06-1119-cr

To Be Argued By:
MICHAEL J. GUSTAFSON

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-1119-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

TROY COLEMAN, also known as Pimp,
Defendant-Appellant.

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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KEVIN J. O'CONNOR
United States Attorney
District of Connecticut

MICHAEL J. GUSTAFSON
Assistant United States Attorney
WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

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STATEMENT OF JURISDICTION

The district court (Hall, J.) 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 pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Viewing the evidence in the light most favorable to the prosecution, was there sufficient evidence for the jury to conclude that the defendant possessed with intent to distribute, and did distribute, 50 grams or more of cocaine base?

2. When the district court's instructions are viewed in their entirety, did the court's instructions concerning the credibility of the cooperating witness and the testimony of law enforcement witnesses accurately inform the jury about the law?

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Preliminary Statement

On February 14, 2003, Troy Coleman sold 2¼ ounces of crack cocaine to a cooperating witness working under the direction and control of the Drug Enforcement Administration ("DEA"). The cooperating witness testified at Coleman's trial that Coleman sold him the contraband. The law enforcement officials who monitored the drug transaction also testified, and the audio tapes generated by the surveillance team were played for the jury. After a full hearing on the facts, a jury convicted the

defendant. Coleman is currently serving a sentence of 240 months of imprisonment.

Coleman contends that the evidence was insufficient to justify his conviction and that the district court did not instruct the jury properly, thus requiring a new trial. For the reasons that follow, this Court should affirm the conviction in all respects.

Statement of the Case

On October 14, 2003, a federal grand jury returned a four-count superseding indictment that charged the defendant Troy Coleman with, among other things, distributing 50 grams or more of cocaine base ("crack") on February 14, 2003, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A)(iii) (Count Two). *See* Joint Appendix ("A") (A: 21-24) This is the charge on which Coleman was tried and convicted.

The grand jury also charged Troy Coleman and his brother, Timothy Coleman, with conspiring to distribute 500 grams or more of cocaine between November 8, 2002, and July 22, 2003 (Count One), and Timothy Coleman with possessing 500 grams or more of cocaine with intent to distribute on July 22, 2003 (Count Three). Count Four alleged a forfeiture claim pursuant to 21 U.S.C. § 853 against Troy Coleman for the car he used to facilitate several drug transactions during the conspiracy.[1]

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[1] The car was forfeited administratively prior to trial.

Timothy Coleman pleaded guilty to the conspiracy charge in Count One on April 5, 2004, and, as Troy Coleman's trial date approached, the United States moved to dismiss Counts One and Four (the conspiracy and forfeiture counts) of the superseding indictment on July 6, 2004. (A: 12; Docket Nos. 91 & 92) The case substantially simplified, the parties selected a jury on July 12, 2004, and the matter was tried before the Honorable Janet C. Hall on July 19 and 20, 2004. (A: 148-357, 396-585)

At the close of the government's evidence, the defendant moved for a judgment of acquittal under Federal Rule of Criminal Procedure 29(a) on the basis that the United States had not sustained its burden of proof. (A: 566-670) The court orally denied the motion. (A: 570-571)

On July 23, 2004, the jury convicted the defendant on Count Two of the superseding indictment. (A: 726-727) The defendant filed post-trial motions on September 2, 2004 (A: 14; Docket Nos. 108 & 109), challenging the sufficiency of the evidence and the court's jury instructions relative to the testimony of the government's law enforcement witnesses and the cooperating witness.

The district court conducted a sentencing hearing on October 12, 2004, denied the defendant's motion for a downward departure, and sentenced Coleman to 360 months of imprisonment and a ten-year term of supervised release. (A: 14-15; Docket Nos. 124 & 125) Judgment entered on October 22, 2004, and the defendant filed a

timely Notice of Appeal the same day. (A: 15; Docket No. 128)

Following the sentencing, the district court issued a written ruling on December 22, 2004, that denied the defendant's post-trial motions for a judgment of acquittal and for a new trial. (GA: 10; Docket No. 136)

On April 6, 2005, this Court granted the government's motion to remand to the district court to determine whether to re-sentence Coleman in light of *United States v. Booker*, 543 U.S. 220 (2005), and *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). On February 16, 2006, the district court re-sentenced Coleman to 240 months of imprisonment and ten years of supervised release.

The defendant currently is incarcerated and serving his sentence.

STATEMENT OF FACTS

On the night of February 11, 2003, DEA Special Agent Peter Borysevicz and members of his task force arrested a local drug dealer in Hartford after having watched this person (the cooperating witness, or "CW")[2] engage in several apparent crack cocaine sales. At the time of the CW's arrest, he had a pending drug arrest, was serving a term of probation, and had several prior drug sale

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[2] Although the cooperating witness testified at trial, and was cross-examined by the defendant, the government will not use his name in this brief.

convictions on his record. (A: 191-192) The CW agreed to cooperate with law enforcement officials that night in the hope of obtaining leniency and a reduced sentence. (A: 314-315) Agent Borysevicz debriefed the CW about his drug trafficking activities,[3] and instructed the CW to contact him if he could make a controlled purchase of narcotics. (A: 194) The agent did not instruct the CW to target any specific drug dealer. (A: 192, 315)

A few days later, on February 14, 2003, at around noon, the CW called Borysevicz to advise that he expected to purchase 2¼ ounces ("two and a Q") of crack cocaine from Troy Coleman.[4] Borysevicz and fellow task force members Joseph Amato, Brenon Plourde and Robert Burgos (Amato and Burgos also testified at trial) met with the CW and directed him to make a consensually monitored call to Coleman, which the agents recorded. (A: 199-201; Gov's Appendix[5] at 1 ("GA: 1")) The gist of

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[3] The full extent of the CW's debriefing was not put before the jury even though it involved a long standing drug relationship with Coleman because Count Two concerned only one instance of drug dealing.

[4] Toll records introduced during the trial confirm telephone contact between Coleman and the CW on the evening of February 13 and again on the morning of February 14, 2003. (A: 544-549; Exs. 9 & 10)

[5] Government exhibits 1-4, and Defendant's exhibit 13, are consensual recordings generated by the CW during the investigation on February 14, 2003. Exhibits 1 and 2 are telephone calls. Exhibit 3 is a recording of the micro-cassette device hidden on the CW's person. Exhibits 4 and 13a are (continued...)

that conversation revealed that the CW and Coleman had spoken previously about getting together: When the CW stated that he expected to arrive at an unspecified meeting spot in ten minutes, Coleman replied, "Yeah. You want the same thing, right?" (GA: 1) The CW testified that he expected to purchase 63 grams of crack cocaine from Coleman.[6] (A: 316-317)

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[5] (...continued)
excerpted recordings from the KEL transmissions made on February 14, 2003. Corresponding transcriptions were marked for identification and provided as an aid to the jury. (A: 199) The transcripts of these recordings (Government exhibits 1-4 and Defendant's exhibit 13) are contained in the Government's Appendix. As explained at trial, the abbreviations in the transcriptions represent the following: TFA JA is Hartford Police Department ("HPD") Detective Joseph Amato; TFA BP is HPD Detective Brenon Plourde; SA PB is Special Agent Peter Borysevicz; and GS AK is DEA Group Supervisor Arthur Kersey. Detective Amato testified that the ability of the KEL Unit to transmit a clear signal depends on many factors, including the distance between the transmitter and the receiver; topography; buildings; and strength of batteries in the unit. (A: 326) Several times during the surveillance the transmission was inaudible and/or lost entirely. These instances are reflected as "U/I" ("unintelligible") in the transcript.

[6] Defense counsel suggested during his cross-examination of the CW that Coleman met the CW not to complete a drug deal but rather to repay a $200 street loan made a few nights earlier. (A: 350-351, 428) The CW flatly rejected that possibility, explaining that he and Coleman "weren't on swapping money terms." (A: 350) The CW was cognizant of the district court's evidentiary ruling precluding (continued...)

