07-0648-cr(L)

To Be Argued By:
ROBERT M. SPECTOR

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 07-0648-cr(L)
07-0652-cr(Con)

UNITED STATES OF AMERICA,
Appellee,

-vs-

TRANEL MCCOY, also known as Freddie,
Defendant-Appellant,

CLAYTON ROBINSON, MAURICE BENNEFIELD, also known as Manager Mo, JAYQUAN FANIEL,

(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 FOR THE UNITED STATES OF AMERICA

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Defendants.

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Statement of Jurisdiction

This is an appeal from a judgment entered in the District of Connecticut (Mark R. Kravitz, J.) on February 14, 2007 after a jury found the defendant guilty of one count of conspiring to distribute five grams or more of cocaine base, one count of possession with the intent to distribute five grams or more of cocaine base, one count of possession with the intent to distribute marijuana and one count of possession of a firearm during and in relation to a drug trafficking crime. The district court had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal on February 21, 2007 pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction over the defendant's challenge to his judgment of conviction pursuant to 28 U.S.C. § 1291.

Statement of the Issues Presented

I. Did the district court err in denying the defendant's motion for judgment of acquittal as to the count charging the defendant with possession of a firearm in furtherance of a drug trafficking crime?

II. Did the district court err in denying the defendant's motion to suppress physical evidence seized as a result of the execution of a search warrant at the defendant's residence on December 20, 2005 based on the claim that the affiants to the warrant intentionally omitted material information from the warrant application?

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

In August, 2004, the FBI was in the midst of a wiretap investigation involving the distribution of cocaine base ("crack") by several groups of individuals in Hartford, Connecticut. Wire interceptions with one of the targets of the wiretap investigation, Clayton Robinson, revealed that, in August, 2004 and September, 2004, the defendant was purchasing seven gram quantities of crack cocaine from

co-defendants Robinson and Daren Willis for redistribution to other customers in Hartford. The defendant was arrested at his residence on November 10, 2004, at which time he admitted that he knew Robinson and Willis and that he had previously purchased crack cocaine from both individuals for redistribution to others. The defendant was released on bond pending trial.

In November and December, 2005, the Hartford Police Department received information from a confidential informant that the defendant was selling crack cocaine from his second floor apartment at 40 Elmer Street, in Hartford. The police conducted surveillance of the residence, observed a large volume of individuals going into and leaving from the residence, and conducted two controlled purchases of crack cocaine from the defendant out of the residence on December 7, 2005 and December 12, 2005. A state search warrant issued based on these controlled purchases, and, on December 20, 2005, Hartford police officers executed the warrant. Upon entry into the apartment, the officers immediately located the defendant and seized from his pocket just under 5 grams of crack cocaine, broken into little rocks and stored in a small pill bottle. They also located several items of contraband in an entertainment center in the defendant's bedroom, including twenty small baggies containing crack cocaine, thirty-four small baggies containing marijuana, and a Colt .45 semi-automatic handgun loaded with hollow-point ammunition. As the officers were seizing the various items of contraband, the defendant made statements to his wife indicating that the narcotics belonged to him.

The defendant was charged in two separate Indictments with one count of conspiracy to distribute five grams or more of crack cocaine, one count of possession with intent to distribute five grams or more of crack cocaine, one count of possession with intent to distribute marijuana and one count of possession of a firearm in furtherance of a drug trafficking crime. The jury convicted him of all four counts after trial, and, at sentencing, the district court sentenced him to a total effective term of 181 months in prison.

In this appeal, the defendant challenges two rulings by the district court. First, he claims that the district court erred in denying his Rule 29 motion for judgment of acquittal as to the count charging him with possession of a firearm in connection with a drug trafficking crime. Second, he argues that the district court erred in denying his motion to suppress the physical evidence seized from his residence on December 20, 2005 based on his claim that the warrant affiants intentionally omitted material information regarding the confidential informant used in the investigation.

For the reasons that follow, these claims have no merit, and the defendant's convictions should be affirmed.

Statement of the Case

On December 14, 2004, a grand jury in Hartford returned a Superseding Indictment against the defendant and several other individuals alleging various narcotics charges. Specifically, the Superseding Indictment charged the defendant in Count One with conspiracy to distribute 5 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846. GA1-GA5.[1] The defendant was released on bond on November 16, 2004.[2]

On December 22, 2005, the court issued an order revoking the defendant's pretrial release. On April 12, 2006, a grand jury in Hartford returned an Indictment against the defendant charging him in Count One with possession with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), in Count Two with possession with intent to distribute marijuana, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D), and in Count Three with possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c). GA6-GA9. All three counts also cited 18 U.S.C. § 3147(1) based on the fact that the defendant had committed the felony offenses while on federal pretrial release. GA6-GA9. In addition, on April 17, 2006, the Government filed a second offender

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[1] The Government's Appendix will be cited as "GA" followed by the page number.

[2] Several documents related to this appeal, including the docket sheets, have been included in an appendix, but that appendix has not been separately paginated.

notice under 21 U.S.C. § 851 based on the defendant's prior drug felony conviction, which increased the applicable penalties for any conviction on the cocaine base and marijuana charges.

On July 14, 2006, the district court granted, absent objection, the Government's Motion for Joinder of the conspiracy charge in the December 14, 2004 Superseding Indictment, and the narcotics and firearms charges in the April 12, 2006 Indictment. On July 24, 2006, the defendant moved to suppress, *inter alia*, various items of physical evidence seized pursuant to a search warrant on December 20, 2005. GA10-GA14. On July 28, 2006, the district court held a suppression hearing, and on August 2, 2006, the court denied the motion in a written ruling. GA38-GA51.

