

09-2979-cr(L)

To Be Argued By:
WILLIAM M. BROWN, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket Nos. 09-2979-cr (L)
09-3267-cr (CON)

UNITED STATES OF AMERICA,
Appellee,

-vs-

ROBERT RAWLS,
CHRISTOPHER LAMONT SHERMAN,
also known as CL,
Defendants-Appellants.

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

BRIEF FOR THE UNITED STATES OF AMERICA

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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 Rawls on July 6, 2009. Rawls Joint Appendix (“RJA”), Volume I, at 78. On July 7, 2009, Rawls filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b). *Id* at 76. The district court entered a final judgment as to Sherman on June 30, 2009. Sherman Appendix on Appeal (“SA”) at 108. On July 7, 2009, Sherman filed a timely notice of appeal. SA 111. This Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

**Statement of Issues
Presented for Review**

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

2. Did the district court err in sentencing Rawls to the statutory mandatory minimum term of imprisonment of 120 months set forth in 21 U.S.C. § 841(b)(1)(A)(iii)?

3. Did the district court err in sentencing Sherman to 132 months imprisonment based upon a finding that Sherman was involved in the distribution of three and a quarter kilograms of cocaine base?

4. Did the district court abuse its discretion by admitting court-authorized wiretap evidence as to Sherman?

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Preliminary Statement

In January 2004, the Drug Enforcement Administration (DEA) Task Force in New Haven, Connecticut, initiated a Title III wiretap investigation targeting the Julius Moorning crack cocaine drug-trafficking organization. The Moorning organization supplied large amounts of

cocaine to virtually every neighborhood throughout New Haven and surrounding suburban areas. The investigation resulted in the successful prosecution of 49 defendants on federal narcotics charges.

Post-arrest interviews identified defendant Mauriel Glover as another crack cocaine distributor in the New Haven area who was receiving kilogram quantities of crack from the same New York City source of supply as the Moorning organization. In 2006, the investigation of Glover's organization continued and members of the Task Force were able to make controlled purchases of crack from Glover and his associates on multiple occasions. Each purchase involved at least one ounce of crack cocaine.

After the most recent controlled purchase in September 2007, the government moved for authorization for a Title III wiretap of Glover's cellular telephone. After the application was approved by the district court, the government conducted court-authorized electronic surveillance of Glover's phone. As a result of the intercepted calls, the government learned that Glover and defendant Roshaun Hoggard were frequently in contact to discuss obtaining powder cocaine from one or more sources. They would also discuss prices, availability, quality, and transportation of the drugs. The intercepted calls revealed that both men would obtain the cocaine, process it into cocaine base, and then distribute it to their co-conspirators in the New Haven area, who would then re-distribute all or part of the crack to customers of their own. The intercepted calls also established that co-

defendant Genero Marte was a main source of supply in Bronx, New York for both Hoggard and Glover. Rawls PSR, ¶ 10. Both Hoggard and Glover would obtain between 100 and 500 grams of cocaine once or twice per week during the 60-day wiretap period. *Id.*

As to defendant Robert Rawls, the calls revealed that he cooked the cocaine into crack for Hoggard, was a close advisor to Hoggard on how to run the business, and also stashed and delivered the drugs to customers on occasion. RPSR ¶16. More specifically, from November 15, 2007 until December 13, 2007, intercepted calls show that Hoggard was receiving at least 150 grams of cocaine per week which was being converted into an equal amount of crack. During this time, Rawls resided with Hoggard in a New Haven apartment, and was frequently on the phone with Hoggard discussing the ongoing narcotics activities. *Id.*

As to defendant Christopher Lamont Sherman, the investigation revealed that he, Hoggard and Glover would pool their resources to make bulk quantity purchases of cocaine, primarily from defendant Marte. On one such occasion, the government arrested Sherman and seized 272 grams of cocaine from him after he had just dropped off Hoggard at Hoggard's New Haven apartment. Sherman and Hoggard had just returned from a trip to the Bronx, New York, to purchase supply from defendant Marte. RPSR ¶ 12 and 15. When pulled over by the arresting officers, Sherman fled the vehicle and was chased by the officers. While fleeing, Sherman threw a bag filled with 272 grams of cocaine onto a nearby roof. The bag was

recovered and Sherman was found hiding in the surrounding bushes.

Defendants Rawls and Sherman were tried together and convicted by the jury on one count of a superseding indictment in which each was charged with conspiracy to possess with intent to distribute and to distribute 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A)(iii). This appeal challenges the sufficiency of the evidence presented by the government at the trial, and also challenges the imposition by the district court of the statutory mandatory minimum term of imprisonment of 120 months set forth in 21 U.S.C. § 841(b)(1)(A)(iii) as to defendant Rawls. Defendant Sherman challenges his sentence to imprisonment of 132 months based upon the district court's finding that he was involved in the distribution of three and a quarter kilograms of crack. Finally, Sherman claims the district court erred by admitting into evidence intercepted telephone calls obtained by court-authorized wiretap pertaining to drug deals.

The defendants' sufficiency of the evidence claims lack merit. The government's evidence of each the defendant's participation in the crack cocaine conspiracy, which included intercepted telephone calls, cooperating witness testimony, post-arrest admissions, surveillance, and seizures of drugs and drug paraphernalia, provided a sufficient basis to support the convictions.

Likewise, the sentencing appeals lack merit, as both defendants received substantial reductions from their

guideline incarceration ranges. Rawls asked for a sentence below the 235-293 month guideline range based on, among other things, the disparity between the crack and powder cocaine penalties, and the district court granted his request, imposing the mandatory minimum 120 months sentence. Sherman likewise faced a guideline range of 324-405 months based on the quantity of crack cocaine involved in the offense, and the district court instead imposed a sentence of 132 months, which was based on the guideline range that would have applied if the quantity of crack cocaine involved in the offense had been converted to powder cocaine.

Finally, defendant's *pro se* challenge to the necessity of the wiretap investigation into Hoggard's telephone must also fail. The Title III wiretaps were approved by two district court judges and were supported by thorough, adequate, and independent affidavits. In sum, the district court correctly concluded that the probable cause was "overwhelming" and that the government's affidavit "was a fully adequate affidavit to support the order of [United States District Court Judge Alan H. Nevas] to issue the Title III wiretap on Mr. Hoggard's phone." Government Appendix (GA) at 22.

Statement of the Case

On January 8, 2008, a federal grand jury in New Haven, Connecticut returned an indictment against 17 individuals, including the defendants Robert Rawls and Christopher Lamont Sherman, charging them 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). RJA 2. On September 23, 2008, a superseding indictment was returned containing essentially the same charges, but with technical changes. RJA 10.

Starting on January 6, 2009, Rawls and Sherman were tried together before a jury and the Honorable Janet C. Hall, U.S.D.J. On January 8, 2009, following completion of the government's case, Rawls and Sherman each made an oral motion for judgment of acquittal, which the district court denied. On January 9, 2009, the jury returned a verdict of guilty as to both defendants as to count two of the superseding indictment, and the district court accepted the verdict. *Id.* On January 13, 2009, Rawls filed a renewed motion for acquittal (RJA 16), and the district court denied the motion on March 13, 2009. RJA 27. On March 19, 2009, Sherman filed a motion for acquittal or, alternatively, for a new trial. SA-19. The district court denied the motion on April 22, 2009. *Id.* On June 30, 2009, the district court (Janet C. Hall, J.) sentenced Sherman to 132 months' imprisonment and five years' supervised release. SA-107. On July 6, 2009, the district court (Janet C. Hall, J.) sentenced Rawls to 120 months of imprisonment and five years of supervised release. RJA 70. On July 7, 2009, Sherman and Rawls each filed separate, timely notices of appeal. *Id.*

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

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

A. The trial of Rawls and Sherman

The government presented, principally, the testimony of special agents of the Drug Enforcement Administration, several local law enforcement officers, an individual who had been charged along with Rawls and Sherman, but who had entered a guilty plea pursuant to written plea and cooperation agreements, and a forensic analyst from the Drug Enforcement Administration Northeast Regional Laboratory.¹

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 Rawls and Sherman participated.

