

1 UNITED STATES COURT OF APPEALS

2 FOR THE SECOND CIRCUIT

3 August Term, 2010

4 (Argued: February 9, 2011 Decided: August 23, 2011)

5 Docket Nos. 08-4211-cr(L), 09-0074-cr(CON), 09-0610-cr(CON),
6 09-1493-cr(CON), 09-3266-cr(CON), 09-3801-cr(CON)
7
8

9 UNITED STATES OF AMERICA,
10

11 Appellee,
12

13 v.
14

15 NIKOLAI NADIRASHVILI, also known as Nikoloz Nadirashvili, also
16 known as Nikush, LEVAN CHVELIDZE, DIMITRIY VOROBAYCHIK, IOSEB
17 KHARABADZE, also known as Soso, CHRISTIAAN DEWET SPIES, also
18 known as David, and ARTUR SOLOMONYAN, also known as Alex,
19

20 Defendants-Appellants,
21

22 JOSEPH COLPANI, also known as Joe, MICHAEL GUY DEMARE, also known
23 as Michel, ARMEN RAZMIK BARSEGHYAN, SPARTAK VAHAGN YERIBEKYAN,
24 LEVON SOLOMONYAN, ALLAH MCQUEEN, RAJAB CHAVIS, also known as
25 Jabs, also known as Keith Chavis, GAREGIN GASPARYAN, also known
26 as Garik, MICHAEL JIMENEZ, also known as Mike, NIEMAN MYLES, also
27 known as Luis, WILLIAM JESUS THOMAS, VAKHTANG MACHITIDZE, TIGRAN
28 GEVORGYAN, also known as Tiko, ARMAND ABRAMIAN, also known as
29 Armo,
30

31 Defendants.
32
33

34 B e f o r e: WINTER, POOLER, and HALL, Circuit Judges.

35 Appeals by six defendants from a conviction after a jury
36 trial in the United States District Court for the Southern

1 District of New York (Richard J. Holwell, Judge) for a variety of
2 weapons trafficking offenses. Appellants challenge, inter alia,
3 the sufficiency of the evidence underlying their convictions, the
4 constitutionality of 22 U.S.C. § 2778(b)(1)(A)(ii) as applied to
5 one appellant, and the district court's Sentencing Guidelines
6 calculation for another appellant. We find that the district
7 court used the wrong standard in applying certain offense level
8 enhancements under Section 2K2.1(b) of the Federal Sentencing
9 Guidelines during one appellant's offense level calculation. We
10 therefore vacate that appellant's sentence and remand for
11 resentencing. We affirm in all other respects.

12 HERALD PRICE FAHRINGER (Erica T.
13 Dubno, Nicole Neckles, on the
14 brief), Fahringer & Dubno, New
15 York, New York, for Defendant-
16 Appellant Nadirashvili.

17
18 Susan V. Tipograph, Thomas Eddy,
19 New York, New York, for Defendant-
20 Appellant Chvelidze.

21
22 KELLY J. SHARKEY, Brooklyn, New
23 York, for Defendant-Appellant
24 Vorobeychik.

25
26 JAMES E. NEUMAN, New York, New
27 York, for Defendant-Appellant
28 Kharabadze.

29
30 JOHN BURKE, Brooklyn, New York, for
31 Defendant-Appellant Spies.

32
33 SETH GINSBERG (Louis V. Fasulo,
34 Fasulo, Shalley, and DiMaggio, New
35 York, New York, on the brief), New
36 York, New York, for Defendant-
37 Appellant Solomonyan.

1 DAVID B. MASSEY, Assistant United
2 States Attorney (Preet Bharara,
3 United States Attorney, on the
4 brief, Matthew L. Schwartz and
5 Andrew L. Fish, of counsel), United
6 States Attorney's Office for the
7 Southern District of New York, New
8 York, for Appellee.
9

10 WINTER, Circuit Judge:

11 Nikolai Nadirashvili, Levan Chvelidze, Dimitriy Vorobeychik,
12 Ioseb Kharabadze, Christiaan Dewet Spies, and Artur Solomonyan
13 appeal from their convictions after a jury trial before Judge
14 Holwell. Appellants were convicted of a variety of weapons
15 trafficking offenses, described in greater detail below. These
16 appeals followed.