The agents searched the CW for hidden money and contraband and then equipped him with a transmitting device (KEL unit) that would allow surveillance officers to hear and record what the CW was saying during his activities. (A: 195, 198)[7] The agents followed the CW to the area of Keney Park, on Edgewood Street, in Hartford, which is where the CW reported that his drug transaction with Coleman would transpire. (A: 205-208) While traveling to the park, the CW drove past the homes of several of Coleman's family members with the task force agents following closely behind. As a result, it is possible that Coleman learned that the CW may have been followed by law enforcement. Additionally, the area on Edgewood Street is difficult for law enforcement to surreptitiously surveil. (A: 209-210, 321)

Given these obstacles, agents ultimately concluded that their surveillance had been detected. Coleman did not meet with the CW on Edgewood Street even though the CW waited in his car for approximately 45 minutes and, during the wait, regularly phoned Coleman. These calls went into Coleman's voice mail. (A: 208-209, 322)

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[6] (...continued)
introduction of evidence of a prior drug relationship with Coleman, and accordingly provided no further explanation.

[7] Unbeknownst to the law enforcement officials working on the case, the KEL Unit also recorded all of their statements and communications during the controlled purchase. (A: 469-470)

While waiting on Edgewood Street, which is a common Hartford drug dealing location (A: 473), the surveillance team saw an individual exit a white Mercedes Benz and approach the CW. Detective Amato activated the KEL Unit in order to hear and record what transpired. (A: 472) The unknown individual approached the CW's vehicle, but got no closer than the front end of the car. (A: 323, 472-473, 513) According to Detectives Burgos and Amato, who watched the CW from a nearby location, the unknown person did not exchange anything with the CW. (A: 472-473, 513) The CW, moreover, denied making a drug deal with this individual (A: 323, 417-418), and the KEL tape[8] (GA: 9; Def's Ex. 13a), which was played for the jury, does not contradict this testimony.

After the 45-minute wait on Edgewood Street, Agent Borysevicz instructed the CW to return to a pre-designated location. (A: 209-210) There, Agent Borysevicz took back from the CW the "buy money" – a sum of $1,500 in cash – and the transmitter. (A: 209-210)

At the pre-designated location, Agent Borysevicz instructed the CW to call Coleman's cell phone and leave a message that the CW was not comfortable doing the deal by Keney Park because there were police in the area. (A: 210) Coleman answered the phone, however, and in

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[8] Not all of the 45 minutes spent on Edgewood Street were recorded. (A: 468)

a brief conversation instructed the CW to meet him in the area of Tower Avenue.[9] (A: 211)

Once law enforcement coordinated the next phase of the investigation, the CW called Coleman to confirm that the CW was on his way to the deal and to "explain" why he was running late. (A: 211-213) In this call, Coleman abruptly cut the CW off, telling him that "it don't make no sense to keep talking." (A: 213; GA: 2)

The CW was then re-equipped with the KEL Unit and, this time, also equipped with a micro-cassette recording device. (A: 214)

The CW drove to Tower Avenue and parked near its intersection with Hampton Street. Surveillance agents saw Coleman standing on Hampton Street, walking toward Tower Avenue, and apparently talking to the CW on his cellular telephone.[10] (A: 326)

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[9] This conversation was not recorded because Agent Borysevicz expected the call to go into Coleman's voice mail. Agent Borysevicz stood near the CW during the conversation and heard what was said. As a result of Borysevicz's overhearing this conversation, the task force established surveillance in the area of Tower Avenue. (A: 215) Borysevicz and the CW both testified that Coleman – and not the CW – selected the Tower Avenue location. (A: 211, 324)

[10] In addition to the micro-cassette and KEL Unit recordings, which contain the CW's side of the phone conversation, cellular telephone records introduced at trial (continued...)

The detectives monitoring the KEL transmissions, Amato and Burgos, heard the CW talking on his cell phone to Coleman, who instructed the CW to drive down Hampton Street. (A: 477, 494, 518) But the CW objected to this instruction, noting that the street was blocked off by cones set up to protect an active construction project. (A: 329-330, 421-422) The CW stated: "I can't go up this street, they got it blocked off . . . . I'm right in front of the school . . . . where do you want me to be at? Der, I can't come in Pimp. They got the street blocked off. They got cones here. . . they got cones right here man[.]" (GA: 3) Detectives Amato and Burgos, who could see the intersection of Hampton Street and Tower Avenue from their vantage point, were similarly concerned that the street was closed to traffic. (A: 476, 479, 494, 497, 519, 521)

The CW ultimately abandoned his protest, drove slowly past the cones, and stopped to pick up Coleman on Hampton Street. (A: 330) The defendant's voice was captured on the micro-cassette recording as he got into the car. (GA: 3)[11]

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[10] (...continued)
document telephone contact between Coleman and the CW at this time. (A: 544-549; Exs. 9 & 10)

[11] The defendant does not contest that his voice is on the recordings. In fact, with the exception of one phrase ("what's up playboy" vs. "see you playboy"), the defendant does not (continued...)

Detectives Amato and Burgos, fearing that they would compromise the controlled purchase if they immediately trailed the CW through the cones and down a closed off street, held back for a few moments before following the CW. (A: 479, 521) As a result, the detectives lost sight of the CW and Coleman. In addition, the audio from the KEL transmitter faded as the CW drove from them. (A: 479-481, 497-500) Law enforcement therefore lost real-time surveillance of the CW and Coleman for approximately two minutes and two seconds as the CW drove down Hampton Street and turned left onto Cleveland Avenue. (A: 287)

The CW, however, did not know that the KEL transmission had faded or that the surveillance team had lagged behind. (A: 423) In addition, the CW knew that the micro-cassette was recording the events inside the vehicle. The CW testified that Coleman entered his car on Hampton Street and told him to drive down the street, take a left on Cleveland Avenue and park a few spots up the street. (A: 330) The micro-cassette recording transcript (GA: 3) corroborates that Coleman was in the CW's car and that he instructed the CW to "go to my house, right there, let me show you wa-where I'm at . . . . There's the street." (GA: 3) The CW followed Coleman's instructions, pulled his vehicle onto Cleveland Avenue and parked a few spots behind Coleman's Acura. (A: 482) During this period, as the CW and Coleman drove down

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[11] (...continued)
dispute any of the words attributed to him in the transcripts. (A: 269)

Hampton Street and turned left onto Cleveland Avenue, the micro-cassette recorded Coleman say, "[s]tuff real whole man." (A: 275-276, 302, 306; GA: 3) The CW testified that Coleman's "real whole" comment was an endorsement of the quality of the crack cocaine he intended to sell to the CW. (A: 331) No other explanation or interpretation for the "real whole" comment was presented to the jury.

The CW further testified that Coleman did not verbally discuss a price for the crack. Instead, Coleman held up one finger and then six fingers to indicate that the price would be $1,600. The CW protested the price, which was relatively high (the DEA had given the CW $1,500 in government funds prior to the deal on Edgewood Street and re-issued that same money to the CW prior to going to Tower Avenue). As the CW negotiated the price, Agent Borysevicz drove onto Cleveland Avenue and spotted the CW's vehicle parked a few spots from the intersection with Hampton Street. (A: 222) Because the KEL transmission had not yet resumed, Agent Borysevicz called the CW on his cell phone to verify the CW's safety. (A: 226- 227) The CW answered the call and pretended to be talking to a drug customer while simultaneously advising Agent Borysevicz that Coleman was about to make the deal. (A: 333-335, 433-434; GA: 4, 7)

The CW testified that at about the same time, Coleman stepped from the car and flipped the cocaine onto the seat of the vehicle. (A: 331-333) The CW responded by saying he was going to "put this on the scale man" to indicate that he would weigh the drugs that Coleman had

just provided to him. (A: 334; GA: 4, 7) The agents were able to regain the KEL transmission at about this point. (A: 481-482, 497-499; GA: 7)

Within minutes of the CW and Coleman having stopped on Cleveland Avenue, Detectives Burgos and Amato turned from Hampton Street onto Cleveland Avenue. The detectives pulled into a parking spot approximately two car lengths from the CW's vehicle. Detective Amato, who was on the passenger side of the surveillance vehicle, saw Coleman standing outside of the CW's vehicle and leaning into the passenger side. (A: 482) Detective Amato was recorded on the KEL tape saying "[h]e got hit off" just as Coleman stepped away from the CW's vehicle. (A: 230; GA: 8)

