

# 09-1725-cr

*To Be Argued By:*  
H. GORDON HALL

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## United States Court of Appeals

**FOR THE SECOND CIRCUIT**

**Docket No. 09-1725-cr**

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UNITED STATES OF AMERICA

*Appellee,*

-vs-

MAURIEL GLOVER, also known as Feet, ROSHAUN HOGGARD, also known as Foot, GENERO MARTE, also known as G, ROBERT RAWLS, CHARLES BUNCH, also known as June, CHRISTOPHER LAMONT SHERMAN, also known as C-L, TORRANCE MCCOWN, also known as Terrance McCown, Jake, WILLIAM HOLLY, also known as L-O, JASON MARCEL DOCKERY, KENNETH THAMES, also known as K-T,

(For continuation of Caption, See Inside Cover)

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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,*

WILLIAM BALDWIN

*Defendant-Appellant,*

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## **Statement of Jurisdiction**

The district court (Janet C. Hall, J.) had subject matter jurisdiction over this federal criminal prosecution under 18 U.S.C. § 3231. The district court entered a final judgment as to Baldwin on April 23, 2009. Appendix (“A”) 22. On April 21, 2009, Baldwin filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). A22. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291.

**Statement of Issues  
Presented for Review**

1. Was the evidence presented at trial sufficient to support Baldwin's conviction on drug conspiracy charges where the jury heard (1) evidence establishing the existence of a conspiracy, (2) telephone calls in which Baldwin ordered significant quantities of crack cocaine from the leader of the conspiracy, and (3) testimony about Baldwin's post-arrest statement in which he stated that the crack cocaine found on him came from the leader of the conspiracy?

2. Did the district court abuse its discretion in declining to instruct the jury that it may draw an adverse inference from the failure of the government to call a witness, when the witness was equally unavailable as a witness to both parties?

# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 09-1725-cr**

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UNITED STATES OF AMERICA,

*Appellee,*

-vs-

WILLIAM BALDWIN

*Defendant-Appellant.*

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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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#### **Preliminary Statement**

The defendant was convicted by a jury on a drug conspiracy charge. On appeal, he challenges the sufficiency of the evidence to support his conviction, and the district court's failure to give a "missing witness" instruction that would have told the jury that it could draw an adverse inference from the government's failure to call a co-conspirator as a witness.

The evidence presented at trial during the government's case-in-chief was substantial and credible, and left no reasonable doubt as to the guilt of the defendant. Further, far from abusing its discretion, the district court made a sound decision based on settled, controlling law when it declined to give a missing witness instruction to the jury. The jury's verdict and the judgment in the case should therefore be affirmed.

### **Statement of the Case**

On January 8, 2008, a federal grand jury in New Haven, Connecticut returned an indictment against 17 individuals, including the defendant, William Baldwin, charging Baldwin and others with one count of conspiracy 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)(iii). A3. On September 23, 2008, a superseding indictment was returned containing essentially the same charges, but with technical changes. A13.

Starting on December 8, 2008, Baldwin and one co-defendant were tried before a jury and the Honorable Janet C. Hall, U.S.D.J. A18. On December 9, 2008, following completion of the government's case, Baldwin made an oral motion for judgment of acquittal, which the district court took under advisement. A18. On December 12, 2008, the jury returned a verdict of guilty as to Baldwin on count one of the superseding indictment. A19. On December 18, 2008, Baldwin moved the district court to set aside the verdict, and made a renewed motion for judgment of acquittal. A19. On March 16, 2009, the

district court denied the motions to set aside the verdict and for acquittal. A21, Government Appendix (“GA”) 853-63.

On April 21, 2009, the district court sentenced Baldwin to 240 months of imprisonment and ten years of supervised release. A21-22, A107. That same day, Baldwin filed a timely notice of appeal. A22, A110.

The defendant is in custody serving the sentence imposed by the district court.

**Statement of Facts and Proceedings  
Relevant to this Appeal**

Baldwin and one co-defendant were tried before a jury in a four-day trial on the charge that they – along with multiple others – conspired 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)(iii). A3, A13, A18-19. During the trial, the government presented, principally, the testimony of special agents of the Drug Enforcement Administration, several local law enforcement officers, and two individuals who had been charged along with Baldwin, but who had entered guilty pleas pursuant to written plea and cooperation agreements. In addition, the government presented various items of physical evidence, and scores of tapes of cellular telephone conversations which had been intercepted pursuant to orders of the district court, including a number in which Baldwin participated.

## **A. Overview of the investigation**

Special Agent Uri Shafir of the Drug Enforcement Administration testified that during 2007, he and his colleagues in the DEA participated in an investigation into suspected crack distribution by Mauriel Glover. GA47.<sup>1</sup> The investigation employed a number of techniques, GA48-50, including supervised or controlled purchases of crack cocaine from Glover. GA79. Specifically, on January 19 and 30, 2006, and on May 7, July 30 and September 5, 2007, informants, working at the direction of the investigators, purchased quantities of crack cocaine from Glover. GA79-97. The government introduced these purchased drugs into evidence, GA79-97, and the parties stipulated that these exhibits were crack cocaine, in amounts of 12.8 grams, 27.3 grams, 27.6 grams, 22.7 grams and 58 grams, respectively. GA494.

In addition to controlled purchases, the investigation also included from September 19, 2007 through November 16, 2007, the court-authorized interception of wire communications occurring over a cellular telephone used by Glover. GA55, GA60. In the course of the trial,

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<sup>1</sup> The government has submitted a proposed Government Appendix, with the entire trial transcript and transcripts from many, although not all, of the recorded phone calls played at trial. The government has attempted to be over-inclusive in its inclusion of recorded call transcripts, but, of course, if the Court would like transcripts from additional calls, or to hear the recorded calls themselves, the government can provide those in a supplemental appendix.

portions of these recorded telephone calls were admitted into evidence and played for the jury. GA190-92 (admitting audiotapes).<sup>2</sup> A review of these recorded calls established that, among the participants in the calls were Mauriel Glover, Jason Dockery, William Holly and the defendant William Baldwin. GA65-68.