17 We address three of the many issues raised by appellants,
18 finding, after due consideration, their remaining arguments to
19 lack merit. We hold that the evidence was sufficient to support
20 all of the convictions and reject a vagueness-as-applied argument
21 raised by Kharabadze. However, the district court employed the
22 wrong standard of proof at sentencing in imposing increases to
23 Solomonyan's base offense level under Section 2K2.1(b)(1)(E) and
24 (b)(3)(A) of the Federal Sentencing Guidelines. We therefore
25 vacate Solomonyan's sentence and remand for resentencing.
26 Otherwise, we affirm.

27 BACKGROUND

28 a) The Evidence

29 Because this is an appeal from a jury trial, we briefly

1 describe the evidence in the light most favorable to the
2 government. See United States v. Gomez, 580 F.3d 94, 97 (2d Cir.
3 2009).

4 From February 2004 until March 2005, the government
5 conducted an investigation into a suspected weapons trafficking
6 ring with the aid of confidential source Kelly Davis. Davis
7 posed as a middleman for buyers of firearms and explosives while
8 cooperating with the government. Upon the government's
9 direction, David resumed prior conversations with Spies about
10 Spies' efforts to obtain something "Russian made" for Davis.
11 Spies put Davis in touch with Solomonyan, who in turn contacted
12 Kharabadze. Using court-authorized wiretaps, the government
13 recorded calls between Solomonyan and Kharabadze in which
14 Kharabadze said, "[e]verything has been put on hold" because
15 "government forces . . . relocated [to the Russian side] and
16 there's no making a deal with them." Solomonyan reported back to
17 Spies about the "obstacles." A few days later, however,
18 Solomonyan told Spies he was dealing with "very serious people"
19 and that the deal was "ninety-nine point nine percent."

20 In May 2004, Davis, Spies, and Solomonyan discussed how to
21 obtain and ship "grenades," "warheads," "missiles," and
22 "launchers," and Solomonyan repeatedly asked Davis to create an
23 order list. The following month, Solomonyan asked Kharabadze to
24 create a price list because he "ha[d] to show [the buyer]
25 something real." Kharabadze agreed to create the list and told

1 Solomonyan he could pick it up the following morning. The next
2 day, before leaving to attend a meeting with Davis and Spies,
3 Solomonyan visited Kharabadze's apartment building for
4 approximately an hour. At the meeting with Davis and Spies,
5 Solomonyan wrote something on a piece of paper, handed it to
6 Davis, and told him to memorize it. In addition to discussing
7 the weapons on the list, Solomonyan also told Davis that he had
8 "overstayed" his visa and asked whether Davis could help. The
9 meeting was resumed two days later, when the three discussed
10 weapons, dimensions, shipping options, and prices in some detail.

11 Later that month, Solomonyan spoke over the phone with a man
12 named Artur Barseghyan about "exercises taking place [in
13 Leninakan, Armenia]" in which "everything that Georgia owned was
14 dumped there. And it's being actively taken out of there." Six
15 months later, in December 2004, Solomonyan spoke to Armen
16 Baregamyanyan, who was in Azerbaijan, about "merchandise" that would
17 go from Leninakan to Georgia to the United States. In January
18 2005, Davis, at the direction of the FBI, told Solomonyan and
19 Spies that he was "under a lot of pressure" and that the "time
20 limit is two weeks." He also said that he had green cards for
21 Solomonyan and Spies, but could not deliver them until he got the
22 "products."

23 Over the following two weeks, Solomonyan made contact with a
24 man in Armenia and managed to obtain digital photographs by email
25 of various weapons that were allegedly available, including a

1 mortar launcher, anti-tank gun, and several missile launchers.
2 At a meeting in March 2005, Solomonyan showed these photos to
3 Davis, and the FBI arrested Solomonyan and Spies.

4 As the events above were unfolding, the government
5 instructed Davis to also try to obtain machine guns and
6 semi-automatic rifles already in the United States. In July
7 2004, Solomonyan and Spies spoke about buying new and used
8 "apartments," which the government contended was code for machine
9 guns. On September 11, 2004, Davis gave money to Solomonyan to
10 purchase guns. The same day, Solomonyan called Nadirashvili to
11 ask whether Nadirashvili knew where he could purchase "cars . . .
12 with automatic transmission[s]." Solomonyan explained that he
13 had "been talking to a dealer for a week now" and that a "man
14 came today, gave me the money," but that the dealer had vanished
15 at the last minute. Nadirashvili said, "I understand what you
16 are talking about," and told Solomonyan he would call Chvelidze
17 to see if he could arrange anything. Nadirashvili immediately
18 called Chvelidze. After some initial confusion during which time
19 Chvelidze thought Nadirashvili was talking about actual cars,
20 Chvelidze caught on and told Nadirashvili that he could not get
21 them that day, but to "[t]ell me if you want to place an order or
22 something." Nadirashvili relayed this information to Solomonyan.
23 Solomonyan called Chvelidze the following day to verify that
24 Nadirashvili "told [Chvelidze] about the cars." Chvelidze
25 confirmed this, and said he would try to help. Solomonyan also

