11-5467(L)

To Be Argued By:
H. GORDON HALL

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 11-5467(L)
10-2554(CON)

UNITED STATES OF AMERICA,

Appellee,

-vs-

ROBERT RAWLS, CHARLES BUNCH, aka June, CHRISTOPHER LAMONT SHERMAN, aka C-L,

(For continuation of Caption, See Inside Cover)

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

BRIEF FOR THE UNITED STATES OF AMERICA

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Defendants,

GENERO MARTE, aka G,
ROSHAUN HOGGARD, aka Foot,

Defendants-Appellants.

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

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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 Genero Marte on December 2, 2009, Marte Appendix 20 ("MA__"), and Marte filed a timely notice of appeal on November 24, 2009, MA20, MA40. *See* Fed. R. App. P. 4(b).

The district court entered a final judgment as to Roshaun Hoggard on June 22, 2010. Hoggard Appendix 32-33 ("HA__"). Hoggard filed a timely notice of appeal pursuant to Fed. R. App. P. 4(b) on June 21, 2010. HA32.

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

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

II. With respect to Hoggard, was there a variance between the conspiracy charge and the trial evidence which prejudiced Hoggard?

III. Did the district court commit clear error in sentencing Marte based on an attribution to him of 5.6 kilograms of crack cocaine or in sentencing Hoggard based on an attribution to him of 3.5 kilograms of crack cocaine?

IV. Did the district court commit clear error in sentencing Marte based on a finding that he was an organizer or leader under U.S.S.G. § 3B1.1(a) or in sentencing Hoggard based on a finding that he was an organizer or leader under U.S.S.G. § 3B1.1(a)?

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Preliminary Statement

The defendants Genero Marte and Roshaun Hoggard were convicted after trial to a jury on one count of a superseding indictment charging them with conspiracy to possess with intent to distribute and to distribute 50 grams or more of crack cocaine. On appeal, both defendants challenge the sufficiency of the evidence presented at

trial, but as set forth below, the evidence was more than sufficient to sustain both defendants' convictions. Hoggard also claims that there was a variance between the indictment and the evidence presented at trial. There was no variance, and in any event, Hoggard can show no prejudice.

Finally, both defendants claim that at their respective sentencings, the district court erred in calculating the drug quantity attributable to them and in increasing their guidelines offense levels for their respective roles in the conspiracy offense conduct. As set forth below, however, the district court properly calculated the defendants' guidelines ranges, including the drug quantity and role enhancements, and thus their sentences should 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 defendants, Genero Marte, also known as "G," and Roshaun Hoggard, also known as "Foot," charging Marte, Hoggard and others with one count of conspiracy to distribute 50 grams or more of crack cocaine, in violation of 21 U.S.C. §§ 846, 841(a)(1) and 841(b)(1)(A)(iii). MA4, MA22-29. Hoggard was also charged with possession with intent to distribute 5 grams or more of crack cocaine, in violation of 21 U.S.C. §§ 841(a)(1) and

841(b)(1)(B)(iii). HA40. On September 23, 2008, a grand jury returned a superseding indictment containing essentially the same charges, but with technical changes. MA10, MA30-36.

Starting on November 7, 2008, Marte and Hoggard were tried before a jury and the Honorable Janet C. Hall, U.S.D.J. MA15. On November 18, 2008, following completion of the government's case, Marte and Hoggard made oral motions for judgment of acquittal, which the district court denied. MA15, HA21. On November 20, 2008, the jury returned a verdict of guilty as to Marte on Count Two of the superseding indictment (conspiracy). MA16. As to Hoggard, the jury returned verdicts of guilty on Counts Two, (conspiracy), and Five, (possession with intent), of the superseding indictment. HA21-22.

On November 24, 2009, the district court sentenced Marte on Count Two to 204 months of imprisonment and five years of supervised release. MA20, MA37-39. On November 24, 2009, Marte filed a timely notice of appeal. MA20, MA40.

On June 18, 2010, the district court sentenced Hoggard to 288 months of imprisonment on Counts Two and Five, to run concurrently, to be followed by ten years of supervised release. HA32, HA282-84. On June 21, 2010, Hoggard filed a timely notice of appeal. HA32, HA285.

Both defendants are in custody serving the sentences imposed by the district court.

Statement of Facts and Proceedings Relevant to this Appeal

A. The trial of Marte and Hoggard—An overview

Marte and Hoggard were tried before a jury on a charge that they conspired to distribute 50 grams or more of cocaine base.[1] At trial, Special Agent Uri Shafir of the Drug Enforcement Administration ("DEA") testified that during 2007, he and other law enforcement officers investigated suspected crack cocaine distribution in the New Haven, Connecticut area by Roshaun Hoggard. Government Appendix 81 ("GA__").[2] Agent Shafir indicated that, along with DEA Special Agent Raymond Walczyk, he was a co-case agent in the investigation. GA106. He stated that the investigation employed, among other techniques, the court-authorized interception of wire communications occurring over two cellular telephones. GA88-89. Agent Shafir testified that his review of the intercepted calls established that

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[1] Hoggard was also tried on a charge that he possessed with the intent to distribute 5 grams or more of cocaine base, HA21, but he does not challenge his conviction on that charge on appeal.

[2] The complete trial transcript is included in the Government Appendix.

among the participants in the calls were Genero Marte, Roshaun Hoggard, Robert Rawls, Kenneth Thames, Chris Lamont Sherman, and Torrance McCown. GA476-86. Many of these intercepted, recorded telephone calls were admitted into evidence.

B. Inside the Hoggard conspiracy: Testimony of Kenneth Thames and corroboration of his testimony

Kenneth Thames, a cooperating witness, testified that he had been charged with distribution of crack cocaine, and had pleaded guilty to participating in a crack cocaine distribution conspiracy with Hoggard and others. At the time of his plea, he entered into written plea and cooperation agreements. GA235, Exhibits 87 and 88.

Thames stated that he began to buy crack cocaine for re-sale from Hoggard in September 2007, and that he continued to purchase crack cocaine from Hoggard through November of that year. GA240-41. According to Thames, the crack cocaine he purchased from Hoggard came in "eight-ball" quantities, each of which cost between $85 and $100 and weighed approximately 3.5 grams, or one-eighth of an ounce. GA242. Thames would order crack cocaine from Hoggard over a cellular telephone using a code. GA241, GA243. In this code, "Monday" would mean one eight-ball, "Tuesday" would mean two, and

"Thursday" or "fortune" would mean four.[3] GA243-44. Thames would break up the crack cocaine he obtained from Hoggard into "dime" bags. Thames would make approximately 20 dime bags from each eight-ball, and would sell these dime bags for $10 each. GA244-45.

Thames thereafter testified about several conversations, recorded in intercepted telephone calls, in which he arranged to obtain crack cocaine from Hoggard, or otherwise discussed such matters with him. For example, Thames explained that in one call on November 17, 2007, he ordered a "fortune," or four eight-balls, from Hoggard, Exhibit T 12; GA1566-67, GA252-55, and three minutes later, Hoggard confirmed that he would bring crack to Thames at Thames's residence at 25 Bond Street, Exhibit T 13, GA1568-69, GA362.

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[3] The government presented recordings of a number of intercepted calls in which other members of the conspiracy used code in conversations with Hoggard that corresponded to the code that Thames had described: "bring Monday," (Exhibit T 6, GA1556-57); "bring me Monday," (Exhibit T 8, GA1558-59); "bring fortune," (Exhibit T 10, GA1560-62); "I need to see you on a . . .Tuesday . . . .I got people waiting," (Exhibit T 42, GA 1629-30); "he want Tuesday," (Exhibit T 43, GA1631-32); "bring Tuesday, cousin," (Exhibit T 75, GA1695-96); "two," (Exhibit T 76, GA1697-98); and "can you bring me four," (Exhibit T 77, GA1699-1700).

Thames's testimony about this transaction was corroborated by Task Force Officer Brian Pazsak, who listened to the calls as they were intercepted, and who was already familiar with Thames and Hoggard from his patrol activity in the Newhallville neighborhood. GA412-15, GA426. After hearing these calls, Officer Pazsak established surveillance in the vicinity of 25 Bond Street, which he knew to be Thames's home. Officer Pazsak saw a car he knew that Hoggard had driven in the past pull up to 25 Bond Street. He saw Thames leave his home, approach and reach into the vehicle, and then go back into his home. As the car left the area, Officer Pazsak saw that it was driven by Hoggard. GA414-16.

In a call the next day, November 18, Thames ordered a "Tuesday" from Hoggard, which Hoggard referred to as a "two-piece." Exhibit T 19, GA1574-76. After this call, Hoggard was heard on a call with co-defendant Robert Rawls, and then again with Thames, confirming the meeting. Exhibit T20, GA1577-78, Exhibit T 21, GA1579-80. Thereafter, Thames testified that he ordered two eight-balls of crack cocaine from Hoggard. Exhibit T 19, GA1574-76, GA258-59. And indeed, Task Force Officer Craig Casman saw a van drive up to Thames's house at 25 Bond Street and park briefly. GA437-38. The van was registered to Columbus House, a homeless shelter in New Haven GA437-38. Thames

testified that Hoggard worked at a homeless shelter in New Haven. GA263.

Later that evening, Thames told Hoggard that the "Tuesday," or two-eight-ball quantity of crack cocaine, which Hoggard had provided to him did not look the way it should, so he arranged for Hoggard to give Thames his $200 back. Exhibit T 24, GA1585-88, GA265-67, GA350-52. According to Thames, he met with Hoggard near Hoggard's workplace to effect the transaction. GA350-52. Officer Casman, who was watching Columbus House after hearing Thames's telephone call, GA439, saw a dark-colored Dodge Durango park behind Columbus House. A tall black male walked out of Columbus House and exchanged items with the occupant of the Durango. GA440-41.

In another series of calls on November 24, 2007, Thames ordered crack cocaine from Hoggard. Exhibit T 53, GA1637-38. After hearing these calls, Agent Shafir and other officers saw a red van registered to Rawls leave from Rawls's home at 397 Edgewood Avenue and travel to Hazel Street. GA461-65. After the van left the Hazel Street area, a New Haven police officer stopped the van and identified the driver as Ketcha Savain. GA466. Savain was later present at Hoggard's apartment on December 11, 2007 when task force agents executed a search warrant there. GA1321.

Thames's testimony continued with his description of other calls he participated in to obtain crack cocaine from Hoggard: Exhibit T 49, GA1633-34, (Tuesday/two eight-balls); Exhibit T 72, GA1691-92, (Tuesday/two eight-balls); and Exhibit T 73, GA1693-94, (unspecified amount of crack cocaine). GA353-62.

C. Hoggard's supply source: Genero Marte

In the next phase of the trial, the evidence focused on Hoggard's drug source, Genero Marte.

In the early evening of November 20, 2007, Hoggard spoke to an unidentified man, apparently describing his futile effort to convert a quantity of cocaine powder into cocaine base. Hoggard said, "I'm on the stove right now, and this shit comin' back all crazy, cousin." Exhibit T 29, GA1594-95. Hoggard next spoke with Marte, and gave him the same message: "Shit is all lumpy and this shit is crazy, it ain't even comin' back right." Marte responded by telling Hoggard to "bring it back." Exhibit T 30, GA1596-98. In separate conversations, Hoggard spoke with two other conspirators, Chris Lamont Sherman and Robert Rawls, and told them that he was returning the drugs. *See* Exhibit T 31, GA1599-1601 (Hoggard to Sherman: "I need to take this shit back, man . . . . I told him I'm bringing all that shit back."); Exhibit T 32, GA1602-03 (Hoggard

to Rawls: "Hey, yo, I'm bringing this shit back, cousin.").[4]

Later that evening, around 9:20 pm, Hoggard told an unidentified man on the phone, "Yo, I called 'G,' man. He told me he gonna change it. I'm right here by the school." The man replied, "Alright, OK. Hold on."[5] Exhibit T 34, GA1610-11. A short time later, Hoggard again spoke to the unidentified man, who told Hoggard, "I re-cooked the thing . . . [it] only came back thirty-three, ok? That's all I give you, the one twenty - eight and the thirty three . . .that I got." The two men then argued, apparently about a quantity. Exhibit T 37, GA1616-17. The conversation continued in the next telephone call, in which the man told Hoggard, "We tossed whatever you had on a Reddings and it came back like thirty-three. So we gave you that as a difference for what you brung. We switched up the work and all that and we gave you the thirty-three on top of what you brung." Hoggard continued to argue with the man, telling him, "I don't know what it was, I kept stirring it, playing with it, you feel me, I

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[4] After these calls, the DEA attempted to observe Hoggard as he left New Haven to meet with Marte in New York. GA704-713.

