06-2215-cr

To Be Argued By:
EDWARD T. KANG

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-2215-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

QUINCY HINES, also known as
"Quince," also known as "Q,"
Defendant,

CLIFFORD HUNTER, also known as "Boo,"
Defendant-Appellant.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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TABLE OF CONTENTS

Table of Authorities. iii

Statement of Jurisdiction. viii

Statement of the Issues Presented ix

Preliminary Statement. 1

Statement of the Case.. 3

Statement of Facts and Proceeding
Relevant to this Appeal.. 4

A. The Investigation. 4

B. The Indictment and Superseding Indictment. 12

C. The Guilty Plea.. 13

D. Sentencing and Notice of Appeal. 19

Summary of Argument.. 19

Argument. 20

I. The appellate waiver should be enforced. 20

A. Governing law and standard of review. 20

B. Discussion. 21

II. The district court did not plainly err in finding a factual basis for the defendant's plea.. 26

A. Governing law and standard of review. 26

B. Discussion. 32

Conclusion. 37

Certification per Fed. R. App. P. 32(a)(7)(C)

TABLE OF AUTHORITIES

CASES

PURSUANT TO "BLUE BOOK" RULE 10.7, THE GOVERNMENT'S CITATION OF CASES DOES NOT INCLUDE "CERTIORARI DENIED" DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

Godwin v. United States,
687 F.2d 585 (2d Cir. 1982). 27

Johnson v. United States,
520 U.S. 461 (1997). 32

McCarthy v. United States,
394 U.S. 459 (1969). 27

United States v. Adams,
448 F.3d 492 (2d Cir. 2006). 22, 24

United States v. Agueci,
310 F.2d 817 (2d Cir. 1962). 29

United States v. Aleskerova,
300 F.3d 286 (2d Cir. 2002) 28

United States v. Baez,
87 F.3d 805 (6th Cir. 1996). 27, 33

United States v. Barnes,
244 F.3d 331 (2d Cir. 2001) (per curiam) 31

United States v. Calabro,
449 F.2d 885 (2d Cir. 1971). 28

United States v. Carbone,
798 F.2d 21 (1st Cir. 1986).. . . . . 30, 32

United States v. Djelevic,
161 F.3d 104 (2d Cir. 1998) (per curiam). 20

United States v. Doe,
297 F.3d 76 (2d Cir. 2002). 32

United States v. Dominguez Benitez,
542 U.S. 74 (2004) 31

United States v. Dortch,
5 F.3d 1056 (7th Cir. 1993). 30, 32

United States v. Geibel,
369 F.3d 682 (2d Cir. 2004). 28

United States v. Gibbs,
190 F.3d 188 (3d Cir. 1999). 31, 32

United States v. Granik,
386 F.3d 404 (2d Cir. 2004). 20

United States v. Ivy,
83 F.3d 1266 (10th Cir. 1996). 30, 31, 32

United States v. Jones,
30 F.3d 276 (2d Cir. 1994). 28

United States v. Juncal,
245 F.3d 166 (2d Cir. 2001) 27

United States v. Livorsi,
180 F.3d 76 (2d Cir. 1999). 27

United States v. Lumpkins,
845 F.2d 1444 (7th Cir. 1988). 26

United States v. Maher,
108 F.3d 1513 (2d Cir. 1997). 24, 26, 27, 32

United States v. Monsalve,
388 F.3d 71 (2d Cir. 2004). 20

United States v. Morgan,
386 F.3d 376 (2d Cir. 2004). 20

United States v. Olano,
507 U.S. 725 (1993). 31

United States v. Rea,
958 F.2d 1206 (2d Cir. 1992). 28

United States v. Rich,
262 F.2d 415 (2d Cir. 1959). 29

United States v. Salcido-Contreras,
990 F.2d 51 (2d Cir. 1993). 21, 22, 25

United States v. Smith,
160 F.3d 117 (2d Cir. 1998). 24, 26, 27, 32, 34

United States v. Story,
891 F.2d 988 (2d Cir. 1989). 28

United States v. Sureff,
15 F.3d 225 (2d Cir. 1994). 29

United States v. Tejada,
956 F.2d 1256 (2d Cir. 1992). 28

United States v. Vaval,
404 F.3d 144 (2d Cir. 2005). 31

United States v. Vonn,
535 U.S. 55 (2002). 31

STATUTES

18 U.S.C. § 3231. viii

18 U.S.C. § 3742. viii

21 U.S.C. § 841. . . . . 3, 13

21 U.S.C. § 846. . . . . 3, 13

21 U.S.C. § 851. . . . . 3, 12, 13

28 U.S.C. § 1291. viii

RULES

Fed. R. App. P. 4. viii

Fed. R. Crim. P. 10. 13

Fed. R. Crim. P. 11. . . . . *passim*

Fed. R. Crim. P. 52. 31

Statement of Jurisdiction

The district court (Janet Bond Arterton, U.S.D.J.) had subject matter jurisdiction under 18 U.S.C. § 3231. Judgement entered on April 27, 2007. A13, A238-39. The defendant filed a timely notice of appeal pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure on May 1, 2007. A13. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Statement of the Issues Presented

I. Should this Court enforce the defendant's knowing and voluntary waiver of his appellate rights after he received the full benefit of his bargain?

