02-1148(L)-cr

To be Argued By:
BRIAN E. SPEARS

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 02-1148(L)-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

KELVIN BURDEN, also known as Waffle, also known as Uncle, also known as Unc, DAVID 4 BURDEN, also known as DMX, also known as X, ANTHONY BURDEN, also known as Mackey, also known as Tony, WILLIE PREZZIE, also

(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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known as Prez, also known as Dog, ANTHONY BUCHANAN, also known as Jungle, TERRENCE THOMPSON, also known as Creed, MICHAEL AWYER, also known as Michael Moss, TERRA NIVENS, also known as Stink, also known as Stinkfinger, FRANK KNIGHT, also known as Ace, also known as Groovy, DWIGHT MASCHECK, also known as Shorty, JERMAINE MARTIN, also known as Psycho, ANDRE MCCLENDON, also known as Popsicle, MICHAEL GLENN, also known as Rockafella, DAVID 17 BURDEN, also known as Quinten, also known as Sid, JOSEPH DANIELS, also known as Digital, LAVON GODFREY, ALVIN WHITE, also known as Uncle Lee, ANDRE DAWSON, also known as Yup Yup, JAHOD NASH, also known as Hottie Jig, JEFFREY FREDERICKS, also known as JL, also known as Dahmer, MARK CALDWELL, also known as Sparks, KEVIN HAMLETTE, also known as Fresh, ERNEST EUGENE WELDON, also known as Gene, also known as Mean Gene, also known as Mean One, THOMAS HOLMAN, also known as Uno, ADAM SANDERS, also known as AD, KENDAL MULLINS, also known as K-Nice, THOMAS FAGAN, JOSEPH DARDEN, JEFFREY LOCKHART, LAMONT BROWN, also known as L, BURDEN CLAIR ST, also known as Gowser, also known as Boo Boo, also known as GP, CEDRIC BURDEN, also known as Sid, ANTONIO WILLIAMS , also known as LO LO, KEITH LYONS, also known as Papa Large, also known as Pops, BARNEY BURDEN, also known as Buddy, also known as Buddy Rock, also known as Rock, DETETRIUS STORY, LESLIE WAYNE CARLOS, also known as Cheetah,

Defendants,

PATRICE ST. SURIN,

Defendant-Appellant.

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STATEMENT OF JURISDICTION

The district court (Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal case under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction under 28 U.S.C. § 1291 over the defendant's challenge to his conviction following a jury trial. (Defendant's Appendix "DA" C & D.)

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Was the evidence adduced at trial, including wiretap recordings, video surveillance, and testimony from law enforcement witnesses and cooperating witnesses, sufficient to establish the defendant's guilt beyond a reasonable doubt?

2. Did the district court abuse its discretion in denying the defendant's motion to strike the testimony of a cooperating witness, after the government produced one of the witness's grand jury transcripts a day late, and defense counsel declined the district court's offer to recall the witness to resume cross-examination at any time during trial?

United States Court of Appeals

FOR THE SECOND CIRCUIT
Docket No. 02-1148(L)

UNITED STATES OF AMERICA,

Appellee,

-vs-

PATRICE ST. SURIN, a/k/a "Patrick,"
a/k/a "Watty Wat,"

Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

The defendant-appellant, Patrice St. Surin, was convicted by a jury of conspiracy to distribute narcotics. Consisting of numerous wire interceptions, surveillance video, and the testimony of cooperating witnesses, the evidence overwhelmingly proved that the defendant supplied multiple kilograms of cocaine from 1998 through April 2001. Specifically, the defendant served as the primary source of supply for cooperating witness Ernest Eugene Weldon. Wire interceptions established the drug

dealing relationship between the two. The evidence further revealed that Weldon converted the defendant's product into crack cocaine for distribution to numerous customers, among them members of a large Norwalk drug organization.

On appeal, the defendant claims (1) that the trial evidence was insufficient to support his conviction, and (2) that the district court abused its discretion by only allowing the defendant to re-open cross-examination of one of the government's cooperating witnesses rather than striking the testimony of the cooperating witness after the government belatedly produced during trial a transcript of the witness' prior grand jury testimony. For the reasons that follow, the Court should affirm the judgment of the district court.

Statement of the Case

On December 17, 2001, a federal grand jury returned an indictment charging the defendant Patrice St. Surin in Count Twelve with conspiracy to possess with intent to distribute 50 grams or more of cocaine base and 5 kilograms or more of cocaine in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A). The defendant pleaded not guilty and was tried before a jury in July 2002. (Government Appendix "GA" 809.)