1 spoke to Nadirashvili again, who said he would "walk around
2 Brighton" to "see if there's anything there." Neither
3 Nadirashvili nor Chvelidze ultimately obtained any firearms for
4 Solomonyan.

5 Solomonyan also spoke with Vorobeychik on September 12.
6 Vorobeychik informed Solomonyan that he had told a third party,
7 "[Solomonyan] will call you. Don't be afraid of what he's going
8 to talk to you about." Solomonyan said, "I'll call him now," and
9 immediately placed a phone call to Allah McQueen. There was some
10 confusion while Solomonyan tried to get McQueen to understand
11 what he meant by "big trucks with . . . fully automatic
12 transmission." However, after Solomonyan said, "Listen, of
13 course I am not talking about vehicles," McQueen said he
14 understood what they were talking about. Over the next week,
15 Solomonyan and McQueen had a number of phone conversations in
16 which they spoke about setting up a deal involving "dogs,"
17 "puppies," an "AK," "dog food," and "an Israeli," which the
18 government argued was code. On September 30, Vorobeychik asked
19 Solomonyan, "[c]an they really get it?" and Solomonyan responded,
20 "Well, I only need two pieces." Vorobeychik later told law
21 enforcement agents that "they" referred to McQueen. In a
22 conversation in October, Vorobeychik and Solomonyan discussed the
23 possibility of "build[ing] the empire" by dealing directly with
24 McQueen. McQueen ultimately provided Solomonyan and Spies with
25 three firearms. Solomonyan and Spies also obtained five

1 additional firearms, apparently without Vorobeychik's assistance.

2 b) The Verdict and Sentencing

3 The jury convicted Solomonyan, Spies, and Kharabadze of
4 engaging in a conspiracy to traffic in foreign defense articles,
5 in violation of 22 U.S.C. § 2778(b)(1)(A)(ii) and (c) and 18
6 U.S.C. § 922(a)(4), and of trafficking in foreign defense
7 articles (or aiding and abetting thereof), in violation of 22
8 U.S.C. § 2778(b)(1)(A)(ii) and (c). Solomonyan, Spies,
9 Vorobeychik, Nadirashvili, and Chvelidze were convicted of
10 engaging in a domestic firearms trafficking conspiracy, in
11 violation of 18 U.S.C. § 922(a)(1)(A) and (o), of firearms
12 trafficking (or aiding and abetting thereof), in violation of 18
13 U.S.C. § 922(a)(1)(A) and of interstate firearms trafficking (or
14 aiding and abetting thereof), in violation of 18 U.S.C. § 924(n).
15 Solomonyan and Spies were also convicted of illegal transfer and
16 possession of a machine gun (or aiding and abetting thereof), in
17 violation of 18 U.S.C. § 922(o), and being illegal aliens in
18 possession of a firearm (or aiding and abetting thereof), in
19 violation of 18 U.S.C. § 922(g)(5). The district court sentenced
20 appellants as follows: Nadirashvili to 41 months' imprisonment;
21 Chvelidze to 34 months' imprisonment; Vorobeychik to 33 months'
22 imprisonment; Kharabadze to 108 months' imprisonment; Spies to
23 240 months' imprisonment; and Solomonyan to 264 months'
24 imprisonment. In calculating Solomonyan's base offense level,
25 the court found by a preponderance of the evidence that two

1 offense level increases applied pursuant to Section 2K2.1(b) of
2 the Federal Sentencing Guidelines: a 15-point increase for a
3 conspiracy involving a destructive device, and a 10-point
4 increase for a conspiracy involving at least 200 firearms.