II. Did the district court commit plain error in finding that there was a factual basis for the defendant's plea of guilty?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-2215-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

CLIFFORD HUNTER, aka "Boo,"
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Clifford Hunter ("the defendant") is a multi-convicted felon who was one of two defendants named in a superseding indictment alleging numerous violations of the federal narcotics laws. Owing to the defendant's formidable criminal history as well as the nature of the charges alleged in the superseding indictment, the defendant faced a potential mandatory minimum sentence of 20 years' imprisonment and a maximum of life imprisonment had he been convicted after trial.

Despite this significant sentencing exposure, the government agreed to allow the defendant to plead guilty to a lesser-included offense of conspiracy to possess with the intent to distribute and to distribute cocaine base, which subjected the defendant to a maximum term of imprisonment of 30 years and no mandatory minimum sentence.

Prior to the plea, the defendant admitted in a written petition with the district court that he "was given crack cocaine on credit by [co-conspirator] Quincy Hines in order to help pay household bills," that he "sold the drugs with intentions to do so," and that he "ended up spending the money on PCP." The parties executed a written plea agreement in which the defendant agreed, *inter alia*, not to appeal his conviction and sentence as long as the district court did not impose a sentence exceeding 235 months' imprisonment. The district court sentenced the defendant to 188 months' incarceration.

Despite the defendant's knowing and voluntary waiver of his right to appeal, as well as his written admission of the conduct that formed the basis of his guilty plea, the defendant now asks this Court to vacate his plea and remand the matter to the district court where he could once again be exposed to a 20-year mandatory minimum sentence. For the reasons that follow, the defendant's claim should be rejected, and his conviction should be upheld.

Statement of the Case

On September 14, 2005, a federal grand jury in New Haven returned a twenty-one count superseding indictment charging the defendant and one co-defendant with numerous violations of the federal narcotics laws. A15-26.[1] The defendant was charged with conspiracy to possess with intent to distribute 50 grams or more of cocaine base ("crack"); possession with the intent to distribute 5 grams or more of crack; aiding and abetting the distribution of crack; use of a telephone to facilitate the distribution of crack and phencyclidine ("PCP"); and unlawful possession of crack. *Id.*

The government previously had filed a second offender information, pursuant to 21 U.S.C. § 851, noticing the district court of the defendant's prior felony drug conviction. A27-29. The defendant was thus subject to a mandatory minimum term of imprisonment of 20 years and a maximum life term of imprisonment if convicted on the conspiracy count.

On December 8, 2006, the government permitted the defendant to plead guilty to the lesser-included offense of Count One of the superseding indictment, that is, knowingly and intentionally conspiring to possess with the intent to distribute and to distribute a mixture and substance containing cocaine base, in violation of Title 21, United States Code, Sections 846, 841(a)(1), and 841(b)(1)(C). The parties executed a written plea

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[1] Citations to the Joint Appendix are referenced as "A _."

agreement that day, which included a provision that the defendant would waive his right to appeal or collaterally attack his conviction and sentence as long as the district court did not impose a term of imprisonment exceeding 235 months. A32-40.

Prior to the plea colloquy, the defendant prepared a petition to enter a plea of guilty with the district court, in which he acknowledged, in his own handwriting, that he "was given crack cocaine on credit by Quincy Hines in order to help pay household bills," that he "sold the drugs with intentions to do so," and that he "ended up spending the money on PCP." A52. The defendant's guilty plea was accepted, and on April 26, 2006, the district court sentenced the defendant to a term of imprisonment of 188 months, to be followed by a term of supervised release of 72 months. A238-39. Judgment entered on April 27, 2006. A13.

Following imposition of sentence, the defendant filed a timely notice of appeal. A13, 241. The defendant is incarcerated.

Statement of Facts and Proceedings Relevant to this Appeal

A. The Investigation

In August 2003, a drug task force led by the Drug Enforcement Administration, began an investigation into a phencyclidine ("PCP") and crack cocaine distribution network operating in Fairfield County. An individual

named Quincy Hines was identified as the primary target. After extensive investigation of Hines, including informant undercover narcotics purchases from Hines and his associates, the task force received authorization to intercept wire communications occurring over Hines' cellular telephones. The wiretap phase of the investigation began on December 28, 2004, and concluded on February 23, 2005.

During that two-month period, law enforcement officers intercepted numerous calls between Hines and Clifford Hunter, establishing a conspiracy to distribute crack cocaine. Illustrative examples of those intercepted conversations are described below.

On January 4, 2005, the defendant and Hines had a conversation in which the defendant agreed to buy $100 worth of cocaine base from Hines.

HINES: You want to spend a hundred dollars on some base?

HUNTER: A hundred? Yeah.

*****

HINES: So don't go nowhere. I'm about to get dressed and come down in there.

HUNTER: All right, I'm at my crib.

A138.

