09-4675-cr(L)

To Be Argued By:
CHRISTOPHER M. MATTEI

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 09-4675-cr(L)
09-5295-cr(CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

BYRON TURNER, also known as, KARVASIK CALDWELL, also known as Country, MICHAEL STEWART, LUIS RAMOS, also known as Carlos, also known as Papi, MARTA RAMOS, LASHAWN SMITH,

(For continuation of Caption, See Inside Cover)

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

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BRIEF FOR THE UNITED STATES OF AMERICA

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Defendants,

VIDA DEAS, also known as V,

Defendant-Appellant.

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Statement of Jurisdiction

This is an appeal from a judgment entered on December 23, 2009 in the District of Connecticut (Christopher F. Droney, J.) after the defendant was convicted at trial of one count of conspiracy to possess with intent to distribute and to distribute 50 grams or more of cocaine base ("crack cocaine") and two counts of possession with intent to distribute an unspecified quantity of cocaine base. A29.[1] The district court 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) on December 28, 2009, and this Court has appellate jurisdiction over the defendant's challenge to his judgment of conviction, pursuant to 28 U.S.C. § 1291.

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[1] The defendant's appendix will be cited as "A" followed by the page number, and the Government's appendix will be cited as "GA" followed by the page number.

Statement of Issues
Presented for Review

1. Was the evidence presented at trial sufficient to support the jury's guilty verdict on the charge of conspiracy to possess with intent to distribute and to distribute 50 grams or more of cocaine base?

2. Did the district court manifestly abuse its discretion in admitting evidence that the defendant knew the cooperating co-defendant's brother?

3. Does the Fair Sentencing Act of 2010 apply to cases, such as the defendant's, involving conduct which occurred prior to the enactment of the Act?

4. Did the superseding indictment violate the 30-day speedy indictment rule set forth at 18 U.S.C. § 3161(b) where the superseding indictment charged a materially different conspiracy than the conspiracy charged in the criminal complaint and the original, timely-filed indictment?

5. Are the penalties applicable to cocaine base offenses arbitrary and capricious where cocaine base is, in fact, a Schedule II controlled substance?

6. Was the defendant time barred under 21 U.S.C. § 851(e) from challenging the validity of a 1993 conviction for a felony drug offense?

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 09-4675-cr(L)
09-5295-cr(CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

VIDA DEAS, also known as "V,"
Defendant-Appellant.

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

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

In February of 2007, the Federal Bureau of Investigation ("FBI"), initiated a Title III wiretap investigation targeting the Byron Turner ("Turner") crack cocaine drug-trafficking organization. The Turner organization supplied large amounts of cocaine and crack cocaine in and around the north end of Hartford, Connecticut. The investigation resulted in the successful prosecution of 14 defendants on federal narcotics and weapons charges.

As to defendant-appellant Vida Deas ("Deas" or "defendant"), the investigation revealed that he assisted Turner's distribution of crack cocaine by (1) converting Turner's cocaine to crack cocaine for distribution; (2) driving Turner to meetings with Turner's crack customers; (3) brokering the sale of 500 grams of cocaine to Turner from Artan Isufaj, which cocaine Deas knew Turner intended to convert to crack cocaine for distribution; and (4) arranging for Turner to receive a refund for a portion of the 500 grams of powder cocaine that Turner purchased from Isufaj. In addition, the investigation revealed that Deas distributed street-level quantities of crack cocaine to customers in and around the Hartford area.

In April 2009, Deas proceeded to trial and was convicted by a jury of one count of conspiracy to possess with intent to distribute and to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A), and two counts of possession with intent to distribute and distribution of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). This appeal followed.

In his initial brief filed on January 4, 2011 ("Deas Brief I"), Deas claims that (1) the Government presented insufficient evidence to support his conviction on the conspiracy charge; (2) the district court erred in admitting testimony that Deas met Turner through Turner's brother; and (3) the case should be remanded for re-sentencing in accordance with the Fair Sentencing Act of 2010. In his supplemental, *pro se* brief, filed on February 28, 2011 ("Deas Brief II"), Deas argues that (1) 18 U.S.C.

§ 3161(b) required dismissal of the superseding indictment because it was not filed within 30 days of his arrest on a criminal complaint; (2) the disparate penalties applicable to cocaine base and cocaine powder offenses are arbitrary and capricious and, therefore, violate his due process rights under the Fifth Amendment; and (3) his prior conviction for a felony drug offense, which subjected him to enhanced penalties under 21 U.S.C. §§ 841(b)(1) and 851, was invalid. For the reasons set forth below, none of these claims has merit.

Statement of the Case

On March 27, 2007, the defendant was arrested upon a criminal complaint, charging him with conspiracy to possess with the intent to distribute fifty grams or more of cocaine base, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A). GA1. On April 10, 2007, a federal grand jury in Hartford, Connecticut returned an indictment against 13 individuals, including Deas. A4. All of the defendants other than Deas pleaded guilty. On October 6, 2008, a federal grand jury sitting in New Haven, Connecticut returned a superseding indictment against Deas. A31. Count One charged Deas with conspiracy to possess with intent to distribute and to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A). A31. Count Two charged Deas with conspiracy to possess with intent to distribute and to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(B). A32. Counts Three, Four and Five charged Deas with possession with intent to distribute an unspecified quantity

of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). A32. On April 14, 2009, the Government moved to dismiss Count Five of the superseding indictment, which motion was granted. A23-A24.

A jury trial commenced on April 20, 2009. A24. On April 22, 2009, following completion of the Government's case, Deas made an oral motion for judgment of acquittal. T(II).510.[2] The district court took the motion under advisement as to Counts One and Two, and denied it as to Counts Three and Four. T(II).520. On April 24, 2009, the jury returned a verdict of guilty on Counts One, Three and Four of the superseding indictment, and the district court accepted the verdict. A25; T(II).662. The jury continued its deliberations on Count Two of the superseding indictment. T(II).662. On April 24, 2009, those deliberations were terminated following the Government's motion to dismiss Count Two. T(II).662-663. On May 4, 2009 and May 7, 2009, Deas filed renewed motions for

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[2] The defendant has not incorporated the trial and sentencing transcripts into his appendix and, instead, has filed them separately, along with his brief. These transcripts, which are part of the appellate record, are separated into six volumes. Volume one, which is comprised of the trial transcript from April 20, 2009, will be referred to as "T(I)" along with the page number. Volumes two through five, which are sequentially paginated together and are comprised of the trial transcripts from April 21, 2009, April 22, 2009, April 23, 2009 and April 24, 2009, will be referred to as "T(II)" along with the page number. Volume six, which is comprised of the sentencing transcript from December 16, 2009, will be referred to as "T(III)" along with the page number.

acquittal, or, in the alternative, for a new trial, A25-A26, and the district court denied these motions on June 12, 2009. A26.

On December 16, 2009, the district court sentenced Deas on each count of conviction to concurrent terms of 240 months imprisonment and ten years of supervised release. A29. On December 29, 2009, Deas filed a timely notice of appeal. A29. He is in federal custody currently serving his sentence.

Statement of Facts

Based on the evidence presented by the Government at trial, the jury reasonably could have found the following facts:[3]

In 2005, Bobby Turner was arrested. T(II).36. Following that arrest, Bobby's brother, Byron Turner ("Turner"), inherited his cocaine and crack cocaine distribution business, and began to spend more time with

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[3] At trial, during its case-in-chief, the Government presented approximately 20 intercepted telephone calls, the testimony of one cooperating co-defendant (Byron Turner), the testimony of two of Deas's narcotics customers (Lynette St. Pierre and David Carrier), several physical exhibits, including various narcotics seized during the course of the investigation, the testimony of law enforcement witnesses, including FBI Special Agents Robert Bornstein and Mark Gentil, and Harford police officers Daniel Villegas and Kevin Salkeld, and the testimony of two forensic chemists.

Deas, who had known Bobby and had dated Turner's cousin. T(II).32-33, 38-39.

