No. 12-600

In the Supreme Court of the United States

ANTHONY ANTICO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LANNY A. BREUER
Assistant Attorney General
APRIL A. CHRISTINE
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court violated the Sixth Amendment in calculating petitioner's advisory Sentencing Guidelines range based in part on acquitted conduct.

2. Whether the evidence was sufficient to support petitioner's racketeering conspiracy conviction.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, rule and guidelines:

Statute, rule and guidelines—Continued: Page

In the Supreme Court of the United States

No. 12-600

ANTHONY ANTICO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-29) is reported at 692 F.3d 79.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2012. The petition for a writ of certiorari was filed on November 12, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of racketeering conspiracy, in violation of 18 U.S.C. 1962(d) and 1963, and illegal gambling, in violation of 18 U.S.C. 1955. 1:08-cr-00559, Docket entry (Docket entry) No. 287, at 1 (Nov. 30, 2010) (Judgment). He was sentenced to 108 months of imprisonment, to be

followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-29.

1. Petitioner's convictions arose out of his membership and participation in the Genovese organized crime family of La Cosa Nostra, a criminal enterprise that operated in New York and other parts of the United States. Presentence Investigation Report (PSR) ¶ 8. The principal purpose of the enterprise was to generate money for its members and associates. PSR ¶ 15. The enterprise achieved that purpose by engaging in various criminal activities, including extortion, illegal gambling, robbery, and burglary. *Ibid.* Members of the enterprise frequently used violence (including murder) and threats of economic and physical injury to achieve their goals. PSR ¶¶ 15-17.

Petitioner was a member of the Genovese crime family, rising from the rank of soldier to captain. PSR ¶¶ 9, 19. As such, he committed numerous crimes with other members of the Genovese family, including Joseph Barrafato, Jr. and Ralph Lento. PSR ¶¶ 20-25. From at least 2000 until at least 2006, petitioner operated an illegal private gambling club on Staten Island, New York. PSR ¶¶ 20-21. Petitioner was captured in numerous telephone calls discussing the club and its daily activities while he was in prison on an unrelated racketeering conviction. PSR ¶ 21.

In June and July 2008, petitioner participated in a plan to rob Mario Gulinello, who had won more than a million dollars in a horse race lottery a few years earlier. Pet. App. 3-13. In June 2008, Barrafato and Lento offered to take Gulinello out for coffee to a nearby store and instead drove him some distance away to Coney Island, where they pulled up alongside petitioner's car

and introduced Gulinello to petitioner. *Id.* at 3-4. Barrafato had previously told Gulinello that petitioner was a "good guy" who had recently been released from prison. *Id.* at 4. After that encounter, Gulinello stopped associating with Barrafato. *Ibid.* Throughout June and July 2008, government agents captured telephone conversations (pursuant to a court-authorized wiretap) among petitioner, Barrafato, and other criminal associates. *Id.* at 4-13. During the intercepted conversations, petitioner and his coconspirators discussed their plan to rob Gulinello. *Ibid.* On July 16, 2008, petitioner was recorded asking Barrafato whether he was "gonna rob anybody." *Id.* at 12. Barrafato responded that he was getting "everything prepared" and petitioner replied "[g]o ahead." *Id.* at 12-13. The following day, a federal law enforcement agent visited Barrafato at his home and told him that his telephone number had come up in connection with an individual who was under investigation. PSR ¶ 25. Barrafato phoned petitioner and told him about the agent's visit; the robbery of Gulinello was never carried out. *Ibid.*; Pet. App. 13.