On August 9, 2006, a trial jury found the defendant guilty of all four charged offenses in both cases. On August 15, 2006, the defendant filed a motion for judgment of acquittal as to the crack cocaine conspiracy count and § 924(c) count. GA52-GA54. On December 21, 2006, the district court denied these motions in a written ruling. GA69-GA74. On February 13, 2007, the district court (Mark R. Kravitz, J.) sentenced the defendant to a total effective term of 181 months' imprisonment and 4 years' supervised release. Specifically, the district court imposed concurrent terms of incarceration of 120 months on Count One of the Superseding Indictment charging the defendant with conspiracy to distribute five grams or more of cocaine base, Count One of the related Indictment charging the defendant with possession with intent to

distribute five grams or more of cocaine base, and Count Two of the related Indictment charging the defendant with possession with intent to distribute marijuana. The court imposed consecutive terms of incarceration of 60 months on Count Three of the related Indictment charging the defendant with possession of a firearm in furtherance of a drug trafficking crime, and one month under 18 U.S.C. § 3147, based on the defendant's commission of the offenses in the second case while on pretrial release in the first case.

Judgment entered February 14, 2007. On February 21, 2007, the defendant filed a timely notice of appeal. The defendant has been incarcerated since December 20, 2005 and is currently in federal custody serving his sentence.

Statement of Facts

Based on the evidence presented by the Government at trial, the jury reasonably could have found the following facts:[3]

In March, 2004, the Federal Bureau of Investigation ("FBI") commenced an investigation of a crack cocaine trafficking organization operating in Hartford,

[3] At the trial, the Government presented the testimony of the following witnesses during its direct case: FBI Special Agent Robert Bornstein, Hartford Police Officers Patrick Farrell, and Kevin Salkeld, and Connecticut Department of Public Safety Fingerprint Examiner Michael Supple.

Connecticut. Tr. at 31.[4] The wiretap portion of the investigation commenced on July 14, 2004 with the court-authorized interception of wire communications over a cellular telephone utilized by Maurice Bennefield. Tr. at 32. The authorization of wire interceptions had been based on controlled purchases of crack cocaine from Bennefield which had been negotiated through Bennefield's cellular telephone. Tr. at 32.

Based on the wire interceptions over Bennefield's phone, the FBI learned that an individual named Clayton Robinson supplied him with crack cocaine for redistribution to others. Tr. at 39. Based on this information, the FBI received court authorization to intercept wire communications over a cellular telephone utilized by Robinson. Tr. at 40-41. The interceptions commenced on August 12, 2004, continued for approximately thirty days, and terminated on September 10, 2004. Tr. at 43. During the wiretap on Robinson's cellular telephone, the FBI learned that he was supplied by an individual named David Francis, and on September 2, 2004, they commenced a court-authorized wiretap investigation of two cellular telephones used by Francis. Tr. at 44. On September 13, 2004, after observing Francis meet with Robinson and conduct an apparent narcotics

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[4] The full, 764-page trial transcript, which covers the proceedings on August 4, 2006, August 7, 2006, August 8, 2006 and August 9, 2006, is contained in the defendant's appendix, but is not separately paginated. Thus, in this brief, the trial transcript will be referred to as "Tr." followed by the page number of the transcript.

transaction, and after observing him meet with several other, unidentified individuals for the purpose of conducting narcotics transactions, the FBI stopped Francis's vehicle, found him in possession of approximately 67.5 grams of crack cocaine and arrested him. Tr. at 44-54.

During the course of their investigation, the FBI learned that the defendant's cellular telephone had been in contact with Robinson's cellular telephone approximately 46 times. Tr. at 56-57. Seven of those contacts occurred during the period of the wiretap and were recorded. Tr. at 57.

For example, on August 17, 2004, at approximately 5:09 p.m., the defendant was intercepted ordering a "Q," or a quarter ounce of cocaine base, from Robinson. Ex. 2a. The defendant advised that it was for his "people." Ex. 2a. About two minutes later, Robinson was intercepted asking his associate, Daren Willis, if he had "two of them" for Robinson's "fat boy" on Earle Street, which was where the defendant lived at the time. Ex. 2b. Robinson was then intercepted telling the defendant that Willis would come to see him. Ex. 2c. Approximately thirty minutes later, Robinson was intercepted talking with Willis about the transaction with the defendant and confirming that Willis had sold him "two." Ex. 2d.

On August 18, 2004, at approximately 6:34 p.m., the defendant was intercepted ordering "two" and telling Robinson that the defendant's "people" wanted to see him. Ex. 2e.

On August 21, 2004, at approximately 6:00 p.m., the defendant was intercepted telling Robinson, "My peoples [are] here," and ordering "that type of thing" for "350." Ex. 2g. Shortly thereafter, two more calls were intercepted between the two individuals indicating that Robinson was right outside the defendant's residence on Earle Street. Exs. 2h and 2i. At approximately 10:16 p.m. on that same date, the defendant was intercepted telling Robinson that his "peoples" from Vermont had gone back after waiting for Robinson for over two hours. Ex. 2j. The defendant indicated that he did not "play with people money like that" and ordered a "buck fifty" from Robinson. Ex. 2j.

On August 22, 2004, at approximately 6:09 p.m., Robinson was intercepted leaving a message on the defendant's voice mail which indicated, "I need it right now, man." Ex. 2k. An intercepted call on August 23, 2004 revealed that the two made plans to meet. Ex. 2l. Finally, on September 1, 2004, at approximately 11:14 a.m., the defendant was intercepted ordering "two tacos" from Robinson. Ex. 2m. On that date, the FBI was successful in conducting physical surveillance of a meeting between the defendant and Robinson, which occurred at the defendant's residence at 64 Earle Street, in Hartford. Tr. at 84.

