

06-4279-cr

To Be Argued By:
EDWARD T. KANG

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-4279-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

RICHARD LESPIER,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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

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

TABLE OF CONTENTS

Table of Authorities.....	iii
Statement of Jurisdiction.....	v
Statement of the Issue Presented	vi
Preliminary Statement.....	1
Statement of the Case.....	4
Statement of Facts and Proceedings	
Relevant to this Appeal.....	6
A. The Trial.....	6
1. Luis Adorno’s Trial Testimony.....	7
2. Jose Reyes’s Trial Testimony.....	10
3. Erica Lopez’s Trial Testimony.....	11
4. Randall Pollack’s Trial Testimony.....	11
5. Thomas Kerr’s Trial Testimony.....	12
6. Annette Boultron’s Trial Testimony.....	13
B. The Evidentiary Hearing.....	15

C. The District Court’s Denial of the Defendant’s Motion for New Trial.	18
Summary of Argument.	25
Argument.	27
I. The District Court Did Not Abuse Its Discretion in Denying the Defendant’s Motion for New Trial.	27
A. Governing Law and Standard of Review.	27
B. Discussion.	28
1. The District Court Did Not Commit Clear Error in Finding That the Defendant Had Failed to Prove That Adorno’s Trial Testimony Was False.	28
2. The District Court Did Not Err in Finding That the Defendant Had Failed to Prove That the Jury Would Not Have Acquitted the Defendant Without Adorno’s Testimony.	34
Conclusion.	38
Certification per Fed. R. App. P. 32(a)(7)(C)	

TABLE OF AUTHORITIES

CASES

PURSUANT TO “BLUE BOOK” RULE 10.7, THE GOVERNMENT’S CITATION OF CASES DOES NOT INCLUDE “CERTIORARI DENIED” DISPOSITIONS THAT ARE MORE THAN TWO YEARS OLD.

<i>Awon v. United States</i> , 308 F.3d 133 (1st Cir. 2002).....	29, 31, 34
<i>Lindsey v. United States</i> , 368 F.2d 633 (9th Cir. 1966).	29, 30, 34
<i>Ortega v. Duncan</i> , 333 F.3d 102 (2d Cir. 2003).....	32, 33, 34
<i>United States v. Curry</i> , 358 F.2d 904 (2d Cir. 1966).....	29, 31, 34
<i>United States v. DiPaolo</i> , 835 F.2d 46 (2d Cir. 1987).....	27, 28, 32, 34
<i>United States v. Gallego</i> , 191 F.3d 156 (2d Cir. 1999).....	27
<i>United States v. Lespier</i> , 2006 WL 533792 (D. Conn. Mar. 1, 2006).....	6
<i>United States v. Reyes</i> , 49 F.3d 63 (2d Cir. 1995).....	29, 31 34

<i>United States v. Sasso</i> , 59 F.3d 341 (2d Cir. 1995).....	27
<i>United States v. Troche</i> , 213 F.2d 401 (2d Cir. 1954).....	33
<i>United States v. Underwood</i> , 932 F.2d 1049 (2d Cir. 1991).....	28
<i>United States v. Wong</i> , 78 F.3d 73 (2d Cir. 1996).....	28

STATUTES

18 U.S.C. § 1959.	4
18 U.S.C. § 3231.	v
28 U.S.C. § 1291.	v

RULES

Fed. R. Crim. P. 4.	v
--------------------------	---

STATEMENT OF JURISDICTION

On August 29, 2006, the district court entered an order denying the defendant's motion for new trial. JA 24. The district court had subject matter jurisdiction under 18 U.S.C. § 3231. On September 7, 2006, the defendant filed a timely notice of appeal pursuant to Rule 4(b) of the Federal Rules of Appellate Procedure.¹ JA 24. This Court has appellate jurisdiction over the defendant's appeal from the denial of his motion for new trial pursuant to 28 U.S.C. § 1291.

¹ For reasons that are unclear, it appears that the same notice of appeal was filed on the docket both on September 7, 2006, and on November 16, 2006.

STATEMENT OF THE ISSUE PRESENTED

- I. Did the district court abuse its discretion in denying the defendant's motion for new trial after a cooperating witness disavowed his written recantation of his trial testimony against the defendant?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 06-4279-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

RICHARD LESPIER,
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This criminal appeal presents the sole issue of whether the district court abused its discretion in denying a motion for new trial based on a witness's recantation of his trial testimony where that recantation was subsequently repudiated.

The defendant was convicted by a jury on July 23, 1999, for one count of murder in aid of racketeering and was subsequently sentenced to life imprisonment. That conviction stemmed from the defendant's involvement in

the December 9, 1996, murder of Carlito Brown. Among the witnesses who testified on behalf of the government was Luis Adorno, who had pleaded guilty to shooting Brown. Adorno testified that the defendant had ordered the killing of Alex Moreno as part of an ongoing war between two rival gangs — the Latin Kings and Los Solidos — and that Adorno had shot Brown in the head after firing at and missing Moreno. Adorno was sentenced to 25 years in prison. This Court affirmed the defendant's conviction on March 12, 2001.

In January 2002, Adorno, after meeting with lawyers for Lespier on three separate occasions, signed an affidavit prepared by Lespier's counsel recanting his trial testimony. Based on that affidavit, Lespier filed a motion for new trial in July 2002.

In response to the defendant's motion, the Honorable Alan H. Nevas, who had presided over the defendant's trial, scheduled an evidentiary hearing on July 20 and 21, 2004. Two witnesses testified at that hearing, Adorno and Special Agent David Dillon from the Federal Bureau of Investigation. At the hearing, Adorno repudiated his signed affidavit and re-affirmed his trial testimony. He presented a number of reasons why he had signed the false affidavit. Most notably, Adorno stated that because he had testified against Lespier, a high-ranking member of the Latin Kings, Adorno received physical threats while serving his prison sentence. Adorno had thus been moved into a segregated section of the prison facilities called the Special Housing Unit, where living conditions were much worse than the rest of the prison population. Adorno

signed the affidavit intending to show other Latin King inmates that he was no longer a “snitch,” so that he could serve out the remainder of his 25-year sentence as a general population inmate.

