05-0709-cr(L)

To Be Argued By:
MARK D. RUBINO

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 05-0709-cr (L),
05-1409-cr (CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

HECTOR TORRES, JOSE ANTONIO FRANCO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

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BRIEF FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

This is an appeal from a judgment entered in the District of Connecticut (Underhill, J.) following a jury trial in which the defendant was found guilty of conspiring to possess with intent to distribute cocaine. The district court had subject matter jurisdiction 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 over the defendant's challenge to his conviction and sentence pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742.

STATEMENT OF ISSUES PRESENTED

1. Did the district court plainly err in admitting the testimony of William Torres and Luis Quiles, based on the Government's failure to provide notice of their testimony pursuant to Fed. R. Evid. 404(b), where their testimony directly related to the essence of the charged conspiracy?

2. Was the district court permitted to find by a preponderance of the evidence at sentencing that the defendant was responsible for more than 500 grams of cocaine, even though the jury found that the Government had proven only a lesser amount beyond a reasonable doubt, and were the court's factual findings clearly erroneous?

3. Was the Government required to prove that the substance the defendant purchased was actually cocaine, where the defendant faced only a conspiracy charge?

4. Where the defendant concedes on appeal that there was sufficient evidence of the existence of a conspiracy and his membership in that conspiracy, has he waived any sufficiency challenge premised on the supposed lack of proof relating to particular transactions within the scope of that conspiracy?

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Preliminary Statement

A jury found the defendant, Hector Torres, guilty of conspiring to possess with intent to distribute cocaine. In a special verdict form, the jury found that the quantity of cocaine that the Government had proven beyond a reasonable doubt was attributable to the defendant was less than 500 grams. In a post-*Booker* sentencing, the district court (Stefan R. Underhill, J.) determined that the Government had proven by a preponderance of the

evidence that the quantity of cocaine attributable to the defendant was 924 grams. The district court then sentenced the defendant to 63 months of imprisonment.

On appeal, the defendant argues that the Government failed to provide him with notice pursuant to Fed. R. Evid. 404(b) with regard to certain testimony, and that the district court erred in calculating his sentencing guidelines based upon 924 grams of cocaine even though the jury found that the amount of cocaine attributable to him was less than 500 grams. The defendant also asserts that there was insufficient evidence to prove both his membership in the charged conspiracy and that the controlled substance involved in the conspiracy was cocaine. For the reasons that follow, the defendant's contentions are meritless, and this Court should affirm the defendant's conviction and sentence.

Statement of the Case

On February 5, 2004, the defendant was arrested and charged by criminal complaint with conspiring to possess with intent to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(A)(ii). On February 18, 2004, the defendant was indicted by a federal grand jury on that same charge. Defendant's Appendix ("DA") 1-4. The case was assigned to the Honorable Stefan R. Underhill, in the United States District Court for the District of Connecticut.

On October 21, 2004, the defendant was found guilty by a jury of conspiring to possess with intent to distribute cocaine. In a special verdict form, the jury found that the

quantity of cocaine attributable to the defendant was less than 500 grams. DA 19.

On January 28, 2005, the district court sentenced the defendant principally to 63 months of imprisonment. Judgment entered on January 31, 2005. DA 7 (judgment), 18 (docket entry). On February 7, 2005, the defendant filed a timely notice of appeal. DA 5. The defendant is presently serving his sentence.

Statement of Facts

A. The Offense Conduct

Beginning in the fall of 2003, the Drug Enforcement Administration (DEA) initiated a wiretap investigation targeting the distribution of cocaine, crack cocaine and marijuana in the Bridgeport, Connecticut area. Beginning on October 20, 2003, and continuing until February 5, 2004, pursuant to court-authorized wiretap orders, law enforcement intercepted conversations occurring over telephones used by, among others, Ricardo Cartagena, a/k/a "Ricky," Luis Quiles, a/k/a "Paco," and Jose Antonio Franco, a/k/a "Tony." The overall investigation resulted in the return of three separate indictments, including *United States v. Jose Franco et al.*, Case No. 3:04-CR-40 (SRU), in which the defendant was charged. DA 1-4.

At trial, the Government presented evidence in the form of telephone conversations of the defendant and his co-conspirators that were intercepted pursuant to the

wiretap orders;[2] witness testimony, including testimony of co-conspirators who dealt directly with the defendant; physical evidence in the form of cocaine seized during the conspiracy period, address books, photographs, and telephone records; stipulations between the parties; and the defendant's own confession.

Ricardo Cartagena, who pleaded guilty to conspiring to possess with intent to distribute cocaine and marijuana, testified that he had known the defendant for approximately 15 years, Government's Appendix ("GA") 4,[3] and that he supplied cell phones to the defendant over the years through a cellular telephone and pager store that he managed called the Pager Wizard, GA 2, 4-5. Cartagena further testified that he knew the defendant to be a cocaine dealer, GA 54, and recounted how he (Cartagena) agreed to introduce the defendant to both Luis Quiles and Jose Franco, both of whom Cartagena knew to be drug dealers, so that the defendant could purchase cocaine from them. GA 14, 19-21.

Specifically, Cartagena testified that, in the summer of 2003, he introduced the defendant to Luis Quiles at the Pager Wizard store. GA 14. Cartagena testified that the

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[2] A select number of wiretap calls are referenced in this brief, the transcripts of which are appended for the Court's ease of reference at GA 163-178. The rest of the transcripts are, of course, part of the court record.

