07-3018-cr

To Be Argued By:
HAROLD H. CHEN

==========

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-3018-cr

UNITED STATES OF AMERICA,
Appellant,

-vs-

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

(For continuation of Caption, See Inside Cover)

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

==========

REPLY BRIEF
FOR THE UNITED STATES OF AMERICA

==========

NORA R. DANNEHY
Acting United States Attorney
District of Connecticut

HAROLD H. CHEN
ALINA M. REYNOLDS
WILLIAM J. NARDINI
Assistant United States Attorneys

ALEX LUNA, NICKY CARRASQUILLA, also known as Nicky Gomez, JOSE R. ADAMES, also known as Ponpa, also known as Pon, also known as Pong, NELSON ROSA, also known as Pee Wee, BOBBY MEDINA, also known as Mr. B., ALEX SALCEDO, JUAN RODRIGUEZ, also known as Juan G., also known as Juan Prosser, also known as John Prosser, also known as Juan Garcia, MARIA ROBLES, also known as Mari, WILLIAM AZCONA, also known as Willie, HENRY MAYORAL, HERIBERTO GUZMAN, also known as Crazy Louis, JOSE A. PENA, BENNY RAMIREZ, DAVID MELENDEZ, also known as Gary, JOEL BUENO, JOSHUA FEBRES, TIMOTHY EBERLY, RAFAEL ALMONTES, also known as Raf, also known as Rafie, AARON KING, also known as A-Mo, JOSE LUIS RODRIGUEZ, also known as Jose Luis, ARCADIO RAMIREZ, also known as Peti, JOHN #1 DOE, also known as N.Y.S. Trooper Rubio,

Defendants.

TABLE OF CONTENTS

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.

STATUTES

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 07-3018-cr

UNITED STATES OF AMERICA,
Appellant,

-vs-

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

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

REPLY BRIEF
FOR THE UNITED STATES OF AMERICA

Preliminary Statement

In responding to the government's brief, Hawkins simply recapitulates various portions of the district court's ruling, which found that Hawkins had neither joined nor participated in the drug-trafficking conspiracy led by Alex Luna. In doing so, however, Hawkins fails to rebut the government's central argument that the record supports the

jury's guilty verdict because, during a two-week span, Hawkins had engaged in two cash-for-drugs transactions with Luna; Luna had agreed to provide Hawkins with a third quantity of cocaine on credit; and during separate recorded conversations, Hawkins specifically told Luna that Hawkins intended to resell Luna's cocaine to third-party customers. Most glaringly, Hawkins wholly ignores the government's argument that Luna's decision to "front" Hawkins cocaine on credit after the two cash transactions were completed reflects not only a degree of trust between Hawkins and Luna, but also a shared goal in having Hawkins resell the cocaine so he could pay Luna back.

Similarly, Hawkins does not challenge the government's argument that the district court's application of the "buyer-seller" rule to him represented a major expansion of this Court's highly fact-specific ruling in *United States v. Gore*, 154 F.3d 34 (2d Cir. 1998). In addition, for all intents and purposes, Hawkins does not dispute that the two narcotics-conspiracy cases from the Seventh Circuit Court of Appeals cited by the district court – *United States v. Lechuga*, 994 F.2d 346 (7th Cir. 1992) (en banc), and *United States v. Mims*, 92 F.3d 461 (7th Cir. 1996) – were parsed selectively for their dicta and do not support the district court's ruling when those cases are read in their entirety.

I. Luna's decision to extend credit to Hawkins after the two completed cash transactions was sufficient to prove that Hawkins had joined the conspiracy

Hawkins does not dispute that the salient issue for this appeal is whether, under 21 U.S.C. § 846, he knowingly joined or participated in the narcotics-distribution conspiracy led by Luna. *See United States v. Snow*, 462 F.3d 55, 68 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1022 (2007); *United States v. Richards*, 302 F.3d 58, 69 (2d Cir. 2002) ("A conviction for conspiracy must be upheld if there was evidence from which the jury could reasonably have inferred that the defendant knew of the conspiracy . . . and that he associat[ed] himself with the venture in some fashion, participat[ed] in it . . . or [sought] by his action to make it succeed.") (internal quotation marks omitted). Nor does Hawkins dispute that, under Fed. R. Crim. P. 29, a district court evaluating a motion for judgment of acquittal must credit inferences from the evidence in the government's favor, *see United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003), and view the evidence as a whole and not examine discrete facts in isolation, *see United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000).