In 2008, petitioner participated in a conspiracy to rob Louis Antonelli, a wholesale jeweler and associate of the Genovese family who sometimes sold jewelry at petitioner's gambling club. PSR ¶¶ 30-35. While petitioner was incarcerated, he learned that Antonelli was not following proper organized-crime protocol, which required him to pay part of his earnings to petitioner and other Genovese family members and associates. PSR ¶ 30. Petitioner told his associate to "wait for" him and stated that they would be "taking a lot of trips" to Antonelli's store when petitioner was released from prison. *Ibid.* In April 2008, after his release, petitioner met with Salvatore Maniscalco, Jr. and recruited him to

rob Antonelli. PSR ¶¶ 31-32. Petitioner told Maniscalco that he would receive 25% of the robbery proceeds and that Antonelli would be carrying approximately half a million dollars in cash and jewelry. PSR ¶ 32. Petitioner gave Maniscalco a black bag and a cell phone and instructed him to wait for a call that would tell him when and where they would commit the robbery. *Ibid.* Maniscalco recruited other associates and together they planned to rob Antonelli as he left his store. PSR ¶ 33. The robbery attempt was a failure, however, as one of Maniscalco's associates shot Antonelli twice in the chest and the would-be thieves fled without stealing jewelry or money. PSR ¶ 34. Antonelli later died from his gunshot wounds. PSR ¶ 35.

2. Petitioner was charged in a five-count superseding indictment with racketeering conspiracy, in violation of 18 U.S.C. 1962(d) and 1963; illegal gambling, in violation of 18 U.S.C. 1955 and 2; conspiracy to commit robbery, in violation of 18 U.S.C. 1951(a); attempted robbery, in violation of 18 U.S.C. 1951(a) and 2; and using and carrying a firearm in furtherance of a crime of violence, in violation of 18 U.S.C. 924(c) and 2. Docket entry No. 183, at 1-13 (May 12, 2010) (Superseding Indictment); Pet. App. 13. Count 1, which charged a conspiracy to violate the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*, specifically alleged four predicate racketeering acts, any two of which would support a conviction for racketeering conspiracy. Superseding Indictment 5-11; Pet. App. 13. The four charged predicate acts were: (1) conspiracy to extort a victim identified as John Doe #1; (2) illegal gambling; (3) conspiracy to rob and attempted robbery of Antonelli; and (4) conspiracies to extort and to rob an

individual identified as John Doe #2, in violation of New York Penal Law. *Ibid.*

Following a jury trial, petitioner was convicted of RICO conspiracy based on the predicate acts of conspiring to extort money from Gulinello (John Doe #2) and illegal gambling. Pet. App. 14. He was also convicted of the separate count of illegal gambling. *Ibid.* Petitioner was acquitted of the remaining three counts and the jury found that the government had not proved the two remaining racketeering acts charged in connection with Count 1. *Ibid.*

The United States Probation Office prepared a PSR, which acknowledged that the jury had concluded that the government did not prove beyond a reasonable doubt that petitioner committed all of the predicate racketeering acts charged in the indictment and that the jury had acquitted petitioner on three of the counts charged in the superseding indictment. PSR ¶¶ 6-7. The PSR noted, however, that because the government was able to prove all of the charged conduct by a preponderance of the evidence, that "racketeering activity must be taken into consideration for guideline purposes, as it is considered relevant conduct for the racketeering charges." PSR ¶ 7 (citing *United States* v. *Ruggiero*, 100 F.3d 284 (2d Cir. 1996), cert. denied, 522 U.S. 1138 (1998)); see PSR ¶ 45. Based on all of the relevant conduct, the PSR calculated a Sentencing Guidelines offense level of 43. PSR ¶¶ 44-106. That calculation also reflected a one-level enhancement because the loss to the victim exceeded $10,000 and a three-level enhancement for petitioner's substantial interference with the administration of justice. PSR ¶¶ 79, 85; see Sentencing Guidelines §§ 2B3.1(b)(7)(B), 2B3.2(b)(2), 2J1.2(b)(2). In combination with petitioner's criminal history category

of I, the advisory Guidelines range associated with the offense level of 43 was life imprisonment. PSR ¶ 168. The maximum penalty permitted by statute for the RICO offense is 20 years, see 18 U.S.C. 1963(a); the maximum penalty permitted by statute for the illegal gambling offense is five years, see 18 U.S.C. 1955(a). See PSR ¶ 167.