The FBI arrested the defendant on November 10, 2004. At the time of the arrest, the defendant was in possession of the cellular telephone that had been intercepted during the Robinson wiretap. Tr. at 55. In fact, the FBI had called the defendant at the number on the day of his arrest and advised him that they wanted to speak with him. Tr. at 58-

59, 92. The defendant indicated that he currently lived at 40 Elmer Street, in Hartford. Tr. at 92. When the FBI arrived at the residence, they arrested the defendant without incident and immediately transported him to the courthouse for his presentment. Tr. at 92, 94. During the 20 to 30 minute trip to the courthouse, the defendant, after having been advised of his *Miranda* rights, expressed a willingness to talk to the agents. Tr. at 94-96. The defendant admitted that he knew Robinson and Willis, that they sold crack cocaine, and that he purchased crack cocaine from them for the purpose of giving it to friends who wanted it. Tr. at 96-97.

Shortly after his arrest, the defendant was released on bond. Tr. at 98. He was ordered to reside in his home at 40 Elmer Street. Tr. at 98. To enforce this condition and the curfew that was imposed, the court ordered that the defendant be subjected to electronic monitoring. Tr. at 99.

On December 13, 2005, the Hartford Police Department obtained a search and seizure warrant for the second floor apartment at 40 Elmer Street. Tr. at 168. The warrant authorized the officers to seize crack cocaine, items associated with the sale of narcotics, weapons, and ammunition. Tr. at 169. Utilizing an emergency response team, the officers entered the second floor apartment by going into the front door of the residence, proceeding up one staircase to a landing, and entering through the front door of the second floor apartment. Tr. at 170-171.

Upon entering the apartment, the officers observed several adults and children. Tr. at 172. They began

securing the adults in the apartment, two of whom had tried to escape through the kitchen area. Tr. at 173. Once everyone was secured, the officers determined that approximately four adults and eight children were present. Tr. at 175. Prior to commencing the search, all of the adults were placed on a couch in the living room, and all of the children were placed in a bedroom that was found to contain no contraband. Tr. at 176. The four adults were identified as the defendant, his wife, John Ball and Troy Young. Tr. at 176. During the routine patdown of these individuals, officers found in the defendant's front pocket a small container with several small rocks of crack cocaine, with a net weight of approximately 4.68 grams. Tr. at 178-179, 191; Ex. 13.

A search of the master bedroom revealed several items of contraband. First, on the night stand next to the bed, they found a small quantity of cash. Tr. at 184. Under the bed, they found a black pouch containing approximately $1700 in cash. Tr. at 224. On one of the top shelves of the entertainment center to the right of the bed, the officers found a baggie containing several rocks of crack cocaine, with a net weight of 11.46 grams, a plate containing a razor blade and cocaine residue, and a bag containing several smaller baggies of marijuana, with a net weight of 11.4 grams. Tr. at 185-186, 191. In the drawers located at the bottom of the entertainment center, the officers found some packaging material, a scale and a .45 caliber handgun, which was stored with the safety turned off and was loaded with six rounds of hollow-point ammunition and one round of ball ammunition. Tr. at 187-188, 209. There were no identifiable fingerprints on the firearm, its

magazine or the ammunition loaded inside of it. Tr. at 198. The scale and the packaging material were located in a different drawer than the firearm. Tr. at 214. Finally, the officers seized documents establishing that the defendant lived in the apartment that was being searched. Tr. at 225.

At the time that the officers found the crack cocaine in the entertainment center, they overheard the defendant and his wife engage in a conversation about it. Tr. at 219. The two were sitting just outside the bedroom, on a couch in the living room, while the search of the bedroom was being done and could observe what was happening in the master bedroom. Tr. at 219, 348. The defendant's wife became very upset when she learned that the officers had found crack cocaine in the bedroom and began to cry. Tr. at 219, 351. In an attempt to calm her down, the defendant stated, "Don't worry. They know it's mine. They know you had nothing to do with it." Tr. at 219, 350. After the firearm was located, the defendant turned to Mr. Ball and told him he should take responsibility for the gun. Tr. at 221, 355. Mr. Ball was unwilling to provide any information or statement to the police. Tr. at 221, 356.

Finally, the Government offered expert testimony regarding the street-level distribution of crack cocaine. Tr. at 388. Among other things, FBI Special Agent Robert Bornstein testified as to the typical use and distribution quantities of crack cocaine. Tr. at 408-409. He recounted the various quantities in which crack cocaine is distributed, which included 3.5 gram or "eight ball" quantities, 7 gram or quarter-ounce quantities, and half-ounce and ounce quantities. Tr. at 408-409. Eight ball

quantities typically sold for between $75 and $120; a half ounce could sell for between $350 and $400; and an ounce could sell for between $650 and $800. Tr. at 408-409. He described the packaging material used for crack cocaine distribution and the manner in which crack cocaine is weighed and prepared for street-level distribution. Tr. at 415-416. He reviewed the tools of the trade for the typical street-level drug dealer, which included a scale, packaging material, a sharp object to separate the material, a piece of cardboard to use as a funnel to transfer the substance into the baggies, and a weapon to serve as protection from rival drug dealers. Tr. at 418-420. He testified that a weapon loaded with hollow-point ammunition would be most effective because of the manner in which a hollow-point round breaks upon impact. Tr. at 421-422. Finally, he explained that, in Connecticut, New York is viewed as a source state, and the northern New England states, such as New Hampshire and Vermont, are viewed as consumer states. Tr. at 413.

The defendant presented the testimony of two witnesses, his thirteen-year-old stepdaughter Tahira and his ten-year-old son Brandon. Tahira testified that she was in the Elmer Street apartment on December 20, 2005 when the Hartford police executed the search warrant. Tr. at 493. According to Tahira, just before the police arrived, she had seen John Ball in the master bedroom looking down at a fight occurring on the street. Tr. at 495. At that point, she observed Ball close the sliding doors that led into the bedroom, but said that she was still able to see inside through a small opening left between the two doors. Tr. at 499-500. She saw him holding a big bag of

marijuana and a gun and watched as he placed the bag of marijuana on the first shelf of the entertainment center and the gun inside a night stand on the opposite side of her parents' bed from where the entertainment center was located. Tr. at 502-503, 514, 518.

