09-3007-cr

To Be Argued By:
S. DAVE VATTI

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 09-3007-cr

UNITED STATES OF AMERICA,

Appellee,

-vs-

NICHOLAS ROJAS,

Defendant-Appellant.

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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

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

STATUTES

RULES

Statement of Jurisdiction

The district court (Kravitz, J.) had subject matter jurisdiction over this federal criminal case under 18 U.S.C. § 3231. On December 19, 2008, the district court denied the defendant's motion for judgment of acquittal under Fed. R. Crim. P. 29, or alternatively, for a new trial under Fed. R. Crim. P. 33. DA 22. Judgment entered on July 9, 2009. DA 26. On July 13, 2009, the defendant filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b), and this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291. DA 27.

Statement of the Issues Presented

1. Where there was evidence at trial that defendant regularly obtained cocaine base for re-distribution purposes, often on credit, from a principal member of the charged conspiracy, could a reasonable jury have found that the evidence was sufficient to establish that defendant Rojas knowingly joined the charged conspiracy?

2. Did the district court err in recalling the jury, which had not yet dispersed and had remained intact, in order to correct an error in the court clerk's initial reading of the jury's written verdict form?

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Preliminary Statement

Between October 2005 and September 2006, Luis A. Colon, a.k.a. "Anthony Colon," headed a large-scale narcotics trafficking organization that distributed substantial quantities of cocaine and cocaine base ("crack cocaine") in and around Waterbury, Connecticut. Colon obtained kilogram quantities of cocaine from co-defendant Arnulfo Andrade, a.k.a. "The Mexican," and would often convert or "cook" the cocaine into crack cocaine. Then, with the aid of his brother Luis E. Colon, a.k.a. "Emanuel

Colon," and co-defendant Jose Garcia, a.k.a. "Peliche," Colon would distribute the crack cocaine and cocaine to a group of street level dealers, often on credit, in the greater Waterbury area. The evidence at trial, particularly the testimony of Colon, who cooperated with the Government following his indictment and arrest, established that defendant Nicholas Rojas was one of Colon's long-time street level crack dealers. After a three day trial before the Hon. Mark R. Kravitz, a jury convicted Rojas of one count of conspiracy to possess with the intent to distribute, and to distribute, 5 grams or more of cocaine base and two counts of use of a telephone to facilitate the commission of a drug trafficking felony.

During the clerk of the court's reading of the jury's special verdict form with respect to the drug quantity finding on the conspiracy count, the clerk omitted the word "base" and simply stated "5 grams or more of a mixture and substance containing a detectable amount of cocaine." The parties did not realize the error until after the jury had been polled and had retired to the jury deliberation room. The district court recalled the jury, which had not dispersed and had remained intact, explained why they had been asked to come back into the courtroom, instructed the clerk to re-read the verdict form and then re-polled the jury. The jury assented to the corrected reading of the verdict form.

On appeal, Rojas claims that, while he sold drugs that he acquired from Colon, he did so only to finance his own drug habit, and that, accordingly, the evidence at trial was insufficient to establish that he joined the charged

conspiracy with the purpose of furthering its objectives. Rojas also claims that the verdict as to the conspiracy count should be set aside on the grounds that it was improper to recall the jury after the district court had discharged the jurors in order to re-read the verdict form and re-poll the jury.

The defendant's claims are without merit. The jury could have reasonably inferred from the evidence, particularly the length of time for which Rojas had been a street level crack dealer for Colon and Colon's provision of crack cocaine to Rojas on credit, that Rojas had joined and participated in the conspiracy with Colon. Further, the court did not err in recalling the jury to correct a mis-reading of the special verdict form. Although the court had announced that the jury was discharged, the jury had not dispersed and was in the jury deliberation room prior to being recalled so that the verdict form could be re-read and the jury re-polled. Accordingly, there was no legal error in recalling the jury and the defendant's conviction on the conspiracy count should be affirmed.

Statement of the Case

On October 4, 2006, a federal grand jury sitting in Connecticut returned a thirteen count indictment charging thirty individuals with various federal narcotics violations. DA 4. Rojas was charged in Count One of the Indictment with conspiracy to possess with the intent to distribute, and to distribute, 500 grams or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846. DA 4. On April 29, 2008, a federal grand jury returned a

Superseding Indictment against Rojas, among others. DA 17. Count One of the Superseding Indictment charged Rojas with conspiracy to possess with the intent to distribute, and to distribute, 5 grams or more of cocaine base in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B)(iii) and 846. DA 32-33. In Counts Two, Three, Four and Five, Rojas was charged with use of a communications facility, that is a telephone, to facilitate the commission of a drug trafficking felony in violation of 21 U.S.C. § 843(b) ("the telephone counts"). DA 34-36.

Rojas' trial on the charges set forth in the Superseding Indictment began on May 12, 2008. DA 18. Rojas was tried with Gwayne Fisher, who had been charged in a separate indictment of conspiring with Colon to possess with the intent to distribute, and to distribute, 500 grams or more of cocaine in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B) and 846. DA 18, 37. On May 16, 2008, the jury found Rojas guilty of conspiracy to possess with the intent to distribute, and to distribute, 5 grams or more of cocaine base. DA 19, 126-27. The jury also found Rojas guilty of the telephone counts set forth in Counts Two and Three of the Superseding Indictment and acquitted him of the telephone count set forth in Count Four. DA 128-29. The Government did not pursue Count Five, which charged a telephone count. DA 27.

On June 17, 2008, Rojas filed a motion for judgment of acquittal, or alternatively, for a new trial. DA 20, 37. The Government filed a memorandum in opposition to the motion on July 8, 2008. DA 21. On December 19, 2008, the district court issued a written ruling denying Rojas'

motion for judgment of acquittal or for a new trial. DA 37-49. On January 6, 2009, the defendant moved the Court for reconsideration, which was opposed by the Government. DA 22-23. On February 6, 2009, the district court denied the defendant's motion for reconsideration. DA 23. On July 8, 2009, the district court sentenced the defendant to a term of imprisonment of eighty (80) months to be followed by a four year term of supervised release on the conspiracy count. DA 26. The district court also imposed a sentence of 48 months to be followed by a one year period of supervised release on each of the telephone counts of which defendant had been convicted, the sentences to run concurrently with the sentence imposed on the conspiracy count. DA 26.

Judgment entered on July 10, 2009. DA 26. On July 13, 2009, the defendant filed a timely notice of appeal. DA 27, 50-51.

Statement of Facts

A. The evidence at trial

In October, 2005, the FBI began an investigation into a Drug Trafficking Organization ("DTO") operating in Meriden, Connecticut. GA 41-42. Utilizing a cooperating witness, the FBI engaged in several controlled purchases of multi-ounce quantities of cocaine base from a variety of different sources, including Harry Johnson and Raul Reyes. GA 41-46. Through these controlled purchases, the FBI identified Milton Roman as a primary source of supply for cocaine base in Meriden and decided to

commence a wiretap investigation as to cellular telephones utilized by Roman. GA 46-47. The wiretap investigation as to Roman concluded in June, 2006, after approximately sixty days of interception. As a result of the wiretap, it was determined that Roman distributed cocaine and cocaine base to a customer base of approximately 30 individuals. GA 56.

During the investigation of Roman, the FBI identified co-defendant Eluid Rivera, a.k.a. "Smoke" and "Smokey," as a primary source of supply for Roman's DTO and received authorization from the district court to intercept communications occurring over a cellular telephone utilized by Rivera. GA 60-61. For his part, Rivera obtained kilogram quantities of cocaine from various individuals in Waterbury, including Luis A. Colon, a.k.a. "Anthony." GA 65, 71-74.

After Luis A. Colon, a.k.a. "Anthony," was identified as a supplier to Rivera, the district court authorized interception of cellular phones used by Colon. GA 74-75. This wiretap investigation of Colon lasted for approximately ninety days. GA 101. Over the course of that wiretap, it was determined that Colon was the head of a drug trafficking ring that operated out of a building located at 262 Walnut Street in Waterbury.