Petitioner's counsel filed a letter objecting to the PSR on mostly factual issues. Letter from Gerald J. McMahon to Roberta Houtlon, Probation Officer (Oct. 20, 2010). The letter objected to the PSR's statement "that the government will be able to prove by a preponderance of evidence the criminal conduct for which [petitioner] was acquitted by the jury," contending instead that the government "will not be able to prove such conduct by any constitutional standard of proof." *Id.* at 1-2. Petitioner also filed a sentencing memorandum seeking a downward departure based on his age and medical condition and the fact that the government knew of his illegal gambling activity for some time, or, in the alternative, the imposition of a non-Guidelines sentence. Docket entry No. 279, at 9-14 (Oct. 22, 2010). At his sentencing hearing, petitioner conceded that the district court was permitted, pursuant to Second Circuit and Supreme Court case law, to "consider acquitted conduct" in sentencing petitioner, but argued that the court was "not obligated to" do so. 11/9/10 Sent. Tr. 9. Petitioner further conceded that, if the district court did find by a preponderance of the evidence that petitioner had engaged in the acquitted conduct, the correct Guideline level would be 43. *Id.* at 8, 10. Petitioner argued that the district court should impose a non-Guidelines sentence of three years of imprisonment. 11/10/10 Sent. Tr. 8

The district court overruled petitioner's objections. See 11/10/10 Sent. Tr. 14-19. The court noted that petitioner "does not dispute that the applicable law, [*United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam)], permits the court to consider acquitted conduct in sentencing as long as the court finds by a preponderance of the evidence that the conduct occurred." 11/10/10 Sent. Tr. at 14-15. And the district court determined that the government had proved the relevant conduct—*i.e.*, the botched robbery of Antonelli that caused Antonelli's death—by a preponderance of the evidence. *Id.* at 15. The court therefore agreed with the PSR that petitioner's total offense level was 43. *Ibid.*

The district court sentenced petitioner to 108 months of imprisonment on the RICO conspiracy count, to be served concurrently with a 60-month sentence on the illegal gambling count. 11/10/10 Sent. Tr. 19. The court stated that petitioner's convictions "are serious" and that a sentence imposed on someone "who has a long history of engaging in criminal acts on behalf of a crime family must be one that promotes respect for the law." *Id.* at 17. The district court noted that petitioner's sentences for prior convictions were "relatively short prison terms" and that his advanced age, while a mitigating factor "[has] not seemed to deter him from continuing to engage in criminal conduct." *Id.* at 17-18. The court further noted that petitioner "held a position of respect in the Genovese crime family" in that "[t]he mere mention of his name caused debts to be paid and his appearance at what are referred to as sitdowns caused disputes to be resolved." *Id.* at 18. The court concluded, however, that petitioner was able to command such results "not because of his benign negotiating skills but because, quite simply, people feared him." *Ibid.*

3. The court of appeals affirmed in a divided opinion. Pet. App. 1-29. The court rejected petitioner's argument that the evidence was insufficient to support petitioner's racketeering conspiracy conviction, finding that the government had introduced both direct and circumstantial evidence of petitioner's involvement in the conspiracy to rob Gulinello. *Id.* at 15-20. The court also rejected petitioner's argument that the district court erred in relying on evidence of acquitted conduct, noting that, pursuant to this Court's decision in *United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam), the district court was entitled to treat acquitted conduct as relevant conduct. Pet. App. 21-23. The court found that the district court was justified in crediting Maniscalco's testimony and concluded that the district court did not err in finding that the government had proved by a preponderance of the evidence that petitioner was involved in the plan to rob Antonelli. *Id.* at 22-23.[1]

Judge Pooler concurred in part and dissented in part. Pet. App. 23-29. Although she "fully" joined the court's affirmance of petitioner's sentence, she would have held that the evidence was not sufficient to support the racketeering conspiracy conviction. *Id.* at 23. She agreed that the wiretap evidence may have been sufficient to establish that petitioner conspired to commit a crime, but did not agree that it established that he conspired to commit the offense of "robbery as it is defined by the New York Penal Law." *Id.* at 24; see *id.* at 24-29.

---

[1] The court of appeals also rejected petitioner's argument that the district court erred in empanelling an anonymous jury. Pet. App. 20-21; *id.* at 23 (Pooler, J., concurring in part and dissenting in part). Petitioner does not renew that argument in his petition for a writ of certiorari.