Nevertheless, Hawkins has not addressed the government's central argument that it was reasonable for the jury to conclude that Hawkins had joined and participated in the Luna drug conspiracy because, during a two-week span in February 2005, Hawkins had engaged in two cash-for-drugs transactions with Luna; Luna had

then agreed to provide Hawkins with a third quantity of cocaine on credit; and Hawkins had specifically told Luna in two recorded conversations that Hawkins intended to resell Luna's cocaine to third-party customers. Instead, Hawkins paraphrases the district court's finding that no conspiratorial agreement was formed between Luna and Hawkins:

> There is no evidence that Luna cared about Hawkins' ultimate disposition of the drugs or attempted to assist him in any way. Indeed, he had no stake in any resale Hawkins might effect. The only evidence, circumstantial or direct[,] available to the jury was that Luna sold Hawkins drugs with the knowledge that Hawkins might resell it. That alone does not constitute a conspiracy.

Appellee Brief at 11.

This view, however, is contradicted by the fact that on February 23, 2005, Luna agreed to provide Hawkins with another distribution quantity of cocaine on credit. During the course of trial, the jury had heard that on February 12 and 17, 2005, Luna and Hawkins had completed two separate cash-for-drugs transactions; and that on February 23, 2005, Hawkins had explicitly stated that he had a prospective customer standing by, and Hawkins promised to pay Luna back once Hawkins had received payment from this customer. Moreover, Hawkins told Luna on February 23 that he was currently broke, *see* JA 49 (stating that "I just made out a child support payment" and "I'm

like total zero"), but nonetheless assured Luna that he had a customer waiting with cash to spend on cocaine, *see id*. ("I got this white kid, he waiting for me right now, he got a $100.00."). Although Hawkins and the district court maintain that this evidence shows that Luna was indifferent to Hawkins' plans, *see* JA 379 (statement from district court ruling that "[n]or is there any evidence that Luna cared what Hawkins did with the drugs"), the jury drew the far more reasonable inference that, at this point, Hawkins and Luna shared a sense of trust and the identical goal of seeking to profit by Hawkins' resale of Luna's cocaine.

Likewise, Hawkins makes no effort to challenge the authorities cited by the government, which hold that a drug supplier's decision to extend credit is a crucial fact in assessing whether a conspiracy to distribute narcotics has been formed. Once a seller extends credit to a buyer, "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). Stated differently, a credit relationship reflects mutual trust between the parties and their "mutual stake in each other's transactions" because "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." *United States v. Gibbs*, 190 F.3d 188, 200 (3d Cir. 1999).

The jury could have reasonably inferred that Luna's decision to extend credit to Hawkins, coupled with the two

preceding cash transactions, embodied a "degree of cooperation and trust" between Hawkins and Luna because Luna would realize his profit only after Hawkins completed the sale to the third party. *See Dortch*, 5 F.3d at 1065. This agreement to extend credit to Hawkins undercuts Hawkins' view, as shared by the district court, that the government failed to present evidence that Luna "agreed to assist Hawkins with Hawkins' sales, except by supplying the cocaine," JA 376; and that "[t]here was no evidence whatsoever that either Luna or Hawkins possessed a shared stake in the sales of cocaine by the other," JA 378. Rather, it was entirely logical for the jury to reach the exact opposite conclusion: that Hawkins and Luna had become co-conspirators and shared a joint goal of having Hawkins sell the cocaine fronted by Luna.