Colon primarily distributed kilogram quantities of cocaine and ounce quantities of cocaine base. He was assisted in his trafficking activities by his brother and co-defendant Luis E. Colon, a.k.a. "Emanuel," and co-defendant Jose Garcia, a.k.a. "Pelichi." GA 76, 80-82. On

those occasions during the wiretap investigation when Colon went to Puerto Rico, he left supplies of narcotics for Emanuel Colon to distribute to his customers. GA 80-81. Colon also supplied Garcia with crack cocaine on credit with the understanding that Garcia would then distribute the crack cocaine to Colon's customers in the area of 262 Walnut Street in Waterbury, which Colon considered to be his block. GA 81, 278-79.

Colon not only supplied Eluid Rivera, but was also a source of supply of cocaine and cocaine base to several other individuals in the greater Waterbury area, including co-defendants Gabriel Machuca Gonzalez, Luis Rivera, Sammy Medina, Erick Montalvo, Roberto Fontanez, Daniel Maldonado, Eric Martin, Luis Vazquez, Carlos Varela, Jose Rivera, Vilmarie Santiago, and Nicholas Rojas. GA 81-85, 92, 290-293. He often supplied cocaine and cocaine base to these individuals on credit and would be paid when these individuals re-sold the drugs they received from Colon. GA 84. During the course of the wiretap investigation into Colon, several individuals, including Gonzalez, Maldonado, Martin, Varela and Rivera were the subject of controlled narcotics purchases. In turn, Colon was supplied cocaine, usually one kilogram at a time, on credit by co-defendant Arnulfo Andrade, a.k.a. "The Mexican." GA 77-79, 85. Phones utilized by Andrade were the subject of wiretaps during this investigation. GA 85. This investigation revealed that, within Connecticut, Andrade was at the top of the supply chain connected to Colon. GA 86.

When Colon lived in the Elmwood Avenue neighborhood in Waterbury, he primarily dealt powder cocaine. GA 265. However, in February 2006, when he moved to the Walnut Street neighborhood, it became apparent to him that the market in this area demanded primarily crack cocaine. GA 267-68. As a result, he learned how to convert powder cocaine into crack cocaine and, within a matter of months, he was, in his own words, running the block. GA 268, 279, 326. He dealt primarily eight ball (3.5 grams or 1/8 of an ounce) and ounce quantities of crack cocaine. GA 261-63.

Nicholas Rojas ("Rojas") was one of the first individuals with whom Colon associated in the Walnut Street neighborhood for the distribution of crack cocaine. GA 343. Colon began to sell crack to Rojas in or about March or April 2006. In turn, Rojas sold the crack he acquired from Colon through the spring and summer of 2006. GA 290, 293, 344. Colon acknowledged that Rojas was addicted to crack cocaine. GA 346-47, 355. However, Rojas also sold crack cocaine and was one of Colon's most frequent customers. GA 293. Rojas would deal with Colon on virtually a daily basis and would primarily obtain eight-ball quantities of crack cocaine, sometimes on credit. GA 292-94, 346-47, 351-52, 412, 418. If Rojas sought crack on credit, Colon would provide the crack to him on that basis. GA 420. Rojas sold the crack cocaine he obtained from Colon on High Street in Waterbury, as a result of which Colon would profit. GA 348, 418-21.

Roberto Fontanez, who lived in the High Street area, testified that he had bought crack cocaine from Rojas in

the High Street area on prior occasions in the 2005-2006 time frame and had seen Rojas engaged in hand to hand drug transactions on High Street during that same period. GA 445-46, 493. Fontanez also indicated that he had seen Rojas and Colon together in the High Street neighborhood during that same time. GA 494. The purpose of these meetings was for Colon to deliver drugs to Rojas or to collect drug money from Rojas. GA 349, 494.

Fontanez's testimony was also corroborated by Colon. Colon would deliver crack cocaine on credit to Rojas in the High Street area and wait around the corner in his car while Rojas sold the drugs. GA 350. This would ensure that Colon would receive immediate payment for the drugs. GA 350. Colon also testified that generally he would give crack cocaine to Rojas on credit if he knew that Rojas had a customer waiting for those drugs so that Colon was assured of prompt payment. GA 344-47.

For example, during an intercepted call on June 23, 2006, at approximately 6:34p.m., Rojas implored Colon to instruct co-defendant Jose Garcia, one of Colon's associates, to give Rojas "a seven," a reference to seven grams of crack cocaine and assured Colon "you'll have it by the end of the night," a reference to being able to pay Colon after Rojas sold the crack. Govt. Ex. 35A (GA 694); GA 278-79, 336.[1] Rojas also implored "come on, Anthony,

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[1] Transcripts of intercepted calls were admitted as full exhibits as an aid to the jury because the calls between Rojas and Colon were predominantly in Spanish. The district court so (continued...)

this is me." Govt. Ex. 35A (GA 694). Colon then said ". . . you are saying to front you some," clarifying that Rojas sought the crack cocaine on credit to which Rojas replied "yeah." GA 336, Govt. Ex. 35A (GA 694). Colon understood that Rojas had to sell the crack cocaine in order to pay Colon. GA 336. Rojas informed Colon that he intended to sell the crack cocaine to a female customer. GA 339-40.

At approximately 9:26p.m., Rojas reported to Colon that Garcia was not around, that he had customers that are waiting for Colon's product and that "O," another of Colon's associates, is going to provide him the seven grams of crack cocaine and will then get that back from Garcia. GA 337; Govt. Ex. 37A (GA 697-698). At approximately 9:39p.m., Colon again spoke to Garcia and Rojas and once again directed Garcia to provide crack cocaine on credit to Rojas. GA 342; Govt. Ex. 38A (GA 704). Rojas told Colon that he had to "run to Southington to bring that seven," confirming that he intended to sell the drugs to a white woman in Southington. GA 339-40; Govt. Ex. 38A (GA 703). At approximately 9:50p.m., Garcia confirmed to Colon that he had provided 3.5 grams of

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[1] (...continued)
instructed the jury. GA 550-51.

crack cocaine on credit to Rojas.[2] GA 342-43; Govt. Ex. 7A (GA 688).

On July 6, 2006, Colon again provided Rojas a quantity of crack cocaine on credit. Govt. Ex. 41A (GA 705-706); GA 351-352. On July 10, 2006, Rojas asked Colon to "bring him five," a reference to five grams of cocaine base. Govt. Ex. 43A (GA 709). Colon confirmed that he delivered the cocaine base to Rojas and that Rojas was "expecting somebody." GA 353-54.[3]

As further evidence of the conspiratorial relationship between Colon and Rojas, the Government introduced evidence that Colon had arranged bail for Rojas on two occasions during the time period of the charged conspiracy. GA 356. First, Rojas was arrested on May 11, 2006. GA 360. Colon paid a bail bonds company a non-refundable $500 so that a surety bond could be posted for Rojas. GA 361. The Government offered the bond paperwork which corroborated Colon's testimony. GA 360-62; Govt. Ex. 153 (GA 725-27). Again, on July 10,

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[2] Although defendant Rojas has not challenged the telephone count conviction on Count Two of the Superseding Indictment, the series of calls on June 23, 2006, ending with Garcia's confirmation that he had provided crack cocaine to Rojas, which Rojas intended to distribute, satisfies all of the requisite elements of that charge under 21 U.S.C. § 843(b).

[3] The July 10 phone call coupled with Colon's testimony that he delivered the requested drugs was sufficient for the jury to have convicted Rojas of the telephone count charged in Count Three of the Superseding Indictment.

2006, Rojas was arrested and, once again, he turned to Colon for assistance in making bail. GA 355-56. Colon again provided some of the money so that Rojas could make bail. GA 356, 359. Colon testified that he bailed out Rojas on these occasions because Rojas was his friend and also because Rojas was selling Colon's crack and was a very good customer. GA 363, 421.

