07-3018-cr

To Be Argued By:
HAROLD H. CHEN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-3018-cr

UNITED STATES OF AMERICA,
Appellant,

-vs-

WARREN HAWKINS,
also known as Paul, also known as Hawk,
Defendant-Appellee,

(For continuation of Caption, See Inside Cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF AND SPECIAL APPENDIX
FOR THE UNITED STATES OF AMERICA

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Defendants.

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Statement of Jurisdiction

The district court (Stefan R. Underhill, J.) had subject matter jurisdiction over this federal criminal case under 18 U.S.C. § 3231. On June 15, 2007, the district court granted the defendant's motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29. JA 380. On July 13, 2007, the government filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b)(1)(B). JA 382. This Court has jurisdiction over the government's appeal from the district court's order granting the defendant's motion for judgment of acquittal pursuant 18 U.S.C. § 3731. *See United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000).

The Solicitor General of the United States has personally authorized this appeal.

Statement of the Issue Presented

Whether the district court, after the jury returned its guilty verdict, erred in acquitting the defendant of conspiracy to possess with intent to distribute cocaine and in finding that the defendant was engaged in a "mere buyer-seller relationship," even though the evidence demonstrated, among other things, that the leader of the drug conspiracy had agreed to provide the defendant with cocaine for resale on credit after the defendant had previously purchased cocaine from the leader for cash on two occasions, and that the defendant had repeatedly told the leader that he intended to distribute the cocaine to other persons.

United States Court of Appeals

FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,
Appellant,

-vs-

WARREN HAWKINS,
also known as Paul, also known as Hawk,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

On May 10, 2006, the government began presenting evidence in its case-in-chief against Defendant-Appellee Warren Hawkins and two co-defendants for conspiring to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846. During the next two weeks, the government's evidence showed, among other things, that an individual named Alex Luna led a drug-trafficking conspiracy in Danbury, Connecticut, primarily from late

2002 to March 4, 2005; that between February 9, 2005, and February 23, 2005, Hawkins called Luna on five separate occasions to obtain distribution-weight quantities of cocaine; that Hawkins and Luna engaged in two cash-for-cocaine sales, including one transaction in which Hawkins told Luna from the outset that he intended to resell the drugs to a third party; and that after these two completed sales, Luna agreed to provide Hawkins with more drugs on credit based on Hawkins' representation that he had lined up a ready third party with $100 to buy cocaine.

At the close of the government's case-in-chief, Hawkins moved for judgment of acquittal pursuant to Fed. R. Crim. P. 29, but the district court denied the motion. The following day, the district court delivered its charge to the jury. Included in the charge was the following instruction which had been neither raised nor discussed at the charge conference: "[W]ithout more, the mere existence of a buyer-seller relationship is insufficient to establish membership in a conspiracy." After less than a day of deliberations, the jury found Hawkins and his two co-defendants guilty. On a special verdict form, the jury found that Hawkins had conspired to distribute less than 500 grams of cocaine, whereas the jury attributed significantly larger quantities to his co-defendants.

Shortly after the jury's verdict, Hawkins moved again for judgment of acquittal and, in the alternative, for a new trial. More than twelve months later, the district court issued a ruling acquitting Hawkins, finding that the government had failed to prove beyond a reasonable doubt

that Hawkins had joined or participated in the conspiracy. In its ruling, the district court relied on *United States v. Gore*, 154 F.3d 34 (2d Cir. 1998), and *United States v. Lechuga*, 994 F.2d 346, 349 (7th Cir. 1992) (en banc), to conclude that Hawkins was at most a buyer of drugs from the charged conspiracy because "[w]ithout more, the mere buyer-seller relationship is insufficient to establish a conspiracy, *even if the seller knows that the buyer intends to resell the drugs*." JA 375 (emphasis added).

The district court, however, erred in two primary respects. First, although the jury delivered a nuanced verdict that distinguished between the relative culpability of Hawkins and his co-defendants, the district court instead chose to reevaluate and reweigh the evidence by viewing discrete facts in isolation and drawing inferences therefrom in the defendant's favor. Specifically, the court chose to infer that Hawkins and Luna did not share the common goal of redistributing drugs, despite the evidence that Hawkins bought distribution quantities of cocaine in rapid succession, told Luna of his plans to resell the drugs, and then agreed to buy more cocaine on credit from Luna based on an anticipated resale of those drugs. In doing so, the district court effectively substituted its judgment for that of the jury. Second, in fashioning its legal standard, the district court not only disregarded this Court's established law on conspiracy, but also selectively read both *Gore* and *Lechuga* without analyzing the facts undergirding the holdings of both cases. Where a supplier engages in a series of distribution-quantity drug sales to a buyer and knows that the buyer intends to resell the drugs, a jury may reasonably infer that both buyer and seller share

a common intent that those drugs be distributed to third parties which makes them co-conspirators. Ironically, a thorough review of *Gore* and *Lechuga* actually supports the district court's original judgment at the close of evidence that there was sufficient evidence for the jury to find Hawkins guilty of narcotics conspiracy. Accordingly, this Court should reverse the district court's order acquitting Hawkins and reinstate the jury's verdict.

Statement of the Case

On March 4, 2005, Hawkins and 19 other defendants were charged by way of criminal complaint for violating 21 U.S.C. §§ 846 and 841. JA 3. On March 17, 2005, a federal grand jury sitting in Bridgeport, Connecticut, returned an indictment that charged Hawkins and his co-defendants with various narcotics-trafficking offenses. *Id*. On September 21, 2005, the grand jury returned a superseding indictment that charged a total of 23 defendants with various narcotics-trafficking and firearms offenses. JA 10, 21, 22. As in the original indictment, the superseding indictment charged Hawkins solely with a violation of 21 U.S.C. §§ 846 and 841 in Count One.

On May 10, 2006, the government began presenting evidence against Hawkins and his co-defendants, Arcadio Ramirez, a/k/a "Peti," and Jose Luis Rodriguez. At the close of the government's case-in-chief on May 22, 2006, Hawkins moved for a judgment of acquittal pursuant to Fed. R. Crim. P. 29 based on the insufficiency of the evidence. JA 226. The district court denied Hawkins' motion, finding that "looking at the evidence in the light most favorable to the government, a reasonable jury could

return a verdict of guilty against each of [the three] defendants." JA 227-28. The defense then presented its case, with the government following with two rebuttal witnesses.

On May 24, 2006, all counsel presented closing arguments, and the district court delivered its jury charge. JA 287-338, 341-50. On May 25, 2006, the jury found all three defendants guilty of Count One. JA 352-53. On a special verdict form, the jury attributed a different quantity of cocaine to each defendant: Rodriguez – 5 kilograms in violation of 21 U.S.C. § 841(b)(1)(A); Ramirez – 500 grams in violation of 21 U.S.C. § 841(b)(1)(B); and Hawkins – less than 500 grams in violation of 21 U.S.C. § 841(b)(1)(C). JA 361-63.

On May 30, 2006, Hawkins filed moved for judgment of acquittal and for a new trial. JA 16. On June 19, 2006, the government moved for an enlargement of time to respond to Hawkins' motions until the court reporter completed the trial transcripts. The district court granted that motion. *Id*. On November 21, 2006, the trial transcripts were completed and filed. JA 18. On December 17, 2006, the government filed a memorandum in response to Hawkins' motions. *Id*.

On February 1, 2007, the court set oral argument for the defendant's motions on February 7, 2007. JA 19. In its order, the court indicated that the government "should be prepared to address Hawkins' argument that the buyer-seller rule announced in *United States v. Gore*, 154 F.3d 34 (2d Cir. 1998), applies to the facts of this case." JA

34a. On February 7, 2007, the court heard oral argument. JA 18.

On June 15, 2007, the district court issued its ruling and order acquitting Hawkins. JA 380. The judgment of acquittal was entered on June 22, 2007. JA 19. On July 13, 2007, the government filed its notice of appeal. JA 382.

Statement of Facts

A. The Evidence at Trial

The evidence is reviewed in the light most favorable to the jury's verdict. The government's evidence revealed that Alex Luna led a large-scale cocaine and cocaine base ("crack") distribution ring in Danbury, Connecticut, primarily from late 2002 until March 4, 2005. JA 65, 102-03. The jury heard evidence about the drug-trafficking activities of Luna and his associates through the testimony of law enforcement officers and cooperating witnesses, surveillance videos, telephone conversations recorded pursuant to a court-authorized Title III wiretap, and the physical exhibits introduced at trial. The evidence showed that Luna, as the undisputed leader of the drug conspiracy, would regularly receive kilogram-sized quantities of cocaine from sources of supply based in New York City. JA 82-87. After receiving shipments of cocaine, Luna and his associates would process and package the cocaine for street sale in hotel rooms, and then distribute it to various street sellers, including Hawkins. JA 72-78, 89-92.

Two cooperating witnesses, Nelson Rosa and Juan Rodriguez, testified about trust as a prerequisite for dealing with Luna and distributing his narcotics. JA 59-61 (Rosa); JA 91-92 (Rodriguez). Rosa testified that during his first encounter with Luna, Luna became angry when he learned that an associate had permitted Rosa to hold Luna's cocaine without Luna's prior consent. JA 59-60. Rosa ultimately joined the Luna drug group only after he gained Luna's trust by smuggling 500 grams of cocaine out of Luna's apartment while the police were conducting surveillance. JA 61. In addition, Rodriguez testified about being with Luna in a hotel room when the conspiracy's principal supplier, Jose Adames a/k/a "Ponpa," arrived holding two kilograms of cocaine. JA 91. When Ponpa viewed Rodriguez with suspicion, Luna made a hand gesture that instantly communicated to Ponpa that Rodriguez was Luna's associate and could be trusted. JA 92.

The trial evidence revealed that Hawkins was a street-level seller who became involved in the Luna drug conspiracy in February 2005, approximately three weeks before he and others were arrested on March 4, 2005. The principal evidence against Hawkins was the testimony of Joshua Febres, Hawkins' co-defendant and a close Luna associate who testified as a cooperating government witness; the testimony of Special Agent Eileen Dinnan of the Drug Enforcement Administration ("DEA"); and, most importantly, five intercepted phone calls and transcripts

from the Title III wiretap: Government Exhibits ("GX") 332, 333, 334, 335, and 336.[1] JA 35-55, 95-225.

In these five phone calls, Hawkins spoke directly to Luna and Febres, and arranged to purchase cocaine directly from both defendants. Febres was a long-time associate of Luna, and also knew Hawkins through Febres' sister. JA 101, 113. Four separate transactions were planned to distribute 19 grams of cocaine; two of these four planned transactions were consummated on February 12 and 17, 2005, and involved a total of 10.5 grams of cocaine.[2] On February 9, 2005, Hawkins spoke to Febres about purchasing five grams of cocaine for $23 per gram:

FEBRES: You coming with five (5) right?
HAWKINS: Yeah.
FEBRES: Alright. So, yeah. He said like . . .
HAWKINS: [U/I].
FEBRES: . . . [Luna] throw you twenty (20) . . . Twenty-three (23) each one. You know what I mean?
HAWKINS: For each one?