After carefully weighing Adorno’s affidavit, his trial testimony, the testimony of the government’s other witnesses, and Adorno’s testimony at the evidentiary hearing, the district court adopted a ruling by United States Magistrate Judge Holly B. Fitzsimmons recommending that the court deny the motion for new trial on grounds that the defendant had failed to prove (1) that Adorno’s trial testimony was false and (2) that the jury would have acquitted the defendant but for Adorno’s testimony.

In this appeal, the defendant contends that the district court erred by failing to make a credibility finding regarding Adorno’s testimony at trial and at the evidentiary hearing. The defendant further contends that the district court failed to weigh all the evidence of perjury before denying the motion for new trial. This Court should reject the defendant’s claims. The district court properly evaluated all the evidence relevant to Adorno’s testimony before correctly determining that the defendant failed to prove that Adorno’s trial testimony had been false. Contrary to the defense’s suggestion, that was precisely the operative legal question, and there was no need for the court to further make a more explicit credibility finding regarding Adorno’s affidavit. Specifically, the district court correctly concluded that Adorno’s trial testimony was consistent with the testimony that he provided at the evidentiary hearing, that his trial

testimony was corroborated by the testimony of numerous other witnesses, and that the reasons Adorno had provided for repudiating his affidavit were credible.

In the alternative, this Court should affirm because the district court did not err in concluding that the defendant had failed to meet his burden of proving that the jury would have acquitted him but for Adorno's testimony. Numerous other trial witnesses testified about the defendant's role in ordering the murder of Alex Moreno, including Jose Reyes, the Director of Security of the Connecticut Latin Kings; Thomas Kerr, who was an inmate housed in the same prison facility after the defendant was indicted; and Annette Boultron, the defendant's girlfriend. On appeal, the defendant dismisses that evidence in cursory fashion as being "far from overwhelming." Def. Br. 17. The district court properly considered their testimony in concluding that there was ample evidence to convict the defendant even without Adorno's testimony.

Accordingly, the Court should affirm the district court's denial of the defendant's motion for new trial.

STATEMENT OF THE CASE

On June 3, 1998, a federal grand jury in Connecticut returned an indictment charging the defendant and co-defendant Luis Adorno with committing murder in aid of racketeering, in violation of Title 18, United States Code, Section 1959(a)(1). Joint Appendix ("JA") 25-31. On July 2, 1999, Adorno pleaded guilty to the indictment and

agreed to testify against the defendant. JA 14. The defendant proceeded to trial, which was held from July 20-23, 1999, with the Honorable Alan H. Nevas presiding. The government called 14 witnesses during trial, including Adorno.

On July 23, 1999, the jury returned a guilty verdict against the defendant. He was sentenced on December 6, 1999, to a term of life imprisonment. JA 590-93. The defendant appealed his conviction, and the judgment of conviction was affirmed by summary order on March 12, 2001. JA 594-97.

On January 22, 2002, Adorno, while serving his 25-year prison sentence, signed an affidavit prepared by Lespier's lawyers, in which he recanted his trial testimony. JA 601-03. The defendant subsequently filed a motion for new trial on July 22, 2002. JA 598-99. In July 2004, Judge Nevas conducted a two-day evidentiary hearing on the defendant's motion, during which the defendant called Adorno and Special Agent David Dillon of the Federal Bureau of Investigation. JA 604-804.

During that hearing, Adorno repudiated his affidavit and asserted that the testimony he had provided at the defendant's trial was true. Special Agent Dillon testified that he believed Adorno's trial testimony was truthful, and that his affidavit contained false information. JA 783. Counsel for the government and the defendant submitted memoranda of law.

On November 7, 2005, Judge Nevas referred the case to United States Magistrate Judge Holly B. Fitzsimmons for a ruling on the defendant's motion for new trial. On February 28, 2006, Judge Fitzsimmons issued a ruling recommending that the district court deny the defendant's motion. JA 806-29; *United States v. Lespier*, 2006 WL 533792 (D. Conn. Mar. 1, 2006). On April 13, 2006, the defendant submitted his objections to Judge Fitzsimmons's recommended ruling. JA 830-37. On August 29, 2006, the district court adopted the recommended ruling and denied the defendant's motion for new trial. JA 24.

On September 7, 2006, the defendant filed a timely notice of appeal of the district court's denial of his motion for new trial. JA 838.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

Part A below describes the evidence presented at the defendant's trial. Part B summarizes the evidence presented at the hearing on the defendant's motion for new trial. Part C describes the district court's ruling denying the defendant's motion for new trial.

A. The Trial

This case arises from a deadly turf war between two gangs, the Latin Kings and Los Solidos. The defendant was the president of the Meriden, Connecticut, chapter of the Latin Kings. Adorno was a soldier in the Meriden chapter of the Latin Kings. The government's evidence at

trial, which was presented primarily through the testimony of six witnesses — Adorno, Jose Reyes, Erica Lopez, Randall Pollack, Thomas Kerr, and Annette Boultron — established that the defendant had ordered Adorno to kill a member of Los Solidos, Alex Moreno. The evidence also established that on the evening of December 9, 1996, Adorno rode in a car with the defendant and two other members of the Latin Kings in search of Moreno. Moreno’s car was located and the defendant ordered Adorno again to kill Moreno. Adorno walked up to Moreno’s car and fired several shots. The bullets missed Moreno and instead struck and killed Carlito Brown, who was driving the car that Moreno was in.

The testimony of the key witnesses presented during the three-day trial is summarized below.

1. Luis Adorno’s trial testimony

Adorno testified to the following facts:

- He was a seventeen-year-old soldier in the Latin Kings in 1996. JA 314, 321.
- As soldier, he was required to follow the orders of his superiors, including the president, or else he risked being killed. JA 321.
- In December 1996, he was living with his girlfriend, Erica Lopez, at the Mills Housing Project (“the Mills”). JA 337.