The government's investigation employed a number of investigative techniques including confidential informants, undercover drug purchases, street surveillance, pen registers and the court-authorized interception of wire

¹ At trial, the Government presented the testimony of the following witnesses during its case-in-chief: Cooperating defendant Kenneth Thames, DEA Special Agents Uri Shafir, Raymond Walczyk, Katlin Flavin, Angelo Meletis, Diane Sanchez, and Anastas Ndrenika, Police Officers Daniel Sacco, Brian Pazsak, Craig Casman, Michael Paleski, Bennet Hines, Charles Gargano, and Marybeth White.

communications occurring over a cellular telephone used by Roshawn Hoggard. GA 52-57. Intercepted telephone calls established that, in addition to Hoggard, the participants in the calls included defendants Robert Rawls and Chris Lamont Sherman, and a number of others. GA 96-100.²

In addition to the intercepted telephone calls, in order to establish the existence of the crack cocaine conspiracy, the Government presented the testimony of cooperating defendant, Kenneth Thames, who stated that he began to buy crack for re-sale from Hoggard in September 2007, and that he continued to purchase crack from Hoggard through November of that year. GA 137-138. Thames testified that the crack he purchased from Hoggard came in “eight-ball” quantities, each of which cost \$100 and weighed approximately 3.5 grams, or one-eighth of an ounce. GA 138-142. Thames stated that he would order crack from Hoggard over a cellular telephone, using a code. In the code, “Monday” would mean one eight-ball, “Tuesday” would mean two, “Wednesday” would mean three, and “Thursday” or “fortune” would mean four. *Id.* Thames testified that he would sell the crack he obtained from Hoggard in “dime” bags, for \$10 each, and that he would make approximately 20 dime bags from each eight-ball. *Id.* Much of Thames’ testimony was independently

² Government Exhibits TT (Telephone Transcripts) 2-131 were transcripts of the calls intercepted over Hoggard’s cellular telephone. GA 71-73 and GA 120.

corroborated by law enforcement officers who testified regarding their surveillance efforts and monitoring on intercepted calls in the wire room.³

1. Evidence against defendant Rawls

In order to establish that Rawls knowingly participated in the conspiracy, the government presented a series of intercepted calls between Hoggard and Rawls. In TT-93, on November 18, 2007, Hoggard asked Rawls to “give me a two-seven like right quick,” and Rawls replied, “Meet me in two seconds let me just grab it right quick.” GA 223. In TT-94, on November 18, 2007, Hoggard referred to Rawls as “Franco” and asked Rawls whether he could “make all them shits for me.” GA 224. Hoggard also said, “And then, I’m a swing through the house and get’ em ‘cause my phone like ringing but I’m driving so.” Rawls said, “Give me a number. Tell me the number,” and Hoggard replied, “You know, two-sevens. You know, make me all the rest of that.”

In TT-105, on November 23, 2007, Hoggard asked Rawls where’s “the shit” at, and Rawls said, “What shit?” Hoggard replied, “What I gave you yesterday to hold . . . remember I gave it to you before I walked out the door and you stuck it in your pocket or something?”

³ In this appeal, both defendants concede that a crack conspiracy led by defendant Hoggard existed. The defendants’ challenge is directed at whether the government proved that each of them was a knowing participant in the conspiracy.

In TT-117, on December 2, 2007, Rawls called Hoggard and said, “You never told me the size.” Hoggard replied, “Two seven,” and Rawls says, “All right.”

In TT-124, on December 2, 2007, Rawls called Hoggard, and Hoggard asked, “All right, what’s our number?” Rawls said, “All right, I got eighteen,” and Hoggard said, “That’s cool.”

In TT-16, on November 17, 2007, Hoggard and Rawls discussed prices being charged by two different suppliers of cocaine. Hoggard told Rawls that “Yamo,” identified by SA Shafir as Victor Alacanter, was charging “twenty-four” dollars per gram, but “G,” or co-defendant Genero Marte, was saying “twenty-five.” GA 231-233. Hoggard then told Rawls he was going to “grab like two from [Yamo]” and “see what’s good.” Rawls replied, “I’m down with it.”

On December 11, 2007, officers executed a federal search warrant for the third floor apartment at 397 Edgewood Avenue, New Haven, the residence of Hoggard and Rawls. GA 443. Seized from the apartment were three digital scales, (Exhibit 136), GA 447, which were covered in white powder residue, a black digital scale with white powder residue and razor blades, (Exhibit 137), GA 449; suspected cocaine recovered from a safe, (Exhibit 139), GA 451-452; zip-lock plastic bags containing suspected cocaine/crack recovered from a safe, (Exhibit 140), GA 452; and kitchen utensils caked in white powder residue (Exhibit 141), GA 454-455. Officers testified that the referenced seized items were of a sort used by drug

traffickers to store, weigh and package for re-sale quantities of drugs, including cocaine and crack. GA 449-455.⁴

When Rawls was arrested on December 11, 2007, he was transported in a police vehicle to the West Haven, CT Police Department for processing. During the ride, and after being informed that he was under arrest for conspiracy to distribute crack cocaine, Rawls stated he was unaware that he could get in trouble just for “cooking the shit.” GA 435. Rawls also admitted that he would help out his associates, Mauriel Glover and Roshaun Hoggard, on occasion when he was asked to do so. GA 436-438.

During his post-arrest interview, Rawls admitted that he used to convert cocaine into crack cocaine for Hoggard to sell, but, more recently, he simply advised Hoggard as

⁴ The parties stipulated that if DEA Forensic Analyst Diana Sanchez were called to testify regarding her examination and analysis of suspected narcotics seized during the investigation, she would testify truthfully that Exhibit 136 (residue from scales seized from Hoggard’s residence on December 11, 2007) was cocaine powder, GA 512; Exhibit 137, (residue from scale seized from Hoggard’s residence) was crack, *Id.*; Exhibit 139, (bag containing white powder seized from safe in Hoggard’s residence), contained 5 grams of crack and .11 grams of cocaine powder, *Id.*; Exhibit 140 (white powder seized from Hoggard’s safe), contained 8.6 grams of crack, *Id.*; and Exhibit 141, (kitchen utensils caked with white residue seized from Hoggard’s residence), contained crack. *Id.*

to how to conduct his crack cocaine business. Rawls did not deny that it was his voice on the intercepted phone calls as described by arresting officers, but he claimed that the cocaine coming into his possession was for his personal use only and not for distribution as crack. GA 417-418.

2. Evidence against defendant Sherman

The government also presented a number of calls between Hoggard and Sherman. GA 226. In TT-87, on November 14, 2007, Hoggard and Sherman talked about demanding that their supplier drop his price to \$25.00 per gram. Hoggard said, “Nigga he better drop that shit to two five nigga.” Sherman asked, “For real.” Hoggard replied, “Hell yeah, you called him and told him?” Sherman said, “ Nah, I ain’t call him yet, I’m about to though.” Hoggard said, “Call that nigga right quick man ... be like yo, that’s that’s our number right there.” Sherman replied, “Yeah because yo we ain’t playing no games man, you know what I mean? We all together like.”