On July 12, 2002, the defendant moved to strike the testimony of one of the government's cooperating witnesses, Anthony Burden, claiming that the government's late disclosure of Burden's prior grand jury testimony violated the Jencks Act, 18 U.S.C. § 3500.

After the defendant declined further examination of Anthony Burden, the district court denied his motion to strike. (GA 421.)

On July 15, 2002, the defendant moved for judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure, which the court denied. (GA 633, 636.)

On July 16, 2002, the jury returned a verdict finding the defendant guilty of engaging in a narcotics conspiracy and attributing drug quantities to him of 50 grams or more of cocaine base and 5 kilograms or more of cocaine. (DA A.)

On July 22, 2002, the defendant renewed his motion for judgment of acquittal. On October 15, 2002, the district court denied the defendant's motion in a written ruling. (GA 887, 905.)

On May 5, 2003, the district court sentenced the defendant to 188 months in prison and ordered that he pay a fine of $5,000. The defendant is currently serving his sentence. (DA C.)

On May 12, 2003, the defendant filed a timely notice of appeal. (DA D.)

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Statement of Facts and Proceedings Relevant to this Appeal

During the course of trial, the government presented the jury with evidence establishing that from 1998 through

the Spring of 2001, the defendant served as the primary narcotics supplier for a drug dealer named Ernest Eugene Weldon. The defendant supplied Weldon on a regular basis with quantities ranging from 250 grams to 1 kilogram of cocaine per transaction. Weldon typically converted the cocaine purchased from the defendant into cocaine base for resale to his various customers, including Anthony Burden and other members of what was known as the Burden Organization. The government's evidence at trial consisted of extensive wiretap evidence, surveillance video, testimony from law enforcement witnesses, and testimony from cooperating witnesses Weldon and Burden.

Testimony of Ernest Eugene Weldon

Ernest Eugene Weldon testified about his direct involvement in the purchase of cocaine from the defendant. Specifically, Weldon testified that in the Fall of 1998, he was in need of a new source of supply and asked his friend, Thomas Holman, for assistance. Holman introduced Weldon to the defendant and, that same day, Weldon and the defendant did their first drug deal: 250 grams of cocaine for approximately $7,000. Weldon and the defendant remained in contact, as a result of which the defendant became Weldon's primary source of supply until April 2001. (243-46, 373-74.)

For several months in 1998, Weldon obtained cocaine exclusively from the defendant, in quantities ranging from 250 to 500 grams. In 1999, however, Weldon began obtaining drugs from multiple sources, in addition to the defendant. (GA 246-48.)

According to Weldon, in 1999 and 2000, Weldon and Holman engaged in drug transactions with the defendant. The transactions occurred at Holman's insistence. Previously, Holman and the defendant had engaged in a drug deal, as a result of which Holman owed the defendant money. Holman had contacts in Bridgeport, Connecticut that were interested in obtaining kilograms of cocaine. Holman approached Weldon and asked him to check with the defendant on the subject of obtaining cocaine. Weldon thus purchased kilograms from the defendant so that Weldon and Holman could, in turn, broker the drugs to Holman's Bridgeport contacts. This arrangement occurred twice for a total of two kilograms of cocaine. (GA 253-60.)

In 2000, Weldon and the defendant continued to engage in drug transactions. During this period of time, Weldon trafficked in large quantities of cocaine base, which he prepared using the powder cocaine he obtained from the defendant. For each transaction, Weldon purchased between 300 and 500 grams of cocaine from the defendant. (GA 268-70.)

Significantly, in approximately the Summer of 2000, Weldon began supplying drugs to members of the Burden Organization, including Kelvin Burden, David Burden, a/k/a "DMX", and Anthony Burden, a/k/a "Tone." Weldon's first transaction involved his sale of a kilogram of cocaine to Kelvin Burden. For this transaction, Weldon did not obtain the cocaine from the defendant. (GA 264-67.)

In the Fall of 2000, Kelvin Burden began serving a jail sentence, as a result of which David "DMX" Burden and Anthony Burden were left to run the Burden Organization's crack cocaine business. David "DMX" Burden and Anthony Burden contacted Weldon towards the end of October 2000. Thereafter, from November 2000 through February 2001, the Burdens purchased crack cocaine from Weldon through multiple transactions in quantities ranging from 300 to 500 grams. Weldon testified that the defendant was his primary supplier during the period in which Weldon sold crack to members of the Burden Organization. (GA 267-69.)