As their relationship developed, Turner observed Deas sell crack cocaine, and Deas would drive Turner around in one of Deas's vehicles to meet with their respective crack cocaine customers. T(II).41-42. On many occasions, Turner provided Deas with multi-ounce quantities of powder cocaine, which Deas would then convert to crack cocaine and give back to Turner for distribution. T(II).48. In exchange for this service, Turner would provide Deas with a few hundred dollars and any pieces of crack cocaine that remained in the cooking pot following the conversion. T(II).48. Over time, Turner learned to convert cocaine to crack cocaine by watching Deas. T(II).49.

On several occasions, Deas arranged for Turner to purchase powder cocaine from a source of supply identified as Artan Isufaj. T(II).53. On the first such occasion, Turner purchased 63 grams of cocaine, and Deas purchased 28 grams of cocaine. T(II).53. On two other occasions, Deas and Turner met with Isufaj, and they both purchased quantities of powder cocaine. T(II).54-55. Following these transactions, Turner converted the powder cocaine to crack cocaine for re-distribution and informed Deas that he was doing so. T(II).55. After these initial transactions, Turner began contacting Isufaj directly to purchase powder cocaine. T(II).54.

In November 2006, FBI Special Agent Robert Bornstein received information from a cooperating witness about Turner. T(I).33. In response to that information,

Bornstein identified Turner and used a cooperating witness to conduct a series of recorded, controlled purchases of crack cocaine from him. T(I).36-42. Based, in part, on those purchases, Bornstein applied for and received court authorization to conduct a wiretap investigation of two cellular telephones used by Turner. T(I).51.

On February 7, 2007, at Bornstein's direction, a cooperating witness called Turner and ordered nine ounces of crack cocaine from him. T(I).66. During his testimony, Turner confirmed that in, February 2007, he accepted an order for nine ounces of crack cocaine from an individual whom he later learned was working with law enforcement. T(II).56-57. Turner did not have that quantity of crack cocaine available for sale, so he initially attempted to contact Roberto Stewart, one of his cocaine suppliers. T(II).57. Stewart was unable to deliver the requested amount, so Turner contacted Deas in the hope that Deas could reach out to Isufaj. T(II).58. Turner had attempted to contact Isufaj directly, but could not reach him. T(II).58.

Beginning on February 13, 2007, the FBI intercepted a series of telephone calls involving Turner, Deas and Isufaj. T(I).67-71. In particular, on February 13, 2007, at approximately 6:02 p.m., Turner was intercepted asking Deas, "What up with T, though?" T(I).84; Ex. 5A (intercepted call).[4] Turner had called Deas because he was trying to get in touch with Isufaj, whom he knew as "T,"

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[4] The Government's full trial exhibits will be referred to by their exhibit number.

to purchase powder cocaine. T(II).67. At 6:42 p.m., Deas called Turner and advised him that he was coming to pick him up and was about to arrive at Turner's residence. T(I).84-85; T(II).67; Ex. 5B (intercepted call). Deas picked up Turner, and the two then drove to meet with Isufaj at the Empire Club. T(II).58, 68. At that meeting, Turner purchased 500 grams of powder cocaine from Isufaj for $12,000. T(II).59. Deas purchased two ounces of cocaine from Isufaj. T(II).59. Following that meeting, Turner went to a location on Mansfield Street to convert the powder cocaine to crack cocaine. T(II).59.

At approximately, 12:57 a.m. on February 14, 2007, Turner was intercepted telling Deas that the cocaine was of poor quality and that he should not begin converting it to crack cocaine. T(I).85-86; T(II).60, 68-69; Ex. 5C (intercepted call). During that conversation, Deas advised Turner that he had not yet begun the conversion process. T(II).69; Ex. 5C. Deas asked Turner whether the quantity of narcotics had doubled as a result of the conversion to crack cocaine. T(II).69; Ex. 5C. Turner responded that he was in the middle of converting the cocaine, so he was not sure of the results. T(II).69; Ex. 5C.

On February 14, 2007, at approximately 5:02 p.m., Turner was intercepted advising Deas that it had taken an unusually long time to produce crack cocaine from the powder cocaine they had purchased from Isufaj. T.(I)87; T(II).70; Ex. 5D (intercepted call). In response, Deas asked whether the conversion process took as long as it had for a previous batch of cocaine they had purchased together. T(II).70; Ex. 5D. Turner said that he had

converted two 63-gram quantities of cocaine, and Deas commented that the cocaine was worse than they had expected. T(II).71; Ex. 5D. Deas and Turner discussed the poor quality of the cocaine and whether Deas could arrange for Turner to return a portion of the unconverted cocaine to Isufaj. T(II).71-72; Ex. 5D. Deas said that he would not have converted a second batch of cocaine if he had been unhappy with the quality of the first batch. T(II).73; Ex. 5D.

On February 14, 2007, at approximately 7:07 p.m., Deas was intercepted telling Turner that he had told Isufaj that Turner was dissatisfied. T(I).89; T(II).75; Ex. 5E (intercepted call). Deas again told Turner that he should not have converted the second batch of cocaine. T(II).76; Ex. 5E. Turner explained that he had done so because he had wanted to try to make some money by selling crack. T(II).76-77; Ex. 5E. Deas then asked Turner whether the quantity of narcotics had doubled as a result of the conversion. T(II).77; Ex. 5E. Turner responded that one 63-gram quantity of powder cocaine had converted to 118 grams of crack, and the other 63-gram quantity of powder cocaine had converted to 109 grams of crack. T(II).78; Ex. 5E. Turner advised Deas that he had received complaints from customers about the quality of the crack cocaine so that Deas could avoid similar problems. T(II).79; Ex. 5E. Deas responded that he understood the difficulty of attempting to sell poor quality crack cocaine. T(II).80; Ex. 5E. Deas then agreed that he would ask Isufaj whether Turner could exchange the unconverted cocaine for better quality cocaine, or simply get a cash refund. T(II).81; Ex. 5E.

On February 14, 2007, at approximately 7:20 p.m., Deas was intercepted advising Turner that Isufaj was willing to meet with Deas and Turner at the same location where they had met the previous day. T(I).93; T(II).81; Ex. 5F (intercepted call). At approximately 7:48 p.m., Turner was intercepted telling Deas that he had just arrived at the meeting location and that he could see Deas's vehicle. T(I).97; T(II).82; Ex. 5G (intercepted call). Turner then met with Deas and Isufaj to discuss the refund. T(II).82.

On February 15, 2011, at approximately 11:15 a.m., Turner was intercepted asking Isufaj whether he was ready to meet. T(I).98-99; T(II).83; Ex. 5I (intercepted call). At 1:05 p.m., Turner was intercepted advising Isufaj that he had arrived and was next to Isufaj's truck. T(I).100; T(II).84; Ex. 5K (intercepted call). At that meeting, Isufaj accepted the unconverted cocaine and refunded Turner between $5,500 and $6,000. T(II).62. At 1:33 p.m., Turner was intercepted advising Deas that Isufaj had refunded his money. T(I).100-101; T(II).84-85; Ex. 5L (intercepted call). Later that afternoon, Turner met with the FBI cooperating witness and sold him nine ounces of crack cocaine, which was only a portion of the narcotics he had purchased from Isufaj. T(I).102-106; T(II).63-65. The substance purchased from Turner lab-tested positive for the presence of cocaine base and had a net weight of 248.1 grams. T(II).179.

Gloria Atkinson was one of Turner's crack cocaine customers. T(II).85-86. After listening to a series of intercepted calls, Turner testified that, on February, 21,

2007, Deas drove Turner to Atkinson's Ellsworth Street residence so that Turner could sell Atkinson a quantity of crack cocaine. T(II).87-88. On February 21, 2007, Hartford Police Detective Danny Villegas observed Turner enter Deas's vehicle on Main Street in Hartford. T(II).499. Approximately one hour later, he observed Deas's vehicle park outside of Atkinson's residence. T(II).501, 507. Deas and Turner then entered the residence, and emerged several minutes later. T(II).502. They departed the area in Deas's vehicle. T(II).502.

Edward Cabral was another one of Turner's crack cocaine customers. T(II).89. On the evening of February 28, 2007, Deas drove Turner to meet with Cabral. Turner's testimony as to this meeting was corroborated by two intercepted telephone calls between Turner and Cabral, during which the two arranged to meet. T(I).185; T(II).91-92; Exs. 47A and 47B (intercepted calls).