[5] Another witness, Mauriel Glover, a crack dealer and associate of Hoggard, explained that the defendant, Genero Marte, was known as "G." GA641-42.

even put mad water and then I put some more, you know soda . . . ."[6] Exhibit T 38, GA1618-21.

Immediately thereafter, Hoggard spoke to Marte. Marte told Hoggard, "What you bring back, that's what you gonna get." Exhibit T 39, GA1622-24. After this call, Hoggard and the unidentified man spoke again, with Hoggard asking, "My shit in the car now?" and the unidentified man replying, "Yeah, everything good." Exhibit T 40, GA1625-26. In the final call, Hoggard spoke to the man, and the man told Hoggard, "I give you the one twenty-eight that you bring me soft, I change it, I give you the thirty-three that come back when I . . . make the . . . ." Hoggard replied, "Alright." Exhibit T 41, GA1627-28.

During this time frame, law enforcement observed a red van registered to Rawls in the area of Marble Hill Road and West 228th Street in Bronxville. GA714. Further, at approximately, 11:50 pm, a red Ford Expedition arrived at Hoggard's home at 397 Edgewood Avenue. Two men got out of the Expedition. Although the surveil-

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[6] Shafir described for the jury the process by which cocaine powder is converted to cocaine base, or crack. He stated that a quantity of baking soda and water is added to a quantity of cocaine powder, and the mixture is heated on a stove or similar device and stirred. After cooking, the water is poured off and the remainder is left to cool and harden. This remainder is crack cocaine. GA502-04.

lance agent was not able to positively identify the men, one matched the physical description of Hoggard, and one the description of Rawls, who lived at 397 Edgewood Avenue with Hoggard. GA716-19.

In a recorded call on November 27, 2007, Hoggard told Rawls, "If you can, spot me a little bit something because, you know, I want to get up there before four, man." Exhibit T 56, GA1639-40. Several hours later, Hoggard spoke to Sherman, who told Hoggard, "I'm coming, I'm coming." Hoggard replied, "Alright, I was just making sure it was final." Exhibit T 58, GA1641-42.

At approximately 10:00 pm that night, a car used by Hoggard was seen parked near the intersection of West 228th Street and Marble Hill Road in the Bronxville area of the Bronx, a location Hoggard had previously met his drug source. GA820, GA824. Approximately 20 minutes later, Hoggard and another individual got in the parked car, which was already occupied by a driver. GA828-30. In this time frame, Hoggard was heard speaking to Marte on the phone: "Yo, I'm by the school, yo." Exhibit T 60, GA1647-48. Minutes later, Hoggard told an unidentified man, "I'm with 'L,' yo." Exhibit T 62, GA1651-52.

Although Marte and Hoggard were not seen together that night, Marte was seen walking in the area of West 227th Street and Marble Hill

Road talking on a cellular telephone. GA930-31. Marte walked toward the car that Hoggard and his associates were in at the time. GA973.

Shortly after Hoggard's telephone conversations, the car left the area and returned to Connecticut. GA830-31, GA921, GA924-26. At approximately 12:30 am, the car pulled up to Hoggard's house at 397 Edgewood Avenue in New Haven. Hoggard got out of the car and went inside his house; the car left. GA926-29.

D. November 27, 2007: Seizure of a supply of cocaine

After the car dropped off Hoggard, Task Force Officers Daniel Sacco and Brian Pazsak (both wearing New Haven police uniforms and operating a marked New Haven police car), followed it and eventually stopped the car. GA1034-35. The driver and the remaining passenger got out of the car, and the passenger fled on foot. GA1036. Officer Sacco chased the passenger and watched as he threw a bag onto the roof of a nearby building. GA1038. Law enforcement ultimately caught the passenger and identified him as Chris Sherman. GA1039. The bag Sherman had thrown was retrieved and found to contain 272 grams of what appeared to be cocaine. Exhibit 93, GA1040. Forensic testing later confirmed that the bag contained 258.5 grams of cocaine powder. GA1426-28.

Shortly after the seizure, Hoggard and Rawls spoke on the phone about Sherman's arrest. Exhibit T 66, GA1661-63. After Hoggard explained what had happened, Rawls asked, "What do you mean? And he throw his 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."

E. December 10, 2007: Arrest of Marte

On December 10, 2007, Marte was arrested in the Bronxville section of the Bronx, New York. GA1161-62. At the time of his arrest, Marte had in his possession a cellular telephone which repeatedly had been in contact with Hoggard's telephone and the telephones of other co-defendants during the investigation. GA1168-71. He also was in possession of over $9,000 in U.S. currency. GA1172-74. At the time of the arrest, two Special Agents from the DEA, Agent Meletis and Agent Walczyk, were able to identify Marte's voice as the voice of the individual who had been intercepted over Hoggard's cellular telephone discussing cocaine and the processing of cocaine into crack with Hoggard. The identifications were based on a direct comparison by each agent of a recording of the voice of "G" from the wiretap with the live voice of Marte. GA1165-67, GA1266.

F. December 11, 2007: Search of Hoggard's residence

On December 11, 2007, Task Force officers executed a federal search warrant at 397 Edgewood Avenue where Hoggard and Rawls lived. GA1316. At the time of the search, there were two women, Ketcha Savain and Sonja Oten, in the apartment. GA1321. Officers seized a variety of drug paraphernalia from the apartment, including the following: three digital scales, which were covered in a white powder residue that was later determined to be cocaine powder, GA1323, GA1426; a black digital scale with white powder residue (later determined to be crack cocaine) and razor blades, GA1323, GA1426; 8.6 grams of crack cocaine seized from Hoggard's safe, GA1325, GA1426; zip-lock plastic bags containing 5 grams of crack cocaine and .11 grams of cocaine powder, recovered from a safe, GA1326, GA1426; drug packaging materials recovered from a safe, GA1332; and kitchen utensils caked in white powder residue, which contained crack cocaine, GA1327, GA1426.

G. Jury Verdict

Following completion of the government's case, on November 18, 2008, Marte moved orally for judgment of acquittal, as did Hoggard. The court denied these motions the same day. MA15, HA21.

On November 20, 2008, the jury returned verdicts of guilty as to the defendants Genero Marte and Roshaun Hoggard on Count Two of the Superseding Indictment, which charged both defendants with conspiracy to possess with intent to distribute and to distribute 50 grams or more of cocaine base/crack cocaine, in violation of 21 U.S.C. § 846. MA16, HA21-22. The jury also returned a verdict of guilty as to Hoggard on Count Five of the Superseding Indictment, which charged him with possession with intent to distribute 5 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(iii). HA22.

Thereafter, on December 1, 2008, Hoggard filed a motion for judgment of acquittal, HA23, which the court denied on March 16, 2009, HA25.

H. The sentencings[7]

1. Genero Marte

The court held three hearings to address various guidelines issues related to Marte's sentencing. In the course of these hearings, the court found that Marte was responsible for 5.6 kilograms of crack cocaine, GA1772, but departed downward to apply a one-to-one sentencing ratio

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[7] Additional details relating to the sentencing proceedings are set forth as relevant below.

between the powder cocaine and crack cocaine guidelines. After this departure, Marte's base offense level was 32. GA1773. The court increased the defendant's offense level by four levels after finding that he led, managed or supervised another individual in the conspiracy. GA1802.

With a total offense level of 36 and criminal history category I, the guidelines recommended a range of 188-235 months. GA1802; Sentencing Table. After considering the sentencing factors in 18 U.S.C. § 3553(a), the court sentenced Marte to 204 months of imprisonment, to be followed by five years of supervised release, and a fine of $25,000. MA20, GA1823.

2. Roshaun Hoggard

At a sentencing hearing on June 18, 2010, the court found that Hoggard was responsible for 3.5 kilograms of crack cocaine, but departed downward to the level that would apply if it used a one-to-one ratio for crack cocaine and powder cocaine, thus arriving at a base offense level of 30. HA218-227. The court increased his offense level by four levels to account for Hoggard's role as a leader and organizer of the offense conduct involving five or more people. HA229-42.

With a final offense level of 34, and a criminal history category of VI, Hoggard faced a recommended guidelines range of 262 to 327 months' imprisonment, subject to a mandatory minimum term of 240 months. HA244-45, HA247. After

reviewing the sentencing factors under 18 U.S.C. § 3553(a), the court sentenced Hoggard to 288 months' incarceration on both counts, to be served concurrently, to be followed by ten years of supervised release on Count Two and eight years of supervised release on Count Five, to be served concurrently. HA277.

Summary of Argument

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

The evidence in the case established that Marte supplied Hoggard with powder cocaine, which Marte knew Hoggard was in the business of transforming into crack and selling. The evidence also established that Hoggard's distribution organization in New Haven sold redistribution quantities of the crack to a number of crack distributors in the New Haven area. The jury found that the activities of the two men, and their confederates, were not a series of independent buyer-seller relationships as is argued by Hoggard, but, rather, aspects of one, single conspiracy which embraced as members Marte and Hoggard, among others.

The jury heard, for example, the testimony of Kenneth Thames that he repeatedly purchased crack cocaine from Hoggard for re-sale. This tes-

timony, as corroborated by law enforcement surveillance of narcotics transactions, and recordings of intercepted telephone conversations between Hoggard and Thames, and Hoggard and other apparent crack cocaine customers, established the existence of the conspiracy. The jury also heard evidence, in the form of recorded conversations, about Marte's role as the cocaine supplier for the conspiracy. Marte and his associate, for example, discussed with Hoggard problems Hoggard was having turning cocaine (which he had obtained from Marte) into crack. Ultimately, Marte agreed to take back a portion of the defective cocaine from Hoggard. The recorded conversations were corroborated by law enforcement surveillance of narcotics transactions, which culminated in the seizure of some 250 grams of powder cocaine from Chris Lamont Sherman, a co-conspirator, following a resupply trip to Marte which Sherman made with Hoggard. Finally, calls intercepted following the seizure left no doubt of Hoggard's connection to the seized cocaine, and of the existence of a crack cocaine conspiracy involving Hoggard, Sherman, co-defendant Robert Rawls and numerous crack cocaine re-sellers.

The evidence against Marte and Hoggard, viewed in a light most favorable to the government, was more than sufficient to support the jury's verdicts of guilty.

Furthermore, the evidence established that Hoggard was a member of a drug distribution conspiracy, and not a mere participant in unrelated "buyer-seller" transactions. The evidence showed that the conspirators worked together to enhance the conspiracy's long-term interests and trusted each other. Hoggard made numerous sales that he knew to be for redistribution, and his transactions spanned several months.

Finally, the evidence against Marte, including the identification of his voice on the recorded conversations, was sufficient to sustain his conviction. Marte participated in numerous recorded conversations, and two separate law enforcement agents identified his voice. Moreover, there was other evidence, including evidence seized at his arrest, that tied him to the conspiracy.

II. There was no prejudicial variance between the indictment and the evidence admitted at trial.

The evidence at trial established that Marte, Hoggard, Sherman and a number of others participated in a single conspiracy to possess with intent to distribute crack. The recordings played at trial, the statements of trial witnesses, and investigative reports from the case were provided to the defense well in advance of trial. Hoggard was not prejudiced by their admission, as his attorney was in a position to challenge and to attempt to discredit this evidence. Hoggard's

specific claim of prejudice by the admission of evidence of a cocaine seizure from his co-defendant, Sherman, is defeated by evidence in the record from which the jury could have found that Sherman was a co-conspirator. The evidence is not at variance with the charge in the indictment alleging a crack conspiracy involving Marte, Hoggard, Sherman and others.

III. The district court properly calculated the quantity of drugs attributable to both Marte and Hoggard.

The evidence at trial, as marshaled by the district court at the time of the sentencings, and viewed against the whole record, including three other jury trials of other defendants in this case, amply supported the court's determination that 5.6 kilograms of crack was reasonably foreseeable to Marte by virtue of his participation in the conspiracy on which he was found guilty by the jury, and that 3.5 kilograms of crack was reasonably foreseeable to Hoggard by virtue of his participation in the same conspiracy. At a minimum, those findings, which were based on conservative estimates specifically tied to evidence of the conspiracy's operations, were not clearly erroneous. But even if the court erred in any respect, any such errors were harmless because the actual quantities attributable to Marte and Hoggard were much higher than the quantities the court used. Moreover, once the court calculated a quantity of crack cocaine, it adopted a

one-to-one ratio between crack and powder cocaine, and thus used the powder cocaine guidelines to establish the base offense level. Accordingly, any minor errors in the court's drug quantity findings did not prejudice the defendants.