According to Weldon's testimony, in April 2001, after a federal search warrant was executed at the stash house of the Burden Organization, he and the defendant became concerned that a federal investigation of the Burden narcotics organization might reach Weldon and the defendant. As a result, the defendant ceased supplying Weldon with cocaine. Instead, the defendant occasionally purchased drugs from Weldon in April and May 2001. In April 2001, Weldon twice sold 62 grams of crack to the defendant for a total of 124 grams. In May 2001, Weldon sold 250 grams of cocaine to the defendant, after which the two ceased engaging in drug deals. (GA 352-78.)

Testimony of Anthony Burden

Prior to the defendant's trial, Anthony Burden pleaded guilty and entered into a cooperation agreement with the government. Burden testified that in late 2000 and early 2001, he and David "DMX" Burden purchased crack cocaine from Weldon on a regular basis. For each

transaction, the quantities ranged from 300 to 500 grams. Burden testified that he did not purchase cocaine directly from the defendant. (GA 117-18, 139-43.)

Wiretap Evidence, Pen Register Data & Video Tape

During the course of trial, the government introduced more than thirty wiretap recordings, the majority of which were played while Weldon was on the stand. The initial recordings concerned interceptions occurring over telephones used by Anthony Burden and David "DMX" Burden in late 2000. These wire interceptions did not record any conversations with the defendant. Rather, the intercepts revealed that Weldon was one of the Burdens' suppliers. Pen register data, however, revealed that the defendant maintained ongoing and frequent contact with Weldon during the course of the wiretap on the Burdens' telephones. Specifically, the pen register data established that from November 2000 through January 2001, Weldon and the defendant were in contact via telephone more than 100 times. (As noted, Weldon testified that the defendant was his primary source of supply while Weldon was selling cocaine base to the Burdens.) (GA 56-59, 147-50, 164-75, 477-80.)

Thereafter, from February through early April 2001, additional wire interceptions occurred over telephones used by Weldon. The interceptions occurring over Weldon's phones confirmed that Weldon supplied the Burdens with narcotics on a regular basis. The recordings, moreover, confirmed that the defendant was Weldon's source of supply. The wiretap on Weldon's telephones recorded Weldon and the defendant discussing, prices,

drug quantities, law enforcement activities and drug customers. (GA 56-59; 277-371.)

For example, on February 5, 2001, a series of conversations between Weldon and the defendant established that the two engaged in a 500 gram narcotics transaction. In a recorded conversation, Weldon expressed an interest in buying cocaine from the defendant. Weldon explained to the defendant that he could obtain the drugs elsewhere, but emphasized to the defendant "we together" and "I ain't goin' against the grain." The defendant responded, "I'll look and see how . . . you know . . . things are, and then, after that, I'mma call you." Later that same day, the defendant called Weldon and asked, "Okay, what's gonna be the house number?" Weldon responded, noting that he wanted a "half," referring to 500 grams, or half a kilogram, of cocaine. Video surveillance subsequently confirmed a brief meeting between the two at Weldon's residence in Norwalk. (GA 286-314; 528-30.)

As another example, in March 2001, a recorded conversation indicated that Weldon and the defendant wanted to meet at a restaurant in Norwalk known as "the Red Lobster." Video surveillance confirmed that the two met in the parking lot of the Red Lobster. The defendant got into Weldon's car. After a short time, the defendant got out of the car carrying a large wad of cash in his hand, which he placed in his pants pocket, before returning to the restaurant. (GA 318-25.)

On April 5, 2001, federal law enforcement officers executed a search warrant at the Burden stash house. Thereafter, on April 24, 2001, wire interceptions

commenced on a cellular telephone used by the defendant. The interceptions confirmed that Weldon and the defendant maintained a narcotics relationship during the period of the wiretap. However, following the execution of the search warrant at the Burden stash house, the defendant ceased supplying Weldon with cocaine. Instead, as evidenced by the wiretap, Weldon played the role of supplying the defendant with narcotics. Recorded conversations indicated that the two arranged to meet at Weldon's residence to exchange 250 grams of cocaine. Video surveillance confirmed the meeting. Weldon testified that in this particular transaction, he sold the defendant 250 grams of cocaine. (GA 58, 362-72, 554-57.)

Drug Quantities Attributable to the Defendant

The evidence at trial established, and the jury specifically found, that the defendant was involved in the distribution of 5 kilograms or more of cocaine and 50 grams or more of cocaine base. According to the evidence, during the course of the conspiracy, i.e., from 1998 through May 2001, the defendant sold Weldon in excess of 10 kilograms of powder cocaine. In the Spring of 2001, the defendant purchased crack cocaine from Weldon on two occasions, each transaction involving 62 grams. The evidence further established that the defendant knew that the drugs he supplied to Weldon were being sold in the form of cocaine base. (GA 373-74.)

