

15-4174
USA v. Delacruz

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 -----

4 August Term, 2016

5 (Argued: November 14, 2016

Decided: July 5, 2017)

6 Docket No. 15-4174

7 _____
8 UNITED STATES OF AMERICA,

9 *Appellee,*

10 - v. -

11 MIGUEL DELACRUZ,

12 *Defendant-Appellant.**
13 _____

14 Before: KEARSE, LOHIER, and DRONEY, *Circuit Judges.*

15 Appeal from a judgment of the United States District Court for the Southern District
16 of New York, Katherine B. Forrest, *Judge*, convicting defendant, following his plea of guilty, of
17 conspiracy to commit robbery, *see* 18 U.S.C. § 1951, and sentencing him principally to 63 months'
18 imprisonment. Defendant challenges his sentence, contending principally that the district court
19 miscalculated his Guidelines-recommended range of imprisonment by erroneously denying him credit

* The Clerk of Court is respectfully directed to amend the caption to conform with the above.

1 for acceptance of responsibility. We conclude that the district court denied the acceptance-of-
2 responsibility adjustment based on clearly erroneous factual findings.

3 Vacated and remanded for resentencing.

4 NOAH SOLOWIEJCZYK, Assistant United States Attorney,
5 New York, New York (Preet Bharara, United States
6 Attorney for the Southern District of New York, Karl
7 Metzner, Assistant United States Attorney, New York,
8 New York, on the brief), *for Appellee*.

9 LOUIS R. AIDALA, New York, New York, *for Defendant-*
10 *Appellant*.

11 KEARSE, *Circuit Judge*:

12 Defendant Miguel Delacruz appeals from a judgment of the United States District
13 Court for the Southern District of New York, Katherine B. Forrest, *Judge*, following his plea of guilty,
14 convicting him of conspiracy to commit robbery, in violation of 18 U.S.C. § 1951, and sentencing him
15 principally to 63 months' imprisonment. Delacruz challenges that aspect of his sentence as
16 procedurally unreasonable, contending principally that the court erred in denying him an advisory
17 Sentencing Guidelines ("Guidelines") reduction in offense level in recognition of his acceptance of
18 responsibility for his offense. We agree. We vacate the sentence and remand for resentencing.

19 I. BACKGROUND

20 The prosecution of Delacruz arose out of a sting operation run by the Drug
21 Enforcement Administration ("DEA"), targeting suspected drug dealer Alex Velez. The investigation

1 culminated in the November 2014 arrests in New York City of Velez and six others including
2 Delacruz ("Velez's crew"), as they believed they were about to carry out a planned robbery of drug
3 dealers. A three-count indictment charged the seven men with (1) interfering with commerce by threat
4 or violence in conspiring to commit such a robbery, in violation of 18 U.S.C. § 1951 (the "robbery
5 conspiracy" or "Hobbs Act" conspiracy) (count one), (2) conspiring to distribute and to possess with
6 intent to distribute the heroin and cocaine they anticipated obtaining in the robbery, in violation of
7 21 U.S.C. § 846 (the "drug distribution conspiracy") (count two), and (3) carrying and using a firearm
8 in furtherance of those two conspiracies, in violation of 18 U.S.C. §§ 924(c)(1)(a)(i) and 2 (count
9 three). All seven eventually pleaded guilty to one or more of the charges against them.

10 Velez pleaded guilty to all four counts of a superseding charging document that
11 included the three counts described above, and he entered into a cooperation agreement with the
12 government. Delacruz pleaded guilty to count one, the robbery conspiracy, with the understanding
13 that the other counts against him would be dismissed. His plea agreement with the government
14 estimated that his Guidelines criminal history category was I; that his total offense level, assuming that
15 he clearly demonstrated acceptance of responsibility for his offense, would be 23; and that his
16 Guidelines-recommended range of imprisonment would be 46 to 57 months.

17 The following description of the relevant events is taken largely from the presentence
18 report ("PSR") prepared on Delacruz by the probation department based on information provided by
19 the government, including DEA surveillance tapes and postarrest-cooperation statements by Velez.

1 A. *The Sting*

2 Starting in mid-2014, a cooperating witness (the "CW") and a confidential informant
3 (the "CI") (collectively, the "Cooperators") working with the DEA attempted to negotiate cocaine and
4 heroin transactions with Velez, who was reputed to be a large-quantity drug dealer in Philadelphia.
5 When those efforts failed, the DEA had the Cooperators ask Velez to help them collect a debt
6 supposedly owed them by one of their narcotics suppliers. In late September, they told Velez the
7 supplier was soon to have a large shipment of narcotics brought to New York City. They asked Velez
8 to rob the couriers; the Cooperators would take the amount owed them and Velez and his crew could
9 keep the rest. Velez immediately agreed and said he knew people who would help.

10 Velez asked Delacruz, a close friend since childhood, to participate in the robbery
11 because he needed a driver and knew Delacruz had a car and a valid license. Velez told the
12 government in a postarrest proffer session that he also recruited Delacruz because he knew Delacruz
13 had been involved in selling drugs. Delacruz agreed to be the driver for the robbery and told Velez
14 he would rent a car for the event. Velez eventually added the other five members of his crew for the
15 supposed robbery: Philadelphians Giovanni Falero, Eduardo Vasquez-Torres ("Vasquez"), and
16 Vasquez's friend Ismael Feliciano, and two New Yorkers, Velez's nephew Riphy Esquea-Martel
17 ("Esquea"), and Esquea's friend, Fausto Espinosa.

18 In mid-October, Delacruz drove Velez from Philadelphia to a location in Manhattan
19 (the "Manhattan Location") near 125th Street and 12th Avenue for a meeting with the Cooperators to
20 discuss robbery details. Velez introduced Delacruz as the driver for the robbery, and Delacruz
21 confirmed his participation. After learning from the Cooperators that the drugs would be arriving in
22 an SUV driven by a woman, accompanied by two men who would be armed, Velez stated that his
23 crew would harm the men.

1 On November 5, Delacruz again drove Velez to Manhattan to meet with the
2 Cooperators. The CI asked whether Delacruz would be participating in the robbery; both Velez and
3 Delacruz responded affirmatively. The Cooperators said they expected the supplier's SUV to be
4 carrying 16 kilograms of cocaine and five kilograms of heroin and expected that one of the men in the
5 SUV would be armed. Velez again indicated that his crew would harm the men in the SUV; he said
6 the crew members with robbery experience would be bringing guns.