On January 6, 2005, the defendant and Hines had a conversation in which the defendant agreed to purchase seven grams of cocaine base from Hines:

HUNTER:	What up man? You coming through or what?
HINES:	I'm trying, Cliff.
HUNTER:	What's going on with you man?
HINES:	What you mean?
HUNTER:	I been calling you all day.
HINES:	I know, but you ain't tell me you wanted some god damn that, that shit that you wanted earlier, you didn't tell me that. I thought you just wanted that that shit I got, the other shit.
HUNTER:	So what, so what cause I wanted that, I got to wait on that?
HINES:	Yeah, because I don't even rock that shit, I gave that shit to you on the strength. I don't be doing that shit for niggers, that ain't nothing I just carry around in my pocket. I don't, I don't, I don't rock that like that. You know what I'm saying?

HUNTER: Yo I can get it yo.

*****

HINES: Yo, first of all, that other shit, uh, you caught me coming out the crib. I don't have no fucking three grams, like stashed around here like that. I don't got that like that. I got seven grams.

HUNTER: Yeah.

HINES: So you can't even get seven grams, I'm not, I, I, where the hell I'm gonna go bag that shit up, I don't got no place to bag that shit up.

HUNTER: So you want me to do seven?

HINES: Yeah.

HUNTER: All right, bring it.

HINES: How much you got?

HUNTER: Whatever it costs.

A152-53.

On the evening of January 19 and early morning of January 20, 2005, the defendant and Hines had a series of phone calls, in which Hines told the defendant that his car

was stalled due to a flat tire and asked that the defendant come to pick him up. The defendant agreed to do so, but the wiretap reveals that the defendant failed to pick up Hines because he met with people to sell drugs:

HINES: How you gonna have me sitting, waiting in the fucking cold, to go fucking juggle a little forty fifty dollars you you can't put that aside to come get your man?

HUNTER: Man, I'm coming to get you. You told me to go check her yo.

HINES: Yeah I told you to go check her but . . .

HUNTER: That's what you told me, man.

HINES: A half hour done went by, you was like I had to go meet some people.

*****

HINES: But then when I called you you was like well I had to go do some running around.

HUNTER: Yeah cuz that shit was serious, man, the shit was serious, man.

HINES: What serious? Forty fifty dollars?

HUNTER: Nah, man! The shit was a hundred dollars, B. Come on, man, what I'm supposed to do, man?

HINES: All right, I guess you gotta get that, I guess you gotta get that hundred. It's funny, but god damn B, you you that fucked up in the game where you gotta get a . . . you gotta . . . you gotta go . . . you gotta go get a hundred dollars in . . . you know what I'm saying?

A163.

On February 13, 2005, the defendant called Hines and introduced him to a wholesale[2] crack cocaine customer named Mike. At the conclusion of that call, the defendant vouched for Mike's credibility and ensured Hines that Mike was "good people."

HUNTER: Yo, I'm put you on to my boy, man, this nigger. I'm put you on to my boy he (unintelligible) money yo, all right?

HINES: Who that?

HUNTER: I'm put you on, he guaranteed a hundred twenty dollar a day yo.

---

[2] A "wholesale" customer is one who purchases narcotics for resale purposes.

HINES: He guarantee what?

HUNTER: He guarantee a, a buck or two a day yo, right. He guarantee a buck or two a day right, all right? I want you to talk to him all right?

*****

HUNTER: His name Mike yo, his name Mike yo, he right here with me right now yo. You want to talk to him?

HINES: Yeah, let me talk to him.

HUNTER: He good people man.

MIKE: Yo, what's good yo?

HINES: What up, what's going on?

MIKE: I'm saying you been having umm wholesale and shit yo?

*****

HINES: Yeah, yeah, yeah.

MIKE: I'm saying like you.

HINES: I'm (unintelligible) like seven grams though.

MIKE: Seven grams?

HINES: Yeah.

MIKE: How much?

*****

HINES: Like 240.

MIKE: 240?

HINES: Yeah.

MIKE: All right, what's your name, yo?

*****

MIKE: All right, I can get your number or something?

HINES: Yeah, yeah, give me a call yeah.

MIKE: Um.

HINES: Get it from Cliff, get it from Booshaun, he'll give it too you.

*****

HUNTER: All right.

HINES:	Yeah, you know this kid though?
HUNTER:	Yeah, he good people, man, he good people man, he good, man.
HINES:	All right.

A166-69.

B. The Indictment and Superseding Indictment

On March 9, 2005, a federal grand jury in Bridgeport charged the defendant and seventeen co-defendants in a multi-count indictment charging numerous violations of the federal narcotics laws. A4-5. The defendant was charged in Count One of that indictment, with conspiring to possess with the intent to distribute and to distribute 50 grams or more of cocaine base.

On July 12, 2005, the government filed an information pursuant to Title 21, United States Code, Section 851, noticing the district court of the defendant's prior felony drug conviction in Connecticut Superior Court. A27-29.