ARGUMENT

Petitioner argues (Pet. 9-19) that the district court erred by considering acquitted relevant conduct in calculating petitioner's advisory Sentencing Guidelines range and that there was insufficient evidence to support his racketeering conspiracy conviction. The court of appeals' decision rejecting those arguments does not warrant review because it was correct and does not conflict with any decision of this Court or of any other court of appeals. Petitioner's Sixth Amendment challenge to his sentence does not merit review for the additional reason that he failed to raise it in the district court and preserved it briefly, if at all, in the court of appeals.

1. Petitioner argues (Pet. 9-16) that the district court violated his Sixth Amendment right to trial by a jury when it calculated his advisory Guidelines range based in part on relevant conduct of which he was acquitted. That argument does not merit review.

a. Petitioner forfeited any Sixth Amendment argument by failing to raise the issue in the district court and by failing to press it in the court of appeals. At his sentencing hearing, petitioner conceded that "Second Circuit precedent and the Supreme Court" case law permitted the district court to consider acquitted conduct as relevant conduct in calculating his advisory Guidelines range. 11/9/10 Sent. Tr. 9. Petitioner's counsel stated that he did not "philosophically" believe acquitted conduct should be used "for any reason at all" but conceded that this Court had rejected that argument. *Id.* at 16. At no point did petitioner argue to the district court that the Sixth Amendment precluded its consideration of acquitted conduct in calculating petitioner's advisory Guideline range. 11/10/10 Sent. Tr. 14-

15 (district court stating that petitioner "does not dispute that the applicable law [*United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam)] permits the court to consider acquitted conduct in sentencing as long as the court finds by a preponderance of the evidence that the conduct occurred").

In the court of appeals, petitioner argued that the district court had no basis to credit Maniscalco's testimony, see Pet'r C.A. Br. 39-48, that it was clear error to do so, see *id.* at 48-51, and that the district court's reliance on that testimony was procedurally unreasonable and rendered his sentence substantively unreasonable, see *id.* at 51-58. Petitioner stated in a footnote that, although this Court held in *Watts* that the Double Jeopardy Clause does not bar the consideration of acquitted conduct in calculating a defendant's sentence, petitioner "maintain[ed] that the Sixth Amendment right to jury trial does bar consideration of conduct presented to the jury but not found proved by it." *Id.* at 51 n.9. Other than citing a dissenting opinion from another court of appeals, however, petitioner did not elaborate on that assertion or offer any supporting argument. See *ibid.* (citing *United States* v. *Mercado*, 474 F.3d 654, 658 (9th Cir. 2007) (Fletcher, J., dissenting), cert. denied, 552 U.S. 1297 (2008)). Under established circuit precedent, "an argument made only in a footnote" is generally considered to be "inadequately raised for appellate review." *Norton* v. *Sam's Club*, 145 F.3d 114, 117 (2d Cir.), cert. denied, 525 U.S. 1001 (1998); *United States* v. *Restrepo,* 986 F.2d 1462, 1463 (2d Cir.), cert. denied, 510 U.S. 843 (1993). Petitioner therefore failed to properly present a Sixth Amendment argument in the court of appeals. And the court of appeals did not acknowledge any such challenge; it simply cited *Watts* and considered

factually whether the district court committed clear error. Pet. App. 22-23. The issue is therefore not properly presented here. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (noting that this Court's "traditional rule * * * precludes a grant of certiorari" when "the question presented was not pressed or passed upon below") (citation omitted).

b. Even if this Court were to overlook petitioner's forfeiture, it would review petitioner's Sixth Amendment argument only for plain error because petitioner failed to raise it in the district court. Fed. R. Crim. P. 52(b); see *United States* v. *Olano*, 507 U.S. 725, 731-732 (1993). To establish reversible error, petitioner would therefore have to show that: (1) there was an error; (2) the error was obvious or plain; (3) the error affected his substantial rights; and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997) (citation omitted). Petitioner cannot satisfy that standard.