Brandon testified that he was also in the Elmer Street apartment on December 20, 2005 when the police executed the search warrant. Tr. at 531. Brandon also remembered seeing John Ball walk into the master bedroom, look out the window and watch a fight that was occurring below on the street. Tr. at 537. Just before the police entered the apartment, he observed Ball sneak a gun into the night stand on the opposite side of the bed from the entertainment center and a bag of marijuana on a small table on the side of the bed closest to the entertainment center. Tr. at 538. He did not remember Ball closing the sliding doors at the entrance of the bedroom and thought that they had been left open. Tr. at 539.

During its rebuttal case, the Government called John Ball as its only witness. Ball testified that he had been inside the Elmer Street apartment on December 20, 2005 when the police executed the search warrant, but denied having been in possession of a firearm or a large quantity of marijuana. Tr. at 586-587. Ball claimed that he had been playing a video game in the living room just before the police had entered the apartment and had never gone into the master bedroom for any reason. Tr. at 587. When the police came inside the apartment, Ball started to run towards the kitchen and was apprehended in the process. Tr. at 587. He admitted that he had possessed a small

quantity of marijuana in his pocket, but denied having possessed any firearm or a larger quantity of marijuana packaged in various, smaller baggies. Tr. at 588-589.

Summary of Argument

I. The district court properly denied the defendant's motion for judgment of acquittal as to Count Three of the second Indictment, which charged him with possession of a firearm in furtherance of a drug trafficking crime. The evidence established that the defendant knowingly possessed the firearm in the master bedroom of his apartment, in the same entertainment center where he stored his crack cocaine, his marijuana, his scale, his packaging material and other narcotics paraphernalia. The firearm was fully loaded with hollow-point ammunition, a round was in the chamber, and the safety for the firearm was off. Also, in the same bedroom, underneath one of the night stands, the officers located approximately $1700 in cash. Thus, the evidence established that the firearm was possessed as a tool of the defendant's drug trade.

II. The district court properly denied the defendant's motion to suppress based on an alleged material omission from the search warrant affidavit used in connection with the December 20, 2005 seizure of crack cocaine, marijuana, and a loaded firearm from the defendant's residence. The affiants did not know that their CI, who had previously provided truthful and reliable information, was arrested by the federal authorities on a federal firearms charge one week prior to the execution of their warrant. Thus, their omission of this information was not

intentional. Moreover, the information itself was not material and, even if it had been included in the warrant, probable cause would still have existed based on the physical surveillance conducted by the detectives and the two controlled purchases that the CI engaged in from the target apartment.

Argument

I. The district court properly denied the defendant's motion for judgment of acquittal as to the count charging him with possession of a firearm in furtherance of a drug trafficking crime.

The defendant argues that no reasonable jury could have found proof beyond a reasonable doubt as to the count charging him with possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c). He claims that the district court erred in its written ruling denying the motion because the Government failed both to prove knowing possession of the firearm and that the possession was in furtherance of a drug trafficking crime.

A. Relevant factual background

At the conclusion of the Government's evidence, the defendant moved for judgment of acquittal only as to two counts: the cocaine base conspiracy count charged in the first indictment, and the § 924(c) count charged in the second indictment. Tr. at 450-454. As to the conspiracy

count, the district court denied the motion. Tr. at 451. As to the § 924(c) count, the court denied the motion without prejudice to renewal, indicating, "I think the better course here is to let this go to the jury. We'll see what the jury does and we'll have to take a look at the case law." Tr. at 454.

On August 15, 2006, after the jury convicted him on all charges, the defendant filed a written motion for judgment of acquittal as to the conspiracy count and the § 924(c) count. GA52-GA54. The district court denied this motion in a written ruling issued on December 21, 2006. GA69-GA74. As to the § 924(c) count, the court rejected the defendant's arguments that he had not possessed the firearm at all, and that there was no evidence that the firearm was possessed in furtherance of a drug trafficking crime. The court stated:

> [P]olice found a mini-drug trafficking factory in Mr. McCoy's bedroom when he was arrested on December 20, 2005, while he was out on release pending trial on the charge in the first indictment. In or about the entertainment cabinet in Mr. McCoy's bedroom, police found eleven grams of crack cocaine, drug packaging material, numerous small bags of marijuana in a larger bag, and a digital scale. They also found a large amount of cash underneath Mr. McCoy's bed and found in the entertainment center a semi-automatic handgun that was fully loaded with hollow point ammunition. FBI Agent Bornstein testified as an expert witness that firearms are regularly used in the drug trade

> and that hollow point ammunition is particularly useful to drug dealers to protect them, their drugs, or their drug proceeds. Finally, and importantly, when police found the drugs in the entertainment center, Mr. McCoy was overheard saying to his distraught wife that she should not worry because the police knew the drugs belonged to him. Police also seized a vial from Mr. McCoy's person that contained over four grams of crack cocaine.

GA71-GA72.

The court rejected the defendant's argument that the jury could not have inferred knowing possession of the firearm because there were others in the house. "The firearm was found in Mr. McCoy's bedroom in the same entertainment center where the drugs were located; police also discovered drug trafficking paraphernalia and a large amount of cash in Mr. McCoy's bedroom. There is no indication that Mr. McCoy's wife was involved in the drug trade." GA73. The court also referred to the fact that the defendant had called his two minor children to testify that the gun had belonged to John Ball: "[T]he jury was not required to believe the testimony of Mr. McCoy's stepchildren. In that regard, the Court notes that the testimony of the stepchildren was not entirely consistent . . . , it was contradicted by evidence found by the police . . . , it was improbable . . . , and it was rebutted by John Ball's testimony . . . ." GA73-GA74.

B. Governing law and standard of review

This Court reviews a district court's denial of a motion for judgment of acquittal *de novo*, *see United States v. Ebbers*, 458 F.3d 110, 125 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1483 (2007), 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. MacPherson*, 424 F.3d 183, 187 (2d Cir. 2005) (quoting *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). Moreover, the task of choosing among competing, permissible inferences is for the fact-finder, not the reviewing court. *See United States v. Best*, 219 F.3d 192, 200 (2d Cir. 2000).

