02-1544-cr(L)

To be Argued By:
ALEX HERNANDEZ

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 02-1544-cr(L)
02-1594-cr(CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

FRANK ESTRADA, a/k/a "Frankie Estrada," a/k/a "The Terminator," a/k/a "Big Dog," a/k/a "Mustard"; EDWARD ESTRADA, a/k/a "French Fry," a/k/a "Fry";
(for continuation of Caption, See Inside Cover)

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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ISAIAS SOLER, a/k/a “Eso,” a/k/a “Dog”; NELSON CARRASQUILLO; WILLIAM RODRIGUEZ, a/k/a “Billy Rodriguez,” a/k/a “William Gomez,” a/k/a “Billy Gomez,” a/k/a “Billy the Kid”; FELIX DeJESUS, a/k/a “Dino”; CHARLES DeJESUS, a/k/a “Chino”; EDDIE LAWHORN, a/k/a “Fat Boy”; YAMARR SHIPMAN, a/k/a “Country”; MICHAEL HILLIARD, a/k/a “Mizzy”; PABLITO COTTO; ROSARIO COTTO, a/k/a “Sato”; BENITO ROSARIO; RICARDO ROSARIO, a/k/a “Q”;; KELVIN VEREEN, a/k/a “Nino”; ; FELIPE SANTANA, a/k/a “Omar Soto”; TAMARIUS MANER, a/k/a “Trigger”; GLORIA VARGAS; HECTOR CRUZ, a/k/a “Casper”; HECTOR GONZALEZ, a/k/a “June Bug”; ENRIQUE MARTINEZ, a/k/a “Ricky Zapata”; and CARMEN COTTO, a/k/a “CC”

Defendants,

DANIEL HERREDIA, a/k/a “D-Nice,” and MAKENE JACOBS, a/k/a Madee”

Defendants-Appellants.

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STATEMENT OF JURISDICTION

The district court (Stefan R. Underhill, J.) had subject matter jurisdiction over these criminal proceedings under 18 U.S.C. § 3231. The defendant-appellants were convicted after trial by jury. Defendant Daniel Herredia was sentenced on September 6, 2002, and he filed a timely notice of appeal on September 10, 2002. Defendant Makene Jacobs was sentenced on September 26, 2002, and he filed a timely notice of appeal on October 1, 2002. *See* Fed. R. App. P. 4(b). This Court has appellate jurisdiction over the district court's entry of final judgment under 28 U.S.C. § 1291 and over the defendants' sentencing challenges under 18 U.S.C. § 3742(a).

ISSUES PRESENTED FOR REVIEW

Claims of Daniel Herredia

I. When the defendant's prior convictions subject him to a mandatory minimum term of life imprisonment, do *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Harris v. United States*, 536 U.S. 545 (2002) require the government to charge those convictions and prove them to a jury beyond a reasonable doubt?

II. When the district court found that the defendant had two prior "felony drug offenses" that qualified him for a mandatory minimum term of life imprisonment under 21 U.S.C. § 841(b)(1)(A), did the district court properly decline to depart downward from this statutory mandatory minimum term?

III. Whether the defendant was properly joined for trial with two alleged co-conspirators and whether the district court abused its discretion when it denied the defendant's motion for severance?

IV. Whether the district court abused its discretion when it precluded a defense witness from offering his subjective impression of another person's reaction when the witness mentioned the name of a government witness?

Claims of Makene Jacobs

I. Whether the defendant received effective assistance of trial counsel?

II. Whether a court has authority to grant a new trial motion when the defendant did not move for a new trial within the seven-day time period set out in Federal Rule of Criminal Procedure 33?

II. Whether a government witness committed perjury and government counsel engaged in prosecutorial misconduct?

III. Whether two convictions used to enhance the defendant's sentence under 21 U.S.C. § 841(b)(1)(A) were "prior" convictions within the meaning of that statute, and if so, whether the statute is unconstitutionally vague?

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Defendants-Appellants.

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

After a ten-day trial, a jury found defendants Daniel Herredia and Makene Jacobs guilty of conspiring to possess with intent to distribute and distributing 1,000 grams or more of heroin in connection with their participation in the Estrada narcotics trafficking enterprise,

an enterprise responsible for the distribution of wholesale quantities of heroin and crack cocaine in Connecticut. Because both defendants had at least two prior convictions for felony drug offenses, the district court sentenced them to mandatory terms of life imprisonment.

Defendant Herredia now appeals his conviction and sentence, challenging the sentencing judge's consideration of his prior convictions in assessing a term of life imprisonment, the district court's failure to depart below the statutorily mandated life sentence, the denial of his motion to sever, and the court's exclusion of certain witness testimony. Defendant Jacobs also appeals his conviction and sentence, claiming that he was denied the effective assistance of counsel, that he was denied a fair trial due to the alleged perjury of a government witness and the alleged misconduct of the prosecutor, and that he was improperly sentenced to a term of life imprisonment. Because all of these challenges are meritless, this Court should affirm the defendants' convictions and sentences.

Statement of the Case

On June 20, 2001, a federal grand jury in Connecticut returned a Third Superseding Indictment against numerous defendants alleged to be involved in drug trafficking activity primarily in and around Bridgeport, Connecticut, including among others the defendant-appellants Daniel Herredia and Makene Jacobs. Count Twelve of the Third Superseding Indictment charged Herredia and Jacobs with unlawfully conspiring to possess with intent to distribute 1,000 grams or more of heroin, in violation of 21 U.S.C.

§ 846. *See* Appendix of Defendant Makene Jacobs, pp. 53-54.[1]

The district court (Stefan R. Underhill, J.) severed the trials of the defendants and scheduled the trial of Herredia, Jacobs, and one other co-defendant (Felipe Santana) for jury selection on November 8, 2001. On November 13, 2001, the government began presentation of its trial evidence, and the trial continued to November 30, when the district court gave final instructions to the jury. A2525-2594. On November 30, 2001, the jury rendered verdicts of guilty on Count Twelve against Herredia and Jacobs. GA 91-92, A2604-2606.

On September 6, 2002, the district court sentenced Herredia to a lifetime term of imprisonment. SA294, GA 95. Judgment was entered on September 10, 2002, and Herredia filed a timely notice of appeal that same day. SA46. On September 26, 2002, the district court sentenced Jacobs to a lifetime term of imprisonment. A2652-2724. Judgment was entered on September 26, 2002, and Jacobs filed a timely notice of appeal on October 1, 2002. A2723-25.

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[1] Hereinafter, all references to the Appendix of Defendant Jacobs are designated "A" followed by the relevant page number(s). References to the Supplemental Appendix of defendant Herredia are designated "SA," references to the Special Appendix of Defendant Makene Jacobs are designated "SPA," and references to the Government's Supplemental Appendix are designated "GA."

On April 30, 2003, this Court granted Jacobs' motion for a limited remand to the district court to conduct an evidentiary hearing and to make findings concerning his claim of ineffective assistance of trial counsel. On June 20 and 23, 2003, the district court held an evidentiary hearing on Jacobs' ineffective assistance of counsel claim. A2793-3032. On June 27, 2003, the court issued its supplemental findings following remand, concluding that Jacobs had not been denied the effective assistance of counsel at trial. GA37-49.

Both defendants are serving their federal sentences.

STATEMENT OF FACTS

At trial, the government's evidence against Herredia and Jacobs rested principally on the testimony of numerous cooperating witnesses concerning both their drug dealing activities generally and their specific dealings with the defendants. In addition, numerous law enforcement officers testified about their physical surveillance of the defendants and others, and the seizure of physical evidence, while lab personnel testified concerning their testing of substances seized for the presence of heroin.

Part 1 below summarizes the evidence that showed the large-scale operation and activities of the Frank Estrada drug trafficking organization. The summary is brief because, as is common in this type of case, the defendants did not generally dispute the government's evidence of the existence of a large conspiracy to distribute heroin. Parts 2 and 3 review the specific evidence linking each of the

defendants to the heroin trafficking conspiracy and detailing their participation in it. Part 4 summarizes the post-trial proceedings.

1. General Evidence of Estrada Heroin Distribution Conspiracy

For much of the 1990s and into the year 2000, Frank Estrada (also known as "Big Dog" and the "Terminator") presided over a massive drug dealing organization. The Estrada organization operated primarily in the P.T. Barnum housing project in Bridgeport, but had offshoots elsewhere in Bridgeport, New Haven, and Meriden, Connecticut. A413, 719, 739, 759, 764, 1033, 1181, 1233-34.

Within P.T. Barnum, the Estrada organization was one of the principal drug trafficking organizations doing business there, with each organization operating in distinct areas of the project where other dealers or organizations were not permitted to infringe. A981, 1164-66, 1201, 1912-14.[2] Members of the organization principally sold drugs between Buildings #4 and #5 and by the mailboxes

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[2] The other principal drug trafficking organization in P.T. Barnum was run principally by members of the Jones family, including Luke, Lance, Lonnie, and Lyle Jones. *See generally United States v. Lewis*, 386 F.3d 475 (2d Cir. 2004), *op. supplemented by United States v. Lewis*, 111 Fed. Appx. 52 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 1355 (2005); *United States v. Jones*, 381 F.3d 114 (2d Cir. 2004), *op. supplemented by United States v. Jones*, 108 Fed. Appx. 19 (2d Cir. 2004), *cert. denied*, 125 S. Ct. 916 (2005).

between Buildings #11 and #12. A1300. The drugs sold at P.T. Barnum included heroin and crack cocaine, but not powder cocaine. A1977. By the latter part of the 1990s, "[n]obody sold powder cocaine in PT [Barnum] housing project." A1364.

To operate his drug trafficking organization, Estrada relied on numerous "lieutenants" who, in turn, supervised "runners" or street-level dealers within the housing project. A785. Estrada's principal lieutenants included Edward "French Fry" Estrada, William "Billy the Kid" Rodriguez, Isaias "Eso" Soler,[3] Hector "Junebug" Gonzalez,[4] Michael "Mizzy" Hilliard,[5] Charles "Chino" DeJesus, Felix "Dino" DeJesus, and Jermaine "Fats" Jenkins. A1161, 1170, 1241-43, 1252.

Defendant Jacobs worked primarily as a street-level dealer within the housing project, but later supervised other street-level dealers. A2012. Defendant Herredia received large quantities of prepackaged heroin from Estrada which he distributed through an organization in New Haven, Connecticut that he organized and supervised. A427, 448-52, 764.

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[3] *See United States v. Soler*, 124 Fed. Appx. 62 (2d Cir. 2005), *petition for cert. filed*, 73 U.S.L.W. 3720 (U.S. June 2, 2005) (No. 04-1628).

[4] *See United States v. Estrada*, 188 F.Supp. 2d 207 (D. Conn. 2002), *aff'd*, 320 F.3d 173 (2d Cir. 2003).

[5] *See United States v. Estrada*, 116 Fed. Appx. 325 (2d Cir. 2004).

The lieutenants obtained prepackaged heroin from Estrada which they distributed to street-level dealers for retail sale and then remitted proceeds from those sales to Estrada. A785. An individual bag of heroin ordinarily sold on the street for $10. The baggies were collected in bundles of ten, and ten bundles made up a "brick" or "G pack" of heroin, worth $1,000 for street-level sale. A785-86, 1159, 1350-51, 1640. For the sale of a brick, the "runner" would generally keep from $100-300, and the "lieutenant" would keep $100-200, with the remainder of the proceeds going back to Frank Estrada. A787-88, 1160, 1204-05, 1583. One of Estrada's lieutenants testified to having six to ten dealers working for him at P.T. Barnum and selling up to $200-300,000 per week of heroin. A1287-88.

The heroin sold by the Estrada organization was prepared for sale at "bagging sessions." During these sessions, uncut heroin obtained by Estrada was cut, ground into powder, spooned into glassine "fold" baggies, taped for sale, and then sometimes stamped with Estrada's distinct brand names, such as "Hawaiian Punch," "Judgment Day," "No Way Out," and "Set It Off." *See, e.g.*, A600-601, 1008, 1186-1190, 1288-89, 1573-75, 1950-55; *see also* GA50-90.[5] More than a kilogram of heroin was bagged during the course of a typical bagging session, enough to fill a "small garbage bag" and up to 200 bricks or $200,000 in value. A994, 1188, 1598-99, 1960.

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[5] The appendix prepared by Jacobs omits a portion of Jose Lugo's testimony. *See* A792. The omitted portion is reproduced in the Government's Appendix. GA50-90.

Estrada carried a gun and protected his drug dealing operation with firearms. A947-48, 989. Other members of the organization also carried guns, and guns were ordinarily present during bagging sessions. *See, e.g.*, A1163, 1317-18, 1610-11, 1955-59.

Estrada also owned two *bodegas* (small grocery stores) and a nightclub. He often received money from drug sales at these locations, and he used the stores to launder his drug money. A1289-93. One of his lieutenants, Jermaine "Fats" Jenkins, testified that he delivered up to $50,000 of drug proceeds at one of Estrada's stores and retrieved heroin from the club. A1294, 1310.

Estrada operated another retail heroin organization near the corner of Noble and Ogden Avenues on the east side of Bridgeport. Nelson Carrasquillo, Estrada's chief lieutenant at the Noble and Ogden operation, testified that during the summer of 2000, he would meet Estrada every two days at the club to deliver narcotics proceeds of approximately $32,500 from the sale of fifty bricks of heroin. A1612-13, 1627-28.

In addition to cooperating witness testimony, several law enforcement officials testified concerning seizures of heroin, firearms, and other incriminating evidence from co-conspirators involved in the Estrada organization. The substance of their respective testimony is summarized below.

A. In February 1996, Bridgeport Police Sergeant John Cummings observed William Rodriguez and Eddie Mercado engaged in fourteen hand-to-hand drug sales at

the P.T. Barnum project. A340-47. The police arrested Rodriguez and Mercado and recovered more than 200 bags of crack cocaine and approximately $2,700 cash from Mercado's person. The police also executed a search of a car in connection with this arrest and found approximately 200 small bags of crack, 100 glassine folds of heroin, and a Tech 9 automatic pistol. A347-51.

Cummings was assigned to the housing project in the year 2000, and he again observed hand-to-hand drug transactions. A352-53. Although he did not identify the individuals involved in the transactions, during the four months he was assigned to the housing project, he regularly saw Makene Jacobs, as well as Frankie Estrada, Edward Estrada, Jermaine Jenkins, Yamaar Shipman, Glenda Jimenez, and Viviana Jimenez, and would often see them congregating in a large group. A354-64.

B. Bridgeport Police Sergeant Juan Gonzalez arrested Felix DeJesus on February 5, 1997 for an outstanding warrant unrelated to the instant investigation, at which time he seized a gun and three bags containing 68 folds of "Set It Off" heroin, a brand name distributed by the Estrada organization. A589-96, 601, 1758-59.

C. On June 17, 1996, Bridgeport Police Detective Thomas Russell (retired) searched an apartment in the housing project at which time he seized 220 glassine envelopes containing heroin, drug paraphernalia, a smoke grenade, two guns, and Frank Estrada's fingerprint inside the drawer of a safe where guns were stored. A636-669.

D. Bridgeport Police Detective Richard DeRiso (retired), interviewed William "Billy the Kid" Rodriguez on or about March 7, 1997. The information which Rodriguez provided resulted in the issuance of a Connecticut Superior Court search and seizure warrant for an apartment at 80 Granfield Avenue in Bridgeport. In that apartment, the police found evidence of a massive "bagging" operation, including boxes containing hundreds of empty glassine envelopes commonly used to package narcotics, two handguns, small amounts of crack cocaine and heroin, four coffee grinders used to grind heroin, and packaging materials, stamps, and boxes marked "Set It Off," "Ransom," and "Monkey B." A674-99.

2. Evidence Specific to Daniel Herredia

Jose Reyes testified pursuant to a cooperation agreement with the government. Reyes, a drug dealing member of the violent Latin Kings criminal organization, knew Herredia from growing up together in New Haven. A400. He testified about conversations he had with Herredia and about his observations of Herredia's running a drug trafficking operation for Estrada in New Haven, Connecticut.

In approximately 1993 or 1994, Reyes was in prison with Estrada and William "Billy the Kid" Rodriguez, when Herredia, who was also then in prison, introduced him to Estrada. A419, 526. Estrada and Herredia were making money in prison by selling heroin, and Herredia said he planned to sell heroin for Estrada after he got out of jail. A417, 419, 422-23. While in prison, Estrada, Rodriguez, and Herredia discussed "open[ing] a drug spot"

at the P.T. Barnum project. A421. Toward the end of 1995 or beginning of 1996, Herredia again discussed going to work for Estrada after he got out of prison. A426-27, 531.

In April 1996, Reyes was released from prison and became "Director of Security" for the Latin Kings in New Haven. A428-29, 481. In the meantime, Estrada and Rodriguez were distributing drugs in Bridgeport, and Herredia had decided to work as a lieutenant for Estrada distributing drugs in New Haven. He had at least two people working for him (including "Ernesto") doing street-level sales. A429-31, 446-51, 465-66. Herredia worked one drug block area for about a month then moved to a location on Howard Avenue in New Haven. A450-51. Herredia boasted to Reyes that Estrada was "bagging up" four kilograms of heroin per week. A459. After Herredia had switched over to Howard Avenue, Reyes approached him for bond money to secure the release from jail of Reyes' Latin Kings boss. Herredia declined, stating that all of his money was wrapped up in heroin he had obtained from Estrada. A454-55.

Another cooperating witness, Jose Lugo, directly implicated Herredia in the Estrada heroin conspiracy. Lugo met Frank Estrada and his brother, Edward Estrada, while in prison from 1990 to 1994. A719, 842-45. Lugo helped Frank Estrada smuggle heroin into prison during the course of numerous contact visits with Estrada's sister. A722-732. Estrada told Lugo of his plans to sell drugs in P.T. Barnum after he got out of jail. A732-33. In 1995 or 1996, after Estrada was released from prison, Lugo learned

from Estrada's sister that he had resumed selling heroin and crack cocaine in the housing project. A739-40.

In early 1997, Lugo was released from jail, and he called Estrada at his Bridgeport store, "La Primera Market," which Estrada used to launder drug money. A743-45, 825-26. Estrada met up with Lugo and bought him new clothes. A746-47. Estrada brought Lugo to P.T. Barnum where Estrada introduced him to numerous members of his drug trafficking organization and explained how the organization operated. A748-59. Lugo stayed involved with Estrada for several months until October 1997 when he stopped selling drugs. A967.