7 On November 11, the CW informed Velez by telephone that the SUV would be
8 arriving in New York City with the drug shipment on November 13. On the evening of November
9 13, Delacruz drove Velez and Falero from Philadelphia to Manhattan in a rented Buick, with Vasquez
10 following, driving a Dodge, with Feliciano and two firearms. Velez informed Delacruz and Falero
11 that the men in the Dodge were armed with guns. When the Buick arrived at the Manhattan Location
12 (the Dodge driven by Vasquez had stopped some distance away), Velez got out to speak with the
13 Cooperators and told them that the other car was nearby. The Cooperators urged him to get the other
14 car closer. Velez complied, and soon both the Buick and the Dodge were parked on 125th Street east
15 of 12th Avenue.

16 Delacruz then drove the Buick closer to the Manhattan Location, where the
17 Cooperators approached the Buick and spoke to Velez, Delacruz, and Falero. The conversation (as
18 translated from Spanish, and with "..." representing a pause) included the following exchange between
19 the Cooperators and Delacruz:

20 [Cooperator]: You're not getting out, right? Or, why are you
21 going to...? When we arrive there with...with the thing, how...?

22 [Delacruz]: No. They're going to fight back and we're ["we[]"
23 subsequently clarified as meaning he and Velez] going to be on backup.

24 (Transcript of Meeting on November 13, 2014 ("T-100"), at 14.) Delacruz later added:

1 [Delacruz]: I can assure you that the one in front, that...that tough guy,
2 as you say...

3 [Cooperator]: Well, that...

4 [Delacruz]: That guy...that guy is going to cry like a sissy.

5 (*Id.* at 15.)

6 Minutes later, the DEA signaled the Cooperators to bring Velez and his crew to the
7 supposed robbery location. The Cooperators began to drive, followed by the Buick, but both cars
8 stopped at 125th Street and 12th Avenue; the CI and Velez exited their respective vehicles and had
9 a conversation. After Velez made gestures as if summoning someone, a Toyota livery cab arrived;
10 Esquea got out and handed Velez a black bag. Falero then exited the Buick, and he, Velez, and
11 Esquea walked toward the Dodge. The CI reentered the Cooperators' car, which resumed driving,
12 followed by the Buick and the Toyota.

13 After those three vehicles had gone several blocks, law enforcement officers stopped
14 the Buick and the Toyota; they arrested Delacruz, who was alone in the Buick, and Espinosa, who was
15 driving the Toyota. Meanwhile, the Dodge, in its parking spot on 125th Street, had gotten blocked
16 in by buses, and other officers arrested Vasquez and Feliciano in the Dodge and arrested Falero and
17 Esquea as they were trying to enter the Dodge. Velez, carrying the bag just given him by Esquea, had
18 walked past the blocked-in Dodge when he was arrested. Before his arrest he was observed throwing
19 the bag over a construction fence.

20 Officers recovered the black bag jettisoned by Velez and found inside a loaded
21 semiautomatic firearm. A search of the Dodge revealed two guns, a large knife, gloves, and masks.
22 From the Buick, officers recovered an empty suitcase and an empty fabric bag.

1 B. *Delacruz's Guilty Plea and the Parties' Sentencing Submissions*

2 In August 2015, Delacruz, pursuant to his plea agreement, pleaded guilty to only the
3 robbery conspiracy count. In describing his conduct, Delacruz stated that

4 [f]rom on or about September 2014 to on or about November 13, 2014, I
5 agreed with others to commit a robbery of alleged--alleged drug dealer to take
6 place in the Bronx, New York. In this regard, I was placing a meeting in
7 Manhattan, New York City, where . . . discussions were had to the alleged--

8 MR. AIDALA [Delacruz's attorney]: Alleged.

9 THE DEFENDANT: --robbery. My role in this matter was to act as
10 a lookout. I knew it was illegal to do so.

11 (Plea Hearing Transcript, August 12, 2015, at 11.) Delacruz stated that what they had been planning
12 to steal were drugs. His plea, entered before a magistrate judge, was accepted by the district judge.

13 The PSR prepared on Delacruz found that he had no prior convictions or arrests, and
14 that he thus had a criminal history category of I. It calculated that his total offense level--including
15 recommended downward adjustments totaling three steps for clearly accepting responsibility for his
16 conduct and for timely agreeing to plead guilty--was 23. His Guidelines-recommended range of
17 imprisonment was therefore 46 to 57 months; the PSR recommended the imposition of 46 months.

18 Delacruz's attorney Louis Aidala submitted to the district court a sentencing
19 memorandum urging that Delacruz be sentenced to time served--about 13 months. Without faulting
20 the PSR's calculation of the Guidelines-recommended range, Aidala objected to two aspects of the
21 PSR's factual description of the events: (1) the implication Delacruz had been involved in selling
22 drugs and would be compensated for participating in the robbery by receiving drugs to sell, and (2)
23 the implication that Delacruz had said he himself would harm one of the drug couriers.

24 As to Delacruz's role and anticipated compensation, Aidala stated that

1 Velez agreed to supply four men to commit the robbery and one man
2 as the driver. *Delacruz was to be the driver/lookout.* On the night of the
3 planned "robbery", the defendants arrived in two vehicles, one of which was
4 driven by Delacruz *No contraband was found in the rented vehicle driven*
5 *by Delacruz, or on his person.*

6 (Delacruz Sentencing Memorandum dated November 2, 2015, at 3 (emphases added).) Aidala argued
7 that Delacruz's role was not to accost the couriers or take the drugs from them (*see id.* at 6), nor was
8 he to receive drugs as his compensation:

9 *Delacruz was to have received a fee for driving and being the lookout.* He was
10 not going to sell the purported narcotics or share in the profits, so the claim by
11 Velez that he supposedly recruited Delacruz because he knew him to be
12 engaged in selling narcotics is unconvincing.

13 (*Id.* (emphasis added).) Aidala argued that there was no basis for Velez's statement that Delacruz had
14 previously dealt drugs.