- He stored guns inside a bag that he kept inside Lopez's bedroom. JA 338-41.
- On December 7, 2006, during a meeting of the Latin Kings at the Mills, the defendant, in the presence of Adorno and several other Latin Kings, ordered that Alex Moreno be killed. JA 343-45.
- Adorno volunteered to kill Moreno, for fear that he would be killed by members of the Latin Kings if he did not volunteer. JA 346.
- After that meeting, the defendant, Adorno, and several members of the Latin Kings drove around in search of Moreno, to no avail. JA 347.
- The defendant told Adorno that he would contact Adorno by beeper when he was ready to resume looking for Moreno. JA 347-48.
- Two nights later, during the early evening of December 9, 1996, the defendant contacted Adorno via beeper while Adorno was at Lopez's home. JA 349.
- Adorno retrieved a gun from the bag inside Lopez's bedroom and told Lopez that he was going out to buy cigarettes. JA 349-50.
- Adorno was wearing a black jacket, black pants, and a black cap as he walked out. JA 350.

- Adorno met the defendant and two other Latin Kings — Ricky Adorno (Luis Adorno’s younger brother), and an individual named “Ray Dog.” JA 351.
- The four entered a white car driven by the defendant. Adorno sat in the back seat, behind the defendant. “Ray Dog” sat in the front passenger seat and Ricky Adorno sat behind “Ray Dog.” JA 352-53.
- The four Latin Kings saw Moreno in a car stopped in the vicinity of North and Hickory Streets. The defendant told Adorno, “Make sure you get Alex.” JA 356-58.
- Adorno got out of the car, approached Moreno’s car, and fired several shots. Adorno saw Moreno duck. Adorno saw another person who he did not recognize seated in the driver’s seat of Moreno’s car. JA 360-61.
- After firing the shots, Adorno got back into the car, and the defendant drove back to the Mills. The defendant dropped off Adorno, Ricky Adorno, and “Ray Dog” at the Mills. Adorno returned to his girlfriend’s apartment and stayed there for the evening. JA 362.

2. Jose Reyes's Trial Testimony

Jose Reyes, who was the Director of Security of the Connecticut Latin Kings in December 1996, testified to the following facts:

- Around December 1996, he went to visit the Meriden chapter of the Latin Kings to investigate a rumor that there was a developing conflict between the Latin Kings and a rival gang, Los Solidos. JA 77-78.
- Reyes discussed that conflict with an individual named Husbando, who was then the President of the Meriden chapter of the Latin Kings. JA 80-83.
- Two weeks after that meeting with Husbando, he returned to Meriden because he had heard that a member of Los Solidos had been killed by Latin Kings. JA 84.
- During that trip, he met with the entire Meriden chapter at the defendant's home. JA 85-87.
- While he was berating the Meriden chapter for their involvement in the killing, the defendant jumped up and admitted that he had ordered the killing of the Los Solidos member (Alex Moreno). JA 92-94. The defendant stated that he had taken over Husbando's position because Husbando had done nothing about the conflict with Los Solidos. *Id.*

- Reyes was impressed by the defendant's conviction and promoted Lespier to the position of Chief Enforcer. JA 94-96.

3. Erica Lopez's Trial Testimony

Erica Lopez, who was Adorno's girlfriend in 1996, testified to the following facts:

- Adorno would spend nights at her apartment on occasions beginning in November 1996. Government's Appendix ("GA") 4-8.
- At the end of November 1996, Adorno put a duffel bag inside her bedroom and told her not to let anybody "play with it." GA 21-22.
- Adorno was at her apartment in the early evening of December 9, 1996. GA 16.
- Lopez heard his beeper go off and Adorno left her apartment shortly thereafter. GA 16-17.

4. Randall Pollack's Trial Testimony

Randall Pollack was a witness to the shooting of Carlito Brown and testified to the following facts:

- Pollack personally knew Carlito Brown a.k.a. "Lite," Alex Moreno a.k.a. "Mummy," and Luis Adorno a.k.a. "Bebe." JA 197-200.

- On December 9, 1996, Pollack was on his way to Moreno's house, when he saw Moreno's car stopped in the vicinity of North and Hickory Streets. JA 211-13.
- Pollack saw Adorno exit the back seat of a white car, approach Moreno's car, and fire several shots into Moreno's car. JA 215-17.
- Pollack saw Adorno wearing a dark-colored hat that night. JA 222.
- Pollack saw three other people inside the white car with Adorno on the night that he shot Carlito Brown. JA 221.

5. Thomas Kerr's Trial Testimony

Thomas Kerr, who met both Adorno and the defendant during separate periods of incarceration, testified to the following facts:

- Kerr met an individual named "Bebe" (identified by other trial witnesses as Luis Adorno) when the two spent time at the Whalley Correctional Center in December 1996. JA 449.
- In the summer of 1998, Kerr met the defendant while the two spent time at the Corrigan Correctional Center. JA 453.

- Kerr was in contact with the defendant on an everyday basis until January 1999, when Kerr was moved out of Corrigan. JA 453, 467.
- Kerr and the defendant got along well. JA 454.
- In the course of their friendship, the two discussed the defendant's membership in the Latin Kings and about Adorno. JA 454-59.
- On one occasion, the defendant told Kerr, "Them devils want to fry me for sending somebody to do something," and "How could they give [me] the death penalty, I didn't pull the trigger." JA 461-62.
- The defendant also told Kerr, "I'm telling you, I'll have someone go to Bebe's mother's house and cut his, cut his dick off and stick it in his mouth and let him know, don't choke on your dick." JA 462.
- The defendant also said, "They don't have nothing on me. All they got on me is [hearsay] and if Bebe talks." JA 463.

6. Annette Boultron's Trial Testimony

Annette Boultron, the former girlfriend of the defendant, testified to the following facts:

- In the early evening of December 9, 1996, the defendant drove Boultron to her sister's apartment at the Mills in a white rental car. JA 519-20.

- While driving to the Mills, the defendant became visibly upset when he saw a black car which he believed had a Latin Kings member riding with a member of Los Solidos. JA 520-24.
- When the defendant dropped her off at the Mills housing project, she saw him meet with several members of the Latin Kings, including “Ray Dog” and Ricky Adorno. JA 526-27.
- Boultron went into her sister’s apartment and saw the defendant return approximately 25 minutes later. JA 527-28.
- When the defendant returned, he was no longer in the white rental car, but in a blue truck. JA 529.
- The defendant picked Boultron up in the truck and drove her home. JA 529.
- On the trip back home, she observed several emergency vehicles and the same black car that had made the defendant upset earlier that evening. JA 530-31.
- Boultron saw that the front doors of the black car were wide open and that glass was shattered with gunshots. JA 531.
- Later that evening, she saw the white rental car parked in front of her home. JA 532.