David Carrier and Lynette St. Pierre were both crack cocaine customers of Deas's who testified at trial. On March 6, 2007, Carrier purchased $20 worth of crack cocaine from Deas, and on March 23, 2007, St. Pierre purchased $70 worth of crack cocaine from Deas. T(II).219-222, 488-491. Lab tests confirmed that the substances purchased by Carrier and St. Pierre contained cocaine base. T(II).229-235, 479-481.

Summary of Argument

1. Deas concedes that the evidence established the first element of Count One, that a conspiracy to distribute crack cocaine existed, but argues that the Government failed to prove that Deas joined in that conspiracy. *See* Deas Brief I, at 17. His participation, however, was established by Turner's testimony that Deas (1) drove Turner to crack cocaine transactions; (2) converted cocaine to crack cocaine for Turner in exchange for money and crack cocaine; (3) brokered Isufaj's sale of 500 grams of powder cocaine to Turner knowing that Turner intended to convert it to crack cocaine; and (4) negotiated the return of unconverted cocaine by Turner to Isufaj. This testimony was corroborated by intercepted telephone calls involving Deas, Turner and Isufaj, the February 15, 2007 controlled purchase of nine ounces of crack cocaine from Turner, surveillance of Deas driving Turner to meet with Turner's crack customers, and testimony by two of Deas's crack cocaine customers.

2. The fact that Deas knew Turner's brother, Bobby, was relevant because it helped to explain the origin of Deas's relationship with Turner and the manner in which that relationship developed. Deas does not challenge the relevance of the testimony, but instead contends that it was prejudicial because the Government also presented unchallenged evidence that Bobby Turner had a criminal history involving narcotics and firearms activities to show how Turner first became involved in drug activity. No evidence was presented that Deas had any knowledge of, or was associated with, Bobby Turner's criminal past. The

Government limited its inquiry to the fact that Deas knew Bobby Turner and did so to show how Deas met Byron Turner. The probative value of this testimony, therefore, was not substantially outweighed by the danger of unfair prejudice, if any prejudice existed at all.

3. The Fair Sentencing Act of 2010, which established new quantity thresholds for cocaine base offenses, only applies to offenses occurring *after* its August 3, 2010 effective date. The conspiracy in this case terminated in March 2007, and according to the terms of the Savings Statute, 1 U.S.C. § 109, and this Court's recent decision in *United States v. Acoff*, 634 F.3d 200 (2d Cir. 2011), Deas is subject to the penalties in place at that time. Moreover, those penalties, as this Court has repeatedly held, do not violate the Constitution.

4. The superseding indictment was timely filed because Count One of the superseding indictment charged a materially different crack cocaine conspiracy than the one charged in the criminal complaint, in that it substantially expanded the time period of the conspiracy charged in the criminal complaint and was based on facts established after the criminal complaint's 30-day speedy indictment period had expired.

5. Cocaine base is a Schedule II controlled substance, and the Congressionally determined penalties for cocaine base and powder cocaine offenses, as codified at 21 U.S.C. § 841(b), are not arbitrary and capricious.

6. The district court properly denied the defendant's challenge to the Government's Information Charging Second Offense, where the defendant was time-barred from challenging the validity of his 1993 conviction for a felony drug offense.

Argument

I. The evidence was sufficient to support the jury's guilty verdict on Count One.

A. Relevant facts

The facts pertinent to consideration of this issue are set forth in the "Statement of Facts" above.

B. Standard of review and governing law

1. Standard of review

A defendant challenging the sufficiency of the evidence bears a "heavy burden." *United States v. Mercado*, 573 F.3d 138, 140 (2d Cir.) (internal quotation marks omitted), *cert. denied*, 130 S. Ct. 645 (2009). This Court will affirm "if '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.'" *United States v. Ionia Management S.A.*, 555 F.3d 303, 309 (2d Cir. 2009) (per curiam) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). All permissible inferences must be drawn in the Government's favor. *See United States v. Guadagna*, 183

F.3d 122, 129 (2d Cir. 1999). "Under this stern standard, a court . . . may not usurp the role of the jury by substituting its own determination of the weight of the evidence and the reasonable inferences to be drawn for that of the jury." *United States v. MacPherson*, 424 F.3d 183, 187 (2d Cir. 2005) (citations and internal quotation marks omitted). "[I]t is the task of the jury, not the court, to choose among competing inferences that can be drawn from the evidence." *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003).

"[T]he law draws no distinction between direct and circumstantial evidence," and "[a] verdict of guilty may be based entirely on circumstantial evidence as long as the inferences of culpability . . . are reasonable." *MacPherson*, 424 F.3d at 190. Indeed, "jurors are entitled, and routinely encouraged, to rely on their common sense and experience in drawing inferences." *United States v. Huezo*, 546 F.3d 174, 182 (2d Cir. 2008), *cert. denied*, 130 S. Ct. 142 (2009). Because there is rarely direct evidence of a person's state of mind, "the *mens rea* elements of knowledge and intent can often be proved through circumstantial evidence and the reasonable inferences drawn therefrom." *MacPherson*, 424 F.3d at 189; *see also United States v. Crowley*, 318 F.3d 401, 409 (2d Cir. 2003). In particular, "the existence of a conspiracy and a given defendant's participation in it with the requisite knowledge and criminal intent may be established through circumstantial evidence." *United States v. Chavez*, 549 F.3d 119, 125 (2d Cir. 2008) (internal quotation marks omitted).

"The possibility that inferences consistent with innocence as well as with guilt might be drawn from circumstantial evidence is of no matter . . . because it is the task of the jury, not the court, to choose among competing inferences." *MacPherson*, 424 F.3d at 190 (internal quotation marks omitted). The evidence must be viewed "in its totality, not in isolation, and the government need not negate every theory of innocence." *United States v. Lee*, 549 F.3d 84, 92 (2d Cir. 2008) (internal quotation marks omitted).

"In cases of conspiracy, deference to the jury's findings is especially important 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." *United States v. Snow*, 462 F.3d 55, 68 (2d Cir. 2006) (internal quotation marks omitted).

2. Conspiracy law under 21 U.S.C. § 846

In every drug conspiracy case, the Government must prove two essential elements by direct or circumstantial evidence: (1) that the conspiracy alleged in the indictment existed; and (2) that the defendant knowingly joined or participated in it. *See United States v. Story*, 891 F.2d 988, 992 (2d Cir. 1989); *see also Snow*, 462 F.3d at 68; *United States v. Richards*, 302 F.3d 58, 69 (2d Cir. 2002) ("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, participat[ed] in it . . . or [sought] by his action to make it succeed.") (internal quotation marks omitted). Where weight-related provisions of the drug laws are implicated, the Government also bears the burden of proving the type and quantity of the substance about which the defendant conspired. *See United States v. Santos*, 541 F.3d 63, 70-71 (2d Cir. 2008); *United States v. Thompson*, 528 F.3d 110, 119 (2d Cir. 2008).

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. Rea*, 958 F.2d 1206, 1214 (2d Cir. 1992). The conspirators "need not have agreed on the details of the conspiracy, so long as they agreed on the essential nature of the plan." *United States v. Geibel*, 369 F.3d 682, 689 (2d Cir. 2004) (internal quotation marks omitted). The agreement need not be an explicit one, as "proof of a tacit understanding will suffice." *Rea*, 958 F.2d at 1214. The co-conspirators' "goals need not be congruent, so long as they are not at cross-purposes." *Id*.

To prove the defendant's membership in the conspiracy, the Government must show that the defendant "knew of the existence of the scheme alleged in the indictment and knowingly joined and participated in it." *Snow*, 462 F.3d at 68 (internal quotation marks omitted). This requires proof of the defendant's "purposeful behavior aimed at furthering the goals of the conspiracy." *Chavez*, 549 F.3d at 125 (internal quotation marks omitted). The defendant need not have known all of the details of the conspiracy "so long as [she] knew its general

nature and extent." *Id.* (internal quotation marks omitted). The evidence of a defendant's participation in a conspiracy should be considered in the context of surrounding circumstances, including the actions of co-conspirators and others because "[a] seemingly innocent act . . . may justify an inference of complicity." *United States v. Calabro*, 449 F.2d 885, 890 (2d Cir. 1971). Finally, "[t]he size of a defendant's role does not determine whether that person may be convicted of conspiracy charges. Rather, what is important is whether the defendant willfully participated in the activities of the conspiracy with knowledge of its illegal ends." *United States v. Vanwort*, 887 F.2d 375, 386 (2d Cir. 1989).