Furthermore, when Hawkins does discuss the trial evidence in his brief, he impermissibly assumes the role of the jury and asks this Court to place great weight on the evidence favorable to him, but to discount or ignore evidence favorable to the government. For example, Hawkins emphasizes the importance of the testimony of Joshua Febres, a cooperating witness for the government, who testified that Hawkins was a drug user,[1] not "a drug

---

[1] Even though Hawkins concedes his defense at trial was that he was solely a drug user and not a drug seller, he contends that footnote 3 on page 14 of the government's opening brief was "mean-spirited." Appellee Brief at 10 n.24. In that footnote, the government simply noted that the district court erred in excluding the testimony of prospective government (continued...)

dealer generally," and not a member of the Luna drug organization.[2] JA 166; Appellee Brief at 7. Hawkins conveniently disregards, however, other portions of Febres' testimony that support a finding that Hawkins had joined and participated in the Luna drug conspiracy. For instance, Febres testified that on February 9, 2005, Hawkins spoke to Luna and Febres about Hawkins' desire

---

[1] (...continued)
witness Paul Foshay, who testified outside the jury's presence that he had purchased cocaine from Hawkins during February 2005 when they worked together at Chemical Marketing Concepts in New Milford, Connecticut. JA 193-99. The district court excluded Foshay's testimony, even though the jury had already heard the recorded February 12 and 23 phone calls between Hawkins and Luna in which Hawkins communicated his intention to resell Luna's cocaine to two prospective drug customers from Hawkins' workplace, JA 45-47, and to a prospective customer whom Hawkins referred to as "white boy Tom . . . from New Milford," JA 48-49. When Hawkins' attorney later argued during summation that the government had failed to produce evidence that Hawkins had sold cocaine to actual customers, the district court overruled the government's objection. JA 339-40.

[2] Although Hawkins and the district court stress the importance of Febres' statement that Hawkins was not a member of the "Luna drug organization," JA 166, 376; Appellee Brief at 7, the record is bereft of any evidence even remotely suggesting that Febres was aware of this Court's legal standard for determining whether an individual joins or participates in a *conspiracy under 21 U.S.C. § 846*, as opposed to Febres' own colloquial understanding of the word "organization."

to purchase cocaine; asked them specific questions about the quality and price of their cocaine; programmed in his own cell phone Luna's cell phone number for future reference; and mentioned how Hawkins had recently met up with Luna co-conspirator, Henry Mayoral, known as "Pac." JA 37-40. Febres further testified that during a February 12, 2005, conversation, Hawkins told Luna that Hawkins had a customer who wanted to buy cocaine, and that Hawkins wanted to re-sell Luna's cocaine to this potential customer. JA 45-46, 126-27. Later that day, Luna delivered the cocaine to Hawkins in the parking lot of Hawkins' residence. JA 219-21. Similarly, Hawkins discounts the probative value of Febres' testimony that he, Luna, and co-conspirator Heriberto Guzman, a/k/a "Crazy Luis" went together that evening to deliver seven grams of cocaine to Hawkins. JA 54-55, 128-31. Although Hawkins glosses over these facts, a reasonable jury could have concluded from these two completed cash-for-drug sales, coupled with the subsequent extension of credit by Luna, that Hawkins knowingly joined and participated in the drug conspiracy. *See United States v. Aleskerova*, 300 F.3d 286, 292 (2d Cir. 2002) ("only slight evidence is required to link another defendant" to the conspiracy) (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").

In the same vein, Hawkins points to other pieces of evidence in isolation that he believes militate against the jury's guilty verdict. For instance, Hawkins characterizes the 10.5 grams of cocaine that he purchased from Luna on

February 12 and 17, 2005, as "minimal" and not "distribution-weight." Appellee Brief at 11, 12 n.27. He also contends that because he purchased cocaine from Luna only during February 2005, this was too brief a period to prove his participation in the conspiracy. *Id*. at 12.

As a threshold matter, however, the jury returned an extremely nuanced verdict that distinguished between the relative culpability of Hawkins and his co-defendants by properly attributing to Hawkins less than 500 grams of cocaine pursuant to 21 U.S.C. § 841(b)(1)(C).[3] Moreover, with respect to the drug quantity, there was testimony from Febres and cooperating co-defendant Jose Pena that 10.5 grams is a distribution-weight quantity of cocaine which may be broken down into smaller quantities for street sale. *See* JA 104 (Febres' testimony that street-level customers would buy cocaine as "20s" (i.e., .2 grams) or "40s" (i.e., .5 gram); JA 81a, 81b (Pena's testimony that "eight-balls" of cocaine (i.e., 3.5 grams) were frequently broken down into "20s" for street sale).

