05-5300-cr(L)

To Be Argued By:
PATRICK F. CARUSO

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United States Court of Appeals

FOR THE SECOND CIRCUIT

**Docket Nos. 05-5300-cr(L),
05-5753-cr(CON), 05-5829-cr(CON)
05-6597-cr(CON), 06-1049-cr(CON)
06-1060-cr(CON)**

UNITED STATES OF AMERICA,
Appellee-Cross-Appellant,

-vs-

AMOS TERRY, also known as Fame, TYRELL EVANS, CRAIG MOYE, JAMES CALHOUN, ROBERT THOMAS,
Defendants-Appellants-Cross-Appellee.

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

STATUTES

RULES

STATEMENT OF JURISDICTION

The district court (Hall, J.) had subject matter jurisdiction under 18 U.S.C. § 3231. The defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

1. Did the district court abuse its discretion or commit legal error in denying defendant's motion for judgment of acquittal or, alternatively, a new trial, where:

a) the evidence at trial established the existence of the single conspiracy charged in the indictment;

b) the evidence at trial established that Thomas knowingly joined the charged conspiracy, and was not merely involved in a buyer-seller relationship with the principal members of the conspiracy; and

c) even if the evidence at trial established the existence of multiple conspiracies, rather than the single conspiracy charged in the indictment, Thomas was not substantially prejudiced by the variance?

2. Was the district court's jury charge legally proper?

3. Did the district court abuse its discretion in refusing to admit into evidence various demonstrative exhibits that reflected a misleading statement of the law of conspiracy and which would have been confusing to the jury?

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Preliminary Statement

Julius Moorning headed a large-scale cocaine base ("crack") trafficking organization in 2003 and 2004 that distributed in excess of a kilogram of crack per day in and

around New Haven, Connecticut. Moorning obtained the drugs from a New York supplier and, with the help of Edward Hines, Rodney Nelson and Michelle Groom, distributed the drugs through an expansive network of street-level dealers in New Haven. The evidence at trial, particularly the testimony of Hines, second in command of the Moorning organization, established that the defendant, Robert Thomas, was one of the organization's street-level crack dealers. After a three-day trial before the Hon. Janet C. Hall, a jury convicted Thomas – the only one of 49 co-defendants not to plead guilty – of the drug conspiracy count with which he was charged.

On appeal, Thomas claims that he was not part of the large-scale conspiracy charged in the indictment, but was rather an isolated buyer of crack from the core members of the Moorning organization. Thomas frames this argument in several ways, claiming that there was insufficient evidence of the overall conspiracy or that he joined the conspiracy, and that the proof at trial varied from the allegations of the indictment. He also challenges the jury instructions in this regard, and contends that the district court improperly precluded him from using certain demonstrative exhibits to illustrate what he claims to be the law of conspiracy. Because the district court faithfully applied the principles of conspiracy law to which this Court has adhered for decades, Thomas' conviction should be affirmed.

Statement of the Case

On April 27, 2004, a federal grand jury sitting in Connecticut returned a 20-count indictment charging 49 defendants with various federal narcotics violations. DA 3, 12-15. Thomas was charged in Count One of the indictment with conspiracy to possess with intent to distribute, and conspiracy to distribute, 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a), 841(b)(1)(A)(iii), and 846. DA 15-16.

Of the 49 defendants indicted with Thomas, 48 pleaded guilty. GA 633-36. Thomas, therefore, was tried alone. His trial commenced on June 22, 2004, before the Hon. Janet C. Hall. DA 6.

On June 24, 2004, the jury found Thomas guilty of conspiracy to possess with intent to distribute, and conspiracy to distribute, at least five grams, but less than 50 grams, of cocaine base. GA 603. Thus, Thomas was convicted of a lesser-included offense of the crime charged in the indictment. DA 15-16; GA 603.

On September 12, 2005, the defendant filed a motion seeking judgment of acquittal, or, in the alternative, a new trial. DA 7. On October 12, 2005, the defendant filed a supplemental memorandum in support of his motion. DA 8. The Government responded to the defendant's motion on November 7, 2005. DA 8. The district court entertained oral argument on Thomas' post-trial motion on November 16, 2005. DA 8.

On February 16, 2006, the district court issued a written ruling denying Thomas' motion for judgment of acquittal or a new trial and sentenced him to 180 months in prison. DA 10; GA 588-602. On February 24, 2006, the defendant file a timely notice of appeal. DA 10, 150. Judgment entered on March 2, 2006. DA 11.

STATEMENT OF FACTS AND PROCEEDINGS RELEVANT TO THIS APPEAL

In 2003, the Drug Enforcement Administration ("DEA") began investigating Julius Moorning, a.k.a. "Red," and his associates, who were suspected of distributing cocaine base ("crack") in and around the city of New Haven, Connecticut. GA 41, 92-93. The investigation included court-authorized wire taps of phones utilized by Moorning's organization to obtain and distribute crack. GA 41, 98-99. The wire taps were in place from January 2004 through April 2004. GA 48, 55. Thousands of pertinent calls were intercepted. GA 124.

On April 27, 2004, a federal grand jury indicted Moorning and 48 members of his extensive crack distribution organization. The defendant, Robert Thomas, a.k.a. "Brooklyn," was charged in Count One of the indictment with conspiracy to distribute, and conspiracy to possess with intent to distribute, 50 grams or more of crack. DA 3, 15-16.

Moorning's brother-in-law, Edward Hines, Jr., a.k.a. "Junior," was second in command of Moorning's distribution organization. GA 92-94, 102, 168-69. Hines

testified at trial. GA 90. He explained how the Moorning organization was structured, how it operated on a day-to-day basis, and the roles his 48 co-conspirators, including Thomas, played in the organization. GA 93-183.

A. The Offense Conduct

1. The Single Conspiracy Charged in the Indictment

Hines testified that he began working for Moorning's drug trafficking organization in the Summer of 2003 and that he enjoyed a position of trust because of his familial relationship with Moorning. GA 93. The operation, however, had been "up and running when . . . [he] came along." GA 151. During the course of the conspiracy, Moorning and Hines would obtain two kilograms[1] of crack two or three times a week from Moorning's supplier, who lived in New York. GA 94-95.

With the assistance of two other individuals, Michelle Groom and Rodney Nelson, a.k.a. "Seize," Moorning and Hines packaged the drugs into redistribution quantities. GA 100, 153. These four principals – Moorning, Hines, Nelson and Groom – then worked as a "team" distributing the crack through an expansive network of known and trusted street-level dealers in and around New Haven, which included their 45 co-defendants. GA 93-95, 98-99,

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[1] There are 1000 grams in a kilogram and 28 grams in an ounce. Each kilogram thus contained roughly 36 ounces.

101, 103-11, 152. Thomas was one such street-level dealer. GA 103-06.

Moorning, Hines, Nelson and Groom supplied only redistribution quantities of crack – or "weight" quantities – to the organization's street-level dealers. GA 95-96. These quantities ranged from an eight-ball (3.5 grams), which sold for $90, up to multiple ounces, each ounce selling for $720. GA 96-97, 132-33.

The four principals did not distribute personal-use quantities of crack to users or "fiends," because they viewed such individuals as weak and untrustworthy. GA 97, 129. That risky task, though more profitable, was left to the organization's street-level dealers, like Thomas, who regularly sold crack in "dime" bags ($10 quantities) or "twenty" bags ($20 quantities). GA 96-98, 110, 154. Moorning "fronted" crack to some of his street-level dealers, including Thomas. GA 108, 143-44, 179-80, 182.

Moorning purchased several cellular telephones that he, Hines, Nelson and Groom used interchangeably for the sole purpose of narcotics trafficking. GA 98-99. These cellular phones – or, more accurately, the telephone numbers assigned to them – were referred to as "work phones." GA 98-99. The work phones connected Moorning, Hines, Nelson and Groom to the network of street-level dealers. If one of the work phones was busy when a street-level dealer called, the dealer would automatically be directed, by a voice message, to one of the other work phones. GA 120.

The numbers for the work phones were not provided to anyone who was not a trusted street-level dealer affiliated with the organization. GA 98-99, 628-29. If an individual who was not part of the organization called the work phones to inquire about purchasing crack, that person would not be able to obtain drugs from Moorning, Hines, Nelson or Groom. GA 106.

Moorning expected Hines, Groom and Nelson to be familiar with the street-level dealers who were part of the organization and who regularly called the "work phones" to purchase crack. GA 121, 628-29. Hines became intimately familiar with the organization's dealers and their sales patterns. GA 175. He testified about the different quantities of crack he delivered to selected street-level dealers on a regular basis, and he identified the various locations throughout the New Haven area where he usually met with each dealer to complete narcotics transactions. GA 106-09.

During the course of the conspiracy, Hines would begin supplying the organization's street-level dealers each morning at approximately 8:00 a.m. GA 101. He would begin his workday by going to Nelson's house, where the kilograms of crack Moorning obtained from his New York supplier, which the principals had packaged into re-distribution quantities, were "stash[ed]." GA 100, 153. There, Hines would pick up 16½ ounces of crack. GA 100-01. The 16½ ounces were divided evenly into three 5½ ounce bags: one bag contained pre-packaged eight-balls; one bag contained pre-packaged half-ounce

quantities; and one bag contained pre-packaged whole ounces (plus one half-ounce bag). GA 100-01.