The CW was followed back to a pre-designated spot by Detectives Amato and Burgos, where he was searched. (A: 335-336, 483, 525) The CW no longer had the $1,500 in government funds, but did have the crack cocaine that Coleman had just sold to him. (A: 483, 525)

DEA Forensic Chemist Cynthia Novello testified that the contraband weighed 60.4 grams and that it contained a detectable quantity of cocaine base. (A: 437-458)

The parties stipulated that although the bag that contained the crack was fingerprinted, no identifiable fingerprints – including those of the defendant – could be located. (A: 232-233; Court Ex. 1)

The agents did not arrest Coleman immediately following the deal. Instead, they continued the investigation into Coleman (and his brother Tim, the subject of the Count One conspiracy that involved a separate cooperating witness) for several months. Ultimately, the DEA obtained an arrest warrant for Troy Coleman and arrested him on April 4, 2003. At the time of his arrest, Coleman – who was unemployed – had $6,151 in his pocket. (A: 299-300) He also had the cell phone that was utilized during the conversations on February 14, 2003. (A: 299; Ex. 5)

SUMMARY OF ARGUMENT

I. The evidence was more than sufficient to support Coleman's conviction. The CW participated in a controlled purchase of crack cocaine from Coleman and testified that Coleman sold him over 2 ounces of crack cocaine for $1,500. The CW's testimony did not stand alone. Rather, law enforcement officials recorded Coleman's interaction with the CW, searched the CW and his vehicle for contraband before and after the drug deal, and conducted physical surveillance.

II. The district court provided comprehensive instructions regarding credibility of witnesses and the need to carefully scrutinize the testimony of both law enforcement witnesses and cooperating witnesses. The instructions adequately informed the jury on the law and certainly did not mislead the jury as to the correct legal standard.

ARGUMENT

I. THE TRIAL EVIDENCE AGAINST COLEMAN WAS SUFFICIENT TO ESTABLISH HIS GUILT

A. Relevant Facts

The underlying facts pertinent to consideration of this issue are set forth in the Statement of Facts *supra*, and are supplemented where necessary below in the Discussion portion.

At the close of the Government's case, the defendant orally moved for a judgment of acquittal and a new trial. (A:566-69) Judge Hall orally denied that motion, acknowledging that she was obliged to "take the evidence in the light most favorable to the government drawing all inferences in their favor." (A:570) Judge Hall then observed that the cooperating witness's "testimony if credited would be sufficient to find the Defendant guilty of the indictment . . . . Obviously there is other evidence corroborative of [his] own testimony but I would note that that alone would be sufficient to defeat the motion so the Court will let the case go to the jury." (A: 570-71)

The defendant later filed a written memorandum in support of his renewed motion for judgment of acquittal or new trial, which the district court denied in an eleven-page written ruling. (GA: 10) Again, Judge Hall observed that "it is not for the court to question the jury's findings regarding witness credibility" when ruling upon a motion for judgment of acquittal. (GA: 14) After reviewing the

testimony of the cooperating witness, the court rejected the defendant's claim that "no rational trier of fact could have found that the government proved Coleman's guilt of the charged offense beyond a reasonable doubt." *Id.*

With respect to the defendant's motion for a new trial, the district court acknowledged its discretion to grant a new trial "'if the interest of justice so requires.'" (GA: 16) (quoting Fed. R. Crim. P. 33). Still, the court recognized that even in the Rule 33 context, "[i]t is only where exceptional circumstances can be demonstrated that the trial judge may intrude upon the jury function of credibility assessment.'" *Id.* (quoting *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992)). The court noted the "direct evidence" offered by the Government in support of the conviction, and found "no sufficient reason to cast doubt on the credibility of that evidence to grant a motion for a new trial." (GA: 17)

B. Governing Law and Standard of Review

1. Rule 29 Motion for Judgment of Acquittal

A defendant challenging a conviction based on 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. *United States v. Florez*, 447 F.3d 145, No. 05-2385-cr, mem. op. at 17 (2d Cir. May 3, 2006); *United*

States v. Zhou, 428 F.3d 361, 369-70 (2d Cir. 2005); *United States v. Dhinsa*, 243 F.3d 635, 648-49 (2d Cir. 2001)*; United States v. Villegas*, 899 F.2d 1324, 1339 (2d Cir. 1990).

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. *See United States v. Morrison*, 153 F.3d 34, 49 (2d Cir. 1998). The task of choosing among competing, permissible inferences is for the fact-finder, not the reviewing court. *See United States v. Johns*, 324 F.3d 94, 96-97 (2d Cir. 2003); *United States v. LaSpina*, 299 F.3d 165, 180 (2d Cir. 2002).

"The ultimate question is not whether [*this Court*] *believe[s]* 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); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Accordingly, "[w]e 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." *United States v. Naiman*, 211 F.3d 40, 46 (2d Cir. 2000) (internal quotation marks omitted); *see also United States v. Temple*, 447 F.3d 130, No. 05-0165-cr(L), mem. op. at 11-12 (2d Cir. May 1, 2006).

2. Rule 33 Motion for New Trial

This Court has repeatedly confirmed the standard of review over a district court's denial of a motion for new trial:

> [A] trial court exercises "broad discretion" in ruling on a new trial motion, and we review its decision deferentially, reversing only for abuse of discretion. *United States v. Ferguson*, 246 F.3d 129, 133 (2d Cir. 2001). In considering whether to grant a new trial, a district court may itself weigh the evidence and the credibility of witnesses, but in doing so, it must be careful not to usurp the role of the jury. *See United States v. Autuori*, 212 F.3d 105, 120 (2d Cir. 2000); *accord United States v. Ferguson*, 246 F.3d at 133. The "ultimate test" is "whether letting a guilty verdict stand would be a manifest injustice . . . . There must be a real concern that an innocent person may have been convicted." *United States v. Ferguson*, 246 F.3d at 133 (citation and quotation marks omitted); *see also United States v. Aponte-Vega*, 230 F.3d 522, 525 (2d Cir. 2000) (per curiam).

United States v. Canova, 412 F.3d 331, 349 (2d Cir. 2005).

C. Discussion

Coleman contends that there was insufficient proof to establish that he sold crack cocaine to the CW on February 14, 2003. This contention fails because the United States

submitted direct and circumstantial evidence that Troy Coleman consummated the drug deal.

1. The CW's Testimony Alone Constitutes Sufficient Evidence

It is well settled that the testimony of a single witness 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. Hamilton*, 334 F.3d 170, 179 (2d Cir. 2003); *United States v. Diaz*, 176 F.3d 52, 92 (2d Cir. 1999). Indeed, "a federal conviction may be supported 'by the uncorroborated testimony' of even a single accomplice witness." *Florez*, 447 F.3d 145, mem. op. at 19 (quoting *United States v. Parker*, 903 F.2d 91, 97 (2d Cir. 1990)). This is the established rule in federal cases. *See Caminetti v. United States*, 242 U.S. 470 (1917). Only in "exceptional circumstances," such as when a witness's testimony "defies physical realities," may a trial judge "intrude upon the jury function of credibility assessment." *United States v. Sanchez,* 969 F.2d 1409, 1414 (2d Cir. 1992).

As described at length in the Statement of Facts above, the CW testified in a very detailed manner about how he purchased 2¼ ounces of crack cocaine from Troy Coleman. The CW's testimony was therefore sufficient to sustain the guilty verdict. *See, e.g., Florez*, mem. op. at 19.

Contrary to the defendant's claim on appeal, the CW's testimony was not "incredible on its face." *Id.*; *Hamilton*, 334 F.3d at 179; *Diaz*, 176 F.3d at 92. The CW advised law enforcement officials that he could purchase crack cocaine from Coleman on February 14, 2003. Telephone records document that Coleman and the CW had been in contact the day before. The CW consented to have his conversations with Coleman recorded by law enforcement. When the CW first called Coleman, the defendant asked, "you want the same thing, right." (GA: 1) The CW then traveled to the unspoken location near on Edgewood Street to meet Coleman. When Coleman did not appear, the CW participated in additional recorded conversations with Coleman. When Coleman instructed the CW to drive through a closed off street, the CW did so reluctantly, and in a manner that he thought would allow the surveillance team to continue monitoring his movements. The CW explained that he was searched before and after meeting with Coleman, and when the CW was searched after having met with Coleman, he was in possession of approximately 63 grams of crack cocaine but not the government's buy money.