When reviewing a sufficiency of the evidence claim, "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; *see United States v. Florez*, 447 F.3d 145, 154-155 (2d Cir.), *cert. denied*, 127 S. Ct. 600 (2006). 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). "The ultimate question is not whether *we believe* the evidence adduced at trial established defendant's guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find*." *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998) (emphasis in original).

A person may be convicted under § 924(c)(1)(A) for "mere possession of a firearm" so long as "that possession is 'in furtherance' of a drug trafficking crime." *United States v. Lewter*, 402 F.3d 319, 321 (2d Cir. 2005). "[T]he requirement in § 924(c)(1) that the gun be possessed in furtherance of a drug crime may be satisfied by a showing of some nexus between the firearm and the drug selling operation." *Id.* (internal quotation marks omitted).

"Although courts look at a number of factors to determine whether such a nexus exists, the ultimate question is whether the firearm 'afforded some advantage (actual or potential, real or contingent) relevant to the vicissitudes of drug trafficking.'" *United States v. Snow*, 462 F.3d 55, 62 (2d Cir. 2006) (quoting *Lewter*, 402 F.3d at 322) (footnote omitted), *cert. denied*, 127 S. Ct. 1022 (2007). "In answering this question, courts distinguish between a gun on the premises which has no reasonable relationship to the drug possession and future distribution and a weapon that is present to further that possession." *Id.* (internal quotation marks omitted); *see also United States v. Ceballos-Torres*, 218 F.3d 409, 415 (5th Cir. 2000) (providing example of locked and inaccessible pistol used for target shooting as a weapon not possessed in furtherance of drug dealing). "[A] drug dealer may be punished under § 924(c)(1)(A) where the charged weapon is readily accessible to protect drugs, drug proceeds, or the drug dealer himself." *Snow*, 462 F.3d at 62-63 (citing *Lewter*, 402 F.3d at 322). "[T]his is 'a very fact-intensive question requiring a careful examination of, among other things, where the gun was located and what else was found in the apartment,' and thus well-suited to resolution by a jury." *Id.* at 63 (quoting *United States v. Taylor*, 18 F.3d 55, 58 (2d Cir. 1994)).

C. Discussion

The defendant argues that the evidence at trial was insufficient to support the jury's guilty verdict as the count charging him with possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C.

§ 924(c). The defendant maintains that the Government offered no evidence to show that he knowingly possessed the firearm at issue. The defendant also claims that the Government failed to show a connection between the alleged possession of the firearm and the drug trafficking crimes charged in Counts One and Two of the second indictment. The defendant's arguments fail.

1. Knowing possession of the firearm

On the issue of possession, the Government established through the testimony of Hartford Police Officers Patrick Farrell and Kevin Salkeld that the firearm was seized from a drawer of an entertainment center located in the defendant's bedroom of the second floor apartment at 40 Elmer Street, in Hartford. Tr. at 187-88, 209. The officers found items establishing the defendant's residency in the apartment, including a credit card bill with the defendant's name and address. Tr. at 225. That same credit card was located in a wallet that contained a large amount of United States currency and was located near the defendant's bed, in the same room as the firearm. Tr. at 224-225. Moreover, the officers also found other contraband in the master bedroom, including a quantity of crack cocaine on one of the shelves of the entertainment center. Tr. at 185-186, 191. When the officers located the crack cocaine, the defendant was overheard telling his wife not to worry because the officers knew that the drugs belonged to him. Tr. at 219, 350.

Thus, there was sufficient evidence presented during the trial to allow a rational trier of fact to conclude that the

defendant knowingly possessed the firearm located in his bedroom. In short, the Government established, as the jury instructions permitted, that the defendant exercised dominion and control over the area in which the contraband was located.

The defendant's arguments that anyone could have accessed the bedroom and that other individuals with a possessory interest, such as the defendant's wife, were present in the apartment, were more appropriately made to the jury, as the fact finder. Tr. at 710 (portion of defendant's closing argument). It was certainly within the jury's proper function, however, to reject the defendant's arguments and conclude, based on all of the evidence, that the defendant knowingly possessed contraband seized from the entertainment center in his bedroom. Moreover, it was the jury's exclusive function to credit the testimony of John Ball and discredit the testimony of the defendant's minor children on this issue of whether it was Ball who placed the firearm in the entertainment center in the defendant's bedroom. *See Payton*, 159 F.3d at 56 (holding that Government "need not disprove that the weapon was subject to the dominion and control of others" and that, to the extent that the defendant offers an alternate theory of possession related to others found in the vicinity of the firearm, the jury is free to reject that theory).

2. Possession of firearm in furtherance of drug trafficking crime

On the issue of whether the defendant possessed the firearm in furtherance of a drug trafficking crime, the

Government established that the entertainment center itself served as a small drug factory. On the top shelf of the entertainment center, the officers located a ceramic plate with a piece of cardboard on it, drug packaging material, and a large bag containing approximately 34 smaller baggies of marijuana. Tr. at 185-186, 191. The officers also located a baggie containing approximately 11 grams of crack cocaine on the second shelf from the top, and, at the time of the discovery, the defendant was overheard assuring his wife that the police knew the crack cocaine belonged to him. Tr. at 185-186, 191, 219, 350. By that time, the officers had already seized over four grams of crack cocaine, broken into approximately forty small pieces, from a vial found on the defendant's person. Tr. at 178-179, 191; Ex. 13. In addition, the officers found a digital scale in a drawer of the entertainment center separate from the drawer where the gun was located. Tr. at 214. Finally, the officers seized a large amount of cash from a wallet found underneath the defendant's bed. Tr. at 224.