By 10:00 a.m or 11:00 a.m., Hines usually would have distributed the entire 16½ ounces of crack to street-level dealers who had contacted him on the work phone and requested a re-supply of crack. GA 102. He would then go back to Nelson's house and get another 16½ ounces of crack, packaged in the same manner as was the first batch. GA 102. This too he would usually sell by the end of the day. GA 102.

Thus, on almost a daily basis, Hines supplied more than 33 ounces of crack – nearly a kilogram – to the Moorning organization's street-level dealers. And, each day, while he was doing so, Moorning, Nelson and Groom were also fielding phone calls from other street-level dealers affiliated with the organization and re-supplying them with crack. GA 102. Given this volume, Moorning was able to reduce the price he charged for an eight-ball (3.5 grams) to $90, in an effort to undercut any competition. GA 127, 151.

Hines' testimony about the operational details of the organization corroborated the testimony of Anthony Simone, a DEA Task Force Officer who was one of the case agents assigned to the Moorning investigation. GA 41. Simone testified that the DEA used calls intercepted through the court-authorized wire tap to identify in advance the locations where organization members would be meeting to conduct narcotics transactions. GA 68-70. This enabled the DEA to conduct surveillance of the

narcotics transactions and, on several occasions, arrest and seize drugs from the street-level dealers who had been supplied with crack by Moorning, Hines, Nelson or Groom during the transaction. GA 70-71.

The members of the Moorning organization worked together to avoid detection by law enforcement. For example, on one occasion, Hines asked Kevin Craft, one of the organization's street-level dealers, to "keep an eye" on another affiliated dealer, Wilfredo Rodriguez, a.k.a. "Little Poppy," because Hines suspected that Rodriguez had been arrested by a narcotics unit after being re-supplied with crack by Hines. GA 121; GA 604-05 (Exhibit T-4/Call No. 6152). On another occasion, Moorning was intercepted advising one of his street-level dealers to be on the lookout for undercover officers operating a gold van. GA 228-30; GA 626-27 (Exhibit T-40/Call No. 2727).

Members of the Moorning organization also regularly spoke in coded conversations to avoid detection by law enforcement. GA 125-28. For example, members of the organization would use terms like " half," or "360" (the price of a half ounce of crack) or "meet me halfway" when arranging narcotics deals for a half ounce of crack. GA 125-26.

The organization's street-level dealers also knew that they were not to "expose" Hines to persons not affiliated with the organization. For example, Hines would supply crack to an affiliated street-level dealer in the presence of other affiliated dealers. GA 113-15. He would not,

conversely, deliver crack to an organization member in the presence of someone who was not an affiliated street-level dealer. GA 113-15. On at least one occasion, Hines chastised Thomas for nearly exposing him in this manner. GA 114-15.

Moorning and Hines would frequently ride around together in the evening, after they had completed their deliveries for the day. GA 109-10. They would discuss the day's sales, check up on their street-level dealers, and conduct counter-surveillance, i.e., attempt to identify undercover law-enforcement vehicles. GA 109-10.

If, while driving around together in the evening, Moorning and Hines did not see one of their street-level dealers out "hustling" dimes and twenties, they would think something was wrong – perhaps that the dealer was working with the police – and would cease selling crack to him. GA 109-10, 177-78. "If you buy crack, you want to sell it. You are not going to sit around. We make sure they were still out and they were out hustling." GA 110.

So, although the Moorning organization's street-level dealers were free to sell the crack supplied to them by the four principals as they saw fit, the dealers were, in fact, expected to sell it, or risk being cut out of the organization. GA 109-10, 177-78. If Moorning or Hines suspected that one of the dealers to whom they were supplying crack had become an addict, they would have considered that dealer weak and untrustworthy and would have ceased doing business with that dealer. GA 129, 177-78.

The street-level dealers were profiting from their affiliation with the Moorning organization. GA 110. Thomas and the other dealers informed Hines that they were "making good money," that the drugs were "going," and that Hines should keep the quality of the crack "the same," meaning that they didn't want "too much baking soda" to be added during the process of converting – or "cooking" – cocaine into cocaine base. GA 110-11, 114.

When Moorning and Hines went to Florida for a few weeks in January of 2004, they left a message on the work phones informing their street-level dealers that the distribution operation was being shut down for that period of time. GA 133-34. They returned from vacation on or about February 2, 2004, and called their street-level dealers to let them know the operation was going back up. GA 134-35. Hines was arrested on April 20, 2004. GA 135.

2. Thomas' Involvement

Thomas testified at trial. He conceded that he knew the Moorning organization existed and that he knew the organization had a leadership hierarchy, i.e., some "top members." GA 324, 328, 334.

Hines, one of those top members, testified that Thomas was one of the Moorning organization's street-level crack dealers. GA 103-06, 111. Hines joined the Moorning organization in the summer of 2003 and began dealing with Thomas at that time. GA 93, 111, 150. But Thomas

had been "hustling" with Moorning's organization "way before" then. GA 150.

Thomas admitted that he purchased an "eight-ball once or twice" from Hines in July or August of 2003. GA 315. Thomas also admitted that Moorning supplied crack to him one time in August of 2003 and one time in December of 2003. GA 315, 339.

Hines, Moorning, Nelson and Groom all supplied crack to Thomas in February of 2004, during the course of the conspiracy alleged in the indictment. GA 111, 140-44, 164-65. Thomas admitted that Nelson supplied him with a half-ounce of crack on February 4, 2004. GA 308-09, 319.

During the course of their dealings in February of 2004, Thomas told Hines that the quality of the crack Hines was supplying to him was good and that he was making "good money" selling it. GA 114. On at least one occasion in February of 2004, Hines actually saw Thomas "serving" crack to a user. GA 114. This occurred as Hines was pulling up to re-supply Thomas with crack, and Hines chastised Thomas for "exposing" him to someone not affiliated with the organization. GA 114-15.

Hines supplied Thomas with crack at various locations throughout New Haven, including the Vernon Street area. GA 111-12. Thomas worked this area with other street-level dealers who were part of the Moorning organization, including Milton Menafee, a.k.a "Milt," Paul Grant, a.k.a. "Buddah," and others. GA 104, 109, 112-13.

When Hines stopped in the Vernon Street area to supply crack to one of the organization's street-level dealers, Thomas, Menafee and Grant would approach Hines' car in a group and Hines would re-supply them with crack. GA 113. Hines, as noted above, testified that he would not have delivered crack to an organization member in the presence of someone who was not one of the organization's street-level dealers. GA 114-15.

Thomas was supplied with as much as a half-ounce of crack when he called or met with Hines, Moorning, Nelson or Groom to obtain drugs. GA 113, 142. He preferred to receive the crack in one, whole piece, rather than in pre-packaged eight-ball quantities. GA 114. Thomas told Hines this was because when he cut the whole piece into dime bags with a razor for re-sale, he was able to get a better cut. GA 114.

Like the other affiliated street-level dealers, Thomas knew the phone numbers associated with at least two of the work phones used by the Moorning organization. GA 330-32. Thomas never called the work phones for any reason unrelated to narcotics dealings. GA 98-99, 143. According to Hines, neither Moorning, Nelson nor Groom ever met with Thomas for any reason other than to supply him with crack. GA 143.

Thomas, and other street-level dealers, sometimes had to call Hines several times, and wait several minutes, before a meeting could be arranged, because Hines was busy throughout the day supplying crack to members of the organization. GA 139. But every conversation Hines

had with Thomas on the work phones pertained to the sale of crack. GA 138.

Thomas admitted, on cross-examination, that he sold crack in dime bags. GA 321, 326. Thomas, himself, however, never appeared to Hines to be high on crack during any of their dealings. GA 129.

With the exception of ten days in February of 2004, Thomas was incarcerated for the four-month period that the wire tap was in place. GA 165-66, 299-300. On December 29, 2003, Thomas was arrested and remained incarcerated through February 3, 2004. GA 299. During his ten days at liberty, Thomas met with one or more of the four principals on at least five or six occasions and placed several calls to the work phones, which were intercepted. GA 111-13, 138-46, 164-66, 176; GA 606-25 (call transcripts).

For example, the day after he was released from prison, February 4, 2004, at 9:31 a.m., Thomas was intercepted calling Rodney Nelson. GA 140-41. Thomas told Nelson that he had spoken to Julius Moorning, the "Big Guy," and that he – Thomas – had "360." GA 140-42, 165; GA 614-15 (Exhibit T-26/Call No. 1456). This was consistent with the coded conversation used by the organization when referencing a half-ounce of crack. GA 125-26.

Nelson met with Thomas on February 4, 2004, and sold him a half-ounce of crack. GA 142, 164-65; GA 618-19 (Exhibit T-28/Call No. 1518) (Groom calls Brooklyn at approximately 10:24 a.m., Nelson is heard in the

background advising Groom that he already supplied Brooklyn). Thomas conceded at trial that Nelson supplied him with a half-ounce of crack on February 4, 2004. GA 308-09, 319.

Later that evening, at approximately 6:40 p.m., Groom spoke to Thomas again. GA 142, 164-65; GA 620-21 (Exhibit T-29 /Call No. 1702). She advised Thomas that she was on her way out to see him. GA 621. Groom supplied Thomas with more crack on the evening of February 4, 2004. GA 142, 164-65.

On February 5, 2004, Thomas went back to prison. GA 300. He served six days and was released on February 11, 2004, having made bond. GA 300.