**B. Inside the conspiracy – testimony by cooperating witnesses**

Two cooperating witnesses provided testimony about the operation of the Glover crack conspiracy. First, Jason Dockery, a co-defendant who testified pursuant to a cooperation agreement with the government, GA178-81, testified that beginning on September 8, 2007 (his twentieth birthday), he assisted Glover in conducting his crack distribution activity. On that date, Glover promised to give Dockery \$100 to hold three to five eight-balls for him.<sup>3</sup> GA169-72. Thereafter, Glover proposed to pay

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<sup>2</sup> The government provided transcripts of the telephone calls as aids for the jury. *See* GA70 (identifying transcripts of telephone calls). The court instructed the jury that the transcripts were not evidence themselves but were merely being provided as an aid to assist the jury as they listened to the recordings. GA192-93.

<sup>3</sup> SA Shafir testified from his training and experience that “eight-ball” is a slang reference to a quantity of crack cocaine weighing approximately 3.5 grams, or one-eighth of an ounce, and that a “dime bag” is a bag of crack containing a smaller quantity than an “eight-ball,” which sells for \$10. GA100.  
(continued...)

Dockery to sell eight-balls for him at the rate of \$100 for every three to ten eight-balls sold. GA173-74. Dockery agreed. Under the terms of their arrangement, Glover would provide eight-balls to Dockery, and call him using a cellular telephone to tell him about the existence and location of customers. After Dockery sold the crack, he would return the money to Glover. GA174-75.

Dockery also explained the coded language he used with Glover to conduct their drug trade. For example, in one recorded conversation played for the jury, Dockery explained that Glover had directed him to bring an eight-ball of crack to one of Glover's customers. GA198 (describing Exh. T-26). According to Dockery, the code Glover used in the call for "one eight-ball" was "Monday." In this same code, "Tuesday" would mean two eight-balls, and "Wednesday" would mean three eight-balls. GA199. Dockery testified that, following this call and another one in which Glover told the customer that Dockery would come to see him (Exh. T-27), Dockery delivered one eight-ball of crack to Glover's customer in exchange for \$100, which he then gave to Glover. GA200. Dockery went on to testify about a number of other intercepted calls in which he explained that Glover directed him to bring specific quantities of crack to customers using the same code. For example, in four calls (Exhs. T-28, T-36, T-38, T-50), Glover used the code "Monday," which Dockery

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<sup>3</sup> (...continued)

According to SA Shafir, during the investigation, "eight-balls" cost approximately \$100, and ounces of crack cocaine cost between \$800 and \$1,000. GA101.

said was a reference to one eight-ball of crack. In another call, Glover used the code “Tuesday” as a reference to two eight-balls of crack. GA200-210 (Exh. T-39).

While Dockery provided the “seller’s view” of the drug conspiracy, the second cooperating witness, William Holly, provided the “buyer’s view.” Holly, another co-defendant who testified pursuant to a cooperation agreement, GA246-48, stated that he was a crack customer of Mauriel Glover, and had been purchasing crack from Glover since July 2007. GA250-51. Holly stated that he would cut the crack he received from Glover into dime bags, 25 to 30 per eight-ball, and sell them to customers in the Newhallville neighborhood of New Haven for ten dollars each. GA253.

According to Holly, to purchase crack from Glover, he would contact Glover at Glover’s cellular telephone number and use a code to indicate to Glover the quantity of crack he wished to purchase. GA251-52. Holly testified that he used the code “Monday” to indicate one eight-ball, “Tuesday” to indicate two eight-balls, “Wednesday” to indicate three eight balls, “Thursday” to indicate four eight-balls, and “Friday” to indicate five eight-balls. GA252.

Holly explained this code further by describing several recorded telephone conversations, played for the jury, in which he participated with Glover, and in which he ordered from Glover, or otherwise discussed with Glover, quantities of crack. For example, in one recording, Holly explained that he ordered two eight-balls of crack from

Glover using the code, “Tuesday.” GA260 (Exh. T-7). In another recording, Glover asked Holly whether he wanted “Monday or Tuesday,” and Holly understood Glover’s coded reference to be to one or two eight-balls of crack. GA261-62 (Exh. T-10). Describing yet other calls, Holly explained that he ordered one eight-ball of crack from Glover using the code “Monday,” GA261-62, and used the code “Friday” to order five eight-balls. GA264 (Exh. T-23).

In addition to this days-of-the-week code, Holly explained other coded language in his calls with Glover. For example, Holly explained that when he told Glover to “bring another one,” he was indicating to Glover that he wished to purchase one more eight-ball of crack. GA263 (Exh. T-18). And when he told Glover in another call that “this shit doesn’t even look like three,” he was complaining to Glover that an eight-ball he purchased from Glover, which had been delivered to Holly by co-defendant Jason Dockery, appeared to him to weigh less than three grams. GA265 (Exh. T-29).

### **C. Surveillance of Baldwin – the October 11, 2007 vehicle stop and subsequent events**

On October 11, 2007, DEA Special Agent Raymond Walczyk directed law enforcement colleagues to conduct surveillance in the area of Edgewood and Norton Streets in New Haven for the purpose of positively identifying the individual (later determined to be the defendant, William Baldwin) with whom Glover was speaking in a series of intercepted calls. GA332. SA Walczyk directed other units

to the area of 34-36 Ivy Street, as the investigators had identified that location as one at which Glover resided and stored crack. GA333.

In the first call in the series, A33-35 (Exh. T-32), Baldwin told Glover that he was at “Sherman and Edgewood,” a location in New Haven, and agreed that Glover should bring to him “the usual.” In the next two calls, which took place within minutes of the first call, the two men exchanged location information as Glover made his way to Baldwin. A36-39 (Exhs. T-33, T-34). As they did so, SA Walczyk determined that Baldwin was using telephone number 203 430-8192. GA334.

While this was taking place, surveillance units observed a black Ford Mustang driven by Glover depart 34-36 Ivy Street and travel to the area of Edgewood and Norton Streets. GA330. Also in the area at that time, investigators observed a red Nissan Altima. GA340. Officer Brian Paszak of the New Haven Police Department testified that he saw the black Mustang, which was later found to contain Glover, and the red Nissan, which was later found to contain Baldwin, parked near each other. GA369. He testified that he saw an occupant of the Nissan leave that car, approach the Mustang, and enter the Mustang. *Id.*

Following the interception of the third call, A38 (Exh. T-34), surveillance agents in police uniforms and operating a marked New Haven police car, GA332, stopped the red Nissan in an effort to identify the individual who had met with Glover. GA359, GA371.

When they stopped the Nissan, there were three people in the car, including Baldwin, who was a passenger in the rear seat. GA335, GA340-42. At the time of the stop, Baldwin was observed by Officer Paszak using cellular telephone number 203 430-8192, and was talking to Glover in an intercepted call. *See* A40-41 (Exh. T-35), GA335-37. In this call, Baldwin told Glover that “the jakes [police] . . . pulled me over.” A40-41.