- The following day, she drove the white rental car and found a pair of gloves and a tee-shirt inside the car. JA 536.
- She removed those items and brought them back to her home. *Id.*
- When the defendant saw those items later that day, he became upset and told Boultron that the items belonged to “Ray Dog.” JA 537.
- Boultron and the defendant proceeded to burn the gloves and tee-shirt. JA 537-38.

B. The Evidentiary Hearing

During the two-day evidentiary hearing, Adorno testified that after being sentenced, he was supposed to be designated in a witness protection program within the Bureau of Prisons, in light of the testimony that he had provided against a leader of the Latin Kings. JA 726-27, 777-79. However, Adorno’s protection did not materialize, and he was placed in the general population of the prison facility where he was housed. JA 726. Adorno testified that the Latin Kings had a powerful presence in the jail system; Adorno was physically threatened and feared retaliation. JA 624, 729, 793.

Adorno, for his personal safety, was segregated from the general population and placed in a section of the prison called the Special Housing Unit (“SHU”). JA 626, 726-27. The living conditions at SHU were much worse than

those at the general population. JA 728-30. Inmates housed at SHU were not afforded the same privileges as those in the general population, including limited recreation time and restricted access to movie, library, and gym facilities. *Id.*

Adorno became despondent at the prospect of serving the remainder of his 25-year sentence at SHU. JA 648, 730. Adorno believed that recanting his trial testimony would prove that he was no longer a “snitch,” and therefore, he could return to living in the general population without further threats from the Latin Kings. JA 732.

Adorno testified that he contacted his father and asked him to contact the defendant’s attorney. JA 621-23. Adorno testified that he contacted the defendant’s attorney to recant his trial testimony in an effort to get the attention of his attorney or the government attorneys. JA 732-33, 815. Adorno stated that if he had his attorney’s number, he never would have submitted the false affidavit. *Id.*

Adorno testified that he met with the defendant’s lawyers on three separate occasions and signed an affidavit that had been prepared by Lespier’s lawyers recanting his trial testimony. JA 735. Adorno stated that the defendant’s lawyers did not offer to provide Adorno with a lawyer and did not explain to him what perjury meant. *Id.* Adorno testified that he did not know that signing the false affidavit was perjury and that he would not have signed the affidavit if he had been represented by counsel. JA 734-39.

Adorno further testified that he immediately told the government that his affidavit was untruthful when he was explained the consequences of perjury. JA 738-39. When asked why he had not told Lespier's attorneys the reasons he was recanting his trial testimony, Adorno testified that he did not completely trust Lespier's attorneys, given that they told him they were "not gonna do nothing for [him]." JA 680.

Adorno then provided testimony that was consistent with his testimony at trial: that Lespier had ordered Adorno to kill Alex Moreno, that Adorno followed that order for fear that the defendant would kill him if he failed to obey, and that Adorno shot and killed Carlito Brown on December 9, 1996 in a failed attempt to shoot Moreno. JA 721-24.

Special Agent David Dillon from the FBI also testified at the evidentiary hearing. Agent Dillon testified that he was one of the case agents in the case against the defendant, and that the government had been prepared in 1999 to proceed to trial against both defendant Lespier and against Luis Adorno, but that Adorno pleaded guilty and chose to cooperate with the government "on the eve of trial." JA 750, 780-81. The government was prepared to present its case to the jury without Adorno's testimony. JA 781.

Regarding the events after Adorno was sentenced, Agent Dillon testified that often cooperating inmates such as Adorno get punished by other inmates when news of their cooperation spreads through the prison. JA 777-78.

Agent Dillon also testified that the government was supposed to provide witness protection for Adorno but that protection had not materialized. JA 778-79.

With respect to Adorno's affidavit recanting his trial testimony, Agent Dillon testified that he had met with Adorno on two occasions prior to the evidentiary hearing. JA 751. During those meetings, Agent Dillon discussed with Adorno the reasons why he had signed the affidavit. JA 757, 775-76. Agent Dillon did not yell at or threaten Adorno during those meetings, which lasted at most 25 minutes. JA 775-76. Based upon his involvement in the investigation as case agent, as well as his meetings with Adorno before the evidentiary hearing, Agent Dillon testified that he believed Luis Adorno provided truthful trial testimony and that the signed affidavit was false. JA 783.

C. The District Court's Denial of the Defendant's Motion for New Trial

After the evidentiary hearing and upon reviewing memoranda of law submitted by both parties, the district court adopted a recommended ruling prepared by Magistrate Judge Fitzsimmons and denied the defendant's motion for new trial. JA 806-29. The court held that the defendant had failed to prove that Adorno's trial testimony was false and that there was no evidence that the jury would have acquitted the defendant without Adorno's testimony.

At the outset of its ruling, the district court made factual findings regarding the trial testimony of the government's key witnesses, Adorno's recantation, and Adorno's retraction of the recantation. JA 807-15. Those findings are summarized above, *see supra* Sections A and B.

The court reviewed relevant case law and stated that when a motion for new trial is based on newly discovered evidence of recantation, the defendant has the burden of proving (1) that the testimony given by a material witness was false; (2) that without the false testimony the jury might have reached a different conclusion; and (3) that the party seeking the new trial was taken by surprise when the false testimony was given and could not address that falsity until after trial. JA 817 (citations omitted). The court denied the motion for new trial on grounds that the defendant had failed to satisfy his burden as to the first two elements of the three-prong test.