In addition, the CW testified as to his motivation to cooperate with law enforcement officials in order to obtain leniency from the criminal justice system. (A: 315) He acknowledged that based on his criminal history and recent arrest, he had great incentive to make a drug deal happen. But he also testified that law enforcement did not instruct him to target any particular individual. (A: 315; 191) And when asked if he understood what would have happened if he were caught framing the defendant, the

CW testified: "I would have defeated my own purpose. I would have hung myself." (A: 436) The defense aggressively cross-examined the CW on his criminal history and the benefits he received from the government as a result of his cooperation. The jury, therefore, had the opportunity to weigh the factors in favor of and against the CW's credibility, and by its verdict it clearly accepted the CW's testimony. "To the extent [the defendant] challenges the accomplice['s] credibility based on [his] plea agreement[] with the government and [his] long histor[y] of criminal and dishonest behavior, he simply repeats facts and arguments already presented to the jury. We will not attempt to second-guess a jury's credibility determination on a sufficiency challenge." *Florez*, mem. op. at 19 (citing *United States v. Autuori*, 212 F.3d 105, 118 (2d Cir. 2000); *United States v. Rea*, 958 F.2d 1206, 1221-22 (2d Cir. 1992); and *United States v. Khan*, 787 F.2d 28, 34 (2d Cir. 1986)); *see also Canova*, 412 F.3d at 349 (affirming denial of new trial motion).

2. The CW's Testimony Was Corroborated

The CW's testimony does not stand alone, however. His account of the drug transaction with Coleman was firmly corroborated by: (1) several audio recordings; (2) physical surveillance conducted by law enforcement agents; and (3) Coleman's own actions and words.

The audio recordings reveal that Coleman was very circumspect on the phone, a fact that a reasonable jury could find to be consistent with drug trafficking. For

example, when the CW contacted Coleman on February 14, 2003, Coleman simply asked, "you want the same thing, right?" (GA: 1) And when the CW called Coleman after the aborted deal on Edgewood Street, Coleman cut the CW off, telling him "it don't make no sense to keep talking." (GA: 2)

The recordings also show that Coleman and the CW had a prior relationship ("like last time"), a fact that further corroborates the CW's testimony that he could purchase crack cocaine from Coleman.

The audio evidence introduced at trial also corroborates that Coleman actually met with the CW and remained in his car for several minutes at precisely the point the CW testified a drug deal occurred. Coleman is heard mumbling, among other things, directions to his residence on Cleveland Avenue. (GA: 3) In addition, when Coleman got into the CW's car, he vouched "stuff real whole man[,]" (GA: 3) which is a statement the jury was entitled to find entirely consistent with the CW's testimony that a drug deal transpired.

The physical surveillance conducted in this case also buttresses the CW's testimony. The agents observed Coleman standing on Hampton Street talking on his cell phone. The recorded conversations and testimony of the CW reveal that Coleman was directing the CW to leave Tower Avenue and drive past the cones at the intersection of Hampton Street. While the officers conceded that they did not observe Coleman inside the CW's vehicle, they did confirm that Coleman was standing next to the passenger

side of the CW's vehicle on Cleveland Street a few minutes later, at the point the transaction occurred. (A: 222, 482, 497-500)

Finally, Coleman's own deeds and statements expose him as a drug dealer: Coleman was careful when talking on the phone; he engineered a meeting that required the CW to drive through a construction zone and an area closed off to most traffic; and he attested to the quality of his product as being "real whole." Further, he displayed a level of sophistication consistent with drug trafficking when he signaled the price to the CW rather than speak audibly. The jury was also presented evidence of Coleman's inexplicable wealth – although unemployed, he had $6,151 on his person when arrested.

3. The Defendant's "Alternate" Theories

On appeal, the defendant dispenses with the requirement that evidence be construed in a light most favorable to the government and instead resuscitates two absurd – and competing – theories of innocence, each based on the premise that the CW framed the defendant. First, Coleman asserts that a reasonable jury could have concluded that the CW obtained crack cocaine from the man in the white Mercedes Benz on Edgewood Street. (Def. Br. 12) Second, Coleman hypothesizes that a reasonable jury could have determined that the CW obtained the crack cocaine from an unknown source as he drove through the construction zone on Tower Avenue.

(Def. Br. 12, 14)[12] But as noted *supra*, the task of choosing among competing, permissible inferences is for the fact-finder, not the reviewing court. *See, e.g., Johns*, 324 F.3d at 96-97; *LaSpina*, 299 F.3d at 180.

Thus, although it is well settled that the government need not, at this stage of the proceedings, "negate every theory of innocence[,]" *Autori*, 212 F.3d at 114, these defense theories are easily debunked.

a. The Meeting Was Not About a $200 Loan

The defendant's suggestion that he met the CW to repay a loan can be rejected out of hand because the transcripts and tape recordings of the conversation between the CW and Coleman are devoid of a single mention of or reference to $200 or an outstanding debt. Instead, all mention of money concerns "fifteen" and "sixteen" (hundred dollars). (GA: 4) At no point did Coleman utter a word about repaying a debt. Surely if Coleman went to the trouble of meeting with the CW on Hampton Street to pay off a $200 debt, he would have expressed confusion or irritation when the CW uttered a non sequitur: "16 . . . you got to be . . . man, you got to be kidding man, you want 1600 for that? I got 15 right now Pimp." (GA: 4) Additionally, if the meeting concerned

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[12] In pursuing this speculation, the defendant has apparantly abandoned the suggestion made at trial that Coleman met with the CW in order to repay a $200 loan. (A: 350-351, 428)

repayment of $200, it is highly unlikely that Coleman would have asked the CW prior to the meeting, "you want the same thing, right?" (GA: 1) Similarly, there is no logical explanation for why one would say, "stuff real whole" if the purpose of the meeting was a $200 debt.

b. The CW Did Not Obtain Crack Cocaine From Someone Other Than Coleman

The defendant's claims that the CW obtained the crack cocaine from someone other than Coleman – either on Edgewood Street or in the construction zone on Hampton Street – are equally implausible.

With respect to the events on Edgewood Street, the CW testified that he did not come in contact with the unknown male in the white Mercedes Benz and did not obtain crack cocaine from this individual. (A: 417-420) The CW's testimony, on its face, was credible and worthy of belief. But Detectives Amato and Burgos corroborated the CW when they testified that they did not see a drug deal transpire, even though they were carefully watching the action *precisely because* Detective Amato initially suspected that something might be happening. (A: 472) In addition, the audio recording of the incident (Def's Ex. 13aa) does not contain any sounds consistent with a drug transaction. Finally, common sense dictates that if the CW intended to earn leniency by framing Coleman, he would not have purchased crack cocaine from a third party while under the watchful eye and ear of a professional surveillance unit and then, having navigated these perilous

waters, orchestrate a second meeting with an unsuspecting Coleman. The scenario suggested by the defendant defies reason and common sense. Why not simply gain credit by making the purchase from the individual in the Mercedes Benz? Why take the chance that the law enforcement officials would observe the unauthorized drug deal, or find the contraband following the deal? And if the CW did buy 2¼ ounces of crack cocaine on Edgewood Street, he must have used $1,500 of his own money that he managed to conceal from Agent Borysevicz's search of the CW and his vehicle that occurred before traveling to Edgewood Street. (A: 197)

Similarly, the defendant's suggestion that the CW obtained the crack cocaine from an unknown source while in the construction zone on Hampton Street also fails once reason and logic are introduced to the analysis. For the defendant's hypothesis to have any validity, one must assume that the CW somehow knew that Coleman – his intended patsy – would not consummate the deal at the first location on Edgewood Street and instead select Tower Avenue/Hampton Street, as opposed to any other location in the greater Hartford area, as the second location. And then, adding another link to this *Palsgrafian* chain, the CW had to know that Coleman would demand that the CW travel down a blocked-off street, thus presenting the CW with the critical opportunity to obtain 63 grams of crack cocaine from a source other than Coleman, who in turn would actually meet with the CW and take the CW's $1,500.