Similarly, the quantity of drugs transacted between Luna and Hawkins is a red herring. This Court has imposed no minimum quantity of cocaine that must be

---

[3] On the special verdict form, the jury attributed 5 kilograms or more of cocaine to Jose Luis Rodriguez in violation of 21 U.S.C. § 841(b)(1)(A); and more than 500 grams, but less than 5 kilograms of cocaine, to Arcadio Ramirez in violation of 21 U.S.C. § 841(b)(1)(B). JA 361-63.

distributed for an individual to be found guilty of 21 U.S.C. §§ 846 and 841(b)(1)(C). *See United States v. Mishoe*, 241 F.3d 214, 216 (2d Cir. 2001) (stating that 21 U.S.C. § 841(b)(1)(C) "has no minimum quantity requirement and no mandatory minimum sentence"). Moreover, due to the secretive nature of the illicit drug trade, it is not uncommon for circumstantial evidence of a large quantity of narcotics to serve as a proxy for conspiratorial intent between a supplier and a purchaser. *See United States v. Espaillet*, 380 F.3d 713, 719-20 (2d Cir. 2004) (reversing district court's grant of Rule 29 motion for drug-conspiracy conviction where prosecution presented no direct evidence of defendant's intent, but defendant was present when two other individuals exchanged brick-shaped package of cocaine). Here, however, the government did not need to rely on such circumstantial evidence because the recorded conversations between Hawkins and Luna constituted *direct evidence* of their conspiratorial intent to distribute cocaine together. Significantly, on both the February 12 and 23 calls, Hawkins explicitly told Luna that Hawkins intended to resell the cocaine to his own customers. *See* JA 45-49, 126-27, 132-37, 181-83, 190.[4]

---

[4] The jury could reasonably conclude that the February 12 and 17 transactions were consummated. JA 219-21 (Special Agent Dinnan's observation of hand-to-hand transaction between Hawkins and Luna on February 12); JA 128-31 (delivery of 7 grams of cocaine to Hawkins by Luna, Febres, and Guzman on February 17).

Another red herring is Hawkins' assertion that his relatively brief participation with Luna and Febres militates against the jury's guilty verdict because Hawkins was arrested on March 4, 2005. This Court, however, has never prescribed a fixed time period for determining when a drug supplier and reseller become co-conspirators. To the contrary, this Court has explicitly found that a "defendant's participation in *a single transaction* can, on an appropriate record, suffice to sustain a charge of knowing participation in an existing conspiracy." *United States v. Miranda-Ortiz*, 926 F.2d 172, 176 (2d Cir. 1991) (emphasis added). As discussed *supra*, the jury had sufficient evidence from the two completed sales on February 12 and 17, and the anticipated credit transaction on February 23, to determine that Hawkins had come within the ambit of the Luna drug conspiracy.

Finally, just as the district court did, Hawkins contends that the government's proof was deficient because Hawkins "was not connected to the supply, processing or packaging of cocaine and Luna never provided him with any assistance, i.e., weapons, cell phones, packaging or scales which normally are the tools of the drug trade." Appellee Brief at 12; JA at 378. By this statement, however, Hawkins seemingly conflates the government's burden of proving a drug conspiracy brought under 21 U.S.C. § 846 versus a RICO conspiracy brought under 18 U.S.C. § 1962(d), in which the government must prove that the defendant agreed that he or a co-conspirator would commit at least two or more predicate racketeering acts. *See Salinas v. United States*, 522 U.S. 52, 65 (1997). In a standard § 846 prosecution, however, the government is

not required to present evidence of any pattern of predicate acts to prove a defendant's guilt. Rather, all that 21 U.S.C. § 846 requires is "evidence from which the jury could reasonably have inferred that the defendant knew of the conspiracy . . . and that he associat[ed] himself with the venture in some fashion, participat[ed] in it . . . or [sought] by his action to make it succeed." *United States v. Richards*, 302 F.3d 58, 69 (2d Cir. 2002) (internal quotation marks omitted). As discussed *supra* and as evidenced by the jury's verdict, the government adequately discharged this burden.