With respect to the defendant's failure to prove that Adorno's trial testimony was false, the district court noted that the only evidence that the defendant presented on this issue was "Adorno's repudiated affidavit, Adorno's motives for repudiating the affidavit, and Special Agent Dillon's testimony." JA 820. Given that Agent Dillon testified that he believed Adorno's trial testimony was truthful, *see* JA 783, the district court focused on the repudiated affidavit and Adorno's motives. As to Adorno's motives for retracting his affidavit, the district court stated:

In an effort to prove that Adorno's trial testimony was false and that his affidavit was truthful, Lespier now attacks Adorno's motive for retracting his recantation. Adorno's testimony regarding his motives for signing the affidavit are plausible. The Latin Kings established a threatening presence in the jail system, and Adorno's fear of retaliation by other members of the Latin Kings was credible. Adorno testified that his life was in danger. Immediately on entering one of the facilities, Adorno was approached by one of the Latin Kings who said, "we know what you did . . . you have to check in" or run the risk of getting hurt. Adorno also testified that he was under pressure from the Latin Kings, and was approached by someone named "Luis," a Latin Kings member, who suggested that he recant his testimony.

As a result of his fear of being housed with other Latin Kings, Adorno said he requested placement in the Special Housing Unit ("SHU"). Living conditions at the SHU were horrible and were considered a punishment. The government's promise to place Adorno in a witness protection program had "fallen through the cracks." Therefore, in a misguided effort to gain the attention of his own attorney and the government, Adorno contacted Lespier's attorneys in order to recant his trial testimony. Adorno thought that if he recanted his trial testimony, other Latin King members would no

longer think he was a “snitch” and he would no longer be hassled.

Adorno testified that he did not know that signing the false affidavit was perjury, and that Lespier’s counsel failed to ask Adorno whether he wanted an attorney. Adorno testified that he would not have signed the affidavit if he had been represented by his attorney. When asked why he did not tell Lespier’s attorney the reasons he was recanting his testimony, Adorno stated that Lespier’s attorney advised him that they were not there to help him and that they were “not gonna do nothing for [him].”

Based on these facts, the Court finds that Adorno’s stated reasons for recanting his trial testimony are as credible as Lespier’s arguments that Adorno repudiated the affidavit to avoid future perjury charges. Additionally, Adorno’s testimony at the hearing on the motion was consistent with his trial testimony. Adorno testified that Lespier was the president of the Meriden chapter, and in December of 1996, on Lespier’s order, he shot and killed Carlito Brown. Adorno stated that if did not do as ordered, he would have been kicked out of the gang, hurt, or even killed. The only inconsistency in Adorno’s testimony is his affidavit, which was repudiated.

JA 821-23 (citations omitted).

Given that the defendant's attacks on Adorno's motives for signing the false affidavit were unavailing, the district court next considered the only other evidence that the defendant presented in support of his new trial motion — the repudiated affidavit. The district court reviewed relevant precedent and correctly held that “repudiated recantations, without more, are not newly discovered evidence and will not support a motion for new trial.” JA 820 (citations omitted).

The district court further held that the defendant had failed to meet his burden of proving that Adorno's trial testimony was false because that testimony was corroborated by the testimony of several other witnesses. JA 823-24. The court reviewed the relevant portions of the testimony of Randall Pollack, Annette Boultron, and Erica Lopez, and concluded that their testimony corroborated Adorno's testimony that he had shot and killed Carlito Brown after receiving orders from the defendant to kill Alex Moreno.

With respect to the defendant's failure to prove that the jury would have acquitted the defendant but for Adorno's testimony, the district court concluded:

Even if the Court were to find that the defendant had proven Adorno's trial testimony was false, the defendant has failed to satisfy the second element necessary for granting a new trial — that the jury probably would have acquitted Lespier in the absence of the false testimony.

Adorno was not the sole or essential source of evidence concerning Lespier's order to kill Moreno. Two other witnesses testified that Lespier admitted to ordering the "hit" on Moreno.

First, Jose Reyes testified that he traveled to Meriden, to investigate a rumor that a Latin Kings member killed a Los Solidos member. While Reyes was berating the members, Lespier jumped up and stated that the Board had "nothing to get mad about because the mission was done and the brother got away with it." Reyes testified that Lespier admitted that he overtook the president's position and ordered the murder.

Second, Thomas Kerr, a fellow inmate of Lespier, testified that Lespier boasted of his position with the Latin Kings. Upon discovering that Kerr knew Adorno, Lespier talked to him about Adorno and his fear that Adorno was cooperating, on numerous occasions. Kerr testified that one day Lespier was upset and approached him saying, "them devils want to fry me for sending somebody to do something." Lespier also asked, "how could they give me the death penalty. I didn't pull the trigger." Later that day, Lespier added, "[t]hey don't have nothing on me . . . All they got is hearsay and if Bebe talks."

The government presented sufficient evidence against Lespier at trial to sustain the verdict. The testimony of Boultron, Lopez, Diaz, Pollack, Reyes, and Kerr, as set forth above, established Lespier's motive for ordering the murder of Moreno, his intent in committing the crime, and his presence at the time the crime was committed. Thus, even without Adorno's trial testimony, Lespier cannot demonstrate that the jury would have acquitted him.

In his post-hearing memorandum, Lespier attempts to trivialize the corroborating witnesses' testimony by questioning the motives of these witnesses. Lespier argues that the testimony of these witnesses must be "viewed skeptically," because of the inducements offered to the witnesses for their cooperation and because of an alleged "lack of corroborating evidence."

....

In concluding that the guilty verdict in this case does not present such a "miscarriage of justice," the Court is persuaded by the admissions of Lespier. Both Reyes and Kerr testified that Lespier told them about his order to kill Moreno. Kerr also testified about Lespier's fear that Adorno would cooperate with the government. Lopez, Diaz, Pollack, Reyes, and Kerr established Lespier's motive

for ordering the murder of Moreno, his intent in committing the crime, and his presence at the time the crime was committed. Although Lespier argues that these witnesses are not credible due to their motivations for testifying and alleged inconsistencies, Lespier's trial counsel had ample opportunity to demonstrate to the jury the witness' alleged bias in favor of the government. Lespier's counsel vigorously cross-examined these witnesses and thoroughly explored the motives and inconsistencies in each witness' testimony. Additionally, trial counsel forcefully argued these biases to the jury during closing arguments. The jury had ample opportunity to see the witnesses testify, weigh the evidence, and listen to the arguments of counsel. There was abundant evidence from which the jury could reasonably have concluded that Lespier not only issued the order to murder Moreno but was present at the night Carlito Brown was shot.