On September 14, 2005, a federal grand jury in New Haven charged the defendant and one co-defendant, Gabriel Douglas, in a twenty-one count superseding indictment. The defendant was charged in Count One, with conspiracy to possess with intent to distribute and to distribute 50 grams or more of cocaine base; in Counts Two through Six, Eight, Ten, Eighteen, and Twenty, with unlawful use of a telephone to facilitate the distribution of

cocaine base and PCP; in Count Seven with possessing with intent to distribute 5 grams of more of cocaine base; in Count Nine with unlawful possession of 5 grams or more of cocaine base; and in Count Seventeen with aiding and abetting the possession with intent to distribute of cocaine base. A15-26. As a result of the government's filing of the Section 851 notice, the defendant, if convicted on all counts of the superseding indictment, faced a mandatory minimum term of imprisonment of 20 years.

On December 7, 2005, a jury was selected, with the defendant's trial to begin the following day. A10. However, before the presentation of evidence began the following day, the defendant agreed to plead guilty to the lesser-included offense charged in Count One, of conspiracy to possess with intent to distribute and to distribute cocaine base, in violation of Title 21, United States Code, Sections 846, 841(a)(1), and 841(b)(1)(C). The parties executed a written plea agreement. A32-40. Included in the agreement was a waiver of appellate rights as to the defendant's conviction and sentence. That provision was the subject of extensive negotiation between the parties. *See* A82-83, A118-19.

C. The Guilty Plea

The defendant entered his guilty plea on December 8, 2005. Prior to the plea colloquy, the defendant, with the assistance of counsel, completed a 17-page document submitted to the district court, entitled "Petition to Enter Plea of Guilty Pursuant to Rules 10 and 11 of the Federal Rules of Criminal Procedure." A41-57. In that petition,

the defendant acknowledged, *inter alia*, that he was able to read and write English, A41, that he understood the offense to which he was pleading guilty and the penalties associated with that offense, A42-44, and that he was entering his plea of guilty freely and voluntarily, *id.* at 53. Moreover, the defendant, in his own handwriting, admitted that he "was given crack cocaine on credit by Quincy Hines in order to help pay household bills. I sold the drugs with intentions to do so. I ended up spending the money on PCP." A52.

The written plea agreement contained a stipulation of offense conduct, signed by the defendant and counsel for the defendant and the government. That stipulation stated:

1. Between in or about December 2004 and continuing until in or about February 2005, the defendant conspired to possess with the intent to distribute and to distribute a mixture or substance containing cocaine base ("crack cocaine") with Quincy Hines and others.

2. During that time period, the defendant was given a quantity of crack cocaine from Quincy Hines on multiple occasions. On at least one occasion, Quincy Hines "fronted" a quantity of crack cocaine to the defendant, with the expectation that the defendant would repay Mr. Hines for that crack at a later date.

3. The defendant was unable to repay Mr. Hines for that fronted crack. Instead, the defendant

> knowingly and intentionally directed a potential crack cocaine customer to Mr. Hines for the express purpose of repaying Quincy Hines for the crack that had been fronted. The defendant vouched for that potential customer's credibility, telling Mr. Hines that that individual was "good people."

A40.

The plea agreement also contained an appellate waiver provision, in which the parties agreed that "the defendant will not appeal . . . the conviction or sentence of imprisonment by the Court if that sentence does not exceed 235 months." A36.

At the December 8, 2005 plea colloquy, the district judge confirmed the defendant's competence to plead guilty, A65, and confirmed his understanding of the nature of the charge to which he was pleading guilty, A69, the rights he would be giving up by his guilty plea, A70-74, the collateral consequences of his plea, A75-76, and the defendant's potential sentencing exposure under the federal statute and the sentencing guidelines, A86-92. The district court further confirmed with the defendant that he understood the terms of the appellate waiver. A74.

The district judge then asked the defendant what he had done to make him guilty of the charge to which he was pleading. The following exchange ensued:

HUNTER: I was credited or fronted crack cocaine from Quincy Hines. My intentions were to pay some household bills and everything, but – I did do that, but I also – I sold crack to pay my bills and I also used it to buy PCP.

*****

COURT: When you say that you were credited or fronted crack by Mr. Hines, are you saying that there was an agreement between the two of you, at least, for you to possess – between the two of you to possess with intent to distribute crack?

HUNTER: I possessed with intent to distribute the crack and to pay him back what I owed him for giving it to me.

COURT: To Mr. Hines.

HUNTER: Yeah.

COURT: So that's the agreement that you and Mr. Hines had.

HUNTER: Yes, I was supposed to pay him back.

COURT: All right, and you voluntarily and willfully entered into that agreement with Mr. Hines?

HUNTER: Yeah.

A95-96.

Later during the hearing, the district judge and the defendant had a further discussion of the factual basis of the plea:

COURT: All right. Mr. Hunter, you have told me that Mr. Hines fronted you crack, that you intended to do things – that you intended to pay bills with it. Does that mean that when Hines gave you, fronted the crack to you, it was your intent to resell some or all of it to pay your bills and buy PCP and otherwise?

HUNTER: I intended to pay my bills knowing that I had to pay him back also.

COURT: But you can't take crack to pay your bills.

HUNTER: No you can't.

COURT: The utilities don't know how to handle that transaction. So your intent was to resell it?

HUNTER: Yes.

COURT: To get money to pay your bills?

HUNTER: Yes.