15 As to the PSR's statement that Delacruz had said that Velez's crew would harm one of
16 the male couriers, Aidala argued that "the transcripts of the meetings that were provided to defense
17 counsel by the government contain no such statement by Mr. Delacruz." (*Id.* at 3; *see also id.* at 6
18 (such a statement by Delacruz is "not borne out by the transcripts of said meetings that were provided
19 to counsel by the government. . . . Delacruz said nothing about their hurting the drug supplier who
20 was the intended victim of the robbery".))

21 The government, for its part, urged the district court to impose a term of imprisonment
22 within the 46-to-57 month range recommended by the PSR. As to Delacruz's objections to the PSR's
23 statements that Delacruz had previously dealt drugs and planned to sell the drugs to be stolen from the
24 couriers, the government stated that

25 given the seriousness of Delacruz's offense conduct, *a sentence within the*
26 *Guidelines Range of 46 to 57 months' imprisonment is warranted regardless*

1 *of whether the Court makes a finding with respect to Delacruz's narcotics*
2 *trafficking activities prior to the instant offense.* Similarly, the defense claims
3 that Delacruz was only to receive a fee for driving and being a lookout but that
4 he was not going to sell the purported narcotics or share in the profits. . . . This
5 is inconsistent with the information provided by Alex Velez during his proffer
6 sessions with the Government. Again, because of the serious nature of
7 Delacruz's offense conduct, *the Government respectfully submits that a*
8 *sentence within the Guidelines Range of 46 to 57 months' imprisonment is*
9 *warranted regardless of whether Delacruz was to be compensated with a fee*
10 *or with a share of the profits from selling the drugs. How Delacruz was to be*
11 *compensated is ultimately irrelevant to his culpability.* There is no dispute that
12 Delacruz was to be paid to be a participant in a robbery that he knew was to be
13 a violent robbery of drug dealers using firearms. This is gravely serious
14 conduct irrespective of how Delacruz was to be compensated for his role.

15 (Government Letter to Honorable Katherine B. Forrest dated November 11, 2015 ("Government
16 Sentencing Memorandum"), at 2 n.1 (emphases added).)

17 In response to the contention that none of the surveillance recordings showed Delacruz
18 stating that he would harm one of the couriers, the government stated that Velez had identified the
19 voice that said one of the couriers was "going to cry like a sissy" as the voice of Delacruz.
20 (Government Sentencing Memorandum at 4 n.2 (internal quotation marks omitted).) It pointed out
21 that Delacruz was present when Velez told the Cooperators that some members of the crew intended
22 to harm the couriers. (*See id.* at 5.) However, the government argued that regardless of the attribution
23 or interpretation of the "cry like a sissy" statement, a prison term for Delacruz within the range of
24 46-57 months was warranted. (*See id.* at 4 n.2.)

25 Opposing Delacruz's request for a sentence of time-served, the government argued that

26 [a] substantial sentence is necessary in this case to reflect the nature,
27 circumstances, and seriousness of the offense, to promote respect for the law,
28 and to provide just punishment. . . . While the defense in its submission claims
29 that Delacruz "was not part of the actual robbery crew but was rather the
30 driver/lookout," (Delacruz Submission at 6), this characterization understates
31 Delacruz's role substantially. Delacruz, in fact, like all of his six other co-

1 defendants, was an integral part of the robbery crew. *Different members of that*
2 *robbery crew played different roles. Delacruz's role was to act as a driver of*
3 *the one of the vehicles that would carry the stolen narcotics.* Furthermore,
4 Delacruz was present for crucial planning meetings leading up to the planned
5 robbery. Delacruz drove from Philadelphia to New York City with Velez on
6 two separate occasions in order to meet with the CW and the CI to discuss the
7 robbery. *Delacruz was relatively quiet during these meetings, as is reflected*
8 *in the transcripts and recordings of the meetings, and he was introduced by*
9 *Velez as the driver for the robbery.* Nevertheless, he was present for
10 discussions that covered all of the relevant details of the planned robbery: the
11 quantity of drugs that would be stolen, the means that would be used to achieve
12 that end, and the fact that [the] robbery crew would bring firearms to effectuate
13 the robbery. . . . Furthermore, the fact that the robbery crew would harm the
14 male occupants of the SUV carrying the narcotics was also discussed in
15 Delacruz's presence. . . . In addition, on the day of the robbery itself, following
16 the meeting at the gas station, Velez told Delacruz and Falero that Vasquez-
17 Torres had brought firearms with him to commit the robbery, and that he had
18 these firearms stored inside of the Dodge. . . . Accordingly, when Delacruz
19 drove *with the other members of the robbery crew to New York City on*
20 *November 13, 2014, he understood full well that he was about to participate*
21 *in a violent, armed robbery of drug dealers.*

22 (*Id.* at 5. (emphases added).) However, the government noted that Delacruz was the only defendant
23 who had been allowed to plead guilty just to count one, which--unlike the drug distribution conspiracy
24 and firearm counts--carried no mandatory minimum term of imprisonment. It stated that

25 this was due to the fact that the Government determined that *Delacruz's offense*
26 *conduct--while quite serious--was less serious than that of his co-defendants*
27 *because Delacruz was solely to act as the driver for the robbery.*

28 (Government Sentencing Memorandum at 6 (emphasis added).)

29 C. *The Fatico Hearing*

30 By order dated November 13, 2015, the district court *sua sponte* scheduled a *Fatico*
31 hearing--*i.e.*, an evidentiary hearing relating solely to punishment, *see United States v. Fatico*, 603
32 F.2d 1053, 1057 & n.9 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980)--in order to determine, *inter*

1 *alia*, the factual bases for (a) Velez's belief that Delacruz had sold drugs in the past and (b) the PSR's
2 allegation that Delacruz had stated that the crew was going to harm one of the drug couriers. At the
3 outset of the hearing, as well as later in writing and again orally at Delacruz's sentencing hearing,
4 Aidala objected to the holding of a *Fatico* hearing into any alleged past drug dealing by Delacruz,
5 unrelated to his offense conduct, arguing that consideration (both by the PSR and by the court) of
6 conduct unrelated to the robbery conspiracy offense violated Delacruz's due process rights. The
7 district court rejected this contention, orally at both hearings and in a written order.