SUMMARY OF ARGUMENT

1. During the course of trial, the government adduced evidence that sufficiently proved the defendant's guilt beyond a reasonable doubt. Weldon testified that from 1998 through April 2001, the defendant served as his primary source of supply. According to Weldon, the defendant sold him more than 10 kilograms of cocaine, which Weldon converted into crack for distribution to other drug dealers in Norwalk. Weldon's testimony was corroborated by wire interceptions which confirmed the drug dealing relationship that he had developed with the defendant. Surveillance video confirmed that the defendant met with Weldon at or near the time that wire interceptions indicated that the two were making arrangements to engage in drug transactions. The testimony of Weldon was alone sufficient to support the jury's verdict. Including corroboration from wire interceptions and surveillance video, the evidence against the defendant was overwhelming.

2. The district court properly denied the defendant's motion to strike the testimony of Anthony Burden. Well in advance of trial, the government turned over Burden's grand jury testimony as it related to the defendant and a detailed interview memorandum prepared by the Federal Bureau of Investigation. While the government did not promptly turn over a separate grand jury transcript concerning Burden's testimony relative to the indictment of *another* defendant in a separate case, it was not required to do so in the absence of a defense motion. Moreover, the late disclosure was inadvertent and is not grounds for reversal, because the defendant had a full opportunity to

redress any harm when he was given an opportunity to re-open the cross-examination of Burden. Indeed, he declined to further cross-examine Burden. Because there was no reasonable probability that, had the transcript been disclosed to the defense promptly, the result of the proceeding would have been different, any error was harmless.

ARGUMENT

I. THE EVIDENCE ADDUCED AT TRIAL, WHICH INCLUDED WIRETAP RECORDINGS, VIDEO TAPE, AND THE TESTIMONY OF COOPERATING WITNESSES, WAS SUFFICIENT TO ESTABLISH THE DEFENDANT'S GUILT BEYOND A REASONABLE DOUBT.

A. Relevant Facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

B. Governing Law and Standard of Review

A defendant challenging a conviction based upon a claim of insufficiency of the evidence bears a heavy burden subject to well-established rules of appellate review. The Court considers 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. The evidence must be viewed in conjunction, not in isolation, and its weight and the credibility of the witnesses is a matter for argument to the jury, not a ground for legal reversal on appeal. The task of choosing among competing, permissible inferences is for the fact-finder, not the reviewing court. *See*, *e.g.*, *United States v. Johns*, 324 F.3d 94, 96-97 (2d Cir.), *cert. denied*, 124 S. Ct. 272 (2003); *United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002); *United States v. Downing*, 297 F.3d 52, 56 (2d Cir. 2002). The testimony of a single

accomplice is sufficient to sustain a conviction so long as the testimony is not incredible on its face and is capable of establishing guilt beyond a reasonable doubt. *See United States v. Diaz*, 176 F.3d 52, 92 (2d Cir. 1999); *United States v. Gordon*, 987 F.2d 902, 906 (2d Cir. 1993). "Any lack of corroboration goes to the weight of the evidence, not to its sufficiency, and a challenge to the weight of the evidence is a matter for argument to the jury, not a ground for reversal on appeal." *Id*.; *see also United States v. Skowronski*, 968 F.2d 242, 247 (2d Cir. 1992) (same). "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).

C. DISCUSSION

In the present case, the evidence established the defendant's guilt beyond a reasonable doubt. Ernest Eugene Weldon testified at length about the defendant's distribution of large quantities of cocaine through multiple transactions occurring from 1998 through the spring of 2001. Weldon explained how his narcotics relationship with the defendant started. Weldon explained the prices that the defendant charged, the frequency with which the drug transactions occurred, and the manner in which the defendant distributed the drugs. The clear import of Weldon's testimony was that he and the defendant entered into an unlawful agreement through which, as Weldon's primary source of supply, the defendant sold Weldon more than 10 kilograms of cocaine. This testimony alone is sufficient to uphold the defendant's conviction. *See Diaz*, 176 F.3d at 92 (testimony of a single accomplice is

sufficient to sustain a conviction so long as the testimony is not incredible on its face); *Gordon*, 987 F.2d at 906 (same). (*See e.g.*, GA 243-73, 373-75.)