Officers at the scene searched the vehicle and Baldwin, but found no drugs. GA342-43. As SA Walczyk explained, the investigators did not search the other two occupants of the car because they wanted this encounter to appear to be nothing more than a vehicle stop. They felt that, had they pulled everyone out of the vehicle and searched everyone, it could have compromised their long-term drug investigation, causing Glover to change telephones, and frustrating the on-going wiretap. GA358-59. Following the stop, the investigators determined that Baldwin was the subject of outstanding arrest warrants, so he was taken into custody, processed, and released. GA359-60.

Several days after the October 11 vehicle stop, Baldwin spoke to Glover again about the vehicle stop in an intercepted call. *See* A42-47 (Exh. T-40). Baldwin told Glover that after the stop, he had gone to jail. Glover asked Baldwin, “Did you go to jail for . . .?” Baldwin replied, “Nah . . . I didn’t get caught with nothin’ or nothin’.” He told Glover that he had been arrested for an outstanding warrant, but remarked “that shit was some crazy shit, how right after that happened, they just come and storm my car and shit.” When Glover asked why

Baldwin had been pulled over, Baldwin replied, “I don’t know, that’s why I was trying to see if they fucked with you.” Glover then explained that, right after he met with Baldwin on the night of the stop, he left the area rapidly with his lights off. After further conversation about the stop, Baldwin told Glover, “I need you to touch me in the morning.” Glover said, “Don’t even say nothing . . . Just call me first thing in the morning and I’ll talk to you in person.”

The following day, the two men spoke again in an intercepted call. *See* A48-53 (Exh. T-41). In that call, Baldwin asked Glover whether he also had been pulled over after the two had met on the evening of October 11. Glover assured Baldwin that he had not been pulled over or arrested, stating that, “I’m not pulling over for nothing. I don’t do the pullovers, especially . . . I don’t care if it’s clean, whatever . . . I don’t pull over.” Having determined that Glover had not been accosted by the police prior to his own vehicle stop, Baldwin ended the conversation.

#### **D. Additional calls between Glover and Baldwin**

In addition to the evidence surrounding the October 11 vehicle stop, the government presented a number of recorded conversations between Glover and Baldwin. For example, in a conversation recorded October 27, 2007, Glover asked Baldwin if Baldwin “would have that right now.” When Baldwin said he did, Glover indicated that he would “swing by.” Baldwin then asked Glover if “it” was for “that seven.” Glover replied, “No, the one-four.” Then Glover clarified, “You gave me the seven already. . .from

the one-four, you know what I mean, this other thing.” Baldwin then said, “You said Thursday?” After that, Glover told Baldwin that he would come by. A67-70 (Exh. T-48).

After this call was played for the jury, SA Shafir testified that there are seven grams in one-quarter ounce, and fourteen grams in one-half ounce. GA419. He also testified that, based on the investigation, he knew that Glover used the code “Thursday” to mean four eight-balls, or fourteen grams, of crack. *Id.*

In another conversation between Glover and Baldwin played for the jury, on September 29, 2007, Baldwin asked if Glover could give him some “soft.” Glover replied that he could not, and that it would be “a little more, too.” When Baldwin asked, “Like what?”, Glover told him, “Like nine,” and told him that it would not be until later in the week. Glover then asked Baldwin, “You ready for the other, though?” Baldwin replied in the affirmative, and the two arranged to meet.

After the call was played, SA Shafir testified that he had heard the term “soft” in relation to discussions of powder and crack cocaine, and that the term “soft” pertained to powder cocaine. GA420. He also stated that, during the investigation, he and his colleagues had made supervised purchases of ounces of crack from Glover, and they had paid roughly \$800 per ounce, or “a little” less than \$900. *Id.*

In another series of intercepted calls between Baldwin and Glover, Baldwin asked Glover for a “half-time report,” A24-26 (Exh. T-8); another “half-time report,” A30-32 (Exh. T-20); the “uzhe . . . a half-time report,” A71-72 (Exh. T-51); “another of the same thing that I just got from you,” A73-74 (Exh. 52); “the usual,” A33-35 (Exh. T-32); “the usual,” A59-61 (Exh. T-45); and “a half-a-sub, yo . . . you know what I mean, you get what I’m saying?” A62-63 (Exh. T-46).

At the conclusion of this series of calls, the government played another intercepted call between Baldwin and Glover. A64-66 (Exh. T-47). In that call, Baldwin asked Glover to “come by.” Glover then inquired, “What, Mon- . . . Mon- . . . Tuesday, Monday, Tuesday . . . ?” Baldwin replied, “All the time.” Glover then stated, “The usual, right?” The two agreed.

#### **E. Baldwin’s arrest and statement**

On January 10, 2008, SA Shafir and other law enforcement officers arrested Baldwin at the Connecticut Superior Court Office of Probation. GA425. Officer Craig Casman of the West Haven Police Department testified that after his arrest, he (Casman) placed Baldwin in a cell at the West Haven Police Department and, as part of police procedure, searched Baldwin. GA479. During the search, Officer Casman and his colleagues recovered a package which fell out of Baldwin’s pants. GA480. The package contained, among other things, numerous small, zip-lock bags containing crack, GA493, as well as empty zip-lock bags typical of bags used to package crack for re-

sale, GA488. The parties stipulated that the package contained a total of 5.4 grams of crack. GA494.

Subsequently, Baldwin waived his *Miranda* rights and told investigators that the crack which had been seized from him that day came from Mauriel Glover. GA469.

### **Summary of Argument**

I. The evidence presented at trial was sufficient to support the jury's verdict of guilty as to Baldwin on the charge of conspiracy to possess with intent to distribute and to distribute 50 grams or more of crack.

First, the evidence easily supported a finding that there was a drug distribution conspiracy between Mauriel Glover, Jason Dockery, and Glover's crack customers. Dockery testified that he sold crack for Glover during the dates alleged in the superseding indictment. This testimony was corroborated by five controlled purchases of crack from Glover by government informants, and also by recordings of intercepted telephone conversations between Glover and Dockery, and Glover and apparent crack customers. Dockery's testimony was complemented by the testimony of William Holly, who testified that, during the dates alleged in the superseding indictment, he repeatedly purchased crack from Glover, sometimes delivered by Dockery, which he resold in the Newhallville neighborhood of New Haven. As in the case of Dockery, Holly's testimony was corroborated by recordings of intercepted telephone conversations between Glover and Holly in which Holly arranged to purchase crack.

