

United States Court of Appeals For the First Circuit

No. 20-1521

UNITED STATES,

Appellee,

v.

CARLOS GOTAY-GUZMAN, a/k/a Negro,

Defendant - Appellant.

Before

Kayatta, Barron and Gelpí,
Circuit Judges.

JUDGMENT

Entered: December 8, 2021

Defendant-appellant Carlos Gotay-Guzman pleaded guilty, pursuant to a plea agreement, to conspiracy to possess controlled substances with intent to distribute and possession of a weapon in furtherance of a drug trafficking crime. On appeal, he argues that the district court erred by assigning criminal history points to certain Puerto Rico convictions. He contends, for the first time, that the convictions should have been considered "foreign" and therefore exempt under USSG § 4A1.1(b). Gotay-Guzman concedes that the claim was not preserved before the district court and that plain-error review therefore applies. The government has filed a motion requesting dismissal or summary disposition, bypassing discussion of the appeal waiver in Gotay-Guzman's plea agreement.

We have considered carefully the arguments set out in the parties' submissions and relevant portions of the record. Even assuming, without deciding, that the appeal is not barred by the appeal waiver in the plea agreement, we conclude that Gotay-Guzman has not satisfied the demanding plain error standard; thus, affirmance is in order. See 1st Cir. R. 27.0(c) (court may summarily dispose of appeal under appropriate circumstances); see also United States v. Grullon, 996 F.3d 21, 32–33 (1st Cir. 2021) (absent clear and binding precedent, "there can be no plain error"); United States v. Arsenault, 833 F.3d 24, 29 (2016) (plain error standard of review); United States v. Torres-Rosa, 209 F.3d 4, 8 (1st Cir. 2000) (on plain error review, rejecting argument that

convictions from Puerto Rico courts "cannot be counted in amassing [a defendant's] criminal history score"). Accordingly, we grant the government's motion for summary disposition and affirm.

Affirmed. See 1st Cir. R. 27.0(c).

By the Court:

Maria R. Hamilton, Clerk

cc:

Michael March Brownlee
Carlos Gotay-Guzman
Max J. Perez-Bouret
Julia Meconiates
Myriam Yvette Fernandez-Gonzalez
Mariana E. Bauza Almonte
Edward Gantar Veronda
Jonathan E. Jacobson

UNITED STATES DISTRICT COURT

District of Puerto Rico

UNITED STATES OF AMERICA

v.

CARLOS GOTAY-GUZMAN

aka Negro

JUDGMENT IN A CRIMINAL CASE

Case Number: 3:15-CR-00162-001 (JAF)

USM Number: 45418-069

Rafael F. Castro-Lang, Esq.

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) One and Six of the Indictment on July 31, 2015.

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21:846, 841(a)(1)	Conspiracy to possess with intent to distribute controlled substances within a protected location	March 4, 2015	ONE
18:924(c)(1)(A)	Possession of a firearm in furtherance of a drug trafficking crime	March 4, 2015	SIX

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

Count(s) remaining is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

November 5, 2015
Date of Imposition of Judgment

S/JOSE A. FUSTÉ¹
Signature of Judge

José A. Fusté
Name of Judge

US District Judge
Title of Judge

November 5, 2015
Date

DEFENDANT: CARLOS GOTAY-GUZMAN
CASE NUMBER: 3:15-CR-00162-001 (JAF)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

ONE HUNDRED SIXTY-FIVE (165) MONTHS AS TO COUNT ONE AND SIXTY (60) MONTHS AS TO COUNT SIX TO BE SERVED CONSECUTIVELY TO EACH OTHER FOR A TOTAL IMPRISONMENT TERM OF TWO HUNDRED TWENTY-FIVE (225) MONTHS.

The court makes the following recommendations to the Bureau of Prisons:

- That the defendant be designated to Pensacola and be enrolled in any drug treatment.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____.

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before 2 p.m. on _____.

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: CARLOS GOTAY-GUZMAN
CASE NUMBER: 3:15-CR-00162-001 (JAF)**SUPERVISED RELEASE**

Upon release from imprisonment, the defendant shall be on supervised release for a term of :

TEN (10) YEARS AS TO COUNT ONE AND FIVE (5) YEARS AS TO COUNT SIX TO BE SERVED CONCURRENTLY TO EACH OTHER.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. *(Check, if applicable.)*

The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable.)*

The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
- 3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
- 4) the defendant shall support his or her dependents and meet other family responsibilities;
- 5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
- 7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
- 8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
- 10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
- 11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
- 13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: CARLOS GOTAY-GUZMAN
CASE NUMBER: 3:15-CR-00162-001 (JAF)

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall not commit another Federal, state, or local crime, and shall observe the standard conditions of supervised release recommended by the United States Sentencing Commission and adopted by this Court.
2. The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance and submit to a drug test within 15 days of release and thereafter, submit to random drug test, no less than 3 samples during the supervision period and not to exceed 104 samples per year in accordance with the Drug Aftercare Program Policy of the U.S. Probation Office approved by this Court. If any such samples detect substance abuse, the defendant shall participate in a in-patient or out-patient substance abuse program, for evaluation and/or treatment, as arranged by the U.S. Probation Officer until duly discharged. The co-payment clause is not imposed.
3. The defendant shall provide the U.S. Probation Officer access to any financial information upon request.
4. The defendant shall submit his person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. §1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation of release. Defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.
5. The defendant shall cooperate in the collection of a DNA sample as directed by the U.S. Probation Officer, pursuant to the Revised DNA Collection Requirements, and the Title 18, U.S. Code § 3563(a)(9).
6. The defendant shall participate in a vocational training and/or job placement program recommended by the U.S. Probation Officer.

DEFENDANT: CARLOS GOTAY-GUZMAN
CASE NUMBER: 3:15-CR-00162-001 (JAF)Judgment — Page 4 of 5**CRIMINAL MONETARY PENALTIES**

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

TOTALS	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
	\$ 200.00	\$ 5,000.00	\$ 0.00

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
TOTALS	\$ <u>0.00</u>	\$ <u>0.00</u>	

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: CARLOS GOTAY-GUZMAN
CASE NUMBER: 3:15-CR-00162-001 (JAF)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A Lump sum payment of \$ 5,200.00 due immediately, balance due
 not later than _____, or
 in accordance C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court cost(s):

The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

SENTENCE

10 BEFORE THE HONORABLE JUDGE JOSÉ A. FUSTÉ,
11 UNITED STATES DISTRICT JUDGE.

13 || APPEARANCES:

14 For the Government: Mr. Edward Veronda, AUSA

16 For the Defendant: Mr. Rafael Castro Lang, Esq.

24 Proceedings recorded by stenography. Transcript produced by
CAT.

	I N D E X	
		PAGE
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2	WITNESSES:	
3	None offered.	
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5	EXHIBITS:	
6	None offered.	
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1 San Juan, Puerto Rico

2 November 5, 2015

3 At or about 10:54 AM

4 * * *

5 COURTROOM DEPUTY: Criminal case 15-162, U.S. versus
6 Carlos Gotay Guzman for sentencing. On behalf of the
7 government, Edward Veronda. On behalf of the defendant,
8 Rafael Castro-Lang.

9 The services of the court interpreter are being
10 provided to the defendant.

11 THE COURT: Just give me a minute to open the PSI.

12 MR. VERONDA: Good morning, Your Honor. Edward
13 Veronda representing the government. We are ready to
14 proceed.

15 MR. CASTRO LANG: Good morning, Your Honor. Rafael
16 Castro-Lang representing the defendant. We are ready to
17 proceed.