Finally, Rojas believed himself to be a loyal part of Colon's drug trafficking ring. On one occasion, he warned Colon about individuals that Rojas believed were going to break into Colon's apartment. GA 357. He referred to Colon as his "partner" which Colon took to mean that Rojas considered himself to be Colon's "boy." GA 358.

In the same conversation, Rojas expressed frustration that Colon's associate, Jose Garcia, would not extend credit to him despite the amount of drugs Rojas had obtained from Garcia and sold. GA 358-60. As a result, Rojas stated he stopped bringing customers to Garcia and that he would only deal with Colon because Colon was the only one that "looks out" for him. GA 360; Govt. Ex. 45A (GA 719-20). Colon also assured Rojas "I'll always look out for you. . ." Govt. Ex. 45A (GA 720). Rojas also confirmed in this call that he could be trusted on credit, stating "when I deal, I come through" and obtained assurance that Colon would continue to deal with him on credit. GA 360; Govt. Ex. 45A (GA 721).

B. The court's jury instructions and the jury's verdict

On May 14, 2008, the district court charged the jury, including with respect to the second element of conspiracy under 21 U.S.C. § 846 – that is, whether defendant Rojas had knowingly joined or participated in the conspiracy. GA 577-81. This charge included the following instructions, among others:

> I also want to caution you that mere knowledge or acquiescence, without participation, in the unlawful plan is not sufficient. Moreover, the fact that the acts of a Defendant, without knowledge, merely happen to further the purposes or objectives of the conspiracy, does not make that Defendant a member of the conspiracy. More is required under the law. What is necessary is that the Defendant must have participated with knowledge of at least some of the unlawful purposes or objectives of the conspiracy and with the intention of aiding in the accomplishment of those unlawful ends. Thus without more, the mere existence of a buyer-seller relationship is insufficient to establish membership in a conspiracy. In deciding whether parties to a sale of narcotics are merely buyer and seller or instead are co-conspirators, the jury may properly consider a number of factors, including the length of time that the buyer affiliated with the seller, whether there was a common goal among the parties to advance the conspiracy's interests, whether there was an agreement or understanding to redistribute drugs, the established method of

> payment, the extent to which the transactions were standardized, the quantities of drugs involved and whether there was a mutual trust between the buyer and seller. None of these factors is dispositive, nor is this listing intended to be exhaustive. In the end, the jury must determine whether on the basis of all of the evidence, the Government has proved beyond a reasonable doubt that the Defendant under consideration knowingly and willingly entered into an agreement or understanding with one or more other persons to accomplish the goals of the charged conspiracy – namely, the distribution of the particular drugs charged.

GA 580-81.

On May 16, 2008, the jury returned its verdict finding Rojas guilty beyond a reasonable doubt of conspiracy to possess with intent to distribute, and to distribute, 5 grams or more of cocaine base in violation of 21 U.S.C. § 846. DA 100-109, 126-29. The jury indicated in a special verdict form prepared by the Court that it had found defendant guilty of conspiracy to possess with the intent to distribute and to distribute controlled substances, and the jury made a separate finding that the drug quantity attributable to the defendant was 5 grams or more of cocaine base. DA 126-27. The jury also returned a verdict finding Rojas guilty of two counts of use of a telephone to facilitate the commission of a drug trafficking felony in violation of 21 U.S.C. § 843(b). DA 128-29. The jury acquitted Rojas of a third telephone count set forth in Count Four of the Superseding Indictment. DA 129.

C. The ruling and order denying the motion for judgment of acquittal

On December 19, 2009, the district court issued a written ruling denying the defendant's motion for judgment of acquittal, or alternatively, for a new trial. DA 37-49. In doing so, the district court engaged in an extensive analysis of *United States v. Hawkins*, 547 F.3d 66 (2d Cir. 2008), DA 41-46, and noted that, in light of *Hawkins*, "the principal issue raised by Mr. Rojas is whether the record evidence was sufficient to support a finding beyond a reasonable doubt that Mr. Rojas was a member of the drug conspiracy charged, rather then merely a simple buyer of drugs." DA 39-40. The district court concluded that "[c]onsidering the evidence in this case in the light of *Hawkins*, the Court has no doubt that the evidence in its totality suffices to permit a jury to find beyond a reasonable doubt that Mr. Rojas was not merely a buyer or seller of narcotics, but rather that he knowingly and intentionally participated in the Colon narcotics distribution conspiracy by agreeing to accomplish its illegal objective beyond the mere purchase or sale of drugs." DA 46.

In reaching this conclusion, the district court found that "the evidence at trial showed that Mr. Rojas was a frequent, not episodic, customer of Mr. Colon and that they had been doing business with one another since approximately 2005", DA 46, and that "[t]heir relationship was thus not "transient," but rather deep and long-standing." DA 46. Moreover, the district court noted that "as was apparent from the testimony and the telephonic

recordings played to the jury, Mr. Rojas engaged in hand to hand drug transactions with the crack cocaine he purchased from Mr. Colon," and "made it clear to Mr. Colon that he would re-distribute the drugs Mr. Colon provided and Mr. Colon knew this." DA 46.

The district court also emphasized that Colon provided Rojas "drugs on credit," that Colon would observe Rojas sell the drugs so that he could collect the money owed, that there were numerous transactions in "standardized amounts," and that there was "considerable mutual trust" between Rojas and Colon as was evident from the "fronting" of drugs, Colon's provision of bail money to Rojas so that Rojas could "get back on the streets to distribute" Colon's drugs and in Colon's vouching for Rojas' creditworthiness with other members of Colon's drug trafficking organization. DA 46-48.

While the district court acknowledged the defendant's argument that he sold drugs "to feed his insatiable drug habit," DA 48, the district court held defendant's motivation for joining the conspiracy was not determinative and that the fact "[t]hat Mr. Rojas was motivated to redistribute Mr. Colon's drugs because of his drive to put narcotics into his system does not alter the fact that there was substantial evidence that would support a conclusion beyond a reasonable doubt that Mr. Rojas was aware of the illegal goals of the Colon drug trafficking organization, knowingly joined that organization and intentionally furthered that organization's goals by distributing Mr. Colon's drugs in downtown Waterbury." DA 48.

Summary of Argument

I. The Court should affirm the jury's verdict as there was sufficient evidence of Rojas' membership in the conspiracy charged against him. From the facts established at trial, a reasonable jury could have concluded that Rojas agreed to participate in and advance the goals of the charged conspiracy as a co-conspirator and that he was not merely in a buyer-seller relationship with Colon. Here, there was considerable evidence through cooperator testimony and numerous wiretapped calls that Rojas intended to sell crack cocaine that he acquired from Colon and that Colon was well aware of this fact and facilitated such activity by Rojas. Colon frequently provided crack cocaine on credit to Rojas, and Rojas was given crack cocaine on credit by other co-conspirators to whom Colon vouched for Rojas' credit-worthiness. Colon would observe Rojas sell the crack that Colon provided so that Colon could collect immediately the money he was owed for those drugs. Moreover, the relationship between Colon and Rojas was long-standing, not merely intermittent. Rojas was one of Colon's first street level crack dealers and they dealt with each other on a frequent basis. Their transactions were standardized, typically in one eighth ounce or "eight ball" quantities. Colon twice arranged for bail for Rojas because was Rojas was moving Colon's drugs on the street. On this record, there was ample evidence for the jury to conclude that Rojas was a knowing and willful participant in the Colon drug trafficking conspiracy.

II. In addition, the district court acted properly in having the jury return to the courtroom so that their verdict form could be re-read correctly and the jury re-polled to reflect their actual verdict. Although the court had pronounced the jury discharged, the jury, in fact, had not dispersed and remained in the jury deliberation room. As the jury had not dispersed and remained an intact unit, it was appropriate for the district court to rectify the clerk's error in reading the jury's verdict form and to ensure that the jury's actual and intended verdict was properly recorded.