Two days later, on February 13, 2004, Thomas was again intercepted on the wire tap, this time calling Hines and arranging to meet with him at the spot on "Star Street," where they had met on a previous occasion. GA 138-39; GA 606-07 (Exhibit T-20/Call No. 3432). Hines met with Thomas on February 13, 2004, and sold him crack. GA 140.

Hines also met with Thomas and sold him crack on February 16, 2004. GA 140; GA 612-13 (Exhibit T-25/Call No. 3571).

On or about February 17, 2004, Moorning "fronted" Thomas a half-ounce of crack. GA 143-44.[2] Moorning then advised Hines that he had done so. GA 143-44. Thomas conceded at trial that a dealer who is "fronted" drugs by a supplier is, in fact, "working for that person." GA 307.

On February 18, 2004, Thomas was again arrested and incarcerated. GA 300. Not realizing that Thomas was in jail, Moorning called Thomas to inquire about the money Thomas owed. GA 144. Thomas never paid Moorning or Hines for the half-ounce of crack that Moorning fronted to him. GA 144.

Thomas did, however, call Moorning twice from jail. GA 144. On both occasions, he left messages for Moorning on the organization's work phones. *Id*. at 145-46; Exhibit T-32 (Call No. 1305); Exhibit T-33 (Call No. 8643). Hines and Moorning listened to the messages. GA 145-46.

Thomas left the first message on February 26, 2004. GA 622-23 (Exhibit T-32 /Call No. 1305). In it, Thomas advised that he had been arrested, requested that Moorning

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[2] *See* GA 143-145, 168 (Hines' testimony that Moorning fronted crack to Thomas right before Thomas went back to jail at the end of February); GA 300 (Thomas' testimony that he was arrested and incarcerated again on February 18, 2004); GA 624-25 (Exhibit T-33/Call No. 8643) (Thomas' March 3, 2004, call to Moorning in which he states that he "came to jail" the day after he saw Moorning).

bail him out, and stated: "I got several hundred on the books, man, you know. My loyalty to be there, man." GA 623. Hines understood Thomas' message to be an acknowledgment that Thomas still owed Moorning $360 for the half-ounce of crack that Moorning had fronted him and that Thomas intended to pay what he owed. GA 145. Hines also understood Thomas' expression of "loyalty" to mean that Thomas would "work-off" any costs associated with bailing him out by selling crack and turning the profits over to Moorning. GA 167.

Thomas left a second message for Moorning on March 3, 2004. GA 145; GA 624-25 (Exhibit T-33 /Call No. 8643). In it, Thomas confirmed that he had been arrested the day after he had seen Moorning and again requested that Moorning bail him out. GA 625.

Moorning and Hines became suspicious of the calls Thomas had placed to the work phones from jail and the messages Thomas had left on the work phones. GA 146. Soon after Thomas' second message, Moorning changed the numbers for the organization's work phones. GA 146.

B. The District Court's Ruling

On February 16, 2006, the district court issued a written ruling denying defendant's motion for judgment of acquittal, or alternatively a new trial. GA 588-602. Pertinent excerpts from the district court's ruling are set forth herein under the "Relevant Facts" section of each "Argument" to which they correspond.

SUMMARY OF ARGUMENT

The Court should affirm the jury's verdict because Thomas has conceded that he knowingly entered into a conspiracy with Moorning, Hines, Nelson and Groom. Furthermore, based upon the Government's evidence, the jury could have found that Thomas and the other street-level dealers, knew, or had reason to know, that the Moorning organization, with which they affiliated themselves, was a broad organization encompassing other street-level dealers who were equally important to the success of the venture. This evidence was sufficient to support the jury's findings that the single conspiracy charged in the indictment existed and that Thomas knowingly joined it. In addition, the district court's jury charge was proper, and the district court's refusal to allow Thomas to introduce various misleading demonstrative exhibits was not an abuse of discretion.

ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION OR COMMIT LEGAL ERROR IN DENYING DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL, OR, ALTERNATIVELY, A NEW TRIAL, BECAUSE THERE WAS SUFFICIENT EVIDENCE TO PROVE THAT THE SINGLE CONSPIRACY CHARGED IN THE INDICTMENT EXISTED AND THAT THOMAS KNOWINGLY JOINED IT.

A. Relevant Facts

Facts stemming from the evidence adduced at trial, which are pertinent to consideration of this issue, are set forth in the "Statement of Facts" above. Additional pertinent facts are set forth below.

1. Thomas' Post-Trial Motion

Thomas filed a post-trial motion and a supporting memorandum in the district court seeking judgment of acquittal or, alternatively, a new trial DA 104-24. At oral argument on the motion, Thomas conceded that there was sufficient evidence at trial to prove that he entered into a conspiracy with the four core members of the Moorning organization: Julius Moorning, Edward Hines, Michelle Groom and Rodney Nelson, all of whom, viewing the evidence in the light most favorable to the Government, supplied crack to Thomas in February of 2004. GA 544.

Thomas claimed, however, that there was insufficient evidence to prove the "single overall drug conspiracy" charged in the indictment. DA 108. In Thomas' view, the Government proved "45 separate and distinct chain drug conspiracies," and therefore, under the reasoning of *Kotteakos v. United States*, 328 U.S. 750 (1956), he should have been acquitted or granted a new trial. DA 108. Thomas also alleged, in his motion, that he was substantially prejudiced by the variance between the proof at trial and the single conspiracy charged in the indictment. DA 116. Finally, Thomas argued that even if the Government proved the single conspiracy charged in the indictment, the evidence did not establish that he was a co-conspirator, but rather, was merely involved in a buyer-seller relationship with the four principals. DA 104.

2. The District Court's Ruling

On February 16, 2006, the district court issued a written ruling denying Thomas' post-trial motion. The district court found

> that sufficient evidence was presented from which a rational trier of fact could have concluded, applying the controlling legal standards, that the government proved the charged single conspiracy beyond a reasonable doubt. . . . [T]he government presented evidence from which the jury could have concluded that Thomas had the required knowledge of the scope of the Moorning organization, even though it did not prove that he knew the identity of all of the street level dealers.

DA 139. The district court then went on to summarize the evidence, portions of Hines' testimony in particular, that supported its finding. DA 139-41.

The district court also found "sufficient evidence of a single conspiracy and [did] not find variance between the charge in the indictment and the proof adduced at trial . . . ." DA 141. Finally, the district court found that "[e]ven if the evidence presented at trial had established proof of conspiracies different from that charged in the indictment, Thomas has not shown the 'substantial prejudice' that the Second Circuit requires to overturn a conviction for prejudicial variance." DA 141.

B. Governing Law and Standard of Review

1. Governing Law

a. Elements of a Drug Conspiracy

The Government must prove two essential elements, by direct or circumstantial evidence, in every narcotics conspiracy case: 1) the conspiracy alleged in the indictment existed; and 2) the defendant knowingly joined it.[3] *See United States v. Jones*, 30 F.3d 276, 281 (2d Cir.

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[3] In *United States v. Gonzalez*, 420 F.3d 111 (2d Cir. 2005), this Court held that the Government must prove a third essential element – quantity – before statutory mandatory minimum sentences may be imposed when defendants are charged with "aggravated" drug offenses. The impact of (continued...)

1994); *United States v. Rea*, 958 F.2d 1206, 1214 (2d Cir. 1992).

To prove the first element and establish that a conspiracy existed, the Government must show that there was an unlawful agreement between at least two persons. *See United States v. Tejada*, 956 F.2d 1256, 1264 (2d Cir. 1992) (citing *United States v. Lobat*, 905 F.2d 18, 21 (2d Cir. 1990); *United States v. Rubin*, 844 F.2d 979, 983 (2d Cir. 1988) ("fundamental element of conspiracy is unlawful agreement")). The agreement need not be an explicit one; "proof of a tacit understanding will suffice." *Rea*, 958 F.2d at 1214.

The conspirators, moreover, "need not have agreed on all the details of the conspiracy, so long as they have agreed on the essential nature of the plan." *Id.* (citing *United States v. Bagaric*, 706 F.2d 42, 63 (2d Cir. 1983)); *Tejada*, 956 F.2d at 1265 (citations omitted). Put another way, their goals or objectives "need not be congruent, so long as they are not at cross-purposes." *Rea*, 958 F.2d at 1214 (citations omitted); *see United States v. Acosta*, 17 F.3d 538, 544 (2d Cir. 1994). "The fact that not each of the conspirators was acquainted with each of the others is of no significance. It is sufficient for the government to have proven . . . that each knew from the scope of the operation that others were involved in the performance of functions vital to the success of the business." *United States v. Sisca*, 503 F.2d 1337, 1345 (2d Cir. 1974).

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[3] (...continued)
Gonzalez on this case is discussed *infra* at Part II.C.2.