According to Lugo, Estrada initially suggested that Lugo (who was from New Haven) work for Herredia distributing drugs in New Haven. A764-65. Instead, Lugo ended up moving into an apartment with Estrada at P.T. Barnum which served as the organization's headquarters. Thus, Lugo entered the inner circle of Estrada "lieutenants" and witnessed as Estrada regularly received up to $30,000 from his lieutenants. A768-72. Once the money was counted, Estrada would direct Hector "Junebug" Gonzalez to provide the lieutenants with more narcotics, including amounts of up to $30,000 worth of heroin at one time. A773-74, 1009.

Lugo observed that Herredia came to P.T. Barnum approximately once a week in a gray Nissan Maxima and would deliver between $20-25,000 in United States currency and would receive up to $30-40,000 of heroin from Estrada. A774-76. Lugo saw Herredia with large amounts of cash and large amounts of drugs, and was

aware that Herredia was selling Estrada's heroin on Howard Avenue in New Haven. A900-01.

Another cooperating witness, Ernesto Rodriguez, began distributing heroin directly under Herredia's supervision for approximately four months after Rodriguez was released from prison in February 1997. A1065, 1099. He described Herredia's operation, which was based out of Herredia's sister's house on Howard Avenue in New Haven. A1040-41. Rodriguez usually received packets of heroin to sell from Herredia's sister, at Herredia's direction, including packages stamped "Monkey Business." A1042-48. Rodriguez sold from 15 to 30 bundles of heroin per day. A1053. While Rodriguez and two other workers sold heroin, Herredia would generally drive around the block in his gray Nissan Maxima supervising the activity. A1050-51. Herredia had a .45 caliber semi-automatic firearm, and another gun was kept in a safe in the sister's house. A1054. Rodriguez twice saw Estrada arrive at the Howard Avenue location to speak with Herredia and to deliver heroin. A1058-63. Herredia went to Bridgeport every four to seven days to pick up drugs from and deliver money to Estrada. A1066-67.

Another cooperating witness, Ismael Padilla, testified that he sold heroin at P.T. Barnum for the Estrada organization from 1996 to 1997 under the direction of William "Billy the Kid" Rodriguez and Hector "Junebug" Gonzalez. A1158-61, 1169. After going to jail for a period of time, he returned in December 1998. From that time until his re-arrest in July 1999, he was a lieutenant in

charge of supplying runners with heroin and collecting their money. A1169-73, 1190.

Padilla testified that he once saw Herredia come out of a car with Estrada outside Building #4 at P.T. Barnum in 1996 or 1997. A1167. (To the same effect, Jermaine Jenkins testified that he once saw Herredia with Estrada in a gray Nissan Maxima when they rode together one afternoon at P.T. Barnum. A1325-26.) On another occasion in 1998 or 1999, Padilla went with his cousin, Charles DeJesus, to deliver drugs to Herredia at Howard Avenue in New Haven. A1182-83.

Special Agent R. Hamilton Jarvis of the Federal Bureau of Investigation arrested Herredia on December 7, 2000, following the grand jury's return of the first superseding indictment in this case. Agent Jarvis and other law enforcement officials found Herredia at his girlfriend's apartment in New Haven and placed him under arrest. They obtained consent from the girlfriend to search the apartment where they found a cardboard box including drug packaging materials, small plastic baggies, a small plastic spoon, and a stamp with a picture of a devil and the word "Satan" on it. A2052-61; Govt. Exh. 237.

3. Evidence Specific to Makene Jacobs

A cooperating witness, Jermaine "Fats" Jenkins, worked as a lieutenant for Estrada in P.T. Barnum from 1997 to 1999. A1288. At that time defendant Jacobs supervised Glenda and Viviana Jimenez who distributed the organization's heroin in an area near the mailboxes outside Building #12. A1301-04. Jacobs would stand

outside "advertising" or "yelling out the name" of the organization's "Hawaiian Punch" brand of heroin. Jacobs also directed buyers toward Glenda Jimenez who would distribute the organization's heroin to them. A1302, 1434-35. On a few occasions, he saw Jacobs give a "G pack" ("brick" of 100 bags) to Viviana Jimenez, and sometimes he gave her "slabs" -- prepackaged plastic bags containing crack cocaine -- to sell. Five or six times Jenkins saw Viviana Jimenez give Jacobs money from drug sales. A1304.

After Jenkins had a personal falling out with Estrada in 1999, he continued to deal Estrada's drugs. However, instead of receiving the narcotics from Estrada, he would obtain it from Jacobs and Charles DeJesus. A1333. On ten or fifteen occasions, Jacobs gave Jenkins a "G pack" of "Hawaiian Punch" brand heroin to sell. A1339.

Viviana Jimenez corroborated Jenkins' testimony and related her heroin dealing activities for the Estrada organization under the direction of Jacobs. Beginning in the summer of 1998, she dealt the "Hawaiian Punch" brand of heroin in the housing project. A1909-11. Jacobs also made street-level sales of "Hawaiian Punch" brand heroin issued by Estrada and given to them by Estrada lieutenant Isaias "Eso" Soler. A1932-34.

Later, Jacobs supervised Viviana Jimenez's sale of heroin and acted as her lieutenant. A2012. In the summer of 2000, Jacobs started supplying the heroin sold by Viviana Jimenez, and sometimes gave Jimenez's boyfriend, Lorenzo Catlett, up to ten bricks at a time to sell. A1935-40. Jimenez knew that Jacobs was also

selling "slabs" of crack cocaine, but she did not distribute crack cocaine for him. A1940-41.

Jimenez recounted her August 2000 arrest by the Bridgeport Police Department while she was selling "Hawaiian Punch" heroin under Jacobs' direction. A1943-45. Jacobs and others were also arrested at the same time, and she recalled Jacobs urging her -- while they were together in handcuffs -- not to cooperate with the police. A1945-47. Jacobs ultimately bonded her out of jail and she returned to selling heroin approximately one month later. A1947-48.

Jermaine Jenkins and Viviana Jimenez's testimony was corroborated with videotape and the testimony of several law enforcement officers. On December 8, 1999, Detective Kevin Connelly concealed himself in an abandoned apartment in Building #12 of P.T. Barnum and made a surveillance videotape. Govt. Exh. 417; A1880. Viviana Jimenez identified Isaias Soler, herself, and others in the video selling "Hawaiian Punch" heroin on that day. A1972-73.

Several months later, on March 29, 2000, Sergeant Juan Gonzalez of the Bridgeport Police Department conducted surveillance of Jacobs outside Building #12 where he saw four or five people give Jacobs money in return for small objects -- transactions which appeared to be consistent with the sale of narcotics. During those observations, he heard the brand name "Hawaiian Punch" heroin being advertised in the same area. A608, 615. Sergeant Gonzalez videotaped his March 29 observations of Jacobs, and the original and a copy of the videotape

were introduced into evidence. Govt. Exh. 414A; A603-04. The videotape was played for the jury during the testimony of Viviana Jimenez. A1974-76. The tape showed Jacobs standing in the "mailbox" area distributing narcotics to numerous customers, including a young woman with two small children.

On the morning of August 3, 2000, Bridgeport Police Officer William Bailey covertly stationed himself in an apartment in Building #13 of the housing project from which he conducted surveillance of Jacobs in the area of Building #12. Jacobs and Yamaar Shipman steered customers to another unidentified male, who in turn gave customers folds of heroin. A1771-74. After a while, Officer Bailey saw Jermaine Jenkins enter the area, speak with Jacobs and others, and then enter an apartment in Building #12 -- the same building in which Viviana Jimenez lived. A1775-76. Later, an unidentified black male came into the area very close to the apartment where Officer Bailey was hidden, and Officer Bailey heard the male ask Jacobs: "Do you have, you have some Hawaiian Punch?" Jacobs replied: "Yeah, it's Punch." A1778.

Following Officer Bailey's observations, he instructed other officers -- Bridgeport Police Sergeant Angelo Pierce and Officer Ernest Garcia -- to arrest Jacobs. A1781. The two officers went to look for Jacobs at Apartment 210 of Building #12 and knocked on the door. Jacobs came down the stairs to the front, exterior door of the apartment and opened the door. The officers arrested him in the doorway of the apartment and placed him in handcuffs. A1870-72. Sergeant Pierce recovered $2,407 in cash in Jacobs' left front pocket. A1866, 1874. Afterwards, Jacobs gave the

police consent to search his apartment, but the search did not reveal any evidence of narcotics or large amounts of cash. A1873-75.

Jacobs presented a defense case. First, Jacobs' supervisor at a paper manufacturing company testified that Jacobs was employed with the company in 1999 and 2000. A2090-98. Second, Benito Rosario, a co-defendant, testified that Jacobs sold only powder cocaine -- not heroin -- at P.T. Barnum. Rosario was shown the videotape of Jacobs engaged in drug transactions on March 29, 2000, and he asserted that Jacobs was selling only powder cocaine that day. A2106-10.

Finally, Jacobs testified in his own defense. He denied participating in any conspiracy to distribute heroin and categorically denied ever engaging in the sale of heroin. A2170. He explained that his three prior arrests and convictions in 1993, 1997, and 1999 had been for selling cocaine, not heroin. A2178-81. He denied any heroin-related transactions with Jermaine Jenkins or Viviana Jimenez. A2171-72. As to the videotape of him selling narcotics on March 29, 2000, he insisted that he was selling only cocaine, A2176, and denied speaking to Benito Rosario that day. A2182.

In response to Officer Bailey's testimony that he (Jacobs) had steered customers to a drug supplier in P.T. Barnum on August 3, 2000, Jacobs denied "selling anything" that day and insisted that he was "[j]ust out there to be out there." A2185. He conceded that at least one person came up to him to ask if he had "Hawaiian Punch" that day, but he insisted that he told that person

"no, I don't have it," and did not knowingly steer him to a seller. A2186.

As to the testimony of Sergeant Pierce concerning his seizure of $2,407 at the time of Jacobs' arrest on August 3, 2000, Jacobs admitted that the money was his and stated that it was proceeds from cocaine sales. A2188. He maintained, however, that the sales had not taken place that day. He also insisted that the police had unlawfully entered his apartment to arrest him and searched it without his consent. A2187-88. He acknowledged that he had pled guilty in state court to conspiracy to sell narcotics on August 3, 2000, arising from "the fact I told the individual [who inquired about "Hawaiian Punch"], no, I didn't have it, maybe it's down there, so that was like the conspiracy." A2190.

Jacobs further testified that he did "a terrible thing selling drugs to a lady with kids, and I know it was wrong," that "as far as selling cocaine, you know, I'm not innocent," but that "as far as heroin, I'm not guilty to that charge." A2191, 2192. On cross-examination, Jacobs continued to insist that he sold only cocaine, despite the fact that it would have been far more profitable to sell heroin:

> Q. Mr. Jacobs, isn't it true that the biggest selling narcotic and the narcotic with the biggest profit margin out in P T is heroin?
> A. Yes.
> Q. You could make the most money by selling heroin, correct?
> A. That's if you want to deal with [it], yes.

Q. If you really want to make a lot of money?
A. Yes.
Q. You didn't want to deal with heroin, right?
A. No.
Q. No?
A. I wanted to get into my own thing. I don't have to specifically deal with heroin because it's the most money you can make, no. That's not my style.
Q. That's not your style?
A. No.
Q. Down to earth kind of guy?
A. Yes, I am.

A2212.

In its rebuttal case, the government re-called Officer Bailey who testified about his surveillance and arrest of Jacobs on November 3, 1994. At that time he saw Jacobs engaged in a hand-to-hand transactions at P.T. Barnum with someone bearing the last name of "Simmons." A2365-66. Although Officer Bailey did not seize evidence from Jacobs that day, he directed Officer Jose Luna to arrest Jacobs' customers. He also testified that of his hundreds of drug investigations at P.T. Barnum over the course of 15 years, none had involved powder cocaine. A2367.

Bridgeport Police Officer Jose Luna also testified in the government's rebuttal case concerning the police department's November 3, 1994 narcotics investigation at the housing project. At the direction of Officer Bailey, he arrested a buyer identified as "Robert Walter" who was

found to be in possession of packages stamped with the "Handicap" logo which contained a white powder that field-tested positive for the presence of heroin. A2374-75. Officer Luna also arrested another buyer at the direction of Officer Bailey, Laburn Simmons, who had similar packages stamped with the "Handicap" logo on his person. The contents, however, could not be field tested because the product had already been consumed. A2376.

4. Post-Trial Proceedings

On November 30, 2001, the jury rendered verdicts of guilty on Count Twelve against Herredia and Jacobs. SA37, GA91-92. On September 6, 2002, the district court sentenced Herredia to a lifetime term of imprisonment. SA45, 294. Judgment was entered on September 10, 2002, and Herredia filed a timely notice of appeal that same day. SA46, GA95. On September 26, 2002, the district court sentenced Jacobs to a lifetime term of imprisonment. A2652-2724. Judgment was entered on September 30, 2002, and Jacobs filed a timely notice of appeal on October 1, 2002. A2725.

Jacobs subsequently moved for a remand to the district court for an evidentiary hearing to supplement the record on whether he was denied effective assistance of counsel because, *inter alia*, his trial counsel had failed to properly investigate and move to suppress $2,407 dollars seized from his person and introduced as evidence at trial. On April 30, 2003, this Court granted his motion, and remanded the case to the district court "for the limited purpose of making a supplemental determination on whether Jacob's trial counsel was ineffective because he

failed to move to suppress the $2,407 that was put into evidence, and failed to investigate whether the police had conducted a legal search, seizure, and arrest." GA26.

On June 20 and 23, 2002, the district court held an evidentiary hearing. A2793-3032. After considering all the evidence presented at the remand hearing, including the testimony of Jacobs' trial counsel, the district court concluded that Jacobs was not denied effective assistance of counsel and held that "[t]o the contrary, Jacobs' trial counsel commendably represented a difficult client facing a difficult case." GA38.

SUMMARY OF ARGUMENT

CLAIMS OF DANIEL HERREDIA

I. The district court did not violate *Apprendi v. New Jersey* by applying a mandatory minimum lifetime term of imprisonment based on factors not included in the indictment or deliberated upon by the jury. Prior convictions, such as those considered by the sentencing judge in Herreida's case, are expressly excluded from the *Apprendi* framework. Furthermore, *Apprendi*'s holding was specifically limited to facts that raise the sentence above the statutory maximum, and under *Harris v. United States*, does not apply to facts that trigger mandatory minimum terms.

II. The district court properly sentenced defendant Herredia pursuant to a statutorily imposed mandatory minimum. The judge was required by statute to sentence

at or above a mandatory minimum and correctly his lack of authority to depart below that sentence.

III. Defendant Herredia was properly joined with co-defendant Makene Jacobs because they were charged as part of a conspiracy to distribute narcotics. Moreover, the district court did not abuse its discretion to deny Herredia's motion to sever. Herredia argued that a videotape of Jacobs engaged in drug transactions was overly prejudicial to him, but the videotape of a co-conspirator engaged in acts in furtherance of the conspiracy would likely have been admitted against Herredia in a separate trial. In addition, the judge repeatedly cautioned the jury to consider the evidence against each defendant separately. Thus, there was no miscarriage of justice to try Herredia and Jacobs together.

IV. The district court did not abuse its broad discretion by excluding the proffered testimony of Herredia's investigator about the reactions of out-of-court declarants to the names of two of the government's cooperating witnesses. The excluded testimony, offered to show that the government's witnesses were "bad guys," was irrelevant to whether Herredia was involved in the Estrada conspiracy, and there was no foundation for the testimony in any event. In addition, the district court properly concluded that the evidence was excludable under Federal Rule of Evidence 403 because it had virtually no probative value but carried a high risk of confusing the jury with irrelevant issues. Finally, any error in excluding the evidence was harmless because it was cumulative of other evidence in the case, and would not have substantially swayed the jury's judgment in this case.

CLAIMS OF MAKENE JACOBS

I. Jacobs' counsel was not constitutionally ineffective. Jacobs' lawyer reasonably decided, as a matter of sound trial strategy, and on the basis of credible and specific reasons, not to move to suppress currency seized from his client at his arrest. In addition, Jacobs suffered no prejudice from his lawyer's decision because a motion to suppress would likely have been unsuccessful, and even if it were successful, the suppression of the currency would have had no impact on the outcome of the trial. Similarly, Jacobs' counsel offered credible descriptions of his investigation of potential witnesses for a motion to suppress and gave valid reasons for declining to pursue the matter any further. Again, Jacobs suffered no prejudice from his counsel's decision because testimony from additional witnesses would not have undermined the government's case, much less changed the outcome of the trial.

Finally, Jacobs' lawyer was not ineffective for failing to object to the introduction of a surveillance videotape showing him engaged in narcotics transactions. Counsel's decision not to object was based on a sound trial strategy, and, moreover, any objection would likely have been overruled. In any event, even if the videotape had been excluded, the testimony of law enforcement and cooperating witnesses was more than sufficient to support the jury's verdict.

II. Jacobs' request for a new trial cannot be granted because he never moved for a new trial in the district court. In the absence of a timely filed motion for a new

trial under Federal Rule of Criminal Procedure 33, a court lacks authority to grant the requested relief.

III. Jacobs is not entitled to a new trial in any event because he received a fair trial. Jacobs argues that a government law enforcement witness presented perjured testimony, but there is no evidence to support that assertion. Jacobs also argues that the prosecution made several inappropriate comments during closing arguments, but all of the prosecutor's statements were proper and within the bounds of vigorous advocacy. Finally, Jacobs argues that the prosecutor's cross-examination of him was improper, but the prosecutor's questioning merely followed-up on statements the defendant had made during his direct testimony.

IV. The district court properly sentenced Jacobs to a mandatory minimum term of life imprisonment under 21 U.S.C. § 841(b)(1)(A) because he had two prior convictions for felony drug offenses. Jacobs' argument that the convictions were not "prior" convictions is foreclosed by this Court's decision in *United States v. Martino*, 294 F.3d 346 (2d Cir. 2002). Moreover, the statute, as applied to Jacobs' case, is not unconstitutionally vague.

