 months, but deferred to the court on whether a sentence in the 262-327 month range was necessary. In imposing a 240 month sentence, which was most certainly contemplated by the parties' written plea agreement, the court agreed with

the defendant that a sentence within the incarceration range was too high, but also agreed with the government that a sentence in excess of the Chapter Two range was minimally necessary to comport with the requirements of § 3553(a) and, more specifically, to reflect both the very serious nature of the defendant's offense conduct and his extensive criminal record, which included four prior sale of narcotics convictions and approximately six prior instances of violating court-ordered supervision. On appeal the defendant claims that the district court abused its discretion and that the sentence was too high. This claim is meritless.

1. The defendant was properly designated as a career offender.

The defendant was properly designated as a career offender at sentencing.[5] As discussed

[5] It is difficult to ascertain whether the defendant has preserved an objection to his career offender status. Before the district court, the defendant appeared to concede that the guideline calculation was correct and argue, instead, that the career offender range was too high and did not reflect the § 3553(a) factors. A96, A99-A101, A106. Still, the defendant did argue before the district court, as he does here, that he should not be designated as a career offender because he sustained the two qualifying convictions before turning eighteen years old, A101, and because, at the state sentencing for the two prior offenses, they were "treated together." A112. Thus, on

above and not disputed by the defendant here, two of the defendant's four prior Connecticut convictions for sale of narcotics count as controlled substance offenses, as defined by U.S.S.G. § 4B1.2, under the modified categorical approach. These 1999 convictions count because the plea transcript for the convictions shows that, for each case, the defendant pleaded guilty without relying on the *Alford* doctrine and, in doing so, specifically admitted to facts involving the actual sale and possession with the intent to sell crack cocaine, facts which show that the defendant was not offering to sell crack cocaine, but was actively involved in the sale of crack cocaine in exchange for money. A13-A15, A18-A19.

The defendant does not challenge this finding and makes no argument under *Savage*. Instead, he argues that the 1999 convictions should not be used as career offender qualifiers because he was under eighteen years old when he sustained the convictions. *See* Def.'s Br. at 23-26. He also maintains that, because he was sentenced on both convictions on the same day, they should not count separately under § 4B1.2. *See* Def.'s Br. at 26-28. Neither argument has merit.

Under the commentary for U.S.S.G. § 4B1.2, "[a] conviction for an offense committed prior to

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appeal, the government does not take the position that this claim should only be reviewed for plain error.

age eighteen is an adult conviction if it is classified as an adult conviction under the laws of the jurisdiction in which the defendant was convicted . . . ." *Id.*, comment. (n.1). It is undisputed that the defendant was prosecuted as an adult for each of his 1999 sale of narcotics convictions. *See* PSR ¶¶ 48, 50. Thus, although he was under the age of eighteen when he committed, and was convicted of, those offenses, the convictions themselves still qualify as controlled substance offenses under § 4B1.1.

In *United States v. Jones*, 415 F.3d 256, 264 (2d Cir. 2005), this Court explicitly held that a defendant's two prior adjudications as a youthful offender counted as career offender qualifiers because the defendant "(1) pleaded guilty to both felony offenses in an adult forum and (2) received and served a sentence of over one year in an adult prison for each offense." *Id.* Indeed, this Court has since noted, "We have held that district courts may consider youthful offender adjudications as predicate prior felony convictions for the imposition of increased sentences under sections of the United States Sentencing Guidelines and other statutes." *United States v. Jackson*, 504 F.3d 250, 252 n.2 (2d Cir. 2007) (holding that defendant's prior New York conviction for criminal sale of a controlled substance in the fifth degree, for which he was adjudicated a youthful offender, constituted a prior felony drug offense under 21 U.S.C. § 841(b)); *see also United*

States v. Cuello, 357 F.3d 162, 168-169 (2d Cir. 2004) (upholding use of youthful offender adjudication to calculate base offense level under § 2K2.1).

Here, the defendant was not even adjudicated as a youthful offender. According to the PSR, when he was twice arrested for sale of narcotics in 1998, *see* PSR ¶¶ 48, 50, he was prosecuted as an adult, and his convictions were adult convictions. As a result, despite the fact that he was under eighteen when he sustained those convictions, they count as controlled substance offenses under § 4B1.2.