In TT-88, on November 14, 2007, Sherman told Hoggard that he sold all of the crack he had and that if anybody wanted to buy some he would have to contact Hoggard. Sherman said, “Anybody call, I’m gonna call you . . . cause I just cleared everything today man.” Hoggard asked, “You say you just, uh, done?” And Sherman replied, “Yeah, I cleared everything my nigga. Today. Today and yesterday man. Everything just went crazy like.” Hoggard said, “Oh word? All right call me then, I could use it,” and Sherman said, “All right.”

In TT-92, on November 15, 2007, Hoggard told Sherman “I had three hundred,” but that he’s “down to the end of it now.” Sherman said, “You did have a whole shit load.”

In TT-14, on November 17, 2007, Hoggard called Sherman because he ran out of crack. Hoggard asked Sherman, “You got the whole one (one ounce of crack)?” Sherman said, “The whole one? A whole one? Why you’re not up?” Hoggard replied, “Yeah . . . nah. I got two people want um Curtis Jackson (one half ounce of crack) and you know a whole one.” Sherman said, “Damn it. You ran out, ran out?” Hoggard said, “Yeah. I’m assed out.” Sherman replied, “Damn I told you the other day I was going up, man, you should have . . .” Hoggard said, “But I didn’t have the money, man.”

In TT-15, on November 17, 2007, Hoggard and Sherman again discussed how they were going to pressure Genero Marte, a co-defendant and main supplier of crack, to drop his price to \$24.00 or \$23.00 per gram. Hoggard told Sherman that another supplier was only charging \$24.00, and Sherman said, “Yeah . . . but um right now ‘G’ (Marte) twenty five cent.” Hoggard said, “Nah . . . he twenty four . . . ‘G’ got to come down brother.” Sherman replied, “Yeah?” and Hoggard said, “Hell yeah . . . absolutely . . . we’re gonna to have to get him back to the old days man.” Sherman said, “Yeah . . . supposed to be twenty four, twenty three.” Hoggard told Sherman, “I need to take this shit back, man . . . I told him I’m bringing all that shit back;” and in TT-32, on November 20, 2007, Hoggard told Rawls, “Hey, yo, I’m bringing this

shit back, cousin.” Minutes later (TT-102), Hoggard spoke to the defendant, McCown, who asked Hoggard, “How did it work out?” Hoggard replied, “No good . . .so I’m about to head back in.”

Intercepted calls on November 27, 2007 led to an attempted surveillance of Hoggard and his confederates. GA 303. In TT-110, Hoggard told Sherman, “Niggas tryin’ to roll out.” In Exhibit TT-56, intercepted approximately twenty minutes later, Hoggard told defendant Robert Rawls, “If you can, spot me a little bit something because, you know, I want to get up there before four, man.” In Exhibit TT-58, intercepted several hours later, Hoggard again spoke to Sherman, who told Hoggard, “I’m coming, I’m coming.” Hoggard replied, “All right, I was just making sure it was final.”

The agents construed the intercepted calls to mean that Hoggard was planning to travel to the Bronxville area of Bronx, New York to meet Genero Marte, his source of supply for cocaine. Accordingly, surveillance was established near the intersection of West 228th Street and Marble Hill Road, as that location was known as one at which Hoggard had previously met his drug source. GA 308. A vehicle used by Hoggard in the past was observed parked in the surveillance area at approximately 10:00 pm. *Id.* Approximately 20 minutes later, Hoggard and another individual enter the parked vehicle which was already occupied by a driver. GA 313. While the vehicle was in view of the surveillance agents, call TT-60 was intercepted, in which Hoggard told co-defendant Genero Marte, “Yo, I’m by the school, yo.” In TT-62, which was

intercepted minutes later, Hoggard told an unidentified male, “I’m with ‘L’ (Sherman) yo.” Shortly thereafter, the vehicle left the surveillance area, and agents followed it back toward Connecticut. GA 313-315.

At approximately 12:30 a.m., Hoggard’s vehicle arrived at the vicinity of Hoggard’s residence, where Hoggard left the vehicle and entered his residence. The vehicle then left the area. GA 327-329.

After the Hoggard vehicle had dropped him off at his residence, officers began to follow it, and effected a vehicle stop. GA 346. The driver of the vehicle and the remaining passenger then exited the vehicle, and the passenger fled on foot. GA 347. The officers chased the passenger, and observed as the passenger threw a bag onto the roof of a nearby building. Ultimately, the passenger was captured and identified as Sherman. The bag, Exhibit 135, was retrieved, and was found to contain a quantity of what appeared to be cocaine.⁵ GA 347-350.

Shortly after the seizure, call T-66 was intercepted in which Hoggard and Rawls discussed the arrest of Sherman. After Hoggard explained what had transpired, Rawls asked, “What do you mean? And he throw his

⁵ The parties stipulated that if DEA Forensic Analyst Diana Sanchez were called to testify regarding her examination and analysis of suspected narcotics seized during the investigation, she would testify truthfully that that Exhibit 135 (seized from Chris Lamont Sherman on November 27, 2007), was 258.5 grams of cocaine powder, GA 512.

whole thing?” Hoggard replied, “Hell yeah, that was two seventy-two he had on him.” Rawls remarked, “God damn! . . .Woooo, that, that, that, that right there, where you say, he was popped, that hurt right there, that hurt.”

B. Post-verdict motions

On January 8, 2009, following completion of the government’s case, Rawls and Sherman each made an oral motion for judgment of acquittal, which the district court denied. On January 9, 2009, the jury returned a verdict of guilty as to both defendants as to count two of the superseding indictment, conspiracy to distribute 50 grams or more of cocaine base, and the district court accepted the verdict. RJA 10.

On January 13, 2009, Rawls filed a renewed motion for acquittal (RJA 16) arguing that the “government did not present sufficient evidence that the defendant Rawls knowingly joined the Hoggard conspiracy or was anything other than an associate of Mr. Hoggard.” RJA 23. The district court denied the motion on March 13, 2009. RJA 27. After noting that Rawls did not dispute that Hoggard led a conspiracy to distribute crack cocaine, the district court found that Rawls’s argument was without merit. RJA 32. The court cited Rawls’ incriminating, post-arrest statements that he did not know he could get in trouble for “cooking the shit,” and that his only function was to “advise [Hoggard] as to how to conduct his business.” RJA 33. The Court found that these statements alone were sufficient to meet the government’s burden of proof. The court went on to note that the government did not rely

solely on Rawls' statements. The government also presented multiple intercepted drug calls between Rawls and Hoggard, as well as evidence of crack cocaine and drug paraphernalia that were seized from the joint residence of Rawls and Hoggard upon execution of a search warrant. RJA 34.

On March 19, 2009, defendant Sherman filed a motion for acquittal or, alternatively, for a new trial. SA-19. The district court denied the motion on April 22, 2009. *Id.* At the outset, the court noted that Sherman, like Rawls, did not dispute the existence of the Hoggard-led crack cocaine conspiracy. GA 843. Sherman argued that while the government may have proven that he was in a buyer-seller relationship with Hoggard, it had not proven that he was a crack conspirator with Hoggard. *Id.* The court rejected this argument as meritless. The court cited the facts and circumstances surrounding Sherman's arrest as well as intercepted drug calls between Sherman and Hoggard, to support its finding that the evidence was sufficient to sustain the conviction. "Thus, given that a rational jury could have convicted Sherman based on the evidence introduced by the Government at trial - namely, the cocaine seized from Sherman, the circumstances surrounding that seizure, the intercepted calls between Hoggard and Sherman, and the intercepted calls between Hoggard and other co-conspirators discussing Sherman - the court finds that Sherman has not met his burden of establishing that there was insufficient evidence to sustain his conviction." GA 846.