The jury properly rejected this rank speculation and instead relied on the evidence introduced at trial to convict the defendant. The district court did not err in denying the motion for acquittal, nor did it abuse its discretion in denying the motion for new trial.

II. THE DISTRICT COURT PROPERLY INSTRUCTED THE JURY CONCERNING WITNESS CREDIBILITY

A. Relevant Facts

Coleman argues that the trial court's instructions concerning the evaluation of the testimony of law enforcement officials and that of the cooperating witness unfairly prejudiced him. Coleman contends that the district court's failure to charge in the precise manner he advocated "deprived [the jury] of clearly evaluating the testimony of all of the Government's witnesses in the capacity and context in which they testified and [the jury] was misled as to the proper legal standard governing their testimony[,]" thus entitling Coleman to a new trial. (Def. Br. 19) Because the district court's instructions to the jury were proper, Coleman's arguments are without merit and should be rejected.

At the outset of the court's charge, Judge Hall advised the jurors that they were "the sole and exclusive judges of the facts. You pass upon the evidence. You determine the credibility of witnesses." (A: 102, 650-651) After instructing on the burden of proof, proof beyond a reasonable doubt, the role of attorneys in trials and the

various types of evidence introduced at trial (A: 103-115, 652-661), the court turned to credibility of witnesses, and instructed that:

> Your decision on the facts of this case should not be determined by the number of witnesses testifying for or against a party.
>
> * * * *
>
> You have had the opportunity to observe all the witnesses as they testified from the witness stand. It is now your job to decide how believable each witness was in his testimony.
>
> * * * *
>
> In making these judgments, you should carefully scrutinize all of the testimony of each witness, the circumstances under which each witness testified, and any other matter in evidence that may help you decide the truth and the importance of each witness's testimony.

(A: 116, 661-662) Continuing, the court suggested a series of questions the jury might ask to determine truthfulness. (A: 116-117, 662) The district court then told the jury:

> you should consider any bias or hostility the witness may have shown for or against any party. Evidence that a witness is biased, prejudiced, or

> hostile toward the defendant requires you to view that witness's testimony with caution, to weigh it with care, and subject it to close and searching scrutiny.

(A: 117, 662-663) The court then focused the jury's attention to the case where a witness has an interest in the outcome of the trial, instructing that "you should bear that factor in mind when evaluating the credibility of the testimony and accept it with care." (A: 118, 663)

The court also instructed that a "witness may be discredited or impeached by contradictory evidence, by a showing that the witness testified falsely concerning a matter, or by evidence that at some other time the witness said or did something inconsistent with the witness's present testimony." (A: 119, 664) Immediately after instructing on impeachment of witnesses, the district court turned to the testimony of law enforcement officials, and instructed that:

> Some of the testimony that you have heard has been the testimony of law enforcement officers. The testimony of a law enforcement officer is entitled to no greater or lesser weight than any other witness's testimony. A law enforcement officer who takes the witness stand subjects his testimony to the same examination and the same tests that any other witness does. When you consider a law enforcement officer's testimony,

> you should use the same tests for truthfulness that you use with other witnesses.

(A: 120, 665)

After discussing expert witness testimony, the court addressed the testimony of witnesses who have cooperated with the government. The district court explained that although the law allows the use of testimony from a cooperating witness,

> it is also the case that the cooperating witness testimony is of such a nature that it must be scrutinized with great care and viewed with particular caution when you decide how much of the testimony to believe.

(A: 122, 666-667) The court then explained that while the general considerations in credibility certainly applied to cooperating witness testimony, there were additional factors "you may want to consider during your deliberations on the subject of cooperating witnesses." (A: 122, 667) Specifically, the jury was told to

> bear in mind that a witness who, by testifying, has the potential to reduce his sentence or to obtain a lower sentence has an interest in this case different than any ordinary witness. You should ask yourself whether these witnesses would benefit more by lying or by telling the truth. Was their testimony made up in any way because they believed or hoped that they would receive favorable treatment by

> testifying falsely? Or did they believe that their best interests would be served by testifying truthfully? If you believe that the witness was motivated by hopes of personal gain, was the motivation one which would cause him to lie, or was it one which would cause him to tell the truth? Did this motivation color his testimony? You must examine such witness's testimony with caution and weigh it with great care. If, after scrutinizing the testimony, you decide to accept it, you may give it whatever weight, if any, you find it deserves.

(A: 122-123, 667) Concluding its instructions on witnesses, the court noted that the jury was "not required to accept testimony even though the testimony is uncontradicted and the witness is not impeached." (A: 124, 668)

In so charging, the district court did not charge the jury in the precise manner requested by the defendant. First, Coleman suggested that the charge regarding law enforcement testimony should include the statement that

> it is quite legitimate for defense counsel to try to attack the credibility of a law enforcement witness on the grounds that his or her testimony may be colored by a personal or professional interest in the outcome of the case.

(Def. Br. 18; A: 56-57) Second, the defendant argued that, with respect to cooperating witness testimony, the court should have instructed that

> [t]he testimony of an informer who provides evidence against a defendant . . . for personal advantage must be examined and weighed by the jury with greater care than the testimony of an ordinary witness.

(Def. Br. 19; A: 58-59)

Judge Hall orally rejected these request (A: 396-404), and the defendant preserved his objections (A: 582-583).

The defendant renewed these objections by memorandum following the verdict, and the district court issued a written ruling denying a new trial on these grounds. (GA: 17- 20) After reviewing the applicable case law, the district court held that its "instructions regarding cooperating witnesses satisfied the court's duty in this regard," and that the instructions "provided the jury with an understanding of the ways in which a cooperator may benefit by furthering the prosecution's case." (GA: 18) The court likewise noted that its instructions regarding law enforcement officers were appropriate, and rejected the claim that "the small differences between the proposed and final jury charges could have prejudiced the defendant." (GA: 19-20)

B. Governing Law and Standard of Review

When challenging jury instructions on appeal, a defendant must show that he was prejudiced by a charge that misstated the law. *See United States v. Goldstein*, 442 F.3d 777, 781 (2d Cir. 2006); *United States v. Thompson*,

76 F.3d 442, 454 (2d Cir. 1996) (a defendant "must establish . . . that the charge actually given, viewed as a whole, prejudiced him") (internal quotation marks omitted), *United States v. Imran*, 964 F.2d 1313, 1317 (2d Cir. 1992) (while a defendant is "entitled to a jury charge that accurately reflects the applicable law," he "does not have the right to dictate the precise language of a jury instruction"); *United States v. Alkins*, 925 F.2d 541, 550 (2d Cir. 1991) ("A court has discretion to determine what language to use in instructing the jury as long as it adequately states the law."). No particular form of words is required, so long as "taken as a whole" the instructions correctly convey the required legal principles. *See Victor v. Nebraska*, 511 U.S. 1, 5 (1994); *Holland v. United States*, 348 U.S. 121, 140 (1954).

Accordingly, when evaluating the adequacy of the charge, a single jury instruction "may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973); *see also California v. Brown*, 479 U.S. 538, 541 (1987); *United States v. Ford*, 435 F.3d 204, 210 (2d Cir. 2006). This Court does not "review portions of the instructions in isolation, but rather consider[s] them in their entirety to determine whether, on the whole, they provided the jury with an intelligible and accurate portrayal of the applicable law." *United States v. Weintraub*, 273 F.3d 139, 151 (2d Cir. 2001); *see also United States v. Jones*, 30 F.3d 276, 284 (2d Cir. 1994) (appellate court must look to "the charge as a whole" to determine whether it "adequately reflected the law" and "would have conveyed to a reasonable juror" the relevant

law); *United States v. Clark*, 765 F.2d 297, 303 (2d Cir. 1985) ("In reviewing [a] charge for error [it is] bound by the principle that it must be viewed in its entirety and not on the basis of excerpts taken out of context, which might separately be open to serious question.") Thus, even if a particular instruction, or portion thereof, is deficient, the reviewing court must "examine the entire charge to see if the instructions as a whole correctly comported with the law." *Jones*, 30 F.3d at 283.