18 THE COURT: Give me one second. Just let me get
19 myself organized here.

20 Very well. Mr. Castro.

21 MR. CASTRO LANG: Yes, Your Honor.

22 THE COURT: Any objection to the contents of the PSI
23 as it stands today?

24 MR. CASTRO LANG: Yes, Your Honor. Obviously there
25 is -- in terms of the calculation of the guideline, there is a

1 one point difference between the Plea Agreement and the PSR.
2 The PSR awarded the defendant four levels for his role in --
3 supervisory role. The Plea Agreement calls for three.

4 Obviously, Your Honor, I couldn't object to the four,
5 because quite frankly the probation officer had a factual
6 basis to impose a four. But at the same time, I believe that
7 the Court also has the discretion to apply the three level,
8 which also applies in these type of cases where there are five
9 or more defendants.

10 And obviously, I think that the Court needs to look
11 at the whole picture when determining the appropriate
12 sentence. 18 U.S. Code 3553 states clearly that the Court
13 should impose a sentence that is sufficient but not greater
14 than necessary. And certainly we feel that the Plea Agreement
15 negotiated with the Government takes into account the
16 substantial amount of incarceration time that this defendant
17 is facing.

18 He has the drug count, and plus five years for the
19 gun count. And in addition to that, a ten-year term of
20 supervised release.

21 So, Your Honor, we believe, Your Honor, that the
22 Court should follow the plea instead of the PSR. Both are
23 correct. And the Court ultimately decides how it's going
24 to -- what sentence should be imposed on this defendant.

25 In terms of my allocution, Your Honor --

1 THE COURT: Can I stop you right there a minute
2 before you make the allocution?

3 MR. CASTRO LANG: Yes, Your Honor.

4 THE COURT: Let's clarify something here, make
5 certain that we are on the same page. You naturally have all
6 the right in the world to give a lot of emphasis to the Plea
7 Agreement.

8 MR. CASTRO LANG: Yes, Your Honor.

9 THE COURT: If I were in your shoes, I would do
10 exactly the same naturally. But we know that the Plea
11 Agreement was a non-binding plea, naturally. So therefore,
12 therefore, the probation department, when they prepared the
13 Presentence Investigation Report, they could have found
14 differences between the calculations that are lodged in the
15 Presentence Report, in the Plea Agreement, and those that they
16 find to be proper. And that takes us to the four points
17 versus the three points.

18 MR. CASTRO LANG: Yes, Your Honor.

19 THE COURT: You could argue -- you could argue three
20 points without a doubt. It would be more difficult to argue
21 two points, but three points you could argue.

22 MR. CASTRO LANG: Yes, Your Honor.

23 THE COURT: But we have to be clear as to the fact
24 that there is no objection to the fact that the calculation
25 for four points is substantiated at least on paper, and on the

1 basis of what the PSI contains.

2 MR. CASTRO LANG: Of course. And that is why I did
3 not file a formal objection.

4 THE COURT: Exactly. That's what I wanted to make
5 sure.

6 MR. CASTRO LANG: Yes, Your Honor.

7 THE COURT: There is no formal objection.

8 MR. CASTRO LANG: Right.

9 THE COURT: You are simply telling me perhaps --
10 although the PSI says four, perhaps you should be inclined to
11 follow a three?

12 MR. CASTRO LANG: That's correct.

13 THE COURT: Okay. Now, before we go into allocution,
14 now let me ask you something. When I took his plea, I have
15 not been able to review the transcript of the plea colloquy,
16 but I ask you, do you -- can you think of any mistake that I
17 committed during the taking of his plea that could be the
18 object of a reversal?

19 MR. CASTRO LANG: Well, Your Honor, quite frankly, I
20 haven't thought about that, but at this moment, I don't know
21 that the colloquy has errors. Certainly I don't come in a
22 sentencing hearing thinking about appeals. I'm concentrating
23 on trying to get the best sentence for my client.

24 THE COURT: Let me ask you something. You were here
25 when I took his plea.

1 MR. CASTRO LANG: Of course.

2 THE COURT: Okay. Let me ask you --

3 MR. CASTRO LANG: And, like I say, that I'm aware of,
4 I don't know that you committed any error in the taking of the
5 plea. But I'm clarifying that I really haven't put a mind
6 into finding error as an appellate lawyer would do.

7 THE COURT: Right. So as of today, as of today, you
8 are telling me that you cannot in your own mind identify that
9 as we proceeded to take his plea, something happened during
10 the plea colloquy that was objectionable.

11 MR. CASTRO LANG: Not that I am aware of at this
12 time. Yes, Your Honor.

13 THE COURT: That's what I wanted to know.

14 MR. CASTRO LANG: That's correct.

15 THE COURT: Very well. Allocution, please.

16 MR. CASTRO LANG: Yes, Your Honor. Like I say, I
17 think that when we come to sentencing, the guiding principle
18 of a sentence is sufficient but not greater than necessary
19 truly is a correct way of handling sentences to be imposed on
20 the defendants.

21 Here the Court has a 47-year-old man. His Criminal
22 History Category is II, because of some misdemeanors. A
23 misdemeanor offense that raised it from I to II pursuant to
24 the plea. Since the misdemeanor caused the level II, I can
25 argue that the Court in the exercise of its discretion

1 || sentenced the defendant as a level one. And obviously I
2 || believe that when we put this case in perspective, a sentence
3 || that is sufficient but not greater than necessary is exactly a
4 || sentence taking the lower end of guideline 32, which is of
5 || course -- I'm requesting that the Court follow the three
6 || levels for supervisory role, which would place him at 121 to
7 || 151 months. But in addition to that, he has five years.

8 So if -- the lower sentence that could be imposed, if
9 the Court were to accept our arguments, would be 15 years, one
10 month. So this means that this 47-year-old, by the time he
11 would finish his incarceration term, would be around 60 years
12 old. And then he has ten years of supervised release. So he
13 would be practically either incarcerated and/or under Court
14 supervision until he is 70 years old, Your Honor.

15 Obviously, by the time he gets out of prison, even if
16 the Court were to impose the lower end that I'm requesting of
17 15 years, one month, by the time he gets out of the prison,
18 he's an old man. Totally disassociated with Puerto Rico.
19 Really, probably, you know, as an elderly man, will not have
20 any desire to become involved in any criminal activity. He
21 will want to be with his family.

22 He has a five year old son. His wife is here. His
23 sister is here. Other family members are all here. When he
24 gets out of prison, what he wants to do is be able to see his
25 child that would have grown up outside of his presence, be

1 able to be with his family. And whatever years he has left,
2 live them peacefully.

3 So, Your Honor, this is what I want to focus on.
4 That I don't see a need to in a sense expend the resources --
5 imagine, today every year that a defendant is incarcerated
6 costs over 30,000 dollars. Imagine what the cost will be in
7 15 years, Your Honor.

8 And so I submit to the Court that if we are realistic
9 and use common sense, it would seem to me that the lower end
10 that I'm requesting certainly is sufficient. It definitely
11 punishes this defendant. 15 years incarceration is a long
12 time, especially when you're 47 years old, Your Honor. And so
13 I don't see that additional punishment in any way fosters,
14 sadly, the aspect of retribution, the aspect of punishment.
15 They're all there.

16 And ultimately, like I say, when he gets out of
17 prison, he'll be so old that I don't think anyone could
18 seriously argue that he would represent a danger to society.
19 And so in a sense, I think the costs of incarceration should
20 be saved for other criminals, younger, more dangerous, that
21 are coming down the line, Your Honor.