C. Sentencing proceedings

1. Defendant Rawls

Based upon a finding that defendant Rawls was responsible for the distribution of approximately 600 grams of crack cocaine, the Rawls PSR concluded that the base offense level was 34. RPSR ¶ 20. The RPSR also determined that Rawls had accumulated ten (10) criminal history points, placing him in Criminal History Category V. RPSR ¶39. Accordingly, the guideline imprisonment range was found to be 235 to 293 months. RPSR ¶68.

At the sentencing hearing on July 6, 2009, the district court agreed with the PSR that the defendant was indeed responsible for the distribution of 600 grams of crack. The court noted that the jury concluded that Hoggard was moving 150 grams of crack per week during the six-week period that Hoggard's phone calls were being intercepted by the government. RJA 48. The court found this to be a "very conservative" estimate. *Id.* The court further found that Rawls, based on the trial evidence, was involved in Hoggard's crack conspiracy and helped Hoggard conduct his drug business during this time, and probably a longer period of time, even cooking the cocaine into crack. *Id.*

Next, the district court rejected the defense counsel's argument that Criminal History Category V overstated the seriousness of the defendant's criminal history. The court specifically noted that the defendant had two prior narcotics convictions and had accumulated two additional

criminal history points because he committed crimes while serving probation from previous convictions. RJA 54.

The district court then departed downward from the guidelines range to account for the crack cocaine/powder cocaine sentencing disparity by applying a one-to-one conversion ratio. RJA p. 54-57. Based upon its conversion of 600 grams of crack to 600 grams of powder cocaine for guidelines calculation purposes, the court determined that the appropriate base offense level was 26. RJA p. 57. Given that defendant Rawls was a Criminal History Category V, the guidelines imprisonment range was found to be 110 to 137 months. However, the mandatory minimum sentence raised the bottom of the guideline range to 120 months. *Id.*⁶

Rawls' defense counsel preserved the argument that tension exists between the parsimony clause in 18 U.S.C. § 3553(a) and the mandatory sentencing provisions in 21 U.S.C. § 841(b), but ultimately asked that the court impose the mandatory minimum sentence of 120 months. RJA 61-62. After considering the parties submissions and all required factors, the district court sentenced Rawls to the

⁶ On April 30, 2009, the government's information filed pursuant to 21 U.S.C. § 851 was dismissed by the district court, absent objection by the government, because the government's filing of the notice after the jury selection process had begun was untimely. Accordingly, the PSR's original mandatory minimum of 240 months was reduced to 120 months. RJA 42-43.

mandatory minimum 120 months of imprisonment and five years of supervised release. RJA 70.⁷

2. Defendant Sherman

Based upon a finding that Sherman was involved in the possession and distribution of more than 4.5 kilograms of crack, the Sherman PSR found the base offense level to be 38. SPSR ¶ 19. The SPSR determined that Sherman had accumulated a total of eight criminal history points placing him in Criminal History Category IV. SPSR ¶ 39. Accordingly, the defendant's guidelines incarceration range was 324-405 months. *Id.*, 57.

At the sentencing hearing on June 30, 2009, the district court began by reviewing the Sherman PSR with the parties and noted that Sherman faced a mandatory minimum sentence of 120 months imprisonment. GA 726. In addition, the court reduced the base offense level to 36 based upon its conservative estimate that the amount of crack attributable to Sherman was 3.25 kilograms, not 4.5 kilograms as the PSR had concluded. GA 765. The court did, however, accept the PSR's estimate that Hoggard alone was responsible for the distribution of 250 grams (one quarter kilogram) of crack cocaine per week, and noted that this "was probably a conservative estimate." GA 763.

⁷ During the sentencing proceedings for both Rawls and Sherman, the Government deferred to the Court and did not advocate for a particular sentence.

The court found that Sherman was “quite involved in a day-to-day and hour-to-hour basis” with Hoggard’s crack dealing efforts, in addition to his own crack distribution activities, for a period of 13 weeks from the end of August 2007 until November 27, 2007, when Sherman was arrested. GA 759-763. The court’s findings in this regard were based upon numerous intercepted drug calls during November 2007 between Sherman and Hoggard and others in which crack transactions were arranged. *Id.* The court noted that its estimate that Sherman was involved in Hoggard’s conspiracy for a period of 13 weeks, resulting in 3.25 kilograms of crack for guidelines calculation purposes, was “an extremely conservative conclusion.” GA 763. The court also noted that Sherman could very well have been dealing crack for a much longer period of time given his lack of employment since 2006, personal tragedies in 2007 including the death of a family member, and the fact that the phone calls indicated a “very long standing relationship” between the defendants. *Id.*

The court concurred that the defendant was a Criminal History Category IV and, accordingly, concluded that the defendant’s revised guidelines range was 262-327 months. GA 763. The court then reduced the guidelines range by applying a one-to-one crack cocaine to powder cocaine ratio. GA 769. Accordingly, the revised base offense level for 3.25 kilograms of powder cocaine was 28, resulting in a revised guidelines range of 110 to 137 months. Given the mandatory minimum, the settled upon range was 120 to 137 months. *Id.* After considering all of the required factors, the court sentenced the defendant to 132 months’incarceration. GA 800; SA 107.

Summary of Argument

I. The evidence was sufficient to support the verdicts of guilty

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

Rawls and Sherman concede that the trial evidence established the first element of the offense of conviction, that a drug distribution conspiracy existed led by Hoggard. The participation of Rawls and Sherman in the conspiracy as co-conspirators of Hoggard was established by recordings of intercepted telephone conversations with Hoggard in which the defendants arranged to obtain quantities of crack from Hoggard which totaled more than 50 grams. In addition, the government presented post-arrest admissions, seizures of large quantities of drugs and drug paraphernalia, as well as corroborating surveillances of narcotics transactions leaving no doubt as to the guilt of defendants Sherman and Rawls.

II. The district court did not commit error in imposing the mandatory minimum sentence on Rawls

Given the guilty verdict returned by the jury, and its specific finding that Rawls' offense conduct involved more than 50 grams of crack, the sentence of 120 months of imprisonment imposed by the district court was

reasonable and was mandated by statute. Furthermore, Rawls' claim that the parsimony clause in 18 U.S.C. § 3553(a) conflicts with the mandatory sentencing provisions in 21 U.S.C. § 841(b) is defeated by this Court's recent decision in *United States v. Samas*, holding that no such conflict exists.

III. The district court did not commit error in imposing a sentence of 132 months imprisonment on Sherman

Sherman's contention that the district court erred in attributing at least 3.25 kilograms of crack cocaine to him for sentencing purposes without making the requisite factual findings is without merit. The district court's conservative estimate as to drug quantities attributable to Sherman was entirely proper as it was based on the trial evidence, including intercepted drug calls and cooperator testimony, as well as undisputed factual matters set forth in the sentencing memoranda and the Presentence Report (PSR).

IV. The district court properly admitted court-authorized telephone calls into evidence against defendant Sherman

The district court thoroughly reviewed the government's Title III affidavits and correctly found that, contrary to the defendant's arguments, the requirements under 18 U.S. C. § 2518 had been satisfied. Specifically, the court found that (1) the probable cause to intercept calls from Hoggard's phone was "overwhelming," and (2)

that the government had made a sufficient particularized showing that routine investigative techniques would not be effective in penetrating Hoggard's crack cocaine conspiracy. Accordingly, the district court's admission of the pertinent intercepted telephone calls into evidence was proper.

Argument

I. The evidence at trial was sufficient to support the jury's verdict of guilty

A. Relevant facts

The relevant facts are set forth in the "Statement of Facts" above.