Once the first element – the existence of a conspiracy – has been established, "'only slight evidence is needed to link'" other defendants with the conspiracy. *Tejada* 956 F.2d at 1265 (quoting *United States v. Vanwort*, 887 F.2d 375, 386 (2d Cir. 1989)); *see Jones*, 30 F.3d at 281-82 (once conspiracy found to exist, "the link between another defendant and the conspiracy need not be strong"). Defendants' actual participation in a conspiracy "can be established only by proof, properly admitted into evidence, of their own words and deeds." *United States v. Russano*, 257 F.2d 712, 713 (2d Cir. 1958) (citing *Glasser v. United States*, 315 U.S. 60 (1942)). These, however, should be considered in the context of surrounding circumstances, including the actions of co-conspirators and others, because, when so viewed, "a seemingly innocent act . . . may justify an inference of complicity." *United States v. Calabro*, 449 F.2d 885, 890 (2d Cir. 1971); *see Cirillo*, 499 F.2d at 888 (jurors should consider conduct of co-conspirators in determining whether defendant was member of the conspiracy). "'A conviction for conspiracy must be upheld if there was evidence from which the jury could reasonably have inferred that the defendant knew of the conspiracy . . . and that he associat[ed] himself with the venture in some fashion, participated in it . . . or [sought] by his action to make it succeed.'" *United States v. Richards*, 302 F.3d 58, 69 (2d Cir. 2002) (quoting *United States v. Podlog*, 35 F.3d 699, 705 (2d Cir. 1994)).

b. Single Versus Multiple Conspiracies

Whether the Government's proof shows a single conspiracy or multiple conspiracies "is a question of fact

for a properly instructed jury." *United States v. Johansen*, 56 F.3d 347, 350 (2d Cir. 1995). "A single conspiracy may be found where there is mutual dependence among the participants, a common aim or purpose or a permissible inference from the nature and scope of the operation, that each actor was aware in his part in a larger organization where other were performing similar roles equally important to the success of the venture." *United States v. Williams*, 205 F.3d 23, 33 (2d Cir. 2000).

"A workable definition of conspiracy applicable equally in all cases and to all types of crime is virtually impossible." *United States v. Rich*, 262 F.2d 415, 418 (2d Cir. 1959). It is essential, therefore, to "determine what kind of agreement or understanding existed as to each defendant." *United States v. Borelli*, 336 F.2d 376, 384 (2d Cir. 1964).

"In determining what kind of agreement existed as to each defendant, courts often assess *knowledge* and *dependency* as evidence of an agreement." *United States v. Taylor*, 562 F.2d 1345, 1352 (2d Cir. 1977) (emphasis added); *see United States v. Tramaglino*, 197 F.2d 928, 930 (2d Cir. 1952). "These factors, in turn, may be inferred from an assessment of the nature of the criminal enterprise and the defendant's role in it, since it would be unrealistic to assume that . . . wholesalers or retailers (of narcotics) do not know that their actions are inextricably linked to a large on-going plan or conspiracy." *Id*.

The quantity of drugs involved in an operation is one factor to consider when determining whether an inference

of knowledge and dependency is permissible. "Precedent within this Circuit abounds for the proposition that one who deals with large quantities of narcotics may be presumed to know that he is a part of a venture which extends beyond his individual participation." *United States v. Magnano*, 543 F.2d 431, 433-34 (2d Cir. 1976); *United States v. Mallah*, 503 F.2d 971, 983 (2d Cir. 1974).

The regular and steady nature of a middleman's operation is another factor to be considered in determining whether an inference of knowledge and dependency is permissible. If the core conspirators who are the "point[s] of contact" between multiple retailers are conducting "a regular business on a steady basis," jurors may infer that the retailers know, or have reason to know, the middlemen handle a larger quantity of drugs than one retailer could sell, and there must, therefore, be others performing similar roles equally important to the success of the venture. *United States v. Miley*, 513 F.2d 1191, 1207 (2d Cir. 1975) (citing *United States v. Bynum*, 485 F.2d 490, 497 (2d Cir. 1973)); *see United States v. Barnes*, 604 F.2d 121, 155 (2d Cir. 1979) (citation omitted) ("[R]etailers whose existence is actually unknown to each other can be held to have agreed in a single conspiracy if each knew or had reason to know that the . . . middleman handles a larger quantity of narcotics than one retailer can sell.").

"The business of distributing drugs to the ultimate user seems to require participation by many persons. Rarely, if ever, do they all assemble around a single table in one large conspiracy simultaneously agreed upon and make a solemn compact orally or in writing that each will properly

perform his part therein." *Rich*, 262 F.2d at 417. Instead, "[m]ost narcotics networks involve loosely knit, vertically integrated combinations" of one sort or another. *United States v. Taylor*, 562 F.2d 1345, 1351 (2d Cir. 1977) (quoting *United States v. Panebianco*, 543 F.2d 447, 452 (2d Cir. 1976)).

"[M]any of the persons who form links in the distribution chain appear never to have met other equally important links." *Rich*, 262 F.2d at 417-18. But if "there be knowledge by the individual defendant that he is a participant in a general plan designed to place narcotics in the hands of ultimate users, the courts have held that such persons may be deemed to be regarded as accredited members of the conspiracy." *Id.* at 418 (citing *United States v. Bruno*, 105 F.2d 921 (2d Cir.), *rev'd on other grounds*, 308 U.S. 287 (1939)); *see United States v. Sureff*, 15 F.3d 225, 230 (2d Cir. 1994) (defendants who did not know one another held to be members of single conspiracy because they had reason to know they were part of larger drug distribution organization); *Mallah*, 503 F.2d at 984.

"[T]he mere fact that certain members of the conspiracy deal recurrently with only one or two others does not exclude a finding that they were bound together in one conspiracy." *United States v. Agueci*, 310 F.2d 817 (2d Cir. 1962). Finally, a monetary stake in the outcome is not necessary for one to be guilty of conspiracy to violate federal narcotics laws. *See United States v. Tutino*, 269 F.2d 488, 490 (2d Cir. 1959).

c. Wheels and Chains

Courts sometimes analyze conspiracies – including drug conspiracies – by drawing analogies to "chains" and "wheels." But this oversimplified "pictorial distinction . . . can obscure as much as it clarifies," particularly when the conspiracy at issue is a drug conspiracy. *United States v. Borelli*, 336 F.2d 376, 383 (2d Cir. 1964).

Whatever value there might be in conceptualizing other types of conspiracies as simple wheels or chains, this "classic distinction" simply has not "held up well in the area of narcotics conspiracy." *United States v. Mallah*, 503 F.2d 971, 984 (2d Cir. 1974). Most drug conspiracies can be diagramed as containing "loosely knit, vertically-integrated combinations" – or chains – aimed at placing narcotics into the hands of users. *Taylor*, 562 F.2d at 1351. But most drug conspiracies also contain elements and combinations akin to wheel (or hub-and-spoke) conspiracies, particularly at the extreme ends of narcotics organizations, where there may be multiple suppliers or multiple street-level dealers. *See Miley*, 513 F.2d at 1206-07.

Given the complexities and the loose-knit combinations inherent in drug conspiracies, this Court, in the context of a drug conspiracy case, has noted:

> [F]or us, the problem is difficult enough without trying to compress it into figurative analogies. Conspiracies are as complex as the versatility of human nature and federal protection against them is

> not to be measured by spokes, hubs, wheels, rims, chains, or any one or all of today's galaxy of mechanical, molecular or atomic forms.

Taylor, 562 F.2d at 1350 n.2.

d. The Buyer-Seller Defense

The buyer-seller defense in this Circuit is a limited one and usually applies only in cases where the defendant participated in a single sale of narcotics in quantities consistent with personal use. *See United States v. Medina*, 944 F.2d 60, 65-66 (2d Cir. 1991). "The rationale for holding a buyer and a seller not to be conspirators is that in the typical buy-sell scenario, which involves a casual sale of small quantities of drugs, there is no evidence that the parties were aware of or agreed to participate in a larger conspiracy." *Id.* at 65. This rationale simply does not apply where there is evidence of "planning among the alleged co-conspirators to deal in wholesale quantities of drugs obviously not intended for personal use. Under such circumstances, the participants in the transaction may be presumed to know that they are part of a broader conspiracy." *Id.* at 65-66 (citations omitted).

e. Prejudicial Variance

A variance occurs when the evidence at trial establishes the existence of multiple conspiracies, rather than the single conspiracy charged in an indictment. *See United States v. Alessi*, 638 F.2d 466, 474-75 (2d Cir. 1980). "Even where such a variance exists, however, . . . [courts]

reverse a conviction only upon a showing of substantial prejudice, i.e. the evidence proving the conspiracies in which the defendant did not participate prejudiced the case against him in the conspiracy to which he was a party." *United States v. Johansen,* 56 F.3d 347, 351 (2d Cir. 1995) (citations omitted).

Courts considers the following factors when determining whether a defendant has been substantially prejudiced:

> (1) whether the trial court gave a jury charge, pursuant to *Pinkerton v. United States,* 328 U.S. 640, 90 L. Ed. 1489, 66 S. Ct. 1180 (1946), allowing the defendant to be convicted for substantive offenses committed by another; (2) whether statements of persons not in a conspiracy with the defendant were used against him; (3) whether there was a prejudicial "spillover" because of a large number of improperly joined defendants; and (4) whether shocking or inflammatory evidence came in against the defendant.

Johansen, 56 F.3d at 351 (internal citations omitted); *see United States v. Geibel,* 369 F.3d 682, 693 (2d Cir. 2004).

> A defendant cannot demonstrate that he has been prejudiced by a variance where the pleading and the proof substantially correspond, where the variance is not of a character that could have misled the defendant at the trial, and where the variance is not such as to deprive the accused of his right to be

protected against another prosecution for the same offense.

United States v. Salmonese, 352 F.3d 608, 621-22 (2d Cir. 2003).