While "mere presence . . . or association with conspirators" is insufficient to prove membership in a conspiracy, a reasonable jury may convict based on "evidence tending to show that the defendant was present at a crime scene under circumstances that logically support an inference of association with the criminal venture." *Snow*, 462 F.3d at 68 (internal quotation marks omitted). Moreover, 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; *see also United States v. Sureff*, 15 F.3d 225, 230 (2d Cir. 1994) (finding defendants who did not know one another to be members of single conspiracy because they had reason to know they were part of larger drug distribution organization).

This Court, however, has overturned conspiracy convictions where the government presented insufficient evidence from which the jury reasonably could have inferred that the defendant had knowledge of the conspiracy charged. *See e.g. Santos*, 541 F.3d at 71; *United States v. Torres,* 604 F.3d 58 (2d Cir. 2010). Similarly, where the evidence establishes the defendant's knowledge of the conspiracy, but is insufficient for the jury reasonably to have inferred that the defendant intended to join it, reversal is appropriate. *See Santos*, 541 F.3d at 71.

C. Discussion

Deas concedes that Turner was, in fact, a powder cocaine and crack cocaine distributor, who received powder cocaine from "at least three cocaine suppliers - Stewart, Isufaj and 'Country.'" Deas Brief I, p. 17. That is, Deas concedes the existence of a conspiracy to distribute crack cocaine involving Turner and others. Deas's attack on the sufficiency of the evidence is limited to his contention that the Government did not prove that he participated in Turner's crack conspiracy.

As discussed in detail above, the evidence of Deas's participation in the conspiracy was comprised of Turner's testimony, intercepted telephone calls involving Deas, Turner and Isufaj, physical surveillance conducted by law enforcement and physical evidence, including 248.1 grams of crack cocaine that Turner sold to a cooperating witness on February 15, 2007. Turner testified that, beginning in 2005, Deas would routinely drive Turner to drug

transactions and that Deas knew that Turner intended to sell crack cocaine to his customers. T(II).41. In addition, Deas often converted powder cocaine to crack cocaine for Turner. T(II).47-48. Turner would provide Deas with 28 or 63 gram quantities of powder cocaine, and Deas would convert the cocaine to crack cocaine for Turner in exchange for cash and any crack cocaine that was left over from the conversion process. T(II).47-48. The jury could have properly inferred that Deas knew Turner intended to distribute the crack cocaine based on the large quantities involved and the fact that Deas knew, from having driven Turner to meet with customers, that Turner was a crack dealer.

In addition, Turner testified that Deas introduced him to Isufaj, a powder cocaine supplier. On numerous occasions, Deas helped Turner acquire powder cocaine from Isufaj in quantities ranging from 28 to 63 grams. T(II).53-54. Moreover, Turner informed Deas that he intended to convert the powder cocaine to crack cocaine and sell it. T(II).52-55. In particular, Turner testified that, in February 2007, Deas arranged for Turner's acquisition of 500 grams of powder cocaine from Isufaj. T(II).58. Deas was present during the transaction. T(II).59. After the transaction, Turner advised Deas that the powder cocaine was not converting well to crack cocaine and that he had received complaints from some of his customers. T(II).68-69, 79. In response, Deas agreed to negotiate Turner's return of approximately 250 grams of the poor-quality cocaine to Isufaj. T(II).80-81. As a result of Deas's efforts, Turner was able to return 250 grams of

cocaine to Isufaj and obtain a partial refund of approximately $5,500 to $6,000. T(II).61-62.

The jury could have reasonably convicted Deas on Count One based on Turner's testimony alone; however, the Government presented several other pieces of evidence that corroborated Turner's testimony. For example, recorded telephone calls between Deas and Turner showed that Deas helped Turner to obtain 500 grams of powder cocaine from Isufaj and then counseled Turner as Turner converted the cocaine to crack cocaine. Testimony of Bornstein and Villegas described their observations of Deas and Turner driving to meet with Cabral and Atkinson, both of whom Deas knew to be crack customers of Turner's. The Government also presented evidence that a cooperating witness purchased nine ounces of crack cocaine from Turner, which, according to Turner, had been converted from powder cocaine supplied by Isufaj. This evidence helped establish that Turner was, indeed, converting the powder cocaine purchased from Isufaj into crack cocaine. Finally, the Government presented the testimony of two of Deas's crack cocaine customers, (Carrier and St. Pierre), who testified that Deas sold them crack cocaine. The jury could properly infer from their testimony and in light of the other evidence that Deas, being a crack cocaine dealer himself, was aware of and participated in a crack conspiracy with Turner.

Deas argues that the jury could not have reasonably concluded that he participated in a crack cocaine conspiracy with Turner because (1) Turner testified that he learned to cook crack cocaine from his brother, not from

Deas, and (2) Turner testified that he worked alone. *See* Deas Brief I, at 18.

Deas's first argument glosses over the substance of Turner's testimony. In fact, Turner testified that he initially became familiar with the conversion process by watching his brother, but that he did not actually learn how to do it properly until he had observed Deas. T(II).49, 112-113. Of course, even if Deas's skewed characterization of Turner's testimony was accurate, the jury still could have reasonably returned its verdict on Count One based on all the evidence. That is, even if Deas did not teach Turner how to convert powder cocaine into crack cocaine, there was ample additional evidence of Deas's participation in a crack conspiracy with Turner, including, *inter alia*, (1) Turner's testimony that Deas converted powder cocaine to crack cocaine for Turner; (2) Deas's transportation of Turner to crack cocaine transactions; (3) Deas's facilitation of Turner's purchase of 500 grams of cocaine from Isufaj, which Deas knew Turner intended to convert to crack cocaine; and (4) intercepted calls between Turner and Deas related to the purchase from Isufaj and the conversion of the powder cocaine to crack cocaine.

Deas's fixation on Turner's testimony that he did not have a "partner" is also unavailing. Although Turner may not have viewed himself as a partner of Deas's, he did not testify that he worked alone. In fact, much of Turner's testimony dealt with his need to rely on Deas and others to assist him in his distribution of crack cocaine. He testified that he relied on Deas to (1) convert powder cocaine to

crack cocaine; (2) drive him to drug transactions; (3) introduce him to a source of supply; (4) arrange for his February 2007 purchase of 500 grams of cocaine from Isufaj, which Deas knew he intended to convert to crack cocaine; and (5) broker the return of a portion of the 500 grams of powder cocaine because it was of poor quality. *See Mercado*, 573 F.3d at 140 (holding that corroborated testimony from cooperating witness that defendant discussed drug prices, details of a drug transaction, and helped convert cocaine to crack, was sufficient to support conspiracy conviction); *United States v. Desimone*, 119 F. 3d 217, 223-24 (2d Cir. 1997) (finding sufficient evidence of conspiratorial relationship where co-conspirator advised the defendant, mediated a drug transaction, and continued to provide counsel following the transaction). Based on all the evidence, it was reasonable for the jury to conclude that, though Turner may not have viewed himself as a partner with Deas, they both joined together with each other and with others in an unlawful conspiratorial relationship for the purpose of distributing 50 grams or more of crack cocaine.

Finally, Deas argues that the jury could not have reasonably considered the February 2007 transactions with Isufaj as evidence of Deas's participation in the crack conspiracy because Deas may not have known "in advance" that Turner intended to convert the powder cocaine to crack cocaine. *See* Deas Brief I, at 19. Here, again, Deas ignores the evidence showing that, prior to these transactions, Deas was well aware that Turner was a crack cocaine dealer. Moreover, the jury could have reasonably inferred from the content of the recorded calls

that Deas knew that Turner intended to convert the powder cocaine to crack cocaine for re-distribution. During those calls, Deas asked Turner whether he had obtained a greater quantity when he had cooked the powder cocaine into crack cocaine. Deas wanted Turner to tell him about the consistency of the crack cocaine that Turner had made and specifically asked whether the quality of the crack cocaine was similar to the quality of a previous batch that they had made from powder cocaine sold by Isufaj. T(II).71-73.