Second, the offenses were properly counted separately because they were separated by an intervening arrest. Under § 4A1.2(a)(2), prior sentences are "always" counted separately if they result from offenses that were separated by an intervening arrest. *See id.* An intervening arrest exists where "the defendant is arrested for the first offense prior to committing the second offense[]." *Id.*; *United States v. Rivers*, 50 F.3d 1126, 1128-29 (2d Cir. 1995) (interpreting similar language from older version of U.S.S.G. § 4A1.2); *United States v. Boonphakdee*, 40 F.3d 5438, 544 (2d Cir. 1994) (holding that a manslaughter and a marijuana offense counted separately because the defendant committed the manslaughter offense while released on bail for the marijuana offense), *abrogated on other grounds*, *United States v. Gonzalez*, 420 F.3d 111

(2d Cir. 2005). According to the PSR, the defendant was arrested September 25, 1998 for sale of narcotics and again on October 24, 1998 for sale of narcotics. *See* PSR ¶¶ 48, 50. The first arrest, on September 25, 1998, was the "intervening arrest" between the defendant's commission of the two sale of narcotics offenses. As a result, they count separately under § 4A1.2. Thus, the defendant was properly treated as a career offender.

2. The district court did not abuse its discretion in imposing a 240-month sentence.

The defendant also argues, for the first time on appeal, that the district court abused its discretion and violated his due process rights by imposing a sentence that was far in excess of the guideline range contemplated in the plea agreement, that was substantially higher than the guideline range advocated by the Government and that did not account for his alleged attempt at cooperation. *See* Def.'s Br. at 11-22. The defendant also appears to argue, for the first time, that the district court committed procedural error by failing to give proper consideration to these arguments. Because the defendant did not raise these issues before the district court, this Court should review them in the context of a plain error analysis and only remand for resentencing if the district court committed an error that was obvious, that affected the defen-

dant's substantial rights and that seriously impacted the fairness and integrity of the judicial proceedings. *See Marcus*, 130 S. Ct. at 2164; *see also United States v. Wagner-Dano*, --- F.3d ---, 2012 WL 1660956 (2d Cir. May 14, 2012) (holding that unpreserved challenges to factual statements in the PSR are reviewed under plain error standard).

The defendant's arguments fail principally because they rely on misstatements of the factual record. First, as discussed above and contrary to the defendant's characterization of his plea agreement, he pleaded guilty in this case under a very specific written agreement which did not bind the district court, the government or the defendant to any guideline range and explicitly contemplated that the defendant could be treated as a career offender and sentenced based on a total offense level of 34. The defendant tries to compare the plea agreement in this case to the type used for a binding plea under Fed. R. Crim. P. 11(c)(1)(C). But the agreement here was not a binding agreement under Rule 11(c)(1)(C) and is nothing like an 11(c)(1)(C) agreement. It did not bind the parties or the court to a guideline range. In fact, it explicitly stated that the parties could argue in support of any sentence and that the district court was not bound at all by the agreement. *See United States v. Woltmann*, 610 F.3d 37, 40 (2d Cir. 2010) ("It is a 'well-settled legal principle that the sentencing

judge is of course not bound by the estimated range in a plea agreement.'").

The defendant argues that the district court violated his due process rights by failing to give him the "benefit of his bargain" and failing to account for the vast amount of negotiation that led to the plea agreement. *See* Def.'s Br. at 12. But it is difficult to understand, in the first instance, how he was deprived of the benefit of his bargain. The written plea agreement contemplated two different guideline ranges, did not bind the court or the parties to either of those ranges, and put the defendant on notice that he could be sentenced as a career offender. That was his bargain, and it did not limit, in any way, the court's discretion to impose a sentence within the statutory limits of a 120 month mandatory minimum term and a life term. In addition, there is absolutely no evidence in the record as to the "negotiation" that gave rise to the written plea agreement, nor is there any suggestion that this plea agreement was at all different from the run-of-the-mill agreement for defendants in this case or the typical narcotics case.

Second, the court's sentence in this case was not in excess, or even inconsistent, with the government's requested sentence, as articulated in its written sentencing memorandum and its oral comments at sentencing. The court imposed a 240-month sentence, which was 103 months above the top of the Chapter Two guideline

range and 22 months below the bottom of the career offender guideline range. The government repeatedly and consistently requested an incarceration term that was in excess of the Chapter Two range and deferred to the court on the issue of whether a sentence within the career offender range was appropriate.

Third, there is no evidence in the record to support the defendant's claim, raised for the first time on appeal, that his agreement to plead guilty gave rise to guilty pleas for other co-defendants, or broke any "logjam." According to the PSR, between December 2010 and March 2011, eleven of the thirty-seven co-defendants in this case, including this defendant, entered guilty pleas. *See* PSR ¶ 3. Nothing in the PSR, and nothing in the record, supports the claim that this defendant's guilty plea, which did not involve his cooperation against anyone, motivated any other defendant's decision to plead guilty.