ARGUMENT

CLAIMS OF DANIEL HERREDIA

I. APPLYING A MANDATORY MINIMUM LIFETIME TERM OF IMPRISONMENT BASED ON HERREDIA'S PRIOR CONVICTIONS, WHICH WERE NOT INCLUDED IN THE INDICTMENT OR DELIBERATED ON BY THE JURY, DID NOT VIOLATE *APPRENDI*

A. Relevant Facts

Count Twelve of the Third Superseding Indictment charged Herredia with Conspiracy to Possess with Intent to Distribute 1,000 grams or more of heroin, in violation of 21 U.S.C. §§ 841(a)(1) and 846. A53-54. Before trial, on September 7, 2001, the government filed an Information pursuant to 21 U.S.C. § 851, placing Herredia on notice that in the event he were convicted of Count Twelve, he would be exposed to the statutorily mandated term of lifetime imprisonment. SA50-53. *See* 21 U.S.C. § 841(b)(1)(A) (providing for mandatory minimum term of lifetime imprisonment for defendants who violate § 841 after two or more prior felony drug convictions). In support of the § 851 Information, the government identified three prior qualifying narcotics felonies by date and nature of the offense, and attached a copy of Herredia's criminal record. SA50-53.

On November 30, 2001, a federal trial jury found Herredia guilty of Count Twelve. In connection with its deliberations, the jury completed a special verdict form

and found beyond a reasonable doubt that the offense of conviction involved 1,000 grams or more of heroin. A2605, GA92.

Prior to sentencing, Herredia filed a sentencing memorandum in which he claimed, among other things, that the government's § 851 Information violated *Apprendi v. New Jersey*, 530 U.S. 466 (2000). SA126-175. He argued that *Apprendi* required the fact of his prior qualifying felony narcotics convictions to be charged and submitted to a jury and proven beyond a reasonable doubt. SA140.

The district court held a sentencing hearing on September 6, 2002. SA260-297. After extended argument, the district court rejected the defendant's challenge to the § 851 Information. The sentencing court stated that "I find that the government has sustained its burden of proof beyond a reasonable doubt to prove the two convictions" supporting the § 851 Information.[6] SA276. The court further stated that "I find as a matter of law that the government has sustained its burden and, therefore, the enhancement called for by Sections

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[6] The government's Information gave notice of three prior felony narcotics convictions. While the government could not locate certificates of conviction for the third conviction, the United States Probation Office located an official Connecticut state court PSR that referenced the third qualifying conviction. The sentencing court chose not to make a finding as to the third conviction because 21 U.S.C. § 841 only requires two prior convictions to trigger a mandatory lifetime term of imprisonment. SA270.

841(b)(1)(a) and 851 has been met." SA276. As required by these findings, the district court sentenced Herredia to a mandatory term of life imprisonment. SA294.

B. Governing Law and Standard of Review

Section 841 of Title 21 of the United States Code establishes a system of graduated penalties that provide progressively higher sentences according to the quantity of narcotics involved in the offense and the defendant's criminal history. As relevant here, under § 841(b)(1)(A), a defendant who is convicted of an offense involving more than 1000 grams of heroin faces a sentence of not less than ten years and not more than life imprisonment. Such a defendant, however, faces a mandatory minimum term of life imprisonment if he has been previously convicted of two or more felony drug offenses. *See* 21 U.S.C. § 841(b)(1)(A); *see also* 21 U.S.C. § 846 (prescribing same penalties for conspiracy offenses).

The application of these penalty provisions -- as with the application of all penalty provisions -- is guided by the Constitution. In *Apprendi*, the Supreme Court interpreted the Sixth Amendment's right to a trial by jury and the Fourteenth Amendment's Due Process Clause to hold that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. The "statutory maximum" under *Apprendi* is "the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*." *Blakely v. Washington*, 124 S. Ct. 2531, 2537

(2004). In other words, as the Court recently reaffirmed, "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *United States v. Booker*, 125 S. Ct. 738, 756 (2005).

Although *Apprendi* limits the discretion of sentencing judges in certain circumstances, the rule in *Apprendi* is inapplicable in two settings. First, *Apprendi* carves out an express "recidivism" exception: facts pertaining to a defendant's prior convictions may be used to enhance the defendant's sentence even though those facts were not admitted by the defendant or proved to a jury. *Apprendi*, 530 U.S. at 489. This exception derives from the Supreme Court's decision in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); this Court has repeatedly held (consistent with the Supreme Court's own statements) that *Almendarez-Torres* survives *Apprendi*. *See, e.g.*, *Martino*, 294 F.3d at 349 (rejecting claim that prior convictions must be alleged in indictment to implicate mandatory minimum term under § 841); *United States v. Anglin*, 284 F.3d 407, 409 (2d Cir. 2002); *United States v. Santiago*, 268 F.3d 151, 155 (2d Cir. 2001).

Second, the Supreme Court and this Court have held that facts that elevate a sentence to a statutorily imposed mandatory minimum also need not be charged in an indictment or proved to a jury, so long as the resulting sentence does not exceed the otherwise applicable statutory maximum. *See Harris v. United States*, 536 U.S. 545, 557-68 (2002) (plurality opinion) (*Apprendi* does not

apply to an increased mandatory minimum sentence unless the triggering facts result in a sentence in excess of an otherwise applicable statutory maximum); *id.* at 569-70 (opinion of Breyer, J.) (*Apprendi* does not apply to mandatory minimums); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986) (holding that fact that triggers a mandatory minimum penalty, without altering the maximum penalty, does not have to be proved to jury); *United States v. King*, 345 F.3d 149, 151-52 (2d Cir. 2003), *cert. denied*, 540 U.S. 1167 (2004). *See also Spero v. United States*, 375 F.3d 1285, 1286-87 (11th Cir. 2004) (reviewing *Apprendi* and *Blakely* to conclude that factors that trigger a statutory minimum need not be found by a jury provided the minimum term does not exceed the otherwise applicable statutory maximum), *cert. denied*, 125 S. Ct. 1099 (2005), and *cert. denied*, 125 S. Ct. 1345 (2005).

This Court reviews legal issues, such as the application of *Apprendi* to the defendant's sentence, *de novo*. *See United States v. Santoro*, 302 F.3d 76, 80 (2d Cir. 2002).

C. Discussion

Herredia argues that his mandatory term of life imprisonment violates *Apprendi*. Specifically, according to Herredia, the reasoning of *Apprendi* required the government to charge his prior felony convictions in the indictment, and prove them to a jury beyond a reasonable doubt, before it could use those convictions to support his mandatory life sentence under 21 U.S.C. § 841(b)(1)(A). Herredia Br. at 7-14. In making this argument, Herredia concedes that it is foreclosed by precedent from the Supreme Court and this Court. *Id.* at 8-9.

Herredia has correctly concluded that his argument is foreclosed by well-established case law. He was convicted for violating 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846 for possession and conspiracy to possess and distribute more than 1000 grams of heroin. The statute establishes a sentence for this offense ranging from ten years to life imprisonment, but because Herredia had at least two prior felony drug convictions, his conviction subjected him to a mandatory minimum term of life imprisonment. *See* 21 U.S.C. § 841(b)(1)(A) (providing that a person who "commits a violation of this subparagraph . . . after two or more prior convictions for a felony drug offense have become final . . . shall be sentenced to a mandatory term of life imprisonment without release").

By its express language, *Apprendi* is inapplicable to this case. The Court in *Apprendi* clearly stated that its holding applies only to facts other than prior convictions. 530 U.S. at 490. Here, the factors that enhanced the defendant's sentence to a mandatory minimum were prior convictions, and thus *Apprendi* does not require those convictions to be charged in the indictment or proved to a jury. *See Anglin*, 284 F.3d at 411; *Santiago*, 268 F.3d at 155. This Court reached that precise conclusion in *Martino*, holding that prior convictions need not be alleged in the indictment to enhance a sentence under § 841. *Martino*, 294 F.3d at 349. In other words, "recidivism need not be treated as an element of the offense." *Id.*

In his supplemental brief, Herredia contends that the Supreme Court's decision in *Blakely* casts doubt on the continuing validity of the *Almendarez-Torres* recidivism

exception to the *Apprendi* rule. Herredia Supp. Br. at 1-3. While several Justices have expressed doubt about whether *Almendarez-Torres* is logically consistent with *Apprendi*, *see, e.g.*, *Shepard v. United States*, 125 S. Ct. 1254, 1264 (2005) (opinion of Thomas, J., concurring in part and concurring in the judgment) (noting that "a majority of the Court now recognizes that *Almendarez-Torres* was wrongly decided"), those questions have been raised since *Apprendi* itself, *see Apprendi*, 530 U.S. at 489-90 (refusing to reconsider *Almendarez-Torres* because the issue is not presented, "[e]ven though it is arguable that *Almendarez-Torres* was incorrectly decided").

In spite of these continuing questions, the Supreme Court has not overruled *Almendarez-Torres* and thus that decision is still good law. Indeed, the Supreme Court's most recent decision on the topic expressly reaffirmed the recidivism exception as part of the *Apprendi* rule. *See Booker*, 125 S. Ct. at 756 (reaffirming rule of *Apprendi* as applying to facts "other than a prior conviction"); *see also Blakely*, 124 S. Ct. at 2536 ("*Other than the fact of a prior conviction*, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.") (emphasis added).

Unless and until the Supreme Court overrules *Almendarez-Torres*, the recidivism exception announced in that decision governs this case. As this Court explained in *Santiago* when faced with the similar argument that *Apprendi* itself overruled *Almendarez-Torres*,

> It is not within our purview to anticipate whether the Supreme Court may one day overrule its existing precedent. "[I]f a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions."

268 F.3d at 155 n.6 (quoting *Agostini v. Felton*, 521 U.S. 203 (1997)).

Even if the Supreme Court were to overrule *Almendarez-Torres*, however, Herredia's life sentence would still not violate *Apprendi*. The rule in *Apprendi* only applies to those facts that raise a sentence above the statutory maximum; it does not apply to those facts that trigger a mandatory minimum sentence within the otherwise applicable statutory maximum. *Harris*, 536 U.S. at 557-68 (plurality opinion); *id.* at 569-70 (opinion of Breyer, J.); *King*, 345 F.3d at 151-52. Here, the applicable mandatory minimum, life imprisonment, was within the statutory maximum, *see* 21 U.S.C. §§ 841(b)(1)(A), 846, and thus *Apprendi* does not apply.

Herredia argues, nonetheless, that the Supreme Court's decision in *Harris* leaves doubt as to whether *Apprendi* applies to mandatory minimums. Herredia Br. at 11-13. In *Harris*, four Justices agreed that *Apprendi* does not apply to mandatory minimums. *See Harris*, 536 U.S. at 557-68 (opinion of Kennedy, J., Rehnquist, O'Connor, and Scalia). Justice Breyer, the fifth Justice in the majority,

explained that although he could find no logical reason to exempt mandatory minimums from the *Apprendi* rule, he would vote in favor of that outcome to avoid the "adverse practical [and] legal[] consequences" that would flow from extending *Apprendi* to mandatory minimums. 536 U.S. at 569 (opinion of Breyer, J.). According to Herredia, these divergent rationales for the holding in *Harris* leave open the question whether *Apprendi* applies to mandatory minimums. Herredia Br. at 12.

Despite the reasons behind the opinions in *Harris*, the holding in *Harris* is clear: a factor that implicates a mandatory minimum enhancement within the maximum authorized by statute "need not be alleged in the indictment, submitted to the jury, or proved beyond a reasonable doubt." 536 U.S. at 568. In other words, a majority of the *Harris* Court agreed that *Apprendi* does not apply to mandatory minimums. *Id.* 557-68 (plurality opinion) (holding that *Apprendi* should not apply to mandatory minimums); *id.* at 569 (opinion of Breyer, J.) (joining plurality's opinion "to the extent that it holds that *Apprendi* does not apply to mandatory minimums"). Thus, even if the logic of the different opinions in *Harris* suggests (as Herredia argues) that the Supreme Court should, or may, overrule that decision in the future, it is for the Supreme Court, and not this Court, to make that decision. *See Santiago*, 268 F.3d at 155 n.6. Until that time, under *Harris*, Herredia's sentence to a mandatory minimum term of life imprisonment is fully consistent with *Apprendi*.

Finally, because Herredia was sentenced to a mandatory term of life imprisonment, there is no need to

remand this case to the district court under *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005). Any error in the district court's use of the Sentencing Guidelines "as a mandatory regime was harmless error." *United States v. Sharpley*, 399 F.3d 123, 127 (2d Cir. 2005), *petition for cert. filed* (May 14, 2005) (No. 04-10167).

II. THE SENTENCING COURT PROPERLY DECLINED TO DEPART DOWNWARD FROM A STATUTORILY IMPOSED MANDATORY MINIMUM TERM OF LIFE IMPRISONMENT

Herredia claims that the district court improperly sentenced him to a mandatory minimum term of life imprisonment because (1) his 1988 conviction should not have counted as a prior conviction under 21 U.S.C. § 841(b)(1)(A), and (2) the sentencing judge should have departed below the mandatory minimum established by that section. Herredia Br. at 14-25. For the reasons discussed below, this Court should reject both arguments.

A. Relevant Facts

Prior to trial, the government served on the defendant and filed with the court an Information under 21 U.S.C. § 851 notifying Herredia that he would be subject to a mandatory minimum term of life imprisonment if he were convicted on Count Twelve of the Third Superseding Indictment. SA50-53. *See* 21 U.S.C. § 841(b)(1)(A). In support of the Information, the government identified three Connecticut state court convictions, in 1988, 1990, and 1992, as qualifying prior narcotics felony convictions. SA50-51.

After his conviction on Count Twelve, Herredia filed a sentencing memorandum in which he argued, *inter alia*, that his 1988 Connecticut conviction should not be considered in determining his eligibility for a mandatory minimum term of life imprisonment. In the alternative, Herredia argued that the district court should depart downward from the mandatory minimum term under Section 5K2.0 of the United States Sentencing Guidelines based on his troubled background and family circumstances. SA162-73.

At sentencing, the district court found that the government had proved beyond a reasonable doubt two of the convictions that supported the § 851 Information, and thus concluded that Herredia was subject to the minimum term of life imprisonment mandated by 21 U.S.C. § 841(b)(1)(A). SA276, 286, 294. In addition, the district court rejected Herredia's request that it depart downward from the statutorily mandated minimum term:

> THE COURT: All right. All right, I've considered a great amount of material in arriving at today's sentence. Most of it, for reasons that are now clear, I think is essentially irrelevant but the sentence in this case is mandated by the operation of two statutes, 20 [sic] USC 841 and 21 USC Section 851. In my view I have no discretion and, therefore, will simply impose sentence without any further comment.
>
> Mr. Herredia, I hereby sentence you to a period of life in prison without release.

SA294.

B. The Sentencing Court Properly Considered Herredia's Prior Felony Conviction for "Street Level" Selling of Drugs to Qualify Him for a Statutory Mandatory Minimum

1. Governing Law and Standard of Review

Section 841 of Title 21 of the United States Code provides a fixed statutory range for a sentencing judge to impose sentence within. For Herredia's conviction under § 841(b)(1)(A) for conspiring to possess with intent to distribute and distribution of more than 1,000 grams of heroin, the statute establishes a sentencing range of ten years to life imprisonment. This fixed sentencing range may be adjusted upward, however, if the defendant has prior convictions for felony drug offenses. As relevant to Herredia, the statute provides that

> [i]f any person commits a violation of this subparagraph . . . 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 . . . .

21 U.S.C. § 841(b)(1)(A).

Before a defendant may be sentenced within a higher sentencing range based on prior convictions, the defendant must be afforded the procedural protections provided by

21 U.S.C. § 851. That section requires the government to file an Information with the court and serve a copy on the defendant providing notification of prior convictions that will be relied upon to trigger the enhanced penalty provisions. § 851(a). The defendant may affirm or deny the allegations in the Information, and if he denies the allegations, the court "shall hold a hearing" to resolve any issues about the defendant's eligibility for an enhanced punishment. § 851(b) and (c)(1). After the hearing, if the court determines that the government has proven the prior felony drug convictions beyond a reasonable doubt and thus that the defendant is subject to increased punishment, "the court shall proceed to impose sentence upon him" as required by § 841. § 851(c)(1) and (d).

The district court's interpretation of 21 U.S.C. § 841 is subject to *de novo* review. The underlying findings of fact are reviewed under the clearly erroneous standard. *See United States v. Lovell*, 16 F.3d 494, 495-96 (2d Cir. 1994).

2. Discussion

The defendant argues that his prior felony drug conviction for the street-level selling of marijuana should not qualify him for a mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A). Herredia Br. at 24-25. That Section, however, provides for a mandatory minimum life sentence when the defendant has at least two prior convictions for a "felony drug offense." It contains no limitations on the types of drug offenses that meet this standard and thus provides no basis for reading an exception into the statute for specific drug offenses. If the

defendant has two or more prior "felony drug offense" convictions, and if the government complies with the procedural requirements of § 851, the defendant is subject to the mandatory minimum term of life imprisonment.

Here, Herredia does not contest that his 1988 Connecticut conviction for sale of a controlled substance was a "felony drug offense," that he had at least one other prior conviction for a felony drug offense, or that the government fully complied with § 851. Therefore, Herredia was properly subjected to a mandatory minimum sentence of life imprisonment.

Herredia's only argument to the contrary rests on this Court's decision in *United States v. Mishoe*, 241 F.3d 214 (2d Cir. 2001). In *Mishoe*, the district court departed horizontally from criminal history category (CHC) VI to CHC V because the court concluded that the defendant had been merely "a street seller of narcotics." Thus, according to the district court, CHC VI overrepresented the seriousness of the defendant's criminal history and a horizontal departure was warranted under U.S.S.G. § 4A1.3. This Court vacated the sentence, holding that the district court had inappropriately adopted a blanket policy that street-level sales of narcotics permitted horizontal departures in the defendant's CHC. 241 F.3d at 218-19. After rejecting the district court's blanket departure policy, this Court remanded for resentencing, expressly noting that the district court was free to consider a downward departure in CHC based on an individualized assessment of relevant factors such as the amount of drugs involved in prior offenses, the defendant's role in prior offenses, and the sentences previously imposed. *Id.* at 219.