II. The district court did not manifestly abuse its discretion in admitting evidence that Deas knew Turner's brother as such evidence explained how Deas met Turner.

A. Relevant facts

During his testimony, Turner was asked if he knew the defendant. T(II).32. Turner said that he knew Deas and identified him in the courtroom. T(II).32. He explained that he had known Deas for "about fifteen years maybe, around that" and that Turner was about thirteen years old when he first "got to know him." T(II).32. He knew Deas by the nickname "V" and had first met him because he had been Turner's cousin's boyfriend. T(II).32. At that time, Turner saw Deas "[a] couple times a week, maybe." T(II).33. When asked to describe their relationship at the time, Turner replied, "It was just, I mean, speaking terms. Not really relationship. Hey, what's up, how you doing. Nothing much, really." T(II).33.

At that point, the Government asked Turner, "Other than Mr. Deas's relationship with your cousin, did he have a relationship with any other of your family members." T(II).33. Defense counsel objected and stated, "We may be getting into 404(b). I think that there's no relevance here and I probably have a 403 objection as well." T(II).33.

At side-bar, the district court asked the Government, "So what are you going to be asking him about?" T(II).34. The Government replied, "I'm going to ask him one more, if he knew Bobby Turner and that's going to be it. I'm not going to – I'm not going to be asking anything about Mr. Bobby Turner and Mr. Deas['s] relationship about selling narcotics. It's simply going to be whether he knew that . . . Bobby Turner and Mr. Deas were friends." T(II).34. The court asked defense counsel, "Any objection?" T(II).34.

Defense counsel stated, "There's plenty of testimony from the Government about Bobby Turner and Bobby Turner's problems. I think it's the Government['s] way of drawing a conclusion that Vida Deas and Bobby Turner have a relationship." T(II).34. The Government responded, "They absolutely had a relationship. And that's going to be the basis of how Mr. Byron Turner and Mr. Deas, their relationship grew after Bobby Turner got arrested." T(II).34.

Defense counsel complained that this information had not been previously disclosed as "404(b) information," i.e. the fact that Deas had "some sort of nefarious relationship

with Bobby Turner. . . . So to make this suggestion now that he was involved in Bobby Turner's drug dealing flies in the face of the Government's prior disclosures of what their 404(b) information was going to be." T(II).35.

At that point, the district court inquired of the Government, "And what are you going to ask him about Bobby Turner?" T(II).35. The Government replied, "The next question was going to be: And did you know Bobby Turner and move on." T(II).35.

After clarifying that the defendant had a "403 objection too," the court overruled the objection and reasoned as follows:

> I don't see it as 404(b) so I believe it is relevant. And, also, as to 403, I don't believe that its probative value is substantially outweighed by the danger of unfair prejudice or the other matters listed in the rule. But I'd ask you to lead him on this so we don't get him volunteering something about that relationship between him and Turner.

T(II).35.

At the conclusion of the sidebar, the Government engaged Turner in the following colloquy:

> Q. Let me ask you this and just answer yes or no here, Mr. Turner. In addition to your cousin, did Mr. Deas also know your brother Bobby Turner?
> A. Yes.

Q. And is Bobby older or younger than you?
A. He's older.
Q. Now, let me focus you on the year 2005. Do you remember if anything happened to your brother that year?
A. My brother was arrested.
Q. And before your brother was arrested, were you selling any drugs?
A. Yes.
Q. What drugs were you selling at that time?
A. Crack cocaine.
Q. When did you start selling crack cocaine?
A. I'm not sure. I had a couple of people that would call me for it and I would just buy little amounts just to have for those certain people. So I'm not sure exactly when I started.
. . .
Q. And your brother, what did he get arrested for down in Maryland?

T(II). 36-37.

At that point, defense counsel objected as to "relevance." T(II).37. The district court summarily overruled the objection. T(II).37.

The colloquy continued as follows:

Q. What was your brother arrested for?
A. Drugs and firearm.
Q. Drugs, meaning drug possession?
A. Yes.

Q. Was he selling drugs as well?
A. Yes.
Q. So after your brother got arrested, what happened to his drug customers?
A. Actually, I went and got his phone from his property down there in Maryland and I took over where he left off, I guess.
. . .
Q. So after picking up your brother's phone, what if anything happened to the volume of your drug business?
A. I would say it went up.
Q. How much did it go up?
A. Substantially, I mean, a lot compared to what I was doing.
. . .
Q. Now, what if anything happened with your relationship with Mr. Deas at this point?
A. Well, actually we started hanging out a little more and I would call him sometime when I needed him to convert powder cocaine into crack cocaine.

T(II).38-39.

B. Governing law and standard of review

All relevant evidence is generally admissible in court. Fed. R. Evid. 402. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. Once evidence is found to

be relevant to a material issue in dispute, the court must determine whether the risk of unfair prejudice substantially outweighs the probative value of the evidence. *See* Fed. R. Evid. 403; *United States v. Huddleston*, 485 U.S. 681, 691 (1988). The Advisory Committee defines "unfair prejudice" as an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee Note to Fed. R. Evid. 403. Thus, as this Court has stated, "Evidence is prejudicial [within the meaning of Rule 403] only when it tends to have some adverse effect upon a defendant beyond tending to prove the fact or issue that justified its admission into evidence." *United States v. Figueroa*, 618 F.2d 934, 943 (2d Cir. 1980).

A district court's evidentiary rulings are subject to reversal only where manifestly erroneous or wholly arbitrary and irrational. *See United States v. Yousef*, 327 F.3d 56, 156 (2d Cir. 2003) (manifestly erroneous); *United States v. Jones*, 299 F.3d 103, 112 (2d Cir. 2002); *United States v. Dhinsa*, 243 F.3d 635, 649 (2d Cir. 2001) (arbitrary and irrational). A trial court's ruling following a conscientious assessment of the Rule 403 factors will not be reversed on appeal absent a clear showing of abuse of discretion. *See United States v. Pipola*, 83 F.3d 556, 566 (2d Cir. 1996); *United States v. Gelzer*, 50 F.3d 1133, 1139 (2d Cir. 1995); *United States v. Ramirez*, 894 F.2d 565, 569 (2d Cir. 1990). Indeed, "[t]he appellate court must look at the evidence in the light most favorable to its proponent, maximizing its probative value and minimizing its prejudicial effect. To find abuse, the appellate court

must find that the trial court acted arbitrarily or irrationally." *United States v. Jamil*, 707 F.2d 638, 642 (2d Cir. 1983) (citation and internal quotation marks omitted). In short, the district court has "broad discretion" to admit or exclude evidence under Rule 403, and this discretion is subject to reversal "only if there is a clear showing that the court abused its discretion or acted arbitrarily or irrationally." *Yousef*, 327 F.3d at 121 (internal quotation marks omitted).

C. Discussion

The defendant claims that the district court abused its discretion when it admitted testimony that Deas knew Turner's brother, Bobby, because the probative value of that evidence was substantially outweighed by the danger of unfair prejudice, under Rule 403. The claim is without merit.

The challenged testimony was very limited, and was admitted to provide context as to how Byron Turner came to know and trust Deas. In particular, the fact that Deas knew Bobby Turner helped to explain Deas's openness to a more significant relationship with Byron Turner following Bobby Turner's arrest. In short, the fact that Deas knew Byron Turner's brother was relevant background information as to the conspiratorial relationship between Deas and Byron Turner, which was the focal point of the prosecution.[5]

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[5] Deas does not argue, as he did below, that evidence of (continued...)

