08-1655-cr

To Be Argued By:
HAROLD H. CHEN

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 08-1655-cr

UNITED STATES OF AMERICA,
Appellee,

-vs-

CLYDE BAXTER, also known as Chopper,
Defendant-Appellant,

ABDUL BAXTER, also known as Doobie, also known as Chris, JERRY HENDERSON, also known as Mackey, MARC BARRETT,
Defendants.

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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STATEMENT OF JURISDICTION

The district court (Stefan R. Underhill, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. On March 26, 2008, Judge Underhill sentenced the defendant, Clyde Baxter, also known as "Chopper," to 120 months of imprisonment. Joint Appendix ("JA") 6, 422. On April 3, 2008, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA 6. On April 4, 2008, the judgment was entered. JA 6, 428-29. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court correctly instructed the jury – in conformity with this Court's repeated holdings – that the government had to prove only that the defendant knew that he possessed some kind of narcotic substance, as opposed to cocaine base, to convict him of possession with intent to distribute cocaine base.

2. Whether the evidence was sufficient to support the jury's guilty verdict that the defendant knowingly possessed with intent to distribute, and distributed, cocaine base in violation of 21 U.S.C. § 841(a)(1).

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Preliminary Statement

On December 18, 2007, after hearing one day of evidence, a jury returned a guilty verdict against the defendant, Clyde Baxter, also known as "Chopper," for possession with intent to distribute and distribution of cocaine base in violation of 21 U.S.C. § 841(a)(1). The government's witnesses at trial included, among others, the defendant's nephew and co-defendant, Abdul Baxter ("Abdul"), who testified that the defendant had prepared two ounces (i.e., 56 grams) of cocaine base from powder

cocaine and traveled with Abdul to a McDonald's parking lot in Bridgeport on July 6, 2006; an undercover officer who testified that the defendant had entered the undercover vehicle and handed over one ounce (i.e., 28 grams) of cocaine base in exchange for $900; and two other law enforcement officers who supervised the controlled purchase with the undercover officer on July 6, 2006. Video and audio recordings corroborated the testimony of Abdul and the three law enforcement officers. On April 4, 2008, pursuant to 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), the district court sentenced the defendant to a mandatory-minimum sentence of 120 months of incarceration, even though the defendant's advisory Guideline range was 360 months to life imprisonment.

The defendant now appeals, claiming that the district court erred in failing to instruct the jury that the defendant had to know that he possessed and distributed cocaine base and not some other controlled substance. The defendant further claims that in light of this faulty jury instruction, the evidence was insufficient to support his conviction because there was inadequate proof to show that the defendant knowingly possessed or distributed cocaine base. Both claims, however, are meritless. The district court's instruction accurately informed the jury of this Court's established law that in prosecutions brought under 21 U.S.C. § 841(a)(1), the government does not have to prove that the defendant knew the exact nature of the drug in his possession. At any rate, the government's evidence, particularly Abdul's testimony that the defendant had prepared the cocaine base in question from powder

cocaine, was sufficient to prove that the defendant knew both that he possessed a controlled substance and that the substance was specifically cocaine base.

Statement of the Case

On January 18, 2007, a federal grand jury returned a indictment charging the defendant, Abdul, Jerry Henderson, and Marc Barrett with various drug-trafficking offenses. JA 2. Count One charged the defendant with conspiracy to possess with intent to distribute, and to distribute, 50 grams or more of cocaine base in violation of 21 U.S.C. §§ 846 and 841(b)(1)(B); Count Six charged him with possession with intent to distribute, and distribution of, five grams or more of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B), and 18 U.S.C. § 2. JA 8-11.

On February 8, 2007, the defendant was arrested and detained. JA 2. On November 27, 2007, pursuant to 21 U.S.C. §§ 851 and 841(b)(1)(B), the Government filed a Second Offender Information to Establish Prior Conviction. JA 5, 19.