A101-02.

The district judge concluded that there was a factual basis for the defendant's guilty plea:

COURT: And so long as there was an agreement between Mr. Hines and Mr. Hunter to – for someone within the conspiracy to possess with intent to distribute crack cocaine, and that Mr. Hunter was a part of that conspiracy, voluntarily and willfully and knowingly, I'm satisfied. It seems to me that the facts, as now developed, satisfy those two elements.

All right, so there is no disagreement that Hines fronted him the crack; he was supposed to pay for the crack; he intended to sell the crack, at least in part to repay it; and he steered and vouched for another customer, at least in part in consideration of one of these transactions involved.

*****

COURT: All right, is that correct, Mr. Hunter?

HUNTER: Yes, ma'am.

D. Sentencing and Notice of Appeal

On April 26, 2006, the district judge sentenced the defendant to a term of imprisonment of 188 months, to be followed by a term of supervised release of 6 years. A233. Judgment entered on April 27, 2006. A13, 238-39. On May 1, 2006, the defendant filed a timely notice of appeal. A13, 241.

SUMMARY OF ARGUMENT

This Court should enforce the parties' express appellate waiver and decline to consider the merits of the appeal. The record reflects that the defendant knowingly and voluntarily waived his right to appeal. In exchange for that waiver, the government allowed the defendant to plead guilty to the lesser-included offense charged in Count One, which freed him from exposure to a mandatory minimum term of imprisonment of twenty years. The defendant should not be permitted to renege on the express terms of the plea agreement after having already reaped the benefit of the plea bargain.

Should this Court consider the defendant's appeal on the merits, the defendant has failed to demonstrate that the district judge committed plain error in finding that there was a factual basis for the defendant's guilty plea. The record reflects that there was an ample factual basis for the defendant's plea to the charged conspiracy. The defendant admitted – in the plea petition, in the stipulation in the plea agreement, and at the plea colloquy – that he received crack cocaine from Quincy Hines on credit and that he

sold that crack cocaine. Moreover, these admissions are well supported by statements of counsel during the plea colloquy, as well as by the multiple conversations intercepted during the course of the wiretap involving the defendant.

ARGUMENT

I. The appellate waiver should be enforced.

A. Governing law and standard of review

It is well settled that a waiver of appellate rights is enforceable, provided the waiver itself is knowing and voluntary, with the effective assistance of counsel. *See United States v. Monsalve*, 388 F.3d 71, 72 (2d Cir. 2004); *United States v. Morgan*, 386 F.3d 376, 379 (2d Cir. 2004) (declining to review merits of a Sixth Amendment challenge to a sentence); *United States v. Djelevic*, 161 F.3d 104, 106 (2d Cir. 1998) (per curiam) (waiver bars claim challenging sentence); *see also United States v. Granik*, 386 F.3d 404, 411 n.5 (2d Cir. 2004) ("appellate waivers are generally enforceable if they are knowing and voluntary") (citation omitted).

Indeed, this Court has held that "[i]n no circumstance . . . may a defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement. Such a remedy would render the plea bargaining process and the resulting

agreement meaningless." *United States v. Salcido-Contreras*, 990 F.2d 51, 53 (2d Cir. 1993).

B. Discussion

This Court should enforce the appellate waiver provision in this case. The record amply demonstrates that the defendant's waiver was both knowing and voluntary.

First, the defendant executed the written plea agreement and agreed to waive his right to appeal and collaterally attack his conviction and sentence as long as the Court did not impose a sentence exceeding 235 months. A36. The defendant's case proceeded to sentencing without any claim that his plea lacked a factual basis, and he received a sentence substantially below that specified in the appellate waiver provision. The defendant was sentenced to 188 months' imprisonment.

Second, counsel for the defendant, during the plea colloquy, stated the subject of the appellate waiver was a "significant issue" that had been discussed at length and was the subject of specific negotiation prior to the plea. *See* A82 ("Mr. Hunter's willingness to waive his appellate rights, which you had discussed earlier. That was a significant issue that we had discussed quite a while."). There is no question that the waiver was made voluntarily and with full knowledge of its consequences.

Third, during the plea colloquy, the district judge carefully reviewed the terms of the appellate waiver and ensured the defendant's understanding of that waiver. The

defendant acknowledged that he understood the rights he was waiving. A74, A92-93. The district court further confirmed that the defendant was competent to enter a plea, AA64-66, that he was satisfied by the representation of his attorney, A68, and that he had reviewed and understood the terms of the plea agreement, A76-78.

The record thus shows that the defendant's waiver was both knowing and voluntary, a fact that he does not contest on appeal. There also is no dispute that the defendant received the benefit of his bargain. Because the district court sentenced the defendant to a sentence of less than 235 months of incarceration (and significantly less than the 240-month mandatory sentence he faced after a trial), this Court should follow the well-settled law in this Circuit enforcing valid appellate waivers. To hold otherwise would allow the defendant to "secure[] the benefits of a plea agreement . . . then appeal the merits of a sentence conforming to the agreement," thus "render[ing] the plea bargaining process and the resulting agreement meaningless." *Salcido-Contreras*, 990 F.2d at 53.