---

[1] The transcripts to the phone calls, which were also admitted as full exhibits at trial, are 332A, 333A, 334A, 335A, and 336A. JA 35-55.

[2] The district court's ruling indicated that Luna and his co-conspirators provided Hawkins with 14 grams of cocaine. JA 378. The actual amount of cocaine provided to Hawkins was 10.5 grams. JA 127, 131.

FEBRES: Yeah.
HAWKINS: How, how is it though? Is it like . . .
FEBRES: Yeah, it's . . . . It's official. Trust.
HAWKINS: Alright. Well, yeah. Hook me up.

JA 37-38. As Febres explained, Hawkins wanted to purchase 5 grams of cocaine from Luna, and was inquiring about its quality and price. JA 175-76. Febres further testified that this planned transaction never occurred. JA 117.

Later in the same conversation, Hawkins spoke directly to Luna and said that he wanted to purchase cocaine from Luna in the future. JA 40 ("I want to get fresh with."), 116-17. To that end, Hawkins programmed Luna's telephone number (203/512-0062) into his own cell phone:

HAWKINS: Yah. So uhm . . . If you want me to call Josh [Febres] or you want to give me a number where I can call you when I'm ready or, or . . .
LUNA: This is my number right here.
HAWKINS: Alright, boss. It's, it's in my phone. The five (5), one (1), two (2) joint?
LUNA: Yeah.
HAWKINS: Alright. I'm a leave . . . I'm a lock it in. I'm a leave it in my phone then.
LUNA: You already know.

JA 40. During this call, Hawkins also told Luna that he recently had met up with Mayoral, known as "Pac,"

another Luna associate and a co-defendant in the drug conspiracy. *Id*.

On February 12, 2005, Hawkins called Luna to purchase an eight-ball (i.e., 3.5 grams) of cocaine. Hawkins specifically told Luna that he intended to resell the drugs to two individuals from Hawkins' workplace:

HAWKINS:	These kids . . . from work, like I got two (2) of them. Homie been calling me. He's . . . looking hard, man. Like . . . You know what I mean? And I don't . . . fuck with them nigga's on Beaver or nothing. I don't even be out there.
LUNA:	Yeah.
HAWKINS:	Like that. Um . . . What you . . . What you um . . . you . . . could do the eight (8) things too, the eight (8) buzy's [phonetic]?
LUNA:	Yeah, yeah. I do whatever [unintelligible ("U/I")].
HAWKINS:	Alright. Well um . . . I'll tell you what then . . . When you going . . . I'm a call you back in like about a, a hour . . . .

JA 46-47. Febres testified that Hawkins was telling Luna that Hawkins had a customer who was "looking hard" — that is, looking to purchase cocaine — and that Hawkins wanted to sell Luna's cocaine to this potential customer. JA 126-27. By referring to his aversion for "Beaver,"

Hawkins was telling Luna that Hawkins wanted to avoid the Beaver Street section of Danbury and purchase cocaine from Luna. JA 112, 127.

Special Agent Eileen Dinnan testified that on February 12, 2005, she was conducting surveillance of Luna late in the afternoon. JA 217-18. She further stated that she had observed Luna meet with Hawkins in the parking lot of the Birchwood Condominiums, where Hawkins lived, and apparently engage in a hand-to-hand transaction of drugs. JA 219-21.

On February 17, 2005, Hawkins called Luna to purchase two eight-balls of cocaine for $90 apiece. Hawkins again agreed to pay Luna cash for the drugs:

HAWKINS:	Yo yeah, I'm about to . . . Um . . . there's an ATM right quick . . . what you want for the Um, two . . . two . . . two ballsies, man.
LUNA:	Um . . .
HAWKINS:	Three and a half and three and a half, right.
LUNA:	Yeah, that'll work.
HAWKINS:	You wanted ninety, ninety bucks, a buck eighty, right.
LUNA:	Yeah.
HAWKINS:	Alright, um, I might have that on me right now, I may no have to stop, my nigger. Where you at right now.
LUNA:	I'm at the crib, I'm leaving right now.

* * * *

HAWKINS: Alright, um where ever, where ever you want it, where ever man, I'm over by Wilder Street getting ready to hit White Street right now, you know what I'm saying.

LUNA: Alright since you are right there, Um . . . Double Twister.

HAWKINS: By where?

LUNA: Double Twister.

JA 54-55. Febres testified that he and Luna delivered seven grams of cocaine to Hawkins that evening in the parking lot of the Double Twister ice cream parlor in Danbury. JA 130-31.

On February 23, 2005, Hawkins called Luna to purchase another eight-ball (i.e., 3.5 grams) of cocaine and stated that he had another drug customer lined up,"white boy Tom" from New Milford who had $100. JA 49. Hawkins also stated that because he had just made a child support payment, Hawkins had no cash and asked Luna to provide the cocaine on credit. *Id*. Luna agreed to do so:

HAWKINS: Listen, I just made out a child support payment. They got me for 1,200. They killed your boy. It was either that or they talking about locking a nigga' up over some dumb shit man.

LUNA: Man.

HAWKINS:	So, I just went ahead and paid the shit and *now I'm like total zero*. But, I got this white kid, he waiting for me right now, he got a $100.00. I need a "8 ball" though. You know what I mean? *I need to come from you right now and go give it to him and then hit you right back in the spot* . . . .
LUNA:	Alright, for sure, let me holla at you right back. I got you.
HAWKINS:	Alright. How long it's going to take. I told the white boy Tom, he's here, he's from New Milford.
LUNA:	Yo, I got you. In less than five minutes.
HAWKINS:	Alright.

JA 49. Soon thereafter, Hawkins called back Luna and said, "I'm a grab the dough from [white boy Tom] and come right back and hit you with it." Luna responds, "Alright, alright." JA 52. Febres testified that Hawkins was trying to serve as a "go-between" for this customer from New Milford and the Luna organization. JA 135-36. This transaction, however, was not consummated because Luna was busy processing a large amount of cocaine with Febres. JA 172-73.

On cross-examination, Febres stated that although Hawkins was a drug addict and bought drugs, Hawkins was not "a drug dealer generally." JA 166. Febres further testified that Hawkins did not sell for, or was a member of,

"the Luna drug organization." *Id.*[3] Febres also testified that Rafael Almonte, one of Febres' and Luna's co-defendants in the narcotics conspiracy, was not a member of the Luna drug organization, even though Almonte purchased drugs from Luna and sold them to his own customers. JA 110.

B. The court's jury instructions and the jury's verdict

On May 24, 2006, the district court charged the jury on the second element of conspiracy under 21 U.S.C. § 846 — that is, whether the three defendants, including Hawkins, had knowingly joined or participated in the conspiracy. This charge included the following

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[3] Throughout trial, Hawkins' defense was that he was a drug user and not a reseller of cocaine. *See, e.g.*, JA 119 (counsel's speaking objection in the jury's presence that "Mr. Hawkins doesn't sell drugs"); JA 180 (eliciting testimony from Febres that Hawkins was a drug user). Nevertheless, the district court excluded the testimony of prospective government witness Paul Foshay, who testified outside the presence of the jury that he had purchased cocaine from Hawkins during February 2005 when they worked together at the same company in New Milford, Connecticut. JA 195-99. When later explaining its ruling, the district court stated that to permit Foshay's testimony would be "ridiculously prejudicial" and "not the way it works in the American system." JA 285. Hawkins' attorney later argued during summation that the government had failed to produce evidence of Hawkins' customers; the district court overruled the government's objection. JA 339-40.

instructions, among others:

> In deciding whether any of the defendants was, in fact, a member of the conspiracy, you should consider whether that defendant knowingly and willfully joined the conspiracy. Did he participate in it with knowledge of its unlawful purpose and with the specific intention of furthering its business or objective?
>
> * * * *
>
> The key question, therefore, is whether the defendant joined the conspiracy with an awareness of at least some of the basic aims and purposes of the unlawful agreement.
>
> The defendant's knowledge is a matter of inference from the facts proved. In that connection, I instruct you that to become a member of the conspiracy, the defendant need not have known the identities of each and every other member, nor need he have been apprised of all of their activities. Moreover, the defendant need not have been fully informed about all of the details or the scope of the conspiracy in order to justify an inference of knowledge on his part. Furthermore, the defendant need not have joined the conspiracy at its beginning or joined in all of the conspiracy's unlawful objectives.
>
> The extent of a defendant's participation has no

bearing on the issue of a defendant's guilt. A conspirator's liability is not measured by the extent or duration of his participation. Indeed, each member may perform separate and distinct acts and may perform them at different times. Some conspirators play major roles, while others play minor parts in the scheme. An equal role is not what the law requires. In fact, the agreement to perform even a single act may be sufficient to draw the defendant within the ambit of the conspiracy.

* * * *

What is necessary is that the defendant must have participated with knowledge of at least some of the unlawful purposes or objectives of the conspiracy and with the intention of aiding in the accomplishment of those unlawful ends.

Thus, without more, the mere existence of a buyer-seller relationship is insufficient to establish membership in a conspiracy.[4]

In sum, a defendant, with an understanding of the unlawful character of the conspiracy, must have

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[4] The instruction on the buyer-seller relationship was not raised or discussed at the charge conference. JA 230-81 *passim*. Rather, the district court raised this instruction, as suggested by Hawkins, with the parties immediately before delivering the charge to the jury. JA 287-90. The government lodged its contemporaneous objection. JA 288-89.

> intentionally engaged, advised or assisted in it for the purpose of furthering the illegal undertaking. He thereby becomes a knowing and willing participant in the unlawful agreement – that is to say, a conspirator.

JA 310-13 (emphasis added).

On May 25, 2006, the jury returned its verdict finding Hawkins guilty beyond a reasonable doubt of conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. § 846. JA 352. On its special verdict form, however, the jury attributed less than 500 grams of cocaine to Hawkins, in violation of 21 U.S.C. § 841(b)(1)(C). JA 361. His co-defendants Rodriguez and Ramirez were found to have conspired to distribute 5 kilograms or more of cocaine in violation of 21 U.S.C. § 841(b)(1)(A), and greater than 500 grams but less than 5 kilograms of cocaine in violation of 21 U.S.C. § 841(b)(1)(B), respectively. JA 362.

C. The ruling and order granting the motion for judgment of acquittal

On June 15, 2007, more than twelve months after the jury rendered its verdict, the district court issued its ruling and order acquitting Hawkins and holding that no "rational jurors could find that the government proved beyond a reasonable doubt that Hawkins joined and participated in the charged conspiracy." JA 379. Despite finding that Luna led a drug conspiracy in Danbury, that Hawkins was aware of the conspiracy's existence, and that "it would be

reasonable to find that Hawkins did indeed function as a sort of 'go-between,' reselling to drug users some of the cocaine that had been sold to him by the Luna organization," JA 371, the district court held that "the prosecution proved at most that it is plausible that Hawkins joined the conspiracy, but not that he joined the charged conspiracy beyond a reasonable doubt." JA 379.