Contrary to the defendant's argument (Def. Br. at 13), the evidence went well beyond Weldon's testimony. For example, the government introduced numerous wiretap tapes, in which the defendant and Weldon spoke in coded language about meeting to engage in drug transactions. Weldon specifically ordered a "half" from the defendant in February 2001, after which he met with the defendant and then sold cocaine base to Anthony Burden. Video surveillance confirmed that the defendant and Weldon met shortly after Weldon placed the order. In another recorded conversation, the defendant told Weldon to get rid of his phone after one of Weldon's customers was arrested. Weldon complied. Moreover, in March 2001, Weldon drove to a restaurant, where the defendant got into Weldon's car. The defendant was captured on video tape getting out of the car, with what appeared to be a wad of cash in his hands. (GA 286-314, 321-24, 345, 528-30.)

In short, the evidence adduced at trial, consisting of wire intercepts, pen register data, video surveillance, and the testimony of cooperating witnesses, established the defendant's guilt beyond a reasonable doubt. Accordingly, the Court should reject the defendant's sufficiency challenge.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION TO STRIKE ANTHONY BURDEN'S TESTIMONY.

A. RELEVANT FACTS

In advance of trial, the government made numerous disclosures to the defendant. Regarding Anthony Burden, the government disclosed to defense counsel, *inter alia*, Burden's plea and cooperation agreements, an FBI interview memorandum, and his testimony before the grand jury on December 13, 2001, in connection with the indictment of the defendant. (GA 191-98, 412, 418.)

In his December 13, 2001 grand jury testimony, Anthony Burden provided the government and the grand jury with virtually no information about the defendant. His only reference to the defendant came after a grand juror asked, "Do you know where Weldon and the other people got their coke? Do you know where they got their stuff?" Burden stated, "From New York." Government counsel asked a few follow-up questions, focusing on where Weldon obtained his drugs. Anthony Burden identified the defendant as one of Weldon's suppliers, but explained "I never seen him provide drugs." (GA 803, 805-06.)

On July 10, 2002, Anthony Burden, as noted above, was called by the government to testify at the defendant's trial as a cooperating witness. His testimony concerned the nature of the Burdens' narcotics organization and the role that Weldon played from November 2000 through

February 2001 as the organization's supplier. Burden testified about the amount of cocaine base purchased from Weldon and the frequency of the drug transactions. Burden also testified that the narcotics organization had other sources of supply, including Claude Gerancon. During the government's direct examination, Anthony Burden made no mention of the defendant. Burden did not testify that he engaged in any transactions with the defendant. Burden's testimony focused on his relationship with Weldon and the quantities that Weldon supplied to the Burdens. (GA 116–50, 164-210.)

On July 11, 2002, the day after Anthony Burden testified, government counsel recalled that Anthony Burden had testified in another grand jury proceeding on May 8, 2002, which led to a one count, single defendant, indictment against Claude Gerancon, one of the Burdens' other sources of supply. In connection with his grand jury testimony in the Claude Gerancon matter, Anthony Burden had made no reference to the defendant. The focus of his grand jury testimony was on Gerancon's role as one of the Burdens' major suppliers. In the course of discussing the Burdens' various suppliers, Anthony Burden had explained that Weldon was one of their sources of supply. (GA 410-21, 845-59.)

That same day government counsel immediately notified defense counsel and forwarded him a copy of the transcript ("Gerancon transcript"). In the event that defense counsel wished to re-open the cross-examination of Burden, government counsel also contacted the United States Marshal's Service and requested that Burden be

produced at the courthouse the following morning. (GA 411-12, 415, 419.)

On the morning of July 12, 2002, the parties advised the district court of the recently disclosed grand jury transcript. Judge Hall asked defense counsel to identify any discrepancies between the Gerancon transcript and statements that Burden made to the FBI and/or in his original grand jury testimony. Defense counsel offered two claimed discrepancies. (GA 410-11.)

First, counsel claimed that there was a discrepancy on the subject of drug quantities. Defense counsel claimed that in the Gerancon transcript, Burden stated that the Burdens at most bought three kilograms from Gerancon; in contrast, when he originally testified before the grand jury, Burden simply testified that Gerancon was one of the Burdens' sources of supply, without referring to quantities purchased from Gerancon. In further contrast, in an FBI interview memorandum, Burden is reported to have mentioned a two kilogram transaction, but Burden did not claim that the transaction was the largest purchase from Gerancon. (In his testimony at the defendant's trial, Burden never discussed quantities that the Burdens obtained from Gerancon.) (GA 414-21.)