IV. The district court properly enhanced each defendant's sentence for their respective roles in the conspiracy.

The evidence at trial supported the court's determination that Marte was a leader in the offense conduct in this case. Intercepted, recorded telephone calls established that Marte was in charge of the New York cocaine operation which supplied the Hoggard organization with cocaine, which it transported to Connecticut, processed into crack and sold in the New Haven area. The conspiracy involved far more than five participants, and was an extensive, interstate operation of long standing. And not only was Marte the party responsible for making cocaine sale-and-return arrangements with the Hoggard operation, but he also directed and instructed at least one unidentified individual in that person's drug dealings with Hoggard.

Finally, the evidence at trial supported the court's determination that Hoggard was an organizer in the offense conduct in this case, specifically of the New Haven crack distribution operation. Intercepted, recorded telephone calls established that Hoggard was in charge of the New

Haven crack operation which was supplied with cocaine by Marte in New York. The conspiracy involved far more than five participants, and was extensive. Hoggard organized and orchestrated the entire New Haven venture, from negotiating for and purchasing the powder cocaine from Marte, to arranging for its transport to New Haven, to processing it into crack and packaging it, and, when necessary, exchanging with Marte's associates cocaine of poor quality for other drugs. The trial evidence disclosed several instances in which Hoggard expressly directed members of the New Haven operation to retrieve proceeds to finance further drug purchases.

Argument

I. The evidence at trial supported the guilty verdicts.

A. Relevant facts

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

B. Governing law and standard of review

1. Sufficiency of the evidence

A defendant challenging the sufficiency of the evidence bears a "heavy burden." *See United States v. Archer*, 671 F.3d 149, 160 (2d Cir. 2011) (quotations omitted); *United States v. Mercado*, 573 F.3d 138, 140 (2d Cir. 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)). *See also Cavazos v. Smith*, 132 S. Ct. 2, 4 (2011) ("A reviewing court may set aside the jury's verdict on the ground of insufficient evidence only if no rational trier of fact could have agreed with the jury."). All permissible inferences must be drawn in the government's favor. *See Archer*, 671 F.3d at 160; *see also United States v. Kozeny*, 667 F.3d 122, 139 (2d Cir. 2011). "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); *see also United States v. Torres*, 604 F.3d 58, 67 (2d Cir. 2010).

"[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; *see Kozeny*, 667 F.3d at 139. Indeed, "jurors are entitled, and routinely encouraged, to rely on their common sense and experience in drawing inferences." *United States v. Huezo*, 546 F.3d 174, 182 (2d Cir. 2008). 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). In this regard, the government is not "'required to preclude every reasonable hypothesis [that] is consistent with innocence." *Archer*, 671 F.3d at 160 (quoting *United States v. Chang An-Lo*, 851 F.2d 547, 554 (2d Cir. 2008)). "[R]eversal is warranted only if no rational factfinder could have found the crimes charged proved beyond a reasonable doubt." *Archer*, 671 F.3d at 160 (quoting *United States v. Gaskin*, 364 F.3d 438, 459-60 (2d Cir. 2004)).

"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 this case, the government was required to prove three essential elements by direct or circumstantial evidence: (1) that the conspiracy alleged in Count Two of the superseding indictment existed; (2) that the defendant knowingly joined or participated in it; and (3) that it was reasonably foreseeable to the defendant that the conspiracy involved 50 grams or more of cocaine base, or crack cocaine. *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 [he] 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). In drug cases, the courts dis-

tinguish between a conspiratorial relationship, on the one hand, and a mere buyer-seller relationship, on the other. *See United States v. Rojas*, 617 F.3d 669, 674-75 (2d Cir. 2010). 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 evidence was sufficient to show that a conspiracy existed.

a. The testimony of Thames

The jury heard and saw evidence from several perspectives which shed light on the existence, objects, membership and inner workings of the crack cocaine distribution conspiracy charged in the superseding indictment.

Testimony from Kenneth Thames, a crack cocaine re-seller and customer of Hoggard, a principal in the conspiracy, established the existence of Hoggard's operation, and elucidated the man-

ner and means by which the distribution activity was carried out. Thames told the jury that he began to buy crack cocaine for re-sale from Hoggard in September 2007, and that he continued to purchase crack cocaine from Hoggard through November of that year. GA240-41. He explained that the crack cocaine he purchased from Hoggard came in "eight-ball" quantities, each of which cost $85 to $100 and weighed approximately 3.5 grams. GA242. Thames stated that he would order crack cocaine from Hoggard over a cellular telephone, using an established code. GA243-44. Thames testified that he would sell the crack cocaine he obtained from Hoggard in "dime" bags, for $10 each, and that he would make approximately 20 dime bags from each eightball. GA244-45.

Thames supplemented his initial testimony by explaining for the jury a number of intercepted telephone calls in which he arranged to obtain crack cocaine from Hoggard, as well as calls in which he and Hoggard used the code he described. In one call, for example, he ordered a "fortune," or four eight-balls, from Hoggard. Exhibit T 12, GA1566-67, GA255. In another call, Thames ordered a "Tuesday" from Hoggard, which Hoggard referred to as a "two-piece." Exhibit T 19, GA1574-76, GA258-59. Thames later told Hoggard that the two-eight-ball quantity of crack cocaine that Hoggard had provided to him did not look the way it should, and arranged for

Hoggard to give Thames his $200 back. Exhibit T 24, GA1585-88, GA266-67. Thames continued to testify that he participated in other calls to obtain crack cocaine from Hoggard: Exhibit T 49, GA1633-34, (Tuesday/two eight-balls); Exhibit T 53, GA1637-38, (Tuesday/two eight-balls); Exhibit T 72, GA1691-92, (Tuesday/two eight-balls); and Exhibit T 73, GA1693-94, (unspecified amount of crack cocaine). GA355-62.

b. Corroboration of Thames

Thames's testimony was corroborated by surveillance of Hoggard conducting drug transactions, and also by numerous intercepted calls between Hoggard and several of his crack cocaine customers in which the customers arranged with Hoggard to obtain crack cocaine.

On three days, November 17, 18, and 24, investigators corroborated Thames's testimony with direct observations. On those days, investigators monitored crack-related calls between Hoggard and Thames, and then established surveillance based on the calls. In each instance, investigators were able to witness meetings, arranged in the calls, in which Hoggard or his surrogates engaged in crack transactions with Thames. *See* pages 6-8, *supra*.

The Thames testimony, together with the corroborating surveillance, if credited by the jury, was more than sufficient to establish the existence of the drug conspiracy headed by Hoggard.

However, the government also presented numerous intercepted calls in which Hoggard and a series of his other crack cocaine customers discussed the purchase/sale of crack cocaine in much the same terms as Thames described. In these exhibits, individuals told Hoggard "bring Monday," (Exhibit T 6, GA 1556-57); "bring me Monday," (Exhibit T 8, GA1558-59); "bring fortune," (Exhibit T 10, GA1560-62); "I need to see you on a . . .Tuesday . . . .I got people waiting," (Exhibit T 42, GA1629-30); "he want Tuesday," (Exhibit T 43, GA1631-32); "bring Tuesday, cousin," (Exhibit T 75, GA1695-96); "two," (Exhibit T 76, GA1697-98); and "can you bring me four," (Exhibit T 77, GA1699-1700).

In sum, Thames's testimony, as corroborated by surveillance and recorded telephone conversations between multiple co-conspirators, established that the conspiracy existed.

2. Marte participated in the conspiracy as the source of supply for co-conspirator Hoggard.

To establish the involvement of Marte and Hoggard in the crack cocaine conspiracy, the government had to show that these men knew of the existence of the charged scheme, that they knowingly joined and participated in it, and that it was reasonably foreseeable to each of them that an object of the conspiracy was to distribute fifty grams or more of cocaine base. *See Snow*,

462 F.3d at 68. In order 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*.

The evidence outlined above amply elucidated the local, distribution aspect of the New Haven distribution conspiracy headed by Hoggard. In addition, the government presented evidence which clearly outlined the supply side of the organization as well, and established the role of Marte as the principal in the supply organization.

For example, on November 20, 2007, Hoggard contacted his source of supply for cocaine, Marte, to complain that cocaine powder he had obtained from him was defective and not "coming back," or converting properly to crack cocaine. At around 7:00 pm that evening, Hoggard spoke to an unidentified man, and described his futile effort to convert a quantity of cocaine powder into cocaine base, telling the man, "I'm on the stove right now, and this shit comin' back all crazy, cousin." Exhibit T 29, GA1594-95. Hoggard then spoke with Marte, telling him, "Shit is all lumpy and this shit is crazy, it ain't even comin' back right." In that recorded conversation, Marte told Hoggard to "bring it back." Exhibit T 30, GA1596-98. After this conversation, Hoggard re-

layed the substance of his conversation with Marte to two separate co-conspirators. *See* Exhibit T 31, GA1599-1601 (Hoggard tells co-defendant Chris Sherman, "I need to take this shit back, man . . . . I told him I'm bringing all that shit back."); Exhibit T 32, GA1602-03. (Hoggard tells co-defendant Robert Rawls, "Hey, yo, I'm bringing this shit back, cousin.").

Later the same evening, Hoggard returned the defective drugs to Marte's associates in New York, but was unsatisfied with the amount of drugs he received in return. While in New York, in a recorded conversation, Hoggard told an unidentified man, "Yo, I called 'G,' man. He told me he gonna change it. I'm right here by the school." The man replied, "Alright, OK. Hold on." Exhibit T 34, GA1610-11. A short time later, Hoggard again spoke to the unidentified man, who told Hoggard, "I re-cooked the thing . . . [it] only came back thirty-three, ok? That's all I give you, the one twenty-eight and the thirty three . . .that I got." The two men then argued, apparently about a drug quantity. Exhibit T 37, GA1616-17.

The argument continued in a subsequent recorded conversation, in which the man, apparently Marte's associate, told Hoggard, "We tossed whatever you had on a Reddings and it came back like thirty-three. So we gave you that as a difference for what you brung. We switched up the work and all that and we gave you the thirty-three on top of what you brung." Hoggard con-

tinued to argue with the associate, telling him, "I don't know what it was, I kept stirring it, playing with it, you feel me, I even put mad water and then I put some more, you know soda . . . ." Exhibit T 38, GA1618-21. Immediately thereafter, Hoggard spoke to Marte, and Marte told him, "What you bring back, that's what you gonna get." Exhibit 39, GA1622-24. In two final calls, Hoggard and Marte's associate spoke again. Hoggard asked, "My shit in the car now?" and the associate replied, "Yeah, everything good." Exhibit T 40, GA1625-26. Marte's associate explained that "I give you the one twenty-eight that you bring me soft, I change it, I give you the thirty-three that come back when I . . . make the . . . ." Hoggard replied, "Alright." Exhibit T 41, GA1627-28.

Approximately two hours later, a red Ford Expedition arrived at Hoggard's home at 397 Edgewood Avenue. Two men got out of the car, and although the agents could not positively identify either of them, one matched the physical description of Hoggard, and one the description of Rawls, who lived at 397 Edgewood Avenue with Hoggard. GA716-19.

The workings of Marte's supply side and Hoggard's distribution organization side in the conspiracy were further illustrated by the events of November 27, 2007. On that day, Hoggard and his associates were seen in the area of West 228th Street and Marble Hill Road in the Bronx.

GA828-30. At the same time and in the same area, Marte was seen talking on a cellular telephone and walking toward a car known to be used by Hoggard. GA930-31, GA973. Hoggard and his associates drove back to Hoggard's home in New Haven, where Hoggard got out of the car and went into his house. GA924-29. After the car dropped off Hoggard, officers stopped it, GA1035, and the passenger fled on foot, throwing a bag onto the roof of a nearby building. GA1036-38. Ultimately, the passenger was captured, and identified as co-defendant Sherman. The bag was retrieved and was found to contain approximately 272 grams of cocaine. Exhibit 131, GA1039-41.

Shortly after the seizure, Hoggard and Rawls discussed Sherman's arrest in a recorded telephone call. After Hoggard explained what had happened, Rawls asked, "What do you mean? And he throw his 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." Exhibit T 66, GA1661-62.