B. Standard of review and governing law

1. Standard of review

A defendant challenging the sufficiency of the evidence bears a "heavy burden." *United States v. Mercado*, 573 F.3d 138, 140 (2d Cir.) (internal quotation marks omitted), *cert. denied*, 130 S. Ct. 645 (2009). This Court will affirm "if 'after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Ionia Management S.A.*, 555 F.3d 303, 309 (2d Cir. 2009) (per curiam) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). All permissible inferences must be drawn in the

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

"[T]he law draws no distinction between direct and circumstantial evidence," and "[a] verdict of guilty may be based entirely on circumstantial evidence as long as the inferences of culpability . . . are reasonable." *MacPherson*, 424 F.3d at 190. Indeed, "jurors are entitled, and routinely encouraged, to rely on their common sense and experience in drawing inferences." *United States v. 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). Where weight-related provisions of the drug laws are implicated, the government also bears the burden of proving the type and quantity of the substance about which the defendant conspired. *See United States v. Santos*, 541 F.3d at 70-71; *United States v. Thompson*, 528 F.3d 110, 119 (2d Cir.2008).

To prove the first element and establish that a conspiracy existed, the Government must show that there was an unlawful agreement between at least two persons. *See United States v. Rea*, 958 F.2d 1206, 1214 (2d cir. 1992). The conspirators “need not have agreed on the details of the conspiracy, so long as they agreed on the essential nature of the plan.” *United States v. Geibel*, 369 F.3d 682, 689 (2d Cir. 2004) (internal quotation marks omitted). The agreement need not be an explicit one, as “proof of a tacit understanding will suffice.” *Rea*, 958 F.2d at 1214. The co-conspirators’ “goals need not be congruent, so long as they are not at cross-purposes.” *Id.*

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).

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

C. Discussion

Rawls and Sherman concede that the trial evidence established the first element of the offense of conviction, that a drug distribution conspiracy existed.⁸ Their attack on the sufficiency of the evidence is limited to the contention that the Government did not prove that they participated in the Hoggard crack conspiracy.

1. Rawls participated in the conspiracy

Rawls' argument that the evidence adduced at trial is insufficient to sustain his conviction because he was convicted "simply because he was an associate of Hoggard" is without merit. Rawls Brief at 10-11. The district court properly rejected this argument and denied Rawls' post-verdict motion for judgment of acquittal. In doing so, the district court correctly found that Rawls' post-arrest statements standing alone provided sufficient evidence to support Rawls' conviction. Rawls told the arresting officers that he didn't know he could get in trouble for "cooking the shit" and admitted that he "advised [Hoggard] as to how to conduct his drug business." Moreover, the district court also noted that the government "introduced evidence of intercepted telephone

⁸ "There is no doubt that a conspiracy between Mr. Hoggard, Mr. Glover and others was proven at trial." Rawls Brief, p. 9.

"Here, Sherman never denied Hoggard led a drug conspiracy. On the contrary, he simply maintained he was not part of it." Sherman Brief, p. 14.

calls between Rawls and Hoggard, as well as evidence of items seized from the apartment where Rawls and Hoggard lived, both of which could be used by a reasonable jury to conclude that Rawls was a member of the Hoggard conspiracy.” RJA 33.

As discussed in detail above, the evidence of Rawls’s participation in the conspiracy was comprised of intercepted telephone calls between him and Hoggard, physical evidence seized from Rawls’s apartment at the time of his arrest, and numerous statements made by Rawls after his arrest. The intercepted telephone calls between Rawls and Hoggard revealed that Hoggard relied on Rawls to convert powder cocaine to crack cocaine for him. In several intercepted telephone calls, Hoggard can be heard asking Rawls to make crack cocaine for him and to tell him the weight of the crack cocaine, after it was converted from powder cocaine.

Moreover, at the time of his arrest, law enforcement officers seized from his and Hoggard’s apartment digital scales covered with cocaine residue, packaging material, equipment for cooking powder cocaine into crack cocaine, and various, separate, small baggies of crack and powder cocaine.

Finally, Rawls made several incriminating statements when he was arrested. He admitted that he used to convert powder cocaine into crack cocaine for Hoggard and acknowledged that the voice on his suspected intercepted telephone calls belonged to him. He admitted to helping out his associates, Glover and Hoggard, on occasion. He

also asked the arresting officer whether he could get into trouble just for converting powder cocaine into crack cocaine.

2. Sherman participated in the conspiracy

Similarly, Sherman's argument that the government did not adduce sufficient evidence at trial to tie him into Hoggard's crack conspiracy is also without merit. As noted by the district court, the facts and circumstances surrounding Sherman's arrest on November 27, 2007, provide the most harmful evidence to Sherman's argument.

On November 27, 2007, Sherman was pulled over in New Haven after returning from a trip to New York City with Hoggard to obtain cocaine. The officers watched as the vehicle that Sherman was in dropped Hoggard off at his New Haven apartment. After the vehicle left Hoggard's place, the officers conducted motor vehicle stop. When the vehicle was pulled over, the doors opened, Sherman jumped out of the passenger seat and ran away into the backyard of a nearby residence. Officers chased Sherman and saw him throw a black bag onto a nearby roof before Sherman was captured hiding in some bushes. The bag contained approximately 272 grams of cocaine. GA 844-845.

Furthermore, the district court noted that the government did not rely solely on the events surrounding Sherman's arrest. The government also played for the jury intercepted drug calls between Sherman and Hoggard

during which matters related to the drug conspiracy were discussed. GA 845-846. Of note, intercepted calls included calls between Hoggard and defendant Rawls after Sherman's arrest and after seizure of the 272 grams of cocaine that Sherman jettisoned onto a nearby roof after fleeing the police. Hoggard and Rawls commiserated over the "hurt" the seizure has caused and discuss mistakes that Sherman had made resulting in his arrest. *Id.* As the district court noted, a rational jury could have convicted Sherman on this evidence. *Id.*

Accordingly, there existed a substantial and sufficient basis for the verdict returned by the jury as to both Rawls and Sherman, and neither verdict should not be disturbed.

II. The district court properly imposed the mandatory minimum term of incarceration upon defendant Rawls

A. Relevant facts

The relevant facts are set forth in the "Statement of Facts" above.

B. Standard of review and governing law

In *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the United States Sentencing Guidelines, as written, violate the Sixth Amendment principles articulated in *Blakely v. Washington*, 542 U.S. 296 (2004). *See Booker*, 543 U.S. at 243. The Court determined that a mandatory system in which a sentence is

increased based on factual findings by a judge violates the right to trial by jury. *See id.* at 245. As a remedy, the Court severed and excised the statutory provision making the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), thus declaring the Guidelines “effectively advisory.” *Booker*, 543 U.S. at 245.

After the Supreme Court’s holding in *Booker* rendered the Sentencing Guidelines advisory rather than mandatory, a sentencing judge is required to: “(1) calculate[] the relevant Guidelines range, including any applicable departure under the Guidelines system; (2) consider[] the Guidelines range, along with the other § 3553(a) factors; and (3) impose[] a reasonable sentence.” *See United States v. Fernandez*, 443 F.3d 19, 26 (2d Cir. 2006); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005). The § 3553(a) factors include: (1) “the nature and circumstances of the offense and history and characteristics of the defendant”; (2) the need for the sentence to serve various goals of the criminal justice system, including (a) “to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment,” (b) to accomplish specific and general deterrence, (c) to protect the public from the defendant, and (d) “to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner”; (3) the kinds of sentences available; (4) the sentencing range set forth in the guidelines; (5) policy statements issued by the Sentencing Commission; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to victims. *See* 18 U.S.C. § 3553(a).

“[T]he excision of the mandatory aspect of the Guidelines does not mean that the Guidelines have been discarded.” *Crosby*, 397 F.3d at 111. “[I]t would be a mistake to think that, after *Booker/Fanfan*, district judges may return to the sentencing regime that existed before 1987 and exercise unfettered discretion to select any sentence within the applicable statutory maximum and minimum.” *Id.* at 113.