Even if there was error in recalling the jury, any such error was harmless because, under the factual circumstances here, the written verdict reflected the true intent of the jury and is the operative verdict. The defendant was charged with a conspiracy to distribute cocaine base, the evidence at trial centered on the defendant's sale of cocaine base and the jury verdict form required the jury to make specific quantity findings as to the amount of cocaine base involved in the defendant's conduct. Following a specific explanation by the district court as to the reason for the recall, each juror assented to the corrected reading of the verdict form. There is no meritorious argument that the jury intended to convict the defendant of a cocaine offense rather than one involving cocaine base, and accordingly, the district court's recalling of the jury did not affect any substantial rights of the defendant.

ARGUMENT

I. The jury could have reasonably inferred from the evidence, particularly the length of time for which Rojas' had been a street level crack dealer for Colon and Colon's provision of crack cocaine to Rojas on credit, that Rojas had joined and participated in the conspiracy with Colon.

A. Relevant facts

The relevant facts are set forth above in the sections entitled "Statement of the Case" and "Statement of Facts."

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) (citing cases).

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).

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*.

Once the first element has been established, a defendant's actual participation in a conspiracy "can be established only by proof, properly admitted into evidence, of their own words and deeds." *United States v. Russano*, 257 F.2d 712, 713 (2d Cir. 1958) (citing *Glasser v. United States*, 315 U.S. 60 (1942)). 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) (citing cases). 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, "[t]he business of distributing drugs to the ultimate user seems to require participation by many persons. Rarely, if ever, do they all assemble around a single table in one large conspiracy simultaneously agreed upon and make a solemn compact orally or in writing that each will properly perform his part therein." *United States v. Rich*, 262 F.2d 415, 417 (2d Cir. 1959). "[M]any of the persons who form links in the distribution chain appear never to have met other equally important links." *Id*. at 417-18. But if "there be knowledge by the individual defendant that he is a participant in a general plan designed to place narcotics in the hands of ultimate users, the courts have held that such persons may be deemed to

be regarded as accredited members of the conspiracy." *Id*. at 418; *see also United States v. Sureff*, 15 F.3d 225, 230 (2d Cir. 1994) (defendants who did not know one another held to be members of single conspiracy because they had reason to know they were part of larger drug distribution organization). Furthermore, "the mere fact that certain members of the conspiracy deal recurrently with only one or two others does not exclude a finding that they were bound together in one conspiracy." *United States v. Agueci*, 310 F.2d 817, 826 (2d Cir. 1962).

C. Discussion

1. Rojas knowingly and willfully participated in a conspiracy to distribute crack cocaine for profit.

As a threshold matter, defendant Rojas does not dispute the existence of the conspiracy charged in the Superseding Indictment. Rojas also does not dispute that he sold drugs that were provided to him by Colon. Accordingly, Rojas' appeal presents the very narrow question of whether the jury could have rationally concluded from the record evidence that he was a member of the charged conspiracy.

The jury reasonably could have concluded from the evidence that Rojas had joined and participated in a conspiracy with Colon to distribute cocaine base. Colon and Rojas did not have a mere episodic, fleeting relationship, but rather a long-standing one that centered around the sale of crack cocaine for profit. When Colon

first began to sell crack cocaine in the Walnut Street neighborhood in early 2006, Rojas was one of his first customers with whom Colon established a regular relationship. GA 343. Over an extended period of time, they dealt with each other nearly every day and Rojas became one of Colon's street level crack dealers. GA 293, 363.

Colon knew that Rojas sold the crack he obtained from Colon in the High Street area, a fact corroborated by Roberto Fontanez who had bought crack cocaine from Rojas in that neighborhood on prior occasions. GA 348, 418-21, 445-46, 493. Colon also provided Rojas crack cocaine on credit, knowing full well that Rojas had to sell the crack in order to pay his drug debt to Colon, thus giving Colon an interest in maintaining Rojas as a street level dealer. GA 292-94, 346-47, 351-52, 360, 412, 418, 420. This was underscored by Colon's arrangement of bail on two occasions when Rojas was arrested so that Rojas could continue moving Colon's crack on the streets. GA 363, 420-21; Govt. Ex. 153 (GA 725-27).

Based on wiretapped calls and Colon's testimony, it was evident that Rojas intended to sell the drugs provided to him by Colon and that Colon was aware of Rojas' intent to do so. GA 412, 417-18, 421. On June 23, 2006, Rojas made clear to Colon that he needed seven grams of crack on credit to deliver to a female customer. GA 336-40; Govt. Ex 35A (692-95). On July 6, 2006, Colon provided crack on credit to Rojas. GA 351-52; Govt. Ex. 41A (GA 705-706). On July 10, 2006, Rojas asked Colon for five grams of crack, a portion of which Colon was aware Rojas

intended to provide a third party. GA 353-54; Govt. Ex. 43A (GA 707-709).

On August 10, 2006, Rojas informed Colon he was going to stop taking customers to Jose Garcia, a Colon associate, because Garcia was reluctant to extend credit and that, going forward, Rojas would deal exclusively with Colon because Colon "looks out" for him. GA 358-60; Govt. Ex. 45A (GA 719-20). Rojas made clear that he could be trusted on credit, stating "when I deal, then I come through." GA 360; Govt. Ex. 45A (GA 721). It was also apparent from Rojas' dealings with Garcia and Orlando Morales, a.k.a. "O," that Rojas was aware that there were others involved in Colon's drug trafficking ring. GA 337. Rojas had no qualms about having Colon vouch for his credit-worthiness to those individuals, further highlighting the depth of his relationship with Colon. GA 342; Govt. Ex. 38A (GA 704). Indeed, their on-going relationship was mutually beneficial. As Colon succinctly described it, Colon made money off Rojas and Rojas made money to buy drugs. GA 421.

In short, given the breadth and nature of their relationship, Rojas was well aware that he was "a participant in a general plan designed to place narcotics in the hands of ultimate users," and the jury could reasonably have found that he was an "accredited member of the conspiracy. *Rich*, 262 F.2d at 418.

Rojas contends that because he sold the drugs acquired from Colon for the sole purpose of supporting his own drug habit and not to further the goals of the Colon

conspiracy, there is no basis for any finding that he was a member of the conspiracy and that the buyer-seller doctrine precludes any such finding. Def. Br. at 14-16. This argument has no merit. As the evidence showed, the means by which Rojas acquired money to finance his own drug habit was by selling Colon's crack in the High Street neighborhood, thereby assisting Colon in placing crack cocaine in the hands of end users for Colon's profit and also for Rojas' benefit, a fact acknowledged by Colon. GA 421. In doing so, the defendant knowingly and willfully participated in sustained drug sales over a lengthy period of time, and he engaged in purposeful behavior aimed at furthering the goal of the conspiracy, that is the sale of crack cocaine for profit. He, too, reaped a benefit from his own participation in this conspiracy to distribute drugs for profit by acquiring money to support his own drug habit. GA 412, 421.

The determinative issue here is whether the defendant joined the conspiracy to advance its common goal of distributing drugs for profit, not whether he shared the same motivations as each of his co-conspirators. The fact that the defendant chose to spend the money he made on drugs for himself while other co-conspirators spent their profits on cars, jewelry, clothes and more material pursuits is simply irrelevant to whether they were all enjoined in a conspiracy to distribute drugs for profit. The fact that the defendant joined the conspiracy because he wanted crack for himself does not change the fact that he joined the conspiracy. The Government does not dispute that Rojas' profits from drug trafficking financed his own drug use rather than the acquisition of material items. However, the

manner in which Rojas chose to spend his profits does not undermine the notion that he was a co-conspirator in the Colon narcotics trafficking ring, especially in light of the mutual benefit and interest each had in Rojas's ongoing re-distribution of drugs acquired from Colon.