On appeal, the defendant asserts that, notwithstanding an appellate waiver, "a defendant may argue on appeal that the district court failed to satisfy the requirement that there is a factual basis for the plea." Def. Br. at 10. The defendant relies solely on *United States v. Adams*, 448 F.3d 492 (2d Cir. 2006), in support of that proposition. For the reasons that follow, however, *Adams* is inapposite.

In *Adams*, federal agents in New York discovered a trailer loaded with 659 kilograms of cocaine and identified

one Howard Willis as the person who had driven the truck from Texas to New York. Willis informed the agents that defendant Adams had propositioned him to haul "dope" to New York, to which Willis had agreed. Adams was thereafter arrested and charged with conspiracy to possess with intent to distribute more than five kilograms of cocaine. Adams decided to plead guilty and at the plea colloquy, the district judge asked Adams whether he understood that he was agreeing to waive his right to appeal his conviction and sentence as long as the sentence did not exceed 162 months; Adams said that he understood. The district judge then asked Adams what he had done to be guilty of the charge to which he was pleading. Adams responded that he had met with Willis and conspired with Willis to transport marijuana, and that it was not until he was arrested that he learned that Adams' source had actually supplied Willis with cocaine. Despite this recitation of facts, the district court accepted the defendant's guilty plea to a cocaine conspiracy. 448 F.3d at 495-96.

Prior to sentencing, however, the defendant moved to withdraw his guilty plea, *inter alia*, on grounds that his attorney had been ineffective in advising him that he could be found guilty of conspiracy to distribute cocaine even if he did not know or could not reasonably foresee that cocaine was to be transported by his co-conspirators. *Id.* at 496. Based on that motion, the district court held a hearing to determine whether it was reasonably foreseeable to Adams that he was engaging in a cocaine conspiracy. After the hearing, the district court held that the government had proven reasonable foreseeability and

found that the legal advice provided by the defendant's attorney, even if incorrect, was objectively reasonable. *Id.*

On appeal, Adams argued that the district court erred by accepting his plea because neither his plea allocution, which admitted participation in only a marijuana conspiracy, nor the factual record developed during the plea proceeding, supported his guilty plea to the charged cocaine conspiracy. *Id.* This Court found the appellate waiver provision unenforceable because "'a defendant retains the right to contend that there were errors in the proceedings that led to the acceptance of his plea of guilty,' and he may argue that the district court failed to satisfy the requirement that there is a factual basis for the plea." *Id.* at 497 (citing *Maher*, 108 F.3d at 1528-29 and *Smith*, 160 F.3d at 120-21).[3]

Adams is distinguishable from the case at hand in two important respects. First, Adams sought to withdraw his guilty plea prior to his sentencing, which demonstrates that his plea, as well as his acquiescence to the appellate waiver provision, may not have been knowing and

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[3] Both *Maher* and *Smith* are inapposite to this issue. *Maher* did not address the issue of the enforceability of an appellate waiver provision when there is allegedly an inadequate factual basis for a plea. In *Smith*, this Court considered the merits of appeal notwithstanding an appellate waiver provision because that provision only waived the right to appeal a sentence, and the defendant was raising a violation of Fed. R. Crim. P. 11. 160 F.3d at 120-21. In contrast, defendant Hunter waived both his right to appeal his sentence *and* his conviction. A36.

voluntary. In contrast, defendant Hunter did not seek to withdraw his guilty plea or otherwise contest his appellate waiver provision until after the district court imposed a sentence of 188 months of imprisonment, which was well below the 235-month appellate waiver trigger. Unlike Adams, defendant Hunter's request to withdraw his guilty plea for the first time on appeal can be seen as nothing more than an attempt to "secure[] the benefits of a plea agreement . . . then appeal the merits of a sentence conforming to the agreement." *Salcido-Contreras*, 990 F.2d at 53. Indeed, there is no claim that his plea, including his appellate waiver, was anything but knowing and voluntary. The Court should reject the defendant's attempt to renege on the bargain he made and from which he benefitted. To do otherwise would "render the plea bargaining process and the resulting agreement meaningless." *Id.*

Second, whereas Adams' admissions demonstrated that there was no adequate basis for a plea of guilty to a cocaine (as opposed to marijuana) conspiracy, in this case, for the reasons discussed hereafter, defendant Hunter's admissions that he purchased crack cocaine from Quincy Hines on credit and resold that crack cocaine clearly demonstrate that he knowingly and voluntarily entered into a crack cocaine conspiracy with Hines. The intercepted conversations between Hunter and Hines provide further support that there was a factual basis for the charged conspiracy.

For these reasons, this Court should enforce the parties' bargained-for appellate waiver and decline to address the merits of the defendant's appeal.