Deas complains, however, that even if the testimony was relevant, its probative value was substantially outweighed by the danger of unfair prejudice. Specifically, Deas argues that he was unfairly prejudiced because the fact that Deas knew Bobby Turner led to an inference that Deas was aware of and, therefore, associated with Bobby Turner's criminal past, which included narcotics and firearms offenses. The evidence at issue, however, simply related to the bare fact that Deas knew Bobby Turner. There was no evidence before the jury that Deas knew anything about Bobby Turner's criminal past. Therefore, the danger of prejudice was minimal, if any existed at all. And, the district court's conclusion to that effect was neither arbitrary, nor irrational.

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[5] (...continued)
his relationship with Bobby Turner was subject to analysis under Rule 404(b). Nevertheless, it should be noted that the district court properly concluded that the challenged testimony did not constitute Rule 404(b) evidence because is did not relate to any other acts committed by the defendant. *See, e.g.*, *United States v. Williams*, 205 F.3d 23, 33-34 (2d Cir. 2000) (holding that, where co-conspirators have engaged in criminal conduct other than that charged in the indictment, evidence of such criminal conduct is admissible at trial "to inform the jury of the background of the conspiracy charged, to complete the story of the crimes charged, and to help explain to the jury how the illegal relationship between the participants of the crime developed").

Finally, even if the district court admitted this evidence in error, the error was harmless. *See United States v. Al-Moayad*, 545 F.3d 139, 164 (2d Cir. 2008) ("[a] district court's erroneous admission of evidence is harmless if the appellate court can conclude with fair assurance that the evidence did not substantially influence the jury."). According to the defendant, evidence of his association with a drug dealer like Bobby Turner, created the risk that the jury would unfairly infer that the defendant himself was a drug dealer. Any inference to that effect, however, was harmless because Byron Turner, an acknowledged drug dealer, provided detailed and extensive testimony about his own drug relationship with Deas, the very point of which was to demonstrate that Deas was, in fact, a drug dealer. Further, as described above, there was ample, direct evidence of Deas's drug activities to render harmless any negligible taint resulting from the very limited testimony that Deas knew Bobby Turner. *See United States v. McCallum,* 584 F.3d 471, 478 (2d Cir. 2009) ("the strength of the government's case is the most critical factor in assessing whether error was harmless").

III. The Fair Sentencing Act of 2010 does not apply to cases, such as this one, involving pre-enactment conduct.

The defendant argues that the Fair Sentencing Act of 2010 ("FSA") should apply to his case and thereby reduce the statutory mandatory minimum penalties to which he was subjected. He concedes that his offense conduct occurred prior to the enactment of the FSA and argues

instead that the FSA should apply retroactively to this case. This Court has recently rejected an identical claim.

A. Governing Law

The Anti-Drug Abuse Act of 1986, 100 Stat. 3207, established a ten-year mandatory minimum sentence for drug offenses involving 50 grams or more of cocaine base, and a five-year mandatory minimum sentence for offenses involving 5 grams or more of cocaine base. 21 U.S.C. § 841(b)(1)(A)(iii), (B)(iii) (2009). After years of debate, Congress passed the FSA, which was signed by the President on August 3, 2010. The FSA amended § 841(b)(1)(A)(iii) to require 280 grams or more of cocaine base to trigger the ten-year mandatory minimum, and amended § 841(b)(1)(B)(iii) to require 28 grams or more of cocaine base to trigger the five-year mandatory minimum. Pub. L. No. 111-220, 124 Stat. 2372, § 2(a) (August 3, 2010). These new penalties govern crimes committed on or after the August 3, 2010 date when the FSA was signed.

For crimes committed before August 3, 2010, the mandatory penalties for 50 grams and 5 grams of cocaine base set forth at that time in 21 U.S.C. § 841(b)(1)(A)(iii) and (B)(iii) continue to apply under the general "Savings Statute" or "Savings Clause," set forth at 1 U.S.C. § 109. *See United States v. Acoff*, 634 F.3d 200, 202 (2d Cir. 2011). Under 1 U.S.C. § 109, "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty ... incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be

treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty." 1 U.S.C. § 109.

B. Discussion

The defendant's argument is foreclosed by this Court's decision in *Acoff*, where the Court held that the savings statute prevents retroactive application of the FSA to crimes committed prior to the FSA's enactment, and that principles of equal protection do not require otherwise. *See Acoff*, 634 F.3d at 202. The holding in *Acoff* was consistent with this Court's own precedent and the published opinions of the four other circuit courts of appeal that have addressed the issue. *See United States v. Diaz*, 627 F.3d 930, 931 (2d Cir. 2010) (per curiam) ("[T]he FSA cannot be applied to reduce Appellant's sentence because, *inter alia*, he was convicted and sentenced before the FSA was enacted."); *United States v. Carradine*, 621 F.3d 575, 580 (6th Cir. 2010) (holding that because FSA contains no express statement that it is retroactive, court must apply penalty provision in place at time the defendant committed the crime in question); *United States v. Bell*, 624 F.3d 803, 814-15 (7th Cir. 2010) (holding that savings statute bars retroactive application of the FSA); *United States v. Brewer*, 624 F.3d 900, 909 n.7 (8th Cir. 2010); *United States v. Gomes*, 621 F.3d 1343, 1345-46 (11th Cir. 2010) (per curiam). *See also United States v. Lewis*, 625 F.3d 1224, 1228-29 (10th Cir. 2010) (stating in dicta that FSA is not retroactive).

In *Acoff*, the Government appealed the district court's imposition of a sentence below the 60-month mandatory minimum term set by 21 U.S.C. § 841(b)(1)(B). *See Acoff*, 634 F.3d at 201. On appeal, Acoff argued that principles of equal protection required the Court to read the FSA as applying not only to future offenders, but also to those who violated the statute before it was amended but whose sentences were not yet final when the FSA was enacted. *See id.* at 202. This Court flatly rejected Acoff's argument, observing that the overriding equal protection concerns expressed in *Griffith v. Kentucky*, 479 U.S. 314 (1987), were simply not implicated by the FSA because Congress, not the Courts, had determined which individuals were eligible for reduced penalties under the FSA. *See Acoff*, 634 F.3d at 202. Further, as noted above, this Court turned aside Acoff's argument that the savings statute should be narrowly construed in light of the common law principle of abatement. *See Acoff*, 634 F.3d at 203 ("We have considered Acoff's remaining arguments and find them to be without merit.").

Here, the defendant advances the same arguments that were properly rejected by this Court in *Acoff*. Accordingly, the defendant is not eligible for retroactive application of the FSA.

IV. The superseding indictment was timely filed where it charged a materially different conspiracy than the conspiracy charged in the criminal complaint and original indictment.

A. Relevant facts

On March 27, 2007, the defendant was arrested upon a criminal complaint, charging him with conspiracy to possess with the intent to distribute fifty grams or more of cocaine base, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A). A4; GA1. On April 10, 2007, the defendant was one of thirteen defendants charged in a 25-count indictment. GA2. The defendant was charged with (1) conspiracy to possess with intent to distribute fifty grams or more of cocaine base, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(A); (2) conspiracy to possess with intent to distribute 500 grams or more of cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1), and 841(b)(1)(B); (3) possession with intent to distribute fifty grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(A); and (4) possession with intent to distribute cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C). GA2-GA14. The indictment alleged that both conspiracies in which the defendant was charged commenced in or about February 1, 2007 and continued through on or about March 26, 2007. GA3.

On October 16, 2008, after all of the other defendants had pleaded guilty, the defendant was charged in a five-count superseding indictment. A31. As in the original

indictment, the superseding indictment charged the defendant with conspiracy to possess with intent to distribute fifty grams or more of cocaine base and conspiracy to possess with intent to distribute 500 grams or more of cocaine.[6] A31-A34. The superseding indictment expanded the time periods of these conspiracies by alleging that both conspiracies commenced in or about January 2004 and continued through on or about March 26, 2007. A31-A34. This expansion of the time period of the alleged conspiracies was based on evidence established after the filing of the original indictment. GA17-GA18.

On December 3, 2008, the defendant moved to dismiss the superseding indictment, arguing that it was barred by the Speedy Trial Act because the defendant was not charged with the expanded conspiracy within 30 days of his arrest. GA18. In denying the motion to dismiss, the district court noted that the superseding indictment did not inherit the 30-day clock of the original criminal complaint because "the criminal complaint specified a two-month period for the two alleged conspiracies, and the original indictment's charged conspiracies were materially different (in length of time) from the superseding indictment's charged conspiracies." GA20.