2. The buyer-seller rule is inapplicable to the facts of this case.

Based upon this Court's analysis of the buyer-seller rule in *United States v. Hawkins*, 547 F. 3d 66 (2d Cir. 2008) and the factors to be considered in the application of that doctrine, a reasonable jury could have concluded, under the totality of the circumstances presented at trial, that defendant Rojas was a member of the conspiracy charged against him.

a. The buyer-seller rule

"The rationale for holding a buyer and a seller not to be conspirators is that in the typical buy-sell scenario, which involves a casual sale of small quantities of drugs, there is no evidence that the parties were aware of, or agreed to participate in, a larger conspiracy." *United States v. Medina*, 944 F.2d 60, 65 (2d Cir. 1991). "[T]he purpose of the buyer-seller rule is to separate consumers, who do not plan to redistribute drugs for profit, from street-level, mid-level, and other distributors, who do intend to redistribute drugs for profit, thereby furthering the objective of the conspiracy." *United States v. Ivy*, 83 F.3d 1266, 1285-86 (10th Cir. 1996). In essence, the buyer-seller rule was intended to protect the ultimate end user of drugs from

being drawn within the ambit of a conspiracy simply because the end user purchased the drugs from a member of the conspiracy.

In this vein, in *United States v. Wexler*, 522 F.3d 194 (2d Cir. 2008), Judge Raggi described the law governing the buyer-seller rule in her partial dissent. As she noted, "[a] transfer of drugs from a seller to a buyer necessarily involves agreement, however brief, on the distribution of a controlled substance from the former to the latter." *Id.* at 210. She went on to state that "[a]bsent more, however, the law does not consider this momentary meeting of the minds sufficient to support a conviction for conspiring to distribute drugs." *Id.* Judge Raggi then set forth a number of factors to be considered in determining whether there was a simple arms length drug sale or the existence of a conspiratorial agreement to distribute beyond that discrete sale from buyer to seller:

> In many cases, the "more" that will demonstrate such a larger agreement is evidence of the seller's knowledge that the buyer intends to redistribute the drugs in question. But intended redistribution is not the only circumstance relevant to determining whether persons have a "joint objective " that goes beyond a buyer's mere purpose to buy and a seller's mere purpose to sell. The length of time that the seller affiliated with the buyer, the established method of payment (for example, whether the seller "fronted" the narcotics to the buyer), the extent to which the transactions were standardized, and the level of mutual trust between the buyer and the

> seller are all factors that a jury may properly consider in deciding whether the parties are involved in a larger distribution scheme such that even a single drug sale between them might be understood as intended to advance the ends of [that larger] conspiracy.

Id. at 211 (internal citations and quotations omitted).

On the heels of *Wexler*, *Hawkins* made clear that "the existence of a buyer-seller relationship does not *itself* establish a conspiracy; however, where there is additional evidence showing an agreement to join together to accomplish an objective beyond the sale transaction, the evidence may support a finding that the parties intentionally participated in a conspiracy." 547 F.3d at 72. The Court went on to note that "[t]he critical inquiry in each case is whether the evidence in its totality suffices to permit a jury to find beyond a reasonable doubt that the defendant was not merely a buyer or seller of narcotics, but rather that the defendant knowingly and intentionally participated in the narcotics-distribution conspiracy by agreeing to accomplish its illegal objective beyond the mere purchase and sale." *Id.* at 73-74.

Although the Court cautioned that "[e]vidence that a buyer intends to resell the product instead of personally consuming it does not necessarily establish that the buyer has joined the seller's distribution conspiracy[,] . . . [c]ircumstantial evidence may, however, support taking the step from knowledge to intent and agreement.

. . . ." *Id.* at 74.[4] In analyzing whether there existed an agreement to participate, the Court noted the relevance of factors, none of which alone are dispositive, such as "whether there was prolonged cooperation between the parties, a level of mutual trust, standardized dealings, sales on credit ('fronting'), and the quantity of drugs involved." *Id.* (internal quotations omitted).

In *Hawkins*, the crux of the Government's case was four intercepted calls between Hawkins and a source of supply, Luna, that occurred over a two week period. In two of those calls, Hawkins made clear that he intended to re-distribute small quantities of cocaine to third parties. In one of those calls, Luna offered Hawkins an eight-ball (3.5 grams) of cocaine on credit, which Hawkins accepted. The deal was never consummated. There was also evidence from these intercepted calls that Hawkins programmed Luna's cell phone number into his own phone and indicated a desire to deal with Luna as opposed to other dealers in the area. The total quantity of drugs involved in the four telephone calls was less than 20 grams of powder cocaine. 547 F.3d at 69, 75.

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[4] In its analysis of the evidence in *Hawkins*, the Second Circuit summarized facts which suggested that Hawkins intended to redistribute the drugs he acquired from Luna, his supplier, and that Luna was aware of Hawkins' intent. This suggests that, while this factor alone is not determinative of membership in the charged conspiracy, it is relevant to the totality of circumstances that must be examined by the finder of fact in reaching a conclusion as to whether membership in the conspiracy has been proven beyond a reasonable doubt. 547 F.3d at 75-76.

In concluding that this evidence was sufficient for a jury to conclude that Hawkins was a member of the Luna conspiracy, the Court noted that Hawkins had demonstrated an intent to distribute of which Luna was aware, that Hawkins had attempted to purchase or purchased from Luna four times over a two week span, that Hawkins contacted Luna after he had identified potential customers and that extension of credit and Hawkins' access to Luna's cell phone number established a mutual level of trust. 547 F. 3d at 75.

b. Application of the *Hawkins* factors supports a finding that Rojas was a member of the charged conspiracy.

In light of *Hawkins*, Rojas cannot claim that the evidence presented against him was insufficient as a matter of law to clear the buyer-seller hurdle. Indeed, the evidence against Rojas from which the jury could have concluded that he agreed wilfully to participate in the charged conspiracy was far more substantial than what this Court found sufficient in *Hawkins*.

First, based on the wiretapped calls and Colon's testimony, the jury had ample evidence from which to conclude that Rojas was a frequent customer of Colon's and had been so for a lengthy period of time. Indeed, their relationship was deeper than the typical arms length transaction involved in a discrete sale for personal use. Rojas had been a street level dealer of Colon's crack cocaine from the time that Colon moved to the Walnut Street neighborhood and began selling crack cocaine. GA

290, 293, 343-44. They dealt with each other almost daily. GA 292-94. Colon bailed Rojas out of jail because, among other reasons, Rojas was moving Colon's drugs on the street. GA 363, 420-21. Their familiarity with each other was evident in the tone with which they addressed each other in intercepted calls that the jury heard, a consideration that would be exclusively within the jury's province to consider. Their prolonged relationship is a factor that weighs in favor of a finding that they were co-conspirators rather than merely a buyer and seller of narcotics.

Second, over a period of time, an element of standardization became apparent with the transactions between Rojas and Colon. Rojas typically acquired one eighth ounce or "eight-ball" quantities of crack cocaine at a time. GA 292. These transactions occurred virtually every day. GA 292-94. That their relationship reached the point where the quantity of crack acquired was consistent is also a factor that points to a conspiratorial relationship.

Third, Colon's and Rojas' mutual understanding of re-distribution is also a factor that weighs in favor of finding Rojas to be a member of the charged conspiracy. Colon was well aware that Rojas was selling the drugs Colon was providing to him and that Rojas primarily did so in the High Street area. GA 348, 418-21. Fontanez testified that he had bought crack cocaine from Rojas on prior occasions in that neighborhood and had seen Colon and Rojas together in that area so that Colon could either deliver drugs to Rojas or collect drug proceeds. GA 349, 445-46, 493-94. The jury heard multiple intercepted calls

which corroborated this understanding of distribution to third party customers. For example, on June 23, 2006, Rojas told Colon he had customers waiting for Colon's narcotics but that he could not locate Jose Garcia, Colon's associate. GA 337; Govt. Ex. 37A (GA 697-98). On July 10, 2006, Colon delivered five grams of crack to Rojas for which Rojas appeared to have a customer. GA 353-54; Govt. Ex. 43A (GA 707-709).