2. Standards of Review

a. Rule 29: Judgment of Acquittal

The district court's ruling on a motion for judgment of acquittal for insufficient evidence is reviewed *de novo*. *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003). Defendants seeking judgment of acquittal under Fed. R. Crim. P. 29 based on a claim of insufficient evidence bear a "heavy burden." *Jackson*, 335 F.3d at 180 (quoting *United States v. Finley*, 245 F.3d 199, 202 (2d Cir. 2001)). Such motions should be granted only in cases where, based upon the evidence adduced at trial, no rational trier of fact could have found the defendant guilty beyond a reasonable doubt. *Jackson*, 335 F.3d at 180. The evidence must be viewed in the light most favorable to the government, and all permissible inferences must be drawn in the government's favor. *See United States v. Guadagna*, 183 F.3d 122, 129 (2d Cir. 1999). "[I]t is the task of the jury, not the court, to choose among competing inferences that can be drawn from the evidence." *Jackson*, 335 F.3d at 180. This deference to the jury is particularly important in conspiracy cases, because "a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel." *Id.* (quoting

United States v. Pitre, 960 F.2d 1112, 1121 (2d Cir. 1992)).

b. Rule 33: New Trial

District courts' rulings on motions for new trial are reviewed under an abuse-of-discretion standard. *United States v. Ferguson*, 243 F.3d 129, 133 (2d Cir. 2001). A ruling denying a motion for a new trial under Fed. R. Crim. P. 33 should be affirmed unless allowing the jury verdict to stand would constitute "manifest injustice." *See Ferguson*, 243 F.3d at 134. In considering motions for new trials, courts view the evidence "in the light most favorable to the government, crediting any inferences that the jury might have drawn in the government's favor." *United States v. Canova*, 412 F.3d 331, 335 (2d Cir. 2005).

C. Discussion

1. The Single Conspiracy Charged in the Indictment

Based upon the evidence presented during the Government's case-in-chief, the jury properly could have found that Moorning, Hines, Nelson and Groom, the 45 street-level dealers named with them in the indictment, and Moorning's New York supplier, all shared a common goal, which, quite simply, was the distribution of substantial quantities of crack cocaine for profit. The jury also properly could have found that the four principals, the street-level dealers, and Moorning's New York supplier were mutually dependent, and knew, or had reason to

know, they were part of a broad operation that required the participation of others for its success.

Moorning, Hines, Nelson and Groom, were clearly joined together in a single conspiracy. Thomas does not argue to the contrary. Moorning headed the organization. GA 93-94, 102. He obtained between four and six kilograms of crack each week from his New York supplier, GA 94-95, which he, and one or more of the other principals, "cooked," packaged for distribution, and warehoused. GA 100, 110-11, 153. Hines, Nelson and Groom worked with Moorning as "a team" distributing these drugs to the organization's street-level dealers. GA 93–95, 98-99, 101, 103-11, 152. The four used "work phones" to connect with the organization's street-level dealers on a daily basis. GA 98-99, 120.

In addition, Moorning's New York supplier was dependent upon the principals and the organization's street-level dealers. The principals, as noted, packaged the drugs into re-distribution quantities, transported them to New Haven, and physically delivered them to the street-level dealers. GA 93-95, 98-11, 152-53.

The four principals, however, did not sell crack to users or "fiends," because, in their estimation, users were "weak" and dealing with them was too dangerous. GA 97-98, 110, 129. Thus, the principals, and Moorning's New York supplier, were critically dependent upon each street-level dealer to cultivate and maintain a customer base of users and to physically deliver crack into the hands of

users, thereby completing the final, essential step in the distribution chain.

The street-level dealers, in turn, were dependent on the principals and Moorning's New York supplier. To keep the drugs "going" quickly with customers, and to continue making the kind of "good money" they were making, the dealers depended upon the principals to meet the dealers' daily distribution needs with a steady supply of reasonably priced, "good" quality crack, which was not cut with "too much baking soda." GA 110-11. Moorning and the other principals, as noted, met this need by securing between four and six kilograms of crack each week from Moorning's New York source of supply and by making daily deliveries of crack to the dealers as needed. GA 95, 98-102.

The principals and the street-level dealers also worked together by conducting counter-surveillance. GA 109-110, 121, 228-30. And they spoke in "narcotics code language" to avoid detection by law enforcement. *See United States v. Cirillo*, 499 F.2d 872, 887-88 (2d Cir. 1974) (use of "narcotics code language" is a factor to be considered in determining whether defendants are members of a single conspiracy); *see Sisca*, 503 F.2d at 1333-34, 1334 n.10.

Given the "loosely knit, vertically integrated" nature of the organization, *see Taylor*, 562 F.2d at 1351 (citation omitted), Moorning's New York supplier,

> at one end of the chain, knew that the unlawful business would not, and could not, stop with . . .

> [his] buyers; and those at the other end knew that it had not begun with their sellers. That being true, a jury might have found that all the accused were embarked upon a venture, in all parts of which each was a participant, and an abettor in the sense that the success of that part with which he was concerned, was dependent upon the success of the whole.

United States v. Tramaglino, 197 F.2d 928, 930 (2d Cir. 1952).

Certainly, the *nature and scope* of the Moorning organization was evidence that the street-level dealers who affiliated themselves with Moorning, Hines, Nelson and Groom, did so with knowledge that they were affiliating themselves with a broad operation in which others were performing similar roles equally important to the success of the venture. *See, e.g., Williams*, 205 F.3d at 33; *Sureff*, 15 F.3d at 230; *Taylor*, 562 F.2d at 1352; *Miley*, 513 F.2d at 1207; *Magnano*, 543 F.2d at 433-34; *Mallah*, 503 F.2d at 983.

For example, at least some of the Moorning organization's street-level dealers, including Thomas, knew "with certainty" that there were other dealers affiliated with the organization who were performing similar roles. GA 112-13. *United States v. Paoli*, 603 F.2d 1029, 1035 (2d Cir. 1979) (citations omitted) ("Where co-conspirators know with certainty that other suppliers and dealers exist, even if they are not known personally, this court has recognized the existence of a

single conspiracy."). All the dealers, though they may not have known the full scope of the organization, knew that the organization was busy enough to require that all four of the principals field calls from, and deliver crack to, the street-level dealers on a daily basis. GA 98-102. From this, jurors could have made a permissible inference of knowledge and dependency.

In addition, the *regularity* with which the street-level dealers interacted with one or more of the principals, and the substantial *quantities* of crack that the dealers regularly purchased also supported an inference of knowledge and dependency. *See Miley*, 513 F.2d at 1207; *Taylor,* 562 F.2d at 1352-54; *Magnano*, 543 F.2d at 433-34; *Mallah*, 503 F.2d at 983. On a daily basis, the four principals, collectively, delivered approximately a kilogram of crack, in redistribution quantities, to the organization's street-level dealers. GA 98-102. Hines himself met with, and supplied crack to, the organization's street-level dealers with such regularity that he became intimately familiar with their practices. GA 103-09. Hines' testimony regarding these facts is undisputed and was corrobrated by the testimony of the case agent. GA 55, 68-71.

The principals were, thus, the "point[s] of contact" for the multiple street-level dealers who affiliated themselves with the Moorning organization, and they were conducting "a regular business on a steady basis." *Miley*, 513 F.2d at 1207. The street-level dealers – by meeting with Moorning, Hines, Nelson and Groom on a regular, if not daily, basis, and by obtaining substantial, "weight" quantities of crack from the four principals on an equally

regular basis – maintained "a close relationship with a solvent, on-going" operation. *Bynum*, 485 F.2d at 497.

From these facts, jurors were entitled to infer that the street-level dealers knew the organization was moving a quantity of drugs greater than one dealer could distribute, and, therefore, that each dealer must have known that there were others involved in the organization who were "performing similar roles" equally important to success of the venture. *See Miley*, 513 F.3d at 1207; *Williams*, 205 F.3d at 33; *Sureff*, 15 F.3d at 230; *Taylor*, 562 F.2d at 1352-54. Where, as here, such an inference is justified, this Court has applied this "principle to uphold single conspiracy convictions in many cases." *Miley*, 513 F.2d at 1207 (citations omitted).

2. Wheels and Chains

Thomas presses on appeal substantially the same argument he pressed in his post-trial motion in district court. In Thomas' view, the Moorning organization was a simple "wheel" conspiracy. DB 3. He claims that the Government failed to prove the single conspiracy alleged in the indictment, because it failed to show that each street-level dealer affiliated with the Moorning organization – each "spoke" in the "wheel" – knew and worked with one another in a "drug related" way and were, thus, connected by a "rim." DB 3.

The defendant is incorrect. Under the law of this Circuit, the Government was not required to prove that all the members of the charged drug conspiracy knew one

another or worked together. *See Sureff*, 15 F.3d at 230 (defendant's claim that government failed to prove single "wheel" conspiracy alleged in indictment because conspirators did not know one another and, therefore, were not connected by a "rim" was deemed "meritless" by court).

More importantly, the jury in this case was entitled to conclude that a single conspiracy existed, because the Government, as discussed above, presented evidence of a common goal as well as evidence from which jurors could have inferred that Thomas and the other street-level dealers must have known they were part of a venture that extended beyond their individual participation and that others were performing roles similar to theirs.