Consideration of the guidelines range requires a sentencing court to calculate the range and put the calculation on the record. *See Fernandez*, 443 F.3d at 29. The requirement that the district court consider the section 3553(a) factors, however, does not require the judge to precisely identify the factors on the record or address specific arguments about how the factors should be implemented. *Id.*; *Rita v. United States*, 127 S. Ct. 2456, 2468-69 (2007) (affirming a brief statement of reasons by a district judge who refused downward departure; judge noted that the sentencing range was “not inappropriate”). There is no “rigorous requirement of specific articulation by the sentencing judge.” *Crosby*, 397 F.3d at 113. “As long as the judge is aware of both the statutory requirements and the sentencing range or ranges that are arguably applicable, and nothing in the record indicates misunderstanding about such materials or misperception about their relevance, [this Court] will accept that the requisite consideration has occurred.” *United States v. Fleming*, 397 F.3d 95, 100 (2d Cir. 2005).

This Court reviews a sentence for reasonableness. *See Rita*, 127 S. Ct. at 2459; *Fernandez*, 443 F.3d at 26-27;

United States v. Castillo, 460 F.3d 337, 354 (2d Cir. 2006). The reasonableness standard is deferential and focuses “primarily on the sentencing court’s compliance with its statutory obligation to consider the factors detailed in 18 U.S.C. § 3553(a).” *United States v. Canova*, 412 F.3d 331, 350 (2d Cir. 2005). This Court does not substitute its judgment for that of the district court. “Rather, the standard is akin to review for abuse of discretion.” *Fernandez*, 443 F.3d at 27.

The Supreme Court has recently reaffirmed that appellate courts must review sentencing challenges under an abuse-of-discretion standard. *See Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586 (2007). In *Gall*, the Supreme Court held that a reviewing court must first satisfy itself that the sentencing court “committed no significant procedural error.” *Id.* If there is no procedural error, the appellate court may then “consider the substantive reasonableness of the sentence imposed under an abuse-of-discretion standard.” *Id.*

Although this Court has declined to adopt a formal presumption that a within-guidelines sentence is reasonable, it has “recognize[d] that in the overwhelming majority of cases, a Guidelines sentence will fall comfortably within the broad range of sentences that would be reasonable in the particular circumstances.” *Fernandez*, 443 F.3d at 27; *see also Rita*, 127 S. Ct. at 2462-65 (holding that courts of appeals may apply presumption of reasonableness to a sentence within the applicable Sentencing Guidelines range); *United States v. Rattoballi*, 452 F.3d 127, 133 (2d Cir. 2006) (“In

calibrating our review for reasonableness, we will continue to seek guidance from the considered judgment of the Sentencing Commission as expressed in the Sentencing Guidelines and authorized by Congress.”).

Further, the Court has recognized that “[r]easonableness review does not entail the substitution of our judgment for that of the sentencing judge. Rather, the standard is akin to review for abuse of discretion. Thus, when we determine whether a sentence is reasonable, we ought to consider whether the sentencing judge ‘exceeded the bounds of allowable discretion[,] . . . committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.’” *Fernandez*, 443 F.3d at 27 (citations omitted). In assessing the reasonableness of a particular sentence imposed:

[a] reviewing court should exhibit restraint, not micromanagement. In addition to their familiarity with the record, including the presentence report, district judges have discussed sentencing with a probation officer and gained an impression of a defendant from the entirety of the proceedings, including the defendant’s opportunity for sentencing allocution. The appellate court proceeds only with the record.

United States v. Fairclough, 439 F.3d 76, 79-80 (2d Cir. 2006) (per curiam) (quoting *Fleming*, 397 F.3d at 100) (alteration omitted).

While it is rare for a defendant to appeal a below-guidelines sentence for reasonableness, this Court has held that the standard of review in those situations is the same as for appeal of a within-guidelines sentence. *See United States v. Kane*, 452 F.3d 140 (2d Cir. 2006) (per curiam). In *Kane*, the defendant challenged the reasonableness of a sentence six months below the guidelines range, and this Court stated that in order to determine whether the sentence was reasonable, it was required to consider “whether the sentencing judge exceeded the bounds of allowable discretion, committed an error of law in the course of exercising discretion, or made a clearly erroneous finding of fact.” *Id.* at 144-45 (quoting *Fernandez*, 443 F.3d at 27). The defendant must therefore do more than merely rehash the same arguments made below because the court of appeals cannot overturn the district court’s sentence without a clear showing of unreasonableness. *Id.* at 145 (“[The defendant] merely renews the arguments he advanced below – his age, poor health, and history of good works – and asks us to substitute our judgment for that of the District Court, which, of course, we cannot do.”).

Where, as here, the claim is that the sentence imposed by the district court pursuant to the mandatory sentencing provisions in 21 U.S.C. § 841(b) violates the parsimony clause in 18 U.S.C. § 3553(a), it is foreclosed by binding precedent. *See United States v. Samas*, 561 F.3d 108, 110 (2d Cir.), *cert. denied*, 130 S.Ct.184 (2009), *reh’g denied*, 130 S.Ct. 1131 (2010).

C. Discussion

Rawls does not challenge the procedural reasonableness of the sentence imposed by the district court, only its substantive reasonableness. The linchpin of the defendant's claim is that the parsimony clause in 18 U.S.C. § 3553(a) conflicts with the mandatory sentencing provisions in 21 U.S.C. § 841(b). In *United States v. Samas*, 561 F.3d at 111, this Court held that there is no such conflict. As this Court explained in *Samas*,

[t]he wording of § 3553(a) is not inconsistent with a sentencing floor. The introductory language of the federal sentencing scheme is qualified: '[e]xcept as otherwise specifically provided, a defendant who has been found guilty of an offense described in any Federal statute . . . shall be sentenced in accordance with the provisions of this chapter' In this case, § 841(b)(1)(A) specifically provides for a mandatory minimum sentence of twenty years (emphasis in *Samas*).

Id. (citation omitted). This Court went on to explain that 18 U.S.C. §§ 3553 (e) and (f) each set forth circumstances in which a mandatory minimum sentence may be avoided, and those provisions would be surplusage if the interpretation urged by the defendant were adopted. *Id.*

Under *Samas*, therefore, the defendant's claims have no merit, and he has failed to show that the district court erred in any way in imposing the mandatory minimum sentence.

III. The district court did not err in finding that Sherman was responsible for conspiring to distribute at least 3.25 kilograms of crack cocaine when the evidence presented at trial and at sentencing supported those findings

A. Relevant Facts

The relevant facts are set forth in the “Statement of Facts” above.

B. Governing law and standard of review

“The quantity of drugs attributable to a defendant at the time of sentencing is a question of fact for the district court, subject to a clearly erroneous standard of review.” *United States v. Hazut*, 140 F.3d 187, 190 (2d Cir. 1998). There is “clear error” only if the Court is “left with the definite and firm conviction that a mistake has been committed.” *United States v. Reilly*, 76 F.3d 1271, 1276 (2d Cir. 1996) (quoting *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948)); see also *United States v. Sash*, 396 F.3d 515, 521 (2d Cir. 2005). As long as the “district court’s account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently.” *Anderson v. City of Bessemer*, 470 U.S. 564, 574 (1985).