On December 17, 2007, the government presented its case-in-chief solely with respect to Count Six. JA 6. On December 18, 2007, a jury returned a guilty verdict. JA 6, 334. On March 26, 2008, the district court sentenced the defendant to 120 months of imprisonment. JA 6, 422. On April 3, 2008, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). JA 6, 431. On April 4,

2008, the judgment was entered. JA 6, 428-29. He is currently serving his sentence.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

A. The evidence at trial

The evidence is reviewed in the light most favorable to the jury's verdict. From May 2006 to July 2006, brothers Abdul Baxter and Jerry Henderson, also known as "Mackey," distributed significant quantities of cocaine base in Bridgeport, Connecticut. JA 123, 127-32. The government's evidence included the testimony of the two co-case agents of the Drug Enforcement Administration ("DEA"), an undercover police officer working at the DEA's direction (Officer Vidal Gonez), and Abdul, who was serving as a government witness. With Officer Gonez's assistance, the DEA conducted, among others, two controlled purchases of cocaine base from Henderson in the McDonald's restaurant parking lot at North Avenue in Bridgeport. JA 128, 145-47.

On July 5, 2006, Officer Gonez, acting undercover, telephoned Henderson to arrange for a purchase of cocaine base. JA 129, 148-49. Henderson said he was out of town, but that he would put Officer Gonez in contact with his brother, "Chris," to facilitate another drug purchase. JA 131, 148-49. "Chris" was a nickname for Abdul. JA 149, 194-95.

Abdul testified that on July 6, 2006, the defendant was staying with Abdul at the home of Abdul's parents in Bridgeport. JA 195-96. The defendant is Abdul's uncle. JA 198. That morning, Officer Gonez contacted Henderson to inquire about the status of his planned purchase of cocaine base. JA 131, 150. Henderson then called Abdul to tell him that Officer Gonez, who used the alias "Rocco," wanted to purchase an ounce of cocaine base for $900. JA 157, 197. Abdul related this information to the defendant, and the two men went to the apartment of Abdul's girlfriend. JA 199. Abdul testified that the defendant went with him to the apartment because Abdul had only powder cocaine and the defendant "could cook" and "turn the powder into crack [cocaine]." JA 199. Abdul further testified that while they were at his girlfriend's apartment, "[m]y uncle cooked the cocaine up" into crack cocaine. JA 199-200.

Once the defendant had cooked the powder cocaine into cocaine base, Abdul called Officer Gonez. JA 202. They agreed to meet in the parking lot of the same McDonald's restaurant. JA 131, 152, 202. Prior to their arrival, DEA agents set up surveillance in the parking lot. JA 132. Abdul and the defendant drove to the parking lot, where they saw Officer Gonez waiting in the undercover vehicle. JA 203-04. According to Officer Gonez's testimony, which was corroborated by audio and video recordings, the defendant approached Officer Gonez's vehicle. JA 204. An audio recorder in his vehicle captured the following conversation:

Undercover Officer: You with Chris?

C. BAXTER:	Yea.
Undercover Officer:	You with Chris, or where's Chris at?
C. BAXTER:	No, that's my nephew.
Undercover Officer:	He's your nephew. Oh, is that the cat in the car?

* * *

Undercover Officer:	What's up, are we going to do this or what?
C.BAXTER:	Nine fifty and you got it.
Undercover Officer:	Nine fifty. My man told me nine. So all I got is nine on me.
C. BAXTER:	All right, let me talk to him.

GA 1. Abdul testified, among other things, that the defendant walked back to Abdul's car, indicated to Abdul that Officer Gonez "was okay," and then returned to the undercover vehicle "[t]o go and make the transaction." JA 205. Officer Gonez testified that after the defendant entered the BMW, Officer Gonez gave him the $900. JA 155. The defendant counted the money and then removed the baseball cap from his head, revealing the cocaine base wrapped in a clear sandwich bag. JA 155. Abdul testified that the defendant returned to his car and handed Abdul the $900. JA 205-06.

Subsequently, a DEA chemist tested the substance that the defendant had provided to Officer Gonez and determined that it was 26.7 grams of 85% pure cocaine base. JA 179.