The case upon which defendant principally relies for his argument, *Kotteakos v. United States*, 328 U.S. 750 (1946), is inapposite. *Kotteakos* was not a drug conspiracy case. Rather, it involved eight separate conspiracies to fraudulently obtain loans under the Federal Housing Act, and there was no evidence that the eight "spokes" had any reason to know they were part of the single, broader conspiracy charged in the indictment. *Kotteakos*, in other words, was devoid of the kind of evidence, almost always present in large-scale drug conspiracy cases, which permits jurors to properly infer that individual defendants – or groups of defendants – must have known they were part of a venture that was broader than their individual participation and in which others were performing roles similar to theirs. *See United States v. Vega*, 458 F.2d

1234, 1236 (2d Cir. 1972); *see also Sureff*, 15 F.3d at 23 (defendant's *Kotteakos* claim deemed "meritless").

The other cases relied upon by Thomas are also plainly distinguishable. In *Berger v. United States*, the defendants were convicted of conspiring to defraud several federal agencies. 224 F.3d 107 (2d Cir. 2000). Relying on *Kotteakos*, they, like Thomas, claimed that the Government had proven multiple conspiracies at trial, rather than the single conspiracy charged in the indictment. *Id.* at 110-11, 115. The Court rejected this argument, affirmed the defendants' convictions, and held that the "jury could reasonably have inferred that all of the appellants were aware of the general nature and extent of the conspiracy – even though they did not join in every aspect of the fraud." *Id*. at 115. *Berger*, therefore, undermines Thomas' claim.

In *United States v. Bertolotti*, 529 F.2d 149 (2d Cir. 1975), "the court found that the single conspiracy which was charged in the indictment was actually an improper consolidation of at least four separate and unrelated criminal ventures, some of which, but not all, involved narcotics, and others of which involved non-drug transactions such as cash theft." *United States v. Leong*, 536 F.2d 993, 995 (2d Cir. 1976) (distinguishing *Bertolotti*). In each of the four transactions, the core conspirators "employed confederates hired for that transaction alone, confederates who had no reason to know that the core group had engaged in similar thefts elsewhere." *United States v. Paoli*, 603 F.2d 1029, 1035 (2d Cir. 1979) (distinguishing *Bertolotti*). The core

members and their confederates "were not conducting what could seriously be called a regular business on a steady basis." *Bertolotti*, 529 F.2d at 155 (quoting *Miley*, 513 F.2d at 1207). In the present case, conversely, the four principals dealt regularly with the same cast of 45 street-level dealers in what was a steady narcotics distribution operation.

Finally, the analytical framework defendant urges on the Court, which depicts the Moorning organization as a simple "wheel" conspiracy, is neither accurate nor helpful. The Moorning organization, in many respects, could be diagramed as a prototypical "chain" drug conspiracy, containing "loosely knit, vertically-integrated combinations" aimed at placing narcotics into the hands of users. *Taylor*, 562 F.2d at 1351. At the top was the organization's New York supplier, an unindicted co-conspirator. Next on the chain was Moorning, followed by his three lieutenants, Hines, Nelson and Groom. Below them, completing the chain, were the dealers.

The organization, however, like most drug conspiracies, could also fairly be viewed as containing elements and combinations akin to a "wheel" conspiracy, particularly at the retailer end of the operation, where there were multiple street-level dealers. *See Miley*, 513 F.2d at 1206-07. Thus, attempting to definitively classify the Moorning organization as a "chain" or a "wheel" conspiracy "obscure[s] as much as it clarifies," *Borelli*, 336 F.2d at 383, which is why drug conspiracies ought "not to be measured by spokes, hubs, wheels, rims, chains, or any one or all of today's galaxy of mechanical,

molecular or atomic forms." *Taylor*, 562 F.2d at 1350 n.2.

Even if, however, the Court were to indulge the defendant's pictorial framework, Thomas' claim that the government proved 45 separate chain conspiracies connected to a "hub," is of no help to him. "[W]here two or more chains are connected to a hub by core conspirators this court has not hesitated to view the entirety as a single conspiracy. This view of the narcotics business cannot be confined to the *Kotteakos* issue." *Mallah*, 503 F.2d at 984 (citation omitted); *see Sisca*, 503 F.2d at 1337; *Bynum*, 485 F.2d at 490); *Sureff*, 15 F.3d at 230; *Taylor*, 562 F.2d at 135; *Miley*, 513 F.2d at 1206-07; *see also United States v. Thompson*, 76 F.3d 442, 454 (2d Cir. 1996).

This point is perhaps most clearly illustrated by this Court's decision in *Taylor,* 562 F.2d at 1345. There, the drug conspiracy consisted of four core members, who formed the "hub," and various distributors – or spokes – in different cities, through whom narcotics were distributed. *Id.* at 1350. One of the defendants, Green, was a wholesale distributor. *See id.* at 1350, 1354. He lived in New York and had no connection to distributors in the Washington, D.C. area, who were also alleged to be part of the charged conspiracy. *Id.* A second defendant, Taylor, was a street-level distributor in the Washington D.C. area who had no connection to the New York distributors. *Id.* at 1350, 1352-53. Both were convicted, the jury having found that they were part of a single conspiracy. On appeal, Taylor and Green (and others) argued that the New York and Washington D.C. spokes – connected only by the four principals that formed the hub

– could not be assimilated into a single conspiracy, as alleged in the indictment. *Id*. at 1351. The Court disagreed and affirmed the conspiracy convictions. *Id*. at 1352-54, 1366.

The Court held that the evidence at trial was sufficient to establish that Taylor was a "regular, if slow-paying, customer" of the organization, who purchased "sufficient quantities [of narcotics] to be in the retail distribution business." *Id*. at 1353. From this, the jury could have inferred that Taylor had knowledge of the broader conspiracy. *Id*. As for Green, the Court acknowledged that he had no particular connection with the Washington, D.C. branch of the organization. *Id*. at 1354. Nevertheless, the Court found that based upon the quantities he purchased and his ongoing relationship with the core members and others, "Green must be considered one of those as to whom the jury could infer knowledge both that the conspiracy had a scope, and for its success required an organization, wider than that disclosed by his personal participation . . . ." *Id*.

3. Thomas Was a Co-conspirator, Not a Mere Casual Buyer

Thomas' claim that he was involved in a mere buyer-seller relationship is devoid of merit. To begin with, Thomas has conceded that he knowingly entered into a conspiracy with the four principals, Moorning, Hines, Nelson and Groom: "There was sufficient evidence to prove a conspiracy at . . . trial between the core four and Mr. Thomas." GA 544. Furthermore, evidence regarding

Thomas' words and deeds, as set forth above, establishes that Thomas was not a mere casual buyer but, rather, was a co-conspirator who knowingly joined the single, broad conspiracy charged in the indictment.

Moorning, Hines, Nelson and Groom *all* supplied redistribution quantities of crack to Thomas during the ten-day period in February of 2004 when Thomas was out of prison. GA 111-13, 138-46, 164-66; *see also* GA 299-300. Once, Thomas purchased a half-ounce of crack from Nelson in the morning, then purchased more crack later that night from Groom. GA 142, 164-65. On another occasion, Thomas had to wait for a delivery of crack because Hines was busy serving other dealers in "the Hill" section of New Haven. GA 139; GA 608-09 (Exhibit T-21). From this evidence, the jury could have reasonable inferred that Thomas knew the Moorning organization was large enough, and busy enough, to require that all four principals field calls from, and make deliveries of crack to, multiple street-level dealers.

Thomas sold crack in the Vernon Street area, had been "hustling" with the Moorning organization dating back to before the summer of 2003, and knew, "with certainty," that there were others in the organization performing roles similar, if not identical, to his. GA 104, 109, 112-13, 150; *Paoli*, 603 F.2d at 1035. He told Hines he was making "good money" selling the "good" quality crack that Hines supplied to him. GA 114. On one occasion, Hines saw Thomas distributing crack and chastised Thomas for "exposing" Hines to someone not affiliated with the organization. GA 114-15. "From this evidence, along

with the evidence discussed above, the jury could have inferred that Thomas knew there were others at his level of the organization who shared the goal of profiting from its crack distribution activities, and that he knew the organization included street-level dealers but not individuals who bought crack from the street-level dealers." GA 596.

Thomas knew the numbers for the organization's work phones, which were given out only to trusted street-level dealers, made numerous calls to the work phones, and spoke in narcotics code language. GA 98-99, 125-26, 138-46, 164-66, 605-21. He also requested that Hines supply him with crack in a "whole half-ounce piece," because "when he was bagging up the dimes and 20s, he got a better cut with the razor when he cuts off a solid piece." GA 114. The buyer-seller rationale simply does not apply where there is this kind of "planning among co-conspirators." *Medina*, 944 F.2d at 65-66.

Moorning himself, because he had a close relationship with Thomas, fronted Thomas a half-ounce of crack in February of 2004. GA 143-44, 150, 182-83. The calls that Thomas made to Moorning from prison demonstrate that Thomas recognized his obligation to pay Moorning for the drugs that Moorning had fronted to him and that he considered himself a loyal member of the organization. GA 145-46, 167, 179. From this, jurors could have inferred that Thomas was in the "retail distribution business," had a close relationship with Moorning, and was "knowledgeable as to the size of . . . [Moorning's] operations." *Taylor*, 562 F.2d at 1353.