Moreover, the instructions must be viewed in light of the arguments made by the parties at trial, both during cross-examination and summation. *United States v. Vaughn*, 430 F.3d 518, 522-24. (2d Cir. 2005), *cert. denied*, 126 S. Ct. 1665 (2006) (citing *United States v. Velez*, 652 F.2d 258, 261 n.5 (2d Cir. 1981), and *United States v. Santana*, 503 F.2d 710, 716 (2d Cir. 1974)), *cert. denied*, 126 S. Ct. 1665 (2006).

"'The propriety of a jury instruction is a question of law that we review *de novo*.'" *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir.) (quoting *United States v. George*, 266 F.3d 52, 58 (2d Cir. 2001)), *cert. denied*, 543 U.S. 908 (2004); *see also United States v. Carr*, 424 F.3d 213, 218 (2d Cir. 2005).

Even assuming error in a jury instruction, this Court "will vacate a criminal conviction 'only if the error was prejudicial and not simply harmless.'" *United States v. Pimentel*, 346 F.3d 285, 301-02 (2d Cir. 2003) (quoting *George*, 266 F.3d at 58), *cert. denied*, 543 U.S. 955 (2004); *Carr*, 424 F.3d at 218. "Such error is harmless

only if 'it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error."'" *Pimentel*, 346 F.3d at 301-02 (quoting *George*, 266 F.3d at 61 (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)). It is the appellant who "bears the burden of showing that a requested instruction accurately represented the law and that, in light of the entire charge actually given, the appellant was prejudiced by the failure to give the instruction." *Vaughn*, 430 F.3d at 522.

C. Discussion

The defendant's two challenges, which attack the court's instructions regarding the testimony of law enforcement officers and a cooperating witness, are discussed in turn.

1. Charge re: Law Enforcement Testimony

At trial, Coleman attacked the credibility of the DEA case agent by attempting "to illustrate the agent's professional interest in [obtaining] the Defendant's conviction by pointing to" the agent's failure to mention certain details – primarily the approximately two-minute gap in physical surveillance – in his grand jury testimony, internal reports or arrest affidavit. (Def. Br. 21-23; A: 246-249, 256-261) Defense counsel successfully established this point during the cross-examination of Agent Borysevicz. Coleman now claims error because the court did not charge the jury that "it is quite legitimate for defense counsel to try to attack the credibility of a law

enforcement witness on the grounds that his or her testimony may be colored by a personal or professional interest in the outcome of the case." (Def. Br. 21-22)

Because the district court gave a comprehensive instruction concerning law enforcement testimony, Coleman's claim should be rejected.

Judge Hall specifically cautioned: "[e]vidence that a witness is biased, prejudiced, or hostile toward the defendant requires you to view that witness's testimony with caution, to weigh it with care, and subject it to close and searching scrutiny." (A: 662-663) Even more particularly, the district court instructed that "if you find that any witness whose testimony you are considering may have an interest in the outcome of this trial, then you should bear that factor in mind when evaluating the credibility of the testimony and accept it with care." (A: 663) Next, Judge Hall covered the important concept of impeachment, explaining that a "witness may be discredited or impeached . . . by evidence that at some other time the witness said or did something inconsistent with the witness's present testimony." (A: 664) Against this backdrop, Judge Hall proceeded to instruct on the care attendant to the evaluation of law enforcement testimony, stating that "[t]he testimony of a law enforcement officer is entitled to no greater or lesser weight than any other witness's testimony. A law enforcement officer who takes the witness stand subjects his testimony to the same examination and the same tests that any other witness does." (A: 665)

The defendant now seeks a new trial – notwithstanding the district court's thorough and balanced instruction regarding law enforcement testimony – because the jury was not told the obvious: that defense counsel's job involves, among other things, challenging the credibility of law enforcement witnesses by exploring those witnesses' professional interest or bias in obtaining a conviction. The defendant's claim that the district court's instructions prejudiced him rings hollow. In fact, the court's charge, taken as a whole, is clearly more helpful to the defendant than the bland language urged upon the court by the defendant.[13]

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[13] The defendant's proposed Request To Charge regarding law enforcement testimony reads as follows:

> You have heard the testimony of law enforcement agents. The *mere fact* that a witness is employed by a state or federal government as a law enforcement officer does not, in and of itself, mean that his or her testimony is deserving of more or less consideration or greater or lesser weight.
>
> At the same time, it is quite legitimate for defense counsel try to attack the credibility of a law enforcement witness on the grounds that his or her testimony may be colored by a personal or professional interest in the outcome of the case.
>
> It is *your* decision, after reviewing all the evidence, whether to accept the testimony of a law enforcement witness and to give to that testimony whatever weight, if any, you find it deserves.

(continued...)

2. Charge re: Cooperating Witness Testimony

Coleman also submits that a new trial is warranted because the district court instructed simply that cooperating witness testimony is of such a nature that it must be "scrutinized with great care and viewed with particular caution when you decide how much of the testimony to believe[,]" as opposed to being "examined and weighed by the jury with greater care than the testimony of an ordinary witness." Because there is no discernible difference between the language employed by the court and that requested by the defendant, the defendant cannot show the requisite prejudice.

The district court's language in the case at bar appears to have been taken from Leonard B. Sand et al., Modern Federal Jury Instructions: ("Sand") Criminal Instruction 7-5, which in turn was adapted from the charge of Judge Frankel in *United States v. Lopez*, 75 Cr. 1177, Tr. 2468-71 (S.D.N.Y. 1976). *See* Sand, Instruction 7-5, n. 1. A review of related model instructions[14] shows that while the

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[13] (...continued)
(A: 56-57) (emphasis in original)

[14] Compare, for example, Sand Instructions 7-5 (Accomplices Called by the Government), 7-6 (Accomplices Called by the Defendant), 7-7 (Unindicted Co-Conspirator as Government Witness), 7-8 (Statutory Immunity of Government Witness), and 7-9 (Informal Immunity of Government Witness). While all of these model charges deal with warning (continued...)

intent of these types of jury instructions is always to alert the jury to the special nature of accomplice or immunized testimony, as compared to the testimony of lay or

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[14] (...continued)
a jury that particular testimony is to be treated with caution, the precise language varies slightly. Instructions 7-5 warns that accomplice testimony "must be scrutinized with *great* care and viewed with particular caution when you decide how much of that testimony to believe." (Emphasis added) Instruction 7-6 similarly reminds jurors that defense "accomplice testimony is such that it must be scrutinized with *great* care and viewed with particular caution when making a decision on how much of that testimony should be believed." (Emphasis supplied) Instruction 7-7 advises that when jurors consider the testimony of an unindicted co-conspirator called by the government they "should exercise caution in evaluating their testimony and scrutinize it with *great* care." (Emphasis supplied) Instruction 7-8, which deals with immunized witness testimony, uses both "great care" and "greater care" terminology, instructing that such testimony must be examined "with *greater* care than the testimony of an ordinary witness. You should scrutinize it closely to determine whether or not it is colored in such a way as to place guilt upon the defendant in order to further the witness' own interests; for, such a witness, confronted with the realization that he can win his own freedom by helping to convict another, has a motive to falsify his testimony. Such testimony should be scrutinized by you with *great* care and you should act upon it with caution." (Emphasis supplied) Instruction 7-9, which covers informal grants of immunity, states that "the testimony of a witness who has been promised that he will not be prosecuted should be examine by you with *greater* care than the testimony of an ordinary witness." (Emphasis supplied)

"ordinary" witnesses,[15] the precise language can and does vary slightly.

In the view of this Court, moreover, the bottom line is "that the jury should carefully scrutinize the testimony of persons who might have something to gain by falsely inculpating the defendant." *United States v. Prawl*, 168 F.3d 622, 627-28 (2d Cir. 1999) (vacating conviction based on court's failure to instruct jury); *see also United States v. Pitera*, 5 F.3d 624, 628 (2d Cir. 1993) (without specifying district court's language, finding that "jury was adequately instructed that it should scrutinize informant testimony with particular care and was also told that an informant might lie in an effort to obtain favorable treatment.")

Thus, in the case at bar, having requested a charge regarding the credibility of a cooperating witness, Coleman was "entitled to a charge that identifies the circumstances that may make one or another of the government's witnesses particularly vulnerable to the prosecution's power and influence, and that specifies the ways (by catalog or example) that a person so situated might be particularly advantaged by promoting the prosecution's case." *Prawl*, 168 F.3d at 628.