B. The court's instructions to the jury

On December 18, 2007, the district court charged the jury on the three elements of possession with intent to distribute cocaine base and the two elements of distribution of cocaine base. JA 272-80. The district court outlined the three elements of possession with intent to distribute cocaine base:

> First, that Baxter possessed a controlled substance;
>
> Second, that Baxter knew he possessed a controlled substance, and;
>
> Third, that Baxter possessed the controlled substance with the intent to distribute it.

JA 272. Next, the district court outlined the two elements of distribution of cocaine base:

> First, that Baxter distributed a controlled substance;
>
> Second, that Baxter distributed the controlled substance knowingly.

JA 272-73. With respect to the knowledge requirement about the type of drug, the district court instructed:

> The second element that the government must prove beyond a reasonable doubt is that Baxter knew that he possessed a controlled substance. To establish this element, the government must prove that Baxter knew that the thing he possessed was a controlled substance and that his possession was not due to carelessness, negligence or mistake. If you find that Baxter did not know that he had a controlled substance in his possession or that he did not know that what he possessed was, in fact, a controlled substance, then you must find Baxter not guilty.
>
> *Although the government must prove that Baxter knew that he possessed a controlled substance, the government does not have to prove that Baxter knew the exact nature of the drugs in his possession. It is enough that the government proves that Baxter knew that he possessed some kind of controlled substance.*

JA 275-76 (emphasis added). Defense counsel objected to the inclusion of this instruction before and after the jury charge was given. JA 245-49, 326-28. In delivering this instruction, the district court noted that "the law is very settled in most circuits and fairly settled in the Second Circuit" that the government is not required to prove that the defendant knew that he was possessing or distributing a specific drug. JA 257.

The district court further instructed that if the government proved the elements for possession with intent to distribute and/or distribution, the jury was required to indicate on the verdict form whether the quantity of cocaine base involved in the defendant's offense was five grams or more. JA 279-80, 341-42.

C. The guilty verdict and sentencing

On December 18, 2007, the jury returned a guilty verdict against the defendant, specifically finding on the verdict form that he possessed with intent to distribute, and distributed, five grams or more of cocaine base. JA 334-35.

On April 4, 2008, the district court sentenced the defendant to a mandatory-minimum sentence of 120 months of incarceration, even though the defendant's advisory Guideline range was 360 months to life imprisonment. JA 409, 428.

SUMMARY OF ARGUMENT

I. The trial court did not err in instructing the jury that the government did not have to prove that the defendant knew he possessed cocaine base, but only that he knowingly possessed some type of illegal drug. This Court has consistently upheld this standard for determining *mens rea* for a possession or distribution offense under § 841. The district court's instruction, as delivered, was entirely consistent with this established standard.

II. The defendant's sufficiency challenge fails as a matter of law because of his flawed view that the district court should have instructed the jury that the defendant had to know he possessed cocaine base, as opposed to a controlled substance generally. Even assuming that the defendant's proposed legal standard were correct and should have been applied, however, the government's evidence was still sufficient to prove that the defendant knowingly violated § 841. Here, the evidence revealed that the defendant prepared the cocaine base, stowed it in a clear plastic bag on top of his head under a baseball cap, and then handed it over to the undercover officer. Viewed in the light most favorable to the government, a reasonable jury could have concluded that the defendant knew that the substance was cocaine base because he had prepared and delivered it with his own hands.

ARGUMENT

I. The district court correctly instructed the jury that the defendant did not need to know the exact nature of the controlled substance which he possessed

A. Governing law and standard of review

This Court "review[s] a claim of error in jury instruction *de novo,* reversing only where, viewing the charge as a whole, there was a prejudicial error." *United States v. Aina-Marshall*, 336 F.3d 167, 170 (2d Cir. 2003). "A jury instruction is erroneous if it misleads the jury as to the correct legal standard or does not adequately inform

the jury on the law." *United States v. Pimentel*, 346 F.3d 285, 301 (2d Cir. 2003) (citation and internal quotation marks omitted). This Court does not review portions of the instructions in isolation, but rather considers 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. Shamsideen*, 511 F.3d 340, 345 (2d Cir. 2008) (quoting *United States v. Weintraub*, 273 F.3d 139, 151 (2d Cir. 2001)).