[3] Because the defendant makes a sufficiency of the evidence challenge, the Government has assembled an appendix containing largely the relevant portions of the direct examinations from the trial transcript.

defendant and Quiles met for approximately 30 minutes and then agreed to conduct cocaine transactions with each other. GA 17-18. Cartagena later testified that, although he did not know about any specific drug transactions that the defendant conducted with Quiles, the defendant later told him in approximately December 2003 that he (defendant Torres) did not want to purchase cocaine from Quiles any more because of the poor quality. GA 19. After hearing this, Cartagena testified that he told the defendant that he could introduce him to another cocaine trafficker, Jose Antonio Franco, whom Cartagena knew as Tony. GA 19-20. Cartagena explained that Tony was a bigger drug trafficker and so he assumed that Tony had better quality cocaine which would make the defendant happy. GA 21.

Thereafter, Cartagena testified that he set up a meeting between Tony and the defendant at the Pager Wizard. GA 23. Cartagena explained that, after the meeting, Tony told Cartagena that he and the defendant had exchanged numbers and were going to try and conduct some drug business with each other. GA 25-26.

Cartagena recounted how he received a telephone call one early Saturday morning from Tony, who was trying to get hold of the defendant. They were supposed to have met so that the defendant could purchase cocaine from Tony, but the defendant had failed to show up. GA 29-30. The wiretapped calls between Tony and Cartagena, Government Exhibits ("GX") 15-17 (GA 163-69), and GX 19 (GA 170-72), in which Tony and Cartagena discuss their respective attempts to reach the defendant, were also introduced into evidence. GA 30-34. Cartagena testified

that he eventually spoke with the defendant who had overslept and missed his meeting with Tony, but that the defendant wanted Cartagena to call Tony and beg him to set up another meeting so that the defendant could purchase the cocaine. GA 38. This conversation was intercepted over the wiretap and introduced into evidence as GX 20. GA 37.

At the defendant's insistence, Cartagena contacted Tony to vouch for the defendant and attempt to persuade Tony to set up another deal with the defendant. GA 39, 173-74. During their conversation, Cartagena and Tony discussed the possibility of Cartagena receiving the cocaine on behalf of the defendant, but eventually Tony agreed to meet with the defendant directly. GA 41-44, 176-78. Cartagena testified that, after the defendant and Tony actually met, Cartagena and the defendant had a conversation during which the defendant said that everything had gone well. GA 48. However, the defendant later confided in Cartagena that he (the defendant) was having a hard time paying Tony on time for the drugs. GA 49-51.

William Torres, no relation to the defendant, also testified as a Government witness after pleading guilty to conspiring with the defendant and others to possess with intent to distribute cocaine. He testified that he assisted Jose Franco (Tony) in the drug business by delivering marijuana and cocaine to other people at Franco's direction. GA 58-59. Torres also testified that he eventually started receiving packages of drugs at his home

that were sent through the mail on behalf of Franco. GA 59.[4]

William Torres testified about a multi-kilogram package that he received around Thanksgiving 2003 and the instructions he received from Franco about what to do with the cocaine. GA 63-64. William Torres explained that he was instructed, among other things, to deliver 500 grams to an individual named "Hector," who William Torres later learned was the defendant. GA 64. William Torres further explained that he traveled from his home in Waterbury to Bridgeport with the 500 grams to meet Franco and "Hector," but the deal did not go through that day. GA 68. However, William Torres explained that the next day, at Franco's instruction, he delivered 500 grams to the defendant at a Home Depot in Bridgeport. GA 70-75.

Lastly, William Torres testified that, approximately two to three weeks later, he delivered 200 grams of cocaine to the defendant on behalf of Franco at a McDonald's restaurant. GA 75-77.

Luis Quiles pleaded guilty to conspiring to possess with intent to distribute cocaine and crack cocaine, and agreed to testify as a Government witness at trial. He testified that he provided cocaine to the defendant. Specifically, Quiles explained that Ricardo Cartagena

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[4] At trial, the Government presented evidence of a seizure of five kilograms of cocaine that had been secreted in a computer that was mailed via UPS to Torres, GX 38-39, which defendant stipulated was in fact cocaine. GX 38A, 39A.

introduced him to the defendant, GA 82, and that he later sold 62 grams of cocaine to the defendant on two separate occasions in approximately October and November 2003. GA 83-84.

Lastly, DEA Special Agent Joseph Benson testified that he conducted a post-arrest interview of the defendant during which Agent Benson confronted the defendant with one of the wiretapped calls between the defendant and Jose Franco. GA 93-96. Agent Benson explained that, initially, the defendant denied any involvement in drug trafficking, but eventually admitted to being involved in the Home Depot transaction, though he said that he had purchased only 125 grams. GA 100-103.

B. The Presentence Investigation

Following the plea proceeding, the United States Probation Office conducted its presentence investigation and prepared a presentence report ("PSR").[5] The probation officer summarized the overall investigation and then with regard to the defendant, the probation officer stated as follows:

> Hector Torres went to trial and was convicted by a jury of participating in the conspiracy. However, the jury found that the conspiracy involved less than 500 grams of cocaine. Torres made a post-arrest statement acknowledging that he did purchase cocaine from Franco at Home Depot, but that it was 125 grams and

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[5] The probation officer used the November 5, 2004, version of the Sentencing Guidelines.