In reaching this conclusion, the district court applied a new standard for determining whether a defendant was a co-conspirator or engaged in a buyer-seller relationship: "I expect the Second Circuit to hold that, without more, the mere buyer-seller relationship is insufficient to establish a conspiracy, *even if the seller knows that the buyer intends to resell the drugs*." JA 375 (emphasis added). In fashioning this legal standard, the district court relied primarily on *United States v. Gore*, 154 F.3d 34 (2d Cir. 1998), and the Seventh Circuit's ruling in *United States v. Lechuga*, 994 F.2d 346, 349 (7th Cir. 1992) (en banc). JA 372-75. From these authorities, the district court concluded that, in *Gore*, this Court held "*sub silentio*, that the agreement implicit in the purchase of drugs by the defendant from his supplier cannot constitute the agreement necessary to proof of a violation of section 846." JA 375. While recognizing that "the Second Circuit has not expressly held as much," the district court held that this Court "would likely follow the Seventh Circuit's holding that the agreement necessary to proof of a conspiracy is an agreement to undertake unlawful conduct in addition to the purchase and sale transaction, even when the buyer intends to distribute the purchased drugs." *Id*.

The district court then addressed the trial evidence, which it characterized as demonstrating "that Luna trusted Hawkins," "that Hawkins purchased drugs from Luna on more than one occasion," and "that Luna knew Hawkins intended to distribute the cocaine that Luna sold him." JA 375-76. The court determined that "there [was] no evidence in the phone calls or elsewhere in the record that would support a finding that *Luna agreed to assist Hawkins with Hawkins' sales, except by supplying the cocaine* – conduct that is insufficient to support a conspiracy conviction." JA 376 (emphasis added) ("Just as proof that Hawkins joined the Luna conspiracy requires both Hawkins' knowledge of the Luna conspiracy and his agreement to join it, so, too, proof that Luna sought to aid Hawkins' plan requires both Luna's knowledge of the Hawkins plan and his agreement to further it."). Noting that Febres testified on cross-examination that "Hawkins was not a member of the Luna drug organization and never sold drugs for Luna," *id*., the district court found that "[t]here was no evidence whatsoever that either Luna or Hawkins possessed a shared stake in the sales of cocaine by the other." JA 378. The district court further found that there was no evidence that Hawkins played a significant role in the Luna organization, dealt with large quantities of drugs, received any payments from Luna, or acted under the control or direction of the Luna organization. JA 377-78. Although the government argued that a reasonable inference from the evidence was that Luna and Hawkins shared a relationship of trust in the conspiracy, the district court rejected that argument because it believed Hawkins "did not hold a position of trust within the charged conspiracy." JA 377.

SUMMARY OF ARGUMENT

After the jury returned its guilty verdict, the district court erred in acquitting the defendant of conspiracy to possess with intent to distribute cocaine and in finding that the defendant was engaged in a "mere buyer-seller relationship." In so ruling, the district court held that it would have been unreasonable for the trier of fact to infer that the defendant had joined or participated in a conspiracy, even though the evidence revealed that the leader of a drug conspiracy had agreed to provide the defendant with cocaine for resale on credit after they had consummated two cash-for-drugs transactions in the preceding days. The district court also discounted the probative value of the defendant's multiple statements to the conspiracy's leader that the defendant intended to distribute the cocaine to third parties.

In arriving at its ruling, the district court misstated this Court's longstanding standard for determining whether a defendant joins or participates in a conspiracy to distribute narcotics. Rather than relying on this Court's established authorities, the district court broadly interpreted *United States v. Gore*, 154 F.3d 34 (2d Cir. 1998), and *United States v. Lechuga*, 994 F.2d 346, 349 (7th Cir. 1992) (en banc), to find that a buyer and seller must undertake some additional conduct between themselves to form a conspiracy, and that a jury may not infer a shared intent that drugs will be resold from a seller's knowledge that the buyer intends to resell them. The district court's legal standard rests on a flawed reading of *Gore* and *Lechuga* that disregards the operative facts in both cases. A

thorough analysis of both *Gore* and *Lechuga* actually undermines the district court's rule for conspiracy and supports the reinstatement of the jury's verdict.

ARGUMENT

I. The Evidence Was Sufficient to Support the Jury's Guilty Verdict That Hawkins Joined and Participated in the Drug-Trafficking Conspiracy

A. Relevant Facts

The relevant facts are set forth above in the sections entitled "Statement of the Case" and "Statement of Facts."

B. Governing Law And Standard Of Review

1. Sufficiency of the Evidence and Standard of Review

This Court reviews a district court's grant of a judgment of acquittal *de novo*, *see United States v. Espaillet*, 380 F.3d 713, 718 (2d Cir. 2004), and applies the standard established in *Jackson v. Virginia*, which asks "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," 443 U.S. 307, 319 (1979). "Under this stern standard, a court, whether at the trial or appellate level, may not 'usurp[] the role of the jury.'" *United States v. McPherson*, 424 F.3d 183, 187 (2d Cir. 2005)

(citing *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003)). The evidence must be viewed in its totality, not in isolation, and the "government need not negate every theory of innocence." *United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000); *see also United States v. Podlog*, 35 F.3d 699, 705 (2d Cir. 1994). The jury is "exclusively responsible" for determinations of witness credibility, and a jury's decision to convict may be based upon circumstantial evidence and inferences from the evidence. *United States v. Strauss*, 999 F.2d 692, 696 (2d Cir. 1993).

When reviewing a district court's grant of a Rule 29 motion, "it is the task of the jury, not the court, to choose among competing inferences that can be drawn from the evidence." *Jackson*, 335 F.3d at 180. It is the court's duty to "review all of the evidence presented at trial in the light most favorable to the government, crediting every inference that the jury might have drawn in favor of the government." *United States v. Walker*, 191 F.3d 326, 333 (2d Cir. 1999) (internal quotation marks omitted). The reviewing court cannot "substitute its own determination of . . . the weight of the evidence and the reasonable inferences to be drawn for that of the jury." *United States v. Guadagna*, 183 F.3d 122, 129 (2d Cir. 1999) (internal quotation marks omitted). Stated differently, a court may grant a judgment of acquittal only if it is convinced that "the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." *Id.* at 130 (internal quotation marks omitted). This deference to the jury is particularly relevant in conspiracy cases "because

a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel." *United States v. Morgan*, 385 F.3d 196, 204 (2d Cir. 2004) (internal quotation marks omitted).

2. Conspiracy law under 21 U.S.C. § 846

In every drug conspiracy case, the government must prove two essential elements by direct or circumstantial evidence: (1) that the conspiracy alleged in the indictment existed; and (2) that the defendant knowingly joined or participated in it. *See United States v. Story*, 891 F.2d 988, 992 (2d Cir. 1989); *see also United States v. Snow*, 462 F.3d 55, 68 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1022 (2007); *United States v. Richards*, 302 F.3d 58, 69 (2d Cir. 2002) ("A conviction for conspiracy must be upheld if there was evidence from which the jury could reasonably have inferred that the defendant knew of the conspiracy . . . and that he associat[ed] himself with the venture in some fashion, participat[ed] in it . . . or [sought] by his action to make it succeed.") (internal quotation marks omitted). To prove the first element and establish that a conspiracy existed, the government must show that there was an unlawful agreement between at least two persons. *See United States v. Tejada*, 956 F.2d 1256, 1265 (2d Cir. 1992). The conspirators "need not have agreed on the details of the conspiracy, so long as they agreed on the essential nature of the plan." *United States v. Geibel*, 369 F.3d 682, 689 (2d Cir. 2004) (internal quotation marks omitted). The agreement need not be an explicit one, as "proof of a tacit understanding will suffice." *United States*

v. Rea, 958 F.2d 1206, 1214 (2d Cir. 1992). The co-conspirators' "goals need not be congruent, so long as they are not at cross-purposes." *Id*.

Once the first element has been established, "only slight evidence is required to link another defendant" to the conspiracy. *United States v. Aleskerova*, 300 F.3d 286, 292 (2d Cir. 2002) (internal quotation marks omitted); *see also United States v. Jones*, 30 F.3d 276, 281-82 (2d Cir. 1994) (once conspiracy found to exist, "the link between another defendant and the conspiracy need not be strong"). The evidence of a defendant's participation in a conspiracy should be considered in the context of surrounding circumstances, including the actions of co-conspirators and others because "[a] seemingly innocent act . . . may justify an inference of complicity." *United States v. Calabro*, 449 F.2d 885, 890 (2d Cir. 1971). Moreover, "[t]he business of distributing drugs to the ultimate user seems to require participation by many persons. Rarely, if ever, do they all assemble around a single table in one large conspiracy simultaneously agreed upon and make a solemn compact orally or in writing that each will properly perform his part therein." *United States v. Rich*, 262 F.2d 415, 417 (2d Cir. 1959). "[M]any of the persons who form links in the distribution chain appear never to have met other equally important links." *Id*. at 417-18. But if "there be knowledge by the individual defendant that he is a participant in a general plan designed to place narcotics in the hands of ultimate users, the courts have held that such persons may be deemed to be regarded as accredited members of the conspiracy." *Id*. at 418; *see also United States v. Sureff*, 15 F.3d 225, 230 (2d Cir. 1994)

(defendants who did not know one another held to be members of single conspiracy because they had reason to know they were part of larger drug distribution organization). Furthermore, "the mere fact that certain members of the conspiracy deal recurrently with only one or two others does not exclude a finding that they were bound together in one conspiracy." *United States v. Agueci*, 310 F.2d 817, 826 (2d Cir. 1962).

C. Discussion

1. The trier of fact could have reasonably inferred from the evidence, particularly Luna's agreement to provide Hawkins cocaine on credit, that Hawkins had joined and participated in the conspiracy

In deciding Hawkins' motion for judgment of acquittal, the district court held that although the government had proven beyond a reasonable doubt that there was a conspiracy to possess with intent to distribute cocaine led by Luna, it failed to prove that Hawkins had joined or participated in the conspiracy. The court's reasoning, however, did not comport with this Court's mandate that any court considering a Rule 29 motion must credit inferences from the evidence in the government's favor, *Jackson*, 335 F.3d at 180, view the evidence as a whole and not segregate discrete facts in isolation, *Autuori*, 212 F.3d at 114, and refrain from usurping the jury's role, *McPherson*, 424 F.3d at 187. As a result, the district court effectively substituted its own judgment of the evidence, and the inferences that could be reasonably drawn

therefrom, for those of the jury. *Guadagna*, 183 F.3d at 129.