Second, defense counsel claimed that there was a discrepancy between Burden's trial testimony and the Gerancon transcript insofar as Burden discussed the price of a kilogram of cocaine. Defense counsel cited a section of the Gerancon transcript, in which Burden referred to a $15,000 outstanding debt to Gerancon. Counsel sought to argue that the amount of the outstanding debt was a

statement by Burden as to the full price for a kilogram. (GA 414-21.)

Anthony Burden was produced in court and made available to defense counsel for further cross-examination. Judge Hall invited defense counsel to cross-examine Anthony Burden. The court indicated that defense counsel "could take whatever time [he] need[ed] with [Burden] to set the stage leading to [the] cross examination." The district court gave defense counsel the opportunity to explore further cross-examination at any point during the trial: "And you can call him whenever you want to call him. . . . You can wait until the close of the government's case, you can do it whenever you want to do it. . . ." (GA 418-21.)

The defendant decided not to engage in further cross-examination of Burden. Instead, the defendant requested that Anthony Burden's testimony be stricken. The court denied the defendant's request, noting that "he is available here today" for further examination. (GA 418-21.)

B. GOVERNING LAW

The Jencks Act, in relevant part, provides that:

> [a]fter a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified.

18 U.S.C. § 3500(b). A "statement" is defined in relevant part to include grand jury testimony. *See* 18 U.S.C. § 3500(e)(3) (defining "statement" to include "a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury").

Rule 52 of the Federal Rules of Criminal Procedure provides that "[a]ny error, defect, irregularity, or variance that does not affect substantial rights must be disregarded." This Court has "applied th[e] harmless error test in numerous Jencks Act cases." *United States v. Jackson,* 345 F.3d 59, 78 (2d Cir. 2003), *cert. denied*, 124 S. Ct. 1165 (2004); *see also United States v. Nicolapolous*, 30 F.3d 381, 383-84 (2d Cir. 1994) (finding Jencks Act error harmless where undisclosed material bore no relevance to the charges, was useful only to impeach a witness whose credibility had already been sufficiently impeached, and did not undermine independent evidence of guilt).

"Where, as here, the government's Jencks Act violation is inadvertent, the defendant must establish that there is a significant chance that the added item would instill a reasonable doubt in a reasonable juror." *United States v. Gonzalez*, 110 F.3d 936, 942 (2d Cir. 1997). While the harmless error doctrine must be applied "strictly" in Jencks Act cases, *Goldberg v. United States*, 425 U.S. 94, 111 n.21 (1976), failure to disclose the withheld material must be deemed harmless where there is no "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Petrillo*, 821 F.2d 85, 89 (2d Cir. 1987) (quoting *United States v.*

Bagley, 473 U.S. 667, 682 (1985) (opinion of Blackmun, J.)); *see also United States v. Sperling*, 726 F.2d 69, 73 (2d Cir. 1984) (failure to disclose Jencks Act material harmless error); *United States v. Mourad*, 729 F.2d 195, 199-200 (2d Cir. 1984) (same). A "reasonable probability," in this context, means "a probability sufficient to undermine confidence in the outcome." *Nicolapolous*, 30 F.3d at 383-84.

When a party fails to comply with its discovery obligations, the trial court has a broad range of options. "[T]he court may order such party to permit the discovery or inspection [of the evidence], grant a continuance, or prohibit the party from introducing the evidence not disclosed, or it may enter such other order as it deems just under the circumstances." Fed. R. Crim. P. 16(d).

A court should order a new trial only if the delay in producing the statements caused the defendant "substantial prejudice." *United States v. Thomas*, 239 F.3d 163, 167 (2d Cir. 2001). Relevant to this determination are "'the nature of the evidence sought, the extent to which it bore on critical issues in the case, the reason for its nonproduction, and the strength of the government's untainted proof' as well as the timing of production." *Id.* (quoting *United States v. Stevens*, 985 F.2d 1175, 1181 (2d Cir. 1993)). To show substantial prejudice, a defendant "must demonstrate that the untimely disclosure . . . adversely affected some aspect of his trial strategy." *United States v. Adeniji*, 31 F.3d 58, 64 (2d Cir. 1994) (affirming conviction after late disclosure of Jencks material, where district court denied motion to strike witness's testimony). A new trial is not warranted absent

"'some indication that the pretrial disclosure of the disputed evidence would have enabled the defendant significantly to alter the quantum of proof in his favor.'" *United States v. Maniktala*, 934 F.2d 25, 28 (2d Cir. 1991) (quoting *United States v. Ross*, 511 F.2d 757, 763 (5th Cir. 1975)).