5 DISCUSSION

6 Appellants raise a variety of issues on appeal. We
7 expressly address only three of these arguments.

8 a) Sufficiency of the Evidence as to Domestic Firearms 9 Trafficking

10 Appellants Nadirashvili, Chvelidze, and Vorobeychik
11 challenge the sufficiency of the evidence underlying their
12 convictions for aiding and abetting domestic firearms trafficking
13 in violation of 18 U.S.C. § 922(a)(2)(A). Vorobeychik argues
14 that although he put Solomonyan in touch with McQueen, through
15 whom Solomonyan ultimately obtained three firearms, he did not
16 knowingly assist in firearms trafficking because he did not know
17 why Solomonyan wanted an introduction to McQueen. Nadirashvili
18 and Chvelidze both argue that although they knew Solomonyan was
19 trying to engage in one specific weapons transaction, they were
20 unaware that he was engaged in a business of dealing in firearms
21 as required under the statute. They also argue that the evidence
22 did not demonstrate their intent to assist Solomonyan in
23 obtaining weapons. Solomonyan and Spies join in the sufficiency
24 challenges without making individualized arguments.

25 1) Firearms Trafficking Under 18 U.S.C. § 922(a)(1)(A)

1 Section 922(a)(1)(A) makes it illegal for "any person . . .
2 except a . . . licensed dealer, to engage in the business of
3 . . . dealing in firearms, or in the course of such business to
4 ship, transport, or receive any firearm in interstate or foreign
5 commerce." A person is "engaged in the business" of dealing in
6 firearms when he "devotes time, attention, and labor to dealing
7 in firearms as a regular course of trade or business with the
8 principal objective of livelihood and profit through the
9 repetitive purchase and resale of firearms, but such term shall
10 not include a person who makes occasional sales, exchanges, or
11 purchases of firearms for the enhancement of a personal
12 collection or for a hobby, or who sells all or part of his
13 personal collection of firearms." 18 U.S.C. § 921(a)(21)(C). We
14 have held that:

15 [t]he government need not prove that dealing
16 in firearms was the defendant's primary
17 business. Nor is there a 'magic number' of
18 sales that need be specifically proven.
19 Rather, the statute reaches those who hold
20 themselves out as a source of firearms.
21 Consequently, the government need only prove
22 that the defendant has guns on hand or is
23 ready and able to procure them for the
24 purpose of selling them from [time] to time
25 to such persons as might be accepted as
26 customers.

27
28 United States v. Carter, 801 F.2d 78, 81-82 (2d Cir. 1986)

29 (internal quotation marks and citations omitted).

30 2) Application

31 "Although we review a claim of insufficient evidence de

1 novo, a defendant challenging his verdict on sufficiency grounds
2 bears a heavy burden. We must uphold the jury's verdict if we
3 find that any rational trier of fact could have found the
4 essential elements of the crime beyond a reasonable doubt."
5 United States v. Hardwick, 523 F.3d 94, 100 (2d Cir. 2008)
6 (internal quotation marks and alteration omitted) (emphasis in
7 original). We "view the evidence, whether direct or
8 circumstantial, in the light most favorable to the government"
9 and "may not substitute our own determinations of credibility or
10 relative weight of the evidence for that of the jury." Id.
11 (internal quotation marks omitted).

12 The sufficiency challenges brought by Solomonyan and Spies
13 may be quickly resolved. There was evidence that they not only
14 corresponded with each other, as well as with numerous contacts,
15 in their attempts to obtain firearms for Davis, but also
16 succeeded in procuring eight guns. This evidence was easily
17 sufficient for the jury to find beyond a reasonable doubt that
18 Solomonyan and Spies violated Section 922(a)(1)(A) by unlawfully
19 engaging in the business of dealing in firearms.

20 Vorobeychik's challenge is also unfounded. Although he
21 claims to have been in the dark as to Solomonyan's true
22 intentions, the government presented ample evidence to allow the
23 jury to conclude that Vorobeychik knowingly aided and abetted
24 Solomonyan in engaging in a business of dealing in firearms.
25 Transcripts of recorded telephone conversations reveal that

1 Vorobeychik put Solomonyan in touch with McQueen after reassuring
2 Solomonyan that McQueen had been warned not to "be afraid of what
3 [Solomonyan's] going to talk to [him] about." Just a few minutes
4 later, Solomonyan told McQueen that he wanted "[t]rucks with
5 fully automatic transmission or small sport's [sic] cars but
6 still with fully automatic transmissions" and clarified that "of
7 course I am not talking about vehicles." Vorobeychik called
8 Solomonyan two weeks later to ask whether McQueen could "really
9 get it," to which Solomonyan replied, "I only need two pieces."
10 The following month, Vorobeychik and Solomonyan discussed a plan
11 to make "large income" by working directly with McQueen. Within
12 one month of this conversation, Solomonyan obtained three
13 firearms from McQueen. Viewing this evidence in its totality,
14 there were ample grounds for the jury to conclude that
15 Vorobeychik knowingly assisted Solomonyan in his firearms
16 trafficking scheme. The jury was certainly not bound as a matter
17 of law to believe that Vorobeychik and Solomonyan were talking
18 about two completely different things over the course of time.
19 The evidence was, therefore, sufficient to support Vorobeychik's
20 conviction.