The instruction given in this case easily satisfies that standard, and the defendant cannot show the requisite

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[15] And presumably expert and law enforcement witness as well, given that these categories are also the subject of specialized instructions.

prejudice. For example, in *United States v. LoRusso*, 695 F.2d 45, 56 n.6 (2d Cir. 1982), this Court disagreed with a defendant's claim that the district court abused its discretion by declining to charge the jury that the testimony of an informer "must be examined and weighed by the jury with greater care than the testimony of other witnesses." *Id*. Instead, the *LoRusso* court explained that "[a]lthough we have frequently encouraged the trial courts to instruct juries to scrutinize an informer's testimony with *great* care, the charge is not required 'unless substantial prejudice results from its omission.'" *Id*. (citing *United States v. Swiderski*, 539 F.2d 854, 860 (2d Cir. 1976) (emphasis added).

The adequacy of the district court's charge in the present case is demonstrated by *United States v. Vaughn*, 430 F.3d 518 (2d Cir. 2005), *cert. denied*, 126 S. Ct. 1665 (2006), where this Court upheld an even less detailed cooperating-witness instruction. In *Vaughn*, the district court began with a "general 'interested witness' charge" which directed the jury to "'consider . . . the witness' relationship to the government or the defendants [and his or her] interest, if any, in the outcome of the case.'" *Id.* at 522. The court then warned that

> the cooperator's testimony had to be "viewed cautiously and weighed with great care" because the cooperator had lied under oath in another proceeding. Having reminded the jury of [the cooperator's] agreement with the government, the court instructed the jury to assess "whether he would benefit more by lying or by telling the truth."

Id. Although this Court held that "[t]he better course would have been for the trial judge to more specifically caution the jury to scrutinize the testimony of the cooperating witness with any eye to his motivation for testfying and what he stood to gain by testifying," it nevertheless held that "the jury charge as a whole and counsel's arguments" during summation "fairly put the issue of the cooperator's credibility to the jury." *Id.* at 523. In reaching this conclusion, the Court limited any suggestion in its earlier opinion in *Prawl* that any particular cooperating-witness instruction is required. Eschewing any such "capacious interpretation" of precedent, the Court held that

> district courts need only fairly put the issue of a cooperating witness's possible motivations to the jury for its consideration and *need not over-emphasize the obvious* – that cooperators may have an interest in currying favor with the prosecutor that could affect the substance of their testimony. As long as district courts intelligibly identify a cooperating witness's possible motivations for the jury's consideration, the cautionary charge given to the jury regarding a cooperating witness's testimony is sufficient.

Id. at 523-24 (emphasis added).

As in *Vaughn*, the cooperating-witness instruction given here intelligibly identified the CW's possible motivations, when "viewed in light of the charge as a whole and the arguments made at trial." *Id.* at 524.

Indeed, the district court here gave a more detailed charge than the one given in *Vaughn*, by outlining the various motives that may be at issue with cooperators, and explaining that the jury "must examine such witness's testimony with caution and weigh it with great care." (A: 122-23) That is virtually identical to the instruction provided in *Vaughn* with respect to the cooperator's having lied under oath in another proceeding, and far more detailed than the instruction provided in *Vaughn* regarding the witness's incentives arising from cooperation. *See* 430 F.3d at 521.

Also as in *Vaughn*, both parties in the present case focused on the CW's motivations during closing arguments, thereby adequately presenting the jury with the issues surrounding the CW's cooperation and his motive to lie. The prosecutor himself brought the issue to the fore during summations. The CW, he said, "was interested in helping himself out," and "hoped to get some leniency on the cases pending before him" when he agreed to cooperate with authorities. (A: 603) The prosecutor asked the jury to "compare [the CW's] incentive to tell the truth versus his motivation to lie," and referred the jury to the judge's forthcoming instruction that they "should look at the testimony of the cooperating witness carefully and absolutely." (A: 608) The prosecutor also asked the jury to focus on the CW's demeanor while testifying (A: 609-11). *Cf. Vaughn*, 430 F.3d at 522 (holding that jury was adequately presented with CW's motives in part because prosecutor asked jury during summation whether cooperation agreement gave CW "a motive to lie, or [] a motive to tell the truth").

Defense counsel also argued to the jury that the CW had a motive to lie about the defendant. For example, during his cross-examination of the CW, counsel reviewed all of the charges the CW had potentially faced, and asked:

Q All of this you knew while you were cooperating. You had that hanging over your head, right?

A Yes.

Q So you could have been sentenced to thirty years to life so when you were saying before you were thinking of me, and you were thinking of helping yourself out, that's really what you were talking about, right?

A Absolutely.

(A: 345) And again:

Q You were hoping to get leniency from the government, both government, state and federal with the charges hanging over your head because you haven't been sentenced for either of these most recent one[s], right?

A Yes.

Q That's why you agreed to cooperate, right?

A Yes.

(A: 346) The following day, defense counsel returned to this theme: "You had an incentive to set Mr. Coleman up, didn't you, . . . with what was hanging over your head?" (A: 430). Again, the CW answered "yes." *Id.*

Defense counsel brought out these same issues during summation. Counsel began by reviewing the CW's criminal history, and arguing that he had received a significantly reduced sentence because of his cooperation – only two years, based on an exposure of up to 100 years on various state charges. (A: 627-28) Defense counsel focused on the CW's testimony that the reason he cooperated was "because in his words two years is better than 30 years to life. He admitted on cross examination that he had an incentive to make a deal happen. So . . . all that counts to [the CW] is that he helps himself out." (A: 629)After reviewing the benefits the CW had garnered from his cooperation, defense counsel immediately focused the jury's attention on all the aspects of the case as to which the CW was the sole eyewitness. (A: 629-30) ("He alone is the one who testified that Mr. Coleman entered his vehicle on Hampton Street after the construction zone. He alone says that that's where Mr. Coleman entered his car. He alone. . . . [H]e alone is the one who mentioned numbers indicating price and weight. He alone. He alone is the one who testified that Mr. Coleman was using hand signals. He alone."); (A: 630) ("Is [the CW] merely making self-serving statements on the tapes to please the agents?"). *Cf. Vaughn*, 430 F.3d at 522-23 (affirming in part because defense counsel argued that "the government married" the CW and "[t]he government will have gone to bat for him"). All of this

argument served to reinforce the court's appropriate jury charge on cooperating witnesses.

As noted, to establish the requisite prejudice, Coleman must demonstrate that either of the court's instructions "misled the jury as to the correct legal standard or that it did not adequately inform the jury of the law." *Id*. (citing *United States v. Masotto*, 73 F.3d 1233, 1238 (2d Cir. 1996); *Anderson v. Branen*, 17 F.3d 552, 556 (2d Cir. 1994)). Coleman fails to meet his burden of showing that there was any error in the jury instructions. The district court's instructions were neither misleading nor inaccurate; indeed, the court's instructions were essentially the defendant's proposed instructions, the difference being simply two letters – "er" – changing "great" to "greater."[16]

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[16] Indeed, the cases cited by the defendant as standing for the proposition that "greater care" rather than "great care" is the appropriate standard actually gloss over this distinction. In *United States v. Corcione*, 592 F.2d 111, 116 & n.4 (2d Cir. 1979), this Court memorialized in a footnote the district court's instruction, which employed the "greater care" terminology, but in approving this instruction stated in the full body of the opinion that the district court "specifically charged the jury that the testimony of the informer and the confessed accomplice must be examined with great care and caution[.]" In *United States v. Bernard*, 625 F.2d 854, 858 (9th Cir. 1980), the court noted that there is no significant difference between a cautionary instruction on the testimony of an accomplice and a cautionary instruction on one granted immunity: "In both instances, the jury is instructed that the testimony 'be received with caution and weighed with care.'" *Id.* (quoting *United* (continued...)

In fact, reasonable minds might conclude that the court's language ("scrutinized with great care and viewed with particular caution") favors the defendant more than the proposed language ("examined and weighed by the jury with greater care than the testimony of an ordinary witness") given that in the case at bar there were no "ordinary" witnesses – just law enforcement testimony, the cooperating witness and an expert – and the court instructed as to each of these types.