Mishoe does not help Herredia here. The *Mishoe* Court reviewed the propriety of a horizontal departure under U.S.S.G. § 4A1.3; it did not interpret 21 U.S.C. § 841(b)(1)(A), much less consider whether the plain language of that Section contains an exception for "street-level-sale" felony drug offenses. In *Mishoe*, because the government had exercised its discretion not to pursue a mandatory minimum sentence, *see Mishoe*, 241 F.3d at 220, the sentencing judge was not constrained to sentence according to a statutory mandatory minimum and could consider the individualized facts of the defendant's criminal history in determining the defendant's CHC. Here, by contrast, the government properly complied with 21 U.S.C. § 851, and thus Herredia was subject to sentence under the mandatory minimum terms of § 841(b)(1)(A). Therefore, unlike in *Mishoe*, the sentencing judge was required by statute to sentence at or above a mandatory minimum.

C. The Sentencing Judge Properly Found that He Had no Authority to Impose a Sentence Below the Mandatory Minimum Sentence

1. Governing Law and Standard of Review

Even before *Booker*, a district court had discretion to depart from the Sentencing Guidelines in appropriate cases, but this same discretion to depart does not exist when the defendant is subject to a statutory mandatory minimum sentence. *See United States v. Medley*, 313 F.3d 745, 749-50 (2d Cir. 2002). When a defendant is subject

to a mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A), the district court may impose a sentence below that minimum only if (1) the government made a motion pursuant to 18 U.S.C. § 3553(e) asserting that the defendant provided substantial assistance to the government, or (2) the defendant met the "safety valve" criteria set forth in 18 U.S.C. §3553(f). *See Medley*, 313 F.3d at 749-750.

In order to qualify for favorable treatment under the "safety valve" provision of § 3553(f), a defendant must satisfy each of the following conditions: (1) the defendant must not have more than 1 criminal history point as determined under the Guidelines; (2) the defendant must not have employed violence or credible threats of violence or possess a firearm or other dangerous weapon in connection with the offense; (3) the offense of conviction must not have resulted in death or serious bodily injury to another; (4) the defendant must not qualify for an upward adjustment for his aggravated role in the offense; and (5) not later than the time of sentencing, the defendant must provide truthful information concerning the offense of conviction, and/or relevant offense conduct. 18 U.S.C. § 3553(f).

The ability of the sentencing judge to depart from a mandatory minimum sentence is a legal question subject to *de novo* review. *See Medley*, 313 F.3d at 748.

2. Discussion

The district court properly declined to depart below the statutory mandatory minimum term in this case because -- as Herredia concedes, *see* Herredia Br. at 25 -- it had no authority to so depart. The sentencing judge could not depart under 18 U.S.C. § 3553(e) because the government did not submit a motion for such a "substantial assistance" departure. SA290-91.

Nor did the defendant qualify for a departure under the "safety valve" criteria of § 3553(f). The defendant's 17 criminal history points placed him well beyond the 1 criminal history point required by § 3553(f)(1), and the fact that the district court found his role in the offense required an upward adjustment meant that he could not meet the criteria of § 3553(f)(4). Either of these two conclusions, standing alone, disqualified the defendant for favorable treatment under the safety valve provision.[7]

Because neither § 3553(e) nor § 3553(f) authorized a departure in this case, the district court had no authority to depart from the statutory mandatory minimum term of imprisonment. After the government exercised its discretion to file an Information pursuant to 21 U.S.C. § 851(a)(1), giving notice of a mandatory minimum term

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[7] In *United States v. Holguin*, No. 04-5277-cr, this Court ordered supplemental briefing on the continued validity of the safety valve provision in light of the Supreme Court's decision in *Booker*. In this case, Herredia does not challenge the safety valve provision or allege that he was eligible for relief under that provision, and thus *Holguin* does not impact this case.

of imprisonment, and the defendant was convicted, the sentencing judge had no authority to sentence below the mandatory minimum mandated by Congress, which, in this case was life imprisonment.

Herredia argues, nonetheless, that the court should have departed downward from the statutory mandatory minimum term because he has had a troubled life. Herredia Br. at 14-25. He cites no authority for this argument, however. As this Court held in *Medley*, the district court lacked discretion to depart from the statutory mandatory minimum term because Herredia did not qualify for relief under §§ 3553(e) or (f).

III. THE DISTRICT COURT PROPERLY DENIED HERREDIA'S MOTION TO SEVER

A. Relevant Facts

Count Twelve of the Third Superseding Indictment charged 20 defendants with conspiracy to possess with intent to distribute 1,000 grams or more of heroin. A53-54. The district court set three of those defendants, Herredia, Jacobs, and Felipe Santana, for trial in November 2001. A21.

The trial evidence established that Jacobs was a lieutenant in the Estrada organization who distributed narcotics within the P.T. Barnum housing project, *see supra* at Facts, Part 3, and that Santana was a street-level distributor at a cross-town retail distribution site at Noble and Ogden Avenues, A1589-1592, 1639. Herredia

received pre-packaged heroin which he distributed for the organization in New Haven. *See supra* at Facts, Part 2.

During the trial, the government played a surveillance videotape of defendant Jacobs standing in P.T. Barnum distributing narcotics to a woman with two small children. A1961-62, 1974-77. The next morning, counsel for defendant Santana moved to sever his trial from that of Jacobs. A2033-35. Santana's counsel argued that once the jury had seen the videotape, it resulted in unfair, spill-over prejudice against him. A2336-38. Counsel for defendant Herredia joined in the motion. A2035, 2336.

The district court which presided over the joint trial of defendants Jacobs, Herredia, and Santana, denied the motion to sever finding that

> [t]he risk of spill-over I think is minimized by the fact that the three defendants being tried together in this case are distinct in the allegations made against them. That is, there is no allegation, no evidence that Mr. Santana was involved in any way in anything that happened at the housing project. And visa versa. And Mr. Herredia is alleged to have been involved in activities in New Haven, so that the three defendants here are distinct geographically, they are distinct in terms of time, at least to a certain extent the time they are alleged to have been involved, and I think that minimizes any spill-over effect because Mr. Santana simply has nothing to do with anything that happened at the housing project.

> And the video I agree was very strong evidence but I don't believe it's going to have any spill-over effect on the other defendants because it was so specific to Mr. Jacobs. So I understand the concern but believe that a fair trial can be had in this case for all three defendants.

A2339.

B. Governing Law and Standard of Review

The Supreme Court and this Court recognize a "preference in the federal system for joint trials of defendants who are indicted together." *United States v. Blount*, 291 F.3d 201, 208-209 (2d Cir. 2002) (quoting *Zafiro v. United States*, 506 U.S. 534, 537 (1993)). "Joint trials promote efficiency and serve the interests of justice by avoiding the scandal and inequity of inconsistent verdicts." *United States v. Nosov*, 153 F. Supp. 2d 477, 481 (S.D.N.Y. 2001) (internal quotation omitted). *See also Richardson v. Marsh*, 481 U.S. 200, 209-10 (1987) (describing benefits of joint trials).

Rule 8 of the Federal Rules of Criminal Procedure governs the joinder of two or more defendants in the same indictment. *United States v. Turoff*, 853 F.2d 1037, 1042 (2d Cir. 1988). Rule 8 permits joinder where the parties to be joined are "alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." Fed. R. Crim. P. 8(b). Therefore, "multiple defendants cannot be tried together on two or more 'similar' but unrelated acts or transactions," but may be tried together if the charged acts

"are part of a 'series of acts or transactions constituting an offense or offenses.'" *Turoff*, 853 F.2d at 1043.

For joinder to be proper under Rule 8(b), the acts in which the defendants are alleged to have participated (1) must arise under a common plan or scheme, or (2) be unified by a substantial identity of facts or participants. *United States v. Rittweger*, 259 F. Supp. 2d 275, 283 (S.D.N.Y. 2003) (citing *United States v. Attanasio*, 870 F.2d 809, 815 (2d Cir. 1989)); *see also United States v. Cervone*, 907 F.2d 332, 341 (2d Cir. 1990). Under this standard, the mere allegation of a conspiracy presumptively satisfies Rule 8(b), since the allegation implies that the defendants engaged in the same series of acts or transactions constituting an offense. *United States v. Friedman*, 854 F.2d 535, 561 (2d Cir. 1988); *see also United States v. Nerlinger*, 862 F.2d 967, 973 (2d Cir. 1988) ("The established rule is that a non-frivolous conspiracy charge is sufficient to support joinder of defendants under Fed. R. Crim. P. 8(b).").

The question of proper joinder raises a question of law subject to *de novo* review. *United States v. Feyrer*, 333 F.3d 110, 113 (2d Cir. 2003).

Even if joinder is proper under Rule 8(b), the district court has the discretion to sever the trial pursuant to Rule 14 which provides, in relevant part:

> If the joinder of . . . defendants in an indictment . . . or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants'

> trials, or provide any other relief that justice requires.

Fed. R. Crim. P. 14. While Rule 14 provides a mechanism for discretionary severance upon a showing of substantial prejudice, a defendant seeking such severance bears a heavy burden of persuasion. *See United States v. Tutino*, 883 F.2d 1125, 1130 (2d Cir. 1989) ("To challenge the denial of a severance motion, a defendant must sustain an extremely difficult burden.") (internal quotations omitted).

A motion to sever should be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Zafiro v. United States*, 506 U.S. 534, 539 (1993); *United States v. Yousef*, 327 F.3d 56, 150 (2d Cir.), *cert. denied*, 540 U.S. 933 (2003), and *cert. denied*, 540 U.S. 993 (2003). "Merely establishing that a defendant would have had a better chance for acquittal at a separate trial is not sufficient to show substantial prejudice." *Tutino*, 883 F.2d at 1130.

A district court's evaluation of the potential for substantial prejudice must take into account that once a defendant is a member of a conspiracy, "all the evidence admitted to prove that conspiracy, even evidence relating to acts committed by co-defendants, is admissible against the defendant." *United States v. Salameh*, 152 F.3d 88, 111 (2d Cir. 1998). However, this Court has held that a defendant is not entitled to severance of his trial from that of a co-defendant simply because the evidence against the co-defendant is far more damaging that the evidence

against him. *See, e.g.*, *United States v. Diaz*, 176 F.3d 52, 103 (2d Cir. 1999).

Because evidence to prove a conspiracy often involves acts of co-conspirators independent from other co-conspirators, there arises a possibility of spillover prejudice. Among the factors considered in determining whether a jury could keep the evidence separate as to each defendant are the following: (1) whether the evidence to be presented at the joint trial would be admissible in a single defendant trial; (2) whether the court can properly instruct the jury to keep the evidence separate as to each defendant; and (3) whether the jury actually evaluated the evidence and rendered independent verdicts. *See United States v. Casamento*, 887 F.2d 1141, 1153 (2d Cir. 1989); *see also United States v. Villegas*, 899 F.2d 1324, 1347 (2d Cir. 1990). "No one of the factors is dispositive." *Villegas*, 899 F.2d at 1347.

In accordance with the *Casamento* factors, this Court has repeatedly held that a trial court can carefully instruct the jury in a way to avoid the possibility of spillover prejudice. *See Feyrer*, 333 F.3d at 115; *United States v. Miller*, 116 F.3d 641, 679 (2d Cir. 1997). The ultimate question is whether the jury can "compartmentalize the evidence presented to it, and distinguish among the various defendants in a multi-defendant suit." *See United States v. Triumph Capital Group, Inc.*, 260 F. Supp. 2d 432, 439 (D. Conn. 2002) (internal quotations omitted).

Thus, the existence of prejudice does not guarantee severance. *See Zafiro*, 506 U.S. at 538-539; *United States v. Walker*, 142 F.3d 103, 110 (2d Cir. 1998). Rather, the

defendant "must show that the prejudice to him from joinder is sufficiently severe to outweigh the judicial economy that would be realized by avoiding multiple lengthy trials." *Walker*, 142 F.3d at 110. Even where the risk of prejudice is high, the court can implement less "drastic" measures such as limiting instructions, that will suffice as an alternative to granting severance. *See Zafiro*, 506 U.S. at 538-39.

Because the district court is given broad discretion to fashion an appropriate remedy for any potential prejudice, this Court has recognized that it rarely overturns the denial of a motion to sever. *Feyrer*, 333 F.3d at 114-115. Indeed, a district court's decision to deny a motion to sever is "virtually unreviewable." *Diaz*, 176 F.3d at 102. A district court's decision will be reversed "only if a defendant can show prejudice so severe that his conviction constituted a miscarriage of justice, and that the denial of his motion constituted an abuse of discretion." *Salameh*, 152 F.3d at 115 (internal quotations and citations omitted).

C. Discussion

Herredia belatedly argues that he was improperly joined with co-defendant Jacobs under Federal Rule of Criminal Procedure 8(b). He further argues that even if joinder was proper, the district court should have granted his motion to sever pursuant to Rule 14 because of the prejudicial impact of a videotape of co-defendant Jacobs.

As a preliminary matter, Herredia has waived any argument that he was improperly joined with Jacobs. His

motion for severance, and the arguments in support of that motion, focused exclusively on the potential for prejudice from the videotape, not on any suggestion that joinder was improper under Rule 8. *See* SA79-82 (requesting severance under Rule 14); A2336-38. Because Herredia never argued that joinder was improper below,[8] he has failed to preserve that argument for appellate review. *See United States v. Harrell*, 268 F.3d 141, 146 (2d Cir. 2001) ("An issue is reviewable on appeal only if it was pressed or passed upon below.") (internal quotations omitted).

In any event, Herredia was properly joined for trial with his co-conspirators. Herredia was indicted along with his co-defendants as part of the Estrada organization conspiracy to possess and distribute heroin. A53-54. Even if there was little connection between the co-defendants beyond the conspiracy, case law does not require any further connection. *Nerlinger*, 862 F.2d at 973 (conspiracy allegation presumptively satisfies Rule 8(b)).

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[8] On July 23, 2001, before trial, Herredia filed a motion to sever claiming both improper joinder under Rule 8 and prejudice under Rule 14. *See* SA71-78. The focus of that motion, however, was on severing his trial from co-defendants who were charged with violations of RICO. The district court ultimately severed the named defendants for several separate trials, and thus in Herredia's trial, the only co-defendants were two co-participants in the heroin distribution conspiracy. The RICO defendants -- and therefore the evidence related to the RICO counts -- were not at issue in Herredia's trial. Herredia never renewed his motion to sever once his trial was set with Santana and Jacobs, and never argued that joinder with Jacobs was improper under Rule 8.

Therefore, it was not plain error to join the defendants under Rule 8.

Herredia's motion to sever, which was made after the trial had commenced, was premised upon the potential for spillover prejudice from the government's playing of the videotape of defendant Jacobs selling narcotics to a woman with two small children. An evaluation of the *Casamento* factors demonstrates, however, that the district court did not abuse its discretion in denying Herredia's motion to sever.

First, because the videotape was used to show acts in furtherance of the underlying conspiracy, the evidence likely would have been admissible against Herredia even if he had been tried separately from Jacobs. *See Salameh*, 152 F.3d at 111.

Second, the court repeatedly and properly instructed the jury to keep the evidence separate as to each defendant. Although the court did not give a specific limiting instruction at the time of the playing of the videotape (and Herredia did not request such an instruction[9]), in the court's final charge to the jury, the court repeatedly admonished the jury to evaluate the evidence against each defendant separately. For example, the court stated

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[9] Counsel for defendant Santana claimed that a limiting instruction would not dispel any prejudice from the videotape. SA225.

> Although there are three defendants on trial, you are to consider each defendant as if he were on trial alone. You are required to render a verdict regarding each defendant separately. Your verdict for each individual defendant must be based solely upon the evidence concerning that defendant. The guilt or innocence of each defendant on trial must be determined separately and must be based solely on the evidence or the lack of evidence presented concerning his involvement in the alleged conspiracy. This is true even though there may be evidence regarding the involvement of others. The guilt or innocence of any one defendant should have no bearing on the guilt or innocence of any other defendant. Before you can find any one defendant on trial guilty of the charge against him, you must be persuaded of his guilt beyond a reasonable doubt by the evidence of his personal involvement.

A2543. *See also* A2539 ("In a criminal case, the government must prove each element of the crime beyond a reasonable doubt against each defendant."); A2540 ("In order for the government to prove that a defendant is guilty of the offense charged, it must prove all elements of the offense beyond a reasonable doubt against that defendant."); A2559 ("It is important for you to note that each defendant's participation in the conspiracy must be separately established by independent evidence.").

Moreover, the jury's verdict establishes that it indeed evaluated the evidence as to each defendant separately. The jury was presented with a special verdict form which

required it to determine the amount of heroin each defendant agreed to possess with intent to distribute. A2567-69. Although the jury found beyond a reasonable doubt that both Herredia and Jacobs' agreements included 1,000 grams or more of heroin, A2605-06, with respect to defendant Santana, the jury found that his agreement included only 100 grams or more of heroin, A2606. These verdicts establish that the jury evaluated the evidence and rendered independent verdicts as to each defendant.

In sum, because the videotape would likely have been admissible against him in a separate trial, because the district court provided appropriate instructions to protect against spill-over prejudice, and because it appears that the jury was able to follow those instructions, Herredia cannot show that the denial of his motion to sever resulted in a conviction that "constituted a miscarriage of justice." *Salameh*, 152 F.3d at 115.

IV. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION BY EXCLUDING TESTIMONY OF HERREDIA'S INVESTIGATOR ABOUT THE REACTIONS OF A PERSON NOT INVOLVED IN THE CHARGED CONDUCT

A. Relevant Facts

Defendant Herredia called a private investigator to testify in his defense. Counsel attempted to elicit testimony from the investigator on his impression that an out-of-court declarant had an audibly unfavorable reaction to the investigator's mention of one of the government's

cooperating witnesses (Jose Reyes) but had no similar reaction to the investigator's mention of Herredia's name. The government objected, and the district court excluded the investigator's proposed testimony, including the analogous testimony about another of the government's cooperating witnesses (Ernesto Rodriguez). Beginning with questioning by Mr. Gladstone, Herredia's counsel:

> Q. Okay. Now, eventually did you get in touch with Ms. Otera?
> A. Yes.
> Q. And without telling us what she told you, can you describe to the members of the jury what happened when you -- without telling us what she said, what happened when you finally did get in touch with Ms. Otera?
> A. At first she would not talk about the case.
> Q. Okay, and did you mention Jose Reyes's name?
> A. Yes.
>
> * * *
>
> Q. Okay, and what was her reaction, without telling us what she said, when you mentioned Jose Reyes's name and you began to talk off the record?
>
> MS. MARQUEZ: Your Honor, I'm going to object. MR. GLADSTONE: Your Honor, he's not going -- I don't know what the objection is.
>
> THE COURT: Well, it would seem the objection is relevance. That's my concern. Maybe we can -- I think we ought to have a short sidebar. I hate to do

that to you but I don't know where you're going frankly.
MR. GLADSTONE: Okay.