8 At the *Fatico* hearing, two witnesses testified. An interpreter testified to the accuracy
9 of Spanish-to-English translations of recorded conversations among the Cooperators, Velez, and
10 Delacruz. Velez testified with respect to the issues raised by the district court in calling for the
11 hearing. (*See Fatico* Hearing Transcript, November 19, 2015 ("*Fatico* Tr."), at 19-117.)

12 As to Delacruz's past conduct, Velez testified that he knew Delacruz had been involved
13 in selling drugs because he and Delacruz occasionally "had done business" selling cocaine (*Fatico*
14 Tr. 35) from some time in 2012 to the time of his arrest (*see id.* at 36), and that he "was involved with
15 [Delacruz] in drug sales a few times" (*id.* at 87). But Velez then denied that he was "involved," saying
16 instead, "that I was always there, like present" (*id.*). Velez testified that he did not supply Delacruz
17 with drugs (*see id.*) and had no involvement in Delacruz's sale of drugs (*see id.* at 86), but that he
18 "saw" Delacruz sell drugs perhaps six times (*e.g., id.* at 82). Velez testified that Delacruz's sales took
19 place near where he and Delacruz lived in Philadelphia, in "[d]aylight" hours, "outside on the street"
20 with "people all about." (*Id.* at 86.)

21 Although Velez had identified Delacruz as the recorded speaker who said one of the
22 couriers was "going to cry like a sissy," Velez did not testify that Delacruz himself intended to inflict

1 physical injury. Velez testified that his crew members had specific areas of responsibility in the
2 planned robbery. He had discussed with Delacruz the role Delacruz would play (*see Fatico* Tr. 116),
3 and the understanding was that Delacruz "was going to drive the [car] that was going to come up from
4 [sic] New York to [sic] Philadelphia. Then he was going to transport the drugs that had been stolen
5 on the return trip to Philadelphia" (*id.* at 34).

6 Q. . . . Mr. Delacruz's role was to rent a car and to drive you to New
7 York on the day of [sic] this fantasy robbery was to take place, correct?

8 A. Yes.

9 Q. His role was not to possess a weapon and it was not to actually
10 participate in the actual robbery, correct? That was not his role, correct?

11 A. What do you mean by participate in the robbery?

12 Q. *He wasn't going to go into the van, as others were supposed to do,*
13 *with guns drawn and actually commit the robbery?*

14 A. Yes.

15 Q. In fact, his role was the most minor of any of yours, isn't that
16 correct?

17

18 A. *His role was to come up to New York with me and then transport*
19 *the drugs back to Philadelphia and help me sell them in Philadelphia.*

20 (*Fatico* Tr. 79 (emphases added).)

21 Velez testified that he had never personally participated in a robbery of drug dealers
22 before (*see id.* at 32, 70), and to the best of Velez's knowledge, neither had Delacruz (*see id.* at 74).
23 Velez testified that the "people that [he] expected were going to actually physically take the drugs
24 from the people in the SUV" were Falero, Vasquez, and Feliciano. (*Id.* at 116.)

1 D. Sentencing

2 At Delacruz's sentencing hearing, the district court adopted the factual descriptions
3 in the PSR (*see* Sentencing Transcript, December 14, 2015 ("S.Tr."), at 5), and overruled both of
4 Delacruz's objections. As to the statement that Delacruz had previously engaged in sales of narcotics,
5 which the court concluded was "supported by a preponderance of the evidence" (S.Tr. 7), the court
6 found

7 that that statement is appropriately included in the PSR, including with respect
8 to this defendant, based on, among other things, the testimony of Mr. Velez at
9 the Fatico. The Court had credited that testimony to the extent that it indicates
10 that the defendant had had involvement in narcotics transactions.

11 *I would note that that does not mean that the defendant is being*
12 *sentenced for a conviction of participation in a narcotics conspiracy. He did*
13 *not plead guilty to that. He pled guilty only to the conspiracy to commit and*
14 *participate in a Hobbs Act robbery. Nonetheless, the Court uses the facts set*
15 *forth in the PSR for overall background in terms of the crime itself but also in*
16 *consideration of the 3553(a) factors.*

17 (S.Tr. 5-6 (emphases added); *see also id.* at 10.)

18 As to the PSR's suggestion that Delacruz said that he himself would harm one of the
19 drug couriers, the court rejected Delacruz's objection, stating that it found that interpretation to be

20 appropriately supported by a preponderance of the evidence based *not on a*
21 *quote* as to something like that in terms of direct language but in terms of the
22 concept, which is taken from T-100.

23 (S.Tr. 6 (emphasis added).) The court referred to Delacruz's recorded statement that "'I can assure you
24 that the one in front, that, that tough guy as you say,' then 'That guy, that guy is going to cry like a
25 sissy.'" (*Id.* at 7). It also referred to

26 [Delacruz's] state[ments] that he is going to be backup
27 when they fought and that the guy is going to cry like a
28 sissy. I believe at least one reasonable inference, in fact

1 I would say it's a logical and *the most likely inference,*
2 *is that there would be harm* that would potentially come
3 to that fellow.

4 As I tried to indicate, *it wasn't a quote,* going to harm the main target
5 drug supplier. Those are words which are used to convey the inference.

6 (*Id.* at 11 (emphases added).)

7 The district court declined to accept the PSR recommendation that Delacruz be given
8 credit, in the calculation of his Guidelines offense level, for acceptance of responsibility. The court
9 stated that

10 *[t]o receive that credit, the Court must find that the defendant has*
11 *truthfully admitted the conduct comprising the offense and also not frivolously*
12 *contest[ed] relevant conduct that the Court determines to be true.* I find that
13 based upon the submissions of the defendant and the positions of the
14 defendant, acceptance of responsibility is not appropriately included here.

15 While the defendant has accepted some responsibility for his offense
16 and has pled guilty to participating in his role, *he maintains in his submission*
17 *of December 5th that he was not going to participate in a robber capacity.* I
18 do note that the government had indicated at one point in a submission that he
19 had been solely a driver.

20 However, the Court finds that based upon the findings of fact that it has
21 now made, including those included in the PSR, it is absolutely clear that the
22 defendant was heavily involved in this, that he was involved in the planning,
23 he participated in at least a couple of the meetings. And while *he was quiet,*
24 *and I think that is clear,* and while *there may have been others who were going*
25 *to be more directly involved in actually removing the drugs from the car,* he
26 was certainly there in an important capacity.