B. Discussion

The defendant contends that the district court erred by failing to instruct the jury that the government had to prove only that the defendant knew he possessed a controlled substance rather than cocaine base. This argument fails because this Court has consistently held that the government does not have to prove, under 21 U.S.C. § 841, that the defendant knew the exact nature of the drugs in his possession. Rather, the government's burden is limited to proving that the defendant knew that he possessed some kind of narcotic.

Under 21 U.S.C. § 841(a)(1), it is unlawful for "any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." This Court has noted that "the essential elements of the crime of possession [under § 841(a)(1)] are that the defendant: (1) knowingly (2) possessed a controlled substance (3) with a specific intent to distribute

it." *United States v. Gore*, 154 F.3d 34, 45 (2d Cir. 1998) (citing *United States v. Martinez*, 44 F.3d 148, 151 (2d Cir. 1995)).

Here, the defendant contends that the district court's instruction for possession with intent to distribute misinformed the jury about the *mens rea* needed for the offense under § 841(a)(1).[1] In particular, the defendant points to the following as the erroneous instruction:

> Although the government must prove that Baxter knew that he possessed a controlled substance, *the government does not have to prove that Baxter knew the exact nature of the drugs in his possession. It is enough that the government proves that Baxter knew he possessed some kind of controlled substance*.

JA 275-76 (emphasis added).

This instruction, however, accurately captures the Court's longstanding standard for knowingly possessing a controlled substance under § 841(a)(1). More than thirty years ago, in *United States v. Morales*, 577 F.2d 769, 776 (2d Cir. 1978) (internal citations omitted), this Court held

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[1] Although the defendant challenges the instruction on possession with intent to distribute, Def. Brief 19-23, he does not challenge the instruction on distribution. Nor has the defendant contended that the court's instruction was erroneous in any respect other than the knowledge requirement.

that "the law is settled that a defendant need not know the exact nature of a drug in his possession to violate § 841(a)(1); it is sufficient that he be aware that he possesses some controlled substance." *See also United States v. Roberts*, 363 F.3d 118, 123 n.1 (2d Cir. 2004) (quoting *Morales* with respect to knowledge element of § 841(a)(1)); *see also United States v. Collado-Gomez*, 834 F.2d 280, 281 (2d Cir. 1987) (per curiam) (recognizing that "[drug] dealers must bear the risk of knowing what drugs they are dealing [under § 841(a)]").

Similarly, in *United States v. King*, 345 F.3d 149, 152 (2d Cir. 2003) (per curiam), this Court reaffirmed the vitality of the *Morales* rule, finding that it is a "settled principle that a conviction under § 841 rests squarely on the knowing possession of some quantity of illegal drugs (and not the knowledge of type and quantity)." In *King*, this Court denied the appellant's claim that the Supreme Court's ruling in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), required the government to prove beyond a reasonable doubt that defendant knew the type and quantity of narcotics involved in his offense. *King*, 345 F.3d at 152-53. There, King had requested an instruction that would have required the Government to prove that the defendant knew he possessed five or more grams of cocaine base. *Id*. at 150. The trial court denied this request and gave the standard instruction that "the jury need not decide whether the defendant knew the type or quantity of the drug alleged in the indictment." *Id*. at 151 (internal quotation marks omitted). In affirming the trial court, this Court upheld the jury instruction, and applied this rule both to convictions under § 841(a) and to the enhanced

sentencing penalties in § 841(b) for trafficking certain narcotics in specific minimum quantities. *Id.* at 152 (finding that "the language of § 841 clearly conveys Congress's intent to subject drug dealers to the enhancements provided in § 841(b) regardless of their awareness of drug type and quantity").