(Whereupon the following discussion took place at Side-bar.)

THE COURT: What's the the purpose of this?
MR. GLADSTONE: The purpose for this, Your Honor, is that when my investigator talked to Alina Otera about Jose Reyes, she was extremely nervous and scared, outright scared to talk about Jose Reyes.
THE COURT: Okay, that's where I thought you were going.
MR GLADSTONE: And his affiliation with the Latin Kings. But when she began to talk, when my investigator asked her, asked her about my client, there was, she had no problem with talking about my client. And the government's case is that my client is some big-time lieutenant in the Latin Kings and that he is a person who has access to guns and is selling large amounts of drugs. We know Jose Reyes did all that and that's the reaction that was given by Alina Otera when she talked about Jose Reyes, but that's not the reaction that was, that he had gotten when he talked about my client. And I'm not asking any specific questions or answers that were gone into. I want to elicit the fact when you talk about Jose Reyes, this person became extremely nervous and scared.

* * *

THE COURT: Let's look at a 403 issue. What's the probative value and what's the prejudicial effect? What you're saying is she's scared of Reyes and she's not scared of her relative, Daniel Herredia. How does the fact that someone otherwise unconnected with this case is afraid of one person and not afraid of the defendant relevant to any issue in the case? It doesn't show whether or not he was involved in the conspiracy. He could have been involved in the conspiracy and because she's a relative of his she's not scared of him. I just -- the prejudicial value to confuse the jury and to get into issues of, you know, kind of who's really a bad guy and who isn't a bad guy and who is violent and who isn't violent, I just don't see how you get this in frankly.

MR. GLADSTONE: I think it comes in because it is relevant, because the government is claiming my client's some big-time drug dealer who has access to guns and he's a violent person.

THE COURT: How is it proof that he's not, the fact that he's got a relative who's not scared of him?

MR. GLADSTONE: All right. The basis of the government's case, if I'm not mistaken is that Daniel Herredia is a lieutenant with the Latin Kings.

THE COURT: Right, okay.

MR. GLADSTONE: That this person sold a tremendous amount of drugs.

THE COURT: How are you going to elicit the fact that this person Otera even knows who Daniel Herredia is?

MR. GLADSTONE: She has a child by his brother.
THE COURT: His brother, right. That's fine.
MR. GLADSTONE: Well then, might I inquire of the court if I could just ask about Jose Reyes and leave it at that?
THE COURT: But what does that get you? All it does is say that Jose Reyes is a bad guy.
MR. GLADSTONE: Right.
MR. HERNANDEZ: We know that already.
MS. MARQUEZ: He's admitted that.
MR. GLADSTONE: But that's the fine point. The point is I think I'm allowed to inquire as to witnesses as to their knowledge of these individuals and her reaction when that person was mentioned.

* * *

MS. MARQUEZ: So how does he know what her reaction was, by the tone of her voice?
MR. GLADSTONE: Yes.
MS. MARQUEZ: I think that makes it even worse; he can't describe how she appeared.
MR. GLADSTONE: Let me ask the court something too, on the -- when you talk on the phone, you can't gauge someone's reaction when you talk on the phone?
THE COURT: What you want to do is elicit lay opinion evidence about how someone this person never met reacted on the phone when he raised two different names?
MR GLADSTONE: Yes, correct.

> THE COURT: Yes, I'm going to keep out that out. Do you have anything else for this witness to do?
>
> * * *
>
> MR. GLADSTONE: And that's my proffer for the record.
>
> THE COURT: And I find, I think there is a foundational problem here. There is a 403 problem that I've already mentioned and there's just a general relevance problem. I don't think that this proves anything, any issue, real issue in the case so I'm going to exclude the evidence.

A2352-58. *See also* A2357-58 (investigator's proffered testimony that out-of-court declarant had unfavorable reaction to Ernesto Rodriguez).

B. Governing Law and Standard of Review

All relevant evidence is generally admissible in court. Fed. R. Evid. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Even if evidence is relevant, however, the district court has the discretion to exclude it "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403.

This Court reviews a district court's evidentiary rulings for abuse of discretion. *United States v. Schultz*, 333 F.3d 393, 415 (2d Cir. 2003), *cert. denied*, 540 U.S. 1106 (2004). In other words, a district court's evidentiary rulings will not be overturned unless they were "manifestly erroneous." *Yousef*, 327 F.3d at 156. Moreover, even if the district court errs in admitting or excluding evidence, harmless error analysis applies. *Id.*; *see* Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights shall be disregarded.").

C. Discussion

The district court did not abuse its discretion to exclude the investigator's testimony because it was irrelevant. Herredia offered the investigator's testimony to show that two out-of-court declarants were afraid of the government's cooperating witnesses but not afraid of Herredia. A2353-58. The district court properly found that the reactions of two people who were otherwise unconnected to the case might show that the cooperators were "bad guys," but it shed no light on the central issue in the case, namely whether Herredia was involved in the Estrada drug trafficking conspiracy. A2358.

In addition, the district court properly noted that there were foundation problems with the proffered testimony. A2358. The investigator essentially offered lay opinion evidence about the reactions of two people, but he had no basis for offering these opinions. He could not observe the declarant's reactions because he only talked with them over the telephone, and he had no previous knowledge of

the declarants against which to gauge their responses. A2356-57.

Even if the testimony were relevant, the court properly excluded it under Rule 403. The district court found that the evidence had virtually no probative value, but that the likelihood of prejudice from confusion of the jury was very high. A2354-55. The court explained that the fact that someone otherwise unconnected with the case was afraid of one person but not afraid of Herredia was not relevant to whether or not Herredia was involved in the drug conspiracy. On the other hand, the court explained that the testimony would likely confuse the jury and get into issues of, "who's really a bad guy and who isn't a bad guy and who is violent and who isn't violent." A2355. The court concluded that this risk of prejudice outweighed any probative value of the testimony. A2355. Thus, the court did not abuse its discretion by excluding the evidence under Rule 403.

Even if the district court erred in excluding the proffered testimony, the error was harmless. First, Herredia offered the investigator's testimony to show that the government's cooperating witnesses were "bad guys," but this evidence was already before the jury. For example, the jury promptly learned on direct examination that Reyes was a convicted felon who began selling narcotics after dropping out of eighth grade. A399-400, 406. He played an active role in violent drug gangs, and as part of these gangs, was involved in numerous shootings. A404-05. Reyes pleaded guilty to a state assault charge and began serving an eight-year prison term. A406. While in prison, Reyes acted as a "soldier"

for a criminal organization which required him to perform numerous acts of violence including slashing Edward Estrada in the back with a razor blade. A411, 415-16. Reyes also pleaded guilty to charges of conspiracy to commit murder and conspiracy to sell narcotics. A461-62. With respect to Ernesto Rodriguez, the jury was similarly informed that: he dropped out of ninth grade and began selling narcotics, A1029-30; he went to prison where he followed orders to cut and stab other prisoners, A1031-34; and after being released from prison he promptly resumed selling narcotics, A1034. Thus, because the district court's disallowance of the investigator's testimony did not exclude any evidence from the jury's consideration, any error in the exclusion was harmless.

Second, even if the proffered evidence was not cumulative, "there is fair assurance that the jury's judgment was not substantially swayed by the error." *Yousef*, 327 F.3d at 121 (quotations and citations omitted). Even if the jury believed the proffered testimony that Reyes and Rodriguez were "bad guys," the jury could still believe that they offered truthful testimony about Herredia's role in the Estrada drug trafficking conspiracy, especially since their testimony about Herredia was consistent with the testimony of other witnesses in the case. *See, e.g.*, *supra* at Facts, Part 2 (testimony of Lugo and Padilla). In any event, even if the proffered evidence would have caused the jury to disregard the testimony of Reyes and Rodriguez, there was still ample evidence of Herredia's involvement in the Estrada conspiracy to support the verdict.

In sum, the district court acted well within its discretion when it excluded the proffered evidence from Herredia's investigator, and any error in this exclusion was harmless.

CLAIMS OF MAKENE JACOBS

I. Jacobs' Counsel Was Not Constitutionally Ineffective at Trial

Jacobs alleges that his trial counsel provided constitutionally ineffective assistance by failing to move to suppress and properly investigate the seizure of $2,407 that was recovered incident to his August 3, 2000 arrest. Jacobs Br. at 19-37. Jacobs also claims that his counsel was ineffective by failing to object to the introduction of the surveillance videotape, or parts of the videotape, depicting him engaged in narcotics trafficking in the P.T. Barnum housing project. Jacobs Br. at 37-41.

As described below, these claims are meritless. For both claims, Jacobs cannot demonstrate that his counsel was constitutionally deficient or that he suffered any prejudice from any alleged errors.

A. Relevant Facts

1. The Fourth Amendment Claims

At trial, Sergeant Angelo Pierce testified that on August 3, 2000, he was part of an arrest team working with Police Officer William "Ron" Bailey and the "TNT" (Tactical Narcotics Team) during a narcotics surveillance

conducted at the P.T. Barnum Housing Project. GA9-10. Sergeant Pierce testified that during the operation he was directed to Building 12 to arrest Jacobs. GA12. He and Police Officer Ernie Garcia proceeded to Building 12 and knocked at the door to apartment 210. Jacobs was placed under arrest when he answered the door. GA13, 16. Sergeant Pierce searched Jacobs' person incident to the arrest and found $2,407 in United States currency inside Jacobs' right front pocket. GA10-11, 19.

At trial, Jacobs testified on his own behalf. He admitted that he was a drug dealer and that he sold crack-cocaine, cocaine and marijuana in P.T. Barnum. A2178, 2181-84, 2192. Jacobs claimed, however, that he never sold heroin and that he was not part of the Estrada organization. A2170, 2176. Jacobs testified that on August 3, 2000, he was in the area in front of Building 12, but that he did not have any cocaine to sell that day and was "[j]ust out there to be out there." A2185, 2206. He said he was arrested later that day when he opened the door to apartment 210 of Building 12. A2187. Jacobs admitted that the $2,407 seized by the officers was his money, and that it was "from the proceeds of selling cocaine." A2188. He claimed, however, that the money was not seized from his person but instead from his apartment. A21288-89. Jacobs offered no other evidence at trial to corroborate his claims regarding the seizure of the money, and he was ultimately convicted by a jury on the drug conspiracy charge.

Jacobs appealed, but before filing his opening brief with this Court, he moved for a remand to the district court for an evidentiary hearing on, *inter alia*, his ineffective

assistance claims related to the seizure of currency. On April 30, 2003, this Court granted the motion in part, ordering a limited remand for supplemental findings on whether Jacobs' trial counsel was ineffective because he failed to move to suppress the currency evidence and failed to investigate whether the police had conducted a legal search, seizure, and arrest. GA26. The district court held an evidentiary hearing during which six witnesses -- including Jacobs' trial counsel -- testified, one witness submitted an affidavit, and the court received into evidence a number of exhibits. GA37. On June 27, 2003, the district court held that "[h]aving considered all of the evidence introduced at the hearing and after applying the standards governing claims of ineffective assistance of counsel, the court concludes that Jacobs was not denied effective assistance of counsel. To the contrary, Jacobs' trial counsel commendably represented a difficult client facing a difficult case." GA37-38.[10]

Specifically, with respect to whether trial counsel was deficient for failing to file a motion to suppress, the district court found that trial counsel had sound strategic reasons for declining to file such a motion. Crediting trial counsel's testimony, the district court summarized counsel's reasoning as follows:

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[10] On June 30, 2003, the district court issued Amended Supplemental Findings on Remand. The government has included a copy of the amended findings in its appendix, GA37-49, and cites to those findings in this brief.

First, Jacobs had insisted from the beginning of his representation that he was going to testify at trial. Because Jacobs was going to testify on his own behalf, Attorney Warren was concerned that: (1) anything Jacobs testified to during the suppression hearing could be used to impeach him at trial; . . . and (2) the government could more effectively cross-examine Jacobs at trial if it was given a preliminary opportunity to cross-examine him at the suppression hearing. Second, Attorney Warren was concerned that Jacobs would give fraudulent testimony at a suppression hearing. Jacobs had previously conveyed to Attorney Warren that he was prepared to testify falsely regarding his state court guilty plea in order to withdraw his plea, and Jacobs had requested Ms. Wright and another potential witness to testify falsely on his behalf. Third, Attorney Warren did not believe the $2,407 was critical to the government's case in light of the videotape surveillance, Sergeant Gonzalez's, Officer Bailey's and Officer Pierce's testimony, as well as the co-operating witnesses' testimony. Moreover, as part of his defense, Jacobs was not going to deny that he was a drug dealer. Thus, whether Jacobs had the $2,407 on his person or in his apartment was immaterial to his defense. Fourth, despite Jacobs' claim that Ms. Wright and Mrs. Moore would corroborate Jacobs' story that the police did not seize the $2,407 from his person, Ms. Wright emphatically informed Attorney Warren that she could not corroborate Jacobs' story because she was not present at the time of the seizure. Moreover, she informed Attorney Warren that

> Jacobs had written her and asked her if she would testify falsely on his behalf, claiming that she had witnessed the police seizing the money from the apartment, rather than from his person. Ms. Wright then promised Attorney Warren that if he asked her or her mother, Hazel Moore, who lived across the street from Jacobs, to testify on Jacobs' behalf, she would deliver Jacobs' letter requesting fraudulent testimony to the United States Attorney's Office. . . .
>
> In sum, Attorney Warren presented not only plausible strategic decisions not to file a motion to suppress, but had unquestionably reasonable bases for choosing not to file a motion to suppress.

GA42-44 (footnotes omitted).

On Jacobs' claim that his counsel had failed to investigate two witnesses who would allegedly corroborate Jacobs' story that the police had illegally seized the currency from his house, the district court rejected Jacobs' arguments and again credited the testimony of Jacobs' trial counsel. The court found counsel's testimony that he had spoken with one of the witnesses (Ms. Wright) on the phone and in person "completely credible." GA45. In these conversations, Ms. Wright explained that she could not corroborate Jacobs' story, expressed a reluctance to testify, and threatened "to supply the prosecution with incriminating evidence against Jacobs" if counsel asked her or her mother (Ms. Moore) to testify for Jacobs. GA45-46. Thus, counsel reasonably decided not to use Ms. Wright as a witness. Moreover, in light of Ms.

Wright's threat, the district court concluded that counsel reasonably decided not to contact Ms. Moore. For all these reasons, the court found that counsel acted reasonably in his investigation of Jacobs' alleged Fourth Amendment claim. GA46.

On the prejudice prong of the ineffective assistance inquiry, the district court found no prejudice from either the failure to file the motion to suppress or the alleged failure to investigate. The motion to suppress would not likely have been successful because counsel had no evidence to corroborate Jacobs' story that the search was illegal. Jacobs' testimony, when weighed against the testimony of Officer Pierce -- who the district court specifically found to be credible -- would have been insufficient to support the motion to suppress. GA46. But even if a motion to suppress were filed, and even if it were successful, the district court concluded that it would not have made a difference in the outcome of the trial. Even without the seized currency, there was "significant evidence connecting Jacobs to the Estrada organization," including testimony from two police officers, videotape evidence of Jacobs engaged in narcotics transactions, and the testimony of two cooperating witnesses. GA47.

On the alleged failure to investigate, the court similarly found no prejudice. The court considered the testimony of the two witnesses Jacobs claimed his lawyer should have investigated (Ms. Wright and Ms. Moore) and found that even if it accepted everything they said at the evidentiary hearing as true, they could not corroborate Jacobs' story about the search because they were not present when he was arrested. Thus, according to the court, even if they

had been given the opportunity to testify, they would not have undermined the government's case, much less "to the point where the jury would have found Jacobs not-guilty." GA48.

2. The Failure to Object to Admission of Videotape

During trial, the government presented significant evidence of Jacobs' participation in the Estrada heroin distribution conspiracy. This evidence included testimony from two cooperating witnesses who described Jacobs' involvement in and role as a supervisor in the Estrada organization, testimony from two police officers who observed Jacobs involved in narcotics transactions, and the currency seized from Jacobs on the day of his arrest. *See supra* at Facts, Part 3. Significantly, the evidence also included a surveillance videotape of Jacobs selling narcotics in an area of P.T. Barnum controlled by the Estrada organization. At one point on this tape, Jacobs is seen selling narcotics to a woman with two small children. A1961-62, 1974-77. Jacobs' counsel did not object to the admission of any part of this videotape.

B. Governing Law and Standard of Review

A claim of constitutionally ineffective assistance of counsel is subject to well-established criteria for review. "To support a claim for ineffective assistance of counsel, petitioner must demonstrate," first, "that his trial counsel's performance 'fell below an objective standard of reasonableness . . .'" *Johnson v. United States*, 313 F.3d

815, 817-18 (2d Cir. 2002) (*per curiam*) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984)). In determining whether counsel's performance was objectively reasonable, this Court "must 'indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound [legal] strategy.'" *United States v. Gaskin*, 364 F.3d 438, 468 (2d Cir. 2004) (alteration in original) (quoting *Strickland*, 466 U.S. at 689).

Second, the defendant must demonstrate "that he was prejudiced by counsel's deficient acts or omissions." *Johnson*, 313 F.3d at 818. In other words, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. As relevant to this case, when a defendant alleges that his counsel was ineffective for failing to file a motion to suppress, the defendant must show that a motion to suppress would have been meritorious and that there is a reasonable probability that "the verdict would have been different if the evidence had been suppressed." *United States v. Matos*, 905 F.2d 30, 32 (2d Cir. 1990) (citing *Kimmelman v. Morrison*, 477 U.S. 365, 375-76 (1986)). When the defendant alleges that his counsel was deficient in failing to object to the admission of a piece of evidence, he must show that had counsel objected to and succeeded in excluding the evidence at issue, the outcome of the trial would have been different. *See, e.g.*, *Diaz*, 176 F.3d at 113.