In determining the quantity of drugs attributable to a defendant for sentencing purposes, the sentencing court

must “approximate the relevant drug quantity” if “the quantity seized does not reflect the true scale of the offense.” *United States v. Jones*, 531 F.3d 163, 175 (2d Cir. 2008) (internal quotation marks omitted) (citing U.S.S.G. § 2D1.1, app. note 12). This Court will sustain such a finding as long as “the evidence – direct or circumstantial – supports a district court’s preponderance determination as to drug quantity.” *Id.* “[A] sentencing court may rely on any information it knows about, including evidence that would not be admissible at trial, as long as it is relying on specific evidence – e.g., drug records, admissions or live testimony.” *United States v. McLean*, 287 F.3d 127, 133 (2d Cir. 2002) (internal citations and quotation marks omitted) (citing, *inter alia*, U.S.S.G. § 6A1.3); 18 U.S.C. § 3661 (“No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.”). “[T]he district court’s estimation need be established only by a preponderance of the evidence.” *United States v. Prince*, 110 F.3d 921, 925 (2d Cir. 1997) (finding district court did not err in attributing to defendant the estimated weight of marijuana in boxes that were not seized). In making a determination as to drug quantity, the district court must “state in open court” its findings. *United States v. Carter*, 489 F.3d 528, 537 (2d Cir. 2007), *cert. denied sub nom. Bearam v. United States*, 128 S. Ct. 1066 (2008).

Moreover, “the quantity of drugs attributed to a defendant need not be foreseeable to him when he

personally participates, in a direct way, in a jointly undertaken drug transaction.” *United States v. Chalarca*, 95 F.3d 239, 243 (2d Cir. 1996) (finding that defendant should be responsible for entire drug quantity when she participated directly in drug conspiracy); *see United States v. Diaz*, 176 F.3d 52, 119-20 (2d Cir. 1999) (holding defendant responsible for drug quantity due to direct participation in running drug block even after he was incarcerated).

Even in the absence of evidence demonstrating that a defendant directly participates in jointly undertaken illegal conduct, “[i]t is well established that a district court may consider the relevant conduct of co-conspirators when sentencing a defendant.” *United States v. Johnson*, 378 F.3d 230, 238 (2d Cir. 2004). “A defendant convicted for a ‘jointly undertaken criminal activity’ such as . . . [a] drug trafficking conspiracy, may be held responsible for ‘all reasonably foreseeable acts’ of others in furtherance of the conspiracy,” *United States v. Snow*, 462 F.3d 55, 72 (2d Cir. 2006) (quoting U.S.S.G. § 1B1.3(a)(1)(B)), *cert. denied*, 127 S.Ct. 1022 (2007), provided that the court makes particularized findings that the acts committed are within the scope of the defendant’s agreement with his co-conspirators and that the acts of the co-conspirators are reasonably foreseeable to the defendant, *United States v. Studley*, 47 F.3d 569, 574 (2d Cir. 1995). *See also Snow*, 462 F.3d at 72 (“The defendant need not have actual knowledge of the exact quantity of narcotics involved in the entire conspiracy; rather, it is sufficient if he could reasonably have foreseen the quantity involved.”). The ultimate question is “whether the conspiracy-wide quantity

was within the scope of the criminal activity” to which the defendant agreed. *Id.*

C. Discussion

Sherman contends that the district court erred in attributing at least 3.25 kilograms of crack cocaine to him without making the requisite factual findings. This claim is without merit.

The Sherman PSR properly concluded that the court-authorized intercepted telephone calls established that, during September and October 2007, both Hoggard and Glover “would obtain between 100 and 500 grams of powder cocaine once or twice a week during the 60-day wiretaps.” SPSR, ¶ 10. The investigation revealed that Glover and Hoggard were purchasing cocaine from Genero Marte, their source of supply in New York City, for approximately 9 months beginning in early 2007 until they were arrested in December 2007. SPSR, ¶ 14. “Conservatively estimating the combined purchase of 500 grams of cocaine per week, which was converted into approximately the same quantity of cocaine base, Glover and Hoggard are responsible for the distribution of approximately 18 kilograms of cocaine base.” *Id.*

The PSR also correctly noted that “Glover and Hoggard were partners, in the sense that they would combine their resources to make bulk quantity purchases from Marte.” SPSR, ¶ 15. Defendant Sherman “also came into this agreement and the three men operated in concert towards large quantity purchases.” *Id.* As a result, the

PSR concluded that Sherman “pooled his resources with Hoggard and Glover in purchasing multi-kilogram quantities of cocaine from Genero Marte, and converted the cocaine into cocaine base for sale. As such, his relevant conduct under §1B1.3(a)(1)(A) and (B) is more than 4.5 kilograms of cocaine base.” SPSR, ¶ 19.

The district court agreed with and accepted the PSR’s estimates that Hoggard alone was responsible for approximately 250 grams (or a quarter-kilogram) of cocaine each week, and noted that this was “probably a conservative estimate.” SA 23. The court found that the intercepted telephone calls from November 2007, indicated a “very long standing relationship between Sherman and Hoggard and other co-conspirators.” *Id.* The court conservatively estimated that the drug-dealing relationship between Sherman and Hoggard had existed for at least 13 weeks at the time of the wire tap, i.e., from in or around late August 2007 until November 27, 2007. *Id.*

Accordingly, based on the intercepted calls, the trial evidence, and after reviewing the PSR and the sentencing memoranda, the court made what it described as an “an extremely conservative conclusion,” that Sherman was responsible for 3.25 kilograms of crack, a reduced figure from the 4.5 kilograms estimated in the PSR to which the defense did not object. The court noted that it could have held Sherman responsible for the drug dealing activities of both Hoggard and Glover (an estimated 18 kilograms worth of crack), but it did not. At the sentencing hearing (GA 753), and in the sentencing memoranda (GA 811, ¶

4), the defense only objected to a quantity finding of 18 kilograms.

Notably, Sherman offered no evidence or testimony to dispute the government's evidence on drug quantity. Thus, the court's drug-quantity finding was both conservative and factually supported. *See Prince*, 110 F.3d at 925 (affirming district court's "conservative" estimate of drug quantity).

IV. The district court properly denied the defendant's motion to suppress the wiretap evidence based on the defendant's claim that the supporting affidavit did not establish that the wiretap was necessary or the result of an independent investigation

A. Relevant facts

On the first day of trial, January 6, 2009, Sherman filed a motion to suppress intercepted telephone calls from defendant Hoggard's telephone (Target Telephone 2) to which Sherman was a party. The defendant claimed, as he does here in his *pro se* brief, that the government's supporting affidavits failed to establish that a wiretap authorization was a "necessity" or was the result of an independent investigation. The defendant claimed that the affidavit to support the wiretap of Hoggard's phone, dated November 13, 2007, is a "copycat" affidavit of the previous affidavit filed in support of the wiretap of Glover's phone dated September 17, 2007. Sherman *Pro Se* Brief, 4-5.

On the same day, after reviewing both affidavits, the district court denied the motion. The district court concluded that the Hoggard affidavit “was a fully adequate affidavit to support the order of [United States District Court Judge Alan H. Nevas] to issue the Title III wiretap on Mr. Hoggard’s phone. There was overwhelming probable cause.” GA 22. The court also found that the affidavit contained a sufficient “particularized showing” that traditional investigative techniques were not likely to be effective against Hoggard, thereby satisfying the “necessity” requirement. In addition, although the court noted there were similarities between the two affidavits, the court found that the Hoggard affidavit “is not a copy cat affidavit.” GA 20. Accordingly, the motion to suppress was denied. GA 23.

B. Governing law and standard of review

1. Overview of Title III

Section 2518(1)(c) of Title 18 of the United States Code requires that an application for a wiretap order provide “a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.” Section 2518(3)(c) requires a finding by the Court that “normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.”

The Supreme Court has stated that Section 2518 “is simply designed to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.” *United States v. Kahn*, 415 U.S. 143, 153 n. 12 (1974). The Court of Appeals for the Second Circuit has held that:

[T]he purpose of the statutory requirements is not to preclude resort to electronic surveillance until after all other possible means of investigation have been exhausted by investigative agents; rather, they only require that the agents inform the authorizing judicial officer of the nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods.