This Court's *mens rea* standard under § 841 is in accord with other Circuit Courts of Appeals. *See, e.g., United States v. Woods*, 210 F.3d 70, 77 (1st Cir. 2000) (finding that the First Circuit had "previously held that the government need only prove that the defendant had knowledge that he was dealing with a controlled substance, not that he had knowledge of the specific controlled substance"); *United States v. Barbosa*, 271 F.3d 438, 458 (3d Cir. 2001) (finding that the defendant's "awareness that he was trafficking in what he believed was a controlled substance, albeit a different type for which he was arrested, is all that is required to satisfy the *mens rea* portion of the substantive offense" under § 841(b)); *United States v. Garcia*, 252 F.3d 838, 844 (6th Cir. 2001) (rejecting appellant's assertion that the government must prove *mens rea* as to the type and quantity of the drugs); *United States v. Carrera*, 259 F.3d 818, 830 (7th Cir. 2001) ("A defendant may be convicted of a violation of 21 U.S.C. § 846 without knowing the exact type of drug involved."); *United States v. Sheppard*, 219 F.3d 766, 769 (8th Cir. 2000) ("To convict a defendant of violating 21 U.S.C. § 841(a), or of conspiring to violate § 841(a) in violation of 21 U.S.C. § 846, the government is not required to prove that the defendant actually knew the exact nature of the substance with which he was dealing.")

(citations and internal quotation marks omitted); *United States v. Sua*, 307 F.3d 1150, 1155 (9th Cir. 2002) (reaffirming the "long established rule that the government need not prove that the defendant knew the *type* and *amount* of a controlled substance that he imported or possessed"); *United States v. Leavitt*, 878 F.2d 1329, 1337 (11th Cir. 1989) ("[T]he government need not prove that Coronel actually knew that the substance involved was methaqualone as long as he knew he was importing a controlled substance.").

Here, the challenged instruction given by the district court adequately informed and did not mislead the jury about the established rule of law articulated in *Morales*, 577 F.2d at 776, and later amplified in *King*, 345 F.3d at 152-53. In every respect, the district court's instruction was consistent with *Morales* and *King*. Nevertheless, the defendant contends that the disparity in the Sentencing Guidelines for offenses involving cocaine base versus powder cocaine imposes a heightened burden on the government to prove that a defendant knew he was selling cocaine base. As his authority for this novel proposition, the defendant cites *Kimbrough v. United States*, 128 S. Ct. 558 (2007), and *United States v. Regalado*, 518 F.3d 143, 148 (2d Cir. 2008) (per curiam). These cases, however, concern the district court's discretion to rely on policy disagreements with the Sentencing Commission, particularly regarding the crack Guidelines, in imposing non-Guideline sentences. *See Kimbrough*, 128 S. Ct. at 575; *Regalado*, 518 F.3d at 148. Neither *Kimbrough* nor *Regalado* involved a challenge to a court's jury instructions or the elements of § 841. Consequently, these

cases, albeit significant in the sentencing arena, do not disturb this Court's established case law regarding the elements of a violation of § 841. *See Veltri v. Bldg. Serv. 32B-J Pension Fund,* 393 F.3d 318, 327 (2d Cir. 2004) ("[O]ne panel of this Court cannot overrule a prior decision of another panel unless there has been an intervening Supreme Court decision that casts doubt on our controlling precedent.") (internal quotation marks omitted).