The government's evidence revealed that Hawkins and Luna had engaged in two consummated transactions in which Luna supplied Hawkins with cocaine, that these transactions occurred because Hawkins had gained Luna's trust, and that Hawkins and Luna had shared a joint goal of having Hawkins resell the cocaine to third parties. Although Luna was extremely suspicious of outsiders and distributed drugs only with people he trusted, JA 58-61, 91-92, Hawkins was able to gain access to Luna through his preexisting relationship with Febres. JA 101, 113. On February 9, 2005, Febres introduced Hawkins to Luna over the telephone. They then discussed the quality and price of five grams of cocaine being offered by Luna, Hawkins' desire to purchase more of Luna's cocaine in the future, and that Hawkins had recently met up with Luna's close associate and charged co-conspirator, Henry Mayoral, a/k/a "Pac." JA 36-40, 113-17. Three days later, Hawkins asked Luna for 3.5 grams of cocaine so Hawkins could re-sell it to two persons from his workplace; later that day, Luna delivered the cocaine to Hawkins in the parking lot of Hawkins' residence. JA 46-47, 126-27, 219-21. Five days later after this sale, Hawkins and Luna discussed a second cash transaction for 7 grams of cocaine. This sale took place at the parking lot of the Double Twister ice parlor, with Luna, Febres, and charged co-conspirator Heriberto Guzman, a/k/a "Crazy Luis," all present. JA 54-55, 128-31.

Six days after the second sale, this burgeoning

relationship based on trust and a shared desire to resell cocaine culminated when Luna agreed to "front" Hawkins, or provide him on credit, 3.5 grams of cocaine. Hawkins told Luna that although he had no cash on hand, Hawkins had a prospective customer, "white boy Tom from New Milford," who had $100 to buy cocaine. JA 48, 137-39, 181-83. Soon thereafter, Hawkins called Luna back and said, "I'm a grab the dough from [white boy Tom] and come right back and hit you with it," to which Luna responded, "Alright, alright." JA 52.

From this record evidence, the trier of fact could have reasonably inferred that Hawkins joined and participated in the drug conspiracy led by Luna. The above facts depict Hawkins as a street-level seller who, during a three-week period, gained immediate access to the otherwise suspicious Luna. In the next eleven days, Hawkins and Luna engaged in two cocaine-for-cash transactions on February 12 and 17, the first for 3.5 grams and the second for 7 grams. Luna personally delivered both amounts to Hawkins, and during the second transaction was accompanied with co-conspirators Febres and Guzman. Six days after the second transaction, Luna agreed to "front" Hawkins with 3.5 grams of cocaine, or supply on credit, because Hawkins stated that he had a ready buyer with cash, "white boy Tom," and that Hawkins intended to pay back Luna immediately after Hawkins resold the cocaine to "white boy Tom." When the above facts are considered in their totality, a trier of fact could reasonably conclude that, during this three-week period, Luna and Hawkins had ultimately established a relationship of trust and coordination in which Hawkins had become a *de facto*

member of Luna's criminal organization instead of an independent contractor.

The heart of the government's proof of Hawkins' knowing participation in the Luna drug conspiracy was the direct evidence of Hawkins' own statements that he intended to obtain Luna's cocaine and resell it to third parties. It rests exclusively within the province of the jury to decide whether to infer from this kind of evidence that Luna and Hawkins formed a conspiratorial agreement. *See McPherson*, 424 F.3d at 187. This Court has not hesitated to reverse district courts that have vacated drug conspiracy convictions premised solely on circumstantial, rather than direct, evidence of conspiratorial intent. *See Espaillet*, 380 F.3d at 719-20 (reversing district court's grant of Rule 29 motion where prosecution presented no direct evidence of defendant's intent, but defendant was present when two other individuals exchanged brick-shaped package of cocaine); *Sureff*, 15 F.3d at 229 (finding evidence of drug conspiracy sufficient where government relied entirely on circumstantial evidence, including coded conversations intercepted by wiretap that could be interpreted as negotiations for drug sales); *United States v. Rodriguez*, 702 F.2d 38, 41-42 (2d Cir. 1983) (reversing district court's grant of Rule 29 motion where prosecution's evidence relied mainly on defendant's conduct consistent with that of a "lookout" during a drug exchange).

Unpersuaded by Hawkins' recorded statements, however, the district court stated that "the pertinent inquiry when considering potential co-conspirators is whether

their 'common goal' is not merely similar, but is actually a shared or joint goal." JA 379. The district court further found that "there [was] no evidence in the phone calls or elsewhere in the record that would support a finding that *Luna agreed to assist Hawkins with Hawkins' sales, except by supplying the cocaine* — conduct that is insufficient to support a conspiracy conviction." JA 376 (emphasis added). The district court also found that "[t]here was no evidence whatsoever that *either Luna or Hawkins possessed a shared stake* in the sales of cocaine by the other." JA 378 (emphasis added); *see also* JA 379 ("Nor is there any evidence that Luna cared what Hawkins did with the drugs. Luna's objective was accomplished once he received the sale proceeds from Hawkins."). Rather, the district court focused on what was missing from the government's case, particularly the court's belief that there was no evidence that Hawkins had a significant role in the Luna organization, dealt with large quantities of drugs, received payments from Luna, or acted under the control of, or in a position of trust within, the Luna organization. JA 377-78. The key error in this analysis was the district court's insistence upon proof of additional *conduct* between Luna and Hawkins, even though they were charged only with the *inchoate* offense of conspiracy, which is satisfied by proof of an agreement alone.

Moreover, a crucial fact omitted in the district court's analysis of whether such an agreement existed was Luna's agreement to extend credit to Hawkins after the two cash-for-cocaine sales were transacted in the preceding 11 days. The usual premise of any credit transaction, whether for legal or illegal goods, is that the buyer is expected to

acquire the necessary funds in the future to pay the seller, even though the buyer does not currently have sufficient funds. Where, as here, the relevant credit sale involves a distribution-weight quantity of illicit drugs,[5] the buyer intends to resell the drugs to a third party in order to obtain cash to pay back the seller. Thus, when drugs are sold on credit, the trier of fact may reasonably infer that the seller not only anticipates that the buyer will resell the drugs, but also that the seller agrees to extend credit precisely because he expects to receive payment after the buyer resells the drugs. Stated differently, when a seller of narcotics extends credit to a buyer, the seller has a vested, ongoing interest in the buyer successfully reselling the drugs to a third party. After all, it would be illogical for a seller to provide drugs to someone who has neither cash nor any tangible prospect of acquiring funds for those drugs in the near future.

Although this Court has not squarely addressed this issue, other courts of appeals have found a drug seller's extension of credit to be a highly probative fact in determining whether a purchaser is a mere buyer or a participant in the drug conspiracy. For example, the Seventh Circuit has "consistently held that evidence of 'fronting' suggests the existence of a conspiracy because it appears *both that the seller has a stake in the success of*

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[5] The jury heard at trial that drug resellers such as government witness Jose Pena would break down eight-balls of cocaine (3.5 grams) into smaller quantities for street sale. For example, an eight-ball of cocaine would be broken down into "20s," which are .3 grams of cocaine. JA 81a, 81b.

the buyer's activities and that a degree of cooperation and trust exists beyond that which results from a series of isolated and sporadic transactions." *United States v. Dortch*, 5 F.3d 1056, 1065 (7th Cir. 1993) (emphasis added). The First Circuit has also held that receipt of a single delivery of illegal drugs on credit was sufficient to bring the buyer within the ambit of the conspiracy. *See United States v. Carbone*, 798 F.2d 21, 27 (1st Cir. 1986) (fronting of half-kilogram of cocaine was "not a single sale; it was a sale for further distribution"); *see also United States v. Ivy*, 83 F.3d 1266, 1286 (10th Cir. 1996) (affirming conspiracy conviction for street-level cocaine dealer because, among other reasons, kingpin's intermediary provided defendant with drugs on credit).

Citing both *Dortch* and *Carbone*, the Third Circuit has similarly found:

> *[A] credit relationship may well reflect . . . trust . . . and often evidences the parties' mutual stake in each other's transactions*. By extending credit to a buyer, the seller risks the possibility that the buyer will be unable to resell the drugs: even if the buyer does successfully resell the drugs, in this generally thinly capitalized "business," *the seller will likely have to wait until the buyer collects the money from his resale before he can pay the seller back for the initial purchase*. In addition, the buyer has a vested interest in the seller's ability to maintain a good working relationship with his supplier, since the buyer will not profit unless the

> drugs continue to flow from the seller's supplier to the seller.

United States v. Gibbs, 190 F.3d 188, 200 (3d Cir. 1999) (emphasis added). In addition, the Tenth Circuit has explained that "the purpose of the buyer-seller rule is to separate consumers, who do not plan to redistribute drugs for profit, *from street-level, mid-level, and other distributors, who do intend to redistribute drugs for profit, thereby furthering the objective of the conspiracy*." *See Ivy*, 83 F.3d 1285-86 (emphasis added).

Here, the government presented evidence that Luna agreed to provide Hawkins with drugs on credit based on Hawkins' explicit representation that he had identified a prospective customer, and that Hawkins would pay back Luna once he had received payment from this third party. In his conversation with Luna, Hawkins acknowledged that he had no available funds, *see* JA 49 (stating that "I just made out a child support payment" and "I'm like total zero"), but assured Luna that he had located a customer with ready cash, *see id*. ("I got this white kid, he waiting for me right now, he got a $100.00."). Although the district court found that Luna was indifferent to Hawkins' plans, *see* JA 379 ("Nor is there any evidence that [the supplier] cared what Hawkins did with the drugs."), that inference is simply not reasonable.[6] More to the point, it

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[6] Although the credit transaction between Luna and Hawkins was never consummated, this does not preclude the trier of fact from relying on the uncompleted credit transaction (continued...)

would have been reasonable for a jury to draw a contrary inference: that if Hawkins had not told Luna that he had a prospective purchaser lined up, Luna would not have agreed to front Hawkins the cocaine, especially because Hawkins had freely disclosed that he was broke after making his last child support payment. Similarly, the jury could have reasonably concluded that if Hawkins had stated that he was broke and wanted the cocaine for his personal use, Luna would not have agreed to provide Hawkins with cocaine.

Furthermore, a reasonable trier of fact could have attached significance to the fact that Luna agreed to extend credit to Hawkins only after the two had previously transacted two drugs-for-cash sales, including one in which Hawkins explicitly told Luna of his intention to resell the cocaine to third parties. JA 46, 126-29. These transactions, which culminated with Luna's agreement to extend credit to Hawkins, reflect a "degree of cooperation and trust" between Hawkins and Luna. *Dortch*, 5 F.3d at 1065. This agreement to extend credit to Hawkins undermines the district court's central findings that there was no evidence that Luna "agreed to assist Hawkins with Hawkins' sales, except by supplying the cocaine," JA 376, and that "either Luna or Hawkins possessed a shared stake

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[6] (...continued)
as evidence of the relationship between Hawkins, Luna, and Luna's organization. After all, the "essence of conspiracy is the agreement and not the commission of the substantive offense." *United States v. McDermott*, 245 F.3d 133, 137 (2d Cir. 2001) (internal quotation marks omitted).

in the sales of cocaine by the other," JA 378. Rather, the logical inference from this credit agreement, which the jury could have reasonably adopted, is that Hawkins and Luna shared a joint goal of having Hawkins sell the fronted cocaine to a third party; only after Hawkins completed the sale to the third party would Luna realize his profit from the transaction.[7] Thus, when considering the evidence of Luna's decision to extend credit to Hawkins after completing two successful cash-for-drugs sales as a whole, a reasonable trier of fact could conclude that Hawkins and Luna had entered into a conspiratorial agreement covering the anticipated resale of the drugs.