27 I also would point to the defense submission at pages 5 to 6 of the first
28 submission, also paragraph 39 of the PSR, where *he indicated that he was*
29 *going to be, quote, just a lookout when he spoke with probation.* I don't
30 believe that that is supported by the totality of the facts before the Court. *He*
31 *was not going to be just a lookout.*

1 So, I decline to include the acceptance of responsibility

2 (S.Tr. 13-14 (emphases added).)

3 The government, asked if it wished to comment on this, said:

4 One point of clarification *from the government's perspective is the*
5 *government's view of the evidence was that the defendant's physical role was*
6 *to be that of a driver.* The government didn't mean to imply that the defendant
7 didn't have other responsibilities with respect to the *planning* of this crime.

8 (*Id.* at 14 (emphases added).)

9 The court adhered to its view that Delacruz had not met the requirements for
10 acceptance-of-responsibility credit. (*See id.* at 17.) Without that credit, Delacruz's total offense level
11 was 26, making the Guidelines-recommended range of imprisonment 63-78 months. In ordering
12 imprisonment for 63 months, the district court stated, *inter alia*,

13 *it is important to the Court that you were there at the very initial planning*
14 *meetings.* You were there in October during the initial meeting. You were
15 there in November during the other meetings. You were, as I mentioned,
16 ready, willing, and able.

17 You were *the go-to man for the leader* of this particular drug robbery
18 conspiracy, Mr. . . . Velez. I believe that the transcript of the wire recording
19 that captures you, among others, indicates that *you were deeply in this, that you*
20 *were fully prepared and certainly understood exactly what would be required.*

21 I do credit the Velez testimony that you were a close friend of his, that
22 you were involved in the narcotics trade, and that you understood that there
23 would be 16 kilos of cocaine and 5 kilos of heroin on the other end of this, and
24 that you believed you stood to gain from that.

25 I also believe that *it is significant that you were willing to participate*
26 *in the aspects of the crime that would have involved the potential for violence,*
27 *namely, that you would have made the lead drug dealer cry like a sissy, to*
28 *quote your words.*

29 I also find significant a fact that we have not talked about, which is that
30 your car had in it an empty suitcase and an empty fabric bag, which are tools

1 of the trade of robbers who expect to take home fruits of robbery, not just
2 deposit into their pockets certain money that they may be paid. If you are paid
3 large sums of money or certainly if you are paid in the form of cocaine and
4 heroin, a suitcase and a fabric bag can come in quite useful.

5 (S.Tr. 27-28 (emphases added).) The court concluded:

6 Based upon the Court's consideration of all the factors under 3553(a),
7 the Court does believe that a sentence of 63 months is appropriate. That is a
8 guideline sentence. But irrespective of the guidelines, the Court would impose
9 the same sentence in any event. It is the Court's view that it is a 3553(a)
10 sentence, a sentence which appropriately reflects for you all of the
11 requirements for sentencing and that it is a sufficient but not greater than
12 necessary sentence.

13 (*Id.* at 29.)

14 II. DISCUSSION

15 On appeal, Delacruz contends principally that his sentence is procedurally unreasonable
16 because the district court miscalculated his Guidelines-recommended range of imprisonment, denying
17 him the acceptance-of-responsibility adjustment based on clearly erroneous findings of fact. He also
18 pursues his contentions that the holding of a *Fatico* hearing was a violation of his right to due process
19 and that it was impermissible for the district court to credit Velez's hearing testimony.

20 The latter contentions are meritless, and we dispose of them at the outset. First, it has
21 long been established that the Due Process Clause does not restrict a court with respect to the type of
22 information it may consider for purposes of sentencing. *See, e.g., Williams v. New York*, 337 U.S.
23 241, 246 (1949); *Apprendi v. New Jersey*, 530 U.S. 466, 481 (2000) ("[N]othing in th[e] history [of
24 the common law of sentencing] suggests that it is impermissible for judges to exercise discretion--

1 taking into consideration various factors relating both to offense and offender--in imposing a judgment
2 within the range prescribed by statute." (emphasis omitted)). *Williams* reflects "the underlying
3 philosophy of modern sentencing," which "is to take into account the person as well as the crime by
4 considering 'information concerning every aspect of a defendant's life.'" *Wasman v. United States*, 468
5 U.S. 559, 572 (1984) (quoting *Williams*, 337 U.S. at 250). Accordingly, federal sentencing statutes
6 provide that the sentencing court, "in determining the particular sentence to be imposed, shall
7 consider," *inter alia*, "the nature and circumstances of the offense and the history and characteristics
8 of the defendant," 18 U.S.C. § 3553(a)(1), and that "[n]o limitation shall be placed on the information
9 concerning the background, character, and conduct of a person convicted of an offense which a court
10 of the United States may receive and consider for the purpose of imposing an appropriate sentence,"
11 *id.* § 3661. "[H]ighly relevant--if not essential--to [the] selection of an appropriate sentence is the
12 possession of the fullest information possible concerning the defendant's life and characteristics.'
13 Allowing consideration of such a breadth of information ensures that the punishment will suit not
14 merely the offense but the individual defendant." *Wasman*, 468 U.S. at 564 (quoting *Williams*, 337
15 U.S. at 247).

16 While principles of due process do not bar the sentencing judge from "consider[ing]
17 any and all information that reasonably might bear on the proper sentence for the particular
18 defendant," *Wasman*, 468 U.S. at 563, what the Due Process Clause does require is that a defendant
19 not be sentenced on the basis of "materially untrue" assumptions or "misinformation," and that he have
20 an opportunity to respond to material allegations that he disputes, in order that the court not sentence
21 him in reliance on misinformation, *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *see also* Guidelines
22 § 6A1.3(a) ("When any factor important to the sentencing determination is reasonably in dispute, the

1 parties shall be given an adequate opportunity to present information to the court regarding that
2 factor."). Thus, when, as here, the PSR contains a material factual assertion that the defendant
3 disputes and that the sentencing court wishes to accept, some kind of hearing for the presentation of--
4 and challenge to--evidence is required, rather than barred, by principles of due process.