This Court's rule in *Morales* and *King* for the knowledge required to prove a violation of § 841 is wholly consistent with other federal crimes in which the government's burden to prove an element of the offense is not linked, explicitly or implicitly, to the defendant's *mens rea*. For example, the federal felon-in-possession statute, 18 U.S.C. § 922(g)(1), forbids a person who has been previously convicted of a felony offense to "possess in or affecting commerce, any firearm or ammunition," which this Court has construed to require nothing more than "a showing that the possessed firearm has previously . . . travelled in interstate commerce" because "[a] defendant's knowledge or ignorance of the interstate nexus is irrelevant." *United States v. Kirsh*, 54 F.3d 1062, 1071 (2d Cir. 1995). In the same vein, many federal criminal statutes provide for heightened penalties based on elements of the offense that are not tied to a defendant's *mens rea*. For instance, 21 U.S.C. § 841(b)(1) itself requires more severe penalties when death or serious bodily injury results from use of an illegal drug. *See*, *e.g.*, 21 U.S.C. § 841(b)(1)(A) ("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*") (emphasis added). It is Congress's legislative prerogative to link punishment, at least in part, to the harms that are perceived to flow from a defendant's conduct, regardless of whether the defendant intended the particular extent of those harms. Thus, this Court's rule that a defendant need not know what drug he trafficked under § 841 – so long as he knew that he was trafficking in some kind of controlled substance – is neither remarkable nor without precedent.

In sum, the district court's jury instruction on the knowledge requirement for possessing with intent to distribute cocaine base was faithful to the established law of this Court. The court did not err by instructing the jury that the government had to prove only that the defendant knew he possessed a controlled substance rather than cocaine base.

II. The evidence was sufficient to prove that the defendant possessed with intent to distribute, and distributed, cocaine base.

A. Governing law and standard of review

A defendant challenging a conviction on sufficiency grounds "bears a heavy burden." *United States v. Masotto*, 73 F.3d 1233, 1241 (2d Cir. 1996). This Court considers the evidence presented at trial in the light most favorable to the government, and "'must uphold the jury's verdict if [it] find[s] that *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Hardwick,* 523 F.3d 94, 100 (2d Cir. 2008) (quoting *United States v. Lewter*, 402 F.3d 319, 321 (2d Cir. 2005)) (remanding case for retrial when improperly admitted evidence was crucial to jury reaching a verdict); *see also United States v. Zhou*, 428 F.3d 361, 369 (2d Cir. 2005) ("The evidence presented at trial should be viewed in the light most favorable to the Government, crediting every inference that the jury might have drawn in favor of the Government.") (citation and internal quotation marks omitted). The task of choosing among competing, permissible inferences is for the fact-finder, not the reviewing court. *See United States v. Reifler*, 446 F.3d 65, 94-95 (2d Cir. 2006) (denying appellants' claims of insufficient evidence leading to wire fraud and racketeering convictions); *United States v. Jones*, 482 F.3d 60, 68 (2d Cir. 2006) (rejecting defendant's sufficiency challenges to RICO and murder conspiracy conviction), *cert. denied,* 127 S. Ct. 1306 (2007); *United States v. Snow*, 462 F.3d 55, 61-62 (2d Cir. 2006), *cert. denied*, 127

S. Ct. 1022 (2007) (upholding jury's verdict where sufficient evidence showed defendant's possession of firearm was "in furtherance" of drug crime).

In addition, the testimony of a single accomplice is sufficient to sustain a conviction so long as the "testimony is not incredible on its face and is capable of establishing guilt beyond a reasonable doubt." *United States v. Florez*, 447 F.3d 145, 155 (2d Cir.) (quoting *United States v. Parker*, 903 F.2d 91, 97 (2d Cir. 1990)) (holding that challenges to accomplices' credibility based on plea agreements went towards weight, rather than sufficiency, of their testimony), *cert. denied*, 127 S. Ct. 600 (2006); *United States v. Hamilton*, 334 F.3d 170, 179 (2d Cir. 2003) ("[W]here there are conflicts in the testimony, we must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses . . . ."). "[A]ny lack of corroboration goes only to the weight of the evidence, not to its sufficiency," and "[t]he weight of the evidence is a matter for argument to the jury, not a ground for reversal on appeal." *Id.*; *see also United States v. Roman*, 870 F.2d 65, 71 (2d Cir. 1989) (holding that witness testimony corroborated by circumstantial evidence, surveillance, and presence of drugs provided sufficient evidence for jury to convict for distribution of heroin). As this Court has stated, "[t]he ultimate question is not whether *we believe* the evidence adduced at trial established defendant's guilt beyond a reasonable doubt, but whether *any rational trier of fact could so find*." *United States v. Payton*, 159 F.3d 49, 56 (2d Cir. 1998) (emphasis in original) (citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