> it was for a guy he knew only as Al. The trial evidence, however, indicates that the quantity was 500 grams of cocaine. Also, at trial, William Torres testified that he made two additional deliveries to Hector Torres, one for 100 grams[6] and a second for 200 grams. Luis Quiles testified at trial that he was also introduced to Hector Torres by Cartagena and that he (Quiles) sold 62 grams of cocaine to Hector Torres on two occasions. This brings the total amount of cocaine to 924 grams.

PSR p. 8, ¶ 41. As a result, the probation officer determined the defendant's base offense level to be 26 under U.S.S.G. § 2D1.1(c)(7) since the offense involved at least 500 grams but less than two kilograms of cocaine. PSR 9, ¶ 46. Finding no adjustments applicable, the PSR set the total offense level at 26. PSR 9, ¶ 53. With a criminal history category of I, the probation officer calculated the defendant's sentencing guidelines range to be 63 to 78 months. PSR 14, ¶ 85.

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[6] It is apparent that the Government, and perhaps the defendant, believed that William Torres also testified regarding another 100-gram transaction with the defendant. Indeed, such a transaction was included in the PSR and was part of the court's calculation that 924 grams of cocaine were attributable to the defendant. However, upon review of the trial transcript, it is clear that William Torres only testified to the 500-gram deal at Home Depot and to one subsequent 200-gram deal.

C. The Sentencing Hearing

At sentencing, the defendant objected to the probation officer's findings as to the quantity of cocaine attributable to the defendant. GA 117. The defendant argued that, because the jury found that the quantity of cocaine attributable to the defendant was less than 500 grams, under *Blakely v. Washington*, 542 U.S. 296 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the district court was precluded from sentencing the defendant based upon a quantity of more than 500 grams. However, the district court immediately rejected this argument by finding at the outset of the sentencing hearing that, even after *Booker*, the court was required to consider relevant conduct and to make a quantity determination under the preponderance of the evidence standard. GA 118.

Defendant further argued that, even if the court were permitted to consider the trial evidence regarding drug transactions exceeding 500 grams, such evidence was not credible. GA 123. In other words, the defendant argued that, because the jury did not believe the conspiracy involved more than 500 grams, the court should make a similar finding. *Id.* However, the court, who had the opportunity to observe the trial testimony, found that Ricardo Cartagena, William Torres, and Luis Quiles provided credible testimony regarding their dealings with the defendant and concluded that the quantity of cocaine attributable to the defendant was 924 grams.[7] GA 139.

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[7] As stated earlier, because the Government mistakenly believed that William Torres had testified to the 100-gram deal, (continued...)

Based upon these findings, the district court calculated the defendant's base offense level to be 26, resulting in a sentencing guidelines range of 63 to 78 months. GA 140. The court sentenced the defendant to 63 months of imprisonment. GA 157.

SUMMARY OF ARGUMENT

I. The defendant failed to object to the trial testimony of William Torres and Luis Quiles and, therefore, he has forfeited his right to challenge their testimony on appeal absent plain error. The testimony of Torres and Quiles was intrinsic evidence of the defendant's guilt, that is, evidence of drug transactions that occurred during the conspiracy period and in furtherance of the charged conspiracy. As such, the Government was not required to provide notice under Fed. R. Evid. 404(b) or any other rule and there was no error, plain or otherwise.

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[7] (...continued)
the Government argued that the quantity attributable to the defendant was 924 grams based solely on the trial testimony. Had the Government realized that William Torres had omitted this transaction from his testimony, the Government would have either (1) argued that the 100-gram transaction was relevant conduct that should be taken into consideration by the sentencing court, or (2) advocated for a finding of 824 grams. In either case, the defendant's offense level would have remained 26 (more than 500 grams but less than 2 kilograms of cocaine).

II. The jury's finding that the Government had proved beyond a reasonable doubt that the defendant entered into a conspiracy involving less than 500 grams of cocaine did not preclude the sentencing court from finding that the Government had proven by a lower standard of proof – a preponderance of the evidence – that the quantity was in fact greater than 500 grams. The jury's verdict merely established the statutory sentencing range, and did not preclude the court from making factual findings that dictated where in that range the defendant should be sentenced. Moreover, the court's finding that more than 500 grams were attributable to the defendant was not clearly erroneous. There was more than ample evidence adduced at trial upon which the court could make such a finding.

III. The Government was not required to prove that the substance the defendant purchased from the co-conspirators was actually cocaine. In a conspiracy case, the violation is the unlawful agreement, and the Government is only required to establish that a conspiracy existed and that the defendant knowingly and willingly agreed to participate in the conspiracy.

IV. There was overwhelming evidence of the defendant's membership in the charged conspiracy. In fact, the defendant concedes that he joined a conspiracy to possess with intent to distribute cocaine. Given this concession, his attack on the strength of the evidence in support of one or more of the drug transactions is of no moment.

ARGUMENT

I. The District Court Did Not Plainly Err in Admitting the Testimony of William Torres and Luis Quiles Under Fed. R. Evid. 404(b), Where Their Testimony Directly Related to the Essence of the Charged Conspiracy.

A. Relevant Facts

The Statement of Facts section of this brief sets forth the facts pertinent to this appeal issue.