When the government violates pretrial discovery rules, the trial judge has wide latitude to decide what remedial action, if any, is appropriate, and so its decision is reviewed for abuse of discretion. *See United States v. Miller*, 116 F.3d 641, 681 (2d Cir. 1997) (discussing Rule 16 violations); *United States v. Giraldo*, 822 F.2d 205, 212 (2d Cir. 1987); *see also United States v. Pascarella*, 84 F.3d 61, 68 (2d Cir. 1996) (reviewing disposition of motion for continuance for abuse of discretion, where defense sought more time for new counsel to prepare for trial).

C. Discussion

The defendant did not suffer substantial prejudice from the late disclosure of Burden's grand jury testimony from the Gerancon case. Hence, the district court did not abuse its discretion by declining to strike Burden's testimony and, instead, by affording the defendant an opportunity to re-open cross-examination of Burden.

At the outset, it is important to understand what exactly the government failed to timely disclose. On appeal, the defendant claims that "[a]t the time [Burden] testified the government provided no testimony that he had previously given." Def. Br. 18. That assertion is not accurate. To the

contrary, well in advance of trial, the government turned over its only FBI interview memorandum pertaining to interviews of Anthony Burden ***and*** Burden's testimony before the grand jury that indicted the defendant. The only testimony that the government failed to disclose in a timely fashion was Burden's testimony in connection with the indictment of Claude Gerancon.(GA 191-98, 410, 412, 418.)

As an initial matter, the defendant did not move for the disclosure of statements as required under the Jencks Act, 18 U.S.C. § 3500, and its counterpart, Fed. R. Crim. P. 26.2. When a defendant fails to properly move for Jencks Act statements, he waives his right to any relief otherwise available under the Act. *See United States v. Scotti*, 47 F.3d 1237, 1251 (2d Cir. 1995) (district court did not err in denying defendant relief where defendant failed to make timely and sufficient motion under Rule 26.2); *United States v. Petito*, 671 F.2d 68, 73-74 (2d Cir. 1982) (although defendant was entitled to production of report under Jencks Act, defendant waived any right to relief under the Act by failing to make a sufficient motion).

Even assuming that the government was required by the Jencks Act to turn over the Gerancon transcript, there is no dispute that the omission was inadvertent. (GA 412, 419.) Nor is there any question that when the government recognized the omission, it immediately sought to remedy it by promptly disclosing the transcript, requesting the Marshal's Service to produce Anthony Burden for further cross-examination and, on the defendant's motion, addressing the matter with the district court. (GA 419.) To this extent, then, the "reason for [the evidence's]

nonproduction," and the "timing of production" are two factors indicating that the defendant did not suffer "substantial prejudice" from the late disclosure. *See Thomas*, 239 F.3d at 167.

Most importantly, the defendant has offered no explanation of how the Gerancon transcript could have been usefully employed to impeach Anthony Burden's trial testimony. At trial, defense counsel pointed to only one supposed inconsistency between Burden's trial testimony on the one hand, and statements to the FBI and his grand jury testimony regarding Claude Gerancon on the other hand. Yet a cursory examination of the statements in question demonstrates the insubstantiality of the claimed discrepancy. At trial, Burden testified that the price of a kilogram of cocaine was $28,000; before the grand jury, he had testified that he owed an outstanding debt of $15,000 to Gerancon. Contrary to defense counsel's arguments in the district court (and not repeated on appeal), there is no inconsistency between these two statements, since Burden's grand jury testimony regarding the $15,000 debt did not indicate that it represented the price of a kilogram of cocaine. (GA 416-17, 167, 183, 856.)

The defendant's second claimed discrepancy is likewise illusory. Defense counsel argued before the district court that Burden's grand jury testimony in the Gerancon case, that the largest transaction with Gerancon involved three kilograms of cocaine, conflicted with the absence of a quantity reference during his grand jury testimony in the present case. He also claimed that it contradicted his discussion with the FBI about a specific

two-kilogram transaction. However, there is no conflict among these statements. The reference to three kilograms was Burden's recollection of the largest transaction; and his reference to two kilograms was in connection with the first transaction in which he participated with Gerancon, which was not represented as having been the largest transaction. (GA 854, 874.)