Fourth, there is no evidence in the record to support the defendant's claim regarding his alleged attempted cooperation. Although the defendant certainly advised the district court that he had accepted responsibility quickly and had provided the government with all of the information about his offense, A61, A101, he also explicitly stated that he had no desire to "snitch" or otherwise cooperate against his associates because he was loyal to his friends. A61. In other

words, in the same breath, the defendant acknowledged that he was not entitled to any reduction for substantial assistance, and yet asked the court for consideration for providing information to the government. He gave the district court scant information about his supposed attempt to cooperate and characterized it as nothing more than an acceptance of responsibility for his criminal conduct, for which he was already receiving a three-level reduction. *See* U.S.S.G. § 3E1.1, comment. (n.1) (requiring a defendant truthfully admit to "the conduct comprising the offense(s) of conviction, and truthfully admitting or not falsely denying any additional relevant conduct for which the defendant is accountable under § 1B1.3").

Moreover, given that the defendant's claims of procedural and substantive error were not raised below, it is not enough for him to show error; the error must be plain. "To be 'plain,' an error must be so obvious that 'the trial judge and prosecutor were derelict in countenancing it, even absent the defendant's timely assistance in detecting it.'" *Wagner-Dano*, 2012 WL 1660956, at *9. Such was not the case here. The district court did consider the defendant's arguments for a lower sentence and even made reference to the "tragic" circumstances of his upbringing in explaining its sentencing decision. And the district court properly considered the Chapter Two guideline range set forth in the written plea

agreement, the fact that the defendant had pleaded guilty with the hope and expectation of arguing for a sentence within that range, and the government's recommendation for a sentence in excess of that range.

In the end, the district court committed no error, let alone plain error, and its sentence was substantively reasonable. As articulated by the government and echoed by the district court, the defendant engaged in very serious offense conduct in this case by purchasing wholesale quantities of crack cocaine, breaking it into smaller quantities and selling it to a customer base of approximately 30 individuals. The defendant was a career offender who had been convicted on four separate occasions of selling narcotics and, despite escalating incarceration terms in these cases, subsequently became even more deeply involved in the drug trade. In the twelve years between his first narcotics arrests in 1998 and his involvement in this case in 2010, the defendant repeatedly violated court-ordered terms of pre-trial and post-conviction supervision and spent most of this time either in jail, or committing crimes. In the court's view, the defendant was properly characterized as a career offender and presented a very high risk of recidivism. Its 240 month sentence was motivated by these concerns. Although the court reduced the defendant's sentence below the guideline range to account for his difficult childhood, it was more con-

cerned about, and more influenced by, the defendant's extensive criminal record. As a result, it imposed a sentence primarily to reflect the need to accomplish the goal of specific deterrence and the goal of protecting the public from further crimes committed by the defendant.

Conclusion

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

Dated: May 29, 2012

Respectfully submitted,

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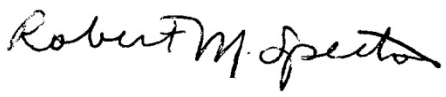

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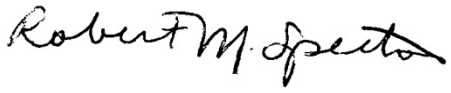
Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief complies with the 14,000 word limitation of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 10,240 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.



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ADDENDUM

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

(a) ***Prior Sentence***

* * *

(2) If the defendant has multiple prior sentences, determine whether those sentences are counted separately or as a single sentence. Prior sentences always are counted separately if the sentences were imposed for offenses that were separated by an intervening arrest (i.e., the defendant is arrested for the first offense prior to committing the second offense). If there is no intervening arrest, prior sentences are counted separately unless (A)the sentences resulted from offenses contained in the same charging instrument; or (B) the sentences were imposed on the same day. Count any prior sentence covered by (A) or (B) as a single sentence. See also §4A1.1(e).

For purposes of applying § 4A1.1 (a), (b), and (c), if prior sentences are counted as a single sentence, use the longest sentence of imprisonment if concurrent sentences were imposed. If consecutive sentences were imposed, use the aggregate sentence of imprisonment.

* * *

U.S.S.G. § 4B1.1. Career Offender

(a) A defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance of fense; and (3) the de fendant has at least two prior felony convictions of either a crime of violence or a substance offense.

* * *

U.S.S.G. §4B1.2. Definitions of Terms Used in Section 4B1.1

(a) The term "crime of violence" means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that --

(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or

(2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term ex ceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, im port, export, distribute, or dispense.

(c) The term "two prior felony convictions" means (1) the defendant committed the instant offense of conviction subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense (i.e., two felony convictions of a crime of violence, two felony convictions of a controlled substance offense, or one felony conviction of a crime of violence and one felony conviction of a controlled substance offense), and (2) the sentences for at least two of the aforementioned felony convictions are counted separately under the provisions of §4A1.1(a), (b), or (c). The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of nolo contendere.