First, given the overwhelming contrary authority, petitioner cannot show any error, much less an obvious or plain error. In *Watts*, this Court held that "a jury's verdict of acquittal does not prevent the sentencing court from considering conduct underlying the acquitted charge, so long as that conduct has been proved by a preponderance of the evidence." 519 U.S. at 157. The Court noted that, "under the pre-Guidelines sentencing regime, it was 'well established that a sentencing judge may take into account facts introduced at trial relating to other charges, even ones of which the defendant has been acquitted,'" *id.* at 152 (citation omitted), and "[t]he Guidelines did not alter this aspect of the sentencing court's discretion," *ibid.* An acquittal means only that

conduct was not proved beyond a reasonable doubt. *Id.* at 155. It does not foreclose a sentencing authority from finding the same conduct proved by the preponderance-of-the-evidence standard that applies at sentencing. *Id.* at 156.

That principle predated the Sentencing Guidelines, and it fully applies to the advisory Guidelines put in place by *United States* v. *Booker*, 543 U.S. 220 (2005). *Booker* and the cases elaborating on it establish that, under the advisory Guidelines regime currently in place, judicial fact-finding does not violate the Sixth Amendment when it results in the imposition of a sentence (such as petitioner's) that does not exceed the statutory maximum for the offense of conviction. That is because, "when a trial judge exercises his discretion to select a specific sentence within a defined range, the defendant has no right to a jury determination of the facts that the judge deems relevant." *Id.* at 233. In discussing the type of information that the sentencing court could consider under an advisory Guidelines regime, the Court in *Booker* drew no distinction between acquitted conduct and other relevant conduct. To the contrary, the Court cited *Watts* for the proposition that "a sentencing judge could rely for sentencing purposes upon a fact that a jury had found unproved (beyond a reasonable doubt)." *Id.* at 251 (emphasis omitted); see also *id.* at 252-253 (emphasizing the need to consider all relevant conduct to achieve the purpose of the sentencing statute).

The Court reaffirmed that principle in *Cunningham* v. *California*, 549 U.S. 270 (2007), finding "no disagreement among the Justices" that judicial fact-finding under the Sentencing Guidelines "would not implicate the Sixth Amendment" if the Guidelines were advisory. *Id.* at 285. And in *Rita* v. *United States*, 551 U.S. 338

(2007), the Court again confirmed that its "Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence." *Id.* at 350-353; see *id.* at 354-355 (noting *Booker*'s recognition that fact-finding by federal judges in application of the Guidelines would not implicate the constitutional issues confronted in that case if the Guidelines were not "binding") (quoting *Booker*, 543 U.S. at 233).

Although *Watts* specifically addressed a challenge to the consideration of acquitted conduct based on double-jeopardy principles rather than the Sixth Amendment, *Booker*, 543 U.S. at 240, the clear import of the Court's decision is that sentencing courts may take acquitted conduct into account in determining a sentence within the statutorily authorized range, so long as that conduct is proved by a preponderance of the evidence. See *Watts*, 519 U.S. at 157. Nothing in *Booker* suggests that the jury trial right prevents that established practice.

c. Petitioner does not contend that the courts of appeals are divided about whether consideration of acquitted conduct in the determination of a sentence violates the Sixth Amendment. Indeed, as petitioner implicitly acknowledges (Pet. 11), every court of appeals with criminal jurisdiction has confirmed that a district court may consider acquitted conduct at sentencing, and this Court has repeatedly declined to review those holdings. See, *e.g.*, *United States* v. *Dorcely*, 454 F.3d 366, 371-372 (D.C. Cir.), cert. denied, 549 U.S. 1055 (2006); *United States* v. *Gobbi*, 471 F.3d 302, 314 (1st Cir. 2006); *United States* v. *Vaughn*, 430 F.3d 518, 525-527 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Jimenez*, 513 F.3d 62, 88 (3d Cir.), cert. denied, 553 U.S.