Furthermore, with respect to this second supposed discrepancy, the defense has offered no claim that Burden's statements in the late-disclosed transcript were inconsistent *with his trial testimony.* In other words, he has not advanced any theory as to how these supposed inconsistencies could have been introduced at trial as prior inconsistent statements, whether offered for the truth pursuant to Fed. R. Evid. 801(d)(1), or simply for impeachment purposes pursuant to Fed. R. Evid. 613. Absent any suggestion of how this information could have been used to the defendant's benefit if disclosed earlier, the district court manifestly did not abuse its discretion in denying the defendant's motion to strike Burden's trial testimony. *See Adeniji*, 31 F.3d at 64 (requiring defendant to show that "untimely disclosure . . . adversely affected some aspect of his trial strategy"); *Maniktala*, 934 F.2d at 28 (denying new trial absent indication that pretrial disclosure would have "significantly" altered quantum of proof in defendant's favor).

In addition, defense counsel vehemently cross-examined Burden on points far more likely to cast doubt on his testimony. Counsel explored at length the nature of Burden's cooperation agreement with the government and the possibility that the judge could reduce Burden's

sentencing exposure. Defense counsel revealed to the jury Burden's extensive criminal record; his drug dealing activities while under the rule of a half-way house; his brandishing of a firearm when confronting a rival drug dealer; and his regular use of drugs during the period of the charged conspiracy. These avenues of cross-examination offered far more to the defense than did the Gerancon transcript, which concerned the Burden Organization's purchase of drugs from Gerancon, not from the defendant. (GA 180-207.)

Apart from the cross-examination that in fact occurred, the defendant was afforded every opportunity to recall Burden for additional cross-examination. The defendant made a tactical choice not to engage in any further cross-examination. (GA 418-21.) Had there been a fruitful line for further cross-examination, the defendant could have pursued it. *See Mourad*, 729 F.2d at 199-200 (affirming denial of new trial motion based on late disclosure of Jencks material, where defendants "had several possible remedies at various times of which they chose not to avail themselves, such as requesting a continuance, recalling the witness for further examination, or introducing rebuttal evidence").

Moreover, Burden was by no means the government's central witness in the case. In fact, Burden never directly implicated the defendant in any drug dealing. He never testified about any transactions in which he saw the defendant handling narcotics. Burden's testimony was limited to the quantities that he and other members of the Burden Organization obtained from Weldon, whom the defendant supplied. It was Weldon, not Burden, who

provided the most damaging testimony against the defendant. Weldon's testimony, coupled with video surveillance, pen register data, and numerous wiretap recordings concerning transactions involving the defendant, established overwhelmingly the defendant's guilt.

Finally, the defense argues on appeal that Rule 26.2 of the Federal Rules of Criminal Procedure left the district judge no discretion but to strike Burden's testimony in the present case. Rule 26.2 effectively embodies the Jencks Act requirement that a party produce, after its witness's direct examination, "any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony." Fed. R. Crim. P. 26.2(a). The rule further provides:

> If the party who called the witness disobeys an order to produce or deliver a statement, the court must strike the witness's testimony from the record. If an attorney for the government disobeys the order, the court must declare a mistrial if justice so requires.

Fed. R. Crim. P. 26.2(e). In the present case, it is undisputed that the government's failure to disclose the Gerancon transcript was inadvertent, and accordingly there is no basis for concluding that the government "disobey[ed]" a disclosure order under Rule 26.2. Indeed, this Court has repeatedly directed district courts to consider "the reason for nonproduction" of late-disclosed evidence when considering what procedural steps, if any, should be taken. *See*, *e.g.*, *Thomas*, 239 F.3d at 167;

Stevens, 985 F.2d at 1181. To the extent the defendant is suggesting that inadvertent violations of the Jencks Act are not subject to harmless error analysis, his position is squarely foreclosed by this Court's precedent. *See Gonzalez*, 110 F.3d at 942; *see also Sperling*, 726 F.2d at 73 (holding that harmless error analysis would be proper even if government's conduct had been "wanton and deliberate"); *Mourad*, 729 F.2d at 199-200; *United States v. Riley*, 189 F.3d 802, 805 (9th Cir. 1999) (recognizing that, "[d]espite the mandatory ring of [Rule 26.2(e)], a district court has discretion to refuse to impose sanctions for noncompliance, and Jencks Act violations are subject to harmless error analysis") (citation omitted).

Absent any indication that fruitful grounds for further cross examination existed, given the overwhelming evidence against the defendant, independent of Burden's testimony, and in view of the defendant's full access to Burden for cross-examination on the subject of the late-disclosed Gerancon transcript, the district court did not abuse its discretion in denying the defendant's motion to strike.

CONCLUSION

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

Dated: July 1, 2004

Respectfully submitted,

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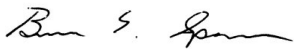

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