Fourth, the mutual trust that existed between Rojas and Colon also compels a conclusion that a rational jury could have concluded they were co-conspirators, not merely a buyer and seller of crack cocaine. Rojas obviously had Colon's cell phone number and used it often to order crack cocaine as was apparent from the numerous intercepted calls heard by the jury. On one occasion, Rojas warned Colon when he believed third parties were going to break into Colon's apartment. GA 357; Govt. Ex. 45A (GA 712-17). On two occasions when Rojas was arrested, he reached out to Colon for assistance in posting bond. GA 359-63. Colon paid money out of his own pocket on both occasions to bond Rojas out because he both liked Rojas and Rojas was moving his crack on the street. GA 363, 420-21; Govt. Ex. 153 (GA 725-27).

It was also clear from Rojas' direct dealings with Jose Garcia and Orlando Morales, a.k.a. "O," that he was well aware that there were others involved in Colon's distribution ring and that Colon was comfortable with Rojas going to other members of his ring when Colon was absent. GA 337. Indeed, Rojas felt free to approach Colon's associates when Colon was absent and had no

qualms about asking Colon to vouch for his credit-worthiness to those individuals, which Colon did. GA 342. Indeed, when Rojas made the request to Colon to vouch for him, he emphasized "come on, Anthony, this is me." Govt. Ex. 35A (GA 694). The language and tone of the request underscored their familiarity with each other. When Rojas was upset that Colon's associate, Jose Garcia, would not deal with him on credit, he told Colon he would bring his customers to Colon exclusively because Colon "looks out" for him. GA 360. A reasonable jury could certainly have concluded that these facts evidence a trust among co-conspirators and is not typical of a casual sale between a buyer and seller of narcotics.

The long-standing bond that Rojas and Colon had was also evident from Colon's demeanor during his testimony regarding Rojas. Colon had to pause to gather himself after Rojas' counsel cross-examination was completed and was very emotional in having to face Rojas, whom he considered a close friend, in the courtroom, a consideration that, while perhaps not evident from a sterile transcript, could not have been lost upon the jury. GA 417, 419. Certainly, the jury was in the best position to assess Colon's demeanor in making their assessment as to whether Rojas and Colon were co-conspirators with a long-standing relationship and common objective of moving drugs for profit or were merely an arms-length buyer and seller respectively.

In attempting to rebut the notion of mutual trust between Colon and Rojas, Rojas argues that Colon did not consider Rojas to be a "partner" in his drug operation. Def.

Br. at 7. There is no particular descriptive term that carries determinative weight in whether one is a co-conspirator in a drug distribution ring. "Partner" is a term of art that carries connotations of equality. There is no question that Colon, who occupied a supplier role and a leadership position, did not share an equal role with Rojas. Colon acquired kilogram quantities of cocaine and had a network of street level dealers to whom he supplied narcotics. Rojas was a street dealer and acquired "eight-balls" of crack cocaine. The fact that their roles within the overall scheme were disparate does not preclude a finding that they were co-conspirators. Rojas referred to Colon as his "partner," which Colon took to mean that Rojas was indicating he was Colon's "boy" in a colloquial sense, which only highlights their bond. GA 358. In short, this testimony was for the jury to consider in the context of the totality of evidence they heard in determining whether Rojas and Colon were co-conspirators in a scheme to sell crack for profit, but it is not dispositive of Rojas' membership in that conspiracy as a matter of law.

Rojas also argues that because Colon would provide drugs on credit to Rojas only if Rojas had a ready customer and Colon could be assured of being paid quickly, Colon and Rojas did not have a trust that is vital to a conspiratorial relationship. Def. Br. at 6. As a preliminary matter, there was ample additional evidence of the mutual trust between Rojas and Colon as set forth above for the jury to conclude there was a conspiratorial relationship notwithstanding Colon's desire to be paid quickly when extending Rojas credit.

But, equally important, there is no requirement in *Hawkins* (or any other buyer-seller cases) that the terms of credit extended to any particular conspirator be identical or similar to those extended to other members of the conspiracy or be for any specific time period. Defendant cites no such authority. Moreover, such a consideration does not make sense. There is no doubt that Colon was concerned that Rojas used his money from drug sales to finance his own drug habit, and accordingly that Colon only wished to extend credit for a short time. GA 344-50. However, the issue is not how quickly Colon wished to be paid. The issue is whether by giving Rojas crack cocaine without demanding money up front, Colon gave himself a vested interest in Rojas' ability to sell that crack. Here, irrespective of the length of time that credit was extended, Colon could be paid for those drugs provided only if Rojas successfully sold the drugs. Accordingly, the length of time for which credit was extended to Rojas is simply irrelevant.

In fact, the "fronting" of crack cocaine by Colon to Rojas, irrespective of the time frame for payment, further supports the jury's conclusion that he was a member of the charged conspiracy to distribute crack cocaine. Colon explained that he would deliver drugs to Rojas in the High Street neighborhood and that he would wait out of sight in his car around the corner while Rojas sold the crack and then delivered the drug money to him. GA 348-50. Multiple phone calls corroborated the existence of credit transactions between Rojas and Colon. GA 336-40, 351-52; Govt. Ex. 35A (GA 694); Govt. Ex.38A (GA 704);

Govt. Ex. 41A (GA 705-706); Govt. Ex. 45A (GA 719-20).

Not only does common sense dictate that drug dealers provide drugs on credit only to those persons with whom they have established a requisite degree of trust, but this Court has held that a drug seller's extension of credit is highly probative in determining whether a drug purchaser is a mere buyer or a knowing participant in a drug conspiracy. *Hawkins*, 547 F.3d at 74-76 (noting the relevance of sales on credit ('fronting') and finding that access to a an alleged co-conspirator's cell phone and obtaining cocaine from that co-conspirator on credit, among other things, reflected a mutual trust that supported a finding of a conspiratorial relationship, rather than a mere buyer-seller relationship); *see also United States v. Gibbs*, 190 F.3d 188, 200 (3d Cir. 1999) ("A credit relationship may well reflect . . . trust . . . and often evidences the parties' mutual stake in each other's transactions."); *United States v. Dortch*, 5 F.3d 1056, 1065 (7th Cir. 1993) ("[E]vidence of 'fronting' suggests the existence of a conspiracy because it appears both that the seller has a stake in the success of the buyer's activities and that a degree of cooperation and trust exists beyond that which results from a series of isolated and sporadic transactions."); *United States v. Carbone*, 798 F.2d 21, 27 (1st Cir. 1986) (fronting of half-kilogram of cocaine was "not a single sale; it was a sale for further distribution"); *Ivy*, 83 F.3d at 1286 (affirming conspiracy conviction for street-level cocaine dealer because, among other reasons, kingpin's intermediary provided defendant with drugs on credit).

The usual premise of any credit transaction, whether for legal or illegal goods, is that the buyer is expected to acquire the necessary funds in the future to pay the seller, even though the buyer does not currently have sufficient funds. Where, as here, the relevant credit sale involves a distribution-weight quantity of illicit drugs, the buyer intends to resell the drugs to a third party in order to obtain cash to pay back the seller. Thus, when drugs are sold on credit, the trier of fact may reasonably infer that the seller not only anticipates that the buyer will resell the drugs, but also that the seller agrees to extend credit precisely because he expects to receive payment after the buyer resells the drugs.

Indeed, Colon himself confirmed these expectations in stating that he typically provided credit to Rojas if Rojas had a ready customer thereby ensuring prompt payment and in stating that he would sometimes wait for payment around the corner from High Street while Rojas sold the drugs. GA 348-50. Given Colon's vested interest in Rojas' street sales, this too was a factor that justified the jury's finding that Rojas was a member of the charged conspiracy.

c. *United States v. Gore* is inapplicable to the facts of this case.