JA 825-28 (citations omitted). Accordingly, the district court held that the defendant had failed to meet his burden of proof and denied the motion for new trial.

SUMMARY OF ARGUMENT

The district court did not abuse its discretion in denying the motion for new trial. First, the district court did not clearly err in holding that the defendant had failed to prove that Adorno's trial testimony was false. The district court

properly considered all of the evidence relevant to establish whether Adorno had perjured his trial testimony, including: the testimony of the other trial witnesses, Adorno's repudiated affidavit, Adorno's testimony at the evidentiary hearing, Adorno's motives for signing the false affidavit, and Agent Dillon's testimony at the evidentiary hearing. Upon consideration of all the relevant evidence, the district court properly concluded that the defendant failed to prove the falsity of Adorno's trial testimony, given that (1) Adorno's trial testimony was corroborated by other witnesses, (2) Adorno had repudiated his affidavit, and (3) Adorno's motives for signing a false affidavit were credible.

Second, the district court did not err in concluding that the defendant had failed to prove that the jury would have acquitted the defendant but for Adorno's testimony. The testimony of numerous other witnesses — including Jose Reyes, Thomas Kerr, Randall Pollack, Erica Lopez, and Annette Boultron — established that the defendant ordered Moreno to be killed, that he intended to commit the crime, and that he was present at the time the crime was committed. Adorno's testimony was not necessary to prove the government's case.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THE DEFENDANT'S MOTION FOR NEW TRIAL

A. Governing Law and Standard of Review

“Motions for a new trial based upon newly discovered evidence are granted only with great caution in *the most extraordinary circumstances.*” *United States v. DiPaolo*, 835 F.2d 46, 49 (2d Cir. 1987) (citations and internal quotation marks omitted); *see also United States v. Sasso*, 59 F.3d 341, 350 (2d Cir. 1995). “Courts are particularly reluctant to grant such motions where the newly discovered evidence consists of a witness recantation as such recantations are looked upon with utmost suspicion.” *DiPaolo*, 835 F.2d at 49 (internal quotation marks omitted); *United States v. Gallego*, 191 F.3d 156, 165 (2d Cir. 1999). Before granting a motion for new trial on grounds that a witness recanted trial testimony, the district court must be satisfied that: (1) the testimony was false and material; (2) without the original testimony the jury probably would have acquitted the defendant; and (3) the party seeking the new trial was surprised when the false testimony was given or did not know of its falsity until after the trial and could not with due diligence have discovered it earlier. *DiPaolo*, 835 F.2d at 49. “The defendant bears the burden of satisfying this three-part test.” *Id.*; *see also Sasso*, 59 F.3d at 350. “When a motion for a new trial is predicated entirely on an affidavit from a trial witness who recants her testimony, a trial judge can

ordinarily deny it without a hearing.” *DiPaolo*, 835 F.2d at 51.

A district court’s denial of a new trial motion is reviewed for abuse of discretion. *United States v. Wong*, 78 F.3d 73, 78 (2d Cir. 1996). “Findings of fact made in connection with the denial of a motion for new trial are reviewed for clear error.” *Id.* at 78-79 (citing *United States v. Underwood*, 932 F.2d 1049, 1052 (2d Cir. 1991)).

B. Discussion

The district court did not abuse its discretion in denying the defendant’s motion for a new trial. The court correctly concluded that the defendant had failed to meet his burden of proving that (1) Luis Adorno’s trial testimony was false and (2) without Adorno’s purportedly false trial testimony the jury might have reached a different conclusion. *See DiPaolo*, 835 F.2d at 49.

1. The District Court Did Not Commit Clear Error in Finding That the Defendant Had Failed to Prove That Adorno’s Trial Testimony Was False.

A number of factors demonstrate that the district court did not commit clear error in concluding that the defendant had failed to prove the falsity of Adorno’s trial testimony.

First, Adorno’s repudiated affidavit cannot, as a matter of law, be the basis of a motion for new trial. Courts have held that where a recantation has itself been repudiated,

“the recantation becomes merely impeaching and could be used at a new trial only for the purpose of cross examining the witness, and not as substantive evidence.” *Lindsey v. United States*, 368 F.2d 633, 636 (9th Cir. 1966); *see also Awon v. United States*, 308 F.3d 133, 141 (1st Cir. 2002) (“A repudiated recantation is not substantive evidence, and can be used at a new trial only to cross-examine the witness.”). Adorno’s affidavit is thus merely an impeaching document and is insufficient to grant a new trial. *See United States v. Reyes*, 49 F.3d 63, 68 (2d Cir. 1995) (“New evidence that is merely impeaching will not ordinarily justify a new trial.”); *United States v. Curry*, 358 F.2d 904, 919 (2d Cir. 1966) (evidence bearing only on credibility is “not sufficient basis for obtaining a new trial”).

Second, Adorno’s trial testimony was corroborated by other witnesses. As discussed in the statement of facts, *supra*, Randall Pollack testified that on the evening of December 9, 1996, he was near Alex Moreno’s house when he saw Adorno exit the back seat of a white car, approach Moreno’s vehicle, and fire several shots into Moreno’s car. JA 211-13, 215-17. Pollack stated that Adorno was wearing a dark-colored hat and that he saw three other people inside the white car with Adorno. JA 221-22. Those observations corroborated Adorno’s account of the events on December 9.

Erica Lopez testified that beginning in November 1996, Adorno would sleep over at her apartment on occasions. GA 4-8. At the end of November 1996, Lopez stated that Adorno placed a duffel bag inside her bedroom, GA 21-

22, corroborating Adorno's testimony that he had placed a bag containing the murder weapon inside Lopez's bedroom. Lopez further corroborated Adorno's testimony that he was at her apartment on December 9, 1996, that Adorno's beeper went off, and that Adorno left the apartment shortly thereafter. GA 16-17.