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[6] The superseding indictment also alleged three counts of possession with intent to distribute an unspecified quantity of cocaine base. The defendant does not challenge the timeliness of those counts of the superseding indictment.

B. Governing law and standard of review

The Speedy Trial Act provides in relevant part:

> Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.

18 U.S.C. § 3161(b). The sanction for a violation of section 3161(b) is that "such charge . . . shall be dismissed or otherwise dropped." 18 U.S.C. § 3162(a)(1). The general purpose of the Speedy Trial Act is to "expedite the process of pending criminal proceedings, not to supervise the exercise by a prosecutor of his investigative or prosecutorial discretion." *United States v. Roman*, 822 F.2d 261, 266 (2d Cir. 1987). Rather, the thirty-day limit's purpose is "to insure that individuals will not languish in jail or on bond without being formally indicted on particular charges." *United States v. DeJohn*, 368 F.3d 533, 538 (6th Cir. 2004).

Where the government files a superseding indictment after the 30-day period has run, it will be considered untimely only where it asserts a charge that was included in the criminal complaint, but was not included in the original, timely indictment. *See United States v. Napolitano*, 761 F.2d 135 (2d Cir. 1985) (holding that only specific charges contained in the criminal complaint are subject to dismissal if brought in an untimely indictment).

The Court of Appeals reviews a district court's findings of fact as they pertain to a speedy trial challenge for clear error and its legal conclusions *de novo*. *See United States v. Gaskin*, 364 F.3d 438, 450 (2d Cir. 2004).

C. Discussion

The defendant appears to claim that the superseding indictment was untimely because it expanded the time period of the conspiracy charged in the criminal complaint, but was not filed within 30 days of his arrest. The defendant's claim is without merit.

The district court properly concluded that Count One of the superseding indictment was materially different from the conspiracy charged in the criminal complaint, in that it expanded the time period of the conspiracy by three years, and, therefore, did not inherit the original complaint's 30-day time period. The criminal complaint charged that, from February 1, 2007 through March 25, 2007, the defendant engaged in a conspiracy with Turner and others to possess and distribute 50 grams or more of cocaine base. GA1. The original indictment, which charged the defendant with the identical conspiracy as the one charged in the criminal complaint, was timely filed on April 10, 2007. GA2. Following the return of that indictment, the Government developed additional, reliable evidence, based largely on interviews with Turner, which showed the existence of a longer term conspiracy than the one charged

in the criminal complaint and the original indictment.[7] Because the superseding indictment charged a materially different conspiracy than the conspiracy charged in the criminal complaint, based on a materially different set of facts, the superseding indictment was not subject to the criminal complaint's 30-day clock.[8] *See United States v. Palomba,* 31 F.3d 1456, 1462-64 (9th Cir. 1994) (holding that dismissal not required where superseding indictment pleads charges arising under the same statute as those contained in the complaint, but those charges differ substantially in "time, place and manner" from the criminal episodes "apparent on the face of the complaint."); *see also Gaskin*, 364 F.3d at 452 ("the critical question . . . is whether the charges pleaded in . . . the indictment are those specifically pleaded in the complaint because, unless they are, the dismissal sanction of § 3162(a)(1) has no applicability."); *Napolitano*, 761 F.2d at 137 (holding that dismissal of charges in superseding indictment not required, even where they arise from the same criminal episode as those specified in the

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[7] Although the government first learned of the possibility of a longer conspiracy during Turner's post-arrest interview on April 3, 2007, it did not develop sufficient, admissible evidence to support a new criminal charge until well after the return of the indictment. GA17-GA18.

[8] The Government notes that even if this Court were to conclude that the conspiracies charged in the criminal complaint and the superseding indictment were identical, there would be no Speedy Trial Act violation because the original, timely filed indictment charged the same crack cocaine conspiracy alleged in the criminal complaint.

original complaint or were known or reasonably should have been known at the time of the complaint).

Here, it is undisputed that the expanded conspiracy charged in the superseding indictment was predicated on evidence developed after the expiration of the 30-day clock. In essence, the Government developed evidence that the defendant's involvement in a crack cocaine conspiracy commenced three years earlier than the initial investigation had revealed. To require dismissal of a new conspiracy charge based on evidence collected after the expiration of the 30-day clock would amount to improper "supervis[ion] [of] prosecutorial discretion in investigating and charging crimes not actually pending before the court." *Gaskin*, 364 F.3d at 452 (citing *United States v. Hillegas*, 578 F.2d 453, 456 (2d Cir. 1978)); *United States v. Pollack*, 726 F.2d 1456, 1462-63 (9th Cir. 1984) (limiting the sanction of dismissal, in part, to "preserve[] the prosecutor's ability to exercise his traditional discretion."). In denying the defendant's motion to dismiss, the district court properly held:

> Expanding the thirty-day rule to encompass not only the charges contained in the complaint (but not in the original indictment), but also charges that may merely have been supported by information obtained by the government during the investigation, such as the interview of the cooperating defendant in this case and the FBI 302 Report transcribing that interview, is not supported by the language of the statute , nor is it supported by existing case law. . . . Furthermore,

> such an expansion would require the Court to usurp the investigative function of the agents, prosecutors, and grand jury, and review judgments as the credibility and reliability of evidence gathered during the early stages of investigations.

GA21-GA22.

This Court's decisions demonstrate that § 3161(b) was intended to prevent the Government from indicting defendants with crimes set forth in the criminal complaint, but not indicted within the thirty-day period, and the superseding indictment here does not offend that purpose. *See Gaskin*, 364 F.3d at 452 ("the purpose of the Speedy Trial Act is simply 'to expedite the processing of pending criminal proceedings,' . . . Accordingly, we apply §§ 3161(b) and 3162(a)(1) to pre-indictment delay in pursuing only the specific charges alleged in a pending complaint.") (quoting *Hillegas*, 578 F.2d at 456). The new allegations in the superseding indictment were set forth neither in the criminal complaint, nor the original indictment.

V. The district court did not err in concluding that cocaine base is a Schedule II controlled substance under 21 U.S.C. § 802(6).

A. Standard of review and governing law

"Cocaine has been listed as a controlled substance since the passage of the original Controlled Substances Act in 1970." *United States v. Manzueta*, 167 F.3d 92, 94 (2d Cir. 1999). "In 1986, Congress amended the statute by introducing separate and far more sever penalties for 'cocaine base'." *Id*. The Controlled Substances Act, as amended, does not specifically define the term "cocaine base." *See United States v. Jackson*, 968 F.2d 158, 160 (2d Cir. 1992) (superseded by statute on other grounds). The Second Circuit, however, views "cocaine base" as a scientific term, meaning a controlled substance with a particular chemical formula, which "when combined with an acid produces a salt." *Id.* at 161 (holding that the term cocaine base is not limited to "crack cocaine").

Under 21 U.S.C. § 802(6), a controlled substance is defined as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter." 21 U.S.C. § 802(6). Schedule II lists "[c]oca leaves ...; cocaine ...; or any compound, mixture, or preparation which contains any quantity of any of the substances referred to in this paragraph." 21 U.S.C. § 812, Schedule II(a)(4); *see also* 21 C.F.R. § 1308.12(b)(4) (listing in schedule II "[c]oca leaves [ ] and any salt, compound, derivative or preparation of coca leaves (including cocaine ... and [its] salts, isomers, derivatives

and salts of isomers and derivatives), and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances"). "Because cocaine base and crack cocaine are mixtures that contain cocaine and are derived from coca leaves, both substances are encompassed by schedule II's definition." *Sanders v. United States*, 237 F.3d 184, 185 (2d Cir. 2001) (citing *United States v. Canales*, 91 F.3d 363, 366-69 (2d Cir.1996); *Jackson*, 968 F.2d at 161-62; *Manzueta*, 167 F.3d at 93-94.

This Court reviews *de novo* a district court's legal conclusions, including those interpreting and determining the constitutionality of a statute. *See United States v. Awadallah*, 349 F.3d 42, 51 (2d Cir. 2003).