1034 (2008); *United States* v. *Grubbs*, 585 F.3d 793, 798-799 (4th Cir. 2009), cert. denied, 130 S. Ct. 1923 (2010); *United States* v. *Farias*, 469 F.3d 393, 399 & n.17 (5th Cir. 2006), cert. denied, 549 U.S. 1272 (2007); *United States* v. *White*, 551 F.3d 381, 383-387 (6th Cir. 2008) (en banc), cert. denied, 556 U.S. 1215 (2009); *United States* v. *Hurn*, 496 F.3d 784, 788 (7th Cir. 2007), cert. denied, 552 U.S. 1295 (2008); *United States* v. *High Elk*, 442 F.3d 622, 626 (8th Cir. 2006); *Mercado*, 474 F.3d at 656-658 (9th Cir.); *United States* v. *Magallanez*, 408 F.3d 672, 684-685 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Duncan*, 400 F.3d 1297, 1304-1305 (11th Cir.), cert. denied, 546 U.S. 940 (2005). The same result is warranted in this case.

d. Even if, contrary to the overwhelming weight of authority, it were the true that the district court obviously erred by considering acquitted conduct at sentencing, petitioner still would not satisfy the plain-error standard because he cannot demonstrate either that any error "affect[ed his] substantial rights" or that the failure to correct any error in considering that conduct would "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (citation omitted).

The district court would likely have imposed the same term of imprisonment even if it had considered only the conduct of which the jury found him guilty without also considering the robbery that led to Antonelli's death. The district court specifically stated that, although the advisory Guidelines range "treat[ed] [petitioner] exactly as if he had been convicted of th[e] extremely serious robbery [of Antonelli]," petitioner "was not convicted of it, he was convicted of less serious offenses, and it is for those offenses that he is and should be sentenced."

11/10/10 Sent. Tr. 16. The court therefore varied downward considerably, commenting that the 108-month sentence imposed was appropriate because the crimes of which petitioner was convicted "are serious" and because petitioner "has a long history of engaging in criminal acts on behalf of a crime family." *Id.* at 17. The court noted that petitioner's "[p]rior relatively short prison terms and his advanced age have not seemed to deter him from continuing to engage in criminal conduct" and that the sentence imposed "comports with that very serious and difficult obligation that the court has to impose such a sentence." *Id.* at 16-17, 19. Thus, by all indications, the district court based petitioner's sentence on the conduct of which he was actually convicted rather than on the conduct of which he was acquitted. Petitioner therefore cannot show that the district court's consideration of relevant acquitted conduct in the calculation of his advisory Guidelines sentence "affect[ed his] substantial rights" and "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Olano*, 507 U.S. at 736 (citation omitted).

2. Petitioner also argues (Pet. 17-19) that the court of appeals erred in concluding that the evidence was sufficient to prove that he agreed to extort money from or rob Gulinello, which constituted one of the racketeering acts in the RICO conspiracy charge and on which the jury convicted him. Review of the court of appeals' correct, fact-bound holding does not warrant review.

Petitioner argues (Pet. 18-19) that there was insufficient evidence to establish that he conspired to use or threaten the immediate use of physical force to take property from Gulinello. In reviewing challenges to the sufficiency of evidence, appellate courts do not make

credibility determinations. See *Glasser* v. *United States*, 315 U.S. 60, 80 (1942). Rather, a reviewing court must affirm a criminal conviction as long as, "after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979); see *Burks* v. *United States*, 437 U.S. 1, 17 (1978). That is exactly what the court of appeals did in this case.

The government presented evidence showing petitioner's direct participation in a conspiracy to rob Gulinello, including recorded conversations between petitioner and Barrafato in which they discussed the progress of the robbery plan. Pet. App. 3-13; Gov't C.A. Br. 28-32. The court of appeals explained that a reasonable jury could have concluded that the robbery plan included "at least an implicit threat of force based on the 'totality of facts' presented," petitioner and Barrafato's use of the word "rob," Barrafato's recruitment of three other men to assist in the robbery, and the fact that the initial car ride to Coney Island was designed to intimidate Gulinello. Pet. App. 19. Viewing the evidence in the light most favorable to the government, as it was required to do, the court of appeals correctly concluded that "there was sufficient evidence adduced at trial of [petitioner's] knowing participation in the conspiracy to rob Gulinello * * * to sustain the racketeering conspiracy conviction." *Id.* at 19-20. Petitioner does not even suggest that that fact-bound determination conflicts with any decision of this Court or of any other court of appeals. Further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LANNY A. BREUER
Assistant Attorney General
APRIL A. CHRISTINE
Attorney

FEBRUARY 2013