The next day Hoggard discussed the seizure with Charles Bunch, another co-defendant. In that conversation, Hoggard indicated he was planning to call Marte to try to get some additional cocaine advanced on credit to cover the loss. Bunch agreed, and indicated he had already

spoken to Marte. Exhibit 68, GA1668-71. Hoggard then called Marte directly, explained the seizure, and tried to arrange for additional cocaine. Marte told him to call back. Exhibit 69, GA1672-74. Several hours later, Bunch advised Hoggard that Marte had agreed to "hit me with fifty." Exhibit 71, GA1677-90, GA1678. From this, the jury could have inferred that Marte had agreed to provide fifty grams of cocaine to Bunch on credit.

In sum, from this evidence, the jury could properly infer that Marte actively participated in the conspiracy as the principal supplier.

3. The evidence established that Hoggard was part of the conspiracy and not just part of two buyer-seller relationships.

Hoggard argues that the evidence presented at trial failed to establish the existence of a "horizontal conspiracy between Hoggard and [co-defendant] Bunch," or a "vertical conspiracy between Hoggard and Marte or Hoggard and Thames." Hoggard Brief at 24. This argument flows from Hoggard's characterization of the government's theory of the activity of Hoggard, Marte and others as "a 'wheel' conspiracy, in which two parallel distribution chains (Hoggard and [co-defendant] Bunch) allegedly were connected to a single 'hub' (Marte)." *Id*. at 20. In contrast, Hoggard contends that his activity was

nothing more than "two forms of buyer-seller relationships" which existed between Hoggard and Marte on the one hand, and Hoggard and co-defendant Thames on the other. *Id* at 21. However, neither the law nor the record supports Hoggard's argument.

a. Hoggard conspired with Sherman, Bunch, and Marte.[8]

Hoggard's resort to "wheel" and "chain" analogies is an oversimplified "pictorial distinction [which] . . . can obscure as much as it clarifies," particularly in reference to a drug conspiracy. *United States v. Borelli*, 336 F.2d 376, 383 (2d Cir. 1964). Such distinctions have not "held up well in the area of narcotics conspiracy." *United States v. Mallah*, 503 F.2d 971, 984 (2d Cir.

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[8] Hoggard focuses attention on evidence relating to Charles Bunch, a co-defendant who was tried with Hoggard and Marte. To respond to these arguments, the government has described part of its evidence against Bunch here, although the government notes that Bunch was acquitted of the conspiracy charge. HA21. Although it is impossible to know why the jury acquitted Bunch, his central defense at trial was a challenge to the identification of his voice on the recorded calls. Whether the voice belonged to Bunch or to some other conspirator, however, the recorded conversations as described in the text establish that Hoggard conspired with Sherman, Marte, and this third conspirator.

1974). Most drug conspiracies can be diagramed as containing "loosely knit, vertically-integrated combinations"—or chains—aimed at placing narcotics in the hands of users. *United States v. Taylor*, 562 F.2d 1345, 1351 (2d Cir. 1977). But most drug conspiracies also contain elements and combinations akin to wheel (or hub-and-spoke) conspiracies, particularly at the extreme ends of narcotics organizations, where there may be multiple suppliers or multiple street-level dealers. *See United States v. Miley*, 513 F.2d 1191, 1206-7 (2d Cir. 1975).

Given the complexities and the loose-knit combinations inherent in drug conspiracies, this Court, in the context of a drug conspiracy case, has noted:

> [F]or us, the problem is difficult enough without trying to compress it into figurative analogies. Conspiracies are as complex as the versatility of human nature and federal protection against them is not to be measured by spokes, hubs, wheels, rims, chains, or any one or all of today's galaxy of mechanical, molecular or atomic forms.

Taylor, 562 F.2d at 1350 n.2.

A more helpful analysis was set forth by this Court in *United States v. Rojas*, 617 F.3d 669, 675 (2d Cir. 2010). There, this Court outlined criteria for determining whether an alleged con-

spirator is actually a conspirator, or a mere buyer of drugs. While the criteria were recited contemplating this narrow purpose, they are instructive in considering drug conspiracy membership generally.

> Did the buyer seek to advance the conspiracy's interests? Was there mutual trust between buyer and seller? Were the drugs provided on credit? Did the buyer have a longstanding relationship with the seller? Did the buyer perform other duties on behalf of the conspiracy? Were the drugs purchased for a re-distribution that was part of the conspiratorial enterprise? Did the quantity of drugs purchased indicate an intent to re-distribute? Were the buyer's profits shared with the members of the conspiracy? Did the buyer/re-distributor have the protection of the conspiracy (physically, financially, or otherwise)? Was his point of sale assigned or protected by members of the conspiracy? Did the buyer use other members of the conspiracy in the re-distribution?

Rojas, 617 F.3d at 675. Considering the *Rojas* criteria, the evidence established that Hoggard, Bunch and Sherman were supplied with cocaine by Marte, *and* that the four men were co-conspirators.

Most significantly, the co-conspirators sought to advance the conspiracy's interests, and their actions demonstrated mutual trust in each other. *See Rojas*, 617 F.3d at 675 ("Did the [individual] seek to advance the conspiracy's interests?"). For example, after Hoggard had difficulty converting a batch of Marte's cocaine into crack, he spoke to a number of his co-conspirators about the issue and what to do about it. When Hoggard suggested to Sherman that Hoggard intended to bring the seemingly defective cocaine back to Marte, Sherman told him, "I'm gonna see if I . . . make a couple calls, see if I can um, off it first, right quick." GA1601. From this, the jury could have found that Sherman intended to try to find a buyer for the cocaine so Hoggard would not need to return it.

Similarly, when Hoggard prepared to travel to New York to meet with Marte to obtain more cocaine, he confirmed with Sherman that Sherman was ready to make the trip: "just making sure it's real." GA1642. And when Sherman lost 272 grams of cocaine in a police seizure following the re-supply trip he had made with Hoggard, Bunch suggested obtaining additional cocaine together with Hoggard and Hoggard agreed. Bunch concluded that they should "put a buck and some change apiece to get one," and Hoggard agreed. GA1646. *See Rojas,* 617 F.3d at 675. ("Did the [individual] seek to advance the conspiracy's interests? . . . . Was there mutual

trust between [the individuals]? . . . . Did the [individual] have a longstanding relationship with the seller? . . . . Did the [individual] perform other duties on behalf of the conspiracy?"). The two men also discussed searching Sherman's residence for hidden cocaine, GA1655, GA1682, and, again, obtaining additional cocaine together, GA1670. *See Rojas,* 617 F.3d at 675. ("Did the [individual] seek to advance the conspiracy's interests? . . . . Was there mutual trust between [the individuals]?").

In addition, the evidence showed that the drugs were provided on credit. For example, after Sherman's arrest, Hoggard spoke to Marte to ask for additional drugs for a "jump start," explaining that Sherman's bond could be high. GA1673. From this, the jury could have inferred that Hoggard and Bunch were attempting to obtain drugs on credit which could be used to obtain proceeds to get over the seizure, and to secure funds to meet Sherman's bond. GA1673. *See Rojas,* 617 F.3d at 675. ("Were the drugs provided on credit? . . . . Were the drugs purchased for a re-distribution that was part of the conspiratorial enterprise? Did the quantity of drugs purchased indicate an intent to re-distribute? . . . . Did the [individual] have a longstanding relationship with the seller?").

Also following the Sherman seizure, Hoggard told Bunch he was nervous, but Bunch reassured Hoggard that Sherman is "solid as a rock, so you

ain't got to worry about that." GA1683. From this exchange, the jury could have concluded that Hoggard and Bunch were weighing the possibility that Sherman, who was in custody, might provide information about their activities to the authorities. Bunch advised Hoggard that Bunch had sent "Silverstein downstairs to talk to him," GA1686, from which the jury could have concluded that Bunch had sent a representative to Sherman to determine Sherman's state of mind in this regard. Bunch went on to discuss with Hoggard Sherman's likely bond and ultimate sentence, and Hoggard remarked, "He got us, man. We ain't gonna like . . . we ain't gonna leave him fucked up." GA1690. From this, the jury could have concluded that Hoggard and Bunch intended to stand by Sherman and assist as they could with his bond and other needs attendant to his nascent prosecution. *See Rojas,* 617 F.3d at 675. ("Was there mutual trust between the [individuals]? . . . . Did the [individual] have the protection of the conspiracy (physically, financially, or otherwise)?").

Finally, as described above, *see supra* at 35-38, Hoggard returned drugs to Marte when there were problems with the quality of the product. Although it is true that "product returns" are an incident of a traditional buyer-seller arrangement, *see United States v. Nunez*, 673 F.3d 661, 665 (7th Cir. 2012), here, as described above, the product return was not the only fact establishing

the conspiracy. Moreover, the cooperative role that others played in the return process demonstrated that those parties also had an interest in furthering the goals of the conspiracy.

In sum, these recorded conversations, against the background of the other trial evidence, show on the parts of Hoggard, Sherman and Bunch "purposeful behavior aimed at furthering the goals of the conspiracy," *Chavez*, 549 F.3d at 125, and "logically support an inference of association with the criminal venture." *Snow,* 462 F.3d at 68. All three men, together with their supplier, Marte, and the others named in the count of conviction, were members of one and the same conspiracy.

b. Hoggard was not a mere buyer-seller, but rather a member of the conspiracy.

Hoggard's other primary argument is that he enjoyed at most a buyer-seller relationship with Thames and his other customers. However, the evidence does not allow this argument to stand.

"The rationale for holding a buyer and a seller not to be conspirators is that in the typical buy-sell scenario, which involves a casual sale of small quantities of drugs, there is no evidence that the parties were aware of, or agreed to participate in, a larger conspiracy." *United States v. Medina*, 944 F.2d 60, 65 (2d Cir. 1991). "[T]he purpose of the buyer-seller rule is to separate

consumers, who do not plan to redistribute drugs for profit, from street-level, mid-level, and other distributors, who do intend to redistribute drugs for profit, thereby furthering the objective of the conspiracy." *United States v. Ivy*, 83 F.3d 1266, 1285-86 (10th Cir. 1996). In essence, the buyer-seller rule was intended to protect the ultimate end user of drugs from being drawn within the ambit of a conspiracy simply because the end user purchased the drugs from a member of the conspiracy.

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

> In many cases, the "more" that will demonstrate such a larger agreement is evidence of the seller's knowledge that the

> buyer intends to redistribute the drugs in question. But intended redistribution is not the only circumstance relevant to determining whether persons have a "joint objective" that goes beyond a buyer's mere purpose to buy and a seller's mere purpose to sell. The length of time that the seller affiliated with the buyer, the established method of payment (for example, whether the seller "fronted" the narcotics to the buyer), the extent to which the transactions were standardized, and the level of mutual trust between the buyer and the seller are all factors that a jury may properly consider in deciding whether the parties are involved in a larger distribution scheme such that even a single drug sale between them might be understood as intended to advance the ends of [that larger] conspiracy.

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

On the heels of *Wexler*, this Court made clear in *United States v. Hawkins* that "the existence of a buyer-seller relationship does not *itself* establish a conspiracy; however, where there is additional evidence showing an agreement to join together to accomplish an objective beyond the sale transaction, the evidence may support a finding that the parties intentionally participated in a conspiracy." 547 F.3d 66, 72 (2d Cir.

2008). The Court went on to note that "[t]he critical inquiry in each case is whether the evidence in its totality suffices to permit a jury to find beyond a reasonable doubt that the defendant was not merely a buyer or seller of narcotics, but rather that the defendant knowingly and intentionally participated in the narcotics-distribution conspiracy by agreeing to accomplish its illegal objective beyond the mere purchase and sale." *Id.* at 73-74.

Although the Court cautioned that "[e]vidence that a buyer intends to resell the product instead of personally consuming it does not necessarily establish that the buyer has joined the seller's distribution conspiracy[,] . . . [c]ircumstantial evidence may, however, support taking the step from knowledge to intent and agreement. . . . ." *Id.* at 74. In analyzing whether there existed an agreement to participate, the Court noted the relevance of factors, none of which alone are dispositive, such as "whether there was prolonged cooperation between the parties, a level of mutual trust, standardized dealings, sales on credit ('fronting'), and the quantity of drugs involved." *Id.* (internal quotations omitted).

In *Hawkins*, the crux of the government's case was four intercepted calls between Hawkins and a source of supply, Luna, that occurred over a two-week period. In two of those calls, Hawkins made clear that he intended to re-distribute

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

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

Using *Hawkins* as a benchmark, the recorded Hoggard calls presented at trial established that Thames, and a number of other identified and unidentified Hoggard crack customers, were full-fledged members of the same crack distribution conspiracy as Hoggard, Marte, Bunch, and Sherman.