B. Governing Law and Standard of Review

Federal Rule of Evidence 404(b) provides in full:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

In *Huddleston v. United States*, 485 U.S. 681 (1988), the Supreme Court articulated a four-part test to guide

judicial discretion under Rule 404(b). Prior bad-acts evidence must be (1) offered for a proper purpose, (2) relevant, and (3) substantially more probative than prejudicial. In addition, (4) at the defendant's request, the district court should give the jury an appropriate limiting instruction that the evidence may be considered only for the purpose for which it was admitted. *Id.* at 691-92; *see also United States v. LaFlam*, 369 F.3d 153, 156 (2d Cir.) (per curiam), *cert. denied,* 543 U.S. 951 (2004). In evaluating the admissibility of evidence offered under Rule 404(b), this Court "follow[s] an inclusionary rule, allowing the admission of such evidence for any purpose other than to show a defendant's criminal propensity, as long as the evidence is relevant and satisfies the probative-prejudice balancing test of Rule 403 of the Federal Rules of Evidence." *United States v. Carboni*, 204 F.3d 39, 44 (2d Cir. 2000) (quoting *United States v. Inserra*, 34 F.3d 83, 89 (2d Cir. 1994)).

Rule 404(b) applies to evidence of "other crimes, wrongs, or acts" -- not to acts directly relating to the crime charged. *See United States v. Gonzalez,* 110 F.3d 936, 942 (2d Cir. 1997). Such "intrinsic evidence" falls outside the scope of Rule 404(b) and is admissible at trial where it tends to prove the existence of an element of the charged offense. *See United States v. Brady*, 26 F.3d 282, 287 (2d Cir. 1994) (evidence of uncharged murders was direct proof of a disputed fact regarding the existence of an enterprise in a RICO conspiracy, and not 404(b) evidence).

Moreover, not all evidence of a defendant's uncharged wrongful conduct is subject in the first place to the limitations placed upon the admission of Rule 404(b)

evidence. Rather, 'evidence of uncharged criminal activity is not considered 'other crimes' evidence under Fed. R. Evid. 404(b) if it arose out of the same transaction or series of transactions as the charged offense, if it is inextricably intertwined with the evidence regarding the charged offense, or if it is necessary to complete the story of the crime on trial." *Carboni*, 204 F.3d at 44 (quoting *Gonzalez*, 110 F.3d at 942) (alterations in *Carboni*).

This Court reviews a trial court's evidentiary rulings, including Rule 404(b) issues, for abuse of discretion. *See United States v. Williams*, 205 F.3d 23, 33 (2d Cir. 2000); *United States v. Lumpkin,*192 F.3d 280, 287 (2d Cir. 1999). This standard of review is exceedingly deferential. "District courts enjoy broad discretion in admitting evidence of similar acts; to find an abuse of that discretion' we must be persuaded that the trial judge ruled in an arbitrary and irrational fashion.'" *United States v. Bok*, 156 F.3d 157, 165 (2d Cir. 1998) (quoting *United States v. Pipola*, 83 F.3d 556, 566 (2d Cir. 1996)).

Under Rule 52(b) of the Federal Rules of Criminal Procedure, an appellate court is empowered to review unpreserved claims for plain error only if the error has not otherwise been waived. *See United States v. Olano*, 507 U.S. 725, 732-34 (1993). A waiver completely "precludes review [and is] . . . 'the intentional relinquishment or abandonment of a known right,'"; waiver occurs "when a defendant or his attorney manifests an intention or expressly declines to assert a right." *Id*. at 732. Forfeiture, on the other hand, occurs when a party fails to timely assert a right. *Id.* Rights that have been forfeited are reviewed for plain error, whereas waiver extinguishes

a claim altogether. *Id*. at 736; *see also United States v. Yu-Leung*, 51 F.3d 1116, 1121 (2d Cir. 1995).

C. Discussion

The defendant argues that William Torres' testimony concerning the 200-gram transaction and Luis Quiles' testimony regarding the two 62-gram transactions were improper Rule 404(b) evidence since the Government failed to provide pre-trial notice of such testimony. This contention is completely baseless and should be rejected.

First, the defendant never objected to their testimony at any time during the trial. Rather, after the Government rested its case, defense counsel put on the record the fact that he had not been provided reports of any interviews of William Torres and Quiles. GA 108-09. Defense counsel acknowledged that he did receive a copy of the agents' notes taken during the interviews of William Torres and Quiles, but wanted the Government to confirm on the record that no reports of interview existed. GA 109-10. Government counsel confirmed the fact that no reports were generated, largely because William Torres and Quiles had only recently pleaded guilty and agreed to cooperate with the Government. *Id.* Defense counsel noted that he thought it was "odd" that reports were not generated, but acknowledged that "[i]f they weren't, they weren't and that's the case, but I wanted to note that on the record." GA 110. Having failed to object to the testimony or move to strike it from the record, the defendant has forfeited this challenge and his claim is reviewed only for plain error. *Olano*, 507 U.S. at 732-34.

The admission of this evidence was not error, plain or otherwise. The indictment charged the defendant with conspiring with Franco, Cartagena, William Torres, and others known and unknown to the grand jury, to possess with intent to distribute cocaine from in or about October 2003 through on or about February 5, 2004. As is generally the case, the indictment did not allege specific drug transactions that were alleged to have occurred during the conspiracy period.

At trial, the Government presented, among other evidence, the testimony of Torres and Quiles to prove the existence of the conspiracy and the defendant's membership therein. To that end, both Torres and Quiles testified to the circumstances under which they met the defendant, and then the repeated instances in which they supplied cocaine to the defendant during and in furtherance of the conspiracy. William Torres testified that, in addition to the 500-gram Home Depot deal,[8] he sold 200 grams of cocaine to the defendant on behalf of Franco approximately two or three weeks after the Home Depot transaction, which occurred on November 30, 2003. Quiles testified that he sold 62 grams of cocaine to the defendant in October 2003, GA 83, and another 62 grams sometime thereafter, but before he (Quiles) was arrested on February 5, 2004, GA 84.