In sum, despite finding the record bereft of "meaningful evidence that Hawkins agreed to work with Luna and his co-conspirators to further a joint goal," the district court disregarded the reasonable inferences that the jury apparently drew from the multiple communications between Hawkins and Luna and Febres, the two completed cocaine-for-cash transactions, and Luna's agreement to provide Hawkins with drugs on credit. In doing so, the court failed to view the evidence as a whole, *Autuori*, 212

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[7] The district court's ruling emphasized that Febres stated on cross-examination that Hawkins did not sell for, or was a member of, "the Luna drug organization." JA 166. There is no evidence that Febres was aware of this Court's standard for whether an individual joins or participates in a conspiracy. Moreover, the ruling makes no reference to Febres' testimony that Febres also did not view co-defendant and co-conspirator Rafael Almonte as a member of the Luna drug organization. JA 110.

F.3d at 114, and arrogated to itself the "task of the jury . . . to choose among competing inferences that can be drawn from the evidence." *Jackson*, 335 F.3d at 180. Accordingly, a rational trier of fact could have concluded from the above facts that Hawkins was "a participant in a general plan designed to place narcotics in the hands of ultimate users," *Rich*, 262 F.2d at 418.

2. The district court misstated this court's established standard for determining whether a defendant joins or participates in a conspiracy

The district court's second fundamental error was its misstatement of this Court's standard for determining whether a defendant has joined or participated in a conspiracy. The linchpin of the district court's ruling was its view that this Court held in *United States v. Gore*, 154 F.3d 34 (2d Cir. 1998), "*sub silentio*, that the agreement implicit in the purchase of drugs by the defendant from his supplier cannot constitute the agreement necessary to proof of a violation of section 846." *Id.* at 40. Relying further on dicta from *United States v. Lechuga*, 994 F.2d 346, 349 (7th Cir. 1992) (en banc), and *United States v. Mims*, 92 F.3d 461 (7th Cir. 1996), the district court found that "the agreement necessary to proof of a conspiracy is an agreement to undertake unlawful conduct in addition to the purchase and sale transaction, even when the buyer intends to distribute the purchased drugs." JA 375. The court further predicted that it "expected the Second Circuit to hold that, without more, the mere buyer-seller relationship is insufficient to establish a conspiracy, *even*

if the seller know that the buyer intends to resell the drugs." *Id*. (emphasis added).

In formulating its legal standard, however, the district court disregarded established Second Circuit authorities for deciding whether an individual joins or participates in a conspiracy. These cases include, among others, *Geibel*, 369 F.3d at 689 (conspirators "need not have agreed on the details of the conspiracy, so long as they agreed on the essential nature of the plan"); *Richards*, 302 F.3d at 69 ("A conviction for conspiracy must be upheld if there was evidence from which the jury could reasonably have inferred that the defendant knew of the conspiracy . . . and that *he associat[ed] himself with the venture in some fashion, participated in it . . . or [sought] by his action to make it succeed*.") (emphasis added); *Jones*, 30 F.3d at 281-82 (once conspiracy found to exist, "the link between another defendant and the conspiracy need not be strong"); and *Rich*, 262 F.2d at 418 (holding that if "*there be knowledge by the individual defendant that he is a participant in a general plan designed to place narcotics in the hands of ultimate users*, the courts have held that such persons may be deemed to be regarded as accredited members of the conspiracy") (emphasis added). Ironically, the district court's newly articulated standard effectively revised the same instructions that it had delivered to the jury twelve months before.

When the district court stated that "the mere buyer-seller relationship is insufficient to establish a conspiracy, even if the seller knows that the buyer intends to resell the drugs," JA 375, it swept too broadly and

misstated this Court's law on conspiracy to the extent it suggests that a jury may not consider a party's knowledge when inferring his intent. The district court's rule would exclude from conspiracies not only sellers who have general knowledge that a buyer might resell, but also sellers who provide drugs to a buyer with the specific intent that the buyer shall distribute them to end users. Here, Hawkins and Luna fall in the latter category as co-conspirators because Luna supplied the drugs, and agreed to front more drugs on credit, with the full knowledge and expectation that Hawkins would resell them.

Similarly, the court's statement that "the agreement necessary to proof of a conspiracy is an agreement to undertake unlawful conduct in addition to the purchase and sale transaction, even when the buyer intends to distribute the purchased drugs," JA 375, is logically infirm. By this statement, the district court incorrectly suggests that for a conspiracy to exist, a seller must intend to take some further action other than furnishing the buyer with drugs. To the contrary, once the seller supplies the buyer, the seller is not required to do anything else to be within the ambit of the conspiracy. Rather, it can be the buyer who is intended to act further by reselling the drugs. Thus, under the district court's logic, a conspiracy would exist only if Luna, as opposed to Hawkins, intended to engage in other illegal conduct besides providing drugs for resale.

The district court's flawed standard for conspiracy rests primarily on its expansive reading of *Gore,* which is inconsistent with this Court's fact-specific ruling there

that, "[w]ithout more, the mere buyer-seller relationship" between a drug seller and *an unindicted confidential informant* is insufficient to establish a conspiracy between the seller and an unknown third party. *Gore*, 154 F.3d at 40. There, the prosecution provided the jury with no evidence that the defendant had ever spoken, met, or even associated with the other 22 co-conspirators charged in the same indictment, let alone any contact with the conspiracy's leader. The *Gore* defendant was an individual named Harvey Wells, who was charged with conspiracy to possess with intent to distribute heroin based on a single sale of 0.11 grams of heroin branded "Fuji Power" to a confidential informant ("CI"). *Id*. at 38. During the transaction, Wells was recorded saying that the CI had not paid him the full amount owed. *Id*. Wells then referred, in vague terms, to an unnamed third party who had supplied him with heroin in the past, stating that Wells did not "want to lose face" with this unnamed supplier by failing to pay him. *Id*.[8]

Despite having no other evidence of Wells' unnamed supplier or evidence that Wells had any contact with his 22 co-conspirators, the prosecution argued that Wells "was *de facto* part of a narcotics conspiracy to sell 'Fuji Power' [heroin]" because he "had to have a supplier in order to sell his drugs." *Id*. at 39. The prosecution further argued

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[8] The *Gore* defendant's precise statement to the CI about the third party was: "Yeah man, I don't want to lose face with that dude man because he always has something decent and he always comes up right. Never tapped, never in a bag, never messed up, yeah so I should do him right." *Id.*

that the one recorded statement between the CI and Wells "verified the existence of a supplier to whom Wells would 'lose face' were he not paid by [the CI]." *Id*.

In light of the government's "meager evidence," *id*. at 41, this Court held: "Here, the record is devoid of any conspiratorial conduct. Without more, the mere buyer-seller relationship between Wells and [the CI] is insufficient to establish a conspiracy." *Id*. at 40 (emphasis added). The Court further found that Wells' remarks about not wanting to "lose face" with his unnamed supplier, "standing alone," were "legally insufficient to show a conspiratorial agreement to distribute drugs made between Wells and that unknown source." *Id*. The Court also held that while Wells' statement "may imply more than one transaction, it gives no specific indication of the exact nature of that transaction or the quantity of drugs involved." *Id*. at 41. Accordingly, the Court reversed Wells' conviction and ruled that "it would be sheer speculation for jurors to conclude that an agreement to distribute drugs had been made." *Id*.

In cabining its holding to the unique facts in *Gore*, this Court did not create, as claimed by the district court, a "buyer-seller rule" with broad applicability in conspiracy cases. In *Gore*, the prosecution's evidence boiled down to three distinct pieces of evidence: (1) Wells' single sale of 0.11 grams of heroin to the unindicted CI, who had initiated the transaction; (2) the fact that Wells sold heroin with the "Fuji Power" brand; and (3) Wells' oblique statement that he did not want to "lose face" with his unnamed, unidentified supplier. Notably missing from the

prosecution's case-in-chief was any evidence of communication between Wells and any of the other 22 charged co-conspirators. *Id*. at 39-41.

In contrast, as discussed *supra*, the record evidence here bears little resemblance to that considered by this Court in *Gore*. First, the record reveals that Hawkins, unlike the *Gore* defendant, communicated directly on five separate phone calls with the undisputed head of the drug conspiracy, Luna, and his close associate, Febres, to obtain cocaine for resale. Here, Hawkins initiated the calls, spoke directly to Luna and Febres, and asked for distribution-sized quantities of cocaine in exchange for money. Hawkins communicated, among other things, his desire to purchase cocaine in specific quantities and for specific prices; his intention to make additional purchases in the future; his plans to pay Luna for the cocaine; and his request that Luna provide him with cocaine on credit. *See* JA 35-55. Second, the trial evidence further disclosed that Hawkins had face-to-face meetings with Luna, Febres, and co-defendant Guzman when Luna delivered the cocaine to Hawkins on February 12 and 17. Moreover, when speaking with Luna in the initial conversation on February 9, 2005, Hawkins told Luna that he had recently met up with another Luna co-conspirator, Henry Mayoral. JA 40. Thus, unlike *Gore*, the government presented evidence of direct contact between Hawkins and Luna from which the jury could infer that Hawkins had knowingly joined and participated in the conspiracy.

In fashioning its standard for conspiracy, the district court also imported dicta from the Seventh Circuit cases of

United States v. Lechuga, 994 F.2d 346, 349 (7th Cir. 1992) (en banc),[9] and *United States v. Mims*, 92 F.3d 461 (7th Cir. 1996). The district court's ruling stated that "[t]he Seventh Circuit Court of Appeals, sitting *en banc*, has expressly held that the agreement at the heart of a narcotics conspiracy charge must be an agreement separate and distinct from the implicit agreement that arises from every purchase of narcotics." JA 372. It further cited a lengthy portion of dicta from *Lechuga*:

> A conspiracy is not merely an agreement. It is an agreement with a particular kind of object – an agreement to commit a crime. When the sale of some commodity, such as illegal drugs, is the substantive crime, the sale agreement itself cannot be the conspiracy, for it has no separate criminal object. What is required for conspiracy in such a case is an agreement to commit some other crime beyond the crime constituted by the agreement itself. . . . But insofar as there was an agreement between [the parties] merely on the one side to sell and on the other to buy, there was no conspiracy between them no matter what [the buyer] intended to do with the drugs after he bought them. [The seller] would not, merely by selling to [the buyer], have been agreeing with [the buyer] to some further sale. A person who sells a gun knowing that the

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[9] *Gore* cites *United States v. Mims*, 92 F.3d 461 (7th Cir. 1996) in a string cite in footnote one. *Gore*, 154 F.3d at 40 n.1. In turn, *Mims* cites *Lechuga*. *See Mims*, 92 F.3d 461, 465 (7th Cir. 1996). This Court did not cite *Lechuga* in *Gore*.

> buyer intends to murder someone may or may not be an aider of abettor of the murder, but he is not a conspirator, because he and his buyer do not have an agreement to murder anyone.