For example, several calls strongly suggest Hoggard made numerous sales which he knew to be for redistribution. *See* GA1555 (caller needs "just a dollar" because "it's slow as fuck"); GA1561 (caller orders "fortune" (four eight-balls) because "I'm asking a person what they need, ... I'm calling for somebody else"); GA1586 (Thames tells Hoggard regarding defective crack, "My man just had some of this shit"); GA1630 (caller tells Hoggard, "I got two people waiting"); GA1632 (caller tells Hoggard, "Matty want Tuesday" (two eight-balls); GA1694 (Hoggard tells Thames, who has ordered a Tuesday (two eight-balls), "Make sure they're there").

While evidence of sales for redistribution may not, by itself, be conclusive of something beyond a buyer-seller relationship, *see Wexler,* 522 F.3d at 211, there is more. Thames testified that his crack relationship with Hoggard spanned several months and embraced numerous purchases of one, two, three and four eight-balls at a time. GA241-42. *See Hawkins*, 547 F.3d at 75 (four purchases of total of 20 grams of crack over two weeks plus other factors indicates conspiracy membership). Also telling was the code that Hoggard consistently employed in arranging crack transaction over the telephone with Thames, and with many others, using the days of the week to denote various quantities of eight-balls. GA242-44, GA1556-62, GA629-32, GA695-1700. *See Hawkins*, 547 F.3d at 74 (prolonged

cooperation, level of mutual trust, standardized dealings . . . and quantity of drugs involved bear on agreement to participate in conspiracy).

The evidence recounted above provided an ample basis for the jury's conclusion that Marte, Hoggard and the other defendants engaged in the single conspiracy charged in the count of conviction. *See Payne*, 591 F.3d at 62. The jury's conclusion must be upheld unless this Court were to find that no rational factfinder could have found that the conspiracy alleged in the indictment existed. *Id*. The government respectfully submits that, on the record summarized above, such a finding is unwarranted.

4. The evidence against Marte, including the voice identification, was sufficient to sustain his conviction.

Marte's sole sufficiency claim on appeal is that the evidence admitted at trial concerning the identification of the voice attributed to him on particular wiretaps was inadequate. This claim is simply not supported by the record, and in any event, the voice identification was not the only evidence that tied Marte to the drug conspiracy.

Marte participated in or was directly discussed in at least 17 recorded calls which were admitted into evidence at trial. *See* GA1589-1690. As to each of these recorded calls, the gov-

ernment bore the burden of establishing their authenticity under Fed. R. Evid. 901(a). That burden could be satisfied "by opinion [testimony] based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." *United States v. Rommy*, 506 F.3d 108, 138 (2d Cir. 2007) (quoting Fed. R. Evid. 901(b)(5), other citations omitted). Once the recordings were admitted, the defense was free to challenge their reliability, including the identification of Marte as a participant, by cross-examination of those identifying Marte's voice on their familiarity with it. Of course, any doubts so raised would go to the weight to be given the evidence by the jury. *See United States v. Tropeano*, 252 F.3d 653, 661 (2d Cir. 2001).

At trial, Agent Meletis testified that, based on wiretaps, the DEA had identified telephone number (646) 982-3443, with direct-connect number 176*888*4921, as corresponding to a telephone facility being used by an individual known at that time only as "G." GA1163. Using this information, on December 10, 2007, law enforcement located the telephone and the individual in possession of the phone near the intersection of West 228th Street and Marble Hill Road in the Bronxville section of New York. GA1164. At that time and location, Agents Meletis and Walczyk spoke to the individual, acquiring general pedigree information and the like, for approximately five to ten minutes. The agents were

able to understand what the individual was saying to them and hear his voice clearly. GA1165-66. Prior to speaking to the individual, the two agents listened to a series of telephone conversations recorded over the telephone in the individual's possession in which "G" had participated. Also, after speaking to the individual, both agents re-listened to the recordings at the scene, to compare the voice of the individual with the voice of "G" on the recordings. GA1166. Based on this comparison, both agents testified that the voice on the recordings and the voice of the individual matched exactly. GA1166-67, GA1263-66. The individual, then identified as the defendant, Genero Marte, was placed under arrest. GA1166-67.

Following Marte's arrest, Agent Walczyk drove Marte from Bronxville to Bridgeport, Connecticut and carried on intermittent conversation with him for approximately one hour and ten minutes. GA1264. Agent Walczyk stated that this longer conversation with Marte did not change his opinion that the voice on the intercepted calls belonged to Marte. GA1266.

Both Agent Meletis and Agent Walczyk were cross-examined thoroughly on the voice identification by three defense attorneys and, in particular, by counsel for Marte. *See* GA1194-1261, GA1281-1310. Nonetheless, the jury, which con-

victed Marte on the conspiracy charge, apparently accepted the identification.[9]

In any event, the agents' testimony regarding their identification of Marte's voice was not the only testimony that tied him to the conspiracy. A search of Marte at the time of his arrest disclosed that he was in possession of the cellular telephone corresponding to telephone number (646) 982-3443, with direct-connect number 176*888*4921, the telephone which had been used by "G" on the recorded calls from the wiretap. GA1168-71, Exhibit 106. Furthermore, the Mercedes-Benz that Marte was operating at the time of his arrest was registered to him in New Jersey. GA1171-72. In a search of the car, agents found an open briefcase containing $9,747 in U.S. currency, mostly in $100-dollar bills. GA1173. The briefcase also contained four other cellphones, none of which was charged. GA1174.

In addition to this evidence tied to Marte's arrest, the jury heard evidence that placed Mar-

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[9] It should be noted that, through cross-examination, counsel for co-defendant Charles Bunch, who was tried with Marte and Hoggard, also strenuously attacked the voice identification of his client, which was based on a comparison of a taped voice and Bunch's in-court "not guilty" plea at the time of his arraignment. The jury acquitted Bunch. HA22.

te in the immediate vicinity of Hoggard's car at West 228th Street and Marble Hill Road on November 27, 2007, as Hoggard and his associates were about to leave for New Haven with a supply of cocaine. GA930-31, 973. (This supply—at least 272 grams of cocaine—would later be seized by New Haven Police officers. GA1034-40.) Finally, the jury heard the testimony of Mauriel Glover, an associate of Marte, to the effect that he knew Marte as "G," the name used by Marte on the intercepted calls. GA641-42.

On this record, then, Marte's comparison of this case with *Ricci v. Urso*, 974 F.2d 5 (1st Cir. 1992), is misplaced. *See* Marte Brief at 14. In *Ricci*, the police were able to ascribe the defendant's name and address to the telephone number used by the offender and beyond this, had nothing but a one minute telephone call between the defendant and an officer, which the officer compared to recordings of intercepted calls. *See Ricci* at 6. Here, as described above, the jury had much more evidence to consider against Marte: lengthy conversations between Marte and the officers who made the voice identification, evidence tying Marte to the telephone picked up on the intercepted calls, testimony that Marte was known as "G," the name used by the supplier on intercepted calls, and Marte's presence in the immediate vicinity of the Hoggard re-supply transactions. In short, while the voice identification in *Ricci* may have been too weak to with-

stand scrutiny, the identification of Marte here, when considered in conjunction with the other evidence against him, was not.[10]

II. There was no prejudicial variance between the indictment and the evidence presented at trial against Hoggard.

Hoggard contends that there was a variance between the indictment and evidence presented against him at trial because the indictment charged one conspiracy but the evidence proved that there were multiple conspiracies. This claim lacks merit.

A. Relevant facts

The relevant facts are set forth above.

B. Governing law and standard of review

"'A variance occurs when the charging terms of the indictment are left unaltered, but the evidence at trial proves facts materially different from those alleged in the indictment.'" *United States v. D'Amelio*, 683 F.3d 412, 417 (2d Cir. 2012) (quoting *United States v. Salmonese*, 353 F.3d 608, 621 (2d Cir. 2003)). Whether what is

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[10] As noted above, the jury was clearly attentive to the voice identification evidence, and apparently rejected that evidence with respect to co-defendant Bunch.

complained of is a variance or a constructive amendment to the indictment is determined by *de novo* review. *See id.* at 416. A defendant demonstrating a variance must prove prejudice to prevail on his claim. *See Salmonese*, 353 F.3d at 621. A variance in proof is fatal to the prosecution only where it "infringes on the 'substantial rights' that indictments exist to protect," informing the accused of the charges against him so that he may prepare his defense, and avoiding double jeopardy. *United States v. Dupre*, 462 F.3d 131, 140 (2d Cir. 2006).

C. Discussion

Hoggard argues that there was a variance between the indictment and the evidence presented at trial.[11] Hoggard Brief at 25-27. In particular, he posits that, "[e]ven if we assume for the purposes of this appeal that Hoggard was shown to have conspired vertically with his buyers such as Thames, and that Bunch was shown to have conspired vertically with his own buyers, there was no evidence of a "horizontal" conspiracy between Hoggard and Bunch." *Id.* at 26. He concludes that this variance in proof prejudiced him because it allowed the admission at trial of evi-

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[11] Hoggard does not claim that the indictment was constructively amended, and the record would not support such a claim. *See D'Amelio*, 683 F.3d at 416-17.

dence of cocaine possession by co-defendant Chris Lamont Sherman, whom he characterizes as an "assistant" of Bunch. Hoggard Brief at 26-27.

Hoggard's argument is misplaced. There was no variance between the indictment and the evidence, and there was no prejudice to Hoggard by the introduction of any evidence.

Just as the indictment alleged, the evidence at trial established, and the jury presumably found, that Marte, Hoggard, Sherman and a number of others participated in a single conspiracy to possess with intent to distribute crack cocaine. *See supra* at 41-53. In particular, the evidence showed that Hoggard conspired with other conspirators who received their cocaine supply from Marte.

Moreover, Hoggard does not claim that he was prejudiced by any "surprise" evidence presented at trial. The most probative and damaging evidence in the case consisted primarily of recordings of telephone conversations occurring over Hoggard's telephone, and the testimony of a cooperating witness who testified he had purchased crack from Hoggard for re-sale. The recordings and witness statement materials were provided well in advance of trial, as were reports of surveillances, seizures, and there is no claim to the contrary. This being the case, Hoggard was not prejudiced when they were admitted at trial, as trial counsel was in a position to chal-

lenge and to attempt to discredit the evidence of which Hoggard now complains. *Compare Dupre*, 462 F.3d at 141 (evidence of wire transfers admitted at trial, of which defense aware beforehand, not prejudicial though different from those alleged in indictment).

Hoggard claims prejudice, rather, through the admission of evidence of the seizure of 272 grams of cocaine from co-defendant Sherman after Sherman, Hoggard, and others returned to New Haven after obtaining the drugs from Marte. Hoggard claims that he had no connection to the seized drugs, that the drugs were Sherman's, and that Sherman was associated with Bunch in a separate conspiracy.

The evidence at trial refutes these claims. In particular, calls intercepted in the hours and days after the seizure provided a clear basis for the jury to conclude that Sherman had been conspiring with Hoggard, Bunch, and Marte, among others, and thus that the evidence was properly admitted against Hoggard. For example, in the immediate aftermath of the seizure, Hoggard and Rawls discussed Sherman's arrest. *See* Exhibit T 66, GA1661-62 (Hoggard explained what happened, and Rawls asked, "What do you mean? And he throw his 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."). The next day, Hoggard discussed the seizure with Bunch, telling him that he was planning to call Marte to get some additional cocaine on credit to cover the lost (*i.e.*, seized) drugs. Bunch agreed, explaining that he had already contacted Marte. *See* Exhibit 68, GA1668-71. Hoggard told Marte about the seizure and tried to arrange for more cocaine, Exhibit 69, GA1672-74, and several hours later, Bunch told Hoggard that Marte had agreed to supply them with more drugs. Exhibit 71, GA1677-90, GA1678. From this evidence, the jury could have inferred that Marte had agreed to provide fifty grams of cocaine to Bunch, at the behest of both Hoggard and Bunch, and that both men had an interest in replacing the cocaine lost with the arrest of Sherman. In short, Hoggard was not prejudiced by the introduction of evidence that was not tied to him.

Neither the evidence nor the inference available to the jury is at odds or variance with the charge in the indictment alleging a crack conspiracy involving Marte, Hoggard, Bunch, Sherman and others. Even where a variance is found to exist, it is "immaterial—and hence not prejudicial—where the allegation and proof substantially correspond, where the variance is not of a character that could have misled the defendant at trial, and where the variance is not such as to deprive the accused of his right to be protected against another prosecution for the

same offense." *Dupre*, 462 F.3d at 142 (quoting *United States v. LaSpina*, 299 F.3d 165, 183 (2d Cir. 2002)). No such circumstances are present here.