The firearm itself was a semi-automatic handgun that was fully loaded with hollow-point ammunition, and the safety latch for the firearm was not activated, so that it was ready to be fired. Tr. at 187-188, 209. FBI Special Agent Robert Bornstein testified as an expert witness that firearms are common tools of the drug trade and are regularly used by drug dealers to protect drugs and drug proceeds. Tr. at 420. Special Agent Bornstein explained that semiautomatic weapons loaded with hollow-point ammunition are particularly useful to protect drug dealers from the violence associated with narcotics trafficking

because hollow-point bullets are specifically designed to expand inside the target, rather than pass through the target, so as to have greater stopping power than ordinary ammunition. Tr. at 420-422.

The foregoing facts are analogous to the facts in this Court's recent decision in *United States v. Snow*. In that case, the police "seized the charged firearms during their raid of the 183 Sixth Street apartment rented by Marcus Snow, where they also found 180 baggies containing approximately 474 grams of crack cocaine hidden in the basement." 462 F.3d at 63. Specifically, the officers "found the two loaded handguns in a bedroom dresser, one in the top drawer and one in the middle drawer, the one in the top drawer next to $6,000 in cash." *Id.* Also, "[t]here was drug packaging paraphernalia in the bedroom's closet," and scales, packaging material and a plate containing trace amounts of cocaine in the nearby kitchen area. *See id.* Based on this evidence, the Court concluded as follows:

> Viewing this evidence in the light most favorable to the verdict, a reasonable juror could conclude that Snow's possession of the handguns facilitated or advanced the instant drug trafficking offense by protecting himself, his drugs, and his business. . . . [L]oaded handguns, illegally possessed, were found in the bedroom of an apartment where drugs were packaged and stored for sale. The guns were in close physical proximity to the paraphernalia used in the packaging and sale of crack cocaine and the trace amounts of illegal narcotics found in the

> kitchen. Moreover, the guns were found in the same dresser as $6,000 in cash, which a reasonable juror could conclude were drug proceeds. From the proximity between the handguns, proceeds, trace amounts of drugs, and drug paraphernalia, a reasonable juror could conclude that the person to be protected was a drug dealer and drug packaging paraphernalia, and the proceeds of drug trafficking were among the things being protected. . . . Applying the deferential standard we must when reviewing the legal sufficiency of a jury's guilty verdict, we hold that this was sufficient evidence to support Snow's conviction under § 924(c)(1)(A).

Id. (internal quotation marks, citations and footnotes omitted).

Here, just as was the case in *Snow*, the Government presented the jury with enough evidence to support its conclusion that the firearm found in the defendant's entertainment center that was, for all purposes, the defendant's drug factory, served some purpose in relation to the defendant's crack cocaine and marijuana distribution operation that he ran out of his apartment. *See also Lewter*, 402 F.3d at 322 (finding sufficient evidence for § 924(c) conviction where firearm had obliterated serial number, was loaded with hollow-point bullets, and was stored within feet of defendant's drug stash).

II. The district court properly denied the defendant's motion to suppress the physical evidence seized from his apartment based on his claim that the affiants intentionally omitted material information from the warrant affidavit.

Prior to trial, the defendant filed a motion to suppress and claimed, *inter alia*, that the physical evidence seized from the second floor apartment at 40 Elmer Street on December 20, 2005 should be suppressed because the affiants for the search warrant intentionally omitted information about the confidential informant which, had it been included, would have caused the issuing judge to decide that probable cause did not exist to support the issuance of the warrant. GA11-GA12. The district court held a hearing pursuant to *Franks v. Delaware*, 438 U.S. 154 (1978), and determined that the affiants did not intentionally or recklessly omit any information from the warrant application and, in addition, that the omitted information would not have altered the probable cause supporting the issuance of the warrant. The defendant now claims that the district court erred in denying the motion to suppress. This claim has no merit.

A. Relevant factual and procedural background

On July 24, 2006, the defendant filed a motion to suppress which set forth a number of arguments, including the claim that all physical evidence seized as a result of the execution of the Connecticut search and seizure warrant at the second floor apartment at 40 Elmer Street on

December 20, 2005 should be suppressed. GA11-GA12. The defendant, in reliance on the Government's disclosure of adverse information about the confidential informant used in the investigation, asked for a *Franks* hearing to determine whether there were material omissions in the warrant affidavit which rendered the warrant invalid.[5] GA11-GA12.

According to the search warrant affidavit, on November 30, 2005, and December 2, 2005, Hartford Police Detectives conducted physical surveillance of 40 Elmer Street after a "registered, confidential, reliable informant" ("CI") advised them that cocaine base was being sold from the second floor apartment of that address. GA32. During their physical surveillance, the detectives

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[5] On appeal, the defendant also appears to claim that the oral statements that he made during the execution of the search warrant should be suppressed because of the *Franks* violation. He did not make this claim before the district court, and thus the only issue preserved for appeal relates to the seized evidence. In any event, to the extent he makes an argument about suppression of the oral statements based on the alleged *Franks* violation, that argument fails for the reasons given in the text.

In the district court, the defendant did seek to suppress the oral statements that he made during the execution of the warrant, but only on the ground that he was subjected to custodial interrogation without being advised of his constitutional rights. GA11-GA12; Tr. 7/28/06 at 3. The defendant has not renewed that argument here and thus he was waived it in this Court. *See United States v. Figueroa*, 750 F.2d 232, 237-38 (2d Cir. 1984).

observed numerous individuals walking into the doorway leading to the second floor apartment at 40 Elmer Street. GA32. These individuals were observed leaving the building a short time later, walking hurriedly down the street. GA32. In addition, the detectives observed several vehicles pull up to the front of 40 Elmer Street, the occupants of which would exit their vehicles, enter the building, exit the building a short while later and drive away. GA32.