22 The thrust, clear thrust of the Sentencing
23 Commission, is to slowly recognize that drug sentences are
24 severe. And they've been lowering the drug quantities. They
25 did it with the powder cocaine. They did it with the drug,

1 minus two. And I believe that there is a recognition that the
2 system is unnecessarily being overloaded with inmates that,
3 you know, you can impose high -- sentences like the one I'm
4 requesting, and avoid this unnecessary, in a sense unnecessary
5 punishment than the one that I am requesting for this
6 defendant.

7 So I ask the Court, I know the defendant is very
8 repentant for what he did. He accepted responsibility early
9 on, Your Honor. In fact, I'm aware that he recommended other
10 inmates that they plead guilty. I was present in a joint
11 meeting where he recommended to another inmate that -- a
12 defendant, that they should plead out.

13 And so I think that my position, Your Honor, is a
14 reasonable one. That this Court sentence the defendant to 15
15 years, one month, plus ten years of supervised release.

16 THE COURT: Let me ask you two things that come up as
17 a result of what you are discussing with me. You mentioned --
18 you made reference to the criminal history.

19 MR. CASTRO LANG: It's II, because --

20 THE COURT: You seem to agree it's a II.

21 MR. CASTRO LANG: Yes. It's a II, because of the
22 two -- the misdemeanor conviction that appears on page 27,
23 paragraph 150.

24 THE COURT: Right. But in reference precisely to
25 those two -- and I think he's a II. On paper he's a II.

1 MR. CASTRO LANG: Yes.

2 THE COURT: But do you see the -- do you see let's
3 call it the red flag that appears there that the carrying of
4 the firearm without a license was reclassified as a
5 misdemeanor? There was a 247(a) dismissal, too.

6 MR. CASTRO LANG: Imagine, Your Honor. He was 25
7 years old.

8 THE COURT: Right. Right. I understand that.

9 MR. CASTRO LANG: 25 years old.

10 THE COURT: Right.

11 MR. CASTRO LANG: Because this conspiracy began in
12 the year 2000. It counts.

13 THE COURT: Right. But I'm not talking about that.
14 I'm talking about --

15 MR. CASTRO LANG: Yeah.

16 THE COURT: Also there is the issue that the firearm
17 in question that appears in paragraph 150 had an obliterated
18 serial number. And that was also re -- all that was
19 reclassified, and the sentence that he got for all that was I
20 think on the low end, if you will, of what could happen under
21 those circumstances. Correct?

22 MR. CASTRO LANG: That's correct, uh-huh.

23 THE COURT: And you are aware, because you are an
24 experienced lawyer, that these reclassifications, that I am
25 not saying that these ones fall in that category, but as a

1 general rule, reclassifications of this nature are our daily
2 bread in the context of what we see when we examine criminal
3 record for purposes of sentencing.

4 We see a lot of those, reclassifications.

5 MR. CASTRO LANG: Well, the system, both the state
6 and the Federal system, thrive on Plea Agreements. And
7 obviously a defendant --

8 THE COURT: Reclassifications.

9 MR. CASTRO LANG: -- is accused -- obviously, I think
10 it's a mistake to read too much into the charges.

11 THE COURT: I'm not reading --

12 MR. CASTRO LANG: Because, Your Honor, there's a
13 reason why the prosecutor agreed to a misdemeanor. There's a
14 reason as to why a judge agreed to that. And so I think one
15 should never --

16 THE COURT: There are always reasons.

17 MR. CASTRO LANG: -- second guess.

18 THE COURT: Well, I'm not second guessing. All I'm
19 saying is there are always reasons.

20 MR. CASTRO LANG: Of course.

21 THE COURT: And there are reasons that are legitimate
22 and others that are illegitimate, like everything else in the
23 world.

24 MR. CASTRO LANG: Of course.

25 THE COURT: But it's II. It's category II.

1 MR. CASTRO LANG: Yes. And the plea allows me, if he
2 had II because of the misdemeanors, to argue that the Court
3 should apply the one, and of course my reasoning, my reasoning
4 Your Honor, again, because I know, Your Honor, that in this
5 courtroom your discretion is -- you decide based on what you
6 believe you should do.

7 THE COURT: Well, let me put it this way.

8 MR. CASTRO LANG: A Plea Agreement is something that
9 you don't have to follow. The PSR you obviously have to take
10 it into account, but you don't have to follow it, also.

11 The basic principle is that of 18 U.S. Code 3553.

12 THE COURT: Absolutely.

13 MR. CASTRO LANG: Sufficient but not greater than
14 necessary.

15 THE COURT: Right.

16 MR. CASTRO LANG: And that in a sense trumps the
17 guidelines, trumps everything, because that's the conclusion
18 that you can say, this sentence that I am imposing on this 47
19 year old man is sufficient but not greater than necessary.
20 And he's going to be into his 70s under Court supervision.

21 THE COURT: Let me ask you something. Going back to
22 the issue in general terms about plea colloquys in general, do
23 you believe that defense counsel and prosecutor both have an
24 obligation to alert the Court during a plea colloquy if the
25 Court is committing an obvious mistake in the application of

1 the rule, of Rule 11? Do you believe that lawyers and
2 prosecutors have an obligation to --

3 MR. CASTRO LANG: Well --

4 THE COURT: -- alert the Court, Judge? I think that
5 there is this issue that you should clarify.

6 MR. CASTRO LANG: Well, obviously, Your Honor, that's
7 one thing -- I don't know that there's any rule that requires
8 that.

9 THE COURT: As a matter of --

10 MR. CASTRO LANG: And obviously the case law is quite
11 clear. The case law is quite clear that if you don't object,
12 if you don't object to a Rule 11 error, then if you appeal,
13 you have to show that had the defendant known about the error,
14 he would have not have plead guilty.

15 THE COURT: I understand that.

16 MR. CASTRO LANG: So there's --

17 THE COURT: I understand that.

18 MR. CASTRO LANG: There are rules that punish lawyers
19 for not objecting.

20 THE COURT: I understand that. But do you believe
21 that -- and I'm asking this from a lot of lawyers, not only
22 you.

23 MR. CASTRO LANG: Yes.

24 THE COURT: I'm just trying to find a consensus,
25 because it's something that bothers us judges sometimes. Do

1 you believe or are you of the opinion that both prosecutors
2 and defense counsel have an obligation, a professional
3 obligation, let's call it that way, to point out to the Court
4 in the context of a sentencing hearing or in the context of a
5 plea colloquy, when it is pretty obvious to counsel or
6 prosecutor that a mistake is being committed?

7 MR. CASTRO LANG: Well, Your Honor, I'm going to be
8 candid with you. As a defense lawyer, my loyalty is to the
9 defendant, overall. I am representing Carlos Gotay Guzman.

10 THE COURT: Yes.

11 MR. CASTRO LANG: If the Court makes a mistake that
12 in the final analysis is going to help my client, I don't
13 think I should alert the Court.