JA 372 (citing *Lechuga*, 994 F.2d at 349).

Neither *Lechuga* nor *Mims*, however, is analytically or factually apposite to Hawkins. Ironically, when the facts are read in their entirety, *Lechuga*'s holding (as opposed to its dicta) actually supports the jury's conviction of Hawkins. *Lechuga* held that the prosecution cannot prove a conspiracy just because a defendant sells a single quantity of drugs too large for personal consumption, even if it may logically be inferred that the defendant knows his buyer intends to resell the drugs. *Id*. at 347. The *Lechuga* court further concluded that a conspiracy can be proven by evidence that the defendant has specific knowledge of the buyer's plans for resale when the transaction takes place. *Id*. at 350.

Lechuga involved a drug seller, Lechuga, who sold more than 500 grams of cocaine to a buyer named Pinto. *Id*. at 346-47. The sale was facilitated by, and executed through, a middleman named Pagan. *Id*. In affirming the jury's conviction of Lechuga for conspiracy to distribute cocaine, the Seventh Circuit found that an agreement existed between Lechuga and Pagan, who knew Lechuga was a drug supplier and helped him find a buyer on multiple occasions. *Id*. at 350-51. The Court, however, found that no conspiracy existed between Lechuga and Pinto, the ultimate buyer, because Lechuga and Pinto

engaged in a single transaction in which Lechuga agreed to sell, and Pinto agreed to buy, narcotics. *Id*. at 349-51.

In applying *Lechuga* to Hawkins, however, the district court ruling failed to acknowledge that Hawkins was the functional equivalent of Pagan, not Pinto. Just as Lechuga supplied Pagan as the middleman, Luna supplied Hawkins with cocaine for distribution as the "go-between." *Id*. Moreover, just as Hawkins told Luna that he had prospective buyers lined up with cash, "Lechuga knew precisely what Pagan was going to do with the drugs he sold him" because "Pagan *told* Lechuga what he was going to do with them." *Id*. at 351. Thus, just as Pagan had joined a conspiracy with Lechuga, Hawkins had joined the conspiracy led by Luna. Contrary to the district court's view, *Lechuga* supports the jury's conclusion that Hawkins had joined the conspiracy with Luna.

Citing *Mims*, 92 F.3d at 465, the district court also found that the Seventh Circuit had "expressly extended" *Lechuga* to include the "situation present in this case, that is, that the buyer of narcotics intends to resell them. '[W]hile purchase of narcotics for resale is evidence of a conspiratorial agreement (especially when the purchases are repeated as they were here), a buyer-seller relationship alone is insufficient to prove a conspiracy. This is the case even when the buyer intends to resell the purchased narcotics.'" JA 372.

Once again, however, *Mims* offers little support for either the acquittal of Hawkins or the district court's new legal standard. There, the Seventh Circuit reversed two

defendants' conspiracy convictions based on the district court's jury instructions that effectively ignored the seller's mens rea, and allowed the jury to convict upon a simple finding that the buyer purchased drugs "for resale." *Mims*, 92 F.3d at 464-65. This instruction focused improperly only the knowledge and intent of the buyer, without requiring some showing that both participants in the sale transaction shared the common goal of redistributing those drugs.

There, Mims testified that he was a cocaine addict and "spot purchase[r]" from different drug suppliers, including an individual named McDade. *Id*. at 463. Mims testified that he "had no particular arrangement or agreement with McDade, but simply purchased drugs from him whenever [McDade] was the most convenient source." *Id*. In contrast, the government's witnesses testified that Mims functioned as McDade's agent or "man on the street." *Id*. Based on these disparate theories of the case, the district court charged the jury that "[o]ne who buys from a conspirator for resale is a member of the conspiracy if he knows at least its general aims." *Id*. at 465. The Seventh Circuit, however, found that this instruction wrongly "direct[ed] the jury to convict Mims and McDade for conspiracy solely on the basis of a purchase for resale, without requiring a finding of an agreement beyond the mere purchase." *Id*. The Seventh Circuit also criticized the district court's general conspiracy instruction, which defined a conspiracy as a combination instead of as an illegal agreement. *Id*. Accordingly, the Seventh Circuit reversed the conspiracy convictions. *Id*. at 466.

Mims is plainly distinguishable from Hawkins. Here, at Hawkins' request, the district court gave a jury instruction that drew an appropriate distinction between the buyer-seller relationship and a conspiracy: "Thus, without more, the mere existence of the buyer-seller relationship is insufficient to establish membership in a conspiracy." JA 290. Moreover, the district court gave its standard instruction that a "conspiracy is an agreement to achieve some unlawful purpose." JA 308, 313. Thus, the district court appropriately instructed the jury of the need to find an "agreement" between the parties that was something more than the simple agreement of Luna to sell drugs to Hawkins. Moreover, because Luna agreed to extend Hawkins credit after two successful cash sales, the evidence reveals that both men intended to form a conspiratorial agreement.

In sum, an analysis of *Gore*, *Lechuga*, and *Mims* in the context of their operative facts reveals that the dicta cited by the district court is actually inconsistent with the district court's new legal standard for conspiracy. Accordingly, the district court erred in using *Gore*, *Lechuga*, and *Mims* as its doctrinal basis for creating its new rule of law that a buyer and seller must undertake some additional conduct between themselves to form a conspiracy, and that a jury may not infer a shared intent that drugs will be resold from a seller's knowledge that the buyer intends to resell them against the backdrop of recently consummated sales of distribution-weight quantities of drugs.

Conclusion

For the foregoing reasons, the district court's ruling and order granting the motion for judgment of acquittal should be reversed and vacated.

Dated: October 31, 2007

Respectfully submitted,

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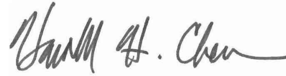
Certification Per Fed. R. App. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 11,391 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



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ADDENDUM

21 U.S.C. § 841(a)

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. § 841(b)(1)(C)

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be

sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

21 U.S.C. § 846

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

Rule 29 of the Federal Rules of Criminal Procedure (Motion for a Judgment of Acquittal)

(a) *Before Submission to the Jury*. After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) *Reserving Decision*. The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) *After Jury Verdict or Discharge*.

(1) Time for a Motion. A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later.

(2) Ruling on the Motion. If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

(3) No Prior Motion Required. A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

(d) *Conditional Ruling on a Motion for a New Trial.*

(1) Motion for a New Trial. If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(2) Finality. The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) Appeal.

(A) Grant of a Motion for a New Trial. If the court conditionally grants a motion for a new trial and an

appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

(B) Denial of a Motion for a New Trial. If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

SPECIAL APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA v. WARREN HAWKINS	Case No. 3:05cr58 (SRU)

RULING AND ORDER

A jury convicted Warren Hawkins of conspiracy to distribute, or to possess with intent to distribute, a detectable amount of cocaine in violation of 21 U.S.C. §§ 846 and 841(b)(1)(C). Hawkins has filed a motion for a judgment of acquittal pursuant to Rule 29(c) of the Federal Rules of Criminal Procedure. In support of his motion, Hawkins argues that, although he purchased cocaine from members of the charged conspiracy, the evidence was insufficient to permit the jury to find that he joined the conspiracy. I agree, and therefore grant Hawkins' motion for a judgment of acquittal.[1]

I. Standard of Review

A. Motion for a Judgment of Acquittal

Rule 29 provides that the court "must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a). A defendant who seeks to overturn a guilty verdict on the ground that the evidence was insufficient, however, "bears a heavy burden." *United States v. Best*, 219 F.3d 192, 200 (2d Cir. 2000). A reviewing court must consider the evidence as a whole, not in isolation, and must defer to the jury's

[1] In light of this ruling, it is unnecessary to consider Hawkins' motion for a new trial, pursuant to Rule 33 of the Federal Rules of Criminal Procedure, which is denied as moot. Nor is it necessary to reach Hawkins' second argument in support of his Rule 29 motion, which addresses the government's summation.

determination of the weight of the evidence, credibility of witnesses, and competing inferences that can be drawn from the evidence. *Id.* The prosecution's proof does not need to exclude every possible hypothesis of innocence. *Id.*

In short, the reviewing court must view the evidence in the light most favorable to the prosecution and must reject the sufficiency challenge if the court concludes that "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original).

II. Evidence at Trial

Hawkins and twenty-two co-defendants were charged in a thirteen-count superseding indictment. Hawkins was charged only in count one: conspiracy to possess with intent to distribute, and to distribute, cocaine[2] in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846.

Seventeen defendants pled guilty either to the crimes charged in the indictment or to other offenses. One "John Doe" defendant was never arrested. Three defendants, including Hawkins, elected to go to trial and to put the government to its proof. Over ten days, the government tried Hawkins with two co-defendants, Arcadio Ramirez and José Luis Rodriguez.

At trial, the government proved the existence of a conspiracy, led by one Alex Luna, to possess cocaine with intent to distribute, and to distribute, cocaine. Luna and his associates – which the government dubbed "the Luna organization" – distributed cocaine in the Danbury, Connecticut area from approximately December 2002 until March 4, 2005. Evidence of the conspiracy included the testimony of law enforcement officers and cooperating witnesses,

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[2] The superseding indictment alleges that the conspiracy charged in count one also involved cocaine base, but there was no evidence whatsoever that Hawkins had any role in or knowledge of transactions involving cocaine base.

surveillance videos, and audiotapes of telephone conversations. Luna obtained quantities of cocaine from suppliers in New York City and met with his close associates at hotels in Danbury to process and package the cocaine for street sale.

The evidence involving Hawkins specifically was a small fraction of the evidence admitted during trial. The only evidence concerning Hawkins consisted of: (1) recordings of five intercepted telephone calls;[3] (2) the testimony of Special Agent Eileen Dinnan of the Drug Enforcement Agency; and (3) the testimony of Joshua Febres, one of Luna's associates, who was cooperating with the government.

In the five telephone calls, Hawkins discussed proposed drug purchases with Luna and Febres. On February 9, 2005, Hawkins spoke with Febres about purchasing five grams of cocaine for $23 per gram. Exh. 332A at 3. Febres testified that the proposed February 9 transaction never materialized. Tr. at 1383. During that call, Hawkins also spoke with Luna and expressed his desire to purchase cocaine from Luna in the future. Exh. 332A at 5-9; Tr. 1382-83. During the February 9, 2005, phone call, Hawkins also told Luna that he had recently seen Henry Mayoral, known as "Pac," a close associate of Luna's. Exh. 332A at 6; Tr. 1394, and Hawkins also stated that he had programmed Luna's telephone number into his cell phone. Exh. 332 at 6.

On February 12, 2005, Hawkins called Luna to purchase an eight-ball (i.e., 3.5 grams) of cocaine. Exh. 333A. Hawkins explained that he knew two individuals from work who were seeking drugs. *Id.* at 2.

> HAWKINS: These kids . . . from work, like I got two (2) of them. Homie been calling me. He's . . . looking hard, man. Like . . . you

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[3] Transcripts of the recorded telephone calls were introduced as full exhibits at trial. Exhs. 332A, 333A, 334A, 335A, and 336A.

know what I mean?