III. The district court properly calculated the drug quantity attributable to each defendant.

A. Relevant facts

1. Marte

In the Marte Pre-Sentence Report, the Probation Office estimated (based on the wiretap evidence) that during September and October 2007, Hoggard and an associate, Mauriel Glover, would obtain between 100 and 500 grams of powder cocaine per week, transport it to New Haven, convert it to crack and distribute it. Marte PSR ¶ 9. The report went on to say that one of the sources used by the two men was Marte, who worked out of Bronx, New York, furnishing Hoggard and Glover with multiple-hundred quantities of cocaine at a time, and that intercepted calls established that Marte was aware that the cocaine he furnished was to be processed into crack. Marte PSR ¶ 10. The report noted that police seized 272 grams of cocaine from Chris Lamont Sherman, a Hoggard associate, after a resupply trip to Marte's operation in New York. Marte PSR ¶ 11. After naming a number of the local crack customers of the Hoggard operation, Marte PSR ¶ 12, Probation concluded that Marte

was responsible for relevant conduct involving 4.5 kilograms of crack. Marte PSR ¶ 13.

In the Second Addendum to the Marte PSR, the Probation Office amended its quantity calculation by stating that Hoggard and Glover purchased cocaine, to be processed into crack, over a nine-month period. In what it characterized as a conservative estimate, the Probation Office concluded that the two men obtained approximately 500 grams per week from Marte over the nine month period for a total of approximately 18 kilograms, all of which was converted into a like quantity of crack. Second Addendum to the Marte PSR.

On July 22, 2009, the court convened a sentencing hearing. At the outset of the hearing, the court noted that the defendant was disputing the quantity recommendation in the PSR. GA1707-08. The court adjourned the hearing to allow briefing on the quantity issue. GA1754. The government submitted a memorandum in support of the 18-kilogram quantity identified in the PSR. GA1759.

On October 8, 2009, the hearing reconvened. After discussion of aspects of the trial evidence and other matters, the court indicated it would accept the government's proffer regarding statements made by Mauriel Glover that he had obtained approximately 80 to 100 grams of cocaine per week from Marte from mid-2007 until his arrest in or about December 2007. GA1768.

Using July 1 as the starting date, and an average of 90 grams per week, the court calculated the "Glover portion" of the quantity for which Marte was responsible to be 2.1 kilograms of cocaine. GA1768-69.

The court then turned to statements made by co-defendant Chris Lamont Sherman to the effect he obtained approximately 100 grams every two weeks beginning in mid-2007. Bearing in mind that police seized 272 grams from Sherman after a trip to Marte's organization, the court conservatively estimated that Sherman obtained from Marte approximately 100 grams every two weeks from May 2007, through the date of his arrest on November 27, 2007, and calculated the total obtained from Marte to be approximately 1.4 kilograms of cocaine. GA1769-70.

Finally, the court determined that the intercepted telephone conversations from Marte's trial indicated that Hoggard was obtaining more than 100 grams of cocaine per week from Marte, and conservatively used the 100-gram figure to calculate the total quantity of cocaine Hoggard obtained from Marte. GA1770. Using this figure, and using a period of acquisitions two weeks shorter than for Glover, based on the relationship established between Glover and Hoggard, and Hoggard and Marte depicted in intercepted calls, the court determined conservatively that

the total amount of cocaine obtained from Marte by Hoggard to be 2.1 kilograms. GA1771-72.

The court then aggregated the total amounts obtained from Marte by Glover, Hoggard and Sherman, discounted evidence from the intercepted calls that Marte was dealing with others as well, and attributed 5.6 kilograms of controlled substances to Marte. GA1772.

Recalling intercepted conversations in which Hoggard plainly discussed with Marte his attempts to process the cocaine powder he had obtained from Marte into crack, *see* GA1596-98, the court found that the entire amount of drugs attributable to Marte was crack, as opposed to cocaine. GA1773. The court went on to indicate, however, that it would depart from the resulting base offense level of 38, using a one-to-one ratio between crack and cocaine, to a base offense level of 32, the level set for 5.6 kilograms of cocaine. GA1773.

2. Hoggard

In the Hoggard PSR, the Office of Probation attributed 4.5 kilograms of crack cocaine to Hoggard. Hoggard PSR ¶ 20. This translated into a base offense level of 38. Hoggard PSR ¶ 20. By contrast, in its sentencing memorandum, the government noted that the court had been employing a one-to-one sentencing ratio between cocaine and crack, and urged the court to use an

attribution of 3.5 kilograms of crack and adopt a base offense level of 30. HA214.

On June 18, 2010, the court conducted a sentencing hearing. At the hearing, the court indicated that it intended to deviate from the base offense level set forth in the PSR (level 38) by adopting the level of 30, a result at which the court had arrived itself, and which had been urged by the government. HA223. The defendant objected to the drug quantity attribution. HA218.

After hearing argument on the quantity issue, the court noted that the government recommended a quantity attribution to Hoggard of 3.5 kilograms of crack, based on findings the court had made at the sentencing of Marte. HA218-19. These findings embraced quantities of crack for which the court found Hoggard and co-defendant Chris Sherman responsible. HA218. As the court then clarified, the Hoggard quantity was based on trial evidence which indicated that Hoggard obtained approximately 100 grams of cocaine per week over a period of approximately 21 weeks, yielding a total of 27.1 kilograms. HA220. Among the trial evidence relied on were the trial testimony of co-defendant Thames, which the court found to be credible, HA226-27, and the post-arrest statement of co-defendant McCown. HA225. The quantity for Sherman, based on his post-arrest statement, amounted to 100 grams of cocaine every two

weeks between May 20, 2007 and Sherman's arrest on November 27, 2007, for a total of an additional 1.4 kilograms. HA220-22. The court indicated that the Sherman quantity was attributable to Hoggard as relevant conduct. HA223. This brought the total cocaine quantity for Hoggard to 28.5 kilograms, and the court indicated throughout that it felt this quantity was a conservative attribution for Hoggard. *See* HA221, HA222. Further, the court then noted that it would treat the quantity of drugs attributable to Hoggard as powder cocaine, through a one-to-one cocaine/crack ratio, although the evidence was that Hoggard converted the drugs to crack. HA252. Ultimately, the court used the 3.5 kilogram quantity advocated by the government, and treated it all as powder cocaine, arriving at a base offense level of 30. HA218.

Having made its findings, the court calculated the applicable Guidelines as an offense level 34, Criminal History Category VI, for a recommended range of 262 to 327 months, subject to a mandatory minimum term of 240 months of imprisonment. HA244-45, 247. In making this calculation, the court noted that it was employing a one-to-one crack to cocaine ratio, in effect treating all of the drugs it found as powder cocaine. HA252. To clarify the record, the court explained that, "technically, the guideline is with the leadership is a 40 and a 6 and that makes it 360 to life, then I will departing [*sic*] because of the

disparity and having no basis to make a judgment that would differentiate the guideline treatment of powder were crack." HA268-69.

B. Governing law and standard of review

1. Sentencing law generally

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." *United States v. Fernandez*, 443 F.3d 19, 26 (2d

Cir. 2006); *United States v. Crosby*, 397 F.3d 103, 113 (2d Cir. 2005).

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*, 551 U.S. 338, 356-59 (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. And although the judge must state in open court the reasons behind the given sentence, 18 U.S.C. § 3553(c), "robotic incantations" are not required. *See, e.g., United States v. Goffi*, 446 F.3d 319, 321 (2d Cir. 2006). "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*, 397F.3d 95, 100 (2d Cir. 2005).

This Court reviews a sentence for reasonableness. *See Rita*, 551 U.S. at 341; *United States v. Cossey*, 632 F.3d 82, 86 (2d Cir. 2011); *Fernandez*, 443 F.3d at 26-27. Reasonableness review has generally been divided into procedural reasonableness (the procedure employed in arriving at the sentence) and substantive reasonableness (the length of the sentence). *See Cossey*, 632 F.3d at 86; *see also United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (en banc). For a sentence to be procedurally reasonable, the sentencing court must calculate the guideline range, treat the guideline range as advisory, and consider the range along with the other § 3553(a) factors. *Cavera*, 550 F.3d at 190. Where a defendant fails to object at the time of sentencing to the district court's alleged procedural error in not fully considering the § 3553(a) factors or in making a mistake in the guideline calculation, this Court reviews the claim for plain error. *See Villafuerte*, 502 F.3d at 208.

In some cases, a "significant procedural error," may require a remand to allow the district court to correct its mistake or explain its decision, *see Cavera*, 550 F.3d at 190, but when this Court "identif[ies] procedural error in a sentence, [and] the record indicates clearly that 'the district court would have imposed the same sentence' in any event, the error may be deemed harmless, avoiding the need to vacate the sentence and to remand the case for resentencing."

United States v. Jass, 569 F.3d 47, 68 (2d Cir. 2009) (quoting *Cavera*, 550 F.3d at 197).

The legal application of the Guidelines by a sentencing court is reviewed *de novo*, while the court's corresponding factual findings, which must be established by a preponderance of the evidence, are reviewed for clear error. *See United States v. Broxmeyer*, No. 10-5283-cr, 2012 WL 3660316, at *11 (2d Cir. Aug. 28, 2012); *Cossey*, 632 F.3d at 86 (citations omitted). In determining the sentence, a district court has the "discretion to rely on the wide array of facts before it, including information set forth in the presentence report, as well as evidence that would not be admissible at trial, so long as the defendant is given an opportunity to contest the accuracy of that information." *Cossey*, 632 F.3d at 86.

2. Calculation of drug quantity

A district court is expected to "begin all sentencing proceedings by correctly calculating the applicable Guidelines range," and to use that range as "the starting point and the initial benchmark" for its decision. *Gall v. United States*, 552 U.S. 38, 49 (2007). Under the Sentencing Guidelines, the court must begin by determining the defendant's "base offense level," U.S.S.G. § 1B1.1, which is determined based on:

> (A) all acts and omissions committed, aided, abetted, counseled, commanded, in-

> duced, procured, or willfully caused by the defendant; and
>
> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity . . . .

U.S.S.G. § 1B1.3(a)(1).

In a drug case, the Sentencing Guidelines require a determination of the quantity of drugs attributable to the defendant, and in the case of a drug conspiracy, the quantity reasonably foreseeable to him. *See Payne*, 591 F.3d at 70; *United States v. Jones*, 531 F.3d 163, 174-75 (2d Cir. 2008). "The quantity of drugs attributable to a defendant is a question of fact" that the government must prove by a preponderance of the evidence. *Jones*, 531 F.3d at 175. The drug attribution of a trial court is subject to a clearly erroneous standard of review, and will be disturbed on appeal only if this Court is "'left with the definite and firm conviction that a mistake has been committed' in that calculation." *United States v. Rawls*, 393 Fed. Appx. 743, 747 (2d Cir. 2010)

(quoting *United States v. Reilly*, 76 F.3d 1271, 1276 (2d Cir. 1996)).[12]

The Guidelines provide that "[w]here there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance." U.S.S.G. § 2D1.1, comment. (n.12); *see also United States v. Batista*, 684 F.3d 333, 344 (2d Cir. 2012); *Jones*, 531 F.3d at 175. All transactions entered into by a defendant's coconspirators may be attributable to him, if they were known to him or reasonably foreseeable by him. *See United States v. Miller*, 116 F.3d 641, 684 (2d Cir. 1997) (citing U.S.S.G. § 1B1.3, comment. (n.1)); *United States v. Podlog*, 35 F.3d 699, 706 (2d Cir. 1994). "In deciding quantity involved, any appropriate evidence may be considered, or, in other words, a sentencing court may rely on any information it knows about." *United States v. Jones*, 30 F.3d 276, 286 (2d Cir. 1994) (citations omitted); *see also Cossey*, 632 F.3d at 86.

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[12] In *Rawls*, this Court reviewed and affirmed the sentences imposed on Robert Rawls and Chris Lamont Sherman, who were co-defendants of Marte and Hoggard who were tried in a separate, later trial.

C. Discussion

1. The district court properly calculated the drug quantity attributable to Marte.

Over the course of three hearings, the district court scrupulously calculated the applicable Guideline range and the departure it found to be appropriate, considered the range as advisory, and the other Section 3553(a) factors, and imposed a reasonable sentence. *See Fernandez*, 443 F.3d at 36; *Crosby*, 397 F.3d at 113.