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[8] The defendant does not claim that the Home Depot deal was improper 404(b) evidence even though it occurred only two to three weeks earlier and involved the same participants. His argument regarding the 200-gram deal is difficult to square with this effective concession.

In sum, each transaction about which Torres and Quiles testified occurred during the charged conspiracy period, with co-conspirators, and in furtherance of the conspiracy. Plainly, this evidence did not involve uncharged conduct; rather, it was direct evidence of the crime charged. Consequently, the testimony of Torres and Quiles did not implicate Rule 404(b). *See Gonzalez*, 110 F.3d at 942; *Brady*, 26 F.3d at 287. Accordingly, there was no error, and this claim should be rejected.

II. The District Court's Sentencing Finding That the Defendant Was Responsible for More Than 500 Grams of Cocaine to the Defendant Was Not Clearly Erroneous, and Comported with the Sixth Amendment.

A. Relevant Facts

The Statement of Facts section of this brief sets forth the facts pertinent to this appeal issue.

B. Governing Law and Standard of Review

In *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005), the Supreme Court held that the Sentencing Reform Act of 1984 was unconstitutional to the extent it required district courts to impose sentences in conformity with the United States Sentencing Guidelines, which entail judicial factfinding by a preponderance of the evidence. In order to remedy this constitutional infirmity, the Court excised certain portions of the federal sentencing statutes which rendered the Guidelines mandatory, namely 18

U.S.C. §§ 3553(b)(1) and 3742(e). Henceforth, the Court said, sentencing courts should still consider the range applicable to a particular defendant under the Guidelines, but treat that range as advisory rather than binding.

The Supreme Court recognized in *Booker* that by excising § 3742(e), it had eliminated the statutory provision which had set forth the standard of appellate review for sentencing decisions. The Court nevertheless determined that implicit in the remaining sentencing scheme was a requirement that appellate courts review sentences for "reasonableness" in light of the factors outlined in 18 U.S.C. § 3553(a). *See Booker*, 125 S. Ct. at 765. This Court has explained that "reasonableness" in the context of review of sentences is a flexible concept. *See United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005). The "appellate function in this context should exhibit restraint, not micro-management." *Id.*

Procedural errors may render a sentence unreasonable. For example, it is unreasonable (because it would violate the Sixth Amendment) to apply the Guidelines in a mandatory manner. *Id.* at 114. Likewise, the improper calculation of a sentencing guideline enhancement may render a sentence unreasonable, at least where that enhancement had an "appreciable influence" on the sentence imposed by the district court. *See United States v. Rubenstein*, 403 F.3d 93, 98-99 (2d Cir.) (vacating and remanding pre-*Booker* sentence, and reviewing enhancement determinations because such decisions "may have an appreciable influence even under the discretionary sentencing regime that will govern the re-sentencing"; "express[ing] no opinion as to whether an incorrectly

calculated Guidelines sentence could nonetheless be reasonable"), *cert. denied*, 126 S. Ct. 388 (2005); *United States v. Selioutsky*, 409 F.3d 114, 119 (2d Cir. 2005) ("An error in determining the applicable Guideline range" may render ultimate sentence unreasonable under *Booker*). In some circumstances, a district court need not resolve every close Guidelines question definitively. For example, such resolution is not required "where either of two Guidelines ranges, whether or not adjacent, is applicable, but the sentencing judge, having complied with section 3553(a), makes a decision to impose a non-Guidelines sentence, regardless of which of the two ranges applies." *Crosby*, 397 F.3d at 112. Nevertheless, "even under the discretionary regime recognized in *Booker* . . . a significant error in the calculation or construction of the Guidelines may preclude affirmance." *United States v. Canova*, 412 F.3d 331, 335 (2d Cir. 2005).

This Court gives "due deference" to the district court's application of the Guidelines to the facts of the case. *United States v. Jackson*, 346 F.3d 22, 24 (2d Cir. 2003), *vacated on other grounds sub nom. Lauersen v. United States,* 125 S.Ct. 1109 (2005). What is meant by "due deference" depends on the nature of the question presented. *Koon v. United States*, 518 U.S. 81, 98 (1996); *United States v. Vasquez*, 389 F.3d 65, 68 (2d Cir. 2004). When a sentencing court's application of a guideline to facts primarily involves an issue of fact, the district court's determination will be reviewed only for clear error. *Vasquez*, 389 F.3d at 75; *Selioutsky*, 409 F.3d at 119; *United States v. Garcia,* 413 F.3d 201, 222 (2d Cir. 2005). If the question is primarily an issue of law, then *de novo* review is warranted. *Id*.

In a drug case, the Sentencing Guidelines require the sentencing court to determine what quantity of narcotics is attributable to a defendant. To making such a finding, the district court considers two categories of criminal conduct. First, a defendant is responsible for his own criminal acts, more specifically, "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant." U.S.S.G. § 1B1.3(a)(1)(A). Second, if the defendant is involved in criminal activity with others, the defendant may also have responsibility for some of the acts of his confederates, that is, "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." U.S.S.G. § 1B1.3(a)(1)(B).