Annette Boultron corroborated Adorno's testimony that he had met Lespier at the Mills on the evening of December 9 before leaving to kill Alex Moreno, that Lespier had arrived at the Mills in a white car, and that the two left to find Moreno along with Ricky Adorno and "Ray Dog." Specifically, Boultron testified that the defendant drove her to her sister's apartment at the Mills in a white rental car. JA 519-20. When the defendant dropped her off at the Mills, she saw him meet with several members of the Latin Kings, including "Ray Dog" and Ricky Adorno. JA 526-27.

Third, the defendant's attack on Adorno's motives for retracting his affidavit is both legally and factually insufficient. Whether or not "Adorno retracted his admission of having testified falsely at trial in order to avoid the risk of being prosecuted for perjury" is irrelevant. Def. Br. 16. His motives do not change the fact that he retracted his affidavit, and that, as a legal matter, his repudiated affidavit cannot be used as substantive evidence in support of a motion for new trial. *See Lindsey*, 368 F.2d at 636 (where recantation has itself been repudiated, "the recantation becomes merely impeaching and could be used at a new trial only for the purpose of cross examining the witness, and not as

substantive evidence”); *Awon*, 308 F.3d at 141 (same); *see also Reyes*, 49 F.3d at 68 (“New evidence that is merely impeaching will not ordinarily justify a new trial.”); *Curry*, 358 F.2d at 919 (evidence bearing only on credibility is “not sufficient basis for obtaining a new trial”).

Moreover, as a factual matter, the district court did not commit clear error in finding that “Adorno’s stated reasons for recanting his trial testimony are as credible as Lespier’s arguments that Adorno repudiated the affidavit to avoid future perjury charges.” JA 823. As detailed in the court’s thorough ruling, Adorno was threatened by other Latin King inmates within the Bureau of Prisons, on account of his testimony against the defendant. JA 726-27, 777-79, 821. The record reflects that another Latin King inmate suggested that Adorno recant his trial testimony. JA 639-41, 822.

For his personal safety, Adorno was segregated from the general population and assigned to a section of the prison called the Special Housing Unit, where living conditions were far worse than those in the general population. JA 626, 726-30. The record reflects that Adorno became despondent at the prospect of serving the remainder of his 25-year sentence at SHU. JA 648, 730. Adorno believed that recanting his trial testimony would prove that he was no longer a “snitch,” and therefore, he could return to living in the general population without further threats from the Latin Kings. JA 732. Adorno called his father and asked him to contact the defendant’s attorney. JA 621-23. The record reflects that Adorno contacted the defendant’s attorney to recant his trial

testimony in an effort to get the attention of his attorney or the government attorneys. JA 732-33, 815. The record reflects that if Adorno had his attorney's number, he never would have submitted the false affidavit. *Id.* The record also reflects that he met with the defendant's lawyers on three separate occasions and signed an affidavit that had been prepared by Lespier's lawyers recanting his trial testimony. JA 735. The record reflects that the defendant's lawyers did not offer to provide Adorno with a lawyer and did not explain to him what perjury meant. *Id.* The record also shows that Adorno immediately told the government that his affidavit was untruthful when he was explained what perjury meant and the consequences of perjury. JA 738-39. Consequently, there is overwhelming evidence to support the district court's conclusion that "Adorno's stated reasons for recanting his trial testimony are as credible as Lespier's arguments that Adorno repudiated the affidavit to avoid future perjury charges." JA 823.

In his brief, the defendant argues that "[i]f there is a fifty percent chance that the government's key witness committed perjury at trial that resulted in a mandatory life sentence for the defendant, the 'interests of justice' require a new trial." Def. Br. 19. That argument misstates the law. As this Court has clearly held in *DiPaolo*, a defendant raising a motion for new trial based on newly discovered evidence bears the burden of proving, *inter alia*, that the trial testimony given by a material witness was false. 835 F.2d at 49. Moreover, in *Ortega v. Duncan*, 333 F.3d 102 (2d Cir. 2003), this Court found that in determining whether the defendant has satisfied his

burden, the district court must “weigh all the evidence of perjury before it, including but not limited to the recantation.” *Id.* at 107. That is precisely what the district court did in this case. Specifically, the district court concluded that the defendant had failed to meet his burden of proving that Adorno’s trial testimony was false because (1) Adorno’s trial testimony was corroborated by the trial testimony of several other witnesses (JA 823-24); (2) Adorno’s trial testimony was consistent with the testimony that he provided at the evidentiary hearing (JA 823); and (3) Adorno’s stated reasons for recanting his trial testimony were “as credible as Lespier’s arguments that Adorno repudiated the affidavit to avoid future perjury charges”² (JA 823). In reaching that conclusion, the district court looked far beyond Adorno’s repudiation of the affidavit and, as instructed by *Ortega*, “weigh[ed] all the evidence of perjury before it.” 333 F.3d at 107.³

² The district court’s finding that Adorno’s stated reasons for recanting his trial testimony were “as credible as Lespier’s arguments that Adorno repudiated the affidavit to avoid future perjury charges” mirrors the language used by this Court in *United States v. Troche*, 213 F.2d 401 (2d Cir. 1954). In *Troche*, this Court found no abuse of discretion where the district judge denied a motion for new trial, after a witness repudiated his own recantation of his trial testimony. In reaching that conclusion, this Court found, *inter alia*, that the reasons that the witness “asserted for having signed the recanting affidavit are at least as plausible as those asserted [on the defendant’s behalf] for his signing.” *Id.* at 403-404.

³ In the alternative, this Court should decline to apply
(continued...)

2. The District Court Did Not Err in Finding That the Defendant Had Failed to Prove That the Jury Would Not Have Acquitted the Defendant Without Adorno's Testimony.