Second, the evidence was more than sufficient to establish that Baldwin knowingly participated in the Glover drug conspiracy. For example, the jury heard recorded conversations between Baldwin and Glover in which Baldwin arranged to obtain quantities of crack from Glover, in total, far in excess of 50 grams. Baldwin's involvement was corroborated by the testimony surrounding the events of October 11, 2007. On that date, the evidence showed that Baldwin interacted with Glover following a suspect intercepted telephone call, and called Glover while he was being arrested and several times thereafter to discuss the matter. Finally, Baldwin's participation in the conspiracy was also corroborated by the seizure from him at the time of his arrest of more than 5 grams of crack, secreted in his pants, and packaged for resale, as well as his own *Mirandized* statement that he had obtained the seized crack from Glover.

In short, the evidence against Baldwin, viewed in the light most favorable to the government, was more than sufficient to support the jury's verdict of guilty.

II. The district court properly exercised its discretion by declining to deliver a missing witness instruction to the jury. The defense failed to establish that Mauriel Glover was peculiarly within the power of the government to call as a witness. Indeed, on the record before the district court, the court properly found that he was equally unavailable to both parties. The court assumed that Glover would assert his right not to testify if called as a witness, and found that there was no reason to question the government's decision not to immunize him. Because Glover had repeatedly

changed his story, there was no reason to believe that his testimony would be unfavorable to the government and thus no reason to believe the government had refused to immunize an exculpatory witness.

Because Glover was equally unavailable to both parties, the district court properly decided to give no “missing witness” instructions, and left it to the parties to argue about his absence in summation. On this record, this decision was not an abuse of discretion.

## Argument

### **I. The evidence at trial was sufficient to support a finding that Baldwin joined and participated in the Glover drug-trafficking conspiracy**

#### **A. Relevant facts**

The relevant facts as presented at trial are set forth in the “Statement of Facts” above.

At the conclusion of the government’s case-in-chief, the defendants on trial moved for judgment of acquittal. A18. The court reserved decision. A18. Thereafter, the jury returned a verdict finding Baldwin guilty on the crack conspiracy charge. A19. Baldwin then renewed his motion for judgment of acquittal. A21.

The district court denied Baldwin’s post-verdict motions for judgment of acquittal, to set aside the verdict and for a new trial in a written ruling. GA853-63. The court found “that the evidence presented at trial was sufficient for a reasonable jury to conclude that Baldwin was guilty of conspiracy to possess with intent to distribute, and to distribute, fifty grams or more of cocaine base.” GA857.

In reaching this conclusion, the court identified several particular portions of the trial record. The court, noted for example, that Baldwin and Glover had participated in multiple telephone calls, and that in one of those calls, Baldwin used the code for four eight-balls of crack,

“Thursday.” GA858-59 (citing Exh. TT-48); *see* A69. The court noted that the use of the coded word for drugs by conspirators was corroborated by the testimony of a cooperating witness, and noted further that Baldwin’s use of the code constituted “evidence that he was aware of, and part of, the conspiracy.” GA859. The court also observed that the same intercepted call demonstrated a drugs-on-credit relationship between Baldwin and Glover, an additional indication of a knowing, conspiratorial relationship between the two men. *Id.* Finally, the court pointed to additional evidence supporting the guilty verdict, including drugs found on Baldwin at his arrest and his statement that he obtained the drugs from Glover. GA860.

The district court rejected Baldwin’s claim that the trial evidence fell short of establishing his involvement in a conspiracy, and demonstrated only a buyer-seller relationship between Baldwin and Glover. GA860-62. In support of this conclusion, the court made five succinct points. First, the court noted that the sixteen calls between Glover and Baldwin over the course of the conspiracy established “prolonged cooperation.” GA861. Second, the court noted the evidence showed “evidence of mutual trust between Baldwin and Glover, as a result of the drugs on credit, which evidences both parties’ knowledge and involvement in the conspiracy.” GA861. Third, the court noted that Baldwin used a code, as well as euphemisms such as “the usual” and “the uzh” which indicated that Baldwin and Glover engaged in “standardized dealings.” *Id.* Fourth, the court described a call from Baldwin to Glover intercepted after Baldwin’s first arrest in which

Baldwin told Glover no contraband had been seized indicating a guilty relationship between the two men. *Id.* Finally, the evidence of the quantity of drugs flowing from Glover to Baldwin during the investigation, “indeed 50 grams or more,” showed that Baldwin was a conspirator rather than a mere buyer. GA862.

## **B. Governing law and standard of review**

### **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. Huevo*, 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. The conspiracy alleged in the superseding indictment existed**

Baldwin does not seriously argue that the trial evidence failed to establish the first element of the offense of conviction, namely that a crack distribution conspiracy existed. *See* GA858 (district court noting that Baldwin did not challenge fact that conspiracy existed). For good reason. The jury reasonably could have concluded from the evidence that the Glover drug-trafficking conspiracy existed as alleged in the superseding indictment. The evidence presented during the government’s case-in-chief, with all reasonably available inferences, viewed in the light most favorable to the government, established beyond any reasonable doubt that the conspiracy to possess with intent to distribute, and to distribute, 50 grams or more of crack alleged in the superseding indictment existed.

The jury reasonably could have concluded that the Glover drug-trafficking conspiracy existed based *first* on evidence that Glover was personally involved in distributing crack cocaine. Specifically, the jury heard evidence that on five separate occasions, government

informants purchased crack cocaine from Glover in controlled purchases, and that the amount of cocaine in those purchases ranged from 12.8 grams to 58 grams. GA79-97, GA494. From this evidence, there was no doubt that the Glover conspiracy was trafficking more than 50 grams of crack.

*Second*, the jury heard testimony from two cooperating witnesses, a co-worker and a customer of Glover's, who corroborated the existence of the conspiracy, and described the operation and "language" of the conspiracy. The co-worker, Dockery, testified about the operation of the conspiracy, explaining how he sold crack cocaine with Glover: Glover would provide him eight-balls and then call him on a cellular telephone to tell him where to find customers. After the sale, Dockery would return the money to Glover. GA174-75. Dockery also explained the "code" he and Glover used for street-level transactions: "Monday" was one eight-ball, "Tuesday" was two eight-balls, and "Wednesday" was three eight-balls. GA199. In conjunction with this testimony, Dockery testified about a number of recorded telephone conversations in which he said that Glover directed him to bring specific quantities of crack cocaine using their code. *See* Exh. T-28 (Glover using term Monday, interpreted to mean a reference to one eight-ball of crack); Exh. T-36 (same); Exh. T-38 (same); Exh. T-50 (same); Exh. T-39 (Glover using term Tuesday, interpreted to mean a reference to two eight-balls of crack). GA200-210.