21 The evidence against Nadirashvili and Chvelidze was
22 sufficient to support their convictions as well. They argue
23 that, although they were aware Solomonyan was engaged in a single
24 gun transaction, the evidence did not show that they knew he was
25 engaged in the business of trafficking in firearms. The statute

1 does suggest that Nadirashvili and Chvelidze had to know that
2 Solomonyan was engaged in more than just a single sale of
3 weapons, as it defines a person "engaged in the business" of
4 dealing in firearms as one who engages in "repetitive purchase
5 and resale of firearms." 18 U.S.C. § 921(a)(21)(C) (emphasis
6 added). However, the government's burden under Section
7 922(a)(1)(A) is to "prove that the defendant 'has guns on hand or
8 is ready and able to procure them for the purpose of selling them
9 from [time] to time to such persons as might be accepted as
10 customers.'" Carter, 801 F.2d at 82 (quoting United States v.
11 Berry, 644 F.2d 1034, 1037 (5th Cir. 1981)). Thus, the
12 government did not need to prove that Nadirashvili and Chvelidze
13 were aware that Solomonyan was actually engaged in multiple
14 transactions, but rather that they knew Solomonyan had held
15 himself "out as a source of firearms" and was ready to procure
16 them for his customers. Id.

17 Applying this standard, there was sufficient evidence for
18 the jury to find that Nadirashvili and Chvelidze aided and
19 abetted Solomonyan in engaging in the business of dealing in
20 firearms. In their first recorded conversation, Solomonyan told
21 Nadirashvili that he had already received money from a customer
22 in exchange for his promise to deliver automatic weapons.
23 Moreover, Solomonyan explained to Nadirashvili that he had been
24 negotiating with a dealer and needed Nadirashvili's help only
25 because the dealer disappeared at the last minute. Nadirashvili

1 immediately relayed all the pertinent information to Chvelidze,
2 who said he could fill the order within several days, and invited
3 Nadirashvili to "place an order." Nadirashvili and Chvelidze
4 each told Solomonyan directly that they would try to procure
5 firearms for him. Perhaps not every rational trier of fact would
6 conclude that Nadirashvili and Chvelidze knew Solomonyan was
7 engaged in anything more than a one-time transaction. However,
8 the applicable standard of review requires only that "any
9 rational trier of fact could have found the essential elements of
10 the crime beyond a reasonable doubt." Hardwick, 523 F.3d at 100
11 (emphasis in original). Solomonyan's statements to Nadirashvili
12 and Chvelidze demonstrated a familiarity with firearms and a
13 fluency in the coded language used to discuss them over the
14 phone. Solomonyan also suggested that he had contacts with a
15 dealer who actually had firearms in his possession. It would not
16 be unreasonable for a trier of fact to infer from these facts
17 that Nadirashvili and Chvelidze knew Solomonyan was not simply
18 filling a one-time order but was in fact holding himself out more
19 generally as a source of firearms. We therefore affirm their
20 convictions.

21 b) As-Applied Vagueness Challenge to 22 U.S.C. §
22 2778(b)(1)(A)(ii)

23 Kharabadze was convicted under Section 2778(b)(1)(A)(ii) of
24 conspiring to broker in foreign defense articles and aiding and
25 abetting Solomonyan and Spies in their commission of the

1 substantive brokering offense. Section 2778(b)(1)(A)(ii) makes
2 it illegal to "engage[] in the business of brokering activities
3 with respect to the manufacture, export, import, or transfer of
4 any defense article." The regulations define "broker" as "any
5 person who acts as an agent for others in negotiating or
6 arranging contracts, purchases, sales or transfers of defense
7 articles or defense services in return for a fee, commission, or
8 other consideration." 22 C.F.R. § 129.2(a). "Brokering
9 activities" are defined to include "the financing,
10 transportation, freight forwarding, or taking of any other action
11 that facilitates the manufacture, export, or import [of] a
12 defense article." Id. § 129.2(b). The regulations also specify
13 that "engaging in the business of brokering activities requires
14 only one action as described above." Id.