14 THE COURT: You don't think you should alert.

15 MR. CASTRO LANG: No. No. My loyalty is to this
16 defendant right here. Okay. That's my loyalty. And that
17 goes -- that's the ethical --

18 THE COURT: Right. There's no loyalty to --

19 MR. CASTRO LANG: -- obligation.

20 THE COURT: There's no loyalty to the purity of
21 proceedings in that sense.

22 MR. CASTRO LANG: Well, you see, Your Honor, that's
23 why I have a prosecutor here. There's a prosecutor here that
24 is supposed to also be alert. And obviously he defends the
25 interests of the government. There is a judge that is assumed

1 to be learned. And so I don't know, Your Honor, but --

2 THE COURT: Well, let me --

3 MR. CASTRO LANG: Again, I'm being candid.

4 THE COURT: That's what I like.

5 MR. CASTRO LANG: Just like you like candidness, I'm
6 going to be candid with you.

7 THE COURT: Absolutely.

8 MR. CASTRO LANG: Everyone has to do their own job.

9 THE COURT: Let me ask you something. Let's suppose
10 for the sake of argument that a mistake is committed in one of
11 those instances and the defense attorney doesn't pick it up
12 for whatever reason, not because of a lack of understanding,
13 simply can fly over you easily in the context of the --

14 MR. CASTRO LANG: We all make mistakes.

15 THE COURT: Exactly. And the prosecutor becomes
16 aware of it at that moment. Does he have an obligation?

17 MR. CASTRO LANG: Of course.

18 THE COURT: Or should he -- or should he assume the
19 same position that you do, this is an adversary proceeding,
20 why should I object pointing out for the benefit of defendant
21 that a mistake has been committed? Should he --

22 MR. CASTRO LANG: A prosecutor's function is to
23 ensure that justice is made. He represents the interests of
24 the government, but also, as a prosecutor, he has certain
25 standards that place him in a special position vis-a-vis the

1 defense attorney who has a loyalty, an ethical loyalty to his
2 client. And that in fact, alerting, bringing forward
3 information that hurts his client could very well be
4 ineffective assistance of counsel or incompetence on behalf of
5 a defense attorney.

6 So I think we have different roles.

7 THE COURT: Okay. Would it be ineffective assistance
8 to point out, in the middle of a colloquy or in the middle of
9 a sentencing hearing, that a mistake is being committed?

10 MR. CASTRO LANG: Well, if you are going to do the
11 prosecutor's job, and tell the Court something that prejudices
12 your client, quite frankly, Your Honor, it's not in me.

13 THE COURT: Okay. I understand that. I do respect
14 that. I have to respect that. Perhaps we should write a law
15 review article about these issues.

16 MR. CASTRO LANG: The First Circuit could decide --
17 maybe that's something the First Circuit should decide, if a
18 defense attorney has an obligation to act against a client in
19 a sentencing hearing when a mistake is being committed that
20 helps his client. I --

21 THE COURT: I understand. But perhaps this is a good
22 subject -- it's coming up a lot. It is a good subject that
23 may be a good subject for a law review article of some kind.
24 But the truth of the matter is it's a very interesting
25 issue.

1 MR. CASTRO LANG: Yes, Your Honor.

2 THE COURT: And the only reason I ask is because I'm
3 dealing here with competent attorneys. That's all.

4 MR. CASTRO LANG: Well, thank you.

5 THE COURT: Very well. Anything else that you want
6 to say or he wishes to address the Court?

7 MR. CASTRO LANG: I believe I've stated what I need
8 to say, Your Honor.

9 THE COURT: What about him?

10 Would you like, Mr. Gotay, to allocute, say something
11 on your behalf?

12 THE DEFENDANT: Yes.

13 THE COURT: Why don't you come to the microphone so I
14 can hear you better?

15 THE DEFENDANT: Yes. I'd like to speak very
16 briefly.

17 THE COURT: Yes, please.

18 THE DEFENDANT: I am a bit nervous, but first of all
19 I would like to apologize to this Court. I would like to
20 apologize to my family, to Puerto Rico. I am extremely
21 repentant. And, Your Honor, my future is in your hands. And
22 I don't have much more to say. Thank you.

23 THE COURT: Give me a second. Let me just take a
24 look at something here. It's very important to look at it.

25 Okay. Yes. It's interesting to note that on the

1 subject of criminal history, we had a very good discussion at
2 the time that the plea colloquy took place, where we even
3 considered, and I actually wrote in the Plea Agreement a note
4 regarding the potential, potential issue of over
5 representation of criminal history.

6 MR. CASTRO LANG: Right.

7 THE COURT: But that's not before us now.

8 Let's take a three-minute recess. I'll be back. I
9 want to check something.

10 MR. CASTRO LANG: Yes, Your Honor.

11 (Recess taken.)

12 (Proceedings reconvened.)

13 THE COURT: Please be seated.

14 ||| Very well. Government, anything?

15 MR. VERONDA: Yes, Your Honor.

16 THE COURT: Please.

17 MR. VERONDA: The g

18 a plus three supervisory role, instead of plus four. So our
19 recommendation is a base level 32, not a base level 33, as is
20 in the Plea Agreement or in the PSR.

21 Counsel was allowed to argue for over representation
22 of the defendant's criminal history, and argue for Criminal
23 History Category I, despite the defendant being Criminal
24 History Category II. And ask for 151 months, which he did.

25 However, the Government can ask for a range within

1 Criminal History Category II of a base offense level 32. The
2 range --

3 THE COURT: Actually, there is no dispute today that
4 he's a II.

5 MR. VERONDA: That -- yeah, that's correct.

6 MR. CASTRO LANG: That's correct.

7 MR. VERONDA: He doesn't dispute it. He can just
8 argue for the over representation, and the Court can consider
9 that and sentence him in the Criminal History Category I --

10 THE COURT: Okay.

11 MR. VERONDA: We are arguing for a sentence in about
12 -- the range of 138 to 168. And I want to make a brief
13 argument why the Court should sentence 168 months, Criminal
14 History Category II, base offense level 32, pursuant to the
15 Plea Agreement, with the 60 months added on Count VI.

16 THE COURT: With the understanding that this is all
17 in the context of a non-binding plea.

18 MR. VERONDA: Correct. The Court can do more, can do
19 less.

20 THE COURT: I understand that. I just want to make
21 certain.

22 MR. VERONDA: Your Honor, I understand the
23 defendant's age. I understand that he'll be older when he
24 gets out, near the age of 60, but our recommendation isn't
25 based on what's happening other the next 15 to 20 years of his

1 life. It's what happened over the last 15.

2 Now the defendant has accepted responsibility for his
3 actions. In his acceptance of responsibility, he says that --
4 he doesn't give a time period that he was involved. But in
5 paragraph 46, which is listed from the -- 46 of the PSR, which
6 is listed from the Indictment, the Indictment reads -- and
7 this was based on the discovery that was provided to counsel.
8 This is not a surprise to him. And it was also provided to
9 the probation officer. That the defendant was the main leader
10 of this organization since at least 2008.

11 And obviously the Court knows in its experience that
12 you don't become a leader out of nowhere. You're somebody
13 before that. And he was a heroin supplier. He was a supplier
14 of drugs to the organization, and he was involved.

15 THE COURT: I am aware of all that.

16 MR. VERONDA: Since 2000.

17 THE COURT: And your colleague is aware of all
18 that.

19 MR. VERONDA: Yes.

20 THE COURT: What you were discussing before is the
21 recommendations in the Plea Agreement. And the same way you
22 can say I want to concentrate on 15 years before today, he can
23 say 15 years after today --

24 MR. VERONDA: And that's what he's asking you.

25 THE COURT: And I understand that.

1 MR. VERONDA: What I'm asking you is the government's
2 interest --

3 THE COURT: I understand that.

4 MR. VERONDA: The government, under 3553(a), is
5 requesting, for his responsibility in this organization -- you
6 know, as someone who has been involved in the organization
7 since the very -- involved in the Enrique Zorilla Public
8 Housing Project since the year 2000, which is the beginning
9 date of the Indictment, Your Honor. Somebody like that, is
10 their Criminal History Category over represented? No.

