

1 UNITED STATES COURT OF APPEALS  
2 FOR THE SECOND CIRCUIT  
3

4 SUMMARY ORDER  
5

6 RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER  
7 FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF  
8 APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY  
9 ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX  
10 OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY  
11 ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.  
12

13 At a stated term of the United States Court of Appeals for  
14 the Second Circuit, held at the Thurgood Marshall United States  
15 Courthouse, 40 Foley Square, in the City of New York, on the  
16 15<sup>th</sup> day of June, two thousand sixteen.  
17

18 PRESENT: AMALYA L. KEARSE,  
19 RALPH K. WINTER,  
20 DENNIS JACOBS,  
21 Circuit Judges.  
22

23 - - - - -X  
24 UNITED STATES OF AMERICA,  
25 Appellee,  
26

27 -v.- 14-2203  
28

29 LEVIT FERNANDINI,  
30 Defendant-Appellant.  
31

32 - - - - -X  
33

34 FOR APPELLANT: Bruce R. Bryan, Syracuse, NY.  
35

36 FOR APPELLEE: Jessica A. Masella, David W.  
37 Denton, Jr., Anna M. Skotko,  
38 Assistant United States  
39 Attorneys, for Preet Bharara,

1 United States Attorney for the  
2 Southern District of New York, New  
3 York, NY.  
4

5 Appeal from a judgment of the United States District Court  
6 for the Southern District of New York (Crotty, J.).  
7

8 **UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND**  
9 **DECREED** that the judgment of the district court be **AFFIRMED** in  
10 part and **REMANDED** in part.  
11

12 Levit Fernandini appeals from the judgment of the United  
13 States District Court for the Southern District of New York  
14 (Crotty, J.) convicting him of (i) conspiracy to traffic  
15 narcotics, (ii) using a firearm to commit murder during and in  
16 furtherance of the narcotics trafficking conspiracy, and (iii)  
17 discharging a firearm during and in furtherance of the narcotics  
18 trafficking conspiracy. Fernandini was sentenced principally  
19 to life imprisonment, which Fernandini challenges as  
20 unreasonable. We assume the parties' familiarity with the  
21 underlying facts, the procedural history, and the issues  
22 presented for review.

23 **1.** Our review of the substantive reasonableness of a  
24 sentence is "particularly deferential": we will set aside  
25 sentences as substantively unreasonable "only in exceptional  
26 cases where the trial court's decision cannot be located within  
27 the range of permissible decisions"; that is, if the sentence  
28 "shock[s] the conscience," if it "constitutes a manifest  
29 injustice," or if "allowing [it] to stand would damage the  
30 administration of justice." United States v. Aldeen, 792 F.3d  
31 247, 255 (2d Cir. 2015) (internal quotation marks omitted).

32 The district court had sound reasons for imposing a  
33 guidelines sentence of life imprisonment. Fernandini was the  
34 leader of a notorious and ruthless gang for nearly a decade.  
35 As gang leader, he significantly increased the quantity of  
36 narcotics the organization imported and enforced the  
37 organization's territory with violence, including killing or  
38 ordering the killing of rival gang members. The district court  
39 had wide latitude to impose a sentence within the guidelines  
40 range for Fernandini's heinous conduct, notwithstanding the

1 abuse he suffered as a child and the efforts he has made in prison  
2 at rehabilitation. A sentence of life imprisonment does not  
3 create an unwarranted sentencing disparity with Fernandini's  
4 co-defendants; he was the leader who reshaped the gang into a  
5 large-scale narcotics trafficking outfit that protected its  
6 territory with lethal force.

7       **2.** We review a sentence for procedural reasonableness  
8 under a "deferential abuse-of-discretion standard." Gall v.  
9 United States, 552 U.S. 38, 41 (2007). That means a district  
10 court's application of the Sentencing Guidelines is reviewed  
11 de novo and its factual findings are reviewed for clear error.  
12 United States v. Cossey, 632 F.3d 82, 86 (2d Cir. 2011). A  
13 sentence is procedurally unreasonable if the district court  
14 "fails to calculate (or improperly calculates) the Sentencing  
15 Guidelines range, treats the Sentencing Guidelines as  
16 mandatory, fails to consider the § 3553(a) factors, selects a  
17 sentence based on clearly erroneous facts, or fails adequately  
18 to explain the chosen sentence." Aldeen, 792 F.3d at 251  
19 (quoting United States v. Chu, 714 F.3d 742, 746 (2d Cir. 2013)).

20       Fernandini fails to establish that the district court  
21 committed any procedural error. The district adequately  
22 explained the basis for its factual findings, made after a  
23 hearing pursuant to United States v. Fatico, 603 F.2d 1053 (2d  
24 Cir. 1979), and we see no clear error in those findings.  
25 Similarly, the district court properly calculated Fernandini's  
26 offense level as 49 before applying an acceptance of  
27 responsibility reduction, rather than capping it at the highest  
28 offense level listed in the Sentencing Guidelines table (43)  
29 before reducing it. See United States v. Caceda, 990 F.2d 707,  
30 709-10 (2d Cir. 1993). Finally, Fernandini's plea allocution  
31 and the Fatico hearing furnished sufficient evidence to support  
32 application of the sentencing guideline for first degree murder  
33 rather than second degree murder.

34       **3.** Fernandini argues for the first time on appeal that his  
35 guilty plea was factually insufficient. We review this claim  
36 for plain error: there must be error, the error must be obvious,  
37 affect the defendant's substantial rights, and seriously affect  
38 the fairness and integrity of the judicial proceeding. See,  
39 e.g., United States v. Garcia, 587 F.3d 509, 515 (2d Cir. 2009).