Thus, in the context of drug offenses, the Guidelines make clear that, at a minimum, the defendant "is accountable for all quantities of contraband with which he was directly involved." U.S.S.G. § 1B1.3 app. note 2. *See also United States v. Diaz*, 176 F.3d 52, 120 (2d Cir. 1999) ("A defendant who is a party to [a drug] conspiracy is accountable for the quantities of narcotics in which he had a direct, personal involvement.") (internal quotation marks and citation omitted).

The Government bears the burden of proving drug quantity by a preponderance of evidence. *United States v. Powell,* 404 F.3d 678, 681 (2d Cir. 2005); *United States v. Desimone*, 119 F.3d 217, 228 (2d Cir. 1997); *United States v. Moore*, 54 F.3d 92, 102 (2d Cir. 1995) ("A district court's estimation of drug quantity is an issue of fact that need be established only by a preponderance of the evidence."). *See also United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005) (reiterating that after *Booker*, district courts may determine sentencing factors by a preponderance of the evidence without violating the Due Process Clause). "In approximating the quantity of drugs attributable to a defendant, any appropriate evidence may be considered, 'or, in other words, a sentencing court may rely on any information it knows about.'" *United States v. Prince*, 110 F.3d 921, 925 (2d Cir. 1997) (quoting *United States v. Jones,* 30 F.3d 276, 286 (2d Cir. 1994)).

Because "'[t]he quantity of drugs attributable to a defendant at the time of sentencing is a question of fact for the district court, [such a finding is] subject to a clearly erroneous standard of review.'" *United States v. Moreno*, 181 F.3d 206, 213 (2d Cir. 1999) (quoting *United States v. Hazut*, 140 F.3d 187, 190 (2d Cir. 1998)). Moreover, in determining drug quantity, the application of a sentencing guideline to the facts will be reviewed under the clearly erroneous standard when the sentencing court's determination was "primarily one of fact." *Vasquez*, 389 F.3d at 75.

C. Discussion

The defendant argues that, given the jury's verdict as to quantity, the court erred in making a sentencing determination that he entered into a conspiracy to possess with intent to distribute more than 500 grams of cocaine. Defendant also attacks the strength of the Government's evidence and suggests that the special verdict as to quantity indicates that the jury must have found the evidence lacking.

First, to the extent the defendant is arguing that the sentencing court erred as a matter of law in finding that more than 500 grams of cocaine could be ever attributable to him, given the special verdict form, the defendant is wrong. This Court recently rejected this very same argument in *United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005). In *Vaughn*, a jury found the defendant guilty of conspiring to distribute marijuana and returned a special verdict finding that the defendant's conduct involved at least fifty kilograms but not more than 100 kilograms of marijuana. 430 F.3d at 521. However, at sentencing, the district court found that, based upon the evidence adduced at trial, that the defendant's conduct involved 544 kilograms. *Id.* at 526.

In rejecting the defendant's challenge to this finding, the *Vaughn* panel reasoned that there is a distinction between elements of an offense, which must be found by a jury, and facts relevant to sentencing, which may be found by a judge. *Id.* The Court explained that, although it previously held in *United States v. Thomas*, 274 F.3d 655 (2d Cir. 2001) (en banc), that drug quantity is not

merely a sentencing factor, it also noted in *Thomas* that *Apprendi* required that the quantity be found by a jury "only in cases where the quantity results in a punishment above a statutory maximum." 430 F.3d at 526-27. Thus, the *Vaughn* court reasoned that Vaughn had been acquitted of an offense that carried a statutory sentencing range of between five and forty years, but convicted of an offense that carried a statutory sentencing range of zero to twenty years' incarceration. *Id.* This Court concluded, therefore, that the sentencing court was authorized to sentence the defendant within that range and in accordance with the facts the sentencing court found by a preponderance of the evidence, which may even include acquitted conduct. *Id*. at 527. *See also United States v. Watts,* 519 U.S. 148, 156 (1997) (per curiam) (finding no due process violation where court considers acquitted conduct at sentencing, because jury finding that the conduct was not proven beyond a reasonable doubt does not preclude judicial finding that same conduct was proven by a preponderance of the evidence).

In this case, because the jury found that the defendant conspired to possess with intent to distribute less than 500 grams of cocaine, the defendant's statutory sentencing scheme was set at zero to twenty years. *See* 21 U.S.C. § 841(b)(1)(C). Consequently, the sentencing court was authorized to consider all of the trial evidence and any other relevant conduct and find by a preponderance of the evidence that the defendant conspired to possess with intent to distribute more than 500 grams, so long as the sentence ultimately imposed was no greater than twenty years.

Moreover, there was more than ample evidence upon which the district court was able to make such a finding. William Torres testified at trial that he delivered 500 grams and later 200 grams of cocaine to the defendant. William Torres' testimony regarding quantity was amply corroborated by the wiretap evidence which indicated that the defendant paid $10,000 to William Torres at Home Depot, GA 74, and still owed $3,000 to Franco, GA 37, 170-72, bringing the total cost of the cocaine to $13,000, which Agent Benson testified was consistent with the going price for 500 grams, GA 107. Luis Quiles testified that he supplied the defendant with 124 grams of cocaine. GA 83-84. While there was no direct evidence to corroborate his testimony regarding the quantity of cocaine he distributed to the defendant, his testimony was generally corroborated by telephone records and the testimony of Ricardo Cartagena. At sentencing, the court specifically stated that it found the testimony of Cartagena, Torres and Quiles to be credible. GA 139. Given the trial evidence, the district court's finding that there were more than 500 grams involved in the conspiracy was not clearly erroneous.