This Court has expressed its reluctance to decide ineffective assistance of counsel claims on direct review, but it has also held that "direct appellate review is not foreclosed." *Gaskin*, 364 F.3d at 467-68. This Court continues to recognize that when a criminal defendant on direct appeal asserts trial counsel's ineffective assistance to the defendant, we may "(1) decline to hear the claim, permitting the appellant to raise the issue as part of a subsequent [28 U.S.C.] § 2255 [motion]; (2) remand the claim to the district court for necessary fact-finding; or (3) decide the claim on the record before us." *United States v. Leone*, 215 F.3d 253, 256 (2d Cir. 2000). *See also United States v. Doe*, 365 F.3d 150, 152 (2d Cir.), *cert. denied*, 125 S. Ct. 449 (2004).

In choosing among these options, this Court has been mindful of the Supreme Court's direction that "in most cases a motion brought under § 2255 is preferable to direct appeal for deciding claims of ineffective-assistance," *Massaro v. United States*, 538 U.S. 500, 504 (2003). *See Gaskin*, 364 F.3d at 467-68. But this direction, as interpreted by this Court, is not an injunction against reviewing new ineffective assistance claims on direct appeal, but rather an expression of the Supreme Court's view that, "the district court [is] the forum best suited to developing the facts necessary to determining the adequacy of representation during an entire trial." *Doe*, 365 F.3d at 153 (alteration in original) (quoting *Massaro*, 538 U.S. at 501).

For this reason, this Court may resolve ineffective assistance claims on direct appeal "when the factual record is fully developed and resolution of the Sixth Amendment

claim on direct appeal is 'beyond any doubt' or 'in the interest of justice.'" *Gaskin*, 364 F.3d at 468 (quoting *United States v. Khedr*, 343 F.3d 96, 100 (2d Cir. 2003)). *See also Matos*, 905 F.3d at 32.

This Court reviews a claim of ineffective assistance of counsel *de novo*, *United States v. Finley*, 245 F.3d 199, 204 (2d Cir. 2001), but "[w]here the district court has decided such a claim and has made findings of historical fact, those findings may not properly be overturned unless they are clearly erroneous," *United States v. Monzon*, 359 F.3d 110, 119 (2d Cir. 2004). Moreover, when reviewing factual findings, "particularly strong deference" is owed when "the district court premises its findings on credibility determinations." *Id.*

C. Discussion

1. Counsel Was Not Ineffective For Failing To Move To Suppress The Currency And Failing To Properly Investigate That Claim

Jacobs' claims that his trial counsel should have pursued a motion to suppress the $2,407 seized at Jacobs' arrest, or further investigated the seizure, fail both the deficiency and prejudice prongs of *Strickland*.

a. Motion to Suppress

As the district court found, trial counsel's decision not to pursue a motion to suppress reflected a valid defense

strategy. GA42. According to the district court, this tactical decision rested on several reasonable concerns about the filing and prosecution of a motion to suppress. For example, counsel was concerned that Jacobs might provide false testimony at a suppression hearing and that his testimony in a suppression hearing could be used to impeach him when he testified at trial. GA42-43. Putting aside the potential pitfalls of Jacobs' testimony, counsel did not believe that the currency was critical to the government's case because there was other compelling evidence of his guilt, including the videotape evidence and testimony from law enforcement and cooperating witnesses. In any event, because Jacobs did not plan to deny he was a drug dealer, it was immaterial to his defense whether the currency was found on his person or in his apartment. GA43. Finally, counsel had no corroborating evidence to support Jacobs' story about the seizure of the currency, and indeed, one of the witnesses Jacobs had identified to corroborate his story told counsel that if called to testify, she would supply the U.S. Attorney's Office with a letter from Jacobs in which he asked her to testify falsely, thereby making Jacobs vulnerable to additional criminal charges for obstruction of justice. GA43. For all of these reasons explained by counsel, counsel's decision not to file a motion to suppress was eminently reasonable. GA44.

Significantly, Jacobs does not address the district court's factual findings or make any attempt to show that they were clearly erroneous. Where as here the district court credited that testimony of trial counsel and his reasons for not pursuing a motion to suppress the money,

Jacobs cannot show that his counsel's performance was deficient under *Strickland*.

Moreover, Jacobs fails to establish that he was in any way prejudiced by the failure to file a motion to suppress. Specifically, Jacobs has failed to demonstrate that, if made, the suppression motion would have been meritorious, and that the result of the trial would likely have been different. *Matos*, 905 F.2d at 32. Jacobs' own witnesses, Ms. Wright and Ms. Moore, did not corroborate his claim that the money was illegally seized from the apartment because both witnesses admitted that they were not present when the defendant was initially placed under arrest and searched. GA43-44, 47-48. Without corroboration, the motion to suppress would have been supported only by Jacobs' testimony, and the district court would have had to weigh his credibility against that of the police officers. Because the district court specifically found that Sergeant Pierce provided credible testimony, it is unlikely that a motion to suppress would have been successful. GA46.

And even if a motion to suppress were successful, Jacobs cannot show that the exclusion of the currency evidence would have had an impact on the outcome of the trial. Jacobs claims that the money was the "only good evidence of his membership" in the Estrada organization, Jacobs Br. at 22, but the money was just a small part of the "overwhelming[]" evidence introduced against Jacobs at trial, GA47. For example, Jermaine Jenkins, a cooperating witness and lieutenant in the Estrada organization, testified that Jacobs was also responsible for the distribution of heroin to street-level dealers and the collection of

narcotics proceeds. Viviana Jimenez, another cooperating witness who was a street-level dealer in the Estrada organization, testified that she had worked for Jacobs selling Estrada's brand of heroin in P.T. Barnum. The testimony of the cooperating witnesses was corroborated by the testimony of law enforcement agents and officers such as Sergeant Gonzalez who testified that while out on surveillance, he observed Jacobs in the Estrada-controlled territory of P.T. Barnum and could hear the brand name "Hawaiian Punch" (Estrada's heroin brand name) being advertised in the area. Officer Bailey, a veteran of the Bridgeport TNT, testified that he had observed Jacobs with other members of the Estrada organization in P.T. Barnum and, among other things, heard him advertising the sale of "Hawaiian Punch." Finally, all of the testimony was corroborated by the introduction of a surveillance videotape depicting Jacobs selling drugs in an area of P.T. Barnum controlled by the Estrada organization. *See generally supra* at Facts, Part 3. Given this overwhelming evidence, exclusion of the money would have had no impact on the jury's decision.

b. Investigation of The Motion To Suppress

Equally without merit is Jacobs' claim that counsel was ineffective for failing to properly investigate the seizure of the money. Jacobs claims that counsel was ineffective because he failed to reasonably investigate Jacobs' Fourth Amendment claim by interviewing Ms. Wright and Ms. Moore. Jacobs Br. at 31-37. In support of this argument, Jacobs relies heavily on Ms. Wright's affidavit stating that

counsel did not interview her, but the district court specifically rejected this testimony and credited trial counsel's testimony that he had in fact interviewed Ms. Wright. *See* GA45 ("The court finds Attorney Warren's entire testimony, and in particular his testimony that he spoke to Ms. Wright on the phone and in person, completely credible."). Because this finding is based on a credibility determination, it is entitled to "particularly strong deference." *Monzon*, 359 F.3d at 119. The mere fact that Jacobs takes a different view of the evidence, or, as here, simply chooses to ignore the district court's findings, does not establish that the district court's findings were clearly erroneous. *Id.* at 120.

The district court credited counsel's testimony at the remand hearing that Ms. Wright was unable to corroborate Jacobs' story and that she was reluctant to testify and in fact threatened to go to the prosecutors with a copy of a letter that Jacobs had written asking her to lie on his behalf if counsel called her or her mother, Ms. Moore, to testify at the trial. GA43. Thus, as the district court found, counsel made a sound tactical decision not to pursue Ms. Wright as a witness in support of a motion to suppress. In addition, because Ms. Wright had threatened to go to the prosecutors with Jacobs' letter if counsel asked Ms. Moore to testify, counsel reasonably decided not to talk with Ms. Moore. GA44.

Moreover, there was no prejudice from counsel's alleged failure to properly investigate Ms. Wright and Ms. Moore as witnesses for Jacobs. The district court received testimony from both women during the evidentiary hearing and concluded that even taking what they said as true, they

could not testify as to whether Officer Pierce seized the money from Jacobs' person or his home because they were not present when Jacobs was arrested. GA43-44, 46-48. Thus, testimony from these witnesses would not have contradicted the testimony of the police officers and would not have undermined the government's case, much less "to the point where the jury would have found Jacobs not-guilty." GA48.

2. Counsel Was Not Constitutionally Ineffective For Failing To Object To The Introduction Of The Surveillance Tape

Jacobs' second claim of ineffective assistance of counsel -- that his lawyer was ineffective for failing to object to the introduction of the surveillance videotape -- was not presented to the district court, but this case presents "circumstances in which a federal appellate court is justified in resolving an issue not passed on below, as where the proper resolution is beyond any doubt. . . ." *United States v. Aulet*, 618 F.2d 182, 186 (2d Cir. 1980). *Massaro* should be read as preferring that defendants bring new ineffective assistance of counsel claims in the form of a Section 2255 motion, rather than serving as an injunction against doing so. Where, as here, the resolution of the Sixth Amendment claim is "beyond any doubt," there is no need to remand for further findings of fact. Indeed, although Jacobs requested a remand on some of his ineffective assistance claims, he did not request a remand on this claim and does not now claim that further facts are required to resolve the claim. In the interest of judicial

economy, therefore, the government respectfully requests that this Court exercise its discretion and address Jacobs' latest ineffective assistance of counsel claim.

Here, Jacobs' claim that his counsel was ineffective for failing to object to the introduction of portions of the surveillance videotape fails first because the failure to object was not deficient performance. Jacobs himself admitted when he testified at trial that he was captured on the videotape selling narcotics, but claimed to be selling cocaine instead of heroin. Thus, counsel's decision not to object to the admission of the videotape was sound trial strategy in light of the defense advanced at trial.

Moreover, any objection to the videotape, or even a portion of the videotape, would have been overruled because there were sound evidentiary bases for the admission of the videotape. The videotape was direct and highly probative evidence of Jacobs selling drugs in P.T. Barnum. Jacobs claims, however, that the court should have excluded the portion of the tape showing him selling narcotics to a woman holding two small children because this part of the tape was highly prejudicial to him. Jacobs Br. at 37- 41. But Rule 403 provides for evidence to be excluded only if the probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. "Because virtually all evidence is prejudicial to one party or another, to justify exclusion under Rule 403 the prejudice must be *unfair*. The unfairness contemplated involves some adverse effect beyond tending to prove a fact or issue that

justifies admission." *Costantino v. Herzog*, 203 F.3d 164, 174-75 (2d Cir. 2000) (citation omitted).

Here, the defendant was not unfairly prejudiced by the videotape evidence. The videotape provided dramatic evidence of Jacobs selling narcotics during the time period charged in the indictment in the area known to be controlled by the Estrada organization. This evidence was highly probative, especially since Jacobs' defense rested on his claim that he was a drug dealer, but not one associated with the Estrada organization. Jacobs identifies no *unfair* prejudice, beyond the tendency of the videotape to show that he was guilty of the offense charged, to justify exclusion under Rule 403. In sum, any objection to its introduction would have been denied.

But even assuming the failure to object to a portion of the videotape was in fact deficient, the defendant still must show that he was prejudiced by the deficiency, and he has failed to make such a showing. *Strickland*, 466 U.S. at 687-88. Specifically, Jacobs has failed to show that but for his lawyer's alleged failure to object to the admission of a portion of the videotape, there is a reasonable probability that there would have been a different outcome at trial. *Id.* at 694. The testimony of cooperating witnesses and law enforcement officers would have been more than sufficient evidence to convict the defendant without the introduction of one small segment of the videotape. *See supra* at Facts, Part 3. Accordingly, Jacobs has failed to show that his counsel's performance was deficient, much less that he suffered prejudice.

II. THE COURT LACKS AUTHORITY TO CONSIDER JACOBS' REQUEST FOR A NEW TRIAL

A. Relevant Facts

During the entire proceedings below, Jacobs never moved for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. His appeal marks the first time he has requested a new trial on any basis. Jacobs Br. at 41.

B. Governing Law and Standard of Review

Under Fed. R. Crim. P. 33, "[o]n a defendant's motion," a district court may grant the defendant a new trial "if the interests of justice so require." Fed. R. Crim. P. 33.[11] If a defendant requests a new trial based on newly discovered evidence, he must file his Rule 33 motion within three years of the verdict. *See id.* If a "defendant makes the motion on any other grounds, he must do so within seven days after the verdict or within such further time the district court sets." *United States v. McCarthy*, 271 F.3d 387, 399 (2d Cir. 2001); *see also* Fed. R. Crim. P. 33.

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[11] Rule s 33 and 45(b) were amended effective December 1, 2002, but the changes were "intended to be stylistic only." *See* Fed. R. Crim. P. 33 & 45(b), Advisory Committee Notes. The language of Rules 33 and 45(b) in effect in November 2001 -- the time period of the relevant events at issue here -- is used in this brief.

Rule 45(b) makes clear that Rule 33's time limits are to be followed with no exceptions. Rule 45(b) states that "the court may not extend the time for taking any action under Rules 29, 33, 34 and 35, except to the extent and under the conditions stated in them." Fed. R. Crim. P . 45(b); *see also United States v. Hocking*, 841 F.2d 735, 736 (7th Cir. 1988). This is not a rule for courts to follow at their discretion. Rather, "Rule 45(b) means what it says." *Hocking*, 841 F.2d at 736. "These time limits were expressly 'framed to resist ad hoc relaxation' and, thus, may fairly be characterized as 'rigid.'" *United States v. Canova*, Nos. 03-1291, 03-1300, ___ F.3d ___, 2005 WL 1444147, *10 (2d Cir. June 21, 2005) (quoting *Carlisle v. United States*, 517 U.S. 416, 434-36 (1996) (Ginsburg, J., concurring)). *See also Carlisle v. United States*, 517 U.S. 416 (1996) (holding that court lacks authority to grant Rule 29 motion outside the time limits prescribed by the rule);[12] *United States v. Dukes*, 727 F.2d 34, 38 (2d Cir. 1984) ("[These] time limits are jurisdictional," and thus if a motion is not timely filed, "the district court lacks power to consider it.").

In *McCarthy*, this Court held that "[w]hen a motion for a new trial is not timely, and 'there is no suggestion that

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[12] Rule 29 sets forth the same seven-day rule. *See* Fed. R. Crim. P. 29; *Hocking*, 841 F.2d at 736 (stating that Rule 29 "employs the same seven-day rule" as Rule 33). Courts construing Rule 33's time limitations have looked to cases construing Rule 29's, and vice versa. *See, e.g.*, *Hocking*, 841 F.2d at 736-37 (discussing Rule 29 and Rule 33 time limitations interchangeably); *United States v. Hall*, 214 F.3d 175, 177 (D.C. Cir. 2000) (relying on *Carlisle*).

the motion is based on newly discovered evidence,' the motion is deemed untimely, and [this Court] lack[s] jurisdiction to consider it." *McCarthy*, 271 F.3d at 399 (quoting *United States v. Moreno*, 181 F.3d 206, 212 (2d Cir. 1999)). Although the Supreme Court's decision in *Kontrick v. Ryan*, 540 U.S. 443 (2004) casts doubt on whether an untimely Rule 33 motion should be labeled a "jurisdictional" defect, *see, e.g.*, *Canova*, 2005 WL 1444147, *9, *12, the underlying point remains: the district court, and by extension this Court, lack authority to consider an untimely request for a new trial, *see id.* at *11 (finding that district court "was not authorized under Rule 33 to entertain" an untimely new trial motion). *See also Carlisle*, 517 U.S. at 433 (holding that district court lacks authority to grant a Rule 29 motion outside the time limit prescribed by the rule); *id.* at 421 (describing the seven-day time limit in Rule 29 as "plain and unambiguous" and stating that "[t]here is simply no room in the text of Rules 29 and 45(b) for the granting of an untimely [motion]").

Even without an express time limitation in a rule, this Court does not consider arguments raised for the first time on appeal. *See Harrell*, 268 F.3d at 146.

The question whether a motion for new trial was filed in a timely manner, and thus whether this Court is authorized to rule on it, is subject to *de novo* review. *See United States v. Hall*, 214 F.3d 175, 177 (D.C. Cir. 2000).

C. Discussion

Jacobs never made a motion for a new trial pursuant to Rule 33. For the first time on appeal, he claims that he is entitled to a new trial because -- according to Jacobs -- the government elicited perjured testimony and engaged in several forms of prosecutorial misconduct. Jacobs Br. at 41-53. Because there is nothing in the record to suggest that Jacobs made a motion for a new trial within seven days after the verdict and because none of the grounds advanced involve newly discovered evidence, this Court lacks authority to grant him the relief he requests. *See, e.g.*, Fed. R. Crim. P. 33; *McCarthy*, 271 F.3d at 399. Alternatively, this Court should decline to consider these claims because Jacobs waived his request for a new trial by failing to present it to the district court. *Harrell*, 268 F.3d at 146 ("An issue is reviewable on appeal only if it was pressed or passed on below.") (internal quotations omitted).

III. THE GOVERNMENT DID NOT PRESENT PERJURED TESTIMONY OR COMMIT ANY OTHER FORM OF PROSECUTORIAL MISCONDUCT

On appeal, Jacobs claims that he was denied a fair trial because the government committed prosecutorial misconduct in that it allegedly: (1) elicited perjured testimony from a police witness, (2) made improper statements during summation, and (3) improperly cross-

examined him.[13] As described above, this Court lacks authority to grant Jacobs a new trial on these grounds because he never asked for a new trial below.

But if this Court reaches these arguments, it should reject them all as meritless. The ultimate question for a court considering a new trial motion is "whether letting a guilty verdict stand would be a manifest injustice." *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001). A manifest injustice is a "real concern that an innocent person may have been convicted." *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992). Here, as described more completely below, the government did not commit prosecutorial misconduct and there would be no manifest injustice in letting Jacobs guilty verdict stand.

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[13] Jacobs also argues -- with no citation of authority -- that the government committed prosecutorial misconduct when it attempted to elicit hearsay testimony from a witness. Jacobs Br. at 52. But even if asking a question that elicits hearsay testimony is construed as misconduct, it can have no impact on the fairness of the defendant's trial where, as here, trial counsel objected to the question, the objection was sustained, and the answer was stricken. GA6-7. *See United States v. Burns*, 104 F.3d 529, 538 (2d Cir. 1997) (the court's sustaining an objection and striking the challenged question cured any possible prejudice). Furthermore, the answer was properly admitted the very next day through another witness. GA9-11.