5 Second, we reject Delacruz's contention that Velez's testimony as to prior narcotics
6 dealing by Delacruz was incredible as a matter of law. The ability of the district judge--who has seen
7 and heard the witness--to make credibility determinations is superior to that of the appellate court, *see*,
8 *e.g.*, *Gall v. United States*, 552 U.S. 38, 51 (2007), and the district judge as factfinder has

9 considerable discretion in resolving evidentiary inconsistencies. Inconsistency
10 may prompt a factfinder to reject both versions of an account, or to accept one
11 over the other based on a finding that one witness's recollection is more
12 reliable or credible than the other. Moreover, a factfinder who determines that
13 a witness has been "inaccurate, contradictory and even untruthful in some
14 respects" may nevertheless find the witness "entirely credible in the essentials
15 of his testimony." *United States v. O'Connor*, 650 F.3d 839, 855 (2d Cir.2011)
16 (internal quotation marks omitted); *United States v. Coté*, 544 F.3d 88, 99 (2d
17 Cir. 2008) (holding that factfinder can resolve conflicts in witnesses' testimony
18 by rejecting extremes and concluding that truth lies "somewhere in between"),

19 *United States v. Messina*, 806 F.3d 55, 64 (2d Cir. 2015).

20 In this case, it would have been helpful for the district court to "carefully explain[] its
21 credibility finding," *id.*, especially given that there was much in Velez's testimony at the *Fatico*
22 hearing that was vague, equivocal, or inconsistent. He testified variously, for example, as to his own
23 prior drug dealing (*see Fatico* Tr. 27, 80, 94 (testifying both that he typically bought only 10 grams
24 of heroin at a time, but that he had dealt in large quantities and was moving a lot of narcotics when
25 he was first contacted by the Cooperators)); as to information he had received from the Cooperators
26 (*see id.* at 76-77 (testifying both that the Cooperators did not tell him what kind of drugs the SUV

1 would be carrying and that the Cooperators told him the SUV would be carrying heroin and cocaine));
2 as to the planned disposition of the stolen drugs (*see id.* at 38, 60 (testifying both that all of the drugs
3 were to be taken to Philadelphia to be sold there, and that some were to be retained by Esquea and
4 Espinosa in New York)); and--most importantly with respect to his assertion that Delacruz had
5 previously dealt drugs--as to the foundation for that assertion (*see id.* at 35, 86-87 (testifying variously
6 that he and Delacruz "had done business" selling cocaine, but that he neither supplied Delacruz nor
7 had anything to do with any of the sales; and that he "was involved with [Delacruz] in drug sales a few
8 times" but that he was only "present," not involved)).

9 Notwithstanding these inconsistencies and equivocations in Velez's *Fatico* hearing
10 testimony--and despite the defense argument that Velez's claim that Delacruz had previously "engaged
11 in selling narcotics [wa]s unconvincing" because Delacruz "was not going to sell the purported
12 narcotics" (Delacruz Sentencing Memorandum at 6)--there was independent evidence in the record
13 to support his testimony (quoted in Part I.C. above) that he and Delacruz planned to sell the stolen
14 narcotics (*see, e.g., Fatico* Tr. 79). In the criminal complaint initiating this prosecution, sworn to on
15 the day after the arrests--apparently prior to any cooperation by Velez (*see, e.g., id.* at 29, 69 (Velez
16 initially lied to the government about his name and his birthplace))--the DEA agent's summary of the
17 November 5 recorded meeting among the Cooperators, Velez, and Delacruz included the description
18 that "[VELEZ] and DELACRUZ suggested that they could sell the CW's portion of the drugs in
19 Philadelphia on behalf of the CW" (Complaint dated November 14, 2014 ("Criminal Complaint"),
20 ¶ 13(d)). Given the record as a whole and the district court's ability to observe Velez's testimony, we
21 cannot conclude that it was impermissible for the court to accept his testimony that Delacruz had
22 previously been engaged in drug sales.

1 We reach a different conclusion with respect to the district court's ruling that Delacruz
2 should be denied credit for acceptance of responsibility.

3 A. *Acceptance-of-Responsibility Adjustments*

4 The Guidelines authorize a two-step decrease in offense level if the defendant "clearly
5 demonstrates acceptance of responsibility for his offense." Guidelines § 3E1.1(a). Entry of a plea of
6 guilty before trial is "significant evidence of acceptance of responsibility" but does not automatically
7 entitle the defendant to such an adjustment. *Id.* § 3E1.1 Application Note 3. If the court decides that
8 that adjustment is warranted, and if the defendant's offense level without any acceptance-of-
9 responsibility credit is at least 16, the court--on motion of the government representing that the
10 defendant has saved the government the time and effort of preparing for trial, "permitting the
11 government and the court to allocate their resources efficiently," by giving timely notice of his
12 intention to plead guilty--may decrease the defendant's offense level by one additional step. *Id.*
13 § 3E1.1(b).

14 In deciding whether a defendant qualifies for the two-step adjustment, the district court
15 should consider, *inter alia*, whether the defendant has

16 truthfully admitt[ed] the conduct comprising the offense(s) of conviction, and
17 truthfully admitt[ed] *or not falsely den[ied]* any additional *relevant conduct* for
18 which the defendant is accountable under § 1B1.3 (Relevant Conduct).

19 *Id.* § 3E1.1 Application Note 1(A) (emphases added). Relevant conduct includes "all acts and
20 omissions committed . . . by the defendant . . . that occurred during the commission of the offense of
21 conviction, in preparation for that offense, or in the course of attempting to avoid detection or

1 responsibility for that offense." *Id.* § 1B1.3(a)(1)(A). As to relevant conduct, however, commentary
2 to the acceptance-of-responsibility guideline specifies that

3 *a defendant is not required to volunteer, or affirmatively admit, relevant*
4 *conduct beyond the offense of conviction in order to obtain a reduction under*
5 *subsection (a).* A defendant may remain silent in respect to relevant conduct
6 beyond the offense of conviction without affecting his ability to obtain a
7 reduction under this subsection.