II. The district court did not plainly err in finding a factual basis for the defendant's plea.

A. Governing law and standard of review

Rule 11(f) of the Federal Rules of Criminal Procedure states:

> **Determining Accuracy of Plea.** Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

"This language does not require the district court to weigh any evidence or predict what a jury would do with the case." *United States v. Smith*, 160 F.3d 117, 121 (2d Cir. 1998). "The court must 'assure itself simply that the conduct to which the defendant admits is in fact an offense under the statutory provision under which he is pleading guilty." *Id.* (quoting *United States v. Maher*, 108 F.3d 1513, 1524 (2d Cir. 1997)). "Rule 11(f) requires an adequate factual basis for a guilty plea; it does not require the judge to replicate the trial that the prosecutor and defendant entered a plea agreement to avoid." *United States v. Lumpkins*, 845 F.2d 1444, 1451 (7th Cir. 1988).

The purpose of Rule 11(f) is to "protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge." *McCarthy v. United States*, 394 U.S. 459, 467 (1969) (quoting Fed. R. Crim. P. 11 advisory committee notes); *see also United States v. Juncal*, 245 F.3d 166, 171 (2d Cir. 2001) ("Rule 11(f) requires only that the trial court 'determine that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty.'") (citing *United States v. Livorsi*, 180 F.3d 76, 79 (2d Cir. 1999)).

"The factual basis of the plea required by Rule 11(f) need not be drawn directly from the defendant." *Smith*, 160 F.3d at 121 (citing *Maher*, 108 F.3d at 1524-25). "The judge may look to answers provided by counsel for the defense and government, the presentence report, 'or . . . whatever means is appropriate in a specific case' – so long as the factual basis is put on the record." *Smith*, 160 F.3d at 121 (quoting *Maher*, 108 F.3d at 1524). "And if 'the charge is uncomplicated, the indictment detailed and specific, and the [defendant's] admission unequivocal,' then the reading of the indictment and the admission of the facts described in it satisfies Rule 11(f)." *Smith*, 160 F.3d at 121 (quoting *Godwin v. United States*, 687 F.2d 585, 590 (2d Cir. 1982)). Rule 11(f) may also be satisfied when the plea agreement sets out a factual basis for the charged crime and the defendant agrees that it was accurate. *See United States v. Baez*, 87 F.3d 805, 810 (6th Cir. 1996); *see also Smith*, 160 F.3d at 121.

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). To prove the first element, 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).

Numerous appellate courts have found that a drug seller's extension of credit is highly probative in determining whether a drug purchaser is a mere buyer or a knowing participant in a 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 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).

Where, as here, a defendant challenges the validity of his guilty plea for the first time on appeal, this Court reviews the district court's acceptance of the guilty plea only for plain error. *See* Fed. R. Crim. P. 52(b); *United States v. Dominguez Benitez*, 542 U.S. 74, 123 S. Ct. 2333, 2338 (2004) (citing *United States v. Vonn*, 535 U.S. 55, 63 (2002)) (defendant who seeks reversal of conviction after guilty plea on ground that district court violated Rule 11 must establish plain error); *United States v. Vaval*, 404 F.3d 144, 151 (2d Cir. 2005) (where appellant fails to object to Rule 11 violation, Court reviews for plain error); *United States v. Barnes*, 244 F.3d 331, 333 (2d Cir. 2001) (per curiam) (where defendant "did not argue the point to the district court, we review the trial judge's acceptance of the plea for plain error").

The defendant bears the burden of establishing plain error. *See Vaval*, 404 F.3d at 151 (citing *Vonn*, 535 U.S. at 59). To establish plain error, the defendant must demonstrate (1) an error, (2) that is plain, and (3) that affects substantial rights. *Vaval*, 404 F.3d at 151 (citing *United States v. Olano*, 507 U.S. 725, 732 (1993)). "If an

error meets these initial tests, the Court engages in a fourth consideration: whether or not to exercise its discretion to correct the error. The plain error should be corrected only if it 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *United States v. Doe*, 297 F.3d 76, 82 (2d Cir. 2002) (citing *Johnson v. United States*, 520 U.S. 461, 466-67 (1997)).

B. Discussion

The district court did not commit plain error in finding that there was a sufficient factual basis for the defendant's guilty plea to the crack cocaine conspiracy charge. The record amply demonstrates that the defendant purchased crack cocaine from Hines on a number of occasions, sold crack to others, received crack cocaine on credit from Hines, and that the defendant thereafter resold the crack cocaine for the purpose of paying household bills and purchasing PCP. Consideration of the existence of this credit relationship with Hines in and of itself demonstrates that there was a sufficient basis for the district court to "assure itself . . . that the conduct to which the defendant admits is in fact an offense." *Smith*, 160 F.3d at 121 (quoting *Maher*, 108 F.3d at 1524); *see also Dortch*, 5 F.3d at 1065 ("evidence of 'fronting' suggests the existence of a conspiracy); *Carbone*, 798 F.2d at 27 (fronting of half-kilogram of cocaine was "not a single sale; it was a sale for further distribution"); *Ivy*, 83 F.3d at 1286 (affirming conspiracy conviction for street-level cocaine dealer who received drugs on credit); *Gibbs*, 190 F.3d at 200 ("[a] credit relationship . . . often evidences the parties' mutual stake in each other's transactions").