B. Discussion

The defendant's argument on the sufficiency of the evidence is simply a variation on his challenge to the jury instruction on whether the defendant had to know that he was possessing cocaine base, as opposed to a controlled substance generally, to be convicted under § 841. More specifically, the defendant contends that the evidence "fails to establish beyond a reasonable doubt that Clyde Baxter knew that the substance that he possessed with the intent to distribute and distributed was five or more grams of crack cocaine." Def. Brief 13. As discussed *supra*, this argument is foreclosed as a matter of law because this Court imposes no such requirement that an individual has to know the type of drug he is possessing or distributing under § 841. *See King*, 345 F.3d at 152; *Morales*, 577 F.2d at 776.

But even if the Court were to indulge the defendant's proposed legal standard, the government's evidence would still be sufficient to prove that the defendant knew he possessed and distributed cocaine base. First, Abdul testified that while he and the defendant were at Abdul's girlfriend's house, the defendant himself "cooked the cocaine up" into crack. JA 199-200. Abdul further testified that they then packaged the cocaine base in clear plastic bags, drove to the parking lot, and then the defendant delivered it to Officer Gonez in the undercover vehicle. JA 201-03. Second, the jury heard testimony from Officer Gonez that the drugs were packaged in a clear plastic bag, stowed on the defendant's head, and handed over by the defendant in a baseball cap when inside the undercover

vehicle. JA 155. In exchange for handing over the drugs, the defendant received from Officer Gonez $900, which the defendant personally counted and handed over to Abdul. JA 155, 205-06. Viewed in the light most favorable to the government, a reasonable jury could have concluded that the defendant knew what he possessed and distributed was cocaine base because he manufactured and delivered it with his own hands. *See Roman*, 870 F.2d at 71 (holding that uncorroborated witness testimony, surveillance, and presence of drugs provided sufficient evidence for jury to convict for distribution of heroin).

Although the defendant contends that no reasonable jury would have believed Abdul's testimony, the testimony of a single accomplice is sufficient to sustain a conviction so long as "the testimony is not incredible on its face and is capable of establishing guilt beyond a reasonable doubt." *Florez*, 447 F.3d at 155. Moreover, it is the jury's province to resolve the "weight of the evidence and the credibility of the witnesses." *Hamilton*, 334 F.3d at 179. Here, while Abdul was subjected to rigorous cross-examination about his potential bias regarding his cooperation with the government, JA 211-16, the jury found him to be credible when viewed in conjunction with other evidence that corroborated Abdul's testimony, including the testimony of the undercover officer and other law enforcement personnel as well as audio and video recordings. Thus, even if the Court were to abandon its established rule from *King* and *Morales* and to require actual knowledge of the narcotic trafficked, the record reveals sufficient evidence from which a jury could

reasonably conclude that the defendant possessed and distributed cocaine base.

CONCLUSION

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

Dated: September 10, 2008

Respectfully submitted,

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ADDENDUM

§ 841. Prohibited acts A

(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--
(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;
(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--
(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
(IV) any compound, mixture, or preparation which

contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;
(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);
(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);
(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;
(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or
(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

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.

(B) In the case of a violation of subsection (a) of this section involving--
(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years 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 $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 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 $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 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.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall

not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 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 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year 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 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater

of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such persons shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed--
(A) the amount authorized in accordance with this section;
(B) the amount authorized in accordance with the provisions of Title 18;
(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use--
(A) creates a serious hazard to humans, wildlife, or domestic animals,
(B) degrades or harms the environment or natural resources, or
(C) pollutes an aquifer, spring, stream, river, or body of water, shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) Penalties for distribution.

(A) In general. Whoever, with intent to commit a crime of violence, as defined in section 16 of Title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with Title 18.

(B) Definitions. For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.