In sum, a reasonable fact finder could have concluded from this record that Hawkins had joined and participated in the Luna drug conspiracy. Accordingly, unlike the district court, this Court should decline Hawkins' invitation to view the evidence in isolation, substitute its own inferences from the evidence for those of the jury, and thereby usurp the jury's proper role as finder of fact. *See United States v. Guadagna*, 183 F.3d 122, 129 (2d Cir. 1999).

II. The buyer-seller rule in *Gore* does not apply here because Hawkins was a drug reseller who engaged in a pattern of cash-sale transactions with his drug supplier and received credit from him

Next, Hawkins has elected not to engage the government's argument that *United States v. Gore*, 154 F.3d 34 (2d Cir. 1998), did not provide the district court with the doctrinal authority to make the sweeping finding that this Court would "hold that, without more, the mere

buyer-seller relationship is insufficient to establish a conspiracy, *even if the seller knows that the buyer intends to resell the drugs*." JA 375 (emphasis added). Nor has Hawkins addressed the government's argument that the two Seventh Circuit rulings which the district court parsed for their dicta – *United States v. Lechuga*, 994 F.2d 346, 349 (7th Cir. 1992) (en banc), and *United States v. Mims*, 92 F.3d 461 (7th Cir. 1996) – do not support an expansive reading of *Gore* when read in their entirety.

Contrary to this Court's established precedent, the district court's new rule of law erroneously suggests that the jury may not infer the existence of a conspiratorial agreement when a seller provides drugs to a buyer with the specific intent that the buyer will distribute the drugs to an end user. Hawkins does not challenge the government's argument in this regard. Nor does he respond to the government's argument that the district court effectively heightened this Court's standard for proving a § 846 conspiracy by holding that "the agreement necessary to proof of a conspiracy is an agreement to undertake unlawful conduct in addition to the purchase and sale transaction, even when the buyer intends to distribute the purchased drugs." JA 375.

By this holding, the district court suggests two different standards for determining whether a narcotics conspiracy exists, both of which are logically infirm and unsupported by legal authority. First, the district court suggests that for a drug conspiracy to exist, a seller must agree to engage in additional criminal conduct beyond the provision of drugs to a buyer. To the contrary, once the seller supplies the

buyer, the seller is not required to do anything else to fall within the ambit of the conspiracy because the offense of conspiracy, by definition, is an inchoate offense.[5] *See Iannelli v. United States*, 420 U.S. 770, 777 (1975) ("Conspiracy is an inchoate offense, the essence of which is an agreement to commit an unlawful act."); *Jackson*, 335 F.3d at 182 ("As in all conspiracy cases, the essence of the crime is what the conspirators agreed to do, rather than what they actually did."); *United States v. McDermott*, 245 F.3d 133, 137 (2d Cir. 2001) (internal quotation marks omitted) ("[E]ssence of conspiracy is the agreement and not the commission of the substantive offense.").

Although it is not clear, the district court's ruling may also be read to suggest that a fact finder cannot infer a drug seller's conspiratorial intent from his knowledge that the purchaser will be reselling the drugs to a downstream customer. Here, because Luna sold cocaine to Hawkins fully knowing that Hawkins intended to resell the cocaine, the jury was entitled to infer that Luna shared Hawkins' intent to resell the cocaine. *Cf. United States v. Nelson*,

---

[5] As discussed *supra*, by requiring "an agreement to undertake unlawful conduct in addition to the purchase and sale transaction, even when the buyer intends to distribute the purchased drugs," JA 375, the district court seemingly conflates the government's burden of proof in a drug conspiracy brought under 21 U.S.C. § 846 versus a RICO conspiracy brought under 18 U.S.C. § 1962(d), even though the government has no burden in a § 846 prosecution to prove that the defendant agreed to commit two or more predicate acts.