In particular, with respect to the quantity calculation, the court declined to adopt either of the drug quantities recommended by the Probation Office. Rather, the court conducted extensive hearings and considered all of the evidence before it, including evidence derived from four separate trials arising out of the same investigation, and statements from cooperating witnesses and co-defendants. GA1767. (As the court noted, the defense had access to all of this evidence through discovery or otherwise. GA1735.) With this record, the court formulated and articulated its own factual basis for determining what it characterized as an "extremely conservative" estimation of 5.6 kilograms of crack cocaine. GA1772.

The court's "extremely conservative" estimate of drug quantity was not clearly erroneous. The court began with a statement of co-defendant

Mauriel Glover that he had obtained approximately 80 to 100 grams of cocaine per week from mid-2007 until December 2007 and noted that the statement had been generally corroborated by intercepted telephone calls. GA1768. The court then used an average of 90 grams per week over that period and arrived at a quantity of 2.1 kilograms as a conservative estimate of what Glover had obtained from Marte. GA1769.

The court also considered a post-arrest statement provided by co-defendant Chris Lamont Sherman, who had been arrested with 272 grams of cocaine, to the effect that he obtained 100 grams of cocaine every two weeks from spring 2007 until his arrest in November 2007. Using the period from May through November 2007, the court estimated Sherman's quantity, all obtained from Marte, as 1.4 kilograms of cocaine. GA1770.

Finally, the court tallied the quantity of cocaine obtained from Marte by co-defendant Hoggard based on intercepted conversations. In doing so, the court estimated that, over approximately the same period as Glover and Sherman, Hoggard obtained 2.1 kilograms of cocaine from Marte. GA1770-72.

The estimated quantity obtained by the three co-defendants totaled 5.6 kilograms, and the court attributed all of it to Marte for sentencing purposes. In this connection, the court noted that intercepted calls indicated that Marte had

other customers as well as Glover, Hoggard and Sherman, but decided to discount all of that information and leave the total quantity found at 5.6 kilograms. GA1772.

These findings were fully supported by the record and accordingly were not clearly erroneous. The court was under an obligation to estimate the controlled substance quantity, as the seizures in the case, while instructive, did not fully reflect the scale of the offense. *See Jones*, 531 F.3d at 175. Using information which was relatively detailed, and was gleaned by the court from presiding over four trials in the case, *see Jones*, 30 F.3d at 286, the court painstakingly assembled a factually accurate model which reasonably but conservatively approximated a documented portion of Marte's drug distribution activity. While it cannot be said that the calculation of the court embraced the full measure of the drugs for which Marte should have been held responsible, the court's finding of 5.6 kilograms of crack was certainly supported by a preponderance of the evidence, and was not clearly erroneous.

Marte claims that the court's calculation was flawed because it rested in part on statements of co-defendants, and for this proposition he cites *Lee v. Illinois*, 476 U.S. 530 (1986). As Marte correctly points out, in *Lee*, the Supreme Court noted that the statement of a co-conspirator may be "presumptively unreliable." *Lee*, 476 U.S. at

545. However, in *Lee*, the Court considered unsworn post-arrest statements of co-participants who were not subject to cross-examination which were only corroborated by their "interlocking" nature. *See id.* at 539, 545. Here, as is set forth above, the district court had more before it than unsworn post-arrest statements. The matters the court explicitly relied upon included evidence which had been adduced in four trials in this case as well as seizures, physical surveillance, dozens of intercepted calls and the sworn testimony of two co-conspirators who were both subject to cross-examination. In short, the record in this case takes it far beyond the concerns expressed by the Supreme Court in *Lee*.

2. The district court properly calculated the drug quantity attributable to Hoggard.

Hoggard asserts that the district court arrived at his drug quantity arbitrarily, first with respect to the quantity component based on co-defendant Sherman (relevant conduct), and also with respect to the quantity component based on Hoggard (offense conduct). He then maintains that the quantity attributed to Sherman as offense conduct should not have been attributed to Hoggard as relevant conduct. Finally, Hoggard claims that certain information relied upon by the court in arriving at his quantity attribution should not have been considered, as he had no notice it was going to be used against him. The

record, however, establishes an ample basis for the court's finding of a total of 3.5 kilograms of crack cocaine for Hoggard. The record also establishes that Hoggard was provided adequate notice of the information the court would use on the quantity issue, and was not prejudiced by its use.

At Hoggard's sentencing, the court explained that it was basing its attribution of drugs to Hoggard on calculations which it had made in connection with the sentencing of Marte. These calculations were based, in turn, on trial evidence which, it found, indicated that Hoggard obtained approximately 100 grams of cocaine powder per week over a period of at least 21 weeks, for a total of 27.1 kilograms. HA220. The court cited several pieces of trial evidence upon which it relied for this calculation, including the trial testimony of co-defendant Kenneth Thames, HA226-27 and the post-arrest statement of co-defendant Terrence McCown, HA225. The court also held Hoggard responsible for drugs it attributed to co-defendant Chris Lamont Sherman, based on a post-arrest statement given by Sherman and cocaine seized from him at the time of his arrest. This quantity component came to an additional 1.4 kilograms, HA220-22, bringing the total Hoggard attribution to 28.5 kilograms, which the court characterized as conservative. HA221-22. The court noted that it would apply a powder cocaine Guideline to this

quantity, although if found that all of the drugs were to be converted into crack cocaine. Ultimately, the court used a total attribution of 3.5 kilograms of crack and treated it all as powder cocaine. HA218.

As far as the quantity attributed by the court directly to Hoggard at the Marte sentencing, Kenneth Thames testified that he purchased crack cocaine from Hoggard from September through November 2007, GA240-41, and that these purchases each ranged in size from 3.5 grams to 14 grams. GA242-52. In addition, the court had the benefit of numerous intercepted calls from which it may have concluded that there were many additional customers like Thames, who were purchasing crack cocaine from Hoggard over the same period. *See,* trial exhibits at GA1556-62, GA1629-32, and GA1695-1700. The court also had before it numerous intercepted calls in which Hoggard discussed with Marte the purchase or return of bulk quantities of cocaine powder, and difficulties Hoggard had from time to time converting that powder into crack cocaine. *See, eg.,* trial exhibits at GA1594-1601. Significantly, these conversations, which occurred within a period of several weeks, referred to more than one quantity of cocaine greater than 100 grams, supporting the court's conclusion that Hoggard was obtaining cocaine from Marte at a rate of approximately 100 grams per week.

With respect to the quantity attributed by the court to Sherman during the Marte sentencing, which the court, in turn, attributed to Hoggard as relevant conduct pursuant to U.S.S.G. § 1B1.3, the court relied on the seizure from Sherman of 272 grams of cocaine on November 17, 2007, as well as a statement he made following his arrest to the effect he was obtaining approximately 100 grams of cocaine from Marte every two weeks from Spring 2007, through the date of his arrest. GA1769-70.

These materials fully support an attribution to Hoggard of 28.5 kilograms of crack cocaine, and the court so found. There was, therefore, no miscalculation by the court as urged by Hoggard. Significantly, the court decided to reduce the attribution to 3.5 kilograms in the interest of keeping its estimate conservative, so even if the court's calculation is wide of the mark, its ultimate attribution is so far below what the record supports that it cannot be faulted as overinclusive. This being the case, even were the Sherman component of the attribution, which was relevant conduct to Hoggard, to be subtracted from the gross attribution the record supports, the record would still support an attribution over seven times that used by the court in calculating the Guidelines range.

Hoggard maintains that he was prejudiced because the court relied upon material from the Marte sentencing in fashioning his quantity at-

tribution. He relies for support on the First Circuit's decision in *United States v. Berzon*, 941 F.2d 8 (1st Cir. 1991). This argument is without merit. In *Berzon*, the court found that "defendant was not told of certain unfavorable evidence the judge had previously heard. To the extent these damaging assertions remained unknown to him, his opportunity to comment was undercut." *Id.* at 18. Based on this finding, the court remanded for a determination as to whether the sentencing court relied upon this information in fashioning its sentence. *Id.* at 20. However, *Berzon* is distinguishable from the instant case. Here, Hoggard was fully apprised of the pertinent information from the Marte sentencing by way of the PSR in his own case, Hoggard PSR ¶¶ 10-15, as well as the sentencing memorandum filed by the government. HA213-15. Further, this Circuit has held that a district court did not err in denying defendant's request for a hearing to challenge information presented as evidence in a related trial, stating that, where "[the defendant] was on notice of all relevant information that could be used in determining his sentence and had an opportunity to make appropriate objections . . . . [n]o more is required by the Due Process Clause or by Rule 32." *United States v. Romano*, 825 F.2d 725, 730 (2d Cir. 1987).

3. Any error in the drug calculations was harmless.

As to both Marte and Hoggard, the district court arrived at attributable drug quantities on a conservative basis, always using less than the maximum amount suggested by evidence in calculating the amounts involved. *See United States v. Thompson*, 76 F.3d 442, 457 (2d Cir. 1996) (holding that a defendant "has no basis for complaint" where the evidence shows a greater quantity of drugs than is attributed at sentencing). Then, after finding a basis in the record for treating all drug amounts attributable to both defendants as crack rather than powder cocaine, the district court departed downward drastically as to both defendants, employing a one-to-one ratio between crack and powder penalties. Had the court found quantities of crack, which were fully justified by the evidentiary record, and then employed the crack Guideline in arriving at base offense levels, those levels would have been well above the ones ultimately used by the court in this case. Accordingly, any error reasonably attributable to the court in this case is harmless. *See United States v. Guevara*, 277 F.3d 111, 125 (2d Cir. 2001) ("Any error in the attribution of drug quantities is harmless error when the underlying base offense level would remain the same.") (quoting *United States v. Frondle*, 918 F.2d 62, 65 (8th Cir. 1990)).

IV. The district court properly applied role enhancements in both Marte and Hoggard's cases.

A. Relevant facts

1. Marte

At the October 8 hearing, the government suggested that an adjustment for Marte's role in the offense would be appropriate, and requested a two-level enhancement under U.S.S.G. § 3B1.1(c). GA1780. In order to consider the issue, the court directed the government to produce several of the intercepted telephone conversations admitted into evidence at trial, and recessed the proceeding. GA1782. After a twenty-minute recess, the government produced copies of transcripts of calls intercepted on November 20, 2007 between 6:30 pm and 10:45 pm which were admitted at trial.

As described above, these calls involved Hoggard's efforts to return defective drug products to his supplier, Marte. Hoggard called an unidentified man and explained he was having problems converting the cocaine into crack. Exhibit TT 29, GA1594-95. Minutes later, Marte called Hoggard, and after hearing Hoggard explain the problem, Marte told him to return the drugs. Exhibit TT 30, GA1596-98, GA1597. Approximately two and one-half hours later, Hoggard called the unidentified man from the earlier call and told him that Marte was going to ex-

change the drugs. He also told the man that he was nearby. Exhibit TT 34, GA1611. In the next call, the unidentified man explained to Hoggard that he had re-cooked the cocaine he had returned and told Hoggard how the problem would be resolved. Exhibit TT 37, GA161-17. He explained, "I called 'G,' I told you, he told me to cook the thing . . . ." GA1617. Hoggard spoke next to Marte to complain about the proposed resolution. Exhibit TT 39, GA1622-24. Marte defended the resolution, saying to Hoggard, "You know, if, if you get something from me and you bring, whatever you bring, I have to give it back to you . . . ." GA1622-24.

After hearing about these exhibits, the court adjourned the hearing to give the Probation Officer and the defense an opportunity to absorb the proffered role information. GA1787.

On November 24, 2009, the court reconvened for sentencing. With respect to the issue of role in the offense, and based on its review of the trial exhibits produced at the hearing of October 8, the court stated that, "[I]t's clear that the unidentified male received instructions from Marte about those narcotics on November 20, 2007 for Hoggard." GA1798. The court went on to find that the call transcripts "clearly indicate[] that the unidentified male was involved in the same criminal activity with Mr. Hoggard and Mr. Marte. GA1799. The court concluded that, "[g]iven that I decided that Mr. Marte's leader-

ship role, based on his supervision of another participant and there being more than five or more people involved in the criminal activity . . . the four-level enhancement under the leadership role is, therefore, appropriate under 3B1.1." GA1802. This brought Marte's adjusted offense level to 36, after the one-to-one quantity departure, for a range of 188 to 235 months. GA1802.