Id. (ellipses in original). Febres interpreted Hawkins' statements on that call to mean that Hawkins had two customers, who were looking for cocaine. Tr. at 1392-93. That same day, Dinnan was conducting surveillance of Luna and observed Hawkins meet with Luna in the parking lot of the Birchwood Condominiums, where Luna lived. Tr. at 1752-53.

On February 17, 2005, Hawkins called Luna to purchase two eight-balls. Exh. 336A at 2. Febres confirmed that he and Luna delivered two eight-balls of cocaine to Hawkins that evening. Tr. 1396.

On February 23, 2005, Hawkins called Luna, seeking to purchase another eight-ball of cocaine. Exh. 334A. He explained to Luna:

> HAWKINS: Listen, I just made out a child support payment. They got me for 1200. . . . So, I just went ahead and paid the shit and now I'm like total zero. But, I got this white kid, he waiting for me right now, he got a $100.00. I need a "8 ball" though. You know what I mean? I need to come from you right now and go give it to him and then hit you right back in the spot.

Id. at 3.

Luna agreed to meet Hawkins. Minutes later the two spoke again, and after Luna explained where to meet, Hawkins told him that Hawkins would "grab the dough from [the white kid] and come right back and hit you with it." Exh. 335A at 2.

In addition to the recorded phone calls, Febres testified that Hawkins purchased narcotics from members of the Luna organization. Febres also accepted the government's characterization of Hawkins as a "go-between." Tr. 1401. Specifically, Febres responded affirmatively ("Yes. I guess.") to the question: "Based on your understanding and your involvement in this

organization, is Mr. Hawkins serving as a go-between for this customer from New Milford and the Luna organization?" *Id.*

On cross-examination, Hawkins' attorney asked Febres whether Hawkins was a member of the Luna drug organization. Tr. 1432.

> Q. Is . . . Warren Hawkins a member of the Luna drug organization?
>
> A. As far as what? Selling drugs for him?
>
> Q. Yes.
>
> A. No, he bought drugs.
>
> Q. Okay, he bought drugs. Yep, he did. But did he ever sell drugs for the Luna drug organization?
>
> A. No.

Id.

III. Discussion

The indictment charges Hawkins with one count: conspiracy to possess with intent to distribute, and to distribute, narcotics in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A) and 846. Notably, he was not charged with possession with intent to distribute, in violation of 21 U.S.C. § 841(a)(1), or with use of a communications facility to facilitate a narcotics transaction, in violation of 21 U.S.C. § 843(b). The evidence at trial was more than sufficient to prove either of those charges.[4]

To prove a narcotics conspiracy in violation of 21 U.S.C. §§ 846 and 841, the government

[4] Before trial the government offered to allow Hawkins to plead guilty to a substitute information charging him with use of a telephone to facilitate a drug transaction, in violation of 21 U.S.C. § 843. Although Hawkins had been provided copies of the intercepted phone calls in which he is heard arranging drug purchases, Hawkins declined the government's offer.

must establish two essential elements: (1) that the conspiracy alleged in the indictment existed, and (2) that the defendant knowingly joined and participated in it. *See United States v. Jones*, 30 F.3d 276, 281-82 (2d Cir. 1994). The government "need not prove the commission of any overt acts in furtherance of the conspiracy." *United States v. Shabani*, 513 U.S. 10, 15 (1994).

"The essence of conspiracy is the agreement and not the commission of the substantive offense." *United States v. Gore*, 154 F.3d 34, 40 (2d Cir. 1998). "As a matter of law, the crime of conspiracy must involve the agreement of two or more persons to commit a criminal act or acts since the act of agreeing is a group act, unless at least two people commit it, no one does." *Id.* (internal quotations marks omitted).

A. Existence of the Charged Conspiracy

Hawkins does not dispute that the government proved the existence of the conspiracy alleged in the indictment. The evidence at trial on that point was substantial.

B. Hawkins' Participation in the Charged Conspiracy

Hawkins claims that there was insufficient evidence from which a jury could find that he joined and participated in the Luna conspiracy. In order to prove a conspiracy charge against a particular defendant, the government must introduce "evidence from which it can reasonably be inferred that the person charged with conspiracy knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it." *United States v. Sanchez Solis*, 882 F.2d 693, 696 (2d Cir. 1989) (quoting *United States v. Gaviria*, 740 F.2d 174, 183 (2d Cir. 1984)). Once the existence of a conspiracy has been established, "though the link between another defendant and the conspiracy need not be strong, the evidence must suffice to permit the jury reasonably to find the element of that defendant's participation – like every element –

proven beyond a reasonable doubt." *Jones*, 30 F.3d at 281-82. For Hawkins to prevail on his Rule 29 motion, he must show that, "viewing the evidence in the light most favorable to the government, . . . no rational trier of fact could have found the essential elements of the crime charged beyond a reasonable doubt." *United States v. Leslie*, 103 F.3d 1093, 1100 (2d Cir.) (quoting *United States v. Taylor*, 92 F.3d 1313, 1333 (2d Cir. 1996)), *cert. denied*, 520 U.S. 1220 (1997).

1. *Evidence of Hawkins' Knowledge of the Luna Conspiracy*

The government adduced evidence from which it reasonably could be inferred that Hawkins knew of the Luna conspiracy. Febres testified, and the recorded telephone conversations show, that Hawkins purchased cocaine from Luna on several occasions. Hawkins was also familiar with Febres and Mayoral, two of Luna's co-conspirators, and the evidence suggests that he was aware of their participation in Luna's narcotics organization. Thus, rational jurors could have found that the government had proven beyond a reasonable doubt the first element of a conspiracy – that Hawkins was aware of an agreement between Luna and others to possess with intent to distribute cocaine.

2. *Evidence of Hawkins' Participation in the Charged Conspiracy*

The critical issue in this case is whether, viewing the evidence in the light most favorable to the government, rational jurors could find that the government proved beyond a reasonable doubt that Hawkins joined and participated in the charged conspiracy. If rational jurors could find that Hawkins agreed to join the conspiracy, then the government's proof is complete; if not, then Hawkins must be acquitted.

a. The Buyer-Seller Relationship

Based on Febres' testimony and the intercepted telephone calls, reasonable jurors could find that: (1) Hawkins purchased cocaine from Luna or Luna's co-conspirators; (2) Hawkins intended to resell some of that cocaine to other individuals; and (3) at least some of the Luna co-conspirators were aware of Hawkins' intent to resell cocaine. In other words, it would be reasonable to find that Hawkins did indeed function as a sort of "go-between," reselling to drug users some of the cocaine that had been sold to him by the Luna organization.

Whether those permissible findings are sufficient for reasonable jurors to find that Hawkins joined the conspiracy turns on the nature of the agreement essential to the crime of conspiracy. Every completed sale involves either an express or implied agreement between the seller and the buyer, whether the item being purchased is a house, a loaf of bread, or illegal narcotics. No sale can occur unless the parties agree on all essential terms. Here, Luna agreed to sell and Hawkins agreed to buy a particular quantity of cocaine for a particular price. Because the drug sales proven by the government involved hand-to-hand transfers, the agreement implicitly included an agreement that Luna and Hawkins would each sequentially possess the narcotics; Luna would possess the narcotics and hand them to Hawkins, who would then possess them. Luna was told that Hawkins intended to resell the narcotics, therefore we know that the possession by each was with an intent on the part of each participant to distribute the narcotics; Luna intended to distribute the narcotics to Hawkins, and Hawkins intended to distribute the narcotics to his customers.

If the agreement implicit in every sale of drugs can constitute the agreement necessary to satisfy the second prong of a conspiracy charge, the proof that Hawkins purchased narcotics from Luna with the intent to further distribute them would provide complete proof that Hawkins

agreed with Luna to possess with intent to distribute narcotics. If so, the logical extension of that principle would mean that every purchaser of narcotics who does not intend to personally consume the narcotics purchased would be guilty of the crime of conspiracy to possess with intent to distribute narcotics. I conclude that more is required.

The Seventh Circuit Court of Appeals, sitting *en banc*, has expressly held that the agreement at the heart of a narcotics conspiracy charge must be an agreement separate and distinct from the implicit agreement that arises from every purchase of narcotics.

> A conspiracy is not merely an agreement. It is an agreement with a particular kind of object – an agreement to commit a crime. When the sale of some commodity, such as illegal drugs, is the substantive crime, the sale agreement itself cannot be the conspiracy, for it has no separate criminal object. What is required for conspiracy in such a case is an agreement to commit some other crime beyond the crime constituted by the agreement itself. . . . But insofar as there was an agreement between [the parties] merely on the one side to sell and on the other to buy, there was no conspiracy between them no matter what [the buyer] intended to do with the drugs after he bought them. [The seller] would not, merely by selling to [the buyer], have been agreeing with [the buyer] to some further sale. A person who sells a gun knowing that the buyer intends to murder someone may or may not be an aider of abettor of the murder, but he is not a conspirator, because he and his buyer do not have an agreement to murder anyone.

United States v. Lechuga, 994 F.2d 346, 349 (7th Cir.) (*en banc*), *cert. denied*, 510 U.S. 982 (1993). The Seventh Circuit has expressly extended this reasoning to include the situation present in this case, that is, that the buyer of narcotics intends to resell them. "[W]hile purchase of narcotics for resale is *evidence* of a conspiratorial agreement (especially when the purchases are repeated as they were here), a buyer-seller relationship alone is insufficient to prove a conspiracy. This is the case even when the buyer intends to resell the purchased narcotics." *United States v. Mims*, 92 F.3d 461, 465 (7th Cir. 1996) (emphasis in original). "The buy-sell transaction is simply not probative of an agreement to join together to accomplish a criminal

objective beyond that already being accomplished by the transaction." *United States v. Townsend*, 924 F.2d 1385, 1394 (7th Cir. 1991).

To my knowledge, the Second Circuit Court of Appeals has not so clearly held that the agreement necessary to sustain a conspiracy conviction must be an agreement to accomplish an objective beyond the underlying sale of narcotics. The Second Circuit, however, has certainly implied as much. In *United States v. Gore*, the Second Circuit noted that "[o]ther Circuits have uniformly held that the mere relationship between a buyer and seller of drugs is not sufficient to show a conspiratorial agreement under § 846." 154 F.3d at 40 n.1 (citing *Mims* as well as decisions from the D.C., Sixth, Ninth, Tenth, and Eleventh Circuits). The Court then went on to adopt that position. "Without more, the mere buyer-seller relationship . . . is insufficient to establish a conspiracy." *Id.* at 40. *See also United States v. Medina*, 944 F.2d 60, 65 (2d Cir. 1991) (declining to apply buyer-seller rule to case involving "advanced planning among the alleged co-conspirators to deal in wholesale quantities of drugs obviously not intended for personal use"); *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1191 (2d Cir. 1989) (noting "a mere buyer-seller relationship is not necessarily a conspiracy"); *United States v. Borelli*, 336 F.2d 376, 384 (2d Cir. 1964) ("A seller of narcotics in bulk surely knows that the purchasers will undertake to resell the goods . . . . But a sale or a purchase scarcely constitutes a sufficient basis for inferring agreement to cooperate with the opposite parties . . . , unless some such understanding is evidenced by other conduct which accompanies or supplements the transaction."); *United States v. Koch*, 113 F.2d 982, 983 (2d Cir. 1940) (Defendant-appellant "had no agreement to advance any joint interest. The appellant bought at a stated price and was under no obligation to [the alleged co-conspirator] except to pay him that price. The purchase

alone was insufficient to prove the appellant a conspirator . . . .").