227 F.3d 164, 197 (2d Cir. 2002) (recognizing that a jury is entitled to conclude that a defendant intended the reasonably foreseeable consequence of his actions if jury's conclusion is "rooted in reason or common sense") (internal quotation marks omitted). In any event, the government's evidence against Hawkins involved more than just Luna's knowledge that Hawkins would be reselling Luna's drugs to Hawkins' co-workers or to "white boy Tom" from New Milford. JA 46, 49. This evidence included, among other things, a pattern of at least two completed transactions that indicated a sense of trust and coordination between the seller and purchaser, JA 45-46, 54-55, 126-31, 219-21; and Luna's agreement to provide Hawkins with drugs on credit, which indicated a shared financial stake between seller and purchaser, JA 49, 132-36. Thus, regardless of how the district court intended its holding to be interpreted, there was sufficient evidence to support the jury's conclusion that Hawkins and Luna had conspired to distribute narcotics.

Next, Hawkins overstates the breadth and scope of the buyer-seller rule from *Gore* without discussing the highly fact-specific nature of that ruling.[6] The buyer-seller rule "precludes a jury from inferring the existence of a conspiracy from *evidence showing nothing more than an*

---

[6] In the Appellee brief, Hawkins refers to the "progeny" of *Gore*. Appellee Brief at 13. However, until its recent ruling in *United States v. Wexler*, No. 06-1571-cr, mem. op. at 1 (2d Cir. Apr. 3, 2008), this Court had not issued a published case since *Gore* fully discussing the buyer-seller rule in the context of a drug conspiracy.

arms-length drug sale." *United States v. Wexler*, No. 06-1571-cr, mem. op. at 23 (2d Cir. Apr. 3, 2008) (Raggi, J., concurring in part and dissenting in part) (emphasis added). "The rationale for holding a buyer and a seller not to be conspirators is that in *the typical buy-sell scenario, which involves a casual sale of small quantities of drugs*, there is no evidence that the parties were aware of, or agreed to participate, in a larger conspiracy." *United States v. Medina*, 944 F.2d 60, 65-66 (2d Cir. 1991) (emphasis added); *see also United States v. Ivy*, 83 F.3d 1266, 1285-86 (10th Cir. 1996) (explaining 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").

Notably, Hawkins does not address the significant factual differences presented by this appeal and *Gore,* which involved a single sale of 0.11 grams of heroin between a drug seller and an unindicted confidential informant, and the absence of evidence that the *Gore* defendant had ever spoken, met, or associated with the other 22 charged co-conspirators. *Gore*, 154 F.3d at 38-40. Nor does Hawkins acknowledge that the *Gore* evidence bears little resemblance to the government's evidence here, which included multiple recorded phone calls between Hawkins and Luna, the leader of the drug conspiracy; Hawkins' statements to Luna on two separate phone calls about Hawkins' intention to purchase cocaine from Luna and resell it to customers waiting in the wings; that Hawkins and Luna consummated the February 17

transaction involving 7 grams of cocaine with other co-conspirators present; and that Luna ultimately agreed to provide Hawkins with cocaine on credit.

This Court's recent ruling in *Wexler* does not alter this analysis because the unique facts and the unique charge brought by the prosecution there have little bearing on this appeal. In *Wexler*, the defendant was a dermatologist charged with, among other things, health care fraud and conspiring with one of his patients to distribute Dilaudid, a controlled substance, which *resulted in the patient's death*. *Wexler*, mem. op. at 17-18. The evidence at trial established that Wexler prescribed personal-use quantities of Dilaudid to his patient, Abler, who allowed Wexler to bill Medicaid fraudulently for procedures that were never performed. *Id*. at 20-21. Abler also agreed to recruit other patients who would allow Wexler to file fraudulent bills in exchange for cash or prescriptions for controlled substances, such as Dilaudid. *Id*. at 7, 8, 20. Ultimately, after Abler died of a Dilaudid overdose, the prosecution charged Wexler with conspiracy to distribute Dilaudid resulting in death under 21 U.S.C. §§ 812, 846, 841(a)(1) and 841(b)(1)(C). *Id*. at 3, 4.

On appeal, this Court held that the government had not carried its burden of proof because "[t]here is no evidence that the Dilaudid received by Abler from Wexler's prescriptions was redistributed or that there was ever any agreement or intention on the parts of Wexler and Abler to do so." *Id*. at 20. Although government witnesses testified that they had received prescriptions through Abler for Percocet, Vicodin, Soma, Viagra, and Valium, no

witness ever testified that Abler had redistributed Dilaudid, which was charged as the specific drug in the drug conspiracy that resulted in Abler's death. *Id*. Accordingly, this Court found that "[b]ecause there was no proof that Abler agreed to, or did, distribute Dilaudid, Wexler and Abler were a mere buyer-and-seller with respect to Dilaudid." *Id*.