11 THE COURT: Nobody's arguing that.

12 MR. VERONDA: Well, defense counsel is arguing
13 that.

14 THE COURT: I haven't heard him say --

15 MR. VERONDA: You can't --

16 THE COURT: I haven't heard Mr. Castro say that I
17 should use Criminal History Category I. Have you said that?

18 MR. VERONDA: Your Honor, that's what is written in
19 the Plea Agreement.

20 THE COURT: But he hasn't argued it here today.

21 MR. CASTRO LANG: I haven't argued that.

22 THE COURT: Of course not. He reserved the right to
23 do that before he read the Presentence Report, and he saw
24 what's in there. He concedes that he's a II, unless I am
25 wrong about what I heard.

1 MR. VERONDA: Yes, but he's arguing for Criminal
2 History Category I, so he's implying that he --

3 THE COURT: In what sense he's arguing for I?

4 MR. VERONDA: Because he's saying 121 months, which
5 is Criminal History Category I.

6 THE COURT: Right. But that has nothing to do with
7 the criminal history. What he's trying to do is convince me
8 that I should do the lowest possible calculation in the
9 context of the GSR. That's all.

10 MR. VERONDA: Okay. But --

11 THE COURT: Isn't that what you're doing?

12 MR. CASTRO LANG: Yes, Your Honor.

13 MR. VERONDA: Your Honor, we disagree with that.
14 There's a time for a lower end, a time for a higher end.

15 THE COURT: You are right to disagree with that.

16 MR. VERONDA: I think this is time for a higher
17 end.

18 THE COURT: You reserved the right --

19 MR. VERONDA: Yes.

20 THE COURT: -- to argue any box within the guideline
21 range.

22 MR. VERONDA: And that's what I'm doing, Your
23 Honor.

24 THE COURT: There's nothing wrong with that either.

25 MR. VERONDA: So what I'm saying is defense counsel,

1 for instance, referenced the trend in both Congress and the
2 sentencing guidelines to reform the criminal justice system,
3 because the criminal justice system puts too much, if you call
4 it, low level hanging fruit in prison for possession of drugs
5 and minor offenses.

6 In fact, one Federal District Judge, a colleague of
7 yours in New York has stated, has criticized the criminal
8 justice system and has stated -- and I forget the exact
9 statistics, but he talks about how 90 percent of the people in
10 the Federal system that are sentenced do not have a manager or
11 supervisory role. They are people who were not organizers or
12 leaders of a gang or drug trafficking organization.

13 We are talking, Judge, not about that 90 percent. We
14 are talking about the ten percent. We're talking about an
15 organizer, a manager, a leader, a supervisor, in an indictment
16 that reached 61 defendants. And the defendant was the
17 organizer, was the leader of this organization since 2008.
18 And the Court must consider that in the Government's argument
19 for 168 months.

20 THE COURT: You should always say the Court should
21 consider that.

22 MR. VERONDA: Is that what I said, should?

23 THE COURT: You said must.

24 MR. VERONDA: Okay.

25 THE COURT: I don't blame you for saying must, but

1 you should say should.

2 MR. VERONDA: We are not talking about low level
3 fruit, Your Honor. We are talking about an organizer,
4 manager, leader, and part of this organizer for the last 15
5 years. And that's why we're submitting to you that a proper
6 and just sentence is 168 months with the 60 months from Count
7 VI.

8 THE COURT: Very well. This sentencing hearing has
9 become a very interesting one. I'm going to tell you why.
10 Because I have identified at least three subjects that we have
11 discussed here that could very well be subjects, themes, for
12 law review discussion. Criminal history, how you gauge it,
13 how do you view it, how do you decide within a particular
14 number how severe or less severe that criminal history is,
15 whether it's a particular criminal history X, with a star that
16 calls attention to something, or is not.

17 We have also dealt with the issues of Rule 11, which
18 I brought up because I have noticed a great interest in the
19 Court of Appeals recently in making certain that Rule 11 be
20 followed correctly, and that is something that no matter how
21 much work you have, no matter how many cases you have to
22 handle, no matter how many pleas you have to take in a
23 particular day, the truth of the matter is Rule 11 is Rule 11,
24 and you have to deal with it.

25 And also we have now a new subject, which is the

1 subject of the philosophy, philosophy behind the two positions
2 that appear here before me regarding what is supposed to be
3 the reason for punishment, especially in drug cases. And you
4 have even brought up and point to even judges who feel in a
5 particular way. So this is three particular subjects that are
6 very interesting.

7 We should even -- we should even consider the three
8 of us get together and write the law review article together.

9 MR. CASTRO LANG: Your Honor, briefly, there were
10 many leaders in this case.

11 THE COURT: There are always --

12 MR. CASTRO LANG: There were many leaders in this
13 case. So -- and in fact I believe the Court sentenced
14 defendant number two yesterday who was a leader, also --

15 THE COURT: Yes.

16 MR. CASTRO LANG: -- to 15 years, Your Honor. Quite
17 frankly, Your Honor, a sentence of 19 years, Your Honor, is
18 really, really high. And --

19 THE COURT: Well, we already discussed that.

20 MR. CASTRO LANG: Yes, Your Honor. Well --

21 THE COURT: We discussed that. Anyway, let's deal
22 with this.

23 No two defendants are the same. You can never say
24 number three compares to number six in a particular
25 indictment; or number two compares to number four; or number

1 two compares to number one. They are different. They require
2 different considerations. If it were like that, you don't
3 need a Judge, then all you need is a computer so that you can
4 fill in the information that appears in the Plea Agreements
5 and PSIs and let the computer put up the sentence. And that's
6 not the way we work.

7 Well, Mr. Gotay, let's call the sentencing findings.
8 Okay? Mr. Gotay, we all know that he plead guilty to Count I,
9 which was a drug conspiracy count in this case. He also pled
10 to Count VI, which is a firearms count basically. We are
11 talking about Title 21 in the context of drug dealing.
12 841(a)(1), 841(a), 860, all those sections. And plus then you
13 go back to Title 18 in the context of 924(c), and there you
14 are.

15 Then you have the issue of the fact that the
16 activities of this conspiracy and the distribution of this in
17 this case without a doubt, there is no issue about that,
18 happened in the context and within the properties of public
19 housing projects owned by public housing authorities which are
20 protected locations under the law. Whether that's the right
21 thing to do by Congress, the wrong thing to do, or whether the
22 guidelines should do it this way or the other way, that's a
23 different story, but that's what we have to deal with, okay?

24 At this point in time, let me just say something,
25 something that saddens me a little bit. It has nothing to do

1 with your client. It has to do with the area where this
2 happened, Enrique Zorilla, and all the others. It's that in
3 the 30 years that I have been sitting here, it's not the first
4 time that I have to deal with a major case involving this
5 particular location. It's sad. Very sad.

6 I will never forget 95-29, which was a horrific case
7 that happened years ago, and that actually the scene of one of
8 the scenes where all these things was going on was Enrique
9 Zorilla, Los Morales, Enrique Zorilla, all those areas.
10 That's besides the point. It just came to my mind. In the
11 spirit of saying what's in your mind, I say it. Just like Mr.
12 Castro decided to say what he had to say. Okay?

13 Very well. So there we have another thing, which is
14 important, that we know, or we at least can responsibly say
15 that this conspiracy that was in place for so many years dealt
16 with lots and lots of drugs in quantity. In quantity.
17 There's no question about it. But here, here in this
18 particular case, this gentleman, Mr. Gotay, ended with a
19 pretty good stipulation, if you will, whereby he is only
20 responsible in the context of the conspiracy for five kilos of
21 cocaine and less than 50 kilos of cocaine. That is a fact.
22 It could have been a lot more.