2. Hoggard

On June 18, 2010, the court addressed the recommendation of the Office of Probation that Hoggard be assessed a four-level enhancement under U.S.S.G. § 3B1.1(a) for his role in the offense conduct as a leader and organizer in criminal activity involving five or more persons. Hoggard PSR ¶ 22. In this connection, the court reviewed the trial record and found that the criminal activity in which Hoggard was involved included as participants Hoggard, as well as co-defendants Marte, McCown, Rawls, Thames, Jowers, Sherman and White. HA229-30. The court noted that,

> [T]he word isn't manager. It is organizer or leader. [Hoggard] in terms of being an organizer, he did go to New York and became the supplier. He did cook it into a form. That's what these folks wanted on the street and sold it to him. I guess if Mr. Hoggard didn't go to New York and get his supply from Mr. Marte and convert it to

> coke [sic.], there wouldn't be an organization. I think under the case law, that's an organizer or leader. He is the driver of the conduct, their activity.

HA232. The court went on to review the Guideline indices of leader/organizer status, observing that, as to the exercise of decision-making authority, "Mr. Hoggard decided when to go to New York, when to re-up, what to buy and what to pay." HA234.

As to the nature of participation in the commission of the offense, the court stated

> that [Hoggard] gets the supply and he prepared it and distributes it. That's a different participation than the person standing on the street . . . . The recruiting of accomplices . . . . He clearly had accomplices in the sense of co-conspirators who distributed his product. The claimed right to a larger share, that likely result not because of negotiations or assertions, because in this case, because of the role he had. The degree of participation and planning and organizing it . . . . He's got to go to New York. He's going to buy from that supplier. He's going to bring it back to New Haven, convert it to crack and turn to other people who commit the final step of distribution. It strikes me that his participation and planning or organizing it, plac-

> es him in an entirely different category . . . .

HA234-35.

With respect to the nature and scope of the illegal activity in question, the court described the scheme in which Hoggard was involved as "broad reaching in the sense it reaches down to New York City to the Bronx and up here to New Haven went on for five or six months probably longer than that." HA235.

Finally, the court considered the degree of control Hoggard exercised over the enterprise, recalling trial evidence that Hoggard directed an individual to his apartment to "get something in connection with the drug transaction or going to New York." HA239-40.

On this record, the court concluded that Hoggard was a leader or organizer for the purposes of U.S.S.G. § 3B1.1(a), and that a four-level enhancement was called for. HA241. In summarizing his role, the court summarized Hoggard's role in the offense as follows:

> [H]e led a group of people who put a lot of drugs on the streets of New Haven. He organized it. He put it together so it could happen. I think to the extent that there's more than the five people involved in the criminal activity. There's more than five in New Haven, more than five in New York. That makes it qualify.

HA238.

B. Governing law and standard of review

Under U.S.S.G. § 3B1.1, a defendant may receive an upward adjustment in his adjusted offense level if he played an aggravated role in the offense. Where a defendant is "an organizer or leader of a criminal activity that involved five or more participants or was otherwise extensive," the adjusted offense level increases by four levels. *See id.*, § 3B1.1(a). Where the defendant is "a manager or supervisor (but not an organizer or leader) and the criminal activity involved five or more participants or was otherwise extensive," the adjusted offense level increases by three levels. *See id.*, § 3B1.1(b). Where the defendant is "an organizer, leader, manager or supervisor in any criminal activity [involving more than one participant]," the adjusted offense level increases by two levels. *See id.*, § 3B1.1(c). "In assessing whether a criminal activity "involved five or more participants," only knowing participants are included." *United States v. Paccione*, 202

F.3d 622, 624 (2d Cir. 2000). "By contrast, in assessing whether a criminal activity is 'otherwise extensive,' unknowing participants in the scheme may be included as well." *Id.*

In distinguishing between an organizer and a mere manager, the district court should consider "the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control and authority exercised over others." U.S.S.G. § 3B1.1, comment. (n.4). "Whether a defendant is considered a leader depends upon the degree of discretion exercised by him, the nature and degree of his participation in planning or organizing the offense, and the degree of control and authority exercised over the other members of the conspiracy." *United States v. Beaulieu*, 959 F.2d 375, 379-80 (2d Cir. 1992). The government must prove by a preponderance of the evidence that a defendant qualifies for a role enhancement. *See United States v. Molina*, 356 F.3d 269, 274 (2d Cir. 2004).

"Before imposing a role adjustment, the sentencing court must make specific findings as to why a particular subsection of § 3B1.1 adjustment applies." *United States v. Ware*, 577 F.3d 442, 452 (2d Cir. 2009); *see also Molina*, 356 F.3d

at 275. "A district court satisfies its obligation to make the requisite specific factual findings when it explicitly adopts the factual findings set forth in the presentence report." *Molina*, 356 F.3d at 276. If there are disputed facts, the district court must make factual findings for appellate review. *See United States v. Thompson*, 76 F.3d 442, 456 (2d Cir. 1996). "[A] lack of specificity devoid of any statement of reasons does not permit meaningful appellate review of the enhancement the district court imposed." *Molina*, 356 F.3d at 276 (faulting district court for granting two-level role enhancement with absolutely no explanation or discussion). This Court will overturn the findings of a district court as to a defendant's role in the offense only where those findings are clearly erroneous. *See Batista*, 684 F.3d at 345.

C. Discussion

1. The district court properly imposed a role enhancement on Marte.

The issue of whether or not a role enhancement was appropriate emerged during the October 8 sentencing hearing. GA1774. In support of a role adjustment, the government placed before the court a series of intercepted telephone calls which had been played at trial, and in which the defendant participated. GA1782-85. The defense objected to any such enhancement. GA1787. Since there was no role enhancement recom-

mendation in the PSR, the district court recessed the proceeding to allow the Office of Probation and the parties to address it more fully, and to file memoranda, GA1787, which they did. GA1793.

The hearing was reconvened on November 24. At the hearing, the district court correctly observed that, for a role enhancement to apply, the evidence would have to support findings that (1) the criminal activity involved five or more persons; and (2) the defendant organized led, managed or supervised one or more participants in the criminal activity. GA1796; *see* U.S.S.G. §§ 3B1.1(a), (b). As to the scope of the activity, the court stated that "[t]here is in my view and based upon the evidence accepted by the jury, no dispute that the criminal activity that's the subject of the superseding indictment involved more than five participants." This finding was supported by evidence in the record that Marte had at least one associate working with him in his supply organization, *see, eg.,* Exhibit TT 29, GA1594-95, and that Hoggard, his customer, worked with a number of individuals in his New Haven distribution organization. *See* above at Sections C(1)(a) and (b).

The court then turned to the leadership issue itself, and cited from the trial record Exhibit TT 37, GA1616-17. GA1796-1802. In its discussion of this intercepted call between Hoggard and Marte's unidentified associate, the court noted

that Hoggard asked the associate, "Where is 'G' at," finding that "G" was, in fact Marte. GA1797. The court further summarized the call, stating that the associate

> responds to Mr. Hoggard's comment by saying, quote, I called "G". I told you he told me cook the thing, hold on, hold on, end quote. In this court's view, that transcript makes it clear that the unidentified male received instructions from Mr. Marte about the narcotics that Mr. Hoggard had returned because Mr. Hoggard was having difficulty converting the powder to crack cocaine and this unidentified male at the direction of Mr. Marte was in effect doing what Mr. Hoggard couldn't do that is to fix the powder into proper crack cocaine.

GA1797. The court's conclusions in this regard are also supported in the record by intercepted calls in which:

- Hoggard complains about drug quality to Marte, and Marte tells him, "Bring it back, I change it." Exhibit TT 30, GA1596-98;

- Hoggard tells an unidentified associate of Marte, "Yo, I called 'G,' man . . . . He told me he gonna change it." Exhibit TT 34, GA1610-11; and

- Marte tells Hoggard, "You know, if, if you get something from me and you bring, whatever

you bring, I have to give it back to you . . . . Exhibit TT 39, GA1622-24.

In these calls, the court saw Marte exercising a high degree of discretion, control and authority with respect to the sale and return of cocaine. *See Beaulieu*, 959 F.2d at 379-80. In the cited calls, the court also saw Marte acknowledged by his unidentified, unindicted, but clearly culpable associate as the man calling the shots on how to respond to Hoggard's complaints.[13] Marte's leadership over this one uncharged associate is sufficient to support the leadership enhancement. *See United States v. Gaskin*, 364 F.3d 438, 467 (2d Cir. 2004) ("participant" for Section 3B1.1 purposes need not be charged, and leadership of one participant satisfies leadership prong); s*ee also* U.S.S.G. § 3B1.1, Application Note 1 ("A 'participant' is a person who is criminally responsible for the commission of the offense, but need not have been convicted."). These calls,

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[13] Citing to *United States v. Pollen*, 978 F.2d 78 (2d Cir. 1992), Marte argues that the district court improperly counted his New York associates in arriving at more than five participants. Marte Brief at 22. However, *Pollen* was about whether individuals who participated in *relevant conduct* as opposed to the *offense conduct* should be counted for Section 3B1.1 purposes. *See Pollen*, 978 F.2d at 88-89. The persons the district court considered here were plainly involved with the *offense conduct*.

against the background of the other evidence in the trial record, establish Marte's status as a leader by well beyond a preponderance of the evidence. *See Molina*, 356 F.3d at 274. Accordingly, the conclusion of the district court that Marte was a leader in the criminal conduct of which he was convicted should be sustained as procedurally reasonable.

2. The district court properly imposed a role enhancement on Hoggard.

Hoggard asserts error in the finding of the district court that he was an organizer of criminal activity that involved five or more participants. Hoggard Brief at 27-35. His attack focuses on (1) the nature of the activity in which Hoggard and the co-defendants were engaged; (2) the number of participants in the activity; and (3), as in his quantity argument, claims that Hoggard was not provided with adequate notice of the information the court ultimately relied on. The record soundly refutes each of these lines of attack.

Hoggard characterizes the court's approach as one which "would make a four step enhancement more or less automatic in the case of every drug dealer." *Id*. at 29. The government does not here argue for the application of such a rule, nor did the district court apply such a rule.

The trial evidence established, and the jury found, that Hoggard was guilty of participating in a drug conspiracy involving well over five individuals. As the court noted at sentencing,

> [Hoggard] gets the supply and he prepared it and distributes it. That's a different participation than the person standing on the street . . . . The recruiting of accomplices . . . . He clearly had accomplices in the sense of co-conspirators who distributed his product. The claimed right to a larger share, that likely result not because of negotiations or assertions, because in this case, because of the role he had. The degree of participation and planning and organizing it . . . . He's got to go to New York. He's going to buy from that supplier. He's going to bring it back to New Haven, convert it to crack and turn to other people who commit the final step of distribution. It strikes me that his participation and planning or organizing it, places him in an entirely different category . . . .

HA234-35. This is entirely consistent with the evidence presented at trial. As far as the New Haven distribution operation, Hoggard was the sole author of the activity, decided when and what to buy cocaine powder from his supplier and at what price, decided how and when and where to transform the powder into crack, packaged the drugs, set the resale price, decided to

whom and in what quantities it would be distributed, and effected most of the wholesale distribution to re-distributors himself. Without Hoggard as the organizer, his New Haven distribution operation would not have existed.

As far as the minimum of five participants required for application of U.S.S.G. § 3B1.1(a), at a minimum, Hoggard, Rawls (who gathered cash for Hoggard's cocaine supply runs, *see* GA1639-40), Marte (the cocaine supplier, *see* GA1596-98), Marte's unidentified associate (who haggled with Hoggard over the return of defective cocaine, *see* GA1610-11,. GA1616-17, GA1618-21, GA1625-26, GA1627-28), Sherman (who accompanied Hoggard to see Marte on a resupply run to New York on November 27, 2007 and sustained the seizure of 272 grams of cocaine upon his return to New Haven, *see* GA817-31, GA1034-40), Thames (a redistributor, *see* GA244-45), and several other unidentified redistributors (for example, *see* intercepted calls: "I need to see you on a . . . Tuesday . . . I got people waiting," GA1629-30; "he want Tuesday," GA1631-32) suffice to establish that there were well over five participants in the criminal activity that Hoggard organized.

Hoggard's notice claim fails here because that he was an organizer of the criminal activity and that there were well over five participants in the activity were explicitly the government theory of

the case at trial and the gist of the evidence presented.

Conclusion

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

Dated: October 4, 2012

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Federal Rule of Appellate Procedure 32(a)(7)(C) Certification

This is to certify that the foregoing brief complies with this Court's order that granted the government leave to file an oversized brief of up to 24,000 words, in that the brief is calculated by the word processing program to contain approximately 20,588 words, exclusive of the Table of Contents, Table of Authorities, Addendum, and this Certification.

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