

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

SUMMARY ORDER

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2 At a stated term of the United States Court of Appeals for the Second Circuit, held at the  
3 Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 3<sup>rd</sup> day  
4 of February, two thousand twelve.

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6 Present:

7 DENNIS JACOBS,  
8 *Chief Judge,*  
9 PIERRE N. LEVAL,  
10 DEBRA A. LIVINGSTON,  
11 *Circuit Judges,*

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15 UNITED STATES OF AMERICA,

16  
17 *Appellee,*

18  
19 v.

Nos. 10-5215-cr (Lead)  
10-5315-cr (Con)

20  
21 HECTOR HERNANDEZ,

22  
23 *Defendant-Appellant.*  
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25  
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27 For Appellee:

John J. Durham, Assistant United States Attorney (Peter A. Norling, Assistant United States Attorney, *on the brief*), for Loretta E. Lynch, United States Attorney, Eastern District of New York, Brooklyn, New York.

1 For Defendant-Appellant: Joyce C. London (Michael A. Young, *on the brief*), Joyce C.  
2 London P.C., New York, New York.  
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5 Appeal from the United States District Court for the Eastern District of New York  
6 (Feuerstein, *J.*).  
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8 **ON CONSIDERATION WHEREOF**, it is hereby **ORDERED, ADJUDGED**, and  
9 **DECREED** that the judgment of the district court entered September 16, 2010, be and hereby is  
10 **VACATED**, and the matter **REMANDED**.

11 Defendant-Appellant Hector Hernandez appeals from a judgment of the United States  
12 District Court for the Eastern District of New York, sentencing him on remand from this Court to  
13 a term of 384 months' imprisonment. We assume the parties' familiarity with the underlying  
14 facts, the procedural history of the case, and the issues on appeal.

15 In 1991, following a jury trial, Hernandez was convicted of four counts related to  
16 conspiracies to distribute narcotics, kidnap and assault, commit murder, and use a firearm in a  
17 drug trafficking offense. *See United States v. Hernandez*, 604 F.3d 48, 50-51 (2d Cir. 2010). On  
18 December 20, 1991, District Judge Thomas C. Platt sentenced Hernandez to 405 months of  
19 incarceration, five years of supervised release, a \$250,000 fine, and a \$200 special assessment.  
20 *See id.* at 51. The 405-month sentence reflected a four-level enhancement for Hernandez's  
21 leadership role in the offenses that had been included in the pre-sentence report. *See id.*

22 In December 1993, this Court affirmed the finding of guilt. *See United States v. Rosa*, 11  
23 F.3d 315, 345 (2d Cir. 1993). However, we also found that Judge Platt had made no factual  
24 findings to justify the four-level leadership enhancement. "Accordingly, we vacate[d]  
25 Hernandez's sentence and remand[ed] for a factual finding on that issue." *Id.* at 344.  
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1           The resentencing process did not begin for 15 years—until August 2008. By that point,  
2 Hernandez had already served 19 years in prison. While incarcerated, he had maintained a clean  
3 disciplinary record, earned a business degree and a diploma in financial planning, tutored other  
4 inmates, and received positive performance reports in his prison jobs. *See Hernandez*, 604 F.3d  
5 at 53. Hernandez cited to this evidence of rehabilitation and urged Judge Platt to impose a  
6 sentence lower than 405 months.

7           Judge Platt, however, rejected these arguments, asserting that his only obligation on  
8 remand was to make a factual finding as to the four-level leadership enhancement. In his  
9 Statement of Reasons, he explained that “[t]he action was remanded from the United States  
10 Court of Appeals for the sole purpose of placing findings as to the defendant’s role in the  
11 offenses . . . .” *Id.* at 52. Judge Platt added that, notwithstanding the narrow remand mandate, he  
12 had “entertained the motions presented in defendant’s sentencing memorandum. All those  
13 arguments were denied.” *Id.* He reimposed a 405-month sentence on March 27, 2009.

14           On appeal, we again vacated the sentence. We found that “the district court procedurally  
15 erred in failing to consider how intervening developments—in particular, Hernandez’s  
16 rehabilitation—affected the Section 3553(a) analysis.” *Id.* at 53. During the 15 years that  
17 elapsed between the issuance of our mandate and the 2009 resentencing, “the law of sentencing  
18 substantially evolved, and Hernandez may have undergone a remarkable rehabilitation.” *Id.* at  
19 54. We ruled that, in view of these changed circumstances, Judge Platt was obligated to re-  
20 sentence Hernandez *de novo*. *See id.* Because Judge Platt had confined his fact finding to  
21 evidence bearing on the four-level leadership role enhancement, we held that “[t]his procedural  
22 error requires vacatur of the 2009 re-sentencing and remand for a third sentencing proceeding.”  
23 *Id.* at 55.

1           Rather than remand to Judge Platt, we directed that the case be reassigned to a different  
2 district judge. *See id.* We observed that “Judge Platt has twice imposed a 405-month sentence  
3 without making the required findings or without providing the necessary assurance that all of the  
4 relevant factors have been considered,” *id.* at 56, and we expressed concern that Judge Platt  
5 would ““have substantial difficulty ignoring his previous views during a third sentencing  
6 proceeding,”” *id.* (quoting *United States v. DeMott*, 513 F.3d 55, 59 (2d Cir. 2008)). We added  
7 that ““an objective observer might . . . question [the judge’s] impartiality.”” *Id.* (brackets in  
8 original) (quoting *DeMott*, 513 F.3d at 59).

9           On remand, the case was reassigned to District Judge Sandra J. Feuerstein. Upon  
10 resentencing, Judge Feuerstein declined to consider the disputed issue whether Hernandez should  
11 receive a four-level leadership enhancement. She stated, “In my opinion, Judge Platt clearly and  
12 concisely stated the reasoning for the four-level leadership enhancement, and since he was the  
13 trial judge and substantiated the enhancement based upon the evidence which was adduced at the  
14 trial, I will not revisit that issue . . . .” Judge Feuerstein then imposed a sentence of 384 months.  
15 Hernandez appealed.

16           We conclude that, by declining to revisit the issue and instead accepting Judge Platt’s  
17 imposition of the four-level leadership enhancement, Judge Feuerstein failed to accord  
18 Hernandez a *de novo* resentencing. We directed that the case be reassigned for resentencing  
19 because we believed that having a different district judge sentence Hernandez was necessary to  
20 preserve ““the appearance of fairness.”” *Hernandez*, 604 F.3d at 56 (quoting *DeMott*, 513 F.3d at  
21 59). The purpose of the reassignment was defeated if the newly assigned judge relied on and  
22 adopted the findings of the prior judge. The purpose of our mandate required that the newly

1 assigned judge make her own determinations as to all aspects of the sentencing decision. *See*  
2 *United States v. Rigas*, 583 F.3d 108, 118 (2d Cir. 2009); *United States v. Quintieri*, 306 F.3d  
3 1217, 1228 (2d Cir. 2002). We therefore vacate the sentence and remand with instructions to the  
4 district court to conduct a *de novo* resentencing.

5 Because Hernandez will be resentenced *de novo*, we need not consider his arguments as  
6 to other aspects of the sentence imposed. The judgment of the district court is hereby  
7 **VACATED**, and the matter **REMANDED**.

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FOR THE COURT:  
CATHERINE O’HAGAN WOLFE, CLERK