III. In a Conspiracy Case, the Government Is Not Required to Prove That the Defendant Actually Possessed Cocaine with the Intent to Distribute It.

A. Relevant Facts

At the close of the Government's case, the defendant moved for a judgment of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure, on the grounds

that the Government had failed to prove that the substance sold to the defendant was actually cocaine. The district court rejected this argument and orally denied the motion for acquittal. GA 112-14.

B. Governing Law and Standard of Review

In a conspiracy case, the essence of the crime is the agreement, and not the commission of the substantive crime that is the object of the agreement. *United States v. Rabinowich*, 238 U.S. 78, 86 (1915). The conspiracy need not be successful. Rather, what the Government is required to prove is the existence of the conspiracy and the defendant's knowing and willful joining in the conspiracy. *United States v. Gore*, 154 F.3d 34, 40 (2d Cir. 1998). The conspiracy may be established entirely by circumstantial evidence, and it is not necessary for the Government to present evidence of actual sales or seizures of narcotics. *United States v. Desimone,* 119 F.3d 217, 223 (2d Cir. 1998). Rather, "[w]hat matters in a conspiracy prosecution is whether the defendants agreed to commit the underlying offense, not whether their conduct would actually have constituted that offense." *United States v. Rosa*, 17 F.3d 1531, 1543 (2d Cir. 1994).

This Court reviews *de novo* both legal questions and denials of motions for judgment of acquittal. *See United States v. Holland*, 381 F.3d 80, 86 (2d Cir. 2005); *United States v. Reyes*, 302 F.3d 48, 52-53 (2d Cir. 2002).

C. Discussion

The defendant renews his argument that his conviction should be overturned because the Government failed to present any evidence that the substance sold to the defendant was cocaine. Judge Underhill properly rejected this argument as wholly without merit.

In this case, while the Government presented evidence of actual transactions to prove the existence of the conspiracy and the defendant's participation therein, plainly, the Government was not required to prove that the substance that the defendant purchased from William Torres and Luis Quiles was actually cocaine. Proof of the actual substance that was possessed in furtherance of the conspiracy was not an element of the offense.

What the Government was required to prove was that there existed a conspiracy to possess with intent to distribute cocaine. Certainly, the Government presented significant evidence that the unlawful agreement was to possess cocaine with the intent to distribute it. Indeed, there was ample testimony demonstrating the parties' intent and belief that they were dealing in cocaine. For example, Ricardo Cartagena testified that he referred the defendant to Jose Franco and Luis Quiles so the defendant could purchase cocaine from them. GA 14, 19-21. William Torres likewise testified that he sold cocaine to the defendant. GA 70-75. Moreover, there was some evidence that the substance being trafficked was, in fact, cocaine. William Torres testified that he had used cocaine in the past, knew what effects it had on his body, that he tasted the cocaine before he delivered it to the defendant,

and that the sensation he experienced was similar to when he used cocaine in the past. GA 64-66. Further, the defendant stipulated that other cocaine seized from William Torres was in fact cocaine. GX 38A, 39A. Finally, the defendant admitted in his post-arrest statement that he purchased cocaine in the Home Depot episode. GA 100-103. Thus, the district court did not err in denying the defendant's Rule 29 motion on this ground, where there was evidence both that the co-conspirators intended and believed that they were dealing in cocaine, and there was evidence that the substance was in fact cocaine.[9]

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[9] Even in a possession case, there is no requirement that the Government prove that the substance was cocaine through expert chemical analysis. *See United States v. Bryce*, 208 F.3d 346, 353 (2d Cir. 1999) (rejecting evidentiary sufficiency challenge; "'lay testimony and circumstantial evidence may be sufficient, without the introduction of an expert chemical analysis, to establish the identity of the substance involved in the alleged narcotics transaction'" and "'[s]uch circumstantial proof may include evidence of the physical appearance of the substance involved in the transaction'") (quoting *United States v. Dolan*, 544 F.2d 1219, 1221 (4th Cir. 1976)).

IV. Because the Defendant Has Conceded the Sufficiency of the Evidence of His Membership in the Conspiracy, His Sufficiency Challenges to Particular Drug Transactions Are Irrelevant.

A. Relevant Facts

The Statement of Facts section of this brief sets forth the facts pertinent to this appeal issue.

B. Governing Law and Standard of Review

"To establish membership in a conspiracy, the Government must prove that the defendant knowingly engaged in the conspiracy with the specific intent to commit the offenses that were the objects of the conspiracy." *United States v. Aleskerova*, 300 F.3d 286, 292 (2d Cir. 2002) (internal quotation marks omitted). "'[O]nly slight evidence is required to link another defendant with a conspiracy once the conspiracy has been shown to exist.'" *Id.* at 292 (quoting *United States v. Abelis*, 146 F.3d 73, 80 (2d Cir. 1998)). To convict a defendant of drug conspiracy under 21 U.S.C. § 846, the Government need not prove any overt acts. *United States v. Shabani*, 513 U.S. 10 (1994).