In the final analysis, it is axiomatic that "defendants are not always entitled to have the precise language they request included in the final charge, as long as the charge given appraises the jury of the crime and the defense." *United States v. Funaro*, 222 F.R.D. 41, 48 (D. Conn. 2004); *United States v. Johnson*, 994 F.2d 980, 988 (2d Cir. 1993).

In sum, Judge Hall's instructions to the jury concerning the cooperating witness's testimony were well-balanced and proper, and do not necessitate a new trial. *See Pitera*, 5 F.3d at 628 (charge on informants was proper because "the jury was adequately instructed that it should scrutinize informant testimony with particular care and was also told that an informant might lie in an effort to obtain favorable

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[16] (...continued)
States v. Morgan, 555 F.2d 238, 243 (9th Cir. 1977) (internal quotation marks omitted). Thus, the court explained that "it did not matter which instruction [greater care or great care] was given. . . . Nor do we find here a distinction between those instructions . . . ." *Id.*

treatment"); *United States v. Provenzano*, 615 F.2d 37, 46 (2d Cir. 1980) (informant charge proper where charge informed jury that informant's relationship with the Government was a factor to weigh in assessing his credibility); *see also United States v. Swiderski*, 539 F.2d 854, 859-60 (2d Cir. 1976) (district court erred by failing altogether to charge the jury to scrutinize informant testimony; Court declined to reach question whether such error was reversible); *United States v. Bufalino*, 683 F.2d 639, 648 (2d Cir. 1982) (district court's unbalanced informant instruction not grounds for reversal because "[t]he jury received ample evidence of the interest of these [informant] witnesses, and could be counted on to use its common sense in evaluating the truth of their testimony"). Accordingly, a new trial is inappropriate.

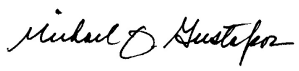
CONCLUSION

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

Dated: June 12, 2006

Respectfully submitted,

KEVIN J. O'CONNOR
UNITED STATES ATTORNEY
DISTRICT OF CONNECTICUT



MICHAEL J. GUSTAFSON
ASSISTANT U.S. ATTORNEY

WILLIAM J. NARDINI
Assistant United States Attorney (of counsel)

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 11,455 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

MICHAEL J. GUSTAFSON
ASSISTANT U.S. ATTORNEY

ADDENDUM

Title 21, United States Code, Sections 841(a)(1) and (b)(1)(A)(iii) [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)(A) In the case of a violation of subsection (a) of this section involving--

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

. . . . .

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall

be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 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 which may not be less than 20 years and not more than life imprisonment 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 $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. 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 5 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 10 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. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

. . . .

Federal Rules of Criminal Procedure, Rule 29(a)

(a) Before Submission to the Jury.

After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the government's evidence, the defendant may offer evidence without having reserved the right to do so.

. . . .

Federal Rules of Criminal Procedure, Rule 33(a) & (b)(2)

(a) Defendant's Motion.

Upon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

(b) Time to File.

(2) Other Grounds. Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 7 days after the verdict or finding of guilty.
. . . .

Modern Federal Jury Instructions (Leonard B. Sand, et al)

7-5 Accomplices Called by the Government
You have heard witnesses who testified that they were actually involved in planning and carrying out the crime(s) charged in the indictment. There has been a great deal said about these so-called accomplice witnesses in the summations of counsel and whether or not you should believe them.

The government argues, as it is permitted to do, that it must take the witnesses as it finds them. It argues that only people who themselves take part in criminal activity have the knowledge required to show criminal behavior by others.

For those very reasons, the law allows the use of accomplice testimony. Indeed, it is the law in federal courts that the testimony of accomplices may be enough in itself for conviction, if the jury finds that the testimony establishes guilt beyond a reasonable doubt.

However, it is also the case that accomplice testimony is of such nature that it must be scrutinized with great care

and viewed with particular caution when you decide how much of that testimony to believe.

I have given you some general considerations on credibility and I will not repeat them all here. Nor will I repeat all of the arguments made on both sides. However, let me say a few things that you may want to consider during your deliberations on the subject of accomplices.

You should ask yourselves whether these so-called accomplices would benefit more by lying, or by telling the truth. Was their testimony made up in any way because they believed or hoped that they would somehow receive favorable treatment by testifying falsely? Or did they believe that their interests would be best served by testifying truthfully? If you believe that the witness was motivated by hopes of personal gain, was the motivation one which would cause him to lie, or was it one which would cause him to tell the truth? Did this motivation color his testimony?

In sum, you should look at all of the evidence in deciding what credence and what weight, if any, you will want to give to the accomplice witnesses.

7-6 Accomplices Called by the Defense

You have heard testimony from a witness called by the defense who testified that he was actually involved in the planning and carrying out of the crimes charged in the indictment.

I must remind you that the defendant has no obligation or duty to come forward with any evidence or to present any witnesses. The burden of proof remains entirely on the government and the defendant is to be presumed innocent by you.

To the extent that the defendant has offered the testimony of this so-called accomplice, I would like to say a few words about the considerations you should keep in mind when you are deciding whether to accept his testimony. The law permits an accomplice to testify as a witness. This testimony may be accepted by you even though there is no other evidence in the record to support it. You may also give his testimony whatever weight, if any, you believe it deserves.

However, at the same time, you must remember that accomplice testimony is such that it must be scrutinized with great care and viewed with particular caution when making a decision on how much of that testimony should be believed. You are reminded to consider the witnesses' interest and motive and to evaluate his testimony in light of all the evidence in deciding what weight, if any, should be given to it.

7-7 Unindicted Co-Conspirator as Government Witness

The government has called as witnesses people who are named by the prosecution as co-conspirators but who were not charged as defendants.

For this reason, you should exercise caution in evaluating their testimony and scrutinize it with great care. You should consider whether they have an interest in the case and whether they have a motive to testify falsely. In other words, ask yourselves whether they have a stake in the outcome of this trial. As I have indicated, their testimony may be accepted by you if you believe it to be true and it is up to you, the jury, to decide what weight, if any, to give to the testimony of these unindicted co-conspirators.

7-8 Statutory Immunity of Government Witness

You have heard the testimony of a witness who has testified under a grant of immunity from this court. What this means is that the testimony of the witness may not be used against him in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the immunity order of this court.

You are instructed that the government is entitled to call, as a witness, a person who has been granted immunity by order of this court and that you may convict a defendant on the basis of such a witness' testimony alone, if you find that the testimony proves the defendant guilty beyond a reasonable doubt.

However, the testimony of a witness who has been granted immunity should be examined by you with greater care than the testimony of an ordinary witness. You should scrutinize it closely to determine whether or not it is colored in such a way as to place guilt upon the defendant

in order to further the witness' own interests; for, such a witness, confronted with the realization that he can win his own freedom by helping to convict another, has a motive to falsify his testimony.

Such testimony should be scrutinized by you with great care and you should act upon it with caution. If you believe it to be true, and determine to accept the testimony, you may give it such weight, if any, as you believe it deserves.

7-9 Informal Immunity of Government Witness

You have heard the testimony of a witness who has been promised that in exchange for testifying truthfully, completely, and fully, he will not be prosecuted for any crimes which he may have admitted either here in court or in interviews with the prosecutors. This promise was not a formal order of immunity by the court, but was arranged directly between the witness and the government.

The government is permitted to make these kinds of promises and is entitled to call as witnesses people to whom these promises are given. You are instructed that you may convict a defendant on the basis of such a witness' testimony alone, if you find that his testimony proves the defendant guilty beyond a reasonable doubt.

However, the testimony of a witness who has been promised that he will not be prosecuted should be examined by you with greater care than the testimony of an ordinary witness. You should scrutinize it closely to

determine whether or not it is colored in such a way as to place guilt upon the defendant in order to further the witness' own interests; for, such a witness, confronted with the realization that he can win his own freedom by helping to convict another, has a motive to falsify his testimony.

Such testimony should be received by you with suspicion and you may give it such weight, if any, as you believe it deserves.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Coleman

Docket Number: 06-1119-cr

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 6/12/2006) and found to be VIRUS FREE.

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Natasha R. Monell, Esq.
Staff Counsel
Record Press, Inc.

Dated: June 12, 2006