B. Discussion

The crux of the defendant's argument appears to be that cocaine base is not separately scheduled as a controlled substance as provided by 21 U.S.C. §§ 811 and 812, and, therefore, the distinction between cocaine base and cocaine, as embodied in the penalty provisions set forth at 21 U.S.C. § 841(b)(1)(A), is arbitrary and capricious, resulting in a violation of the defendant's right to due process under the Fifth Amendment. The defendant's claim is without merit.

This Court and other Circuit Courts of Appeal have repeatedly rejected the argument advanced by the defendant. In particular, this Court has held that cocaine base and crack cocaine are both substances "encompassed

by schedule II's definition." *Sanders*, 237 at 185 (citing *Canales,* 91 F.3d at 366-69); *Jackson*, 968 F.2d at 161-62; *Manzueta*, 167 F.3d at 93-94.

It being well-established that cocaine base is, in fact, a Schedule II controlled substance, the only remaining issue raised by the defendant is whether the disparate treatment accorded to cocaine and cocaine base offenses under the penalty provisions set forth at 21 U.S.C. § 841(b)(1) is arbitrary and capricious and, therefore, offensive to his Fifth Amendment right to due process. That question has also been conclusively answered by this Court in the negative. In *United States v. Stevens*, this Court held that Congress had a "valid reason for mandating harsher penalties for crack as opposed to powder cocaine: the greater accessibility and addictiveness of crack.", 19 F. 3d 93, 97 (2d Cir. 1994) (citing *United States v. Haynes*, 985 F.2d 65, 70 (2d Cir. 1993)). In reaching this conclusion, this Court joined every other circuit to have ruled on the issue. *Id.* The Court has subsequently re-affirmed this holding. *See, e.g., United States v. Then*, 56 F.3d 464 (2d Cir. 1995); *see also United States v. Regalado*, 518 F.3d 143 (2d Cir. 2008) (per curiam) (relying on *Stevens* to hold that "Regalado's (unpreserved) due process challenge to the 100-to-1 powder to crack cocaine ratio underlying his sentence is without merit as we have repeatedly rejected similar constitutional challenges.").

VI. The defendant's challenge to the validity of his prior felony drug conviction is time-barred.

A. Relevant facts

On April 6, 2009, the Government filed an Information to Establish Prior Conviction, in which it described several different convictions upon which it intended to rely to establish that the defendant had previously been convicted of a felony drug offense. GA23-GA26. The Government included the defendant's October 29, 1993 conviction for Possession of Narcotics, in violation of Connecticut General Statute § 21a-279(a). GA25.

On April 15, 2009, the defendant filed a response to the Government's Information in which he argued that, under the modified categorical approach applied in *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008), the Government had failed to establish that any of his prior narcotics convictions qualified as felony drug offenses. GA28. He also argued, without further explanation, that each of the convictions listed in the Government's notice was invalid. GA28.

Deas appeared for sentencing on December 16, 2009. T(III).1-2. Having been convicted of a violation of 21 U.S.C. §§ 846, 841(a)(1) and (b)(1)(A), Deas faced a mandatory minimum term of imprisonment of ten years. The Government presented the district court with evidence that, on October 29, 1993, the defendant entered a guilty plea and was convicted in the Superior Court of the State

of Connecticut of one count of Possession of a Narcotics, in violation of Connecticut General Statute § 21a-279(a). GA34-GA39. In particular, the Government presented the district court with a certified copy of the court record of conviction and judgment and a certified copy of the transcript of the guilty plea proceeding. GA34-GA39. According to these documents, the defendant entered a guilty plea to a violation of Connecticut General Statute § 21a-279(a), and affirmed in connection with that guilty plea that the narcotic substance he unlawfully possessed was cocaine. GA36.

In light of this evidence, the district court found that Deas had previously been convicted of a felony drug offense, as that term is defined at 21 U.S.C. § 802(44), and rejected any constitutional challenge to the validity of that conviction. T(III).30, 39. As a result, the court concluded that the defendant was subject to a mandatory minimum term of imprisonment of 20 years. T(III).37. The court imposed concurrent terms of imprisonment of 20 years and concurrent terms of supervised release of 10 years on each of Counts One, Three and Four. T(III).56.

B. Standard of review and governing law

Pursuant to 21 U.S.C. § 851, the Government may seek an enhanced sentence of a person convicted of a drug offense when that person has been previously convicted of one or more felony drug offenses by filing prior to trial or guilty plea an information listing the previous convictions to be relied upon at sentencing. According to this statute, if a defendant denies any allegation in the information, he

must file a written response to the information. The statute further states that "[t]he court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment." 21 U.S.C. § 851(c)(1). The statute requires that if a defendant contends that a conviction was obtained unconstitutionally, the defendant "shall set forth his claim, and the factual basis therefor, with particularity in his response to the information." *Id.*, § 851(c)(2). For any constitutional claims raised by the defendant, the statute provides that he "shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response." *Id.* Under 21 U.S.C. § 851(e), however, "[n]o person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction." *See also United States v. Henderson*, 320 F.3d 92, 102-104 (1st Cir. 2003) (upholding the constitutionality of section 851(e)).

C. Discussion

On appeal, the defendant does not challenge the district court's conclusion that the 1993 possession of narcotics conviction qualified as a prior felony drug offense, as that term is defined under 21 U.S.C. § 841(b). Instead, the defendant claims that the district court erred when it concluded that the conviction itself was valid and was not constitutionally defective. This claim is without merit.

First, the defendant was barred from challenging the validity of the 1993 conviction because, under 21 U.S.C. § 851(e), a defendant cannot challenge the validity of any prior conviction sustained more than five years before the date of the information alleging such prior conviction. The government filed its second offender information on April 6, 2009, and the defendant sustained the possession of narcotics conviction at issue on October 29, 1993. Thus, this Court need not review the district court's conclusion as to the validity of the defendant's qualifying conviction because the defendant was barred from making such a challenge in the first place. The plain language of section 851(e) barred the defendant from challenging the validity of his October 29, 1993 conviction because it was sustained more than 15 years prior to the filing of the second offender information.

Second, the challenge itself fails based on a plain reading of the guilty plea transcript for the 1993 conviction. GA32-GA39. According to that transcript, after engaging the defendant in a colloquy concerning his trial rights, the nature of the offense to which he was pleading guilty, the existence of any force or threats used to influence his decision to plead guilty and the factual basis for the guilty plea, the state court judge explicitly found as follows:

> I will make a finding that your pleas are voluntary and with an understanding and knowingly made with the assistance of competent counsel. There are factual bases for those pleas. The pleas are accepted and findings of guilty are made.

GA37. Thus, as demonstrated by the transcript of the defendant's guilty plea underlying his 1993 possession of narcotics, the conviction itself was valid and did not suffer from any constitutional defects. The district court's conclusion that the conviction was valid, therefore, was correct.

Conclusion

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

Dated: May 31, 2011

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 12,381 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

CHRISTOPHER M. MATTEI
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ADDENDUM

1 U.S.C. § 109. Repeal of statutes as affecting existing liabilities

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

18 U.S.C. § 3161. Time Limits and Exclusions

(b) Any information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges. If an individual has been charged with a felony in a district in which no grand jury has been in session during such thirty-day period, the period of time for filing of the indictment shall be extended an additional thirty days.

21 U.S.C. § 851. Proceedings to Establish Prior Convictions

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before

pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the

Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

Fed R. Evid. 401. Definition of "Relevant Evidence"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Fed. R. Evid. 402. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

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

Fed. R. Evid. 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

ANTI-VIRUS CERTIFICATION

Case Name: U.S. v. Deas

Docket Number: 09-4675-cr(L)

I, Louis Bracco, hereby certify that the Appellee's Brief submitted in PDF form as an e-mail attachment to **criminalcases@ca2.uscourts.gov** in the above referenced case, was scanned using CA Software Anti-Virus Release 8.3.02 (with updated virus definition file as of 5/31/2011) and found to be VIRUS FREE.

Louis Bracco
Record Press, Inc.

Dated: May 31, 2011

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Sworn to me this

May 31, 2011

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Qualified in Kings County
Commission Expires November 15, 2012

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