8 *Id.* § 3E1.1 Application Note 1(A) (emphasis added). Thus, "the paramount factor in determining
9 eligibility for § 3E1.1 credit is whether the defendant truthfully admits *the conduct comprising the*
10 *offense or offenses of conviction,"* *United States v. Kumar*, 617 F.3d 612, 637 (2d Cir. 2010)
11 ("*Kumar*") (quoting *United States v. Teyer*, 322 F.Supp.2d 359, 376 (S.D.N.Y. 2004) (Lynch, then-
12 *District Judge*) (emphasis ours)), *cert. denied*, 563 U.S. 1028 (2011). A denial of acceptance-of-
13 responsibility credit "for behavior which [the defendant] has continued to deny *and has not been*
14 *proved against him beyond a reasonable doubt*" violates the Fifth Amendment. *United States v.*
15 *Oliveras*, 905 F.2d 623, 631 (2d Cir. 1990) (emphasis added); *see, e.g., United States v. Austin*, 17
16 F.3d 27, 29-31 (2d Cir. 1994) ("*Austin*") (defendant who was charged with illegal purchase and resale
17 of 36 firearms but was allowed to plead guilty with regard to only five, could not be denied
18 acceptance-of-responsibility credit for refusing to assist the government in the recovery of the
19 remaining 31); *United States v. Santiago*, 906 F.2d 867, 871, 873-74 (2d Cir. 1990) ("*Santiago*")
20 (sentencing court could not properly deny acceptance-of-responsibility credit based on defendant's
21 refusal to admit past drug dealing not charged in the indictment).

22 Nonetheless, "a defendant who falsely denies, or frivolously contests, relevant conduct
23 that the court determines to be true has acted in a manner inconsistent with acceptance of
24 responsibility." Guidelines § 3E1.1 Application Note 1(A); *see, e.g., United States v. Rivera*, 96 F.3d

1 41, 43 (2d Cir. 1996) (upholding denial of § 3E1.1 reduction where defendant had not shown
2 "contrition and candor"). As the sentencing judge "is in a unique position to evaluate a defendant's
3 acceptance of responsibility," her determination whether or not to grant the reduction is "entitled to
4 great deference on review," Guidelines § 3E1.1 Application Note 5, and we will not disturb that
5 determination unless it is "without foundation," *e.g.*, *Kumar*, 617 F.3d at 635 (internal quotation
6 marks omitted); *United States v. Zhuang*, 270 F.3d 107, 110 (2d Cir. 2001) (internal quotation marks
7 omitted); *United States v. Reyes*, 9 F.3d 275, 280 (2d Cir. 1993) (internal quotation marks omitted);
8 *Santiago*, 906 F.2d at 874 (internal quotation marks omitted).

9 In light of a defendant's due process right to contest alleged factual errors in his PSR,
10 his good-faith objection to material PSR statements that he disputes does not provide a proper
11 foundation for denial of the acceptance-of-responsibility credit. *See generally United States v. Lee*,
12 653 F.3d 170, 172, 174 (2d Cir. 2011) (impermissible for government to withhold a motion for the
13 third-step reduction after defendant timely pleaded guilty but objected to a PSR assertion, thereby
14 triggering the need for a *Fatico* hearing); *see also Austin*, 17 F.3d at 30 (holding that the district court's
15 denial of acceptance-of-responsibility credit based on conduct "beyond the offense of conviction"
16 lacked a proper foundation).

17 B. *Sentencing Procedure and Our Standard of Review*

18 Under the current federal sentencing regime, despite the Sentencing Guidelines having
19 been declared advisory rather than mandatory, "a district court should begin all sentencing proceedings
20 by correctly calculating the applicable Guidelines range. . . . [T]he Guidelines," while not the only
21 consideration, "should be the starting point and the initial benchmark." *Gall*, 552 U.S. at 49. The

1 court should then, "after giving both parties an opportunity to argue for whatever sentence they deem
2 appropriate, . . . consider all of the § 3553(a) factors to determine whether they support the sentence
3 requested by a party." *Id.* at 49-50.

4 The court of appeals reviews a sentence for both procedural and substantive
5 reasonableness. It

6 must first ensure that the district court committed no *significant procedural*
7 *error, such as failing to calculate (or improperly calculating) the Guidelines*
8 *range, treating the Guidelines as mandatory, failing to consider the § 3553(a)*
9 *factors, [or] selecting a sentence based on clearly erroneous facts.*

10 *Id.* at 51 (emphases added).

11 Assuming that the district court's sentencing decision is procedurally sound, the
12 appellate court should then consider the substantive reasonableness of the
13 sentence imposed under an abuse-of-discretion standard. When conducting
14 this review, the court will, of course, take into account the totality of the
15 circumstances

16 *Id.*; *see id.* at 41 ("courts of appeals must review all sentences . . . under a deferential abuse-of-
17 discretion standard"); *United States v. Cavera*, 550 F.3d 180, 188 n.5 (2d Cir. 2008) (en banc) ("the
18 'unreasonableness' standard is a particularly deferential form of abuse-of-discretion review"), *cert.*
19 *denied*, 556 U.S. 1268 (2009).

20 "A district court . . . necessarily abuse[s] its discretion if it base[s] its ruling on an
21 erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v.*
22 *Hartmarx Corp.*, 496 U.S. 384, 405 (1990); *see, e.g., United States v. Carter*, 696 F.3d 229, 232 (2d
23 Cir. 2012).

1 C. *The District Court's Bases for Denying Acceptance-of-Responsibility Credit to Delacruz*

2 The district court's statements at the sentencing hearing indicate that the court denied
3 Delacruz acceptance-of-responsibility credit because it viewed him as falsely attempting to minimize
4 his participation in the robbery conspiracy, based on two findings of fact. We conclude that both
5 findings are clearly erroneous.

6 1. *The "quote, just a lookout" Finding*

7 As quoted in Part I.D. above, one of those findings was the court's statement that the
8 PSR reflected that "when [Delacruz] spoke with probation," "he indicated that he was going to be,
9 *quote, just a lookout*" (S.Tr. 14 (emphases added)). The court found that supposed indication false
10 because, it found, Delacruz "was not going to be just a lookout." (*Id.*) There is indeed every
11 indication in the record that Delacruz was not to be just a lookout but was to be the getaway driver
12 taking the stolen narcotics back to Philadelphia. But the court's finding that Delacruz told probation
13 that his role was "just" to be a lookout is clearly erroneous. There is no statement in the PSR saying
14 that Delacruz claimed being a lookout was his only role.