A. The Government Did Not Elicit Perjured Testimony

1. Relevant Facts

Police Officer Pierce testified as follows:

Q. Sir, drawing your attention to August the 3rd of 2000, did you have an opportunity on that day to assist Officer William "Ron" Bailey from the Bridgeport TNT making some arrests out at the P T Barnum housing project?
A. Yes, sir.
Q. And as a result of communications which you received from Officer Bailey, did you arrest an individual by the name of Makene Jacobs?
A. Yes, sir.

* * *

Q. . . . After Mr. Jacobs was placed under arrest, did you have an opportunity to search him?
A. Yes, sir.
Q. And as a result of that search, did you seize 2,407 dollars in cash from Mr. Jacobs?
A. Yes, sir.
Q. And what did you do with that currency after you seized it?
A. We turn it into evidence.

GA9-11.

Jacobs testified at trial that the money was "never on my person." A2221. He now claims that if Leandra Wright, his former girlfriend, and her mother, Hazel Moore, had been called as witnesses at the trial, they would have supported his claim that the money was found in his apartment, not on his person. Jacobs Br. at 44.

2. Governing Law and Standard of Review

In *McCarthy*, this Court explained that

> [a] new trial based on allegations of perjured testimony should be granted only with great caution and in the most extraordinary circumstances. To prevail, a defendant must show (i) the witness actually committed perjury; (ii) the alleged perjury was material; (iii) the government knew or should have known of the alleged perjury at [the] time of trial, and (iv) the perjured testimony remained undisclosed during trial.

McCarthy, 271 F.3d at 399 (alteration in original) (internal citations and quotations omitted).

If this Court reviews Jacobs' claim, it should review for plain error because Jacobs did not object to the introduction of the testimony in the district court. A district court has broad discretion in its decisions to admit or exclude evidence and testimony. When a defendant raises new objections to the admission of evidence for the first time on appeal, the Court reviews those claims for

plain error under Fed. R. Crim. P. 52(b). *See, e.g.*, *United States v. Inserra*, 34 F. 3d 83, 91 n.1 (2d Cir. 1994).

A trilogy of decisions by the Supreme Court interpreting Rule 52(b) has established a four-part plain error standard. *See United States v. Cotton*, 535 U.S. 635 631-32 (2002); *Johnson v. United States*, 520 U.S. 461, 466-67 (1997); *United States v. Olano*, 507 U.S. 725, 732 (1993). Under plain error review, before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that was "plain" (which is "synonymous with 'clear' or equivalently 'obvious'"), *see Olano*, 507 U.S. at 734; and (3) that affected the defendant's substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *Johnson*, 520 U.S. at 466-67.

3. Discussion

Jacobs's argument for a new trial based on allegedly perjured testimony should fail. Most significantly, Jacobs cannot show that Sergeant Pierce offered perjured testimony in this case. In fact, the district court held as follows: "At the trial as well as at the evidentiary hearing, Officer Pierce testified that he seized the money from Jacobs' person, and the court found his testimony in both instances credible." GA46. As set forth above, this Court grants considerable deference to the credibility findings of the district court, *see Monzon*, 359 F.3d at 119, but putting aside this credibility determination, a conflict in testimony

between Sergeant Pierce and Jacobs does not, by itself, demonstrate that Pierce committed perjury. *See, e.g.*, *United States v. Gallego*, 191 F.3d 156, 161 (2d Cir. 1999) ("The district court found no indication, nor do we, that any difference between the accounts offered by these two witnesses suggests perjury by either."). And although Jacobs argues that Ms. Wright and Ms. Moore would contradict Pierce's testimony, again, the district court specifically rejected this argument. *See* GA43-44, 46-48.

Moreover, even if Sergeant Pierce's testimony was in some way debatable, the conflicting accounts of the currency seizure were presented to the jury through Jacobs' own testimony. "The jury was entitled to weigh the evidence and decide the credibility issues for itself." *McCarthy*, 271 F.3d at 399-400 (citing *United States v. Zichettello*, 208 F.3d 72, 102 (2d Cir. 2000)). Because the record reveals that the alleged perjury was disclosed during trial, Jacobs' claim must fail.

B. The Government Did Not Commit Prosecutorial Misconduct During Summation

Jacobs claims that he was denied a fair trial because of prosecutorial misconduct committed during closing arguments. First, Jacobs claims that twenty-two statements made by the government using the pronoun "I" improperly injected the prosecutor's personal opinion into the case. Jacobs Br. at 46-50. Next, he contends that the prosecutor's drug quantity calculations amounted to comments on facts not in evidence. *Id.* at 50. He also

claims that the prosecutor inappropriately argued that Jacobs, as a lieutenant in the organization, was in a position to have other people do his "dirty work." *Id.* at 52. Finally, Jacobs claims that the prosecutor's "tree" analogy and references to a "wood chipper" were improper. *Id.* at 52-53. As set forth below, all of his claims are without merit.

1. Relevant Facts

At the end of trial, counsel for the government presented nearly two hours of closing arguments. Although the district court reminded counsel of their obligation to object to any improper summation, A2387-88, there were no objections to any of the arguments made by the prosecution during its summation.

During jury instructions, the court instructed the jury as follows: "In determining the facts you must rely on your own recollection of the evidence. What the lawyers have said in their closing arguments, in their comments, in their objections or in their questions is not evidence." A2534.

2. Governing Law and Standard of Review

"The government has broad latitude in the inferences it may reasonably suggest to the jury during summation." *United States v. Edwards*, 342 F.3d 168, 181 (2d Cir. 2003) (citation omitted). Accordingly, a prosecutor is not precluded from using colorful rhetoric when arguing that

inferences be drawn from the evidence at summation. *United States v. Rivera*, 971 F.2d 876, 884 (2d Cir. 1992).

Furthermore, to secure a reversal on a claim of prosecutorial misconduct arising from allegedly wrongful statements made in summation, the defendant must demonstrate that the alleged misconduct "so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process. The defendant must point to *egregious misconduct*. Where, as here, the defendant did not object to the remarks at trial, reversal is warranted only where the remarks amounted to a flagrant abuse." *United States v. Coriaty*, 300 F.3d 244, 255 (2d Cir. 2002) (internal citations and quotations omitted) (emphasis added); *see also United States v. Young*, 470 U.S. 1, 11 (1985) ("Inappropriate prosecutorial comments, standing alone, would not justify a reviewing court to reverse a criminal conviction obtained in an otherwise fair proceeding."); *United States v. Zichettello*, 208 F.3d 72, 103 (2d Cir. 2000). In evaluating whether egregious misconduct has occurred, courts consider the following factors: (1) the severity of the alleged misconduct, (2) the measures adopted to remedy it, and (3) the certainty that a conviction would have occurred in the absence of the alleged misconduct. *United States v. Melendez*, 57 F.3d 238, 241 (2d Cir. 1995).

3. Discussion

First, Jacobs claims that during summation the prosecutor inappropriately used the pronoun "I." He attributes great weight to the government's use of phrases such as "I will try to anticipate some of the arguments that

counsel will be making," or "A conspiracy, I submit to you is very much like a tree . . . ." *See* Jacobs Br. at 47-48. He argues that these statements impermissibly communicated the prosecutor's personal beliefs to the jury. For the reasons set forth below, his contention is without merit.

A prosecutor's use of language such as "I suggest," or "I submit" has been approved by this Court because it does not constitute an outright endorsement. *United States v. Eltayib*, 88 F.3d 157, 173 (2d Cir. 1996). The government is allowed to respond to argument that "impugns its integrity or the integrity of its case." *Id.* While the use of certain phrases, such as "I'm here to tell you that," or "I think it is clear" has been discouraged by the court, "a prosecutor's use of the pronoun 'I' does not automatically wreck the case." *Id.* Significantly, the defendant offers no explanation for how such comments in this case "so infect[ed] the trial with unfairness as to make the resulting conviction a denial of due process." *Coriaty*, 300 F.3d at 255 (citations omitted).

Analysis under the three-part test enumerated above reveals the harmlessness of the government's word choice. *See Melendez*, 57 F.3d at 241 ((1) severity of the alleged misconduct, (2) measures adopted to remedy it, and (3) certainty that a conviction would have occurred in the absence of the alleged misconduct). Most of the challenged language is entirely harmless. Of the twenty-two objections Jacobs now raises to statements made in the government's summation, more than half (twelve) are based on the use of the words "I submit" or "I respectfully submit." *See* Jacobs Br. at 47-49. A claim of

prosecutorial misconduct as to these statements is baseless. *See Eltayib*, 88 F.3d at 173.

The remainder of the challenged statements are equally innocent. For example, the prosecutor stated, "In this case each of these defendants took affirmative steps to actually distribute heroin, narcotics, so I think you can infer from that when they possessed that heroin they possessed it with the intention of distributing it." A2410. Similarly, the prosecutor provided some introductory comments about the purpose of his summation:

> This is my opportunity to explain to you what it is that the government has to prove in this case in order for each of these defendants to be found guilty, and I also want to take this opportunity to explain to you what we believe the evidence in this case has shown, how it is that we have proven the charges that we need to prove in this case. And I will also try to anticipate some of the arguments that counsel will be making. And I'd also like to try and give you a frame work, if you will, within which to view the evidence in this case.

A2394. These statements do not refer to the prosecutor's personal beliefs, but rather -- at most -- merely comment on the evidence or provide a roadmap for the summation. *See United States v. Jaswal*, 47 F.3d 539, 544 (2d Cir. 1995). While prosecutors are cautioned against using the personal pronoun extensively, statements such as "I think," when used in an innocuous conversational sense do not impinge upon due process because they do not attempt to substitute the prosecutor's personal judgments for the

evidence. *United States v. Higgs*, 353 F.3d 281, 332 (4th Cir. 2003), *cert. denied*, 125 S. Ct. 627 (2004). The government's use of the word "I" in such a manner is a way to ". . . express not a personal belief but a contention, an argument, which, after all, is what a summation to the jury is meant to be." *Eltayib*, 88 F.3d at 173.

In any event, in light of the overwhelming evidence presented against Jacobs, *see supra* at Facts, Part 3, it is hardly probable that twenty-two innocuous references to "I" in the closing arguments at the end of a two-week trial had any impact on the verdict at all. *See Melendez*, 57 F.3d at 241.

With regard to the drug quantities attributable to the defendants, the prosecutor argued to the jury as follows:

> How much is being sold per day? In a brick, a brick, if you recall, is hundred bags, all right? We multiple that by .039, that's equal to 3.9 grams per brick, all right? If he sells two bricks a day, that works out to 7.8 grams per day. All right? 7.8 grams times the 141 days is equal to 1,099.8 grams. That's over a thousand grams.
>
> * * *
>
> Now, there is only one problem with these figures. These are the figures that I came up with this morning on my own and we checked it with our best math people and this number, the 3.9 grams is wrong. It's low. It's extremely low, and it's low because what we did is we averaged the average,

> and if you invest on a regular basis, you know, dollar cost averaging over all the average number, the average of an average is always lower than the average of its constituent parts.

A2414-16. According to Jacobs, this language implied that a mathematics expert had determined the quantity of narcotics, but no such expert had been presented at trial. Thus, according to Jacobs, the prosecutor improperly referred to facts not in evidence. Jacobs Br. at 50.

Jacobs' reliance on a two-sentence excerpt from the government's summation is entirely misplaced. "A prosecutor's statements during summation, if improper, will result in a denial of due process rights only if, in the context of the entire summation, they cause the defendant substantial prejudice." *United States v. Rivera*, 22 F.3d 430, 437 (2d Cir. 1994) (citations omitted). As the above-quoted portion of the government's summation makes clear, the prosecutor was not "implying that a person skilled in mathematics had determined the quantity of narcotics." Jacobs Br. at 50. Rather, the prosecutor was simply arguing to the jury -- through the use of a legitimate rhetorical device -- that the amount of narcotics he believed the defendants conspired to distribute, while in excess of one thousand grams, was actually a conservative estimate. Furthermore, the trial court specifically instructed the jury that "[i]n determining the facts you must rely on your own recollection of the evidence. What the lawyers have said in their closing arguments, in their comments, in their objections or in their questions is not evidence." A2534. And again,

Jacobs can make no argument that these two sentences had any prejudicial impact on the verdict in this case.

Finally, Jacobs claims that the prosecutor committed misconduct during his summation by stating that "washing dishes is too dirty for the hands of Makene Jacobs," and referring to the Estrada conspiracy as a tree and asking the jury to "push the button on [the] wood chipper." Jacobs Br. at 52-53. Jacobs argues that these statements were "blatantly inappropriate" and implied that the government, the court, and the police all wanted him to be convicted. *Id.* at 53. In its entirety, the statements to which Jacobs now objects read as follows:

> Makene Jacobs. Again, he's out there on a daily basis, he has other people doing the dirty work for him because, remember, you know, even washing dishes is too dirty for the hands of Makene Jacobs. So he has people like Viviana Jiminez [sic] and other people working for him out there selling drugs. And where is he in the hierarchy? He's not a street level guy. He's not a Viviana Jiminez [sic]. He's a lieutenant. . . .
>
> * * *
>
> What we've done in this case is we've taken this tree and we've chopped it down, we cut it off at the base, and that tree right now is lying right here, all right? And it needs to be chopped up and put away. It's right next to the wood chipper, but I can't push that button. The judge can't push that button. The police officers who came in here to testify, they

> don't have that power. They can't push the button on that wood chipper. Only you, the members of the jury applying your common sense in this case can press that button and I respectfully urge you to do so when you go back there and deliberate. Thank you again for your attention.

A2417-20.

Taken in context, the prosecutor's "dirty dishes" and "wood chipper" analogies constituted nothing more than rhetorical devices meant to enhance the eloquence of his argument. A prosecutor is not precluded from vigorous advocacy or the use of sarcasm or colorful adjectives in summation. *Jaswal*, 47 F.3d at 544; *Rivera*, 971 F.2d at 884.

In any event, Jacobs' point is, at best, academic, as the trial court specifically instructed the jury that it was its role alone to determine both the defendant's guilt or innocence and the amount of narcotics involved in the conspiracy:

> If, however, you find that the government has proved each of the elements of the charged conspiracy beyond a reasonable doubt for any defendant, then you must return a guilty verdict for that defendant and you must make an additional determination regarding the quantity of the substance containing a detectable amount of heroin involved in the conspiracy for that defendant. To determine that amount you must determine the quantity of the substance containing a detectable amount of heroin that was the individuals you find

were conspirators possessed with intent to distribute and that such quantity was reasonably foreseeable to that defendant.

* * *

If you find a defendant guilty, then you must decide on the nature of the narcotics that the defendant agreed to possess with intent to distribute. If you find that the substance contained a detectable amount of what was heroin then you must determine the amount of narcotics that the defendant agreed to possess with intent to distribute.

A2565-67.

C. The Government Did Not Commit Prosecutorial Misconduct in its Cross-Examination of Jacobs

1. Relevant Facts

Sergeant Pierce testified on direct examination that on August 3, 2000, he assisted in the arrest of Jacobs and recovered $2,407 from Jacobs' person. On cross examination, Pierce testified in relevant part as follows:

Q. Do you know an Officer Garcia?
A. Yes, sir.
Q. Was he present with you at the time that Mr. Jacobs was taken into custody?

A. Yes, sir.

* * *

Q. And how many officers went to the location where Officer Bailey said Makene Jacobs was?
A. Myself and Ernie Garcia.

* * *

Q. What did you hear after you announced Police?
A. The door opened, sir.
Q. And you announced a number of -- at least twice?
A. At least.
Q. Could have been more?
A. No, sir.
Q. Tell me what occurred when the door opened?
A. We arrested Mr. Jacobs.
Q. Did you arrest him inside the apartment or outside the apartment?
A. Right in the doorway, sir.
Q. And who was -- was there one, either you or Officer Garcia that was classified as the arresting officer?
A. Yes.
Q. Who was that?
A. Officer Garcia.
Q. And did there come a time when both you and Officer Garcia entered through the doorway into the, into the apartment at the bottom of the stairs?
A. Yes, sir.

Q. Did there come a time that either you or Officer Garcia went up the stairs?
A. Yes, sir.

GA12-13, 16-17.

Jacobs testified on direct examination in relevant part as follows:

Q. Now, did there come a time when you were arrested that morning?
A. Yes.
Q. And do you recall who placed you under arrest?
A. Yes, it was Officer Angel Pierce.
Q. And was there an Officer Garcia there as well?
A. Yes, and I recall another officer but I don't know, I don't know his name but I know him by the name of Tito.
Q. Where were you when you were placed under arrest?
A. I was inside the apartment of Building 12, 210.
Q. Now, did the officers enter your apartment?
A. After I open the door.

* * *

Q. Now, did there come a time, did you see any of the arresting officers actually enter your apartment?
A. Yes, when I was placed under arrest the Officer Garcia, he went upstairs and I recall telling him that he couldn't search the apartment because I know from other individuals how these officers

> would do a lot of dirt, and he went upstairs and I recall telling him he couldn't search the apartment because he didn't have a search warrant and he went upstairs anyway.

A2187-88.

When questioned on cross examination about his August 3rd arrest, Jacobs testified as follows:

Q. Did Officer Pierce ever arrest you before you got busted in August of 2000?
A. No.
Q. Had you ever seen Officer Pierce before August 2000?
A. No.
Q. Did you know Officer Garcia before August 2000?
A. No.
Q. As far as you know, did Officer Pierce have something against Makene Jacobs in August of 2000?
A. I don't know. If he did, I don't know what.
Q. So you don't have any reason to think he had anything against you, is that correct?
A. No.
Q. And what about Officer Garcia, you didn't know him before either, is that correct?
A. No.

Q. And as far as you know, he had no reason to have anything against you, is that correct?
A. Yes.

A2219-20.

Jacobs contends that "[a]mongst the most egregious behavior by the prosecutor took place during cross-examination of Jacobs . . . ." Jacobs Br. at 50. The "egregious behavior" to which he refers consists of asking him whether Police Officer Garcia, who did not testify, had a personal grudge against him. *Id.* at 51. Jacobs claims that the prosecutor's questioning amounted to testimony that another police witness would corroborate Sergeant Pierce's testimony regarding the August 3, 2000 arrest and seizure of money from Jacobs.