On December 7, 2005 and December 12, 2005, the detectives used the same CI to engage in two controlled purchases from the second floor apartment at 40 Elmer Street. GA32-GA34. On each occasion, the detectives searched the CI for contraband before the purchase, provided the CI with Hartford Police funds, and observed the CI enter the front door to 40 Elmer Street, stay inside the house for a short time, exit the house, and meet the detectives at a predetermined location. GA32-GA34. At that meeting, the CI, after being searched again for contraband, turned over a white rock-like substance that appeared to cocaine base packaged for street-level distribution, and field tested positive for the presence of cocaine. GA32-GA34. Also, at that meeting, the CI described the controlled transactions. GA33-GA34. He stated that he went into the 40 Elmer Street house through the front door, walked to the second floor landing, knocked on the door at the top of the landing, and spoke to a dark-skinned black male who had braids in his hair, was approximately 5' 10", 350 pounds, and was know to the CI as "big boy." GA33-GA34. This individual asked the CI what he needed. GA33-GA34. On December 5, 2005, the

CI ordered a "forty of rock," and on December 12, 2005, the CI ordered a "twenty of rock." GA33-GA34. At that point, the CI handed the individual the Hartford Police monies, and "big boy" retrieved one piece of rock-like substance from a plastic bag containing several rock-like objects that was in his pocket. GA33-GA34.

On December 12, 2005, United States Magistrate Judge Thomas P. Smith issued a search warrant for the search of 53 Rosemont Street, Third Floor Apartment, in Hartford, which was the residence of James B. Ray, Jr., the CI described above. GA19. In essence, the warrant issued based on information from a confidential source who, on multiple occasions, had observed several firearms inside the residence and on Ray's person. GA19. The investigating officers confirmed that Ray had several prior felony convictions, and the search warrant affidavit indicated that there was probable cause to believe that evidence relating to a violation of 18 U.S.C. § 922(g)(1) would be found in the residence. GA19. On December 13, 2005, in the early morning hours, federal law enforcement officers executed the search warrant at the 53 Rosemont Street address and arrested Ray after finding a Winchester M-1 Carbine .30 caliber rifle and a bold action .303 British Caliber rifle. GA19. Ray waived his *Miranda* rights and admitted that he had possessed the firearms and had intended to sell them. GA19.

Ray continued to work as a CI for federal law enforcement authorities after his arrest. Tr. 7/28/06 at 6.[6] Several months after his arrest and during this period of attempted cooperation, the CI attempted to steal some monies from the agents with whom he was working. Tr. 7/28/06 at 6-7. Specifically, in January, 2006, during the course of a controlled purchase, the CI attempted to steal monies from the federal agents handling him. Tr. 7/28/06 at 8-9.

On December 13, 2005, at approximately 3:30 p.m., Detectives Farrell and Salkeld presented a search warrant application to a Connecticut Superior Court Judge. GA35. The judge signed the warrant, and the officers executed it on December 20, 2005, at which time they discovered numerous items of contraband, including the cocaine base, marijuana and firearm that form the basis for Counts One, Two and Three of the second indictment against the defendant. GA36-GA37.

Both Detectives Salkeld and Farrell testified that, prior to their execution of the search warrant on December 20, 2005, they had no knowledge that the CI they had used in their search warrant had been arrested by federal authorities. Tr. 7/28/06 at 81, 111. The federal authorities never contact them to advise that they had an arrest warrant for the CI. Tr. 7/28/06 at 88. Indeed, the officers acknowledged that they did not know that the target of

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[6] The transcript of the *Franks* hearing is included in the defendant's appendix, but is not separately paginated. It will, therefore, be referred to by "Tr. 7/28/06" and the page number.

their warrant was an individual who had previously been indicted by the federal authorities. Tr. 7/28/06 at 88. They were not even certain that the "Big Boy" who was selling crack cocaine out of the Elmer Street Apartment was Tranel McCoy. Tr. 7/28/06 at 115-116. They also had no knowledge, prior to the execution of the search warrant, that the CI had ever lied to, or stolen money from, the authorities. Tr. 7/28/06 at 82, 111. The detectives did learn, after the execution of their warrant, that, at some point, the CI admitted to having stolen monies from ATF. Tr. 7/28/06 at 82. Once they learned of this incident, they stopped using him as a CI. Tr. 7/28/06 at 113.

The CI was on the Hartford Police Department's list of registered confidential informants, which means that he was checked through several different databases and approved for use as an informant by a commanding officer. Tr. 7/28/06 at 84, 111-112. He was also told that if he were to provide false information, he could be prosecuted. Tr. 7/28/06 at 85.

The district court issued a written ruling on August 2, 2006 denying the defendant's motion to suppress. GA38-GA51. As to the *Franks* issue, the court found that the CI used by the Hartford detectives had been registered as an informant after the completion of a background check in the summer or early fall of 2005. GA41-GA42. The CI had provided the officers with reliable information on several occasions before the issuance of the search warrant in this case. GA42. Although the CI was arrested by the federal authorities on December 13, 2005, the Hartford detectives did not become aware of this arrest until after the

execution of their warrant on December 20, 2005. GA43. Over a month after the execution of the warrant, without the knowledge of the Hartford detectives, the CI was investigated for attempting to defraud the federal authorities in connection with a controlled purchase of narcotics. GA43. Thus, the court concluded, there was "no evidence that either Detectives Salkeld or Farrell knowingly, intentionally, or even recklessly made any false statement in their warrant application. . . . [T]he [d]etectives testified – credibly, in the Court's view – that they were unaware of the informant's federal arrest until after the search on December 20, 2005." GA47. The court further found that, according to the detectives, "the informant had provided credible and reliable information," and they were not aware "of any indication that the informant had provided false information." GA47. Thus, the court concluded that the defendant had failed to satisfy "the threshold requirement under *Franks*." GA48.