23 Had you tried the case, God knows what the tables
24 would have been for sentencing. But we know for sure there
25 was a lot more drug than that, and I do believe that nobody

1 can disagree with the fact that the stipulation that you
2 people entered into for five and not more than 15 was a good
3 stipulation. No question about it. Do you agree with that?

4 MR. CASTRO LANG: Yes, Your Honor.

5 THE COURT: Of course. It's impossible to disagree
6 with that.

7 MR. CASTRO LANG: But that's our job.

8 THE COURT: Of course.

9 MR. CASTRO LANG: And obviously when we arrive to a
10 Plea Agreement, both parties --

11 THE COURT: Sure.

12 MR. CASTRO LANG: -- in a sense --

13 THE COURT: It's a give away.

14 MR. CASTRO LANG: Both parties are comfortable with
15 the agreement.

16 THE COURT: Sure. But I am -- I dare to say, I dare
17 to say that it could have been a lot more, because it was a
18 lot more. But that's five. It's five to 15.

19 Anyway, and it was within 1,000 feet of a protected
20 location. And it includes the names that I mentioned, Enrique
21 Zorilla, Los Morales, and a bunch of wards in Manati, and
22 actually the town of Florida and Barceloneta, which also
23 includes housing projects owned by public housing authorities.

24 So therefore, we have to start with a base offense
25 level of 35 I think it was, correct?

1 MR. CASTRO LANG: Your Honor, the --

2 THE COURT: The calculation.

3 MR. CASTRO LANG: The base offense level pursuant to
4 the Plea Agreement is a 30. When you add the two levels for
5 protected location, it's 32. And three levels for supervisory
6 role would be 35.

7 THE COURT: 35.

8 MR. CASTRO LANG: That's correct.

9 THE COURT: Okay. Well --

10 MR. CASTRO LANG: And then you have the three level
11 reduction for acceptance.

12 THE COURT: Wait a minute. Wait a minute. Wait a
13 minute.

14 Let me go to the PSI again. I want to make sure that
15 this is correct.

16 If you go to paragraph 137 of the PSI, if you are so
17 kind, you start with a base offense level of 32. Considering
18 two things, the amount of drug, which we are going to
19 consider, and the protected location. Correct?

20 MR. CASTRO LANG: That's correct, Your Honor.

21 THE COURT: Then it's actually two components here
22 involved in the 32. Drug and protected location.

23 MR. CASTRO LANG: That's correct.

24 THE COURT: Okay.

25 MR. CASTRO LANG: It includes both.

1 THE COURT: Then the next adjustment that we have to
2 deal with is supervisory role.

3 MR. CASTRO LANG: That's correct.

4 THE COURT: The Plea Agreement recommended that we
5 consider it to be a three point type.

6 MR. CASTRO LANG: Right.

7 THE COURT: Supervisory role.

8 MR. CASTRO LANG: Uh-huh.

9 THE COURT: The probation department in the
10 Presentence Report considered it to be a IV. And if that were
11 the case, we would have a base offense level of 36. Minus
12 three points for acceptance. We would end up with a 33.

13 MR. CASTRO LANG: That's correct.

14 THE COURT: Okay. We are not talking about guns
15 still at all. Okay? Now, should it be a III or should it be
16 a IV? That's the question.

17 MR. CASTRO LANG: It could be either.

18 THE COURT: It could be either. Absolutely. But let
19 me just try to figure it out, because very seldom do we have a
20 nice discussion like this. And I want to make certain that we
21 do it correctly.

22 There's no question about when you see the
23 Presentence Report, that this gentleman, the defendant, was
24 the main leader of the drug trafficking organization, or at
25 least that's what the papers show. That's what the

1 investigation shows. If there was somebody above him, we
2 don't know. We know that he was the number one guy according
3 to -- at least to what we have before us here.

4 And the information that appears in the PSI would
5 allow a reasonable fact finder to make a finding that in this
6 conspiracy, starting in 2000 more or less, and up in 2015 more
7 or less, or '14, '15, he was indeed a high ranking member of
8 the conspiracy. And he was the so-called owner of the heroin
9 that was distributed in that -- as part of that conspiracy.
10 And there's also some information here in this PSI that would
11 indicate that it's about the year 2005, 2008, around there
12 somewhere. More 2008. That you can say for sure that he was
13 the main leader of the organization.

14 Even though I mentioned 2000 before, when you fine
15 tune what appears in that PSI, you can say more than 2000,
16 around 2005, 2008, around there somewhere more or less.

17 MR. CASTRO LANG: I believe it says 2008, Your
18 Honor.

19 THE COURT: 2008.

20 MR. CASTRO LANG: 2008 I believe is what the PSR
21 says.

22 THE COURT: That is my recollection. Then he
23 actually, as a leader, he directly supervised operations at
24 Enrique Zorilla, the housing project, as well as the other
25 drug points. And he received the proceeds from distribution

1 of these narcotics that were sold during the span of his
2 leadership in the conspiracy, 2008 we're saying. And he was
3 the one in charge of maintaining control basically of all the
4 distribution activities, as much as you can say that somebody
5 can control something like that. But he was the person, the
6 figure that surfaces as the controlling figure. There's no
7 question about it.

8 || PROBATION OFFICER: Your Honor.

9 THE COURT: Yes.

10 PROBATION OFFICER: If I may, the probation officer
11 would like to give a little more light to the Court.

12 || THE COURT: Yes, if you are so kind.

PROBATION OFFICER: According to application note four of guideline section 3B1.1 in distinguishing a leadership role the factors the Court should consider include the exercise of decision-making authority, the nature of the participation in the commission of the offense, recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and the scope of the illegal activity, and the degree of control and authority exercised over others.

23 In paragraphs 45 and 46 of the PSR, it is depicted or
24 described, the role of the defendant in the offense.

25 THE COURT: Right.

1 PROBATION OFFICER: And that's where he announces the
2 four level enhancement came in.

3 THE COURT: So rather than me talking from the top of
4 my head, let me go now to 44 and 45. I think it's better that
5 way. Not a good thing to talk off the top of my head. Yes.
6 45 and 46 you said.

11 There was another person whose name was Jose Cintron
12 Otero, known as Checo, who was also considered one of the main
13 leaders. But we already know that at the beginning of the
14 year 2015, that gentleman that was referring to Cintron Otero
15 was murdered along with another individual by the last names
16 Banales Santiago in San Patricio Plaza mall, located in
17 Guaynabo, after exiting the Cinemas that appeared there.

18 Let's go back to 46. By the way, I'm not saying your
19 client was responsible for this. I'm just referring to the
20 PSI.

21 MR. CASTRO LANG: Oh, that was another leader, Your
22 Honor, for sure. He could have been number one, but he was
23 dead.

1 MR. CASTRO LANG: Oh, of course. I'm not inferring
2 that either.

3 THE COURT: Okay. So 46 tells us that from in and
4 around the year 2000, your client was a high ranking member of
5 the conspiracy who supplied and was the owner of the heroin
6 distributed in the conspiracy. And as we have now agreed on
7 or about around June 2008 more or less, he became one of the
8 main leaders of the drug trafficking organization.