United States v. Miller, 116 F.3d 641, 663 (2d Cir. 1997); *United States v. Torres*, 901 F.2d 205, 231 (2d Cir. 1990). *See also United States v. Vazquez*, 605 F.2d 1269, 1282 (2d Cir. 1979).

“The requirement that there be disclosure as to the use, success, and potential success of other investigative techniques, however, does not mean ‘that any particular investigative procedures must be exhausted before a wiretap may be authorized,’” *Miller*, 116 F.3d at 663 (quoting *United States v. Young*, 822 F.2d 1234, 1237 (2d Cir. 1987)), even though other techniques used in combination might have borne some fruit. *See Young*, 822

F.2d at 1237.⁹ “A reasoned explanation, grounded in the facts of the case, and which ‘squares with common sense is all that is required.’” *United States v. Bellomo*, 954 F.Supp. 630, 639 (S.D.N.Y. 1997) (quoting *United States v. Ianniello*, 621 F.Supp. 1455, 1465 (S.D.N.Y.), *aff’d* 808 F.2d 184 (2d Cir. 1985), in turn quoting *United States v. Shipp*, 578 F.Supp. 980, 989 (S.D.N.Y. 1984), *aff’d sub nom. United States v. Wilkinson*, 754 F.2d 1427 (2d Cir. 1985). Indeed, the Court of Appeals in *Young* recognized that “wiretapping is particularly appropriate when the telephone is routinely relied on to conduct the criminal enterprise under investigation.” *Id.*, 822 F.2d at 1237 (quoting *United States v. Steinberg*, 525 F.2d 1126 (2d Cir. 1975)). The issue of whether normal investigative means have been exhausted must be tested in a practical and common sense manner. *See Torres*, 901 F.2d at 231 (citing *United States v. Scibelli*, 549 F.2d 222, 226 (1st Cir. 1977)).

⁹ In cases such as this one, involving the investigation and prosecution of narcotics trafficking organizations, this Court has recognized the inadequacy of several normal investigative techniques and approved of investigators resorting to electronic surveillance. *See Torres*, 901 F.2d at 232 (confidential informants had minor role in the overall scale of operation); *Young*, 822 F.2d at 1237 (physical surveillance impractical as it would have likely been conspicuous and drawn attention to the investigators); *United States v. Martino*, 664 F.2d 860, 868 (2d Cir. 1981) (use of pen register data and toll records did not identify participants to a phone conversation or other coconspirators).

2. Standard of review

When reviewing the issuing judge's determination that the requirements of Section 2518(3)(c) have been met, the Court should not "make a *de novo* determination of sufficiency as if it were [the issuing judge], but [must] decide if the facts set forth in the application were *minimally adequate* to support the determination that was made.'" *Torres*, 901 F.2d at 231 (emphasis added) (quoting *Scibelli*, 549 F.2d at 226); *see also United States v. Smith*, 31 F.3d 1294, 1298 n.1 (4th Cir. 1994). The reviewing court should "grant considerable deference to the district court's decision." *United States v. Concepcion*, 579 F.3d 214, 217 (2d Cir. 2009). When conducting this review, the Court should view the application in a "common-sense and realistic fashion," and give deference to the authorizing judge's determination. *United States v. Ruggiero*, 726 F.2d 913, 924 (2d Cir. 1984).

C. Discussion

On the first day of trial, Sherman's counsel filed a 2-page motion to suppress the wiretap evidence claiming that the Hoggard affidavit failed to establish the "necessity" requirement, and that the affidavit was essentially a copycat of the Glover affidavit. In response, the district court recessed and personally reviewed the subject affidavits.

After reviewing both wiretap affidavits, the district court correctly determined that the affidavits satisfied all requirements. At the outset, the court noted that the

affidavits were “not identical” and were not “copy cat” applications. GA 16. The court specifically pointed to information in the Hoggard affidavit of November 17, 2007 (Target Telephone 2) (GA 891-920) that did not appear in the Glover affidavit of September 13, 2007 (Target Telephone 1) (GA 849-890).

For example, paragraph 29 of the Hoggard affidavit (GA 907) contained a description of attempts to personally surveil Hoggard that does not appear in the Glover affidavit. GA 17. In paragraph 30 (GA 907-908), there is reference to the fact that Hoggard was very difficult to monitor due to the use of multiple rental vehicles. *Id.* The court found this was “very important information to provide, very particular to Mr Hoggard which was not included in the Glover application.” GA 17-18. Furthermore, in paragraph 40 (GA 911), the affiant stated that he was unaware of any “undercover act or officer that could infiltrate [Hoggard’s] organization.” Once again, the court correctly noted that this statement was important to the “necessity “ determination and was particular to Hoggard as it did not appear in the Glover affidavit.

In paragraphs 17-23 (GA 901-904), there is a recounting of a series of intercepted drug calls between Hoggard and Glover all of which occurred after the Glover wiretap application was submitted and approved. GA 19.

And finally, in paragraph 59 (GA 915-916), there is an explanation of the usefulness of the Glover wiretap and how the information gathered had established the nature of the criminal relationship between Glover and Hoggard.

GA 18-19. It also showed that each defendant used “separate stash locations, resupply locations and had a distinct customer base.” GA 19.

Accordingly, the district court correctly ruled that the government satisfied the “necessity” requirement under 18 U.S.C. §2518 in order to establish a basis for the Title III wiretap on defendant Hoggard’s telephone. Specifically, the court correctly found that (1) the probable cause to intercept calls from Hoggard’s phone was “overwhelming,” and (2) that the government had made a sufficient particularized showing that routine investigative techniques would not be effective in penetrating Hoggard’s crack cocaine conspiracy. GA 22. As this Court has stated, the government “is not required to exhaust all conceivable investigative techniques before resorting to electronic surveillance. The statute only requires that agents inform the authorizing judicial officer of the nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods.” *United States v. Concepcion*, 579 F.3d at 218 (internal citation omitted). Therefore, the district court’s admission of the pertinent intercepted telephone calls into evidence was proper.

CONCLUSION

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

Dated: June 18, 2010

Respectfully submitted,

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A handwritten signature in black ink, appearing to read "Wm Brown, Jr.", written in a cursive style.

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

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 12,343 words, exclusive of the Table of Contents, Table of Authorities and Addendum of Statutes and Rules.

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WILLIAM M. BROWN, JR.
ASSISTANT U.S. ATTORNEY

ADDENDUM

18 U.S.C. § 2518. Procedure for interception of wire, oral, or electronic communications

(1) Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

(a) the identity of the investigative or law enforcement officer making the application, and the officer authorizing the application;

(b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the particular offense that has been, is being, or is about to be committed, (ii) except as provided in subsection (11), a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

(c) a full and complete statement as to whether or not other investigative procedures have been tried and failed

or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) a statement of the period of time for which the interception is required to be maintained. If the nature of the investigation is such that the authorization for interception should not automatically terminate when the described type of communication has been first obtained, a particular description of facts establishing probable cause to believe that additional communications of the same type will occur thereafter;

(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire, oral, or electronic communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; and

(f) where the application is for the extension of an order, a statement setting forth the results thus far obtained from the interception, or a reasonable explanation of the failure to obtain such results.

(2) The judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire, oral, or electronic communications within the territorial jurisdiction of the court in which the judge is sitting (and outside that jurisdiction but within the United States in the case of a mobile interception device authorized by a Federal court within such jurisdiction), if the judge determines on the basis of the facts submitted by the applicant that--

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) except as provided in subsection (11), there is probable cause for belief that the facilities from which, or the place where, the wire, oral, or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission

of such offense, or are leased to, listed in the name of,
or commonly used by such person.

* * *

Add. 4