Dockery's testimony was complemented by testimony by another cooperating witness, Holly, one of Glover's

customers. Like Dockery, Holly testified both about the operations and the language of the conspiracy. He explained that when he wanted to buy crack from Glover, he would call Glover on his cellular telephone number and use a code to tell him how much crack he wanted to buy. GA251-52. Holly stated that he would cut the crack he received from Glover into dime bags, and sell them to customers in the Newhallville neighborhood of New Haven for ten dollars each. GA253.

Like Dockery, Holly used the days-of-the-week code to order specific quantities of crack from Glover. Specifically, he used “Monday” to indicate one eight-ball, “Tuesday” to indicate two eight-balls, “Wednesday” to indicate three eight balls, “Thursday” to indicate four eight-balls, and “Friday” to indicate five eight-balls. GA252. Holly provided a number of examples of his use of this code with Glover. For example, in one call, Holly ordered two eight-balls of crack using the code word, “Tuesday.” GA260 (Exh. T-7). In another call, Glover asked Holly whether he wanted “Monday or Tuesday,” and Holly understood Glover’s coded reference to be to one or two eight-balls of crack. On that occasion, he ordered one eight-ball of crack from Glover using the code word “Monday.” GA261-62 (Exh. T-10). And in yet another call, Holly stated that he used the code “Friday,” to order five eight-balls from Glover. GA265 (Exh. T-23).

This testimony from cooperating witnesses about the inner workings of the conspiracy, when combined with the evidence of Glover’s crack cocaine sales to government informants, provided ample evidence that the Glover drug-

trafficking conspiracy existed. Here, the evidence presented by the government proved the existence of the Glover crack distribution conspiracy, and that it involved more than 50 grams of crack.

## **2. Baldwin knowingly participated in the conspiracy**

The evidence was more than sufficient to prove that Baldwin knowingly participated in the Glover crack distribution conspiracy as charged in the indictment. To establish a particular defendant's membership in an alleged conspiracy, the government must present proof of his purposeful behavior aimed at furthering the goals of the conspiracy. *See Chavez*, 549 F.3d at 125. This may be accomplished through circumstantial evidence. *Id.*

In this case, the evidence showing Baldwin's knowing participation in the conspiracy fell into three main categories: (1) evidence about the October 11, 2007 vehicle stop, (2) recorded telephone calls between Baldwin and Glover, and (3) evidence obtained from Baldwin at his arrest, including his post-arrest statement.

*First*, a reasonable jury could infer from the evidence (and reasonable inferences therefrom) that Baldwin and Glover engaged in a narcotics transaction on October 11, 2007. On that day, in a series of intercepted calls, which took place within minutes of one another, Baldwin used telephone number 203 430-8192 to arrange to meet with Glover so Glover could provide him with "the usual." In these calls, they also exchanged location information as

Glover made his way to Baldwin. A33-35 (Exh. T-32); A36-39 (T-34).

While these calls were taking place, surveillance units watched Glover, driving a black Ford Mustang, depart 34-36 Ivy Street and travel to the area of Edgewood and Norton Streets. GA330. Also in the area at that time, surveillance operatives observed a red Nissan Altima. GA340. Officer Paszak observed the black Mustang, which was later found to contain Glover, and the red Nissan, which was later found to contain Baldwin, parked close to one another. GA369. He observed an occupant of the Nissan leave that car, approach the Mustang, and enter the Mustang briefly. *Id.*

Immediately after the meeting, surveillance agents in police uniforms and a marked police car, GA332, stopped the red Nissan and found three people in it, including Baldwin, who was a passenger in the rear seat. GA335, GA340-42. Baldwin was using cellular telephone number 203 430-8192, and was talking to Glover in an intercepted call. GA335-36; A40-41 (Exh. T-35). In that call, Baldwin told Glover that “the jakes [police] . . . pulled me over.” Officers at the scene searched the car and Baldwin but found no drugs. GA340-41. They did not search the other occupants of the car, however, to avoid compromising their investigation. GA358-59.

From this evidence, and against the backdrop of proof of Glover’s crack distribution activity, the jury could reasonably infer that Baldwin and Glover had engaged in a narcotics transaction on the night of October 11. This

conclusion was reinforced by subsequent calls between them. Specifically, several days after the October 11 vehicle stop, Baldwin and Glover discussed the reasons for the stop and what, if anything, had prompted or resulted from the stop. Baldwin told Glover that after the stop, he had gone to jail. A42-47 (Exh. T-40). Glover asked Baldwin, "Did you go to jail for . . .?" Baldwin replied, "Nah . . . I didn't get caught with nothin' or nothin'." He told Glover that he had been arrested for an outstanding warrant, but remarked "that shit was some crazy shit, how right after that happened, they just come and storm my car and shit." When Glover asked why Baldwin had been pulled over, Baldwin replied, "I don't know, that's why I was trying to see if they fucked with you." Glover then explained that, right after he met with Baldwin on the night of the stop, he left the area rapidly with his lights off. After further conversation about the stop, Baldwin told Glover, "I need you to touch me in the morning." Glover said, "Don't even say nothing . . . . Just call me first thing in the morning and I'll talk to you in person."

The following day, in another intercepted call, *see* A48-53 (Exh. T-41), Baldwin asked Glover whether he also had been pulled over after the two had met on the evening of October 11. Glover assured Baldwin that he had not been pulled over or arrested, stating that, "I'm not pulling over for nothing. I don't do the pullovers, especially . . . I don't care if it's clean, whatever . . . I don't pull over." Having determined that Glover had not been accosted by the police prior to his own vehicle stop, Baldwin then ended the conversation.

From this exchange, the jury could reasonably have inferred that, in the call, Baldwin was attempting to determine whether Glover had been pulled over before Baldwin, and had given information to the authorities leading to the stop of Baldwin. Having satisfied himself that this had not occurred, Baldwin continued his narcotics relationship with Glover over the ensuing period.