It is true that once Thomas paid for the crack supplied to him by the four principals, he had no further *monetary* obligation to them. GA 157. He was, however, expected to sell the crack; and he would have risked being cut out of the organization if Hines and Moorning didn't see him doing so in the evening, or if they suspect that he was smoking the crack they supplied to him. GA 109-10, 129, 157, 177-78. Hines testified that Thomas was never high during their dealings. GA 129, 157.

Based upon the foregoing, jurors could have inferred that, by linking himself with the four principals, Thomas knew, or had reason to know, he was affiliating himself with an ongoing operation in which others were performing similar roles that were equally important to the success of the venture. *See Williams*, 205 F.3d at 33; *Miley*, 513 F.2d at 1207; *Sureff*, 15 F.3d at 230. This was sufficient to establish that Thomas knowingly joined the single conspiracy charged in the indictment.

The principal case relied upon by Thomas in support of his claim that he was merely a casual buyer is inapposite. In *United States v. Gore*, 154 F.3d 34 (2d Cir. 1998), the defendant – a seller – was convicted of conspiracy to distribute heroin. *Gore*, 154 F.3d at 38. The conspiracy charge against the defendant stemmed from a single transaction between the defendant and a confidential informant ("CI"), in which the defendant sold the CI 0.11 grams of heroin for $45.00. *Id.*

The heroin was branded with the name "Fuji Power." *Id*. The CI was wearing a wire, and his conversation with

the defendant was recorded. *Id*. During the transaction, the defendant complained that the CI had not paid him the full amount owed. *Gore*, 154 F.3d at 38. The defendant then referenced, in vague terms, a third person who had supplied him with drugs in the past and with whom he didn't "want to lose face" by being unable to pay what he owed to the third person. *Id*.

The government argued that because the defendant "had to have a supplier in order to sell his drugs, he was *de facto* part of a narcotics conspiracy to sell 'Fuji Power.'" *Id*. at 39. It also argued that the defendant's recorded statement "verified the existence of a supplier to whom . . . [he] would lose face were he not paid by" the CI. *Id*.

The Court held that the defendant's single sale to the CI of a quantity of drugs consistent with personal use established only a buyer-seller relationship, not a conspiracy. *See Gore*, 154 F.3d at 40 (citation omitted). Without more, the record was simply "devoid of any conspiratorial conduct." *Id*.

Thomas, as noted, purchased redistribution quantities from his co-conspirators on multiple occasions, admitted he was making a good profit selling the crack they supplied to him, was observed selling crack by a co-conspirator, was fronted crack by a co-conspirator, promised to pay what he owed for the crack that had been fronted to him, and pledged his loyalty to the organization of which he was a member. *Gore*, therefore, is not controlling.

4. Variance and Substantial Prejudice

Because the evidence at trial was sufficient to support the jury's finding that Thomas had knowledge of, and joined, the conspiracy charged in the indictment, there was no variance. *See Alessi*, 638 F.2d at 472-73. The Court, therefore, need not reach the question of prejudice. *Id.* Even if there had been a variance, however, Thomas' claim that his substantial rights were prejudiced by it is without merit. *Id*. at 474-75.

Thomas claims he should have been tried only for entering into a conspiracy with Moorning, Hines, Nelson and Groom, and that, had the indictment and trial been so structured the evidence admissible against him would have been markedly different. This is incorrect. In fact, nearly all the evidence admitted against Thomas at trial in this case would have been offered by the government and admissible against Thomas under his narrow theory of the conspiracy.

Only one of Thomas' co-conspirators – Hines, with whom Thomas dealt directly – testified at trial. The most damaging aspects of Hines' co-conspirator testimony would have been no different had the indictment alleged a conspiracy between Thomas and the four core members, because the Government would have been permitted to adduce testimony relating to the conspiracy between Moorning, Hines, Nelson and Groom. Hines, therefore, would have been able to testify about all the details pertaining to Moorning's New York supplier, the day-to-day delivery operations in which he, Moorning, Nelson

and Groom engaged, the details of how the crack was packaged, where it was stashed and how much crack he and Moorning, Nelson and Groom distributed each week.

Hines would have been able to testify about Thomas' involvement and the numerous calls Thomas placed to Hines for the purpose of obtaining redistribution quantities of crack. He would have been able to testify about Thomas' preference for a whole, half-ounce piece of crack, rather than eight balls, to facilitate the cutting of crack into dime bags.

Hines also would have been able to testify that he once saw Thomas selling crack to a user and that Thomas once told Hines that he was making good money selling the crack that Hines was providing to him. Hines would have been able to testify about the half-ounce of crack that was fronted to Thomas and the calls Thomas placed to Moorning from jail after he got arrested, in which Thomas pledged his loyalty to the organization and promised to pay for the half-ounce of crack that had been fronted to him.

All the surveillance testimony pertaining to Hines, Moorning, Nelson and Groom would have been admissible to corroborate Hines' testimony about the day-to-day operations of Moorning and the other three principals. For this same reason, evidence pertaining to seizures of crack also, presumably, would have been admissible, because each seizure was the result of a delivery made by Hines, Moorning, Nelson or Groom. Furthermore, as the district court ruled, even if the seizure evidence "would not have been offered and admitted in a five-person conspiracy

case, . . . [this evidence] was not 'shocking' or 'inflammatory.'"[4] GA 599.

There was, moreover, no prejudicial spillover effect in this case. *See Alessi*, 638 F.2d at 475. Thomas was tried alone because his 48 co-defendants pleaded guilty. The trial lasted only three days. The jury, therefore, was able to give individual consideration to Thomas; and the fact that it found less than the 50 grams of crack attributable to him – far less than the amount Moorning, Hines, Nelson, Groom and the other street-level dealers distributed – confirms that the jury did, in fact, give individual consideration to the particular evidence against Thomas in accordance with the district court's instructions. *Id*.

Because Thomas was tried alone, he and the jurors were not made to endure weeks of shocking or inflammatory evidence admitted against Thomas' co-defendants. *Id*. (citation omitted). To the contrary, the only testimony about transactions involving street-level dealers, other than Thomas, pertained to conduct that was "essentially the same" as Thomas' conduct, a fact which undermines Thomas' prejudice claim. *Id.* Finally, the

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[4] The Government, moreover, stressed in closing argument that the crack seized from other street-level dealers, and admitted into evidence, was not offered as evidence that Thomas was part of the conspiracy. GA 469. Rather, it was offered to corroborate Hines' testimony about the "first part of this equation" – that a conspiracy existed and the substance the organization was distributing was, in fact, crack. *Id*. at 469, 435.

district court did not give a *Pinkerton* charge. There was, accordingly, no substantially prejudicial variance in this case.

II. THE DISTRICT COURT'S JURY CHARGE WAS NOT ERRONEOUS

A. Relevant Facts

Facts stemming from the evidence adduced at trial, which are pertinent to consideration of this issue, are set forth in the "Statement of Facts" above. The district court's jury charge is set forth in its entirety in the Government's Appendix. *See* GA 471-534. Jurors were permitted to keep a written copy of the district court's oral charge with them during deliberations. GA 472.

B. Governing Law and Standard of Review

The district court's jury charge is reviewed *de novo*. *United States v. Ford*, 435 F.3d 204, 210 (2d Cir. 2006). A defendant who challenges the propriety of a jury charge must show that the charge, viewed in its entirety, misstated the law and prejudiced him. *See United States v. Thompson*, 76 F.3d 442, 454 (2d Cir. 1996).

C. Discussion

The district court properly charged the jury regarding the distinction between single and multiple conspiracies. It also properly charged the jury regarding the essential elements of a drug conspiracy and the jury's obligation to

determine, beyond a reasonable doubt, the quantity of crack to be attributed to Thomas.

1. The Multiple Conspiracies Charge

Thomas devotes but two paragraphs in his brief to this claim. DB 19-20. The Court should dispose of the argument with equal dispatch.

The district court "explained in detail the essential elements of the crime of conspiracy and made it crystal clear that, before . . . [Thomas] could be convicted, the jury was required to find the single conspiracy charged." *Sisca*, 503 F.2d at 1345; GA 498, 500-14.

The district court also "focused the jury's attention on the importance of their determining whether . . . [Thomas] joined the conspiracy and the scope of his agreement." *United States v. Sperling*, 506 F.2d 1323, 1341 (2d Cir. 1974).

> If you are satisfied that the conspiracy charged in Count One existed, by satisfied, you find that the government has proven beyond a reasonable doubt that it existed, you must next turn and ask yourselves if Mr. Thomas was a member of that conspiracy. In deciding whether Mr. Thomas was in fact a member of the conspiracy or not, you should consider whether he knowingly and willfully joined the conspiracy.

GA 508. Finally, the district court specifically charged that the jury should find the defendant not guilty if the Government failed to prove that Thomas knowingly joined the single conspiracy charged in the indictment. *See Sperling*, 506 F.2d at 1341.

> Proof of several separate and independent conspiracies is not proof of the single, overall conspiracy charged in the indictment, unless one of the conspiracies proved happens to be the single conspiracy charged in the indictment.
>
> . . . [I]f you find that the conspiracy charged in the indictment does not exist, you cannot find the defendant guilty of the single conspiracy charged in the indictment. This is so even if you find that some conspiracy other than the one charged in this indictment existed, even though the purposes of both conspiracies may have been the same and even though there may have been some overlap in membership.

GA 502-03. The charge, therefore, was proper because it stressed "that there must be [a] finding of the single conspiracy charged and individual knowing participation" in it by Thomas. *United States v. Aracri*, 968 F.2d 1512, 1520 (2d Cir. 1992).