9 And as one of the main leaders, Mr. Gotay directly
10 supervised the operations at Enrique Zorilla Public Housing
11 Project, as well as the other drug points; received the
12 proceeds from the distribution of the narcotics sold during
13 the span of his leadership in the conspiracy; and was in
14 charge of maintaining control of all distribution activities.
15 He also controlled the drug points located at Los Morales
16 Public Housing Project, the Cortes ward, the Aqueducto ward,
17 also known as La Cruz, and these are located in Manati, Puerto
18 Rico.

19 According to the PSI, he had the final approving
20 authority as to the discipline to be imposed upon residents of
21 the Enrique Zorilla Public Housing Project, residents in and
22 around the municipality of Manati, and members of the
23 conspiracy, as well as its enemies and rivals.

24 At times during the conspiracy, Mr. Gotay was also
25 the owner of the cocaine, crack cocaine, marijuana, heroin,

1 Xanax and Percocet. And he would also act as an enforcer and
2 supplier within the conspiracy.

3 Needless to say that we know that he carried firearms
4 in furtherance of the drug trafficking organization. I was
5 trying to say this off the top of my head, but that's exactly
6 what it was. I do think that when you consider all that, one
7 can safely say on the basis of the contents of the PSI, that
8 Mr. Gotay was an organizer or leader of a criminal activity
9 that involved five or more participants or was otherwise
10 extensive.

11 Therefore, he definitely qualifies for a four level
12 increase. It could have been a three by stipulation, but
13 that's not binding. I do think and I make a finding that it
14 should be a four.

15 So there we are. Going back to the calculations,
16 recapping, we have a 32, which consists of two things, drugs
17 and protected location. We have the plus four for the role
18 that we just described. That brings us a level 36.

19 He was granted three levels for acceptance of
20 responsibility, so his adjusted base offense level on the drug
21 count should be 33. And a 33, with a Criminal History
22 Category of II, gives us a sentencing range of -- a suggested
23 sentencing range of 151 to 188 months. And a fine range that
24 starts at 17,500. Some people extend it all the way to the
25 millions. I'd rather think in terms of 175 thousand, because

1 the figure of the millions scares the hell out of me.

2 Then when we go to Count VI, firearms count under
3 924(c)(1)(A). We know that in the guideline it's basically
4 the statutory minute of 60 months. Starts there. And I
5 always like to see guideline calculations even in -- I mean
6 criminal history calculations in firearms cases.

7 We know that chapter three and chapter four properly
8 speaking do not apply, but we have the calculation no matter
9 what. It's a II.

10 So once again, 33 and a II is 151 to 188, with a fine
11 range that I mentioned, starting at 17,500 to 175,000. And
12 the supervision is at least ten years, because of the fact
13 that this was in a protected location. And to that we have to
14 consider the consecutive sentence that must be imposed,
15 because of firearms, starts at 60 months. And the supervised
16 release for that is two to five years, and the fine cannot
17 exceed 250,000. Very well.

18 Let me see. Obviously we have to look at something
19 that we discussed here, the 3553(a) factors naturally. We
20 have to consider his age. We have to consider his number of
21 dependants. We have to consider his education. We have to
22 consider so many things as to his person. But also, aside
23 from the personal information that must be considered, and
24 should be considered, all that appears in the PSI naturally.

25 We have talked about the nature and circumstances of

1 the offense. And aside from his personal history, we have I
2 think mentioned and the PSI obviously mentions how serious the
3 conduct was. And of course we have to think in terms of
4 crafting a sentence that promotes respect for the law, that
5 provides fair punishment, and that above all, above all,
6 constitutes deterrence more than to him, to the general
7 public, too, because the truth of the matter is he has to
8 serve a lot of time. But there is an element of deterrence
9 towards the general public actually. The people who are out
10 there who see what's going on.

11 So no doubt that the PSI and the Court and even
12 counsel, everybody has talked about matters that pertain to
13 3553(a). There is no question about it. I do think that the
14 disposition we should make in this case, and the disposition
15 would be within the bracket, if you want to call it that way,
16 of recommendation in the Plea Agreement, should be
17 imprisonment of 170 months. We should impose a fine, even if
18 it's nominal as a matter of principle here. We should impose
19 a fine of \$5,000 in this case. And to that we have to add the
20 60 months consecutive for the drug firearms count.

21 And if you add 170 and 60 --

22 MR. CASTRO LANG: Did you say 170 months?

23 THE COURT: He made his allocution. The defendant
24 allocuted. Absolutely, he did, correct, Counsel?

25 MR. CASTRO LANG: Yes. Of course.

1 THE COURT: The clerk was telling me did he allocute.
2 Okay. So if you take 170 and you take 60, we are
3 talking of an aggregate of 230 months. Then we have to deal
4 with the supervised release. And it should be ten years as to
5 Count I, and five years as to Count VI. But we know that
6 supervision is always concurrent, so therefore those five for
7 the gun are swallowed by the ten years for the drugs. So the
8 end result is it's a ten year supervisory term, as we
9 discussed previously.

10 And the conditions should be these. He cannot -- he
11 has to first follow -- he cannot commit another Federal, state
12 or local crime. And he has to follow all the standard
13 conditions of supervision that we have adopted in this
14 district, as recommended by the Sentencing Commission.

15 He cannot unlawfully possess controlled substances.
16 That is a standard one. Naturally he cannot possess firearms,
17 destructive devices or dangerous weapons.

18 And while he's on supervised release, he has to be
19 drug tested. The first test usually occurs within 15 days of
20 release into supervision. Thereafter, he has to submit to
21 random drug testing that cannot be less than three tests
22 during the supervision period and not more than 104 samples
23 per calendar year.

24 And I always give the defendants the full effect of
25 the Drug After Care Program policy, complete, including

1 treatment, et cetera. I will not include the co-payment
2 clause.

3 He has to participate in vocational training and/or
4 job placement programs. He has to provide the probation
5 officer access to his financial information. The fine has to
6 be paid during the period of supervision. And if there is any
7 issue with the non-ability to pay, of course there is a
8 procedure that must be followed to discharge that fine.

9 The search clause applies to the supervision. That
10 means that his person, his property, his house, his vehicle,
11 his papers, his computers, I always define it this way,
12 anything he owns, uses or borrows, anything, whether moveable
13 or real property, can be searched by a probation officer in
14 supervision without a warrant only based upon reasonable
15 suspicion of him having contraband or having violated terms
16 and conditions of release. Failure to submit is a ground for
17 revocation. And of course everybody who lives with him has to
18 be informed of the fact that this condition is in place.

19 He has to give DNA samples as required by law. And
20 of course there's a special monetary assessment to be imposed,
21 which is 200 dollars. A hundred per count.

22 I saw in the Plea Agreement, which I reviewed
23 earlier, that he waived his right to appeal when he was --
24 when he -- when we took his plea. And the sentence that has
25 been imposed is within the range contemplated in the Plea

1 Agreement. Therefore --

2 MR. CASTRO LANG: With all due respect, it's not.

3 THE COURT: It's not? Why not?

4 MR. CASTRO LANG: It's a different guideline level
5 than the one stipulated in the Plea Agreement. You applied a
6 guideline for 33. The plea says 32. You've imposed a
7 sentence of 170 months, and the guideline for a level 32
8 Criminal History Category of II is 135 to 168.

9 So the sentence that you are imposing, it definitely
10 exceeds the terms and conditions of the Plea Agreement and the
11 sentence recommendation made. So he has not waived any
12 appeal.

13 THE COURT: Well, let me put it this way --

14 MR VERONDA: I just wanted to point out, your
15 colloquy with defense counsel is no longer academic, that he
16 is actually correcting you for his client. I'm actually
17 joining him, that the defense -- that the maximum under the
18 Plea Agreement is 168 months.