In addition to this evidence about the events of October 11, the jury heard a *second* category of evidence that helped establish Baldwin's knowing participation in the Glover drug-trafficking conspiracy, namely a series of intercepted calls between Baldwin and Glover. The language Baldwin and Glover used in their taped conversations is, standing alone, very suspicious. However, viewed in the context of the substantial evidence in the record of Glover's pervasive crack distribution activity, and evidence of a drug-related meeting observed and memorialized by surveillance officers, these calls present clear and compelling evidence of Baldwin's knowing participation in the conspiracy charged in the superseding indictment.

The jury could reasonably infer that a conversation between Baldwin and Glover on October 27, 2007 involved a discussion, in part through code words, about payment for previous drug transactions. *See* A67-70 (Exh. T-48). In this conversation, Glover asked Baldwin if Baldwin "would have that right now." When Baldwin said he did, Glover indicated that he would "swing by." Baldwin then asked Glover if "it" was for "that seven." Glover replied, "No, the one-four." Then Glover clarified,

“You gave me the seven already . . . from the one-four, you know what I mean, this other thing.” Baldwin then said, “You said Thursday?” After that, Glover told Baldwin that he would come by.

From this exchange, the jury could reasonably have inferred that Glover was trying to collect money from Baldwin for crack which Baldwin had previously purchased. The jury could have found that Baldwin had previously obtained seven grams of crack (“that seven”), but that Glover was attempting to collect for a different batch of crack, in this case fourteen grams of it, or four eight-balls (“the one-four”). In addition, in the conversation, Baldwin confirmed that the quantity at issue was four eight-balls, by referring to it as “Thursday,” which, according to co-conspirator Holly, was code for four eight-balls.

In this conversation alone, there is evidence of Glover having provided Baldwin with drugs on credit, indicating, not only Baldwin’s guilty involvement, but his relationship of trust with Glover. *See United States v. Hawkins*, 547 F.3d 66, 76 (2d Cir. 2008). There is also the use of the codes “seven,” “one-four,” and “Thursday” to conceal the one-quarter ounce and one-half ounce quantities of crack that were being referred to. *See id.* at 74.

Other conversations provided additional support for the conclusion that Baldwin knowingly participated in the Glover crack-trafficking conspiracy. For example, the jury heard evidence, in a call recorded on September 29, 2007, that the focus of the narcotics relationship between

Baldwin and Glover was crack cocaine. *See* A27-29 (Exh. T-14). In the call, Baldwin asked if Glover could give him some “soft.” Glover replied that could not, and that it would be “a little more, too.” When Baldwin asked, “Like what?” Glover told him, “Like nine,” and told him that it would not be until later in the week. Glover then asked Baldwin, “You ready for the other, though?” Baldwin replied in the affirmative, and the two arranged to meet. After the call was played, SA Shafir testified that he had heard the term “soft” in relation to discussions of powder and crack cocaine, and that the term “soft” referred to powder cocaine. GA420. He also stated that, during the investigation, he and his colleagues had made supervised purchases of ounces of crack from Glover, and they had paid roughly \$800 per ounce, or “a little less” than \$900. Thus, the jury could reasonably have inferred from the call that Baldwin had tried to obtain an ounce of cocaine powder from Glover but, having failed to do so, arranged to purchase an ounce of crack.

Once again, the use of codes and secretive language by Baldwin and Glover illustrates the guilty nature of their relationship, and it also illustrates the trust that existed between them in this regard, as well as the well-established nature of their narcotics relationship.

Finally, the record includes another series of intercepted calls between Baldwin and Glover. As in the case of the above-referenced calls, when viewed against the background of Glover’s documented crack distribution, it did not require speculation or conjecture for a reasonable juror to conclude that the subject matter

discussed by Baldwin and Glover was crack cocaine. Further, the jury could reasonably infer that in each of these calls, Baldwin was attempting to obtain 14 grams of crack from Glover, for a total of well over 50 grams. *See* A24-26 (Exh. T-8) (Baldwin asking Glover for a “half-time report”); A 30-32 (Exh. T-20) (asking for another “half-time report”); A71-72 (Exh. T-51) (asking for the “uzhe . . . a half-time report”); A73-74 (Exh. 52) (“another of the same thing that I just got from you”); A33-35 (Exh. T-32) (“the usual”); A59-61 (Exh. T-45) (“the usual”); A62-63 (Exh. T-46) (“a half-a-sub, yo . . . you know what I mean, you get what I’m saying?”). After these calls, the jury heard another call between Baldwin and Glover in which Baldwin used the days-of-the-week code. *See* A64-66 (Exh. 47). In that call, Baldwin asked Glover to “come by.” Glover then inquired, “What, Mon- . . . Mon- . . . Tuesday, Monday, Tuesday . . . ?” Baldwin replied, “All the time.” Glover then stated, “The usual, right?” The two agreed. The jury could have reasonably inferred that every one of these intercepted calls was an attempt by Baldwin to procure 14 grams of crack from Glover.

In addition to the intercepted calls and testimony about the events of October 11, the jury also heard a *third* category of evidence that established Baldwin’s knowing participation in the Glover crack-trafficking conspiracy: the evidence arising from his arrest. Baldwin was arrested on January 10, 2008, and when he was searched pursuant to police intake procedures, the police found a package containing, among other things, small zip-lock bags with 5.4 grams of crack cocaine. GA479-80, GA488-49, GA493-94. The police gave him his *Miranda* warnings,

and Baldwin told officers that he obtained the crack from Glover. GA469.

Where as here, the jury heard testimony about the vehicle stop on October 11, 2007, listened to numerous recorded calls from which it could reasonably conclude the defendant arranged to obtain crack from the author of the conspiracy, discussed in such calls avoiding arrest for possession of drugs and discussed payment to the author of the conspiracy for drugs previously obtained, and was ultimately arrested in possession of crack packaged for resale, there exists a substantial and sufficient basis for the verdict returned by the jury, and their verdict should not be disturbed.

**3. Baldwin's arguments on the sufficiency of the evidence are meritless**

Baldwin argues on appeal that proof of his involvement was lacking because the testifying co-conspirators did not know him, because he was not observed selling crack during the investigation, because the intercepted calls in which he participated were vague, and did not refer by their terms to crack, and because his post-arrest statement was not believable. These points, taken individually or as a whole, do not undermine the evidence in the record from which the jury could have concluded that Baldwin was a participant in the Glover crack distribution conspiracy.