Defendant argues that because the evidence here shows only that Rojas intended to sell drugs that he acquired from Colon, *United States v. Gore*, 154 F.3d 34 (2d Cir. 1998) dictates that defendant cannot be a member of the

charged conspiracy. Def. Br. at 15. *Gore* is inapplicable to the facts of this case.

In *Gore,* the prosecution provided the jury with no evidence that the defendant had ever spoken, met, or even associated with the other 22 co-conspirators charged in the same indictment, let alone had any contact with the conspiracy's leader. The *Gore* defendant was an individual named Wells, who was charged with conspiracy to possess with intent to distribute heroin based on a single sale of 0.11 grams of heroin branded "Fuji Power" to a confidential informant ("CI"). *Id*. at 38. During the transaction, Wells was recorded saying that the CI had not paid him the full amount owed. *Id*. Wells then referred, in vague terms, to an unnamed third party who had supplied him with heroin in the past, stating that Wells did not "want to lose face" with this unnamed supplier by failing to pay him. *Id*.

Despite having no other evidence of Wells' unnamed supplier or evidence that Wells had any contact with his 22 co-conspirators, the prosecution argued that Wells "was *de facto* part of a narcotics conspiracy to sell 'Fuji Power' [heroin]" because he "had to have a supplier in order to sell his drugs." *Id*. at 39. The prosecution further argued that the one recorded statement between the CI and Wells "verified the existence of a supplier to whom Wells would 'lose face' were he not paid by [the CI]." *Id*.

In light of the government's "meager evidence," *id*. at 41, the Second Circuit held: "Here, the record is devoid of any conspiratorial conduct. Without more, the mere buyer-

seller relationship between Wells and [the CI] is insufficient to establish a conspiracy." *Id*. at 40. The Court further found that Wells' remarks about not wanting to "lose face" with his unnamed supplier, "standing alone," were "legally insufficient to show a conspiratorial agreement to distribute drugs made between Wells and that unknown source." *Id*. The Court also held that while Wells' statement "may imply more than one transaction, it gives no specific indication of the exact nature of that transaction or the quantity of drugs involved." *Id*. at 41. Accordingly, the Court reversed Wells' conviction and ruled that "it would be sheer speculation for jurors to conclude that an agreement to distribute drugs had been made." *Id*.

Gore had a very unique set of facts that does not warrant a broader applicability to this case. Indeed, the record evidence here bears no resemblance to that considered by this Court in *Gore*. In contrast to the fleeting and speculative relationship between the defendant in Gore and his unknown supplier, Rojas had a direct, long-term relationship for standardized amounts of crack cocaine with Colon, repeatedly dealt with Colon on a credit basis, was aware of other co-conspirators and had direct dealings with those other persons at Colon's direction and indicated an intent to deal exclusively with Colon.

In summary, from the record evidence, a reasonable jury could have concluded that Rojas agreed to participate in and advance the goals of the charged conspiracy as a

co-conspirator, rather than simply being in a buyer-seller relationship with Colon.

II. The district court properly recalled the jury to correct the initial mis-reading of the jury verdict form where the jury had not dispersed and had remained intact.

A. Relevant facts

On May 16, 2006, the jury rendered its verdict, finding the defendant guilty of one count of conspiracy to possess with the intent to distribute, and to distribute, 5 grams or more of cocaine base and two counts of use of a telephone to facilitate a drug trafficking felony. DA 19. The jury completed a written verdict form to this effect. DA 126-29 The clerk of the court read the verdict form and thereafter the jury was polled. DA 100-108. Each juror assented to the verdict as read by the clerk of the court. DA 106-108.

However, when the clerk of the court read the jury verdict form for the record, it was apparent to the parties that, with respect to each of the telephone counts, that the clerk, rather than stating "cocaine base" as charged in the telephone counts and specifically set forth in the verdict form with respect to those counts, had merely said the word "cocaine." DA 108-109. At the time, the parties believed that the clerk's rendition of the verdict form as to the conspiracy count had been correct. DA 108, 118. Accordingly, the district court asked the clerk to re-read the verdict form as to the telephone counts and re-poll the jury. DA 108-109.

The court explained the reasons for the re-reading of the verdict form to the jury and specifically stated that the court wanted "to ensure that your verdict is as to cocaine base and not as to cocaine. . ." DA 108-109. The clerk did so and the jurors individually assented to the corrected reading as to the telephone counts. DA 109-112. The court then announced the jury was discharged, but asked them to remain in the jury room so that the court could thank them personally for their service. DA 114. All members of the jury did so. DA 116, DA 121-22.

After the jurors left the courtroom, the parties again reviewed the transcript of the clerk's reading of the verdict form and realized that the clerk had also misread the jury's quantity finding with respect to the conspiracy count, stating "five grams or more of a mixture and substance containing a detectable amount of cocaine" rather than "cocaine base." DA 115-16. Within six minutes of the jurors having retired to the deliberation room, the district court was notified of the discrepancy with respect to the conspiracy count. DA 114-15.

After some discussion with the parties, the jurors, all of whom were still present in the jury deliberation room, were brought back into the courtroom. DA 121-22. The district court again explained to the jury the reason that they had been asked to return to the courtroom and specifically stated that, with respect to the conspiracy count also, the court clerk had "read the word cocaine only and didn't read the words cocaine base. . ." DA 122. The clerk then correctly re-read the verdict form and the jury was re-polled as to the verdict. DA 122-24. Each juror

then gave their assent to the verdict. DA 122-24. The district court then again discharged the jury. DA 125.

B. Standard of review and governing law

1. Standard of review

A district court's interpretation of a federal rule is reviewed *de novo*. *United States v. Camacho*, 370 F.3d 303, 305 (2d Cir. 2004)(reviewing *de novo* district court's interpretation of what constitutes "final judgment" for purposes of Fed. R. Crim. P. 33). Any error in that interpretation is reviewed for harmlessness. Fed. R. Crim. P. 52(a) provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." The proper test for harmless error under Rule 52(a), which applies if a claim of non-constitutional error has been properly preserved in the district court, is whether the appellate court has a fair assurance that the error did not substantially affect the verdict. *See Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946); *United States v. Yousef*, 327 F.3d 56, 121 (2d Cir. 2003).

2. Governing law

Fed. R. Crim. P. 31(d) provides:

(d) Jury Poll. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If a poll reveals a lack of unanimity, the court may direct the jury

to deliberate further or may declare a mistrial and discharge the jury.

The district court's pronouncement alone that a jury is "discharged." does not preclude a jury from being recalled. *Summers v. United States*, 11 F.2d 583 (4th Cir. 1926). A jury "may remain undischarged and retain its functions, though discharge may have been spoken by the court, if, after such announcement, it remains an undispersed unit, within control of the court, with no opportunity to mingle with or discuss the case with others, and particularly where. . . the very case upon which it has been impaneled is still under discussion by the court, without the intervention of any further business." *Id.* at 586.

C. Discussion

1. The district court properly recalled the jury where it had not dispersed and remained intact.

The defendant contends that once the jury was pronounced discharged, the district court did not have the authority to recall the jury to correct the error in the reading of the jury's verdict. Def. Br. at 17. However, the district court's mere intonation of the word "discharged" does not have legal significance in and of itself. *Summers* is instructive in this regard.

In *Summers*, the defendant was convicted of two counts of violation of federal penal laws. During the course of jury deliberations, the jury was brought into the

courtroom and the court gave further explanation of a portion of the jury charge that had been previously given. 11 F.2d at 585. Thereafter, the jury resumed its deliberations and subsequently rendered a guilty verdict as two counts with which the defendant had been charged. The court then informed the jury they were discharged for purposes of that particular case. *Id.* Defendant then moved to set aside the verdict on the grounds that he had not been present when the additional explanation of the jury charge had been given. After noting that the jury had not dispersed, the district court set aside the verdict, recharged the jury and instructed them to deliberate anew. *Id.* at 586. The jury did so and returned an identical verdict.