In *Gore*, the Second Circuit reversed the judgment of conviction on a charge of conspiracy to distribute heroin, holding that the government had not satisfied the most basic element of a conspiracy charge – an agreement to distribute drugs. *Id.* at 41. The defendant had sold "Fuji Power" branded heroin and spoke with the informant concerning the quality of the heroin and his supplier, stating, "You always get something good and people don't appreciate it. Yeah man, I don't want to lose face with that dude man because he always has something decent and he always comes up right." *Id.* at 38. The government contended that it was reasonable to infer from that statement the existence of an agreement between the defendant and his supplier. *Id.* at 40.

The Court held that the defendant's sale of heroin with the label, "Fuji Power," was insufficient to show that he was part of a conspiracy to distribute heroin with that brand. *Id.* at 39. No witness testified to the defendant's participation in any conspiracy. *Id.* Moreover, the Court noted that the defendant's remarks from which one could infer a buyer-seller relationship with his source were legally insufficient to show a conspiratorial agreement to distribute drugs made between the defendant and his source. *Id.* at 40.

In both this case and in *Gore*, there was sufficient proof that a sale of drugs had occurred between the defendant and his supplier, and that the defendant intended to further distribute the purchased drugs.[5] If the purchase of drugs by one who intends to resell them satisfied every

[5] In *Gore,* evidence of the purchase from the supplier was circumstantial and evidence of the intent to sell was direct; here, evidence of the purchase from the supplier was direct and evidence of the intent to resell was circumstantial. That difference in the nature of the proof cannot matter; in each case, a jury could have found both a sale to the defendant and the defendant's intent to further distribute the drugs.

element of 21 U.S.C. § 846, *Gore* would have been decided differently. I therefore conclude that in *Gore* the Second Circuit held, *sub silentio*, that the agreement implicit in the purchase of drugs by the defendant from his supplier cannot constitute the agreement necessary to proof of a violation of section 846.

Although the Second Circuit has not expressly held as much, I conclude that the Court of Appeals would likely follow the Seventh Circuit's holding that the agreement necessary to proof of a conspiracy is an agreement to undertake unlawful conduct in addition to the purchase and sale transaction, even when the buyer intends to distribute the purchased drugs. I expect the Second Circuit to hold that, without more, the mere buyer-seller relationship is insufficient to establish a conspiracy, even if the seller knows that the buyer intends to resell the drugs. *Cf.* *Gore*, 154 F.3d at 40.

b. Other Evidence of Agreement

The mere existence of a buyer-seller relationship is not sufficient, standing alone, to prove a conspiracy to possess with intent to distribute cocaine. Nevertheless, I must consider whether the other evidence in the record, when considered in conjunction with the buyer-seller relationship, is sufficient for reasonable jurors to find beyond a reasonable doubt that Hawkins agreed to participate in the Luna conspiracy.

In *Gore*, there was little besides the buyer-seller relationship to prove participation in the charged conspiracy. Here the government offered more evidence about Hawkins' relationships with his co-defendants. The record includes audiotapes of phone calls between Hawkins and Luna conspirators. In addition, Hawkins was seen meeting with Luna under circumstances suggesting the hand-to-hand delivery of drugs for money. The government emphasizes that Luna

trusted Hawkins, as shown by the fact that he met with him to deliver drugs. Significantly, Hawkins purchased drugs from Luna on more than one occasion. In addition, there was evidence from the intercepted phone calls that Luna knew Hawkins intended to distribute the cocaine that Luna sold him. All of this evidence was available to the jury and must be considered when deciding Hawkins' Rule 29 motion.

Luna's knowledge of Hawkins' intent still does not give rise to an agreement with respect to Hawkins' sales. Just as proof that Hawkins joined the Luna conspiracy requires both Hawkins' knowledge of the Luna conspiracy and his agreement to join it, so, too, proof that Luna sought to aid Hawkins' plan requires both Luna's knowledge of the Hawkins plan and his agreement to further it. There is no evidence in the phone calls or elsewhere in the record that would support a finding that Luna agreed to assist Hawkins with Hawkins' sales, except by supplying the cocaine – conduct that is insufficient to support a conspiracy conviction, for the reasons set forth above. "Where the buyer's purpose is merely to buy, the seller's purpose is merely to sell, and no prior or contemporaneous understanding exists between the two beyond the sales agreement, no conspiracy has been shown. No joint objective exists among the two, even though both are aware of the illegal nature of the goods." *United States v. Burroughs*, 830 F.2d 1574, 1581 (11th Cir. 1987).

As in *Gore*, the record here "is devoid of any conspiratorial conduct" on the part of Hawkins. 154 F.3d at 40. No witness testified to Hawkins' participation in the conspiracy or membership in the Luna organization. To the contrary, on cross-examination Febres testified that Hawkins was not a member of the Luna drug organization and never sold drugs for Luna. Tr. 1432.

The tapes of the intercepted phone calls provide conclusive evidence that Hawkins purchased cocaine from Luna, but they do not provide meaningful evidence that Hawkins agreed to work with Luna and his co-conspirators to further a joint goal. The phone calls set forth both Hawkins' efforts to purchase cocaine from Luna conspirators and Hawkins' remarks concerning his own customers – one of whom had $100 that Hawkins could use, effectively, to finance Hawkins' purchase from Luna.

Hawkins' two statements to Luna concerning two "kids . . . from work" and a "white kid" who were looking to purchase cocaine from him are insufficient to establish that Hawkins joined or participated in an agreement with Luna or Febres jointly to distribute or to possess with intent to distribute cocaine. *Cf. Gore*, F.3d at 41 (holding that defendant's statement made contemporaneously with heroin sale, pointing to the existence of a potential drug source, was "too thin a reed to support the essential element of a conspiracy – the agreement"). At most, those statements are consistent with the characterization that Hawkins acted as a "go-between." Tr. 1401. A "go between" is not necessarily a co-conspirator. *See Mims*, 92 F.3d at 463-64 (holding that defendant, who made as many as ten trips per night to facilitate sales between drug users and drug sellers, was not necessarily a conspirator; guilt would turn on proof of conspiratorial agreement). One who merely *functions* as a go-between without intending to further the goals of the conspiracy does not thereby become a conspirator, unlike one who intentionally facilitates transactions *in order to further* the aims of the conspiracy.

The level of trust shown by Luna toward Hawkins is not significant; Hawkins was shown some trust, but he did not hold a position of trust within the charged conspiracy. Luna permitted only trusted associates to "hold the phone," to carry drugs for Luna, and especially to attend

meetings at hotels where cocaine was cut and re-pressed for distribution. Hawkins did none of those things. The trust demonstrated by meeting face-to-face to sell drugs is the level of trust inherent in every street-level drug sale to end-users. No inference of conspiratorial agreement arises out of such sales.

Nor do other factors often considered as raising permissible inferences of conspiratorial conduct supply sufficient evidence to prove Hawkins' guilt beyond a reasonable doubt. The number of transactions and duration of the sales activity are not significant; there were a total of five phone calls and three drug transactions, all within the month of February 2005. The quantity of cocaine that Hawkins purchased, a total of 14 grams, does not suggest his participation in a conspiracy; indeed, that quantity alone does not even suggest distribution rather than personal use – it is only the phone calls that provide the evidence of an intent to distribute by Hawkins. There was no evidence whatsoever that either Luna or Hawkins possessed a shared stake in the sales of cocaine by the other; Hawkins never discussed paying Luna a cut of the proceeds, never received payments from Luna for activities on his behalf, never suggested that he was under Luna's control, never received instructions or encouragement from Luna, never referred to the purchased drugs as "Luna's drugs," never accounted to Luna for sales made or monies received, and never acknowledged acting on behalf of Luna or jointly with him. There was no evidence that Hawkins and Luna ever talked or met for a purpose other than Hawkins buying drugs from Luna; Hawkins was not connected to the supply, processing, or packaging of cocaine for sale, or to the solicitation or delivery of orders through the conspirators' cell phone. There was no evidence that Luna or his conspirators sought to promote Hawkins' sales in any way or that they provided Hawkins with "tools of the trade," e.g., firearms, packaging materials, or cell phones.

The government argues that Luna and Hawkins shared a common goal: to sell more drugs.[6] There are several problems with this argument. First, it uses the phrase "common goal" to describe similar goals. The pertinent inquiry when considering potential co-conspirators is whether their "common goal" is not merely similar, but is actually a shared or joint goal; here there is no evidence that Luna and Hawkins agreed to further a shared or joint goal. Second, there is not even any evidence that Hawkins had a goal of selling *more* drugs, i.e., that he planned any future sales. The evidence about him, his activities and his intentions is quite limited. One might assume that all drug dealers want to sell more drugs, but even accepting that assumption does not help prove an agreement between Luna and Hawkins. Nor is there any evidence that Luna cared what Hawkins did with the drugs. Luna's objective was accomplished once he received the sale proceeds from Hawkins. I share former Chief Judge Scullin's view that "the law of conspiracy in this Circuit demands proof beyond a reasonable doubt that Defendant intended to further or advance the . . . conspiracy's interests, not that he inadvertently or incidentally did so by buying, using and/or selling drugs that he obtained from the . . . conspiracy." *United States v. Santiago*, 2003 WL 21254423 at *7 (N.D.N.Y. 2003) (citations omitted). The necessary proof is lacking in this case.

In sum, considering all the evidence in the light most favorable to the government, the prosecution proved at most that it is plausible that Hawkins joined the conspiracy, but not that he joined the charged conspiracy beyond a reasonable doubt. *Cf. United States v. Jones*, 393 F.3d 107, 112 (2d Cir. 2004). The proof at trial was insufficient, therefore, to sustain the jury's

[6] Citing a goal to sell more drugs is not especially helpful in determining whether a particular defendant joined a conspiracy. Although all co-conspirators share that goal, not all people who share that goal are co-conspirators.

verdict. Accordingly, the Rule 29 motion is granted and Hawkins is acquitted of the charge in count one of the superseding indictment.

IV. Conclusion

Hawkins' motion for a judgment of acquittal **(doc. # 642)** is **GRANTED**. A judgment of acquittal shall enter and the clerk shall close the case against Hawkins, who shall be released from custody forthwith.

It is so ordered.

Dated at Bridgeport, Connecticut, this 15th day of June 2007.

/s/ Stefan R. Underhill
Stefan R. Underhill
United States District Judge

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Hawkins

Docket Number: 07-3018-cr

I, Louis Bracco, hereby certify that the Appellant's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 10/31/2007) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: October 31, 2007