It is well-settled that an individual need not know the identities of all conspirators to be a member of the

conspiracy himself. *See Sureff*, 15 F.3d at 230. Accordingly, while both of the conspirators who testified at trial, Jason Dockery and William Holly, said they did not know Baldwin to be a co-conspirator, this limit to their knowledge is not, in and of itself, a defect in the government's proof of his membership. So long as there was evidence that the defendant knew that he was "a participant in a general plan designed to place narcotics in the hands of ultimate users," he may be deemed to be a member of the conspiracy. *Rich*, 262 F.2d at 418.

Neither is it a defect that the government offered no direct evidence of Baldwin actually selling drugs. To prove the conspiracy charge, the government did not have to provide direct evidence that Baldwin himself sold drugs. Rather, the government's burden was to establish that Baldwin knew of the existence of the conspiracy, and knowingly joined and participated in it, *see Snow*, 462 F.3d at 68, through his own behavior undertaken to further the conspiracy's aims. *See Chavez*, 549 F.3d at 125. As described in detail above, a substantial portion of the evidence offered at trial did just this.

Finally, Baldwin claims that the conversations in the telephone calls were vague and that his post-arrest statement (identifying Glover as the source of the drugs found in his pants) was inherently incredible. According to Baldwin, because Glover had been arrested one month before Baldwin, and because drug dealers do not typically hold crack cocaine for that long, Baldwin's statement that the drugs came from Glover was implausible. But these were arguments for the jury. Indeed, defense counsel

cross-examined a government witness on the length of time crack was typically held by dealers, *see* GA471-72, and argued to the jury that the appropriate inference to be drawn from the seized crack cocaine was that Baldwin was holding the crack for his own use, not for distribution. GA687-88. On appeal, Baldwin argues another inference from this statement, namely, that he must have been hiding his true source of supply. Of course, the other available inference was that Baldwin truthfully stated that he had obtained the crack from Glover and that, because it was packaged for re-sale, Baldwin was holding it for re-sale. The fact that different inferences can be drawn from the evidence is of no moment. “The possibility that inferences consistent with innocence as well as with guilt might be drawn from the . . . 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).

In short, from the record evidence, a reasonable jury could have concluded that Baldwin agreed to participate in and advance the goals of the charged conspiracy.

## **II. The district court properly exercised its discretion in denying the request for a missing witness instruction**

### **A. Relevant facts**

Following the completion of the presentation of evidence in this case, counsel for Baldwin requested the district court to instruct the jury on a missing witness. A75-77. Specifically, the defense asked the court to instruct the jury that the government was in the best position to produce the witness, but did not do so, and thus the jury could infer that the testimony of this missing witness would have been unfavorable to the government. *See* A75. Defense counsel initially raised the issue in a proceeding regarding charge requests. A78-81. The court then further reviewed the written charge proposed by the defendant, and entertained further argument from the parties. A82-95. The following day, the court indicated that it would not give the requested charge. GA571. The court then allowed the parties to place their positions on the record, and engaged in an extended colloquy with the attorneys. GA571-79. Thereafter, the court placed its ruling denying the charge request of the defense on the record. A96-106.

The missing witness in question was Mauriel Glover. GA783. Glover was mentioned prominently during the trial, as he was portrayed in the government's case as the leader of the crack conspiracy which was the subject of the prosecution. Shortly after his arrest in the case, Glover entered into a proffer agreement with the government and

began providing inculpatory information about various defendants, including Baldwin. On May 20, 2008, he entered a plea of guilty to the conspiracy charge pursuant to a written plea agreement and, in connection with the plea, also entered into a cooperation agreement. GA871. Pursuant to the cooperation agreement, Glover continued to provide inculpatory information about certain of his co-defendants, GA784, and testified briefly at the trial of co-defendants Roshawn Hoggard, Genero Marte and Charles Bunch, which had taken place before the district court several weeks before the trial in the instant case. *Id.*

As much of the conspiratorial activity portrayed by the government's evidence in the instant trial revolved around Glover, it might reasonably have been anticipated that he would have appeared as a government witness in the case. However, on the eve of Baldwin's trial, during a trial preparation meeting with government agents, Glover unexpectedly advised that he had never had narcotics dealings with Baldwin, and had no idea of the meaning of the coded, intercepted narcotics conversations between himself and Baldwin's co-defendant which the government intended to introduce, and did introduce, at trial. GA784-85. This information was in direct contravention of information on the same subjects Glover had previously provided to government agents pursuant to proffer and cooperation agreements. A91-92. Accordingly, government counsel set forth these matters in a letter to defense counsel shortly thereafter. GA4-5 (Court Exh. 1).

Defense counsel argued that Glover was more available to the government than to Baldwin, as Glover

had entered into a cooperation agreement. A82. The government stated that Glover was incarcerated and could be made available on short notice for a court appearance, should the defense desire it. Government counsel represented that there was no information as to whether or not Glover would exercise his right to silence if called. A79, GA572. The defense made no other showing of Glover's unavailability to the defense, other than to advise the court that, in a brief discussion with Glover's attorney, defense counsel had been advised that the attorney would advise Glover to assert his Fifth Amendment rights were he to be called. *Id.* There was no indication that the defense had issued a subpoena for Glover, or that Glover had actually indicated an intention to assert his right to silence. A85.

The government argued that it had no more idea than the defense as to whether Glover would assert his right to silence if called by either party. A79. The government also argued that it labored under the additional stricture that Glover had provided two different, irreconcilable stories about the same subject, the guilt or innocence of the defendants on trial, and that calling Glover as a witness posed an ethical dilemma for the government. A87-88.

The following day, the district court ruled that it would not give the requested instruction. GA571. For the purposes of its ruling, and based on the record made by both counsel, the court presumed that Glover would assert his right not to testify if he were called as a witness. GA785. The court also determined that, because of Glover's background of changing his version of events, it

would be “soundly argued by the government that immunizing him would not be in the public interest.” GA787. Accordingly, the court deemed Glover to be equally unavailable to both parties. GA787-88. Ultimately, because of the repeated proffers Glover had given, and the multiple versions of the truth he had provided, the court observed that Glover as a witness would be problematic for either party, between available direct and cross examinations, GA789, and that, on balance, it would not be fair to infer from his absence that his testimony would be unfavorable to the government. GA790.

At the suggestion of defense counsel, the parties agreed that, given the ruling of the court, neither party would mention the absence of Glover from the trial, with Baldwin maintaining his exception to the court’s ruling. GA576-78.