2. Quantity as an Element

In *United States v. Gonzalez*, this Court held that quantity is an element of the "aggravated drug offenses"

set out in 21 U.S.C. § 841(b)(1)(A) and § 841(b)(1)(B). 420 F.3d 111, 115-16 n.1 (2d Cir. 2005). As such, the mandatory minimum sentences set forth in § 841(b)(1)(A) and § 841(b)(1)(B) apply only if quantity is proved beyond a reasonable doubt to the jury or is admitted by the defendant. *See Gonzalez*, 420 F.3d at 125.

Thomas was charged in Count One of the indictment with conspiracy to possess with intent to distribute, and conspiracy to distribute, 50 grams or more of a substance containing a detectable amount of crack. The jury found Thomas guilty of the lesser-included offense of conspiracy to possess with intent to distribute less than 50 grams, but more than five grams, of crack; and their finding was reflected on a special verdict form. GA 603. Thomas concedes that he was convicted of a lesser-included offense. GA 555; DA 123.

Notwithstanding this concession, Thomas claims that the following language in the jury charge was error:

> [F]or you to find Mr. Thomas guilty of the drug conspiracy charged in Count One, you must find the government has proven beyond a reasonable doubt two elements: One, that the conspiracy as charged to possess with the intent to distribute and to distribute a schedule two controlled substance; namely cocaine base existed. And, two, that Mr. Thomas knowingly and willingly agreed to become a member of that conspiracy. Although there's a quantity charged in Count One in the indictment as I just read it to you, the charge or the crime does not

> require the government to prove a specific quantity of cocaine base for you to find the defendant guilty.

GA 498-99.

The district court then instructed jurors that, if they found that the charged conspiracy existed and Thomas knowingly joined it, they should determine what quantity of crack was attributable to him.

> After considering whether the government has proven beyond a reasonable doubt, the two elements that I have just described above, you should then determine the quantity of drugs that was attributable to Mr. Thomas in the conspiracy. In order for Mr. Thomas to be criminally accountable for a particular quantity of cocaine base, the acts involving the cocaine base must have been within the scope of Mr. Thomas' agreement and must also have been foreseeable to him.

GA 499. Furthermore, the district court went on to devote 15 pages of its charge to explaining the essential elements of a drug conspiracy, GA 500-15, including the requirement that the Government prove, beyond a reasonable doubt, the quantity of crack that was attributable to Thomas. GA 513-15.

Contrary to Thomas' claim, the quoted language is an accurate statement of the law. The jury properly could have found Thomas guilty of the drug conspiracy charged in the indictment without attributing a specific quantity to

him. Had they done so, Thomas would have been found guilty of the lesser-included offense of conspiracy to possess with intent to distribute an *unspecified* quantity of crack under 21 U.S.C. § 841(b)(1)(C). *See Gonzalez*, 420 F.3d at 131. Instead, as noted, the jury found, beyond a reasonable doubt, that at least five grams of crack should be attributed to Thomas, making him guilty of the lesser-included offense set out in 21 U.S.C. § 841(b)(1)(B).

The district court was plainly authorized to charge the jury on lesser-included offenses. Rule 31 of the Federal Rules of Criminal Procedure provides that "[a] defendant may be found guilty of any . . . offense necessarily included in the offense charged." Fed. R. Crim. P. 31(c). Violations of §§ 841(b)(1)(B) and (C) – which respectively involve five to 50 grams of cocaine base, and no specified quantity of cocaine base – are both lesser-included offenses of 21 U.S.C. § 841(b)(1)(A), which requires a higher threshold of 50 grams of cocaine base. *See, e.g., United States v. Thomas*, 274 F.3d 655, 672-73 (2d Cir. 2001); *United States v. McLean*, 287 F.3d 127, 134 (2d Cir. 2002); *United States v. Stevens*, 19 F.3d 93, 95 (2d Cir. 1994). For these reasons, the Sixth Circuit has had occasion to reject a claim similar to the one Thomas raises here. *United States v. Solorio*, 337 F.3d 580, 589-91 (6th Cir. 2003); *see also United States v. Yeje-Cabrera*, No. 03-1329, 2005 WL 2868315, at *8-*9 (1st Cir. Nov. 2, 2005).

Finally, Thomas' assertion that neither party specifically requested that lesser-included offenses be included in the charge is unavailing. *See United States v.*

Welbeck, 145 F. 3d 492 (2d Cir. 1998) (upholding defendant's conviction for possession of crack cocaine where trial court submitted a lesser included offense charge to a deliberating jury without notice to defendant prior to summation and without defendant's consent); *United States v. Singleton*, 447 F. Supp. 852, 854 (S.D.N.Y. 1978) ("[T]he Court properly may instruct the jury concerning lesser included offenses without request from either party.").

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING THOMAS' MOTION TO INTRODUCE DEMONSTRATIVE EXHIBITS

A. Relevant Facts

Facts stemming from the evidence adduced at trial, which are pertinent to consideration of this issue, are set forth in the "Statement of Facts" above. In addition, the district court sustained the Government's objection to several demonstrative exhibits the defendant sought to introduce and use in his closing argument because the district court believed the exhibits would confuse the jury. GA 426-31.

B. Governing Law and Standard of Review

The district court's evidentiary rulings are reviewed for abuse of discretion. *See United States v. Arena*, 180 F.3d 380, 400 (2d Cir. 1999).

C. Discussion

To prove the existence of the charged conspiracy, and Thomas' participation in it, the Government was required to present evidence from which jurors could have inferred that Thomas and his co-conspirators knew, or had reason to know, that they were part of a broad organization in which others were performing similar roles equally important to the success of the venture. *See Miley*, 513 F.2d 1206-07. Under the law of this Circuit, the Government was not required to prove that all the members of the charged drug conspiracy knew one another or worked together. *See Sureff*, 15 F.3d at 230; *Mallah*, 503 F.2d at 984; *Tramaglino*, 197 F.2d at 930; *Taylor*, 562 F.2d at 1351-52, 1354.

The proposed demonstrative exhibits illustrated Thomas' view, based upon a flawed reading of *Kotteakos*, that the Government failed to prove the single conspiracy alleged in the indictment, because it failed to show that each street-level dealer affiliated with the Moorning organization – each "spoke" in the "wheel" – knew and worked with one another in a "drug related" way and were, thus, connected by a "rim." DB 3. One of Thomas's proposed demonstrative exhibits depicted a wheel with spokes that were connected by an outer rim. DA 35. Another exhibit depicted a wheel with spokes, but no outer rim connecting the spokes. DA 34.[5] The demonstrative

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[5] A third exhibit contained a photographic flow chart (continued...)

exhibits, therefore, likely would have been confusing to the jury and misleading.

In its ruling on Thomas's post-trial motion, the district court articulated it concerns about Thomas' proposed demonstrative exhibits and its reason for denying their admission into evidence.

> After viewing them, the court found that the demonstrative exhibits presented a risk of confusing the jury with respect to the law and the trial record and that they would not be helpful to the jury. It did not limit the oral arguments that defense counsel could make in his summation on the issue of single versus multiple conspiracies. It certainly did not deny Thomas the opportunity to make a closing argument, which was the action the Supreme Court found to violate the Sixth Amendment in the sole case cited in Thomas's memorandum on the issue of the right to counsel. *See Herring v. New York*, 422 U.S. 853, 859 (1975), *cited in* Def.'s Mem. Supp. Mot. J. Acquittal or New Trial at 15 [Dkt. No. 1520]. The court finds no support for Thomas's contention that the court's refusal to allow use of certain demonstrative exhibits violated his Sixth Amendment right to counsel.

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[5] (...continued)
depicting the distribution of milk from farm to consumer. DA 32.

GA 600. Given the law of this Circuit in the area of drug conspiracies, and the district court's concern about the risk of confusing the jury posed by admission of the proposed demonstrative exhibits, the district court did not abuse its discretion in ruling that the exhibits were inadmissible.

CONCLUSION

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

Dated: September 22, 2006

Respectfully submitted,

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

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a) (7) (B), in that the brief is calculated by the word processing program to contain approximately 13,587 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

PATRICK F. CARUSO
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Addendum

Rule 29. Motion for a Judgment of Acquittal

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

(b) Reserving Decision. The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) After Jury Verdict or Discharge.

(1) Time for a Motion. A defendant may move for a judgment of acquittal, or renew such a motion, within 7 days after a guilty verdict or after the court discharges the jury, whichever is later.

(2) Ruling on the Motion. If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

(3) No Prior Motion Required. A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

(d) Conditional Ruling on a Motion for a New Trial.

(1) Motion for a New Trial. If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(2) Finality. The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) Appeal.

(A) Grant of a Motion for a New Trial. If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

(B) Denial of a Motion for a New Trial. If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

Rule 33. New trial

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

(b) Time to File.

(1) Newly Discovered Evidence. Any motion for a new trial grounded on newly discovered evidence must be filed within 3 years after the verdict or finding of guilty. If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case.

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

21 U.S.C. § 841 (in pertient part)

. . . .

(b) Penalties

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

(1)(A) In the case of a violation of subsection (a) of this section involving--

. . .

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

. . .

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that

authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving--

. . .

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

. . .

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the

use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram

of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during

the term of such a sentence.

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

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.