15 We note that in his plea allocution, Delacruz stated that his role was to be a lookout;
16 but he did not say that that was his only role, and he was not asked at the plea hearing to elaborate on
17 any aspect of the robbery other than what the crew had been planning to steal. It may sometimes be
18 possible to discern from a defendant's demeanor a lack of candor indicating an attempt to conceal
19 greater culpability; but in this case the district judge was in no position to make such an assessment
20 since she did not preside over the plea allocution hearing. Although she accepted the plea, that hearing
21 was conducted by a magistrate judge. And following the entry of his plea, the defense submissions

1 to the court unfailingly described Delacruz as either the "driver/lookout" or, more often, simply the
2 "driver." (*See* Delacruz Sentencing Memorandum at 3, 5, 6; Letter from Louis R. Aidala to Hon.
3 Katherine B. Forrest dated December 5, 2015, at 1, 3.)

4 The government's sentencing submission likewise noted that Delacruz described
5 himself as either the "driver/lookout" or the "driver." (Government Sentencing Memorandum
6 at 2 n.1., 5, 6.) The government did not suggest in any way that Delacruz had sought to deny his role
7 as driver.

8 Plainly, the judge believed the PSR to have stated that Delacruz claimed to probation
9 that he was only a lookout; that belief is clear from her precision in saying, "*quote*, just a lookout"
10 (S.Tr. 14 (emphasis added)). And that finding stands in clear contrast to other inferences or findings
11 that she stated were "*based not on a quote*" (*id.* at 6 (emphasis added); *see also id.* at 11 ("it wasn't a
12 quote")). However, as the PSR nowhere says that Delacruz stated to probation that he was to be just
13 a lookout, the court's finding that he did so state is clearly erroneous.

14 2. *The Finding that Delacruz Said He Would Inflict Harm*

15 The district court also found that Delacruz, when he told the Cooperators that one of
16 the drug couriers would "cry like a sissy," meant that he personally would harm the courier.
17 Addressing Delacruz at the sentencing hearing, the court said it found that "you were willing to
18 participate in the . . . violence, namely that *you* would have made the lead drug dealer cry like a sissy,
19 to quote your words" (S.Tr. 27-28 (emphasis added)). While "cry like a sissy" did indeed quote
20 Delacruz's own recorded words, Delacruz did not in fact say that he would be the one to inflict the

1 harm. And the circumstances shown in the record provide no support for the court's finding that
2 Delacruz meant that he would do so personally.

3 First, while the court found that Delacruz was Velez's "go-to man" (*id.* at 27), we have
4 seen nothing in any of Velez's statements to indicate that Delacruz expected or was expected
5 personally to participate in the violence. At Velez's mid-October meeting with the Cooperators--the
6 third planning meeting, but the first that was attended by Delacruz (*see* Criminal Complaint ¶¶ 9-11)--
7 Velez said that "DELACRUZ would be the driver, and that the robbery crew would consist of five
8 men" (*id.* ¶ 11(b)), and "that the robbery crew would shoot the robbery victims" (*id.* ¶ 11(c)). Velez's
9 testimony at the *Fatico* hearing was similar. He testified that the members of his crew had various
10 roles (*see Fatico* Tr. 116-17) and that his understanding with Delacruz was that Delacruz's role was
11 to be the driver who brought Velez to New York and drove the stolen drugs back to Philadelphia (*id.*
12 at 34). Velez testified that at the first meeting with the Cooperators that was attended by Delacruz,
13 the Cooperators emphasized that Velez's crew needed "to be armed to commit th[e supposed] robbery"
14 (*id.* at 75) because the men in the SUV would be armed and were "very dangerous" (*id.* at 38). Velez
15 testified that he had never known Delacruz to be involved in robbing drug dealers (*see id.* at 74) and
16 that the men who would actually seize the drugs from the couriers were Falero, Vasquez, and
17 Feliciano (*see id.* at 116).

18 While the court found that Delacruz had an "important capacity" in the planned robbery
19 (S.Tr. 14), the record indicates that his importance was as the getaway driver. The anticipated robbery
20 "was supposed to be a situation where people ran up to a van, snatched people and got the narcotics,"
21 not a theft from a fixed location. (*Fatico* Tr. 103.) Especially with respect to a moving target, there
22 could be no assurance of easy access to and egress from a parking place in Manhattan (indeed, when

1 the Cooperators gave the signal to leave for the site of the supposed ambush, the Dodge was in fact
2 penned in by buses, even with the driver in it), and as Velez told the Cooperators at the meeting in
3 which he introduced Delacruz as the driver, after the robbery the crew would want to make a "quick"
4 exit from New York (Criminal Complaint ¶ 11(c)).

5 Second, contrary to the district court's finding that, with respect to the anticipated
6 violence, "[Delacruz] w[as] fully prepared" for "exactly what would be required" (S.Tr. 27), we have
7 seen no evidence that Delacruz had a weapon. There is of course no question that Delacruz was aware
8 that the crew planned violence against the couriers: The surveillance tapes reveal that Velez so stated
9 to the Cooperators at the first meeting Delacruz attended and reiterated that statement to them at the
10 second meeting Delacruz attended; Velez said some crew members would be bringing guns. But the
11 tapes also show, as the district court noted, that Delacruz was "quiet" in those meetings (S.Tr. 14).
12 We have been pointed to no statements *by Delacruz* about harm coming to anyone until his recorded
13 statement on the night of November 13, a few minutes before the supposed robbery was to take place:
14 When Delacruz made the statement that he and Velez would be backup and that the tough guy was
15 going to cry like a sissy, he, Velez, and the rest of the crew were assembled in Manhattan, poised to
16 follow the Cooperators to the anticipated ambush site. Although Falero, Vasquez, and Feliciano,
17 whose job it was to subdue the couriers and seize the drugs, had brought weapons, they apparently
18 brought only three--the two guns and a knife found in the Dodge. And although Velez had Esquea
19 bring him a gun, there is no evidence that a gun was brought by or for Delacruz. When Delacruz was
20 arrested in the Buick, he was alone with nothing but an empty suitcase and an empty fabric bag.

21 In sum, we have seen nothing in the record to support the district court's finding that
22 Delacruz meant, in saying that the armed and dangerous courier was going to cry like a sissy, that that
23 was to result from harm inflicted on him by the unarmed Delacruz.