#### **B. Governing law and standard of review**

“[W]hen a party has it peculiarly within its power to produce witnesses and fails to do so, the ‘jury may infer that the testimony, if produced, would be unfavorable to that party.’” *United States v. Myerson*, 18 F.3d 153, 158 (2d Cir. 1994) (quoting *United States v. Torres*, 845 F.2d 1165, 1169 (2d Cir. 1988) (internal quotation marks omitted)). Where the witness is equally available to both parties, the court faces a choice of one of three paths. It may “(1) give no instruction and leave the entire subject to summations, (2) instruct the jury that no unfavorable inference may be drawn against either side, or (3) instruct the jury that an adverse inference may be drawn against

either or both sides.” *United States v. Caccia*, 122 F.3d 136, 139 (2d Cir. 1997) (citations omitted). This Court has suggested that where a witness is equally available to both sides, a missing witness charge is inappropriate. *See id.* (citing *United States v. Adeniji*, 31 F.3d 58, 65 (2d Cir. 1994)); *see also United States v. Slaughter*, 386 F.3d 401, 403 (2d Cir. 2004) (noting view that missing witness instruction inappropriate where witness equally available, but approving charge on the facts in that case as within the trial court’s discretion). Further, “[n]o instruction is necessary where the unrepresented testimony would be merely cumulative.” *Torres*, 845 F.2d at 1169.

The availability of a witness to a party turns on, not merely physical presence or accessibility, but the facts and circumstances of the witness’s relationship to the parties. *See Myerson*, 18 F.3d at 158. Thus, for example, where a witness had been a government informant and had expressed an unwillingness to be interviewed by defense counsel, he was not meaningfully available to the defense. *See United States v. Saa*, 859 F.2d 1067, 1075-76 (2d Cir. 1988). On the other hand, the failure of the government to immunize a witness who had cooperated with the government, to obviate the witness’s reliance on his Fifth Amendment privilege, does not necessarily give rise to an inference that the witness would testify favorably to the defense. “[I]n the absence of circumstances that indicate the government has failed to immunize an exculpatory witness, a district court does not abuse its discretion in refusing to give a missing witness charge.” *Myerson*, 18 F.3d at 160. Where a missing witness instruction is requested, “a judgment is to be reached as to whether

from all the circumstances an inference of unfavorable testimony from an absent witness is a natural and reasonable one.” *Id.* at 159 (quoting *Burgess v. United States*, 440 F.2d 226, 234 (D.C. Cir. 1970)).

The denial by the trial court of a request for a missing witness charge is reviewed for abuse of discretion. *See Adeniji*, 31 F.3d at 65 (citing *Torres*, 845 F.2d at 1170-71), and “does not often serve as a ground for reversal.” *Torres*, 845 F.2d at 1171 (quoting McCormick, On Evidence § 272, at 805). To prevail on appeal, a defendant challenging the district court’s instructions to the jury must show that his requested charge accurately reflected the law, that he was prejudiced by the charge as given, and that any error in the charge was not merely harmless. *See Saa*, 859 F.2d at 1076; *Torres*, 845 F.2d at 1171.

### **C. Discussion**

The district court did not abuse its discretion in declining to give a missing witness instruction. The defendant never established that Glover was peculiarly within the power of the government to produce as a witness at trial. *See Myerson*, 18 F.3d at 158. The defense did not issue a subpoena for Glover, A85, or request that the government make Glover, who was in custody at the time, available to testify, *see* A79, or request that the government extend testimonial immunity to Glover. Neither did the defense determine to any degree of certainty whether, if called by them to testify, Glover would assert his constitutional right to silence. Instead, the defense relied on the facts that Glover had entered into

plea and cooperation agreements with the government, GA572, and that Glover's attorney had indicated she would advise him to assert the Fifth Amendment were he called. In opposition to the defense request, the government pointed out that, like the defense, it had no information as to whether Glover would testify if called by the government. A79, GA572. On this record, it cannot fairly be said that Glover was in the peculiar power of the government, such that a jury should be able to draw an inference against the government from its failure to call him.

A fairer read on the issue of availability is, as the district court found, that Glover was equally unavailable, to both parties. Here, the district court presumed that Glover would assert his right not to testify if called as a witness. GA787. The court also found, though, that there was no reason to question the government's failure to immunize Glover. As the district court properly found, there was no reasonable basis to infer that Glover's testimony would be unfavorable to the government and thus that the government had refused to immunize an exculpatory witness. GA789-90.

Although Glover had a cooperation agreement with the government, he had immediately prior to trial provided information to the government which directly contradicted information he had previously given on the issue of whether the two defendants at trial were involved in narcotics activity. GA4-5. The import of this was two-fold. First, as far as the availability of Glover to the government as a witness, the fact that he had clearly lied about pivotal

issues in the case, and could lie again, raised serious ethical issues for government counsel. Second, if Glover testified along the lines of his original statements, his testimony would have been devastating to Baldwin; if, on the other hand, he testified as he indicated he would immediately prior to trial, he would have been roundly impeached by the government using his proffer statements. Either way, it cannot be said that “from all the circumstances an inference of unfavorable testimony . . . [would have been] a natural and fair one.” *Myerson*, 18 F.3d at 159 (citation omitted).

In short, on this record, the district court properly found that Glover was equally unavailable to both parties. With that finding, the district court could have given no instruction, an instruction allowing the jury to draw inferences against either or both parties, or an instruction that no inference could be drawn against either side. *See Caccia*, 122 F.3d at 139. Neither party requested either of the instructions referenced in *Caccia*, and indeed, such instructions are disfavored by this Court. *Id.* Accordingly, the most appropriate course of action was the course chosen by the district court: no instruction was given, and the issue was left for the parties to argue in summation. That they agreed not to, at the suggestion of defense counsel, GA576-78, is of no moment for the defendant’s appeal here. In other words, on the record before this Court, the district court did not abuse its discretion in denying Baldwin’s request for a missing witness instruction.

Even were this Court to conclude otherwise, the defendant would still necessarily need to demonstrate that he was prejudiced by an abuse of discretion by the district court, and that the denial of the requested charge was not harmless error. *See Saa*, 18 F.3d at 158. Here, there was no prejudice to the defendant as, while the district court did not give the instruction requested by the defense, it did not preclude the attorneys from arguing the point to the jury. *See Torres*, 845 F.2d at 1170 (no reversible error in failure to give missing witness charge where counsel permitted to argue the inference themselves in summation).

**CONCLUSION**

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

Dated: May 19, 2010

Respectfully submitted,

DAVID B. FEIN  
UNITED STATES ATTORNEY  
DISTRICT OF CONNECTICUT

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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 11,025 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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