15 Kharabadze contends that his conviction should be vacated
16 because the phrase "the business of brokering activities" is
17 unconstitutionally vague as applied to him. Specifically, he
18 claims that the word "facilitates" is ambiguous and argues that
19 he could not have known that "merely . . . providing information
20 about the availability and prices of foreign defense articles"
21 fell within the statute. Kharabadze Br. at 28 (emphasis
22 omitted).

23 "[T]he void-for-vagueness doctrine requires that a penal
24 statute define the criminal offense with sufficient definiteness
25 that ordinary people can understand what conduct is prohibited

1 and in a manner that does not encourage arbitrary and
2 discriminatory enforcement.'" United States v. Rybicki, 354 F.3d
3 124, 129 (2d Cir. 2003) (quoting Kolender v. Lawson, 461 U.S.
4 352, 357 (1983)). In an as-applied challenge, "one whose conduct
5 is clearly proscribed by the statute cannot successfully
6 challenge it for vagueness." United States v. Nadi, 996 F.2d
7 548, 550 (2d Cir. 1993). Regardless of whether there is
8 ambiguity at the outer reaches of Section 2778, Kharabadze's
9 conduct falls clearly within its intended scope. He provided
10 Solomonyan with a list of estimated prices based on his knowledge
11 of the Russian market for military weapons, knowing that
12 Solomonyan needed the price list in order to negotiate with
13 purchasers who wanted to see "something real" or at least
14 "approximately real." Applying the usual meaning of the word,
15 this conduct unquestionably "facilitate[d]" Solomonyan's import
16 of defense articles. We therefore reject Kharabadze's
17 constitutional challenge to his conviction under Section 2778.

18 c) Offense Level Enhancements Under Section 2K2.1(b) of the
19 Sentencing Guidelines

20 Solomonyan argues that the district court's imposition of
21 two offense level increases -- one for conspiracy involving more
22 than 200 weapons pursuant to U.S.S.G. § 2K2.1(b)(1)(E) and the
23 other for conspiracy involving a destructive device pursuant to
24 U.S.S.G. § 2K2.1(b)(3)(A) -- was erroneous because the court
25 found the requisite facts only by a preponderance of the evidence

1 rather than with reasonable certainty. We agree.

2 Section 2X1.1(a) of the Federal Sentencing Guidelines states
3 that where a conspiracy is not covered by a specific offense
4 guideline, the base offense level is "[t]he base offense level
5 from the guideline for the substantive offense, plus any
6 adjustments from such guideline for any intended offense conduct
7 that can be established with reasonable certainty." (emphasis
8 added). Consequently, the district court correctly looked to
9 Section 2K2.1(a)(4)(B) to set the base offense level at 20
10 because the offense involved possession and transport of a
11 machine gun and was committed while Solomonyan was an illegal
12 alien. However, the offense level adjustments listed in Section
13 2K2.1(b) make no mention of a conspiracy. The district court,
14 therefore, should have reverted to the reasonable certainty
15 standard described in Section 2X1.1(a) when it applied the two
16 offense level increases under Section 2K2.1(b)(1)(E) and
17 (b)(3)(A). See United States v. Savarese, 404 F.3d 651, 655-56
18 (2d Cir. 2005). We therefore vacate Solomonyan's sentence and
19 remand for the district court to make that determination in the
20 first instance. Id.; see 18 U.S.C. § 3742(f)(1) ("If the court
21 of appeals determines that . . . the sentence was imposed in
22 violation of law or imposed as a result of an incorrect
23 application of the sentencing guidelines, the court shall remand
24 the case for further sentencing proceedings with such
25 instructions as the court considers appropriate."). On remand,

1 the district court is instructed to recalculate Solomonyan's
2 offense level for the conspiracy convictions, applying the
3 reasonable certainty standard to any facts underlying the offense
4 level adjustments listed in Section 2K2.1(b).

5 CONCLUSION

6 For the foregoing reasons, we vacate Solomonyan's sentence
7 and remand to the district court for resentencing in accordance
8 with this opinion. We have considered all the arguments advanced
9 by appellants that are not expressly discussed in this opinion
10 and find them meritless. We affirm the remainder of the
11 convictions and sentences.