First, the defendant acknowledged a conspiratorial relationship with Hines in his petition to enter a plea of guilty. In that document, the defendant, in his own handwriting, admitted that he "was given crack cocaine on credit by Quincy Hines in order to help pay household bills." A52. He further admitted that he "sold the drugs with intentions to do so," and that he "ended up spending the money on PCP." *Id.*

Second, the parties executed a written plea agreement in which the defendant acknowledged that he had purchased crack cocaine from Hines on multiple occasions and that "[o]n at least one occasion, Quincy Hines 'fronted' a quantity of crack cocaine to the defendant, with the expectation that the defendant would repay Mr. Hines for that crack at a later date." A40. The defendant also stipulated in that agreement that he "was unable to repay Mr. Hines for that fronted crack. Instead, the defendant knowingly and intentionally directed a potential wholesale crack cocaine customer to Mr. Hines for the express purpose of repaying Quincy Hines for the crack that had been fronted. The defendant vouched for that potential customer's credibility, telling Mr. Hines that the individual was "good people." *Id.* The credit relationship described in the executed plea agreement, by itself, is sufficient to establish a factual basis under Rule 11(f). *See Baez*, 87 F.3d at 810.

Third, the defendant's statements made during the plea colloquy demonstrate a sufficient factual basis. For example, when asked by the district court what he had done to make him guilty of the charged offense, the

defendant responded, "I was credited or fronted crack cocaine from Quincy Hines. My intentions were to pay some household bills and everything, but – I did do that, but I also – I sold the crack to pay my bills and I also used it to buy PCP." A95. The defendant also acknowledged that he "possessed with intent to distribute the crack and to pay him back what I owed him for giving it to me" and that he did so "voluntarily and willfully." A96.

Fourth, the statements made by the attorneys for the government and the defendant support the district court's finding that there was a factual basis for the defendant's plea of guilty to the charged crack cocaine conspiracy. *See Smith*, 160 F.3d at 121 ("The judge may look to answers provided by counsel for the defense and government . . . so long as the factual basis is put on the record."). For example, counsel for the government stated that "Mr. Hines provided Mr. Hunter with crack cocaine with the expectation that he would be paid back for that crack. Mr. Hunter was unable to pay money at that time, but it was expected when Mr. Hines made that sale that Mr. Hunter would be reselling that crack and using part of the proceeds to pay Quincy Hines back for the crack that he had fronted." A100. Moreover, counsel for the defendant stated that "Mr. Hunter's primary drug that he abused was PCP . . . he sold – he got crack cocaine from Mr. Hines, resold a portion of that, or all of it, at different occasions, a portion or all, then paid some bills, and then took those proceeds to purchase PCP for his personal consumption." A103.

Fifth, the intercepted phone conversations between the defendant and Quincy Hines support the district court's finding of a factual basis. They show an ongoing relationship between Hunter and Hines and demonstrate Hines' awareness of the fact that Hunter was distributing the crack cocaine he was buying. The intercepted communications on January 4 and January 6, 2005, reflect that Hines sold quantities of crack cocaine to the defendant. A138, 152-53. The intercepted calls on January 19 and January 20, 2005, demonstrate that the defendant was reselling the crack cocaine purchased from Hines. A163. Moreover, an intercepted call on February 13, 2005, shows that the defendant introduced a potential wholesale crack cocaine customer named "Mike" to Hines, and that the defendant vouched for that individual's credibility. A166-69. The call indicates that the defendant was trying to establish a regular relationship between Hines and Mike, who in turn would distribute the narcotics he purchased from Hines.

The confluence of these factors demonstrate that the relationship between the defendant and Quincy Hines was not a mere buyer-seller relationship, but rather a conspiracy to possess with the intent to distribute crack cocaine. The record does not reflect, nor did the defendant state, that the defendant had received the "fronted" crack cocaine from Hines with the intention of consuming it. Indeed, the defendant admitted that his intent was to resell the credited crack for the purpose of paying back Hines and to use the profits of his sales to pay his household bills and to purchase PCP, his drug of choice to consume. Moreover, on at least one occasion, the defendant

attempted to assist Hines' narcotics distribution activities by steering a potential crack cocaine customer and vouching for that individual's credibility. In this regard, the relationship between Hines and the defendant was like any other distribution relationship, with Hines acting as the supplier and the defendant serving as a mid-level distributor. Irrespective of their distinct roles, their common objective was the same – to distribute crack cocaine for the purpose of making a profit. The fact that the defendant might use a portion of the proceeds of his sales to purchase other drugs to consume does not change his status as a conspirator. Indeed, it is not at all uncommon for drug dealers also to be drug users.

For the foregoing reasons, the district court did not commit plain error in finding that there was a factual basis for the defendant's guilty plea to the crack cocaine conspiracy.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: April 17, 2008

Respectfully submitted,

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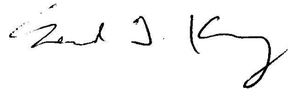

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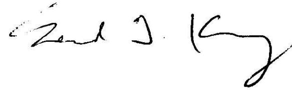
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(c)

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 7,798 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.



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ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Hunter

Docket Number: 06-2215-cr

I, Louis Bracco, hereby certify that the Appellee'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 4/17/2008) and found to be VIRUS FREE.

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