2. Governing Law and Standard of Review

> Central to the proper operation of the adversary system is the notion that when a defendant takes the stand, the government be permitted proper and effective cross-examination in an attempt to elicit the truth. Once a defendant has put certain activity in issue by offering innocent explanations for or denying wrongdoing, the government is entitled to rebut by showing that the defendant has lied. Where a defendant testifies on direct about a specific fact, the prosecution is entitled to prove on cross-examination that he lied as to that fact. The same holds true for defendant's false statements on

> cross-examination. Finally, the government's opportunity to impeach the defendant's credibility once he has taken the stand includes the opportunity to use evidence that it was barred from using on its direct case.

United States v. Beverly, 5 F.3d 633, 639-40 (2d Cir. 1993) (internal quotations and citations omitted).

Furthermore, reversal is not mandated in cases of prosecutorial misconduct unless the misconduct "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168 (1986). Just as with allegations of prosecutorial misconduct arising from statements made during summation, the defendant must point to egregious misconduct to prevail. *United States v. McCarthy*, 54 F.3d 51, 55 (2d Cir. 1995). "The severity of the misconduct, curative measures, and the certainty of conviction absent the misconduct are all relevant to the inquiry." *Id.*

3. Discussion

Contrary to his contention, the government's cross-examination of Jacobs on whether Officer Garcia had anything against him was perfectly proper because the defendant himself indicated on direct that Officer Garcia was corrupt and improperly searched the apartment. A2188. It is well settled that a defendant may, on direct examination, open the door to evidence that was not introduced in the government's case in chief. Indeed, the defendant may even open the door to otherwise

inadmissible evidence. *See United States v. Havens*, 446 U.S. 620, 627-28 (1980).

Finally, in light of the extensive evidence adduced at trial, even taken as a whole, Jacobs' claims of prosecutorial misconduct are hardly prejudicial, let alone "egregious misconduct" or "a flagrant abuse." *Coriaty*, 300 F.3d at 255. Upon remand, the trial court found, "[a]ll of the evidence overwhelmingly indicated that Jacobs was guilty of conspiracy to possess with intent to distribute one kilogram or more of heroin as part of the Estrada organization." GA47. Furthermore, the court noted that "[i]n addition to the normal array of government witnesses, the government's case included a surveillance videotape of Jacobs selling narcotics . . . . Accordingly, there is no dispute that Jacobs was selling drugs and that he was doing so in an area of the Housing Project controlled by the Estrada organization . . . ." GA38. The court also found Jacobs' version of events, that he was selling powder cocaine and not heroin, not credible. GA40.

The court's findings are fully supported by the record. Indeed, several government witnesses testified at trial that Jacobs sold heroin on a regular basis. *See* A1933-34 (testimony of Viviana Jimenez describing Jacobs selling heroin); A1937-39 (testimony of Viviana Jimenz that Jacobs supplied her with "Hawaiian Punch" heroin); A1974-76 (testimony of Viviana Jimenez identifying Jacobs on videotape selling heroin); A1303-1304 (testimony of Jermaine Jenkins that he witnessed Jacobs distribute heroin and crack cocaine); A1339 (testimony of

Jermaine Jenkins that Jacobs provided him with heroin for distribution 10-15 times).

Similarly, Officer Ron Bailey of the Bridgeport Police Department's TNT testified that he witnessed Jacobs' involvement with other members of the Estrada organization selling heroin. For instance, Officer Bailey testified that, on several occasions, he observed Jacobs converse with potential drug buyers and direct them toward another member of the Estrada organization who sold them the drugs. A1770-76. He also observed Jacobs converse with an unidentified black male about "Hawaiian Punch," the brand name of the heroin sold by the Estrada organization. The black male approached Jacobs and asked "Do you have, you have [sic] some Hawaiian Punch?" Jacobs responded, "Yeah, it's Punch," and he and the customer walked under a stairwell out of the officer's view. A1778. Another officer, Sergeant Angelo Pierce, testified that when he arrested Jacobs, he had on his person $2,407 in cash. A1866.

Thus, in light of the extensive evidence presented at trial, Jacobs' claims of prosecutorial misconduct are of no consequence, as the evidence of his guilt was overwhelming.

IV. THE DISTRICT COURT PROPERLY SENTENCED JACOBS TO A MANDATORY MINIMUM TERM OF LIFETIME IMPRISONMENT

Jacobs argues that the district court erred in sentencing him to a mandatory minimum term of lifetime imprisonment because the convictions used to enhance his mandatory minimum sentence were not "prior" convictions within the meaning of 21 U.S.C. § 841(b)(1)(A). Jacobs Br. at 54-57. He also argues, for the first time on appeal, that if they are considered prior convictions, the penalty provision of 21 U.S.C. § 841(b)(1)(A) is unconstitutionally vague. Jacobs Br. at 57-58. Finally, Jacobs claims that prior felony narcotics convictions used to enhance his mandatory minimum sentence must be included in the indictment and proven to a jury beyond a reasonable doubt because they are "elements" of the offense and it is required by *Apprendi*. Jacobs Br. at 59-62. For the reasons set forth in the government's response to Herredia's *Apprendi* argument (Claims of Daniel Herredia, Point I), this Court should reject Jacobs' argument that his prior convictions had to be proved to a jury beyond a reasonable doubt. For the reasons set forth below, this Court should also reject Jacobs' other challenges to his mandatory minimum sentence.

A. Relevant Facts

Count Twelve of the Third Superseding Indictment charged Jacobs with Conspiracy to Possess with Intent to

Distribute and Distribution of 1,000 grams or more of heroin, in violation of 21 U.S.C. § 841(a)(1) and 846. A53-54. Before trial, on March 26, 2001, the government filed an "second offender" information under 21 U.S.C. § 851 outlining Jacobs' four prior drug convictions and putting him on notice of his exposure to a mandatory lifetime term of imprisonment if convicted of the narcotics trafficking offense charged in Count Twelve. GA1-4. *See* 21 U.S.C. § 841(b)(1)(A) (providing for mandatory minimum term of lifetime imprisonment for defendants who violate § 841 after two or more prior felony drug convictions). In support of the § 851 Information, the government identified four prior qualifying narcotics felonies by date and nature of the offense, and attached a copy of Jacobs' criminal record. GA1-4. The convictions included the following: (1) August 18, 1995 Sale of Narcotics; (2) June 18, 1997 Sale of Narcotics; (3) March 1, 2000, Possession of Narcotics; and, (4) Conspiracy to Sell Narcotics in violation of Connecticut General Statutes, Sections 21a-277(a) and 21a-279(a).

On November 30, 2001, a federal trial jury found Jacobs guilty of Count Twelve, specifically finding, beyond a reasonable doubt, that the offense of conviction involved 1,000 grams or more of heroin. A2605-2606, GA92.

Prior to sentencing, Jacobs filed a sentencing memorandum in which he claimed, among other things, that the convictions set forth in the § 851 Information were not "prior" felony drug convictions because the conduct underlying those convictions was part of the conduct he was charged and convicted of at trial in this case. A2613-

2618. He also argued that the Supreme Court's decision in *Apprendi* required the fact of his prior qualifying felony narcotics convictions to be charged and submitted to a jury and proven beyond a reasonable doubt. A2620-2624.

At sentencing on September 26, 2002, the district court rejected Jacobs' claim that his prior convictions were not "prior" and sentenced Jacobs to a mandatory term of life imprisonment. A2706-2707, 2719, 2723. In rejecting Jacobs' claims, the district court stated:

> I'm going to make the following findings of fact and I'm using the beyond a reasonable doubt standard because I don't believe that there is any reasonable doubt with respect to the following facts:
>
> Makene Jacobs was convicted of the crime set forth in paragraph 42 of the presentence report. He was arrested on November 3rd, 1994 for distribution of narcotics, specifically heroin, and that that heroin was not heroin that was prepared or sold or in any way involved with the Estrada organization and /or Terminators crew. Rather, it was prepared and distributed on behalf of some other person or entity and it doesn't matter frankly who it was, it was not Frank Estrada or his coconspirators and that's the important point here.
>
> The conviction set forth in the PSR, paragraph 44, was a conviction for Makene Jacobs. The date of arrest was May 16, 1997. The conviction was for sale of narcotics, specifically crack cocaine.

> Neither of these two convictions were for activities, were in furtherance of the conspiracy set forth in Count Twelve of the third superseding indictment in this case, which charged heroin conspiracy. Makene Jacobs did not join the heroin conspiracy set forth in Count Twelve until at least 1996.
>
> In terms of conclusions of law, it is my conclusion based upon the law of the 2nd Circuit specifically as set forth in the *Martino* decision that both of the convictions we've been talking about, those set forth in paragraphs 42 and 44 are prior convictions within the meaning of 841(b)(1)(b) of Title 21. Both occurred prior in time.
>
> The defendant's involvement in the current offense began at a time after he had a meaningful opportunity to refrain from criminal activity and, accordingly, I conclude that the 851 enhancement applies in this case.

A2705-07.

B. The District Court Properly Sentenced Jacobs To A Mandatory Minimum Term of Lifetime Imprisonment Because Jacobs Had Two Prior Felony Drug Convictions

1. Governing Law and Standard of Review

Federal law prescribes a graduated scheme of penalties for drug trafficking offenses, setting forth progressively higher sentences according to the quantity of narcotics involved in the offense and the defendant's criminal history. As relevant here, under 21 U.S.C. § 841(b)(1)(A), a defendant who is convicted of an offense involving more than 1,000 grams of heroin faces a sentence of not less than ten years and not more than life imprisonment. Such a defendant, however, faces a mandatory minimum term of life imprisonment if he commits the offense "after two or more prior convictions for a felony drug offense have become final." *Id.*

This Court interpreted the identical "prior conviction" language in § 841(b)(1)(B) in *Martino*, 294 F.3d 346. In that case, the defendant argued that his prior conviction could not be used to enhance his sentence on a drug conspiracy charge because the conviction occurred after the conspiracy began. This Court rejected that argument, holding that "[t]he dispositive question for purposes of enhancing a mandatory minimum under 21 U.S.C. § 841(b)(1)(B) for a defendant's prior drug-related final conviction is . . . whether or not the defendant ceased

criminal activity after the prior conviction." *Id.* at 350-51 (citing *United States v. Garcia*, 32 F.3d 1017, 1019 (7th Cir. 1994)). "A defendant's sentence must therefore be enhanced if there is 'continued involvement' in criminality subsequent to the prior conviction." *Id.* at 351 (citing *United States v. Howard*, 115 F.3d 1151, 1158 (4th Cir. 1997)).

This Court reviews questions of law *de novo*, and findings of fact for clear error. *Martino*, 294 F.3d at 349.

2. Discussion

Jacobs argues that his August 18, 1995 and June 18, 1997 convictions are not "prior" convictions within the meaning of 21 U.S.C. § 841(b)(1)(A) because they occurred during the course of the drug conspiracy for which he was convicted. But as Jacobs concedes, this argument is foreclosed by *Martino*. Jacobs Br. at 54. In *Martino*, this Court held that the fact that a prior conviction occurred after a drug conspiracy began is not dispositive. The central question is whether the defendant engaged in continuing criminal activity after the prior conviction. *Martino*, 294 F.3d at 350-51.

Here, there is no question that Jacobs engaged in continuing criminal activity after his 1995 and 1997 convictions. The district court found that he joined Estrada's heroin trafficking conspiracy in 1996, and this was fully supported by the evidence in the record. A2690. Furthermore, cooperating witnesses testified about Jacobs' involvement in the conspiracy from 1997 through 2000. *See* A1301-04, 1434-35 (Jacobs' involvement in 1997 and

1999); A1932-34, 1935-40 (Jacobs' involvement 1998 through 2000). Because Jacobs engaged in continuing criminal activity after his 1995 and 1997 convictions, the district court properly relied on those convictions to enhance his sentence under 21 U.S.C. § 841(b)(1)(A).

C. Jacobs Did Not Preserve His Constitutional Challenge to 21 U.S.C. § 841(b)(1)(A), But It Is Not Unconstitutionally Vague in any Event

1. Governing Law and Standard of Review

In *United States v. Venturella*, 391 F.3d 120 (2d Cir. 2004), this Court explained the vagueness doctrine:

> The vagueness doctrine is a "manifestation[] of the fair warning requirement." *United States v. Lanier*, 520 U.S. 259, 266 (1997). . . . Generally, "the void-for-vagueness doctrine requires that a penal statue define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). We have held that when "the interpretation of a statute does not implicate First Amendment rights, it is assessed for vagueness only . . . in light of the specific facts of the case at hand and not with regard to the statute's facial validity." *See [United States v.] Rybicki*, 354 F.3d [124,] 129

> [(2d Cir. 2003) (en banc), *cert. denied*, 125 S. Ct. 32 (2004)] (internal quotation marks omitted). "One whose conduct is clearly proscribed by the statute cannot successfully challenge it for vagueness." *Id.*

Venturella, 391 F.3d at 133-34 (alteration in original).

This Court has declined to rule on the constitutional validity of a criminal statute when the challenge is raised for the first time on appeal. In *United States v. Feliciano*, 223 F.3d 102 (2d Cir. 2000), the Court deemed waived a defendant's constitutional challenge to the Violent Crime in Aid of Racketeering statute, because the defendant had failed to raise the challenge below. The Court observed that "[t]here is no reason why [defendant's] constitutional challenges could not have been raised below, where he had ample opportunity to raise them and where the district court would have had the opportunity to address them," and "[a]ccordingly, we find that [the defendant] waived these challenges." *Id.* at 125 (footnote omitted).

If Jacobs' constitutional argument is not deemed waived, it would be reviewed for plain error. A claimed error not raised below may be corrected on appeal only if there is "(1) error, (2) that is plain, and (3) that affects substantial rights." *Johnson*, 520 U.S. at 467 (internal quotations omitted). "Where all three conditions are met, 'an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affects the fairness, integrity, or public reputation of judicial proceedings.'" *United States v. Whab*, 355 F.3d 155, 158 (2d Cir.) (quoting *Johnson*, 520 U.S. at 467

(quoting *Olano*, 507 U.S. at 732)), *cert. denied*, 541 U.S. 1004 (2004).

Before this Court will find an error "plain," "it must, 'at a minimum,' be 'clear under current law.'" *Id.* (quoting *United States v. Weintraub*, 273 F.3d 139, 152 (2d Cir. 2001) (quoting *Feliciano*, 223 F.3d at 115))). This Court "'typically will not find such error where the operative legal question is unsettled,' including where there is no binding precedent from the Supreme Court or this Court." *Id.* (quoting *Weintraub*, 273 F.3d at 152). In addition, "'in the rare case,' we can notice plain error that does not contravene clearly established precedent . . . where such error is so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *Id.* (alteration in original) (internal quotations and citations omitted).

2. Discussion

This Court should reject Jacobs' constitutional challenge to his life sentence. Because Jacobs failed to raise the claim in the district court, his claim is waived on appeal. *See Feliciano*, 223 F.3d at 125. At best, because of his failure to pursue the claim before the district court, Jacobs' claim is subject only to plain error review.

Here, there was no error, much less plain error. As applied to the facts of this case, 21 U.S.C. § 841(b)(1)(A) is not unconstitutionally vague because the evidence shows that Jacobs' conduct was clearly covered by the statute. Jacobs was convicted of conspiring to distribute heroin as part of the Estrada organization. The district

court found that he did not join that conspiracy until "at least 1996," A2706, and thus his 1995 conviction was clearly prior to his commission of the instant offense. With respect to his 1997 conviction, that conviction involved the sale of crack-cocaine, A2706, and thus was completely independent of the heroin distribution conspiracy. In other words, as the district court found, "[n]either of these two convictions were for activities, were in furtherance of the conspiracy set forth in Count Twelve of the third superseding indictment in this case, which charged heroin conspiracy." A2706.

But even if the statute were unconstitutionally vague as applied to Jacobs' case, this error was not "plain." Jacobs identifies no binding precedent, from the Supreme Court or this Court, finding the penalty provisions of 21 U.S.C. § 841(b)(1)(A) unconstitutionally vague, and the government has been unable to identify any such cases. In the absence of any precedent upholding vagueness challenges to the statute, this was not plain error.

CONCLUSION

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

Dated: July 11, 2005

Respectfully submitted,

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

This is to certify that the foregoing brief is calculated by the word processing program to contain approximately 26,990 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification. The United States has filed herewith a motion for permission to file an oversized brief.

ALEX HERNANDEZ
ASSISTANT U.S. ATTORNEY

ADDENDUM OF STATUTES AND RULES

Title 18, United States Code § 3553

(e) Limited authority to impose a sentence below a statutory minimum. -- Upon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code.

(f) Limitation on applicability of statutory minimums in certain cases. -- Notwithstanding any other provision of law, in the case of an offense under section 401, 404, or 406 of the Controlled Substances Act (21 U.S.C. 841, 844, 846) or section 1010 or 1013 of the Controlled Substances Import and Export Act (21 U.S.C. 960, 963), the court shall impose a sentence pursuant to guidelines promulgated by the United States Sentencing Commission under section 994 of title 28 without regard to any statutory minimum sentence, if the court finds at sentencing, after the Government has been afforded the opportunity to make a recommendation, that --

(1) the defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) the defendant did not use violence or credible threats of violence or possess a firearm or other dangerous

weapon (or induce another participant to do so) in connection with the offense;

(3) the offense did not result in death or serious bodily injury to any person;

(4) the defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in section 408 of the Controlled Substances Act; and

(5) not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

Title 21, United States Code, § 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, 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;

* * *

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.

* * *

Federal Rules of Criminal Procedure (as in effect in November 2001)

Rule 8. Joinder of Offenses or Defendants

(b) Joinder of Defendants. Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Rule 14. Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a

motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

Rule 33. New Trial

On a defendant's motion, the court may grant a new trial to that defendant if the interests of justice so require. If trial was by the court without a jury, the court may -- on defendant's motion for a new trial -- vacate the judgment, take additional testimony, and direct the entry of a new judgment. A motion for new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty. But if an appeal is pending, the court may grant the motion only on remand of the case. A motion for a new trial base on any other grounds may be made only within 7 days after the verdict or finding of guilty or within such further time as the court may fix during the 7-day period.

Rule 45. Time

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time for taking any action under Rules 29, 33, 34 and

35, except to the extent and under the conditions stated in them.

Rule 52. Harmless Error and Plain Error

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Federal Rules of Evidence (as in effect November 2001)

Rule 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading

the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.