19 THE COURT: Okay.

20 MR. VERONDA: So anything above that, he has --

21 THE COURT: It's very simple to correct. I'm going
22 to tell you, he has 14 days to enter a notice of appeal. He
23 has the right to appeal in forma pauperis. He has a right to
24 have his attorney fees paid on appeal under the Criminal
25 Justice Act. Any time that he has served in pretrial

1 detention has to be credited toward his sentence.

2 Any recommendations that you want?

3 MR. CASTRO LANG: Yes, Your Honor. If I may, first
4 of all, the indulgence of the Court, I request reconsideration
5 on this what I find extremely high sentence that even goes
6 beyond what the government requested by two months. You
7 imposed 170 months, plus the five years. The 19.2 years, Your
8 Honor, on a 47-year-old with a Criminal History Category of
9 II. Again, Your Honor, you know in the system defendants
10 engage in these plea negotiations obviously in the hopes that
11 the Court will take them into account. I think the fact that
12 the government was willing to enter into the Plea Agreement
13 that it entered with the defendant, that it found that the
14 guidelines that we stipulated were adequate and met all of the
15 factors, sentencing factors that a Court takes into
16 consideration -- obviously, Your Honor, the Court is not
17 obligated by any Plea Agreement. But I again emphasize that
18 this is a 47-year-old, Your Honor. 19.2 years incarceration
19 has him really practically incarcerated all his life. You
20 know, he's up to 66 years old, plus ten years supervised
21 release. 76 years old.

22 Do you really think, Your Honor, that that is a
23 sentence that is sufficient but not greater than necessary? I
24 really submit to the Court that it's greater than necessary.
25 The Court, if the Court, for example, even following the PSR's

1 analysis of a level 33, with a Criminal History Category of
2 II, would establish a guideline of 151 to 188, you know, if
3 the Court were to impose the 151, the defendant would be
4 serving 17.7 years, Your Honor.

5 Don't you think that -- I mean, I'm requesting, I'm
6 trying to ask the Court for a middle, middle of the ground
7 position, not as low as I initially requested, certainly not
8 what the prosecutor requested. But a middle of the road.
9 Instead of 19.2, 17.7, Your Honor.

10 THE COURT: Would he still -- would he still have the
11 right to appeal?

12 MR. CASTRO LANG: Would he what?

13 THE COURT: Would he still have the right to appeal?

14 MR. CASTRO LANG: If you put a sentence of 17.7, we
15 won't, we won't have a right to appeal, because, Your Honor,
16 the guideline -- if you impose 151, that is within the Plea
17 Agreement. So I would -- then I would not be able to
18 appeal.

19 THE COURT: Let's review this again. Let's review
20 this again. I gave him 170, correct?

21 MR. CASTRO LANG: That's correct.

22 THE COURT: And you're asking for how much now?

23 MR. CASTRO LANG: I'm asking for a guideline sentence
24 of 151 months, which happens to be the lower end of the level
25 33 of the PSR, which is higher than the plea, and in the

1 middle, middle range of the level 32 of the Plea Agreement.
2 So it's not -- it's a middle of the ground request that would
3 fall within the terms of the waiver of appeal clause.

4 MR. VERONDA: Judge, I just want --

5 MR. CASTRO LANG: And that I feel, again, Your Honor,
6 quite frankly, 17.7 years, can you really say that conceding
7 that small amount that somehow the criminal justice system is
8 being hurt? I really just don't see it. Quite the contrary.
9 I think you're conserving economic resources that quite
10 frankly we should be thinking more of that than we do.

11 Certainly the punishment and deterrence is there,
12 because anyone that hears a 47-year-old got 17.7 years, by
13 God, plus ten years supervised release, that's a hell of a
14 long time, Your Honor. No one loses anything. The defendant
15 leaves with at least a sense that, gee, the Judge, you know,
16 did the right thing. And really no one loses.

17 MR. VERONDA: Judge, I just wanted to point out,
18 since Mr. Castro-Lang mentioned that the recommendation was
19 168 months, if the Court is concerned about the waiver of
20 appeal --

21 THE COURT: I'm not concerned about anything.

22 MR. VERONDA: Okay. So he was talking about
23 reconsideration. I just wanted you to hear from the
24 government further before you did anything.

25 THE COURT: Here the lower end was 151 and the high

1 end was 188, correct?

2 MR. CASTRO LANG: Yes, Your Honor, following the PSR,
3 it's 151 to 188.

4 THE COURT: Let's talk about the PSI. So if it's 151
5 and 188, the difference between the two is 37 months, correct?

6 MR. CASTRO LANG: Excuse me. I --

7 THE COURT: The different is 37 months between the
8 two ranges.

9 MR. CASTRO LANG: The difference, yes, between the
10 170 -- no. The difference, 161 -- is 19 months.

11 THE COURT: 19 months.

12 MR. CASTRO LANG: 19 months between what you imposed
13 and what I am suggesting to the Court. A difference of 19
14 months.

15 THE COURT: I am going to make a very minor change
16 here. Rather than 170, we're going to make it 168. Other
17 terms and conditions are the same. And I already warned him -

18 -

19 MR. CASTRO LANG: One more year, Your Honor?

20 THE COURT: What?

21 MR. CASTRO LANG: One year. One year.

22 THE COURT: One year?

23 MR. CASTRO LANG: Can you give me one year?

24 THE COURT: And you are not going to appeal? He's
25 going to certify he's not going to appeal?

1 MR. CASTRO LANG: No appeal. Give me one year. Give
2 me one year.

3 THE COURT: So you want actually -- you actually want
4 me to give him rather than 170 --

5 MR. CASTRO LANG: 168 minus 12 is 156.

6 THE COURT: 156.

7 MR. CASTRO LANG: Yes, Your Honor.

8 MR. VERONDA: Judge.

9 THE COURT: Yes.

10 MR. VERONDA: The Court has made its ruling.

11 THE COURT: Made a ruling, yes.

12 MR. VERONDA: I really don't think --

13 THE COURT: He has a right to ask for
14 reconsideration.

15 MR. VERONDA: I understand he has a right to ask for
16 resentencing, but it's practically bargaining at this point.

17 THE COURT: It seems to me I am going to make it 165,
18 as I said before.

19 MR. CASTRO LANG: 165.

20 THE COURT: 165, rather than 170. And then of course
21 the -- I will recognize, if he wants to, to take the matter on
22 appeal. And I warn him or I advised him what his rights are
23 as to that.

24 Any recommendation that you want?

25 MR. CASTRO LANG: Yes, Your Honor. We would request

1 || that the Court recommend Pensacola.

2 THE COURT: Pensacola.

3 MR. CASTRO LANG: And he has been a constant
4 marijuana user, Your Honor. The 500 hour drug course.

5 THE COURT: 500 hour drug abuse treatment program.

6 | What else? That's it?

7 MR. CASTRO LANG: Permission to withdraw.

10 MR. CASTRO LANG: Yes, Your Honor.

11 THE COURT: Thank you.

12 * * *

1 U.S. DISTRICT COURT)
2 DISTRICT OF PUERTO RICO)

3
4 I certify that this transcript consisting of 48 pages is
5 a true and accurate transcription to the best of my ability of
6 the proceedings in this case before the Honorable United
7 States District Court Judge José Antonio Fusté on November 5,
8 2015.

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13 S/ Amy Walker
14 Amy Walker, CSR 3799
15 Official Court Reporter
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