The district court did not err in concluding that the defendant had failed to meet his burden of proving that the

³ (...continued)

Ortega. The facts of *Ortega* are distinguishable from those in the present appeal in three significant respects. First, whereas Adorno repudiated his recanting affidavit, the witness in *Ortega* reiterated his recantation during a post-trial evidentiary hearing. That distinction is significant because, as discussed above, a repudiated recantation is not “new evidence” and cannot be the basis for a motion for new trial. See *Lindsey*, 368 F.2d at 636; see also *Awon*, 308 F.3d at 141; *Reyes*, 49 F.3d at 68; *Curry*, 358 F.2d at 919. Second, in *Ortega*, the defendant presented two additional witnesses who corroborated the recanting witness's claim that his trial testimony was false. 333 F.3d at 105. In contrast, defendant Lespier has not put forth any new evidence other than Adorno's repudiated recantation that supports his claim that Adorno's trial testimony false. Third, in *Ortega*, the district court rejected the witness's recanting affidavit based on the finding that the witness had “essentially no credibility, and was ‘a totally compliant witness, who can be led by a questioner virtually wherever the questioner wants him to go.’” 333 F.3d at 107. In contrast, the district court in this case did not reject Adorno's affidavit on grounds that he was “unworthy of belief,” *id.*, but rather, on the proper conclusion that the defendant had failed to meet his burden of proving that Adorno's trial testimony was false. See *DiPaolo*, 835 F.2d at 49.

jury would have acquitted the defendant but for Adorno's testimony. As the district court noted, "Adorno was not the sole or essential source of evidence concerning Lespier's order to kill Moreno." JA 825. Numerous witnesses testified to the defendant's involvement in the death of Carlito Brown. The government was prepared to present its case against Lespier without Adorno's testimony. JA 780. Adorno did not plead guilty nor did he agree to testify against the defendant until less than three weeks prior to Lespier's trial. JA 14.

Jose Reyes testified that in December 1996, he was the Director of Security of the Connecticut Latin Kings and a member of the gang's New Haven chapter. JA 40-41. Reyes stated that around that time, he went to visit the Meriden chapter of the Latin Kings to investigate a rumor that there was a developing conflict between the Latin Kings and a rival gang, Los Solidos. JA 77-78. Reyes discussed that conflict with an individual named Husbando, who was then the President of the Meriden chapter of the Latin Kings. JA 80-83. Reyes testified that two weeks after that meeting with Husbando, he returned to Meriden because he had heard that a member of Los Solidos had been killed by Latin Kings. JA 84. Reyes stated that during that trip, he met with the entire Meriden chapter at the defendant's home. JA 85-87. Reyes testified that while he was berating the Meriden chapter for their involvement in the killing, the defendant jumped up and admitted that he had ordered the killing of the Los Solidos member (Alex Moreno). JA 92-94. The defendant stated that he had overtaken Husbando's position because Husbando had done nothing about the

conflict with Los Solidos. *Id.* Reyes stated that he was impressed by the defendant's conviction and promoted Lesprier to the position of Chief Enforcer. JA 94-96.

Thomas Kerr testified that he met an individual named "Bebe" (identified by other trial witnesses as Luis Adorno) when the two were housed at the Whalley Correctional Center in December 1996. JA 449. Kerr also testified that in the summer of 1998, he met the defendant while incarcerated at the Corrigan Correctional Center. JA 453. Kerr testified that he was in regular contact with the defendant until January 1999, when Kerr was moved out of Corrigan. JA 453, 467. Kerr and the defendant got along well. JA 454. In the course of their friendship, the two discussed the defendant's membership in the Latin Kings and about Adorno. JA 454-59. On one occasion, Kerr testified that the defendant told him, "Them devils want to fry me for sending somebody to do something," and "How could they give [me] the death penalty, I didn't pull the trigger." JA 461-62. Kerr also testified that the defendant said, "I'm telling you, I'll have someone go to Bebe's mother's house and cut his, cut his dick off and stick it in his mouth and let him know, don't choke on your dick." JA 462. Kerr testified further that the defendant told him, "They don't have nothing on me. All they got on me is [hearsay] and if Bebe talks." JA 463.

Annette Boultron testified to facts that not only corroborated Adorno's testimony, but also directly implicated the defendant in the murder. Boultron testified that on December 9, 1996, the defendant drove her to the Mills in a rental car, a white Escort. JA 519-20. While

driving to the Mills, the defendant became upset when he saw a black car which he believed had a Latin King member riding with a member of Los Solidos. JA 520-24. Boultron stated that when the defendant dropped her off at the Mills, she saw him meet with several members of the Latin Kings, including “Ray Dog” and Ricky Adorno. JA 526-27. Boultron went into her sister’s apartment and saw the defendant return approximately 25 minutes later. JA 527-28. However, when the defendant came back, he was no longer in the white Escort, but in a blue truck. JA 529. As the defendant drove her home, she saw police cars and ambulances and the same black car that had made the defendant upset earlier that evening. JA 530-31. Boultron observed that the front doors of the black car were wide open and that glass was shattered with gunshots. JA 531. She saw the white Escort parked in front of her home later that evening. JA 532. Boultron testified that the next day, she drove the white Escort and found therein a pair of gloves and a tee-shirt. JA 536. She removed those items and brought them back to her home. *Id.* When the defendant saw those items later that day, he became upset and told Boultron that the items belonged to “Ray Dog.” JA 537. Boultron and the defendant proceeded to burn the gloves and tee-shirt. JA 537-38.

The testimony of Reyes, Kerr, and Boultron establishes the defendant’s motive and intent in ordering the killing of Alex Moreno. Additionally, their testimony, when considered in conjunction with the testimony of Randall Pollack and Erica Lopez, establishes that the defendant was present at the time Adorno shot and killed Carlito Brown.

For these reasons, Adorno's testimony was merely cumulative, and the district court did not err in holding that the defendant had failed to meet his burden of proving "that the jury probably would have acquitted Lespier in the absence of the false testimony." JA 825.

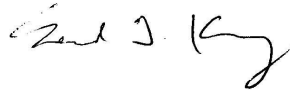
CONCLUSION

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

Dated: March 5, 2007

Respectfully submitted,

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

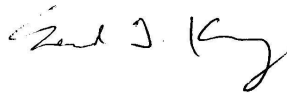
A handwritten signature in black ink, appearing to read "Edward T. Kang". The signature is written in a cursive style with a large, stylized "K" at the end.

EDWARD T. KANG
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 8,523 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

A handwritten signature in black ink, appearing to read "Edward T. Kang". The signature is written in a cursive style with a large, stylized "K" at the end.

EDWARD T. KANG
ASSISTANT U.S. ATTORNEY

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Lespier

Docket Number: 06-4279-cr

I, Louis Bracco, 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 CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 3/5/2007) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: March 5, 2007