In *United States v. Dhinsa*, 243 F.3d 635, 648-49 (2d Cir. 2001), this Court set forth in detail the familiar standard for reviewing claims of insufficiency of the evidence:

> A defendant challenging a conviction based on a claim of insufficiency of the evidence bears a heavy burden. *See United States v. Walsh*, 194 F.3d 37, 51 (2d Cir. 1999). The evidence presented at trial should be viewed "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) (quotation marks omitted). . . . We consider the evidence presented at trial "in its totality, not in isolation," but "may not substitute our own determinations of credibility or relative weight of the evidence for that of the jury." *United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000). "We defer to the jury's determination of the weight of the evidence and the credibility of the witnesses, and to the jury's choice of the competing inferences that can be drawn from the evidence." *United States v. Morrison*, 153 F.3d 34, 49 (2d Cir. 1998). Accordingly, we will not disturb a conviction on grounds of legal insufficiency of the evidence at trial if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also United States v. Naiman*, 211 F.3d 40, 46 (2d Cir. 2000).

(Emphasis in original); *see also United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003).

Beyond the general standard that applies to insufficiency claims, where, as here, a defendant failed to

object to the sufficiency of evidence at trial, he bears "the burden of persuading a court of appeals on the insufficiency issue that there has been plain error or manifest injustice." *United States v. Finley*, 245 F.3d 199, 202 (2d Cir. 2001); *see also United States v. Muniz,* 60 F.3d 65, 67 (2d Cir. 1995) (holding that defendant who fails to challenge sufficiency of evidence in trial court "cannot prevail on that ground on appeal unless it was plain error for the trial court not to dismiss on its own motion"), *amended,* 71 F.3d 93 (2d Cir. 1995), *reversed on reconsideration, based on other grounds,* 184 F.3d 114 (2d Cir. 1997); *United States v. Kaplan,* 586 F.2d 980, 982 n.4 (2d Cir. 1978).

Because a defendant bears the burden of proving that he has suffered prejudice as the result of an error that is plain, *Olano*, 507 U.S. at 732-34, the defendant must show not only that the evidence was legally insufficient, but also that the district court's failure to dismiss the convictions on its own motion was so plainly erroneous that the court was derelict in its duties. *Muniz,* 60 F.3d at 70 (quoting *United States v. Yu-Leung,* 51 F.3d 1116, 1121 (2d Cir. 1995)). Plain error may *not* be found where the challenged evidence was only a "trifle short" of sufficient. *Id.*[10]

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[10] This Court granted *en banc* review to address the issue whether this was the proper standard when applying plain error analysis, but the issue was rendered moot before the full court heard argument. *See Muniz*, 184 F.3d at 115.

C. Discussion

The defendant argues that there was no proof of his knowing and intentional membership in three of the four cocaine transactions presented at trial, namely the 200-gram transaction described by William Torres and the two 62-gram transactions as to which Luis Quiles testified. The defendant's argument misses the point of conspiracy law.

The indictment charged the defendant with participating in a single conspiracy, not with engaging in specific drug transactions. The Government proved the charged conspiracy through the testimony of the co-conspirators, the wiretap evidence, physical evidence, including seized drugs, as well as through the defendant's own confession. Indeed, the defendant concedes that the Government proved the existence of a conspiracy involving at least Cartagena, Franco, Torres and the defendant. Appellant's Brief at 10. The 200-gram and the two 62-gram transactions merely constituted additional evidence of the existence of the same conspiracy and the defendant's membership in that conspiracy, which the jury was free to accept or reject.

At trial, the defendant never objected to this testimony as either irrelevant to the charged offense, or even as improper Rule 404(b) evidence. Neither did the defendant move for a judgment of acquittal under Rule 29 on this basis. For the first time on appeal, the defendant now appears to be attacking the credibility of Torres' and Quiles' testimony regarding these other transactions. However, having conceded his membership in the conspiracy, Appellant's Brief at 10, the defendant's

sufficiency of the evidence challenge necessarily fails. *See Griffin v. United States*, 502 U.S. 46, 59-60 (1991) (where there are alternate factual grounds for finding the defendant guilty, the court will presume the jury convicted on the ground that was supported by adequate evidence); *United States v. Barnes*, 158 F.3d 662, 672 (2d Cir. 1998) (following *Griffin*).

CONCLUSION

For the foregoing reasons, the defendant's conviction and sentence should be affirmed.

Dated: January 25, 2006

Respectfully submitted,

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

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,064 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

MARK D. RUBINO
ASSISTANT U.S. ATTORNEY

Addendum

21 U.S.C. §§ 841(a)(1) and (b)(1)(C)
[Relevant Portions]

(a) Unlawful acts

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

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

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

(b) Penalties

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

. . . .

(1)(C) In the case of a controlled substance in schedule I or II . . .such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any

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

. . . .

21 U.S.C. § 846. Attempt and conspiracy

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the

commission of which was the object of the attempt or conspiracy.

Federal Rule of Evidence 404(b):

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

U.S.S.G. § 2D1.1. Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy [Relevant Portions] **(2004)**

(a) Base Offense Level (Apply the greatest):

(1) 43, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed

the offense after one or more prior convictions for a similar offense; or

(2) 38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under § 3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level 32, decrease by 2 levels; (ii) level 34 or level 36, decrease by 3 levels; or (iii) level 38, decrease by 4 levels.

. . . .

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	Base Offense Level
(7) At least 500 G but less than 2 KG of Cocaine (or the equivalent amount of other Schedule I or II Stimulants);	Level 26

. . . .

ANTI-VIRUS CERTIFICATION

Case Name: United States v. Hector Torres

Docket Number: 05-0709-cr(L)

I, Natasha R. Monell, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **briefs@ca2.uscourts.gov** in the above referenced case, was scanned using Norton Antivirus Professional Edition 2003 (with updated virus definition file as of 1/25/2006) and found to be VIRUS FREE.

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Dated: January 25, 2006