In stark contrast, the present appeal provides sufficient evidence for a jury to infer that Hawkins intended to resell Luna's cocaine because Hawkins explicitly told Luna during their phone calls that Hawkins had ready customers waiting to buy cocaine. Unlike *Wexler*, there was never any dispute that the drug distributed by Luna and Hawkins was cocaine. Moreover, as discussed at length *supra*, the government provided direct evidence of two completed transactions, and one anticipated transaction, in which Hawkins agreed to distribute cocaine supplied by Luna. Thus, *Wexler* is of no moment to this appeal.

Finally, other than his passing remark that the district court's ruling was "well-articulated and thoughtful, and examines the facts of [*Lechuga* and *Mims*]," Appellee Brief at 16, Hawkins does not engage the government's analysis of those cases from the Seventh Circuit Court of Appeals. More specifically, Hawkins does not address the government's argument that *Lechuga* and *Mims*, when read in their entirety, actually support the jury's conviction of Hawkins. *Lechuga* affirmed the conviction of a defendant named Pagan who functioned as a drug middleman, just as Hawkins did, by purchasing cocaine from a supplier to resell it to another person. *Lechuga*,

994 F.2d at 350-51 ("If, knowing that Lechuga was a drug dealer, Pagan assisted him in distributing drugs to at least one dealer farther down the chain of distribution, namely Pinto, then Lechuga and Pagan were coconspirators."). Just as Hawkins told Luna that he had prospective buyers lined up with cash, "Lechuga knew precisely what Pagan was going to do with the drugs he sold him" because "Pagan *told* Lechuga what he was going to do with them." *Id*. at 351.

Similarly, *Mims* is inapposite because that case reversed conspiracy convictions based on a faulty jury charge that ignored the seller's mens rea, and allowed the jury to convict upon a simple finding that the buyer purchased drugs "for resale," regardless of whether the seller knew of (and shared) that intent. *Mims*, 92 F.3d at 464-65. In contrast, the district court here not only instructed the jury that a "conspiracy is an agreement to achieve some unlawful purpose," JA 308, 313, but also gave a charge on the distinction between the buyer-seller relationship and a conspiracy: "Thus, without more, the mere existence of the buyer-seller relationship is

insufficient to establish membership in a conspiracy."[7] JA 290.

In sum, despite the district court's effort to buttress its expansive interpretation of *Gore* by importing dicta from *Lechuga* and *Mims*, a thorough analysis of these authorities reveals little doctrinal support for the legal standard that a buyer and seller must agree to undertake some other conduct, in addition to the purchase-and-sale transaction, to form a conspiracy. Likewise, these three cases do not support the district court's view that even if a seller and buyer have recently engaged in drug transactions *and* the seller is aware that the buyer intends to resell the drugs, a jury may not reasonably infer that both parties have formed a conspiratorial agreement to distribute drugs within the meaning of 21 U.S.C. § 846.

---

[7] Although Hawkins refers to page 16, note 4 of the government's opening brief as making a "sour grapes" objection, he does not dispute that the jury instruction on the buyer-seller relationship was not raised or discussed at the charge conference. JA 230-81 *passim*. Rather, the district court raised this instruction, as suggested by Hawkins, with the parties only immediately before delivering the charge to the jury. JA 287-90. The government lodged its contemporaneous objection. JA 288-89.

Conclusion

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

Dated: April 30, 2008

Respectfully submitted,

NORA R. DANNEHY
ACTING UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT

HAROLD H. CHEN
ASSISTANT U.S. ATTORNEY

ALINA M. REYNOLDS
WILLIAM J. NARDINI
Assistant United States Attorneys (of counsel)

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

This is to certify that the foregoing brief complies with the 7,000 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 4,919 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

HAROLD H. CHEN
ASSISTANT U.S. ATTORNEY

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Hawkins

Docket Number: 07-3018-cr

I, Louis Bracco, hereby certify that the Reply 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 4/30/2008) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: April 30, 2008