The district court also found that, even if the detectives "had included in the application the fact that the informant had been arrested on federal weapons charges, that fact would not have deprived the warrant of probable cause." GA48. The application described the detectives' surveillance of 40 Elmer Street and their observance of a pattern of visitors consistent with narcotics activity. GA48. In addition, the application described two controlled purchases by the CI from the target apartment. GA48. The informant was searched prior to and after the controlled purchases, and, despite the absence of recorded conversations, the simple "fact that the informant had been arrested on a federal weapons charge would not seriously

undermine the informant's credibility in that regard." GA48.

B. Governing legal principles

"Ordinarily, a search or seizure pursuant to a warrant is presumed valid. In certain circumstances, however, a defendant may challenge the truthfulness of factual statements made in the affidavit, and thereby undermine the validity of the warrant and the resulting search or seizure." *United States v. Awadallah*, 349 F.3d 42, 64 (2d Cir. 2003) (citing *Franks*, 438 U.S. at 164-72; *United States v. Canfield*, 212 F.3d 713, 717 (2d Cir. 2000)). "In order to invoke the *Franks* doctrine, [the defendant] must show that there were intentional and material misrepresentations or omissions" in the search warrant affidavit. *See id.* Said another way, to be entitled to a *Franks* hearing, "a defendant must make a substantial preliminary showing that: (1) the claimed inaccuracies or omissions are the result of the affiant's deliberate falsehood or reckless disregard for the truth; and (2) the alleged falsehoods or omissions were necessary to the judge's probable cause finding." *United States v. Salameh*, 152 F.3d 88, 113 (2d Cir. 1998).

"A misrepresentation or omission is intentional when 'the claimed inaccuracies or omissions are the result of the affiant's deliberate falsehood or reckless disregard for the truth.'" *Awadallah*, 349 F.3d at 64 (quoting *Canfield*, 212 F.3d at 717-18). It is material when "the alleged falsehoods or omissions were necessary to the issuing judge's probable cause finding." *Canfield*, 212 F.3d at 718

(internal brackets and quotation marks omitted). "To determine if the false information was necessary to the issuing judge's probable cause determination, *i.e.*, material, 'a court should disregard the allegedly false statements and determine whether the remaining portions of the affidavit would support probable cause to issue the warrant.' If the corrected affidavit supports probable cause, the inaccuracies were not material to the probable cause determination and suppression is inappropriate." *Awadallah*, 349 F.3d at 65 (quoting *Canfield*, 212 F.3d at 718). "The ultimate inquiry is whether, after putting aside erroneous information and material omissions, there remains a residue of independent and lawful information sufficient to support probable cause." *Canfield*, 212 F.3d at 718 (internal quotation marks omitted). "If, after setting aside the allegedly misleading statements or omissions, the affidavit, nonetheless, presents sufficient information to support a finding of probable cause, the district court need not conduct a *Franks* hearing." *Salameh*, 152 F.3d at 113.

"Probable cause is 'a practical, commonsense decision whether, given all the circumstances set forth in the affidavit . . . , including the veracity and basis of knowledge of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.'" *Canfield*, 212 F.3d at 718 (quoting *Illinois v. Gates*, 462 U.S. 213, 238 (1983)). "In assessing the proof of probable cause, the government's affidavit in support of the search warrant must be read as a whole, and construed realistically." *Salameh*, 152 F.3d at 113.

A district court's factual findings related to whether an affiant made intentional or reckless misrepresentations or omissions in a warrant affidavit are reviewed for clear error. *See United States v. Trzaska*, 111 F.3d 1019, 1028 (2d Cir. 1997). The question of whether "untainted portions [of a search warrant affidavit] suffice to support a probable cause finding is a legal question" reviewed *de novo* by this Court. *See Canfield*, 212 F.3d at 717 (internal quotation marks omitted).

C. Discussion

The defendant fails to satisfy both prongs of *Franks*. First, as the district court concluded, neither affiant knew that the CI had been arrested by federal authorities on December 13, 2005. Both detectives testified credibly that they did not know that the CI had been arrested on a federal firearms charge until after the execution of the search warrant on December 20, 2005. Tr. 7/28/06 at 81, 88, 111. The district court specifically concluded that the detectives had provided credible testimony on this key point. GA47. Specifically, the court found that the officers had not intentionally omitted any information from the warrant application because they had not known this information when they applied for the warrant. GA47. On appeal, the defendant has failed to show why the district court's credibility determination on this issue constituted clear error.

Second, as the district court concluded, even had the information at issue been included in the warrant affidavit, the affidavit still would have established probable cause to

support the issuance of the warrant. The probable cause finding in the December 13, 2005 search warrant was based on the fact that the CI had engaged in two controlled purchases of cocaine base from the defendant at the second floor apartment of 40 Elmer Street. GA32-GA34. The supervising detectives searched the CI for contraband both before and after the controlled purchases, supplied the monies to be used for the cocaine base purchased, observed the CI enter the front entrance of 40 Elmer Street and stay inside for a short time, and seized a small quantity of cocaine base from the CI immediately after each purchase. GA32-GA34. Moreover, prior to using the CI to engage in the controlled purchases, Detectives Farrell and Salkeld conducted physical surveillance of the 40 Elmer Street house to test the veracity of the CI's initial information that narcotics were being sold out of the second floor apartment of that residence. Surveillance conducted on November 30, 2005 and December 2, 2005 revealed a large number of individuals approaching the house on foot and by car, entering the residence, remaining for a short period of time, leaving from the same front door through which they came, and walking or driving away quickly. GA32. The fact of the CI's arrest on December 13, 2005 would not have undermined the detectives' confidence in the information he had provided to them about the two controlled purchases.

Conclusion

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

Dated: July 24, 2008

Respectfully submitted,

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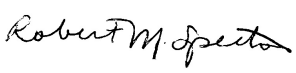

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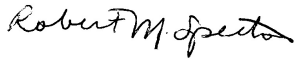
CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

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 9,578 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.



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Addendum

18 U.S.C. § 924(c)

[A]ny person who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime . . . be sentenced to a term of imprisonment of not less than 5 years . . . .