On appeal, the Fourth Circuit Court of Appeals upheld the verdict on the grounds that it was proper to recall the jury, despite the trial court's pronouncement of discharge, where the jury had remained intact and not dispersed into the community. In so holding, the Court stated:

> The duties of a jury ordinarily are presumed to be at an end when its verdict has been rendered, received, and published. If thereupon, with or without further positive direction of the court, it is allowed to disperse and mingle with the bystanders, with time and opportunity for discussion of the case, whether such discussion be had or not, the discharge of the jury becomes final, and its functions are at an end. . . . On the other hand, it may remain undischarged and retain its functions, though discharge may have been spoken by the court, if, after such announcement, it remains an

> undispersed unit, within control of the court, with no opportunity to mingle with or discuss the case with others, and particularly where, as here, the very case upon which it has been impaneled is still under discussion by the court, without the intervention of any further business.

11 F.2d at 586; *see also United States v. Marinari*, 32 F.3d 1209, 1214 (7th Cir. 1994) ("Until the jury is actually discharged by separating or dispersing (not merely being declared discharged), the verdict remains subject to review.") (internal citation omitted); *State v. Colon*, 272 Conn. 106, 284-87 (2004) (jury properly permitted to reassemble and correct verdict where jurors had not dispersed and remained a judicial body under the authority of the court).

Here, as in *Summers*, after the initial mis-reading of the verdict form, the jury remained an intact unit. Although the district court pronounced the jury discharged, the jury retired to the deliberation room pursuant to the district court's instruction. DA 114, 116, 121, 124-25. Within six minutes, the district court was informed that the reading of the verdict form as to the conspiracy count had been incorrect and the parties and the court engaged in a colloquy as to the appropriate manner in which to remedy the problem. DA 115-21.

During this time, the jury remained intact in the jury deliberation room for the purpose of meeting with the court who wished to thank each of them individually for their service. DA 114-21. The fact that the jury was still

intact was repeatedly noted by the district Court. DA 114, 116, 121. Thereafter, the jury was recalled into the courtroom, the verdict was correctly read and the jury was re-polled. DA 122-25. Each juror assented to the correctly read verdict form as to the conspiracy count. DA 123-24. As the jury had remained intact and untainted during this time, the district court properly re-assembled the jury so that the actual verdict the jury has intended was correctly entered.

2. Even if there was error in recalling the jury, any such error was harmless.

Even if there was error in re-calling the jury to correct the verdict, any such error was harmless because the written verdict which embodied the true intent of the jury controls over the misread verdict. In this regard, *United States v. Boone*, 951 F.2d 1526 (9th Cir. 1991), is instructive.

In *Boone*, the defendant had been charged with multiple counts of fraud, tax evasion, interstate transportation of stolen goods and other offenses. In reading the jury's written verdict form at the conclusion of the trial, the court stated that the jury had found the defendant "not guilty" of four counts of which the jury had, in fact, found the defendant guilty on the verdict form. *Id.* at 1530. This error was not realized until after the jury had been dismissed. The district court sentenced the defendant on those four counts in accordance with the guilty finding on the verdict form. *Id.* at 1531.

On appeal, the defendant argued that her conviction on those counts in light of the contrary verdicts was error. The Ninth Circuit Court of Appeals held that the written verdict controlled, that "[i]t would elevate form over substance to find that the misread verdict was the operative verdict" and "[t]o conform the written verdict to reflect the misread verdict would frustrate the jury's intent and the entire jury process." *Id.* at 1533. The Court reasoned that any conclusion that the jurors agreed with the mistaken reading by the trial court required an assumption that the "jurors unanimously changed their minds in a split second" as to those four counts and that, since the jurors did not their own copies of the verdict form, it was "unreasonable to expect the jurors to have corrected the judge's misreading of their verdict and to conclude by their failure to do so have assented to the misread verdicts." *Id.* at 1532.

Here, too, as in *Boone*, it would elevate form over substance if the misread verdict were declared the operative verdict. The indictment against defendant Rojas charged him with conspiracy to possess with the intent to distribute, and to distribute, 5 grams or more of cocaine base. DA 32-33. The evidence at trial focused on the defendant's acquisition of cocaine base from Colon and his sale of cocaine base in the High Street neighborhood. GA 290-94, 336-63. The jury verdict form required a specific finding as to whether the quantity of cocaine base that was the subject of the conspiracy was five grams or more or was less than five grams. DA 127. The jury was not asked to make any quantity findings with respect to cocaine. DA 127.

The jury was given two original verdict forms to complete and, when they entered the courtroom upon reaching a verdict, the verdict forms were handed to the court clerk at the court's instructions. GA 674, DA 100. There is no plausible argument that the jury really intended to convict the defendant of a cocaine, rather than cocaine base offense, and that this intent manifested itself in the brief time between the return of the completed verdict form to the court and the poll of the jury on the misread verdict.

Given that the lawyers for both parties and the court failed to catch the omission of the word "base" upon the initial mis-reading of the verdict, it is more likely that the jurors also did not notice the omission of the same word. That the jurors' true intent was to find the defendant guilty of a cocaine base offense is further highlighted by the fact that, when the telephone counts were re-read correctly *after* the court told the jury "I want to make sure your verdict is as to cocaine base and not as to cocaine, okay," DA 109, every juror assented to the re-read verdict. DA 109-112. Not one came forward to say that the intent of the jury or any individual juror had been to find the defendant guilty of a cocaine offense.

Likewise, when the jury was brought back into the courtroom for the conspiracy count to be re-read, the court again explained that the word "base" had been omitted in the reading of the verdict form on the conspiracy count and that the court wanted to make sure that the verdict as reflected in the form was the jury's verdict. DA 122. Again, being aware of the precise issue, the jury assented

to the corrected reading of the verdict form. DA 123-24. Not a single juror indicated that she or she had intended to find defendant guilty of a cocaine offense. Had the verdict form as to the conspiracy count also been re-read correctly at the time the telephone counts were re-read, it is likely that the jury would have assented to the corrected verdict and made clear their intent to convict defendant of conspiracy to possess with the intent to distribute cocaine base as charged in the Indictment. Any "inconsistency" in the verdicts now claimed by the defendant, Def. Br. at 17, is not one of any substance, but a hyper-technical one based on an inadvertent omission by the court clerk.

In summary, on the factual record here, the written verdict form is the operative verdict, and any error in the court's re-assembly of the jury was harmless in that it did not implicate any substantial rights and did not have any effect upon the outcome of the proceeding. On this factual record, any contrary result would undermine the integrity of the jury process. Accordingly, there is no basis to set aside the jury's verdict as to the conspiracy count and the defendant's conviction on that count should be affirmed.

Conclusion

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

Dated: April 22, 2010

Respectfully submitted,

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

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 13,214 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

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ADDENDUM

21 U.S.C. § 841(a)

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. § 841(b)(1)(B)

(b) Penalties

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

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

. . .

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

. . .

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or

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

21 U.S.C. § 846

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the

same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 843(b)

It shall be unlawful for any person to knowingly or intentionally to use any communication facility in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter.

Rule 29 of the Federal Rules of Criminal Procedure (Motion for a Judgment of Acquittal)

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

(b) *Reserving Decision*. The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is

discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) *After Jury Verdict or Discharge*.

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

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

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

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

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

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

(3) Appeal.

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

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

Rule 31 of the Federal Rules of Criminal Procedure. (Jury Verdict)

....

(d) Jury Poll. After a verdict is returned but before the jury is discharged, the court must on a party's request, or may on its own, poll the jurors individually. If the poll reveals a lack of unanimity, the court may direct the jury to deliberate further or may declare a mistrial and discharge the jury.

Rule 52 of the Federal Rules of Criminal Procedure (Harmless and Plain Error)

....

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